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RELIGION AND THE PUBLIC DEFENDER

Sadiq Reza*

It takes a special breed to have the understanding, compassion and dedication to do what criminal defense lawyers do As for public defenders — they are doing God's work. If Christ had been a lawyer, he would have been a public defender.¹

Virtually all public defenders fight a daily battle against burnout and the creeping erosion of confidence that inevitably accompany defending acts we cannot condone and protecting those who are the source of so much harm and grief Whether the process unfolds subtly or suddenly, all defenders must confront the disturbing consequences of their zealous representation of guilty clients.²

Introduction

Enlarged copies of the first quote above — yellowed, torn and affixed with cellophane tape — adorn the office walls of many a lawyer at the Public Defender Service for the District of Columbia. The words inspire and exhort a cadre of already exceptionally committed attorneys to persevere in championing the cause of those whom they represent: indigent adults and juveniles charged with criminal offenses in Washington, D.C. The second quote, from a revered veteran of that office, expresses a decidedly more sober and earthly reality of public defender work. To be sure, defending wrongdoers has ample precedent in Christianity and the other Abrahamic faiths. Moses prevailed upon God to forgive the Israelites for worshipping the Golden Calf;³ Jesus protected the adulter-

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1. *Profile: Michael Karnavas*, THE CHAMPION, Dec. 1993, at 51.

2. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1267 (1993) [hereinafter Ogletree, *Beyond Justifications*].

3. See Exodus 32:9-12 (New Revised Standard Version).

ess from stoning despite her guilt;⁴ and Muhammad enforced God's commandments to respect personal privacy, and thereby suggested an exclusionary rule some fourteen hundred years before that rule would epitomize the legal "technicality" in our criminal justice system.⁵

But lofty examples such as these do not answer the more mundane, but crucial, questions raised by the day-to-day work of public defenders. How "Christ-like" is it to cross-examine a witness whose testimony is apparently both truthful and accurate, in an effort to discredit the witness and secure a client's acquittal? How "Christian" is it to fight to block damning evidence against a client from the eyes and ears of a jury, or to conceal unfavorable information about a client from a judge, for the sake of a guilty client's freedom? What part of "God's work" is it to argue against state supervision of children who have been forsaken by family and community and are clearly in need of help? How "religious" is it, in other words, to use every lawful means available, indeed to push the limits of lawfulness, to fight to wrest from state authority individuals who may be dangerous to society, to themselves, or to both, or who may at least be involved in conduct that our laws deem criminal?

Conventional justifications for public defender work are many and persuasive. Emerging literature on the role of religion in lawyering, meanwhile, challenges rules of professional conduct that reflect these justifications and sanctify what public defenders do. Questions posed by the "religion and lawyering" movement include: whether an attorney should reveal client confidence when called for by a greater societal good, for instance to protect an innocent person from being executed;⁶ whether an attorney should

4. See *John* 8:3-11. For a legal analysis of this episode, see Thomas L. Shaffer, *Should a Christian Lawyer Serve the Guilty?*, 23 GA. L. REV. 1021, 1027-29 (1989) [hereinafter Shaffer, *Serve the Guilty?*].

5. See 16 *Sahih Muslim Bi Sharh al-Nawawi*, vol. 8, at 118-19 (Dar Ihya' al-Turath al-Arabi, reprint at Beirut, n.d.) (reporting Muhammad's injunction against eavesdropping and spying); Osman Abd-el-Malek al-Saleh, *The Right of the Individual to Personal Security in Islam*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 55, 70 (M. Cherif Bassiouni ed. 1982) (discussing episodes in which early Muslim leader Umar ibn al-Khattab ignored wrongdoing he discovered by "spying"); Awad M. Awad, *The Rights of the Accused Under Islamic Criminal Procedure*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 91, 104 (M. Cherif Bassiouni ed. 1982) (same); *Qur'an*, xlix:12 (A. Yusuf Ali trans., American Trust Publications 2d ed. 1977) ("[S]py not on each other . . ."); *id.*, xxiv:27-28 ("O ye who believe! Enter not houses other than your own, until ye have asked permission and saluted those in them. . . . If ye find no one in the house, enter not until permission is given to you . . .").

6. See *infra* text accompanying notes 30-31.

“conscientiously object” to actions on behalf of a client that contravene the attorney’s religious beliefs;⁷ and whether attorneys should take a more active “moral” role in advising and representing clients.⁸ The court-appointed attorney is occasionally, but not routinely, distinguished from other attorneys in these discussions, because of the relative powerlessness of clients who receive court-appointed counsel and the need for their zealous representation.⁹

This Essay will argue that the public defender, or any other attorney appointed by the court to defend adults or juveniles charged with criminal offenses, should not undertake, or fail to undertake, any action to the legal detriment of a client on the basis of a conflict the attorney perceives between religious and professional imperatives, except in the rare case of imminent death or serious bodily harm to another. This argument rests on the following four premises: (1) the public defender occupies a unique position in our legal system, and options that may be available to lawyers who serve private interests or other clients cannot and should not be available to him; (2) any deviation by a public defender from the governing professional constraints (and exhortations) in representing a client that stems from conflicting religious beliefs and harms the client would be both professionally unethical and immoral; (3) religion is at best equivocal in addressing questions of the propriety of specific actions taken or urged on behalf of clients; and (4) the appropriate role of religion in the work of a public defender is that of individual inspiration, or motivation to work to change the professional code or the criminal justice system itself. Each of these premises will be discussed in turn.

I. The Special Role Of The Public Defender

Case law, rules of professional conduct and legal scholarship uniformly recognize the special role of a criminal defense lawyer in our system of justice. Thirty years before the Supreme Court declared the right to counsel in criminal cases to be a fundamental right in *Gideon v. Wainwright*,¹⁰ the Court spoke of the need for defense counsel in order to protect the innocent.¹¹ Soon after

7. See *infra* text accompanying notes 23-36.

8. See *infra* text accompanying notes 37-44.

9. See *infra* text accompanying note 44.

10. 372 U.S. 335 (1963).

11. See *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

Left without the aid of counsel [the criminal defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the

Gideon, Justice White clarified that criminal defense counsel also must vigorously defend the guilty, even if that means withholding incriminating evidence and attacking incriminating evidence counsel knows to be true.¹² Rules of professional conduct reflect this duty and protect counsel in fulfilling it. Rule 3.1 of the American Bar Association's ("ABA") *Model Rules of Professional Conduct* exempts criminal defense counsel from the prohibition against frivolously asserting or controverting issues.¹³ The ABA's Standards Relating to the Administration of Criminal Justice go further, advising criminal defense counsel that it is proper to discredit a truthful government witness and that failing to do so could violate counsel's duty to represent the client zealously.¹⁴ Scholarly commentary supporting and explaining the special leeway for criminal defense counsel abounds. Professor Richard Wasserstrom presented some of this reasoning in an oft-cited article,¹⁵ and nu-

skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id.

12. See *United States v. Wade*, 388 U.S. 218, 256-58 (1967) (White, J., dissenting in part and concurring in part).

[D]efense counsel has no . . . obligation to ascertain or present the truth. Our system assigns him a different mission . . . [W]e . . . insist that he defend his client whether he is innocent or guilty. . . . Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. . . . [M]ore often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth

Id.

13. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1999) ("A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.") [hereinafter MODEL RULES].

14. See ABA Standards Relating to the Administration of Criminal Justice, Standard No. 4-7.6 commentary (1993) [hereinafter ABA Standards].

15. See Richard Wasserstrom, *Lawyers As Professionals: Some Moral Issues*, 5 A.B.A. HUM. RTS. 1, 12 (1975).

Because a deprivation of liberty is so serious, because the prosecutorial resources of the state are so vast, and because, perhaps, of a serious skepticism about the rightness of punishment even where wrongdoing has occurred, it is easy to accept the view that it makes sense to charge the defense counsel with the job of making the best possible case for the accused — without regard . . . for the merits

Id.

merous commentators have expanded and refined the analysis.¹⁶ Professor Monroe Freedman has for decades noted the special circumstances of criminal defense cases in his authoritative positions on legal ethics, particularly on the vexing questions of client perjury and cross-examining the truthful witness.¹⁷ In essence, special rules for criminal defense lawyers are seen as necessary to protect against overreaching by the state and to enforce constitutional and statutory protections for the benefit of the individual client and society at large.¹⁸

These justifications are even stronger when applied to indigent clients. Criminal defense counsel's duty to protect a client against oppression by the state is heightened for clients who are disadvantaged socioeconomically and have no real choice of counsel.¹⁹

16. See, e.g., David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993); Ogletree, *Beyond Justifications*, *supra* note 2, at 1244-59 (reviewing traditional "role morality," "client-centered" and "systemic" justifications for criminal defense work); Kim A. Taylor, *Reading Between the Lines: Indigent Defense Issues and the Restatement of the Law Governing Lawyers*, 46 OKLA. L. REV. 63, 66 (1993) [hereinafter *Indigent Defense Issues*] ("In the development and analysis of rules of professional responsibility, it has long been recognized that criminal defense is . . . different. . . . [Criminal] cases involve fundamental questions of liberty, and sometimes even life [T]he disparity of resources and power between the state and the defense in a criminal case demands that the accused be afforded greater protection."); Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 46-50 (1993) (considering the traditional justifications from feminist and clinical education perspectives).

17. See MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* (1990) (in particular chapters 6 and 8); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

18. See also DAVID LUBAN, *LAWYERS AND JUSTICE* 60 (1988) ("[C]riminal defense is a very special case [of lawyers' advocacy], in which the zealous advocate serves atypical social goals. . . . The goal of zealous advocacy in criminal defense is to curtail the power of the state over its citizens. We want to handicap the state in its power even legitimately to punish us, for we believe . . . that if the state is not handicapped or restrained . . . , our political and civil liberties are jeopardized. Power-holders are inevitably tempted to abuse the criminal justice system to persecute political opponents, and overzealous police will trample civil liberties in the name of crime prevention and order. To guard against these dangers, we protect our rights in effect by overprotecting them."); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L. J. 2419, 2426-27 (1996) [hereinafter Taylor, *Alternating Visions*] (noting that the Supreme Court in the 1960s "signal[ed] its expectation that criminal defense lawyers would uncover and raise claims of constitutional violations"). But see William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993) (criticizing the categorical exemption of criminal defense from critiques of the adversary system).

19. See, e.g., Ogletree, *Beyond Justifications*, *supra* note 2, at 1258-59 ("[F]ocus . . . on the disempowered status of individuals represented by public defenders [provides] the strongest of the theories offered to justify zealous advocacy [in criminal defense work]."); Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st*

Race- and class-based prejudices against clients further heighten the duty.²⁰ Similarly, justifications for advocacy itself take on added meaning in the context of indigent criminal defense. Maximizing the "human dignity" and "autonomy" of a client and ensuring the client's fair treatment at the hands of the law are seen as core purposes of representation within the adversary system.²¹ Clients already disenfranchised socioeconomically and in danger of further alienation though criminal sanctions need the assistance of counsel for dignity and autonomy all the more.²² The public defender thus plays a unique role within the special arena of criminal defense work.

II. Proposals for Deviating from Rules of Professional Conduct on the Basis of Religious Values

Professor Thomas Shaffer has long suggested that a lawyer might "conscientiously object" to actions on behalf of a client that offend the lawyer's religious sensibilities.²³ Professor Leslie Griffin now presents "exemption" and "civil disobedience" as two options available to the lawyer whose religious convictions conflict with obligations of the professional rules that govern lawyers' conduct.²⁴ Under the "exemption" model, lawyers would be permitted to violate professional rules to the detriment of clients with impunity,

Century, 58 LAW & CONTEMP. PROBS. 81, 82-85 (1995) (discussing disparate economic and racial impacts of the criminal justice system and consequently greater imperative for assistance of counsel); Taylor *Alternating Visions*, *supra* note 18, at 66 (noting added disadvantages of prejudices against poor and minority defendants in criminal justice system); Smith, *supra* note 70, at 47 ("Indigent criminal defendants have often been victimized in countless ways themselves.").

20. See, e.g., Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 789 (1995) ("[T]he public defender's clients are the epitome of the class of individuals that the public is convinced is the cause of crime. Public defender clients are uniformly poor, mostly Black, and routinely perceived as social outcasts."); Taylor, *Alternating Visions*, *supra* note 18, at 2441 (noting "the negative presumptions that actors in the criminal justice system and members of this society hold against poor people of color, who tend to be those charged with crimes") (footnotes omitted); *id.* at 2468 (noting "the presumptions of guilt that attach because of class and race") (footnote omitted).

21. See Freedman, UNDERSTANDING LAWYERS' ETHICS, *supra* note 17, at 39-48.

22. See, e.g., Barbara A. Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 178 (1983) (describing the "social worker's reason" for public defender work).

23. THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 29 (1981); Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319 (1987); see also Thomas L. Shaffer, *Less Suffering When You're Warned: A Response to Professor Lewis*, 38 CATH. U. L. REV. 871 (1989).

24. Leslie Griffin, *The Relevance of Religion to a Lawyer's Work: Legal Ethics*, 66 FORDHAM L. REV. 1253, 1259-61, 1277-80 (1998) [hereinafter Griffin, *Legal Ethics*].

protected from disciplinary sanction or other penalty, when they have a "good faith" religious basis for doing so.²⁵ Professor Griffin herself acknowledges the shortcomings of this approach, particularly the difficulty of establishing and enforcing consistent governing standards, and thus prefers the "civil disobedience" approach, in which the lawyer acts according to his religious beliefs and suffers any consequent punishment from the profession and the law.²⁶ As a practical example of the latter approach, Professor Griffin hypothesizes a scenario of a Catholic lawyer who discloses her client's plan to kill someone.²⁷ As Professor Griffin describes it, the lawyer is then professionally disciplined for revealing a client confidence; publicity surrounding the penalty raises a public uproar, and the legislature changes the rule of client confidentiality to include an exception for imminent bodily harm; the lawyer participates in drafting the new rule (though in doing so relies on American constitutional and common law traditions rather than Catholic precepts); and subsequent theological debate results in a definitive statement from the Pope endorsing the new rule.²⁸ In Professor Griffin's view, this scenario illustrates an appropriate resolution of conflict between professional and religious imperatives — the "corrective role" that religion can play in the legal profession.²⁹

Model professional rules recognize that the prospect of death or serious bodily harm to another allows a breach of client confidentiality,³⁰ and a sense of the gravity of Professor Griffin's factual premise is widely shared.³¹ Applying the "civil disobedience" ap-

25. *Id.* at 1259-60.

26. *Id.* at 1260-61, 1277-79.

27. *See id.* at 1277-79.

28. *See id.* at 1278.

29. *See id.* at 1275.

30. *See* MODEL RULES Rule 1.6(b)(1) ("A lawyer may reveal . . . information [relating to the representation of a client] to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117A(1)(a) (Proposed Final Draft No. 1, 1996) ("A lawyer may use or disclose confidential client information when and to the extent the lawyer reasonably believes necessary to prevent . . . death or serious bodily injury . . .") (quoted in Monroe H. Freedman, *The Life-Saving Exception to Confidentiality: Restating Law Without the Was, the Will Be, or the Ought to Be*, 29 LOY. L.A. L. REV. 1631, 1639 (1996) [hereinafter Freedman, *The Life-Saving Exception to Confidentiality*]). Professor Griffin's argument is premised on the absence of such a provision. *See* Griffin, *Legal Ethics*, *supra* note 24, at 1277-8 n.80.

31. *See, e.g.,* Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, A Guilty Client, An Innocent Condemned Man, and An Ethics-Seeking Defense Counsel*, 29 LOY. L.A. L. REV. 1611 (1996) (arguing that it is reasonable to disclose client confidences in extreme circumstances where otherwise irreparable in-

proach to less compelling facts, however, such as revealing the location of a murder victim's body to ease the suffering of the victim's family,³² exposes three fundamental problems with the approach. Two of these problems — the ambiguity of religious teachings and the role of legislation — will be addressed respectively in the latter two sections of this Essay. The third problem, which is the primary problem for the purposes of this Essay, is that the client is completely forsaken in the "civil disobedience" scenario. The client is, in fact, simply excluded from the analysis. The likely consequences of the lawyer's "civil disobedience" for the client include criminal charges (or incriminating evidence on the pending charges) and consequent punishment. Professor Griffin's civilly disobedient lawyer thus becomes an informant against her client.³³

The problem from the perspective of the client is one of notice and choice. Professional rules require a lawyer to keep information learned from a client confidential.³⁴ Clients know of this obligation, or are informed of it the first time they meet with their attorneys. As such, they rely on it when they speak with their attorneys.³⁵ For an attorney then to breach that promise is nothing

jury to third party would occur); Freedman, *The Life-Saving Exception to Confidentiality*, *supra* note 30, at 1631 (stating opinion that "human life should take precedence over confidentiality"); Robert P. Lawry, *Damned and Damnable: A Lawyer's Moral Duties With Life on the Line*, 29 LOY. L.A. L. REV. 1641 (1996) [hereinafter Lawry, *Damned and Damnable*] ("As current law and ethics rules stand, I hope a general exception would be implied, allowing lawyers to make such a disclosure to save the life of a wrongfully convicted person.").

32. This is the much-discussed "Lake Pleasant Bodies" case. *See* *People v. Belge*, 372 N.Y.S.2d 798 (Onondaga County Ct.), *aff'd*, 376 N.Y.S.2d 771 (App. Div. 1975); *see also* Griffin, *Legal Ethics*, *supra* note 24, at 1280; Steven H. Hobbs, *The Lawyer's Duties of Confidentiality and Avoidance of Harm to Others: Lessons from Sunday School*, 66 FORDHAM L. REV. 1431, 1436-37 (1998) (noting that the Belge court wrestled with implications of balancing clients' constitutional protections "against the general interests of society and the particular interests of the victim's families"); Lawry, *Damned and Damnable*, *supra* note 31, at 1654-55 (arguing that lawyers in Belge case were morally justified in keeping their silence).

33. The result is the same, of course, with disclosure to prevent death or serious bodily harm. *See also* FREEDMAN, UNDERSTANDING LAWYERS' ETHICS, *supra* note 17, at 115-16 (consequences for criminal defendant upon disclosure of his perjury).

34. *See* MODEL RULES Rule 1.6; *see also* MODEL RULES Preamble at ¶3 ("A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.").

35. Not all clients, of course, divulge harmful information on the basis of this guarantee. Some withhold it out of mistrust or fear, or the belief that disclosing it might temper the commitment of their attorney to fight for acquittal or dismissal of the charges. Others freely incriminate themselves, to police officers as well as defense counsel, in apparent ignorance of the rule.

short of a betrayal of the client.³⁶ Thus, in Professor Griffin's "civil disobedience" scenario, religious values may triumph, society may be bettered by a changed rule, and the lawyer herself may be vindicated, but an unwitting human being has been sacrificed in the process. The client had no notice that his reliance on the professional code — the law — could be turned against him for the sake of other interests, let alone that his own lawyer could do the turning. And in the case of the indigent criminal defendant, the client had no role in selecting the lawyer who then incriminated him. Though this result is arguably justifiable if necessary to prevent death or serious bodily harm to another, it is hardly justifiable (if at all) otherwise.

Some scholars have proposed that attorneys disclose their religious or moral parameters to clients at the outset and secure the clients' consent to those parameters before agreeing to represent them.³⁷ The option to request different counsel is not, however, typically available to the criminal defendant who receives a court-appointed lawyer.³⁸ That lawyer herself therefore must be commensurately limited in her ability to control the terms of the representation. Scholars also endorse "morally counseling" clients during the course of the representation, though they typically advise doing so only with caution and restraint.³⁹ The possibility that lawyer and client may not have shared values is all the greater with

36. For a less strident view, see Bruce A. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 *FORDHAM L. REV.* 1307, 1311 (1998) [hereinafter Green, *Lawyer Discipline*] ("Given lawyers' particular duty 'to encourage respect for the law,' it might seem anomalous to allow lawyers to opt out of the particular rules of professional conduct that they find offensive on religious or moral grounds." (footnote omitted) (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-6 (1980) and MODEL RULES Preamble). *But see also* Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 *GEO. J. LEGAL ETHICS* 19, 40-41 (1997) [hereinafter Green, *Personal Values*] (noting that a lawyer's withdrawal from representation on the basis of a conflicting personal belief "might reasonably be perceived [by the client] to be an act of betrayal").

37. *See, e.g.,* Azizah Y. al-Hibri, *Faith and the Attorney-Client Relationship: A Muslim Perspective*, 66 *FORDHAM L. REV.* 1131, 1139 (1998) [hereinafter al-Hibri, *Faith and the Attorney-Client Relationship*]; Green, *Personal Values*, *supra* note 36, at 55; Harold S. Lewis, Jr., *Shaffer's Suffering Client, Freedman's Suffering Lawyer*, 38 *CATH. U. L. REV.* 129 (1988).

38. *See also* Taylor, *Alternating Visions*, *supra* note 18, at 2440-41 (noting that "consent . . . may be illusory" when given by the client of a public defender who discloses a formal conflict of interest).

39. *See, e.g.,* Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 *FORDHAM L. REV.* 1469, 1495-99 (1998); Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 *HOUS. L. REV.* 327, 379-97 (1998); *see also* Green, *Personal Values*, *supra* note 36, at 41-52 (discussing appropriate scope of and limitations on moral and religious counseling of clients).

indigent criminal defendants, whose education and outlook typically differ radically from those of the attorney,⁴⁰ and who may already question the fairness — the “morality” — of the circumstances that underlie the criminal charges against them. Moral counseling by a public defender thus could threaten the client’s trust, which is essential to the representation and difficult for a court-appointed attorney to establish. It also could be coercive,⁴¹ or simply irrelevant.⁴² This means not that moral advice by a public defender is forbidden,⁴³ but that it should be dispensed, if at all, only with extraordinary care.

Because of the unique circumstances of court-appointed counsel, scholars who urge that attorneys’ representation of clients and advice to them be more infused with religious and moral values often temper the exhortation with respect to such counsel.⁴⁴ The argu-

40. Cf. Ogletree, *Beyond Justifications*, *supra* note 2, at 1283-84 (noting that most law school graduates are white and of middle- to upper-class means); Cochran, *supra* note 39, at 394-95 (discussing difficulty of moral discourse “across cultural boundaries” and need for lawyer to be sensitive to differences in moral values).

41. See Lesnick, *supra* note 39, at 1498, 1499 (noting client’s “vulnerabilities” and the danger of oppression by the lawyer); Green, *Personal Values*, *supra* note 36, at 46-47 (uninvited “theological dialogue” with client could be “abusive”).

42. Moral or religious issues are possibly the last factors a public defender could successfully urge a client to consider in deciding between, for instance, pleading guilty and going to trial, or whether or not to impeach a truthful incriminating witness. Cf. Cochran, *supra* note 39, at 329 (“The client’s interest in freedom may conflict with the client’s interest in forgiveness, reconciliation, and a clear conscience.”). They may also be the last issues about which the client wants to hear from his lawyer. Cf. B. Carl Buice, *Practicing Law to the Glory of God*, 27 TEX. TECH. L. REV. 1027, 1032 (1996) (“People want different things from their priest and their lawyer.”); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 6 (1951) (“The priest handles other people’s spiritual aspirations. A lawyer handles other people’s troubles.”).

43. Cf. MODEL RULES Rule 2.1 (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”); FREEDMAN, *UNDERSTANDING LAWYERS’ ETHICS*, *supra* note 17, at 50-52, 57 (discussing lawyer’s duty of moral consultation with client).

44. See, e.g., Cochran, *supra*, note 39, at 393 (noting that in “morally counseling” the client, “when the client has not chosen the lawyer or would have a difficult time changing lawyers, the lawyer should be less directive”); Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 FORDHAM L. REV. 1469, 1492 (1998) (“To accept personal reasons for unwillingness [on the part of appointed criminal defense counsel to undertake particular actions on behalf of clients], given the pervasive inadequacy of compensation and litigation support for criminal defense work, may well be to step out onto a slippery slope . . .”); Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9, 56-60 (1995) (considering the “greater risks” of “morally activist lawyering” in “the poverty law setting,” including the possibility that moral considerations could dampen the zeal that legal services lawyers bring to representing their clients).

ment is easily made explicit with respect to public defenders. Criminal defendants, unlike parties in other legal matters, face the deprivation of liberty or life. Constitutionally-mandated guarantees — the right to trial, the right to counsel, the privilege against compulsory self-incrimination, the presumption of innocence — are reflected in special procedures and special leeway for counsel in order to protect against the erroneous deprivation of life or liberty. Indigent criminal defendants are uniquely disadvantaged in the criminal justice system, as in society at large, and special care must be taken to ensure that they receive the same protections as criminal defendants of better means. Court-appointed counsel must therefore be held rigorously to uniform standards of professional conduct in representing them.⁴⁵

That a criminal *prosecutor* also is governed by special rules of professional conduct strengthens the argument. Just as the relative powerlessness of the criminal defendant entitles him to special procedural protections, and his attorney to special professional rules, the power of the prosecutor binds her to special obligations. The prosecutor must, for instance, disclose exculpatory information to the defense.⁴⁶ She also is enjoined from prosecuting charges she knows are not supported by probable cause.⁴⁷ And she must “serve justice” rather than seek to “win.”⁴⁸ These special rules reflect fundamental societal values about how criminal laws should be enforced, and embody a resolution of the often competing goals of law enforcement and individual liberties. The juxtaposition of the special rules for prosecutors and those for criminal defense counsel reflects a careful balance between the state’s power to prosecute and punish and the individual’s right to protect himself against that power. For one side to act inconsistently with the rules that govern it upsets that balance; to do so to the disadvantage of the client it represents thus is to disserve both that client and society, which has approved that balance.⁴⁹ Moreover, each side *ex-*

45. See also David Luban, *Are Criminal Defenders Different?*, *supra* note 16, at 1756-57 (arguing that the problem with vesting “ethical discretion” in the criminal defense lawyer is that “the temptations to offer only a minimal, perfunctory defense are immense for the vast majority of the criminal bar”).

46. See MODEL RULES Rule 3.8(d); *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995).

47. See MODEL RULES Rule 3.8(a).

48. See FREEDMAN, *UNDERSTANDING LAWYERS’ ETHICS*, *supra* note 17, at 214-15.

49. Cf. Green, *Personal Values*, *supra* note 36, at 59 (“[It could be argued that] because the professional norms embody the professional community’s understanding of what it means to be a good lawyer, they are presumptively justified and worthy of respect.”) (footnotes omitted).

pects the other side to represent its client in accordance with the governing rules (as does the judge). For the criminal defense lawyer to change the rules vis-à-vis only his client is to doubly disadvantage the client, by depriving the client of his lawful rights and not working a commensurate change in the prosecutorial powers that necessitate and justify those rights.

In other lawyer-client relationships, it may well be appropriate for lawyers to take a more affirmative moral role in the representation and for religious values to inform this morality. Professor Allegretti's "covenantal model" is one proposal for such a lawyer-client relationship.⁵⁰ For religion, morality or other considerations to affect a lawyer's decision whether to represent a client in the first place is, moreover, fully appropriate outside of the context of court appointments. Just as a private physician may choose not to treat a patient,⁵¹ a lawyer serving private interests may choose not to serve a particular client or cause.⁵² Lawyers, public defenders included, should also take moral responsibility for the clients and causes they represent.⁵³ Once a lawyer has agreed to represent an individual, however, the lawyer cannot vary the terms of that representation according to standards that are not shared by the client or known to her and that are not reflected in rules of professional conduct.⁵⁴ This axiom only can be stronger when the lawyer acts as

50. Joseph G. Allegretti, *Lawyers, Clients, and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 FORDHAM L. REV. 1101, 1116-29 (1998) (describing a model connecting religious faith and legal practice).

51. See AMA PRINCIPLES OF MEDICAL ETHICS ¶ VI (1992) ("A physician shall . . . be free to choose whom to serve . . ."); AMA CODE OF MEDICAL ETHICS Standard 8.10 (1992) ("Physicians are free to choose whom they will serve."); *id.* Standard 9.06 ("[A] physician may decline to accept . . . [an] individual as a patient."); *id.* Standard 9.12 ("The creation of the physician-patient relationship is contractual in nature. Generally, both the physician and the patient are free to enter into or decline the relationship."). *But see id.* Standard 9.12 ("[P]hysicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, or any other basis that would constitute illegal discrimination.").

52. See FREEDMAN, UNDERSTANDING LAWYERS' ETHICS, *supra* note 17, at 49, 57; Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 FORDHAM L. REV. 1339, 1353-54 (1998); Green, *Personal Values*, *supra* note 36, at 53.

53. See, e.g., Monroe H. Freedman, *Religion is Not Totally Irrelevant to Legal Ethics*, 66 FORDHAM L. REV. 1299, 1304 (1998) [hereinafter Freedman, *Religion is Not Totally Irrelevant*] ("Lawyers are morally accountable. A lawyer can be 'called to account' and is not beyond reproof for the decision to accept a particular client or cause." (citing FREEDMAN, UNDERSTANDING LAWYERS' ETHICS, *supra* note 17, at 71)).

54. See, e.g., FREEDMAN, UNDERSTANDING LAWYERS' ETHICS, *supra* note 17, at 50, 71; Green, *Lawyer Discipline*, *supra* note 36, at 1311; Lesnick, *supra* note 39, at 1493-94 (calling this "[a] strong version" of the distinction between the attorney's

an agent of the state — a public servant — in fulfilling an obligation the state has assumed, and the client does not choose who fulfills that obligation in representing him. For a public defender to base his decisions in representing a client on anything other than the client's legal interests and objectives would be both unprofessional and immoral.⁵⁵

Indeed, in the tumult and hectic pace of the criminal courts, and in light of the stakes involved and the high caseloads public defenders typically carry, the public defender is perhaps most like an emergency-room physician, whose duty is to treat all patients to the best of her abilities regardless of both the circumstances that brought them to the emergency room and the social or moral ramifications of treating them.⁵⁶ An emergency-room physician might well deplore those circumstances — an overdose from recreational drug use, for instance, or gunshot wounds from an assault instigated by the patient himself. The physician may also have religious objections, for instance to sexual behavior that is associated with contracting HIV, or to specific medical procedures like abortions or blood transfusions, but the patient's medical needs and wishes govern. The emergency room is no place to try to change society's mores or to stand on religious principle, and unwitting patients in need of care cannot be the pawns of such change or principle. Neither should poor people charged with crimes.⁵⁷

III. Religious Views On The Work Of Public Defenders

Perhaps the most that can be said about religious views on the work of public defenders is that they are equivocal. Scholarly com-

freedom to decide which clients to represent and his freedom to decide how to represent them).

55. Cf. Marc D. Stern, *The Attorney as Advocate and Adherent: Conflicting Obligations of Zealousness*, 27 TEX. TECH L. REV. 1363, 1369 (1996) ("The religious attorney may believe that the [client's] temporal advantage is a snare and a delusion, but it is the client's consent and understanding of his or her own interests alone that empowers the attorney to act. Anything more is a usurpation by the lawyer, and as to which the attorney is an interloper."); Green, *Personal Values*, *supra* note 36, at 44 ("[I]t would be improper for a lawyer to recommend a course of conduct [for the client] when the lawyer's motivation is to promote the lawyer's unexpressed personal views.").

56. See AMA PRINCIPLES OF MEDICAL ETHICS ¶ VI (1992) (excepting "emergencies" from physician's freedom to choose patients); AMA CODE OF MEDICAL ETHICS Standard 8.11 (1992) ("[T]he physician should . . . respond to the best of his or her ability in cases of emergency where first aid treatment is essential.").

57. The emergency-room analogy also perhaps best captures Professor Freedman's compelling description of a client as someone who comes to a lawyer "because he or she is suffering in some way or, at least, is trying to avoid suffering." Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U. L. REV. 331 (1987).

mentary on Jewish and Christian perspectives on lawyering readily illustrates this. In one view, for instance, though the Jewish tradition is "hostile" to a lawyer's adversarial role, Jewish principles of equal justice for strangers and the poor support a Jewish lawyer's "upholding the rule of [secular] law."⁵⁸ According to this view, a Jewish lawyer may properly defend a client to the extent permitted by governing secular law.⁵⁹ The rules of professional conduct for lawyers are, of course, part of that law. A competing view, however, prohibits a Jewish lawyer from assisting guilty clients, or distinguishes asserting technical or affirmative defenses from asserting innocence and prohibits the latter.⁶⁰

Christian interpretations are equally inconclusive. In one view, secular laws are valid and binding only insofar as they are consistent with "natural law" and moral standards.⁶¹ In another view, Christian lawyers are permitted to use all means available under governing secular laws to prevent the punishment of a guilty person.⁶² In a combination of the viewpoints, the Christian criminal defense lawyer is exhorted to seek all available procedural and substantive protections on behalf of a client but must employ "moral" means in doing so, and thus may not attack the truthful witness.⁶³

Islamic tradition too is open to interpretation. Islamic law is replete with protections for the criminal defendant, and forgiving

58. Russell G. Pearce, *The Jewish Lawyer's Question*, 27 TEX. TECH L. REV. 1259, 1265, 1269 (1996).

59. See Michael J. Broyde, *Practicing Criminal Law: A Jewish Law Analysis of Being a Prosecutor or Defense Attorney*, 66 FORDHAM L. REV. 1141, 1150-51 (1998).

60. See *id.* at 1147-49; see also Leslie Griffin, *The Lawyer's Dirty Hands*, 8 GEO. J. LEGAL ETHICS 219, 270 (1995) [hereinafter Griffin, *Dirty Hands*] ("Jewish law recognizes a presumption of innocence for the accused party, so the lawyer can assume that her client is innocent and therefore worthy of defense. An admission of guilt, however, destroys the presumption of innocence and excludes the possibility of legal representation for one who confesses to a crime." (citing BASIL F. HERRING, *JEWISH ETHICS AND HALAKHA FOR OUR TIME* 113-14 (1984))); Russell G. Pearce, *To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence*, 29 LOY. L.A. L. REV. 1771, 1772-76 (1996) (presenting opposing views derived from Jewish tradition on disclosing client confidences).

61. See, e.g., Griffin, *Dirty Hands*, *supra* note 60, at 267-68.

62. See, e.g., Shaffer, *Serve the Guilty*, *supra* note 4, at 1033 ("I am entitled . . . to see to it that the legal engines of punishment operate according to their own rules — one of which is that I am entitled to use the rules to avoid the punishment provided in the rules."); see also Griffin, *Dirty Hands*, *supra* note 60, at 268 (lawyer not at fault for defending guilty criminal since the "evil act" is already committed).

63. See Collett, *supra* note 52, at 1377 ("The intentional destruction of the reputation of the truthful witness, presentation of the perjurious client's testimony — these means are forbidden for Christian lawyers.").

rather than punishing the guilty is repeatedly stressed.⁶⁴ At the same time, Muslims are enjoined from aiding others in wrongdoing,⁶⁵ and not all individuals enjoy the same degree of procedural protection.⁶⁶ Thus, in Islam, as in other religions, even the most basic tenets can lead to opposite conclusions about the propriety of specific actions on behalf of a client.⁶⁷

The conclusion reached by Professor Freedman is therefore inescapable: serving one's client within the parameters of the adversary system may very well be "the essence of religion . . . [and] justice."⁶⁸ As Professor Freedman succinctly points out, "religion" does not tell us whether, or when, its injunctions to aid those in need and keep confidences are trumped, or even contradicted to begin with, by its exhortations to respect human life and strive for "justice."⁶⁹ The most "religious" course of conduct for a public defender is thus arguably to do precisely what the law and the professional rules allow and exhort him to do, which is also precisely what the judge, prosecutor, society, and, most importantly, the client expect him to do. The lawyer who is not comfortable doing so, for religious reasons or others, should not be a public defender.

IV. How Religion Should Influence the Work of a Public Defender

That religious considerations should not alter a public defender's representation of a client to the legal detriment of the client does not mean that religion has no role in the public defender's work. Religious imperatives and exhortations may well sustain and in-

64. See, e.g., Awad, *supra* note 5, at 94-99 (discussing presumption of innocence, right to indictment, right to present defense, limitations on search and seizure and interrogation, and rights to notice and opportunity to be heard); *Qur'an*, v:34 (remitting punishment for armed robbers who repent); *id.* at v:39 (same for thieves); *id.* at xxiv:5 (false accusers); *id.* at xxv:70 (idolaters, murderers and adulterers).

65. See, e.g., *Qur'an* v:2 ("Help ye one another [i]n righteousness and piety, [b]ut help ye not one another in sin and rancor.").

66. See, e.g., Awad, *supra* note 5, at 100-01 (delineating categories of accused individuals on the basis of known "character" and differing procedural protections for each category).

67. See also al-Hibri, *Faith and the Attorney-Client Relationship*, *supra* note 37, at 1136 (discussing difficulty of client-centered representation in light of Islamic obligation to strive for justice); Azizah al-Hibri, *The Muslim Perspective on the Clergy-Penitent Privilege*, 29 LOY. L.A. L. REV. 1723, 1725, 1730-31 (1996) (discussing Qur'anic injunctions not to betray trusts and confidences and limitations on those injunctions for greater social good); *id.* at 1732 (discussing duty of Muslims to abide by governing secular laws or work to change them).

68. Freedman, *Religion is Not Totally Irrelevant*, *supra* note 53, at 1299.

69. *Id.* at 1300-01.

spire a public defender in his work, and help him to treat clients with the compassion and dignity many feel is necessary to representing indigent criminal defendants.⁷⁰ Compassion and a sense of dignity are often the only benefits indigent criminal defendants receive from their representation, and the public defender is almost as often the sole provider of those benefits. Also, religion can motivate a public defender to transcend the immediate legal exigencies of his clients and provide assistance beyond that required by the pending charges and the professional rules.⁷¹

In addition, religion can shape the work of the public defender by influencing changes in the professional rules themselves.⁷² Professor Freedman's campaign to create an exception to client confidentiality when necessary to prevent death or serious bodily injury is a model for such change, though its ground was not explicitly religious.⁷³ And 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. The "restorative justice" movement provides one model for such reform, in its focus on healing for victims,

70. See Abbe Smith and William Montross, *The Calling of Criminal Defense*, _____ MERCER L. REV. _____ (forthcoming 1999) (detailing Jewish and Christian precedent for public defender work); Monroe H. Freedman, *Legal Ethics from a Jewish Perspective*, 27 TEX. TECH L. REV. 1131 (1996) [hereinafter Freedman, *Jewish Perspective*] (discussing Jewish precedent and inspiration for compassion toward clients and zeal on their behalf); Shaffer, *Serve the Guilty?*, *supra* note 4, at 1027-29 (discussing Biblical inspiration for serving the guilty and "the repulsive"); Griffin, *Legal Ethics*, *supra* note 24, at 1258-59 (listing various possible motivations religion can provide for lawyers).

71. Cf. Michelle S. Jacobs, *Legal Professionalism: Do Ethical Rules Require Zealous Representation for Poor People?*, 8 ST. THOMAS L. REV. 97, 108-09 (1995) ("Why shouldn't we advocate that in the poverty area, zealous representation means providing holistic assistance to the client?") (suggesting, as example, affirmative obligation to refer alcoholic client charged with driving under the influence of alcohol to treatment) (footnote omitted).

72. See Griffin, *Legal Ethics*, *supra*, note 24, at 1265-67, 1273; Thomas D. Morgan, *The Relevance of Religion to a Lawyer's Work — Legal Ethics: A Response to Professor Griffin*, 66 FORDHAM L. REV. 1313, 1315-19 (1998) (discussing interplay between religious and professional ethics).

73. See Freedman, *The Life-Saving Exception to Confidentiality*, *supra* note 31; FREEDMAN, UNDERSTANDING LAWYERS' ETHICS, *supra* note 17, at 102-03, 165; Morgan, *supra* note 72, at 1315 ("I believe a source of Professor Freedman's motivation was theological, and while I do not recall him making an explicit appeal to Jewish tradition, I do not understand his failure to do so to have been other than a rhetorical choice.") (footnote omitted); see also Freedman, *Jewish Perspective*, *supra* note 70, at 1136-37 ("I have written extensively for thirty years about the need to change the existing [professional] rules to conform with the constitutional and religious ideals that I believe in. One of many examples is the rule that forbids a lawyer to reveal a confidence in order to save an innocent human life.").

reconciling victims and offenders, and reintegrating offenders into the community.⁷⁴ Criminal laws and enforcement policies that disparately burden certain segments of the population can also be attacked, community religious institutions can be strengthened to prevent crime at its roots, and spiritual and other counseling can be made available to clients as a supplement to their legal representation. With his unique combination of legal training, firsthand knowledge and divine inspiration, the religious public defender is ideally situated to launch such initiatives. The legislature, professional rules committee, bar associations and religious and community organizations—all serve as appropriate venues for a public defender to act on religious beliefs that he feels compel a change in the dictates of defending the indigent accused. The specific case of any one client is not such a venue.

Conclusion

Perhaps more so than other lawyers, the religious public defender must be “schizophrenic,” separating his professional obligations from his religious commitments.⁷⁵ Having accepted the responsibility of representing indigent criminal defendants, the public defender is duty-bound to draw a line between the mandates of that responsibility and competing religious obligations. For this reason, some might conclude that the work of public defenders is immoral *per se*. Others might argue that the immorality lies with the adversary system, or the motivations that underlie it.⁷⁶ As this Essay has attempted to show, “religion” can support or defeat any one of these propositions. Whatever answer he chooses, the public defender must remain faithful to his client.

74. See generally Daniel Van Ness and Karen Heetderks Strong, *RESTORING JUSTICE* (1997); HOWARD ZEHR, *CHANGING LENSES* (1990).

75. See Stern, *supra* note 55, at 1370.

76. Cf. Luban, *Are Criminal Defenders Different?*, *supra* note 45, at 1755 (“[I]t is inherent in the defender’s role that its duties will deviate to at least some degree from common moral requirements not to assist wrongdoers or aid in frustrating legitimate social efforts to control them. The defender’s morality will inevitably deviate from common morality, perhaps even conflict with common morality”); Wasserstrom, *supra* note 15, at 12 (noting that “the amoral behavior of the criminal defense lawyer is justifiable” given the threat the state poses to the criminal defendant).

