Originally published in

New York Law Journal

Ethics and Criminal Pratice

April 20, 2021

Cancellation, and Defending Accuseds

By Joel Cohen

How do changes in social values manifest today?

As a young prosecutor I attended a prosecution training session on jury selection. It was a far different time, when the use of peremptory challenges was wide open. A prosecutor could challenge a prospective juror for any conceivable reason. Perhaps the prosecutor didn't like the juror's beard or, more importantly (and disturbingly), because the juror was Black. Given such wide latitude, we were effectively trained to exercise "a prosecutor's sagacity," an unspoken imprimatur to almost reflexively strike Black jurors if the defendant was Black, and strike Jews as too sympathetic (especially toward Jewish defendants). Conversely, we were encouraged, unofficially of course, to keep Nordics on the jury on the presumed logic that they would typically be unsympathetic to *any* defendant. All these unwritten guidelines were blithering generalities, to be sure. Nonetheless, they were "the smart money" in a prosecutor's jury selection gambit.

Yes, the Supreme Court's decision in *Batson* largely ended such peremptory strikes in 1986. Under that ruling, prosecutors could no longer cavalierly exclude jurors based on race, ethnicity or religion. Some prosecutors still try, of course, by attempting to disguise what they're doing. However, prosecutors' offices no longer hold training sessions akin to those I recall from the bad old days. At least, I hope not.

Hardliners who disdain cancel culture, though, might see *Batson* as a forerunner to the type of guardrails placed on lawyers who can no longer practice law in the freewheeling style of yesteryear. In some ways this is analogous to the restraints imposed on defense lawyers; for example, given reformative case law, they can no longer cross-examine rape victims challenging their sexual promiscuity as they might have years ago. Just imagine how the cancel culture might (properly) attack lawyers on both sides of legal controversies who

engage in such conduct today, as well as the prosecution offices or law firms with criminal defense components that tolerate such tactics.

How do changes in social values manifest today? Actually, we see it constantly evolving. Previously, America's legal world, particularly in academia, perceived, or imposed on itself, a "duty" on the part of criminal defense lawyers to represent unpopular clients, dating back to John Adams' defense of British soldiers in the Boston Massacre trials. Today, though, we see young lawyers asserting personal principle differently. Yes, white shoe or institutional law firms have shunned representing unpopular clients if their client base might be offended, possibly leading the clients to take their business elsewhere. Fair indeed for a firm to decline a representation under such circumstances. (Indeed, until 35 years ago or so, most institutional law firms wouldn't abide having a criminal practice at all, viewing it as an untoward business that might alienate corporate clients that disdained even a remote connection to such a practice).

Now, though, something else is afoot. It's not necessarily a fear that the firm's client base will be offended. Rather, in some cases, unpopular representations raise concerns that the firm's own lawyers—typically those younger and arguably more idealistic—might raise objections, finding the representations inconsistent with their principals or values. That, too, might be fair grounds for a firm to consider in declining a particular representation—that is, the sensitivities of its personnel. These changes differ from many earlier changes insofar as they don't arise from case law or ethics rules, but shifts in generational values.

The current shifts in values, though, go far beyond that. Some of the "cancel culturalists" at play may actually have nothing to do with the law firm being asked from within to decline a retention. They may be law students who loudly protest a particular representation, and actually demand that the law school disinvite that law firm's recruiters. Or they stridently denounce the law firm for representing a particular unpopular client, raising placards and bullhorns outside the law firm's office. Such protests might even sometimes be about representing a former or even then-current president of the United States, or the Congress. It has happened, as you might remember.

Batson, of course, was far different. It wasn't about young lawyers raising ethical concerns. It was about offensively using race as a *tactical* trial measure. Yet something interesting happens when we compare cancel culture to *Batson.* Protests against legal retentions today sometimes attempt to inhibit or effectively bar law firms from the retentions themselves—not simply bar the questionable, maybe horrendous, tactics sometimes employed in representing a client. This is not to suggest that a law firm should represent the likes of Hitler, or the Government of Iran, or Pol Pot. There is a point where a client or his cause is so objectionable that the outside community's disdain may indeed warrant surrender, even if the law firm itself might somehow be willing to accept the representation absent a public outcry.

Still, those who truly believe in American justice as it relates to the criminal defense function should understand that outsiders to the law firm simply shouldn't be the decisionmakers. They shouldn't be allowed to finally determine that a law firm's representation is not appropriate, merely because *they* don't like the would-be client or what he is accused of. Such a protocol, if adopted by law firms, would remove legal controversies from the decisionmakers—that is, judges or juries—and place them in the hands of outsiders with large bullhorns who have decided that they happen to be right, period.

To be certain, this is not generally about civil litigation retentions—such as the countless meritless lawsuits that were brought on behalf of President Trump, ostensibly to "Stop The Steal." In civil litigations, the plaintiff's lawyer willingly institutes a case on behalf of her client and choses to affirmatively engage in what might be an anti-social undertaking. Not so in the criminal realm where, let's remember, the constitutional rights of a client are at stake and our justice system encourages a defense—for whomever.

Just imagine if law firms, however, as a result of such "popularity contests" among outsiders to those law firms had been "restrained" from providing a defense for the likes of Martin Luther King, John Lewis, Muhammed Ali, the Scottsboro Boys, the Chicago 7, the Central Park Five or the Duke Lacrosse men, for example, in jurisdictions that clearly reviled each of them. Imagine cancel cultures, in their respective days and in jurisdictions, prevailing on lawyers through loud protest to forgo criminal representations of *those* figures! When we speak of this in terms of legal ethics, it's foundational that lawyers don't adopt—and aren't to be viewed by society as adopting—the oftentimes offensive positions or actions of their clients.

One might argue that the above-identified individuals warranted representation, contrasted with those today who might be best left to their own devices, or public defenders. At least public defenders (and boutique criminal defense firms) don't seem to be protested against for representing unpopular defendants. Nonetheless, who should decide for law firms that might otherwise be willing to undertake those representations? Law students? Lobbying groups? Newspaper columnists from the opposite side of the spectrum?

Yes, there's no ethical duty requiring a lawyer to represent an unpopular criminal defendant except, maybe, in a small town with no one else to pursue the defense. Still, consider how history might have unfolded had the great Thurgood Marshall been forced to forgo criminal cases in the Deep South, where he and his clients were reviled by the locals. Those locals could easily have given him a return train ticket northward, aided by a few flaming crosses outside his hotel room window. Not identified as such, and admittedly far more toxic, that would have been the "cancel culture" of its day.

For sure, the Harvey Weinsteins, Jeffrey Epsteins, Ghislaine Maxwells, Matt Gaetzes or defendants of their ilk, to us, hardly deserve the same sympathy as the "unpopular" defendants noted above. But even though it's unlikely that these individuals will ever be ultimately exonerated as were the others mentioned here, isn't there a principle at stake?

No question, everyone has the First Amendment right to protest a lawyer or law firm from representing *anyone*. And it needn't matter if one labels the protesters cancel culture or not. Rather, it's about the precedent set when those who (maybe even rightly) despise a particular defendant get

to make the decision on whether, and by whom, he or she should be represented. Isn't society enabling the outsourcing of a law firm's intake policy for certain clients sort of like the tent inhabitant choosing to let the camel poke its nose inside the tent? Today it may be unpopular criminal clients; tomorrow foreign governments; next day—who knows?

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