Traditions, symbols, and the challenges of researching the legal profession: the case of the cab rank rule and the Bar's responses

Traditions, Symbols, and the Challenges of Researching the Legal Profession: The Case of the Cab Rank Rule and the Bar's Responses

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1. Introduction

During 2012-13 the authors were commissioned by the Legal Services Board in England and Wales to carry out research on the Bar's cab rank rule (Flood & Hviid 2013). The Bar Standards Board was requesting a rule change to put in place a set of standard contractual terms for when the cab rank rule was invoked that would mean the rule would be set aside if different terms were used (Baksi 2012, but see Hyde 2013). The research aim was to compile a literature review that would inform policy and discussion. Unfortunately, there was scant literature to review. What happened next took us on a research journey that was exciting and challenging. To tell this story we divide the article into two main parts. The first presents the research and the second analyses the response of the Bar to the research. We expected a defensive response but not of the ferocity that came. It was a journey that lasted some years. We tell this story because researchers are not always well prepared for what might happen after they publish. And because the legal profession is a powerful institution in society that is prepared to mobilize itself strongly against perceived attacks and slights (Baldwin and McConville 1978).

Legal professions in most countries have ambivalent feelings about research conducted on them (Danet et al 1980). There are a number of possible reasons for this, including views that there is no necessity for research, sociological research is meaningless, much of what lawyers do is private and therefore beyond the researcher's purview, lawyers are too busy to give researchers time, lawyers feel threatened by research and more. Nevertheless, there has been a huge rise in research on legal professions over the latter half of the twentieth and the early twenty-first centuries. Not all of it has been without controversy.

In the 1970s Baldwin and McConville researched plea bargains by interviewing defendants who had accepted them (Baldwin and McConville 1977; 1978). What appeared to be straightforward research erupted in anger and vilification when the Bar rejected the findings and called the integrity of the research into question. Questions in parliament, imposed university reviews of research protocols ensued and despite the Bar's dented *amour propre* the research was found to be properly conducted. The Bar wanted to know the names of the defendants so that cases could be revisited if necessary. They particularly disliked the suggestion that innocent defendants were persuaded to accept plea bargains to facilitate the efficiency of the courts. Despite the Bar's explicit aim, it created a chilling effect amongst researchers? with attempts to suppress the research. The power and status of the Bar was used to great effect against relatively powerless academics.[1]

The experience of Baldwin and McConville indicated how strongly the Bar would defend itself when it felt its core values were being attacked, no matter the strength of the evidence. This in part is connected to the nature of the relationship between legal academics and practitioners. It has never been an easy one (Twining 1994). However, a series of mediating institutions have since built up that have begun to improve the

research environment for academics and practitioners. Some of these are new outside organisations and others are established but have divided in ways that facilitate research. Two key institutions that were research minded and paved the way for others in the 1980s and 90s were the Law Society's Research and Policy Planning Unit set up by Walter Merricks and headed by Carole Willis and ACLEC,[2] which drafted in an academic, Professor Kim Economides of Exeter University. Both promoted vigorous research agendas that drew in many academics. Following the Clementi Review (2004) and its successor the Legal Services Act 2007, the regulatory structure was radically revised (LSB nd; Mayson 2020). Bodies such as the Law Society and Bar Council had to split themselves into representative organisations and regulators. The Law Society became the representative body and the Solicitors Regulation Authority (SRA) the front-line regulator. The Bar Council similarly split with the Bar Standards Board (BSB) as regulator. Over them was the Legal Services Board (LSB), whose remit was to protect against regulatory arbitrage among the regulators. Additionally, the LSB engaged in research on the legal services market and one of its first actions was to establish a Research Strategy Group (RSG).[3] All the front-line regulators and the representative bodies were invited to be members. Within its first year the RSG had set out an ambitious research plan, all of which was supported by the profession. The RSG was transparent about its research and published its results on its website and encouraged academic publication.

An examination of the LSB research website shows an extensive range of research on a wide variety of topics, from mapping the legal services market through modelling ethics to studies of mystery law shopping.[4] Moreover, the LSB tapped into different sets of expertise including sociology, psychology and economics. For the cab rank rule study, the LSB selected a legal sociologist and an economist. However, because of the lack of literature on the cab rank rule the researchers decided to add an empirical element by way of interviews of those involved in legal practice, eg. government officials, regulators, lawyers, as well as those who worked for lawyers in various ways. We also employed economic modelling to try to understand the case for the cab rank rule. Our methodological diversity covered a number of areas.

In the next section we analyse the cab rank rule and present our findings. This is followed by sociological and economic analyses of the rule, and then our discussion of the responses by the legal profession and our conclusion which discusses the position of elites and their compatibility with research.

2. Cab Rank Rule Research

The cab rank rule is a simple concept expressed both negatively and positively in the Bar Standards Board's Handbook rules C29-30.[5] It states a barrister must not withhold advocacy services because of the objectionable natures of the case or client, nor should funding be a determining factor and that a self-employed barrister must comply subject to exceptions stipulated in the code. Higgins (2017:204-7) points out that it is not universally agreed upon among lawyers and judges.

The cab rank rule is claimed to ensure that the availability of justice will be guaranteed. Indeed, the BSB deems the rule to be a bulwark of the rule of law (Deech 2012), and if the rule is so simple and well regarded, what is the point of examining it? The reason is that although the rule has a laudable aim, its presence in the post-Legal Services Act

2007 market is no longer so clear and straightforward. We asked if it had the potential to distort the legal services market. In other words, is it a rule for the protection of the Bar or does it still offer protection for clients against capricious behaviour by the Bar? Indeed, we ask if it is a rule and if it is meant for the benefit of the client why are there so many exceptions and why do a number of judges and lawyers (see below) think it has little relevance in the modern legal services market?

One of the peculiar attributes of the cab rank rule is that it applies to a relatively small group of lawyers, namely, self-employed barristers who are instructed by solicitors. According to Bar Standards Board (BSB) statistics,[6] in 2020, there were 13,502 self-employed barristers out of a total of 17,078. At the same time there were nearly 147,000 solicitors on the Roll.[7] Moreover, two sectors of advocates are excluded from the rule's remit. Solicitor-advocates—of whom there are 5,200—fall outside, as do self-employed barristers who take instructions on Public Access or Licensed Access routes. It is possible therefore that at any one time the number of self-employed barristers covered by the cab rank rule may fall below the number mentioned.[8]

The cab rank rule is part of the mythology and traditions of the Bar and we often think of traditions as long-standing. It seems, however, many traditions are of recent invention, according to Hobsbawm (1983), although disguised to appear ancient 'from time immemorial'. But the types of invented traditions fit well with myths. According to Hobsbawm there three overlapping types: those that foster social cohesion among groups, those that create legitimising institutions, and those 'whose main purpose was socialization, the inculcation of beliefs, value systems and conventions of behaviour' (Hobsbawm 1983:9). All three types serve the purpose of maintaining the Bar as a closed institution with its own folklore, but its impregnability to the outside world forces of market and competition have eroded this sense of containment as its members have spread into the modern, bureaucratised workforce. In order to maintain the strength of the Bar's bonds, it is imperative that its traditions and myths remain acknowledged and unquestioned, preferably in a form that makes them impregnable to attack.

In the next section we contextualise the cab rank rule by examining its history, ethical imperatives and its equivalents elsewhere.

Context and Background

History

The first mention is an early statement of the rule issuing from the Scottish Court of Session in 1532, "No advocate without very good cause shall refuse to act for any person tendering a reasonable fee, under pain of deprivation of his office of advocate" (Humphries 2009). Robertson (2005:25) suggests it appeared in the Bar's consciousness in the 17th century, perhaps not in quite the way the rule is envisaged now. John Cook as Solicitor General was commanded to prosecute Charles I for war crimes. All other lawyers left town in order not to be asked. On the return of the monarchy in 1660, Cook, now a judge, was himself prosecuted for having indicted the king (regicide) (Robertson 2006). Despite arguing that he was under a duty to accept any brief accompanied by an appropriate fee, Cook was hung, drawn and quartered—not the most auspicious start for the basic duty of the Bar. Robertson (2005:26) also refers to Lord Erskine defending Tom Paine and Lord Brougham defending Queen

Caroline (in divorce proceedings) as articulating the premises of the cab rank rule. It is worth recollecting Thomas Erskine's defence of Paine:

> From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgement.[9]

A series of cases from the 1960s onwards considered the cab rank rule by way of adjudicating questions of immunity. *Rondel v Worsley* epitomised the ideal of the cab rank rule,[10] the selfless, professional barrister ensuring "unpopular individuals and issues are properly represented". In 2002, the House of Lords, in *Hall v Simons*, brought many of the matters of immunity and the cab rank rule to a head. Lord Steyn's judgment, "It is a valuable professional rule. But its impact on the administration of justice in England is not great,"[11] was disliked by the Bar. The case was one against solicitors (and solicitor advocates) rather than barristers, yet the law lords also had to consider the role of barristerial immunity. While they took different routes, they came to the same destination,[12] which was that it was a valuable professional rule but one of little significance in daily practice.

The cab rank rule, however, never applied to solicitors until during the Courts and Legal Services Bill, under the Thatcher government, the Bar lobbied the House of Lords to amend the bill to introduce a cab rank rule for solicitor advocates. Abel (2003:81) describes how the branches of the profession fought over the bill

> Sir David Napley mocked the Bar's idealization of the rule as 'the acme of virtue'; because exceptions had proliferated 'ad infinitum' it 'would not make the slightest difference'. The *Solicitors Journal* agreed it was 'one of the great illusions of legal life'. Geoffrey Bindman (whose firm was one of the two declining to represent defendants) called it a 'delusion' and a 'sham', 'just another ploy in the devious rearguard action by the Bar to maintain its long-standing privileges'.

The House of Commons added exceptions for solicitors, which effectively nullified the rule (Abel 2003:73-4; Thurman 1993:5-6).

Representation and the cab rank rule

There are few sustained analyses of the cab rank rule, although it crops up often in the literature as a footnote. Perhaps one way to start this discussion is to ask what is at issue here? In this section we focus on representation. The ethical and human rights aspects of the cab rank rule have been dealt with extensively elsewhere (Quinlivan 1998, Higgins 2017). To tease out the issues we compare the English barrister with the American attorney in their relationship to clients.

We have referred already to Robertson's portrayal of John Cook as the earliest (failed) advocate of the cab rank rule (Peacey 2001). Cook's approach was that he was acting as an advocate who had been hired by his client, which in this case was the government of the day. He was indifferent to the outcome. While Cook's view was not primarily

altruistic, the cab rank rule is interpreted this way today. Quinlivan (1998:117) sees the rule reflecting concerns for "maintaining and sustaining justice and promoting good." It nonetheless reflects loyalty to the client in an attempt to protect the client's autonomy. But in so doing the lawyer's own autonomy is fettered and the lawyer's behaviour is therefore rendered unaccountable.[13] The lawyer is denied choice and acts merely as disinterested agent. One advantage of this is that the choice of lawyer does not signal anything about the client's own view of the case. If there were choice, then by seeing who had or had not turned down the offer to work on a case might signal something, however unlikely, which would influence the court or even a jury.

In contrast, lawyers in the US view lawyer autonomy as crucial and something that should not be sublimated to that of the client. Wolfram (1984) gives the example of the lawyer asked to represent a self-confessed Nazi who wants to vindicate a right of free speech in order, in the future, to be able to spread legal but vicious Nazi propaganda about Jews and Blacks. Wolfram views this from two angles. From the client's perspective the threat of unwarranted criminal proceedings gives rise to a duty of representation. However, he does not accept there is a duty to assist in the vindication of the right to free speech. Wolfram (1984:230) argues

> Unlike the murder situation, here the abhorrent ideology of Nazism is central to the proposed course of conduct. With the lawyer's assistance the ideology can be broadcast, without it, it will be suppressed, even if against the legal right of the Nazi to free expression. [Furthermore] the Nazi proposes to engage in future elective behaviour. Moreover, it is behaviour that will impose harm upon the targets of speech, Jews and blacks, whereas an acquittal of an unjust murder charge will have no "victims".[14]

A key element is the weight attributed to the interest in focus that will tip the scales and "will differ according to the values of the assessor" (Quinlivan 1998:127). Other less extreme examples can be invoked to show the different interests at play. Freedman (1984) uses the case of the disinheriting parent who wants a will to exclude his son because the boy is opposed to the war in Vietnam. Wasserstrom (1984) suggests the lawyer ought to refuse because the client's reason is bad, while Freedman asks which is preferable, the immorality of refusal or the immorality of the cause? The English barrister would, it seems, be bound to act in all these situations regardless of the morality of the outcome.

But is the situation for the English barrister so clear-cut as suggested? Disney (1986) provides two examples from the 1970s. First, where the Bar Council in 1974 had to appeal for assistance from QCs to defend IRA bombers because there were no original takers for the briefs. And, second, where barristers in Sydney asked the Bar Association to request members to accept briefs for prisoners involved in riots: the cases would mean making allegations against senior police, prison and public officials, with low remuneration. Avoidance, according to Disney, was common: he wrote, "the cab rank rule is not infrequently evaded. Such evasion is difficult to detect, and even more difficult to prove with sufficient certainty to justify disciplinary action." (Disney 1986:605).

Although it is strictly true that the United States does not possess the cab rank rule it is implicated from time to time.[15] Charles Wolfram (1998) considered the effects of a

ruling by the Massachusetts Commission Against Discrimination. The Commission effectively imposed a "cab rank rule" to prohibit lawyers from choosing clients on the basis of their gender.[16] Thus

> a woman lawyer who says flatly to a man that she only represents women in contested divorce proceedings violates the Massachusetts law prohibiting gender discrimination in a "place" (the lawyer's office) of "public accommodation" (the publicly advertised practice of law) (Wolfram 1998).

The United States has given constitutional protections to lawyers over representation so that only the courts, and not the legislature or the executive, can regulate their activities. According to Wolfram the way the Commission had phrased its ruling left the respondent lawyer in an absurd position. Although attorneys have the right of refusal of clients, to say refusal is a matter of principle incurs the Commission's wrath. However, if the lawyer had said that "the particular (male) prospective client is 'not consistent with my specialty and area of interest'," refusal would have been legitimate.

Wendel (2005:999) argues for a convergence of views in that the United States is little different from the UK in its cab rank rule because the procedures and grounds for disengaging from clients are difficult, but he characterises it not as a rule but a principle and so not binding in the same manner as a rule. The real distinction here is between individual and system level decisions.[17] Whereas individuals may make decisions for all sorts of reasons creating something of an ad hoc approach to decision-making, the system ought to be capable of making more rational decisions. Wendel (2005:1030) gives the example of allocating health resources in favour of either pre-natal care or heart transplants: the former might help more people than the latter and thus be preferred. But relying on system level justifications of the legal system sees normative conflict channelled into fair procedures and thus alleviating lawyers of difficult decisions and responsibility. Quinlivan (1998:138) argues, "legal practice should be more than moral prostitution, and the practitioner should be given the right to exercise moral autonomy" (See also Smith 2006).

For the English (and some Commonwealth jurisdictions) these issues are less vital and their approach more pragmatic (McLaren et al 2013). Michael Beloff's (2010) view of the Bar is good example of this pragmatic type of thought. He even compares himself to Michael Caine's character in *Alfie*,[18] when he asks, "What's it all about?" And not unlike the casual film character he approaches his answer as a "jobbing attorney". First, Beloff notes the changes in the Bar from a small craft industry into a full-scale business replete with regulation. Barristers are "case managers." Later, he invokes the cab rank rule as a central value of the Bar and justice. Yet he recognises the truth of Lord Steyn's words when he said in *Arthur Hall*: "Its [the cab rank rule] impact on the administration of justice is not great. In real life a barrister has a clerk, whose enthusiasm for unwanted briefs may not be great, and he is free to raise the fee within limits."[19] As important as the rule is, Beloff understands the multifold role of the barrister as one who must owe a duty to the court over and above the duty to the client.[20]

Perhaps this is the essence of the English pragmatism. Beloff (2010) recalled Lord Gifford establishing a set of radical chambers in the 1970s that refused to act for landlords or the police.[21] The Bar Council objected to this, but the chambers declared they were expressing their preference rather than issuing a prohibition. This approach

has been restated through the intervening years, as we show. Interestingly, Beloff comments on two further ambiguous situations—prosecuting barristers and politician-barristers—both of which embody divided loyalties.[22]

Samuels (1998) takes the pragmatic view further when he brings conflicts of interest into the picture. Although he promotes the independence of the Bar and the virtues of the adversarial system, he is unable to see why the interests of existing clients should be trumped by new ones, which is implied in the cab rank rule.

> One can well imagine cases where the interests of the existing client, and those of the new client, are totally incompatible [in civil cases]…I think that the example of client conflict supplies the first ground upon which the cab-rank principle should be honourably retired….Its ethos is well embedded in the traditional practice of the Bar, whose members generally honour the obligation to make their services widely available, and to refuse a brief…only for sound reason (Samuels 1998:11).

Mayson (2008) challenges the ideology of the cab rank rule further and reinforces Samuels' view. He is critical of the Bar's formulation and justification of the cab rank rule. He wonders "whether it has now become an emotive 'article of faith' for the self-employed Bar rather than a rationally justifiable professional obligation." He indicates how it fails to meet the needs of disadvantaged clients in legally aided criminal and family work and that it is too easily evaded. Because the rule is subject to what Mayson terms "professional relaxation"[23] and therefore can be suspended for economic reasons, it is difficult to justify in the public interest.

In the next section we turn first to an empirical sociological study of the cab rank rule and then to an economic analysis.

Sociological analysis of the cab rank rule

Because there is little information on the actual working of the cab rank rule, we undertook interviews—eighteen in all.[24] Our interviewees included regulators, government officials, barristers, solicitors, and barristers' clerks. The range of views was diverse from devotion to the status quo ante to some scepticism to complete puzzlement. For example, one clerk said of the rule, "I haven't thought about that for twenty years until you mentioned it." Another commented, "It is difficult to get a man to understand something, when his salary depends on his not understanding it," which we found revealing.[25]

The general tenor of our interview responses followed Lord Steyn in *Arthur Hall,* namely the rule had little effect. Yet on the part of some barristers and Bar officials there was an absolute conviction that without the cab rank rule, the rule of law would collapse. The polarity of views can be represented, however, in a simple fashion: whether the topic was *people* or *money*. The origin of the cab rank rule is to ensure that the unwanted client receives representation, but what is apparent today is that such a client hardly wants for representation. The client who may be undesirable is one who might cause a "cracked" trial resulting in a lower fee for counsel.[26]

The profession's view is that over hundreds of years what was a matter of honour—that the Bar would defend clients against the state—mutated into a professional obligation

written into the code of ethics. One solicitor, for example, argued that it enabled country solicitors to battle equally against the likes of Linklaters as each had access to the same barristers. This is a naïve view, as we know there are monitoring difficulties in principal (client)-supervisor (solicitor)-agent (barrister) models. The cab rank rule does not protect against, for example, the supervisor and agent conspiring against the principal. A substantial mythology has been erected around the cab rank rule in these ways.

Another divergent observation that emerged from the interviews was over the nature of the cab rank rule. This view was that the rule was a nice principle, and might be important as such, but it was not a real working rule. Alex McBride (2010:7) reinforces this,

> In practice the 'cab rank rule' is routinely broken, not because barristers are trying to take the cases they find the most palatable, but because they're looking for better ones, whether it be higher profile, better paid or more egregious…It's professional pride.

Another barrister commentator put the reasoning behind the rule in such a way as to invert it:

> I think most barristers would actually identify as the main justification, for which read: benefit to the barrister, namely that, so they assert, the existence of the cab rank rule ensures that we are not associated with our clients, their conduct, or their views. Obviously, that is nonsense, and anyway not a justification. No other professionals assert that need or suffer that problem, why should we?

We next examine the binary division of the cab rank rule as surfaced from the interviews: the odious clients (*people*) and problematic fees (*money*).

Specialisation of practice

One of the regulators interviewed referred to a case we have mentioned before, the Birmingham Six IRA bombers in the 1970s (Disney 1986).[27] With defence counsel reluctant to appear, the Bar Council had to appeal for QCs to take on the case. No other case since then seems to have attracted such opprobrium that no counsel could be found. Indeed, the very opposite has occurred; the "worse" the client, the more attractive and desirable. Several respondents suggested that if Anders Breivik (Bangstad 2014), the Norwegian bomber and shooter, had been on trial here in the UK, "barristers would have queued around the block to represent him."[28] While this obviously remains hypothetical, the idea is not far-fetched.[29] For example, during the O.J. Simpson murder trial a change of defence counsel was anticipated.[30] One particular defence lawyer being interviewed for the team put forward an unusual reverse contingency fee: he would be paid only if he *lost* the case. If he won the resultant publicity would far outweigh any monetary reward, which confirms the attraction of the "odious" client.

The manner in which the cab rank rule is presented makes it appear simple until all the exceptions are taken into account, but they do not account for all the possibilities. For example, they do not mention specialisation although they refer to "a Court in which [the barrister] professes to practise." Thus it would be far-fetched for a Chancery barrister to represent a client in a family court and the cab rank rule is unlikely to be

invoked. But where specialisation is more narrowly specified then problems arise. We now have not only substantive specialisation but also specialisation as to the type of client.[31] Two examples will suffice: criminal prosecution and defence, and family law.

Although specialization in criminal prosecution or defence occurs, it is not always explicit.[32] Within the constraints of the cab rank rule barristers in either chambers ought to be available for any kind of criminal work.[33] Formally they are, but informally solicitors, the Crown Prosecution Service and others know which chambers do which kinds of work and so would be unlikely to send a prosecution brief to a dogmatic defence set of chambers and vice versa. This information is available to the "club" but not the general public: it operates through informal networks. A similar situation is arising in family law where particular barristers act exclusively for Local Authorities in care proceedings while others act only for parents or children. Again, these distinctions are informal and not publicized in ways that would incur the BSB's disfavour.

The converse to this should be mentioned which is where clients want a particular barrister who is known for working in distinct areas. One barrister said that having worked for both sides might deter some clients who would prefer a more "zealous advocate". For example, victims of race discrimination or assaults by the police might not want to be represented by a barrister who previously was cross-examining someone like them on behalf of the police. As we have seen this cannot be done explicitly without incurring sanction from the Bar for breaching the rule. It has to be done covertly reducing knowledge about the market and making it harder for consumers.[34] This raises the issue of how repeat players have the advantage in selecting the best counsel for the case as they have inside information not generally available (Hanretty 2014).

Another barrister observed that he worked in the very small field of pension fund law which meant that he and the other several barristers would act for either side as necessary and that clients understood this. In this situation it was the small number of counsel that made any specialisation by client virtually impossible. One area where he said there was curtailment on outside representation was where counsel acted for HMRC. A regulator said that if a barrister were doing high-level work for the Revenue, it would say, "We expect you not to act for the other side." The argument here being that this is perhaps covered more appropriately by a conflicts rule or possibly even competition law rather than the cab rank rule.

One area that is supposed to be non-exclusive, but, again, we have no data on, is the operation of panels by organisations such as local authorities. A regulator argued that "theoretically" panels could restrict the working of barristers. At the time of the research the Attorney General's Panel of Counsel had a "Myth Buster", which is no longer on the website, as follows:

> Myth 4 When You Are Appointed As Panel Counsel You Can No Longer Act Against Government: This is not true. We fully encourage counsel to maintain both a public and private practice, this includes acting against Government. It is beneficial to Government if counsel have had experience of acting against Government as we believe it makes them a better advocate as they have seen Governments' arguments from the other side. Panel membership is also not

> infinite; we would therefore want to ensure that should your panel membership cease you would have a private practice to return to.[35]

Problematic fees

Fees and costs have always been an opaque matter for legal services. Transparency, consistency, and simplicity are often missing. This was confirmed by the two Competition and Markets Authority reports (CMA 2016; 2020), which insisted regulators had to do more to promote transparency. Publicly-funded fees caused difficulty where the two main areas in which the cab rank rule is at best ambiguous are in criminal defence work and community legal service work. Among our respondents this topic aroused much emotion and frustration directed both at funders and the BSB. Without going into great detail on this topic, we indicate the main features that impact on the cab rank rule. The first part to take into account follows from our discussion of the nature of a rule above. In addition to the individual and entity aspects of the rule there is a third; the institutional. This is articulated in the rule in connection with the deeming and undeeming of fees. In relation to publicly funded cases in criminal and family law, the Bar Standards Board explicitly excluded such cases from the cab rank rule because of the low level of fees granted in such cases. For a barrister to accept a case and have the rule apply, the fee must be a "proper" one (Counsel 2015).[36] To these we can add the BSB's Standard Contractual Terms (SCT) which were introduced in 2013. The cab rank rule does not apply unless all parties agree to the SCT or the barrister's own terms, which can be interpreted as a restriction on competition that might be disproportionate. Public access clients are also excluded from the cab rank rule which reinforces confusion and could potentially leave clients stranded without representation (Walters 2017). The institutional layer—that imposed by the BSB on behalf of the Bar—on the cab rank rule adds complexity to a melange of exclusions and exemptions that appear to make the rule not only unenforceable but rather meaningless.

The rule appears to serve the Bar more than it does consumers. For an example of how this works we take the example of "either way offences", say benefits fraud.[37] This is where potential problems for barrister and clerk occur. In "either-way cases" there is, under the graduated fee scheme, a particular fee for each court that covers a number of activities. However, if the defendant elects for the Crown Court and then pleads or in some other way the case cracks, then counsel receives a fee less than would have been awarded if the case had remained in the magistrates' court or not cracked. Peter Wright, barrister's fees clerk, is quite emotional when he says,

> The biggest bugbear…is the regulation over "Defendant Elect Cases". It is the Defendants right to elect for a Crown Court Trial (in either way offences) but this is not the problem. The issue revolves around the fees paid to DEFENCE advocates under the Advocates Graduated Fee Scheme.
>
> Currently it stands that if the Defendants pleads at any point before or on the first day of trial the Defence Advocate is paid £203 plus vat, this fee covers everything that has happened on the case, by everything I mean everything [various hearings listed]. If alternative counsel has covered these hearings then the divvying up of the pot gets ridiculous…Surely if it is the Crown's decision to drop the case then defence counsel should expect to be paid a full Fee (please

> note at this point the CPS advocate (assuming self employed) receives a full fee regardless of when the case concludes).[38]

The response from a number of clerks was, if possible, to steer a course away from this type of work. For them the client had too much leeway to spoil a case. One clerk put it this way:

> In the old days when solicitors couldn't go to court, the fee to the barrister was a disbursement so it didn't matter who got it. The solicitor couldn't touch it and so he thought "I might as well buy the best barrister I can." In the new world the advocacy fee, the barrister's fee is a potential profit centre not a disbursement. So, you look at that fee and say, "Do I want it to leave my building?" Not if I can make a profit out of it. I look for the most profitable advocate not the best. If you're running a quality service then you look for the best advocate, but if you're running a bargain basement operation you look for the most profitable. So, if you're dealing with cases in faraway geographical places with uncertain fees, then you send a barrister. That puts the solicitors in the economically dominant position as they control the workflow. And the Bar, because of the cab rank rule, are in an ethically weaker position.[39]

A solicitor reinforced this position when he said that he would authorise the work in stages such as pre-trial work, cracked trial stage, but he would never authorise full trial work. It was all based on risk analysis: as he further said, "Risk, risk, risk." Or as the clerk put it, "The solicitor is driven by cash and we're driven by ethics." Another clerk went so far as to mention 'brown envelope deals' between solicitors and chambers where the work was done off the books in order to cement strong relationships between them (cf. Higgins 2012). He said, "The cab rank rule is a clean hands rule and business is currently very dirty. And those who are ethical are at a disadvantage." Another solicitor emailed a barrister's clerk: "We do prefer solicitor advocates to the Bar for our overflow work, because they make a payment to us...Don't even ask me to explain why we are having to do all this – it is bad for my blood pressure, but it is called survival. The litigators' fee means that we have lost 30% of our income from that work, rather more than our profit margin."

The cash nexus between solicitors and barristers was picked up by a regulator who said:

> It's to do with the divvying up of legal aid between them. If too much money sticks in the hands of the solicitor then it's a loss maker for the barrister. Now if the work is coming from a law factory the clerk doesn't mind because plenty of work will follow even though the individual barrister suffers. The client is therefore irrelevant.

For most clerks, while they respected the barristers' ethics, they had not heard a rational explanation of the cab rank rule; for them it was a shackle. One clerk suggested the question ought to be put, "Would you refuse to act if you didn't have the rule?" Another clerk stated that, "The true ethos of the Bar is not the cab rank rule, it's a collegiate ethos. It's helping the judge, it's pointing out to your opponent something he's missed."

In the next section we provide economic explanations for the cab rank rule.

Economic analysis of the cab rank rule

The cab rank rule is sparsely addressed in the economics literature. Where it has done so it has focused on links with remuneration. The few contributions either explicitly or implicitly assume that barristers are motivated by financial considerations. This assumption, although far from obvious, is articulated clearly in Hanlon and Jackson, "the Bar's function has been to administer justice in an independent non-pecuniary fashion" (1999:556). Taking finding representation as a market failure, it arises for two reasons, either the fee is inadequate or the case is unsavoury. Before focusing on the financially motivated barrister, we consider the obvious alternative that barristers act out of a concern for justice and the rule of law. In this scenario, the cab rank rule may be a way to avoid free riding. Even if all barristers hold the view that everyone should be represented, they might rather prefer it if someone else dealt with the unsavoury cases. We can ask if it would become obvious to the Bar if someone chose to avoid what was seen as a collective responsibility. In that case, the consequent loss of reputation might be just as effective as the cab rank rule.

Hanlon and Jackson (1999) identify two important consequences of the cab rank rule: barristers cannot choose on the basis of the profitability of a brief and clients can choose any barrister they wish. This implies that the cab rank metaphor is limited since, at most cab ranks, we are expected to choose the first cab on the line. Yet the cab rank rule only requires that the barrister accept the brief; it says very little about the level of effort the barrister will put in once the brief has been accepted. The problem of ensuring adequate effort may be solved by the second consequence identified above, namely that future potential clients may punish poor current effort. Before evaluating the evidence of the latter, we focus on possible adverse effects on performance arising from the cab rank rule, in theory forcing barristers to take cases independent of remuneration.

In a group of papers that compares the US and UK positions on the representation of indigents in criminal cases, Tague (1999; 2000; 2007) discusses the incentives created for UK barristers by a particular remuneration system. Although the cab rank rule was not the primary purpose of his study, it can be inferred that adverse incentive effects can arise in a small number of ways. The first regarding the incentive to return briefs, or to place oneself in a position where briefs will have to be returned. Barristers often have incentives to engage in strategic overbooking to ensure that they are continually employed. The second regards the incentive to prepare when there is the possibility that a brief may have to be returned. The third is that there may be too much or too little incentive to put the proper pressure on a defendant to plead guilty and the potential for biases as to the timing of such a pleading. Tague's main lesson is that it is possible that the cab rank rule, by making barristers take cases with potentially low remuneration, could leave the barristers with poor financial incentives to perform to an expected standard.

Clients do not have to take the next available cab (Hanlon & Jackson 1999) which is important because it puts into play the role of the expert purchaser of the barrister's services, namely solicitors. Solicitors can monitor the barrister's efforts, and also engage with barristers on a recurrent basis so that punishment by not hiring in the future is possible. But does it matter? Hanretty (2014) analysing this answers positively. He

demonstrates how "repeat players" do better, in the sense that they are more likely to succeed on appeal, a finding reinforced by Hanlon and Jackson (1999), owing to repeat purchasers making better selections. Hanretty also reveals that it matters if the leading QC is experienced. Based on a statistically significant estimate, he finds that if an appellant has the choice between a barrister who has argued ten cases before the then House of Lords and one who has only argued one case, choosing the former increased the odds of winning by 24 per cent (1999:694). However, even where the repeat purchaser hires an inexperienced barrister, they are also more likely to win. This research suggests that repeat purchasers may do better for a combination of two reasons. They select better barristers and they make better use of them. It could be that more experienced purchasers are better able to select appropriately skilled barristers, better able to monitor or better able to provide barristers with relevant information and material.

This analysis has focused on the cab rank rule as ensuring that everybody gets represented. But some might be more ambitious and think that for justice we needed the outcome not systematically determined by the ability, financial or otherwise, of one side to choose their barrister wisely. Could a pure cab rank rule potentially counterbalance this inequality if it ensures that each party get a draw from the same distribution of talent? Hanretty's (2014) insights are important here as well because they suggest that it potentially matters both who is hired and who is doing the hiring. The former effect could in theory be nullified by the cab rank rule. The second, that more experienced purchasers of barrister services are on average able to "do better", even with an inexperienced barrister, suggests that a totally level playing field where outcomes depend on the characteristics of the case rather than those involved may be impossible to achieve. The argument that the cab rank rule puts everyone on an equal footing may not be sustainable. Two features of the particular services in question temper the likelihood of the market providing the necessary discipline. The first is the ability of the client to assess the quality of the barrister. This may be solved by the actual choice in this market being delegated to solicitors, who are professional, informed purchasers, who are moreover often repeat purchasers of these services. The second relates to whether the performance was adequate, as the services provided by both solicitor and barrister essentially have the characteristics of a credence good (Decker & Yarrow 2010; Dulleck et al 2011). The key characteristic of such a good or service is that the consumer, even after having "consumed" it, is unable to assess the quality of what was delivered (d'Andria 2013).

In the next section we engage with the Bar's reception to our research on the cab rank rule. We also discuss the intricacies of researching the legal profession, which is bound up with the position, power and status of the profession.

3. The Bar's Response to the Research

This part of the article discusses the reaction of the Bar and other parts of the legal profession to the publication of the cab rank rule report. Everyone concerned with the production of the report understood that it would be politically sensitive and the reaction strong. Different segments of the Bar reacted and responded, as did the solicitors' profession and judiciary. Two main points emerged from the reactions. There was a studied incomprehension as to why the cab rank rule had been criticized; it was something benign and above criticism.[40] The second was that those who would venture

such a critique must suffer from some lack of moral (and intellectual) worth. This is another way of saying that a large proportion of the reactions were ad hominem attacks. For example, a comment in the *Law Society Gazette* story on the report said, "Yes, this is what we expect from the half-educated half-wits who become professors nowadays" (Flood 2013). Others went further, the chairman of the Criminal Bar Association wrote,

> Legal Services Board proposes abolition of the cab rank rule…How dare they? This is a further demonstration that the LSB is a politically motivated body whose mission is the wholesale destruction of the publically [sic] funded criminal Bar… I could write a great deal more on this crassly ignorant analysis of the Cab Rank rule, but there is no need to spell it out. Read it and weep.[41]

The responses to the cab rank rule report fell into different groups. The first group, the principal one, comprised comments by the Bar Council and the Bar Standards Board. Both were extensive with the Bar Council report at around 30 pages and the BSB coming in at 87 pages. They had features in common: both were replete with ad hominem comments about the researchers, both failed to appreciate that social science research is not the same as legal analysis, and both fulminated against the cost of the research accusing the LSB of extravagance. Sir Sydney Kentridge QC (2013) wrote the Bar Council response which was characterised by its overtly normative approach. He lamented our lack of "practical experience" in the legal profession, otherwise we would have understood better and not criticised the cab rank rule. However, we were academics with considerable expertise in researching the legal profession and therefore we believed our statements had credibility.[42] Kentridge accused us of sneering at the Bar's ethical pretensions and that we were openly hostile towards the Bar (Kentridge 2013; Baksi 2013). He also dismissed out of hand all government reports into the Bar including the "notorious" OFT report on competition in professions (OFT 2001). A surprising element of his comments was a lack of recognition of how much the Bar and the legal profession in general had changed over the years. For example, we discussed how chambers were becoming corporatised as they grew in size and scale. His reaction was to say this "could hardly be true of chambers in general" and omitted to provide any evidence to the contrary. It was merely his unsupported statement of belief. Indeed these were common characteristics as shown by his static perception of the Bar and his refusal to see how the cab rank rule had changed over the years from the inability to find defence counsel for the IRA bombers in the 1970s to how publicity could now compensate for the persona of the defendant such as OJ Simpson or Brevik. He dismissed this as irrelevant. His response was full of "weasel words" designed to evoke emotional responses without necessarily being based on fact or evidence.[43]

The second point in his comments was his refusal to accept that social science engaged in different methods to lawyers. He dismissed our interviewees because they had not been "truthful" or were "bizarre". Since we were eliciting what people thought about the rule, divining a truth was not our concern, but how did he know otherwise? Indeed, Kentridge tried to keep the discussion within a remit of his beliefs and own experience at the Bar combined with judges' case opinions. Needless to say, Kentridge's status of notable elder statesman played well to the audience in the Bar who were buoyed by his rallying cry and his adherence to "tradition".

The second response from the Bar Standards Board (McLaren et al 2013) was in many respects more considered than the Bar Council's. It ran to 87 pages with a series of line-by-line comments. It was essentially a forensic study designed to pinpoint errors rather than engage with the key arguments. Their first argument was that we had conflated different parts of the rule. Although the BSB has a new handbook, its rules pertaining to the cab rank rule are close to the old code. In the code rule 601 said a barrister must not withhold services, whereas rule 602 stated a barrister must comply with the cab rank rule (Flood and Hviid 2013:3). The first is a negative and the second a positive duty, which is not the clearest form of exposition for comprehension. Whether one reads the handbook or the code, the rules on the cab rank rule have to be read as a whole, not that that necessarily makes them intelligible. We argued that the rule would be very difficult for clients to comprehend, eg. the special circumstances for QCs without juniors as a reason not to be bound. Indeed, one of our interviewees at the Bar Council stated that these were not independent rules but exceptions to the general rule. In that sense that the exceptions are connected to issues of funding, listing, and over-booking, then they are pertinent and relevant. They are relevant to the consumer who wonders if she can hire this lawyer or not. This was further discussed in the interview where the new standard terms of contracting, the deeming and undeeming of fees were mentioned. All these items refer to one thing—how the cab rank rule may be avoided or, worse, should be avoided.

For the researchers it was interesting that the BSB commentators took the economic arguments seriously even if they sometimes skewed them. For example, they say the cab rank rule ensures that everyone not only is able to get a lawyer but rather the lawyer of their choice. This is a profound statement, but there is nothing in their response to back it up. We argued two points that even if the client succeeds in getting her choice of barrister there is no guarantee of quality of effort, unless the client is a repeat player. Repeat, expert purchasers of legal services are better situated to evaluate the quality of work and sanction for underperformance. One-shot clients are rarely so equipped. They also ignored some of our arguments especially those around deeming and where standard contractual terms were varied as both circumstances released barristers from the rule. And again this tended to affect poorer individual clients rather than repeat purchasers.

Where lawyers typically represent one set of interests, eg. prosecution or defence, banks or customers, there are incentives, formal and informal, not to diverge from established career choices. The commentators categorically denied that this occurred. In fact, where we adduced evidence from our interviews the BSB commentators rejected it.[44] They claimed since interviewees would deviate from the formal presentation of the rule their statements could not be representative of the truth. A comment to the Law Society Gazette by a solicitor brought this into stark relief

> I have never had a barrister outright refuse a case, and as a matter of principle I would only ever send instructions to a barrister who I would expect to take the case unless [told] by my client as to who he/she/it wishes to use. I have, however, had an experience where the fee demanded by my client's chosen barrister was deliberately priced so high that my client couldn't possibly afford it. The clerk was absolutely open about it—saying that this eminent barrister regularly advised the other party to the dispute and, while on this occasion there

> was as yet no conflict, he would need a substantial fee to justify subsequently having to turn away the other work that he expected to be offered. In other words, not quite "No thanks, don't fancy your client", but as near as dammit (Flood 2013).

Kentridge took a similar position to the BSB: on the one hand there was formal truth as presented in judges' opinions and rule books, on the other there were untrustworthy statements by people who were unreliable. They arbitrarily dismissed and denied barristers' clerks views, which were deemed irrelevant. Clerks were not personally subject to the cab rank rule so what mattered was that they followed it. We saw this as a refusal on the part of the BSB to face up to the role played by clerks in the business of the Bar. We know the actual practice of the cab rank rule depends greatly on the clerks (Flood 1983).

The responses of barristers' clerks to the research were markedly different to that of barristers. Most metaphorically shrugged their shoulders at the ensuing outrage. One blogger, Clerkingwell (2013), commented that no clerk wished to turn down work, but because chambers were so specialised, clerks frequently referred cases to other chambers, eg. if a request for criminal defence came to a family set. He accepted that barristers would escape cases where the fees were low, for a client unlikely to re-brief them, and the court was elsewhere in the country. Another clerk, notabarrister (2013), accepted that it was easy to avoid cases by ramping up fees, but he expressed disappointment that the Bar had withdrawn the "protection" of the cab rank rule from those on legal aid in criminal and family matters. He concluded, "Am I missing something here? Does this not seem completely contrary to the noble idea of the Cab Rank Rule that there should always be representation for those who need it providing you get paid for it?"

There was a final group that made their views known, namely senior judges who contacted the LSB with their concerns. The then chairman of the LSB, Dave Edmonds, wrote to the Lord Chief Justice that although no one was seeking to abolish the cab rank rule the BSB had applied to vary it and therefore it needed to be researched. Edmonds was perplexed as to why it was so complex as he believed it could be stated simply, but as it stood then it covered 67 sub-paragraphs and four pages of typescript much of it contradictory.[45] He even rephrased the rule

> Why not start from a very simple rule that says "provided that they have the appropriate experience and training, and are not engaged in other work that makes this impossible, all barristers who are advocates have an ethical obligation to represent clients who seek their help, irrespective of the nature of the case or the nature of the client."

We decided that the combined forces of the Bar had done us a great compliment by writing over 120 pages of review and that we should tackle these statements head-on. We composed an eleven-page response in which we explained the differences between black letter normative and social science positive research (Flood 2013).

Apart from some individual barristers who approved of our research, most including their institutions were vehemently opposed to our research. It was criticised for its

moral failure, and that of the researchers too. If we had recognised the explicit and hidden virtues of the cab rank rule we would have been unable to speak negatively about it. But we had recognised its virtue and we applauded this; what we could not accept was that its moral character placed it above criticism. We found plenty to criticise, as we have outlined, and the Bar wished to convert our critique into an attack on its integrity by questioning ours.[46]

What is clear for researchers on the legal profession is a need to be transparent in aims and methods and convey this to them. Danet's research (1980) was clear on this: lawyers will not always understand how social science research operates. They will be puzzled by its apparent utility or otherwise. This is not their fault as they have been trained differently, but this difference does not absolve them of responsibility once they are involved in research. At the time of Danet's research the total amount of research on lawyers was limited, although Flood (1987) was engaged in his PhD ethnographic research on a corporate law firm in Chicago and was aware of no others but there had been some (eg. Katz 1982, Mann 1985).

Since then, legal profession research has expanded enormously (Abel et al 2020).[47] In addition, the number of institutions involved with legal practice and the profession has grown and become interested in knowing what is happening. In England and Wales following the Legal Services Act 2007 and the establishment of the Legal Services Board, with a research remit, the legal profession was folded into an active research environment. The legal profession acknowledges research is necessary since the profession is too complex an institution to be run by "common sense" approaches. It has financial, well-being, gender, and race issues, to mention a few, that are claiming its attention and action (eg. Vaughan 2017; Sommerlad et al 2020). Stronger alliances between professions and researchers are necessary and productive, but there must be mutual recognition of each other's approaches and values for this endeavour to be successful.

4. Conclusion

Hobsbawm adduced three reasons for the existence and persistence of traditions: fostering social cohesion among groups, legitimising institutions, and socialisation of behaviour (1983). For the Bar the cab rank rule is a vital part of these processes. It has sacred elements as shown in its belief of underpinning the rule of law. It is part of professional knowledge characterised as tacit knowledge, that which is not explicitly articulated but is acquired on the job (Collins 2010). Professionals' knowledge is not merely absorbed through individual study but must be augmented by social interaction with those who will show the correct deportment and responses in the professional community.[48] Hobsbawm also distinguished tradition from convention and routine because the latter are technical in nature rather than ideological (1983:3). However, traditions as

> objects or practices are liberated for full symbolic and ritual use when no longer fettered by practical use. The spurs of Cavalry officers' dress uniforms are more important for 'tradition' when there are no horses…the wigs of lawyers could hardly acquire their modern significance until other people stopped wearing wigs (Hobsbawm 1983:4).

Traditions are not necessarily constructed out of the air, they have history but their role and purpose can be manipulated to particular ends (Post 1996). They are not necessarily predicated on use and the question as to whether the cab rank rule has a practical use anymore is open. As a rule exercising influence it may have some moderate effect. Judges, lawyers, and clerks all admit that is probably at best marginal for practical purposes. The combined effects of the rule's exemptions and workarounds by clerks, solicitors and others render it thus. No one appears accountable for it. Ultimately, it excludes those—legally aided and direct access—who probably need it the most. Yet its symbolic status is never doubted. It distinguishes the Bar from almost every other profession and endows it with mythic status. Perhaps only the Hippocratic Oath is older and more venerated although the differences between the original statement and its modern iterations are substantial (Antoniou 2010). For some modern doctors it is a nostalgic reverie (Miles 2004). None appear to question its enormous symbolic value.

Given their symbolic nature, traditions are not lightly abandoned. Indeed, considerable energy is put into maintaining their resilience in the light of modern changes to professional life. This was clearly seen when the cab rank rule report was published. The Bar mobilised huge levels of resources to fend off perceived attacks on one of its core symbols. It engaged with the profession, parliament, the press, the judiciary, and the regulators, but did not enlist any academics to its aid.

While the symbolism of the cab rank rule was never disputed, the Bar undermined its case by seeking to exempt barristers from the rule over mainly financial matters—solicitors as credit risks, undeeming legal aid—even though the odious client was now celebrated for bringing publicity. And, as the chairman of the LSB indicated, it took many pages to explain the rule's operation, which was not in clients' interests.

Doing research on the legal profession is never simple. Heinz and Laumann (1982) learned that when they received funding from the National Science Foundation to undertake their study of Chicago lawyers, they were awarded the "Golden Fleece Award" by Senator William Proxmire. The award aimed to publicise money-wasting research.[49] Their research became a standard reference point for almost every legal profession researcher thereafter. Research that affects elites will always be contentious because elites have the capabilities to retaliate and attack (Aguiar & Schneider 2016). They can draw on resources of finance and power, which academics might not have available to them. This is why institutional support is crucial as Baldwin and McConville discovered when studying plea bargaining.

Researching elites, and the Bar is an elite institution, is bedevilled in that it involves compromise to gain access and maintain contact. Salverda and Abbink (2013:6) distinguish functional elites from overarching elites as those who command resources within particular fields, but whereas some of those groups are limited to their specific activities (eg. athletes), others command resources beyond their jurisdictional boundaries, which is typical of the Bar and the legal profession generally. Law has always been one of the most transportable skills evidenced by the high numbers of lawyers in legislatures around the world. Strategic elites have therefore gained hegemonic positions within society, which, according to Gramsci (2011) has enabled them to maintain ideological control by asserting certain values as normative so they

appear congruent with common sense. This is necessary as change can only diminish their status rather than enhance it as Simmel (1957:555) argues:

> The highest classes, as everyone knows, are the most conservative…They dread every motion and change…because they regard every modification of the whole, as suspicious and dangerous. No change can bring them additional power, and every change can give them something to fear, but nothing to hope for.

We see why many of the comments made against the research were predicated on the "common sense" of the cab rank rule. Because any critique of the rule, given its mythic status, must be interpreted as an attack on the profession itself and therefore a move towards diminishing it. It is redolent of the Bar's reaction to the Thatcher government's Green Papers on reforming the legal profession by introducing more competition in legal services (Flood 1995:149). The Bar took full page advertisements claiming that 700 years of justice were to be justified to government in 12 weeks. Perhaps the most salient and telling comment about elites, which the Bar probably adheres to, is that by Tancredi Falconeri in Lampedusa's *The Leopard,* "If we want things to stay as they are, things will have to change." The reason was that Sicilians believed themselves perfect with no need to improve.

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[1] Other writers met with criticism, sometimes vitriolic, from the legal profession, notably Zander (1961), Abel-Smith and Stevens (1967). See Sugarman (2009). Richard Abel wrote a number of books and articles critical of the English legal profession that were met with vituperative criticism from both practitioners and academics. See Sherr (1994; 2004), Abel 1988; 2003; 2004).
[2] See Obituaries: Carole Willis, *Guardian* 6 December 2006, https://www.theguardian.com/news/2006/dec/06/obituaries.mainsection; and ACLEC at https://ials.sas.ac.uk/ukcle/78.158.56.101/archive/law/resources/he-policy/aclec/index.html.
[3] In full disclosure Flood was appointed as one of the first members of the Research Strategy Group.
[4] See Legal Services Board, Research, https://www.legalservicesboard.org.uk/research.
[5] See the Bar Standards Board, Handbook at https://www.barstandardsboard.org.uk/the-bsb-handbook.html?part=E3FF76D3-9538-4B97-94C02111664E5709&q=Rules+C29-C30+-+The+cab+rank+rule.
[6] Statistics on Practising Barristers, Bar Standards Board, https://www.barstandardsboard.org.uk/news-publications/research-and-statistics/statistics-about-the-bar/practising-barristers.html.
[7] Annual Statistics Report 2019, https://www.lawsociety.org.uk/en/topics/research/annual-statistics-report-2019.
[8] I have deliberately not covered the cab rank rule in great detail in this article preferring to refer readers to Flood and Hviid (2013) and Higgins (2017.
[9] *R v Paine* (1792) 22 State Trials 357, 412.
[10] [1967] 3 All E.R. 993 at 1029 (H.L.).
[11] *Arthur JS Hall v Simons (AP)* [2002] 3 All E.R. 673, 680e.
[12] Lord Hope said, "Its value as a rule of professional conduct should not be underestimated, but its significance in daily practice is not great …" *Hall* n 9 above, 714b.

[13] Cf Dare (2016), who adduces various arguments about the neutrality and non-accountability of lawyers.
[14] For further discussion of this view from the perspective of tobacco litigation and lawyers' roles in it see Liberman (2005).
[15] The exception to lawyer autonomy is if a court appoints a lawyer to represent a client. ABA Model Rules of Professional Conduct, Rule 6.2 (2002).
[16] *Stropnicky v Nathanson*, No. 91-BPA-0061 (Mass. Comm'n Against Discrimination Feb. 25, 1997).
[17] The American situation has become more complex in the Trump presidency where the president has attempted to use the Justice Department as his own legal staff (Green and Roiphe 2018; 2019), but compare Luban (2020).
[18] *Alfie* (1966) at http://www.imdb.com/title/tt0060086/.
[19] *Hall* n 9 above, 680.
[20] The recent furore over Dinah Rose QC's representation of the Cayman Islands' case against same sex marriage is indicative of the emotive force of the cab rank rule (Slingo 2021). See also Goldsmith's comments (2021) on Rudy Guiliani's representation of Donald Trump.
[21] Heinz and Laumann (1982) discuss how lawyers specialise by client and will place multiple lawyers on retainer to prevent them acting for their opponents, not dissimilar to the UK.
[22] An analogous situation is that of Paul Diamond, a barrister who has made a specialty of defending conservative Christians with views antithetical to abortion and homosexuality (http://www.pauldiamond.com/about-paul-diamond/). We can deduce his response to a request to act against such views. It would be difficult to see how he could abide by the cab rank rule, yet he is defending "undesirable" clients in the view of many. See also "Barrister defends Christians in courts", Christians Together in the Highlands and Islands at http://www.christianstogether.net/Articles/262168/Christians_Together_in/Christian_Life/Barrister_defends_Christians.aspx.
[23] This in connection with how the Bar "deems" and undeems fees as proper professional fees in respect of paragraph 604(b) of the Code. See "Acceptance of Instructions in Criminal Cases", http://www.barcouncil.org.uk/for-the-bar/practice-updates-and-guidance/guidance-on-the-professional-conduct-of-barristers/acceptance-of-instructions-in-criminal-cases/. The effect is that a barrister is not obliged to accept any instructions but once accepted one must continue.
[24] The interviews were open structured asking subjects about their experience with and views on the cab rank rule. Some of the interviews were specific in that they focussed on such issues as funding or contracts. They lasted from 30 minutes to over an hour. They took place in London and Australia. All interviewees were assured anonymity unless agreed otherwise. Interviewees were found through snowball sampling after starting with people we already knew. We also used lawyers' blogs and Twitter as sources. Blogs are a rich source of discussion for the rule.
[25] Quotation attributed to Upton Sinclair, *I, Candidate for Governor: And How I Got Licked* (Berkeley: University of California Press, 1994, 1935).
[26] According to the Legal Services Commission, "A 'cracked' trial is a case that is terminated between the [Plea and Case Management Hearing] and the first day of trial. A case where no PCMH took place, but the case was listed for trial and did not get to trial or Newton Hearing, is also deemed to be a cracked trial." Legal Services Commission, The Litigator Graduated Fee Scheme Guidance (2008-2011) at

http://www.legalservices.gov.uk/docs/cds_main/LGFS_guidance_-_3_February_2011.pdf.

[27] See also 'The Birmingham Framework' by Fr. Denis Faul and Fr. Raymond Murray (1976), CAIN Web Service—Conflict and Politics in Northern Ireland at http://cain.ulster.ac.uk/events/other/1974/faul76.htm.

[28] Lucy Reed, a law blogger pointed out (2012) how the allure of the odious client did not work so well in family law because many proceedings are held in private. See also Family Law Week (2013).

[29] We see the problem arising in India as lawyers expressed their repugnance at the alleged perpetrators of the hideous gang rape and murder of a 23-year-old woman in New Delhi in December 2012. Even though India has a cab rank rule, the Saket Bar Association, which covers the trial court, "urged its members not to represent the five men [charged] because of the heinous nature of the crime" (Rana et al 2013). It was thought that the court would have to appoint representatives but all five men obtained legal representation through the efforts of their relatives. Without representation the accused would have had strong grounds for appeal. Convictions in similar cases have been overturned (Bhattacharya 2013; Harvey-Jenner 2013). The longstop is for the court to appoint counsel for the accused. The lawyers have already made capital out of their representation. The results have not been so different from what happens in the west.

[30] Famous American Trials: the O.J. Simpson Trial 1995 at http://law2.umkc.edu/faculty/projects/ftrials/simpson/simpson.htm.

[31] McLaren et al (2013:14-15) refer to this as "side specialisation" about which they say, "We simply do not accept that there is any true specialisation in a particular side of a particular field of work." Our interviewees disagreed with this naïve view, as do others. A retired circuit judge wrote to the Law Society Gazette saying that barrister friends of his would not act for landlords and that clerks would fend off legal aid work (Darroch 2015).

[32] For example, 25 Bedford Row chambers specializes "in the defence of individuals and companies…" http://www.25bedfordrow.com/home/about-us.asp.

[33] A former chairman of the Bar Council, lamented the loss of 'an even-handed legal system in which prosecutors defend, and defenders also prosecute.' D. Browne, 'Making the Bar Council Work in Everybody's Interest' 17, 8 December 2008 at http://www.barcouncil.org.uk/media/145539/dbrowne_s_inaugural_speech_081208.pdf.

[34] There is another aspect to this situation, which is blogging and tweeting by members of the Bar. For example, 1 Crown Office Row runs the UK Human Rights Blog (http://ukhumanrightsblog.com/). John Cooper QC (twitter.com/John_Cooper_QC), Francis Fitzgibbon QC (twitter.com/ffgqc), and Felicity Gerry (twitter.com/felicitygerry) are all active on Twitter. All these social media outlets become forms of advertising of specialties and perspectives on the law, whether implicit or explicit, which could potentially fall afoul of the cab rank rule yet increase information for consumers in the market.

[35] See "practical information" (new standard contractual terms) Attorney General's Panel of Counsel at http://www.tsol.gov.uk/PanelCounsel/myth_busting.htm.

[36] Bowcott (2018) writes how the Legal Aid, Sentencing and Punishment of Offenders Act 2012 essentially removed eligibility for legal aid from many areas of law, so the deeming aspect is becoming moot. Quinlivan (1998) also indicated how in New Zealand

there have been problems with barristers refusing to take legally aided cases even though the cab rank rule obliged them to take them.
[37] Cases which are non-indictable yet the defendant can elect to be tried either in the Magistrates' Court or before a jury at Crown Court.
[38] P. Wright, 'Defendant Elect Cases in the Crown Court' The Ponderings of Barristers Fees Clerk, 12 September 2012 at http://stpaulschambers.blogspot.co.uk/2012/09/defendant-elect-cases-in-crown-court.html.
[39] And more to the point a weaker bargaining position. Walking away from the offer may be unattractive, especially to very junior barristers.
[40] This in itself is surprising and reinforces the construction of tradition by selective forgetting and remembering. In an article, "Memory Lane" (Obiter 2013), he writes, "The Law Society's Gazette, 7 February 2008, Bar Standards Board wants to abolish 'cab rank rule'. The Bar Standards Board this week proposed the abolition of the 'cab rank rule' in a consultation on changes to be made in relation to the Legal Services Act 2007. BSB chairwoman Ruth Evans said: 'We may not see barristers selling their services in the supermarket aisles quite yet, but we can expect changes in the way some organise their affairs.'"
[41] See Weekly Roundup 26.01.13 at n 4, https://www.criminalbar.com/resources/news/weekly-round-up-26-01-13/.
[42] Both of us have been commissioned by various aspects of the legal profession to undertake research. We were not strangers to the topic.
[43] For an analysis of weasel words see "Weasel Words: Intriguing, but Deceptive" *Propaganda in advertising* at http://unit2project.weebly.com/weasel-words.html.
[44] The BSB response even accused us of making up facts. One such was where we had tried to establish how many infractions of the cab rank rule the BSB had recorded. It had none on record. The authors said we hadn't contacted the BSB, whereas we had. In fact, the only finding we could locate was by the Bar Council against a barrister in 2006. Mark Mullins, a committed Christian and regional chairman of the Lawyers' Christian Fellowship turned down "the case of an illegal immigrant who wanted to use his homosexual relationship as grounds to stay in this country." The Bar Council ruled that he was in breach of the rule and was guilty of professional misconduct for which he was reprimanded and ordered to pay £1,000 towards the cost of the case. J. Mills, 'Barrister who refused to represent gay client reprimanded' *Daily Mail,* 26 July 2006 at http://www.dailymail.co.uk/news/article-397625/Barrister-refused-represent-gay-client-reprimanded.html.
[45] Edmonds letter to the Lord Chief Justice on file with author.
[46] When the Bar appeared before parliamentary committees, they would routinely denigrate the research.
[47] The range of research wide including ethnography, psychology, legal education, legal markets, legal technology, legal organisations, regulation, and globalisation.
[48] Shortly after the report was published xxx was invited to an Inns of Court dinner for legal academics. The organiser thanked the academics for their support for and assistance to the Bar. This was not an acknowledgement of equals but an illustration of their perceived distinctions between academics and practitioners. See Sugarman (2020:1).
[49] Our research was subject to a Freedom of Information request by the Bar on its cost who said the cost was wasteful.