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The Role of Attorney Conscience: A Short Defense of Amoral Technicians

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I. Introduction

138. Rule 1.2(b) of the Model Rules of Professional Conduct states that "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."[2] This rule of attorney amorality, and its informal codification in the common law tradition, is one of the cornerstones of our legal system.[3] Much like the presumption of innocence, it allows lawyers to represent any party without risk of sanction and ensures socially unpopular parties can have equal access to justice.

139. Adherence to this principle also protects against the "oligarchy of lawyers" problem, the notion that the moral or political judgments of lawyers would reverberate throughout society because these lawyers would control access to the justice system and substitute their own views for the judgments of the public institutions we have built to fairly adjudicate these matters.

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2 Model R. Prof'l Conduct 1.2(b) (2020).

3 See, e.g., *Utah v. Holland*, 876 P.2d 357, 361 (Utah 1994).

140. This principle, that lawyers are amoral technicians not morally liable for the views or activities of their clients, is now facing pressure in certain segments of society. In this paper I will outline these critiques, trace the history of this doctrine, and argue that it remains valuable even as those in some quarters exert social pressure onto lawyers for representing clients they find objectionable.

II. The Amoral Technician: A Model for Attorney Behavior

Law, Morality and the Space In-Between

141. Lawyers find themselves in a unique position that allows them, or forces them as the case may be, to make moral choices that those in other professions may not have to make. Supposing that law is a mechanism by which we enforce the moral norms of society, those who make a living by helping their clients avoid consequences of the law are definitionally going to encounter moral choices. This is true of defense attorneys helping lawbreakers avoid jail, of tax attorneys helping wealthy clients avoid tax liability, of corporate attorneys helping companies with controversial business endeavors, and so on. But if law is simply a codification of moral norms, then as long as one isn't breaking the law, they should be safe from offending the moral norms of society as well.

142. But this is not so. Almost anyone would argue that there are behaviors that are immoral even if they are not illegal (e.g. abortion, drunkenness, eating meat, trillion-dollar companies paying employees minimum wages, polluting up to the legal limit, etc.). Further, there are things that are illegal that many would argue are not immoral (e.g. rolling a stop sign, smoking marijuana, selling an organ, etc.). These examples suggest there is not a perfect overlap between law and morality and that the law is seeking to accomplish something more.[4] Indeed, the law seeks to balance a variety of concerns like personal autonomy, social efficiency, public safety, religious conscience, individual rights and many other values.

143. So, if law and morality are not the same thing, how can an attorney navigate this complex web of social norms while also providing competent legal service to her client? One answer is that she doesn't have to. Instead, an attorney can take on a role as an "amoral technician."

4 But see WILLIAM EDMUNDSON, THREE ANARCHICAL FALLACIES: AN ESSAY ON POLITICAL AUTHORITY (1998).

144. The amoral technician view typically asserts that a lawyer must serve her client within the bounds of the law but that she is not therefore endorsing her client's actions from a moral perspective, and for that reason she should not be held morally accountable for her work.[5] This view offers a convenient out for lawyers working on the edge of the law, but it also has the advantage of allowing lawyers to hone their expertise in their craft without needing to study moral epistemology as well.

145. Stephen Pepper offers a compelling defense of this concept. On his view, developed countries have a vast lawmaking body comprised of legislatures, courts, and administrative agencies. These bodies are, in various ways, publicly accountable in a way that individual lawyers are not. Therefore, when a client asks a private attorney to perform some function, and the attorney declines as a matter of personal morality, she is substituting her own private judgment for that of the public institutions we have vested with lawmaking power, and thus denying her client access to justice.[6]

146. This is what Pepper calls the "oligarchy of lawyers." If some conduct were sufficiently objectionable, it would be unlawful. If it is within the law, then it is not the attorney's role to take it upon herself to privately police beyond what the law requires. This might also compound inequalities in access to justice even further, Pepper worries, because only those who are well-connected or otherwise legally sophisticated will be able to circumvent the oligarchy of lawyers serving as a barrier to the courts.[7] Finally, a true amoral technician may be able to charge a premium for her services in a market where other lawyers are putting arbitrary restrictions on their services. Yet again, the parties that benefit will be those able to pay for the amoral lawyers, available to offer the fullest range of services.

147. The amoral conception of the attorney helps to clean up the blurred lines at the edge of law and morality. If your client asks you to draft a contract for a hired assassin, you can decline because that behavior is illegal. If your client asks you to help them leverage a tax loophole, you would be substituting your own judgment for that of Congress if you decline to do the work. Since Congress is publicly accountable and you are not, it is best to leave the lawmaking to them and take your private moral convictions to the ballot box.

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5 ANN SOUTHWORTH & CATHERINE L. FISK, THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE 53 (2019).

6 ANN SOUTHWORTH & CATHERINE L. FISK, THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE, 54–56 (2019)

7 ANN SOUTHWORTH & CATHERINE L. FISK, THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE 56 (2019).

The Darkside of Amorality

148. We will discuss a plethora of examples of otherwise reasonable people working feverishly to limit access to justice for groups and individuals they find morally objectionable. For those who are happy to have their own moral conscience saturate their legal practice, such examples might not be so upsetting, as long as there is agreement about who is morally unworthy of representation. But for those attracted to the amoral technician conception, the idea that lawyers are technically skilled professionals who help a client maximize her legal rights without judgment, these instances of lawyers being socially sanctioned simply for representing an unpopular client will be alarming.

149. But first consider a pair of cases where we have seen public outrage concerning government action: the Watergate Scandal and the torture memos following the Abu Ghraib photographs. In both of these cases, almost all public moral opinion converged on these actions being unacceptable. Naturally, the lawyers in these cases offered an amoral technician conception of their behavior, and it was hardly satisfying to a deeply offended public. John Yoo, in defending the Bush Administration's use of torture and effectively declaring it legal, argued that he was simply offering "an abstract analysis of the meaning of a treaty and a statute," as if writing a law review note or seminar paper instead of a memo that would have far-reaching impact on prisoners all around the world.[8]

150. It's not just the prominent cases that might be unflattering to the amoral conception; real attorneys face these challenges every day. Consider a family law attorney representing a parent in a custody battle. The attorney knows her client has been putting the child into unsafe situations, staying at a string of different homes while abusing drugs. There is no other parent in the picture, but a concerned sister with a stable homelife hoping to "rescue" the child from the unstable parent. The child has a great relationship with her aunt and cousins, and even attends the same school. Is there really any defense for working to undermine what is clearly the better living situation for the child? For an amoral technician, this attorney's duty is simply to expand her client's access to the law, even if third parties suffer the consequences.

151. This is a tough bullet to bite for the amoral conception. Is a memo condoning torture really just an abstract interpretation of a statute? On the one hand, perhaps lawyers are accountable to something other than simply what their client orders, especially when a client is a government official or lawmaker and the public good is at stake. On the other hand, the legal system cannot work as designed when lawyers are allowed to apply their own conscience test to any instruction they receive. If an attorney has a legal objection to a client order, she may certainly object. For example, courts have held

8 Robert Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 228 (2006).

that an attorney has no obligation to help a client lie to the court.[9] But if the content of an attorney's objection is purely moral, then it is unclear why an attorney should have personal veto power in an area that is not related to her expertise or training.

152. Attorneys following the amoral conception will sometimes produce unpopular results. But for the amoral technician, access to justice is a value that overrides one's personal convictions. The law is constructed in a very public fashion, and therefore, attorneys should follow it and not impose restrictions on client access to justice beyond what the law already does. Another stress test for the amoral conception: election lawsuits. Bad actors in this space can do direct damage to voter confidence in the integrity of their democracy. Is knowingly spreading disinformation just poor sportsmanship, or can we criticize it from a higher ground? The amoral conception allows an attorney to challenge, for example, pandemic-related adjustments to voting procedures on good faith technical grounds. The amoral conception does not allow attorneys to knowingly make fictitious assertions in court about widespread voter fraud as it is disallowed under Rule 3.3 requiring candor toward the tribunal. The amoral conception dovetails nicely with Rule 1.2(b), as both seek to insulate attorneys from sanction for defending unpopular clients. With this in mind, we turn to coverage of contemporary efforts to unseat the amoral conception.

III. Modern Attacks on 1.2(b)

Criminally Repugnant Clients

153. In early March of 2020, Hollywood mogul Harvey Weinstein was sentenced to 23 years in prison for a series of criminal sex offenses. The case was lauded as an example of a previously untouchable abuser, protected by his wealth and status, finally being brought to justice at the peak of the #MeToo era, a social movement encouraging women to speak out about sexual assault and for men in positions of power to be held accountable.

154. Although this case represents a key progressive victory for women, many onlookers felt the trial brought unfair ire onto Weinstein's attorney Ronald Sullivan, the first black faculty dean in Harvard's history. Professor Sullivan was not invited to continue in that role as administrators cited a climate of concern at the Winthrop House, his designated undergraduate residence.[10]

9 *Nix v. Whiteside*, 475 U.S. 157, 171 (1986).

10 Elizabeth Joseph & Jason Hanna, *The Harvard Law Professor Representing Harvey Weinstein is Being Removed as a Faculty Dean*, CNN, May 13, 2019.

155. Sullivan wrote in an open letter to students that "[i]t is particularly important for this category of unpopular defendant to receive the same process as everyone else -- perhaps even more important. . . [t]o the degree we deny unpopular defendants basic due process rights we cease to be the country we imagine ourselves to be."[11]

156. Professor Sullivan is right, of course. As an American with constitutional rights, Weinstein is entitled to effective representation.[12] Effective, zealous and competent legal representation are not simply platitudes you might find on a law firm website; they are a sacred duty arising out of the Constitution's edict that all citizens shall receive due process.[13] So why does someone like Ronald Sullivan have to choose between upholding the Constitution and losing his professional standing, at an august institution like Harvard no less? As many legal philosophers would argue, if lawyers are refusing to represent a party because of their belief he is guilty or otherwise objectionable, they are substituting their individual judgment for that of the public institutions of justice we have built.[14] The criminal justice system therefore depends upon lawyers being able to represent despicable clients without compromising their quality of service, and letting a judge or jury make final determinations of guilt or innocence.

157. Of course, the sanctions faced by Professor Sullivan came from outside the justice system. Harvard University is not bound by Rule 1.2(b) and can sanction an employee who engages in conduct they find objectionable, other constitutional arguments notwithstanding. But Harvard sets a poor example in suggesting that some defendants are so reprehensible that lawyers should be ostracized for attempting to provide them access to justice.

Morally Objectionable Clients

158. Another example of the same line of attack on the spirit of 1.2(b) also occurred at Harvard, though students at Yale quickly followed suit. During a recruiting event for the prominent law firm Paul Weiss, students protested their representation of ExxonMobil, an energy company that some accuse of exacerbating climate change and environmental degradation.[15] This example is different because Exxon is not accused of any crime by the protestors, only of morally objectionable practices.

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11 Elizabeth Joseph & Jason Hanna, *The Harvard Law Professor Representing Harvey Weinstein is Being Removed as a Faculty Dean*, CNN, May 13, 2019.

12 U.S. CONST. amend. VI.

13 U.S. CONST. amend. XIV.

14 See, e.g., ANN SOUTHWORTH & CATHERINE L. FISK, THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE 54 (2019).

15 Emily Pontecorvo, *Calls for Law Firm to #DropExxon go NationalWith Law Student Boycott*, GRIST, Feb. 10, 2020,

159. The idea that lawyers have a special role as moral guardians of society is hardly new. Lawyers provide access to civil remedies and criminal justice, no doubt important services. But plumbers provide access to valuable services too, and yet, no one thinks plumbers are entering some sacred fraternity entrusted with moral stewardship of civilization. Those arguing that lawyers have special duties as citizens, rather than simply being valuable tradespeople like plumbers or accountants, are, of course, lawyers. Could it be an inflated sense of self-importance that motivates Robert Gordon to write that a good citizen lawyer "feels a sense of proprietorship, or ownership in common, of the legal framework" which is fundamentally "in her profession's special stewardship."[16]

160. Likely not. Gordon would not advocate cutting off access to legal representation for those who work in the energy sector. Instead, Gordon's concept of a citizen lawyer is one who doesn't push meritless claims or exhaustive discovery requests simply to bankrupt an opponent. A lawyer who is simply conscientious in her work is different from a lawyer who brings her own moral agenda to bear on all of her choices as an attorney.

161. Consider the controversial case of King & Spalding and their decision to withdraw from working to defend the Defense of Marriage Act. Paul Clement, a senior partner working on the case, resigned in protest and opined that "defending unpopular clients is what lawyers do."[17] This decision to withdraw, after accepting the appointment initially, was criticized by a variety of legal thinkers.[18]

162. If a given firm stops representing an unpopular client, what then? Perhaps another firm will fill the void, or perhaps not. If an unpopular party can find no one to represent them, is it then that their enemies can claim victory? Surely not. As Brian Goldman writes in the Stanford Law Review, a surprising number of unrepresented parties arrive at the Supreme Court and, in those cases, the Court appoints counsel or seeks some kind of amicus brief. [19]

163. Why? Because the Court values the adversarial process as a system that produces accurate results. Instead of depending on the Court's own imagination as to what the opposing arguments would be, they invite assistance in their deliberation from a zealous advocate so that the issue will receive the justice it deserves.[20] Efforts to deprive

16 Ann Southworth & Catherine L. Fisk, The Legal Profession: Ethics in Contemporary Practice 69 (2019).

17 Ann Southworth & Catherine L. Fisk, The Legal Profession: Ethics in Contemporary Practice 78 (2019).

18 See, e.g., Editorial, *The Duty of Counsel*, N.Y. Times, Apr. 27, 2011.

19 Brian P. Goldman, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 Stan. L. Rev. 907, 909–10 (2011).

20 Brian P. Goldman, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 Stan. L. Rev. 907, 941 (2011).

unpopular clients of legal representation are like starving out a castle in a siege. It may be an effective tactic in a brutal war, but it is not something that citizen lawyers who believe in our justice system would resort to.

Morally Objectionable Lawyers

164. A third example shows pressure on Rule 1.2(b) coming from a somewhat different direction. On occasion, aren't plaintiffs entitled to a lawyer who *does* share their views? In other words, some causes will be so wrapped up in a complainant's identity that appointing an outsider, a hired gun with no personal stake in the case, would be insufficient to further the cause.

165. To return to Harvard one more time, consider the facts of *Students for Fair Admissions v. Harvard*. According to the complaint, Harvard is systematically discriminating against Asian-American students in their admission process. Although Asian-American applicants have, on average, higher numerical indicators like grades and test scores, these credentials are balanced out by poorer performances on soft factors like life story, character and personality.[21]

166. Fighting for a group who might be facing unconstitutional discrimination seems noble, but this case is not being litigated by an Asian-American advocacy group. Instead they were represented by a civil rights nonprofit that opposes affirmative action.[22] In fact, though there appears to be some factual merit to the group's assertions, they have no actual plaintiffs at the helm in their case. This creates the interesting conundrum that what is purportedly a case about Asian-American access to institutions of higher education may in fact be a facade to advance a political agenda.

167. One can imagine, then, a reasonable argument against Rule 1.2(b) is not that lawyers who defend reprehensible clients should be sanctioned, but that we should object to lawyers who represent clients without a full belief in their cause. Even so, it is hoped that lawyers can advocate zealously for clients they may not relate to or even believe. Lawyers in these contexts (say, public defenders) often cite their duty to the justice system generally rather than loyalty to the individual client as the motivation for their effective advocacy.

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21 *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard College (Harvard Corp.)*, 397 F. SUPP. 3D 126, 131, 136 (D. Mass. 2019).

22 Students for Fair Admissions.

What Kind of Oligarchy?

168. Recall Pepper's worry that when lawyers are calling the shots regarding who receives access to justice (instead of just representing everyone fairly and letting juries determine guilt or innocence) they are playing God with the justice system and likely discriminating against certain groups or viewpoints. Though things appear to be incrementally changing, lawyers are overwhelmingly white and older lawyers are still overwhelmingly men.[23] It is hard to imagine that a homogenous group of this sort would always make decisions that are in the best interest of underrepresented groups.

169. But the threat of viewpoint discrimination is not the only permutation of the oligarchy of lawyers problem. If the ruling class of lawyers tends to accept the same ideas about market forces governing who is well-represented and who is not, then those with a lack of market power will invariably be underserved by the bar. Lawyers have a monopoly on the practice of law, after all, and thus many people depend on the charity of lawyers who choose to do pro bono service. This oligarchy is even more troubling than the philosophical one discussed previously; the economic oligarchy closes off access to justice to large groups of people.

170. Of course, a laissez faire allocation of legal services is not the only possible model, but it would be hard to institute alternatives without the blessing of the powers that be. And therein lies the fundamental oligarchy problem: justice isn't supposed to be about playing politics for legal representation. But as it stands, our legal economy is largely driven by market forces, with underfunded public defense offices and legal aid groups trying to fill a discouraging justice gap.[24]

171. In sum, it is important to the integrity of our courts that even parties like the Boston Marathon bombers or Harvey Weinstein receive a fair trial and effective representation. Social sanctions and economic conditions that undermine efforts to provide counsel to defendants are counterproductive. Rule 1.2 memorializes an important principle of institutional justice, and we only degrade ourselves with movements to unseat it.

IV. Conclusion

172. Rule 1.2(b) is a rule worth fighting for. The ability of a lawyer to zealously represent her client without fearing social or political reprisals is a key pillar of a justice

23 *Annual 2019: ABA Releases New Report on Legal Profession Statistics, Trends,* ABA, Aug. 8, 2019.

24 *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans*, LEGAL SERVICES CORP., Jun. 2017.

system that provides equal access to every citizen, even those who are unpopular. A justice system that encourages lawyers to only represent their allies and friends is not one that best serves the constitutional principles lawyers tend to respect. But this is the system that will be created if lawyers become afraid to represent defendants who have agitated the powers that be.

173. The key argument of this paper is that access to justice is undermined when attorneys are allowed to import their personal moral convictions into their practice, or when third parties are able to exert pressure onto attorneys to conform with certain moral agendas. The takeaway is not that lawyers should be sociopaths; conscientious lawyers should always be welcome in our justice system. But when lawyers are given more authority to control who gets their day in court, inevitably some groups will benefit, and others will lose out. Our aspiration for equality before the law is diminished the more we empower the oligarchy of lawyers.

174. On the one hand, those who "lose" in this system will sometimes be unsympathetic; perhaps no one should shed a tear if Harvey Weinstein is railroaded at trial because no good or impartial lawyers will represent him. But on the other hand, we should hold our justice system in higher esteem than to not take it seriously when the stakes are highest. The system functions at its highest level when access to justice is expanded and when parties are able to present their case in an adversarial, truth-seeking fashion. The amoral conception of the attorney role promotes both of these objectives, and Rule 1.2(b) protects attorneys who are doing right by their clients and the law.