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In defence of defending the reviled

By giving terrorists, dictators, and even manipulative defendants proper legal representation and a fair trial, we not only occupy the moral high ground to condemn them; we also create potent symbols of the superiority of our way of life in contrast with theirs.

Vishnu V. Shankar

What connects Captain Preston, Kehar Singh, Saddam Hussein, Manu Sharma, and Salim Hamdan?

Besides being among our community's most reviled individuals (many of them at least), they were defended by some of the most conscientious lawyers of their time. Unsurprisingly the legal profession's time-honoured commitment to defend the most reviled of defendants has never been free from criticism, even in societies committed to the rule of law such as India and the United States. In November 2006, Ram Jethmalani, one of India's most respected criminal lawyers, was attacked on television and in the press for defending Manu Sharma, the prime accused in the Jessica Lall murder case. In January 2007, Charles Stimson, a senior Bush administration official responsible for the Guantanamo detainees, called for a boycott of the law firms who were *pro bono* representing the detainees. A year has passed since these events and since the Supreme Court is to shortly decide Mr. Sharma's appeal against his conviction, it is about time to re-evaluate the issue.

"Come on, why should lawyers defend someone who is so 'obviously guilty'?"

Although this may sound like self-serving lawyer-talk, the question of guilt, "obvious" or otherwise, is for the court and not for the lawyer — or for the press. The honest lawyer (there are many of us, I assure you) does not manufacture facts (the 'crime' has already been committed) or twist the law (the law already exists) and certainly does not lie. Among other things, lying destroys that intangible asset to success at the bar — reputation. Nevertheless, even honest defence lawyers do put a gloss on the evidence as well as the law in favour of their clients — but so do the prosecution's lawyers. The truth, according to theory, emerges from this adversarial cauldron. Nobody seriously believes that this system is perfect. What lawyers believe is that the alterna-

tives will exceed the monstrosity of a Kafkaesque trial, where prosecutor and judge are rolled into one.

The media have suggested that public opinion should determine whether Mr. Jethmalani should represent Mr. Sharma. The public, according to the press at least, had pronounced him guilty. Yet "obvious guilt" has the unpleasant familiarity of mob justice and societal prejudice. Consider the European inquisitions or the *ad hoc* caste panchayats. As Bob Dylan memorably put it in *Hurricane* (1976), a song about the 1967 murder conviction of the black boxer Rubin 'Hurricane' Carter: "...if you're black you might as well as not show up on the streets 'less you want to draw the heat..." Even more tellingly: "...all of Rubin's cards were marked in advance...the trial was a pig-circus, he never had a chance..." If public opinion can deny Mr. Sharma legal representation today, tomorrow it can deny other unpopular defendants proper representation — lower castes, religious minorities, the poor, women, sexual minorities, and others.

"Okay, I can see why the 'most prejudiced' need good lawyers but why the high and mighty like Manu Sharma who abuse the legal system?"

Equality before the law

Our Constitution entitles us to equality before the law — no accused, meek or mighty, can be disfavoured for legal representation. This embodies a deeper truth: a criminal trial is essentially a commitment to pursue the truth and nothing else. A criminal trial is not the forum to ventilate even genuine grievances about power imbalances in society. A criminal trial, unlike an affirmative action law, is not meant to favour the weak over the powerful. The purpose of a criminal trial is to determine the truth — whether Mr. Sharma murdered Jessica Lall and, if he did, to punish him for it by expressing our collective moral outrage. Whatever the Supreme Court's verdict will turn out to be, Mr. Jethmalani's courageous refusal to withdraw from the

case reaffirmed our society's unqualified commitment to the truth.

The commitment to the truth requires fair access to legal representation. If the 'problem' was that Mr. Jethmalani's unquestioned legal brilliance would tip the scales in favour of the defence, it would have been solved not by getting him to withdraw but by getting equally skilled lawyers for the prosecution. Fortunately, Mr. Jethmalani does not have a monopoly over high-quality advocacy in this country. Still, if defendants buy witnesses or bribe the police, courts should punish them for it. But denying them lawyers of their choice is troubling for both moral (why fight a wrong with another wrong?) and pragmatic reasons. If incompetent lawyers reign in the courtroom, on either side, no one will be wiser about who killed Jessica Lall.

"Isn't there a difference between defending 'ordinary' criminals and those who commit 'high' crimes like terrorism or genocide?"

On March 5, 1770, at the height of revolutionary fervour in the American colonies, a group of British soldiers led by Captain Preston shot and killed unarmed civilians in what is known as the Boston Massacre. Still he was defended not by an English barrister but by an American patriot and future President, John Adams. History abounds with similar examples. Mr. Jethmalani defended Kehar Singh, who was accused of killing Prime Minister Indira Gandhi; Ramsey Clark, a former U.S. Attorney General, defended Saddam Hussein; and many American law firms *pro bono* represent Guantanamo detainees, such as Osama bin Laden's bodyguard, Salim Hamdan.

Criticising these lawyers shows a fixation with short-sighted goals: this defendant, this trial, this crime — this conviction. This "ends justifies the means" approach destroys a crucial justification for criminal justice — expressing the collective moral outrage of society.

Collective moral outrage can legitimately be expressed only from a position

of collective moral superiority. If I treat you the same way that you have (or would have) treated me, how can I be morally superior to you? I may even be your moral equal but I can never sit in judgment over you. This is not philosophical sophistry but is embodied throughout the criminal law. Why, in a murder trial, is a damning confession extracted by torture inadmissible in evidence? This is so because in respect of the confession at least, the prosecution and the accused have been reduced to moral equals — each committed a violation of another's right to bodily integrity. Likewise, denying defendants the counsel of their choice makes it impossible to legitimately convict them. By doing so, we risk cutting ourselves on that sharpest of knives — moral hypocrisy.

Collective moral superiority is especially valuable when the community is fighting a war of principle and ideology—for example, the ideals of liberal democracy versus the intolerance of religious fundamentalism. Like all important values, the moral high ground does not come free. The defence of the reviled involves costs — unfortunate acquittals, lenient sentences, and worse — and we will lose many battles before we win the war. A mature society committed to the rule of law will resist the popular impulse to react to temporary discomfort. This is what separates us from them. By giving terrorists, dictators, and even manipulative defendants proper legal representation and a fair trial — the very ideals they would deny the rest of us — we not only occupy the moral high ground to condemn them, we also create potent symbols of the superiority of our way of life in contrast with theirs. The defeat of crime, terrorism, intolerance — and the resolute condemnation of the reviled — require no less.

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