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Recommended Citation
Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 Tex. L. Rev. 111 (1995)
Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/707

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Response

The Lawyer's Moral Obligation of Justification

Monroe H. Freedman*

In his eloquent apologia, *Defending*,[1] Professor Michael Tigar joins other celebrated criminal defense lawyers, like Clarence Darrow[2] and Edward Bennett Williams,[3] who made a particular effort to explain publicly their essential role in the American system of justice.[4] This role includes representing not just the despised but the despicable, not just the damned but the damnable. Perhaps the only lawyer who was able to earn a universally good reputation as a zealous defense lawyer by representing only an innocent defendant was Atticus Finch—and he, of course, was fictitious.[5]

I take it that the reason I have been invited to write a companion piece to Professor Tigar's essay is an exchange that he and I had in *Legal Times* two years ago.[6] In that exchange, I argued that lawyers have a moral

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1. 74 TEX. L. REV. 101 (1995).

2. Darrow spoke and wrote on this theme throughout his career. *See, e.g.*, CLARENCE DARROW, THE STORY OF MY LIFE 75-76 (1932) (justifying his criminal defense practice as a means of exposing the social and genetic causes of crime).

3. *See, e.g.*, EDWARD B. WILLIAMS, ONE MAN'S FREEDOM 7 (1962) (characterizing his clients as "the weak and the friendless, or the scorned and degraded, or the nonconformist and the unorthodox").

4. For a lesser effort, see MONROE H. FREEDMAN, *Representing the Unpopular Client: The Case of Dr. Bernard Bergman*, *in* UNDERSTANDING LAWYERS' ETHICS app. A, at A-2 (1990) (justifying the author's decision to defend a client who had been condemned in the press as "the meanest man in New York").

5. For a revisionist view of Atticus Finch, see Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473, 479-80 (1994) (noting that Atticus Finch, who at various times appears to tolerate, trivialize, and condone Southern treatment of Blacks, did not choose to defend Tom Robinson, a Black man falsely accused of raping a White woman, but rather reluctantly accepted a court appointment).

6. *See* Monroe H. Freedman, *Must You Be the Devil's Advocate?*, LEGAL TIMES, Aug. 23, 1994, at 19, 23 [hereinafter Freedman, *Must You*] (asking Professor Tigar to defend his decision to represent John Demjanjuk, the accused Nazi death camp guard); Michael E. Tigar, *Setting the Record Straight on the Defense of John Demjanjuk*, LEGAL TIMES, Sept. 6, 1993, at 22 (responding to Professor Freedman and disputing his view that lawyers should be called to justify their advocacy); Monroe Freedman, *The Morality of Lawyering*, LEGAL TIMES, Sept. 20, 1993, at 22 [hereinafter Freedman, *The Morality*] (exploring the moral implications of deciding to represent a client or cause). This

obligation to justify—to the public as well as to ourselves—why we represent unpopular clients and causes. As Sisella Bok has explained, in discussing moral decisionmaking:

> Moral justification . . . cannot be exclusive or hidden; it has to be capable of being made public. . . . John Rawls has set it forth most explicitly, under the name of *publicity*, as a formal constraint on any moral principle worth considering. According to such a constraint, a moral principle must be capable of public statement and defense.[7]

A moral obligation of public justification is particularly appropriate for lawyers. Ours is a profession of public service. Indeed, we hold a government-granted monopoly to serve a fundamental constitutional function—providing the right to counsel—and we hold that unique power for the benefit of the people of the United States. In a democratic society, the people are entitled to know what lawyers do and why we do it. It is proper, therefore, to publicly challenge lawyers to justify their representation of particular clients, and lawyers, within the bounds of zealous representation, are morally bound to respond.

I did not always hold this position. A quarter of a century ago, Professor Tigar and I had another debate.[8] The occasion was the picketing of a law firm, Wilmer, Cutler & Pickering, by a group of law students led by Ralph Nader. The picketers objected to the firm's defense of General Motors in an air pollution case and challenged the lawyers to justify that representation. I argued against the picketing, contending that it was wrong to criticize lawyers for zealously representing even the most heinous clients.

Professor Tigar sided with the picketers, arguing that it was proper to publicly challenge the lawyers in the firm for their choice of clients:

> I am not criticizing [Wilmer, Cutler & Pickering] for [going all out on behalf of their clients]. I am criticizing them for the choice of their clients that they choose to go all out on behalf of. And that, you see, is an important difference.[9]

Professor Tigar explained to the law students in the audience that "you have to make a decision, just as [every other lawyer] has to make a decision."[10] He continued:

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exchange was followed by a debate between us at Hofstra Law School on April 6, 1994, which was videotaped.

7. SISELLA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 92 (1978).

8. The debate took place at the George Washington Law Center, in 1970. Professor Tigar and I disagree about what exactly was said during both the George Washington and Hofstra debates. I will be pleased to send a videotaped copy of the Hofstra debate, without charge, to anyone requesting one, along with a transcript of our 1970 debate.

9. Michael E. Tigar, Debate at George Washington University Law School 7 (1970) (transcript on file with the *Texas Law Review*).

10. *Id.* at 8.

> The decision is: Which side are you on? The decision is whether or not you will commit your skills, your talents, your resources to the vindication of the interests of the vast majority of Americans or the vindication of the interests of . . . the minority of Americans who own the instruments of pollution and repression . . . .[11]

"What I am proposing," he said, "is a moral decision."[12]

Professor Tigar went on to defend the picketers in their demand for a public justification from the lawyers in the firm:

> [T]hey say, many of the people in that firm, that they believe in certain things, and I think that it is all right to ask them whether in fact their conduct in fact belies the assertion that they believe in certain things.[13]

In sum, Professor Tigar argued: first, that every lawyer has to decide, in representing a client or cause, whether to commit "your skills, your talents, your resources" to that client or cause; second, that the lawyer's decision is a moral one; and, third, that it is appropriate to publicly ask a lawyer to justify the choice that he has made.

It is no secret that Mike Tigar is a great advocate, so it should surprise no one that over the years, I have become persuaded to his position. Which brings us to the Demjanjuk case and to my exchange with Professor Tigar in *Legal Times*.

John Demjanjuk was born in Ukraine and is a naturalized American citizen. When he came to the United States after World War II, he lied to conceal the fact that he had been a Nazi concentration camp guard. Years later, Demjanjuk's lies were uncovered. In 1981 his citizenship was revoked, and in 1986 he was extradited to Israel to stand trial for participating in the mass murder of Jews in the gas chambers of Treblinka. Demjanjuk was convicted in Israel, but the Israeli Supreme Court, with extraordinary honesty and courage, reversed the conviction. The court found that Demjanjuk could not have been a guard in Treblinka because he had an alibi. The alibi was that Demjanjuk wasn't killing Jews in Treblinka because he was too busy killing Jews in the extermination camp at Sobibor.[14]

The same honest and courageous Israeli Supreme Court found "clear and unequivocal evidence" that Demjanjuk had volunteered to serve as a

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11. *Id.*

12. *Id.* at 20.

13. *Id.* at 8.

14. I have learned from sad experience that it is risky to be sardonic because some readers miss the point. So let me add explicitly that Demjanjuk didn't claim the alibi—the court found it for him, on the basis of the "clear and unequivocal" evidence of Demjanjuk's role at Sobibor.

member of the *Wachmanner*.[15] As a volunteer *Wachmann*, Demjanjuk trained in the Trawniki unit, which "was established for one purpose—in order to study and to teach its members how to exterminate, annihilate, [and] destroy [Jews] and bring about the 'final solution' of the 'Jewish problem.'"[16] *Wachmann* Demjanjuk then carried out his genocidal purpose in the gas chambers at Sobibor.[17]

As a result of the decision of the Israeli Supreme Court, *Wachmann* Demjanjuk was returned to the United States. As his son said shortly after the decision, "Hopefully, by the end of the week, the family will be reunited, and there will be grandchildren sitting on my father's lap."[18] My reaction on reading that was bitter. "Swell," I thought, "and if that son of a bitch had had his way, I wouldn't have grandchildren"—because, of course, there would be no such thing as a Jewish child or grandchild if *Wachmann* Demjanjuk and his Nazi cohorts had been successful in their "Final Solution."

And then I read that my old friend, Mike Tigar, was representing *Wachmann* Demjanjuk in his effort to get his United States citizenship restored and to assure that he would be able to live out his life with his grandchildren on his lap in Cleveland, Ohio. Recalling our debate in 1970, this meant that Professor Tigar had asked himself, "Which side are you on?" and had made the personal, moral decision to side with *Wachmann* Demjanjuk. And the irony was inescapable: Professor Tigar had argued in our 1970 debate that the lawyers at Wilmer, Cutler & Pickering had acted wrongly because they had chosen to represent a client who was harming people with emissions of toxic gas, and now Professor Tigar was representing a man who had murdered people en masse in Nazi gas chambers.

Remembering that Professor Tigar had argued that "it is all right to ask" the lawyers at Wilmer, Cutler & Pickering why they had chosen to represent General Motors, I wrote a column titled, *Must You Be the Devil's Advocate?* which concluded:

> Although I didn't realize it for some time, my opponent won the [1970] debate in the most decisive way—by converting me to his

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15. Israel v. Demjanjuk, Crim. App. No. 347/88, Opinion of the Supreme Court of Israel ¶ 447 (July 29, 1993), at 1 (translation on file with the *Texas Law Review*).

16. *Id.* Conclusion of the Proceedings, at 40.

17. I quote conclusions from the decision of the Israeli Supreme Court without rehearsing here the extensive support for those conclusions; it includes evidence of Demjanjuk's Nazi S.S. blood-group tattoo and also documentary evidence, which Demjanjuk tried, but failed, to refute at trial. Professor Tigar, as Demjanjuk's lawyer, might put forth a different view of Demjanjuk's guilt, but I understand Professor Tigar's position to be that he would represent Demjanjuk *even if* Demjanjuk were in fact a mass murderer of Jews at Sobibor.

18. Michael Parks, *Demjanjuk Free, Leaves Israel for U.S.*, L.A. TIMES, Sept. 22, 1993, at A8.

position. The issue is not whether General Motors should be represented. Of course they should, and there will always be someone who will do it. The real issue for each of us is: Should *I* be the one to represent this client, and if so, why?

And so I now ask my victorious opponent in that long-ago debate: Mike Tigar, is John Demjanjuk the kind of client to whom you want to dedicate your training, your knowledge, and your extraordinary skills as a lawyer? Did you go to law school to help a client who has committed mass murder of other human beings with poisonous gases? Of course, someone should, and will, represent him. But why you, old friend?[19]

I do not regret having written the column. What I do regret is that I went into print without first showing the column to Professor Tigar and giving him an opportunity to comment. That was not an act of friendship. It was inexcusable, and Professor Tigar was understandably angered by it.[20]

But, as he has done in *Defending*, with respect to his representation of Terry Nichols, Professor Tigar presented an eloquent moral justification for his decision to represent Demjanjuk.[21] First, he noted that the memory of the Holocaust should not be dishonored by denying even its perpetrators the fullest measure of legality. One lesson of the Holocaust is that the vast powers of government must constantly be subjected to the most exacting scrutiny in order to guard against their abuse. Further, Professor Tigar referred to "powerful evidence" that lawyers in the Department of Justice suppressed evidence that would have shown that Demjanjuk should not have been extradited on charges of having been a guard at Treblinka. This kind of corruption of justice is an intolerable threat to American ideals, regardless of one's opinion of the accused. And Professor Tigar concluded: "When the government that did wrong denies all accountability, the judicial branch should provide a remedy. I have spent a good many years of my professional life litigating such issues. I am proud to be doing so again."[22]

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19. Freedman, *Must You*, *supra* note 6, at 23.

20. Professor Tigar's response began: "All of Monroe Freedman's statements about me in this newspaper are wrong, except two: We are—or were—old friends. And I do represent John Demjanjuk." Tigar, *supra* note 6, at 22.

Other commentators, with less justification, said that my question, "Why you?" was "insulting" and that my position was "worse than absurd," "dangerous," and "pernicious." One ethics professor wrote to me to say that "Joe McCarthy would be proud of you." I can only wonder how the same commentators would have characterized Professor Tigar's position in our 1970 debate.

21. Tigar, *supra* note 6, at 22.

22. *Id.* at 21.

Thus, Professor Tigar's moral response to my question illuminates a crucial issue of enormous public importance about what lawyers do and why they do it. That issue is frequently posed by asking whether one can be a good person and a good lawyer at the same time. Or whether the lawyer forfeits her conscience when she represents a client. Or whether the lawyer is nothing more than a hired gun. Essentially, these questions ask whether the lawyer, in her role as a lawyer, is a moral being. Three sharply different answers have been given to that question.[23]

The Amoral Lawyer.—One answer is dubbed "the standard conception."[24] It holds that the lawyer has no moral responsibility whatsoever for representing a particular client or for the lawful means used or the ends achieved for the client. Critics have accurately pointed out that under the standard conception, the lawyer's role is at best an amoral one and is sometimes flat-out immoral.[25]

Moral Control of the Client.—A second answer insists that the lawyer's role is indeed a moral one. It begins by agreeing with the standard conception that the lawyer's choice of client is not subject to moral scrutiny. But it holds that the lawyer can impose the lawyer's moral views on the client by controlling both the goals that are pursued and the means that are used during the representation.[26]

According to this view, the lawyer can properly coerce the client from using lawful means to achieve lawful goals.[27] For example, the lawyer, having taken the case and having induced the client to rely upon her, can later threaten to withdraw from the representation—even when this would cause material harm to the client—if the client does not submit to what the lawyer deems to be the moral or prudent course.[28]

Choice of Client as a Moral Decision.—The third answer also insists that the lawyer's role is a moral one. It also begins by agreeing with the standard conception that the client (after proper counseling) is entitled to make the important decisions about his goals and the lawful means to be

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23. *See generally* FREEDMAN, *supra* note 4, at 43-64.

24. *See* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 672-74 (1978) (explaining that the basic concept that a lawyer has no moral accountability for actions taken on behalf of a client can be derived from the ABA Code of Professional Conduct).

25. *See, e.g.*, Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 556 (1991) (observing that many critics "argue that the amorality, or even immorality, of lawyers is a function of 'the standard conception' of lawyering which wrongly requires lawyers not to be morally accountable for their clients' goals").

26. *See* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1987 AM. B. FOUND. RES. J. 637, 640-41 (1987) (arguing against the amoral role for lawyers and supporting the idea that lawyers can interpose themselves and their moral concerns as filters of what legally permissible projects clients should be able to take).

27. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY at xxii (1988).

28. I criticized this view in Monroe Freedman, *ALI to Clients: Drop Dead!*, LEGAL TIMES, May 31, 1993, at 26, and FREEDMAN, *supra* note 4, at 60-64.

used to pursue those goals.[29] But this answer recognizes that the lawyer has the broadest power—ethically and in practice—to decide which clients to represent.[30] And it insists that the lawyer's decision to accept or reject a particular client is a moral decision. Moreover, that decision is one for which the lawyer can properly be held morally accountable.

Although critics have erroneously, and repeatedly, identified me with the first answer (the standard conception), I have consistently advocated the third answer for at least nineteen years.[31] Of course, this is one of the lessons that I learned, although belatedly, from Professor Tigar.

Finally, I do have one quarrel with Professor Tigar. Describing the prosecutor's role (not in a particular case, but in general), he says, "On one side, we see the government's reassuring sense of power and knowledge, of things as they should be, that we will be safer if another creature is jailed . . . ."[32] That, I believe, is a caricature of the prosecutor's function. I share Professor Tigar's desire to glorify the defense lawyer, and I often repeat the ABA's characterization of the defender as the client's "champion against a hostile world."[33] But the conscientious prosecutor also serves an essential, and noble, role in the adversary system.

Indeed, I have surprised students over the years by recommending to those interested in public interest law that they consider work in a prosecutor's office. At one time, my principal reason for that recommendation was that one can do more good as a decent, conscientious prosecutor than as a fire-eating defender, explaining that many of the most compelling cases that I have defended were prosecutions that an ethical prosecutor would never have maintained in the first place.

But that is too limited an apologia for the prosecutor's function. Just as I have learned from Professor Tigar, I have learned from my son,

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29. The ABA Model Code, for example, provides that

> [I]t is often desirable for a lawyer to point out [to a client] those factors which may lead to a decision that is morally just as well as legally permissible. . . . In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1986).

30. "The traditional position of the American bar has been that the lawyer may apply his personal views of his client's morality . . . in deciding whether to accept the case in the first instance." STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 148 (1971) [hereinafter STANDARDS].

31. *See, e.g.*, FREEDMAN, *supra* note 4, at 49, 49-50 (arguing that a lawyer should be allowed to apply her own moral standards in choosing clients, but should take moral responsibility for her choices); Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 204 (1978) (contending that a lawyer's choice of clients can properly be "subjected to the moral scrutiny and criticism of others").

32. Tigar, *supra* note 1, at *tan 16.

33. *E.g.*, Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U. L. REV. 331, 331 (1987) (citing STANDARDS, *supra* note 30, at 145).

Caleb, who for four years served as a prosecutor in Dade County, Florida. As defense lawyers, Professor Tigar and I maintain our focus on the suffering defendant and are concerned with safeguarding his fundamental rights against the immense power of the state, which threatens to imprison or kill him.[34] But my son, and other prosecutors, have their primary focus on the suffering victims and their families and are concerned with safeguarding the fundamental right to a peaceful society against those who rob, maim, and kill other people.

Each of these—the defender and the prosecutor—are essential aspects of the adversary system. Each plays an exalted role in seeing that "the system-called-justice respects and renders justice properly-so-called."[35] And neither side need denigrate the other in order to exalt itself.

34. *See* FREEDMAN, *supra* note 4, at 6-10; Freedman, *supra* note 33, at 331-33; Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319 (1987).

35. Tigar, *supra* note 1, at 110.