

HOW CAN YOU DEFEND THOSE PEOPLE?
Hofstra University
Dedication of Monroe H. Freedman Institute
For the Study of Legal Ethics
September 13, 2016

- We all are here today because Monroe Freedman (1928-2015) came before us. Like Ellen Yaroshefsky and Abbe Smith, Monroe Freedman was a rare duality – criminal defense lawyer and earthy practitioner, while also distinguished scholar and professor
 - Prof. Freedman was representing what we now call LGBTQ organizations in the late 1950's or early 1960's, well before the events following the raid of the Stonewall Inn and before anyone even acknowledged the names of those groups (here, the Mattachine Society, active after 1953); he was representing gay and lesbian people when only the bravest of them identified themselves even privately that way at all. And he represented all others seeking to vindicate their own civil rights. Although he eventually represented members of Congress, he never stopped defending the poor
 - in considering our debt to him, and the time over which that debt has accrued interest, note that it was 50 years this past June since his landmark article in the University of Michigan Law Review, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*
 - Hoping to honor Monroe Freedman, I speak today to **The Question: How can you defend those people?** Here, I refer intentionally to the title of the collection of essays that Abbe

Smith and he edited (*How Can You Represent Those People?* (Palgrave MacMillan 2013))

- I don't hope to improve upon or even add to the essays that compose that book – which include Monroe Freedman's own answer to "The Question." Indeed, I noted after I prepared these remarks that many of the points I would make appear in the essays that others wrote when I later read those. Unsurprisingly, many of us committed to criminal defense share an ethos
- Neither can I match the elegance of Jim Castle's distilled answer, which is so much worth your consideration that I have reprinted it for you today
- But I don't have to improve upon the 15 essays in Smith & Freedman's collection and I don't have to match Jim Castle's elegance. Because after practicing law for over 31 years, it hardly matters what my answer is. What matters much more, really, is your answer as you set out on the practice of law or if you are in early years of practice
 - your answer has much to do with who you will be as a lawyer
 - and not just if you choose criminal defense; regardless what you choose, your answer goes to the values that you will embody as a lawyer
- All I can do usefully, then, is encourage you to come to your own answer to The Question – and maybe frame for you some of the

less visible considerations embedded in that Question, which may inform your answer

- Four considerations: Why is The Question important? Why must we respect those who ask it? What will our answers reveal of us? Will we implement and live our answers?
 - **First, why is The Question important?**
 - Because it reveals so much about the questioner
 - and because it is such a common question, therefore reveals so much about many of us and about our culture
 - consider the question slowly: How can you represent those people?
 - never, “my people”
 - never even, “one of us” or “our people”
 - alienation, a need to assign the accused as the “other,” is embedded prominently in the question
 - and implicitly but unmistakably, the question rests on the belief that both questioner and you are above, superior to, that other; to “those people”
 - you and the questioner are the unstated “we,” having a side conversation on the sly, out of earshot of “those people”

- the question would not be put to you if you were one of them, in the questioner's eye
- so the question is important in part because it lays bare the widely shared supposition that *we* do not commit crimes; *they* do. That *we* are better than *they*. And that *you* are committing class betrayal by coming to *their* aid, because *we* need protection from *them*
- The Question denies implicitly but completely an important truth: that **we all are criminals**. You are; I am
 - ever smoked pot? Tried cocaine? Shared either with a friend? Sold some?
 - shoplifted?
 - groped a fellow student or kissed him/her while he or she was drunk?
 - vandalized a playground or opposing school's property?
 - bootlegged music from the internet?
 - broken into a garage or shed as a prank or while being stupid?
 - not reported all the tips you received at your job waiting tables?

- for many of us, worse?
- about 1 in 4 Americans has a criminal record.
The rest of us just have not been caught
- www.weareallcriminals.org; Emily Baxter
(former public defender in Minnesota)
- much of the difference (if there is one) between we and they, then, is **who gets caught – and why**
- You must explore those two questions on your own. Try to do that honestly
- For this is why The Question is important: we live in a culture of near universal criminality, but who gets prosecuted and why remain lively questions
- Not who are they, but who do we imagine culturally is included in that alienated group of “those people” and why?
- **Second, regardless what you think it reveals of the questioner, why must the questioner have our respect?**
 - because any one of us might have asked the question ourselves, at some point in our lives; some of us probably have
 - surely, some of the people we love do ask that question

- the questioner almost certainly is unaware of the assumptions embedded in the question, let alone how unsound they are
- the questioner may assume, rightly, that she never would commit a serious crime; she does not know that there can be no guarantee that she will not be accused of one, falsely or mistakenly
- he does not know that he one day suddenly may become one of “those people,” perhaps through no act of his own
- she does not know that one day, someone she loves—her father, her son, her brother, her friend—statistically *will* become one of “those people”
- he does not realize that some day, he will need you
- and you may not realize that you also will need him and her
 - you will need the questioner as a juror; someone you must reach and persuade, rather than scoff at or dismiss
 - you will need the questioner as a judge; as someone who has your client in her hands
 - you will need the questioner as your friend or ally

- we cannot cure the alienation inherent in The Question by treating the questioner as alien to us or to our values
- we cannot address the implicit sense of superiority in The Question by treating the questioner as morally or intellectually inferior to ourselves
- this is why we must respect the questioner
- **Third, what will our answers reveal of us?**
 - do we crave the *status quo*, the stability of the world as it is, the way prosecutors (and most judges) crave it?
 - or do we take our chances with change, even chaos, on the belief that our world today is only a rough, penciled sketch of what it could be and should be if we all lived a greater commitment to the humanity of everyone and to assuring the stake of everyone in our shared earth?
 - do we think that police violations of the US Constitution are a regrettable but small price to pay for social order and for safety from “those” people?
 - or do we think that lawlessness of those acting with the vast power of the sovereign is a greater threat to liberty and to our security than any crime by the poor or by the individual person ever will be?
 - do we look at the racial, ethnic, and class disparities surrounding us in the criminal justice system and say

sympathetically how unfortunate all of those disparities are?

- or do we rebel against them, urge action against them even when that will threaten the *status quo*, and take action ourselves?
- will we seek to win, which is so much more frequent when you are aligned with the powerful and with the government, whose interest always is to preserve the social order as it is and to resist change?
- or will we savor the occasional—even rare—win and relive it (maybe even improve on it) for years as we hone our skills as raconteurs with our many losses and our scattered, delicious wins?
 - that is, will we have the sense of self-worth and stamina to lose for a living?
 - and to sustain ourselves for months or years on the rare win?
- will we come to demand the ordinary as it simplifies our days tending the assembly line of criminal justice, which works most smoothly when every human being and every case is packaged neatly as a widget identical in its ordinariness to all others?
- or will we revel in the mischief of the extraordinary: mischief that we can make on behalf of the powerless in trying to discomfit the comfortable, alarm the complacent, cause uncertainty to those who are certain

about everything – and in some way, to jam a stick in the gears of that infernal assembly line that mechanically transports our clients to their doom or debilitation?

- that is, will we author or enjoy a good caper, like Jim Shellow, when for example he concluded that our State Crime Laboratory seemed to identify all white powders as cocaine, so he began to file motions to require the State Crime Lab to identify an unknown white powder and stapled a plastic baggie of white powder to the motion – causing great consternation and gnashing of teeth in clerks’ offices, judges’ chambers, and prosecutors’ offices
- or will we seek to remain ever among the smaller “we” with those who ask The Question, hoping always to separate ourselves from the larger group of “those” people?
- our answers to these subsidiary questions and others, all considerations in answering The Question, fundamentally determine who we are and will be as lawyers. This what our answers reveal of us
- **Fourth and finally, revealed this way to the world – to our families, friends, adversaries, judges, and employers – will we live with *and in* our answer?**
- if we claim to be defenders, will we befriend the friendless? Stand alone, if necessary, in defending the universally detested person?

- will we separate the human being who is our client from the inhuman act he may have committed? Will we alone be unwilling to judge him by the worst thing he ever has done?
- will budding sympathy for our clients, and for their victims, eventually grow into mature and deeper empathy for the entire human family?
- indeed, will we get to the time in which we acknowledge silently, as we sit with our least fortunate clients, that there but for the grace of God go I?
- will we eventually live with the knowledge that there is no us and no them; that the very premise of The Question is false, for there is no “those” people – there is only “we”
- will we come to understand that an implicit conundrum that The Question presents – how can you advance an hypothesis of innocence when objective evidence and common sense so strongly suggest guilt? – is not even the central conundrum of criminal defense work
 - the central conundrum or seeming contradiction is that defenders of the accused resist and oppose the criminal justice system at the microscopic level of individual clients, often many times a day
 - all the while enabling that system at the macroscopic level by participating in it; by serving as officers of the same courts that demean or even destroy our clients

- that conundrum, not the more technical one implicit in The Question, is the one we must answer to ourselves, rather than to the cocktail partygoer who poses The Question
- and if we cannot resolve that greater puzzle, that conundrum, or remove the tension of contradiction, will we at least in the end get to the point where we restate The Question this way: **How can I *not* defend my people?** [Here I acknowledge my debt to Abbe Smith and Robin Steinberg and their essays, and all of our debts to Barbara Babcock]
- if and when you get to restating The Question in some way like that, you will be a defender – even if you never practice criminal defense
- and as a defender you will have found a vocation in law – a way of being, not just a job
 - you will let others look for jobs, or speak of wanting a life
 - in your vocation, you will *live* a life melded with that vocation. You may well love that life – and love the lives of “those people” . . . your people . . . us