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SERVING THE GUILTY*

Thomas L. Shaffert†

My purpose here is to ask whether there is a moral way for a lawyer to serve the guilty. I think this is an issue Mr. Rightor would have enjoyed. He was devoted to the instruction of future lawyers, particularly those who studied law at this law school and were enrolled in his classes in professional ethics. He was equally devoted, in the midst of a busy and successful law practice, to care and compassion for the occasional professional colleague who had, as Mr. McDonald said in his eulogy, "through ignorance or . . . financial plight . . . allowed his feet to stumble." Mr. Rightor was devoted as well to the victims of lawyers and of the society that lawyers create.

The Issue

How to serve the guilty is probably the oldest and most persistent of moral questions for trial lawyers. Its age and persistence are evidenced by the vehemence with which non-lawyers condemn us for serving the guilty, and by the energy and sophistry the organized profession gives to defending trial lawyers.

I pose the question here in terms of a quaint treatment of it—the character of Thomas Furnival, barrister and member of Parliament, in Anthony Trollope's novel *Orley Farm*.¹ Trollope's reaction to Furnival is in many ways the reaction our youngest students have to us lawyers when they first come to law school and ask us whether it is possible to represent guilty clients. Furnival's reaction to himself is like the reaction law professors have to that question.

* This paper is the text of the Inaugural Rightor Lecture given in memory of Edward R. Rightor (1896-1962), a member of the Louisiana Bar and an instructor in Professional Ethics at Loyola University School of Law. It represents the first in a series of annual lectures to be sponsored by this law school's St. Thomas More Club. The purpose of these lectures will be to focus on various ethical considerations that an attorney must face in the practice of law.

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1. A. TROLLOPE, *ORLEY FARM* (A. A. Knopf, New York 1950).

Orley Farm is the story of a guilty woman, Lady Mary Mason, who has forged what appears to be a codicil to the will of her dying husband, Sir Joseph Mason. She has done this 20 years before the novel begins. The codicil has been proved in litigation through Lady Mason's testimony; her son Lucius is now in possession of Orley Farm. Sir Joseph's eldest son, Joseph Mason, has been cheated out of the farm. He is a child of Sir Joseph by a former marriage; Lucius is Lady Mason's only child. Her forgery is like the misdeed of the biblical Rebecca; she has acted dishonestly to benefit her child.

A scheming and vengeful solicitor named Dockwrath has as he believes been mistreated by Lucius and he sets out to prove the forgery from old documents which will show how Lady Mason managed to get through the will contest. What she did was this: On the day the codicil was supposedly executed the witnesses to it signed another document for Sir Joseph—a partnership deed. Lady Mason gave the codicil that same date; the witnesses to the deed thought (and testified) that what they signed was the codicil. Dockwrath produces the partnership deed and the aging witnesses, and the witnesses are prepared to say that they signed only one paper. He then succeeds in getting Joseph Mason and his respectable London lawyers to agree to prosecute Lady Mason for perjury, based on her testimony in the will contest. That is the tension of the story. Trollope thought it was his best plot in some 47 novels.

Lady Mason returns to the barrister who represented her in the will contest—Thomas Furnival. Furnival represents and befriends her even though he comes quickly to see what happened and to believe that his client is guilty of forgery and perjury. He serves the guilty with misgiving and professional bluster, as we justify to our students the fact that we and our colleagues serve the guilty. I want to pause, now, for a while, over these loyalties and emotions of Thomas Furnival.

Lady Mason is an attractive client—pretty, upright, dependent, pathetic but appealing in her pathos. That is part of it. Another part is that Furnival has been through this issue once before and then managed to suppress his doubts about her and get her a verdict, a result which convinces Furnival himself that he was right to suppress his doubts:

“Twenty years ago, at the time of the trial, he had at one time thought,—it hardly matters to tell what, but those thoughts had not been favourable to her cause. Then his mind had altered, and he

had learned,—as lawyers do learn—to believe in his own case. And when the day of triumph had come, he had triumphed loudly, commiserating his dear friend for the unjust suffering to which she had been subjected. . . .

But the first stages of dealing with Lady Mason on the second occasion raise the old doubts—and, because Furnival is sharp, he can see what happened. Nonetheless:

Mr. Furnival did think that he might induce a jury to acquit her; but he terribly feared that he might not be able to induce the world to acquit her also. As he thought of all the case, he seemed to put himself apart from the world at large. He did not question himself as to his own belief, but seemed to feel that it would suffice for him if he could so bring it about that her other friends should think her innocent. It would by no means suffice for him to secure for her son the property, and for her a simple acquittal. It was not that he dreaded the idea of thinking her guilty himself; perhaps he did so think her now—he half thought her so, at any rate; but he greatly dreaded the idea of others thinking her so.

So there were three things working on Mr. Furnival—personal attraction, what he thought of as loyalty, and a zeal born of professionalism. In all of these ways and in each of them a lawyer comes to believe in his own case. Trollope makes an interesting distinction!

Furnival is attracted to Lady Mason; he feels a loyalty to her which is more than professional loyalty: He wants to save her from the world's disapproval—which means that Furnival knows that the world cannot forgive her as he does. "He wished he could know whether or no she were innocent, without knowing whether or no she were guilty." In fact,

He said to himself that he could forgive the fault. That it had been repented ere this he did not doubt, and it would be sweet to say to her that it was very grievous, but that yet it might be forgiven. It would be sweet to feel that she was in his hands, and that he would treat her with mercy and kindness. But then a hundred other thoughts forbade him to think more of this. If she had been guilty—if she declared her guilt to him—would not restitution be necessary? In that case her son must know it, and all the world must know it. Such a confession would be incompatible with that innocence before the world which it was necessary that she should maintain. Moreover, he must be able to proclaim aloud his belief in her innocence; and how could he do that, knowing her to be guilty—knowing that she also knew that he had such knowledge? It

was impossible that he should ask any such question, or admit of any such confidence.

Mr. Furnival cannot face up to the consequences of Lady Mason's guilt—neither the consequences to her, nor the consequences to himself. If she is guilty, and if he remains by her side, then he is guilty too. It is necessary *to his survival* that she remain, as we lawyers say, *not guilty*. She need not be innocent, but she must be not guilty.

The importance of Lady Mason's being not guilty becomes more prominent as the trial approaches. Mr. Furnival's ardor cools. It bothers him that the nature of the case requires him to engage two criminal trial lawyers whom he secretly regards as not respectable. At the trial, it is neither ardor nor his client's respectability which pulls him through, but professionalism. In other words, it is not her being innocent which pulls him through; it is her being not guilty:

. . . On these three days—seeing that he had not shaken the matter off, he rose to his work as though he still loved her, as though all his mind was still intent on preserving that ill-gotten inheritance for her son. It may almost be doubted whether at moments during these three days he did not again persuade himself that she was an injured woman.

But:

. . . as he sat down he knew that she had been guilty! To his ear her guilt had never been confessed; but yet he knew that it was so, and, knowing that, he had been able to speak as though her innocence were a thing of course. That those witnesses had spoken truth he also knew, and yet he had been able to hold them up to the execration of all around them as though they had committed the worst of crimes from the foulest of motives! And more than this, stranger than this, worse than this,—when the legal world knew—as the legal world soon did know—that all this had been so, the legal world found no fault with Mr. Furnival, conceiving that he had done his duty by his client in a manner becoming an English barrister and an English gentleman.

That is all possible, we lawyers say, because Lady Mason, although not innocent, was entitled to a lawyer who would treat her as not guilty.

Trollope editorializes in that fashion, but, great novelist that he is, he makes his point better by comparing Furnival with other

lawyers in the story—particularly with his junior colleague Felix Graham, and with Mr. Chaffanbrass, a wily criminal defense lawyer, brought down from the old Bailey, whom Trollope regards as typical.

Graham is unable to be in the case, he says, unless he believes Lady Mason to be innocent. He disapproves of the way English lawyers face questions of guilt and innocence. He believes that a trial lawyer should seek to find and demonstrate truth, and not to serve guilty clients. Furnival has to pretend to Graham that he, Furnival, believes in Lady Mason's innocence. Chaffanbrass has contempt for Graham. Trollope uses Graham and Chaffanbrass to frame Furnival's moral problem. When Furnival first suggests to Chaffanbrass that they retain Graham as their junior helper:

“‘Felix Graham is very much interested in the case,’ said Mr. Furnival, ‘and is as firmly convinced of her innocence as—as I am.’ And he managed to look his ally in the face and to keep his countenance firmly.

“‘Ah,’ said Mr. Chaffanbrass. ‘But what if he should happen to change his opinion about his own client?’

‘We could prevent that, I think.’

‘I’m not so sure. And then he’d throw her over as sure as your name’s Furnival.’

‘I hardly think he’d do that.’

‘I believe he’d do anything.’ And Mr. Chaffanbrass was quite moved to enthusiasm. “‘I’ve heard that man talk more nonsense about the profession in one hour, than I ever heard before since I first put a cotton gown on my back. He does not understand the nature of the duty which a professional man owes to his client.’”

Graham is diffident in the trial, of course; Chaffanbrass growls at him; and Trollope says that he can understand why Chaffanbrass would feel as he does:

Considering the lights with which he had been lightened, there was a species of honesty about Mr. Chaffanbrass which certainly deserved praise. He was always true to the man whose money he had taken, and gave to his customer, with all the power at his command, that assistance which he had professed to sell. But we may give the same praise to the hired bravo who goes through with truth and courage the task which he has undertaken. I knew an assassin in Ireland who professed that during twelve years of practice in Tip-

perary he had never failed when he had once engaged himself. For truth and honesty to their customers—which are great virtues—I would bracket that man and Mr. Chaffanbrass together.

Neither Chaffanbrass nor Graham struggles with the moral problem. Graham, like some of our youngest students, would establish a system in which accused people have no defense if lawyers think them guilty—a system in which lawyers, not juries and judges, decide questions of guilt. Graham would deprive us of our right to regard our clients as not guilty. Because Graham is self-righteous in his adherence to the principle, he has to be duped by his colleagues and he has to avoid personal contact with his client. The world has to hide itself and to pretend, for his benefit.

Mr. Chaffanbrass does not believe that guilt has anything to do with the case. He supposes his clients to be guilty even when they are innocent (as in his defense of Phineas Finn, in *Phineas Redux*). He is the sort of lawyer our youngest students disapprove of; he seems to have no morals at all. He acts as if lawyers have a license to ignore both the truth and the consequences of what they do.

Mr. Furnival is neither a hired bravo nor a Pharisee. He gets no comfort from sitting in judgment, and no comfort from refusing to sit in judgment. Furnival struggles. In the end he resolves his struggle through self-delusion. When erotic attraction has cooled, and when there is no joy left in loyalty to his client, he comes to believe in his case because he sees advocacy as a job. If it is service, it is not service to his client, but service to the government.

There are two moral questions here: One is that Lady Mason has cheated her step-son, and continues to do so. The other has to do with a social fact: The guilty are repulsive. Lady Mason, as pretty and respectable as she is, comes to be repulsive to everyone in the story, even to herself. Her neighbor and friend, Sir Peregrine Orme, loves her and is at one point engaged to marry her, but he gives her up when he learns of her guilt. He withdraws his household from her, and becomes a dying recluse because the tragedy of her guilt is his tragedy, too—a tragedy he cannot bear with her but must bear alone. Lady Mason's closest friend, Sir Peregrine's daughter-in-law, Mrs. Orme, still comforts her, but Mrs. Orme also urges Lady Mason to confess her guilt and make restitution. Lucius, Lady Mason's son and beneficiary of her treachery, says at the end, "She can never be my mother again." And Lady Mason herself, although she is acquitted, admits her guilt, restores the

farm to Joseph, and banishes herself to Germany. "She bowed her head and kissed the rod, she prayed that her release might come to her soon."

Revulsion and the New Testament

The social and personal reality I am concerned about is revulsion. The New Testament is filled with repulsive people; one of the most prominent things the New Testament does is provide an answer to the issue of revulsion. But the New Testament answer is a difficult answer. The problem of whether to serve the guilty is answered with stories of Jesus having lunch with tax collectors, and choosing his friends from among prostitutes, thieves, violent revolutionaries, and Samaritans. "Many bad characters," St. Matthew says (*Matthew 9:10*). Evidence that the New Testament answer is difficult is available in the fact that few Christians follow Jesus' example in this respect, and almost as few can understand it. It may be that the processes by which the world condemns people are important and useful processes. It may be, as is often the case with New Testament answers, that Jesus' solution is painful.

Emile Durkheim noticed, nearly a hundred years ago, that crime is "an integral part of all healthy societies." It is, he said, "a movement of the public temper" more than it is an assault on the community. It is a process for clarifying values more than it is a challenge to values. It is both the stimulus and the product of a society's need to stand for something. If we didn't have criminals we would have to invent them; without criminals we would have no public morals. Seen in this sociological perspective, Lady Mason, in her crime, contributed to the maintenance of the private-property economy of Victorian England and to the tradition which provided for the families of dead men by having their property devolve on their eldest son.

Kai Erikson compared Durkheim's theory of deviance with the criminal-court records of the Massachusetts Bay Colony.² He discovered that the earliest definitional American society defended and defined itself through three "crime waves," each of which occurred when it had a need to draw itself together, and each of which served to locate and underline important moral values. The

2. K. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* (Wiley Pub. Co. New York 1966).

first of these crime waves was the antinomian controversy of the 1650's; the second was the immigration of the Quakers about five years later; the third was the witch trials at the end of the 17th century. Erikson notices several things about these processes of definition which are important in understanding why it is that New Testament stories on serving the guilty provide a painful answer:

—Deviance is conferred. It is not accurate to define crime as you would define a disease—as if society were a body and misconduct were pathological. Ann Hutchinson and others who were identified as deviant in the antinomian crisis were not markedly unusual in their behavior, but their behavior came at a time when it was important to support the authority of the leaders of the colony. The Quakers were, in their theology and their political objectives, similar to the Puritans, but they came to the colony at a time when its theocratic principles were at risk. In each case, and in the case of the witches, who arose when expansion of the colony was threatening its political integrity, the deviants gave the colony a needed opportunity to reinforce values which were central to its survival.

—This is not a game, as some deviance processes are. We have ways of establishing good manners and civility without condemning people, but the criminal law is not one of them. Criminal law is played out on the borders of the community; it is a confrontation between those who act at the limits and those “whose special business it is to guard the cultural integrity of the community.” This was, given the importance of real property and of inheritance in the island economy of England in 1860, equally true of Lady Mason and of what she was accused of doing. She forged the will, and then lied about it, because she thought it was wrong of her husband to give nothing to her child. She knew, too, that she had confronted one wrong by committing another.

—The deviant and those who seek to punish her are cooperators. The criminal cooperates in the process by condemning himself; each side nourishes the other. There is something to be said for Felix Graham's concern for honesty and decency in his society. And there is something to be said for Lady Mason's role in helping Felix get his values straight. The deviant “is not a bit of debris spun out by faulty social machinery, but a relevant figure in the community's overall division of labor.”

—Deviants are sometimes evil and sometimes not. The powers of the world condemn the deviant out of their own needs, so that, during the fervor of war, the conscientious objector is as much an outcast as the thief. And if, occasionally, the outcast becomes a successful revolutionary or reformer, the prosecutors of yesterday become the outcasts of today. The important point about the sociological analysis is that power, serving as always to perpetuate itself by processes of fear, causes the deviant, the outcast, to become repulsive.

—The community, which always has and always needs processes of condemnation, seems to lack processes of reconciliation. It always manages to throw people out—it always *has* to do that—but it lacks ways to get them back in again. Mrs. Orme, who was Lady Mason's comforter, knew that; that is why she is a model of virtue in her care for Lady Mason. But she is also the person who insists on repentance, and the person who knows that, repentant or not, Lady Mason cannot get back in. Mr. Furnival sees that fact, too, and determines to save Lady Mason from public suspicion of guilt. Sir Peregrine, who loves Lady Mason, sees the same fact and his knowledge throws him into despair. (Sir Peregrine is the father of Mrs. Orme's late husband. He is Lady Mason's neighbor, and until he learns she is guilty, her fiance.) The price of being a deviant, of cooperating in the society's important task of defining itself, is a tragic price; the stories of Jesus, while they may say something to those of us who propose to serve the guilty, do not make them any less guilty. Sometimes there is nothing for God to forgive (Ann Hutchinson, or the biblical leper), and sometimes the outcast has done something sinful (Lady Mason, the good thief), but even if God forgives them, or doesn't need to, and we are supposed to forgive them, or don't need to, the world is not likely to forgive them. Repentance is not a way back in; repentance is tragic.

The point of Mr. Furnival's concern to vindicate Lady Mason publicly, as well as judicially, is just this point. If she is condemned publicly, her respectability is finished. When Mrs. Orme insists that Lady Mason must admit her guilt, Mrs. Orme knows, and Lady Mason knows, that the results of repentance will be tragic. Lady Mason will lose her respectability, once and for all, just as Lucius will lose Orley Farm. Repentance is not a way back into the community. Mrs. Orme practices what Aquinas called "fraternal correction"—the virtue of charity. She is a good friend, in all

senses of the word; she is unconditionally caring. But she does not hide the truth, not from herself, and not from Lady Mason. "Love does not keep a record of wrongs; love is not happy with evil, but is happy with the truth" (I. Cor. 13:6). Mrs. Orme knows and says that Lady Mason cannot get back in.

Jesus forgave the woman taken in adultery, and saved her from capital punishment. He sent her away shrunken and redeemed, but she was no less an adulteress (*John* 8:1-11). The social effects of repentance, in other words, are not redemptive; God's Kingdom is not of this world.

This is the contrast between two kingdoms. The powers of this world turn people out—communities turn people out—and they do it inevitably. They do it in the process of defining and defending themselves; turning people out is part of the definition of a community which is formed by the powers of this world. Jesus' answer to that fact is to say that his Kingdom is not part of the community formed by the powers of this world; the world of power through fear is not part of his Kingdom. His alternative is stark and tragic: He gathers his followers around him, but he does the gathering on Calvary. His Kingdom, as Professor John Howard Yoder puts it, is the Cross.³

Jesus does not re-integrate social outcasts. Mrs. Orme knew that, and Lady Mason knew that. He redeems outcasts. The tax gatherer who became St. Matthew was not turned into a respectable Jewish citizen; neither was Cornelius, the Roman officer to whom the Lord sent St. Peter (*Acts* 10); neither was the woman taken in adultery. When Jesus touches the leper, Jesus became a leper. Jesus was then forbidden to enter the city openly. He was required, like the leper, to live outside, and to call out "unclean, unclean" (*Leviticus* 13:45-46; *Mark* 1:42-45).

The stories of Jesus and the guilty people of his day offer an answer to this question of how a lawyer is to serve the guilty, but it is a hard, hard, answer. Jesus offers comfort, but his is the comfort of one who is, as Karl Barth puts it, wholly other.⁴ It is the comfort

3. J. YODER, *THE POLITICS OF JESUS* (William B. Eerdmans Grand Rapids, Michigan 1972).

4. K. BARTH, *THE EPISTLE OF THE ROMANS* (6th ed. E. O. Hoskyns trans. Oxford University Press London 1968). See also E. BUSCH, *KARL BARTH: HIS LIFE FROM LETTERS AND AUTOBIOGRAPHICAL TEXTS* (John Bowden trans. Fortress Press Philadelphia 1976).

of a Kingdom which is wholly other. The comfort is the comfort of the Cross and Resurrection. It involves, for a Christian lawyer, the agony of living, working, and wielding power in the wordly kingdom and seeking at the same time to stand with the outcasts under the Cross.

Lawyers' Answers

None of Trollope's three lawyers meets the problem of serving the guilty with a New Testament answer. Mr. Chaffanbrass claims for himself the benefits of the adversary ethic. He takes advantage of a license, which no other citizen enjoys, to overlook the consequences of what he does. Those who argue for such a license claim that it is essential to the purposes of the government that lawyers be given this special license: The government will do justice only if every person called to book before the government has an advocate. Mr. Chaffanbrass would say that Lady Mason must have her case argued fully, so that judge and jury can do justice, and that it is the mission of other lawyers to argue the case for the prosecution. Neither set of lawyers need worry about the outcome; that is the government's worry. Mr. Chaffanbrass's moral claim is the one Trollope, who was a man of the world and the son of a trial lawyer, could not understand; but it is the dominant principle in our Code of Professional Responsibility, and, for the most part, the answer we law professors give to our youngest students when they wonder how lawyers can serve the guilty.

Felix Graham does not stand on Calvary either. He argues, as modern "public interest" lawyers often argue, that lawyers should see to the benefit of the community. It is more important, in Graham's view, for Lady Mason's lawyer to get at and proclaim the truth, than it is for him to argue for Lady Mason's acquittal. The reason it is more important to find and proclaim the truth is that a lawyer is a public servant. "It all resolves itself into this," Graham says,

Let every lawyer go into court with a mind resolved to make conspicuous to the light of day that which seems to him to be the truth. A lawyer who does not do that—who does the reverse of that, has in my mind undertaken work which is unfit for a gentleman and impossible for an honest man.

But, Trollope says, "No living orator would convince a grocer that coffee should be sold without chicory; and no amount of eloquence

will make an English lawyer think that loyalty to truth should come before loyalty to his client." And, therefore, Graham is not professionally successful. Mr. Chaffanbrass, who is successful, condemns Graham as unprofessional. Furnival, who is both respectable and successful does not trust Graham. He has to lie to Graham, and to protect him from the lies of others.

Thomas Furnival feels a little of the agony of trying to serve the kingdom of the world and also stand on Calvary, or at least he feels agony which is like that agony. He resolves his agony illegitimately, though. At first, he does so through the memory of a past triumph and an erotic attraction to his client, and then through the familiar juices of competition. Furnival, finally, longed to beat Sir Joseph Mason a second time, and he did; the excitement of the courtroom carried him through. His client was an incidental professional necessity. He resolved the agony as trial lawyers, I think, often do—through the emotional dynamics of a demanding, intricate game—a game which, I will say for myself, I find more engrossing than any other game I have ever played.

None of these lawyers has an answer which will stand up to moral analysis. Mr. Chaffanbrass takes advantage of a license to be immoral. He doesn't bother to argue why he should have such a license; those who do argue say that the professional privilege is necessary in order for a lawyer to serve the state. A modern American lawyer might even say that he does not serve the guilty at all; he serves the Constitution. The problem with that as a moral position is that it includes no way to decide if the system is worth serving. Service to power can end one up in Buchenwald—not as a victim but as an executioner.

Felix Graham claims a dispensation from Mr. Chaffanbrass's loyalty to Lady Mason, but his claim is essentially the same claim Mr. Chaffanbrass makes. Graham also rests his morality on duty to the state. He seeks to serve the public interest in much the same way an elected official, or a civil servant, seeks to serve the public interest. His system does not offer, any more than that of Mr. Chaffanbrass, a way to evaluate what the state is up to.

And Furnival—poor Thomas Furnival—suffers from his passions. (That is how one refers, in the Thomistic tradition, to being subject to lust, jealousy, anger, and pride; it is suffering from one's passions.) He makes no clear moral claim at all, and, because he does not, all of his decisions are made for him. He stands firmly in

mid-air. Many lawyers work out the problem of serving the guilty in this way. The ambivalence of it is expressed in our official rules on serving the guilty. ("Ambivalence" is a word derived from chemistry, which means being pulled simultaneously in two directions.) On the one hand, "It is ethical for a member of the bar to represent the accused even if he knows the latter to be guilty. In fact, it may be on occasion an ethical duty to do so." But, on the other hand,

There are certain inherent limitations. . . . There must be no relationship between them except purely that of attorney and client; counsel must retain control of the presentation of the case, and neither the client nor any outside person may dictate to him how to conduct the case. . . . Counsel is not expected to stultify himself in an attempt to advance his client's interest. The attorney is justified in withdrawing, where, during the progress of the litigation, the client engages in conduct that tends to degrade or humiliate the attorney.

This is what you sound like when you rationalize your service in the courts of the worldly kingdom and still try to stand on Calvary. In the courts of the worldly kingdom, respectability—honor, if you like—is of first importance. Our Code of Professional Responsibility often sounds as if our highest duty is to preserve the integrity of the legal profession. But, on Calvary, we are in the service of adulteresses, lepers, prostitutes, thieves, Samaritans, tax gatherers, publicans, and heathens—and we are so much in their service that we risk being regarded by the world as they are regarded. That is the Christian life, and there is no honor in it.

Two Tentative Thoughts on a Theology of Serving the Guilty

An adequate moral answer to the problem of serving the guilty would, I think, involve first a turning *toward* the guilty.

It would involve a more generous response than our official rules allow for; it would involve even a loving relationship, an I-Thou relationship, as Martin Buber put it.⁵ The Gospel seems to say that we *have* to do that; we are commanded to do it. The Christian system for approaching outcasts is manifestly a system for, above all, *being with* them.

5. MARTIN BUBER, *I AND THOU* (notes by Walter Kaufmann, Scribner New York 1970).

My second tentative thought is that we should be honest about looking for the face or force which makes it hard for us to serve the guilty. The criminal law is, at least in large part, a system for adding coercion to an agreed-upon set of moral rules. It is in some ways a system of sin but it is not a system of redemption, because, as Kai Erikson demonstrates, it offers no way back in. It is, in that sense, not a moral system so much as it is a system for protecting power. Erikson's most remarkable finding in the criminal-court records in colonial Massachusetts was that crime rates were stable. When the fervor broke out, and people were prosecuted for disobedience, or for Quaker theology, or for black magic, the incidence of other crimes declined. The amount of social energy given to prosecution remained stable. There seemed to be fewer thieves, more witches, fewer murderers, more Quakers. One offense became less important as another became more important. The amount of energy which the worldly kingdom devoted to its system of right and wrong was constant. That energy was always directed to the offense which most threatened the maintenance of power. The method and the product of that social system was fear. You were supposed to become afraid of disobedience as you would be of theft.

Another way to put that is that the kinds of crime which showed up in the records were related to the things which power feared most—disobedience as the colony began to become diverse; unacceptable liberalism in belief as liberalism began to gain ground in Mother England; alliances with the devil as the theocratic regime began to crumble. Evil appeared as the elders lost authority, and as the elders lost authority evil appeared. "Men who fear witches," Erikson says, "soon find themselves surrounded by witches." In Lady Mason's case: "Men who become jealous of private property soon encounter eager thieves."

I am aware of a difficulty here. It is this: Is there no difference between the guilty who are *really guilty* and the guilty who are only victims of the pretensions and delusions of power and fear? Is there no difference between Ann Hutchinson, a conscientious objector to war, or the 17th century Quaker, and a murderer, a Mafia don, or Lady Mason? Durkheim and Erikson would say there is none; all are cast out; none gets back in. Jesus would say there is. "Do not suppose that I have come to abolish the Law. . . ; I did not come to abolish, but to complete" (*Matthew* 5:17). He cured the leper; he also forgave the woman taken in adultery, and saved

the good thief (for eternity only, though, not from the cross). He served people differently, depending on whether *real guilt* was present or not. But it is true— isn't it?—that he did serve them all. The guilty were no more repulsive to him than those who were innocent victims. It did not seem to make a difference to him whether his client could get back in the city, as the leper did, or not. I notice, as a tentative way to cope with the problem of real guilt, that the law of Jesus is not like the law we serve in the courts of the world. His is the law which finds people *innocent*. Not guilty. And not "not guilty," either. But innocent:

"If splendor accompanied the dispensation under which we are condemned, how much richer in splendor must be that one under which we are acquitted! Indeed, the splendor that once was is now no splendor at all; it is outshone by a splendor greater still. For if that which was soon to fade!—*is* soon to fade—had its moment of splendor, how much greater is the splendor of that which endures!" (II Cor. 3:8-11)

The problem for us Christian lawyers is not: How *can* we serve the guilty? It is: Why don't we serve the guilty? Why do we need excuses such as the Constitution, or the Code of Professional Responsibility, or the integrity of the legal profession when we have the story of Jesus? I think we fail to serve the guilty because we are afraid. Whether the criminal law is a system of morals or not, it is a system of fear and power. First and always it is a system which defends itself through fear. It is not the association of people Jesus proclaimed. Stanley Hauerwas expressed, recently, what I mean here:

[b]y learning to be forgiving we are enabled to view other lives not as threats but as gifts. Thus in contrast to all societies built on shared resentments and fears, Christian community is formed by a story that enables [Christians] to trust the otherness of the other as the very sign of the forgiving character of God's Kingdom.⁶

It is not guilt which keeps us from serving the guilty. It is fear.

6. Hauerwas, *Jesus: The Story of the Kingdom*, 26 THEOLOGY TODAY 303, 316 (1978).

