Canceling Lawyers

Author : W. Bradley Wendel

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Leah Litman, Lawyers' Democratic Dysfunction, 68 **Drake L. Rev.** 303 (2020).

Suppose you became aware that a person advocated for doing abhorrent things, and if given the opportunity, would provide assistance to others who directly did those things. Suppose, for example, that this person thought that one way to deter refugees from seeking asylum in the United States would be to forcibly separate children from their parents, locking children in cages in squalid camps that would shock Charles Dickens, and making it impossible to reunite families subsequently. If this person loudly advocated for these things at a bar, you might get up and move to a different barstool. If this person were your neighbor, you might avoid making eye contact with them on the street. If this person were a member of your family, you would dread Thanksgiving dinner.

If this person were a high-ranking government lawyer, however, they would likely suffer no adverse consequences in their career and might even be promoted to a higher position. This is the concern animating Leah Litman's powerful and passionate recent article – a contribution to a symposium on Jack Balkin and Sandy Levinson's book, *Democracy and Dysfunction*. Networks of elite lawyers are so conflict-averse that they look the other way when members of their club participate in actions that threaten fundamental democratic and human-rights norms. (Pp. 305, 307.) They have an opportunity to sanction immoral conduct by "withholding certain future government appointments and promotions from the lawyers" (P. 307), but instead they welcome these wrongdoers back into the fold of the respectable legal profession. (P. 317.) There are some things one could do that would result in ostracism and exclusion from polite society, so "[w]hy is enabling racist and cruel family separations not on the prohibited list of actions?" (P. 318.)

It is a factual question, yet to be answered, whether lawyers in the Trump Administration, including those who worked on the "zero tolerance" and family-separation policies at the southern border, will suffer no adverse career consequences. According to an article in *Politico*, job prospects for senior national security officials in the administration may not be so bright.[1]

As Litman notes, however, two high-ranking lawyers involved in the George W. Bush Administration's effort to find a legal justification for "enhanced interrogation techniques" did pretty well for themselves after leaving the Justice Department. They are now known by the titles of Ninth Circuit Judge Jay Bybee and Supreme Court Justice Neil Gorsuch. (Pp. 308-13.) What's more – and this is really what sticks in Litman's craw – elite establishment lawyers from both political parties vouched for the character of both of these lawyers. Neal Katyal, for example, wrote an op-ed urging that Gorsuch be confirmed, and introduced him at his Senate hearing. (P. 312.) Will something similar happen to Rod Rostenstein, who provided advice to the Trump Administration on the family-separation policy?[2]

There is a longstanding professional tradition of withholding moral accountability from lawyers who represent unpopular clients. When conservative luminaries Bill Kristol and Liz Cheney labeled elite law firm lawyers representing detainees post-9/11 as the "Guantánamo Nine," many other elite lawyers, including former Solicitor General Charles Fried, rushed to their defense.[3] If it is wrong to criticize these lawyers as somehow pro-al-Qaeda, then wouldn't it be a similar analytical mistake to call out or shun lawyers who advised the Trump Administration on its family-separation policies?

Litman's response is well known to legal ethics scholars, as it was forcefully advocated by Monroe Freedman.[4] Freedman correctly observed that in most cases, outside the unusual context of court-appointed representation, there is no legal obligation on the part of any particular lawyer to accept the representation of any particular client. Because lawyers have legal discretion to choose their clients, they are fully morally accountable for the choices they make. If a lawyer decides to represent Harvey Weinstein, people might think the lawyer is pro-rape, as happened to Harvard Law School Professor Ronald Sullivan.[5] Moral accountability, in such a case, could include informal sanctions such as shaming, ostracizing, and refusing to hire or promote the lawyer. Of course, a lawyer like Sullivan would reply that it is preposterous to suggest that he is pro-rape. His representation of Weinstein could be motivated by his commitment to values such due process of law and ensuring that litigants are treated with dignity Or, he might believe that even powerful people such as Weinstein may not get a fair shake at trial and in the court of public opinion if they are accused of particularly heinous acts. It is possible that Sullivan is morally accountable for the clients he chooses to represent, but he has carried his burden of normative justification.

Freedman's position has always seemed to me to beg an important question. If there were no legal discretion to choose one's clients, as in the English cab rank rule for barristers, Freedman would find it inappropriate to hold lawyers morally accountable. In any case, Model Rule 1.2(b) states that "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities." The question that gets begged here is the relationship between law and morality. A view held by many political philosophers is that there is no moral obligation to obey the law.[6] If that's the case, then why should a legal obligation to represent all clients make any difference to the moral evaluation? Freedman never answered that objection satisfactorily.

Litman has no difficulty with that question, because her position would support full moral accountability for actions taken by lawyers acting in a representative capacity. This view, which is grounded in the persistence of moral agency, was the received view during what David Luban and I have referred to as the first wave of theoretical legal ethics.[7] Scholars in the so-called second wave have argued that there are obligations attaching to one's role as a lawyer that may excuse what would otherwise be regarded as morally wrongful acts or associations. You might have good reasons to avoid the hypothetical neighbor who advocates doing terrible things, but as a lawyer, there may be good reasons to represent a client who did those things. In my experience, scholars (although, interestingly, not most practicing lawyers) resist this view quite vigorously. Letting go of accountability, in ordinary moral terms, not based solely on restricted or distinctive professional normative considerations, seems to assume too much about the goodness of social and political institutions. To quote the title of a chapter from Luban's 2007 book, philosophers are worried about "the ethics of wrongful obedience."[8]

One may still have misgivings about informal social sanctions, such as calling out and shaming, particularly where these sanctions include denial of jobs or promotions. Some of the recent hand-wringing about "cancel culture" seems overblown, for many of the reasons alluded to by Litman in this paper. One aspect of morality is what Peter Strawson referred to as reactive attitudes, such as hurt feelings, resentment, indignation, or offense.[9] Moral accountability is grounded in these reactive attitudes. As talented a standup comic as Louis C.K. is, if you find his behavior toward women to be abhorrent, you understandably would not want to watch his Netflix specials, and would want to make sure your friends also know what a despicable person he is. On the other hand, precisely because they are informal, social sanctions such as canceling performers are not always precisely calibrated to the magnitude of the offense and the reliability of the evidence.

But Litman's point is: This is morality, not professional discipline, and there is no Due Process Clause in the moral domain. Scholars who are sympathetic with first wave legal ethics theory and skeptical of professional nonaccountability should be with her in criticizing elite lawyers who are too quick to forgive

and forget the willingness of Trump Administration lawyers to lend assistance to humanitarian disasters such as the zero-tolerance policy that led to so many families being needlessly torn apart.

1. Laura Seligman, Tarnished by Trump: National Security Officials Struggle to Find New Jobs, **Politico** (Jan. 8, 2021).
2. *See* Dahlia Lithwick, What Will Happen to the Lawyers Who Aided and Abetted Donald Trump?, **Slate** (Nov. 1, 2020).
3. Charles Fried, *Op-Ed: Mr. Stimson and the American Way*, **Wall St. J.** (Jan. 16, 2007).
4. Pp. 321-22 (citing Monroe Freedman, *The Lawyer's Moral Obligation of Justification*, 74 **Tex. L. Rev.** 111 (1995)).
5. Isaac Chotiner, *A Harvard Law School Professor Defends His Decision to Represent Harvey Weinstein*, **The New Yorker** (Mar. 7, 2019).
6. *See, e.g.,* A. John Simmons, **Moral Principles and Political Obligations** (1980); Kent Greenawalt, **Conflicts of Law and Morality** (1987).
7. David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 **Geo. J. Legal Ethics** 337 (2017).
8. David Luban, **Legal Ethics and Human Dignity** (2007).
9. P.F. Strawson, *Freedom and Resentment*, 48 **Proc. Brit. Acad.** 1 (1962).

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