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Christian Advocacy

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CHRISTIAN ADVOCACY

An interesting, though somewhat disturbing, article by Mr. Charles P. Curtis of the Massachusetts Bar recently appeared in the Stanford Law Review.[1] The article discussed the ethics which should guide a lawyer when he acts on behalf of his client. He developed two points: that the lawyer's duty to his client is so high that "he is required to treat outsiders as if they were barbarians and enemies;"[2] and that the practice of law is outside of and divorced from Christian moral ethics. In furthering his first point Mr. Curtis develops at length the proposition that the advocate has the duty to lie for his client whenever that becomes necessary to protect his client's interests. And on his second assertion he states that Stoicism is the only acceptable philosophy for lawyers. I submit that both of Mr. Curtis' propositions are demonstrably false and manifestly dangerous to society.

I

Mr. Curtis first argues that, since a lawyer would lie for his wife and child, and even for friends if close enough, as would every person, then he should lie for his client with whom he stands in such intimate relationship. The truth does not belong to the lawyer, but to the client, and therefore he is not free to give this to others. Mere silence quite often does not protect the truth, and for this reason it is better for the lawyer to lie. How far may he carry this? Mr. Curtis says that he must lie "beyond the point where he could permissibly lie for himself."[3]

But this is not true, for a lie is an intrinsic evil and is never permissible. It is a deliberate word, sign, or action by which a person conveys to another an idea contrary to his own mind. The nature of man is frustrated in three particulars by a lie: it places the will at variance with the intellect; it defeats the ends of speech, i.e., the communication of ideas; and it makes that society which is natural and essential to man impossible, or at least difficult. God has not designed the nature of man in order for man to oppose it, but rather for man to follow it. When a person perverts a natural faculty he is transgressing the natural law. Every violation of a just law is a wrong of some sort, and a violation of the law of God is a wrong of the gravest sort. It has been said that when a man knowingly and willingly says that which belies his own inner convictions, he does violence to his own nature, he outrages his own dignity, he misuses his God-given faculty of speech, and he introduces discord into his soul. St. Paul has told us, "Putting

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[1] Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).
[2] *Ibid.*, p. 6.
[3] *Ibid.*, p. 8

away lying, speak ye the truth every man with his neighbor, for we are members of one another."[4] And we are told in the Old Testament that a lie is abominated and hated by the Lord.[5] What is intrinsically evil is never permitted, no matter by whom committed or for how fine a reason.

Distinguished from the direct falsehood is a mental reservation. By a mental reservation we mean the act of the mind which limits the common and ordinary sense of the words used to some particular meaning intended by the speaker. This is called a strict mental reservation when there are no circumstances present which would permit the hearer to suspect that the words used are so limited. Thus, when a person asks, "Did you take my wallet?" and he is answered, "No"—the answerer meaning that he did not take it in the past few minutes—you have a strict mental reservation, for there is no clue as to the limitation which the answerer intends. Such a reservation differs not at all from a lie, and is therefore immoral on the same grounds and to the same extent as the lie.

However, where a mental reservation is used in such circumstances that the hearer knows or should know that the answerer intends a limitation of his words, we have what is known as a broad mental reservation. If, for example, an attorney is asked if his client committed a certain crime and he answers, "No," the questioner should know, if he does not, that the attorney meant, "Not for your information." The broad mental reservation may be used without culpability in certain circumstances, viz., where the person questioned has either the right or the duty to keep the requested information secret and silence will not accomplish this, and where the questioner has no right to know the truth. It differs from the lie in that the words spoken do not differ from the truth as apprehended by the mind of the speaker. But even though not lies, this type of mental reservation can be employed only where the proper conditions are present, for indiscriminate use would destroy all mutual trust among men.

Equivocation may or may not be morally used depending upon the circumstances. As we ordinarily understand equivocation it is the use of terms having two or more significations with an intent to deceive the hearer. In this sense equivocation may never be used, for it is a lie and nothing more. It is so defined in the dictionary. But where we mean the use of ambiguous terms for the purpose of concealing the truth from one who is merely officious in asking, equivocation may be used under the same conditions as a broad mental reservation. If the listener is deceived, he is deceived by himself and not by the speaker.

Now we all recognize the right of a man to conceal certain things.

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[4] Eph., IV, 25.
[5] Prov., VI, 17; XII, 22.

No man is obliged under any circumstances to reveal his sins or crimes, except to God or his confessor. Further, the natural law permits a man to do all that is necessary to preserve his own dignity and independence, and the concealment of his personal affairs is necessary to accomplish this. Therefore a man has a right to keep his own secrets. And for the same reason he has a right to keep the secrets of another. But when a man is in possession of another's secrets, as in the case of a lawyer with regard to the personal affairs of his client, he has not only the right, but also the positive duty, not to divulge them. Justice requires that nothing be taken from a man which belongs to him alone. This refers not only to his property or life, but to his secrets as well. The attorney, therefore, has a duty not to divulge his client's affairs. This duty ceases only where keeping the secret will harm the lawyer, a third person, or the community. Where the harm will accrue to the attorney, he has a right to break his trust only if the harm is all out of proportion to the importance of the secret to his client. But where the harm will accrue to a third person or to the community, the lawyer's right to break his trust becomes a duty to do so. High though the lawyer's duty to his client may be, he has an even higher duty to the common weal. This involves preventing harm to society or to innocent members of society.[6]

But although the lawyer has a duty to keep his client's confidences, he may not lie to do so. This is, as we have said, intrinsically evil and never permitted. But he may answer any question regarding his client by the use of a broad mental reservation, providing the three conditions are fulfilled. As said previously, the lawyer has not only the right but the duty to keep his client's secrets. And as often as not silence will not suffice in the face of direct questions to keep certain information private. The difficulty comes in the third condition, i.e., that the person asking does not have a right to know the truth. Mr. Curtis gives the example of a lawyer who has persuaded a client, wanted by the police, to give himself up. After a meeting with the client in which the latter promises to give himself up in two days, giving him time to clean up his affairs, the lawyer is asked by a police official if he has seen his client. Mr. Curtis believes that the lawyer is justified in answering, "No." This is questionable, though, as even Mr. Curtis himself admits. He resolves the question in favor of his own thesis, but it seems that the lawyer would in such a case be morally bound to answer the policeman truthfully. For it seems to us that the police have the right to know the whereabouts of wanted criminals. The safety of the public depends upon this right.

[6] Canon 37, CANONS OF PROFESSIONAL ETHICS, American Bar Association, provides that, "The announced intention of a client to commit a crime is not included within the confidences which he (the lawyer) is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened."

The lawyer's duty towards his client outside of court is clear. But what may he do in court? May he lie? May he make use of broad mental reservations? May he keep material matters secret if the opposing side or the court does not have cognizance of them? Mr. Curtis says that,

> "I take it that it is inadmissible to lie to the court. A lawyer's duty to his client cannot rise higher than its source, which is the court."[7]

This much is true—it is inadmissible to lie to the court, since it is inadmissible to lie at any time. Nor may use be made of a broad mental reservation, simply because it is impossible to fulfill the third condition. It is the duty of the court to mete out justice. This is impossible if the trier of the case does not have all of the facts or law at his command. The court, then, has a right to know those things which are material to the case. And where the questioner has a right to know the truth of that which he asks, nothing less than the absolute truth may in good conscience be given. This is the case where the lawyer is *asked* about a certain matter. The same duty to disclose is not present, however, where no question has been put to him. Mr. Curtis is undoubtedly correct when he says that the attorney has no duty to argue his opponent's case for him, or to supply arguments, facts, or law which his opponent has neglected. Mere silence cannot be a lie, nor even a mental reservation, since nothing at all is said. Silence in and of itself does not cause but merely permits the court to draw erroneous conclusions. This assumes, however, that there is no injustice latent in the silence. If the lawyer knows or discovers that a fraud is being practiced on the court or the opposing party, he is in duty bound to speak. But this rests upon his obligation to practice justice, and not upon his duty not to lie. The whole question of the lawyer's conduct in or out of court does not rest upon the proposition that the lawyer's duty to his client cannot rise higher than his duty to the court, although this is true enough, but, rather, upon the indisputable fact that his duty to his client cannot rise higher than his duty to his God. The Canons of Professional Ethics recognize this:

> "The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. *He must obey his own conscience and not that of his client.*"[8] (Italics added).

II

An interesting omission in the Stanford article is any discussion of what cases a lawyer may take. Apparently Mr. Curtis assumes that he

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[7] Curtis, *supra*, note 1, at p. 7.
[8] Can. 15.

may take any case presented to him. This, of course, is not true. In criminal cases there is no doubt but what a lawyer may take any case, whether he knows the accused is guilty or not, since both the natural and the positive law accord the guilty as well as the innocent a right of defense.[9] But in civil cases the attorney is more restricted. Offenses against the virtue of justice are sinful, and the lawyer who prosecutes an unjust claim is a cooperator in the sin. Therefore, when the cause is unjust, the case may not be undertaken. The lawyer, however, is not bound to inquire into the motives of his client. If the action is founded upon recognized principles of law, he may prosecute it. But he may not participate in his client's immoral intent, if such there be. Nor may he advise his client how to skirt the law in order to achieve an unjust end.

Often an attorney accepts a case which appears on its face to be just or at least probably just. These cases he may prosecute to a successful conclusion, even if they are objectively unjust, just so long as he himself believes in its justice. If he is in doubt he may in good faith accept the case, for, after all, the purpose of the suit is to settle the doubt. But if at any time during the suit he recognizes that it is actually unjust, he must withdraw. St. Thomas states the lawyer's obligation in this manner:

> "If in the beginning the lawyer believed the case to be just, and afterward in the procedure it becomes evident that it is unjust, he must not betray the case, in such wise as to help the other side, or to reveal the secrets of his case to the other party. But he can and must abandon the case or induce his client to yield or to compromise without injury to his adversary."[10]

Catholic moral teaching commands restitution by the attorney when he has prosecuted an unjust case. If the injustice of the action is not apparent to the attorney until after the conclusion of all proceedings, he must restore to the injured party whatever of the unjust gain he himself has received in the way of fees. If his fee came, not out of the money awarded in the judgment, but from his client's own money, he is not bound to restitution. Also if he bows out of the case as soon as he recognizes that it is an unjust cause, he is not bound to restitution, even if his client subsequently wins. But if he accepts and prosecutes a case which he knows to be unjust at the time, or if he continues to act in the case after discovering its injustice, he is bound to restore to the injured party, not only what he himself has received, but all that that party has lost, including the entire amount of his costs and disbursements.

[9] See O'Connell, *Moral and Ethical Considerations in the Defense of Those Accused of Crime*, 35 MARQ. L. REV. 311 (1952).

[10] ST. THOMAS AQUINAS, SUMMA THEOLOGICA, II-II, lxxxi, III, 2. Canon 44 of the Canons of Professional Ethics recognizes injustice as a reason which *permits* a lawyer to withdraw from a case once taken.

Nothing excuses from this obligation except restitution to the injured party by the client.

III

Christianity, according to Mr. Curtis, has no place in the practice of law. He contends that the lawyer fails in his duty to his client if he represents him as a Christian. Mr. Curtis prefers Stoicism.

> "The Stoics gave us counsel of perfection, but it is none the less valid. If a lawyer is to be the best lawyer he is capable of being, and discharge his 'entire duty' to his clients, here in the Stoic sage is his exemplar. Here in Stoicism is his philosophy. Let him be a Christian if he chooses outside the practice of the law, but in his relations with his clients, let him be a Stoic, for the better Stoic, the better lawyer."[11]

All of which is utter nonsense. In the first place Christianity is not something that you turn on or off at will, that you practice from 5:00 P.M. to 8:00 A.M. only. Quite to the contrary, it is a complete way of life. It is that relationship with God that controls the totality of man's actions. God will not be shut out during business hours. If a man is truly a Christian, he is a Christian twenty-four hours a day, all the days of his life. If he is only a Christian when it is convenient, he is no Christian at all.

The lawyer does not fail in his duty when he represents his client as a Christian, for as a Christian he is in conscience bound to deal honestly and fairly with him. The client may in perfect faith entrust his affairs to such a man. He is not so safe, however, where his attorney acts on the assumption that there is no God. If there is no higher moral law which prevents the attorney from lying *for* his client, then there is none which prevents him from lying *to* his client. The good pagan cannot be trusted, for there is nothing which will keep him good when it is to his advantage to be bad. Stoicism failed centuries ago, and it will just as surely fail today.

Our courts have said over and over again that this is a Christian nation.[12] The fact that non-Christian minorities are protected under the law, both moral and positive, does not make it any the less a Christian nation. Ethical problems are expected to be viewed in a Christian state in the light of Christian morality. The nation's courts are entitled to expect, and in practice they do expect, that the lawyers practicing before them will be guided in their actions by sound moral principles. But why do we say *Christian* morals? After all. morality is one for all mankind. The primary dictate of the natural law—that good must be done and evil avoided—is binding upon every race and nation and religion indiscriminately. And indeed it is so recogniżed. But the more particular rules under this primary law differ, as witness Mr. Curtis' principles.

[11] Curtis, *supra* note 1, at p. 20.

Men see "the good" in different lights. Obviously not all are correct. If there is a God, and if Christ is God, then only Christian moral teachings are correct. Since the nation is Christian there can be no excuse for deviation from these moral principles. And the lawyer is no more excused than is any other man.

The article by Mr. Curtis argues in essence that the lawyer's duty to his client is superior to his duty to God. With this we cannot agree. Vice and virtue are not so intermingled and indistinguishable that they may be practiced unselectively.[13] Vice by its very definition may never be practiced. God is the supreme and ultimate end of man. But man will never reach his ultimate end if he places a higher value on temporal ends. The lawyer's duty to his client is high. There can be no argument there. But never does his duty rise so high that he must sacrifice his eternal salvation to perform it.

I sincerely doubt if Mr. Curtis means all that he said, and I doubt if he practices all that he meant. For I submit that an acceptance of these doctrines would result in a flood of sharp practices, dishonest lawyers, unjust lawsuits, and perjurous testimony. I submit that it would bring shame and disrepute on the law profession. Lawyer Curtis may be an able lawyer, but he is less than mediocre as an ethician.

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[12] See, for example, Church of the Holy Trinity v. United States, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892); Townsend v. Hagan et al., 35 Iowa 194 (1872).

[13] "I don't know any other career that offers ampler opportunity for both the enjoyment of virtue and the exercise of vice, or, if you please, the exercise of virtue and the enjoyment of vice, except possibly the ancient rituals which were performed in some temples by vestal virgins, in others by sacred protitutes." Curtis, *supra,* note 1, at p. 18.