

The Lawyer and Faustian Bargains

by Michael E. Tigar

The image of the devil fighting for the soul pervades our literature. Images from Stephen Vincent Benet's *The Devil and Daniel Webster* or the cadences of Milton's *Paradise Lost* enliven our speech and our perceptions. The devil, we say, is in the details, or in the bottle in front of us. For, as we know, "Malt does more than Milton can/To justify God's ways to man."

In lawyer circles, there is the story of the young law student standing in front of the career services bulletin board and shaking his head. An older gentleman appears beside him. "Why the frown?" the older man inquires.

"There are no jobs in public service," the young man laments. "To make money and pay off your law school debt, you have to sell your soul."

"And what," asks the old man, "is wrong with that?"

"Well, for one thing, you go to hell when you die."

"That's not so bad."

"Oh, come on!"

"No, really. I'm the devil, and I know."

"Oh, sure! The devil."

"You don't believe me. Come with me for awhile. I'll have you back before your next class."

And with that, the young man was spirited away to a sort of paradise. Soft breezes blew. There were refreshing drinks and good things to eat. Beautiful young men and women swam in the lagoon. The young man spent several days there and then by some magic was back where he had been standing—and hardly any time had passed.

So he sold his soul. He became successful and wealthy. Unlike some who followed in the same path, he was never bothered by the U.S. Attorney, and he certainly did not go to Club Fed.

As it must to all mortals, death came to him. And he went

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to hell. It was a fiery furnace. The noise and stench were unbearable. The cries and groans of eternal anguish rattled around inside his head.

After a few days of this, by his reckoning of time, he demanded to see the devil. There was a wait, but his wish was granted. There, in an air-conditioned office, sat the older gentleman who had recruited him.

"Look," the lawyer said. "When you and I made the deal, I came down here. It was beautiful, peaceful—nothing like what's out there."

"Ah, yes," said the old gentleman, "you were in our summer associate program."

That is only one of the thousands of devil-and-the-lawyer stories. They are everywhere in the Western tradition. In old Brittany, they spoke of St. Ives, the patron saint of lawyers: "Saint Yves is from Brittany/A lawyer but not a thief/Such a thing is beyond belief."

I speak of the "Western" tradition because it seems to me that this dialectic of God versus evil, and distressingly often of those who believe in our God versus everybody else's, is a characteristic of the three great monotheistic religions of the world: Judaism, Christianity, and Islam. If there is one God and He is all powerful, the very idea of Him summons up the image of His dialectical antagonist.

Thousands of heretics stood in a valley near Marseille in 1209. "Which ones should we kill?" asked the general that Philip Augustus had sent to do the papal bidding. He was standing on the hillside and thinking of the 15,000 men, women, and children who were down there.

"Kill them all," said the papal legate. "God will recognize His own."

Oh, yes, there are forces of evil in polytheistic religions, but none, I think, with the all-encompassing power of Satan in our mythology, none whose doings set the stage for an opera like *Faust*. This sort of confrontation requires an anti-God who embodies all the characteristics of evil. After slurping, lusting,

stealing, and blaspheming your way through the seven deadly sins, you finally total your karma by indulging in the lively ones.

It seems a little strange, at least to me, that “Faustian bargain” or similar locutions should have crept into our legal literature only recently, in the last half of the 20th century. There are no federal cases before 1967 that use it, or any variant. Before 1945, there is not a single federal case that uses any combination of deal, bargain, or contract with Faust, the devil, or Satan. Perhaps the increased interest in opera has been responsible for the change, or some newfound willingness to look outside the English-language cultural tradition. Perhaps in older times judges were afraid to speak the blasphemous words.

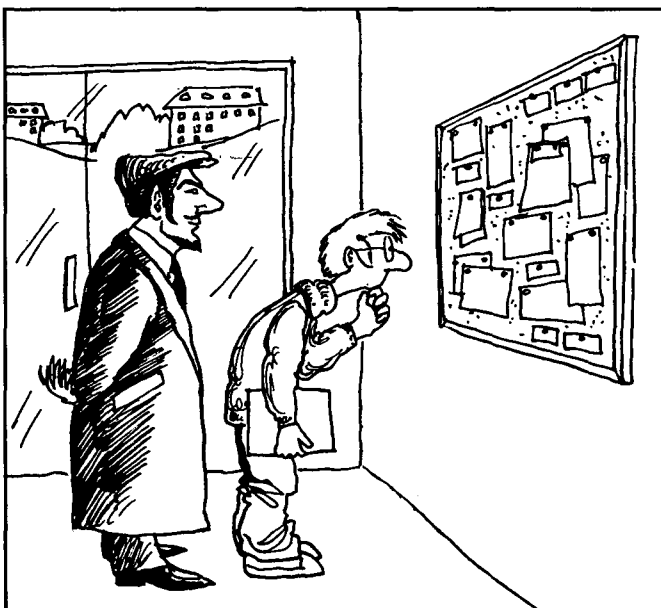
The Snitch as Devil

But there you have it: In the last 40 or so years, the Faustian bargain emerges as a metaphor, officially sanctioned by judges in their opinions. The metaphor takes its place alongside other images that express that same deeply rooted idea, one that is attached to a particular kind of transaction: Somebody, to gain an advantage to which they are not entitled, does a deal with a miscreant.

When you tell us who you think is the miscreant in one of these bargains, you tell us more about your own values than about the deal you are describing. Unless you are joking, your choice of image tells us your own sense of right and wrong, heaven and hell.

Recently, Judge Steven Trott of the Ninth Circuit excoriated prosecutors for making a deal for testimony and then failing to find out that the snitch was a liar who was conspiring against the defendant. Judge Trott spoke of “the devils with whom the criminal justice system has chosen to deal,” meaning to cast the snitch as devil and the prosecutor as a sort of Faust. Of course, Trott’s Faustian prosecutor saves himself from hell by making sure that the snitch keeps the bargain to give truthful testimony. For Judge Trott, the State is young Faust, always in danger of being seduced by the devils but needing to woo them in order to punish those who have done evil.

Defense lawyers may see this sort of bargain differently, especially when they represent clients who are challenging the existing constellation of state power and social relations.



In 19th century Ireland, as in all countries where a colonial people foment rebellion, the English Crown would by various means induce informers to testify against leaders of the liberation movement. Defense counsel knew that the poor informer was not drawn willingly into his bargain. The Crown was the devil, and the more dangerous for possessing very Satan-like powers. After all, the government is not only powerful, it is a recidivist, for when it commits crimes with impunity, it is tempted to repeat them.

And so, in this image, here is the great Irish barrister John Philpott Curran speaking of such a bargain:

I speak not now of the public proclamation for informers, with a promise of secrecy, and of extravagant reward. I speak of what your own eyes have seen, from the box where you are now sitting; the number of horrid miscreants, who acknowledged, upon their oaths, that they had come from the seat of government—from the very Chambers of Dublin Castle—where they had been worked upon, by the fear of death and the hope of compensation, to give evidence against their fellows. Oh, yes, the mild, the wholesome, the merciful councils of this government are perched over catacombs of living death, where the wretch that is buried a man, entombed till his heart has had time to fester and dissolve, is then dug up a witness! And if you will let him in, please do not let him take an oath on the Bible. He would defile the Evangelists.

Quoted in Michael Tigar & Kevin McCarthy, *The Warrior Bards* (1989).

Not these words, perhaps, but this sort of thinking has dominated my experience for the defense.

I remember my mentor Edward Bennett Williams telling the jury in the John Connally trial about the dangers of believing the purchased testimony of Connally’s old friend, who had turned government witness in exchange for absolution in a dozen bank frauds. “There are some things you cannot buy,” he said. “You can’t buy love, for when you pay, it isn’t love you get. You can’t buy justice, for when money changes hands, it becomes injustice. And you can’t buy truth. You can buy *testimony*, and that you have seen is a very different thing.”

As lawyers, we may not often think of ourselves as engaged in such cosmic struggles. And yet, in our daily lives, we often strive for results or invoke procedures that we would not countenance for a moment if we were responsible for erecting by our own standards a system that called itself justice.

We go along in this way because in the nature of our system, our adversaries are likewise seeking a result or using a procedure just as blessed by legal doctrine as the one we invoke. So in the nature of things as they are, we tell ourselves, in the clash of principles and procedures, the system achieves something worthy of justice’s name.

There is, of course, a trap in that way of seeing the way in which we practice law. In fact, the system does not guarantee good results. Just recently the Supreme Court split five to four, holding that Congress violated the First Amendment by telling legal services lawyers they could not advise poor clients to challenge unfairness in the welfare system or to bring impact litigation. These prohibitions even extended to expenditure of private funds that legal services offices might raise. So for the past five years, the poor’s underfunded lawyers have also been prohibited from playing a full part in defining justice. Justice Anthony Kennedy, who wrote the majority opinion upholding the rights

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of poor people and their advocates, is an opera fan. He has told me that he cues up operas on his stereo according to the case he is working on. Could *Faust* have been an inspiration for this particular opinion?

My theme is captured in one of Justice Kennedy's observations for the Court: "An informed, independent judiciary presumes an informed, independent bar." That presumption, far too often, does not hold true.

In capital cases, dozens of death row prisoners have been set free because they were found to have been innocent in fact. A Texas court had trouble holding that a lawyer who slept during his client's capital trial was ineffective. A federal judge noted that Texas paid an appointed lawyer in a death penalty case \$11.84 an hour, and got what it paid for.

If the system excludes poor people and people of color from equal access, then its results are subject to legitimate question. We the lawyers guard the courthouse door, and almost nobody enters unless they can find one of us to walk in alongside them.

I believe we truthfully can be said to have some responsibility for the positions we take, the procedures we use, and the results we get. We are, in fact, the system. In about the year 1087, Pope Gregory VII received a letter from peasants in Germany complaining that their lord was grinding them too hard. The lord, when asked to explain, said he was doing no more to these peasants than was justified by the custom of the place.

The Pope wrote back, "I would

remind you that the Lord Thy God hath said, 'My name is Truth.' He hath not said, 'My name is Custom.'"

We are condemned to signify. Our professional gestures mean something, not just for our clients but in the larger context of the system called *justice*. Louis XIV was king of France even when seated on the *chaise percée*, and we are speakers about justice even when doing our daily work. Our thousand bargains with good or evil are made piecemeal, every day of our professional lives.

And so, as a lawyer, I may make metaphorical use of the Faustian legend, as I defend the life or liberty of someone committed to my care. But in my life, my own piecemeal bargains, the legend lives as well. I say to myself, fearful of my own failures to heed my fellow creatures' calls for justice: What if I wanted someday to sell my soul to Mephisto? I might see him at a distance, that old gentleman. Quickening my step, I catch him by the shoulder, and he turns to look me in the face.

"Mephisto, old man. Remember me? I am ready to sell you my soul."

And he looks at me, finally recognizing who I am. "*Your* soul?" he says with that smile of his. "I already have it." □