1-1-2016

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Repository Citation
Lonnie T. Brown, In Defense of the Devil's Advocate, 44 Hofstra L. Rev. 1037 (2016), Available at: https://digitalcommons.law.uga.edu/fac_artchop/1099

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IN DEFENSE OF THE DEVIL’S ADVOCATE

Lonnie T. Brown, Jr. *

I. INTRODUCTION

Among the many controversial positions for which Monroe Freedman advocated during his illustrious career, the one that I find most surprising and uncharacteristic is his contention that lawyers who undertake morally questionable representations have a duty to explain or justify their choice of client.¹ Specifically, in 1993, Professor Freedman penned a well-known column in the Legal Times—entitled Must You Be the Devil’s Advocate?—in which he took Professor Michael Tigar to task for his representation of reputed Nazi war criminal John Demjanjuk.² Professor Freedman tacitly criticized Professor Tigar for his client choice and expressly called upon him to publicly justify why he was willing to dedicate his training, knowledge, and “extraordinary skills as a lawyer” to someone as universally reviled as Demjanjuk.³ Such an inquiry was appropriate, according to Professor Freedman, because a decision regarding whom a lawyer is willing to represent is one “for which the lawyer can properly be held morally accountable, in the sense of being under a burden of public justification.”⁴

* Professor of Law and A. Gus Cleveland Distinguished Chair of Legal Ethics and Professionalism, University of Georgia School of Law. J.D., Vanderbilt Law School, 1989; B.A., Emory University, 1986. I would like to express special thanks to Susan Fortney and Bruce Green for giving me the opportunity to present an earlier version of this Article during the 110th AALS Annual Meeting in New York as part of a program titled “Ethics in Criminal Practice—the Hardest Questions Today: A Conversation in Honor of Monroe Freedman.” I am honored to have been invited to participate in this tribute to one of the true giants in the field of legal ethics.

I would also like to thank my colleague Russell Gabriel for his perceptive comments on earlier drafts of this Article. In addition, I would like to thank Elizabeth Barwick for her thorough research assistance and insightful input. And, finally, I thank my wife Kim for her keen editorial eye, patience, and support.

2. Id.
3. Id.
4. Id.
This Article argues that Professor Freedman’s call for a public accounting with regard to client choice, though undoubtedly well-intentioned, has the potential to profoundly undermine the attorney-client relationship and to fundamentally compromise a criminal defendant’s ability to obtain a fair trial, in both perception and reality. While Professor Freedman maintained that his position was at least partially consistent with the so-called “standard conception” of an advocate’s role, in truth, that can only be so if the attorney’s public justification is one that is fully supportive of the client. A lukewarm explanation such as “everyone is entitled to a defense” connotes procedural obligation rather than uncompromising loyalty and zeal.

Although Professor Tigar took strong issue with the propriety of Professor Freedman’s column, in a response also published in the Legal Times, he nevertheless provided the requested public explanation. In my view, he should not have felt compelled to do so, and Professor Freedman should not have sought such a public justification in the first instance. The decision to represent a controversial client can be extremely difficult, requiring an attorney to grapple with issues concerning personal morality, practical impact, and the concept of justice itself. Once the decision has been made, no attorney should have a right to question it, and the lawyer who made the decision must resist the urge to publicly explain or rationalize his or her choice. If a public explanation or defense is needed, it should come from fellow members of the bar not engaged in the representation, as occurred, for example, in

5. Monroe Freedman, Opinion, The Morality of Lawyering, Legal Times (D.C.), Sept. 20, 1993, at 22 [hereinafter Freedman, The Morality of Lawyering]. Under the standard conception, attorneys have “no moral responsibility whatsoever for representing a particular client or for the lawful means used or the ends achieved for the client.” Id. Hence, Professor Freedman’s general view departed somewhat from the wholly amoral posture of this conception in terms of ultimately holding attorneys morally accountable for their choice of client. However, he still accepted, as a first principle, the standard conception notion “that [a] client ... is entitled to make the important decisions about his goals and the lawful means to be used to pursue those goals.” Monroe H. Freedman, Response, The Lawyer’s Moral Obligation of Justification, 74 Tex. L. Rev. 111, 116-17 (1995) [hereinafter Freedman, Moral Obligation]; see also Monroe H. Freedman & Abbe Smith, Understanding Lawyers’ Ethics § 4.02, at 70 (4th ed. 2010) (“If a lawyer chooses to commit herself to serve that client, however, then the lawyer is duty-bound ‘to seek the lawful objectives of [the] client through reasonably available means permitted by law,’ and to ‘take whatever lawful and ethical measures [that] are required to vindicate a client’s cause or endeavor.’” (alterations in original) (citations omitted)).


7. But see W. William Hodes, Essay, Accepting and Rejecting Clients—The Moral Autonomy of the Second-to-the-Last Lawyer in Town, 48 U. Kan. L. Rev. 977, 988 (2000) (maintaining that Professor Freedman was “morally entitled” to request a public justification and Professor Tigar was “morally entitled” to refuse to respond).
the aftermath of the public attacks on attorneys who undertook to represent Guantanamo Bay detainees.  

In the Parts that follow, this Article analyzes Professor Freedman’s public justification requirement and elaborates on the potential concerns it raises. In addition, the Article provides substantive evidence of the latter in the form of a sampling of public justifications offered by attorneys who were engaged in the representation of some highly controversial clients. The efforts of these attorneys to explain their respective client selections underscore the precarious posture in which a duty of public accounting situates criminal defense attorneys and their clients and makes the case for imposing that duty on attorneys who are not involved in a given controversial representation. Detached attorneys possess the necessary moral distance and perspective to more credibly and effectively explain to the public why a lawyer would accept a singularly reprehensible client. Moreover, aspects of the very rules that govern the profession strongly support, at least by implication, an affirmative ethical duty to speak out in defense of “the devil’s advocate.”

II. “MUST YOU BE THE DEVIL’S ADVOCATE?”—FREEDMAN’S CALL FOR PUBLICLY JUSTIFYING ONE’S CHOICE OF CLIENT

In his Legal Times column challenging Professor Tigar’s representation of John Demjanjuk, Professor Freedman asserted, characteristically, that once a lawyer accepts a representation, he or she must—Lord-Brougham-style—do anything and everything, within the
HOFSTRA LAW REVIEW

bounds of the law, to achieve the client's lawful objectives, no matter what the consequences.14 According to him, however, the act of accepting the representation subjects the lawyer to the moral judgment of the public and, indeed, requires counsel to publicly justify why he or she would advocate for the client in question.15 More specifically, Professor Freedman proclaimed:

[A] lawyer's decision to represent a client may commit that lawyer to zealously furthering the interests of one whom the lawyer or others in the community believe to be morally repugnant. For that reason, the question of whether to represent a particular client can present the lawyer with an important moral decision—a decision for which the lawyer can properly be held morally accountable, in the sense of being under a burden of public justification.16

The critical point for him was that American lawyers are not bound to accept every client who walks through the door.17 With the exception of cases in which attorneys are judicially appointed,18 attorneys possess


14. See Freedman, supra note 1; see also FREEDMAN & SMITH, supra note 5, § 4.01, at 68-69 ("Let justice be done—that is, for my client let justice be done—though the heavens fall. This is the kind of representation we would want as clients, and it is what we feel bound to provide as lawyers."); supra note 5 and accompanying text.

15. See Freedman, supra note 1.

16. Id.; see also Amy Porter, Representing the Reprehensible and Identity Conflicts in Legal Representation, 14 TEMP. POL. & C.R. L. REV. 143, 162 (2004) (noting that under a "discretionary model" of client selection, a "lawyer bears moral responsibility for representing certain clients [and]...[i]n assuming this moral responsibility, it could be a short leap to expect that moral consciousness and decision-making process be made public").

17. See 1 GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 6.12, at 6-31 to -32 (4th ed. 2016 & Supp. 2015) ("Lawyers are not required to accept employment in all cases, and the formal rules of professional conduct are crowded with provisions permitting or even requiring lawyers to take into account the interests of non-clients, even including adversaries in litigation."); W. Bradley Wendel, Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection, 34 HOFSTRA L. REV. 987, 994-95 (2006) (observing the distinct difference between the American legal system's freedom of choice in client selection and the "British 'cab-rank' rule, which requires barristers (but not solicitors) to accept the representation of clients in the order they come through the door, like taxicabs waiting in a queue for passengers").

18. MODEL RULES OF PROF'L CONDUCT r. 6.2 cmt. 1 (AM. BAR ASS'N 2013) ("A lawyer may...be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services."). It should be noted, however, that even in cases involving appointment, it may be possible for a lawyer to avoid the representation "for good cause when "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client." Id. r. 6.2(c); see also Wendel, supra note 17, at 994 (noting that appointed
the discretion to decide the clients with whom they are willing to associate. According to Professor Freedman, "[i]f there were no choice, there would be no responsibility."

He acknowledged that holding a lawyer morally accountable for his or her choice of client could have an adverse effect on the judicial process by diminishing the number of qualified attorneys who would be willing to take on an unpopular representation. In fact, Professor Freedman confessed that this was his original position, firmly believing earlier in his career that it was "wrong to criticize a lawyer for choosing to represent a particular client or cause" because "then those individuals who are most in need of representation might find it impossible to obtain counsel." His view changed, however, following a debate in which Professor Tigar apparently defended the propriety of protesters picketing the law firm of Wilmer, Cutler & Pickering for its decision to represent General Motors in an air-pollution case, while Professor Freedman condemned their behavior.

According to Professor Freedman’s account, Professor Tigar deemed it appropriate for the protesters to challenge each lawyer at the firm to consider: "Is [General Motors] really the kind of client to which I want to dedicate my training, my knowledge, and my skills as a lawyer? Did I go to law school to help a client that harms other human beings by polluting the atmosphere with poisonous gases?" The point that Professor Freedman took from this (and later wholeheartedly embraced) is that, while every client is entitled to representation, a lawyer must always ask: "Should I be the one to represent this client, and if so,

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19. See MODEL RULES OF PROF’L CONDUCT r. 6.2 cmt. 1 ("A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant."). But see Michael E. Tigar, Essay, Defending, 74 TEX. L. REV. 101, 102 (1995) ("While we have the right to pick and choose among clients who come to our doors, the indigent defendant facing death at the state’s hands has a powerful claim on us.").

20. Freedman, supra note 1; see also HAZARD, JR. ET AL., supra note 17, at 6-32 ("[T]he very fact that lawyers have a choice of clients and cases makes it legitimate to ask why they choose as they do.").


22. Id.; see also Theodore B. Olson & Neal Katyal, We Want Tough Arguments: When Top Advocates Stand up for Uncle Sam and Detainees, America Gets the Best Law, LEGAL TIMES, Jan. 22, 2007 ("If lawyers are going to be attacked in such vicious terms for trying to help, the best ones won’t lend their talents to the cause."). But see FREEDMAN & SMITH, supra note 5, § 4.02, at 72 ("[T]he concern that people and causes will go unrepresented because lawyers fear criticism has proved to be baseless.").

23. Freedman, supra note 1.

24. Id.
Moreover, for Professor Freedman, this was not simply a question that a lawyer must answer privately but rather was one to which the lawyer was ethically obligated to provide a public response as well. And, this is what he challenged Professor Tigar to do in the Legal Times piece with regard to his decision to represent Demjanjuk, widely—though incorrectly—believed to be Ivan the Terrible of Treblinka.

Although Professor Tigar strongly objected to the questioning of his representation and bristled at the audacity of Professor Freedman’s issuance of a challenge to him for a public justification concerning his choice of client, he nevertheless provided the explanation sought. His response was powerful and persuasive, and it likely quelled some lingering misgivings that many may have had regarding his involvement in the Demjanjuk matter. But, what about the unpopular client for whom an attorney does not have a powerful, persuasive explanation? In that situation, what is counsel supposed to do? What type of explanation would suffice? And, who is to be the judge of whether a given explanation is adequate?

Such questions lead to the inexorable conclusion that Professor Freedman’s call for lawyers to publicly justify their client choices—while thoughtfully inspired—creates a dangerously slippery slope that will ultimately serve to significantly undermine the very criminal justice system that he so ably and passionately advocated for during his lifetime. In particular, a requirement of public justification will inevitably erode time-honored, fundamental attributes of the process, including the presumption of innocence, the right to effective assistance of counsel, and the sanctity of the attorney-client relationship.

25. Id.

26. See Freedman, Moral Obligation, supra note 5, at 112 (“In a democratic society, the people are entitled to know what lawyers do and why we do it. It is proper, therefore, to publicly challenge lawyers to justify their representation of particular clients, and lawyers, within the bounds of zealous representation, are morally bound to respond.”).

27. See Tigar, supra note 6 (observing that a district court judge’s decision finding Demjanjuk to have been Ivan the Terrible “is now universally conceded to have been wrong”).

28. Id. (“I have answered that question for myself, and it is insulting for Professor Freedman to suggest that I am faithless to my principles.”). Professor Tigar also argued that there is no support for Professor Freedman’s claim that lawyers should be required to publicly justify their representations, noting that “[t]here is no rule of professional responsibility that so provides, and several rules cut directly against [Professor Freedman’s] assertions.” Id.

29. Id.

30. See Freedman, The Morality of Lawyering, supra note 5 (“It is no surprise that Tigar, in response to my question, has come through with a powerful, persuasive explanation—a moral explanation—of his decision to represent John Demjanjuk.”).

31. See Tigar, supra note 6 (“To put lawyers under such a burden of public justification undermines the right to representation of unpopular defendants... I can no more be under a duty to make a public accounting of why I took this case than I can be under a duty to open up the files of
Part elaborates on these and other potential unintended consequences that Professor Freedman’s proffered requirement would have on criminal defendants, their counsel, and the process in general.32

III. UNINTENDED CONSEQUENCES OF PUBLICLY JUSTIFYING ONE’S CHOICE OF CLIENT

How does someone like you sleep at night, with all the scum you represent?

– Detective Kurlen, The Lincoln Lawyer33

It is commonplace for non-lawyers to ask or at least ponder this sort of question with regard to a criminal defense attorney’s decision to represent a client accused of a heinous act or one who is obviously guilty.34 The frequency and often rhetorical tone of the inquiry can inspire all manner of responses, from indignation to flippancy.35 Inquirers, however, are more than likely simply expressing their uninformed incredulity about the work of a criminal advocate.36 Their bewilderment is understandable, and one can make a persuasive case for their entitlement to a reasoned explanation. Furthermore, such a response might actually be systemically beneficial insofar as it may serve to foster a better understanding of the criminal justice process.37

32. While Professor Freedman’s public justification requirement was not limited to the criminal arena, the focus of this Article is on that area because it is the setting in which the most troubling concerns are presented.

33. THE LINCOLN LAWYER (Lionsgate 2011) (quoting Detective Kurlen’s question posed to fictional criminal defense attorney Mick Haller, portrayed by Matthew McConaughey).

34. See HOW CAN YOU REPRESENT THOSE PEOPLE?, at ix (Abbe Smith & Monroe H. Freedman eds., 2013) (“All criminal defense lawyers are asked this question—by family, friends, and folk of all sorts. The query is such a part of the criminal defense experience that it is known as ‘the question.’”); Porter, supra note 16, at 143 (“Like all criminal defense attorneys, I regularly encounter questions about how I can represent my clients.”). See generally HOW CAN YOU REPRESENT THOSE PEOPLE?, supra (collecting essays by noted criminal defense attorneys responding to the persistent question for which the book is titled).

35. See Ann Roan, “Those People” Are Us, in HOW CAN YOU REPRESENT THOSE PEOPLE?, supra note 34, at 135-36 (admitting that she has answered the “question more than once by saying, ‘because I am very pro-crime’”); Robin Steinberg, Fair Play, in HOW CAN YOU REPRESENT THOSE PEOPLE?, supra note 34, at 177 (noting that her responses to the question “range from the frivolous to the philosophical, and from the purely political to the deeply personal”).

36. See, e.g., Roan, supra note 35, at 135 (“[B]y and large, people [who ask the question] are genuinely curious.”).

37. See id. at 136 (“The more thoughtful we can be in the face of a (usually unintentionally) thoughtless question, the more likely it is that we can get people to open their minds—and maybe change them—both inside and outside the courtroom.”); Goldberger, supra note 8, at 15 (maintaining that personal explanations of representations by attorneys can “make the role of the judicial process more intelligible”).
I have no problem with the question when posed in a generic form. For example, "how can you be a criminal defense attorney?" Rather, my concern relates to when it is proffered in relation to a specific client and clearly calls for a substantive explanation or justification. Professor Freedman's variance on the question is of this troublesome ilk. Requiring a criminal defense attorney to respond to his formulation of the inquiry raises a host of problematic concerns that were surely unintended.

First, the question is discriminatory in the sense that it effectively calls upon only those lawyers who represent particularly unpopular or controversial clients to respond. Professor Freedman requested an explanation from Professor Tigar for his representation of John Demjanjuk, it is highly improbable that a similar demand would be made upon an attorney representing a client of less notoriety or infamy. The disparate impact of the question thus has the potential to create the very problem that Professor Freedman feared before he adopted his public justification stance—lawyers may avoid representing these types of clients, resulting in "those individuals who are most in need of representation . . . find[ing] it impossible to obtain counsel."

In addition, there is the practical problem of timing. When would a lawyer be expected to fulfill the public justification requirement? If the expectation is that this must be accomplished at or around the time that the decision to represent a given client is made, then it is unlikely that a lawyer would possess the necessary information to offer a knowledgeable explanation. At this stage, the attorney probably knows nothing more than the nature of the prosecution's accusations and whatever information the defendant may have communicated, which will, of course, be protected by the attorney-client privilege and duty of confidentiality. An obligation to publicly justify the representation at the outset, therefore, invites judgment without investigation or evidence.

Furthermore, given the fact that throughout the life of a case an attorney's knowledge about, and opinion of, a client and case will almost certainly change, his or her justification will likely vary at different points. Does this mean that lawyers should have a duty to seasonably update their justifications? Such a requirement would be inordinately unreasonable, unduly distracting a lawyer from what should be his or her primary focus—providing quality, zealous representation to the client.

38. Freedman, supra note 1.
39. Id.; see also supra text accompanying note 22.
40. See infra note 111 and accompanying text.
However, unless an attorney supplies these updates, the originally proffered justification may invariably be inaccurate.

A more troubling by-product of requiring a public justification for one's choice of client is that it necessarily presupposes that a criminal defendant is factually guilty, and, therefore, in need of having his or her counsel offer a plausible rationale for taking on such a futile cause. The requirement thus transforms the cherished presumption of innocence into one of guilt; otherwise, there would be no need for any justification. This truly turns the criminal justice process on its head, undermining one of our system's most critical features through the very mouth of the individual charged with safeguarding it.\textsuperscript{41}

A related concern is that an attorney who offers a public explanation for his or her choice of client may thereby implicitly acknowledge that the client is guilty or, at a minimum, accord credence to the media's or the public's prejudgment of the client's guilt. In short, an attorney must openly pass some degree of judgment on the client. The potential devastation that this can cause to the attorney-client relationship cannot be denied.\textsuperscript{42} Once a lawyer states something to the effect that "every defendant—even one who may be guilty—is constitutionally entitled to an effective defense, and I am fulfilling that role," a client's confidence and trust in that lawyer will be irreparably compromised.\textsuperscript{43}

Worse still, an attorney called upon to justify representing a particularly reprehensible client may opt to create a stark moral distance between lawyer and client, publicly condemning what the client has done or who the client is, while contending that the attorney is simply doing his or her job. This approach exposes a palpable conflict of interest as the lawyer's public justification places his or her interest above that of the client.\textsuperscript{44} The lawyer may be more concerned with


\textsuperscript{42.} See Abbe Smith, Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things, 28 Hofstra L. Rev. 925, 928 (2000) ("[O]ne of the most important things a defense lawyer can offer a client accused of a terrible crime[] [is] suspension of judgment."); see also Roan, supra note 35, at 133-34 ("As a defender, you must believe in your clients—in their humanity, dignity, experience, struggle. You cannot hate your clients. You cannot badmouth them, even to other defense lawyers, because, if you do, you lose the right to stop other people from doing the same."); cf. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 84 (5th ed. 1884) ("The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury.").

\textsuperscript{43.} See, e.g., Robert A. Burt, Conflict and Trust Between Attorney and Client, 69 Geo. L.J. 1015, 1036 (1981) (discussing the inevitable erosion of trust that occurs in the attorney-client relationship when an attorney views a client as factually guilty).

\textsuperscript{44.} See Model Rules of Prof'L Conduct r. 1.7(a)(2) (AM. BAR ASS'N 2013) ("A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or
maintaining personal credibility or moral stature than with loyally and zealously defending the client.

A prime example of this is Anthony Griffin’s notorious representation of Michael Lowe, grand dragon of the Texas Knights of the Ku Klux Klan (“Klan”), to prevent the compelled disclosure of the group’s membership list. As a black lawyer, Griffin’s choice of client was met with especially harsh criticism. To counteract this, he understandably went to great lengths to separate himself from his client and the Klan. Besides consistently highlighting the First Amendment focus of the case and the potential benefit for black citizens of a favorable outcome, “Griffin repeatedly emphasize[d] that he believe[d] that the Klan is a terrorist organization whose message of hatred and intolerance should be condemned at every turn.”

While Griffin was somehow able to sustain a positive working relationship with Lowe—notwithstanding his moral distancing—this type of posturing typically serves to confirm the negative public perceptions that inspired his brand of commentary in the first place.

Professor David Wilkins has rightly observed: “A lawyer who keeps her distance from an unpopular client...will inevitably reinforce the prevailing perception that the client is subhuman and therefore does not deserve legal protection.”

more clients will be materially limited...by a personal interest of the lawyer.”

46. Id. at 1058-60.
47. Id. at 1053-56.
48. Id. at 1043-49, 1053. Attorney David Goldberger found himself in a similar position as a Jewish lawyer representing a group of American Nazis in their infamous effort to picket in the heavily Jewish-populated town of Skokie, Illinois. Goldberger, supra note 8, at 10, 11. He contends that “by visibly maintaining an appropriate degree of distance between the attorney and the client, an attorney can better communicate the professional nature of the attorney-client relationship to the public.” Id. at 14. This is what Goldberger endeavored to do in the Skokie case. Id.
49. Wilkins, supra note 45, at 1055 (“So long as Lowe is aware that Griffin intends to speak out on these issues, one can view any resulting harm to the Klan as part of the implicit price that organization is paying for the benefit of obtaining Griffin’s services. The fact that Lowe continues to express confidence in Griffin’s representation, even in the face of the latter’s criticism of the Klan’s activities and objectives, suggests that Lowe finds the trade-off acceptable.”); see Goldberger, supra note 8, at 14 (noting that in representing the Nazis in Skokie he made “sure that the party leader had no objection to [his] public articulation of personal disagreement with the client’s political goals and views...[and] made [it] clear that [he] would make no derogatory statements about the client or the client’s activities”).
50. Wilkins, supra note 45, at 1054.
51. Id.; see also Porter, supra note 16, at 166 (questioning whether “Griffin [was] being an unethical advocate by refusing to commit himself to only positive statements to the press about the Ku Klux Klan and instead keeping a distance from his client”).
Attorney David Goldberger, who represented a group of American Nazis in their attempt to obtain a permit to picket in heavily Jewish-populated Skokie, Illinois in the late 1970s, has expressed similar concerns about the potential dangers of moral distancing by counsel. Specifically, in justifiably attempting to distance oneself from a condemnable client, such as the Nazi Party and the Klan, Goldberger cautioned:

> It is... important for the attorney to resist the temptation to seek a degree of distance from the client that would damage the effectiveness of the attorney-client relationship. Too much distance cuts off access and reinforces a client’s fear that, because of political differences or personal dislike, [the attorney] will not be an aggressive advocate. Once the client succumbs to that fear, reliable attorney-client communication is impossible.

Rather than disassociating themselves from their clients, some attorneys may choose to justify a chosen representation by stridently proclaiming the client’s innocence to the public. Although this may be good for the morale of the attorney-client relationship, it can create other problems that may be of even greater concern. Take for example a criminal defendant, accused of a heinous offense, whom the media vilifies. The deck is already heavily stacked against that defendant and any proclamation of innocence by counsel will likely be met with ample skepticism. Indeed, if the defendant’s guilt has been depicted as virtually undeniable, such a statement by defense counsel could make matters worse—namely, that the attorney is not only an awful person for agreeing to represent the defendant, but he is also a liar. Furthermore, cases like this can have the collateral effect of making it difficult for lawyers who may actually be representing innocent clients to establish any sort of public credibility.

In addition to the potential damage that can be inflicted on one’s client, the attorney-client relationship, and the criminal justice system, requiring defense counsel to justify a particular representation fails to countenance the tremendous burden that these lawyers have undertaken. Attorneys who are courageous enough to be the devil’s advocate often

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52. See Goldberger, supra note 8, at 10-11. It is important to note that many of the Jewish residents of Skokie were actually survivors of Nazi concentration camps. Id. at 11.

53. Id. at 13.

experience a variety of negative repercussions. Their physical safety and that of their families may be compromised, their practices may suffer significant damage, and the personal and emotional toll that such cases may exact is immeasurable. Well-known attorney Stephen Jones’s description of the effects of his representation of Oklahoma City bomber Timothy McVeigh provides a vivid depiction of just how devastating it can be to advocate for the devil:

For this representation, I was demonized, ostracized and exposed to physical and economic risks. The FBI investigated threats against my life, and I had no less than half a dozen serious security incidents at my home. I placed a loaded revolver in my office desk drawer and a loaded shotgun in my closet at home. Because of threats, another lawyer on the defense team was authorized to carry a concealed weapon. My family had armed guards on our property for 2½ years, motion detectors, electronic eyes, unlisted telephone numbers and emergency-response numbers. A law practice of 25 years was destroyed. It took me seven years to build it back to pre-1995 levels.

Expecting defense counsel to publicly explain the representation of a vilified client such as Timothy McVeigh, when already faced with the prospect of these types of consequences, literally adds insult to injury. These attorneys should be praised for the incredible sacrifice they make for the good of the system, rather than saddled with more baggage.

One final concern that may flow from a public justification requirement is that it could encourage attorneys to engage in excessive commentary to the media, which, in turn, might result in violations of the ethical rules regulating such communications. In particular, Rule 3.6 of the American Bar Association (“ABA”) Model Rules of Professional Conduct prohibits a lawyer who is participating in the litigation of a matter from making “an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public

55. See, e.g., Goldberger, supra note 8, at 10 (“Representing genuinely unpopular clients subjects you not only to personal attacks and criticism, but also to the bar’s uncertain commitment to the principle that a general duty exists to represent the perceived villains of society.”).

56. See, e.g., Diana B. Henriques, Madoff’s Advocate, N.Y. TIMES, Mar. 11, 2009, at B1 (noting that Bernie Madoff’s attorney, Ira Lee Sorkin, “keeps a yellowed newspaper clipping about the first death threat against him”).

57. Stephen Jones, The Case for Unpopular Clients, WALL ST. J., Mar. 13-14, 2010, at W1; see also Goldberger, supra note 8, at 11-12 (noting that John Demjanjuk’s Israeli counsel, Yoram Sheftel, “was the victim of a brutal acid attack that permanently damaged one of his eyes and nearly left him blind”).

58. It should be noted that Stephen Jones did not voluntarily choose to represent Timothy McVeigh but, rather, was appointed. Jones, supra note 57. Given this fact, one could reasonably speculate that the potential negative consequences for an attorney who affirmatively chose to undertake such a controversial representation might be even worse, if that is possible.
communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.\textsuperscript{59} In their zeal to justify a certain representation, defense counsel might be tempted to issue over-the-top public pronouncements that could "have a substantial likelihood of materially prejudicing" some aspect of the case.\textsuperscript{60} Furthermore, that temptation might also lead to conduct or statements that are dishonest or deceitful and, thus, inconsistent with the dictates of Rule 8.4(c).\textsuperscript{61}

On the other hand, the combination of a public justification requirement and the ethical constraints on commentary to the press can be viewed as placing attorneys in an untenable, catch-22 situation.\textsuperscript{62} Specifically, an attorney is required to speak out in order to justify or explain a controversial representation, but, in doing so, he or she must necessarily curtail the breadth and water down the content of any statements in order to avoid running afoul of the ethical constraints.\textsuperscript{63} Consequently, lawyers faced with a public justification obligation may quite literally be damned if they do and damned if they don't.

In the abstract, there are clearly a host of prospective concerns that would likely emanate from mandating that attorneys publicly justify their representations. The next Part moves from the hypothetical to the actual by examining a sampling of explanations offered by attorneys in some notoriously controversial cases, and assessing their probable effects.

IV. PUBLIC JUSTIFICATIONS OFFERED BY THE DEVIL'S ADVOCATE: EXAMPLES AND EFFECTS

Although it may oftentimes be best for an attorney to avoid any attempt to explain his or her choice of client—as established in Part III—defense counsel may nevertheless find it impossible to

\textsuperscript{59} Model Rules of Prof'l Conduct r. 3.6(a) (AM. BAR ASS'N 2013).
\textsuperscript{60} See, e.g., Tigar, supra note 6 (noting his awareness of "the limitations on [his] rights, as counsel, to use public media to air [his] views" in offering his public justification for representing John Demjanjuk).
\textsuperscript{61} Model Rules of Prof'l Conduct r. 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."); see also id. r. 4.1(a) ("In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.").
\textsuperscript{62} See Goldberger, supra note 8, at 60 ("[L]awyer may not be able to fully explain himself for fear of harming the client's case or violating disciplinary rules regarding comments on pending cases.").
\textsuperscript{63} See id. at 15 (noting that one "need only look at Michael Tigar's carefully hedged response to the insulting attack leveled against his appearance in the Demjanjuk case in order to understand the problems attorneys face when they communicate with the press").
avoid this temptation, especially in the most disturbing cases. The substance of the justifications discussed in this Part reveals that even highly experienced advocates, with the best of intentions, have great difficulty eluding potential harm to their clients or cases when making such statements.

Infamous defendant Joel Steinberg was charged with the brutal killing of his illegally adopted six-year-old daughter. The case received extensive, negative media coverage, and then-N.Y. Mayor Ed Koch even chimed in by colorfully suggesting that Steinberg should be “boiled in oil.” Steinberg’s lawyer, Ira D. London, was met with the usual questions concerning how he could represent someone like Steinberg. In responding to these inquiries, London maintained that while he was “no fan of Mr. Steinberg, he believe[d] he [was] entitled to the best defense his money can buy against charges that he murdered Lisa Steinberg.” The statement attributed to London is obviously of the moral-distancing variety—akin to “my client is indeed a horrible human being, but everyone is entitled to quality representation and I am simply fulfilling that role.” As already noted, a lawyer who does this may be placing his personal interest over that of the client and, thus, operating under a conflict of interest that, at a minimum, facially undermines the all-important duty of loyalty owed to the client.

Attorney Gerald Boyle had the distinction of representing a real-life Hannibal Lecter in the form of Jeffrey Dahmer, a serial killer who grotesquely murdered seventeen males of various ages and purportedly


66. Sullivan, supra note 65 (noting that one patron at a local restaurant asked London “how can a nice-sounding guy like you represent someone like Steinberg?”).

67. Id.

68. See supra note 44 and accompanying text; see also Roan, supra note 35, at 134 (“Acting in a way that suggests the people we have the privilege to defend are strange or scary undermines the right to counsel and our democratic ideals.”).

69. See supra text accompanying notes 49-51.

ate some of their body parts. Not surprisingly, Boyle’s representation of Dahmer was cast in an unfavorable light, described by one newspaper as “defending the indefensible[,] [t]he almost inconceivable.” In responding to these types of characterizations, Boyle stated at one point that “[a] lawyer doesn’t pick and choose who he’s going to represent by holding a popularity contest . . . . I took this case because I was asked to and I saw no reason not to.” While the nature of Dahmer’s crimes—to which he confessed—made it virtually impossible for Boyle to say anything positive on his client’s behalf, the statement he made arguably worsened the situation. Boyle essentially accepted the public portrayal of Dahmer and explained his decision to accept the representation in a manner that could in no way inspire trust and confidence within the attorney-client relationship.

Ira Lee Sorkin represented a less gruesome but equally vilified client in Bernie Madoff, who eventually entered a guilty plea on fraud charges stemming from an elaborate Ponzi scheme that stole retirement savings from thousands of investors. In explaining his representation of someone like Madoff, Sorkin stated: “[T]o preserve a system that can protect the people who didn’t do bad things, you have to represent people who did do bad things.” Madoff was admittedly guilty of the crimes alleged, but this is still a pretty destructive statement, especially coming from one’s own attorney. It would have been far better if other lawyers had supplied this sort of justification on Sorkin’s behalf.

Former U.S. Attorney General Ramsey Clark offered a more nuanced public justification for his much-maligned decision to serve as defense counsel for ousted Iraqi President Saddam Hussein in his prosecution on various war crime charges before the Iraqi High Tribunal. Clark, no stranger to controversial representations, felt compelled to author an editorial expounding upon his decision to take on

72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id.
78. Id.
79. Among many others, Clark has represented the Palestine Liberation Organization, Sheik Omar Abdel Rahman (alleged mastermind of the 1993 bombing of the World Trade Center), and reputed Nazi war criminal Karl Linnas. Id. at 93.
Hussein as a client.\textsuperscript{79} Much of his explanation focused on the importance of fairness and justice in a criminal trial as politicized as that of Saddam Hussein.\textsuperscript{80} According to Clark’s account, the U.S. government appeared to structure a judicial process designed to exact so-called “victor’s justice” by ensuring that the trial would undoubtedly result in a conviction and a death sentence.\textsuperscript{81} He emphatically noted that “[t]he United States has already destroyed any hope of legitimacy, fairness or even decency by its treatment and isolation of the former president and its creation of the Iraqi Special Tribunal to try him.”\textsuperscript{82} The clear implication of his harsh critique is that Hussein needed a lawyer like Clark who would fight arduously against a powerful opponent that constructed a system heavily weighted against the accused. Clark concluded by proclaiming: “The defense of such a case is a challenge of great importance to truth, the rule of law and peace. A lawyer qualified for the task and able to undertake it, if chosen, should accept such service as his highest duty.”\textsuperscript{83}

Although he certainly did not engage in any moral distancing, as one might expect with a client as universally demonized as Hussein, Clark’s impassioned defense of his client choice may, nevertheless, have been somewhat damning because of what it omitted. Specifically, Clark avoided any discussion regarding the possible innocence of Hussein, focusing instead on portraying the United States as a villain, perhaps deserving of similar condemnation.\textsuperscript{84} One could interpret his justification as implying that Hussein may in fact have been guilty of the atrocities alleged, but the United States—Hussein’s ostensible prosecutor—was equally culpable. Such posturing could reasonably be interpreted as evidencing more concern for exposing the evils of American government and foreign policy than providing effective legal counsel to Hussein. On the other hand, by publicly exposing the systemic deficiencies in Hussein’s prosecution, Clark actually may have been

\textsuperscript{80} Id. (“The United States, and the Bush administration in particular, engineered the demonization of Hussein, and it has a clear political interest in his conviction. Obviously, a fair trial of Hussein will be difficult to ensure—and critically important to the future of democracy in Iraq.”).
\textsuperscript{81} See id. (“The intention of the United States to convict the former leader in an unfair trial was made starkly clear by the appointment of [Ahmad] Chalabi’s nephew to organize and lead the court.”).
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} See, e.g., id. (“[Hussein] has been cut off from all communications with the outside world and surrounded by the same U.S. military that mistreated prisoners at Abu Ghraib and Guantanamo.”).
defending his client in the only manner likely to have any meaningful impact, at least in terms of perception.

In explaining his rationale for representing John Demjanjuk, Professor Tigar adopted an approach very similar to Clark’s. He concentrated on what he viewed as the abject unfairness of the process to which Demjanjuk had been subjected. As with Clark’s representation of Hussein, Professor Tigar’s involvement was more about protecting his client’s rights in the face of a process that was overwhelmingly stacked against him. Specifically, he compellingly asserted:

> When the most powerful country on earth gangs up on an individual citizen, falsely accuses him of being the most heinous mass murderer of the Holocaust, and systematically withholds evidence that would prove him guiltless of that charge, there is something dramatically wrong. When that man is held in the most degrading conditions in a death cell based on those false accusations, the wrong is intensified. When the government that did wrong denies all accountability, the judicial branch should provide a remedy. I have spent a good many years of my professional life litigating such issues. I am proud to be doing so again.

Both Clark’s and Professor Tigar’s public justifications were powerful and persuasive, yet nevertheless flawed in two important respects. First, they can be viewed as at least partially focused on

85. Tigar, supra note 6.
86. Id. Ironically, this is one of the principal justifications that Monroe Freedman offered for how he could represent “those people.” In particular, he has maintained:

> In a free society, it is vital that there be a counter to the overwhelming power of government, because it is a power that can be easily abused by those who wield that power, individuals who may be more interested in advancing their own ambitions, venting their own hatreds, and satisfying their own prejudices, than they are in respecting our rights and protecting society. In representing “those people,” therefore, even those who have committed the worst crimes against other people and against society, the criminal defense lawyer serves each of us by curbing official abuse and preserving the fundamental values of a free society.

Monroe H. Freedman, Why It’s Essential to Represent “Those People,” in HOW CAN YOU REPRESENT THOSE PEOPLE?, supra note 34, at 78; see also Joseph Margulies, Ruminations on Us and Them, in HOW CAN YOU REPRESENT THOSE PEOPLE?, supra note 34, at 101-06 (discussing his representations of Guantanamo detainees and recounting the extreme, wrongful treatment to which they were subjected under the authority of the U.S. government and others); Abbe Smith, How Can You Not Defend Those People?, in HOW CAN YOU REPRESENT THOSE PEOPLE?, supra note 34, at 170-72 (discussing the necessity of challenging authority on behalf of criminal defendants in certain situations); Steinberg, supra note 35, at 183 (“There is unfairness in the power disparity between those charged with crime and a prosecutorial system armed with cops, judges, and jails. . . . There is no other way to understand what is happening in our criminal justice system other than as a gross abuse of power. There is no fair fight; it’s a slaughter. And it makes picking sides easy for me.”).

87. Tigar, supra note 6.
88. Cf. supra note 86.
propping themselves up as paradigms of professionalism by taking on such cases, patting themselves on the back for being the brave ones who stepped up to the plate. In addition, and more significantly, Clark’s and Professor Tigar’s personal involvement in the cases undermined the credibility of their critiques. In other words, of course they as counsel for the condemned clients would argue that the process was unfair, so how can they be believed? As elaborated upon further in the next Part, this latter point makes plain one of the primary benefits of placing the burden of public justification on other members of the profession—perceived objectivity.

V. PUBLIC JUSTIFICATIONS OFFERED ON BEHALF OF THE DEVIL’S ADVOCATE

There are various possible justifications for why an attorney would accept the responsibility of being the devil’s advocate. As demonstrated, however, when articulated personally by the advocate a number of troubling concerns may arise. In addition, the proffered justification, even if observably strident and convincing, may be viewed skeptically by the public in the same way that one might question the veracity of a chef who writes rave reviews about his or her own dishes. Such public explanations carry far more potential weight when proclaimed by members of the profession who are not involved in the unpopular or controversial representation. Two noteworthy contemporary examples serve to illustrate this point.

In 2010, a group calling itself Keep America Safe, led by Elizabeth Cheney and William Kristol, released a video seeking to expose attorneys in President Obama’s U.S. Department of Justice (“Justice Department”) who had previously represented Guantanamo Bay detainees. The video, which was purportedly an effort to ascertain the identities of these attorneys, damningly asked: “Who are these government officials? . . . Whose values do they share?” To make matters worse, the group ominously labeled the unknown lawyers as

89. See Goldberger, supra note 8, at 60.
90. See id. (“Such statements of support coming from the organized bar are valuable because they would be far more credible than the self-justifying statement made by a courtroom advocate.”). 91. Id.
93. Id.
the “Al Qaeda 7.” The clear intent was to characterize the lawyers as unpatriotic, terrorist sympathizers, solely by virtue of their choice of client.

Rather than waiting for the attorneys in question to personally explain or justify their representations, a distinguished group of lawyers—many on the more conservative side of the political spectrum—publicly came to their defense. Benjamin Wittes, a senior fellow at the Brookings Institution, crafted a letter condemning the “shameful series of attacks” on the Al Qaeda 7 lawyers and characterizing their efforts as consistent with “the American tradition of zealous representation of unpopular clients,” such as John Adams’s well-known defense of British soldiers charged in the aftermath of the Boston Massacre.

As noted by the New York Times, “[t]he letter was signed by a Who’s Who of former Republican administration officials and conservative legal figures,” and included, among others: former Solicitor General and Whitewater Independent Counsel Kenneth Starr; former Deputy Attorney General Larry Thompson; former Chief Counsel to the National Security Council and the State Department John Bellinger; former Deputy Assistant Secretary of Defense for Detainee Affairs Matthew Waxmann; former White House Associate Counsel Bradford Berenson; and Peter Keisler, former Assistant Attorney General for the Civil Division and the official who was in charge of representing the government in cases brought by Guantanamo detainees.

Noted attorneys Walter Dellinger and Stephen Jones also spoke out in defense of the so-called Al Qaeda 7. In defending Justice Department attorney Karl Thompson’s previous assistance in a detainee case, Dellinger asserted:

[Thompson’s efforts] seemed to me to be not only part of a lawyer’s professional obligation but a small act of patriotism as well. The other Justice Department lawyers named in [the] . . . attack came to provide assistance to detainees in a number of ways, but they all

95. Benjamin Wittes, Opinion, Presumed Innocent? Representing Guantanamo Detainees, BROOKINGS (Mar. 24, 2010), http://www.brookings.edu/research/opinions/2010/03/24-lawyers-wittes. There were actually nine attorneys, but only two had been identified—Principal Deputy Solicitor General Neal Katyal and National Security Division attorney Jennifer Daskal. Id.


97. Id.

deserve our respect and gratitude for fulfilling the professional obligations of lawyers.\textsuperscript{99}

In his third-party defense of the maligned detainee attorneys, Stephen Jones maintained:

Because we have rejected in this country a private system of vengeance for an institutionalized judicial process, courts must rely upon the experience and integrity of defense counsel. These lawyers have to be willing to accept the challenge. That necessary reliance is damaged by the short-sighted and ill-advised attacks now being made on the Justice Department lawyers.\textsuperscript{100}

Similar to the attack by Keep America Safe, Charles “Cully” Stimson—then-Deputy Assistant Secretary of Defense for Detainee Affairs—publicly called out lawyers from major law firms in 2007 for their representation of Guantanamo detainees.\textsuperscript{101} Specifically, in a radio interview Stimson stated:

Actually you know I think the news story that you’re really going to start seeing in the next couple of weeks is this: As a result of a FOIA . . . request through a major news organization, somebody asked, “Who are the lawyers around this country representing detainees down there,” and you know what, it’s shocking . . . .\textsuperscript{102}

After identifying the firms by name, Stimson proceeded to add:

I think, quite honestly, when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms, and I think that is going to have major play in the next few weeks. And we want to watch that play out.\textsuperscript{103}

A barrage of respected lawyers quickly rose to the defense of the impugned advocates.\textsuperscript{104} Among the most significant and eloquent

\textsuperscript{99} Dellinger, supra note 92.

\textsuperscript{100} Jones, supra note 57.


\textsuperscript{102} Id.

\textsuperscript{103} Id.

\textsuperscript{104} See, e.g., Neil A. Lewis, Official Attacks Top Law Firms Over Detainees, N.Y. TIMES, Jan. 13, 2007, at A1 (quoting then-ABA President Karen J. Mathis as saying that “[l]awyers represent people in criminal cases to fulfill a core American value: the treatment of all people equally before the law. To impugn those who are doing this critical work—and doing it on a volunteer basis—is deeply offensive to members of the legal profession, and we hope to all Americans”).
defenders were former Bush Solicitor General Ted Olson and former Obama Principal Deputy Solicitor General Neal Katyal. In an article that appeared in the Legal Times, Olson and Katyal pointedly denounced Stimson, stating as follows:

When government officials are called “war criminals” and when public-interest lawyers are called “terrorist huggers,” it not only cheapens the discourse, it scrambles the dialogue. The best solutions to these difficult problems will emerge only when the best advocates, backed by weighty resources, bring their talents to bear. And the heavy work of creating solutions for these complicated issues can only move forward when the name-calling ceases.

As evidence of the power of these concerted, third-party rebukes, defending the honor of those who chose to voluntarily represent detainees, Cully Stimson succumbed to the backlash, issuing a public apology and ultimately resigning from his post. Third-party defenses, such as these, are distinctly beneficial because they effectively relieve defense counsel from any perceived obligation to publicly justify or explain their client choices, freeing them to concentrate on providing quality legal representation.

It is important to note that some highly regarded advocates known for taking on controversial clients habitually remain silent in the face of near-crippling public scrutiny, rather than devoting energy to publicly justifying their representations. Judy Clarke is one such attorney, and her list of clients boasts many of the most condemnable defendants in recent memory, including Eric Rudolph (the Olympic bomber), Ted Kaczynski (the Unabomber), Zacarias Moussaoui (a September 11th attacker), and Dzhokhar Tsarnaev (the Boston Marathon bomber). Her preferred

106. Olson & Katyal, supra note 22.
107. Cully Stimson, An Apology to Detainees’ Attorneys, WASH. POST (Jan. 17, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/01/16/AR2007011601383.html (“I apologize for what I said and to those lawyers and law firms who are representing clients at Guantanamo. I hope that my record of public service makes clear that those comments do not reflect my core beliefs.”).
109. See Goldberger, supra note 8, at 60 (observing that statements made by the organized bar in defense of an attorney’s representation of a given client “are valuable because an attorney’s time and ability to justify his representation is limited by the client’s interests”).
110. See Mark Bowden, Dzhokhar Tsarnaev Has the Most Ferocious Lawyer in America Defending Him, VANITY FAIR (Mar. 30, 2015), http://www.vanityfair.com/news/2015/03/judy-clarke-dzhokhar-tsarnaev-lawyer ("She shuns attention. She almost never gives interviews and does
approach in representing her clients, almost all of whom face the death penalty, is to dig as deeply as possible into their pasts to understand who they really are and then develop narratives designed to humanize them to juries.\textsuperscript{111}

Clarke sincerely believes that “no person should be defined ‘by the worst moment, or worst day’ of his life,”\textsuperscript{112} and she is firmly opposed to the death penalty.\textsuperscript{113} For her, this personally justifies and explains why she does what she does. To require that she publicly articulate her approach and motives every time she steps into the fray as the devil’s advocate is truly asking too much. The act of other lawyers taking the initiative to do so on Clarke’s behalf, as with the Al Qaeda 7 and other detainee lawyers, would serve to free her, and lawyers like her, to concentrate more forcefully on providing clients with optimal representation, thus better securing the sanctity of the attorney-client relationship and the fairness of the judicial process.

VI. AN ETHICAL DUTY TO DEFEND THE DEVIL’S ADVOCATE

Apart from it being more effective and appropriate for lawyers other than those involved in a representation to undertake the responsibility of public justification, there is support in the ethical rules for viewing this as a professional obligation. First and foremost is Rule 1.2(b), which provides that “[a] lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”\textsuperscript{114} The clear intent behind this rule is to encourage lawyers to be more willing to take on representations that may be viewed as controversial or unpopular and, thereby, to ensure that everyone is able to obtain counsel if they desire.\textsuperscript{115}

\textsuperscript{111} Id. But see Tucker Carrington, How Can You Defend Those People?, in HOW CAN YOU REPRESENT THOSE PEOPLE?, supra note 34, at 37 (observing that defense attorneys “expend a lot of effort trying to tell the stories of our clients’ lives—to show that they are something other, and more—than the worst thing they may have done” but, in doing so, sometimes lose sight of the truth).

\textsuperscript{112} Bowden, supra note 110.

\textsuperscript{113} Id. (“[Clarke] is at war with the state—in particular, with the state’s power to impose death. She calls the death penalty ‘legalized homicide.’”).

\textsuperscript{114} MODEL RULES OF PROF’L CONDUCT r. 1.2(b) (AM. BAR ASS’N 2013).

\textsuperscript{115} See id. r. 1.2 cmt. 5 (“Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client’s views or activities.”); see also MODEL CODE OF PROF’L RESPONSIBILITY EC 2-26 to -27 (AM. BAR ASS’N 1980) (“[I]n furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. . . Regardless of his personal feelings, a lawyer should
Oddly, Rule 1.2(b) is not really even a rule in the true sense of the word but rather more of an unenforceable pronouncement. The only way to accord this provision any meaningful significance is to interpret it as creating somewhat of a duty on the part of attorneys—at least, to avoid criticizing those who accept the responsibility of being the devil’s advocate, and at most, to affirmatively speak out in their defense. The obvious concern is that lawyers who are subject to harsh criticism for their choice of client—especially from fellow members of the bar—might decline to undertake such representations, thus reducing the availability of effective counsel. By eschewing this sort of criticism and actually taking up the mantle of defending other lawyers’ client choices, attorneys can positively counteract this serious potential problem.

Further support can be gleaned from Rule 6.2, which makes it very difficult for a lawyer to avoid appointment by a judge to represent a particular client. Essentially, attorneys are required to accept such representations unless they can demonstrate that it will likely result in a violation of the ABA Model Rules of Professional Conduct, will impose an unreasonable financial burden on the lawyer, or the cause is so repugnant to the attorney that it will impair his or her ability to

not decline representation because a client or a cause is unpopular or community reaction is adverse.

116. See HAZARD, JR. ET AL., supra note 17, § 6.12, at 6-29 ("Although Rule 1.2(b) announces no prohibition or affirmative rule of conduct, and therefore could not be a basis for discipline, it states a fundamental principle of the law of lawyering.").

117. See Jones, supra note 57 (maintaining that attacks such as those by Keep America Safe “are making fearless lawyers an endangered species in this country”); see also Raymond M. Brown, A Plan to Preserve an Endangered Species: The Zealous Criminal Defense Lawyer, 30 Loy. L.A. L. Rev. 21, 21 (1996) (maintaining that criminal defense lawyers are “disdained, mocked and unappreciated” and hyperbolically predicting that “[t]he day will come when the last criminal defenders will quietly take down their shingles and stroll unmourned and unnoticed into the night”); supra note 22 and accompanying text.

118. One could also make the argument that the ethical duty to report the professional misconduct of attorneys embodied in Rule 8.3 implies a concomitant obligation to speak up on lawyers’ behalf in order to quell public misperceptions or defend them against unwarranted attacks for their choice of clients. See MODEL RULES OF PROF’L CONDUCT r. 8.3(a) (AM. BAR ASS’N 2013) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

119. Id. r. 6.2.
effectively represent the client. Appointed lawyers thus perform an invaluable service that they are professionally constrained to provide. To criticize them for their representations would therefore be demonstrably unfair, and it should go without saying that their difficult task could be made more bearable if third-party attorneys vocally supported them.

To do this for appointed lawyers, however, but not for those who accept such matters on their own volition—even if paid—seems impossible to reconcile. All lawyers who advocate for the unpopular or despised are deserving of a public defense waged by other members of the bar to lessen their already heavy burden and, perhaps more importantly, to better educate the citizenry about our criminal justice process.

VII. CONCLUSION

Monroe Freedman’s pronouncement that attorneys should be held morally accountable for their choice of client “in the sense of being under a burden of public justification” was undoubtedly inspired by noble intentions. He cared deeply about the legal profession, and his words and actions were unfailingly designed to enhance the sanctity of the work that lawyers perform. Unfortunately, even the most honorable plan can sometimes have unintended consequences, and I think that this was the case with ethically obligating attorneys to publicly justify their client choices. The potential negative effects that such a duty could have on the availability of legal counsel, individual attorney-client relationships, and the criminal justice system as a whole argue powerfully against imposing this obligation on lawyers.

Nevertheless, Professor Freedman’s principal desire appears to have been the fostering of greater understanding among the public about what lawyers do and why they do it. Indeed, in his rejoinder to

120. Id.; see also ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 4-2.1(d) (4th ed. 2015) (“Qualified defense counsel should not seek to avoid appointment by a tribunal to represent an accused except for good cause, such as: representing the accused is likely to result in violation of applicable ethical codes or other law; representing the accused is likely to result in an unreasonable financial burden on the lawyer; or the client or crime is so repugnant to the lawyer that it will likely prejudicially impair the lawyer’s ability to provide quality representation.”).

121. See MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 6 (“[A] lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”); see also HAZARD, JR. ET AL., supra note 17, § 6.12, at 6-33 (“The profession must support the efforts of those who defend the unpopular and must educate the general public about the difference between representing a person and agreeing with that person’s views or actions.”).

122. See Hodes, supra note 7, at 988 (“Freedman was morally entitled to question and to challenge, perhaps sparking a response that would have educative value—as it ultimately did”).
Professor Tigar’s response, Professor Freedman asserted: “I believe that a major reason for lawyer-bashing . . . is that our profession has failed to explain and to justify the true nature and importance of the lawyer’s role in American society.” I fully agree with this assessment, especially as it pertains to lawyers who are courageous enough to serve as the devil’s advocate. The public is entitled to reasoned explanations for why attorneys undertake such representations, but the burden of offering these public justifications is more appropriately borne by the profession rather than the individual lawyers engaged in the matters under scrutiny.

While commentators have reasonably questioned the propriety of Professor Freedman’s 1993 Legal Times article, I am personally grateful to him for challenging Professor Tigar’s decision to represent John Demjanjuk and for provocatively calling upon lawyers to publicly justify their client choices. Through his characteristic quest for answers, Professor Freedman revealed to me the professional necessity of our coming to the defense of the devil’s advocate.

123. Freedman, The Morality of Lawyering, supra note 5; see also supra note 37 and accompanying text.
124. See Freedman, The Morality of Lawyering, supra note 5 (recounting some of the harsh criticism that he received for asking Professor Tigar to publicly justify his representation of Demjanjuk).
125. See Tigar, supra note 13, at 7 (observing that Freedman’s “ardent, insistent, probing, sometimes fierce or sardonic—almost never solemn—methods of inquiry led him to embroider the main themes of his work with new examples and insights, and even at times to go back and change an emphasis or rendering”).