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Is a Bad Lawyer a Bad Person?

By: Alice Woolley

In 1976 Charles Fried famously asked, “Can a good lawyer be a good person?” (“The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation” (1976) 85 Yale LJ 1060 at 1060).

Law and morality are distinct. As a consequence, lawyers sometimes represent bad people, and sometimes help people do bad things. There is thus a legitimate question about whether being a lawyer is consistent with an ethical life. Nonetheless, Fried answered his question “yes”. Because of the law’s legitimacy and justification, a lawyer who assists people to pursue their goals and interests through the law can be – is – a good person. She does a job worth doing.

What, though, about the bad lawyer? By bad lawyer I don’t mean the excessively zealous lawyer – the lawyer who goes too far in advocating for clients. Rather, I mean the lawyer who just does the job badly, who is lazy, disinterested, careless, foolish or otherwise deficient at the work. I mean the lawyer who fails to fulfill what Rebecca Roiphe recently identified as the central professional obligation of lawyers: “the creative interpretation of norms in lights of facts and experience” (Rebecca Roiphe, “The Decline of Professionalism” (2016) 29 GJLE 649 at 680). Can we describe that lawyer’s failure as a moral one such that, while we might not say she is a bad person *tout court*, we can claim that, in that respect at least, she is a bad person? That she has acted wrongfully, not merely ineffectively?

Claiming competence as a virtue – or its absence as a vice – is challenging. At a recent comparative ethics conference Professor Xiaobing Liu noted the Chinese proverb, “Virtue without competence is always better than competence without virtue” (“Latest Reform on the Legal Ethics Assessment Mechanism in the Chinese Legal Profession Admission System”). A person who tries to do good, even if she does so ineffectively, seems self-evidently more virtuous than a person who does bad things efficiently and effectively. Adolf Eichmann made the trains run just as they were supposed to, but the trains took Jews to the concentration camps. Competence can be no more moral than the ends it serves.

Further, competence is arguably an attribute, not a choice. The morality (or immorality) of an act generally turns on it being something a person could choose to do (or not do); a person’s height is not, for example, a legitimate basis for moral assessment. We don’t impose criminal liability on a person who trips and falls, even if they hurt someone on the way down. If competence arises from a person’s intelligence, judgment or skill, and those are qualities a person simply has or lacks, competence similarly ought not to be the subject of moral assessment.

I accept those arguments. Unless one can claim that being a lawyer is a good job – or at least not a bad one – one cannot claim that being a competent lawyer is a virtuous thing to be.

Competence can at most be a necessary condition for virtue; it cannot be a sufficient one.

Further, some aspects of competence are beyond a lawyer’s control; consequently, that one

lawyer is less skilled than another does not necessarily make that lawyer less virtuous than the other. The most that can be claimed for competence as a duty (or in its absence, as a failing) is a duty to be as good at the job as you are capable of being.

My claim is thus a relatively modest one. It is that a lawyer who diligently and to the best of his abilities represents a client within the bounds of the law does something good. And a lawyer who does not – who is not diligent, and does not provide the best representation of which he is capable, does something bad.

Lawyers working within a democracy that respects the rule of law do not serve evil. There may be a deviation between the law and morality, but the work lawyers do is not systemically wrong, and given the law's claim to legitimacy and justification, lawyers can in fact claim that the work they do is legitimate and justified. When a lawyer acts with competence and diligence, they do a job worth doing and they do it well. A competent lawyer is not Eichmann, and is not analogous to Eichmann.

Further, a lawyer's failure of competence and diligence is unlikely to be harmless. The client counts on the lawyer to fulfill his objectives, and if the lawyer does not provide diligent and competent service he is much less likely to do so. The objectives may have no particular merit or morality, but they are the client's own, and if they fail it should be because they lacked legal merit, not because the lawyer represented them inadequately. A client injured by his lawyer's incompetence has suffered a harm he ought not to have suffered.

Lawyers have power and status. They have a license that provides them with an exclusive right to provide certain services to the public. Not all lawyers may be equally capable, and certainly not all are well compensated. But in my view the right to practice and the power that goes with it imposes on lawyers an obligation to do the job they have to the best of their abilities. If a lawyer cannot do the job as it ought to be done, then the right to do it should be given to someone else.

Law society codes of conduct tell lawyers that their fundamental duty is to practice law "honourably and with integrity" (e.g., FLS [Federation of Law Societies] Model Code, Rule 2.1-1). They go on in the commentary to suggest that "If integrity is lacking, the lawyer's usefulness... within the profession will be destroyed, no matter how competent the lawyer may be". In my view, however, the codes get that wrong. Within the ethical boundaries of being a lawyer (i.e., loyally representing a client within the bounds of legality), the fundamental duty is competence, not honour or integrity. If competence is lacking, a lawyer is not useful, no matter how much honour and integrity the lawyer has.

I am not of course arguing in favour of the dishonourable lawyer, or supporting a fractured or compartmentalized ethics for the lawyer. But I am saying that being a lawyer imposes certain specific responsibilities. It is, at heart, a job (albeit a professional one, as Roiphe cogently argues). Doing that job, and doing it well, is the heart of lawyer ethics. Possessing honour and integrity might be helpful qualities for a lawyer, or they might be descriptors that we attach to the lawyer who does the job well. But they are not the job, and they are not the lawyer's ethical obligation. The ethical obligation is to do the job of a lawyer, and to do it diligently and to the best of your ability.

I recently had the privilege to see Bruce Springsteen perform on Broadway. In the show he tells the story of his mother, who spent 40 years as a legal assistant. He describes her commitment and effort, and how when he walked home with her from work he learned what pride is, referring I think both to his mother's pride in doing her job well, and to his pride in her. That image, of the dignity and value of a person who has a job (or responsibility), and does it well, is the idea I am trying to capture here. As I said, I acknowledge that some jobs are bad, and doing them well is no virtue. But where a task is worth doing, or even where it is just a task you have undertaken, I think there is something admirable in doing it as well as you can. And, where that task affects others, or affords you power and status, there is something wrong when you make no effort, or don't do the best that you can. A bad lawyer may not be a bad person, but they act badly.

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