

# Is a Lawyer Bound to Support an Unjust Cause?

by A. S. CUTLER\*

The layman's question which has most tormented the lawyer over the years is: "How can you honestly stand up and defend a man you know to be guilty?"

Or, as to civil cases: "How can you defend a case when you know your client is wrong and really owes the money sought?"

At the outset we must remember that in a democratic country even the worst offender is entitled to a legal defender. If a person accused of crime cannot afford a lawyer, the court will assign one to defend him without cost.

Many lawyers however, believe the right to defend means the duty to employ any means, including the presentation of testimony the lawyer knows to be false.

## *Should the Lawyer Blindly Reflect His Client?*

Such an attorney argues the lawyer has no right to judge his client to be guilty or to appraise a civil action by deciding his client is in the wrong. Such a lawyer argues that before one knows a person to be guilty in a criminal matter or wrong in a civil action there must be a judgment of the court to that effect. Judgments are notoriously uncertain when applied to conflicting evidence.

In support of this position, advocates enjoy reciting the following colloquy attributed to Samuel Johnson by his famous biographer, James Boswell:

BOSWELL: But what do you think of supporting a cause you know to be bad?

JOHNSON: Sir, you do not know it to be good or bad till the judge determines it. You are to state facts clearly; so that your thinking, or what you call knowing, a cause to be bad must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But Sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, why then, sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion.

BOSWELL: Why, no, Sir, Everybody knows you are paid you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life in the intercourse with his friends?

JOHNSON: But, Sir, does not affecting a warmth when for affecting warmth for your client, and it is therefore properly no dissimulation; the moment you come from the Bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the Bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble on his hands when he should walk upon his feet.

It is argued that what a lawyer says is not the expression of his own mind and opinion, but rather that of his client. A lawyer has no right to state his own thoughts. He can only say what his client would have said for himself had he possessed the proper skill to represent himself. Since a client is deemed innocent until proved guilty, a lawyer's knowledge that his client is guilty does not make him so.

As one attorney put it:

The lawyer is indeed only the mouthpiece and prolo-

gator of his client, and the underworld, in their characteristically graphic manner, indeed call their lawyers the mouthpiece. It is well to remember that an advocate should never become a litigant, as it were, and must never inject his own thoughts and opinions into a case.

It is asked:

How can a lawyer, or any person for that matter, know whether a person is guilty before his guilt is established? "To be guilty" under our concepts of due process means to be so adjudged after a trial by a jury or court as due process in the particular case may require. A person charged with crime might be completely deprived of counsel. For all the lawyers in the community might believe him guilty and wash their hands of him.

Again:

How does such prejudgment of guilt differ from the lynch mob, which is equally so convinced of guilt that it considers a trial an idle ceremony? True, to be strung up by the lynch mob without a trial may be somewhat more embarrassing to the victim than to submit to a trial without counsel, but, if defense counsel plays the important role which lawyers like to think he does, a person charged with crime is indeed in an unhappy position if he has to rely on his own knowledge of the law and wits to counter an experienced prosecutor bent on conviction and whose success is measured by his percentage of convictions.

Another lawyer contends:

On undertaking a client's case, he must wipe out the villainy of the defendant with all the resources at his command. Are not the facts that are unfavorable to his client to be left for the prosecution?

If the lawyer may see the better way and approve (not to foster claims that are wrong) the circumstances that compel him, especially in criminal cases, to follow the lesser. Thus the lawyer lives with the maxim: "*Video meliora proboque deteriora sequor*".

Such an attitude we submit entirely overlooks the bifurcated robes of a lawyer. The duty is not simply one which he owes his client. Just as important is the duty which the lawyer owes the court and society.

Great as is his loyalty to the client, even greater is his sacred obligation as an officer of the court. He cannot ethically, and should not by preference, present to the court assertions he knows to be false.

The Canons of Professional Ethics of the American Bar Association are clear, succinct and unambiguous:

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 chicanery. He must obey his own conscience and not that of his client.

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong.

His appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

The American Bar Association recommends this oath of admission:

I will not counsel or maintain any suit or proceeding

\* The author is a member of the New York Bar (New York City); this piece is taken from the American Bar Assn. Journal, April 1952.—The Editors.

which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law.

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 man 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 insincere statements by counsel.

It is too glibly said a lawyer should not judge his own client and that the court's province would thus be invaded. In more than 90 per cent of all criminal cases a lawyer knows when his client is guilty or not guilty. The facts usually stand out with glaring and startling simplicity.

If a lawyer knows his client to be guilty, it is his duty in such case to set out the extenuating facts and plead for mercy in which the lawyer sincerely believes. In the infrequent number of cases where there is doubt of the client's guilt and the lawyer sincerely believes his client is innocent, he of course should plead his client's cause to the best of his ability.

In civil cases, the area of doubt is undoubtedly considerably greater. At a guess, only one-third the cases presented to a lawyer are pure black or pure white. In only one-third of the cases does the lawyer indubitably know his client is wrong or right. In the other two-thirds gray is the predominant color. It is the duty of the advocate to appraise the client's cause in his favor, after giving due consideration to the facts on the other side. In such a case, it is of course the duty of the advocate to present his client's case to the best of his ability.

Where the lawyer is convinced, after studying the law and the facts, that his client cannot succeed, his duty is to obtain the best settlement he can, fairly and expeditiously.

Every hour of the day, the lawyer is a persuader. His success must be measured by the ability he possesses to make other see situations in the same light that he does.

That does not mean, however, that the lawyer should fool himself. He should not be such a partisan that he blinks at the true facts and views the situation through the rose-colored glasses of hopefulness, partisanship, or his own self-interest.

A lawyer should worship truth and fact. He should unhesitatingly cast out the evil spirits of specious reasoning, of doubtful claims, of incredible or improbable premises.

Truly, the best persuader is one who has first really persuaded himself after a careful analysis of the facts that he is on the right side. Some assert that lawyers must be actors. That is only partially true. An actor can portray abysmal grief or ecstatic happiness without having any such corresponding feeling in his own heart. A young actor can well portray the tragedy of King Lear, though his face is unringled and unmarred after has makeup is removed.

A good actress can portray the anguish of a dotting mother over the death of a child, even though the actress herself is a mere girl whose only relationship with children has been with her own sisters and brothers.

The good lawyer cannot make such quick changes as the actor.

The true lawyer can only be persuasive when he honestly believes he is right. Then the able advocate is invincible. His

persuasiveness is so powerful that it can pierce through rock and steel. Indeed, it is so strong that it can change the mind of a judge who has already decided to find to the contrary.

Oftimes a lawyer has argued against his better judgment, has allowed himself to be persuaded against himself. Sometimes too, he has won. Yet, no matter how great the man, the true lawyer cannot dissemble. If he has no confidence in his own facts and in the truth and righteousness of his client's cause, then no matter how hard he tries and how good an actor he may be, his auditors will perceive that he himself does not really believe what he utters. That way lies disaster.

In this search for the ascertainment of the truth, however, the lawyer should not hypnotize himself. Merely because his client retains him for a fee, the lawyer should not permit himself to be overpersuaded.

It has often been suspected that the more gold with which you cross the palm of the fortune-telling gypsy, the better might be the fortune she would predict.

It hardly need be said that lawyers, however, should be above the itinerant and nomadic status of gypsies. Their power to look the facts in the eye should not be affected or weakened merely by the size of the fee involved.

It is to be noted that in this discussion, the lawyer always acts with sincerity and honesty. His partisan position predisposes him to believe in his client's cause. He is not insincere enough, however, to tender facts that he knows to be false or take a position in which he does not believe sincerely.

A lawyer who signs his name to a set of papers, should in effect vouch for the honesty and fairness of his client's cause. Otherwise strike and blackmail suits based upon improper motives would clutter up the court calendars to such an extent that honest and fair causes would be seriously delayed in trial.

It is as much the lawyer's duty to brush off and refuse to participate in cases that are mouldy and can only add destructive fungus growth to the tree of justice, as it is to refuse to assist in the subornation of perjury. A lawyer should strive to do his bit towards pruning and keeping alive the indispensable flower of justice as the gardener tends and nurtures his plants.

All lawyers know everyone is entitled to the best defense he can muster. This does not mean every lawyer must take every case, including those in which he has no belief in his client's contention. For instance, a well-known public figure, very active at the Bar, refuses to represent alleged bootleggers, counterfeiter or rapists. Should he be censured because of such prejudices?

There are thousands of others at the Bar who could have represented defendants accused of those three crimes, when indeed they were innocent.

The matter of duty and personal preference is not to be confused. A lawyer has the right to represent in civil courts the husband or wife accused of adultery. He does not have to do so unless he sincerely believes that his client is innocent of the offense charged.

Of course, when a lawyer is assigned by the court, he must fulfill his obligation to the court. This does not include, however, presenting false or improper testimony. Nor does it justify dissimulation and insincerity, even where the lawyer is consummating a court order to act in defendant's behalf.

Rather it is the duty of such an advocate to present all the relevant facts and circumstances. If he can show the prosecution is mistaken and his client is innocent, that is his duty. If he knows his client to be guilty, then it is his duty merely to over-

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## Book Review

**REVISED PENAL CODE:** by Vicente J. Francisco, East Publishing, 1952. Vols. 1 & 2, \$19.00 a volume; \$35.00 a set.

None has contributed more to the country's legal literature than Dean Vicente J. Francisco. He has written legal treatises and texts on almost every phase of the law, and always, each field of the law upon which his incisive mind has ploughed, has been enriched thereby. Every book he has written is concededly authoritative, and on more than one occasion, the Supreme Court, in its decision, made reference to some of them. And if all the legal treatises and texts he had previously written bear the impress of authority, that impress should be more marked and indelible on his latest book, the subject of which—criminal law—he is most qualified to write about. To this subject, he has dedicated a great portion of his life; to his success in its practice, he owes much of his fame as a legal practitioner. Indeed, the Dean's name has become inextricably linked, has become almost synonymous even, with criminal law. It is not surprising, therefore, that the publication of the present volume has been much awaited and so well received.

The present volume—the most recent of the commentaries on the *Revised Penal Code*—was prompted by the author's belief that it is his professional duty to make available to others, his professional experience in the practice of criminal law. "All knowledge is vain when it is kept to one's self; it becomes of any use only when imparted to others. The imparting of knowledge, however, will be ineffectual, if not done with a noble purpose. The present work, impelled as it had been by the author's sense of kinship with his fellow lawyers and by his desire: "to aid in the fulfillment of the profession's pledge to defend the innocent and bring the guilty to justice," has such a purpose. And in this sense, the book may rightly be called a "labour of love."

Dean Francisco's *Revised Penal Code* makes a welcome departure from the usual technique employed by other commentators on the penal law. The author has not contented himself with citing and reproducing controlling decisions, but has ventured farther afield by setting down principles and commentaries derived from the philosophy and the jurisprudence of criminal law. As a skillful surgeon artfully cuts to get to the affected parts of the human anatomy so that they can be removed or

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sent the extenuating facts and circumstances on his client's behalf.

Chicanery and insincerity should be no part of a lawyer's make-up in any case.

Let us return for a moment to the delightful dialogue between Boswell and Johnson. It makes wonderful reading. Is it a real answer to the question posed at the beginning of this article?

Do you, Mr. Lawyer, or indeed any human being possess the ambivalence to dissimulate in the courtroom, and to "resume your usual behaviour" when you come from the Bar? Can you throw off insincerity and dissimulation in the courtroom as though it were a cloak, subdue that dishonest portion of your thinking, and resume being a man of integrity when you return to your office?

Inevitably the two character traits contained in the one body would tend to merge. Obviously, dissimulation and insincerity will eventually overcome integrity.

Whether he walks upon his hands or feet, as Samuel John-

son argued, so' had Dean Francisco incisively cut to the deepest philosophical beds underlying each provision of the penal code. This was done, as the preface states, "not out of presumption but in the honest conviction that a collection of provisions of law and decided cases must necessarily be haphazard, confusing, and in the end of little help or value, unless it is brought together and organized on the basis of principles."

At the same time, the emphasis due to judicial interpretation and applications of our criminal law was not neglected. On the contrary, discussion of the decisional law on the subject was made more comprehensive by the manner of presentation adopted; it is made in question and answer form in the manner of Viada. The legal problem posed by every proviso in the penal code and its solution are presented in a direct, dramatic and easily understandable way. Such mode of approach makes possible a comprehensive discussion of almost all the cases decided by the Supreme Court in connection with the particular proviso in question. Thus, the book is not only an analytical study of the philosophy behind each provision of the code; it also serves the purpose of a case-book, with this decided advantage: that it is presented in a form most convenient both for the busy lawyer in the provinces who due to circumstances oftentimes beyond his control, cannot keep abreast with all the decisions of the Supreme Court, as well as for the candidate for the bar, who will find in the novel mode of approach, apt training in how to make effective answers to bar questions.

Taken all together, Dean Francisco's *Revised Penal Code* is the most comprehensive study of criminal law so far published. Each article of the *Revised Penal Code* is treated first, from its historical and philosophical background, followed by the judicial interpretations made thereof. In controversial questions, and in the absence of decisions by the higher courts on the matter, the author suggests possible solutions. In the book, one readily sees the hand of a legal craftsman; it is written in a scholarly, but readable and far from pedantic, manner. It breathes the spirit and intent of the purpose and function of our criminal law. It is compact but thorough in the treatment of the subject matter, and should be a credit to the professional library of judges and lawyers as well as to the bookshelf of students of law.

—ATTY. LOPE E. ADRIANO

son argues, may not affect the character or soul of the walker. Pleading earnestly a cause which the lawyer knows to be untrue cannot but perniciously affect his character.

Whatever the situation was in Johnson's day, there should be no artifice at the Bar. Nor should a man "resume his usual behaviour" the moment he comes from the Bar. The lawyer's usual behavior both in his office, and at the Bar and in Society, should be that of a man of probity, integrity and absolute dependability.

The argument that a lawyer should be a mouthpiece for his client, indelicate as that connotation may be, is specious and only logical to a limited extent. A lawyer should not be merely a mechanical apparatus reproducing the words and thoughts and alibis of his client, no matter how sincere or dishonest. Rather the lawyer should refuse to speak those words as a mouthpiece, unless the utterances of his client are filtered and purified by truth and sincerity.

Chicanery, dissimulation and insincerity may be words to be found in the dictionary in the lawyer's library. But they should never be found in the lawyer's heart.