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The Other Way Round

Susan P. Koniak*

The wise man who is not heeded is counted a fool, and the fool who proclaims the general folly first and loudest passes for a prophet and Führer, and sometimes it is luckily the other way round as well, or else mankind would long since have perished of stupidity.

—Carl Jung

There have always been sexy subjects, and there always will be. Some topics are sexy for a time and then fade into obscurity or become quaint anachronisms; the now-omnipresent Y2K problem is sure to meet some such fate. But there are other topics, such as, the connection between identical twins, incest, extraterrestrial life, dinosaurs, the American Civil War and evil, which just stay in vogue. Topics guaranteed to draw a crowd.

I am just as likely to be in that crowd as the next person. Having spent part of this afternoon watching a History Channel presentation on the Lizzie Borden case, I am all too aware of my own attraction to these crowd-pleasing topics. But in writing and speaking about ethics, I have made a point of going another way, of avoiding the crowd-pleasers, the overtly sexy subjects: the criminal defendant who wants to lie on the stand, the lawyer whose client tells him where the bodies of missing people may be located, the client who walks in and confesses to a crime for which another is to be executed at dawn and the morality of questioning a rape victim about her past sexual encounters. Writing about lawyers collaborating with systems of evil was not something I wanted to do.

Before going any further with the problems I have with the subject matter of this Symposium, I do, however, want to take a moment to say that I found the papers delivered very interesting. I

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received the papers in advance and not only did I enjoy reading them, but I learned a good deal. I learned about trials in Vichy France that I had no idea took place.2 I learned about Justice Lamar, who I did not know had sat on the United States Supreme Court, and I even looked up some of his opinions, which, as Professor Carrington would have predicted, I found uninteresting and unimpressive, in contrast to the Justice’s background, which Professor Carrington’s paper illuminates, and which I found fascinating.3 I am most familiar with Professor Daynard’s topic, lawyer participation in the tobacco companies’ wrongdoing, but as always I learned much I did not know from Professor Daynard, whose knowledge of these matters is vast and insight, great.4 And, as a death penalty opponent, I was pleased to see that topic included in the Symposium and was impressed by the thoughtfulness Professor Cottrol brought to the topic.5 And as for Professor Burt’s concept of wrong yesterday and tomorrow but not today, I found it not just cleverly put, but a concept that captured a phenomenon well worth naming and exploring.6

So what’s my problem? Why was I so reluctant to participate in this event? First, I thought getting a bunch of lawyers, judges, students and academics to sit around and talk about lawyer participation in systems of evil was unlikely to do any good. Now, I'm not suggesting that conferences only be held when they are likely to do some good; there would be precious few conferences to attend, if that were the standard. But I have a limited amount of time that I am prepared to devote to speaking to large groups of lawyers and associated professionals, and I'd much rather spend that time talking to these real-world actors about problems they might actually do something about. However intellectually stimulating or fun it might be for real-world actors to take a break from practical mat-

ters to contemplate the dilemmas of the past or the difficulties of situations they are unlikely to ever encounter, to put it bluntly, I am simply not interested in spending my time providing them with that break from the grind.

But having little interest in performing this service for lawyers and judges was not the only reason I was so reluctant to participate. I had another concern. I was not just afraid this Symposium would do little real-world good; I thought it might actually do some harm.

I. Moral Insurance

How could it be that talking about lawyers cooperating with systems of evil might do harm? First, it has been my experience that people in our society are well-nigh incapable of discussing the moral failings of others, at least of actors in the past, without professing that they themselves might not have behaved any better in the same circumstances. “Who knows how I would actually have behaved, if I were in his shoes?” I would have bet any amount of money that this Symposium could not take place without one or more presenters or audience members uttering this phrase. Moreover, I would have bet that when uttered, the phrase would have been met with the equivalent of nods or other signs of agreement from most, if not all, of the assembled. I would have won that bet.

Asserting that one cannot be sure that one would do the right thing until and unless one is actually faced with a particular situation is common. People say it, almost as a matter of good manners: like saying “excuse me” after inadvertently bumping into another. But unlike “excuse me,” the moral humility mantra has a darker side, which I want now to explore. If all the comment was meant to express was the simple fact that no one can be absolutely certain about one’s own or anyone else’s behavior in the future, the comment would not be so offensive. I believe, however, that this ubiquitous phrase is intended to communicate something more than the obvious reality that no one has a fool-proof crystal ball. But what?

I believe it serves as a form of insurance against the possibility of our own future moral failings. If I screw-up in the future and turn out to be a far cry from a moral hero or even a moral mortal, well, I never claimed otherwise. I warned you (and everyone else) that I did not know how I would behave. I never claimed that you
could count on me. Thus, when I end up disappointing you, when I end up putting my career or money or my own ease above moral principal, hey, I admitted all along that I might turn out just that way. No one will be able to say of me, the mantra suggests, that I was all high and mighty about the conduct of others and now have turned out to be no better myself. Instead, I'll make clear just how morally dim my vision might be. That way I'll be safe. Self-righteousness may be dangerous to others, but it might prove much more dangerous to me. If I were self-righteous, heaven forbid, I might actually have to live up to the standards I proclaimed.

Self-righteous me, I commit myself all the time. I say to others (and I now write here) that if I were in a burning building, I would try and save others. I would not just head for the nearest door. Do I know that I would do this? I obviously cannot know the future any better than the next person. I can, however, do all I can now to help myself to be in the future all I want to be. Committing myself, publicly and not just in my own heart, is part of that plan.

By defining myself publicly and privately as a certain kind of person—by committing myself to be all I can be by announcing that is who I am—I give myself every chance possible to be just what it is I say I am. I say I am an honest person and that I would tell the truth in situations when a lie might help me get ahead. And when the temptation comes to lie, I remember that I have defined myself as honest, and it helps. If I were in a burning building, of course, I would want to find the nearest door. But, I have said for years I would do otherwise and that would help sustain me. It would give me something to use against the fear. I am convinced of this: if I did not make a point of committing myself in advance to moral behavior, I would be a more failed moral actor than I am.

I was thus concerned about a day in which who-knows-how-any-of-us-would-behave was likely to be a repeated refrain. And frankly, I was not terribly interested in having to play the self-righteous role of critiquing the way others, whether knowingly or not, might invite the assembled to hide behind this phrase.

II. OF PRIESTS AND PROPHETS

Related to the concern just expressed, I feared that, to a greater or lesser extent, condemning self-righteousness would be a theme of the day. After all, the moral insurance mantra I have just
critiqued serves to condemn self-righteousness as much as it serves to excuse future (and past) moral failings. It is a way of signaling that the speaker is not self-righteous, that all may feel comfortable in her presence—she will be slow, not quick to judge. The draft of Professor Burt's paper, which I read prior to arriving in Rhode Island, concluded that: "an unshakeable conviction of one's own self-righteousness can be both a hallmark and a proximate cause of sliding into evil." That line confirmed for me that somehow in discussing evil, self-righteousness would once again be the whipping boy. And where the self-righteous have undoubtedly been responsible for much evil in our past (and will be responsible for much evil in our future), sometimes it is the other way round. The self-righteous have always also been those who have led us away from evil, those who have sacrificed most to combat evil, and that too will always be so.

I am not sure about everything. What sane person is? But I am sure about some things. What sane person isn't? Moreover, some of the things I'm sure of concern matters of right and wrong. Am I self-righteous about those matters? I think so. At least I am if self-righteousness means there are matters about which I believe there is a right and wrong; and believe that those who disagree with me are wrong. I am, if self-righteousness means that about those matters, I am not easily moved; that I do not approach conversations on such matters with an open-mind. Does that mean I stop listening to those with whom I disagree, or otherwise treat all those folks with disrespect? No, at least not on most matters, although on some my self-righteousness does include an unwillingness to treat with respect the contrary views of others.

Listening, dialogue, respect, it is hard to speak against such things. Professor Burt appropriates all those concepts and having done so, he succeeds in making his argument seem all the more appealing. How could one argue against such ideals? But how much listening is it moral to do while others are suffering? Should Garrison have listened more? Should he have been less sure of what he was so sure about? In his own time, others surely thought so. Immediate and absolute abolition. How impractical and unsympathetic to the concerns of the South could he have been? An extremist of the first order. But on slavery, as we now all acknowl-

7. Id. at 38-39.
edge, there is most surely a right and wrong. And Garrison, that self-righteous prig, he had it right. His condemnation of others and their pernicious contrary views was powerful and admirable. His willingness to be branded an extremist in the name of justice and with the aim of ending the suffering of others was courageous. Had he been plagued with moral uncertainty instead, would the world then have been better off? And how much poorer would we be now without the shining example of extremists like Garrison? On second thought, perhaps, not too much poorer. We still don't celebrate this man.

As Garrison's still somewhat tarnished reputation shows, being right is not a complete defense against the charge of self-righteousness, or the perception of others that self-righteousness is sin. Prophets are not just despised in their own time; the condemnation of such folks persists across time. To turn Professor Burt's phrase on its head: Right Yesterday, Right Tomorrow and Wrong Today. Is this not at least as troubling a phenomenon as that identified by Professor Burt?

Understanding can be, and often is, overrated. As long as evil (and its lesser cousin, bad) exists, we need the ability to judge and yes, to condemn. I understand that the Versailles Treaty was a problem for Germany and Germans. I understand how ordinary Germans might thus be attracted to someone with Hitler's stance on that treaty and Hitler's ideas on the German economy and German pride. I understand (because I see it all around me in my own country) how ordinary citizens are willing to overlook the faults, however big, of politicians and even to overlook some pernicious ideas espoused by politicians. As long, that is, as those politicians express a set of ideas that those same citizens see as in their self-interest. I understand that once Hitler was in power, one person was not likely to make much of a difference in stopping the moral atrocities being committed by his regime. I understand the thinking: "If I refuse to go along with this anti-Jewish law, it may cost me dearly and the law will still be there, harming the Jews." "If I refuse to run this concentration camp, someone else is sure to do it and my career will have been hurt for nothing." I understand all this. And I can still judge. None of my understanding changes my

8. See id. at 20.
moral judgment about any of these matters. And it should not. Judgment has its place too.

Convincing others to doubt all their moral judgments and to avoid "self-righteousness" at all costs is a dangerous enterprise. The world needs its prophets, as well as its priests.

Professor Burt, however, warns us of the dangers of false prophecy. And the problems he identifies are no doubt real. A member of some anti-Semitic group took action this summer. To wake up the world to the need to eliminate Jews, he walked into a day care center and shot little children. False prophecy can kill.

How then can advocating anything other than listening be responsible? After all, there is always the possibility that the actor's sense of right will be wrong? Moreover, even if those one encourages to act are right and not wrong, there is another danger of self-righteousness. Well-articulated by Professor Burt, this second problem is that moral conviction, even when correct, may lead to ruthlessness. Abolitionists may come to see slaveholders as subhuman. Consider how liberty, equality and fraternity devolved into a blood bath as the French Revolution took hold. Thus, there are twin dangers of prophecy: error and cruelty.

Should we not then fear the advocate of prophecy more than the advocate of moral doubt? One's answer to this will in large measure be a function of one's background understanding of the status quo. To put this point simply, in the Garden of Eden, the prophet is the serpent; in Sodom, that role is reserved for the one who listens respectfully and remains unsure of what is right and wrong. Unfortunately, as there is no way to prove whether the status quo is not-so-bad or horribly-unredeemed, this method of choosing between the dangers of prophecy and the dangers of moral uncertainty, chief among them complacency towards and inattention to the suffering of others, gets us only so far and no further. If we cannot tell for sure whether we are closer to Eden than

9. See id. at 40.
11. Id. (reporting that the shooter said he acted to give "a wake-up call to America to kill Jews").
12. This, of course, is the flip side of the question I posed earlier: Is advocating inaction (listening and moral doubt) responsible when evil exists?
13. See Burt, supra note 6, at 40.
Sodom, it seems to me we need both prophets and priests. This far, at least, Professor Burt and I appear to agree.

Where we disagree is that Professor Burt apparently believes we have got all too many prophets as it is and way too few priests. I see the situation much the other way. At this point, audience becomes important. I believe Professor Burt is right that today's fringe right groups are prophetic and dangerous. Moreover, it may well be that such groups are more common and more powerful today than in this nation's recent past. Having said that, however, Professor Burt and I were not addressing members of the Aryan Nation. Our audience was made up of lawyers, judges, other academics and a sprinkling of law students. It seems to me then that an important question therefore is this: How might our immediate audience (or more generally, the larger audience to which this law review is directed: lawyers and law students) be likely to cooperate with evil (or badness)? Through false (or true, but cruel prophecy) or through moral complacency? The answer to that question, for me, is clear. To put it mildly, prophecy is not the greatest danger for this group.

Professor Daynard, speaking of the evil tobacco companies, sounded more than a little prophetic. As he was speaking, I was watching the faces in the room. There was a fair amount of eye-rolling among the assembled. "Calling the tobacco companies 'evil' is hyperbolic," the expressions on the faces seemed to say. Not to put too fine a point on the matter, Professor Daynard risked ridicule by saying what he said to this crowd of "sensible" people, trained (as lawyers are) to see both sides of any dispute. The world in general does not embrace its prophets, and a group of lawyers strikes me as even more likely than a group of average folks to label a prophet crazy, to marginalize him (right or wrong). Prophets threaten the status quo and lawyers, they maintain it. Is the prophet a role lawyers or other subgroups of the "power elite" are likely to adopt? That seems unlikely to me.

The reflective understand how prophets are perceived. They understand the costs of the role. It is the lunatics who do not understand this (or if they do, do not care). The reflective person's

14. See id.
15. In the late 1960s and early 1970s, the left fringe played a somewhat similar role, but today left fringe groups are not major forces in American life.
understanding of the costs of prophecy serves as a powerful check on the dangers Professor Burt correctly associates with moral conviction. Unfortunately, it serves as too effective a check, leaving us, I fear, many prophets too short; many true-prophets too short, that is. I will return to this point, but first a word about prophecy and ruthlessness.

There is no doubt that moral conviction might lead to ruthlessness, but the idea that the connection is inevitable ignores a rich and long tradition that associates prophecy with self-sacrifice and love of one’s enemy. Christ, Ghandi and Martin Luther King are all part of that tradition. There is thus a strong prototype of the prophet as martyr to a moral vision, which condemns the connection between conviction and ruthlessness that Professor Burt sees as so close. Are these prototypes sure-fire guarantees that prophecy will not degenerate into ruthlessness? No, but the existence of these powerful examples belies the simplistic straight-line connection between prophecy and ruthlessness that some are eager to draw.

Consider the Milgram experiments, which Professor Burt interprets as part of his argument on the relationship between ruthlessness and moral conviction.17 According to Professor Burt, it was the need of the subjects to reestablish meaning that led them to their cruelty.18 The story Professor Burt tells is that the idea that good people would encourage the subjects to harm others destroyed the subject’s understanding of the world.19 In an effort to recreate meaning, the subjects chose to believe that the good people were doing what was right (by asking the subjects to shock the “victims”).20 This need to recreate meaning thus led to cruelty, or so Professor Burt suggests.

But, Burt’s explanation seems flawed to me. The Milgram subjects could have recreated meaning in another way; they could have told themselves the following story: the people instructing them to shock others may or may not have been good, but what they were telling the subjects to do was wrong. The problem was not that the subjects searched for meaning, as Professor Burt claims; the problem was that the subjects chose the wrong mean-

17. See Burt, supra note 6, at 32-35.
18. See id. at 34.
19. See id. at 33-35.
20. See id. at 33-34.
Notably, that meaning was that people in authority, people the subjects had been conditioned to respect, must be doing right and should be obeyed. Milgram's original explanation, in other words, seems accurate to me. Accurate and troubling—a moral lesson about the evil of going along to get along, a moral lesson about too little self-righteousness in individuals, not too much.

III. FIRST THINGS FIRST: BAD BEFORE EVIL

One tradition in Judaism teaches that what it means to be the chosen people is this: God's presence was once whole in the world; in Hebrew it is called the Shekinah and it was represented by a giant and beautiful crystal globe. That globe was broken into billions of tiny pieces, and shards of glass now lay all around us. What it means to be a member of the chosen people is that one has been assigned by God the task of picking up the pieces of glass and putting them—piece by piece—back together to reform the globe.

The globe will, of course, never be completely whole again. There are simply too many tiny pieces of glass to collect and fit together; a Herculean task. At most, what may be accomplished is that enough fragments will be fit together so that one might envision, while looking at the partially reconstructed orb, what the whole must have been. In Hebrew, this work of reconstructing the globe is called “tikun olam,” the repair of the world, and it is realized through living a life devoted to law, a life devoted to justice.

I believe lawyers are a form of chosen people—a group with a special responsibility to repair the globe of justice that lies shattered at our feet. Most lawyers will not end up collaborating with systems of evil but many, too many, lawyers throughout their careers participate in many little wrongs: stealing a little client money here, assisting a little client fraud there, lying to a judge now and then . . . . You get the idea. These lawyers do not participate in systems of evil (most ordinary lives do not present one with such grand opportunities), but ordinary lives present all of us daily with the chance to trample on the shards of glass that lie at our feet. Ordinary lives give us the chance to make these pieces of glass smaller and smaller until they are so small that no one could possibly hope to pick them up. Some lawyers avoid trampling unnecessarily on glass, but do nothing to reassemble the globe, while

21. See id. at 34-35.
others are not just content to smash the glass at their feet. They spend their time knocking off the few pieces of glass that have been replaced by others. In little ways, not grand acts of evil, they spend their time destroying, not repairing, the world.

Professor Weisberg emphasized careerism in his exploration of why lawyers (and other professionals) cooperate with evil.\textsuperscript{22} I think the problem is much deeper and simpler than that, which is to say that lack of ambition is no guard against collaboration with evil. Succeeding in one's career is just one of many ways of trying to fit in, winning acceptance and feeling loved (or its near-equivalent). To notice that those around us are doing wrong, and to mention the wrong they do, risks rejection. It separates us from the crowd. By judging we invite judgment on ourselves; that is what at all costs we, all of us, fear and want to avoid. So we go along with bad because most of us, thankfully, are not called upon to go along with evil, but that is just luck and nothing more.

What bothered me about this Symposium was not just the prospect of a group of lawyers buying moral insurance by telling one another how none of them could be sure how he or she would behave, but the converse bothered me as well. I was not happy contemplating a group of lawyers sitting around telling themselves that they would not cooperate with evil, if ever they saw it, when in their daily lives they were not even bothering to pick up a single piece of glass.

First, as my glass story suggests, even were it true that in some moral crisis that you will never face (or never permit yourself to acknowledge that you face) you would do right, that does not a moral person make. Not if, in the meantime, you spend all your time trampling on glass and knocking pieces off of the globe that others are reconstructing. Moreover, if you do not have the courage to stand up against little wrongs, what reason do you have to believe that in the face of a big wrong you will suddenly prove equal to the task. Morality takes practice, and I do not mean practice listening. I mean practice judging, practice risking being disliked for separating oneself from the crowd, practice cutting one's hands on little pieces of glass.

One's entire career need not be on the line to bring out the coward that resides within. Separating oneself from the crowd by

\textsuperscript{22} See Weisberg, \textit{supra} note 2, at 139.
suggesting that how others are behaving is wrong, not evil, but wrong, itself takes guts. People avoid judging for reasons as simple and pathetic as not wanting to be thought a goodie-two shoes or unworldly. Lawyers need to worry less about whether they would have risked their whole careers to stand against the oppression of Jews in Vichy France, and more about whether they would risk anything, to do right versus wrong, in some less dramatic setting tomorrow. Moral muscle does not get built by imagining that in some extreme situation one might prove heroic; it gets built through exercise, slow and steady, day by day.

Listening is important. To avoid the dangers of false prophecy, it is essential that one accept and keep constantly in mind that the world is complicated, that others with different commitments may be right and that you may be wrong. But essential as all that is, it is not enough. Let me now get a little more concrete about what kind of exercise I have in mind.

IV. PRACTICE

First, stop helping those around you to do the wrong thing and start helping them in the other direction. As part of our allergy to self-righteousness, all too many of us rush to support the moral lapses of our friends and loved ones. I was in my car in a parking lot, pulling out of a space, and I tapped the car behind me. A friend was in the car with me. We got out to see whether I had damaged the other car and found a huge dent in it, precisely where my car had made contact. It seemed nearly impossible that such a light tap as I had given that other car could have produced so much damage. I said, "Can you believe that little tap could have done all that?" My friend thought a minute and said, "You know you may be right. That dent may have been there already. Are you going to leave a note?" The idea that my car did not make that dent, given the perfect line-up of my back bumper and the dent, was ludicrous. Sometimes light taps cause big dents. But my friend was rushing to help me find some excuse for not leaving a note, just in case I had the urge to do the wrong thing. We all make similar moves. Where did we get this idea that helping others be the least they can be is "help"? If my friend thought I was tempted to flee the scene without leaving a note, what she should have said was: "Here's a pen. Do you have paper for the note?"
Proclaim a standard for yourself. Commit yourself to what you would do in a crisis, and tell others. Next, try giving up all the little, stupid lies—the ones that make your life easier, but also help you understand yourself as a person who lies for small advantage. That understanding of yourself will surely not help you tell the truth when anything substantial is at stake. What little lies? Those ten points you add to your LSAT score for no good reason every time the subject comes up. Those stories you tell in which you delivered the perfect come-back. When, in reality, it was not until two hours later that the retort came into your head.

Finally, each week, every week, ask yourself what glass you have picked up and replaced in the shattered sphere. Ask yourself what glass you have stepped on. Notice the damage, however small, that you have done. And ask yourself whether you have risked anything, however small, in the name of what you believe to be right. Examine your hands for cuts. The little cuts you get from picking up those pieces of glass build courage. Courage you may someday need.

I end with words from Kierkegaard, who wrote eloquently about the distinction between true and false prophets in Fear and Trembling. But the words I want to read are from another of his works, The Present Age, where he wrote:

If the jewel which everyone desired to possess lay far out on a frozen lake where the ice was very thin, watched over by the danger of death, while, closer in, the ice was perfectly safe, then in a passionate age the crowds would applaud the courage of the man who ventured out, they would tremble for him and with him in the danger of his decisive action, they would grieve over him if he were drowned, they would make a god of him if he secured the prize. But in an age without passion, in a reflective age, it would be otherwise. People would think each other clever in agreeing that it was unreasonable and not even worth while to venture so far out. And in this way they would transform daring and enthusiasm into a feat of skill, so as to do something, for after all “something must be done.” The crowds would go out to watch from a safe place, and with the eyes of connoisseurs appraise the accomplished skater who could skate almost to the very edge (i.e. as far as the ice was still safe and the danger had not yet begun) and then turn back. The most accomplished skater would manage to go out to the furthermost point and then perform a still
more dangerous-looking run, so as to make the spectators hold their breath and say: "Ye Gods! How mad; he is risking his life."\textsuperscript{23}

And the jewel would remain untouched, the glass would lie shattered on the ground. It takes courage to be mistaken for the fool, courage to act, courage to right wrongs and prepare oneself for encounters with evil. We need to start small, but we need to start. "Conscience doth make cowards of us all and . . . the native hue of resolution is sicklied o'er with the pale cast of thought."\textsuperscript{24} Listen and consider. And then? Then dare.

\textsuperscript{23} Soren Aabye Kierkegaard, Parables of Kierkegaard 15-16 (Thomas C. Oden ed., 1978).

\textsuperscript{24} William Shakespeare, Hamlet, Prince of Denmark act 3, sc.1. 82, act 2, sc.2, ll. 604-05 (G. Blakemore Evans ed., 2 Riverside Shakespeare 1974).