

Confession for the Soul?: A Lawyer's Moral Advice to a Guilty Client About Saving an Innocent Defendant

Jeffrey L. Kirchmeier*

An attorney watching the movie *Dead Man Walking*¹ may be intrigued by a scene near the end where Sister Helen Prejean, portrayed by Susan Sarandon, finally convinces the condemned murderer Matthew Poncelet, played by Sean Penn, to confess to his horrible crime. The moment is played as a breakthrough climactic scene, where the audience feels the release of emotion in Penn's character as he confesses his guilt prior to his execution. Penn's character finds redemption in the confession, and Sarandon went on to win an Academy Award.

The climactic scene may make defense attorneys reflect on how they counsel clients. Although a defense lawyer has no legal motivation to encourage a client to confess, the film's portrayal of the grace of confession may make an attorney wonder if it is a counseling mistake not to provide an opportunity for spiritual redemption. Just as there is overlap between law and morality, there is overlap between legal adviser and moral adviser. But the movie's scene also highlights that there is a difference between a spiritual adviser and a legal adviser.

The issue of whether or not a criminal defense attorney should provide moral counseling may arise in a number of ways, including the hypothetical problem for this essay that asks how to advise a client who committed a crime for which an innocent person is going to be punished. In this scenario, Steven told his attorney that he heard that David has been convicted of a murder and is facing a sentence of up to thirty years in prison. But Steven reveals that it was he, not David, who committed the gang-related murder. Now, Steven has asked his attorney whether he should come forward or stay silent when his silence would mean that the innocent David will go to prison for Steven's crime. Under the hypothetical, we assume that there is no easy way to save David from prison without Steven coming forward. Thus, Steven and his attorney face the moral dilemma together about what to do.

The law does not require a client to confess to a crime, and legal ethics rules do not require an attorney to advise a client to confess. But the American Bar Association's Model Rules of Professional Conduct allow lawyers to consider relevant "moral" factors in giving advice to a client,² as does an advisory Ethical

* Professor of Law, City University of New York School of Law. J.D., Case Western Reserve University School of Law, 1989; B.A., Case Western Reserve University, 1984.

¹ DEAD MAN WALKING (PolyGram Filmed Entertainment 1995).

² MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009).

Consideration of the older ABA Model Code of Professional Conduct.³ Because ethics rules do not require such advice, an attorney should weigh the pros and cons of giving moral advice before deciding how to advise the client. In this balancing process, the attorney should consider the pitfalls of giving moral advice as well as what course of action best serves a client.

I. WHY IS IT DIFFICULT FOR ATTORNEYS TO GIVE MORAL ADVICE?

While a defense attorney's role in the legal system generally requires that the attorney not advise clients to confess to crimes, the question here is whether the attorney's role changes when an innocent person is being punished for the client's crime. As an attorney contemplates giving advice based on morals instead of law, there are several factors the attorney should consider, including: (1) where the attorney finds a source of morality; (2) how the moral dilemma affects the lawyer directly; and (3) how advice on morality may affect the attorney-client relationship.

A. Attorneys May Have Difficulty Determining the Moral Option for a Client

If the attorney were to advise Steven that morals dictate he confess, the attorney would first have to be confident that confession—as opposed to self-preservation—is the moral thing to do. While most probably conclude that confession is the honorable choice, if a lawyer is giving moral advice it is useful to question the source of such morality. Although a lawyer may research sources for legal advice, there is not an organized resource for moral advice in a law library.

Anytime one defines an act as “moral,” one must consider from where the rules of morality originate. Religious beliefs may be one's source of morality. Religious scholars are best left to resolve what is “moral” from a religious point of view, but one might assume that in many of the world's religions, coming forward would be the moral thing to do. Many religions embrace some form of the Golden Rule about doing to others what you would have them do to you, and that sentiment helps explain why morals dictate that Steven should come forward.⁴ As a lawyer, though, one must be careful about imposing one's own religious morals on a client who might have different religious morals.

Other sources may provide moral guidance. Philosophers such as Aristotle, Jeremy Bentham, John Stuart Mill, and Friedrich Nietzsche may inform

³ “In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.” MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1981). Under the Model Code, ethical considerations are not mandatory commands.

⁴ The Golden Rule “is certainly recognized in all cultures, and numerous studies show that it has been endorsed in all of the major and most minor religions.” Neil Duxbury, *Golden Rule Reasoning, Moral Judgment, and Law*, 84 NOTRE DAME L. REV. 1529, 1531 (2009).

discussions of morality.⁵ One also may look to literature and popular culture to consider what society deems the moral choice. As noted earlier, the film *Dead Man Walking* implies that it is a great act to confess one's sins, but in that movie the confession did not come with any different earthly punishment. Victor Hugo's *Les Misérables*, however, praises the morality of confessing in a scenario similar to Steven's situation.⁶ In that book, Jean Valjean, who is wanted for a theft crime that would send him to prison for life as a repeat offender, adopts another identity to lead a law-abiding life. Valjean eventually discovers that another man named Champmathieu is about to be tried for Valjean's crimes. Valjean gives up everything he has by going to Champmathieu's trial to reveal his true identity. The lesson from the novel is that Valjean is a noble and honorable man, endorsing the view that a guilty person should confess to save an innocent person.

Another reason one might conclude that Steven's moral choice is to confess is because if he does not, his inner torment for allowing David to serve his sentence would be worse than going to prison for the crime. Woody Allen's film *Crimes and Misdemeanors*⁷ and Fyodor Dostoyevsky's novel *Crime and Punishment*⁸ both contemplate this issue, raising the question of whether one may live with having committed a horrible crime without confession. Although Allen's film implies that one may live with such a sin, Dostoyevsky's novel implies the opposite conclusion. In our hypothetical, Steven is visually upset and torn by the dilemma of another being punished for his crime so that he has come to his attorney for advice. Thus, it is a legitimate concern about how Steven might live with himself if he did not come forward to save another from going to prison for his crime.

Some moral questions are difficult, while others are clearer, such as the conclusion that an unjustified killing is morally wrong. Most systems of morality would likely dictate that a guilty person should confess to save an innocent person from being convicted. On the other hand, one might argue that the guilty person has no moral obligation to correct a problem with the justice system that allowed the innocent defendant to be convicted. A deeper exploration of the proper moral advice in this situation is beyond the scope of this essay. But it is important to realize that a lack of model rules of morality for lawyers makes it more difficult for lawyers to give moral advice than it is for them to give legal advice.

B. Moral Issues May Directly Affect the Attorney

The guilty client's dilemma also raises moral issues for the attorney who knows that an innocent person is going to prison. For example, Steven's lawyer

⁵ See, e.g., THE PROBLEMS OF PHILOSOPHY 131–273 (William P. Alston & Richard B. Brandt eds., 3d ed. 1978).

⁶ VICTOR HUGO, LES MISÉRABLES (Charles E. Wilbour trans., Modern Library 1931) (1862).

⁷ CRIMES AND MISDEMEANORS (Orion Pictures 1989).

⁸ FYODOR DOSTOYEVSKY, CRIME AND PUNISHMENT (David Magarshack trans., Penguin Books 1977) (1866).

should reflect on what she or he would do in Steven's situation. If the lawyer in Steven's situation would not confess to save another person, one would have to wonder whether or not the attorney is justified in giving contrary advice to Steven. Such fear would not change what is the right thing to do, but it would raise questions about a lawyer's advice to Steven to confess.

Defense lawyers defend guilty clients all of the time, so a lawyer should consider whether Steven's case is different enough from the usual case to mandate moral advice to confess. Every time a lawyer defends a guilty client, the lawyer arguably increases the possibility that another person may be convicted of the crime. If the lawyer is successful, another defendant may be prosecuted. Of course, there are a large number of reasons it is essential for our criminal justice system that guilty and innocent clients have the right to a competent lawyer.⁹ Also, the defense lawyer is not responsible if the prosecuting function fails. But if a defense lawyer regularly plays a role in attempting to let guilty clients go free, one wonders if the lawyer is justified to impose a moral obligation on some unlucky clients to confess. If the lawyer advises Steven to confess, the lawyer's code would be that guilty defendants normally do not need to confess but if a third person is charged with the client's crime, the client has a moral obligation to come forward.

Even without putting one's self in Steven's situation, an attorney should consider one's own obligation as someone who knows that an innocent person has been convicted of a crime. If the attorney believes Steven is morally obligated to come forward, the lawyer would have to contemplate whether or not the lawyer also is morally obligated to save the innocent person. If Steven should sacrifice his freedom to save the innocent David, then a lawyer may have a moral obligation to sacrifice a bar license to save an innocent person.¹⁰ One might distinguish the two because the guilty defendant committed the crime that created the dilemma, giving the defendant, and not the attorney, the duty to disclose his guilt.¹¹ Also, one might argue that the lawyer does a job where confidentiality is essential to the system and if the lawyer breaches that confidentiality, it harms the system. But one might respond that saving an innocent person from a life in prison is more

⁹ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (reasoning that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

¹⁰ If the attorney were to reveal the confidential communications from Steven, it would violate ethics rules. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2009) (stating "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. . ."). There are limited exceptions to the confidentiality rule, and Model Rule 1.6 (b)(1) allows an attorney to reveal a confidence where a lawyer reasonably believes the revelation is necessary "to prevent certain death or substantial bodily harm." *Id.* at R. 1.6 (b)(1) (2009).

¹¹ For example, criminal law traditionally places responsibility on defendants who commit a voluntary act or have a duty to act. By contrast, the law generally does not punish those who fail to act and do not have a duty to do so. See, e.g., MODEL PENAL CODE § 2.01 (1962).

important than playing a role in the legal system.¹² However an attorney answers these questions, the client's moral dilemma creates moral questions for the attorney too.

C. Moral Issues May Interfere with the Attorney-Client Relationship

When a client's dilemma places a moral weight on the attorney, there is a risk that the attorney's own burden will affect the advice to the client. Attorneys, like anyone else, feel anguish about innocent persons being sentenced to prison. In this situation, there is a danger that an attorney would encourage a guilty client like Steven to confess, not because it is the best choice for the client but because the confession would help the attorney sleep at night.

Because attorneys face outside pressures to do what is "right" for society when representing a guilty client,¹³ an attorney must be self-aware about what motivates the moral advice to a client. Attorneys are not trained for moral counseling as much as legal counseling. So when an attorney gives non-legal advice, the attorney-client relationship moves to a nebulous area outside the attorney's area of expertise.

The attorney-client relationship also may affect the client's perception of the advice, so that moral advice might blur the role between legal adviser and moral adviser. One of the lawyer's primary roles is to give legal advice and to help a client make legal decisions. When an attorney steps outside that role it may confuse matters for the client. When a prisoner talks to clergy, the prisoner expects religious advice. When a prisoner talks to a lawyer, the prisoner expects legal advice. If a lawyer combines moral and legal advice, it may be confusing or misleading to a client who has been deferring to the lawyer on matters of law. When a person who has guided you through court appearances and the litigation of your case advises you to confess to another crime, it may appear to be legal advice. Thus, an attorney must be cautious both about how the attorney-client relationship affects the moral advice and about how the moral advice might affect the attorney-client relationship.

¹² See Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 3, 33 (1998) (arguing that confidentiality rules are of little value to society and should be abolished). See also . . . AND JUSTICE FOR ALL (Columbia Pictures 1979) (where the "hero" lawyer announces in court that his client is guilty).

¹³ Michael Asimow & Richard Weisberg, *When the Lawyer Knows the Client is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature*, 18 S. CAL. INTERDISC. L.J. 229, 251–57 (2009) (noting that in literature and popular culture, decent moral lawyers are often weak advocates for guilty clients).

D. *An Attorney Should Be Aware of the Pitfalls of Giving Moral Advice to a Guilty Client*

As discussed above, an attorney giving moral advice to a client faces a number of challenges. First, it is difficult for a lawyer to give moral advice to a client because there may be different sources of morality that one may consider. Second, a client's moral dilemma may create personal moral issues and pressures for the attorney. Third, those pressures, and the way the attorney handles the problem, may affect the attorney's relationship with client. Finally, the attorney-client relationship itself may affect how the client digests the advice.

Here, most moral principles likely would support a conclusion that one should not let another person be punished for one's sins, even if it becomes trickier when coming forward will result in a long prison sentence. With an understanding of the pitfalls of giving moral advice to a client, the next question is whether an attorney should still discuss morality with a client.

II. IN SPITE OF THE DIFFICULTIES INHERENT IN MORAL ADVICE, SHOULD A LAWYER COUNSEL A GUILTY CLIENT ABOUT CONFESSING TO PROTECT AN INNOCENT PERSON?

A lawyer's professional role does not prohibit an attorney from giving advice based on moral considerations. Under Rule 2.1 of the American Bar Association's Model Rules of Professional Conduct, a lawyer "may refer" to moral factors in advising a client.¹⁴ As explained in the comments to that rule, "It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice."¹⁵ On the other hand, a lawyer is not required to give moral advice outside the scope of legal advice either. In the comments to the Model Rules, the drafters' suggestion about giving moral advice focuses on where the moral advice affects the legal aspect of the case: "Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."¹⁶

There is a gray area about an attorney's role in giving moral advice, which is the way it should be because there is no easy solution for problems like the one contemplated here.¹⁷ Ethical rules allow moral considerations to play a role, but

¹⁴ Rule 2.1 of the American Bar Association's Model Rules of Professional Conduct provides: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009).

¹⁵ *Id.* at R. 2.1 cmt. 2 (2009).

¹⁶ *Id.*

¹⁷ By contrast, some have argued that lawyers have a moral responsibility to give moral advice. See, e.g., Deborah L. Rhode, *Moral Counseling*, 75 *FORDHAM L. REV.* 1317, 1319 (2006) ("This essay argues that lawyers have a moral responsibility to provide moral counseling, whether or not it can be packaged in pragmatic terms.").

because of the dangers in giving moral advice discussed earlier, an attorney must be careful in giving such advice. Court and ethics opinions note the challenges of giving non-legal advice, allowing attorneys to do so while advising caution in some situations.¹⁸

Even though the professional ethics rules allow the attorney to give moral advice, they also limit what the attorney can do in this situation. A defense attorney cannot compel a guilty client to come forward. The decision about whether or not a client like Steven should confess is a decision for the client. The American Bar Association Standards of Criminal Justice Prosecution Function and Defense Function are not binding in most jurisdictions, but they are considered by many to be “the best expression of the norms of the profession.”¹⁹ Standard 4-5.2 gives examples of case decisions that are ultimately left to the accused and decisions ultimately left to defense counsel.²⁰ Decisions about whether to enter a plea belong to the client and, similarly, a decision in this case about whether to confess would be up to the client.

Thus, Steven’s attorney is limited under ethical rules. First, there is no legal obligation for Steven to come forward, so the attorney cannot give “legal” advice that he must come forward. Second, under rules of professional responsibility, the attorney “may” tell Steven how morals should inform his decision but the attorney does not have to give moral advice. And finally, the ultimate decision about what to do is left to Steven.

So, under the guilty-client problem, our framework is based on the following facts and principles: (1) Steven is telling the truth that he committed the crime for which David is about to be sentenced; (2) Steven’s confession is the only way to save the innocent David; (3) Steven asked for his attorney’s advice; (4) No law commands Steven come forward, and rules of professional responsibility prohibit his attorney from coming forward; and (5) Steven’s attorney establishes under some moral code that David should confess. Under these conditions, an attorney should discuss the options with Steven and help him weigh the legal and moral

¹⁸ See, e.g., *Florida v. Buckle*, 771 So. 2d 1131, 1132 (Fla. 2000) (noting that attorneys should be careful and exercise judgment about giving religious materials to a client).

¹⁹ H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 RUTGERS L. REV. 719, 763 (2000). Prof. Uviller proposes a model standard for the allocation of client and attorney decisions in a criminal case. *Id.* at 777–80. See also Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case*, 90 B.U. L. REV. 1147, 1179 (2010) (stating that “the defendant has a significant autonomy interest in controlling the key decisions in the case”); Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 11–27 (1998) (discussing the division between decisions for counsel and decisions for the client).

²⁰ STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-5.2 (3d ed. 1993). See also MODEL CODE OF PROF’L RESPONSIBILITY EC 7-8 (1981) (stating “the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.”).

obligations, but the attorney should not go so far as to encourage Steven to take the “moral” approach and confess to save David.

Despite the concern about blurring legal and moral issues and the concern about the difficulties in determining what is “moral,” an attorney still should be willing to discuss moral consequences with a client who wishes to do so. Considering the professional responsibility rules, most scholars agree that attorneys should discuss moral issues with a client.²¹

As a practical matter, an attorney’s advice to a client may rest on a number of factors, including the type of ongoing attorney-client relationship and the attorney’s awareness of other pressures on the client. In a similar situation in *Morales v. Portuondo*, a teenaged client told his lawyer that other people had been convicted for the client’s crime.²² The attorney advised the teen to discuss any guilty feelings with a priest because it was not in the client’s best interests to confess in court. That lawyer’s approach is sound in that it leaves the moral issues to a person of faith while working to protect the client’s legal interests. But it would be overly simplified to say that an attorney should always take that approach. Often, a client may have a close ongoing relationship with the lawyer, and the client may not have a close relationship with clergy.²³ Further, there may be benefits to discussing the moral options with someone who also can advise about the legal implications.

One reason an attorney should discuss moral issues with a client is that generally a client seeking advice has limited options for consultation. As in *Morales*, some clients may go to clergy or a mental health professional for guidance. But if a client is not religious or does not have a psychologist, the client’s only source for confidential advice is the lawyer. Although family and friends can provide advice, they are not bound by confidentiality rules. A good defense attorney would advise Steven not to talk to his family and friends about the

²¹ “Despite the uncertainties regarding nonlegal counseling in the attorney-client relationship, the vast majority of ethical commentators encourage attorneys to discuss nonlegal, particularly moral, issues with their clients.” Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 420 (2005). Cf. Geoffrey C. Hazard, Jr., *Is There an American “Legal Profession?”*, 54 STAN. L. REV. 1463, 1466–69 (2002) (asserting there should not be a requirement for attorneys to advise clients on nonlegal issues).

²² *Morales v. Portuondo*, 154 F. Supp. 2d 706, 713 (S.D.N.Y. 2001). In *Morales*, a teenager had informed his attorney that he and two others had killed someone and that two other people had been convicted of the murder. The client explained that he was tormented and could not sleep. Years later, after the client died, the court reasoned that because the client only repeated statements he had made to others to the attorney, and because the client had been deceased for four years and the two innocent men had spent nearly thirteen years in prison, the attorney-client privilege did not bar the use of the client’s statements. *Id.* at 731.

²³ Under the counseling hypothetical for this essay, the lawyer has an ongoing relationship with Steven from representing him on a minor drug offense through trial and probation. The attorney has been representing Steven for more than six months, which, along with the fact that Steven came to the attorney for advice, indicates Steven may be relying upon the attorney for more than legal advice.

dilemma because such conversations are not privileged. Thus, due to the attorney's advice, Steven is limited to discussing the life-changing issue with his attorney and possibly a few other professionals.

Here, because Steven asked the attorney about what he should do, the attorney should engage in that discussion even if ultimately the attorney does not advise the client to do one thing or the other. By contrast, if the client did not ask for such advice, the attorney should be cautious about giving moral advice because merely raising the issue might imply a moral judgment.²⁴

Although the client makes the final decision, an attorney should weigh the pros and cons of the options with Steven. The attorney should be careful about giving moral advice contrary to the client's legal interests, but the two might balance the legal consequences, the moral implications, and the burden that Steven might carry under various outcomes. The attorney and client might also discuss how the system's responsibility for convicting guilty defendants affects the client's individual responsibility. It will be a difficult discussion for the attorney, who might be tempted only to discuss legal options, avoiding the muddiness of the moral quandary. That hands-off approach may work where the client has other resources. But where the attorney is the only confidential adviser, it seems the attorney should help the client wrestle with the moral issues too. Ultimately, the attorney should give the client all of the legal information needed, but the attorney cannot impose the attorney's morals and advise the client to confess or not to confess. The moral choice belongs to the client.

An attorney who knows an innocent person is being punished will carry a heavy burden too. In some cases, the attorney might be tempted to violate the attorney-client privilege and reveal that the client is the guilty party. That action would undermine the purposes of the attorney-client privilege, where it is essential to the system that clients know they can trust attorneys with their confidences.²⁵ If the attorney breached Steven's confidence, it would undermine the system because future defendants in Steven's position would fear talking to their attorneys. The breach also would put the attorney's law license at risk. Although the focus of this essay is on the attorney's advice to the client and not the ethics of confidentiality, it is important to note that the attorney faces a moral predicament too.

Ultimately, the guilty client must live with the decision of whether or not to save the innocent defendant. If the client wishes to make the "moral" choice and save the innocent defendant by confessing, the attorney must help the client understand the legal procedures and consequences. The client's decision will result in someone spending a long time in prison, so the attorney should help the

²⁴ See MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 5 (2009): "In general, a lawyer is not expected to give advice until asked by the client." If Steven did not raise the question and he told the lawyer that he had committed the crime and the attorney knows that David was being punished for the same crime, an attorney should be careful about raising the issue.

²⁵ A lawyer also "is a public citizen having special responsibility for the quality of justice." MODEL RULES OF PROF'L CONDUCT pmb1. (2009).

client avoid a rash decision and weigh the consequences. Although an attorney is not an expert in moral advice, an attorney is in a unique position to help the client carefully balance both legal and moral considerations.

III. CONCLUSION

Law and morality are intertwined so that moral issues are inevitable in criminal cases. Although rules of professional conduct understand this connection and allow attorneys to consider moral issues in advising clients, attorneys must be careful. One person's moral framework may differ from another's, and when a legal adviser becomes a moral adviser, it may confuse the attorney's primary role of giving legal advice.

Still, because the moral issues affect the legal issues and because a client may have few other resources for professional guidance, an attorney should be willing to discuss morality with the client. An attorney should begin to answer Steven's question "What should I do?" by discussing the legal options and Steven's legal interests. Where the conversation goes next may depend on Steven's follow-up questions and how the attorney evaluates factors such as whether or not Steven has other people to discuss the moral challenges. In most cases, an attorney should discuss the moral issues, being cautious about the pitfalls discussed above. The attorney, though, must remember that moral choices such as a guilty client's difficult dilemma about whether or not to save an innocent person are decisions for the client. The attorney may counsel the client but must not impose the attorney's morals and should let the client make the ultimate decision. It is the moral thing to do.