HE: But, Mr. Philosopher, there is such a thing as a standard conscience just as there is a standard grammar, and then exceptions in every language that I think you learned people call—er—oh, what is it, er—

I: Idioms.

HE: Exactly. Well, then, every profession has its exceptions to the general code, and I might very well call these *trade idioms*. . . . And sovereign, minister, financier, magistrate, soldier, writer, lawyer, attorney, merchant, banker, artisan, singing-master, dancing master are all perfectly honest people, although their behavior departs from the accepted code in several respects and is full of moral idioms. . . . The job is worth what the man is worth, and in the end vice-versa, the man is worth what the job is. So we make the job worth as much as we can.

—*Denis Diderot, Rameau's Nephew*

David Luban,
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1

THE CASE OF THE WICKED UNCLE

"This was the longest trial ever known, lasting 18 days, and the jury (most of them) gentlemen of the greatest property in the land, and almost all members of parliament." So begins the transcript of a 1743 trial. "They were only to try a mere matter of fact, whether lord Altham had a son?"

The facts of the case, which is usually known as *Annesley v. Anglesea*, are barely believable.[1] James Annesley was the sole son of the wealthy Lord Altham. Expelled from the family home at age ten by his cruel father and the father's conniving mistress; kidnapped and shipped to America at the death of his father two years later by his own uncle, the earl of Anglesea, who wished to claim Lord Altham's estate for himself; indentured into servitude in Pennsylvania for thirteen years—surely this is melodrama and not history! James finally escaped and returned to England, where he initiated legal action to regain his stolen estate.

But another misfortune occurred: James accidentally shot a man to death. Uncle Anglesea, seeing an opportunity to rid himself of the usurper once and for all, instructed his solicitor, James Gifford, to prosecute Annesley for murder.

> Lord Anglesea disclosed his intentions to him in this manner: I am advised that it is not prudent for me to appear publicly in this prosecution, but I would give 10,000£. to have him hanged. . . . If I cannot hang James Annesley, it is better for me to quit this kingdom and go to France, and let Jemmy have his right. . . . (1224)

Anglesea in fact spent 800£. on the prosecution, but James Annesley was acquitted; he then instituted the present suit to eject Anglesea from the Altham estate. The question facing the court was simply whether James was indeed the legitimate son and heir of Lord Altham. After so many years, James had a difficult proof ahead of him.

1. Full citations for all cases referred to in this book will be found in the Table of Cases at the end. Further citations to this case are given parenthetically in the text.

Annesley v. Anglesea is a landmark case in the law of evidence. That is because James Annesley's attorneys, to help prove that he was the real heir of Lord Altham, wished to demonstrate the uncle's repeated attempts to get rid of him. They called James Giffard to bear witness that Anglesea had offered 10,000£. to see his nephew hanged; this, however, raised the complicated issue of whether an attorney can reveal the confidences of his client. (That question will form our topic in later chapters.)

It is not, however, the only interesting question the trial raised. There occurred within it a remarkable drama, when Mr. Giffard, on the witness stand, was cross-examined by the earl of Anglesea's lawyer. (The transcript does not indicate which of Anglesea's several lawyers conducted the cross-examination; let us suppose, just to have a name before us, that it was Thomas Burroughs, the attorney of record.) It would be hard to find an example that better raises the philosophically disquieting issues of legal practice—of, in Diderot's words, the lawyer's "trade idioms."

Mr. Thomas Burroughs was faced with a problem: How could he discredit James Giffard's damning testimony? Clearly, he had to throw Giffard's credibility into question. A sally in that direction had been made earlier that day by another of Anglesea's counsel, Mr. Solicitor General Warren Flood. Arguing the evidentiary point that Giffard should not be permitted to testify, Flood had concluded, "If, after all we have said, Mr. Giffard is to give his evidence, I am persuaded he must appear in such a light, as to receive but little or no credit" (1235). Only a dishonorable lawyer would reveal a client's confidences, and a dishonorable lawyer may not be telling the truth.

This by itself was scarcely likely to convince the jury. So Burroughs attempted to do two other things. First, he showed that there was bad blood between Giffard and Anglesea over an unpaid bill. (Indeed, it was this that led to the discovery that Anglesea's was the hidden hand behind his nephew's prosecution for murder: as Giffard explained it, "this bill of costs of mine [for that prosecution] would never have come to light, had I not been obligated to sue for my right" [1251–52].) Hostility might account for Giffard's testimony.

Second, Burroughs used a two-edged tactic: he attempted to turn Anglesea's foul plot against Giffard himself by suggesting that an honorable lawyer would not have executed it. Either Giffard was dishonorable, then, or he was lying about the plot. Either way, his testimony might be discounted. Anglesea's lawyer impugning the

honor of Anglesea's former lawyer for following Anglesea's instructions: a moment of irony and high drama.

> Pray now, when my lord Anglesea said to you, That he did not care if it cost him 10,000£. to get the plaintiff hanged, did you understand that it was his resolution to destroy him if you could? —I did, Sir.
>
> Did you advise my lord Anglesea not to carry on that prosecution? —I did not advise him not to carry it on; I did not presume to advise him. . . .
>
> Did you approve or disapprove of his expressions and design altogether? —I cannot say that I did either.
>
> Did not you go on as effectually after, with the prosecution, as you could? —I did, to be sure Sir. Indeed, I advised my lord Anglesea not to appear upon the trial.
>
> When my lord Anglesea said, that he would not care if it cost him 10,000£. so he could get the plaintiff hanged, did you apprehend from thence, that he would be willing to go to that expense in the prosecution? —I did.
>
> Did you suppose from thence that he would dispose of that 10,000£. in any shape to bring about the death of the plaintiff? —I did.
>
> Did you not apprehend that to be a most wicked crime? —I did.
>
> If so, how could you, who set yourself out as a man of business, engage in that project, without making any objection to it? —I may as well ask you, how you came to be engaged for the defendant in this suit. . . .
>
> Did you not apprehend it to be a bad purpose to lay out money to compass the death of another man? —I do not know but I did. But I was not to undertake that bad purpose. If there was any dirty work, I was not concerned in it.
>
> If you did believe this, I ask you, how came you to engage in this prosecution without objection? —I make a distinction between carrying on a prosecution, and compassing the death of a man.
>
> How came you to make that distinction? —I may as well ask, how the counsel came to plead this cause?
>
> Did you ever mention to any of your counsel, that my lord made that declaration? —I did not.
>
> If you had told any of them that my lord made that declara-

tion, would they have appeared for you? —I can't tell whether they would or not.

Do you believe any honest man would? —Yes, I believe they would, or else I would not have carried it on, Sir. And I do assure you, it is the only cause I was concerned in at the Old Bailey in my life, and shall be the last (1248–50).

Burroughs, it seems to me, was a good cross-examiner: his sequence of questions was designed to invoke a moral argument, or at any rate a logical sequence of moral reactions on the part of the jury. Ignoring Giffard's responses for the moment, as well as the fact that Burroughs was trying to discredit Giffard and not Anglesea, we can analyze the argument into three stages.

First, the jury was to believe that Anglesea's intention was immoral; further, that Giffard's stance toward it was that of a Yahoo—Giffard made no moral judgment, ventured no moral advice or opinion, and proceeded nevertheless with utmost vigor. It is amazing to us that immediately after Giffard confessed to having neither approved nor disapproved of Anglesea's design, he eagerly explained exactly *how* zealous he had been—as though the jury would approve of this rather than being astonished and repelled.

Second, Burroughs suggests that Anglesea's plan was equivalent to *any* expenditure of 10,000£. to kill young James Annesley, say by putting out a contract on him. Giffard admits this (though a moment later he denies it), admits further that that would be a "most wicked crime" and, somehow, does not see that he has made himself out an accomplice in it.

Third, Burroughs attempts to circumvent the obvious objection that prosecuting Annesley for murder is legal, while putting out a contract on him is not. Burroughs insinuates, by suggesting that no honest lawyer would involve himself in it, that such a prosecution is not legal business-as-usual.

Giffard's responses were more spontaneous and less sophisticated than Burroughs's questions, but they too limn something like a moral position.

First, we may find in Giffard's very lack of self-consciousness in his original admissions a belief that they reveal no wrongdoing. He has zealously pursued a client's legal ends without passing moral judgment upon them: what is wrong with that? That, some might say, is the duty of a lawyer. Thus, David Dudley Field in 1871 defended his representation of the Erie Railroad robber barons Fisk and Gould:

> [T]he lawyer, being intrusted by government with the exclusive function of representing litigants before the courts, is bound to represent any person who has any rights to be asserted or to be defended. . . . It is lawful to advocate what it is lawful to do.[2]

Otherwise, "If the saint sues the sinner, the sinner shall not be defended. If it should happen that a saint wrongs a sinner, the sinner cannot sue the saint."[3] Field's son expanded the argument:

> Shades of Webster, Choate and the numberless great Massachusetts advocates, that have passed away, defend us! Most of those men, whom Massachusetts delighted to honor, defended and prosecuted at divers times divers men accused of crimes. . . . When they represented the prosecution, and the accused was acquitted, did they share in the guilt of a wrongful prosecution? . . . [A]s in almost all cases there are two lawyers, and as in all cases, where the jury do not disagree, there is a verdict one way or the other, and as every lawyer of any considerable practice loses and wins a number of cases each year, it follows that all lawyers must necessarily be wicked men. . . . Upon this monstrous doctrine a surgeon should refuse to set a broken limb, till he got a certificate of the good moral character of his patient.[4]

For these reasons, the lawyer's morality must be distinct from, and not implicated in, the client's. Murray L. Schwartz calls this the "principle of nonaccountability": "When acting as an advocate for a client . . . a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved."[5] Add to this the "principle of partisanship"—"When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail."[6]—and you get a credo that justifies Giffard's behavior. Gerald Postema calls it the "standard conception of the lawyer's role";[7] William Simon says that these principles define partisan advocacy.[8] It is not a credo to be dismissed lightly; Field's argument is a powerful one.

Second, Giffard corrects his earlier admission that Anglesea's

2. Field, Field, and Bowles, in Kaufman, p. 258.
3. Ibid., pp. 257–58.
4. Ibid., pp. 261–62.
5. Murray L. Schwartz (1), p. 673.
6. Ibid. Schwartz labels this the "principle of professionalism," but since other views of professionalism are possible, I prefer William Simon's term "partisanship."
7. Postema, p. 73.
8. William H. Simon (3), pp. 36–37. He calls the first "the principle of neutrality."

scheme was immoral. Now, he sharply maintains the distinction between "carrying on a prosecution" and "compassing the death of a man." Spending 10,000£. on a murder prosecution is not the same as putting out a contract on the accused. Legality alters the moral status of the act or, more exactly, prevents us from seeing the pair as instances of the same type: the lawyer is simply not performing the same act as the nonlawyer who aims at the same or analogous ends.

Third, it follows from this that there is nothing dishonorable about Giffard's mission. Indeed, the day before, attempting to exclude Giffard's testimony from the *Annesley* trial, Anglesea's counsel had argued precisely this point! Mr. Eaton Stannard, of counsel to the defendant, called the earlier murder prosecution of Annesley "nothing more than a proceeding, according to the regular and open course of the law," which "is not to be . . . imputed to a man as a crime, and affect him not only as to his character, but his fortune" (1218).

All of this, however, is secondary in importance to Giffard's repeated parry of Burroughs's question, How could you? He replied *I may as well ask you, how you came to be engaged for the defendant in this suit*. What, after all, would be the effect on James Annesley if Burroughs prevailed in the present suit? He would be declared a liar, his uncle would have Annesley's estate. Giffard, on Burroughs's argument, tried to deprive James of his life; Burroughs, on the same argument, is now trying to deprive him of his honor, his title, and his patrimony.

Giffard's response, of course, was not an effort to pull Burroughs into the ooze with him, but to raise his own representation to the level of Burroughs's. No one could deny that Burroughs engaged in honorable legal business by defending Anglesea; if holding that brief was honorable, so was Giffard's prosecution.

The "if-then" argument runs both ways, however: if Burroughs's representation of Anglesea is honorable, then so was Giffard's, but if Giffard's was not, then. . . .[9] This whole dialogue highlights a troubling feature about the practice of law, the peculiar trade idiom encompassed in the principles of partisanship and nonaccountability. Burroughs's cross-examination did not sway the distinguished jury, and (you may have been wondering) James Annesley won his case; but Burroughs's was not uncompelling as a moral argument. (The fact that it was offered only as a trial tactic, the contrary position having been argued by the same team of lawyers the previous day, points to another trade idiom of the profession, an instrumental use of argument we shall discuss in the next chapter.) How can such a prosecu-

9. As the logician puts it: one person's *modus ponens* is another's *modus tollens*.

tion as Giffard's be honorable? How should we answer Dudley Field's rhetorical question, "Did the 'numberless great Massachusetts advocates' share in the guilt of a wrongful prosecution?" Why shouldn't they? But Giffard's rhetorical counterquestion to Burroughs is also compelling. Perhaps all wrongful causes are indeed created equal; perhaps, when Thomas Burroughs, Esq., tried to paint a repugnant portrait of James Giffard, Esq., he could not avoid conjuring up his own features as well.

And if it "follows that all lawyers must necessarily be wicked men"? One might echo the young Quaker moralist Jonathan Dymond who wrote in 1829: "A man is not compelled to be a lawyer."

One assumes, of course, that if the argument has gotten to the point of abolishing the legal profession, it has successfully refuted itself. Still, we would like to know what, apart from its drastic conclusion, constitutes its flaw. More crucially, it is essential to realize that lawyers themselves are not immune to doubts about the validity of their trade idioms. Witness Giffard's remarkable final confession (almost too realistic to be true): "I do assure you, [prosecuting Annesley] is the only cause I was concerned in at the Old Bailey in my life, and shall be the last." And witness a similar remarkable moment in David Dudley Field's self-justification: "You may well suppose that the litigation has not been in any respect to my taste."[11] Not in any respect? If Field and Giffard really thought these cases were morally unproblematical business-as-usual, why the disclaimers?

The point bears emphasis that the "standard conception" described by Schwartz's two principles has not been universally acceded to by thoughtful lawyers (Schwartz himself articulates the principles only in order to criticize them.) Another example will illustrate the debate.

Zabella v. Pakel concerns a wealthy man attempting to evade a five thousand dollar debt to an "old friend, countryman and former employee"[12] by pleading the statute of limitations. When I present this case to law students they do not at first see what it has to do with lawyers' ethics (rather than clients' ethics): the law is clear, the defense is uncontroversial, the defendant's lawyers employ no questionable tactics. Although most of them agree that the wealthy defendant is acting badly, they do not see that that is the lawyers' problem.

These students, by holding Pakel's lawyers morally unaccountable,

10. Quoted in Mellinkoff, p. 250.
11. Field, Field, and Bowles, p. 262.
12. *Zabella* at 455.

are assuming the "standard conception" and would presumably agree with James Giffard. They agree as well with Judge George Sharswood, whose 1854 lectures on legal ethics are a distant ancestor of the current ABA Code of Professional Responsibility and Model Rules of Professional Conduct. Perhaps (Sharswood argues) "*in foro conscientiae*, a defendant who knows that he honestly owes the debt sued for, and that the delay has been caused by indulgence or confidence on the part of his creditor, ought not to plead the statute": this does not alter the fact that "[t]he lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury."[13] We recognize this as a variant of Field's argument that a lawyer's role limits his discretion and liability; the lawyer "is bound to represent any person who has any rights to be asserted or defended."

Eighteen years before, however, another distinguished jurist had composed the first American "code" of lawyers' ethics.[14] David Hoffman's resolution 12 reads: "I will never plead the Statute of Limitations, when based on the *mere efflux of time*; for if my client is conscious he owes the debt; and has no other defence than the *legal bar*, he shall never make me a partner in his knavery."[15] And here we recognize Burroughs's counterargument: a partner in knavery is an accomplice in knavery, lawyer or not.

The conclusion to draw from this dispute is only a modest one. It is that neither bar critics nor bar apologists are right to view the issue as one between "the lawyers" and "the public": the corrupt lawyers unable to see the wickedness of their trade idioms versus the upright, long-suffering public or, inversely, the enlightened profession versus an ignorant rabble, eager to condemn what they don't understand. Our colloquy of Giffard, Field, Sharswood, and Hoffman shows instead that a thoughtful person, lawyer or not, can feel the force of both sides of the issue: we feel both the attraction and repulsion of the lawyer's trade idioms. We do not know whether they are moral idioms as well.

13. Sharswood, pp. 83–84.

14. David Hoffman, "Resolutions of Professional Deportment," in Hoffman. Hoffman's code, couched entirely in the first person, is arguably intended as a sort of catechism for lawyers rather than as a legislative proposal, a reading suggested by Resolution L: "I will read the foregoing forty-nine resolutions, twice every year, during my professional life."

15. Ibid., p. 754. Compare Resolution xiv, p. 755: "My client's conscience, and my own, are distinct entities: and though my vocation may sometimes justify my maintaining as facts, or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go."

2

Lawyers Against the Law

"Striving with all my power is precisely what I promise."
—*Faust's pact with the Devil*

Let us begin by looking more closely at the principle of partisanship: When acting as an advocate, a lawyer must, within the established constraints on professional behavior, maximize the likelihood that the client will prevail. This principle corresponds to canon seven of the ABA Code: "A lawyer should represent a client zealously within the bounds of the law." Canon seven's language is borrowed in turn from canon fifteen of the 1908 ABA Canons, which asserts that "[t]he lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied." The stock expression "zealous advocacy," often deployed in discussions of lawyers' ethics, derives from these rules, and the doctrine of zealous advocacy is roughly equivalent to the principle of partisanship.

The first thing to notice about Schwartz's formulation of the principle is that he restricts it to lawyers in their role as advocates, that is, as courtroom lawyers. Schwartz's reason for limiting the principle in this way is that he wishes to argue for a different standard of behavior—a less zealous and client-centered standard—in non-advocatory roles such as negotiation. In a courtroom setting, Schwartz argues, the opposing lawyer, the procedural rules, and the judge are there to ensure fairness, and so the system may be able to tolerate no-holds-barred zeal on the part of an advocate. In negotiation, by contrast, the rules and the judge are gone, and if the adversaries are mismatched, an unfair outcome may ensue. Schwartz therefore proposes that zeal be restricted in such a setting.

It is important to realize that this is a proposal for reform, for a change from actual practice. For in fact, the principle of partisanship is generally taken as a credo by lawyers in nonadvocate roles just as much as by courtroom lawyers. Many business lawyers deny this is true. They claim that their line of work consists of more-or-less amicable dealmaking among parties that need to trust each other because they will do business again and again. The lawyer's role is to work