

Ethical Concerns Surrounding Criminal Defense Work

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ABSTRACT

Criminal defense attorneys often receive much backlash from the public because of the nature of their work. They are responsible for representing a person convicted of a crime in court, yet many believe that this action is completely immoral in and of itself. Due to a fair amount of literature (dating back to the late 18th century) that labels the criminal defense profession as being unethical, this literature review seeks to eliminate any stereotypes which degrade the defense sector of the criminal justice system. The review begins by demonstrating the harmful effects of stereotypes in the court room. Next, the review examines ideas which seek to refine the criminal defense process in order to eliminate potential slander on the field. Finally, the review rebuts any claims which label the profession as unethical by showcasing the dire importance of defense function in court. By ridding criminal trials of prejudice towards the defense counsel, the courtroom can operate efficiently and ensure equal justice under the law.

Introduction

Since the days of the Boston Massacre, defense lawyers have been in the face of public scrutiny regarding the ethics of their work. Defense lawyers represent clients who are charged with crimes of varying severity in order to ensure a fair civil trial. The defense counsel places a “burden of proof” on the prosecutor in order to preserve their client’s innocence until otherwise determined by the jury. Since their duty involves defending individuals suspected of crimes, many people believe that the defense function is inherently unethical, paving the way for slander against the profession as a whole. People who adopt such negative perspectives towards defense lawyers view the profession on a case-to-case basis and seldom consider the utmost importance of defense function. For example, the essential role of defense becomes clear when a suspect is wrongfully convicted and sent to prison. On the contrary, when a guilty criminal is set free and deemed innocent, the negative stereotype regarding defense lawyers persists labeling them “lawyer criminals”. The question in essence is whether the act of defending a person accused of a crime is ethical or not. Although criminal defense attorneys often handle sensitive work relating to the defense of their clients which can often be seen as pushing the boundaries of ethics, criminal defense work is ethical because lawyers have no obligation to determine the guilt of their client, a lawyer’s duty is strictly to defend their client by any lawful means, and criminal defense is necessary in order to uphold justice in civil trials. The paper will focus on a means to improve the function of defense counsel, address the backlash which defense lawyers face, and refute blind accusations which place defense lawyers in an unethical pigeon-hole.

Before reviewing major literature on the subject of criminal defense ethics, it is important to understand the foundation in which criticism of defense lawyers is based upon. The landmark case of *Rex v. Preston* first widely recognized the importance of criminal defense. To give historical context, British redcoats were accused of initiating the Boston Massacre which was a violent scuffle between redcoats and colonists that re-

sulted in the deaths of Americans. Because colonists sympathized with the American victims, the public denounced the redcoats and blamed them for murder.¹⁰ It was only until John Adams took a controversial step against patriotism to defend the redcoats in court that criminal defense was accepted to ensure justice in the court system. In the case of the redcoats, John Adams faced public backlash for representing British officers who had strictly limited American freedoms. Though controversial, John Adams' decision to represent the redcoats ultimately led to more equitable civil trials and produced an initiative to enforce a defendant's rights. Similarly to the Americans' disapproval of John Adams, public resentment of defense attorneys finds substance when the defendant is suspected of a high crime. For example, when a lawyer is tasked with defending a murderer like Ted Bundy, it is easy to accuse the lawyer of acting against their own morals in order to represent their client. However, this broad censure of the profession suggests that defense attorneys justify their clients' actions, something they cannot and do not control. The defense attorney can represent their client without agreeing to their client's suspected crime, and they must merely act to evade prosecution from rashly convicting the defendant.

Literature Review

Harmful Implications of the Stereotype

Primarily, it is important to understand how a simple stereotype which labels defense lawyers unethical can cause destruction in the legal scene and society. In his article titled "Criminal Lawyers or lawyer criminal?" included in "The Florida Bar Journal", Joseph McSorley, private lawyer and former federal prosecutor for Washington D.C. and Miami, debunks the common misconceptions that lawyers are dishonest to their clients by highlighting many ethical obligations which lawyers must abide by in order to stay in practice. Ethical standards will be discussed in detail later in the paper. According to McSorley, defense lawyers carry a "personal advocacy role which focuses solely on protecting the individual interests of their clients, but within an ethical framework".⁵ Additionally, McSorley reveals an unhealthy enmity between prosecutors and defense counsel, stemming from negative stereotypes. The hostility resulting from the stereotypes leads to distraction in court, and it goes against guidelines of professional conduct in which lawyers must adhere to. Although the stereotype damages the efficiency of civil trials and undermines the portrayal of defense lawyers, aside from outlying instances, there is no evidence which supports the notion that lawyers across the board are acting criminally and unethically. As long as defense lawyers act according to certain ethical standards bestowed upon them by the ABA (American Bar Association), there is no reason to generalize legal professionals as engaging in shady practices or acting unethically.

Comparatively, an editorial cartoon illustrated by Dan Wasserman demonstrates the critical need for defense function. In the image, a judge claims that the court has "no money to provide you [defendants] with lawyers in civil cases".⁹ The portrayal of a judge violating the defendant's right to an attorney, sixth amendment, highlights the importance of criminal defense in the justice system. Without legal representation, defendants may have to plead guilty or inadequately defend themselves against trained professionals, often resulting in their conviction. In this case, without defense attorneys, any wrongful conviction would inevitably lead to the punishment of innocent people through fines or imprisonment. To further install the importance of attorneys and criminal defense, Wasserman labels the judge's desk "Mass Courts", allowing the viewer to infer that civil trials lose their purpose without the presence of defense lawyers. Overall, the image points to the imminent downfall of the court system by ignoring a citizen's right to an attorney. If stereotypes persist and eventually strip defense lawyers of their role in civil trials, the scenario depicted in Wasserman's editorial cartoon could become reality. Prosecutors would maintain unlimited power in the courtroom, and, having no source of rectification, they could twist the validity of evidence in order to successfully convict a defendant. Ultimately, corruption would unfold without the presence of defense attorneys.

Revisions/Improvements to Strengthen the Criminal Defense Process

Moreover, reviewing the American Bar Association's (ABA) standards of defense function provides insight about the roles of defense counsel and presents guidelines for exceptional defense practice. In part one of their criminal justice standards titled "Defense Function", the ABA provides defense counsel with aspirational standards or "best practices" of defense so that lawyers understand acceptable practices in the courtroom.¹ According to the ABA, their "standards are intended to address the performance of criminal defense counsel in all stages of their professional work".¹ The ABA begins by listing the functions and duties of defense counsel such as effectively balancing their position as officer of the court while being a loyal advocate for their client, both of which are essential in administering justice. Then, the ABA addresses the importance of defense counsel acting within the law to serve their client when faced with "competing ethical and constitutional obligations".¹ Additionally the ABA explains that defense counsel must not consider race or other prejudices in their proceedings and, they should seek to eliminate such biases. Then, the ABA explains a defense attorney's duty when there is a conflict of interest among the client and the defense representation; on a side note, they reason that a defense attorney's workload should be minimized in order to assure quality service to their client. Finally, the ABA outlines ways to achieve excellence in a public defense counsel through core values such as diversity and arbitration. If defense lawyers act according to the constitution, laws, and ABA standards of best practice, they should be assured that they are acting ethically and distributing justice equitably. In an effort to inspire best practices for defense lawyers, the ABA simultaneously seeks to improve the function of criminal defense. Accordingly, the legal scene should seek to acknowledge the imperativeness of defense function instead of degrading the profession with negative stereotypes. In effect, adopting a mindset which seeks to improve the process of criminal defense will boost productivity and result in harmony between both sides in civil litigation.

In another attempt to minimize the ethical dilemma which many lawyers face, in their 2010 essay Stephen J. Schulhofer, a law professor at NYU and distinguished legal scholar, and David D. Friedman, an economist and widely published scholar, assert that an important way to reform the criminal justice system is to allow defendants the right to choose their own attorneys. Friedman and Schulhofer point to a lack of trust in the relationship of defendant and attorney largely due to negative stereotypes regarding criminal defense. Because mutual trust is very important to the progression of a defense case, Friedman and Schulhofer believe that the current system where states supply defense is ineffective. In turn, they propose a voucher method which allows the defendant to choose their representative in court. Allowing defendants to choose their attorney will greatly reduce the potential for error, and it will keep wrongful convictions to a minimum.⁶ The proposed voucher system would decrease stigma surrounding criminal defense lawyers because defendants would ultimately be more content with the person representing them in court. Additionally, if the defendant carefully chooses an attorney, the attorney will feel more content knowing that the defendant chose them for defense. The mutual content elucidated above would then result in a greater bond between the defendant and his attorney; moreover, giving defendants the choice for their representation in court would thereby reduce the ethical strain in which the attorney undertakes when representing said defendant.

Moreover, legal scholar and professor at Columbia Law School William H. Simon argues that the reasons most commonly given to distinguish the guilty from the innocent in a trial should not cause more "adversarial ethic" (competition) in criminal defense.⁷ He describes that avoiding aggressive criminal defense is essential in preserving the crucial function of defense. Because aggressive criminal defense focuses more on bashing the opponent or ensuring their client's dignity by any means, defense lawyers often sacrifice their sworn intent to preserve justice and instead get caught up in meaningless rivalries. According to Simon, bridging the gap between aggressive defense and criminal defense is vital in order to restore an incentive to defense lawyers which focuses on achieving justice.⁷ The defense lawyers who practice aggressive tactics are careful to uphold laws and ethical codes, but they often dismiss their duty as officers of the court. In this sense, criminal defense

itself is ethical, but the lawyers who practice it often become entangled in trivial matters such as competition and disregard the deeper significance of their work.

On a separate note, in the 2011 book “With Liberty and Justice for Some” Glen Greenwald, American journalist and author, argues that the principle of equality in the criminal justice system has been under attack in recent years. Greenwald asserts that “in a radical and momentous shift, the American political class and its media increasingly repudiate the principle that law must be equally applied to all”.⁴ As a result of the shift towards inequality, defendants and plaintiffs are treated differently depending on their wealth, race, and/or power. If an attorney takes on the representation of an affluent defendant/plaintiff, the lawyer may act against ethical obligations in order to preserve their client’s reputation or become incentivized by bribery. In essence, the book points to unethical practices by both prosecutors and defense attorneys. Since both defense counsel and prosecution are subject to unethical practices, it is damaging to the justice system to single out a certain side as being unethical. The ABA restricts illegal behavior: “Defense counsel should know and abide by the standards of professional conduct as expressed in applicable law and ethical codes and opinions in the applicable jurisdiction”.¹ Although there may be select instances where defendant attorneys act unethically, it is wrong to categorize the profession as unethical, especially since defense counsel is a vital function to ensure justice in a civil trial.

Criminal Defense is Ethical and Indispensable

Finally, defense lawyers act ethically in order to preserve their clients’ Sixth Amendment right. The necessity of criminal defense is highlighted in the case of *Gideon v. Wainwright*. Clarence Gideon was charged in a Florida State Court with felony breaking and entering. Gideon requested for the court to provide him with a lawyer, but they refused due to the state law which said attorneys can only be appointed to an indigent defendant in capital cases. After representing himself in court, the Florida State Court found Gideon guilty and sentenced him to five years in prison. Gideon then submitted a habeas corpus and eventually appealed his case to the Supreme Court arguing that the Florida State Court’s decision violated his right to counsel. The judges voted in favor of Gideon and decided that the Sixth Amendment’s guarantee of a right to assistance of counsel applies to criminal defendants in state courts due to the Fourteenth Amendment.³ The results of *Gideon v. Wainwright* set a landmark precedent for supplying defense counsel in future cases and largely recognized the imperative-ness of defense function.

A concern around ethics presents itself when a defense lawyer comes across incriminating evidence of their client. Due to the dilemma which defense lawyers face when in the possession of evidence which incriminates their client, The State Bar of California underlines a defense lawyer’s duty regarding such evidence. If a lawyer comes across evidence detrimental to their client’s innocence and briefly observes it, they have no obligation to bring it forth to the prosecution. On the other hand, if a lawyer keeps the evidence or removes it from its original location, the defense lawyer must then bring forth the evidence to prosecution.⁸ Defense lawyers must act to serve their client, but most importantly, they must serve as officers of the court who strive to achieve justice whether or not the circumstances lead to their loss at court. When defense lawyers justify their actions by preserving justice, they are concerned with the welfare of society and are not singly interested by selfish incentives. Hence, queries surrounding the ethics of criminal defense cease if every defense lawyer fulfilled their duty as officer of the court.

Finally, in his essay titled “Ethical Problems in Criminal Defense Work”, James Bayorgeon, a Wisconsin attorney, reviews criticism concerning ethics in criminal defense work and argues that lawyers are morally bound to completely defend their client as long as they are acting within the law. According to him, “the attorney may defend the accused by all lawful means [...] and act in his defense as the accused may morally do himself”.² Since it is widely accepted that an accused person should avoid self incrimination by any lawful means possible, the same should be said for a defense lawyer representing an accused person. Moreover, if the

defense attorney comes across evidence which negatively impacts their clients chances at becoming innocent, the defense attorney has no obligation to turn over the evidence to prosecution.² Turning over such evidence would make a defense attorney's role akin to a prosecutor's role. Accordingly, a defense attorney may morally represent any defendant regardless of their innocence, yet they must still act within the bounds of the law. To combat the opposing side which believes defense attorneys should abstain from defending clients who are assumed to be guilty, Bayorgeon claims that denying defense based on a client's "presumed guilt" is a violation of a citizen's Sixth Amendment right.² The duty of defense lawyers is not to judge the defendant's guilt nor to prove the defendant guilty; instead, defense counsel must lawfully represent their client using their professional expertise. Consequently, the only justifiable person given the role to judge the defendant is the judge himself. It is based on this notion that critics deem the practices of defendant attorneys unethical. They believe that perceived guilt equates to actual guilt and that representation of a "guilty" person is acting against ethics. In reality, a defendant can only be convicted based on concrete, factual evidence. Furthermore, guilt is not determined until the judge's final verdict is given. On this basis, defendant attorneys merely uphold their client's rights and privileges as a citizen regardless of whether they are thought to be guilty or not. Even in extreme cases where a person is accused of an abhorrent crime, the accused maintains their right to defense counsel. The lawyer in charge of enforcing that right is simply acting according to the constitution and dutifully serving justice.

Discussion

The most informational source as it pertained to the topic of ethics in criminal defense was "Ethical Problems in Criminal Defense Work" by James T. Bayorgeon. Although the source was written in 1958, it is still current to ethical debates in criminal defense in today's society. The source is relevant to the topic of criminal defense ethics because it refutes critics who state the profession is unethical. Additionally, Bayorgeon's points are easy to understand, and his viewpoints on criminal defense strengthen the overall argument of the paper. Since Bayorgeon is an attorney and the source is published in the Marquette Law Review, the source is definitely credible. Moreover, the information provided by Bayorgeon is accurate because he utilizes various sources of evidence like court cases to further establish his credibility. Bayorgeon clearly describes common misconceptions relating to the ethics of criminal defense, and then refutes these misconceptions with clear evidence and specific claims. Although his intent is to simply and objectively inform his audience to support criminal defense, Bayorgeon is slightly biased towards the topic since he is a lawyer and takes a stance dictating that criminal defense is ethical.

Additionally, the criminal justice standards for defense function written by the ABA provided a neutral basis to relate several claims back to. Since the standards were written in 2017, the source is very current to criminal defense ethical debates. The information contained in the ABA standards is relevant to the topic of criminal defense ethics because it outlines ways defense lawyers should act in relation to the judge and their client. Also, the ABA is a reputable source for legal professionals, giving them authority to advise defense lawyers about their duties in court. The accuracy of the ABA's standards may be deemed questionable because they provide no evidence for the guidelines they place on lawyers. In spite of this, the ABA is a trusted organization composed of legal professionals who have passed the bar exam, making the information in their standards accurate. Because the ABA's purpose is to present aspirational guidelines through standards, the information included in the standards is impartial to the debate of criminal defense ethics.

In another light, a source which was ineffective at providing beneficial evidence to the topic was "The Ethics of Criminal Defense" by William Simon. The source is not current because it was written in 1993. Although the topic of the essay is relevant to criminal defense and a lot of the information included in the legal essay is detailed and sophisticated in nature, the source uses too complex of diction which makes it difficult to understand Simon's key points. At a higher reading level, graduate level or above, this problem could be

avoided, and the essay's significance could be extracted into my research paper. Additionally, the source is twenty seven pages of dense material which made it hard to follow along. William Simon is a legal scholar and professor at Columbia Law School, so his essay is very much credible along the lines of authority. Along with his credibility as an author, the information is accurate because of multiple sources which Simon references throughout the course of his paper. The purpose of his paper is to refute stereotypes which classify criminal defense as unethical. Because his paper carries essentially the same purpose as mine, it should, in theory, be a great source of information to help strengthen my argument. The opposite is true. Since the paper is written for an intended audience of law school students and lawyers, the reading level surpasses that of mine: a high school student. Accordingly, the usefulness of this source was hindered by my own reading ability.

Another source which contributed minimally to the strength of my argument is the essay titled "Defendants Should Have the Right to Choose Their Own Defense Attorneys" written by David Friedman and Stephen Schulhofer. The essay is relatively current, being written in 2013. As far as relevancy goes, the essay lacks a component of complexity in regards to the information it contained. The information it shared was unrelated to my claim which made it difficult to synthesize in order to support my overall argument. The authors Friedman and Schulhofer are credible to write on the topic because the former is an economist and the latter a legal professor/scholar. Since Friedman and Schulhofer use multiple sources to support their claims, the information included in their essay is accurate. The purpose of the source is to propose an improvement which would give the defendant more power in terms of choosing their own representation. Because the source speaks nothing about ethics, relating it back to my claim was a difficult task. Besides its little relevance to my topic, the source is fully credible and could still be used craftily in order to strengthen my argument.

In conclusion, the original hypothesis which motivated me to research the ethics of criminal defense was rejected. After much research, I concluded that criminal defense was entirely ethical and a crucial process in civil trials. A negative perception of the profession based on an untrue stereotype led me to believe that criminal defense was unethical. Essays like Bayorgeon's revealed that these stereotypes were based on false accusations and ignored the utmost importance of criminal defense. Ultimately, research guided me to understand that defending a client accused of a crime is ethical because they are never ensured to be guilty until the judge's final verdict is given. Moreover, failure to represent a client accused of a crime is a denial of their Sixth Amendment right which gives U.S. citizens a means to defend themselves by use of an attorney. On this basis, a refusal to defend a person accused of a crime is more unethical than choosing to represent that person. Research on this topic must still be conducted in order to effectively revise the process of criminal defense. Unethical practices will always exist, but reducing their likelihood of occurring is one step towards achieving more equitable justice in court. Additionally, more research regarding statistics of malpractice in the criminal defense scene should be made known to the public in order to eradicate misconceptions about ethics of the profession. Polls or censuses which show the number of lawyers (defendant attorneys and prosecutors) engaging in unethical activities is one possible solution to shift the blame off of defense counsel. After researching the topic, it was surprising to see a lack of credible evidence which directly supported the stereotype regarding criminal defense ethics. Instead of only focusing on one side of the court, the sources pointed towards both ends becoming susceptible to unethical practices. Although it is easy to blame defendant attorneys for acting against their morals in order to represent a client who could in fact be a murderer, prosecutors bear the same ethical responsibilities and are just as likely to break their obligations as defendant attorneys are. The research experience completely changed my perspective on criminal defense. Prior to research, I fell victim to the trap of the negative stereotype which labeled defendant attorneys unethical because of the people they represent. A deeper understanding of defense counsel's role shifted my view to respect the profession as a whole and allowed me to see that a defendant attorney should not be held accountable for the actions of their clients. In a broader sense, negative stereotypes can be eliminated with public enlightenment through knowledge and education in order to base right and wrong on factual evidence rather than on opinionated claims.

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