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THE LEGAL ETHICS OF SERVANTHOOD

THOMAS L. SHAFFER*

The morals of professionals cannot avoid being vicarious. We act in the nature of things for another person. His ends become our ends in the process of our acting for him. A pastor advises, performs priestly services for, and prays over his parishioner — all toward the spiritual health of the parishioner, and in consequence of the parishioner's desire for spiritual health. The physician practices his art so that his patient may realize his wish to be healthy; the mechanic repairs the machine so that the machine will do what the mechanic's client wants it to do.

The legal profession has exalted its version of this vicarious morality into the ethics of the professional adversary. A lawyer will sometimes, in reference to this system, call himself a "hired gun," that is, a mercenary — one whose morals are so completely vicarious that he kills one person because a third person wants him to.

In the law as in the clergy the vicarious nature of the vocation usually involves the professional becoming involved in the moral choices of his client — and this in a way that may not be as persistently present in other professional relations. One example of this is the wealthy dowager who decides to disinherit her blameless children and give her wealth to the Moral Majority. Consider the professionals who enable her to make that decision: the physician who delivers her from influenza so that she can turn her attention to legal business need not concern himself with what she is doing in her restored health; the mechanic who unfreezes the fuel lines in her car, so that she can drive to town to see about her will, need not ask what she will do with the car when it begins to work again. But her lawyer, unless he really is a hired gun — and few lawyers are — is likely to ask himself about the will he drafts. He may — many lawyers would — wonder about the righteousness of the end he is hired to accomplish. He is apparently not as free as the mercenary or the physician or the mechanic to say, "It's none of my affair."†

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If that is so of lawyers — and it may, in other and rarer circumstances, be true of physicians and mechanics — it may be useful to notice that the moral question being asked is, “What is the client up to?” And that question implies another question: “How is the client, in his association with me, changing? What is he becoming *because of me*?” Not only does my professional assistance enable him to *do* something; it also enables him to *become* something. When I understand that this is so, I may say to myself, my hope is that the new person will be a better person than the old person was: Pastors do not point their parishioners toward hell; physicians consider it immoral to administer lethal drugs, even at the behest of the state (that is, they do not seek to change their patients from life to death); lawyers consider it immoral to advise clients on how to become criminals. We professionals try not to make things worse. My client will be a different person because of his association with me, as he will be a different person after any intense association; and to notice that is to ask, “What do I want him to be?” or, to put that another way, “What am *I* up to?” Professional morals, because they are vicarious, tend to obscure the fundamental moral question — What am *I* up to? — and thus professionals find it necessary to ponder questions of whether to lie, to kill, or to destroy — questions that would be readily answered if the professional were acting only for himself.

Such questions are what make professional ethics interesting. I raise them in order to ask the question I would like mainly to talk with you about, a consequential question, and that is whether the ethics of the New Testament are of any value in discussing professional morality. Such a question is probably of value to Jews and Christians; the New Testament is mostly about Jesus of Nazareth and (1) professionals to whom Jesus is of ultimate importance might claim to find value for their lives in his life. And (2) the God

†Arguments for the adversary ethic in the legal system are not usually arguments that say, “It’s none of my affair;” few lawyers are that callous. These arguments — as formulated, say, by Professor Monroe Freedman — are that a morality of role is appropriate for lawyers as advocates, and that the role is necessary because of the larger welfare of the community or of the state. They are arguments that say a special morality is justified when a larger good is being served. Thus the lawyer who uses his skill to suppress evidence against a rapist will not admit that he has taken on the morals of rape; nor will he argue that rape is none of his affair. He will argue instead that he is acting in a role in order to serve the state. Some would argue (Martin Luther, for example) that in serving the state the lawyer is serving his neighbor.

of Jesus is the God of Israel. The moral principles of Jesus are the moral principles of Israel. The question is of value, too, I hope, to (3) those who are neither Christians nor Jews. The moral principles of Jesus have often been of interest and influence in the lives of non-believers. Nineteenth-century American legal ethics, for example, regularly invoked what Judge Sharswood called "the high and pure morality, which breathes through the Sermon on the Mount," without implying that to be moral a lawyer would have to confess the faith of Israel and of the church.

I

Christian notions of service to others were first developed in a culture that understood and accepted the morality of service, of doing unto others as one would be done to. Jesus announced that ancient Jewish moral principle, as his contemporary Rabbi Hillel did: "You shall treat your neighbor lovingly, for he is like yourself" (Leviticus 19:18, J. Mackie's translation). That moral principle supports offering service and then carrying out the service for the well-being of the person served. This service to another was and is consequent on serving the God of Israel, a loving God, a God who is addressed as Father. This God says, "I will make allowances for them as a man who makes allowances for the son who obeys him. Then once again you will see the difference between an upright man and a wicked one, between the one who serves God and the one who does not serve him" (Malachi 3:17-18, Jerusalem Bible).

Jesus announced this Jewish moral principle of obedient service in three ways:

- (1) The service Jesus enjoins is pursued to the point of suffering.
- (2) The service Jesus enjoins is powerless.
- (3) The service Jesus enjoins is given a justification in terms of its social consequences; that justification is the reconciliation of one person to another.

Taken as a whole, the Christian emphasis points to a professional morality of servanthood — of being a *servant* and not merely being *of service*. The refinements turn service into servanthood.

A. *Suffering*. Jesus said, "Among pagans it is the kings who lord it over them, and those who have authority over them are given the title Benefactor. This must not happen with you. No; the greatest among you must behave as if he were the youngest, the leader as if he were the one who serves. For who is the greater: the one at table or the one who serves? The one at table, surely? Yet here am I among you as one who serves" (Luke 22:24-27, Jerusalem Bible). Jesus drew on the moral theology of Israel, the morals of obedient service to God. He also drew specifically on four mysterious songs from the Book of the Prophet Isaiah; he laid claim, for himself and his followers, to the image in Judaism of the Servant of the Lord, the servant who suffers. One of those songs said that the Servant of the Lord brings justice (Isaiah 42:1-4). One said that this servant brings "light to the nations . . . salvation . . . to the ends of the earth" (Isaiah 49:1-6, Jerusalem Bible). One spoke of the Servant of the Lord as humiliated in his own generation but finally vindicated by God (Isaiah 50:4-9). And one of them spoke of the servant as a deviant, one who is made ugly by the touch of God and who suffers for his deviance:

a thing despised and rejected by men,
 a man of sorrows and familiar with suffering,
 a man to make people screen their faces;
 he was despised and we took no account of him . . .
 Harshly dealt with, he bore it humbly,
 he never opened his mouth,
 like a lamb that is led to the slaughterhouse,
 like a sheep that is dumb before its shearers
 never opening its mouth . . .
 They gave him a grave with the wicked,
 a tomb with the rich,
 though he had done no wrong
 and there was no perjury in his mouth.
 Yahweh has been pleased to crush him with suffering.
 If he offers his life in atonement,
 he shall see his heirs, he shall have a long life
 and through him what Yahweh wishes will be done.

(Isaiah 53:3, 7, 9-10, Jerusalem Bible.)

The Servant of the Lord brings justice to Israel, and salvation to the other nations. He is, like the prophets, vindicated by God, but, before vindication, he is (like some of the prophets) despised and rejected of men — a deviant, a leper. The first Christians made

dogmatic claims on these songs — most notably the claim that Jesus's death by torture was resolved, as Isaiah said, in glorification, in the Resurrection.* The moral point I am making is not that dogmatic claim, but the claim that Jesus invoked this image of the suffering servant as a command to his followers. That is the way his followers are to be — the way Christians are to live with their clients — not merely to *serve* them but to be their servants, and to expect to suffer for it. This is a clear and radical command. It brings to mind Kierkegaard's melancholy observation: "Remove from Christianity its ability to shock . . . and it is altogether destroyed. It then becomes a tiny, superficial thing, capable neither of inflicting deep wounds nor of healing them."

B. *Powerless*. Jesus announced that a kingdom had come. The way one belonged to the kingdom that had come was to be powerless. "Let the children come to me," he said, "and do not stop them; for it is to such as these that the kingdom of God belongs. I tell you solemnly, anyone who does not welcome the kingdom of God like a little child will never enter it" (Luke 18:17, Jerusalem Bible). One could ponder what it means to welcome anything as a child welcomes what happens to him. It does not mean innocence; children are not innocent. It does not mean simplicity; children are as complicated as adults are. But being a child does mean being without power. The kingdom Jesus speaks about is a kingdom one enters when he is able to welcome it as one who does not share in worldly power.

But this absence of power — renunciation of power — is not a circumstance; it is a choice. And it has a purpose. "The self-abasement of Christ to powerlessness, to the renunciation of all obvious marks of distinction, is . . . *intended to render a service*," Thieliike says (emphasis added). For example, Jesus's refusal to use power at the behest of Satan (Luke 4:1-4; Mark 4:1-11) serves the dignity and freedom of men; it shows that what the Father Jesus speaks of makes women and men subjects through their own free decision rather than objects of the power of others. When Jesus performs miracles he uses them to teach with rather than to compel with or threaten. He seeks powerlessness even when he *uses* power

*The Jewish tradition, according to Cohon, sees the image in Isaiah as the personification of Israel, but it is possible to see the Servant of the Lord as also a specific person (cf. Rowley, McKenzie) — and this without Christian allusions.

(as, say, in the curing of the leper, whereby touching the leper he cures the man's disease but in the process makes a leper of himself; Mark 1:40-45).

C. *Reconciliation*. In the Letter to the Hebrews an early Christian moral theologian says, "Let us keep firm in the hope we profess, because the one who made the promise is faithful. Let us be concerned for each other, to stir up a response in love and good works" (Hebrews 10:23-24, Jerusalem Bible). The Jewish follower of Jesus here claims his Jewish heritage. Rabbi Hanina bar Hama, commenting on Proverbs (25:21-22), said, ". . . even if the enemy come to your house to slay you, and he is hungry or thirsty, give him food and drink; for thereby God will reconcile him to you . . ." (*cf.* II Kings 6:21-23). Jesus, when giving directions to his followers on how they were to resolve their disputes, said, "If your brother does something wrong, go and have it out with him alone, between your two selves. If he listens to you, you have won back your brother" (Matthew 18:15, Jerusalem Bible). The aim of moral life with clients, according to these texts, is to serve in such a way that the person served will himself become a servant — that he will himself be moved to love, to good works, to the company of those who serve. This is a *social ethic*; it makes an argument, a consequential, ethical argument, for these otherwise curious demands for suffering and for powerlessness. It gives suffering and powerlessness a social consequence and uses that consequence as a reason for being a servant. These teachings do not show exactly how reconciliation will occur; what they say is that it occurs as a consequence of suffering, powerless servanthood. The teachings do suggest, though, that one result is the conversion of the person served. Conversion to what? *To suffering and powerlessness*. This social ethic is curious: St. Paul says, "If my blood has to be shed as part of your own sacrifice and offering — which is your faith — I shall still be happy and rejoice with all of you and you must be just as happy and rejoice with me." He speaks of a fellow believer who has been persecuted, Epaphroditus, and says, ". . . it was for Christ's work that he came so near to dying." And of Jesus himself, the exemplar, Paul says:

His state was divine,
Yet he did not cling
to his equality with God
but emptied himself

to assume the condition of a slave.

(Philippians 2:7, 17, 30; Jerusalem Bible.)

A curious teaching. Karl Barth says of it, “. . . no one is . . . to be pitied if he cannot at first belong to this minority, nor to be envied if he really must.”

The moral command or example for professionals is to take on the servant's task, a task that summons the professional out of what Karl Barth called an “impossible isolation and concentration on (self),” that one do that, not in order to be satisfied in his altruism but in order to make his professional action correspond to the action of Jesus, who is a suffering servant. In this response one serves God by being servant to his clients, by being a servant in suffering, in powerlessness, and in reconciliation. That is the legal ethics of servanthood. It is apparently the way to be a Christian and a lawyer. It will no doubt come out about the same way for the clergy, physicians, and mechanics. It will probably come out in a similar way for Jews: The theology behind the ethic is specific for believers, in any case, and it is that the suffering follower contributes in his obedience to God's action as Creator and Redeemer of mankind. For Christians the focus of obedience is Jesus as Lord and Savior; for Jews the focus is a personal identification with and within Israel as Servant of the Lord.

This leaves open a question on the usefulness of this ethical teaching for non-believers. Was this radical view of servanthood useful for, say, the many Americans of Thomas Jefferson's generation who admired the ethics of the New Testament but would probably not have been attracted to suffering and powerlessness or to the notion that God comes into the world through the suffering of His people? What are the *secular* arguments for suffering servanthood?

My colleague Steven Hobbs pointed me in this regard to the paradoxical Oriental psychology of Lao Tsu, in poetry sometimes remarkably like Second Isaiah, on the triumph that is in submission:

One who takes on himself the humiliation
of the state
Is called a ruler worthy of offering
sacrifices to the gods of earth and
millet;

Is called a king worthy of dominion
over the entire empire.

* * *

The way is broad, reaching left as
well as right,
The myriad creatures depend on it
for life yet it claims no authority.
It accomplishes the task yet lays
claim to no merit.
It clothes and feeds the myriad
creatures yet lays no claim
to being their master.

* * *

It is because it never attempts
to be great that it succeeds
in becoming great.

From another world, the Scots Calvinist William Barclay argues that Jesus's notion is a common-sense competitive way to get ahead. I relay this without endorsement: "It is only the man who will consent to serve more than anyone else who will really rise high," Barclay says. "It is a law of life that service leads to greatness; and that the higher a man rises the greater the servant he must be . . . no one ever loved a man who was always out for himself."

II

The American legal profession has been affected by this radical legal ethics of servanthood. It is *so* radical that one might guess that it would be made trivial among the faithful and ignored by everybody else, and from those guesses might suppose that nothing would come of it. But you will find in our legal history and in our lawyer stories more than a trace of the notion that we overcome evil by suffering the outrage of evil.

Take, for example, the model held up to law students of Andrew Hamilton, the champion of free speech, who represented the journalist Zenger before the colonial tyrants of New York, or of John Adams defending the British soldiers after the Boston Mas-

sacre, or of the brave Army lawyers who defended Generals Homma and Yamashita and in the process defied Douglas MacArthur. It is possible to claim for such American-lawyer-hero stories, and to claim seriously, a bit of the powerlessness and suffering and reconciliation of the biblical ideal. And American lawyers in the 18th and 19th centuries thought of it just that way — biblically. David Hoffman, the father of American legal ethics, was a formidable Bible scholar; he was approved of even at Princeton, which was in those days the defender of the old American Calvinism. Judge George Sharswood was a Sunday-School teacher; most of those who formulated the codes of legal ethics of a century ago came from and returned to the church. If they failed they failed *as* Christians and Jews. The movement to purge American professional ethics of all theology is a recent thing, and its rationale is historically and thematically shallow.

James William McClendon, a contemporary moral theologian, does an interesting thing with some of our modern hero stories; he demonstrates how they *are* a theology of suffering servanthood. Martin Luther King, Jr., is one of his examples; Dag Hammarskjöld is another. Dr. King was the hero and exemplar of the civil rights movement; Hammarskjöld was the model peacemaker. King was also a Baptist preacher; he came from, returned to — never left — the Southern black church. His life *was* a theology of exodus and atonement; the images of his leadership (those he followed and those he left to us) are the images of the servant who overcomes evil by suffering it, who is powerless, who kneels in the street and prays for his persecutors. Hammarskjöld, the man of peace, is seen in his diary as a follower of the Cross and not as the practitioner of peaceful co-existence that he seemed to be at the United Nations — another powerless sufferer whose life was a theology of reconciliation.

So, too, of lawyer heroes — Thomas More, for example, or my favorite of them all, Atticus Finch, of the Maycomb, Alabama, Bar, hero of *To Kill a Mockingbird*. Miss Maudie says, in reference to Atticus's defense of Tom Robinson, that the Christians of Maycomb had Atticus *go for* them. Go where? To the Cross. There Atticus and, even more, his innocent client suffer. There Atticus is the white church, gathered with Rev. Sykes and the black church, gathered in reconciliation at the Cross. The courtroom is the Cross, the Cross showing what men do to one another in the name of the

law. The agony of Southern Christianity is in that story, and it is the recent story of an American lawyer.

III

Professional morals, then, are vicarious. That is implicit in any professional's undertaking to be of service. Biblical professional morals are, as well, the morals of those who serve God. The God of Jews and Christians is a loving Father who serves people and whose command is that his servants serve people, too, and serve them in a specific and radical way — in suffering, in powerlessness, toward reconciliation. This command has continuing influence in professional ethics in America, which, depending on how you look at it, may prove either that we are more theological than we thought we were, or that the Holy Spirit is remarkably persistent.

What I have to try to do in conclusion is to connect this moral theology with the basic question in professional ethics: What do I wish for my client? That is the professional version of the basic moral question for anybody: What am I up to?

I have often thought that I could talk about the question of what I am up to as the professional in professional relationships, which is also the question of what I hope for my client, in terms of three alternatives:

- (1) I hope that my client will be *free*; what I seek for him will be realized when he can choose for himself; or
- (2) I hope that my client will be *right*; what I seek for him will be realized when, looking at his act, I can see that he did the right thing; or
- (3) I hope that my client will be *good*; what I seek for him will be realized when he develops and rejoices in his own moral qualities, when he becomes virtuous.

These answers now seem to me to be too much like moral rules and too little like the Jesus who said that the Sabbath is made for man, not man for the Sabbath. Perhaps we could say that the moral ideal that is unique in the New Testament is not a matter of rules but a matter of how to live with rules. Whether that is right or not, the Sabbath is made for man, not man for the Sabbath. Rules and mor-

al dilemmas are subordinated: Servanthood, in suffering and powerlessness and toward reconciliation, approaches the other not as the occasion of my own moral choice but as one who is cherished. *First* he is cherished and *then* he is a moral dilemma. He is cherished whether he is a moral dilemma for me or not.

It is even starker than that. The other — say, client — is cherished, but not as an equal. He is cherished as a superior, as my master, as the boss. First he is cherished and then, if he becomes a moral dilemma for me, he is given the benefit of the doubt. If we disagree, *he* is probably right. Bosses are entitled to the benefit of the doubt. Servanthood is, in St. Luke's Gospel, a literal notion. The Greek word Luke uses to render Jesus's meaning is the word for a table servant — “waitress” might be a modern English equivalent. St. Paul uses “slave” to express the idea to the Greeks. The New Testament writers thought that Jesus meant for his teaching on servanthood to be taken literally. Notice, for example, that St. John's Gospel focuses the events leading to the Cross and Resurrection on Jesus washing the feet of his companions.

The legal ethics of servanthood will therefore balance my hope that my client will be free against the command that my serving him will reconcile, that he will be restored to his brothers and sisters and be stirred up to love and good works. His destiny is, certainly, to be free, but that is so that he can choose to be reconciled to others and so that he can be liberated, in suffering and without power. My hope for him, in his freedom, is like my hope for myself, in my freedom.

In this way of looking at things, I hope, too, that my client will choose what is right. In his freedom, I hope, he will see clearly and choose bravely and end up doing the right thing. But my servanthood is, as Jesus's was, the renunciation of power — and this means, in professional relations, the renunciation of all of the clout that professionals in our culture have — the power of special knowledge, the status, the paternalism I am seduced into because my client seems to be dependent on me. I am not his master; he is mine. I am not his father; we are together brothers of a Lord who wants us both to be waitresses. If I have power — and heaven knows lawyers have power in America — it is as a means of servanthood and a means inferior to love; otherwise I should renounce it, as Jesus renounced the power to work miracles, lest my power coerce those whom God wants to be free.

And, finally, I hope that my client will grow in virtue, will not only make right choices but will become the sort of person who makes right choices. I want him to be better than he would have been if I had not stumbled into his life. But the price of that growth seems to be suffering — my own, by definition; that is what “compassion” means — but also *his* suffering. That part of servanthood is so hard for lawyers, so radical, that it is all but unacceptable. Our training and self-selection is competitive. Our professional metaphors are to rivalry and are often warlike. We aim to win for our clients in court and, in the office, to prevent their losing. Our best moves are assaults, bombshells, forays, frontal attacks, and rear-guard actions. Everything turns on victory. And so when Anthony Lewis wants to write a book about poor old Clarence Earl Gideon’s finding a friend in court, he uses a biblical battlefield for his symbol. *Gideon’s Trumpet* tells of a lawyer who no doubt served his client but was not his client’s servant. I suspect that servanthood would involve more contact and less victory. Jesus cures the leper, and becomes a leper in the process. Jesus saves the good thief, but he does not rescue him from suffering; the good thief does not come down from the cross until he, too, is dead.

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