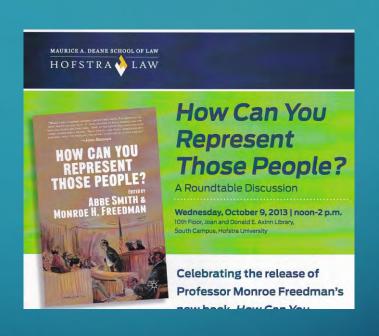
なんで、『あんな奴ら』を弁護できるのか?

HOW CAN YOU REPRESENT "THOSE PEOPLE"?

Keiichi Muraoka 村 岡 啓 一 Professor, Hitotsubashi University 一橋大学 特任教授

刑事弁護人の定義

被疑者・被告人の利益を守って積極的に行動し、手続のすべての段階において、 実質的な当事者対立の構造を作り出し、 法の許す範囲で全力を尽くす法律家



当事者主義の信奉者

汚れ仕事だが誰かがやらなければならない。 両当事者に党派的な援助者がいなければ、 当事者主義は機能しない。

弁護人は、警察や検察が高い水準を保つ ように制度をきれいにする役回りなのだ。

憲法至上主義者

高貴な仕事だ。

資力に関係なく、罪に問われた者は誰でも 弁護を受けられる憲法上の権利を持つ。

だから、犯罪者を代理する弁護人は、誇り を持って弁護するのだ。

市民的自由権論者

犯罪者として告発されている人は、我々すべての代表だ。

彼らの権利が奪われるならば、それは、

皆の権利の崩壊につながる。

犯罪者の権利を守ることは、我々自身の 権利を守ることなのだ。

法実証主義者

真実は誰にも分らない。有罪は必ずしも 真実ではない。

刑事弁護人が十分に役割を果たした後に 到達する法的結論なのだ。

事実を究明することは、弁護人の義務ではない。それは、裁判官と陪審員の役割だ。

哲学者

法の世界で「有罪」というのは、道徳的な観念でも事実的な観念でもなく、法的な観念である。

それは、無罪推定の下で、法の定める手続が行われた後の正式な判定のみを指す 言葉でしかない。

利益衡量論者

1人の無辜が有罪とされるよりも10人の有罪の者が無罪となって自由の身になる方がマシだ。

有罪者が釈放されるリスクは、無実の者を救うための社会的コストだ。

ソーシャル・ワーカー

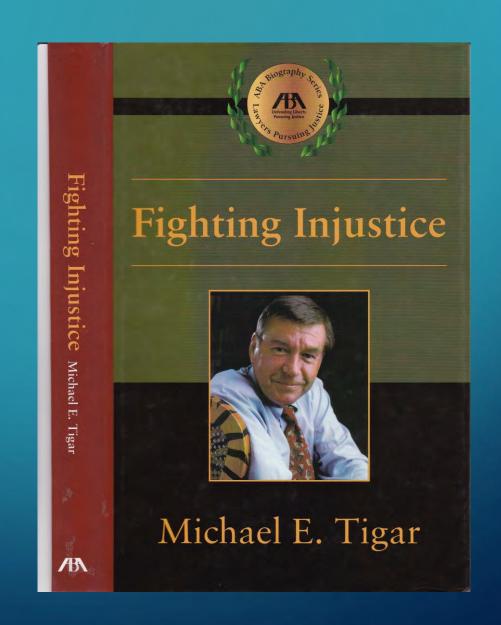
犯罪者の大部分は不正義の犠牲者だ。 弁護人の援助を得て社会の一員として 適切に扱われることの効果は、友人・知人、 縁故者に広がり、自らの怒りや疎外感を 軽減する。

人道主義者

抽象的な「正義」のためではなく、犯罪に問われている者の人間としての現実的な必要を満たすために、援助者としての弁護人が必要なのだ。

刑事弁護人の二つの顔

- 依頼者の代理人 REPRESENTATIVE, AGENT 依頼者に対する誠実義務(忠実義務)
- 独立の司法機関 INDIPENDENT JUDICIAL ORGAN司法制度に対する誠実義務(忠実義務)



第1問

弁護人の反対にもかかわらず、被告人は自ら証言台に立つことを選択した。

弁護人は被告人が偽証するだろうと考え ている。

この場合、弁護人は被告人を証言台に立たせることは許されるか?

第2問

弁護人は、依頼者に強制処分(家宅捜索) が迫っているという情報を適法に知った場合 (例えば、新聞記者からの情報提供など)、 その情報を依頼者に伝えることは許される か?

第3問

弁護人において、自己の依頼者である殺人 事件の被告人が別の殺人事件の真犯人であ り、無実の者がその事件の殺人犯として誤っ て有罪とされたことを知ったが、被告人が弁 護人の守秘義務を解除しない場合、弁護人 が、冤罪者を救うために、自己の依頼者が真 犯人であることの情報を開示することは許さ れるか?

第4問

日本では、検察官が必要と認めるときに、被疑 者・被告人と協議を行い、他人の刑事事件の解 明につながる供述を行うなど必要な協力をする ことと引き換えに、被疑者・被告人に一定の利益 (恩典)を与える制度が導入されようとしています。 司法取引をめぐるドイツ及びアメリカの弁護の実 情に照らして、お二人は、この制度の導入をどの ように考えられますか?



POINTS OF VI

OPINION AND COMMENTARY

Atticus Finch, Esq., R.I.P.

BY MONROE FREEDMAN

A new ethical rule model for lawyers is being promoted in scholarly books. law reviews, and her journals. His name is Atticus Finch. He looks a lot like Gregory Peck. He is a gemlemen. He has

"For me," writes a California trial lawyer in the October 1991 issue of the ANA Jour

CASES AND WAR NO MORE CONTROVERSIES compelling

nuf. "there

Finch. Fine citizen, parent and law-yer, Finch ... would remind us that the burden [of meeting a higher standard of behavior and trust] is never too much to

bear.

Another commentator, in a November 1950 essay in the Stanford Lew Review, eulogiscs Atticus Finch in a different fashion, but with much the same sense of admiration: "[T]here is no longer a place in America for a lawyer like Atticus Finch. There is nothing for him to do here—nothing he can do. He is a moral character in a world where the role of moral thought has become at best highly

And so on. Actions Finch, the hero of Harper Lee's novel To Kill a Macking-bard, has become the ethical exemplar in articles on topics ranging from military justice to moral theology. If we don't do something fast, lawyers art, going to start taking him seriously as someone to emu-late. And that would be a bad mistake.

The whole business begins with the idea that understanding and abiding by the rules of ethical conduct is not mough Rather, it is said, a crucial element that is too often overlooked is "character." The notion of character traces back to what Aristotle called "virtue." The quality of virtue or character is not directly concerned with doing the right thing, but rather with being the right type of person. That is, the person of character will "naturally" act upon the right principles.

The Appointed Model

Atticus Finch is a lawyer in the small town of Macomb. Ala., in the 1930s. As most readers will remember, in the course of the novel, a black man, Tors Robinson, is falsely accused of raping a white woman, who, in fact, had been trying to seduce him. Finch is appointed to defend

Finch would prefer not to have been appointed but, recognizing his duty as a member of the bar, he carries out the renresentation zealously. He even risks his own life to protect Robinson from a lynch mob. As we are told in the book, as well as in recent commentaries on lawyers' ethics, Finch acts as he does because he is: a gentleman

Is Attious Finch, then, a role model for lawyers? I think not.

Monroe Freedman, the Howard Lich-tensiein Distinguished Professor of Legal Ethics at Hofstra University Law School, testifies frequently as an expert witness on sira" appears monthly in Logal Times.



Atticus Finch, a k a Gregory Peck: Lawyers are taking him seriously as a role model—and that's a "bad mistake."

In risking his life to save Robinson, Finch is undeniably admirable. But am I really expected to tell my students that they should emulate Finch by putting themselves between a lynch mob and a chent? I may be a staurch preparent or cealous representation, but I can't sell

what I won't buy.

It's true that Finch, having been ap-pointed by the court to defend an unop-alar client, gives him effective represen-tation. That's an important ethical point, but it is also a relatively small one. And a refusal to accept a court's appointment is

punishable by imprisonment for contempt.

What looms much larger for me is Atticus Finch's entire life as a luwyer in Macomb (which, ironically, is what "character" is all about)

Down With Gentlemen?

Let's go back to the idea of the pentleman. Part of my problem with it is that too many people who have carried that title have given it a had name. Gentlemen tend to congregate together and to exclude to congregate segenter and to extense others from their company and from their provinges on grounds of race, gender, and refigers. In short, the gratherms has less often been part of the problem of social rijustice and too sellom part of the solution. Aristotle himself was an clinist who taught that there is a natural aristocracy

and that some people are naturally fit to be

Consider Finch. He knows that the administration of justice in Maxomb, Ala., is racist. He knows that there is a segregated "colored balcosy" in the courthouse. He knows, too, that the restrooms in the courthouse are segregated—if, indeed, there is a restriction at all for blacks inside the courthouse

Finch also goes to segregated restaurants, drinks from segregated water foun-tains, rides on segregated buses, and sits in a park that may well have a sign announcing "No Dogs or Colored Allowed." Finch is not surprised when Robinsen, having been convicted by a bigoted jury, is later shot to death with no less than 17 ballets while making a hopeless attempt to escape from prison to avoid

Even more telling. Atticus Finch in-structs his children that the Ku Kinx Klan. is "a political organization more than anything." (David Duke, can you use a campaign manager who looks like fineg-ory Peck?) Finch also traches his children that the leader of the lynch mob is "hasi-cally a good man" who "just has his blind

In this respect. Finch is reminiscent

SEE CONTROVERSIES, PAGE 21

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モンロー・フリードマンの思想と人となり

モンロー・フリードマンの倫理観と倫理研究に与えた ユダヤ教の影響

The Influence of Judaism on Monroe Freedman's Understanding and Study of Ethics

Presenter: Jane B. Tigar