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Abstract

The field of legal ethics, as we know it today, has grown out of thoughtful, systematic grounding of lawyers' duties in a comprehensive understanding of lawyers' roles and the situating of lawyers' roles in underlying theories of law, morality and justice. Unfortunately, the field of theoretical legal ethics has mostly lost track of the thing at the heart of a lawyers' role: the integrity of the lawyer-client relationship. The field of theoretical legal ethics has developed in ways that are deeply lawyer-centered rather than fundamentally client-centered. This paper, which was delivered at Hofstra Law School as the Lichtenstein Distinguished Professor of Legal Ethics Lecture in October, 2010, explores the history of how legal ethics came to be lawyer-centered and what it would mean to ground a fundamentally client-centered conception of lawyers' duties in moral, political and jurisprudential theory.

Keywords

Attorney and client, Duty of loyalty (Law), Legal ethics, Jurisprudence, Law--Study and teaching (Continuing education), Justice administration

Disciplines

Legal Ethics and Professional Responsibility

ENGAGED CLIENT-CENTERED REPRESENTATION AND THE MORAL FOUNDATIONS OF THE LAWYER-CLIENT RELATIONSHIP

*Katherine R. Kruse**

I. INTRODUCTION

Thank you for inviting me here to speak with you today about engaged client-centered representation. I am going to talk about the continuities and discontinuities between the way lawyers and clients are viewed in the two worlds in which I live: the world of legal ethics scholarship and the world of clinical legal education. It is fitting that I get the opportunity to have this conversation at Hofstra, because Hofstra is a place with a rich tradition and history in both areas.

I begin with a story that goes back to the beginning of legal ethics as we know it today: before the ABA promulgated the Model Rules of Professional Conduct; before Professional Responsibility courses were required in law schools; before states required mandatory CLE credits in ethics; and before legal scholars wrote systematically about the relationship between lawyers' duties and lawyers' roles in society and in our system of justice. Before that whole substructure of legal ethics analysis had been constructed, lawyers worked out the details of their professional responsibilities to clients and to the public in conversation with other lawyers engaged in the same kind of practice, trying to figure out together what it meant to be good lawyers.

The story is about the consequences of a conversation among lawyers about their professional responsibilities.¹ In the early 1960s, a

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1. The details of this story are drawn from Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133, 136-39 (2008).

group of criminal defense lawyers got together regularly to talk through tactical questions about how to do their jobs faithfully and well. In one of their meetings, the subject of client perjury came up. One of the members of the group confessed a problem to which she had no good solution: her client was going to testify at trial, she thought the client was going to lie, and she did not know what she was supposed to do about it. The group realized that this was a difficult question that they had each faced at one time or another, and that they had faced it largely alone. It was not the kind of question they had wanted to talk about out loud and in public. As they talked through the issue, they realized that the Canons of Professional Responsibility were inconsistent with respect to the duties of confidentiality toward clients and candor toward the courts, and that there were different ways to resolve the inconsistency. So, they came up with a variety of different answers or strategies for dealing with the situation.

These were also the early days of *Gideon v. Wainwright*,² when the constitutional right to counsel in criminal cases had just been established.³ One of the young lawyers who had been part of this discussion group had started an institute to train lawyers in criminal defense work. In a training session at that institute, he presented the question of what a lawyer should do when faced with potential client perjury, laid out a variety of possible resolutions, and defended the idea that if efforts to dissuade the client from testifying falsely failed, it was consistent with a lawyer's ethical duties to maintain confidentiality and present the client's testimony anyway. The lecture was reported in the press; the next day, he was served with notice of disbarment proceedings for even suggesting such a thing out loud and in public. In defending himself against these ethical charges, that lawyer wrote a law review article laying out the rationale for his answer and showing that he was not just fomenting disrespect for the law or disrespect for the courts, but that he was advancing a thoughtful answer to a difficult question that was grounded in lawyers' professional roles and duties.

As many of you probably know, that young man was Monroe Freedman, and his article, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*,⁴ along with his later book, *Lawyers' Ethics in an Adversary System*,⁵ were among the first thoughtful, comprehensive descriptions of what it means for a lawyer to

2. 372 U.S. 335 (1963).

3. *Id.* at 338-39, 344.

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

5. MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).

zealously represent a client within the bounds of the law and how central that concept is to our societal notions of fairness, dignity, autonomy, and justice. Freedman argued in that work and elsewhere that at the very heart of this comprehensive vision of zealous advocacy within the bounds of the law, there is a relationship—the lawyer-client relationship.⁶ And, that relationship is a very human relationship built on a foundation of loyalty by the lawyer and trust by the client. Freedman argued then, as he has continued to argue vigorously over the years, that if we have ethical rules that require lawyers to betray their clients, it will destroy the loyalty and trust in the lawyer-client relationship, make it impossible for lawyers to perform their adversary function properly, and undermine the foundation of our system of justice.⁷

The field of legal ethics, as we know it today, has grown out of thoughtful, systematic grounding of lawyers' duties in a comprehensive understanding of lawyers' roles and the situating of lawyers' roles in underlying theories of law, morality, and justice. Unfortunately, in the process, the field of theoretical legal ethics has mostly lost track of the thing that Freedman insisted was at the heart of a lawyers' role: the integrity of the lawyer-client relationship. As I will discuss, the field of theoretical legal ethics has developed in ways that are deeply lawyer-centered rather than fundamentally client-centered. I am going to speak about how that happened. I am also going to share some of my ideas about what it would mean to ground a fundamentally client-centered conception of lawyers' duties to represent a client zealously within the bounds of the law in moral, political, and jurisprudential theory.

II. THE TRADITIONAL LAWYER-CENTERED APPROACH TO LEGAL ETHICS

By the mid-1970s, theoretical interest in legal ethics was on the rise. But many of the people who were thinking and writing in the new field did not begin their careers as legal ethicists the way Monroe Freedman did: by talking to other lawyers about what it means to be a good lawyer and grounding the insight of that experience in theory. Instead, they approached legal ethics as philosophers exploring what David Luban called the “hard, unsolved . . . issues in legal ethics that are amenable to treatment by moral philosophy.”⁸ From the perspective of

6. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 68-70, 128-29 (4th ed. 2010); Freedman, *supra* note 4, at 1470.

7. See FREEDMAN & SMITH, *supra* note 6, at 128, 137-39; Freedman, *supra* note 4, at 1470, 1473, 1475.

8. David Luban, *Calming the Hearsed Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 452 (1981).

philosophers, the interesting questions in legal ethics arose from conflicts between the demands of lawyers' professional roles and ordinary morality.⁹ The theoretically interesting questions centered on, in the words of Charles Fried: "Can a good lawyer be a good person?"¹⁰

To frame the important and interesting questions of legal ethics in terms of conflicts between role morality and ordinary morality, moral philosophers had to define lawyers' role morality in a way that would create conflicts between moral responsibility and professional duty. According to the moral philosophers, lawyers occupy a simplified and morally problematic universe in which their decisionmaking was determined according to only two parameters: client objectives and the bounds of the law.¹¹ I am going to argue later that an engaged client-centered approach to pursuing a client's objectives within the bounds of the law is not at all simplified and much less morally problematic than the moral philosophers in legal ethics have painted it to be. But first, I need to better explain the philosophers' critique of traditional legal ethics.

To create philosophically interesting conflicts between role morality and ordinary morality, the moral philosophers in legal ethics had to define the parameters of professional duty—client objectives and the bounds of the law—in a particular and simplistic way. The bounds of the law were understood within the moral philosophical critique as allowing lawyers to do whatever they wanted to do, as long as they could find a way to justify it with legal arguments. With respect to the bounds of the law, moral philosophers pointed out that lawyers did not typically engage in good faith interpretation of the meaning of legal limits.¹² Instead, lawyers engaged in a kind of linguistic gamesmanship that stretched the meaning of law well past its intended purposes.¹³ And this expansive conception of the bounds of the law, which included any colorable interpretation of law that lawyers could argue with a straight face, was insufficient to contain over-zealous partisan tactics.¹⁴

As it turns out, the territory out at the colorable limits of the law is fertile ground for the kinds of conflicts between role morality and ordinary morality that the moral philosophers wanted to explore

9. *Id.* at 454-56.

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

11. Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73-74 (1980).

12. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 111 (2010).

13. *Id.*

14. *Id.*

theoretically. When you push the limits of the law out past its intended purposes, a lot of things are legally permissible, and not all of them are morally right. But the moral philosophers could not get lawyers out to the colorable limits of the law on their own steam. Lawyers' professional duties are to pursue their *clients'* objectives, and if their clients want things that most law-abiding people want, then lawyers do not have occasion to push out to the colorable limits of the law. To create dilemmas between role morality and ordinary morality, the moral philosophers also had to posit clients who wanted to use the law to maximize their own wealth, freedom, and power over others.

The examples that moral philosophers gave of lawyers' moral dilemmas took on a predictable structure: they involved clients who wanted to do the wrong thing and harm innocent third parties but whose actions nonetheless fell within the arguable bounds of the law. For example, a man owes a debt, but his creditor has waited too long to collect it, so the man has an arguable statute of limitations defense to defeat his moral obligation to repay his creditor.¹⁵ Or, a man wants to disinherit his son because he disagrees with his son's opposition to the Vietnam War.¹⁶ Some of these examples came from actual cases. One particularly well-worn example arose from the facts in the 1962 case *Spaulding v. Zimmerman*,¹⁷ in which the defendant in a personal injury case discovered through a medical examination of the plaintiff that the plaintiff was suffering from a life-threatening aortic aneurysm, but the law did not compel the defense to turn over the results of that medical examination, and the defendant settled the case without ever advising the plaintiff that his life was in danger.¹⁸

You may already be familiar with these examples or examples like them, because they are the kinds of examples you have probably encountered in your professional responsibility classes. Now, if you were a particularly bold student in your professional responsibility class, you might have asked, when confronted with an example like the one in *Spaulding*: Why doesn't the lawyer just ask the client if the client is willing to reveal the damaging medical information to help save the plaintiff's life?¹⁹ But a question like that threatens to do away with the conflict between role morality and ordinary morality that the example is

15. See, e.g., Postema, *supra* note 11, at 66.

16. Richard Wasserstrom, *Lawyers As Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 7 (1975).

17. 116 N.W.2d 704 (Minn. 1962).

18. *Id.* at 707-08, 710.

19. This point has consistently been made over time by Monroe Freedman. See Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 200-01 (1978).

meant to illustrate. It diverts the discussion away from the lawyer's moral dilemma and onto the question of what kind of discussion is appropriate for the lawyer and the client to have about whether to reveal the information. To get the discussion back to the main point—the lawyer's moral dilemma—you were probably told to assume that the client will not agree to reveal the information.

To focus on the lawyers' moral dilemma, clients had to be constructed as what I have elsewhere called “cardboard clients,” who care only about the advancement of their own interests and are unconcerned with the harm caused to others.²⁰ As you can see, the lawyers in these examples are assumed to be basically good people. They want to lead moral lives and to do the right thing. They do not want to harm other people. They are not in it for the money. People like that can be trusted to make good moral decisions, and if they were not required to abide by their clients' wishes, they would probably make good moral decisions about their clients' lives and affairs. The problem is not with the lawyers themselves, but with the professional duty to pursue the client's objectives up to the limits of the law. Because the law does not require clients to do the right thing, because clients have no incentive to do the right thing on their own, and because lawyers are duty-bound to press their clients' objectives all the way to the arguable limits of the law, there must be something rotten at the very core of legal ethics. To fulfill your professional duty to be a good lawyer, you have to be a morally bad person.

The solution that the moral philosophers arrived at was that we should hold lawyers morally responsible for the actions they take as lawyers.²¹ They argued that re-introducing ordinary moral responsibility and judgment into professional decisionmaking would remove the professional obligation to do the wrong thing in the name of professional role and encourage lawyers to set limits on their legal representation that seem right to them, based on their own moral compasses.²² If legal representation were shaped by the moral judgment of lawyers rather than the partisan duty to clients, it would prevent harm from coming to innocent third parties. And it would permit lawyers to integrate their duties as good lawyers into their ordinary moral lives as good persons.²³

20. Kruse, *supra* note 12, at 103, 121.

21. David Luban has presented the best-developed version of this view. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 160 (1988).

22. *See id.*

23. The drive toward this kind of integration is explored at length more recently in DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 155-170 (2008).

The solution that the moral philosophers offered made sense—that is, if you accept the assumptions about moral lawyers and cardboard clients on which it was based.

If you take away the assumptions about moral lawyers and cardboard clients, there are some fairly obvious problems with this solution.²⁴ If you assume that lawyers and clients are equally capable of sound moral decisionmaking, it does not make a lot of sense to give lawyers a moral veto over their clients' decisions. After all, the decisions made in legal representation are going to affect the *client's* life. There is no reason to believe that lawyers' legal training gives them particular moral expertise. Our democratic system is based on the idea that we are a government of laws, not men—and that means clients should be able to pursue their objectives within the bounds of legitimate legal limits, not within the bounds of their lawyers' moral compasses. And when you further consider that we live in a morally pluralistic society, characterized by fundamental moral disagreement over foundational values, the idea that the client's affairs ought to be governed by the lawyer's moral compass becomes even less defensible.

I have previously explored the challenge of moral pluralism by positing a lawyer-client relationship between a lesbian couple who is preparing to have a child by insemination or adoption in a state that does not explicitly permit gay marriage or co-adoption, and a lawyer who believes that homosexuality is immoral and that it is damaging for children to be raised in a same-sex household.²⁵ I created this example to critique the moral philosophers' solution because if you take the lawyer's point of view, the example has all the earmarks of the typical legal ethics hypothetical: a client who wants to do something immoral that threatens harm to an innocent third party and a legal context in which the lawyer has to push out to the arguable limits of the law to accomplish the client's goals. But it is also quite clearly an example in which it is inappropriate for the client's life decisions to be guided by the lawyer's moral compass. I am going to return to this example later, but before I do that, I want to turn to a question that I hope you are asking yourself by now: isn't there a better solution than what the moral philosophers offer us?

24. See TIM DARE, *THE COUNSEL OF ROGUES?: A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE* 89-99 (2009).

25. Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 393, 408 (2005).

III. A DIFFERENT DIAGNOSIS AND A DIFFERENT SOLUTION

There is a better solution. In fact, there is a completely different way of diagnosing the problems of legal professionalism that lie at the core of the moral philosophers' concerns. But to get there, you have to bring to mind a different image of clients. You have to imagine a client who walks into a lawyer's office with a human problem or situation: she has been injured on the job, she wants to file for divorce, she has just fired an employee and has been sued for wrongful termination, or she wants to start a business and does not know what regulations or procedures apply to her. What the lawyer does—what the lawyer has been trained to do and has expertise in doing—is to sort the facts of that human problem or situation into a series of legal categories: claims, defenses, procedures, and evidentiary proof. The lawyer “issue-spots” the client in much the same way that law students learn to issue-spot facts in a law school exam. In the process of issue-spotting, the lawyer distills the legally relevant facts and determines what strategies and structures are legally available for pursuing the client's objectives.²⁶

As a result of their legal professional training, lawyers have a tendency to over-value their clients' legal rights and interests relative to the weight that their clients might assign to the protection of those rights and interests when the clients compares them to the other things that the clients value. If a lawyer is not careful, a client's human problem can disappear, and the client can appear instead as a bundle of legal rights and interests walking around in a human body. The client's important non-legal interests—the client's relationships with others, reputation and standing in the community, values, and commitments that the client wants to honor—can fade into the background as the client's legal rights and interests come more sharply into focus.

When we add to this picture the fact that protecting one's own legal rights and interests almost always involves maximizing one's own wealth, freedom, and power at the expense of others, we start to see something really interesting. We have criticized the moral philosophers for assuming that clients are just cardboard figures who want to take advantage of other people and are impervious to moral restraint. But now we see that in the practice of law and in the very process of employing legal expertise, lawyers are in danger of doing something

26. For further discussion of this diagnosis of the problem in legal professionalism, see Warren Lehman, *The Pursuit of a Client's Interests*, 77 MICH. L. REV. 1078, 1079-82 (1979); Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181, 183-85, 188-91 (1999); and William H. Simon, Commentary, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 53-55.

very similar. They are in danger of over-valuing their clients' legal rights and interests and disregarding the other values, relationships, and commitments that clients bring to the table (what I have called the problem of legal objectification).²⁷ And, from the outside, that can look a lot like zealously pursuing the interests of selfish, grasping clients to the limits of the law.

Though they may look the same in terms of lawyer behavior, the problem of lawyers who legally issue-spot their clients is actually quite different from the problem of role morality as it was posed by the moral philosophers in both its diagnosis and in its solution. In the legal issue-spotting diagnosis, we are not imagining that clients *really are* only interested in maximizing their wealth, freedom, and power—we are imagining that the lawyer's preoccupation with the client's legal rights and interests has caused the client's other values to fade into the background. The solution is not to turn over moral control of the representation to the lawyer—it is to get lawyers to bring the client's other interests and concerns back into the picture so that the legal representation can be directed toward objectives that put the pursuit of legal interests into the context of the client's other values, relationships, and concerns.

What I have just described is the client-centered approach to lawyering that forms the centerpiece for most teaching about the professional skills of interviewing and counseling and is the established orthodoxy of most teaching that goes on within clinical legal education.²⁸ The client-centered approach was developed in the mid-1970s, during the same period of time that the moral philosophers in legal ethics were exploring conflicts between role morality and ordinary morality. The client-centered approach can be seen as addressing the same basic problematic behavior that the moral philosophers observed—that lawyers are intent on pursuing their clients' objectives, narrowly defined as the maximization of wealth, freedom, and power over others, all the way up to the arguable limits of the law.

But the client-centered approach diagnoses the source of the problem differently and it offers a different solution. The moral philosophers diagnosed the problem as lawyers who were trapped within a professional role that bound them to the zealous pursuit of their clients' interests and prevented them from exercising moral judgment. The

27. See Kruse, *supra* note 12, at 122-24.

28. For a more comprehensive discussion of client-centered representation, see generally Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); and Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006).

client-centered approach diagnosed the problem as lawyers who distorted their clients' objectives by over-valuing the clients' legal interests and losing track of the clients' non-legal interests. The solution that the client-centered approach offered was a broader range of lawyer deference to client decisionmaking on the theory that lawyers may be experts on the law, but only clients are experts on their own lives.

I am a proponent of client-centered lawyering, both because I think it provides a better diagnosis of the problems in legal professionalism and because I think it offers a more attractive solution than the moral philosophers have offered us. It is more attractive because it allows us to re-introduce moral responsibility into legal representation by defining the duty of partisanship to include a responsibility to shape legal representation around a more robust and holistic understanding of client objectives. It provides a source of limitation on lawyers' no-holds-barred partisanship that springs directly from lawyers' professional duties to pursue their clients' objectives, rather than from appeals to lawyers' moral compasses that compete with professional duty and undermine the values of autonomy, dignity, equality, and the rule of law. But the question of what it means to be a good client-centered lawyer is a complicated one, and its applicability outside the context of individual client relationships is questionable. I will spend the rest of my time here exploring these complications and limitations in more detail.

A. *Engaged Client-Centered Representation*

When the client-centered approach to legal representation was first introduced in the lawyering skills literature, its methods were based on deference to client decisionmaking, techniques of neutral interviewing and counseling, and a philosophy of minimizing interference with client decisionmaking.²⁹ The assumption implicit in these methods was that clients already knew what their objectives were, and that lawyers needed to take special care not to distort their clients' objectives by expressing opinions about what the clients ought to do or even offer legal advice.³⁰

As the client-centered approach has become more sophisticated over time, most lawyering theorists have acknowledged that this kind of detachment and non-interference by the lawyer is not only unworkable,

29. See Dinerstein, *supra* note 28, at 507-09.

30. See, e.g., DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 51-57 (1977). Later versions of this interviewing and counseling textbook have significantly modified this stark view. See DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 289 (2d ed. 2004) ("Client-centeredness does not require you to hide from giving advice. . . . Client-centeredness encompasses the notion that as a matter of autonomy, clients who seek your help are entitled to ask for and receive advice.").

but it is also undesirable.³¹ What has emerged instead are varying degrees of lawyer engagement in helping clients determine their objectives in light of the law and “in light of the clients’ own understandings of themselves, their relationships with others and the world and the clients’ evolving desires about what they want.”³² Engaged client-centered representation recognizes that clients do not arrive with static and pre-determined objectives to which lawyers can simply defer. Clients’ objectives are tied to their feelings, relationships and experiences; their objectives often change over the course of representation; and their objectives are shaped in part by the information about the law and available legal options that their lawyers explain to them.³³

The basic guiding principle underlying client-centered representation is to value and enhance the client’s autonomy, both within the lawyer-client relationship and within society. Moral philosophers have criticized client autonomy as a basis for legal ethics, arguing that autonomy has no moral value in itself; that what has moral value is what people do with their autonomy.³⁴ However, this criticism equates “autonomy” with “doing whatever [you] want” in the moment.³⁵ Ironically, it is from the field of moral philosophy that we get a much deeper and richer version of what autonomy means, which can help guide lawyers past the neutral and non-interventionist roots of client-centered lawyering and into the nuances of an engaged client-centered approach to determining their client’s objectives.

The word “autonomy” means, quite literally, “self-rule,”³⁶ and philosophers have understood it to encompass both the “negative” freedom to be free from the interference of others, and the “positive” freedom to grow, discover, evolve and flourish in one’s own way.³⁷

31. One of the earliest and most comprehensive critics of this view was Stephen Ellmann. See generally Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991 (1992); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987). For an overview of the different kinds of critiques of lawyer neutrality that have emerged within the client-centered lawyering theory literature, see Kruse, *supra* note 28, at 385-399.

32. STEPHEN ELLMANN ET AL., *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 7 (2009).

33. See *id.* at 6-7, 23.

34. See David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 638-39.

35. David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 826 (arguing against both this popular conception and a more sophisticated Kantian notion of self-rule).

36. Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 286 n.19 (2003).

37. ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 123-34 (1969).

Joseph Raz described the ability to define and become the person one wants to be over the course of one's lifetime in terms of "authorship" of one's own life.³⁸ Under this more expansive view, one's autonomy—the ability to be the author of one's own life—can be constrained in a number of different ways. One's autonomy can be frustrated by external forces or conditions that create a lack of meaningful choice in the world.³⁹ One's ability to be the person one wants to be can also be defeated by succumbing to fleeting desires.⁴⁰ The story of Odysseus, who commanded his crew to tie him to the mast of his ship so that he will not be tempted by the call of the Sirens is a classic example used by philosophers to explain how interfering with what someone wants to do in the moment may actually enhance their autonomy by preserving their fidelity to their own deeper-seated values.⁴¹

However, we are not often like Odysseus in knowing and being able to articulate what our deepest-seated values are and requesting help in staying true to them. Living a life in accordance with our values is likely to be a process that unfolds over time. Our deepest values are often opaque and come clear to us only through the process of making choices over time. Our values are diverse and likely to be internally inconsistent, forcing us to prioritize and choose between them as we move through life. It is through practical choices made in situations of value conflict or confusion that we are likely to discover, articulate, and actualize the kind of persons we want to be.

Legal representation is often a site for those kinds of practical choices that bring deeper-seated values to light. Because the situations that lead clients to seek legal representation often involve disruptions or threats to the status quo, plans for the future, or responses to new opportunities, clients' legal issues are often entangled with deeper values, projects, commitments, and relationships with others. Engaged client-centered representation recognizes that in pursuing a client's objectives in legal representation, lawyers are doing much more than simply taking "hired gun" marching orders from their clients. To determine what the client's objectives are, lawyers often engage their clients in a process of value clarification that includes techniques of active listening and probing beneath the surface of a client's stated wishes to ensure that what the client says he wants is consistent with the client's other values and to ensure that the decisions made by the client

38. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 155, 369 (1986).

39. *Id.* at 372-74.

40. *See* GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 14-15 (1988).

41. *See id.*

in the moment will stand the test of time as the client's situation changes.

The touchstone for engaged client-centered representation is to shape legal representation around the client's own values. This attention to client values strikes a middle ground between the "hired gun" approach of neutral non-interference and thicker notions of the lawyer-client relationship proposed by some legal ethicists. Some legal ethicists have argued that the ideal lawyer-client relationship should be like a friendship, in which lawyers and clients mutually strive for goodness as they collaborate in addressing the moral issues that inevitably arise in legal representation. Legal representation, they argue, should be a moral give-and-take between lawyers and clients in which both lawyers and clients try to make each other better persons.⁴² This view of the lawyer-client relationship as this kind of friendship aims beyond helping a client articulate the client's objectives according to the client's own values and seeks to morally educate the client.

In my view, these thicker notions of the lawyer-client relationship as a friendship or mutual search for the good are both unrealistic and inappropriate goals for legal representation. Clients retain lawyers because lawyers have legal expertise. Lawyers are also people with the same moral expertise as anyone else. Clients may seek moral counsel from their lawyers, just as they might from their teachers, dentists, or plumbers. But in choosing a lawyer, clients typically do not have the personal information that we rely on when we turn to friends for moral guidance, such as whether they share our values or have the life experience to understand our dilemmas or empathize with our struggles.⁴³ Moral insight may come from a client's process of clarifying his values in legal representation and moral advice may be incidental to that process. However, moral instruction—like moral control—is an inappropriate *goal* for lawyers to have in the lawyer-client relationship.

With these principles in mind, let's go back to *Spaulding*, the personal injury case in which the defendant's doctor discovered that the plaintiff was likely suffering from an aortic aneurysm, which may have been caused by the automobile accident. The defendant did not reveal this fact to the plaintiff, a choice that eventually led the court to set aside the judgment based on the parties' settlement.⁴⁴ In 1998, Roger Cramton and Lori Knowles investigated the decades-old facts of this professional responsibility classic by combing through court records and interviewing

42. For the most prominent articulation of this view, see THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 46-50 (2d ed. 2009).

43. See DARE, *supra* note 24, at 92.

44. *Spaulding v. Zimmerman*, 116 N.W.2d 704, 710-11 (Minn. 1962).

lawyers, judges, and surviving family members.⁴⁵ Based on their investigation, it appears likely that the defendant's lawyer, who was paid by an insurance company, pushed the case through to settlement without ever consulting his client about whether to reveal the information about the life-threatening medical condition to the plaintiff.⁴⁶ Doing so served the legal and financial interests of both the client and the insurance company, who may have been liable for greater damages if the more serious condition had come to light.

But was it consistent with the long-term values, relationships, and commitments of the defendant, John Zimmerman? The Zimmermans and the Spauldings were neighbors in rural Minnesota, and twenty-year-old David Spaulding (the plaintiff) worked together with nineteen-year-old John Zimmerman (the defendant) in the Zimmerman's road construction business.⁴⁷ The automobile accident occurred at dusk when the car driven by John Zimmerman, who was transporting employees of his father's road construction business home at the end of the day, collided with a car occupied by the Ledermann family on their way home from the county fair.⁴⁸ It was a tragic event for all three families involved. In addition to seriously injuring David Spaulding, the accident killed twelve-year-old Elaine Ledermann and John Zimmerman's brother James, and broke the neck of John Zimmerman's father, Edward.⁴⁹

Given the close relationships in a tight-knit community and the devastating losses that his own family had already suffered, it is quite likely that John Zimmerman would have consented to reveal medical information critically important to David Spaulding's life and health. That is, if his lawyer had cared about representing his legal interests within the context of his other values. This is an important point, in no small part because the stripped-down facts of *Spaulding* have been used for so many years in legal ethics to create a moral dilemma for David Zimmerman's lawyer: What do you do when your client insists on keeping potentially life-saving information confidential?⁵⁰ The case is only rarely used to point to the need for lawyers to consult their clients rather than assuming that their clients will want to maximize their legal

45. Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63, 63 n.2 (1998).

46. *See id.* at 69-70.

47. *Id.* at 63-64.

48. *Id.* at 64.

49. *Id.*

50. *See, e.g.*, Luban, *supra* note 21, at 179 (describing *Spaulding* as an example of a situation in which "lawyers may be required by the duty of confidentiality silently to permit the ruin of innocent third parties").

and financial interests at the expense of others.⁵¹ And those kinds of assumptions, which limit legal representation to a client's narrowly-defined legal interests, are the kind of problems that engaged client-centered representation is designed to address.

B. The Limits and Possibilities of an Engaged Client-Centered Theory of Legal Ethics

Are there limits to engaged client-centered representation? I think there are, and I want to mention two of them. One limit is raised by the lesbian family planning example I alluded to earlier, where the lesbian couple goes to a lawyer to get advice on how to use existing law to structure their family affairs so that their child can enjoy a family relationship that best approximates the kind of relationship the child would have if they were legally able to marry.⁵² Because we are imagining that the law does not permit same-sex marriage or co-adoption in their state, the law only imperfectly captures what the couple wants to do. It may come as a surprise to the clients that they cannot simply replicate a legal family out of existing legal structures. In making legal decisions in light of that information, the couple may be forced to confront their deeper values about trust, loyalty, and family as they consider how they feel about having legally asymmetrical relationships with a child who cannot be co-adopted and what to do about the possible parental rights of the child's biological father. If the lawyer in that scenario believes strongly that what the clients are doing is morally wrong and damaging to the child, it may be difficult for the lawyer to take the clients through a sensitive and probing discussion of how to pursue their available legal options in ways that honor their deeper values, individually and as a couple.

In such circumstances, it can be difficult for the lawyer to achieve the empathy required to put oneself in the client's shoes and understand the value trade-offs from the client's point of view. The very task of finding ways within the law to structure a non-traditional family may be experienced by the lawyer as a betrayal of his own ideals, a betrayal of community values, or a threat to his own identity. To the extent that the lawyer strays outside the stable confines of pure legal interest-based advice and counseling and enters a broader conversation about the

51. See Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1606-07 (1995) (describing the facts as a missed opportunity for client counseling).

52. The lesbian family planning example is discussed more fully in Kruse, *supra* note 25, at 408-11.

clients' values, he is likely to find himself in a moral conflict of interest where his personal values and commitments materially limit his nuanced exploration of his client's options. The temptation for the lawyer in such a situation is to avoid the conflict by detaching emotionally and viewing the situation logically within the confines of maximizing the client's legal interests.

A lawyer in Tennessee found himself in this type of situation.⁵³ He petitioned to be taken off the appointment list for representing girls seeking judicial bypasses of parental consent for abortion because of his own beliefs about assisting what he viewed as the termination of a human life impaired his ability to fully counsel his clients.⁵⁴ Full counseling, in his view, included advising them to talk to their parents or to seek alternatives to abortion.⁵⁵ The Supreme Court of Tennessee responded that the lawyer's moral commitments were not a compelling reason to be relieved of court-appointed duty, saying that the lawyer must set aside his moral views and represent his clients' legal interests impartially.⁵⁶ As we broaden our ideas about competent legal representation to include engaged client-centered counseling that goes beyond advice about legal interests, we are calling on lawyers to exercise a broader range of problem-solving skills than merely legal reasoning and analysis, and we must recognize the limits that moral conflicts of interest may set on the deployment of those broader skills.

Second, we must be attuned to the difficulties that inhere in translating the vision of engaged client-centered lawyering into contexts where clients' objectives and values are difficult to ascertain through methods of self-reflection and value clarification. Two particular contexts spring to mind. One is the situation of diminished-capacity clients—children, adolescents, or elderly clients—whose ability to engage in value clarification may be limited.⁵⁷ The other is the situation of entity clients like corporations, where the “real” client is not a human being at all, but is instead a legal fiction. The methods of engaged client-centered representation—active listening and probing the client to more deeply explore the client's legal options within a framework of the client's own values—are of limited utility in such circumstances.

53. See Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Op. 96-F-140, at 1 (1996).

54. See *id.* at 1, 3.

55. See *id.* at 1-2.

56. See *id.* at 3-5.

57. See MODEL RULES OF PROF'L CONDUCT R. 1.14 (2007) (model rule for “Client with Diminished Capacity”).

However, I would argue that engaged client-centered representation is still valuable in defining an ideal toward which a lawyer ought to strive in these contexts. When the client's values are less than fully developed, where the client is unable to articulate them, or where the client is not a human being at all, the lawyer may be tempted to revert to one of two extremes. One temptation is to return to legal interest-based representation that views client objectives only in terms of maximizing the client's wealth, freedom, and power over others. This is a safe default choice to take in the absence of knowing that the client has competing values. But this takes us right back to kind of legal interests-based counseling that engaged client-centered representation is designed to avoid. The other is for a lawyer to impose her own values on representation in the guise of substituted judgment, by assuming that the client's values are consistent with the lawyer's values. But this returns us to the role of the lawyer as a moral director of the client's affairs.

In the area of diminished-capacity representation, lawyering theorists who teach in clinics that represent children, elderly persons suffering from dementia, or mentally impaired clients, have been carving out a kind of solution that avoids each of these extremes.⁵⁸ Lawyering theorists in this area suggest that lawyers should strive to make decisions that represent the client's unique values to the extent that those values can be ascertained and separated from the lawyer's values. Elderly clients may be impaired in decisionmaking, but they have a lifetime of choices in other contexts that reflect and reveal their values. Children may have insufficient life experience to have fully-formed values, but they have a set of preferences on which a lawyer can draw to infer deeper values that are unique to them.

In the corporate context, the discussion has been dominated by legal ethicists who propose variations on the moral lawyering solutions, urging lawyers to act as "lawyer-statesmen" taking a leadership role in helping their clients develop a sense of social responsibility or by defenders of the stark view of lawyers as hired guns. There has been less attention to how a third path between these extremes might be carved.⁵⁹ The legal ethical discussion in the corporate client context would be enriched by considering what it might mean to approximate an approach

58. For an excellent discussion of the challenges of client-centered lawyering in these contexts, see generally Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505 (1996); and Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 *UTAH L. REV.* 515.

59. See Kruse, *supra* note 12, at 118-22; Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 *FORDHAM L. REV.* 1339, 1356-57 (2006).

that sought out the values of an entity client. Corporations are not human beings that experience value conflict, continuity, and clarification over time and through experience. However, they usually have a mission, a corporate culture, and a public reputation from which values can be derived. Legal ethicists have a tendency to swoop in after the fact, survey the ruins of a scandal like Enron and ask: Where were the lawyers who failed to prevent this harm to the public from occurring?⁶⁰ The result is a renewed call for lawyers to step into the breach and provide moral direction in legal representation to a morally wayward corporate client. What tends to get overlooked is that the lawyers in those scandals were not being very good partisan representatives either.⁶¹ Enron, after all, did not triumph from its misdeeds—it collapsed. However, I suspect that despite the headline grabbing scandals, many lawyers who represent entity clients engage in thoughtful exploration with their clients to discover what is in their client's long-term interests in ways that approximate client value clarification.⁶²

I began this talk with the story of the beginning of theoretical legal ethics as we know it today, suggesting that it grew out of thoughtful conversations among lawyers about what it meant to be a good lawyer, and sought to articulate the theoretical foundations and justifications for good practice. Much of the client-centered lawyering theory grows similarly out of the experience of practice, and is produced by scholars embedded in the project of teaching students how to be reflective about practice experience. I want to end by saying that I hope that legal ethics can make itself relevant to corporate practice in much the same way. Rather than endlessly replaying headline grabbing scandals, my hope is that legal ethicists will go out in search of the lawyers who quietly exercise good judgment in the day-to-day representation of entity clients, seek to understand their practices, and build a foundation of theory that articulates and supports those practices.

60. This question has been traced to the comments made in the savings and loan crisis of the 1980s, which “has become a convenient shorthand used by scholars of the legal profession who believe . . . that lawyers have failed to take seriously their responsibility as professionals while representing wealthy corporate clients.” See W. Bradley Wendel, *Professionalism as Interpretation*, 99 Nw. U. L. REV. 1167, 1167-68 (2005).

61. See, e.g., William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1459-60, 1464-67 (2006).

62. There is some support for this conclusion in an empirical study of the ethical practices of large firm litigators. See Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 844-46 (1998) (discussing corporate lawyers' appeals to client reputation not merely as a pragmatic cost-benefit analysis, but as a way of “providing a social looking-glass that allows one . . . to see and judge oneself”).