For A Lawyers’ Boycott of South Africa: Ethics and Choice of Client

I. Introduction

Recently, students at many law schools boycotted job interviews at law firms representing the South African government. The law student boycott raised questions beyond the scope of traditional discussions of “moral refusals” to represent clients: its collective character created the possibility of an effect beyond merely protecting the individual attorney’s conscience. That broader effect was the potential impact on the prospective client of a collective refusal of representation.

A lawyers’ boycott of South Africa is not only possible but ethically justifiable. The envisioned boycott would take the following form: a group of public-interest attorneys issues a statement pledging that signatories will not represent the South African government, and calling for all lawyers who oppose apartheid to sign. These attorneys can influence by example a much larger legal community. The group has a few paid staff members, but relies for the most part on volunteer associates from large, prestigious firms. These volunteers urge other lawyers in their firms to sign on and to make a firm-wide commitment to the pledge. Associates at a number of firms are successful at winning such a pledge.

The aim of the boycotting lawyers would be to isolate and put pressure on the South African government by drastically curtailing the availability of counsel from the “elite” firms that South Africa is accustomed to employing, thereby increasing the possibility of internal change in South Africa. Such a boycott is particularly likely to have an impact as it comes during a period of great unrest and political volatility in South Africa; an attorneys’ boycott would therefore be both timely and meaningful.


3. The actual harm to a prospective client done by an isolated attorney’s refusal to represent is, compared to the harm possible from collective action, fairly theoretical.
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II. The Boycott and the Model Rules

The Model Rules of Professional Conduct do not speak directly to the issue of collective refusal to represent a particular prospective client. However, their guidelines concerning representation of morally distasteful clients and individual refusal or termination of such representation suggest how the Rules might apply to a lawyers' boycott. The Rules attempt to strike a compromise between two conflicting visions of the lawyer: one of counsel as legal technician who bears no responsibility for implementing particular ends and can with equal facility represent admirable or distasteful clients, the other of counsel as moral being who need not compromise his or her personal integrity by representing a repugnant client.

Rule 1.2(b) states the classic principle of professional detachment: "A lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities." The Comment adds that "[l]egal representation should not be denied to people . . . whose cause is controversial or the subject of popular disapproval." However, Rule 1.16(b) sets out the countervailing consideration: "a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client," or if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." Therefore if the attorney feels that representation would endorse a repugnant course of action, he or she may withdraw from or decline the case.

The same tension is reflected in Rule 6.2, regarding the acceptance of appointments. A counsel may decline "[if] the client or the cause is so repugnant to the lawyer as to be likely to impair . . . the lawyer’s ability to represent the client." The Comment to the Rule contrasts this heightened standard for appointments with an attorney’s ordinary obligation to accept non-appointed prospective clients: "[a] lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant." Counsel should, however, accept "a fair share of unpopular matters or indi-

5. Id. Rule 1.2(b).
6. Id. Rule 1.2 (Comment).
7. Id. Rule 1.16(b).
8. Id. Rule 1.16(b)3.
9. The language of Rule 1.16(b)3 is general; there is no stipulation that the "repugnant course of action" must be pursued specifically in litigation.
10. Id. Rule 6.2(c).
11. Id. Rule 6.2 (Comment).
gent or unpopular clients.” Thus a lawyer is not obliged to accept any particular distasteful client, although he or she should generally take at least some unpopular matters.

The disjunctive language of Rule 1.16(b) suggests that an attorney may terminate representation due to the repugnance of the client’s objectives, even if there is “material adverse effect” on the interests of the client. That proviso would appear to apply only where there is no specific reason for withdrawing from a representation. If the material adverse effect proviso also applies in the repugnance situation, however, it might pose an ethical problem for current counsel to South Africa who wish to withdraw during a boycott. Under boycott conditions, South Africa would presumably have a difficult time finding new representation upon the withdrawal of former counsel. But aside from its possible relevance to withdrawal during an ongoing adjudicative process, it is difficult to see how this rule could prevent a lawyer from dropping South Africa as a client. The “material adverse effect” language cannot have been intended to bind a lawyer to lifelong servitude to a client in any legal matter that might arise. If a client lost all his or her money, the Rules would not compel counsel to continue representation on a pro bono basis in future cases, even though finding other counsel might be difficult.

The Rules, then, do not forbid individual refusal to represent South Africa. In the words of one commentator, “a lawyer asked to espouse a morally distasteful cause is neither damned if he does, nor damned if he doesn’t.” Lawyers acting in concert ought to be viewed similarly to lawyers acting individually, under the Rules. The ethical burden on the attorney of a repugnant representation is the same, whether the sense of repugnance is shared by many or only by a few. Since the Rules do not censure individual refusal, they should not be read to censure group refusal to represent, a matter on which they are silent.

III. The Boycott and the Right to Counsel

The primary objection to the idea of a lawyers’ boycott is that it would infringe upon the boycott target’s right to obtain counsel.

12. Id.
13. See supra notes 7-8 and accompanying text.
14. Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 Tex. L. Rev. 689, 702 (1981). Professor Rhode’s discussion of the lawyer’s role as expressed in the Model Rules supports the argument that the Rules can be read either way on this point.
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Critics of the student boycott\textsuperscript{15} made such an argument, grounded not in the sixth amendment right to counsel,\textsuperscript{16} but in a broad ethical claim of the rightness of a system which takes paying clients regardless of moral repugnance and the concomitant wrongness of collective or even individual rejection of clients on that basis. The right to counsel ideal is simply that no one, no matter how distasteful, should be prevented from hiring a lawyer. Attorneys, the argument goes, should respect this principle and accept the ethical obligation to represent clients regardless of their repugnance.\textsuperscript{17} From this ideal, the argument concludes that an organized boycott would completely thwart the right to counsel.

A former civil rights lawyer and leading critic of the student boycott, Charles Morgan, Jr., followed this traditional perspective in arguing that “lawyers should take cases whether their clients are black or white, guilty or innocent, popular or unpopular or named Botha or Mandela.”\textsuperscript{18} Morgan compared the South African government to Southern blacks in the 1950s and 1960s, in that both were denied counsel, and condemned Covington & Burling for dropping South African Airways (SAA) as a client. He argued that the decision was equally unjustified whether it resulted from business pressure created by public disapproval of South Africa, or from the moral revulsion of firm members.\textsuperscript{19}

Morgan’s criticism highlights the right-to-counsel objection that would be raised to a lawyers’ boycott of South Africa. Underlying the right to counsel argument is the assumption that the existing distribution of legal services through a free market is both justifiable and fair. In a recent speech critical of the student boycott, former Yale Law School Dean Eugene Rostow defended the fairness of the existing system. He analogized this allocation of lawyers to a taxi-cab system, which takes all paying fares on a first-come first-served

\textsuperscript{15} See, e.g., Morgan, \textit{Bad For Lawyers, Bad For Lawyering}, N.Y. Times, Oct. 11, 1985, at A35, col. 1. Since many of the arguments made by critics of the student boycott are equally applicable to the lawyers’ boycott, those arguments will be incorporated into the case against lawyers’ collective action.

\textsuperscript{16} The sixth amendment right to counsel has been held to apply only in criminal or quasi-criminal cases. See Gideon v. Wainwright, 372 U.S. 355 (1963); Lassiter v. Department of Social Services, 452 U.S. 18 (1981). The boycott would thus violate no constitutional right of the prospective client.

\textsuperscript{17} This is also reflected to some extent in the Model Rules. See supra notes 5-6 and accompanying text. \textit{But see supra} note 11 and accompanying text.

\textsuperscript{18} Morgan, \textit{supra} note 14, at A35, col. 1.

\textsuperscript{19} Morgan stated, “Whatever the reason, Covington and Burling . . . has . . . turned a time-honored view of lawyering on its head.” \textit{Id.}
basis. By this argument, it is unjust to deny a generally disliked but well-off client an attorney; ability to pay is a more equitable criterion than moral or political acceptability.

Underlying this traditional right-to-counsel perspective is the idea that it is dangerous for lawyers to inhibit aspiring litigants’ access to court on account of moral or political distaste, and even worse for them to encourage other lawyers not to take clients of whom they disapprove. It could be argued that if many attorneys publicly reject clients whom they regard as repugnant, the general public will have reason to assume that lawyers who still do represent unsavory clients necessarily approve of those clients. This public identification of attorneys with their clients’ positions and activities would then further discourage those few courageous lawyers willing to represent unpopular clients, resulting in the destruction of the right-to-counsel ideal.

However, this rather pristine vision of professional detachment, also embodied in Model Rule 1.2(b), does not reflect the reality of lay perception. The public already identifies lawyers with their clients. It may be true that this identification makes it difficult for any attorney to represent unpopular clients, but a lawyers’ boycott of South Africa would not make the existing situation worse. Moreover, the boycott could actually improve the public image of the legal profession by counterbalancing the negative popular image of lawyers as “hired guns.”

The right-to-counsel argument fails because it does not go far enough: a boycotted South Africa would hardly be the only civil client without a lawyer. For whole segments of the population, the broad right-to-counsel ideal is merely that – an ideal, not an actual-

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21. Interview with Robert Cover, Chancellor Kent Professor of Law and Legal History at Yale Law School, in New Haven, Connecticut (Nov. 15, 1985).
22. Professor Abel argues that “although the lawyer claims to be amoral in agreeing to represent a client, and, thus, refuses to accept ethical responsibility, lawyer, client, and society all persist in viewing the lawyer as implicated in the client’s ends and accountable for the means used to pursue them.” Abel, Why Does the ABA Promulgate Ethical Rules?, 59 TEX. L. REV. 639, 687 (1981). In support of his argument, Professor Abel cites a case in Los Angeles where the claimant in a worker’s compensation proceeding shot the employer’s attorney when compensation was not immediately forthcoming. Cf. Los Angeles Times, Apr. 26, 1981, § 1, at 24, col. 1. Lawyers do identify with their clients. For a discussion of psychological problems arising from the principle of detachment, and lawyer’s consciousness of responsibility for actions taken on behalf of clients, see Postema, Moral Responsibility and Professional Ethics, 55 N.Y.U. L. REV. 63 (1980).
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ity. The need for attorneys far exceeds the available supply. Moreover, the distribution of the shortfall is not random, but falls along income lines. Of course, there are legal services organizations, but they are able to handle only a fraction of possible cases. Thus, South Africa is no more singled out for deprivation than any person who cannot afford a lawyer. Those invoking the right-to-counsel argument can claim no moral superiority for the status quo they seek to protect; even that status quo does not meet the right-to-counsel ideal. Taxicab justice is simply not consistent with the broad principle that people have the right to a lawyer.

Boycott opponents attempting to salvage this principle might try to make a distinction between the proper obligations of attorneys and those of the government in providing legal services. Yet if the government's obligation to provide legal representation only begins just below the line dividing those clients who can afford counsel from those who cannot, then surely the lawyer's representation of only non-indigent clients cannot be characterized as a moral or ethical obligation stemming from the right-to-counsel. Here, too, it is clear that neither morality nor professional ethics lies at the root of the arguments against the boycott.

In addition, there is a substantial intertwining of the organized legal profession with the government in the area of providing legal services to the poor. Clearly, the Bar cannot disclaim all responsibility for representation of indigents, since it has already voluntarily recognized at least a shared responsibility with the government in this arena.

24. One study has estimated that only about 15 percent of the legal problems of the poor receive legal attention. L. Goodman & M. Walters, The Legal Services Program: Resource Distribution and the Low Income Population 11-59 (1975).

25. For discussions of the inadequacy of the Bar's commitment to pro bono services, see Rhode, supra note 14, at 696-701; Marks, A Lawyer's Duty to Take All Comers And Many Who Do Not Come, 30 U. Miami L. Rev. 915 (1976).

26. The right-to-counsel principle is not inherently unrealizable under conditions of scarcity. Lawyers' services could be allocated in a more rational and fair fashion, by, for example, using queueing systems, accepting only particular categories of cases, or accepting on the basis of how much a lawyer is "needed" for the particular case. The necessity for lawyers could also be lessened by creating alternative forms of dispute resolution and relaxing the Bar's monopoly on representation by easing restrictions on "unauthorized practice."

27. There is no moral reason for placing South Africa and other clients who happen to have money in a higher-priority category for representation.

IV. The Boycott and Usurpation of the Adjudicatory Function

A second argument against the use of moral criteria in choosing clients is that such criteria usurp the function of judge and jury by pre-judging the case. As Lloyd Cutler of Wilmer, Cutler & Pickering asserted, "[j]udgments of right and wrong are to be made after the process is completed, not before it begins."29

The thrust of the usurpation critique is that lawyers should not deny litigants the opportunity to vindicate themselves in court. This would apply to individual refusals to represent as well as to the boycott, but with special force to the latter. In the case of the organized boycott, the "usurpation" could amount to a "lawyer's trump"30 preventing South Africa from asserting a possibly valid legal claim.31

This argument is based on two flawed assumptions: first, that the sort of judgment a lawyer makes in deciding to participate in the boycott is adjudicative in nature; second, that in all cases the disposition of the individual case will amount to a final resolution of the issue that motivated the boycott.

Examination of the usurpation problem reveals three possible intersections between the repugnance of the prospective client and the particular case at bar. In one area, the repugnance has nothing to do with the legal claim. An example of a case in this area would be one in which a person who is a Nazi seeks to contest a termination of welfare. In a second, the repugnance is in the legal claim, and is capable of final judicial resolution. Such a case might arise when a manufacturer of electric cattle prods goes to court to contest a law forbidding sale where it appears likely that the prods would be used against people. In a third area, the ultimate source of a client's undesirability cannot be resolved in the case, but the representation is nevertheless so intertwined with the source of repugnance that lawyers feel their integrity would be compromised by the representation. Representation of South Africa falls in this category. Lawyers' sense that apartheid is bad will not be conclusively adjudicated in any case, yet the practice of apartheid manifests itself in some aspect of nearly every case.32

31. The boycott might appear to pose antitrust problems, but the non-economic motivation of the boycott organizers and the important first amendment interests involved make this unlikely. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).
32. The manifestation of apartheid in a given case may be addressed by a judge — for
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A boycott might well be inappropriate under the usurpation analysis in the first two areas, but not in the third. In the first, the relatively slight degree of the attorney's involvement with the repugnant aspect of the client would not justify the ethical "shunning" in every unrelated legal matter. In the second, lawyers would in essence be saying, "this case should lose, so we will bar it from court" — prejudging that which a court should judge.\(^3\)

The usurpation claim cannot apply to the third area, since the argument does not by its terms constrain all judgments by lawyers but only those which the judicial system should properly make. The kind of judgment attorneys participating in the boycott make is not adjudicative. It is, instead, analogous to a "political question" which is not justiciable since it is properly decided in the executive and legislative spheres rather than in the judicial sphere. Similarly, the judgment that South Africa is repugnant is one which is in the province of public and personal opinion. Thus, although it is South Africa's policy of apartheid which gives rise to the distaste, that policy is not directly on trial. A boycotting lawyer prejudges only that which the legal system will not judge.\(^4\)

In the case of South Africa, it is difficult to separate the source of distaste from even the most apparently routine litigation. For example, Covington & Burling represented SAA in securing landing rights in a 1973 route certification hearing before the Civil Aeronautics Board.\(^5\) This matter turned out to involve segregated cafeterias and toilets at SAA terminals, although the restrictions only applied to South African blacks, not foreign blacks. Ultimately, Covington & Burling prevailed, and SAA was awarded landing rights despite its recognized racial discrimination.\(^6\)

Covington & Burling also represented SAA in 1970 when the New York State Division of Human Rights charged that the government of South Africa, and SAA as an instrumentality of that government, for example, whether racial discrimination in a particular case is permissible — but the question of whether the policy of apartheid should stand or fall will, of course, never be adjudicated in an American court.

33. Here, the distinction between the second and third areas is that in the former, the source of repugnance is discrete and resolvable in any particular case. Thus, while individual refusal to handle that case might be acceptable, an organized action against the client would be inappropriate.

34. Law can pre-empt public opinion, for example by making certain kinds of discrimination illegal. In the case of South Africa, however, national boundaries limit the reach of our legal principles to the actions of other countries.


36. Green, supra note 35, at 203.
discriminated on the basis of race in granting visas. Jurisdiction was asserted on the basis of SAA's use of New York's Kennedy Airport. Covington & Burling argued that New York State law did not apply to a foreign air carrier, and won in the New York Supreme Court.37

To represent South Africa is to represent reprehensible policies and practices. Such representation pre-empts the attorney's own moral judgment without replacing it with an authority empowered to make such a judgment; an arbiter could release the lawyer from a moral dilemma by directly addressing ethical considerations. Because no such authority exists, a lawyers' boycott of South Africa based on the repugnance of apartheid does not usurp the adjudicative function.

V. The Boycott's Impact

Boycott opponents might be concerned that all lawyers would refuse to represent South Africa, thus totally excluding it from the legal arena. The unlikely eventuality that South Africa could find itself totally unrepresented would pose ethical problems, though not insurmountable ones;38 exclusion of South Africa should be no more troubling than the ongoing exclusion of those who cannot afford counsel. One could argue that it is morally worse to do intentional harm than unintentional harm, but that distinction is not valid here. The fact that attorneys set fees and choose paying clients necessarily entails the intentional exclusion of those who cannot pay the fees asked.

Some might argue that South Africa's legal problems are likely to be more complex and major than those of indigent persons, thus putting South Africa in a separate category more deserving of counsel. Yet regardless of the complexity of South Africa's problems, deservingness might more properly and ethically hinge on how important the legal problem is to the client. Moreover, South Africa is a large and powerful nation with numerous alternative methods of dispute resolution. Even deprived of counsel, South Africa could turn to negotiation, arbitration, or even its power to freeze assets of foreign entities or persons within that country.

It is in all likelihood impossible for the boycott to achieve total exclusion. Yet it is not essential that the collective action achieve such a result for it to be effective. A successful boycott would be

38. See Wolfram, supra note 30, at 227-29, 233.
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one which made a powerful political and educational statement, isolating South Africa and making it a pariah. One example of such action in another arena is the recent artists' boycott of South Africa.\(^3\) Furthermore, a boycott would be effective simply by ensuring that South Africa could not procure the quality of representation it might otherwise obtain, with the ease it might otherwise enjoy.

VI. Setting Ethical Limits to the Boycott Principle

A final argument against the boycott is that once the legitimacy of such action is acknowledged, subsequent boycotts of clients deserving of representation become equally legitimate. This is a real danger, but not as uncontrollable a danger as boycott critics would claim. We need not be prepared to accept any and all collective refusals, for there are principled ways of evaluating them.

There are two important limiting principles. One is that a boycott of any client who has historically been the subject of exclusion or discrimination is unethical. The other is that boycotts — like our system of laws — ought to focus on behavior, not immutable characteristics. We should ask: does the boycott seek to exclude voices which would be silent but for representation, or instead voices which are heard with great force in our society with or without their day in court? Does it exclude the defenseless and oppressed, or those who would use the law to oppress others? An analysis of the ethics of a boycott should look to the particular features of the rejected client.\(^4\)

This scrutiny of particular features is neither unprecedented nor unworkable. Content-consciousness is not foreign to the law; in fact, the criteria above are analogous to the "discrete and insular minority" standard in antidiscrimination law, which standard serves to evaluate those who claim discrimination. A threshold issue in the evaluation is the history of the group as a victim of unequal treatment. As in antidiscrimination law, we may draw a line here between acceptable and unacceptable targets of a boycott action, based on the particular features of the target.

By this standard, the South African government is simply not comparable to poor blacks in the South in the 1950s and 1960s, as Mr. Morgan claims.\(^5\) There are a number of differences: historical

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39. This was the movement affiliated with the "Sun City" recording.
40. See Marcuse, Repressive Tolerance, in A CRITIQUE OF PURE TOLERANCE 81-117 (R. Wolff, B. Moore, Jr., & H. Marcuse eds. 1965).
access to legal representation, wealth, political clout, and ability to resort to alternative means of resolving disputes. These differences illustrate the incongruity of characterizing South Africa as defenseless and oppressed. To use the rhetoric of public calling to justify representation of a powerful, repugnant client is merely to rationalize desire for private gain.

Boycotts should target what someone does, not what someone is. There must be a nexus between the individual or entity who is the target and the wrong which lawyers seek to protest. Thus, a boycott of the government of Israel, or of the PLO, might be legitimate, but not a boycott of all Jews or all Palestinians. The American Nazi Party might be boycotted, but not all of its members in all legal matters. South Africa satisfies both principles. Its particular features set it apart from persecuted minorities. The South African government is directly responsible for the social, economic, and legal subjugation of a majority of its citizens, and for the deaths of over fifteen hundred of those citizens since September 1984.42 Moreover, South Africa is in a state of crisis; the situation there calls for extraordinary pressure in order to bring about meaningful change. It is particularly appropriate and important for lawyers to act as lawyers here, since it is the unjust system of laws in South Africa which is under attack. Attorneys ought to see themselves as moral actors in the political universe, and to act with a broader conception of achieving justice.

— Valerie Marcus