Standing for Justice:
The Lawyer's Role in the Client Selection Process

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The issue of the lawyer's role in the justice system has never been more relevant. As security issues weigh increasingly on the national conscience, for some, the sanctity of civil rights has become negotiable. In *Democracy in America*, Alexis de Tocqueville recognized long ago that even in the most vigilantly administered liberal democracy there is a constant threat of the summary deprivation of rights. De Tocqueville identified the lawyer as the de facto counterweight to democracy's potential ills.[1]

May lawyers be the gate keepers of the justice system, rather than the servants of those who come into contact with it? The answer is clear. A lawyer must not be permitted to be the judge or the jury. This principle was succinctly explained by Eddie Greenspan when he wrote that, "no defendant should have to pass a trial of conscience by his own lawyer, in addition to the trial in court. One trial for each accusation is enough,"[2] Or, as put by the American lawyer Lloyd Cutler, "the essence of the adversary process is that judgments of right and wrong are to be made after the process is completed, not before it begins."[3]

The lawyer's role in civil or criminal litigation, and one that is essential to the workings of democracy and the justice system, is to present the evidence and make the legal and

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1 Alexis De Tocqueville, *Democracy in America*, transl. Harvey C. Mansfield (University of Chicago Press, 2000) at 251-3. Wherein De Tocqueville discusses, ""On the spirit of the lawyer in the United States and how it serves as a counterweight to democracy".

2 Edward L. Greenspan and George Jonas, *Greenspan: The Case for the Defence* (Toronto: MacMillan) at 284.

3 Book Review (1970) 83 Harvard L.R. 1746 at 1750 as cited in Gavin Mackenzie, *Lawyers and Ethics* (Toronto: Carswell, 1998), ch. 4 at 4-4 [*MacKenzie*].

factual arguments that the client would have made if he or she had the knowledge, skills and experience to do so, and to do so fearlessly. This role is poorly understood by some, and under attack by many in academia, who seek to insert a moral and social imperative in what lawyers do, and who they can do it for.

When considering the importance of this overriding duty of counsel to his or her client, it is important to contextualize the analysis and consider the several ethical duties that a lawyer must balance.

The duties of a lawyer are comprehensively, though not exhaustively, codified in the Law Society Rules of Professional Conduct. Rule 4.01(1) provides that the lawyer must represent his or her client, "resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect".[4] The qualification in Rule 4.01(2) is that the lawyer is obliged not to "knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable."[5] The qualification is on the lawyers duty with respect to the client's conduct, in other words *how* the lawyer represents the client, not on *whether* the lawyer will represent the client.

This sentiment is echoed in the American College of Trial Lawyers Canadian Code of Conduct prescription for employment of a lawyer in civil cases:

> The lawyer should decline to prosecute a cause or assert a defence obviously devoid of merit… or in which the lawyer or the lawyer's firm or associates have conflicting interests. Otherwise it is the lawyer's right and duty to take all proper action and steps to preserve and protect the merits of the

4 Rules of Professional Conduct, Rule 4, "Relationship to the Administration of Justice", online: http://www.lsuc.on.ca/regulation/a/profconduct/rule4/ [*Rules of Professional Conduct*].

5 *Rules of Professional Conduct, supra* note 4.

> client's position and claims and *he or she should not decline employment in any case because of the unpopularity of the client's cause or position.*[6]

The barrister's oath taken by lawyers in Ontario includes this ethical duty: "you shall neglect no one's interest… you shall not refuse cases of complaint reasonably founded." This part of the oath limits a lawyer's right to decline representation on grounds of moral repugnancy. Former Justice Michael Proulx of the Quebec Court of Appeal and criminal lawyer David Layton in their book *Ethics and Canadian Criminal Law* note that, "the Ontario wording on its face mandates that a lawyer accept any non-frivolous case, and it can be seen to equate with a cab-rank rule favoured by barristers in England and Wales."[7]

The English "cab-rank rule" is defined by Deborah Rhode in her book *In the Interests of Justice: Reforming the Legal Profession*: "barristers, like taxis, must accept work on a 'first come first served' basis".[8] The rationale for this principle was further explored by Lord Pearce in the leading case of *Rondel v. Worsley*[9]:

> It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter. And that would be the inevitable result of allowing barristers to pick and choose their clients. It not infrequently happens that the unpleasant,

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6 American College of Trial Lawyers Canadian Code of Trial Conduct, 1999, *Employment in Civil Cases.* See also *Court Appointments and Employment in Criminal Cases* in same.

7 *Canadian Rules of Professional Conduct* in *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at chapter 2H [*Ethics*].

8 Deborah Rhode, "The Advocate's Role in the Adversary System: *In the Interests of Justice: Reforming the Legal Profession* (Oxford: Oxford University Press, 2000) at 129.

9 [1967] 3 All E.R. 993 at 1029 (H.L.) [*Rondel*].

> the unreasonable, the disreputable and those who have apparently hopeless cases turn out after a full hearing to be in the right. And it is a judge's (or jury's) solemn duty to find that out by a careful and unbiased investigation. This they simply cannot do if counsel do not (as at present) take on the less attractive task of advising and representing such persons however small their apparent merits.[10]

The cab-rank rule is often contrasted with the American model, wherein lawyers are said to have ample freedom to refuse a client. But American lawyers by no means have unfettered discretion to decline representation. For instance, in the Massachusetts case of *Stropnicky v. Nathanson*[11] feminist attorney Judith Nathanson refused to represent a male client in divorce proceedings. It was her belief she needed, "to feel a personal commitment to her client's case in order to function effectively as an advocate."[12] In ordering that she cease her practice of refusing clients due to their sex, the Massachusetts Commission Against Discrimination found that Nathanson's practice of law was "a place of public accommodation" and therefore she had no right to reject clients based on suspect criteria: "*Stropincky v. Nathanson* created quite a furor in the Massachusetts legal community since it challenged a lawyer's traditional right to reject potential clients for any reason."[13] This shift in the American paradigm is reflected in the Code of Trial Conduct of the American College of Trial Lawyers[14], which is the same as the American College of Trial Lawyers Canadian Code of Conduct, as noted above.

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10 *Rondel, supra* note 9, as cited by the Honourable Michael Proulx Justice, *The Defence of the Unpopular Client: Some of the Hardest Questions* (2000), 5 Can. Crim. L. Rev. 221 at 227-8 [*Proulx*].

11 19 M.D.L.R. at 40 [*Stropnicky*]..

12 *Stropnicky, supra* note 11.

13 Robert T. Begg, *The Lawyers License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Disciplinary Rule* (2001-2) 64 Alb. L. Rev. 153 at 180.

14 Code of Trial Conduct of the American College of Trial Lawyerst, 1994, *Employment in Civil Cases.* See also *Court Appointments and Employment in Criminal Cases* in same.

Wherever they practise, lawyers have many duties to balance. But it is not the burden of counsel in their representation of a client to correct possible flaws in the legal infrastructure, though in some cases that may be the happy result. That onus lies with the legislature and in the right of citizens to elect their representatives, and occasionally, with the courts. To require counsel for clients to assume the responsibility of legal reform would be tantamount to, "a surreptitious and undesirable shift from a democracy to an oligarchy of lawyers."[15] A counsel's refusal to represent a client on moral grounds can be viewed to improperly undermine the functions of both the legislature and the legal system which he or she is supposed to serve.[16]

If, from a western legal standpoint, the refusal to represent potential clients on moral grounds is contrary to professional ethics, if not contrary to public law, what are the remaining criticisms of this approach, and how may they be addressed philosophically? The arguments of those who believe that lawyers can and should pick and choose clients on moral grounds can essentially be broken down into four categories:

1. Lawyers are not morally neutral and should not be expected to act in such a way in their professional lives, especially when the burdens of the lawyer's fiduciary relationship are onerous;

2. Lawyers, like other private citizens, should have the freedom to contract and associate with choice, as accorded to any member of Canadian society;

3. The inability to obtain legal representation due to the moral repugnancy of the conduct in question is overemphasized as a barrier to justice in today's legal environment; and

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15 R. Wasserstrom, "Lawyers as Professionals: Some Moral Issues" in D. Luban *The Ethics of Lawers* (Dartmouth Publishing Co. Ltd, Aldershot 1994) 461 as cited in Maree Quinlivan, *The Cab Rank Rule: A Reappraisal of the Duty to Accept Clients* (1998), 29 Victoria U. Wellington L. Rev. 113 at 125 [*Quinlivan*].

16 *Quinlivan, supra* note 15 at 125.

4. Lawyers should not be merely "mouthpieces" for their clients.

There is much overlap in these categories.

The immediate response to the moral neutrality argument is that lawyers serve the public. The corollary of the exclusive right of audience in the courts is the obligation to use that monopoly in the service of all comers. Though characterized differently, this conception of lawyers is partly accepted by Professor Allan Hutchinson who writes:

> As much as lawyers are officers of the law, they are also agents of the people; they ought not to uphold the law for its own sake, but must commit themselves to achieving justice through law.[17]

But then he falls into error when he goes on to state:

> Lawyers should represent only those clients and causes that contribute to the common good. This does not mean that they do (or do not do) entirely as they please. Lawyers must still obey the general imperative to uphold the public purposes of legal rules at the same time that they constantly challenge or uphold those rules in line with their compatibility with the highest substantive ideals of a truly democratic polity.[18]

If we accept that a lawyer must not play a legislative or gate-keeping function, then a lawyer true to his or her calling cannot "only" accept clients based on what he or she thinks is the "common good". The contrast between Professor Hutchinson's view and that put forward here is explained by Eddie Greenspan: "…the philosophy of legal

17 Allan C. Hutchinson, *Legal Ethics and Professional Responsibility*, (Toronto: Irwin, 1999) in Chp. 2 [*Hutchinson*].

18 *Hutchinson, supra* note 17.

activism is that it distrusts general standards, and looks to the triumph of preferred causes rather than to the triumph of justice as its ultimate aim."[19]

In this sense, lawyers are akin to medical practitioners providing healthcare. Just as doctors true to the Hippocratic Oath should not refuse to treat an addict or an AIDS patient or an accused murderer, based on their personal moral barometer, if the treatment is within the scope of their expertise, lawyers must separate their private and public domains and indiscriminately serve the ends of justice. Everyone, even those who all would deem morally reprehensible, is entitled to justice. Access to justice means nothing unless it is available to all, and unless there are lawyers available to vindicate rights or defences. If all lawyers subscribed to the ethic that they would only represent those whose principles or lifestyles they agreed with, or "causes that contribute to the common good", even the "last lawyer in town", would not be available to represent the unpopular accused or litigant.

Our own jurisprudential history shows that there are cases where the client deemed morally repugnant has had difficulty obtaining, or has been unable to obtain, legal representation. The accused in the notorious case of *R. v. Sharpe*[20], a child-pornography case, was temporarily unable to secure representation due to the repugnant nature of the charges. With renewed efforts, he was able to secure the services of Richard Peck of the Vancouver bar. As recounted by Mr. Proulx, on the numerous occasions when Mr. Peck was asked by the media why he accepted

19 *Greenspan, supra* note 2 at 287.

20 [2001] 1 S.C.R. 45.

Sharpe's brief, he would simply respond, "I took an oath when I became a lawyer."[21] And indeed, there were serious legal issues in the case, as the decision in the Supreme Court shows.

There is an additional danger if a lawyer's submissions can be treated as his or her personal opinion. As Gavin McKenzie states, "we are likely to fall into the trap of associating all lawyers with their clients and their clients' causes…"[22] English barrister David Pannick, put it this way: "To the extent that the advocate picks and chooses between potential clients on the basis of whether their conduct or opinions are acceptable to him, he is, implicitly, associating himself with his clients and their causes and giving a personal endorsement to the submissions he makes on their behalf."[23] Lawyers should not be perceived as accepting the moral responsibility of the consequences of their client's conduct or personally identifying themselves with it. Gavin Mackenzie also explains that, "[i]f we associate lawyers with unpopular clients and causes, it will become difficult for unpopular clients to obtain competent representation."[24] As well, if a lawyer is known only to accept cases from clients whose views he or she agrees with, the objectivity of the submissions made by such a lawyer may be doubted by the court, to the detriment of the client's cause. Rule 1.2(b) of the American Bar Association Model Rules of Professional Conduct attempts to counter theses effects by prescribing that, "a lawyer's representation of a client… does not

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21 *Proulx, supra* note 10.

22 *Mackenzie, supra* note 3 at 4-3.

23 D. Pannick, *Advocates* (Oxford, University Press, 1992) at 141 [*Pannick*].

24 *MacKenzie*, *supra* note 3 at 4-3.

constitute an endorsement of the client's political, economic, social or moral views or activities."[25]

The contrary view seems to dominate the media and popular perception. Even first-year law students may be, "more likely to base their perceptions of lawyers on media and fictional accounts, since they will have not yet have encountered the legal system in a first-hand way…"[26] Lawyers should recognize and deal with these perceptions. A shining example of how to do so was shown by Anthony Griffin in 1993, when he was serving as chief counsel to the Texas branch of the NAACP. At the same time he was retained to represent the grand dragon of the Texas Knights of the Klu Klux Klan. Despite finding the position of the Klansman personally repulsive, he defended him against the efforts of the state to obtain the Klan's membership list. During the process, Griffin was dismissed from his post with the NAACP. In the end, Griffin won the case. From the beginning, Griffin maintained that his decision to represent the Klan was correct. Griffin reasoned in an interview with the New York Times: "In our role as lawyers, we're not G-d… If lawyers backed off because someone is unpopular or hated, then our entire justice would just fall apart."[27] Griffin is right and his critics are misguided.

Perhaps the most compelling reason that lawyers should not judge their clients, and thereby limit their access to counsel, is this: the lawyer's opinion may be wrong. There are many examples in both our history and in present times where the innocent are

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25 As cited in Ronald Goldfarb, "Guilt by Association: Lawyers Should be Judged by the Clients they Keep" (Washington Post, 1997) at C03.

26 Angela Fernandez, *Polling and Popular Culture (News, Television, and Film): Limitations of the Use of Opinion Polls in Assessing the Public Image of Lawyers* at prepared for the Law Society of Upper Canada Task Force on the Independence of the Bar (September 7, 2006).

27 *Proulx*, *supra* note 10.

persecuted and too often wrongfully convicted. Wrongful convictions occur for many reasons, but one of them is the inadequacy of counsel. Where the counsel pool is limited, that risk is increased. Lawyers are not well situated to assess the "common good". It is impossible to ascertain the morality and community standards of future generations. Was a lawyer who refused to defend or represent suffragettes, because of a moral belief that women were not qualified to vote, acting ethically? Must a lawyer be "for" gay marriage to advocate its legality as a human rights issue? In recent years we have seen the evolution of corporate governance standards to new levels as well as increasingly strict requirements for transparency in publicly traded securities. Must lawyers be convinced that the highest ethical standards were met before agreeing to represent corporate actors in criminal or civil suits?

During the era of McCarthyism, lawyers risked their livelihood if they were viewed as sympathetic to the communist cause. Even the American Bar Association endorsed this sentiment, demanding that lawyers take anti-communist oaths, declaring those retained by known communists unfit for membership to the bar.[28] American attorney Andre A. Borgeas recounts the tale about the Washington law firm Arnold & Porter, which refused to limit the range of the clients it would represent:

> In a comical encounter while playing golf, Paul Porter was approached by a fellow attorney who said "Paul, I understand your firm is engaged in defending homosexuals and Communists," and Porter replied, "That's right. What can we do for you?[29]

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28 (1999-2000) 13 Geo. J. Legal Ethics 761 at 763 [*Borgeas*].

29 *Borgeas, supra* note 28 at 769.

It is the Paul Porters we should celebrate. Another example, from popular fiction, is Atticus Finch, and his famous defence of a murder charge in *To Kill a Mockingbird*. He had to sacrifice greatly to defend a black man falsely accused of the rape of a white woman, a crime punishable by death in Alabama[30] (The way he defended him was fraught with ethical problems. But that is another issue).

But if counsel has a firm duty to accept clients or defend causes of a morally distasteful nature, do lawyers simply become "mouthpieces" for those clients or causes? "Mouthpiece" is just a pejorative term for "advocate". An ethical lawyer puts forth the client's case forcefully, within the bounds of the law and professional responsibility. A rogue lawyer argues only what the client wants put forward, without regard for the facts or the law, or the rules of professional responsibility. The former is an advocate, the latter is a mouthpiece. They should never be confused.

Eddie Greenspan puts forth the following hypothetical: what would he have done if he had been asked, as a Jew, to defend notorious Holocaust denier Ernst Zundel? He believes that he would have indeed defended Zundel, whose views he finds personally repugnant. But, and this is a very important distinction, he would not have acted for Zundel on the basis that he may be *right*, rather, as he states: "A lawyer like me… only defends clients. Clients, and not crimes (or hate or lies)."[31] Though he put this forward in the criminal context, Greenspan's words equally apply throughout the legal spectrum. But a lawyer who accepts an unpopular client need not refrain from engaging in a

30 *Proulx, supra* note 10.

31 *Greenspan, supra* note 2 at 284.

discussion about the morality of the client's aim. As explained by Mr. Proulx and Mr. Layton:

> "…it is perfectly legitimate not only to advise the client as to the legal pitfalls and weaknesses in a case but also to discuss the morality of achieving the client's desired goal. By the same token, through dialogue with the client, a lawyer may come to accept that the retainer's objectives are not repugnant at all."[32]

Is it acceptable for a lawyer to reject a client if the lawyer sincerely believes that his personal views will interfere with the client's representation rendering him incompetent? Phil Rankin, a renowned Jewish human rights lawyer publicly explained his refusal to defend Nathan LeBlanc, a potential client accused of the racially motivated murder of a Sikh caretaker. LeBlanc was allegedly a member of the white-supremacist group "White Power". Mr. Rankin's position was that, "as a Jew and an activist on behalf of human rights issues," he was unable to, "guarantee that his legal work would not be affected by his personal views."[33]

Are such exceptions legitimate? Mr. Pannick poses this difficult question in the following manner: "…should we require lawyers to defend clients which they feel they cannot competently defend, as Phil Rankin felt when faced with someone who stood in moral opposition of his views?" There is no easy answer. No lawyer should take on a case he or she feels incompetent to handle, or if he or she is unwilling to give it the zeal that it requires. It is unethical to do so for the former reason and unjust to the client to do so for the latter. But protection of justice as an ideal should be a constant for the

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32 *The Cab Rank Rule* in *Ethics, supra* note 7 at chp. 2F. See also *Pannick*, *supra* note 23 at 135.

33 (Globe and Mail, April 27, 1999) as cited by *Proulx*, *supra* note 10 at 222.

ethical lawyer. The fallibility of this ideal cannot be tested in theory alone: "No one can honestly say what he will do if his ideals are put to some final, cataclysmic test, but it does not follow that there are no ideals or that no ideals have any validity."[34] The words of Mr. Proulx are apt:

> "… my dear friends, when the curtain falls, following the trial of the unpopular, unlike an actor who goes back to his dressing room and removes his mask, you much look into the mirror of your conscience. You must confront the consequences of your moral choices, and so, throughout your entire career you grow and evolve with respect to your *understanding of your place in the system of justice*."[35] (emphasis added)

How all of us will respond to the challenge, if asked to represent a client whose alleged or known conduct offends us, is ultimately a matter of conscience. But our conscience must be guided by our oath and the professional and public responsibility we have as lawyers, if the privilege we have to practice law means anything.

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34 *Greenspan*, *supra* note 2 at 287.

35 *Proulx, supra* note 10 at 239.