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Cover Page Footnote

Many thanks to Prof. Russell Pearce for his inspiration and editorial suggestions, and to Jonathan Fass, Jacqueline Tepper, and Prof. Ian Weinstein for their helpful comments. I am deeply indebted to my research assistants Sandra Valdivieso, an outstanding legal researcher, and Chaim Zellinger, a true Talmudic scholar.

“FORGIVE ME VICTIM FOR I HAVE SINNED”: WHY REPENTANCE AND THE CRIMINAL JUSTICE SYSTEM DO NOT MIX—A LESSON FROM JEWISH LAW

Cheryl G. Bader*

INTRODUCTION

The appropriate intersection of religious values and an attorney’s functions as a legal advocate and a counselor has been hotly debated. At a recent conference on this topic at Fordham Law School, I had the pleasure of learning about the extraordinary work of the Georgia Justice Project (“GJP”),¹ a criminal defense organization with a practice philosophy grounded in Christian theology.² The GJP maintains a central mission of redirecting the lives of its clients to achieve moral religious redemption.³ A central feature of this practice is the GJP’s encouragement of client confession, in the form of letters written to victims and their family members, whereby clients seek forgiveness prior to the adjudication of their criminal cases.⁴

Unfortunately, the criminal justice system is not an ideal setting to pursue religious redemption,⁵ as our secular courts are not designed to advance a criminal defendant’s potential goal of seeking

* Assoc. Clinical Prof. of Law, Fordham Univ. School of Law. Many thanks to Prof. Russell Pearce for his inspiration and editorial suggestions, and to Jonathan Fass, Jacqueline Tepper, and Prof. Ian Weinstein for their helpful comments. I am deeply indebted to my research assistants Sandra Valdivieso, an outstanding legal researcher, and Chaim Zelling, a true Talmudic scholar.

1. Georgia Justice Project (“GJP”) is a non-profit organization that represents indigent criminal defendants. See Georgia Justice Project, *Who We Are*, at http://www.gjp.org/who_we_are.html (last visited Nov. 16, 2003) [hereinafter GJP, *Who We Are*].

2. See Douglas B. Ammar, *Forgiveness and the Law: A Redemptive Opportunity*, 27 FORDHAM URB. L.J. 1583, 1585 (2000) [hereinafter Ammar, *Forgiveness and the Law*].

3. *Id.* at 1595.

4. See *id.* at 1584, 1597 (explaining that the GJP encourages clients to write letters asking for forgiveness); Douglas B. Ammar & Tosha Downey, *Transformative Criminal Defense Practice: Truth, Love, and Individual Rights—The Innovative Approach of the Georgia Justice Project* 31 FORDHAM URB. L.J. 49 [hereinafter Ammar, *Truth, Love, and Individual Rights*] (explaining that the GJP encourages apology).

5. See Ammar, *Forgiveness and the Law*, *supra* note 2, at 1596.

absolution of sin.⁶ In fact, under the American criminal justice system, a criminal defendant who asks a victim for forgiveness creates legally admissible evidence of his own guilt.⁷ This evidence is admissible whether the defendant's motive is to pursue religious repentance and redemption or otherwise.⁸ This provides a clear disincentive to seeking religious absolution through confession while a criminal case is pending.⁹

Taking another approach that avoids mingling of criminal prosecutions and repentant confessions, ancient Jewish law places a complete prohibition on the use of confession in the adjudication of a criminal case.¹⁰ This prohibition bars both admissions of guilt in the form commonly known as a guilty plea and admissions of guilt in an extra-tribunal context.¹¹ The lack of any evidentiary value of confessions under Jewish Law stands in stark contrast to the high premium placed on an accused's confession under the American criminal justice system.¹²

This essay will critique the GJP's encouragement of confessions in the context of the secular American justice system via comparison with the treatment of confessions under ancient Jewish law.¹³

6. *See id.* at 1590.

7. *See id.*

8. *See id.*

9. *See id.* at 1596.

10. Steven H. Resnicoff, *Criminal Confessions in Jewish Law*, Project Genesis, Inc., at <http://www.torah.org/features/secondlook/criminal.html> (last visited Nov. 9, 2003) [hereinafter Resnicoff, *Criminal Confessions in Jewish Law*] (“[W]hile admissions of civil liability raise different issues, Jewish law not only forbids coerced criminal confessions but basically bans the use of any criminal confession.”); Symposium, *The Adversarial vs. the Inquisitorial System: Reflections on the O.J. Simpson Trial*, *TOURO JEWISH L. REP.*, Dec. 1995, (quoting Prof. Aaron Kirschenbaum explaining that “in classical Jewish law a confession not only could not be coerced, but even a voluntary confession would not be entertained”), available at <http://www.tourolaw.edu/Publications/jewishlaw/dec95/jlrdec95.htm#symposium>.

11. *See* Resnicoff, *Criminal Confessions in Jewish Law*, *supra* note 10.

12. Anthony X. McDermott & H. Mitchell Caldwell, *Did He or Didn't He?*, 69 *U. CIN. L. REV.* 863, 870-71 (2001) (stating the importance of confessions in the American criminal justice system).

13. Jewish law, called *Halakhah* in Hebrew, is compromised of the written law in the Hebrew Bible, and the oral law, later partially transcribed in the Talmud. Tracey R. Rich, *Halakhah: Jewish Law*, *JUDAISM* 101, at <http://www.jewfaq.org/halakhah.htm> (last visited Nov. 25, 2002) (explaining that “Halakhah is made up of mitzvot from the Torah as well as laws instituted by the rabbis and long-standing customs” and that “[a]ll of these have the status of Jewish law and all are equally binding”). The oral law was given in conjunction with the written law and was transmitted through the generations in its entirety. *See id.* Between 100 C.E. and 500 C.E., due to the Roman persecution and Jewish exile from Israel, transmission in this fashion was no longer feasible. To avoid the loss of this knowledge, the Rabbis of the time put this oral law into writing, creating the Talmud. *See Talmud Bavli, Tractate Berachos, The Record-*

Specifically, this essay posits that the absolute prohibition on the use of confessions in a legal system firmly rooted in religious values recognizes the danger inherent in combining the act of speaking of one's sins for religious penance with the use of such confessions in the criminal adjudication process.¹⁴ The Jewish legal system avoids these inherent dangers by completely devaluing the accused's confession.¹⁵ The GJP, in contrast, merges the process of seeking absolution with the criminal adjudication of the client's criminal case, not only running the risk of exposing the client to greater criminal liability,¹⁶ but also risking devaluing the act of speaking ones sins to achieve true spiritual repentance by compelling confession as a condition to legal representation.¹⁷

The GJP has devoted substantial resources and energy to providing clients with quality legal representation and a wide array of social services and emotional and financial support.¹⁸ I applaud the GJP for its holistic approach to lawyering and its commitment to the laudable ideology of restorative justice. Nonetheless, I intend to strike a note of caution to defense attorneys who utilize their role as legal advocate and advisor to seek religious repentance for their clients in the context of a secular criminal justice system that does not subjugate evidentiary efficacy to religious aspirations.¹⁹

Part I of this Essay briefly reviews the unique approach to representation provided by the GJP.²⁰ Part II discusses the role of con-

ing of the Oral Law, JewishAmerica, at [http:// www.jewishamerica.com/ja/timeline/writoral.cfm](http://www.jewishamerica.com/ja/timeline/writoral.cfm) (last visited Nov. 16, 2003); *see also* Tracey R. Rich, *Torah*, JUDAISM 101, at <http://www.jewfaq.org/halakhah.htm> (last modified Nov. 25, 2002) (explaining that the Talmud was written down between the second century C.E. and the fifth century C.E.). The courts adjudicating Jewish Law are known as Beth Din. Chicago Rabbinical Council, *Beth Din: Rabbinic Court of Law*, at <http://www.crcweb.org/Beth%20Din/Beth%20Din1.htm> (last modified Nov. 6, 2003).

14. This essay is meant to raise questions and encourage further discussion. It is a preliminary exploration of a topic that merits further discussion.

15. *See Laws of Witnesses* ch. 35, § 135 (Rabbi J. L. Kadushin trans., Jewish Code of Jurisprudence: Talmudical, Commercial and Criminal Law (1915)) (stating that in order for a confession to be accepted, it must be confirmed by two witnesses); *see also* Resnicoff, *Criminal Confessions in Jewish Law*, *supra* note 10 (explaining that the possibility of "purposeful psychological or physical manipulation" also detracts from the credibility of criminal confessions).

16. *See infra* notes 77-85 and accompanying text.

17. *See infra* notes 31-52, 223 and accompanying text.

18. GJP, *Who We Are*, *supra* note 1 (stating that "GJP programs include[:] Quality Legal Representation[:] Individual Counseling[:] Job Training and Employment[:] Addiction Counseling[:; and] Educational Assistance").

19. *See infra* notes 140-41 and accompanying text.

20. *Infra* notes 26-60 and accompanying text.

fession in the context of the American criminal justice system.²¹ Part III contrasts the treatment of criminal confessions under traditional Jewish Law with their treatment under the American secular system.²² Part IV concludes with the contention that efforts to combine the process of repentance with the criminal adjudicative process are problematic from both a legal and religious perspective.²³ Jewish Law, by stripping any evidentiary value from the act of confession apparently favors the process of repentance through confession above the process of obtaining criminal convictions.²⁴ The American criminal justice system makes no such accommodation.²⁵

I. THE GEORGIA JUSTICE PROJECT

The GJP is a private non-profit organization that represents indigent criminal defendants.²⁶ It has adopted as a principal philosophy a holistic approach to client representation,²⁷ and it provides a variety of services for the client, from continued education to job placement.²⁸ For example, in 1993 the GJP established New Horizon Landscaping,²⁹ which “offers an opportunity of job training and steady employment for [clients] served by Georgia Justice Pro-

21. *Infra* notes 61-146 and accompanying text.

22. *Infra* notes 147-201 and accompanying text.

23. *Infra* notes 202-35 and accompanying text.

24. See Resnicoff, *Criminal Confessions in Jewish Law*, *supra* note 10.

25. See *infra* notes 140-141 and accompanying text; Richard J. Ofshe & Richard A. Leo, Symposium, *Symposium on Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law*, 74 DENV. U.L. REV. 979, 983-84 (1997) (noting that confessions are damaging evidence and lead to an expectation of conviction).

26. See Georgia Justice Project, *Legal*, at <http://www.gjp.org/legal.html> (last visited Nov. 16, 2003) [hereinafter GJP, *Legal*]. GJP accepts clients only from within Fulton or DeKalb counties in Georgia. *Id.* The GJP accepts clients only at the beginning stages of their criminal cases, usually right after they have been arrested. *Id.* The GJP generally does not take any civil or federal cases. *Id.*

27. See GJP, *Who We Are*, *supra* note 1

GJP's mission is to ensure justice for the indigent criminally accused and take a holistic approach to assist them in establishing crime-free lives as productive citizens. GJP's goal is to have a positive impact on the lives of individual clients and their families, which in turn positively affects the community by decreasing crime and violence.

Id.

28. See *id.* Every GJP client works with a social worker, for example. *Id.* GJP provides clients with counseling, job training, educational programs, and addiction counseling. *Id.*

29. See Georgia Justice Project, *New Horizon Landscaping*, at <http://www.gjp.org/nhl.html> (last visited Nov. 16, 2003) [hereinafter GJP, *New Horizon Landscaping*].

ject.”³⁰ This commitment to broad based client problem solving is extremely admirable.

One unique and perhaps more troubling aspect of the nature of the GJP’s attorney-client relationship is that it is predicated on a contract whereby the client agrees to make major “life changes.”³¹ Before the GJP agrees to represent an individual, extensive interviews are conducted.³² The GJP’s social services staff assesses the depth of the client’s commitment to make “life changes” before agreeing to represent the client.³³ Once the GJP decides to take on a client, the client must sign a contract whereby the GJP’s continued representation is contingent on the client’s continued attempts to make the lifestyle changes that the GJP determines are in the best interest of the client.³⁴ The first four weeks of this representation constitute a “trial” period during which the GJP determines whether to continue with its representation.³⁵ If the client satisfactorily completes the trial period, a “probationary” period begins.³⁶ The GJP continues to represent the client so long as he complies with his part of the agreement.³⁷

The GJP has a religious foundation,³⁸ and GJP lawyers engage their clients in moral discussions and encourage religious repentance.³⁹ According to the GJP’s Executive Director Douglas Ammar, if the client is guilty, the GJP begins the client on a path to atonement.⁴⁰ The first step in this process involves the client’s ac-

30. *Id.*

31. GJP, *Legal*, *supra* note 26 (explaining that the GJP requires that a defendant commit to changing his life before he is taken on as a client).

32. *Id.*

33. *Id.*; Ammar, *Truth, Love, and Individual Rights*, *supra* note 4, at 3.

34. See GJP, *Legal*, *supra* note 26; Georgia Justice Project, *Probationary Client Contract*, at <http://www.gjp.org/generalContract.html> (last visited Nov. 25, 2003) [hereinafter GJP, *Probationary Client Contract*].

35. See Georgia Justice Project, *Social*, at <http://www.gjp.org/social.html> (last visited Nov. 25, 2003) (“[W]e find individuals who will take maximum advantage of the opportunities available to them.”).

36. See *id.*

37. See *id.*; GJP, *Probationary Client Contract*, *supra* note 34.

38. See Deputy Attorney General Larry D. Thompson, Address to the Georgia Justice Project, Atlanta, GA (May 17, 2002) (explaining that the GJP’s philosophy is based on religious principles and that by “[w]orking with religious advisors of all faiths, the [GJP] shows its clients not only how to behave lawfully, but why they should”), available at <http://www.usdoj.gov/dag/speech/2002/051702gajusticeproject.htm>.

39. Ammar, *Truth, Love, and Individual Rights*, *supra* note 4, at 7-8 (explaining that repentance is encouraged).

40. See *id.* at 7.

ceptance of responsibility for the crime he committed.⁴¹ Subsequent steps include apology to the victim, or to family members of the victim;⁴² reparation in the form of compensation or restitution to the victim;⁴³ and penance or “self imposed hardship” meant to repair the moral harm the client’s action caused to the victim.⁴⁴ The final step is reconciliation.⁴⁵

The GJP’s philosophy is based on the idea of restorative justice.⁴⁶ Restorative justice “focus[es] on healing for victims, reconciling victims and offenders, and reintegrating offenders into the community.”⁴⁷ Client’s confessions, made in the form of apologies,

41. See *id.* (providing that repentance is the first step and defining repentance as “remorsefully accepting responsibility for one’s wrongful and harmful actions, repudiating the character aspects that generated the aspects, and resolving to atone or make amends for the [wrong and] harm done”); Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 34-35 (2003) [hereinafter Simons, *Retribution for Rats*].

42. See Ammar, *Truth, Love, and Individual Rights*, *supra* note 4, at 7; Ammar, *Forgiveness and the Law*, *supra* note 2, at 1596.

43. See Ammar, *Truth, Love, and Individual Rights*, *supra* note 4, at 7.

44. *Id.* (defining penance as “‘self-imposed hardship or suffering’ that repairs the moral harm the wrongdoer has inflicted on the victim”); Simons, *Retribution for Rats*, *supra* note 41, at 36.

45. See Ammar, *Truth, Love, and Individual Rights*, *supra* note 4, at 7 (defining reconciliation as “‘the process by which the victim forgives the wrongdoer [and] completes the wrongdoers’ reconciliation with the community’ signaling that the debt has been repaid”) (internal citation omitted).

46. See Ammar, *Forgiveness and the Law*, *supra* note 2, at 1591. The movement toward restorative justice began in the 1970s. Janelle Smith, *Peacemaking Circles: The “Original” Dispute Resolution of Aboriginal People Emerges as the “New” Alternative Dispute Resolution Process*, 24 HAMLINE J. PUB. L. & POL’Y 329, 336-37 (2003). This approach is widely gaining acceptance. Gretchen Ulrich, *Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 HAMLINE J. PUB. L. & POL’Y 419, 435 (1999) (providing that restorative justice “is steadily building interest” in the United States); Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53, 53 (1998) (“Restorative justice is a growing international movement within the fields of juvenile and criminal justice.”). The restorative justice model, like the GJP, has a religious foundation. Sadiq Reza, *Religion and the Public Defender*, 26 FORDHAM URB. L.J. 1051, 1066-67 (1999) (providing that the restorative justice model is an example of a model where “religious perspectives can inform change in the criminal justice system itself, for instance by stimulating legislative reform to shift the emphasis from retribution and punishment to forgiveness and healing”).

47. Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations When the Defendant is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts*, 24 HAMLINE J. PUB. L. & POL’Y 225, 252 (2003) (“Restorative justice seeks to give voice to the values of forgiveness, apology, mercy, and reconciliation.”); Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 291 (2001) (providing that restorative justice “makes the act of apology the centerpiece of victim-offender mediations”); Reza, *supra* note 46, at 1066-67.

are seen as the vehicle through which victims can begin “healing the[ir] wounds” and clients can become “contributing members of society.”⁴⁸

As a model of restorative justice, confession is a major underpinning of the GJP’s philosophy.⁴⁹ The GJP requires, for example, that a “guilty client” write letters of apology to victims or family members of victims.⁵⁰ Their practice of encouraging, and in some instances requiring clients to write letters to victims and victims’ families acknowledging their conduct and seeking forgiveness prompted a flurry of criticism from several members of the audience attending the conference at Fordham. This controversial practice is antithetical to a basic criminal defense premise that while confession may be good for the soul, it is generally not good for the case.⁵¹ Most criminal defense attorneys will caution clients not to discuss a pending criminal case with anyone other than the attorney and would certainly advise against writing letters to victims expressing remorse.⁵²

Although the GJP boasts positive results in achieving non-incarceration sentences for clients in comparison with the local public defense office,⁵³ Executive Director Douglas Ammar acknowledges that a causal link to the practice of pre-adjudication confession cannot be established.⁵⁴ In fact, the GJP’s non-incarceration success rate is more likely attributable to the nature and amount of resources the organization devotes to each individual client⁵⁵ and

48. Restorative Justice Online, *Introduction*, at http://www.restorativejustice.org/rj3/intro_default.htm (last visited Jan. 2, 2004) (“Restorative justice is a systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders and communities caused or revealed by the criminal behaviour.”). Restorative justice programs share four related steps. *Id.* The first step, Encounter, “[c]reate[s] opportunities for victims, offenders and community members who want to do so to meet to discuss the crime and its aftermath.” *Id.* The second step, Amends, “[e]xpect[s] offenders to take steps to repair the harm they have caused.” *Id.* The third step, Reintegration, “[s]eek[s] to restore victims and offenders as whole, contributing members of society.” *Id.* Finally, the fourth step, Inclusion, “[p]rovide[s] opportunities for parties with a stake in a specific crime to participate in its resolution.” *Id.*

49. See Ammar, *Forgiveness and the Law*, *supra* note 2, at 1594-96.

50. See, e.g., *id.* at 1584, 1597 (providing examples of letter writing on the part of the client to seek forgiveness).

51. See *id.* at 1596 (explaining that criminal defense attorneys rarely utilize the apology because the current configuration of evidence law and ethical standards governing the profession do not allow much room for it).

52. See *id.*

53. See Ammar, *Truth, Love, and Individual Rights*, *supra* note 4, at 13-14.

54. See *id.*

55. Each GJP lawyer represents approximately fifteen clients at a time. Margaret Graham Tebo, *Full-Service Assistance: Project Offers Free Representation to Clients*

the limited category of criminal accusations it defends clients against.⁵⁶ As Douglas Ammar points out, the judges before whom the GJP appears are acutely aware of the broad support and social services provided by social workers and other staff members of the GJP,⁵⁷ including placement of clients in educational programs and job skills training.⁵⁸ The GJP even provides jobs for some clients within their organization.⁵⁹ These unique features of GJP representation most likely account for a court's willingness to provide alternatives to incarceration for GJP clients.⁶⁰

II. THE ROLE OF CONFESSION IN THE AMERICAN CRIMINAL JUSTICE SYSTEM

Extrajudicial confessions are generally admissible in the American criminal justice system, so long as certain basic requirements are met.⁶¹ The Fifth Amendment Due Process Clause requires, for example, that a confession is admissible only if it is voluntarily made.⁶² So long as the defendant's will is not overborne at the

Who Commit to Social Services Programs, 87 A.B.A. J. 26, 26 (Dec. 2001). At the same time, the GJP puts a tremendous amount of time and resources into every client. See Patrick Jonsson, *Lawyers Defend Poor—If They Mend Their Ways*, CHRISTIAN SCI. MONITOR, Jan. 23, 2002, at 1 (“[GJP’s] lawyers carefully research each case, interview family members, write long letters to clients in jail, and even give them a job mowing lawns after they come out.”); see also Ga. Sup. Ct. Comm’n on Racial and Ethnic Bias in the Court System, *Let Justice Be Done: Equally, Fairly, and Impartially*, 12 GA. ST. U. L. REV. 687, 754-57 (1996) (explaining why most indigents are at a disadvantage in attaining alternatives to incarceration because of their lack of sufficient resources and social services); Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1480 (2000) (providing that “spending more resources . . . can produce more favorable outcomes”).

56. The GJP agrees to represent only about ten percent of those who apply. Ammar, *Truth, Love, and Individual Rights*, *supra* note 4, at 7. It generally limits its representation to cases within Fulton or Dekalb counties that do not involve federal or civil matters or charges of child abuse, domestic violence, drug trafficking, sex abuse or vehicle violations. GJP, *Legal*, *supra* note 26.

57. See generally Tebo, *supra* note 55, at 26 (providing an example of the publicity the GJP has received in the legal community for its innovative approach to selecting and mentoring its clients and handling their criminal cases); see also GJP, *Legal*, *supra* note 26.

58. See *id.*; Jonsson, *supra* note 55, at 1 (explaining that the GJP provides its clients with the ways and means of becoming useful and productive citizens); see also GJP, *New Horizon Landscaping*, *supra* note 29 (providing an example of the job skills and placement programs sponsored by the GJP).

59. GJP, *New Horizon Landscaping*, *supra* note 29.

60. See *supra* notes 55-59 and accompanying text.

61. See *infra* notes 62-65 and accompanying text.

62. See *Spano v. New York*, 360 U.S. 315, 320 (1959). For a more in depth discussion on confessional admissibility, see Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 373 (1998).

time he makes his confession, his confession is considered voluntary.⁶³ The Fifth Amendment protection against self-incrimination also limits the admissibility of extrajudicial confessions.⁶⁴ A defendant's confession is generally admissible only if the defendant knowingly waives his rights before a custodial interrogation begins.⁶⁵ The well known *Miranda* decision and its progeny set forth the requirements which law enforcement officials must abide in order to ensure that an accused's confession does not violate the accused's right against self-incrimination.⁶⁶

Despite various constitutional guarantees, criminal defendants face immense pressure to confess throughout the judicial process.⁶⁷ Systematic pressure can be so strong that even innocent defendants confess to crimes they did not commit.⁶⁸ This phenomenon is by no means a new one.⁶⁹ As far back as seventeenth century Salem, for example, colonists falsely confessed that they were witches.⁷⁰ After the murder of the famous Lindbergh baby in 1932, over 200 people falsely confessed to having committed the crime.⁷¹ This phenomenon continues today,⁷² as the pressure placed upon criminal defendants during police interrogations is so great that even innocent defendants confess.⁷³ The frequency and pervasiveness of false confessions is reflected by the amount that has been written

63. See generally *Spano*, 360 U.S. at 320-21 (overturning a conviction based on a finding that petitioner's involuntary confession was secured through pressures incompatible with the Fourteenth Amendment).

64. See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

65. See *id.* at 475.

66. See *id.*

67. See, e.g., Corey J. Ayling, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1177, 1179 (1984) (finding that there is enormous pressure from society for individuals to confess); Penney, *supra* note 62, at 373 (1998) (noting that "the state has always placed pressure on criminal suspects to confess in one form or another").

68. See James R. Agar, *The Admissibility of False Confession Expert Testimony*, 1999 ARMY LAW. 26, 26 (1999); Ayling, *supra* note 67, at 1179; Ofshe & Leo, *supra* note 25, at 983 (noting that "confessions by the innocent still occur regularly").

69. See, e.g., Agar, *supra* note 68, at 26 (explaining that while "[f]alse confessions may seem to be a recent phenomenon in criminal law, [] American history is replete with examples of false confessions.").

70. See *id.*

71. See *id.*

72. See Ofshe & Leo, *supra* note 25, at 983.

73. See Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 726 (1997) (indicating that false confessions may be elicited during police interrogations even where there is no physical coercion).

on the subject.⁷⁴ Commentators have developed various classifications of false confessions given during police interrogations⁷⁵ and have proposed a host of potential solutions.⁷⁶

Systematic pressure on an accused individual to confess is exacerbated by the powerful impact of confessions on the criminal prosecution.⁷⁷ A criminal defendant who has confessed to the crime is cloaked in a figurative presumption of guilt,⁷⁸ such that where police obtain a confession during interrogation, they consider the crime solved and the defendant the guilty party.⁷⁹ Prosecutors, recognizing the increased likelihood of obtaining a conviction, are less inclined to make a favorable plea offer in cases involving confessions.⁸⁰ Conversely, defense attorneys are more likely to take a grim view of the case and pressure the defendant to plead guilty as the only hope of reducing the sentence.⁸¹

74. See, e.g., *id.* at 721-42 (describing how false confessions are elicited and the problems associated with this practice); Penney, *supra* note 62, at 322-79 (explaining the history of confessions and the effect of the 1966 *Miranda* decision); George C. Thomas, *The End of the Road for Miranda v. Arizona?: On the History and Future of Rules of Police Interrogation*, 37 AM. CRIM. L. REV. 1, 3 (2000) (noting various scholars who have written about false confessions, including Paul Cassell and William Stuntz).

75. See Johnson, *supra* note 73, at 726. “[V]oluntary false confessions” refer to those instances where innocent persons approach the police on their own and falsely confess to the crime. *Id.* “[C]oerced-compliant false confessions” occur where the individual confesses for what he perceives to be an immediate gain, i.e., ending the interrogation. *Id.* at 727. “[C]oerced-internalized false confessions” occur where the individual confesses because the police convince him that he committed the offense even though he did not. *Id.*; see also Maj. Joshua E. Katsenberg, *A Three-Dimensional Model for the Use of Expert Psychiatric and Psychological Evidence in False Confession Defenses Before the Trier of Fact*, 26 SEATTLE U. L. REV. 783, 805-10 (2003) (discussing voluntary, coerced-compliant, and coerced-internalized false confessions); Welsh H. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 109, 109 n.28 (1997).

76. See H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, 32 COLO. L. REV. 11, 20 (2003) (suggesting that there is a need for better training and taped interrogations); Johnson, *supra* note 73, at 735-41 (suggesting that police interrogations be electronically recorded); Katsenberg, *supra* note 75, at 810 (suggesting videotaping interrogations, allowing expert testimony on false confessions and placing a complete bar on the use of confessions obtained in a coercive manner).

77. See Ofshe & Leo, *supra* note 25, at 983-84 (noting that confessions are arguably the most damaging evidence the government can present at trial).

78. See *id.* at 984.

79. See *id.*

80. See *id.* (noting that after obtaining a confession, prosecutors become more eager to go to trial, as they have heightened expectations of attaining a conviction).

81. See *id.*

Confessions are especially damning at trial.⁸² Jurors are likely to treat the confession as determinative of a defendant's guilt,⁸³ such that confessions introduced at trial will make the defendant's conviction and subsequent incarceration much more likely.⁸⁴ It is extremely difficult for defense attorneys to convince jurors that a confession was given falsely.⁸⁵

Pressure to confess from a client's attorney would exacerbate the systematic pressure that already exists.⁸⁶ An attorney's influence on a client can be particularly weighty due to the unequal nature of attorney-client relationships.⁸⁷ In representing indigent defendants, the lawyer often wields a considerable amount of power over her client.⁸⁸ In fact, many commentators caution lawyers against even discussing their moral views with the client for fear that they will overbear the client's autonomy on moral questions.⁸⁹

82. See *id.* at 983-84 ("A confession—whether true or false—is arguably the most damaging evidence the government can present in a trial.").

83. See *id.*; White, *supra* note 75, at 139 ("Empirical evidence suggests that a defendant's confession will likely have an even more powerful impact on the jury than eyewitness testimony."); Mitchell P. Schwartz, Comment, *Compensating Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119, 1121 (2003) ("Studies have demonstrated that jurors consider confessions to be the most persuasive evidence of a defendant's guilt.").

84. See Ofshe & Leo, *supra* note 25, at 984.

85. See *id.*; see also Johnson, *supra* note 73, at 720 (providing that disagreements as to what occurred during a police interrogation become a "swearing contest" between the criminal defendant and law enforcement and explaining that a defense attorney faces a "Catch 22" at trial when trying to convince a jury that her client confessed falsely, because she must convince the jury that her client's version of the story is more reliable than the police version while convincing the jury that her client is "unreliable" enough to have signed a false confession); White, *supra* note 75, at 139 ("[J]uries will often refuse to believe that anyone would confess to a crime that they had not committed.").

86. See *infra* notes 87-89 and accompanying text.

87. See Howard Lesnick, Symposium, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference: General Responses to the Conference: The Religious Lawyer in a Pluralist Society*, 66 FORDHAM L. REV. 1469, 1493 (1998) (describing the unequal nature of the attorney-client relationship); see also Robert F. Cochran, Jr. et al., *Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591, 594, 600 (2003) [hereinafter Cochran et al., *Client Counseling*].

88. See Melanie D. Acevedo, Note, *Client Choices, Community Values: Why Faith-Based Legal Services Providers are Good for Poverty Law*, 70 FORDHAM L. REV. 1491, 1517 (2002) (providing that in the poverty law setting "the lawyer—who is educated, middle-class and typically white—interacts with a client who is poor, probably uneducated and often a person of color" (citing Paul E. Lee & Mary M. Lee, *Reflections From the Bottom of the Well: Racial Bias in the Provision of Legal Services to the Poor*, 1993 CLEARINGHOUSE REV. 310, 312 (1993))).

89. See, e.g., Cochran et al., *Client Counseling*, *supra* note 87, at 596 (explaining how advocates of client-centered lawyering believe that lawyers should be neutral and non-judgmental and that clients should have full autonomy to make moral decisions);

The traditional conception of the lawyer-client relationship was based on the notion of the lawyer as a professional.⁹⁰ Clients were presumed ignorant of the law, and lawyers, as “members of an elite,” were thought to be in the best position to advise their clients on the right course of action.⁹¹ Short of identifying his problem, the client’s role in the relationship was extremely limited.⁹²

The client-centered counseling approach was born in response to criticism of traditional attorney-client relationships that subjugated the role of the client.⁹³ Client-centered advocates criticized the traditional conception because it exacerbated the inequalities inherent in the lawyer-client relationship, particularly in the poverty law setting.⁹⁴ Client-centered lawyers advocate a relationship characterized by client autonomy.⁹⁵ The lawyer remains neutral while working with the client to understand the client’s own values and goals and present possible options to pursue.⁹⁶ The client, however, makes all the decisions that are germane to the outcome of the case.⁹⁷

A third approach, closer in philosophy to the GJP’s, was established in response to client-centered counseling.⁹⁸ Under this ap-

Deborah L. Rhode, *Ethics in Counseling*, 30 PEPP. L. REV. 602, 608 (2003) (finding that client-centered counseling often restricts lawyers to a role that ill-serves the client’s interests); Acevedo, *supra* note 88, at 1518 (finding that clients can easily be manipulated by their lawyers and fall prey to coercion).

90. See Joseph Allegretti, *Religious Values and Legal Dilemmas in Bioethics: The Role of a Lawyer’s Morals and Religion When Counseling Clients in Bioethics*, 30 FORDHAM URB. L.J. 9, 12-13 (2002) (describing the authoritarian model of lawyer-client relationships); Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFFALO L. REV. 71, 77 (1996) (“The client-centered approach developed in reaction to the dominance of the lawyer in traditional models of lawyering.”).

91. Allegretti, *supra* note 90, at 13 (quoting Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 15-24 (1975)).

92. See Hurder, *supra* note 90, at 77 (describing the traditional approach, but arguing for the collaborative approach).

93. See *id.*; Allegretti, *supra* note 90, at 15.

94. See Reza, *supra* note 46, at 1059-61 (explaining that the lawyer/client relationship is especially unequal when dealing with indigent criminal defendants “whose education and outlook typically differ radically from those of the attorney”).

95. See Allegretti, *supra* note 90, at 15; Cochran et al., *Client Counseling*, *supra* note 87, at 601 (“The client-centered counselor seeks to protect the client’s autonomy.”); Rhode, *supra* note 89, at 604.

96. See Allegretti, *supra* note 90, at 15.

97. See *id.*

98. See *id.* at 16-17 (describing the collaborative approach, which allows lawyers to engage clients in moral dialogue, while avoiding the problems of the authoritarian client-centered models). This approach, coined the “collaborative approach to lawyering” by Robert Cochran, Jr., is one of many approaches to lawyering proposed by various scholars as representing a middle ground between client-centered lawyering

proach, the lawyer may introduce and discuss with the client moral issues that she believes to be relevant to the client's case,⁹⁹ while remaining cognizant not to impose her beliefs on the client until he has reached his final decision as to what course of action to take.¹⁰⁰ Once the client has made his decision, however, the lawyer may impose her beliefs on the client if she considers his final decision to be "morally wrong."¹⁰¹ Proponents of the "collaborative" approach criticize the client-centered approach on the ground that client-centered lawyers assume that their clients value freedom from incarceration above all else.¹⁰²

The focus of client-centered lawyering, however, is on client autonomy.¹⁰³ Client-centered lawyers caution against making assumptions about their clients.¹⁰⁴ Client-centered lawyering calls upon attorneys to engage their clients in dialogue in order to determine the client's values and form the representation in accordance with the client's values rather than the values of the attorney.¹⁰⁵

"Collaborative" critics of the client-centered approach contend that lawyers do their clients a disservice by not discussing moral

and traditional conceptions of the lawyer's role. For a more in depth discussion of other approaches to lawyering, see Abbe Smith, *Promoting Justice Through Interdisciplinary Teaching, Practice, and Scholarship: The Difference in Criminal Defense and the Difference it Makes*, 11 WASH. U. J.L. & POL'Y 83, 94-107 (2003) [hereinafter Smith, *The Difference*].

99. See, e.g., Allegretti, *supra* note 90, at 17 (noting that the collaborative model "encourages the client to consider . . . the interests of others who might be affected by her decisions").

100. See *id.* The GJP appears to express its moral beliefs at the outset of its relationship with potential clients. See Ammar, *Truth, Love, and Individual Rights*, *supra* note 4, at 8 ("Convincing the offender to accept responsibility is a challenge, because of the potentially far-reaching consequences, but we have found that the early establishment of a relationship of trust enables the client to believe that we are working for his best interest and for the interest of the community.")

101. Rhode, *supra* note 89, at 610.

102. See Stephanos Bibas, *Harmonizing Substantive Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1404-05 (2003) (criticizing the client-centered counseling approach because "[i]t ignores the constructive role that defense lawyers can play in educating and transforming clients' misperceptions and short-term desires" and because it discourages confession); Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 Hous. L. REV. 327, 331 (1998) [hereinafter Cochran, *Lessons from Dostoyevsky*].

103. Allegretti, *supra* note 90, at 15; Cochran et al., *Client Counseling*, *supra* note 87, at 601; Rhode, *supra* note 89, at 604.

104. See Bibas, *supra* note 102, at 1404-05; Cochran, *Lessons from Dostoyevsky*, *supra* note 102, at 331.

105. See Allegretti, *supra* note 90, at 15.

issues with them.¹⁰⁶ For example, Robert Cochran, Jr., in his article *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*,¹⁰⁷ argues that the collaborative approach to lawyering is most beneficial to the client because it allows the lawyer to discuss moral issues with the client as a friend would.¹⁰⁸ As a result, the lawyer is able to ascertain whether the client values confession and “clear conscience” over and above his freedom from conviction.¹⁰⁹ According to Cochran, by discussing moral issues with the client, the collaborative lawyer is able to make the most difference in her client’s life.¹¹⁰

Many commentators argue, however, that it is not the lawyer’s place to introduce her own morality into discussions with the client.¹¹¹ Ethics scholar Monroe Freedman, for example, provides that once the lawyer-client relationship has been established, the lawyer should refrain from discussing any moral issues with the client.¹¹²

Concerns regarding the infusion of morality in client counseling are especially significant in the poverty law setting.¹¹³ Commentators have noted the inherent differences between attorney and client in this context.¹¹⁴ For example, it is unlikely that poverty lawyers and their clients will have shared common life experiences or socio-economic backgrounds.¹¹⁵ Thus, the client’s values may not comport with the lawyer’s, making the lawyer’s own moral advice somewhat irrelevant.¹¹⁶ A collaborative lawyer runs the risk of imposing her beliefs on the client, despite efforts to the con-

106. See Cochran, *Lessons from Dostoyevsky*, *supra* note 102, at 342; cf. Bibas, *supra* note 102, at 1404-05.

107. See Cochran, *Lessons from Dostoyevsky*, *supra* note 102, at 342.

108. See *id.* at 379-80.

109. See *id.* at 384.

110. See Bibas, *supra* note 102, at 1404-05.

111. See Monroe H. Freedman, *Brendan F. Brown Lecture Commentary: Legal Ethics and the Suffering Client*, 36 CATH. U.L. REV. 331, 332 (1987); Rhode, *supra* note 89, at 608; Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who do Terrible Things*, 28 HOFSTRA L. REV. 925, 934-35 (2000) [hereinafter Smith, *Defending Defending*]; Acevedo, *supra* note 88, at 1518.

112. Freedman does provide that a lawyer’s morality can play a role, though, to the extent that a lawyer is able to decide whether to represent a client. Freedman, *supra* note 111, at 332 (providing that a lawyer’s own morality may properly influence her decision before she agrees to represent a client, but arguing that once a lawyer agrees to undertake the representation, she should do so zealously).

113. See *infra* notes 114-128 and accompanying text.

114. See Allegretti, *supra* note 90, at 20; Reza, *supra* note 46, at 1059-60.

115. See Reza, *supra* note 46, at 1059-60.

116. *Id.*

rary.¹¹⁷ The “collaborative” approach also assumes that the lawyer will have the requisite time to build a sufficiently in-depth relationship with the client to offer such moral counsel.¹¹⁸

Courts have also registered their criticism of lawyers that impose their religious beliefs on the client.¹¹⁹ The Utah case of *State v. Taylor*¹²⁰ provides an example.¹²¹ In that case, defendant Taylor was charged with various counts, including criminal homicide.¹²² After discussing the case with his lawyer, Elliot Levine, Taylor pled guilty.¹²³ At the penalty phase, Levine stated in his closing argument:

I talk to my client, I need to know whether or not they committed that crime. . . . And if that’s the case then I feel it’s my obligation to get that person to take the first step, and that is to come forth, admit their wrong doing, then to get them through the system in a sense that the appropriate punishment is im-

117. See Allegretti, *supra* note 90, at 20 (“Some scholars have worried that the collaborative and friendship models might be a cloak for subtle manipulation and domination by the lawyer.”); Cochran et al., *Client Counseling*, *supra* note 87, at 600; Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 *GEO. J. LEGAL ETHICS* 19, 46-47 (1997); Reza, *supra* note 46, at 1060.

118. See Cochran et al., *Client Counseling*, *supra* note 87, at 600 (“Moral counsel also requires time, a scarce commodity in the hourly billing-driven practice of the corporate lawyer or the heavy case-load practice of the legal aid lawyer.”).

119. *Infra* notes 120-28 and accompanying text. See also Stropnick v. Nathanson, 19 M.D.L.R. (Landlaw, Inc.) 39 (MCAD Feb. 25, 1997), *aff’d*, No. 91-BPA-0061 slip op. (Mass. Comm’n Against Discrimination July 26, 1999) (affirmed on review to the full commission); Teresa Stanton Collett, Symposium: *The Relevance of Religion To a Lawyer’s Work: An Interfaith Conference: General Responses to the Conference: Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation With Evil*, 66 *FORDHAM L. REV.* 1339, 1359 n.80 (1998) (explaining that “[t]he Tennessee Bar Association has taken the position that a pro-life Catholic lawyer has a professional obligation to accept court appointed representation of a minor seeking an abortion”); Jennifer Tetenbaum Miller, Note, *Free Exercise v. Legal Ethics: Can a Religious Lawyer Discriminate in Choosing Clients?*, 13 *GEO. J. LEGAL ETHICS* 161, 163-166 (1999) (discussing Tennessee abortion decision, and a Massachusetts decision holding that a lawyer’s moral decision to represent only women in divorce cases constituted discrimination) (citing Tenn. Bd. of Professional Responsibility, Formal Op. No. 96-F-140 (1996)).

120. 947 P.2d 681 (Utah 1997).

121. For a more detailed discussion of the case, see Cochran, *Lessons from Dostoyevsky*, *supra* note 102, at 329-31.

122. See *Taylor*, 947 P.2d at 684.

123. See *id.* at 683. The trial court did not find that Levine encouraged Taylor to plead guilty. *Id.* at 684. Rather, the trial court found, and the Utah Supreme Court affirmed, that Levine “did not pressure Taylor to plead guilty,” and that “Taylor pled voluntarily because he did not want to put his family and the victims through a trial and he did not want to testify.” *Id.*

posed and they live with that punishment. That's exactly what I've done in Mr. Taylor's case.¹²⁴

The Utah Supreme Court found that Levine's arguments were merely strategic.¹²⁵ The Court, however, provided that, "[i]t is not the role of defense counsel to persuade a defendant to plead guilty because counsel concludes that the defendant committed a crime."¹²⁶ The Court suggested that the lawyer should remain neutral.¹²⁷ It commented:

[c]ertainly attorneys are bound to have private feelings about the clients they represent and their guilt or innocence, but it is their professional responsibility to set aside private feelings and judgments and vigorously argue the law and the facts in a light as favorable to the defendant as the facts and the law permit.¹²⁸

Client-centered counseling is also criticized on the ground that client-centered lawyers fail to take into account how the client's decision may affect the community as a whole.¹²⁹ Restorative justice focuses on community but in doing so runs the risk of putting the community's interests against the interests of the client's.¹³⁰ This focus on community can detrimentally affect the defense lawyer's zealous representation of her client.¹³¹ Zealous representation is especially important in the poverty law context.¹³² An indigent defendant cannot "shop around" for counsel that will zeal-

124. *State v. Holland*, 876 P.2d 357, 362 (Utah 1994) (Stewart, J. & Durham, J., concurring) (quoting Levine's closing argument in *Taylor*).

125. *See Taylor*, 947 P.2d at 686.

126. *Holland*, 876 P.2d at 362 (emphasis removed).

127. *See id.* ("[I]t is [the] professional responsibility [of a defense attorney] to set aside private feelings and judgments and vigorously argue the law and the facts in a light favorable to the defendant as the law and facts permit.").

128. *See id.*

129. *See Cochran, Lessons from Dostoyevsky*, *supra* note 102, at 340.

130. Ammar, *Truth, Love, and Individual Rights*, *supra* note 4, at 7.

131. *See Smith, Defending Defending*, *supra* note 111, at 951-52

It is difficult, if not impossible, to zealously represent the criminally accused and simultaneously tend to the feelings of others It is simply wrong to place an additional burden on criminal defense lawyers to make the world a better place as they labor to represent individuals facing loss of liberty or life.

Id.; *see also Smith, The Difference*, *supra* note 98, at 92 ("My chief concern about indigent criminal defense is that some criminal lawyers do not engage in zealous advocacy and too often betray client confidences, sometimes for so-called 'moral' reasons.").

132. As it is, "in most criminal cases the balance is weighted heavily on the government's side." Smith, *The Difference*, *supra* note 98, at 110.

ously advocate on his behalf.¹³³ He is limited to the attorney that is appointed to him and to that attorney's concept of zealousness.¹³⁴ Indigent defendants often enter the lawyer-client relationship distrustful of whether the lawyer is "really working for them."¹³⁵ As the client sees that the lawyer places his interests above all else, he becomes more likely to trust his lawyer.¹³⁶ Furthermore, a defense lawyer's zealous representation helps to safeguard against the possibility that an innocent defendant is convicted of a crime he did not commit.¹³⁷

The GJP's restorative justice philosophy is evidenced in its focus on client confession.¹³⁸ Restorative justice attempts to restore the victim by presenting an opportunity for forgiveness and to restore the client by allowing him the opportunity to achieve atonement.¹³⁹ Critics of the restorative justice approach argue that its emphasis on confession makes it incompatible with the American criminal justice system.¹⁴⁰ Confessing can be dangerous for the client from a legal perspective because confessions are arguably the most powerful evidence to establish the client's guilt.¹⁴¹

Commentators have raised the possibility of clients using other types of apologies, or "partial apologies," where the client's apol-

133. See Smith, *Defending Defending*, *supra* note 111, at 935 ("Poor people accused of crime do not have the luxury to pick and choose among lawyers.").

134. See *id.*

135. Smith, *The Difference*, *supra* note 98, at 119 ("Clients who are unable to choose because they cannot pay for their own lawyer are more likely to . . . believe that their lawyer is not really working for them").

136. See *id.*

137. Monroe Freedman provides, for example, that one "systemic reason for the zealous representation that characterizes the adversary system . . . is not only to respect the humanity of the guilty defendant and to protect the innocent from the possibility of an unjust conviction." Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 61 (1998).

138. See *supra* notes 1-4, 40-48 and accompanying text.

139. See *supra* notes 46-48 and accompanying text.

140. See Butcher, *supra* note 47, at 252; Latif, *supra* note 47, at 301-04 (discussing restorative justice and providing that "[c]urrently, the Federal Rules of Evidence and most state codes of evidence treat an apology that admits fault as an admission of guilt"). Another critique is that the goal of restoring the victim can never really be achieved without punishment, and that the restorative justice movement's focus on client forgiveness is therefore misplaced in the American criminal justice system's retributive system. See, e.g., Stephen P. Garvey, *The Theory and Jurisprudence of Restorative Justice*, 2003 UTAH L. REV. 303, 305 (2003) ("[T]he victim . . . cannot really be restored without punishment.").

141. See Jonathan Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1013 (1999) (discussing the use of apology in the civil context and providing that one of the "risks associated with apology . . . is the fear that an apology can be used against one's client in court as an admission of fault"); Latif, *supra* note 47, at 309-12.

ogy falls just short of admitting guilt, and “safe apologies,” where the client waits until the end of his criminal case to apologize.¹⁴² Restorative justice purists have criticized both of these approaches as detracting from the full effect that the confession is supposed to have on the victim.¹⁴³

Whether a lawyer considers her proper role to be that of a “neutral partisan,” there to help the client reach his own decisions, or that of a “collaborator,” there to challenge the client to take what the lawyer considers to be morally correct action, may have a greater affect on the outcome of the client’s case than the lawyer realizes.¹⁴⁴ If a client writes a letter to a victim, confessing his sin and asking for forgiveness, as the GJP’s clients do, the client runs the risk of his confession being admitted in his criminal case.¹⁴⁵ The rules of evidence and criminal procedure in the American judicial system are not accommodating to restorative justice principles or a client’s interest in religious redemption.¹⁴⁶

III. THE ROLE OF CONFESSION IN TRADITIONAL JEWISH LAW

In contrast to American law, under Jewish law, confessions have no evidentiary value in criminal adjudications.¹⁴⁷ In a traditional Rabbinical court, criminal conviction could only be obtained through the testimony of two witnesses.¹⁴⁸ The two witness requirement is clearly stated in the Bible: “One witness will not rise up against a man for any iniquity or sin that he sinneth; at the word of two witnesses, or at the word of three witnesses, shall a matter be established.”¹⁴⁹ It is from this Biblical verse that the Talmud extrapolates that a confession cannot lead to a conviction.¹⁵⁰ Al-

142. Cohen, *supra* note 141, at 1030-67; Latif, *supra* note 47, at 305-12 (discussing partial and safe apologies).

143. See Cohen, *supra* note 141, at 1067 (“Some may feel that ‘safe’ apologies are duplicitous: If you are really sorry, should you not be willing to pay for what you have done?”); Latif, *supra* note 47, at 309-12.

144. See *supra* notes 86-89, 111-17 and accompanying text.

145. E.g., O’Neal v. State, 228 Ga. App. 162, 163 (Ct. App. 1997) (affirming the trial court’s finding that a letter of apology written by the defendant is admissible).

146. See *supra* notes 140-41, 145 and accompanying text.

147. See *infra* notes 148-51 and accompanying text.

148. See *Talmud Bavli, Tractate Sanhedrin* 9b (Rabbi Asher Dicker & Rabbi Abba Tzvi Naiman trans., Rabbi Hersh Goldwurn et al. eds., 1993). The Talmud sets forth the stringent requirements for who may qualify as a witness. See *Laws of Witnesses, supra* note 15, at ch. 20-39, §§ 64-161b (providing an in-depth discussion of the rules of witness qualification).

149. *Deuteronomy* 19:15 (The Pentateuch & Haftorahs: Hebrew Text, English Translation and Commentary (Dr. J. H. Hertz ed., Soncino Press 2d ed. 1960) (1938)).

150. See *Talmud Bavli, Tractate Sanhedrin* 9b.

though the passage does not specifically prohibit the use of confessions and could be interpreted to allow the accused to constitute one of the witnesses, the Talmud makes clear that the evidentiary requirement of two independent witnesses may not be satisfied with the accused's confession.¹⁵¹

The Talmudic prohibition against an accused acting as one of the witnesses against himself is derived from an oral interpretation¹⁵² of a Biblical passage prohibiting the testimony of the accused's relatives.¹⁵³ The accused is deemed to be a relative to himself and therefore is similarly disqualified from testifying.¹⁵⁴ Although the prohibition on confessions is derived through a combination of Biblical interpretations that to those unfamiliar with Talmudic analysis may not appear to be self evident, it is widely accepted by both ancient sages and contemporary Talmudic scholars as divinely decreed.¹⁵⁵

The invalidity of confessions is a broad doctrine and results in the almost total rejection of the testimony of the accused.¹⁵⁶ The very act of pleading guilty, the ultimate form of confession, is deemed a nullity.¹⁵⁷ In addition, a person could not render himself an "evil doer," even for purposes beyond criminal conviction on the basis of his own confession.¹⁵⁸ For example, in order for an individual to qualify as a reliable witness in any court proceeding, the individual must be of upstanding moral character.¹⁵⁹ If the individual had a blemished character, he would not be permitted to testify in the Rabbinical courts.¹⁶⁰ If one confesses, however, to

151. *Id.*

152. See *supra* note 13 and accompanying text (providing an explanation of oral law).

153. See Irene Merker Rosenberg & Yale Rosenberg, *In the Beginning: The Talmudic Rule Against Self-incrimination*, 63 N.Y.U. L. REV. 955, 976 (1988); see also *Deuteronomy* 24:16 (providing that a father shall not be put to death for his child). Rashi claims that oral law expanded upon this prohibition in order to forbid the testimony of any relatives.

154. *Talmud Bavli, Tractate Sanhedrin* 10a. Relatives' testimony is prohibited whether positive or negative. *Laws of Witnesses, supra* note 15, at ch. 28-34, § 120.

155. For an in depth and insightful discussion of the origins of the Jewish law prohibition on self-incrimination, see Rosenberg & Rosenberg, *supra* note 153, at 975-77. See also AARON KIRSCHENBAUM, *SELF-INCRIMINATION IN JEWISH LAW passim* (1970).

156. See Resnicoff, *Criminal Confessions in Jewish Law, supra* note 10.

157. *Id.*; *Talmud Bavli, Tractate Sanhedrin* 9b.

158. *Talmud Bavli, Tractate Sanhedrin* 9b.

159. See *id.*

160. *Laws of Witnesses, supra* note 15, at ch. 32, § 138 (noting that if one has committed a wrong, he cannot be a witness); see also *Maimonides, Laws of Witnesses* ch. 10-11. Ignoramuses and professional gamblers are not reliable to stand witness. *Laws*

committing an immoral act, that confession has no implication on the individual's ability to bear witness in any case, except of course one in which his own guilt is being adjudicated.¹⁶¹ Accordingly, the witness cannot disqualify himself as a witness on the basis of his own admission of immoral character.¹⁶²

The absolute prohibition on self-incrimination is accepted by Talmudic scholars as a divine decree and therefore not subject to the same form of scrutiny in which legal scholars engage when examining the efficacy of secular legal doctrine.¹⁶³ Nevertheless, even those legal principles that are divinely decreed may be explored for their underlying rationale. Miamonides, the preeminent Jewish law scholar and philosopher,¹⁶⁴ has offered the following rationale for the absolute evidentiary prohibition on confession. An individual who has "lost his mind" or has a suicidal tendency might confess falsely.¹⁶⁵ Accordingly, a divinely decreed measure would

of Witnesses, supra note 15, at ch. 32, § 132. Ignoramuses are not believed because it is assumed that if one is unfamiliar with the Jewish Law at some point he has violated it. *Id.* at ch. 33, § 146. As to professional gamblers, although technically gambling is not forbidden under Jewish Law, it has the "luster of thievery." *Id.* at ch. 32, § 132. When a person places a bet, he does not expect to lose; therefore upon losing the bet, he does not part with his money in an entirely voluntary fashion. *Id.* In contrast, if someone confesses to actual thievery in court, he is still considered a reliable witness on other matters, and his integrity is entirely uncompromised. *Id.* at ch. 32, § 128. This is because he is not permitted to compromise his own integrity through his own confession. *Id.*

161. *Talmud Bavli, Tractate Sanhedrin* 9b.

162. *Laws of Witnesses, supra* note 15, at ch. 32, §§ 135-38; *Maimonides, Laws of Witnesses* 12:2.

163. See Rosenberg & Rosenberg, *supra* note 153, at 974 n.72.

164. Maimonides codified Jewish Law and provided in all areas of Jewish Law. He lived in Egypt around 1100 C.E. See MENACHEM ELON, *JEWISH LAW: HISTORY: SOURCES, PRINCIPLES* VOL. 3, at 1181-86 (Bernard Auerbach & Melvin J. Sykes trans., 1994).

165. *Laws of Witnesses, supra* note 15, at ch. 32; *Maimonides, Laws of Witnesses* 12:2 (explaining that one may not confess against himself because there is believed to be a possibility that he has lost his mind or become suicidal or sadomasochistic, such that he might admit guilt in order to receive punishment, even though he is not guilty). After giving this reason, the Rambam ends the paragraph by explaining that the main reasoning of this rule is that it is a ruling of the king (G-d). *Id.* The Ridbaz, an early fifteenth commentator on Maimonides, notes that while the Rambam's reasoning would work for a case of capital punishment, for cases of corporal punishment this is insufficient. *Id.* The Ridbaz therefore proposes an alternative reason. *Id.* That a person is not believed to testify about things that pertain to his own body or self because they do not belong to him, but rather to G-d. *Id.* It is for this reason that a person is not permitted to commit suicide as well. *Id.* On the other hand, his property is nominally his, so he is believed to testify about it. *Id.* In conclusion the Ridbaz also says "with all this I also admit that this is a ruling of the king (G-d) and one cannot question it." *Id.*

prevent an accused being put to death¹⁶⁶ on the basis of a confused mind and would prevent the use of the court system as a vehicle for suicide.¹⁶⁷

As Yale and Irene Rosenberg argue, however, reliability of the confession could not be the sole concern of the prohibition.¹⁶⁸ Even confessions with conclusive corroborating evidence that do not present any indication of falsification are strictly prohibited.¹⁶⁹ The Rosenbergs suggest that the strict application of this procedural bar to prosecution is less troubling in a society and culture that subscribes to divine retribution.¹⁷⁰ Even though in the Rabbinical court, many guilty individuals will go unpunished to protect a very few, all who are guilty will be punished in the ultimate court in which G-d presides.¹⁷¹

The Talmud's treatment of confessions as they apply in cases involving fines can also be seen as consistent with a bar on such evidence in the criminal context.¹⁷² Generally, if one is adjudged to be a thief, the Rabbinic Court will order her to pay the victim the value of the stolen goods plus an additional punitive fine in the same amount.¹⁷³ For example, if A were found guilty of stealing \$ 100 from B, A would be assessed a fine totaling \$ 200.¹⁷⁴ If, however, A were to come to the Rabbinic Court and admit that she stole the \$ 100 from B before any witnesses were to testify, she would be assessed only \$ 100, without the additional \$ 100 fine.¹⁷⁵ This would be true even if witnesses were subsequently to testify that A stole the money.¹⁷⁶

Accordingly, one can conclude that an individual's admission can serve as competent evidence that she stole the money and that the

166. Capital punishment was permitted in Rabbinical courts. See Haim H. Cohn, *Capital Punishment*, in *THE PRINCIPLES OF JEWISH LAW* 526 (Menachem Elon ed., 1975). For a list of offenses meriting capital punishment and the verses from which the law is derived, see *Talmud Bavli, Tractate Sanhedrin* ch. 7-9.

167. *Laws of Witnesses*, *supra* note 15, at ch. 32.

168. Rosenberg & Rosenberg, *supra* note 153, at 1034-35 n.286-93.

169. *Id.*

170. *Id.*

171. *Id.*

172. See *infra* notes 178-80 and accompanying text.

173. Generally, a thief must repay the value of the stolen item in addition to a fine equal to the value of the goods, which is also paid to the legitimate owner. *Maimonides, Laws of Theft* 1:4. This obligation is derived by *Talmud, Bava Kama* 64-65 from *Deuteronomy* 22:3.

174. *Maimonides, Laws of Theft* 1:4.

175. *Id.* at 1:5.

176. See *id.* at 3:8-9. For an in depth discussion, see *Encyclopedia Talmudis*, *Modeh Beknass*.

reprieve from penalty is a positive consequence of the confession.¹⁷⁷ A more widely accepted view is that the confession has no evidentiary value regarding the theft of the money, but that the admission is nonetheless accepted as an acknowledgement of a civil liability.¹⁷⁸ Commentators explain that when the Talmud lends credence to confessions in monetary matters, it is not affording them any evidentiary value that an obligation previously existed; rather, it views the confession as the actual creation of a new obligation.¹⁷⁹ Therefore, although an individual is prohibited from admitting criminal liability, there is no such limitation on admitting civil liability.¹⁸⁰ Indeed, in civil monetary matters, it is believed that “the confession of the defendant has the veracity of a hundred witnesses.”¹⁸¹

This apparent dichotomy between criminal and civil matters has been explained as follows. A person’s being—both body and soul (“*nefesh*”)—belong not to the individual, but to G-d.¹⁸² Accordingly, the individual is not free to take a course of action that might

177. See *supra* notes 173-76 and accompanying text.

178. There are two different types of monetary judgments. There is a judgment where the court decides that A owes B a sum of money because he either borrowed the money from B, or he damaged B for that amount of value. Then there is a monetary judgment from A to B, which can be classified as a penalty. In the case of a thief, the two coexist in the same judgment. If two witnesses testify that A stole \$100 from B, A will be obliged to pay \$200 to B, or double the value, for his crime. The first \$100 is a monetary duty that A owes to B for the \$100 he has deprived B of by stealing from him. The second \$100 is a penalty imposed by the Torah. Therefore, A can oblige himself for the \$ 100 that is a civil liability (because he has deprived B of the money and must repay) but not for the \$100 that is a criminal liability. For an in depth discussion, see *Encyclopedia Talmudica*, Hodoas Ball Din.

179. *Talmud Ketubot* 72a (finding that a confession in monetary matters will have legal implications, but that implications will be limited to monetary matters); *Talmud Makos* 3a (same); *Teshuvos Rashbah* vol. 2, § 231. There is also a minority view that explains that the court actually believes B in monetary matters because of his confession. See *id.*

180. *Talmud Ketubot* 72a; *Talmud Makos* 3a; *Teshuvos Rashbah* vol. 2, § 231.

181. *Talmud Makos* 3a.

182. *Maimonides, Laws of Witnesses* 12:2 (providing this explanation in Ridvaz’s commentary); see also Rosenberg & Rosenberg, *supra* note 153, at 1038 n.296. The Ronsebergs provide that “the total exclusion of selfinculpatory statements serves as a fence around the two-witness rule and other commandments relating to the sanctity of human life, and as a constant reminder of God’s omniscience and omnipotence.” *Id.* at 1038-39. The Rosenbergs provide that in “Anglo-American doctrine . . . a person may not consent to a criminal act against himself,” and they analogize this rule to the prohibition on the use of confessions in Jewish law. *Id.* at 1037. A confession in a capital case, for example, would be equivalent to a defendant committing suicide. *Id.* In other words, under Jewish law, “one is not permitted to offer his life or his body through the vehicle of a confession in a criminal case.” *Id.* at 1037-38; see also *supra* note 165 and accompanying text.

dispose of life or cause bodily damage.¹⁸³ Confessing to a crime could result in the imposition of the death penalty or other forms of corporal punishment.¹⁸⁴ In fact, Jewish law scholar Aaron Kirschenbaum has opined that even an individual's reputation is not her own to be defamed or debased by her own words.¹⁸⁵ On the other hand, an individual's monetary wealth is property that she can freely divest herself of.¹⁸⁶ The Talmud does not protect against imprudent monetary decisions.¹⁸⁷

As is true in the Christian tradition,¹⁸⁸ Judaism includes in its concept of repentance that an individual seek forgiveness¹⁸⁹ from any victims he has wronged. In seeking an individual's forgiveness, the perpetrator must verbally acknowledge his sin to the victim.¹⁹⁰

Maimonadies,¹⁹¹ in the *Laws of Repentance*, ruled that, among the requirements for repentance, there is a necessity to "speak out" sins one has committed and one's resolution not to commit such sins in the future.¹⁹² There appears to be some disagreement in the Talmud as to whether one is required to speak one's sins out loud,¹⁹³ and many commentators on Maimonadies are bewildered

183. *Supra* notes 165, 182 and accompanying text.

184. See generally Ammar, *Forgiveness and the Law*, *supra* note 2, at 1596 (explaining that criminal defense attorneys are reluctant to encourage clients to apologize to victims as the laws of evidence will generally allow such apologies to be admitted in court as confessions to the detriment of their clients' criminal proceedings).

185. See KIRSCHENBAUM, *supra* note 155, at 74 (citing R. Shymon shkop, *Novellae to Kethuboth* 18:05).

186. See *supra* notes 172-181 and accompanying text.

187. See *supra* notes 179-180 and accompanying text.

188. See Theodor Meron, *Crimes and Accountability in Shakespeare*, 92 AM. J. INT'L L. 1, 11 (1998) ("According to Christian doctrine, a sinner who dies without receiving communion, without confession and absolution, without a chance to repent, may be doomed to eternal damnation.").

189. Maimonides, *Laws of Repentance* 2:9.

190. *Id.* (providing commentary describing appeasement as verbally asking for forgiveness).

191. Maimonides, also known as Rambam, was a preeminent codifier of Jewish law and Jewish Philosopher. He lived in Spain, the Middle East, and North Africa around 1135-1204 C.E. and was credited with authoring the *Misneh Torah*. Tracey R. Rich, *Sages and Scholars*, JUDAISM 101, at <http://www.jewfaq.org/sages.htm#Rambam> (last modified Nov. 25, 2002).

192. This speaking out is called "Vidduy" in Hebrew. It is unclear if this is even confessional in nature as implied by the definition of the word "confession" in English. Indeed, the connotation of the term seems to be closer in concept to prayer and an explicit expression for one's own benefit acknowledging that one has done wrong. See *Vidduy* Introduction (Mesorah Publ'g 1998).

193. Maimonides, *Laws of Repentance* 2:2-3. (In Law 3, Maimonides compares speaking out one's sins without resolving one's heart to repent to immersing oneself in a purifying body of water while holding the source of the impurity in one's hands. The immersion will be of no avail until one casts away the source of the impurity.); see

by the approach he took in reaching this ruling,¹⁹⁴ particularly because King David¹⁹⁵ in *Psalms* says “[f]ortunate is the one . . . who does not publicize his sins.”¹⁹⁶ Rabbi Joseph Caro¹⁹⁷ explains that Maimonides is applying this principle primarily in two cases; 1) where someone has sinned publicly and therefore the sin is already public knowledge, such that his speaking out only serves to inform people that he has repented; and 2) where someone has sinned against a fellow man and therefore must ask him for forgiveness.¹⁹⁸ Maimonides himself later explains the requirement this way:

It is a great thing to speak out in public and specify ones sins. . . when is this said when one has sinned against his fellow man, however if he has sinned to G-d he does not have to publicize himself, rather he is brazen faced if he does reveal them, rather he shall repent before G-d and specify his sins to G-d and confess them to Him and then can make a general public confession saying that he has sinned to G-d and it is better if he does not reveal his sins as it is stated[,] Fortunate is one who does not publicize his sins.¹⁹⁹

Publicly trumpeting that one has flouted the laws of G-d may have a negative impact on the community. Accordingly, it seems that the purpose of speaking out one’s sins is to help solidify the individual’s resolve for repentance.²⁰⁰ It is, however, clear that the

also Rabbienu Jonah, *Gates of Repentance* 1:41 (Rabbienu Jonah, a contemporary of the Rambam whose work is the premier source for the laws of repentance, also lists this among the requirements for repentance; however, in his list it is the seventeenth item, which indicates that it is a less crucial element than all the requirements that proceed it in the list.).

194. This is a common occurrence in the study of Jewish Law, as Maimonides, for the sake of brevity, simply presented the actual rules without indicating his underlying reasoning therefore, and commentators are constantly striving to understand the underpinnings of the Maimonides rulings. Furthermore, in this instance, Maimonides’ rulings appear to be in conflict with the teachings of an earlier sage. See *infra* notes 195-196 and accompanying text.

195. King David, King of Israel, authored a majority of the Book of Psalms. According to Jewish tradition, the Messiah will ultimately come from the descendents of David. *A Glossary of Basic Jewish Terms and Concepts*, JUDAISM 101, at <http://www.ou.org/about/judaism/di.htm> (last visited Dec. 30, 2003).

196. *Psalms* 45 (The Pentateuch & Haftorahs: Hebrew Text, English Translation and Commentary (Dr. J. H. Hertz ed., Soncino Press 2d ed. 1960) (1938)).

197. Rabbi Joseph Caro was the author of the *Shulchan Oruch*, the most commonly used codification of Jewish Law. He also authored a commentary on Maimonides. He was born in Toledo, Spain in 1488 and emigrated to Tzefas, Israel in 1536. He died in 1575. OU Dep’t of Jewish Education, *Great Leaders of Our People—Rabbi Joseph Caro*, at <http://www.ou.org/padres/bios/caro.htm> (last visited Nov. 20, 2003).

198. *Kesef Mishneh* (commenting on *Maimonides, Laws of Repentance* 2:2).

199. *Maimonides, Laws of Repentance* 2:2.

200. See *supra* notes 192-93 and accompanying text.

mere act of confessing one's sins in court does nothing to further the repentance of the confessor, and if anything, a public in court confession may be considered brazen faced.²⁰¹

IV. EFFORTS TO COMBINE THE PROCESS OF REPENTANCE WITH THE CRIMINAL ADJUDICATIVE PROCESS IS PROBLEMATIC FROM BOTH A LEGAL AND RELIGIOUS PERSPECTIVE

As Jewish law demonstrates, the process of criminal adjudication should not be merged with the process of seeking repentance from G-d.²⁰² The Talmud's absolute prohibition on any form of criminal confession²⁰³ demonstrates a theologically based acknowledgement of the inherent danger in combining the two processes.²⁰⁴ By barring from evidence even undisputedly voluntary, intelligent, corroborated confessions, Jewish law opts completely to divorce from the criminal justice system the act of speaking out one's sins.²⁰⁵ Jewish law reflects a divine judgment that the purity of the act of seeking repentance is paramount to the need to convict and punish perpetrators in "earthly" tribunals.²⁰⁶ Perhaps, in this regard, the principles of restorative justice are more compatible with Jewish law than the American criminal justice system.

The GJP seeks to serve its clients in a dual capacity.²⁰⁷ At the same time that it undertakes legal representation of a client in the secular criminal court system, it embarks on a mission to obtain religious absolution from sin for the client.²⁰⁸

The GJP introduces an element of theological counseling that is foreign to most attorney-client relationships.²⁰⁹ Indeed, legal representation by the GJP is conditioned on a client pursuing religious repentance.²¹⁰ By merging the process of religious repentance with the process of criminal adjudication, the GJP runs the risk of compromising the client's success in both processes.²¹¹ As detailed ear-

201. *See supra* notes 198-99 and accompanying text.

202. *See supra* notes 150-67 and accompanying text.

203. *Supra* notes 10-11, 150-62 and accompanying text.

204. *Supra* notes 163-67 and accompanying text.

205. *Supra* notes 150-67 and accompanying text.

206. *Supra* notes 150-67 and accompanying text.

207. *See supra* notes 31-52 and accompanying text.

208. *See supra* notes 31-52 and accompanying text.

209. *See supra* notes 86-89, 111-28 and accompanying text (discussing ideological and practical concerns regarding attorneys attempts to influence their clients moral decisions and encourage confession).

210. *See supra* notes 31-52 and accompanying text.

211. *See supra* notes 5-9, 77-85 and accompanying text.

lier in this Essay, evidence of an accused's confession is a powerful prosecution tool that can severely constrain a defendant's trial strategy and plea bargaining position.²¹²

Although extrajudicial confession may sometimes be a successful criminal defense strategy,²¹³ a defense attorney's decision to employ that strategy should not be influenced by the attorney's personal theology.²¹⁴ This outside motivation on the part of the attorney may cloud her judgment regarding the legal merit of the strategy.²¹⁵ It may prove hard for the lawyer to separate her role as legal counselor from her newly adopted role as religious counselor.²¹⁶

Merging the process of repentance with the adjudication of criminal cases is problematic on a number of levels. Placing evidentiary value on "confessions" made for the purpose of pursuing religious repentance potentially stifles such confessions, particularly to the extent the confessions are in the context of seeking forgiveness from victims with whom the defendant shares no evidentiary privilege.²¹⁷ Conversely, if expressing remorse and asking forgiveness from victims carries a potential benefit in terms of a reduced sentence by the court, this potential benefit would provide a substantial incentive for an accused to feign remorse and go through the motions of insincerely asking for forgiveness.²¹⁸ In addition, in a system in which confessions have evidentiary value, it is axiomatic that law enforcement entities will seek to extract confessions.²¹⁹ Inevitably, the potential exists for coercion, abuse and false confession.²²⁰ Surrendering to such external pressure is antithetical to ex-

212. *See id.*

213. *See supra* notes 53-54 and accompanying text.

214. *See supra* notes 125-28 and accompanying text.

215. *See supra* notes 125-28, 144-46 and accompanying text.

216. *See supra* note 117 and accompanying text.

217. To the extent that one who sins must seek forgiveness from a victim in order to achieve repentance, such "confession" must be spoken explicitly and is not subject to any evidentiary privilege, such as a clergy privilege. *See O'Neal v. State*, 228 Ga. App. 162, 163 (Ct. App. 1997) (affirming the trial court's finding that a letter of apology written by the defendant is admissible as evidence of his guilt); Latif, *supra* note 47, at 301-04 (explaining that "the Federal Rules of Evidence and most state codes of evidence treat an apology that admits fault as an admission of guilt"); *see also* Cohen, *supra* note 141, at 1013 (noting the admissibility of apologies as evidence of fault in the civil context).

218. *See* Latif, *supra* note 47, at 304.

219. *See supra* notes 67-85 and accompanying text.

220. *See supra* notes 67-76 and accompanying text.

periencing genuine regret, which is fundamental to true repentance.²²¹

The act of seeking repentance is by nature extremely complex and personal. As is true with most matters religious in nature, the experience will vary for each individual and cannot be reduced to an institutionalized formula. Although the process of repentance in both the Jewish and Christian tradition involves the act of seeking forgiveness from another individual, repentance must be motivated by a genuine feeling of regret for having wronged G-d as well as any victimized individuals.

The motivation to seek repentance must be pure, unencumbered by external pressures or the incentive to minimize one's punishment in the criminal justice system or to obtain free and highly desirable legal representation.²²² Clearly, a coerced confession benefits neither the victim nor the client.²²³ It is not clear from the GJP's literature the extent to which continued representation is explicitly contingent on the attorney's assessment that the client has made adequate progress on the path to repentance. Any effort, however, on the part of an attorney to influence the conduct of a client can have a profound impact.²²⁴ The attorney may not even be cognizant of the degree of influence she wields over the client.²²⁵ Furthermore, an attorney may not be in the best position to assess a client's motivation.²²⁶ Indeed, the process of questioning a client's religious resolve may erect a barrier in the attorney-client relationship. Moreover, nothing in the training an attorney receives or the nature of her work qualifies the attorney to assist an individual in seeking religious repentance.

There is no natural link between the criminal adjudication process and pursuit of religious repentance. Indeed, the requirement of a public allocution of guilt for acceptance of a guilty plea is inconsistent with the notion under Jewish law that proclaiming one's

221. See Latif, *supra* note 47, at 305.

222. *But see supra* notes 31-52 and accompanying text (describing the GJP's policy of requiring clients to commit to making "life changes" and, often, to apologizing to their victims, in order to obtain representation).

223. See Latif, *supra* note 47, at 305 ("[I]ntervention[s] that lead to coerced confession] may make the apology meaningless to both parties"). When lawyers tell their clients that they must confess, or lose an opportunity for free quality legal representation as a consequence if they do not, the client's confession runs the risk of being coerced. *Id.* at 304 (providing that "an offender who has been ordered to apologize may simply utter the words without feeling or expressing shame, remorse, or regret").

224. See *supra* notes 86-89, 113-18 and accompanying text.

225. See *supra* notes 86-89, 113-18 and accompanying text.

226. See *supra* notes 113-18 and accompanying text.

sins publicly is a brazen act.²²⁷ Similarly, Christianity recognizes the private nature of the process of seeking repentance.²²⁸ The GJP, while certainly well meaning, links the two potentially conflicting processes.²²⁹

Apparently, the GJP has, through its dedication, hard work and relative wealth of resources and support services, achieved successful results for its clients in terms of both the outcome of criminal cases and resolving life problems beyond the narrow criminal prosecution.²³⁰ I applaud them for their good intentions and their good work. Nonetheless, I seek to sound a note of caution to any organization that seeks to use the criminal justice system as a vehicle for pursuing religious absolution on behalf of its clients. We learn from the sacred teachings of the Bible and the Talmud that criminal adjudication and religious repentance are separate processes that should not be mixed.²³¹ American law emphasizes the individual and individual rights in relation to government authority. Jewish law, however, focuses on the individual's relationship to G-d and community.²³² Under a Jewish law system, which bans the use

227. Public proclamation of one's sins was deemed "brazen-faced," as it could lead to a public sense of lawlessness and casual acceptance of sin. See *supra* 195-199 and accompanying text.

228. See, e.g., Robert John Araujo, *International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the "Priest-Penitent" Privilege Under International Law*, 15 AM. U. INT'L L. REV. 639, 644-45 (2000) (providing that Pope St. Leo I "instructed [bishops] on the need for secrecy in confessions in order to safeguard the reputation of the penitent and to promote greater reconciliation between God and people"); Anthony Merlino, *Tightening the Seal: Protecting the Catholic Confessional from Unprotective Priest-Penitent Privileges*, 32 SETON HALL L. REV. 655, 666 (2002) (providing that repentance strengthens one's relationship with God, and providing that the Roman Catholic Church's emphasis on private confession is attributable to the Church's recognition that individuals are less likely to confess, and accordingly achieve atonement, where confessions are made public); Seymour Moskowitz & Michael J. DeBoer, *When Silence Resounds: Clergy and the Requirement to Report Elderly Abuse and Neglect*, 49 DEPAUL L. REV. 1 (1999) (discussing the history of, and emphasis on, private confession in various Christian faiths).

229. See *supra* notes 138-41 and accompanying text.

230. See *supra* notes 53-62 and accompanying text.

231. See *supra* notes 10-11, 150-162, 228 and accompanying text.

232. See Suzanne Darrow-Kleinhaus, *The Talmudic Rule Against Self-Incrimination and the American Exclusionary Rule: A Societal Prohibition Versus an Affirmative Individual Right*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 205, 217 (2002)

("Whatever the authority in Jewish law, whether the rabbinical court or the secular law of the king, the ability to suspend the individual's rights in favor of the larger society graphically illustrates the major difference between the American and Jewish legal systems. While American law focuses on the individual, both in granting rights and in imposing responsibilities, Jewish law focuses on the community and the individual's commitment to the community.").

of confessions in criminal adjudication, clients of the GJP would not be faced with potentially contrary goals. Judaism recognizes, and indeed sets in place, limitations on the adjudicative system administered by individuals.²³³ It subjects the efficiency of such systems to theological principles, on the premise that G-d's ultimate judgment is unencumbered by institutionalized rules of procedure.²³⁴ The secular system, however, in which criminal defense attorneys must operate does not recognize any distinction between a religious individual seeking a victim's forgiveness for the purpose of obtaining repentance and a criminal defendant providing to the victim a confession admissible in a court of law.²³⁵

Id.

233. *See supra* notes 10-11, 150-62 and accompanying text.

234. *See supra* notes 170-71 and accompanying text.

235. *See supra* notes 5-9, 140-41 and accompanying text.

