

Representing Immoral Clients

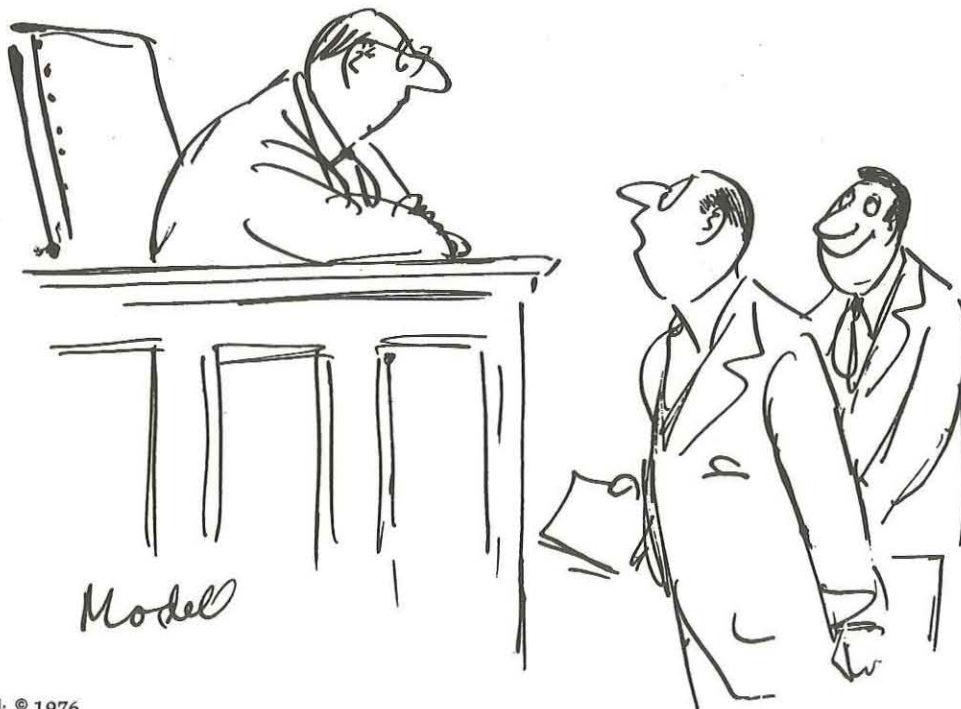
When the Nazis wanted to march through the neighborhoods of Holocaust victims in Skokie, ACLU lawyers defended their right to march. When Charles Manson, the Boston Strangler, and the Midtown Slasher went to trial, they all had lawyers by their side. Powerful corporate conglomerates hire armies of lawyers to assist them in crowding out any struggling competition. Anyone in our country who wants to welch on any debt or weasel out of any obligation can probably find a lawyer ready to take on his case.

Under our judicial system, every criminal defendant who so wishes must be represented by legal counsel. However heinous the offense, however frank the avowal of guilt, some lawyer undertakes the representation. In unsavory civil suits as well, many lawyers are willing to make their services available. Often it seems clear to many of us in these cases which side is the "good" side, which side ought, in the name of justice, to prevail. Yet some lawyer is devoting the full measure of his professional devotion to furthering the cause of the other side.

Both lawyers and philosophers have raised difficult moral questions about the representation of "repugnant" clients. Is a lawyer under a moral obligation to take on a repugnant client, or is she under a moral obligation to send him away? Or is the decision to represent properly left to the lawyer's own professional discretion? Is the lawyer damned if she takes the case, damned if she doesn't, or neither?

The Lawyer as Butcher and Baker

The current ABA Code of Professional Responsibility leaves the decision to represent largely up to the individual lawyer. While the Code is not particularly clear or explicit on these matters, it seems to state that lawyers have no duty to represent any given client, aside from duties imposed by court-ordered appointments, or generalized duties of pro bono service. "A lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client." A lawyer has a duty to refuse representation only "if the intensity of his personal feeling



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*"If it please the Court, my client would like it to be known
he has already learned his lesson and is very, very sorry indeed."*

...may impair his effective representation of a prospective client."

This position acquires initial plausibility from an analogy between the legal profession and many other sorts of work. The butcher and baker, it is argued, may sell their goods or services to whomever they please, within fairly broad limits. (They may not discriminate against customers on the basis of race, for example.) The butcher does not have to sell his pork chops to every Tom, Dick, and Harry who happens along. Nor, on the other side, must he refuse to deal with customers who show themselves less than morally upright. The choice belongs to the butcher.

This account requires some qualification, however. We might criticize the butcher on moral grounds for sending a poor and starving customer away empty-handed. Or suppose that the butcher knew that one of his frozen lamb chops would be used as a murder weapon, with the evidence conveniently cooked in a post-crime supper. Would he have a right to avert his eyes as he rang up the sale?

Furthermore, the butcher-lawyer analogy may itself be questioned, on two counts. First, the lawyer interacts with her clients far more extensively and intimately than the butcher with his. She acts in a more direct way to further their morally dubious projects. Second, the legal profession may be argued to have a special moral dimension that many other lines of work do not. The butcher deals in ribs and steaks—the lawyer deals in rights and justice. Defending rights and promoting justice are not incidental components of what the lawyer does in carrying out her professional tasks. Justice and rights are at the heart of what the legal profession is about.

Refusing the Immoral Client

Philosopher Virginia Held of the City University of New York argues that a lawyer's decision to accept or reject a prospective client should be heavily influenced by a concern for justice and individual rights. The lawyer must ask whether a prospective client has a moral (as well as legal) right to press his claim, and whether the interests of justice will be best served by representing such a client.

In criminal cases, of course, every defendant has a constitutional right to counsel, and usually also a moral right to defend himself against the awesome power of the state. In civil cases, however, there is no constitutional right to counsel. There may be a moral right to *some* legal representation, but not to representation by any *particular* lawyer. On Held's view, "A lawyer must first of all exercise responsibility in considering whether he or she is morally permitted to sell legal services to people exercising legal rights they should not, on moral grounds, be permitted to have." Lawyers in our society wield a great deal of power; they are able, for good or for ill, to help alter our judicial system and strengthen or weaken its respect for political and economic rights. In exercising this power responsibly, the choice of clients is extremely important.

Even in criminal cases, Held maintains that lawyers have an obligation to choose clients carefully. Here, too, "those most deserving of an outcome favorable to them in a legal controversy ought to have the strongest legal talent on their side. Lawyers should...employ their talents in behalf of those clients who most clearly deserve them." Unless she is the "last lawyer in town," the lawyer should refuse to sell her services in a morally repugnant cause.

Representing the Immoral Client

On the other side of this dispute are those who argue that the lawyer has instead an obligation to *withhold* independent moral judgment. The lawyer does not serve justice by heeding, but by muffling, the still small voice of his private conscience. Judge George Sharswood, in his 1854 treatise on professional responsibility, wrote that "The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury." In both civil and criminal cases, the final decision is to be reached through the full judicial process, and not preempted by the lawyer's personal verdict.

Does this mean that a criminal lawyer should defend even the known guilty? Charles Wolfram, Visting Professor at Cornell Law School, identifies this as the traditional lawyers' reply: "Defense of the known guilty is appropriate in order that the established governmental system, and not private legal perceptions, determine guilt and innocence." Even in cases of seemingly cut-and-dried guilt (and guilt is rarely if ever *that* cut or *that* dried), lawyers should not set themselves up as extra-judicial tribunals.

In civil cases as well, Alan Donagan, Professor of Philosophy at the University of Chicago, argues for the right of individuals to pursue, so far as the law permits, what they take to be reasonable and justifiable ends. In a complex and complicated society like our own, one person's ends may very well come into conflict with another's, and "persons of honor in a free society" may disagree about what would count as a just and fair resolution. Frequently such conflicts will be carried into the courts.

According to Donagan, "A society fails in respect to the human dignity of its citizens if it fails to allow them a fair opportunity to raise such questions about what is due to them under the law before properly constituted courts, and to defend themselves against claims upon themselves or charges against themselves; it would so fail if it denied them the opportunity to hire legal advisors whose professional obligation would be...to represent them in doing these things."

Now, "whatever a lawyer may believe about his client's case, [typically] he cannot deny the possibility that his client may be morally as well as legally in the right." It behooves the lawyer, therefore, to reserve his private judgment and, by accepting some morally dubious cases, assist in maintaining a legal system in which the human dignity of all claimants is equally respected.

Charles Wolfram suggests a different justification for a limited duty to represent even disreputable clients. Just as the butcher may be under an obligation to give a piece of meat to someone who is starving, the lawyer is sometimes under an obligation to represent "a necessitous client who has a compelling need for legal services . . ." The underlying duty here is "a fundamental moral duty to rescue," qualified by considerations of "the capacities of the lawyer, the risk that may be incurred by the lawyer or caused to others, and the nature of the client's legal needs." This duty to rescue extends to the rescue of morally disreputable clients if "the client's claim is legally just, the client's claim is a socially important and morally compelling one, and the need of the client for this particular lawyer's services are truly pressing."

On Wolfram's view, the duty to represent does not arise for minor legal matters, but only to vindicate some legal right to an essential human need. Thus, some lawyer might have an obligation to defend an innocent Nazi erroneously accused of a serious crime. But for Wolfram, a Nazi's right to march through Skokie is not an urgent enough legal matter to generate an obligation to represent Nazi clients, at least not on grounds of *rescue*.

The Last Lawyer in Town

The "last lawyer in town" may be obligated to represent immoral clients if refusing means that human dignity will go unrespected or urgent legal needs unmet. But what about everyone else? Do the arguments for a duty to represent mean only that *some* lawyer will have to accept an unsavory case, or that *no* lawyer can justifiably refuse?

Held suggests that, while everyone may be entitled to counsel, not everyone is entitled to the *best* counsel.

First-rate lawyers may—and, on Held's view, should—pick their cases with care, while mediocre lawyers, and all lawyers sharing the burden of representing unpopular clients, will occasionally get stuck representing clients with unjust or immoral ends. Likewise, Donagan's argument from human dignity does not seem to imply that every lawyer has an obligation to take every case, but that lawyers should be on guard that their private judgments do not conspire to leave any claims unrepresented. Wolfram specifies that his duty of rescue does not apply if many other lawyers are available and willing to handle the necessitous client's case.

It does seem, however, that if the last lawyer in town is *obligated* to represent a disreputable client, it is at least *permissible* for other lawyers to do so as well. It does not seem necessary to have in hand a certificate of unanimous refusal before accepting a morally problematic case.

Lawyers, like everyone else, are morally accountable for their actions, both private and professional. They are morally accountable for representing disreputable clients and morally accountable for refusing. In the absence of clear instructions from the professional code, it is left up to the individual lawyer to weigh his obligations to promote justice, to respect human dignity, and to preserve his own moral integrity. Each lawyer must face the hard question: will he be known for the company he keeps, or for the company he turns away?

The views of Virginia Held, Charles Wolfram, and Alan Donagan are taken from drafts of papers prepared for an ongoing research project on lawyers' ethics, conducted by the Center for Philosophy and Public Policy and the University of Maryland School of Law. For information about working papers available from this project, see p. 15.

Making Fathers Pay

In any examination of the profile of American poverty, one fact is especially striking. The overwhelming majority of children receiving welfare in this country do so because they are denied the support of their fathers. The absence of fathers from the home is the principal cause of AFDC (Aid to Families with Dependent Children) dependency, accounting for 85 percent of AFDC cases (widowhood, once the chief concern of the AFDC program, now accounts for 4 percent of cases). More than one out of six children are currently living apart from their fathers, and more than one third of those children live in poverty.

The proportion of absent fathers who fail to support their children is astonishingly high. Only one quarter of AFDC mothers have child support orders, and in about 80 percent of all cases mothers with support orders experience delinquency in payments owed. Roughly 40 percent of all divorced, separated, and single women never receive *any* support from the fathers of their children.

One might think that in the case of AFDC children much paternal negligence can be explained by poverty—if a poor father just hasn't got any money he can hardly mail off a monthly support check to his kids. It