

THE RESPONSIBILITY OF LAWYERS FOR THE JUSTICE OF THEIR CAUSES

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I want to thank you, the graduating class, for inviting me to speak today. And to congratulate you and your families on the achievement this day represents. This is the first time I have been asked to give a graduation speech, and I feel some trepidation at the beginning of my new career.

The subject I have chosen is an aspect of a larger topic: *The Responsibility of Lawyers for the Justice of their Causes*, surely one of the most boring ever invented to fill the time before you finally have your diploma in hand. But first, how about a brief, sentimental, even silly moment of celebration before the serious business. Look around you for a friendly fellow student or a family member. Indulge yourselves: smile, or frown, or make a face, or ignore that person completely. For some of you, an ordeal is over. For almost all of you, I suspect, there have been moments of feeling wounded or lost, frightened or humiliated, in jeopardy. Well folks, you've crossed over the line: you are the alumni.

You are also crossing over the line into the life of the profession. That is something you can look forward to. It's not that you can be proud just to be a lawyer. After all, there are good lawyers and bad ones. But you can be proud of the powers you have acquired through the study of law, and proud of that tradition within the law in which lawyers use their powers to help others for the common good. This is an exacting tradition. Many lawyers aspire to it. Some achieve it. I hope you will be of that number.

And now to my business. I want to do something very lawyerlike: to make an argument in favor of a position, of an attitude you might adopt, and I think ought to adopt, toward your practice of law in the years ahead.

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Begin with a vacuous piety: Try your best, oh graduating students of the Washington College of Law, to avoid doing harm with your lawyer skills.

If I asked each of you to swear an oath to try to avoid doing harm with your lawyer skills, I bet most of you would say, "Why object? All right, boss, you're the graduation speaker, sounds harmless, even obvious, to me, I hereby pledge myself to avoid doing harm with my lawyer skills."

But I think this vacuous piety has some controversial bite. It would get many lawyers into trouble. To make the pledge controversial, let me put aside two of its easy meanings. When you represent a client, you should do your best for her, or him. That means: *avoid malpractice*, and who can quarrel with that. Then there's another, slightly more touchy point. I think we would all agree that a lawyer doesn't in most situations have to take on a client. If you think the client is trying to do something terrible, and wants to use your lawyer skills to do harm, you don't have to take the case, unless a court appoints you to take it.

Your right-to-turn-down-a-case goes beyond just not having to do something to help a person with evil intentions. You might not take the case because you didn't want to contribute or even be associated in any way with a client you thought was bad. Your cases are yours to choose on any basis you want.

I know this is a *little* controversial because of the reaction from the establishment bar and editorial writers when students around the country began a boycott of hiring interviews with firms that represent the South African government. A lot of lawyers thought it was outrageous for students to try to influence law firms, or to interfere with the ability of the South African government to get counsel, by threatening not to go to work for those firms.

I want to go a step further than those students. While it's true no one should blame you for refusing to represent a client whose activity you disapprove of, that's not enough. You should feel guilty, and we should disapprove of you, if you go ahead and argue a cause you think will do more harm than good. You shouldn't take the case if you think it would be better for society, or more moral, for the client to lose. You shouldn't take the case if you think the client shouldn't be in court in the first place, for example, because the client should morally have made recompense even though he has a technically good legal defense. You shouldn't take the case if your client is enforcing his legal rights, but is *using* his legal rights in a bad cause.

This is the tough meaning of the vacuous piety that you should

avoid doing harm with your lawyer skills. Most lawyers don't agree with it at all. They believe that you are not tarred morally by your clients' underlying intentions, or character, or by the outcome, as long as you don't participate in law breaking yourself. Maybe they make an exception and condemn Mafia lawyers, even when they aren't involved directly in criminal activity. But that's about it. I think you *are* tarred with bad actions of clients that you facilitate in your work as a lawyer.

To the extent this is right, it is wrong to represent an abortion clinic that's trying to lease a new building to expand its operations, if you are pro-life. And it's wrong to represent a landlord who has been intimidated into trying to evict an abortion clinic if you are pro-choice. It's wrong to work against unionization if you believe everyone should have a labor union; and wrong to work for union rights to picket a shopping center if you think unions are generally evil. It's wrong to lobby for the postponement of environmental controls if you think they should be imposed right now; and wrong to do antitrust work against a corporate merger, if you believe mergers are good for the economy.

My position is extreme, and it will certainly apply to you at some point in your lives as lawyers. I suppose that's what graduation speeches are at least sometimes for. I'm saying you should turn down the client even though she isn't trying to get you to do anything illegal, and even though she isn't doing anything illegal herself. She just wants you to argue that the abortion clinic has violated its lease, which you don't believe is the case, or that the merger violates the antitrust laws. I'm saying that *if you* think the outcome of winning-for-your-client would be on balance a bad thing, socially unfortunate, you should decline to participate, in spite of the fact that the client will pay, and that you wouldn't be doing anything that came close to violating the canons of professional ethics. You'd be in the clear as far as "unethical conduct" is concerned, as it's defined by your profession. But I'm suggesting that you'd be morally in the wrong anyway.

There are lots and lots of objections to what I've just said. I'm going to try to shoot down about twenty of them in rapid succession. First, what about the Porsche? I don't mean mine (I don't have one); I mean the one you might imagine in your future. The short answer is that there's plenty of money to be made out there, for most lawyers most of the time, without becoming a hired gun—that's what we're talking about, the lawyer as a gun for hire regardless of the morals of the client. At least at present, there are tons of morally

innocuous, or positively beneficial, or neutral, lawyer work. *Most* lawyer work falls into that category for most people. If sticking to that type of work involves some loss of income, so be it. Maybe you'll win a Porsche in the lottery.

Second, if I don't do it, someone else will. But that doesn't make it right for you to do it. You should avoid doing harm with your lawyer skills even if there is someone else waiting to take your place.

Third, what can be wrong, indeed why isn't it a good thing, to help people enforce their rights? Lawyers should be devoted to legality, but I am proposing that they refuse clients on non-legal grounds—on the grounds that, though within their rights, the clients in question are doing more harm than good.

The simple answer is that law is not coterminous with morality: there is a vast range of behavior that harms people without legal remedy, and when lawyers help people do that harm, they can't escape responsibility for it if it is immoral. Legality is important. It's a good starting point for the discussion. But that your client had a legal right to injure and get away with it doesn't mean that you can have a clear conscience, even if your role was just routinely technical, and it wasn't you who chose the course of action, if the course of action was immoral.

Further, lawyers are often—maybe usually—more than just legal technicians. They shape deals and they make law. They invent new forms of social life, they fill gaps, resolve conflicts and ambiguities. They mold the law, through the process of legal argument, in court, in briefs, in negotiations. It won't do to say, look, I molded the law this way, and this way, and this way. I've made a lot of law. But don't hold me responsible for the actual content of the law I made. That was determined by who happened to be my client at the time. I chose my clients according to their ability to pay. What concern is it of mine if the law they paid me to make goes against my own moral beliefs? I'm just an advocate and I leave the final decision to others.

The trouble with this is that your activity is not neutral, and the better your legal skills, the less neutral you become. Lawyers think up new rules, ideas, arrangements and arguments. Which ones win, which ones judges and juries and legislatures adopt, is a function of who has the legal talent on their side, as well as a function of the justice of the position. If you put your legal talent on the side of outcomes you disapprove of, you make it at least a little more

likely that bad outcomes, bad new inventions of your own, will prevail. You bear responsibility when *your* unique way of molding the law, your work product, wins out to the detriment of the community, even if it was not you, but a judge or administrator who "pulled the trigger," so to speak, by actually deciding the case, and even if someone else would have done it if you didn't.

But what would happen to the right to counsel if lawyers were always second-guessing the justice of their clients' causes? And what about Our Adversary System? Isn't it based on the lawyers going all out for their clients, and letting truth emerge through conflict? It's up to the jury or the judge to decide on the justice of the case; it's up to the *lawyer* to present the best possible case for her side, whichever it may be.

These are serious objections, and I'm willing to make some concessions to recognize some counterprinciples to the one I'm arguing for. After all, even on this day of days there are no absolutes.

First, I am *not* saying that you should represent bad clients halfheartedly or incompetently. I'm talking about the choice of clients. Once you sign on, it seems to me you *are* somewhat stuck with being an adversary within the adversary system, unless something unexpected happens that means you have to withdraw. This can pose a lot of delicate problems, if you are really trying not to use your lawyer skills in ways that harm people. But that's not my issue.

Second, people, including your potential clients, have a *right* to counsel, in the sense that the state will provide one if they can't afford one, only in a few situations—in some aspects of the criminal justice system, and in some, though by no means all, family law situations. The only other sense in which they have a right to counsel is that the state will not forbid them to have a lawyer *if* they can find one they can afford. The right to counsel does not mean that clients whose causes hurt the body politic have a right to *your* counsel just because they have the money to pay for it.

I think it's morally fine to be a public defender or a legal services lawyer, in spite of the fact that you will sometimes find yourself representing guilty or immoral people. In those cases, there has been a *social* decision that people should have lawyers even if they can't afford them. I'd go further, and say that if a prospective client can't get a lawyer unless *you* represent them, and if they are likely to be treated unfairly by the system if they don't have a lawyer, then you ought to take the case to prevent the injustice of their being unrepresented.

But what I'm talking about is this: ought you, or ought you *not* to do the paperwork for a real estate developer who is acting legally and completely within his rights in buying up 100 low income apartments housing 400 poor people and converting them to 40 condominiums housing 80 yuppies, when the poor people will have to move into smaller apartments for higher rents and increase the starch content of their children's diets? I say you ought not to do it, and the right to counsel is irrelevant. Let some other lawyer do it, or let the developer do it himself, in the unlikely event that no one else can be bought.

I think the real objection to my proposal is that it contradicts our sense that it's okay to distribute legal services among people according to how much money they can pay. Lawyers want to feel that because society has left the decision about who gets a lawyer, and what lawyer (an incompetent or the best money can buy) to the market, then it's all right for them to forget about it, while selling their own services for what they will command, regardless of the morality of the legal activity.

If you—if most lawyers—took the choice of clients seriously according to the vacuous piety that you should avoid doing harm with your lawyer skills, it seems likely that some clients would have to pay more for less legal service, and other people would get more service for less money. Your moral intuitions would influence the distribution of legal talent, through the market, along with the buying power of clients. Would that be better or worse than the current situation?

I think it would be better. At present, the distribution of legal services is a disgrace: rich people get vastly more than they need or deserve; middle income people can't afford a lawyer in numerous situations in which they are ripped off for relatively small amounts of money, or discriminated against on sexual or racial grounds, or seriously injured. Poor people have virtually no access to legal services, given the abysmal underfunding of the Legal Services Corporation. If lawyers felt morally responsible for their individual contribution to this allocation of legal services, it seems likely to me that they would improve it, though perhaps only marginally. This would hurt, probably, some current excess consumers of lawyer time.

If you applied your moral judgment to the choice of clients not just occasionally but in every case, you might often choose in ways that I disagreed with. Though I think the overall pattern of choices would probably be better than that which emerges from a market

where human suffering counts for nothing and dollars for everything, I am in favor of taking client morality into account for its own sake. My proposal is left-wing only in the very general sense of being for liberation and responsibility, even if the consequences may sometimes be conservative.

That's my sermon folks. Now file it away in the great video library of memory. Maybe one day when the senior partner plunks the papers down on your desk, you'll hear that vacuous piety whispering in your ear: Try not to use your lawyer skills in ways that do harm.

Thank you.