

# Ethical Problems in Criminal Defense Work

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# NOTES

## Ethical Problems Involved In Criminal Defense Work

### I. INTRODUCTION

There is probably no aspect of the legal profession which engenders more misunderstanding than the attorney's role as defense counsel in a criminal action. The attorney is often-times subject to the most severe criticism for undertaking the defense of an accused who is "obviously" guilty or who has already confessed his guilt. Such criticism is most vehement, of course, when the attorney is successful in his defense and the accused is set free.

It would appear that the obvious way to avoid the greater majority of such criticism would be an intensified educational program to make the public aware of the rights of any accused person and the duties of his defense counsel. This too glib answer, however, offers no solution to the dilemma of the attorney who is informed by his client, the accused, of facts, which if put into evidence would be sure to result in a conviction. Here again, of course, there is another obvious answer, that is, that the attorney may simply drop the case. But to offer such a solution in the present discussion, is merely to evade the basic problem ever present in the practice of criminal law.

### II. MORAL VIEW

There appears to be little dispute as to the moral principles governing the defense of one accused of crime. The attorney may defend the accused by all lawful means. This general principle is best stated as follows:

"The general principle governing criminal trials is that the accused has a right to be free from punishment until he is proved with moral certainty to be guilty. Accordingly, the lawyer for the defendant, even though he knows that his client committed the crime with which he is charged, can lawfully utilize all objectively honest means to avert the verdict of guilty. . . . Of course, he may not employ perjury, or induce witnesses to lie on the stand. But, so long as he confines himself to facts that are objectively true, he may present them in such a manner that the jury will be inclined to render a verdict of not guilty."<sup>1</sup>

This is so because the attorney stands in the place of the client and may do and act in his defense as the accused may morally do himself. It is basic that the accused has a moral right not to accuse himself. Thus, although the accused may divulge to the attorney information of a highly incriminating nature, the attorney is under no obligation to

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<sup>1</sup> Father Francis J. Connell, C.S.S.R., S.T.D., *MORALS IN POLITICS AND PROFESSIONS*, at III (Newman Bookship, Westminster, Md. 1946).

come forth with such information. Note that this is a right in a negative sense, i.e., the attorney has a right *not* to furnish the information. This cannot be extended to give the attorney a right to restrain a witness from testifying to incriminating matters or in any other way to suppress valid legal evidence.

The attorney not only may defend his client by all lawful means, but it would appear that he is duty bound to do so. For when the attorney undertakes the defense he has entered into a contract with the client by which he pledges himself to devote his skill and knowledge, as best he can, to defend the client against the charge.<sup>2</sup>

Thus, in the concrete situation where the attorney undertakes to defend one who has admitted his guilt to the attorney, the attorney may, nevertheless proceed to defend the accused by all lawful means, and do so with the knowledge that such defense is moral and right.

Nor need the attorney have any qualms of conscience if his accused client is found not guilty and set free, for:

“Nothing seems plainer than the proposition, that a person accused of a crime is to be tried and convicted, if convicted at all, *upon evidence*, and *whether guilty or not guilty*, if the evidence is insufficient to convict him, he has a *legal* right to be acquitted.”<sup>3</sup>

The validity of this statement is so plain that no further comment is needed thereon.

To this position the argument is raised that the objective of a judicial proceeding is truth and thus the attorney, as an officer of the court, has a duty to come forth with any and all facts which will aid the tribunal in arriving at its ultimate goal, *viz.*, truth. This argument, while plausible on its face, does not stand up to a careful analysis.

Such an argument shows a basic misunderstanding of the nature of a criminal proceeding and what it purports to judge. The state, in the valid exercise of its police powers, has prohibited the commission of certain acts, ranging from the prohibition of parking an auto in certain designated zones to the prohibition of murder. The law forbids the act and imposes penalties on those who violate the law.

A court composed of mere men is in no position to judge the moral guilt or innocence of another man. Whether or not there is moral guilt, and if so, to what degree, cannot be determined by the overt acts of an individual. Moral guilt can be determined only by looking at the conscience of the accused, and this is something which no court has yet been able to do. Rather, the court judges whether or not the individual has done those certain overt acts constituting a

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<sup>2</sup> Father Henry Davis, S.J., *MORAL AND PASTORAL THEOLOGY* at 382 (Sheed and Ward, New York, N.Y. 1943).

<sup>3</sup> George Sharswood, L.L.D., *PROFESSIONAL ETHICS*, at 105 (The Goe. T. Bisel Co., Philadelphia, Pa., 1907).

crime. Even the elusive concept of *mens rea* is determined by means of the overt acts. Thus the proper object of a judicial proceeding is to render a decision consonant with justice, upon the evidentiary facts set forth. Were the criminal courts of this country to attempt to punish one for his moral guilt, it would, in effect, be an attempt to control thought. For one may be morally guilty of a wrong without ever having committed an overt act.<sup>4</sup>

The court, in its attempt to arrive at the truth as to whether or not the prohibited act has been committed, has laid down certain rules to be followed. Chief among these is that the state has the burden of proving its allegations and that such proof must be made in accordance with the rules of evidence. It is the duty of the prosecutor to make this proof and the function of the defense counsel, as regards this particular phase of the trial, to see that the rules of evidence are complied with. Thus the defense counsel fulfills his role as an officer of the court by seeing that the proof of the prosecution is made accordingly. It is not within his province to assume the role of the prosecutor and come forth with affirmative evidence of the commission of the overt acts alleged.

There is a school of thought which holds that an attorney should decline to undertake the defense of one whom he knows to be guilty. It would appear that any attorney espousing such a view is in a position which contradicts itself. Witness the following statement:

"It is only when a lawyer really believes his client is innocent that he should undertake to defend him. All our democratic safeguards are thrown about a person accused of a crime so that no innocent men may suffer. Guilty defendants, though they are entitled to be defended sincerely and hopefully, should not be entitled to the presentation of false testimony and insecure statements by counsel."<sup>5</sup>

The contradiction is readily apparent. If an attorney should defend only those whom he believes to be innocent, how then are the "guilty" defendants to obtain counsel, the right to which is admitted. Further, is not the attorney usurping the function of the judge and jury by pre-judging the guilt or innocence of the client?

## II. LEGAL POSITION

From a legal viewpoint there appears to be little doubt that an attorney may defend one whom he knows to be guilty of the offense charged. In fact, it may be even said that in certain circumstances there is a duty to defend one accused of crime, regardless of the attorney's personal opinion of guilt. Both the Federal<sup>6</sup> and numerous

<sup>4</sup> MATT. 5. 28.

<sup>5</sup> Cutler, *Is a Lawyer Bound to Support an Unjust Cause? A problem of Ethics*, 38 A.B.A.J. 300, at 301 ( ).

<sup>6</sup> U.S. CONSTITUTION, Art. 6.

state constitutions<sup>7</sup> give one accused of crime the right to the assistance of counsel. Perhaps the basic principle of such constitutional provisions may be summed up as follows:

“Every man, accused of an offense, has a constitutional right to a trial according to law; even if guilty, he ought not to be convicted and undergo punishment unless upon legal evidence; and with all the forms which have been devised for the security of life and liberty.”<sup>8</sup>

Without the assistance of counsel, many, if not all, of the rights guaranteed to an accused would be mere paper rights, lacking substance and meaning.

The right to assistance of counsel is itself a substantial right,<sup>9</sup> the denial of which is grounds for reversal of a conviction. Nor can it be said that the right to counsel is only the right of an innocent man; there would appear to be little doubt that even a guilty defendant is entitled to a fair trial.<sup>10</sup> This being so, it is the duty of the defense counsel to assure that the accused is given a fair trial,<sup>11</sup> be he guilty or innocent in the eyes of the attorney or the public.<sup>12</sup> There is no duty upon the defense counsel to aid the prosecution in its case, for the accused has the right to have his guilt, if any, determined by the court and jury.<sup>13</sup>

The state having the burden of proof,<sup>14</sup> the defense is under no duty to come forth with incriminating evidence. The prosecution, however, has a double duty; the District Attorney must not only attempt to make the case for the State, but he must also come forth with any facts tending to show the innocence of the accused.<sup>15</sup> This is just one example of the numerous safeguards set up to protect the innocent. However, such safeguards are available to the guilty as well. For it must be remembered that guilt is a legal concept, and not a subjective determination made by a lawyer or the public at large, and until an accused is found guilty by a court, he is entitled to all the safeguards and protections afforded by law.

Thus, a lawyer in undertaking the defense of a “guilty” accused is merely acting in accordance with his oath as an attorney to uphold the constitution and laws of the land. For to deny any man the assistance of counsel is to strip him of his rights and privileges as a citizen. It is the unique role of an attorney as defense counsel to be

<sup>7</sup> WIS. CONSTITUTION, Art. I, sec. 7; CONSTITUTION OF MICHIGAN of 1908, Art. II, sec. 19; ILLINOIS CONSTITUTION, Art. II, sec. 8.

<sup>8</sup> See note 3 *supra*.

<sup>9</sup> State ex rel. Traister v. Mahoney, 196 Wis. 113, 219 N.W. 380 (1928).

<sup>10</sup> Fischer v. State, 226 Wis. 390, 276 N.W. 640 (1937).

<sup>11</sup> State v. Barto, 202 Wis. 329, 232 N.W. 553 (1930).

<sup>12</sup> State ex re. Drankovich v. Murphy, 248 Wis. 433, 22 N.W.2d 540 (1946).

<sup>13</sup> Lonergan v. State, 111 Wis. 453, 87 N.W. 455 (1901); Melli v. State, 220 Wis. 419, 265 N.W. 79 (1936); Parke v. State, 204 Wis. 443, 235 N.W. 775 (1931).

<sup>14</sup> Fraccaro v. State, 189 Wis. 428, 207 N.W. 687 (1926).

<sup>15</sup> O'Neil v. State, 189 Wis. 259, 207 N.W. 280 (1926).

engaged not only in the defense of the rights of his individual client, but in the defense of the rights of each and every citizen of the land. If the courts can deprive even the most despised accused of his rights as a citizen then may it also deprive the bulk of the citizenry of the rights afforded them under the constitution. For such rights are worthless unless the courts will enforce them and the lawyers protect them.

#### IV. CONCLUSION

There is little question, if any, as to the right of an accused to a fair trial and assistance of counsel. The difficulty arises in the moral issues involved in the defense of one who has admitted his guilt. However personally repugnant the particular case may be to the individual attorney, it must always be remembered that even the most wayward of citizens have rights which must be protected. Chief among which are the right to a fair trial and "due process" of law. The protection of such rights is a moral act the accomplishment of which is an art peculiar to attorneys. It is not only the attorney's singular ability to protect such rights but also his duty as a member of a profession dedicated to justice. The attorney need feel no reluctance, on moral grounds, to undertake the defense of an accused; rather, he should undertake such a task in a spirit of service to his profession, his fellow citizens and his country.

JAMES T. BAYORGEON

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**Wisconsin's Anti-Bushing Law 218.01 (3) (a) 18** — The present capacity of our nation's automobile manufacturers to produce cars far exceeds the American public's ability to consume them.<sup>1</sup> This excess, coupled with the great number of dealers handling the same product in the same market area, has forced dealers into various unethical practices. Bushing<sup>2</sup> is but one of many such practices. However, it is also one of the most successful.

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<sup>1</sup> On March 1, 1958 dealers had in stock a sixty-eight day supply of cars. This high inventory (thirty days is normal) had increased from February 1, 1958 despite factories working three or four day weeks instead of the usual five day week. *Automotive News*, March 1st, 1958, page 1.

<sup>2</sup> The "bush" as it is called is set up by another practice known as highballing. The highball was developed to get a buyer who is shopping to return to the bushing dealership before he purchases an automobile. The following is an example of how a highball followed by a bush enables a dealer to sell an automobile.

Mr. Smith is looking for a new car. He has decided to buy a certain make and model and knows the equipment he wants. Mr. Smith begins to shop around for the best price he can get. He wants to see how little a cash difference he can pay and still get the car of his choice. Mr. Smith first stops at the X Auto Company and receives a figure of \$2400.00 cash difference from a salesman there. From the X Auto Company, Mr. Smith proceeds to the Y Auto Company and by letting the figure of \$2400.00 cash difference slip out, gets the salesman at the Y Auto Company to agree to a cash difference of \$2350.00. By repeating this process at several more dealers, Mr. Smith manages to reduce the cash difference to \$2100.00 at the B Auto Company.