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MONROE FREEDMAN: PROPHET OF BIBLICAL JUSTICE

*Timothy W. Floyd**

Commentators often assert that the overriding ideal behind Professor Monroe Freedman's distinctive view of legal ethics was individual autonomy.¹ Professor Freedman's provocative *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*,² and his even more provocative answers, have drawn criticism as being too focused on individual autonomy.³

Certainly, Monroe had a profound respect for individual dignity and autonomy, and he readily asserted that respect for individual autonomy was central to his view of legal ethics.⁴ In what follows, however, I will suggest that his emphasis on dignity and autonomy were derived from an even deeper commitment to justice.⁵ More particularly, Monroe Freedman had a passion for and commitment to justice in the tradition of the Hebrew Bible.

In an article published twenty years ago, *Legal Ethics from a Jewish Perspective*, Professor Freedman stated very directly that his views on legal ethics were derived from Jewish tradition and values.⁶ According to Monroe, the principal themes that motivated his philosophy of legal ethics were "the dignity and sanctity of the

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1. See, e.g., Edward J. Eberle, *Three Foundations of Legal Ethics: Autonomy, Community, and Morality*, 7 GEO. J. LEGAL ETHICS 89, 92 n.10 (1993) (listing Monroe Freedman first among a list of scholars who are "[p]rominent proponents of an autonomy model of legal ethics").

2. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

3. See Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Questions*, 34 HOFSTRA L. REV. 641, 642-49 (2006).

4. Professor Freedman characterized his own work in the language of autonomy: "My view of lawyers' ethics is, therefore, client-centered, emphasizing the lawyer's role in enhancing the client's autonomy as a free person in a free society." Monroe H. Freedman, *Ethical Ends and Ethical Means*, 41 J. LEGAL EDUC. 55, 56 (1991).

5. See *infra* notes 20-32 and accompanying text.

6. Monroe H. Freedman, *Legal Ethics from a Jewish Perspective*, 27 TEX. TECH L. REV. 1131, 1131 (1996).

individual, compassion for fellow human beings, individual autonomy, and equal protection of the laws.”⁷ In that essay, Monroe elaborated upon the Jewish sources for those themes and identified his role models as Moses and Abraham.

Moses, the great leader of Exodus, resolutely advocated for the Hebrews⁸ and insisted to Pharaoh, the most powerful ruler in the world: “Let My people go.”⁹ Moses advocated on behalf of economic and social change in the face of harsh and unyielding opposition.¹⁰ He stood up to the most dominant economic, political, and military power of his day.¹¹ And he did not accept defeat even though Pharaoh continued to stonewall and renege on his promises to free the Israelites.¹² Finally, in the face of Moses’s persistent advocacy, Pharaoh relented and agreed to Moses’s demands.¹³

Preceding Moses was Abraham, who advocated on behalf of the people of Sodom and Gomorrah before the Lord, God.¹⁴ In Genesis, chapter eighteen, God has heard about the great evil of the cities of Sodom and Gomorrah and announces his intention to deal with them harshly if the reports are true:

Abraham came forward and said, “Will You sweep away the innocent along with the guilty? What if there should be fifty innocent within the city; will You then wipe out the place and not forgive it for the sake of the innocent fifty who are in it? Far be it from You to do such a thing, to bring death upon the innocent as well as the guilty, so that innocent and guilty fare alike. Far be it from You! Shall not the Judge of all the earth deal justly?” And the LORD answered, “If I find within the city of Sodom fifty innocent ones, I will forgive the whole place for their sake.” Abraham spoke up, saying, “Here I venture to speak to my LORD, I who am but dust and ashes: What if the fifty innocent should lack five? Will You destroy the whole city for want of the five?” And He answered, “I will not destroy if I find forty-five there.”¹⁵

7. *Id.* at 1134.

8. *Id.*

9. *Exodus* 5:1.

10. *See* Freedman, *supra* note 6, at 1134.

11. *See id.*

12. *See* David B. Kopel, *The Torah and Self-Defense*, 109 PENN ST. L. REV. 17, 23-24 (2004).

13. Of course, Pharaoh reneged on his promise one last time, only to be swallowed up in the Red Sea. *See id.* at 24.

14. *See* Freedman, *supra* note 6, at 1134-35.

15. *Genesis* 18:23-28. I hesitate to bring up Sodom because of the association in popular culture with same-sex acts. But, the Sodom story in Genesis has nothing to do with same-sex relationships—the evil of the people in Sodom was violence toward strangers and sexual assault of the vulnerable. Monroe Freedman himself was far ahead of his time in advocating for lesbian, gay,

As the story proceeds, Abraham pushes his luck. He gets the Lord to agree to spare the cities if forty righteous are found, then thirty, then twenty, and finally ten.¹⁶ Each time, Abraham comes across as more deferential (and cagey)—but the truth is, he courageously stands up to the Lord of the Universe and pleads on behalf of the people. Finally, God agrees to spare the city only if ten righteous are found.¹⁷

In the end, “Abraham wins the argument but loses the case.” God decides to “send[] two angels to go and see if Abraham’s [ten] righteous can be found in Sodom.”¹⁸ But, instead of finding even that small number of good people, the angels come across a “rape-crazed mob bent on violence.”¹⁹ As Fred Clark has said, “[y]ou can have the best attorney in the world, but if you’re going to act like that in court, you’re not doing yourself any favors.”²⁰

In addition to Moses and Abraham, it is clear to me that Monroe stands squarely in the tradition of the ancient Hebrew prophets—of Isaiah and Jeremiah, of Amos, Hosea, and Micah. Monroe believed passionately and advocated zealously on behalf of justice. And, the justice he pursued is the justice of the Hebrew Bible. That justice is embodied most obviously in the prophets.²¹

Prophetic justice as embodied by Professor Freedman, however, is strikingly different from our traditional American idea of justice. American justice idealizes the statue of Lady Justice, a blindfold over her eyes, holding scales in one hand and a sword in the other. The scales convey the idea of neutrality and the weighing of competing interests; they emphasize rationality and the application of neutral principles in decision-making. The blindfold emphasizes equality before the law, that the law is dispassionate and objective, and that decision-making is untainted by bias.

There is nothing wrong with those ideals, but Monroe Freedman knew that our criminal justice system does not live up to the ideals promised by the statue with blindfold and scales. Although our justice

bisexual, and transgender rights, serving as a volunteer legal advisor to a gay rights group in the early 1960s.

16. *Genesis* 18:29-32.

17. *Genesis* 18:32.

18. Fred Clark, *The Righteous Man and the Wicked City: ‘Abraham Pleads for Sodom,’* PATHEOS (July 12, 2012, 10:33 AM), <http://www.patheos.com/blogs/slacktivist/2012/07/12/the-righteous-man-and-the-wicked-city-abraham-pleads-for-sodom>.

19. *Id.*

20. *Id.*

21. For a discussion of the biblical prophets and justice, see Timothy W. Floyd, *Lawyers and Prophetic Justice*, 58 *MERCER L. REV.* 513 (2007).

system promises equal justice under law, we simply do not provide equal justice for everyone. For many, and especially the poor, *injustice* is more apparent than justice. The vast bulk of the civil legal needs of poor individuals and families go unaddressed. And, although indigent criminal defendants have a constitutional right to appointed counsel, the criminal justice system especially fails to provide equal justice. Poor persons accused of crimes do not receive equal treatment in our criminal courts. America imprisons a higher percentage of its population than any nation on earth.²² Those prisoners are overwhelmingly poor and disproportionately people of color.²³ In the most serious criminal cases, those involving the death penalty, the process is rife with arbitrariness, bias, and unfairness. We do not have a principled system that singles out those most deserving for the ultimate punishment.²⁴ One thing that persons on death row do have in common, however, is that they are overwhelmingly poor.²⁵ Moreover, a very high percentage of persons sentenced to death did not have effective defense counsel.²⁶

Our unjust criminal justice system is in part a product of a particular understanding of justice. We in the United States (especially in popular culture) tend to equate “justice” with punishment. Justice consists of giving people what they deserve, and when they do evil and cruel things, justice demands that they receive suffering in return. This mindset sees justice as primarily a matter of retribution—the world as sharply divided into good and evil, and violence directed against “evil-doers” as necessary and, indeed, as God’s will. That is, *punishment* is the way that the scales of justice must be balanced. If justice consists mainly of punishing the guilty, then Professor Freedman’s position in

22. Nick Wing, *Here Are All of the Nations That Incarcerate More of Their Population than the US*, HUFFINGTON POST (May 4, 2015, 8:21 AM), http://www.huffingtonpost.com/2013/08/13/incarceration-rate-per-capita_n_3745291.html.

23. See Aimee Pichi, *Are America’s Jails Used to Punish Poor People?*, CBS NEWS (Feb. 11, 2015, 12:47 PM), <http://www.cbsnews.com/news/how-jails-are-warehousing-those-too-poor-to-make-bail/>; Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL’Y INITIATIVE (May 28, 2014), <http://www.prisonpolicy.org/reports/rates.html>.

24. See Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 450-54 (1995); Timothy W. Floyd, *What’s Going On?: Christian Ethics and the Modern American Death Penalty*, 32 TEX. TECH L. REV. 931, 949-50 (2001).

25. Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 686 (2015) (“The death penalty is also imposed almost exclusively on the poor.”).

26. AM. CIVIL LIBERTIES UNION, *SLAMMING THE COURTHOUSE DOORS: DENIAL OF ACCESS TO JUSTICE AND REMEDY IN AMERICA 7-8* (2010), https://www.aclu.org/files/assets/HRP_UPRsubmission_annex.pdf.

The Three Hardest Questions does not make sense.²⁷ Advocating for the guilty client sometimes means that “guilty” criminal defendants do not receive punishment.

Professor Freedman’s life and work on behalf of social and criminal justice was based not on the blindfold and scales image but, rather, in the spirit of Amos: “[L]et justice roll down like water, and righteousness like an everflowing stream.”²⁸ In *The Prophets*, Rabbi Abraham Joshua Heschel explains that the prophets’ preoccupation with justice is rooted in a powerful awareness of injustice: “Moralists of all ages have been eloquent in singing the praises of virtue. The distinction of the prophets was in their remorseless unveiling of injustice and oppression”²⁹

Heschel emphasizes the *pathos*, or passion, of God. The prophets are not concerned with objectivity, rationality, and neutrality. Rather, they emphasize God’s *passion* for justice and the dynamic drive to achieve justice.³⁰ The divine passion is manifested as compassion for those who are suffering, anger toward those who perpetuate injustice and oppression, and zealous advocacy on behalf of the victims of injustice and oppression.³¹

See the difference. The image of a mighty stream expresses power, movement, and vitality, as opposed to the neutrality, calm, and orderliness of the blindfold and scales. At the very heart of the biblical story, the children of Israel groaned in their suffering under Pharaoh. God did not wear a blindfold when it came to suffering. God heard their cries, remembering the covenant with Abraham, Isaac, and Jacob, and took notice of their suffering and oppression. God’s mighty act of deliverance of the people of Israel from their bondage is the central story of the Hebrew Bible and the foundation for Judaism and for Christianity.

The God of the Bible demands that we hear the cries of the suffering, the widows, the orphans, and the aliens. God demands that we take notice, care for them, and advocate on their behalf against the powers of this world. That is biblical justice.

27. Professor Freedman posits that although strategies employed in defending a guilty man could be viewed as undermining an attorney’s duty to search for the truth, “[s]uch actions are permissible because there are policy considerations that at times justify frustrating the search for truth and the prosecution of a just claim . . . [such as] the maintenance of an adversary system, the presumption of innocence, the prosecution’s burden to prove guilt beyond a reasonable doubt, the right to counsel, and the obligation of confidentiality between lawyer and client.” Freedman, *supra* note 2, at 1482.

28. *Amos* 5:24.

29. ABRAHAM J. HESCHEL, *THE PROPHETS* 204 (Harper & Row 1962).

30. *See id.* at 224-25, 231.

31. *See id.* at 216, 223-24, 231.

Monroe's focus on the suffering client is perhaps the most distinctive feature of his work. In a remarkable essay entitled *Legal Ethics and the Suffering Client*, Monroe took issue with the position expressed by Professor Thomas Shaffer in *Legal Ethics and the Good Client*.³² Shaffer's essay emphasized that lawyers should engage in moral counseling with their clients.³³ Monroe agreed with Shaffer that the individual human being, and therefore a client that the lawyer is charged with representing, is "the noblest work of God."³⁴ Rather than focusing on the client's "goodness," however, Monroe stated:

[M]y primary concern is with the fact that my client has come to me because he or she is suffering in some way or, at least, is trying to avoid suffering. . . . [Shaffer] thinks of the client principally as someone who is capable of being good, and who is in need of moral counseling, while I think of the client principally as someone who is in trouble, vulnerable, and in need of my help; he thinks of the client as "this other person, over whom I have power," while I think of the client as one whom I have the power to help³⁵

Monroe Freedman fully embodied the prophetic passion for justice in his decades of advocacy. No one in the legal academy has done more to challenge injustice and oppression, critique the powerful, challenge conventional wisdom, and advocate for those who suffer from social injustice. From *The Three Hardest Questions* to his very early advocacy for lesbian, gay, bisexual, and transgender rights, to his standing up to the bullying of Warren Burger, to his defense of ambulance chasing, to his critique of Atticus Finch, to his gracious assistance to colleagues and criminal defense lawyers across the country and the decades, Professor Freedman was a true prophet.³⁶

32. See Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U. L. REV. 331, 331 (1987) (citing Thomas L. Shaffer, *Legal Ethics and the Good Client*, CATH. U. L. REV. 319 (1987)).

33. See *id.* at 334.

34. *Id.* at 336.

35. *Id.* at 331, 334.

36. His life's work certainly seems "prophetic" in retrospect. See generally Ralph J. Temple, *Monroe Freedman and Legal Ethics: A Prophet in His Own Time*, 13 J. LEGAL PROF. 233 (1988) (discussing the many issues on which Professor Freedman's works in legal ethics have been seminal and "prophetic"). Perhaps, Monroe was right about Atticus all along, as the Atticus Finch of the recently published novel by Harper Lee, *Go Set a Watchman*, is a far cry from the hero of *To Kill a Mockingbird*. See Bennett L. Gershman, *Deconstructing Atticus Finch: In Praise of Monroe Freedman*, HUFFINGTON POST (July 24, 2015, 12:58 PM), http://www.huffingtonpost.com/bennett-l-gershman/deconstructing-atticus-fi_b_7859760.html ("The Atticus Finch in Lee's new novel is now a crotchety, mean-spirited, racist, not the deified single father and heroic defender of the weak and powerless.").