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LEGAL ETHICS AND THE SUFFERING CLIENT

Monroe H. Freedman*

Thomas Shaffer is the most erudite and graceful writer in the field of lawyers' ethics, and he has few peers in any other area of legal scholarship. If I had the luxury of studying for a year under any professor in the country, it would be with Professor Shaffer. In this Commentary on his Brendan Brown Lecture,¹ I am going to disagree with him, but only to express a different, not a better, view.

The difference between us is expressed in major part in the titles of our two pieces. Professor Shaffer is primarily concerned with his client's "goodness," while my 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.²

That difference in our perspectives or major premises is illustrated in the first paragraph of Professor Shaffer's lecture. Legal ethics, he says, relates to "this other person, over whom I have power."³ I would say, "this other person, whom I have the power to help." Legal ethics, he continues, is concerned with "the *goodness* of someone else."⁴ I would say that legal ethics is concerned with the limits on how far I can go as a lawyer in helping that person and, therefore, with the limits of that person's rights. That is, when we write and enforce rules of lawyers' ethics, we define clients' rights in fundamental ways.

In the same paragraph Professor Shaffer says: "[L]egal ethics begins and ends with Socrates' question to the law professors of Athens: 'Pray will you concern yourself with anything else than how we citizens can be made as good as possible?'"⁵ I would say that justice must include a concern with "how we people can have full and equal rights under law." To illustrate that difference: if all of the citizens of Athens had been as good as Socrates

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1. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U.L. REV. 319 (1986).

2. The dictionary definition of the intransitive verb "to suffer" expresses my meaning more precisely than I had thought it might: "1. to undergo or feel pain or distress. . . . 2. to sustain injury or loss. . . . 3. to undergo a penalty. . . . 4. to be the object of some action. . . ." THE RANDOM HOUSE COLLEGE DICTIONARY (rev. ed. 1982).

3. Shaffer, *supra* note 1, at 319.

4. *Id.* (emphasis in the original).

5. *Id.* at 319 n.1.

wanted them to be, perhaps there would have been no noncitizen slaves, but that is far from clear. Socrates was willing to teach a slave about geometry (*Meno*), but I am not aware that he ever favored emancipating the one-third or so of the Athenian population who were slaves. In any event, the difference in emphasis between Professor Shaffer and me is a significant one.

To avoid a frequent misunderstanding of my position, however, I would reiterate a point that I have made before and that Professor Shaffer properly emphasizes in his critique of my views: “[T]he attorney acts both professionally and morally in assisting clients to maximize their autonomy, that is, *by counselling clients candidly and fully regarding the clients’ legal rights and moral responsibilities as the lawyer perceives them . . .*”⁶ That is, although the lawyer is to serve the client’s interests as the client sees them, moral discourse between lawyer and client is an important element of my view of the lawyer’s role.

Professor Shaffer overstates, however, the extent to which I consider the lawyer to be bound to act on a client’s decision that the lawyer deems to be morally wrong. First, I hold that the lawyer’s decision to accept a client or a cause is virtually wholly within the lawyer’s autonomy.⁷ A lawyer who finds a potential client or cause to be morally offensive can simply decline the retainer. Second, contrary to Professor Charles Fried⁸ and others, I consider the lawyer’s decision in that regard to be a moral decision that is subject to the moral scrutiny and criticism of others.⁹ It is only after the lawyer has freely chosen to be the client’s “champion against a hostile world,” and has induced the client’s reliance on that commitment, that the lawyer is then required to provide zealous representation of the client’s interests as the client perceives them.¹⁰

Professor Shaffer is accurate, therefore, when he quotes me as saying, “The attorney acts unprofessionally and immorally [when he deprives] clients of their autonomy, that is, by denying them information regarding their legal rights, by otherwise preempting their moral decisions, or by depriving them of the ability to carry out their lawful decisions.”¹¹ My next words, though, impose an important qualification: “Until the lawyer-client rela-

6. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U.L. REV. 191, 204 (1978) (emphasis added), *quoted in* Shaffer, *supra* note 1, at 322-23.

7. Freedman, *supra* note 6, at 204.

8. *See generally* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

9. Freedman, *supra* note 6, at 204-05.

10. ABA STANDARDS RELATING TO DEFENSE FUNCTION 145-46 (1971). *See* Freedman, *supra* note 6, at 204-05; M. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 9-26 (1975).

11. Freedman, *supra* note 6, at 204, *quoted in* Shaffer, *supra* note 1, at 322-23.

tionship is contracted, however—until, that is, the lawyer induces another to rely upon his or her professional knowledge and skills—the lawyer ordinarily acts entirely within the scope of his or her own autonomy.”¹² In my view, therefore, there is an important difference between declining to represent a client or cause, and accepting a client but giving the client less than the lawyer’s zealous best.¹³

Prior to accepting the client or cause, therefore, the lawyer has virtually full autonomy. After the lawyer has deliberately chosen to represent a client or cause, however, the lawyer’s autonomy is significantly limited because the lawyer’s principal function is to serve the client’s autonomy—to allow the client maximum freedom to exercise or to forgo rights to which the client is legally entitled. Even then, however, the lawyer retains some significant scope to avoid involvement in conduct that is morally offensive to the lawyer. This is because there are three circumstances in which I would allow the lawyer to withdraw on moral grounds: (a) if the client consents;¹⁴ (b) if withdrawal can be accomplished without significant harm to the client’s interests;¹⁵ or (c) in a matter other than criminal litigation, if the lawyer discovers that the client has knowingly induced the lawyer to take the case or to take action on the client’s behalf on the basis of material misrepresentations about the facts of the case, and if withdrawal can be accomplished without direct divulgence of the client’s confidences.¹⁶

There is another fundamental point on which Professor Shaffer and I differ. Referring to diversity as a “social justification for the ethics of autonomy,” Professor Shaffer says, “[W]e have never wanted diversity more than we have wanted goodness.”¹⁷ My first reaction to those propositions is that I have never viewed diversity as a justification for autonomy. That notion puts the collectivity first, ahead of the individual. That is, Professor Shaffer suggests that we grant the individual autonomy so that society can enjoy diversity. On the contrary, though, I see diversity in society as a byproduct (of mixed value) of the primary goal of respecting the dignity of each individual as a free human being.

My reference to diversity, therefore, is far more modest than to assert it as essential in itself to the common good. In response to the idea that it is

12. Freedman, *supra* note 6, at 204.

13. That is the essence of my disagreements with Professor Richard Wasserstrom and with Ralph Nader. See Freedman, *supra* note 6, at 193-96; M. FREEDMAN, *supra* note 10, at 10.

14. AMERICAN LAWYERS’ CODE OF CONDUCT rule 6.2(b) (Reporter’s Draft, 1981) (The author was the Reporter for the AMERICAN LAWYERS’ CODE OF CONDUCT.).

15. *Id.* rule 6.2(a).

16. *Id.* rule 6.5.

17. Shaffer, *supra* note 1, at 326.

desirable to foster diversity by maximizing lawyers' autonomy in dealing with their clients, I have suggested simply that it would be better "to have that diversity as a reflection of clients' viewpoints, rather than the lawyers'."¹⁸ The reason it would be better is that giving dominance to lawyers as a class is, in my view, elitist and paternalistic.¹⁹

Beyond that, I am not at all sure who the "we" are who want goodness more than full and equal rights under law. If that "we" is editorial, and consists entirely of Tom Shaffer, I am willing to take my chances and go along. If it is the Moral Majority, I am a lot less willing. If it is—and it has been—the Grand Inquisition that is insisting upon goodness over diversity, I know which side of the rack I am on, and I'll take diversity every time.²⁰

To sum up the differences in perspective between Professor Shaffer and me with regard to lawyers' ethics: he 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 help; and he, therefore, thinks of legal ethics as being rooted in moral philosophy and as beginning and ending with how "citizens can be made as good as possible," while I think of legal ethics as being rooted in the Bill of Rights and involving essentially how people in our society can have full and equal rights under law. Finally, Professor Shaffer is no more a statist than I am an anarchist, and he is no more indifferent to freedom than I am to goodness. Nevertheless, he does place somewhat more weight on a collectivistic concern that everyone be as good as possible, while I place more weight on an individualistic concern that everyone be as free as possible.

Given those differences in our perspectives, it is hardly surprising that Professor Shaffer and I initially make different choices among his three ethical systems—Rectitude, Freedom, and Goodness. Nor is it surprising that he and I agree that I fall rather neatly into "the legal ethics of freedom." What we do not entirely agree upon is where Professor Shaffer comes out. He thinks he belongs in the school of the ethics of goodness; I believe that the school of goodness collapses into the school of rectitude—which Profes-

18. Freedman, *supra* note 6, at 195.

19. *Id.* at 193.

20. Professor Shaffer concludes his argument on diversity vs. goodness (or wisdom) by noting: "American law schools, from coast to coast, . . . are the most relentlessly uniform, undiverse, and fungible programs in American higher education." Shaffer, *supra* note 1, at 327. It seems to me, though, that our law schools might gain in wisdom (and certainly in intellectual stimulation) through greater diversity in our faculties, student bodies, and curricula.

sor Shaffer rightly condemns for what he calls its hubris and for what I would call its paternalism and elitism. In my view, that necessarily leads him back into the school of the ethics of freedom.

What is wrong with the legal ethics of rectitude, Professor Shaffer shows, is that it is "a one-way street."²¹ It says that "what is important is that the client do the right thing, and that it is the lawyer's job to see to it that his client does the right thing."²² That is wrong, Professor Shaffer says (quoting Karl Barth) because the lawyer "must be prepared to be counseled in turn" by the client.²³ Professor Shaffer says it, and I have no doubt that he means it. I do not think, though, that it really is going to come out that way. The reason is that the Barth quote goes on, as it must, to add a crucial clause: "[the lawyer] must be prepared to be counseled in turn *if there is need for it.*"²⁴

What that means is that we have substituted two questions for another. I ask, "If the client disagrees with me in his moral decision of whether to pursue a right that is legally available to him, whose decision controls?" I answer that I have a professional obligation to counsel my client to do what I believe to be the right thing, but "[i]n the final analysis . . . the lawyer should always remember that the decision whether to forego legally available objectives or methods is ultimately for the client and not for himself."²⁵

Professor Shaffer changes the question. He asks, "Must I be prepared to be counseled in turn [by my client] if there is need for it?" He answers yes, but that is not the crucial question. He then must ask, "Who ultimately decides, the client or I, whether I need his counsel or he needs mine?"

If you have read Professor Shaffer's article, you know the answer to that question. In his discussion of the legal ethics of rectitude, Professor Shaffer rejects the hubristic lawyer's response that the lawyer's "conscience" must be his own and not his client's.²⁶ That is, he rejects the legal ethic that makes the lawyer's conscience prevail over the client's. In Professor Shaffer's discussion of the legal ethics of goodness, however, the lawyer's "conscience" is replaced by the lawyer's "character" or "integrity,"²⁷ and that somehow changes everything. That is, it is hubristic for the lawyer to dig in his heels and refuse to do the client's bidding in the name of the lawyer's conscience, but at the same time it is essential for Professor Shaffer that the

21. *Id.* at 322.

22. *Id.* at 321.

23. *Id.* at 322.

24. *Id.* (emphasis added).

25. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8.

26. Shaffer, *supra* note 1, at 321.

27. *Id.* at 329-30.

lawyer refuse to do “some things—some *lawful* things”²⁸ in the name of her character or her integrity.

Who ultimately decides, then, whether the lawyer needs the client’s advice or whether the client needs the lawyer’s? Why, the lawyer does, of course. The street may no longer be one-way, but it is the lawyer who gets to direct the traffic.

That is why I say that the legal ethics of goodness collapses into the legal ethics of rectitude. Call it conscience or call it character and integrity—it is still the same hubris, the same paternalism and elitism.

That is why I also believe that Professor Shaffer has no acceptable alternative to the school of ethics in which the lawyer says, “If I freely choose to represent your interests, I will give you my best counsel, but in the final analysis, I will represent your interests as you freely determine them to be, and not as I impose upon you as your moral superior.”

Professor Shaffer and I both believe that the client is “the noblest work of God.”²⁹ We will, therefore, accept the risks of the client’s freedom of choice; we will respect the client’s moral decision; and, as a result of that acceptance and that respect, we will maximize the chances that the client will achieve goodness in the only way that it truly can be achieved—through moral counseling and the uncoerced exercise of a free will.

28. *Id.* (emphasis in the original).

29. *Id.* at 329.