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Critical Essays

UNDERSTANDING FREEDMAN'S ETHICS

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I have just finished my second semester using Monroe Freedman's new book, *Understanding Lawyers' Ethics*, as one of two primary texts in my professional responsibility course.[1] Both semesters, students found his book accessible and intellectually challenging. Some students even found it "outrageous." Others, of more concern, found it "realistic" and "practical." For a course often perceived as both boring and irrelevant, such reactions are cause for high praise.

Unlike my students, readers familiar with the professional writing concerning lawyers' ethics or professional responsibility will find no new "outrages" in Monroe Freedman's new book.[2] Instead they will find a thoughtfully expanded and updated version of his controversial classic, *Lawyers' Ethics in an Adversary System.* The opening chapters defending Freedman's concept of the adversary system and his suggested balance of client

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1. In class we juxtapose M. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990) with D. LUBAN, LAWYERS AND JUSTICE (1988).

2. Many lawyers, not the least influential of which is retired Chief Justice Burger, have characterized Freedman's position in exactly that fashion — "outrageous." M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM viii (1975) [hereinafter ADVERSARY SYSTEM].

and lawyer autonomy are particularly good additions, providing the philosophical underpinning of his proposed system of professional ethics.

Freedman's basic premise remains that the American adversarial legal system is "rooted in the Bill of Rights"[3] and exists primarily to affirm the human dignity of each individual.[4] While he argues that the system discerns truth and achieves justice more effectively than any existing alternative, he maintains that discerning the truth is only a secondary goal.[5] Thus, on occasion, truth becomes expendable in Freedman's system of ethics.[6]

Freedman's conclusion is the result of a fundamental misunderstanding of the role of the lawyer. The role of the lawyer is not to "win" the unwinnable case, nor to legally extort more for the client than the client is entitled to under the law. The role of the lawyer is to voice the client's perspective artfully and persuasively so that a just resolution can be reached. Few clients intentionally act in a totally irrational or unjustifiable manner. The client's motivation, intent, circumstances and desires provide the tools that a lawyer uses in representation. The lawyer's job is to make the others involved in the matter understand the client's perspective and vicariously share the client's pain or dilemma. Once the decisionmakers understand the perspectives of all involved, the law and the parties can "do justice." Absent this understanding, any justice achieved is merely a happy coincidence. This is as true at the bargaining table as it is at the bar.

Lest those readers who are unfamiliar with Freedman's work misunderstand, Freedman's Achilles' heel is not that he is unprincipled or lacks respect for the system. In fairness, he should be classified as a "true believer." It is clear from his writings that Monroe Freedman believes that the American adversary system is the primary safeguard for all rights enjoyed by the American people. A central article of his faith is that justice is best served by two dedicated and unfettered advocates championing opposing views before an impartial judge or jury.[7]

His creed, which elevates client service above almost all other moral considerations, admits only one limitation — the lawyer is morally accountable for the clients and causes the lawyer chooses to represent.[8] However, with few exceptions the lawyer's autonomy and personal moral responsibility end upon the attorney's agreement to accept the client.[9] Unfortunately, the moral parameters that should guide a lawyer's selection of clients are merely alluded

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3. M. FREEDMAN, *supra* note 1, at ix, 7.
4. *Id.* at 13, 26.
5. *Id.* at 27.
6. *Id.* at 120 (normal examination of criminal defendant presenting perjurious testimony is required), 168 (cross-examination designed to discredit truthful witness is professional obligation).
7. *Id.* at 18.
8. This is perhaps best illustrated by Freedman's high praise of a famous quotation attributed to Lord Brougham during his representation of the Queen in *Queen Caroline's Case*, where the barrister argued that fidelity to one's client is demanded even at the cost of causing a national political crisis. M. FREEDMAN, *supra* note 1, at 65-67.
9. *Id.* at 50.

to, with no extended discussion.[10] Even more disappointing, because of his seemingly wholehearted endorsement of role morality,[11] he rarely is called upon to struggle with the lawyer's personal responsibility after agreeing to represent a client. In the few instances where he acknowledges that such responsibility may exist and conflict with blind loyalty to the client, he dismisses the problem by suggesting that a lawyer not undertake representation that is likely to give rise to such a difficult situation.[12]

This is not a satisfactory resolution of the problem in light of his foundational premise that zealous representation is the societal method of affirming the intrinsic dignity of every citizen. The rapist or corporate plunderer does not lose his inherent worth as a person by committing the wrongful act. The law no longer brands a person "outlaw," literally casting that person beyond the protection of the law. The accused, innocent or guilty, retains the right to be heard in court. Freedman's solution of refusing representation suggests that the accused has a right to be heard, but heard only through the voice of one who is not repulsed by the conduct for which he is accused. Yet if the conduct is so heinous as to repulse all who know of it, the accused may be left to stand mute before his accuser.[13]

On a more pragmatic level, Freedman ignores the issue of moral responsibility for client selection in a law firm setting. The majority of law students will begin their legal careers as associates in law firms of various sizes.[14] Is the supervised lawyer accountable for the "selection" of the client when there was no voluntary association between the client and the particular lawyer? Are all members of law firms required to reject work from established clients of the firm because an individual lawyer perceives the client's cause as unjust? Freedman gives no guidance in balancing the conflicting obligations to the client who reasonably expects representation, the firm which, at a minimum, has an economic interest in the representation, fellow attorneys who expect each lawyer to shoulder his or her share of the workload, and the lawyer's own conscience.

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10. The considerations Professor Freedman specifically mentions are 1) the likelihood that the lawyer will be required to use tactics that the lawyer finds offensive (*id.* at 68); 2) the belief that the client's cause of action or defense should not be legally recognized (*id.* at 69); 3) the ability of the client to pay the lawyer's fee (*id.* at 68); 4) whether the case is in an area of practice in which the lawyer has chosen to practice (*id.* at A-1); and 5) whether in some significant respect it involves a cause to which the lawyer thinks is worth devoting time (*id.* at A-2).

The scattered citations reflect the fact that there is no development of a method of client selection, but merely passing references to various concerns.

11. "Role morality" is a system of ethics that determines the morality of an act by the actor's role in society, independent of any general principles of morality that should be observed by all members of the society. This concept is extensively discussed in Wasserstom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

12. *See* M. FREEDMAN, *supra* note 1, at 168 n.20.

13. This raises what has become known as the "last lawyer in town" dilemma. Professor Freedman does not address this in this book. However, his willingness to serve as counsel under such circumstances can be inferred from some of his other writings. *See, e.g.*, Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U.L. REV. 191, 199 (1978).

14. *See* Gibbons, *Law Practice in 2001*, 76 A.B.A. J. 68 (1990); Rehnquist, *The State of the Legal Profession*, 14 LEGAL ECON. 44 (1988).

Once the attorney-client relationship is formed, Freedman argues that the lawyer is constitutionally defined as agent or "contractor" for the client, and is bound to accept the client's direction on all matters concerning his or her case.[15] If irreconcilable disagreements arise between the lawyer and client concerning the objectives and tactics of representation, after "moral consultation," the lawyer must defer to the client's judgment. Unfortunately, "moral consultation" is not clearly defined. From the use of the phrase, it may mean either: 1) the lawyer's moral obligation to consult with the client on all aspects of the case to enhance the client's realm of decisionmaking and thus free choice;[16] and/or 2) consultation with the client about the morality of the client's proposed course of conduct in an attempt to modify the client's position.[17] The first definition focuses on the morality of the attorney's conduct, while the second standard focuses on the morality of the client's choice. The absence of a clear definition weakens his explanation by example of what he characterizes as a professional obligation, and leaves unanswered the question of the lawyer's moral responsibility after failed consultations.

Only in cases of severe and lasting disagreement with the client may the lawyer withdraw, and even this option cannot be discussed with the client in order to persuade the client to the lawyer's view, because of its "coercive" effect.[18] While the examples he cites are drawn from cases where highly personal matters are at stake,[19] business clients also feel pressured by threats to withdraw. To the small business owner the threat of increased legal fees due to the hiring of replacement counsel can seem very coercive. A scientist seeking a patent for a new invention in a rapidly developing industry may find delay equally "coercive." Freedman fails to identify the nature or degree of "coerciveness" that is sufficiently repugnant to seal the lawyer's lips. Under Freedman's theory there can be no morality-motivated negotiation between client and counsel about continued representation after the attorney-client relationship is formed. The attorney may only unhappily continue representation or provide notice to the client of his intention to withdraw.

Following his discussion of the adversary system and the attorney's role, Freedman turns to the lawyer's duty of confidentiality.[20] Because of his perception of the lawyer as almost the client's "alter ego," Freedman believes that lawyers should be required to maintain client confidences strictly, even at personal cost. The only exceptions that Freedman clearly favors are ones that permit disclosure when human life is at stake or when necessary to avoid presenting a case before a tainted jury or judge. Grudgingly, he also would allow disclosure when the lawyer's conduct is made the object of formal charges of

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15. M. FREEDMAN, *supra* note 1, at 49-50.

16. *Id.* at 51. This position is consistent with Model Rule of Professional Conduct 2.1 and its commentary which suggests that under certain circumstances the lawyer ought to "refer to relevant moral and ethical considerations in giving advice." MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 comment (1983).

17. *See* M. FREEDMAN, *supra* note 1, at 88; MODEL RULE 2.1, *supra* note 16.

18. M. FREEDMAN, *supra* note 1 at 64. *But see id.* at 50 (outlining proper circumstances for withdrawal).

19. Freedman discusses child custody and deportation cases. *Id.* at 64 n.93.

20. *Id.* at 87-108.

misconduct.[21] To permit disclosure for less compelling reasons diminishes the client's ability to rely upon the lawyer as a source of help in times of need.[22] Equally important, any lesser standard diminishes the lawyer's ability to be an influence for good through thoughtful and candid counsel.[23]

His criticisms of the exceptions to the duty to maintain confidences contained in the Model Rules of Professional Conduct are scathing and persuasive. Lawyer codes of professional ethics traditionally have permitted lawyers to reveal confidences to obtain their fees, or defend themselves from charges of wrongdoing, but not to protect the fortunes or reputations of others, and only recently, and in limited circumstances, to protect the lives of third parties.[24] Freedman rightfully denounces the ethical priorities that such a history of exceptions evidences.

Having laid his foundation of constitutionally-mandated attorney loyalty to clients, Freedman reaffirms his well-known position concerning proper conduct when faced with perjury by a client who is charged with a crime.[25] He suggests that the criminal defendant[26] lying to the court in defense of his liberty may, and perhaps should, suffer a multitude of adverse consequences[27] including, but not limited to, a more severe sentence by the judge convinced that the defendant lied, or prosecution for perjury. However, one "adverse consequence" that the defendant should not suffer is "betrayal" by the lawyer entrusted with the defense. Freedman suggests that revealing perjury by a criminal defendant is exactly that — betrayal.

He explores his position through a series of hypothetical situations, the most troubling of which was suggested by Chief Justice Warren Burger at a symposium on legal ethics.[28] The hypothetical lawyer is appointed to represent a drifter accused of raping a young woman who is engaged to be married to a local minister. Initially the drifter asserts that the woman consented to having sexual intercourse. While investigating the case, the lawyer discovers the woman had two sexual relationships prior to the rape. The first man refuses to talk to the lawyer. The second, apparently jilted by the woman and anxious for revenge, is eager to tell all he knows (and perhaps more). Later the defendant confesses to the lawyer that he raped the woman, but proposes to testify that she consented.[29]

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21. *Id.* at 102-03.
22. *Id.* at 98.
23. *Id.* at 88.
24. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-104(c)(4) (1981); and MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.6(b)(1) (1983).
25. *See* Dorsen, Book Review, 11 HARV. C.R.-C.L. L. REV. 764, 765 (1976); and Lazarus, Book Review, 51 N.Y.U. L. REV. 348, 349 (1976).
26. It is important to note that Freedman does not extend this "right" to commit perjury to a civil litigant. Freedman, *Teaching Legal Ethics in the Twenty-first Century*, in MATTHEW BENDER LAW SCHOOL REPORT (Jan. 1991).
27. These consequences may include diminished credibility of the defendant, use of a defense that, in the lawyer's judgment, is not the best calculated to protect the client, increased jail time if judge decides defendant is lying, and so on.
28. M. FREEDMAN, *supra* note 1, at 161.
29. *Id.* at 162-63.

Freedman contends that the lawyer should first seek to dissuade the client from perjuring himself, but if unsuccessful, should put the defendant on the witness stand and examine him normally, allowing the client to tell his perjurious tale and use the tale as appropriate in closing argument.[30] Additionally the virtuous lawyer must call the vindictive lover, and cross-examine the prosecutrix in such a way that it appears plausible that she did consent, even though the lawyer knows this to be a lie.[31] To his credit, Professor Freedman does not attempt to justify his position by claiming that lawyers never "really know" the truth.[32] Instead, he returns to his premise that the lawyer is bound to perform the role the client's script requires in deference to the client's autonomy.[33]

Particularly troubling is his attempt to respond to the criticism that an attorney who examines the client in an ordinary way must necessarily coach the client, thus making the perjury more effective.[34] This objection is cavalierly dismissed as plainly unethical, yet to fail to prepare the client to testify effectively is to fail in zealously representing the client just as much as requiring the client to testify in narrative form, which Freedman rejects. To a judge who is a trained observer of trial technique, unprepared direct examination differs from narrative testimony only in that it does not automatically violate the rules of evidence.

Freedman examines his conclusions in reference to existing case law and ethical codes. Once again he finds the Model Rules of Professional Conduct lacking, both in candor and in thoroughness. Rule 3.3 of the Model Rules of Professional Conduct forbids an attorney from knowingly offering false evidence. Freedman argues that the use of the word "knowingly" encourages either "selective ignorance" on the part of attorneys who intentionally fail to fully investigate the clients' cases, or "disingenuousness" by attorneys who advise their clients to talk in hypothetical terms.[35]

He follows his discussion of client perjury quite naturally with a discussion of the problems inherent in preparing witnesses. While his discussion is largely unchanged from *Lawyers' Ethics in an Adversary System*, it still raises important questions about the methods lawyers use to obtain information concerning a case, and the ease with which that information can be unintentionally altered by the phrasing of questions or the preliminary information given to a potential witness.[36] His discussion of the psychology of memory is quite good and informative for those unfamiliar with the psychological literature. However, as Freedman suggests, drawing the line between eliciting testimony and manufacturing it will always require a judgment call by the lawyer. It is unfortunate that he fails to give any guidance on how to make the call.

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30. *Id.* at 120, 168.
31. *Id.* at 168.
32. *Id.* at 119, 141.
33. *Id.* at 119-20.
34. *Id.* at 123.
35. *Id.* at 130.
36. *Id.* at 143-60.

Two new chapters address conflicts of interest. According to Freedman, all conflicts should be subject to a knowledgeable and voluntary waiver by clients to ensure maximum freedom in their selection of attorneys. Even opposing parties in litigation should be permitted to waive any conflict of interest if they wish to employ the same attorney or firm.[37]

There may be merit in this suggestion when dealing with sophisticated clients and large multi-office firms. However, when considering unsophisticated clients or both sides of a controversy being represented by the same lawyer, it seems fraught with the potential for abuse or collusion. Additionally, there are times when non-clients have a vital interest in the vigor of representation. The clearest example of this is in representing a fiduciary who has recognized legal obligations to others.[38]

The chapter on corporate representation focuses primarily on the problem of identifying the client. To resolve this problem, when representation begins Freedman would have corporate counsel request the board of directors identify to whom the lawyer is responsible (the board, the stockholders, the officers, et cetera). This directive then would be determinative should a situation develop where there were conflicting claims upon the lawyer's loyalty.[39] The greatest deficiency of this chapter is the failure to adequately explain how representation of large corporate entities affirms individual dignity. The only treatment this issue receives is a brief footnote calling the reader's attention to the fact that not all corporations are multinational conglomerates.[40] This is hardly sufficient when Freedman's justification for his proposed system of legal ethics is the affirmation of human dignity. Absent greater treatment of this issue, it would be logical for the profession to craft different and less client-protective rules for corporate representation.[41] This would be a dramatic

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37. *Id.* at 182.

38. *Estate of Laurence D. Miller,* No. P-82-233 (Cleveland County Dist. Ct., Okla. 1989) is an example of such a case. The case revolved around the right of a non-resident widow to assert a forced heir's share in real property located in the State of Oklahoma. The testator, a Texan, had left a will directing that all of his property go to his son by a previous marriage. During the litigation, and unbeknownst to the probate court, the son, as executor, removed hundreds of thousands of dollars of Oklahoma oil well revenue. When this was brought to the attention of the Oklahoma trial judge, the powers of the executor were suspended upon suspicion of embezzlement of estate funds. The executor resigned and his uncle was appointed administrator with will annexed. The law firm that had previously represented the executor maintained that it could represent the administrator based upon the waivers and consents of the executor and administrator. The wife who had brought the cash withdrawals to the court's attention was appalled. Yet the executor's law firm asserted that the beneficiary had no standing to challenge the propriety of the representation because both "clients" had consented. The underlying litigation was settled before the issue was presented to the court and therefore was never judicially resolved. In this case it is questionable whether either the executor or administrator could knowledgeably consent to joint representation. Assuming that such consent was possible, permitting such joint representation seems undesirable since it undermines the faith of the heirs and beneficiaries in the judicial system.

39. M. FREEDMAN, *supra* note 1, at 200-01.

40. *Id.* at 197 n.1.

41. For such a proposal, see D. LUBAN, *supra* note 1, at 177-236.

departure from present Rules which Freedman suggests afford greater protection to corporate clients than that offered individuals.[42]

The content of Freedman's chapter on "Prosecutors' Ethics" remains the same as the material presented in *Lawyers' Ethics in an Adversary System*,[43] although the rewritten material is less accusatory about the level of professionalism among prosecutors. He continues to suggest what many believe to be an unworkable standard of personal belief in the defendant's guilt prior to a prosecutor's seeking an indictment.[44] Additionally, he discusses what he perceives as unethical conduct in the practice of obtaining a waiver of civil liability for any abuse by police before the dismissal of criminal charges against a defendant.[45]

He closes his book with a chapter on lawyer advertising, arguing that it should not be regulated beyond the normal regulation of any other advertising — it cannot be deceptive.[46] His basis for this position is that advertising is valuable because it makes people aware of their legal rights. Without unlimited advertising wrongs might go unrighted, compensation denied, and abuse of power unchecked.[47] This is a proper ending for a book premised on the idea that our society primarily recognizes human dignity through the adversarial legal system. Unfortunately, the initial premise is wrong.

The most compelling argument for Freedman's initial premise is found in cases involving criminal defense or great constitutional principles. In those increasingly rare instances when the full panoply of constitutional rights is invoked in defense of an indigent client unjustly accused of a crime, the lawyer serves both his client and nation well. Even in those less rare instances where the rights are asserted by a very well paid criminal defense lawyer on behalf of an individual overwhelmingly implicated in dealing drugs to school children, a constitutional purist must applaud the defense lawyer's efforts (while fervently praying for the success of the prosecutor). However to most individuals entangled in the criminal justice system, this clash of legal titans over the guilt or innocence of the accused is largely a myth. The day-to-day reality of lawyers involved with criminal cases is one of negotiated pleas and massive caseloads.[48]

Yet it is the myth, rather than the reality, which Freedman relies upon to sustain his vision of lawyerly virtue. As in all myths, there is sufficient truth and wisdom to provide a principled code of conduct for heroic situations. The situations he invokes are those where the individual stands alone against a society that seeks to take his liberty or life (whether justified or not), or where

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42. M. FREEDMAN, *supra* note 1, at 205.
43. ADVERSARY SYSTEM, *supra* note 2, at 79-98.
44. M. FREEDMAN, *supra* note 1, at 221. For representative criticism of Professor Freedman's position, see Meagher, *A Critique of Lawyers' Ethics in an Adversary System*, 4 FORDHAM URB. L.J. 289, 298-99 (1976).
45. *See* M. FREEDMAN, *supra* note 1, at 225-28.
46. *Id.* at 264-65.
47. *Id.*
48. *See, e.g.*, Glanzer & Taskier, *The Fine Art of Plea Bargaining*, 2 CRIM. JUST. 6 (1987).

the majority seeks to deny equal protection of the law to a minority.[49] The truth that his code of conduct relies upon is that individual dignity is one of the cornerstones of our republic.

But his political theory, and thus ethical theory, is marred by his failure to recognize that respect for the individual is but one of the cornerstones of this nation. Another is the voluntary union of individuals living together in community, seeking to govern ourselves as a society. By coming together as a nation, we have agreed to live together as peacefully as possible, and we have surrendered a certain degree of freedom that would be ours in a state of nature. We are no longer free to do that which harms others without just cause. We define "just cause" by our collective wisdom embodied in the Constitution and legislation passed by our elected representatives.[50] In this manner "we are a government of laws, and not men."[51]

The daily tasks of the courts in this nation are two: 1) to decide if the state has the right to punish an individual accused of committing a crime; and 2) to provide a peaceful and just resolution of private disputes. In accomplishing these tasks, it is necessary that the actions of the courts be both just and perceived as just. When the courts achieve justice, those actions validate not only the existence of the courts, but also the continued existence of our government, and more importantly the rule of law in this nation. It is our pursuit of justice that affirms human dignity, not the adversary system.

Benjamin Disraeli defined justice as "truth in action."[52] John Rawls argues that justice is best determined in reference to what a disinterested person would determine to be just when placed behind "the veil of ignorance" and presented with the facts of a situation.[53] In both this definition of justice and method for its determination, the necessity for truth is presupposed. How can anyone know what is just when he or she does not know all of the facts of a situation? Truth is a precondition to justice and thus indispensable in the courtrooms of this nation. It is a moral imperative in our legal system, for without it, "the lawyer either cheats her way to justice or cheats justice,"[54] and we, as professionals, must act as "liars, coercers and tricksters" or "white collared rascals."[55]

Freedman denies this imperative in the name of human dignity through zealous representation. But human dignity is not dependant upon legal repre-

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49. In his defense of the adversary system, Freedman cites cases such as *Brown v. Board of Education*, *Baker v. Carr*, *United States v. Nixon*, and *NAACP v. Button*. M. FREEDMAN, *supra* note 1, at 19-23.

50. The irony of referring to much of our current statutory law as "collective wisdom" does not escape me. However, as a matter of political theory, that is what the statutory law is supposed to embody.

51. Adams, *Novanglus papers*, Boston Gazette (1774), no. 7, *incorporated in* MASS. CONST. pt. 1, art. XXX (1780).

52. Speech by Benjamin Disraeli in the House of Commons (Feb. 11, 1881), *reprinted in* 20 THE WORKS OF BENJAMIN DISRAELI, EARL OF BEACONSFIELD 88 (R. Arnot ed. 1904).

53. J. RAWLS, A THEORY OF JUSTICE (1971).

54. D. LUBAN, *supra* note 1, at 16.

55. Noonan, *Professional Ethics or Personal Responsibility?* (Book Review), 29 STAN. L. REV. 363, 369 (1977).

sentation; it is dependant upon justice. Justice requires that an individual be accorded both rights and duties.

How can the lawyer, who has sworn to promote justice, act as an accomplice to perjury that, if successful, will thwart the ends of justice?[56] Or arguing from Freedman's premise, how is human dignity enhanced by facilitating a denial of responsibility by the client and denying the rights of another? Is it not as much an affront to human dignity to deny the rapist his responsibility as it is to deny the victim her vindication? If individual dignity in a community is dependant upon equal protection of the laws, do we not diminish every individual's dignity when we intentionally deny justice?

Freedman agrees that the most troubling aspect of the rape hypothetical is that the lawyer is required to "respect" the dignity of the client who is lying by destroying the dignity of the truthful prosecutrix.[57] With truth as the touchstone of the lawyer's conduct this awful paradox is avoided. The attorney for the rapist is not required to assist the rapist in creating a lie in order to ensure that the client's rights are adequately protected. Such assistance is required only if the client's right is defined as an unqualified right to avoid punishment. But the client does not have an unqualified right to avoid punishment. The client's right is to require the state prove its power to punish him. If the evidence of guilt is so compelling that only by the introduction of a lie can a reasonable doubt be raised, then the state has met its burden of proof.

By declining to assist in creating lies in the courtroom, not only is the lawyer precluded from presenting the client's perjurious testimony, but counsel may not present the testimony of the vindictive lover or cross-examine the prosecutrix for the purpose of creating the illusion that she consented to the sexual activity. This result is mandated because the lawyer knows that the victim did not consent.

Freedman's response to this position is that it defeats the basic purpose of the attorney-client privilege, which is to promote candor in the relationship, enhancing the quality of representation. Once clients know that lawyers will not rely on known falsehoods in creating a defense, the clients will simply not tell the lawyers the truth. This is undesirable because lawyers then lose the opportunity to counsel clients and persuade them to "do the right thing." Freedman argues the ultimate effect of forbidding lawyers to assist in creating a lie fails to protect both the system and the client. The system will be polluted with the lie, since the client will lie to the next lawyer and proceed to present the perjury with the unknowing assistance of the second lawyer. Thus we are all losers, or so the argument goes. But that assumes that when lawyers know the truth, society is the "winner." That is an assumption with which I disagree. It is only when the judge and jury know the truth that society wins. Each time the lawyer uses talents and skills to pollute the courtroom with a lie, either

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56. I am, of course, assuming the most typical case of perjury, where the client seeks to evade punishment for a crime which he committed. However, the question remains the same for the defendant that "confesses" to a crime which he did not commit.

57. M. FREEDMAN, *supra* note 1, at 168.

explicit or implicit, the lawyer has intentionally diminished the chances that individual justice will be done. Thus society loses.

If the lawyer cannot assist in creating a lie, then what defense is left to the defendant who has acknowledged his or her guilt to the attorney? Any defense that is based upon the facts which the lawyer knows. In the hypothetical case it appears that the law provides no defense. The function of the lawyer then is to persuade the client to plea bargain, and obtain the best deal possible from the prosecutor. If the client insists on a trial, the lawyer must find any inconsistencies or errors in the state's case, and capitalize upon them. The difficulty with this type of defense is that jurors and judges have a psychological need to have occurrences explained. Inconsistencies and errors by witnesses and experts are often viewed as "mere technicalities," preventing justice rather than serving its ends. Such a defense also does not provide the fact-finders with an alternative interpretation of the facts that are undisputed. In the absence of an explanation, people will create one. If the state presents a set of facts with the explanation that the facts constitute a crime committed by the accused, in the absence of any contrary explanation, in most cases the jury or judge will accept the explanation offered.[58] The perjury of the defendant is an attempt to offer another plausible explanation of the facts. Offering alternative explanations or interpretations is not intrinsically wrong. Labeling them as truth is.

But if the attorney refuses to offer the defendant's "explanation" or merely presents it as an alternative interpretation without asserting that it is true, hasn't the attorney compromised the client's defense? Only if the client has a right to any defense. If the client's right is to present only those defenses which are based on fact and recognized by law, the client's position is not compromised. In such a case, the benefit of counsel is not in evading responsibility by the successful presentation of a bogus defense, but in ensuring that the punishment received is not excessive for the nature of the crime committed and the character of the criminal who committed it.

The shortcomings of Freedman's equation of unrestrained legal representation equals human dignity are even more glaring when applied to civil litigation and non-litigation situations. In litigation involving purely private matters, how can the lawyer avoid the dilemma of affirming the client's dignity at the cost of the opposing party's when truth and justice are not professional touchstones? The model of total partisanship is glaringly inadequate when attempting to justify the use of child custody as a weapon in the division of marital property, or guardianship proceedings to void the actions of an elderly parent in order to insure continued rights of inheritance.

Individual dignity is not directly at issue in most civil litigation. Human community is. The affirmation of human dignity in cases of slander, assault, and other similar torts is in the recognition of the cause of action — not in the existence of adversarial legal representation. What Professor Freedman fails to acknowledge is that the affirmation of human dignity is in the justness with

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58. *See generally* Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989).

which we deal with one another. "Justness" can only occur when we understand the reality of our circumstances through our own perceptions and truthful representation by others of theirs. Truth is the foundation of justice and justice is the foundation of human dignity in a society. Adversarial representation is only a means we have selected to achieve these ends.

Despite my disagreement with some of Professor Freedman's initial premises and ultimate conclusions, I will continue to require that my students read *Understanding Lawyers' Ethics*. Professor Freedman's book provides students with a principled argument for unrestrained zeal in the cause of their clients. His emphasis on serving clients should be stressed to all future lawyers. He challenges some preconceived notions of what the moral lawyer does in difficult situations. He struggles to provide a definition of professional "goodness." In a marketplace crowded with books seeking to define professional responsibility by the study of professional "badness," Professor Freedman's book is a refreshing and challenging option.