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THE “GOOD PERSON” QUESTION: VALID QUERY OR HOBSON’S CHOICE?

*Raymond M. Brown**

It is an act of hubris for me to comment on Professor Gillers’ arguments. However, there are two aspects of his position which I feel compelled to discuss.¹ The first is the deceptive complexity of his basic question: “Can a good lawyer be a bad person?” The second is whether the challenge of being a “good person” presents the zealous lawyer with a Hobson’s Choice: the need to satisfy more than one master.²

Professor Gillers’ qualified exclusion of criminal defense lawyers from the “good person” inquiry raises the more fundamental issue of whether we work within a morally just system.³ After careful thought, a practicing lawyer must conclude that uncertainty⁴ surrounding the lawyer’s proper role and profound flaws in the justice system make Profes-

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1. Every trial lawyer has the shocking experience of reading a transcript of what he thought was a concise legal argument or summation only to be aghast at the strange linguistic formulations which fell from his lips. On sober reflection it is clear that this mirrors the subtle but unmistakable difference between the rhythms of spoken and written speech. This article represents a hybrid form, an attempt to edit a spoken presentation from a rough transcript into a respectable text without destroying the character of the original discussion. Quotations from professor Gillers’ (Draft) are from the January 14, 1998 Draft of his paper “Can a Good Lawyer Be a Bad Person?” which he circulated before the Symposium (hereinafter “Draft.”). The final version is in this volume, 2 J. INST. STUD. LEG. ETH. 131 (1999).

2. According to Noah Webster’s original dictionary “Hobson’s Choice” is “a vulgar proverbial expression, denoting ‘without an alternative.’ It is said to have had its origin in the name of a person who let horses and coaches, and obliged every customer to take in his turn that horse which stood next to the stable door.” AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). Though it should be noted that Eric Partridge has a different view of its etymology and tells us that it means “That or none.” A DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH (8th ed. 1984).

3. Professor Gillers assumes a “just legal system.” Draft at 1 and 16, footnote 22. However, the criminal justice system falls so far short of this goal that it is a mistake to examine real ethical issues concerning the lawyer’s function using the gossamer assumption of flawlessness.

4. Professor Gillers obviously recognizes the complexity of the question since the answer *he* supplies is “. . . *sometimes*. Certainly not always. And not automatically.” Draft at 21 (This answer is given to the “question” reconstituted as to whether lawyers should be willing to “think. . . from the standpoint of somebody else.”) Draft at 22.

sor Gillers' question generally unanswerable and dangerous in the criminal defense context.

The fatal flaw in the question lies in the lack of a consensus about what constitutes "good person" conduct for a lawyer. Before exploring the legal community's lack of clarity on this point, I should state my own bias. Whether the lawyer is acting as a "good person" should not be judged by extra-ethical standards applied to the lawyer during litigation. Rather, the lawyer acting as "good person" should be concerned about our failure to strive hard enough to build a "just legal system." The "good person" is the lawyer concerned about problems raised by the title of this conference, "Access to Justice." Is access to the institutions of justice distributed equally or primarily to those with power and economic strength? Is substantive justice ever improperly determined on the basis of gender, race, class or cast?

I concede that my concept of what constitutes "good person" conduct will not meet with universal acceptance. However, the fatal complexity of the question "Can a good lawyer be a bad person?" is demonstrated by the wide variety of responses it generates in the legal universe. To structure these responses I suggest that we divide the legal community into three Estates.

The First Estate is that of Real People, composed of those not having law degrees and not functioning as moral philosophers. The Second Estate consists of Practicing Lawyers with a Third Estate reserved for Legal Academics. Posing Professor Gillers' question to each of these groups produces varying and frequently unsatisfying answers, proof enough that the "good person" question is flawed and dangerous.

A Delegate of the Estate of Real People would probably ask "Aren't most good lawyers 'bad people.' Don't they represent horrible clients and use clever technicalities to thwart true justice?"

Some years ago I saw a television interview showing two ladies walking down a Michigan street prior to the start of a well publicized local criminal case. A television reporter stuck a microphone under their chins and said, "What do you think about this case that's coming up?" One lady made me feel very good because she said, "I just hope this guy gets a fair trial 'cause he's entitled to one." Suddenly however, the other lady grabbed the microphone and said, "He's only entitled to a fair trial if he's innocent."

At Court TV⁵ there is lively feedback from viewers by means of computer e-mail. Amazingly, zealous and aggressive lawyers whose tri-

5. The Courtroom Television Network.

als are televised are frequently castigated by viewers who dislike their clients. The same viewers who are capable of seeing fine distinctions on legal and strategic issues are unwilling to acknowledge separation between lawyer and client.

This is noteworthy since the jury system is predicated on the belief that ordinary citizens are capable of internalizing important values related to due process. (Jury instructions are meaningless if this predicate is incorrect.) Somewhat reassuring is the anecdotal experience of criminal defense lawyers who are often told by jurors that a defendant was acquitted because the state had not proven its case beyond a reasonable doubt despite jurors "belief" that he was guilty .

On the other hand these same criminal defense lawyers share the cocktail party, bus, or train experience of having someone turn to them, after learning of their criminal background, and asking the "Big Question."⁶ The "Big Question" is a variation of "How do you represent people when you know they're guilty?" The first few times a young lawyer hears it she launches into a discourse on the adversary system and the Bill of Rights only to see the eyes of her listeners glaze over like Christmas hams.

These examples suggest that non-lawyers vary tremendously in their willingness and capacity to adopt basic concepts of the justice system, depending on circumstances, training, personality and timing. These opinions also suggest great confusion in evaluating and understanding the role of the advocate. Some folks would characterize a lawyer as a "good person" if she zealously championed her client's cause. Other citizens would have a definition of a "good person" that turned on whether *they* were sympathetic to the client's cause. Clearly, there is no consensus in the First Estate on the definition of a lawyer's role or of what would make a lawyer a "good person."

The "good person /bad lawyer" question produces an equally perplexing set of responses when presented to practicing lawyers.

"Why are you bringing me that hypothetical stuff right now! I've got interros to answer and motions to file and sooner or later I have to fire a secretary who's a nice person but doesn't work very efficiently. Then I've gotta' get over to the jail and see a client before I go to court this afternoon."⁷

6. For a further discussion of the "[Big] Question" see Raymond M. Brown, *A Plan to Preserve An Endangered Species: The Zealous Criminal Defense Lawyer*, 30 LOY. L.A. L. REV. 21 (1996).

7. Composite hypothetical answer based on 25 years of being, and working with, practicing lawyers.

The typical practicing lawyer barely has time to breathe much less the leisure to contemplate abstract theoretical questions. When ethical issues arise in practice, the rules are consulted and (hopefully) followed.

The lawyer's response may vary slightly if he is active in the bar and sits on one of many committees with potential to study systemic questions. However, even in an environment conducive to thoughtful analysis, questions about the moral conduct of lawyers and broader issues affecting the entire justice system are frequently evaded.

In New Jersey, our late Chief Justice Robert Wilentz responded to lawyers who criticized the justice system by assigning them to committees which met on snowy evenings in the Trenton gulag. These committees would focus on issues like "sanctioning," or how the criminal justice system should work.

Invariably, some committee member would say, "What about race and class? Why are so many blacks and Latinos in our prisons?" After heated discussion an answer would surface.

"That is a question of social justice. It doesn't really impinge on our role as lawyers. We are only concerned with whether the rules are correct, whether any judge is overtly discriminating and whether there is any overt or obvious racism or sexism. We don't have time to examine broad complex moral questions."⁸

Limitations on time and resources, and the perception that the overlap between social and legal justice is not the concern of the bar, means that deeper, moral questions escape examination.

There may, of course, be some exceptions. In February, 1997, the ABA House of Delegates passed a resolution⁹ asking death penalty jurisdictions "not to carry out" the death penalty until certain due process standards were satisfied, including the "eliminat[ion of] discrimination in capital sentencing on the basis of the race of either the victim or the defendant." This certainly evidences a concern with "access to justice" issues consistent with "good person" conduct beyond the purview of the normal ethical rules.

8. This composite hypothetical question and answer are based on the author's service on many bar and court committees including the New Jersey Supreme Court Special Committee to Assess Criminal Division Needs (1989-90) and on the New Jersey Supreme Court Task Force on Sanctioning and Probation (1991-92).

9. H.R. REP. No.107 sponsored by the Section on Individual Rights and Responsibilities was adopted by a vote of 280-119.

However, even this modest¹⁰ proposal has produced considerable controversy between defense lawyers and prosecutors.¹¹ It has also prompted ideological attacks including the assertion that the resolution "subject[s] the Association yet again, to charges that it is a political action lobby rather than a professional association of the bar."¹²

It is, of course, not reasonable to impose on lawyers acting as "good people" the obligation to "resolve" the death penalty controversy, when the rest of society remains deeply divided on the issue. However, the cautious position staked out by the ABA House of Delegates met not just with opposition, but with the accusation that the action was "political." This suggests the lack of a consensus on how "good lawyers" should approach deep moral questions. (Sometimes perhaps we are only driven to approach issues like this by a sense of fatigue like that reflected in Justice Blackmun's despairing resolve to no longer "tinker with the machinery of death."¹³)

However, American lawyers are not alone in evading profound moral questions because of the busy-ness of their lives or the intractability of the problems. Professor Richard Weisberg has studied the performance of the French bar during World War II. He has highlighted its willingness to defy a long, noble tradition of French legal history, by litigating the question of who was a Jew for purposes of deportation to death camps, under the Vichy Regime's Statute *des Juifs*.

The failure of French lawyers to challenge the Vichy scheme has been viewed by many as a betrayal of the first principles of French justice,¹⁴ an issue still being fought in France and reflected in some of the controversy surrounding the recent trial of Maurice Papon. As professor Weisberg notes,

10. It important to note that through House Report 107 "the Association takes no position on the death penalty."

11. See, e.g., Michael D. Wims, *Debating ABA's Death Penalty Resolution: Bad Process, Bad Result*, 13 CRIM. JUST. 18 (1998) which includes the text of the "Dissent" from H.R. Rep. 107 written by the Criminal Justice Section's Prosecution Function Committee.

12. *Id.* at 20.

13. In 1994, after a lifetime of supporting the death penalty, Justice Blackmun dissented from a denial of certiorari in a capital case, *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994). "From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor."

14. Richard Weisberg, *Legal Rhetoric Under Stress: The Example of Vichy*, 12 CARDOZO L. REV. 1371, 1373 (1991).

“...lawyers seek relief from considering the basic premises of their actions by recourse to eloquence, formalism, and the situational realities of the ‘job.’”

We may find a perverse sense of relief in the notions that American lawyers are not alone in finding it difficult to wrestle with deeper systemic questions. Nonetheless, we are forced to conclude that the Second Estate fails as dismally as the First in discovering a useful definition of the lawyer acting as “good person.”

Among academic legal ethicists I am certain that there is spirited debate about what constitutes a “good person” in the context of Professor Gillers’ question. However, I want to discuss a problem raised by a book compiled by Mersky and Blaustein and published in 1978. It ignored the first 100 Justices of the United States Supreme Court¹⁵ and asked 100 legal scholars¹⁶ around the country to designate *inter alia* the “greatest” Justices.¹⁷

Justice Roger B. Taney was the author of *Dred Scott*¹⁸ and a man whom Charles Sumner said “Should be hooted down in the page of history.” Taney was designated one of the twelve greatest. He was in distinguished company with Justices Cardozo, Black, Stone, Brandeis, and others about whom there would be agreement. It is troubling that academics let the brilliance of Taney overwhelm the moral questions that arise from his authorship of the opinion in *Dred Scott*.

This dispute over whether the assessment of the “goodness-greatness” of Taney (and by implication other lawyers and judges) should be based on his skill or on the moral quality of his work is not an academic artifact. It has figured prominently in a vigorous and ongoing debate over whether Associate Justice Clarence Thomas has the requisite qualities to sit on the Supreme Court.¹⁹

It also suggests that the Academic Estate is no closer to a clear concept of the lawyer as “good person” than the rest of the legal world. Without clarity on this point, Professor Gillers’ question must remain unanswered.

15. ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES* (1978).

16. The qualitative analyses in the study were based on surveys of “. . .law school deans and professors of law, history and political science who deal with constitutional law. . .” *Id.* at 116.

17. “Neither criteria, yardsticks, nor measuring rods were provided the experts to assist in making their appraisals.” *Id.* at 36. The other 7 are Marshall, Story, John M. Harlan, Holmes, Hughes, Frankfurter and Warren. *Id.* at 37.

18. *Scott v. Sandford*, 60 U.S. 393 (1857).

19. A. Leon Higginbotham Jr., *An Open Letter To Justice Clarence Thomas From a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1007 (1992).

I have gone further however, and said that the question is not only unanswerable, but dangerous when raised in the criminal justice context. This is true, despite Professor Gillers' caveat that "Criminal matters are a special case."²⁰ This disclaimer does not eliminate the dangerous implications that the criminal defense lawyer can, like his civil counterpart, serve more than one master while working within the system.

It is at this juncture that Professor Gillers' desire to "Focus [on] the morality of the lawyer working within an essentially just system" suffers from its divorce from reality. Our criminal justice system remains profoundly flawed in ways that make debates circumscribed by the "premises of the system" misleading when applied to the real world.

Criminal defense lawyers face many problems for which little practical guidance can be obtained by consulting current ethical guidelines. To inaccurately suggest to these beleaguered lawyers the need to satisfy an external "good person" standard is to deepen their dilemmas. To suggest that they function in a closed system that adequately defines their roles isolates them from the important ethical debates of the day.

A prime example of the "insoluble" problems which are exacerbated rather than solved by the Model Rules is the "Perjury Trilemma" so artfully named and described by Monroe Freedman.²¹ This problem of *potential* client perjury is an everyday problem faced by criminal defense lawyers. It is addressed by RPC's 1.6, 1.3, and 3.3, governing client confidences, and the lawyer's duties to the tribunal and his client. As Comments to the Rules and the observations of practitioners make clear, these Rules make it frequently impossible to act both ethically and effectively.

I have extended Professor Freedman's paradigm to what I call the Racial Trilemma created by the requirement that a lawyer offer a racially neutral explanation for peremptory jury challenges once an opponent has made out a *prima facie* case under *Batson*²² and its progeny.

Given the prominence of race and gender in our society, and the time limitations generally confronting lawyers in jury selection, it is illusory to believe that all peremptory challenges can be racially and (gender-wise) neutral.²³ Consequently RPC 3.3's duty of Candor to the

20. The Professor cites Model Rules 3.1 and 3.3 and ABA Standard 4.1.1 (fn. 16) as evidence that "the defense lawyer's morality must be strictly circumscribed by the premises of the system and the role the lawyer plays within it." Draft at 16.

21. See MONROE FREEDMAN, UNDERSTANDING LAWYERS ETHICS 6 (1990).

22. *Batson v. Kentucky*, 476 U.S. 79 (1986).

23. The concept of the "Racial Trilemma" is still in its nascent stages. However, some earlier thoughts on the prominence of race in jury selection appear in Raymond M. Brown, *Peremptory Challenges as a Shield for the Pariah*, 31 AM. CRIM. L. REV. 1203 (1994).

Tribunal is under constant strain when lawyers are called upon to justify their strikes. (This has led to detailed and sometimes tortured analyses of pretextual reasons offered in defense of challenges.)

In support of his view that the criminal justice system has sufficient moral integrity to be analyzed separately, Professor Gillers also offers *Gideon's*²⁴ extension of the Sixth Amendment. This, he says, shows the system correcting its own "morally indefensible" legal reasoning. However, the problem of adequate representation for indigent defendants still plagues our system, in part because the standards which the Supreme Court has evolved for evaluating ineffectiveness of counsel under *Cronic* and *Strickland*²⁵ lend themselves to the notion that if the criminal defense lawyer is breathing, then there has been adequate representation. Thus, our current approach to the promise of the Sixth Amendment reveals the deep dark secret of inadequate indigent defense rather than proof that the system is so clear about the lawyer's role that it can be regarded as morally self-contained.

The thinking criminal lawyer must reject the notion that she lives in a separate, self-governing ethical world. Consequently Professor Gillers' notion that there may be a valid "extra-ethical" "good person" concept will leach over into the criminal realm. This brings us back to where we began. The criminal defense lawyer is confronted with a Hobson's Choice. She must follow Lord Brougham's famous "declaration" that "[A]n advocate knows but one person in all the world, and that is his client."²⁶ while attempting to satisfy the vague but dangerous suggestion that she function as a "good person."

The "Conclusion" to Professor Gillers' Draft uses Brougham's phrase to highlight the "dilemma" of the lawyer who is asked to think from a second point of view. Brougham's axiom poses as significant an issue today as it did a century and a half ago but not in the way implied by today's discussion. Professor Gerald Uelman describes Brougham's comment as "the quintessential definition of the appropriate role of a defense counsel."²⁷ This reference to Brougham in Professor Gillers'

24. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

25. *United States v. Cronic*, 440 U.S. 648 (1984) and *Strickland v. Washington*, 445 U.S. 688 (1984) establish the standards by which claims of ineffective assistance of counsel claims are measured against the 6th Amendment of the US Constitution. Read *in pari materia* they establish that a conviction will only be reversed where a court finds that "but for counsel's unprofessional errors, the result of the proceeding would have been different."

26. *Supra* note 2.

27. Gerald F. Uelman, *Lord Brougham's Bromide: Good Lawyers As Bad Citizens*, 30 *Loy. L.A. L. Rev.* 1, 119, 120 (1996).

paper draws the criminal defense lawyer deeper into the "good person" discussion.

Professor Uelman's recent comments on the subject were offered in response to criticisms by columnist George F. Will, and supported by former Co-Counsel Robert Shapiro, that Johnnie Cochran was a "good lawyer" but "bad citizen" when he "played the race card" in defending his client in *California v. O.J. Simpson*.

Putting aside my disdain for the hypocrisy of the "race card" allegation, I will end this comment by focusing on Cochran's much maligned closing argument. There he attacked the conduct of a policeman, Mark Furhman, comparing him to Hitler:

And now we have it. There was another man not too long ago in the world who had those same views who wanted to burn people who had racist views and ultimately had power over people in his country. People didn't care. People said, "He's just crazy. He's just a half-baked painter." And they didn't do anything about it. This man, this scourge, became one of the worst people in this world, Adolph Hitler, because people didn't care, didn't try to stop him. He had the power over his racism and his anti-religion. Nobody wanted to stop him, and it ended up in World War II. The conduct of this man.²⁸

There were a variety of critical responses to these words, on the strategic and historical level. Strange indeed, however, were those that implied that because of the history of racial tension in Los Angeles that some concept of "good citizenship" ("good personhood"?) required Cochran to refrain from making this argument *even if he thought it served his client best*.

I do not believe that Professor Gillers would support this criticism, but it is precisely the kind of dilemma we will confront if we offer to the bar the idea that there is a dichotomy during litigation between being "good lawyers" and being "good people." If we must press the "good person" concept, we should urge lawyers to litigate zealously and then speak publicly and often about the need for such zeal, even in the service of the most despised client.

28. Cochran closing argument, C.A. v. O.J. Simpson.

