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Should a Christian Lawyer Serve the Guilty?

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People who teach or practice law are in some ways like public executioners or the Air Force officers who watch over the buttons that will send nuclear missiles into action: Other people, ordinary people, want to know what we do to overcome what seem to ordinary people to be moral obstacles to doing what we do.

What ordinary people say to lawyers, and what my students say when they first come to law school, when they are still more ordinary people than they are law students, is this: How can lawyers lend their skills and talents to the representation of people who harm society?

The reason that question keeps coming up is that the answers given to it by the American legal profession are not sensible. An example: At least since about 1850 the American legal profession, when asked why lawyers represent guilty people, has said that guilty people aren't really guilty. "Guilt" is a lawyer's word; it means the judgment pronounced by the state on someone accused of crime. In our system, it means the judgment pronounced by a judge and jury after the accused person has been given what we call a fair trial.[1]

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[1] The grandfather of American legal ethics, David Hoffman, in taking up the question as part of his *Resolutions in Regard to Professional Deportment*, II A COURSE OF LEGAL STUDY (2d ed. 1836), in T. SHAFFER, AMERICAN LEGAL ETHICS 59-68 (1985), was quizzical and unclear. *See* Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673 (1979). In the next intellectual generation in the profession, Judge (and Dean) George Sharswood was much clearer and generally of the view stated in the text: *Essay on Professional Ethics* (1854) (4th ed. 1876), in 32 AMERICAN BAR ASSOCIATION REPORTS (1907), and in T. SHAFFER, *supra*, at 177-78, 197-202, 220-22, 224-30. In the third generation, the generation of codes, the position described here had become settled convention. Jones, *Code of Ethics Adopted by the Alabama Bar Association* (1887), 118 Ala. xxiii

One of the things "fair trial" means is a trial at which the accused person has a lawyer on his side.[2] Therefore, this answer goes, no one is guilty until he has been found guilty after he has had a lawyer's help. So one of our official professional ways of answering the old, old question is to say that the person who asks the question doesn't understand what guilt means. The problem with this traditional answer is that ordinary people who are not easily intimidated by lawyers will say that they *do* know what guilt is. They don't have to wait for the state to certify it. Dirty Harry knows what guilt is. So did Captain Furillo of "Hill Street Blues." So do you. There are cases of doubt, of course, but in cases that cause ordinary people to ask lawyers the old, old question, there is not doubt. Someone has murdered an old woman or raped a child or poured noxious poison into the river. It is obvious that the deed was done, and obvious who did it. You can tell because the first thing the guilty party says to himself is, "Gee, I am in trouble. I better get myself a good lawyer." Good lawyer means clever, resourceful lawyer, "someone who can get me off."

And so the guilty person gets a clever lawyer, and the clever lawyer does his best, and the culprit avoids being certified as guilty by the state, which means that he is restored to civilized society, there no doubt to continue his evil career. Ordinary people know what they're talking about when they ask law teachers: How can lawyers help guilty people?

Another of our official professional answers says that lawyers may serve the guilty because the state, the "system," needs them to do it. You can't punish the guilty if you don't give them a fair trial first. You can't have a fair trial unless the guilty person has a lawyer to help him. Therefore you need lawyers. The state needs lawyers. Lawyers do not, after all, serve guilty people; they serve the state. As I once argued to myself, when I defended a member

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(1899); AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS (1908); Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988).

[2] See, for example, Judge Sharswood's analysis of the celebrated *Courvoisier* case in London:

> [I]s not the prisoner in every case entitled to have the evidence carefully sifted, the weak points of the prosecution exposed, the reasonable doubts presented which should weigh in his favor? And what offence to truth or morality does his advocate commit in discharging that duty to the best of his learning and ability? What apology can he make for throwing up his brief?

Sharswood, *supra* note 1, *quoted in* T. SHAFFER, *supra* note 1, at 178.

of the American Nazi Party,[3] I am not lending my skill and talents to organized hate: I am not serving evil; I am serving the Constitution.

I decided later that that answer won't do. Service to the state—even service to the Constitution—will not excuse service to evil. Surely that is clear in terms of ordinary morality. Ordinary people understand ordinary morality; that's why they are not persuaded by this second official professional answer to the old, old question.

If the ordinary people I am talking about happen also to be ordinary Jews or Christians, with some understanding of the ethical traditions of their faith, they may add that a theory that allows service to the state to trump elementary perceptions of evil is idolatry. It depends on a maneuver that puts the state where God ought to be.[4]

To say, though, that the legal profession's official answers to the old, old question are fatuous is not to say that there is no answer. My concern for most of the last twenty years has been to see if I can work out sensible answers to old, old questions in legal ethics, and particularly to see if I can do this within the context of the story of Israel and of the Cross—the story of Jews and Christians.[5]

On this question of guilty clients, which is the oldest of the old, old questions for lawyers, I have found it useful to make some distinctions. I make distinctions because I am a Roman Catholic. My peculiar branch of the Hebraic tradition includes the medieval Scholastics, who have taken a lot of grief for their hair-splitting and counting angels on the points of pins, but the Scholastics had a useful canon for argument: Never deny, they said; seldom affirm; always distinguish. I have some distinctions I want to make, now, on this old, old question of lawyers serving the guilty.

The first distinction is between being guilty and being repulsive. The second is between being guilty and being punished. And the third is between being faithful and being loyal.

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[3] Shaffer, *supra* note 1, at 698-703.

[4] *See* Shaffer, *The Tension Between Law in America and the Religious Tradition*, in THE WEIGHTIER MATTERS OF THE LAW 315 (J. White & F. Alexander eds. 1988).

[5] *See* T. SHAFFER, FAITH AND THE PROFESSIONS (1987).

I. The Distinction Between Being Guilty and Being Repulsive

The first thing you notice when you think about repulsive people, as distinguished from guilty people, and when you do this thinking in the light of the Gospel, is that Jesus of Nazareth seemed to *prefer* the repulsive. He went to parties with tax collectors,[6] who were the First Century equivalents of 20th century bosses of organized crime. He was generous to prostitutes, thieves, Samaritans, and Roman army officers.[7] He seemed always to turn toward the repulsive—for his meals,[8] when he took a drink of water, when he wanted to give a lesson about prayer to his fellow Pharisees,[9] and even while he was being tortured to death in the name of the law.[10] That fact from the Gospel and parallel curiosities one could assemble from the moral teachings of the Rabbis[11] don't answer the question of how a lawyer who is also a Jew or a Christian can serve the guilty—but those images from Scripture give us fair warning that the answer is not as simple as either lawyers or ordinary people think.

It is not a bad thing that society regards certain people as repulsive. No human institution or community could exist unless we did. All of our communities define themselves by excluding repulsive people. Our institutions—institutions such as the criminal law, the courts, the legal profession—serve this elementary and essential need that the community has: They assist in locating and identifying in a public way those who cannot be members of the community.[12]

In this way the Torah and the priesthood excluded from the community those who harmed society, from murderers and thieves to adulterers and people who had contagious skin diseases.[13] Jesus

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[6] *Matthew* 9:10-13.

[7] *Matthew* 8:5-13; *Luke* 7:1-10; *John* 4:46-53. *See Acts* ch. 10.

[8] *See supra* note 6.

[9] *Luke* 18:9-14.

[10] *Luke* 23:39-43.

[11] J. Jeremias, The Parables of Jesus (3d rev. ed. 1972); J. Petuchowski, Our Masters Taught: Rabbinic Stories and Sayings (1982).

[12] S. Dinitz, R. Dynes & A. Clarke, Deviance: Studies in the Process of Stigmatization and Societal Reaction (1969); K. Erikson, Wayward Puritans (1966).

[13] *Mark* 1:40-45; *Leviticus* ch. 13; Mouw, *Biblical Revelation and Medical Decisions*, in Revisions: Changing Perspectives in Moral Philosophy (S. Hauerwas & A. MacIntyre eds. 1983).

of Nazareth did not quarrel with such legal institutions in his community. He honored them. The rules said that you should not touch a leper, for example—that if you did you became a leper. When Jesus cured the leprous man, he chose to do so by touching him. That meant, as St. Mark's Gospel says, that Jesus could no longer go into the town. It also meant that the cured leper should go to the priests and have his cure checked out, and that is what Jesus told him to do.[14]

In the same way, Jesus honored the rigorous rule of the Torah that an adulterous woman was to be stoned to death. He did not dispense with that rule either, or disregard it; what he did was call for the witnesses that the Torah required before the stoning could take place.[15] What he did in both cases was to turn toward the repulsive, to take their side, to be with them. If we take the Gospel stories as moral models, Jesus says to us, his followers, that we should turn to the repulsive, to those our communities tell us, for good reason, to avoid. The lesson says to separate the condition of being guilty from the condition of being repulsive. The Gospel gives no warrant for turning away from repulsive people, even though there are sound moral, social and legal reasons for doing so.

The distinction between the repulsive and the guilty gives comfort to a lawyer. It doesn't answer everything that comes up when you think about serving the guilty, but it helps. I think, for example, of the time I was appointed by the United States District Judge to represent a prisoner who had been convicted of raping a five-year-old child.[16] Guilt was certainly an issue in that assignment, but revulsion was a more serious problem for me. It was a problem for other lawyers, too. I asked a colleague of mine, an expert in criminal law, for some advice on the case. The first thing he said to me was, "Well, if you get him out, I hope he moves in next door to you."

Revulsion is an issue when it is absent, too. The best guilty clients—the ones we lawyers most like to work for—are not repulsive. They are college-educated, pleasant people who eat well, drive fine automobiles, take vacations without regard to cost, and are generous to their neighbors. They are guilty not of rape or armed rob-

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[14] *Mark* 1:40-45.

[15] *John* 8:1-11.

[16] Weaver v. Lane, 382 F.2d 251 (7th Cir. 1967), *cert. denied*, 392 U.S. 930 (1968).

bery but of such things as price-fixing, securities fraud, water pollution, oppression of the poor in the Third World, and making illegal political contributions. These activities get a person into trouble, but they don't make him repulsive. In fact, the guilty who are not repulsive avoid getting into trouble more often than the repulsive guilty do. They understand, as the repulsive guilty do not, that lawyers are most helpful when they keep you out of trouble.

The case of the unrepulsive guilty is one we have to return to later, when we discuss the distinction between being faithful and being loyal; for present purposes their situation perhaps shows that being guilty is not the same thing as being repulsive.

II. The Distinction Between Being Guilty and Being Punished

The interesting thing about the legal profession's second official answer to the problem of serving the guilty was that it involved turning to power, turning to the state, serving not the person of the guilty, but, as I once told myself, serving the Constitution.[17] The interesting thing that the Gospel says about revulsion, as distinguished from guilt, is that the moral thing to do is to turn toward the repulsive person, to reach out to that person, to reach through his repulsiveness. It is fairly evident that we are in the presence of a radically different approach to a professional problem; but, even so, the scriptural approach to revulsion does not reach the question of guilt.

The second distinction I am provoked to by my Scholastic forebears is the distinction between guilt and punishment. Let's concede that the person the lawyer is serving is a guilty person, in the sense that ordinary people know him to be guilty. Assume a not-doubtful case of guilt and ask whether it is a moral thing for a lawyer to use her efforts in such a case to avoid the law's punishment for the guilty person.

I suppose the clearest case in the Gospel is, again, the woman taken in adultery. The Torah prescribes death by stoning in such a case.[18] Jesus was asked by some law professors if they should follow the Torah and execute the punishment. Guilt was not at is-

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[17] *Id.*; *supra* note 3.

[18] *Leviticus* 20:10; *Deuteronomy* 22:23-24.

sue—not, at any rate, guilt in the ordinary person's sense of the word.

Jesus said, "Let him who is without guilt cast the first stone."[19] The story is often told as if its meaning was that we are all guilty, so why should she be punished when we are not? The professors were wrong to judge the woman. That meaning is sentimentally attractive, but it cannot be the meaning of the story. A civil order in which no offender was punished would be a chaotic civil order—no order at all. And, besides that, in this case, Jesus and the law professors were dealing with a bit of law that had been given to them by the Creator of the Universe. It is unlikely, even if it is sentimentally attractive, that Jesus was saying: "Oh, come on, fellows (wink, wink)—let her go."

Nor was Jesus saying that the punishment was out of all proportion to the offense. To a modern reader it seems to be, but a first-century rabbi would not have said that, because the punishment as well as the offense are in the Torah, and it is not possible to repeal the Torah. The Jewish tradition does deal with the problem of punishments being excessive.[20] Jews, then and now, place an almost absolute value on human life.[21] But you have to be a good lawyer to honor both Torah and tradition. And Jesus's professional ancestors, the Rabbis who preserved and taught the Torah, were very good lawyers indeed. What they had done was to ponder the will of God in the Torah so thoroughly as to make capital punishment unlikely.

In capital cases, the Torah requires two eye witnesses.[22] That and other requirements made it unlikely—virtually impossible, in fact—that an adulterous woman would be stoned. What Jesus was doing, when he said, "Let him who is without guilt cast the first stone," was calling for the application of the law requiring two witnesses (who would be called upon to cast the first stones).[23] When the law professors turned away, they were saying to him, and to the woman, that no one was there to be a witness. They had failed

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[19] *John* 8:7.

[20] PENTATEUCH AND HAFTORAHS (J. Hertz ed., 2d ed. 1986), on *Deuteronomy* 21:18-22.

[21] *See id.*; SIFRE, A TANNAITIC COMMENTARY ON THE BOOK OF DEUTERONOMY, PISKA 218-20 (R. Hammer trans. 1986); E. WIESEL, A JEW TODAY 172-75 (1978).

[22] *Deuteronomy* 17:6-7. *See also* Z. FALK, INTRODUCTION TO JEWISH LAW OF THE SECOND COMMONWEALTH 118 (1972).

[23] Z. FALK, *supra* note 22. *Compare Acts* 7:58-60.

to prove their case.

Then, as you will recall, Jesus pointed out to the woman that no one remained to condemn her. And, he said, he would not condemn her either. She was free to go. She had had a good lawyer. She had been found not guilty.[24]

And there, I think, you have a distinction between being guilty and being punished. There is no doubt that the woman was guilty; the story assumes that. But a lawyer, invoking legal requirements, stepped between her guilt and her punishment, and she went free.

It's a distinction we lawyers often find attractive. I once represented a man who was in prison for life because he had been found guilty of kidnapping a policeman in Indianapolis and taking the policeman's car to Albuquerque, New Mexico.[25] The facts of the case were such that punishment—life in a maximum-security prison—seemed excessive. Not that kidnapping a police officer should be taken lightly, but this case had some, as we say, extenuating circumstances: My client was a pimp quietly going about his business, in the appropriate part of town, when he encountered the policeman. The policeman was not after my client for violating the law. He was shaking him down and he had just raised his rates. My client had a short fuse. He pushed the policeman back into the policeman's car and drove out into the country and dumped him in a ditch. My client did drive the car to Albuquerque, and he did commit all of the acts which the law says are necessary to establish kidnapping, which is a very serious offense. But I didn't see any reason why he should spend his life in jail, and I was happy to try to get him out.

The scriptural question, the ethical question for a lawyer who wants to deal with this business of serving the guilty in the light of Hebraic faith, is whether there is anything that says the guilty must be punished. We lawyers often think, particularly when we are all steamed up about our side of a case, that there is nothing that says the guilty must be punished. If we are pressed on the point, we chop a little logic and say: Look, the same set of laws that provides for punishment here also gives me a license to do my best to avoid punishment. The same rules apply, on both sides of the case. If you, the accuser, are going to point to the punishment

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[24] *John* 8:10-11; K. BARTH, CHURCH DOGMATICS 232-36 (T. and T. Clark ed. 1961).

[25] Sims v. Lane, 411 F.2d 661 (7th Cir.), *cert. denied*, 396 U.S. 943 (1969).

rule, I am going to ask you to read on down the page and notice that the rules provide for a lawyer to show why, under the rules, the punishment should not be imposed. And the rules say I can do that when the accused is guilty.

The only answer I have thought of, or heard of, to that logic is that the will of God prescribes punishment, even if the law of man does not; that there is something in the divine order that requires punishment for the guilty. I don't read our heritage, our tradition, or our Scripture to say that. I am open to learning something on the point, but I haven't learned anything yet.[26]

III. The Distinction Between Being Faithful and Being Loyal

I said I would need to return to the case of the unrepulsive guilty—the pleasant and generous people who are guilty of exploiting the poor, polluting the environment, fixing prices, and corrupting public officials.

It is possible to pursue this situation fairly far—to include business and financial activity that is apparently well within the law. It is not hard to imagine entirely legal exploitation of the poor; the history of industrial America until about 1940 is primarily a history of such exploitation. Most forms of environmental pollution have been legal, and many of them are still legal. The corruption of public officials is usually not a matter of overt bribery; one of Philip Marlowe's powerful antagonists once said, when Marlowe accused him of bribing police officers: "[D]on't go around thinking that I buy politicians or law enforcement officers. I don't have to."[27]

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[26] I did not, by the way, get my kidnapper out of jail. I did my best, but I failed. Only one of the four judges who heard the case agreed with me about it. *See Sims*, 411 F.2d at 667 (Kiley, J., dissenting); but part of my argument was later accepted by the same court. Alicea v. Gagnon, 675 F.2d 913, 922 (7th Cir. 1982). My client made the best of the situation; he took a job playing clarinet in the prison orchestra, and that got him out of the house once in a while. He died in prison five years later. I didn't succeed for the fellow who was convicted of raping the child either. There I got two of four judges. *See* Weaver v. Lane, 382 F.2d 251, 255 (7th Cir. 1967) (Hastings, J., dissenting), *cert. denied*, 392 U.S. 930 (1968). The district court's opinion in Mr. Weaver's favor was not published. In the Nazi case, I did better; he was restored to his companions by the trial judge, who found, in an unreported opinion, that the Indiana Anti-Hate Act violated the fifth amendment to the federal Constitution. *See* Shaffer, *supra* note 1, at 698-703.

[27] R. Chandler, The Long Goodbye 193 (1954) (Ballantine ed. 1971).

There is a lot of interesting ethical territory in there, but I am not proposing to get into it at first. I want at first to get into cases of the unrepulsive guilty: The commercial employer who has a tough time making a profit and who needs lawyers to help him figure out how to pay less than the minimum wage, or how to avoid his employees' legal right to organize and bargain collectively—have a union—and not get caught at it; or who, having evaded the law on wages or unions, wants to avoid punishment.[28] The polluter who has undoubtedly polluted but who would like his lawyer to show him how to hold the public authorities at bay until he can make another year or two of profit—and then he will obey the law.[29]

What makes these cases different is that they are continuing enterprises. The clients of mine that I told you about were like the woman taken in adultery or the thief on the cross: Their crimes were in the past. The thief on the cross was dying; Jesus told the woman to go and sin no more, and I'm sure she did as she was told; my rapist and my kidnapper had committed the crimes they were accused of committing, or not. But not so the exploiter, the polluter, the price fixer, or the corrupter of public officials. They want lawyers to assist them in continuing to do what they are doing. The moral issue that is raised here has less to do with frustrating retributive justice than with complicity. The question is whether a lawyer should lend his assistance to wrong that has yet to occur.

The disagreement between ordinary people and lawyers on this question is the clearest of all. The ordinary, decent thing to do when you seem to be getting into murky moral territory—and I'm just sure your mothers told you this—is to get out. When in doubt, don't. Our capacity for self-deception is infinite; mothers understand that. If we stay in the murky territory, even for a little while, we will manage to persuade ourselves that it is all right to be there. The safe moral thing to do is to get out while the still small voice that is whispering in your ear is the voice of your guardian angel and not the voice of the fallen angel on the other shoulder.

The American lawyer's official answer is just exactly the opposite. Our official answer says that we are not responsible for what

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[28] *See* T. SHAFFER & J. ELKINS, LEGAL INTERVIEWING AND COUNSELING ch. 2 (2d ed. 1987).

[29] A similar case is analyzed in T. MORGAN & R. ROTUNDA, PROFESSIONAL RESPONSIBILITY 158-61 (4th ed. 1987).

our clients do. We need not be concerned about what they do with the learning and skill they buy from us, nor for what we think they plan to do with what they ask us to do for them.[30] As long as we ourselves stay within the bounds of the law—that is, we do nothing illegal ourselves—and do not advise our clients to break the law, we are being professionally moral. Our clients may use our advice to cheat the poor, poison the consumer, and ruin society. But we claim—and the law gives us—a license not to have to answer for our clients.[31]

In theory—in ethical concept—this quickly becomes a drama of mutually closed awareness. The lawyer, who is not responsible for what his clients do, simply tells them what they can do—or can get away with—under the law. The client, who lives in a complex and over-regulated world, depends on his lawyer for guidance. In all probability, the client expects moral advice, although he may not put it exactly that way. In any event he does not get moral advice, because the lawyer, who is not responsible for his client's moral life, avoids giving moral advice. The possibility of two consciences meeting one another in that sort of drama has been excluded in principle.

I like the way one of Louis Auchincloss's lawyers put the proposition, when he was talking to the wife of a young lawyer who worked with him: "Your client wants you to do something grasping and selfish. But quite within the law. As a lawyer you're not his conscience, are you? You advise him that he can do it. So he does it and tells his victim: 'My lawyer made me!' You're satisfied, and so is he . . . ."[32]

That is the conceptual world our official ethics describe. It is not the one that exists in fact, I am happy to be able to tell you. In fact, business lawyers are sources of moral advice for their clients. In fact, the clients of business lawyers want moral advice from their lawyers. In fact, official professional ethics do not describe the moral world in which business people and lawyers meet one another. Lawyers are chosen by business clients—and paid very well—because they are sensitive to moral questions. And, anyway,

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[30] *See* R. RODES, LAW AND LIBERATION (1986).

[31] Shaffer, *supra* note 1.

[32] L. AUCHINCLOSS, THE GREAT WORLD AND TIMOTHY COLT 73 (1956). *See* T. SHAFFER, *supra* note 1, at 367-415.

business people do not succeed because they are rapacious and immoral; the rapacious and immoral do not always fail, but they often fail, and, often, the reason they fail is that they are rapacious and immoral.

Why is that? It is because most people in law practice and in business carry around with them the morals they learned in their families, their neighborhoods, and their religious congregations. This morality is, by and large, religious, because most people in America—even those who go to college—are religious people: Ninety-four percent of Americans believe in God; seventy per cent of us claim an institutional religious affiliation; more than half of us regularly go to services.[33] There is a moral universe out there; people find it possible to be moral in it. You can't always tell that if you go to the movies—or to college—or watch television, but it's true. The most important ethical job we who teach in professional schools have is to respect the morals our students bring to us—to respect them and to try to persuade our students that those morals are serviceable in the professions.

This serviceable moral universe is not private either. It is a communal phenomenon and a communal enterprise. It exists among us as a shared thing. It is just not true that a lawyer working in the world walks through a moral minefield in which no one respects her ethical sensitivity and everyone is trying to corrupt her. It is possible to find moral support in our communities, from other persons. Lawyers can expect to find that moral support from clients, and clients can expect to find it from their lawyers.

If that is so, then the sort of moral world we live in is one in which moral influence is possible and may be routine. It is likely that our association with one another will make each of us a better person. And if that is so, then it is relevant for any professional—and especially a lawyer—to ask, as to each of her clients: Is this person becoming a better person because of me?

Here is where I want to distinguish between loyalty and faithfulness. If I am faithful to you, I may sometimes decide to risk your being annoyed with me and tell you what I think will make you a better person. It may not be what you want to hear, or even what you are prepared to do. But I would argue—as a teacher of lawyers who sees as relevant the scriptural morality of Jews and Chris-

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[33] Report No. 259, *Religion in America*, THE GALLUP REPORT (April 1987).

tians—that it is part of the job. Another way to put this is to notice the way Aristotle defined the virtue of friendship.[34] Friends are people who seek to make one another better; they are collaborators in the good. They are faithful to one another in their mutual interest in being good people. This is more than loyalty: Loyalty takes the friend's side, regardless. Loyalty hates those whom the friend proposes to hate. Faithfulness is willing to risk disloyalty. Faithfulness is willing to try to influence the friend. Faithfulness is what makes it possible to negotiate the problem of the guilty client who wants my legal services in order to do something disgusting.

CONCLUSION

I have consulted the biblical model for professional service and seen there that the theological professional ethic says to turn toward the repulsive person, not away from him. His guilt may or may not be a moral problem for me, but his repulsiveness should not be; if it is, there is something the matter with me—not with him who is repulsive, but with me.

That same biblical model makes it possible, then, for me to engage the question of guilt and to distinguish between guilt and punishment. It does not follow as night follows day that punishment should follow guilt. At least, in dealing with frail and fallible human institutions, I am entitled as a professional to see to it that the legal engines of punishment operate according to their own rules—one of which is that I am entitled to use the rules to avoid the punishment provided in the rules.

And then, finally, I am faced with the possibility of complicity in evil. The problem now is not so much that my client is guilty as that he wants to be, and he wants me to help him become guilty. I am entitled there to take account of a theological view of what another human person is; to take as my professional mandate—that is, as what I am being paid to do—being concerned for his moral welfare; and to exert my professional influence in such a way that there is a chance for that person to change his mind.

Things are never that clear, of course. Rarely do you meet a person, even in the law office, who wants to do something manifestly disgusting. When you do, it is much easier than you might suppose

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[34] *Book Eight of the Nichomachean Ethics, quoted in* T. SHAFFER, *supra* note 1, at 149-50.

to talk him out of it. Rarely is moral advice given with the label "moral," but sometimes it is; and the best lawyers know when what they are giving is moral advice, and they become very good at giving it. Rarely is moral advice given with "thus saith the Lord" directness; it usually comes when people are talking together as friends.[35]

What makes complicity in evil unlikely is the steady desire for the welfare of the other person. That requires healthy respect for what we bring to our professions from family, town, and religious congregation. It requires clear sight. And it requires enough confidence and moral courage to risk the possibility that the advice may not be taken, that the evil course may after all be the one the client chooses.

It would be a useful thing to finish this with some ringing declaration from one of the past presidents of the American Bar Association—but I won't. Instead I am going to leave you with a relatively laconic observation from a born-again Christian lawyer who practices in a little town in Tennessee and spends much of his time talking to worried lawyers and law students, trying to make his profession better from the ground up. His name is John Acuff. He practices in Cookeville, Tennessee. John came up to Charlottesville, when I was teaching there, and gave a talk to the Law Student Christian Fellowship. After the talk, one of the students asked John if he does any criminal-defense practice. That question, when translated, is the question I have been talking to you about tonight. When translated, the question to John was, "Do you represent guilty people?"

John's laconic answer was this: "Yes. When I think I can do some good."

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[35] *See* Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957 (1978), in T. SHAFFER, *supra* note 1, at 436.