

JUSTICE OR MERCY?—A PERSONAL NOTE ON DEFENDING THE GUILTY

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And the Lord said unto Cain, Where is Abel thy brother? And he said, I know not: Am I my brother's keeper?¹

* * *

And, behold, a certain lawyer stood up, and tempted him, saying, Master, what shall I do to obtain eternal life?

He said unto him, What is written in the law? how readest thou?

And he answering said, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy strength, and with all thy mind; and thy neighbor as thyself.

And he said unto him, Thou hast answered right: this do, and thou shalt live.

But he, willing to justify himself, said unto Jesus, And who is my neighbor?²

There are many paradoxes about the practice of American law. One of the most challenging and persistent is that faced by the lawyer who defends a client she knows is guilty. Indeed, of all the various branches of the legal profession, the criminal defense bar is perhaps the most criticized and least understood by lawyers and nonlawyers alike. Among nonlawyers, the typical reaction is that defendants who are *known* to be truly guilty of the crimes of which they are accused hardly deserve a defense at all. Most people believe that the constitutional and other procedural protections for accused criminals are really for the unjustly accused—the innocent. Thus, one who is rightly accused because the accusation is true has no need of—indeed, has no moral right to—a legal defense.³

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1. *Genesis* 4:9 (King James).

2. *Luke* 10:25-29 (King James).

3. For a general discussion of the inconsistency and ambivalence, with which the

Similarly, one often senses an uneasiness about the morality of criminal defense practice even among lawyers. Justifications of such practice by the noncriminal defense bar tend to be arguments about the criminal defense lawyer's role in the American adversary system, rather than defenses of the substantive results that such lawyers achieve when they succeed in mitigating or avoiding punishment of guilty clients. However, bromides about "putting the state to its proof" and "defending the Constitution" ring hollow when the result of the criminal defense lawyer's work is the release and exoneration of someone who has committed a brutal and violent act. To the raped woman, the abused child, the spouse and children of a murder victim, such abstractions are meaningless. Indeed, they may actually perpetuate and enhance the violence of the original crime by underscoring the victim's (and society's) helplessness to resist this violation of her life.

I believe there is morality in defending even those guilty of the most heinous crimes, a morality that is based not on the lawyer's role in the system, but rather on her choice to defend a person in need. Our failure to see the goodness in this course of action stems, I think, from our failure to see criminal defendants as one of us—as our brothers, and sisters, and neighbors. The lawyer's decision to defend the guilty person thus is an act of redemption for the lawyer herself, and not just for her client.

I.

And ye shall know the truth, and the truth shall make you free.⁴
What is truth?⁵ Truth is knowledge of things as they are, and as they were, and as they are to come.⁶

Such morality as the general public perceives in criminal defense lawyering seems to depend on the guilt or innocence of the client. The lawyer who defends the innocent client, like Atticus Finch in *To Kill a Mockingbird*, is seen as a moral hero; the lawyer who defends the guilty client most certainly is not. In this view, then, the crucial question

American public views the constitutional protections afforded accused criminals, see H. MCCLOSKEY & A. BRILL, *DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES*, ch. 4 (1983), especially at 140, 154-56, and 163.

4. *John* 8:32 (King James).

5. *John* 18:38 (King James).

6. The Doctrine and Covenants of the Church of Jesus Christ of Latter-Day Saints [The Mormon Church] § 93:24 (1981) (original ed. 1835) [hereinafter *Doctrine and Covenants*].

about the defendant is, "Is he guilty?" The unspoken moral assumption is that one should not defend guilty people. The morality of criminal defense lawyering is made to depend on the strength with which one can answer that her clients are innocent.

I experienced first hand how deeply this attitude runs through American culture last summer when, for the first time, I participated in a criminal trial as a consultant to the defense lawyers. Everyone who became aware of my involvement in this trial, from my wife and closest friends to mere acquaintances, asked the same question about the defendants: "Are they guilty?"

The question was a difficult one for me. Although I had practiced law for five years before going into law teaching, I had been no closer to a criminal case than the average citizen. I certainly carried into the case the average citizen's assumption about criminal defendants: They *must* be guilty; why else would the state have charged them? Initially, I wondered if I had done the right thing in getting involved in the representation. I confided to a friend that, all things considered, I really would rather be helping the prosecution.

Accordingly, my answer to "Are they guilty?" was a rather typical defense of the Anglo-American adversary system of criminal justice, with emphasis on the constitutional right of all defendants (even guilty ones) to a vigorous defense, the service to freedom that is rendered by putting the state to its proof in every case, the critical importance of the presumption of innocence, and so on. As I became more practiced in responding to the question, my answer became more sophisticated. I could observe that once one accepts that all defendants are entitled to a legal defense as a matter of right, as we have in the United States, then *somebody* must be available to render that service for society. That makes us all responsible for the consequences of criminal defense lawyering. One cannot escape responsibility for the release and exoneration of a guilty defendant by declining to represent the defendant personally, if she believes that the defendant is entitled to a lawyer at all. Delegating the dirty work to someone else does not make one less answerable.

This more sophisticated response had the advantage of putting the questioners off their guard; in life, as in law, the best defense is often a good offense. The one thing I did not do, however, was confront the question directly, by thinking about the people I was defending, rather than my role in the system. *Did* they deserve a defense? Could I morally justify helping to obtain an acquittal if they really were guilty?

As I reviewed the evidence and exhibits in the trial record and

watched the testimony and evidence unfold, I frequently confronted uncomfortable, disappointing facts about the defendants. Legal guilt or innocence was for the jury, of course, but in my judgment it seemed as if they might indeed have "stepped over the line." One might honestly have answered, "Yes, they *are* guilty." At the same time, I also saw signs of the prosecutorial ambition about which I had often heard, as the state twisted the evidence and stretched the law to reach two people whose conviction and imprisonment would surely boost a prosecutor's career. The evidence was ambiguous, and one could have used it to construct and support a story of exoneration as easily as one of guilt. The "truth" turned out to be rather complicated.

As I came to know the defendants, I grew to like them. We had things in common. They had good marriages, they loved their families, they were religious in their own way, they had done some good in their lives. They were nice people, enjoyable to be around, simple and straightforward in many respects. They projected considerable honesty and integrity.

Paradoxically, then, at the same time that I grew in the suspicion that the defendants were, perhaps, guilty of the charges levied against them, I also grew in the desire that they not be found guilty and sentenced to prison. Notwithstanding what they might have done, I did not want them to be punished. They had become my friends.

In *East of Eden*, John Steinbeck explores free will in the myth of Cain and Abel and paints the portrait of two boys, twin brothers abandoned by their mother and raised by their father. Aron is a beautiful, fair-haired, angelic child, as perfect in his conduct as in his appearance. Caleb is darkhaired, troubled and brooding, a child who wants to be good—who is, basically, good—but who is plagued by personal flaws and imperfections. People are drawn to Aron, for he believes in his own goodness, but they are wary of Caleb, who seems resigned to an apparent inability to be good. Even the twins' father prefers Aron to Caleb. As the novel builds to a climax, a sincere and good-hearted attempt by Caleb to soothe a past humiliation of his father is misunderstood and rejected. Paralleling the biblical story, Caleb seeks retribution by striking out at the more favored brother and revealing to Aron a hidden family secret about their birth: The twins' mother is a prostitute. Unable to reconcile the reality of his sinful ancestry with his life of goodness, Aron embarks on a course that leads to estrangement from his family and, ultimately, to his death.

After Aron leaves, his high school girlfriend expresses less sorrow than relief, confiding to Caleb that, "I didn't love Aron anymore."

"Why not?," Caleb asked in reply.

I've tried to figure it out. When we were children we lived in a story that we made up. But when I grew up the story wasn't enough. I had to have something else, because the story wasn't true anymore.

Well—

Wait—let me get it all out. Aron didn't grow up. Maybe he never will. He wanted the story and he wanted it to come out his way. He couldn't stand to have it come out any other way. [] We kept it going because we were kind of used to it. But I didn't believe the story any more.

How about Aron?

He was going to have it come out his way if he had to tear the world up by its roots. [] When you're a child you're the center of everything. Everything happens for you. Other people? They're only ghosts furnished for you to talk to. But when you grow up you take your place and you're your own size and shape. Things go out of you to others and come in from other people. It's worse, but it's much better too.⁷

We may all wish to be Arons, but in reality we are all Calebs. We seek out those who seem to be perfect, so much better than ourselves, perhaps hoping to catch a ray of reflected glory. In fact, however, one can only worship such people, despairing at the gap that exists between our own flawed existence and the perfection they seem to have achieved. One can never come to know and like and love them, because that would reveal their flaws and shatter the image of perfection. Indeed, those who cannot negotiate the gap between aspiration and reality, both in their own lives and those of others, are like Aron doomed to a tragic end, either emotionally detached from their brothers and sisters—their neighbors—or bitterly cynical about them.

The contradiction between what we are and what we would like to be is one of the attributes that makes us human. Thus, the contradiction between the apparent bad deeds of the defendants and their goodness in other aspects of their lives was not a paradox at all. The contradiction made friendship possible. It made the defendants into real people, people that I could better understand because, like me, they were strong as well as weak, good as well as bad. They were, in fact, my neighbors.

We all need a story to tell us who we are and how we fit. The

7. J. STEINBECK, *EAST OF EDEN* 662 (Penguin Books ed. 1979).

"truth" of a guilty defendant's deeds is simple, deceptively so; the truth of who and what he may be is always far more complicated. We are free, to paraphrase Stanley Hauerwas, only to the extent that we have a story, for it is that story that tells us the truth about ourselves.⁸ In defending the guilty client, the lawyer gives the client a new story, one that blunts the evil alleged by the state by incorporating not only alternate interpretations of the state's evidence of the client's bad deeds, but also the whole of his life, including its good. By suggesting to the client a new way of thinking of himself, the process of defending the guilty client carries with it the possibility of reformation and redemption.

II.

[T]he Lord is very pitiful, and of tender mercy.⁹ [He] knoweth the weakness of man, and how to succor them who are tempted.¹⁰

There is a bias inscribed in the question, "Are they guilty?" It is the assumption that the question is morally relevant to the lawyer's decision to represent a client. Interestingly, doctors do not confront this question, even from laypersons. A patient's culpability in contracting a disease or causing an injury generally is not thought relevant to the doctor's decision whether to accept and treat the patient. It seems sufficient that the patient is sick or injured, and in need; personal responsibility for the sickness or injury is just not germane. Why is it not enough for the lawyer simply to be committed to the defense of those who need her? Must she judge her clients before defending them?

I remember when Utah executed Gary Gilmore for murder in 1977. Attending college in Provo, where the murder was committed, I witnessed first hand the community's reliving of the shock and horror of the crime as the execution date approached. Gilmore's victim was a young student who was working his way through law school, married, father of a young child, popular with his fellow students, a committed Mormon law student in a Mormon college town. Late one night in a gas station rest room, Gilmore shot him in cold blood at close range through the back of the head. Gilmore never expressed sorrow or re-

8. S. HAUERWAS, A COMMUNITY OF CHARACTER: TOWARD A CONSTRUCTIVE CHRISTIAN SOCIAL ETHIC 12 (1981) ("Liberalism . . . tempts us to believe that freedom and rationality are independent of narrative — *i.e.*, we are free to the extent that we have no story.').

9. James 5:11 (King James).

10. Doctrine and Covenants, *supra* note 6, § 62:1.

morse to the victim's family, and his motives for deciding not to exhaust his appeals were ambiguous to the end.¹¹

At a memorial service for Gilmore, one of his lawyers related that Gilmore "loved children."¹² A prison chaplain who spoke at the service emphatically stated his conviction that "the thing Gary wanted to leave was love. He probably had more capacity to love than anyone at that place [the Utah State Prison]."¹³ It subsequently came to light that while awaiting his execution, Gilmore had carried on a sensitive correspondence with a 10-year-old girl who lived in Salt Lake City.¹⁴ Nevertheless, the derision and anger with which the community reacted to this portrait of Gilmore rivalled that directed at the crime itself. The stark contrast between murdering a father and loving a child was simply too great for the community to believe that both could originate in the same person. Having just executed Gilmore for the murder, the community rejected the love out of hand.

It is, I suppose, more comfortable to kill if one believes that the object of death is irredeemably evil. Hence the grotesque caricatures of the enemy every time a nation goes to war. In the realm of criminal justice, firm belief in the defendant's pervasive badness justifies meting out so irreversible a punishment as death. Such a belief, moreover, reassures the rest of us of our goodness. The executed defendant is not like us; he was bad, we are good. Thus, what happened to him won't happen to us, because we don't do the things he did. With this reasoning we isolate ourselves from those we judge to be bad, and soothe our insecurities about how good (or bad) we ourselves might be.

People are more complex than this. All have sinned and fallen short of glory.¹⁵ Each of us is part good and part evil. Granted, some

11. Gilmore was never actually tried for this murder; he was tried, convicted, and executed for a similar killing committed the next evening. At one point, he expressed some remorse for both murders to a police interrogator. By the time of the trial, however, that feeling seemed to have vanished. Compare N. MAILER, *THE EXECUTIONER'S SONG* 298 (1979) with *id.* at 439-43. Gilmore asked to be executed, but it was unclear whether he was motivated by a desire to atone for the murders or by his unwillingness to endure a life in prison. See, e.g., *id.* at 484, 909; Selbin, *From Killing to Death, The Infamous Saga of Gary Gilmore*, Salt Lake Tribune, Jan. 16, 1977, at B3, col. 1. Profiles of the victims and details of the murders—which are chilling for their senselessness—can be found in N. MAILER, *supra*, at 207-50.

12. N. MAILER, *supra* note 11, at 1019.

13. *Id.* at 1020.

14. See *id.* at 1038. See also *Legal Issue Created Top Role*, Salt Lake Tribune, Jan. 17, 1977, at 1, col. 6.

15. *Romans* 3:23 (King James).

have greater parts of the one than the other. In the eternal judgment that most Christians believe in, there undoubtedly will be distinctions made between the Gary Gilmores of the world, and everyone else. I wonder, however, how great those differences will be? We may be surprised to find that the fully responsible, wholly and irredeemably evil person is truly a rare occurrence. People like Gary Gilmore may not be different in kind from the rest of us, but only in degree, a degree that may be slighter than we expect. Gilmore's brother said of him:

There are many stories circulating about Gary Gilmore now, and some are good and some are bad, some are true and some are not, but the Gary Gilmore that I knew, was both good and bad, like everyone else. That is what I remember most about Gary Gilmore, that he was exactly like everyone else¹⁶

If the guilty are truly like the rest of us—our brothers and sisters, our neighbors—then it would seem that the Gospel requires more than mere satisfaction with the justice of our condemnation.

Notwithstanding the heinousness of the acts that may have been committed by any criminal defendant, the remaining goodness of that person, however small, merits him defense and comfort. Jesus said, "I was in prison, and ye came unto me."¹⁷ As a Mormon, my mental image of the scene painted by this passage is that of Mormon farmers bringing food and clothing to the founding prophet of Mormonism, Joseph Smith, and other 19th century Mormon leaders who were held on trumped-up charges in a squalid jail in Liberty, Missouri during the winter of 1838. I suspect the associated images of non-Mormons are similar. Jesus was innocent; therefore, when we imagine visiting prisons, in our minds' eye we visit only the *unjustly* imprisoned—those convicted by the world, perhaps, but known by us to be guiltless. There are but few (and I would not include myself among them) who clearly see in this passage a command to visit even petty criminals, much less murderers, rapists, or child molesters. All these, one supposes, richly deserve their punishment.¹⁸

It is revealing of the passage's meaning, I think, that those who are being commended by Jesus for figuratively visiting him did not even know that they had done the good deed: "Lord, when saw we thee

16. N. MAILER, *supra* note 11, at 1017-18.

17. *Matthew* 25:36 (King James).

18. I was first stimulated to think about this passage in connection with criminal defense lawyering by Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 753-54 (1975).

sick, or in prison, and came unto thee?"¹⁹ Presumably, these people were aware that they had been to prison to visit criminals; they just did not realize that one of them had been the Lord. The spirit of this passage, then, seems to be that not merely the unjustly imprisoned, but even the very worst among us, those with barely a shred of good left in them, have claim on our kindness and mercy. "Inasmuch as ye have done it unto one of the *least* of these *my brethren*, ye have done it unto me."²⁰ The question is not one of innocence or guilt—of justice—but rather one of mercy: Can I commit myself to the aid of others without judging them, and then defend them as I myself would wish to be defended? It is our habitual inability to see ourselves as among the guilty—in contrast to Jesus' explicit identification with them—which commonly frames the moral dilemma of criminal defense lawyering in terms of justice rather than mercy.

III.

[I]f any man sin, we have an advocate with the Father.²¹ For Christ is . . . entered into heaven itself, now to appear in the presence of God for us.²² Listen to him . . . who is pleading your cause. . . .²³

Christians believe that Jesus satisfied the demands of justice through the events of Gethsemane and the cross. Having done so, he extends his mercy: One need not suffer for her flaws and imperfections if she repents and believes in his name. This forgiveness—the central event and doctrine of Christianity—is not usually thought of as contingent. Yet scripture metaphorically suggests that the severity of the sentence passed upon us by the Father for our flaws depends upon the advocacy of the Son in pleading our cause. We are saved by the persuasiveness of his defense.

If Jesus is God, I suppose one can rely on the truth and fairness of the arguments he chooses to make in our behalf. These perfectly just arguments cannot be the same for everyone, because our stories are not the same. On earth, however, the belief that one can ascertain the precise degree of personal responsibility that attaches to the acts of another is a sad and hopeless pretension. Only one who has borne all

19. *Matthew* 25:39 (King James).

20. *Matthew* 25:40 (King James) (emphasis added).

21. 1 *John* 2:1 (King James).

22. *Hebrews* 9:24 (King James).

23. Doctrine and Covenants, *supra* note 6, § 45:1.

the pain and suffering and imperfection of humanity, who has descended below all things, can perfectly balance the demands of justice against the exculpations of mercy. Humans always punish inaccurately, either too harshly or too leniently, our knowledge and experience simply inadequate to calibrate the cosmically proper measure of justice and mercy.

Since we cannot hope to achieve perfection in judging others, we ought to consider the side of the scale on which we will err: Is it better that justice rob mercy, or mercy, justice? If we ourselves were being judged, would we not prefer errors of mercy rather than justice? Jesus himself warned that one who judges others will herself be judged by the same standard she applies to others.²⁴ If we are truly to treat the guilty as our neighbors, the Gospel imperative is that we must choose mercy over justice in our dealings with others.

Mercy can operate only if one resists the temptation to see others as merely the sum of our perception of the things that they have done. Criminal defendants are more than the acts they are accused of committing, even if the accusations are true.²⁵ The decision to defend a criminal is, at least, a decision to defend the whole of the accused person, including the part of him that is good. Thus, the decision not to defend a criminal—because, for example, one could not live with the thought of being an instrument in releasing and exonerating a guilty person—is more a judgment of oneself than of the criminal. It is a recognition that one cannot, in that situation, overlook the badness of the acts that the person has committed in order to defend the goodness that is in the person, too.

Criminal defense lawyering, then, is an act of Christian charity. It is the setting aside of judgment to help one's neighbor. It is the recognition that the criminal defendant *is* one's neighbor, her brother or sister. It is, finally, a choice that holds the promise of reforming and redeeming the lives of both lawyer and client.

24. *Matthew* 7:12 (King James). This principle, of course, is not unique to Christianity. See, e.g., M. STEINBERG, *BASIC JUDAISM* 12 (1975) ("That which is hurtful to thee do not to thy neighbor. This is the whole doctrine. The rest is commentary. Now go forth and learn.") (quoting Hillel).

25. For example, broad discretion in sentencing, though it is much criticized, gives the judge the opportunity to consider the whole life of the defendant in deciding the appropriate punishment for his crime.