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## ON LAWYERS AND MORAL DISCERNMENT

ROBERT E. RODES, JR.†

Lawyers make their living by interfering in other people's affairs. If they are to lead moral lives, they must exercise moral discernment regarding those affairs as well as regarding their own. Rule 2.1 of the American Bar Association's Model Rules of Professional Conduct says: "In rendering advice a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."<sup>1</sup> People who come to lawyers for advice are apt to be, to a greater or less extent, traumatized. They are very apt, in the unfamiliar situation they are encountering, to do whatever their lawyer says. The lawyer, therefore, has a serious responsibility not to tell them to do anything wrong.

Not only must lawyers refrain from advising their clients to do anything wrong; they must also refrain from helping their clients do anything wrong that they think up for themselves. Lawyers' moral discernment must extend not only to their clients' agendas but also to how far their service to their clients makes them complicit in whatever wrong the clients do. There are various ways of addressing the question of complicity; all of them call for moral discernment regarding the lawyer's role distinct from moral discernment regarding the client's agenda.

Lawyers' moral discernment, whether regarding their clients' actions or their own, is commonly exercised in dialogue. An agenda for a representation is not formed by a lawyer laying moral pronouncements—or, worse, guilt trips—on a client on a take it or leave it basis. The case may well be one where the client's moral discernment is better than the lawyer's, and the two of them, when they have reflected on it together, may well come up with a better moral discernment than either had at the

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<sup>1</sup> MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007).

outset. A common agenda calls for a common discernment, and a common discernment is achieved through dialogue.

Other forms of dialogue are called for when a lawyer is dealing with other parties to a transaction or with opposing parties to a litigation. It is possible, I suppose, to negotiate a transaction or settle a case through sheer power and the threat of its exercise, but it is more agreeable all around to put on the table the question of what is fair and try to arrive at a common discernment. Advocacy also calls for moral dialogue. *Dura lex sed lex* will sometimes, perhaps, sway a court by itself, but one will make a more effective argument if one can lead a court or jury to a moral discernment in accordance with the claim one is presenting.

In legislation also, there is moral discernment arrived at through dialogue. There is, of course, no one-to-one correspondence between law and morality, nor should there be. We cannot effectively make people do good and avoid evil through the force of the enacted law, but we certainly do not want to deploy that force in favor of having them do evil and avoid good. Whatever else we put into the law, we try to make laws that encourage people to do as they ought, and we do our best not to make ones that encourage them to do as they ought not. Therefore, in the legislative process, there is a lot of discussion of the rights and wrongs of particular cases to which the proposed law may apply, and a reaching for a common moral discernment on which a majority can vote.

By using the term “moral discernment,” I am making a claim that not everyone will accept. The claim is that the concepts of Right and Wrong are objective qualities that may be predicated of particular human acts in the same way that Green and Blue are objective qualities that may be predicated of particular neckties.<sup>2</sup> The most common objection to this claim is that the rightness or wrongness of an act cannot be empirically verified, but when you come right down to it, neither can the greenness or blueness of a necktie. That is, just as there is no criterion of

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<sup>2</sup> Right and Wrong, as I am using the terms, are necessary but not sufficient guides for choice. By Right I mean within the range of morally acceptable options, and by Wrong I mean outside that range. Complete theories of right action require more subtle definitions. See Michael Slote, *Right Action*, in THE OXFORD COMPANION TO PHILOSOPHY 818, 818–19 (Ted Honderich ed., 2d ed. 2005) [hereinafter OXFORD COMPANION].

rightness that you can apply to an act, so there is no criterion of blueness that you can apply to a necktie. You compare the necktie with other objects you know are blue, and you compare the act with other actions you know are right.

Obviously the discernment of right and wrong cuts deeper than the discernment of blue and green. When I was a child, everybody around me agreed on what things were blue and what things were green. I very soon found myself making judgments of color in full accord with theirs, and I have never had occasion to question any of their judgments since I have grown up. Naturally, I cannot say the same about judgments of right and wrong, but the fact that there is disagreement on moral questions does not prove that those questions have no right answers. Some moral questions are hard. Some require more reflection than most people have the time or the ability to deploy. The same is true of other questions to which nobody doubts there are right answers. Take the question of whether a certain pill cures the disease for which it is prescribed, causes heart attacks, or both. There will be a spate of empirical studies before even the experts claim to know. Or take the question of whether two notes are in harmony. Play the two together, and some people will tell you immediately. I will not have a clue.

A number of eighteenth century British philosophers, notably David Hume<sup>3</sup> and Adam Smith,<sup>4</sup> concluded that people have a moral sense that is the ultimate arbiter of questions of right and wrong. Hume put it this way:

The final sentence, it is probable, which pronounces characters and actions amiable or odious, praise-worthy or blameable; that which stamps on them the mark of honour or infamy, approbation or censure; that which renders morality an active principle, and constitutes virtue our happiness, and vice our misery: It is probable, I say, that this final sentence depends on some internal sense or feeling, which nature has made universal in the whole species.<sup>5</sup>

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<sup>3</sup> See DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 5 (Tom L. Beauchamp ed., Oxford Univ. Press 1998) (1777).

<sup>4</sup> See ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 128 (Knut Haakonsen ed., Cambridge Univ. Press 2002) (1759).

<sup>5</sup> HUME, *supra* note 3, at 5.

Edmond Cahn in the 1950s<sup>6</sup> and James Wilson in the 1990s<sup>7</sup> have argued for a similar sense. This sense seems very similar to what Jacques Maritain calls “knowledge through connaturality.”<sup>8</sup> Through this concept, Maritain relates the immediate discernment of right and wrong to Natural Law—which, as he describes it, does not seem too different from Hume’s internal sense or feeling which nature has made universal in the whole species:

My contention is that the judgments in which Natural Law is made manifest to practical Reason do not proceed from any conceptual, discursive, rational exercise of reason; they proceed from that *connaturality or congeniality* through which what is consonant with the essential inclinations of human nature is grasped by the intellect as good; what is dissonant, as bad.<sup>9</sup>

Cahn and Wilson are both chary of resting moral judgments on discursive reasoning.<sup>10</sup> Hume and Maritain both assign such reasoning a definite, albeit subordinate, place—quite similar places, although not exactly the same. After the passage just quoted, Hume says:

[I]n order to pave the way for such a sentiment, and give a proper discernment of its object, it is often necessary, we find, that much reasoning should precede, that nice distinctions be made, just conclusions drawn, distant comparisons formed, complicated relations examined, and general facts fixed and ascertained.<sup>11</sup>

He draws an analogy from a classical appreciation of the arts:

[I]n many orders of beauty, particularly those of the finer arts, it is requisite to employ much reasoning, in order to feel the proper sentiment; and a false relish may frequently be corrected by argument and reflection. There are just grounds to conclude, that moral beauty partakes much of this latter species, and demands the assistance of our intellectual faculties, in order to give it a suitable influence on the human mind.<sup>12</sup>

<sup>6</sup> See generally EDMOND N. CAHN, *THE SENSE OF INJUSTICE: AN ANTHROPOCENTRIC VIEW OF LAW* (1949).

<sup>7</sup> See generally JAMES Q. WILSON, *THE MORAL SENSE* (1993).

<sup>8</sup> JACQUES MARITAIN, *On Knowledge Through Connaturality*, in *THE RANGE OF REASON* 22, 22 (1952).

<sup>9</sup> *Id.* at 27.

<sup>10</sup> See CAHN, *supra* note 6, at 4–14; WILSON, *supra* note 7, at 1–26.

<sup>11</sup> HUME, *supra* note 3, at 5.

<sup>12</sup> *Id.* at 5–6.

Compare this with what Maritain says:

Moral philosophy has critically to analyze and rationally to elucidate moral standards and rules of conduct whose validity was previously discovered in an undemonstrable manner, and in a non-conceptual, non-rational way; it has also to clear them, as far as possible, from the adventitious outgrowths or deviations which may have developed by reason of the coarseness of our nature and the accidents of social evolution.<sup>13</sup>

In his book *On the Philosophy of History*, Maritain points to a growth through time in people's moral discernments, with a corresponding growth in moral philosophy.<sup>14</sup> He attributes that growth to "moral experience."<sup>15</sup> I gather the idea is that when we see what we do to ourselves and other people there are some things we realize we should not have done, and these realizations enter into how we behave in the future and what we teach our children. This moral philosophy, which Maritain calls "a kind of after-knowledge,"<sup>16</sup> formulates what we have learned, and new principles develop. Maritain refers to views on slavery, polygamy, the employment relation, and the treatment of prisoners of war as examples of moral development.<sup>17</sup> We can point to gender equality and concern for the environment as examples of considerable growth since the time in which he wrote.

The development of moral discernment through dialogue is analogous on a smaller scale to the development of moral philosophy through experience. Examples are everywhere. Here are three, taken more or less at random from the legal literature or from lawyers' experience:

(1) A criminal defendant has the right to be present in court when a judge is passing sentence on him. He is entitled to evoke an empathetic awareness (Adam Smith would call it sympathy) in the person who is disposing of his life. For the same reason, a personal injury lawyer should be careful to keep an injured plaintiff in the sight of the jury.

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<sup>13</sup> MARITAIN, *supra* note 8, at 28.

<sup>14</sup> See JACQUES MARITAIN, *ON THE PHILOSOPHY OF HISTORY* 104–11 (Joseph W. Evans ed., 1957).

<sup>15</sup> *Id.* at 109.

<sup>16</sup> *Id.*

<sup>17</sup> See *id.* at 105–07.

(2) In a book by Thomas Shaffer and Robert Cochran, there is a story of a young couple who come to a lawyer to get the lawyer to stop the conversion of a large house in their neighborhood into a home for mildly retarded adult men. The lawyer takes her clients to visit the men and see if that reassures them. What she is doing is adding factual information—as well as empathy—to the clients' moral scrutiny of the situation.<sup>18</sup> According to Hume, this is one of the ways that reason informs the moral sense.

(3) An employer comes to a law firm for advice about a discontinued industrial process that has turned out to be carcinogenic. The lawyers find that the cancer took so long to develop that the period of limitations under the state's Occupational Diseases Act had expired before any of the client's employees or former employees got sick. But, the lawyers suggest that since workers are suffering from a disease contracted in the employer's service, the employer may want to do something for them. The officers of the employer agree, and set up a plan of monitoring and treatment. Here, the lawyers point the way to a moral discernment that the officers might have made for themselves if their attention had not been fixed on something else. What the lawyers do is comparable to pointing out an object that another person has not noticed. Say that I see a hawk in the sky, point at it, and say, "Look, there's a hawk up there." The person with me looks up and says, "So there is."

There are various ethical theories on the market. They are often useful to guide discernment, but none of them is a substitute for the discernment itself; that is, there is no criterion that one can simply apply to all proposed actions, and so decide whether they are right or wrong. Any such criterion would either have intuitively discerned limitations or exceptions, or would require intuitive discernment to apply. Take, for instance, the Golden Rule: Do to others as you would have them do to you. This is an important call to empathetic discernment, but it cannot always be literally applied. It is all very well for me to tell my grandson he should not push his sister down because he would not want her to push him down. But, it becomes more complicated if I want to stop somebody from reading a certain

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<sup>18</sup> See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 116–29 (1994).

book because it is a bad book and I would want someone to stop me if I started to read it.<sup>19</sup> Also, I have a fairly thick skin: I am capable of blundering into doing things that mortally offend other people, but which would not in the least have offended me. The Golden Rule would not help me to discern what those things are.

The Principle of Universalizability is another useful guide for moral discernment, but not a substitute for it. The Principle asserts that to act morally is to act in ways that we would be content to have everyone act under the same circumstances. When I was a child, I stole a small pulley out of a bin of such pulleys in a Sears Roebuck store. My father told me to think about what would happen if everybody stole one. I had never thought about that before, and was duly contrite when I did. That was the Principle of Universalizability at work.

I have used the same principle in teaching Legal Ethics. One of the greats in this subject, Monroe Freedman, argues that a lawyer should be morally accountable for what cases he chooses to take, but not for what he does, as long as it is within the law, to further that case once he has taken it:

The lawyer's decision to accept or to reject a client is a moral decision for which the lawyer can properly be held morally accountable. . . . One of the most important considerations in deciding to accept or reject a client is that the lawyer, in representing the client, might be required to use tactics that the lawyer finds offensive.<sup>20</sup>

Given the Principle of Universalizability, I take the exact opposite view. There are all kinds of reasons for turning down a case, but you cannot turn it down on moral grounds unless you would be content if no lawyer took it. On the other hand, there are forensic tactics that may be quite effective, but I would be content if nobody used them. Therefore, it is morally acceptable not to use them.<sup>21</sup>

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<sup>19</sup> See, e.g., Robert E. Rodes, Jr., *Limits of Law*, 48 REV. POL. 481, 481–83 (1986) (reviewing 2 JOEL FEINBERG, *OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* (1985)).

<sup>20</sup> MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 74 (3d ed. 2004). "When Freedman was doing criminal defense work, he stopped taking rape cases because he did not want to be in the position of cross-examining the victim." *Id.* at 222.

<sup>21</sup> Bringing up irrelevant sexual irregularities on the part of rape victims is the example most commonly dealt with in the literature, but there are others. In 1921,

Either way, however, the Principle of Universalizability will not tell me which clients to take or what tactics to use. That requires moral discernment. The Principle does no more than keep me from escaping the necessity for such discernment on the ground that it is somebody else's problem.

For some religionists, divine command is an adequate source of morality. I had a student of this persuasion once in a Jurisprudence class (she graduated from law school at the head of her class). She insisted that all morality could be found in the Bible. Her views on moral questions were always tenable and always supported by Scriptural texts. They were not much different from the views of any strong Evangelical Christian, even one without her command of proof texts. For neither she, nor I, nor anyone else comes to the Scripture with a mind or a heart empty of moral discernment. Our religious commitments affect our moral discernment in many important ways, but they are not written on a clean slate and their application often requires a discerning heart.<sup>22</sup> I believe moral theology, like moral philosophy, is apt to be an after-knowledge.

Consequentialism, the view that the rightness or wrongness of an action depends on whether its effects will be overall good or bad,<sup>23</sup> is perhaps less a theory than an attitude. "You can't make an omelet without breaking eggs" is not exactly a principle of philosophy, but many moral arguments are based on it. Such arguments are often persuasive. There is a film about the staff preparations for the Normandy landings in June 1944, in which the generals agonize over whether to send parachutists to almost certain destruction in order to take out the guns that would otherwise inflict far heavier losses on the troops at the beachheads. This kind of discernment is generally conceded to be necessary in wartime, but when it is used to justify an economic system in which some people are left miserable so that the rest may prosper, we become skeptical of it. Similarly, when it is used to justify torture, most people, myself included, reject it. In short, we recognize that good results are generally better than

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Hugo Black, the future Supreme Court Justice, defending a Klansman who had shot and killed a Catholic priest, used flagrant appeals to the racial and religious prejudices of the jury. See ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 71-88 (2d ed. 1997).

<sup>22</sup> This is what Solomon asks for in 1 *Kings* 3:9 (New International).

<sup>23</sup> See Brad Hooker, *Consequentialism*, in *OXFORD COMPANION*, *supra* note 2, at 162, 162.

bad ones, but they cannot justify actions that our immediate discernment calls wrong.

Utilitarianism is a particular form of consequentialism erected into a system by Jeremy Bentham (1748–1832),<sup>24</sup> and espoused by a number of eminent thinkers since. It approves an act insofar as it causes pleasure or prevents pain and disapproves of it insofar as it causes pain or prevents pleasure. Its analyses are sometimes useful. For instance, it would support the graduated income tax by pointing out that a person gets less pleasure out of his second million dollars than his first.<sup>25</sup> But as a sufficient criterion for moral judgments, Utilitarianism will not do. In the first place, pains and pleasures cannot be definitively quantified against one another. If I am watching a bad movie in good company, does the pleasure of the company outweigh the pain of the movie? Is the whole experience more or less pleasurable than watching a good movie by myself? If a client comes in with a heartrending story, does the pleasure I take in anticipating a solution to her problem outweigh my pain in hearing about it? How does the pleasure six people take in watching one television program compare with the pleasure eighteen people take in watching another?

Even if pleasures and pains could all be quantified, the most serious objection to Utilitarianism would remain: That is that some pleasures are better than others. If A gets a certain quantum of pleasure out of listening to a symphony, and B gets the same quantum out of playing a video game in which he pretends to be a serial killer, it is not hard to think of A's pleasure as morally superior to B's. It follows that our moral discernment is not reducible to a quantitative measurement of pleasures and pains. Furthermore; some acts are generally regarded as immoral even if the pleasures they cause are far in excess of the pains. In Edinburgh in the early nineteenth century, a man named William Burke made part of his living by murdering tramps and selling their bodies to the local medical school for dissection.<sup>26</sup> Let us assume that he dispatched his

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<sup>24</sup> See generally JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (Clarendon Press 2d ed. 1907) (1789).

<sup>25</sup> See JEREMY BENTHAM, *First Lines of a Proposed Code of Law for Any Nation Complete and Rationalized*, in 'LEGISLATOR OF THE WORLD': WRITINGS ON CODIFICATION, LAW, AND EDUCATION 187, 199–200 (Philip Schofield & Jonathan Harris eds., 1998).

<sup>26</sup> See L. Perry Curtis, Jr., *Burke, William*, in 4 *ENCYCLOPEDIA AMERICANA* 796,

victims quickly and painlessly before they realized what he was doing, that they had been leading miserable lives, and that nobody missed them. On that assumption, there would be no significant pain to set against the pleasure to Burke from having money to spend, to the medical students from learning their profession, and to their future patients from being restored to health by the students' ministrations. Nevertheless, I believe most people would agree with me in stigmatizing Burke as a murderer (he was hanged). Our moral discernment disregards our measurement of pleasures and pains, and condemns the unprovoked murder out of hand.

Of course it could be argued that the pain to the general public from murders being committed with impunity outweighs the pleasure experienced in the sale and use of the cadavers. Fair enough, but the pain caused to us by the murder seems to be a product of our discernment that the murder was wrong. Again, then, the moral discernment is prior to the quantitative measurement of pains and pleasures. If the contemplation of good deeds causes us pleasure and the contemplation of evil deeds causes us pain, we cannot define good and evil in terms of pleasures and pains or the whole project will become circular.

People seem to like to form moral judgments on one or another of these theories rather than on connatural intuitive discernment because the theories give an illusion of objectivity. The author of the article on Utilitarianism in *The Oxford Companion to Philosophy* concludes by saying:

The great strength of utilitarianism as an ethical theory lies in its ability to replace the hodgepodge (and, arguably, inconsistency) of our common-sense moral intuitions with a unified system of thought that treats all moral questions in uniform fashion and in relation to an ideal, human happiness or desire satisfaction, that is both less obscure and more attractive than most alternatives.<sup>27</sup>

And Bentham himself excoriates what he calls "the principle of sympathy and antipathy,"<sup>28</sup> presumably meaning Adam

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796 (Int'l ed. 1994).

<sup>27</sup> Michael Slote, *Utilitarianism*, in OXFORD COMPANION, *supra* note 2, at 890–91.

<sup>28</sup> BENTHAM, *supra* note 24, at 13–21.

Smith's doctrine,<sup>29</sup> as "rather a principle in name than in reality."<sup>30</sup>

What one expects to find in a principle is something that points out some external consideration, as a means of warranting and guiding the internal sentiments of approbation and disapprobation: this expectation is but ill fulfilled by a proposition, which does neither more nor less than hold up each of those sentiments as a ground and standard for itself.<sup>31</sup>

But it is of the essence of moral discernment—or of any other kind of discernment for that matter—that it does not depend on the application of any "external consideration." Let us go back to the necktie. When I look at it and decide it is green, I do not have any external consideration as a means of warranting and guiding my internal sentiment of green or blue. I just look at it and say what color I think it is.

Of course judgments as to color are different from moral judgments in that no one is apt to disagree with them, and except in a few cases like traffic lights, it would not matter if they did. Moral judgments, on the other hand, often differ greatly, and may cause acrimony or even open warfare when they do. That is true enough, but it does not change the nature of moral discernment. There is an old joke about a man who is seen one night searching the sidewalk at a street corner. He explains to a passerby that he lost his wallet in the middle of the block, but is looking for it on the corner because there is more light. His reasoning seems to be like that in the quoted passage from *The Oxford Companion to Philosophy*. I submit that you cannot tell right from wrong without using common-sense intuitions, and if those intuitions are a hodgepodge, you have a problem that you cannot solve by giving up on them. I believe both Maritain and Hume, in the language I have quoted, point the way to a use of reason to sort out the hodgepodge or keep it from occurring.

Moral philosophy to a great extent and moral theology to a greater extent have tended to come up with "exceptionless" moral rules. That is, rules to the effect that it is *always* wrong to commit adultery, to commit suicide, to kill innocent people, or whatever. If these rules are all a matter of after-knowledge, if they result from reflection on a series of individual discernments,

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<sup>29</sup> See SMITH, *supra* note 4, at 11–20.

<sup>30</sup> BENTHAM, *supra* note 24, at 16.

<sup>31</sup> *Id.*

how can we be sure that they will be applicable in every occasion for discernment that may ever arise? This question can be made particularly difficult by constructing hypotheticals. A madman has an atomic bomb that he will set off unless you shoot your grandmother. An evil emperor will invade and destroy your country unless you leave your husband and marry him.

Let me try to answer with this analogy. When I was about ten years old, I stuck my finger in a light socket. The result was an interesting noise and an unpleasant tingle in my hand. I thought that if I put something other than my finger into the socket, I could hear the interesting noise and avoid the unpleasant sensation. The object I chose was a metal cap pistol. Bad move. It blew a fuse and plunged the whole house into darkness. Reflecting on this experience (with some aid from the experience of previous generations) I arrived at the exceptionless rule, "Don't put metal objects into light sockets."

Of course it is the unchanging nature of electricity that enabled me to derive from this one incident a principle good for all times and places. By the same token, it is the claim that there is an unchanging human nature that supports the claim that exceptionless rules can be derived from the experience of moral discernment in individual cases. Maritain refers to such experience as "the judgments in which Natural Law is made manifest to Practical Reason."<sup>32</sup> The moral discernment in a particular case is based on an intuitive awareness of human nature and what human nature requires—Maritain's knowledge through connaturality, and Hume's internal sense or feeling which Nature has made universal in the whole species. The horrible hypotheticals, then, are simply invitations to give the last word in a particular situation to forces that we recognize as inimical to our nature. It is easier to turn the invitation down in a hypothetical case than in a real one, but in either case it should be turned down.

Your faculty for moral discernment is called your conscience. It is your duty to form it by study and reflection if necessary, and once it is formed, to follow it. The duty stated in this way raises the Problem of the Erring Conscience. If, as I have argued, the rightness or wrongness of a particular act is a matter of objective reality like the color of a necktie, and if, as is obvious from

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<sup>32</sup> MARITAIN, *supra* note 8, at 27.

everyday experience, it is possible to be mistaken about whether a particular act is right or wrong, then there is a paradox in the offing. It is my duty to do X because, having formed my conscience as best I can, I believe in conscience that X is the right thing to do. On the other hand, it is my duty not to do X because X is in fact wrong.

Actually, however, the paradox will be spurious. Doing what I erroneously suppose to be right because I want to do right is no more paradoxical than taking what I erroneously suppose to be the road to Detroit because I want to go to Detroit. Nobody will blame me (except perhaps for my stupidity) for taking the wrong road, but I still will not get to Detroit. Similarly, nobody will (or nobody ought to) blame me for doing what my conscience told me was right, but it still was not the right thing to do. To be sure, insofar as the requirements of morality are requirements of our nature, falling short of them may have bad consequences in spite of my good faith—just as my good faith will not get me to Detroit if I take the wrong road.

At this point, we come to a special problem for lawyers. Our job, as I say, is to interfere in other people's affairs. Those people have consciences, often consciences as carefully formed as our own, and yet that may differ from ours. If they are bound to follow their consciences and we to follow ours, how are we to reach an agenda for the representation with which lawyer and client are both comfortable? More problematic still, if we are in agreement when the representation starts, but something comes up in the middle on which our consciences differ, what are we to do?

The first thing to note about situations like this is that they are not as frequent as is often supposed. The typical case in which the client's agenda runs afoul of the lawyer's conscience is not one where good faith and serious reflection have resulted in differing moral discernments. It is one in which the client gets carried away by an unaccustomed forensic environment, and wants the lawyer to do something that any objective discernment outside the courthouse would find immoral, or else it is one in which the lawyer's own conscience is carried away by the duty of "zealous representation" to permit what a thoughtful client, as well as a neutral observer, would regard as a dirty trick.

Monroe Freedman, whose take in these matters is unfailingly thoughtful and decent, although here in my opinion quite wrong, resolves all these problems by subordinating his own moral discernment to the client's autonomy.<sup>33</sup> Or perhaps I should say he discerns a duty on his part to respect the client's autonomy, a duty which is more important than his discernment of what the client should do. He is very careful to share his discernment with the client, but once he has accepted the representation, he considers himself bound to implement the client's choices: "Accordingly, the attorney acts both professionally and morally in assisting clients to maximize their autonomy, that is, by counseling clients candidly and fully regarding the clients' legal rights and moral responsibilities as the lawyer perceives them, and by assisting clients to carry out their lawful decisions."<sup>34</sup>

He uses as an example a case where Lawyer A, after a hard negotiating session, receives a draft contract for his client's signature in which Lawyer B for the other party has inadvertently left in place a provision favorable to A's client that A had reluctantly agreed to take out. The question is whether A should inform B of the mistake and let B correct the draft. Freedman argues that respect for client autonomy requires presenting that question to the client—accompanied no doubt by suitable moral advice—and following the client's decision whichever way it goes.<sup>35</sup>

For my part, I would be insulted if my lawyer put a question like that to me, and I would be very hesitant to employ a lawyer who would be willing to leave the provision alone if the client said to do so. But, the main thing to notice about this case is that it is not one of differing moral discernment. I cannot believe that the client thinks it is morally right not to correct the other party's inadvertence. What Freedman discerns to be his moral duty as a lawyer is to allow the client's autonomy to trump the client's moral duty as a human being. I strongly disagree.

I believe my disagreement with Freedman, unlike the question just considered, represents a genuine difference of moral discernment. After we have both reflected carefully on the case, he sees the lawyer's duty one way, and I see it another. But since

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<sup>33</sup> See FREEDMAN & SMITH, *supra* note 20, at 46–69.

<sup>34</sup> *Id.* at 62.

<sup>35</sup> See *id.* at 54.

we are both professors, our difference is, in the most literal sense, academic.

Sometimes practical cases do occur in which lawyer and client, both following carefully formed consciences, differ on a moral question that concerns them both. Such cases tend to involve domestic relations or civil rights. The client believes he would be the best person to have custody of his children; the lawyer believes the other parent would be better. The client believes it would be wrong to rent an apartment to an unmarried cohabitating couple; the lawyer believes it would be wrong to discriminate against such a couple.

Whatever the source of the disagreement, I suggest the following rules for handling it. The first rule is to treat the difference with respect. The client comes to the lawyer needing help. The relation between them is necessarily one of trust and confidence. Any lack of respect betrays it. There is a story from a 1963 casebook that has been called "the most famous case in legal counseling."<sup>36</sup> A woman comes to a lawyer to divorce her husband and marry her lover. The lawyer decides she is "an amoral, spoiled brat," and tells her she needs a good horsewhipping. He may be right, but that is no way to treat a client.

At the same time, it is important to be clear and steadfast in setting forth one's own moral discernment regarding the matter in hand. Questions of right and wrong have right answers, however hard those answers may be to arrive at in particular cases. When a common moral discernment is required for a common agenda, the best way to reach one is for people to put their own discernment on the table, along with whatever of their reasoning they can articulate, and then listen carefully to each other. If this is done with sufficient respect, it may lead to a common conscience, or, if that is impossible, at least to an amicable parting.

If, after sifting the matter with a client, the lawyer is in doubt as to what is the right thing to do, I think it is appropriate to resolve the doubt in favor of the client's discernment or the client's interest. There is a traditional moral doctrine called Probabilism according to which an act may be safely done if there

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<sup>36</sup> See THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* 460-62 (1985).

is a reasonable probability that it is morally acceptable.<sup>37</sup> The nuances of the doctrine were developed in the confessional, where it was too late to decide not to do the act in question. Even so, it gives some support to the idea that one can defer to another's discernment if one is not sure it is wrong.

On the other hand, if the lawyer clearly discerns that a proposed act is wrong, the lawyer must not do it, and also must not be complicit in the client's doing it. The traditional doctrine on complicity, which I find pretty persuasive, judges complicity in terms of intention.<sup>38</sup> If I help somebody do something wrong, *and my purpose is to facilitate the wrong act*, I am just as guilty as the person I help. If I act for some other purpose, however, the fact that my act also facilitates another person's wrong act does not necessarily mean that I am doing wrong. My favorite example is the hypothetical case of the woman who comes into my office with two black eyes and a broken arm and wants a divorce from her husband because he beats her up.<sup>39</sup> I know that she is planning to marry someone else when her divorce comes through. Discerning her situation in the light of my understanding of marriage, I would regard it as wrong for her to enter a purported marriage with someone else. But, she still needs to be free from her abusive husband, and I believe it is right for me to help her to gain that freedom. I will not be complicit in anything she does wrong with that freedom when she has it.

What all this adds up to is that we can talk to each other about right and wrong. Rightness and wrongness are discernable qualities of proposed acts. If I say something is morally acceptable and somebody else says it is not, one or the other of us is mistaken. I can try to make the other person see it my way, and he can try to make me see it his way. It may not be easy to reach agreement, but it is easier than it would be if right and wrong were a matter of taste like whether hamburgers taste better with onions. It is also easier than it would be if right and wrong were determined by the syllogistic application of general

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<sup>37</sup> See *Probabilism*, in THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 1331, 1331 (F.L. Cross & E.A. Livigstone eds., 3d ed. 1997).

<sup>38</sup> See Richard A. McCormick, *Cooperation in Evil*, in ENCYCLOPEDIA OF CATHOLICISM 366, 366–67 (1995).

<sup>39</sup> See ROBERT E. RODES, JR., CLASSIC PROBLEMS OF JURISPRUDENCE 44–45 (2005).

principles that some people would affirm, others deny, and still others not understand.

There is a journalist, Randy Cohen, who does a syndicated column called "Everyday Ethics." He addresses concrete situations described by his readers, and gives his opinion of what is or is not the right thing to do.<sup>40</sup> He states general principles occasionally, but as summaries of his individual judgments, not as sources for them. One can disagree with his judgments, and some readers write in to tell him so. Both he and his readers assume that there are right answers to be discerned, and that reflection and discussion will help with the discernment. No one falls back on debatable principles of philosophy or theology, and no one attributes disagreement to matters of taste.

On a global level, the practical discernment of right and wrong played a crucial part in the development of the Universal Declaration of Human Rights. When UNESCO assembled a panel of philosophers to consider the proposed Declaration, it emerged that there was broad agreement on what the rights were, but no agreement at all on the source of the rights. Maritain prefaces a book of widely divergent philosophical papers on the subject with an explanation based on what seems to be a more sophisticated version of his knowledge through connaturality.<sup>41</sup>

Lawyers need to concern themselves with moral discernment on both these levels. They have charge of the most important cohesive force in a pluralist society such as ours—both in our own country and in the world. In the work entrusted to them, they cannot rely on enacted measures devoid of moral content. Nor can they rely on elegant syllogisms with debatable premises. Their calling is to meticulous investigation and careful reflection on the rights and wrongs of individual cases. It is on that work that the peace of our society and the love of our neighbors depend.

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<sup>40</sup> Many of his judgments are collected in RANDY COHEN, *THE GOOD, THE BAD, & THE DIFFERENCE: HOW TO TELL RIGHT FROM WRONG IN EVERYDAY SITUATIONS* (2002).

<sup>41</sup> See Jacques Maritain, *Introduction to UNESCO, HUMAN RIGHTS, COMMENTS AND INTERPRETATIONS* 9, 12–14 (1949).

