2003

Symposium: Client Counseling and Moral Responsibility

Thomas L. Shaffer
Notre Dame Law School, thomas.l.shaffer.1@nd.edu

Deborah L. Rhode

Paul R. Tremblay

Robert F. Cochran

Symposium: Client Counseling and Moral Responsibility

Robert F. Cochran, Jr.
Deborah L. Rhode
Paul R. Tremblay
Thomas L. Shaffer

TABLE OF CONTENTS

I. INTRODUCTION: THREE APPROACHES TO MORAL ISSUES IN LAW OFFICE COUNSELING, ROBERT F. COCHRAN, JR.
   A. *The Directive Approach*
   B. *The Client-Centered Approach*
   C. *The Collaborative Approach*
II. ETHICS IN COUNSELING, DEBORAH L. RHODE
   A. *Contextual Frameworks*
   B. *Client-Centered Frameworks*
   C. *Collaborative Frameworks*
   D. *Contextual Frameworks Revisited: The Need for Structural Analysis*
III. CLIENT-CENTERED COUNSELING AND MORAL ACTIVISM, PAUL R. TREMBLAY
IV. THE VIRTUE OF FRIENDSHIP IN LEGAL COUNSELING, THOMAS L. SHAFFER
   A. *Three Cases*
      i. First case: Bad news
      ii. Bush League Cause Lawyering
      iii. Cause Lawyering
V. ROUNDTABLE DISCUSSION

This symposium is based on papers and discussion presented at the Professional Responsibility Section panel at the annual meeting of the American Association of Law Schools in Washington, D.C., on January 4, 2003. Professor Robert Cochran served as moderator and presented an introduction. Members of the panel, Professors Deborah Rhode, Paul Tremblay, and Thomas Shaffer presented three different approaches to moral issues that arise in the client counseling relationship. This may have been the first time

that leaders of each of these approaches to client counseling have gotten together for such a discussion. The presentations were followed by questions from the floor. All of the authors, as well as those people who raised questions, were given the opportunity to edit their comments for this symposium edition.

I. INTRODUCTION: THREE APPROACHES TO MORAL ISSUES IN LAW OFFICE COUNSELING

Robert F. Cochran, Jr.*

One of the most important challenges to lawyers and clients is addressing issues that are not controlled by law. Will the client take steps (legal steps) that will harm other people? Will the officers of a corporation consider the effects of its actions on workers, on consumers, on the community, on the environment? In a divorce, will the client take actions that will harm a child or spouse? What role should the lawyer play regarding these questions? The way lawyers address such issues may do more to determine whether their practice is socially useful or socially harmful than any rule governing the profession. The way lawyers address these issues is also likely to have a great deal to do with whether they find the practice of law personally satisfying.[1]

The rules of the profession do not completely ignore the question of moral counsel. ABA Model Rule (MR) 2.1 states, "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[2] This "rule" is not really a rule. It states that "a lawyer *may*" raise such factors.[3] It is more like one of the Ethical Considerations (ECs) of

* Louis D. Brandeis Professor of Law, Pepperdine University School of Law; J.D., University of Virginia. Many thanks to Sam Levine for his comments on an earlier draft.

1. Several books and articles have explored the place of lawyer/client moral discourse. *See* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994); MONROE H. FREEDMAN & ABBE HOFFMAN, UNDERSTANDING LAWYERS' ETHICS 60-62 (2d ed. 2002); DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 282-84 (1991); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 334-38 (1990); ROBERT F. COCHRAN, JR., JOHN M.A. DIPIPPA & MARTHA M. PETERS, THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING (1999); Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons From Dostoyevsky*, 35 HOUS. L. REV. 327 (1998); Jack L. Sammons, *Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counseling in the Law Office*, 18 U. ARK. LITTLE ROCK L.J. 1 (1995); Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers as Strangers and Friends: A Reply to Professor Sammons*, 18 U. ARK. LITTLE ROCK L.J. 69 (1995).

2. ABA Model Rules of Prof'l Conduct, MR 2.1 (2002).

3. *Id.* It is probably best that there is not a rule governing the role that lawyers play as to such issues in legal representation–the counseling role requires discretion.

the earlier ABA Model Code which set aspirational standards for the profession. This portion of MR 2.1 is in fact a weakened version of EC 7-8, which stated, "[i]n assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible . . . ."[4] Note several differences between the standards. First, MR 2.1 presumes a somewhat directive lawyer–the lawyer is "rendering advice."[5] EC 7-8 presumes a more collaborative lawyer–the lawyer is "assisting his client to reach a proper decision" and "point[ing] out" various factors.[6] The rules also vary in the strength with which they encourage lawyers to raise moral concerns. MR 2.1 is merely permissive–"a lawyer *may* . . . ."[7] EC7-8 is a little more directive–"it is often desirable . . . ."[8] Finally, each provision reflects a somewhat different moral viewpoint. MR 2.1 is more relativist–a lawyer may refer to "moral" factors along with "economic, social and political" factors.[9] EC 7-8 is more traditional–it assumes that some decisions are "morally just."[10]

Over recent decades, three schools of thought have emerged among legal ethicists and legal clinicians concerning the lawyer's role as to moral issues in the counseling relationship. Those approaches are directive, client-centered, and collaborative. Each provides a different combination of answers to the following questions: 1) Who controls the important decisions in the relationship? and 2) Are the interests of people other than the client taken into consideration in making those decisions?

I admit up front that I am not a neutral observer of this discussion. My preference is for the collaborative approach, though I appreciate the arguments for each of the other schools of thought. I also admit that the lines between the schools of thought are not as clear as I might suggest. As you read the essays that follow this one, you will see that each writer is influenced by the same concerns that influence the others. Nevertheless, each balances them a bit differently in developing his or her approach.

4. ABA Model Code of Prof'l Responsibility, EC 7-8 (2002). A few jurisdictions continue to follow the Model Code.
5. ABA Model Rules of Prof'l Conduct, MR 2.1 (2002).
6. ABA Model Code of Prof'l Responsibility, EC 7-8 (2002).
7. ABA Model Rules of Prof'l Conduct, MR 2.1 (2002).
8. ABA Model Code of Prof'l Responsibility, EC 7-8 (2002).
9. ABA Model Rules of Prof'l Conduct, MR 2.1 (2002).
10. ABA Model Code of Prof'l Responsibility, EC 7-8 (2002).

A. The Directive Approach

The first school of lawyering advocates a directive lawyer, a lawyer who is willing to assert control of moral issues that arise during legal representation. Along with Professors David Luban and William Simon, Professor Deborah Rhode, whose essay appears in this colloquium, has proposed a lawyer who is likely to take control of moral issues that arise during the representation. In her book, *In the Interests of Justice*, Rhode argues that "[l]awyers can, and should, act on the basis of their own principled convictions, even when they recognize that others could in good faith hold different views."[11] David Luban argues in his book, *The Good Lawyer*, that "when professional and moral obligations conflict, moral obligations take precedence."[12] Rhode and Luban provide little, if any, discussion of the role that the client might play in determining what moral standards should control the representation.

William Simon argues in his book, *The Practice of Justice*, that "[l]awyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice."[13]

> "Justice" here connotes the basic values of the legal system and subsumes many layers of more concrete norms. Decisions about justice are not assertions of personal preferences, nor are they applications of ordinary morality. They are legal judgments grounded in the methods and sources of authority of the professional culture. I use "justice" interchangeably with "legal merit."[14]

Under Simon's model, the lawyer looks to the values underlying the law to resolve the moral issues. This model clearly leaves the lawyer in charge of the moral issues that arise in legal representation. Simon's criteria for making decisions during the representation are beyond the understanding of the ordinary client. In Simon's formulation, "justice" is a technical issue

---

11. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 58 (2000). Rhode prefers the title "contextual" rather than "directive" for her theory of lawyer/client counseling. *See* Deborah L. Rhode, *Ethics in Counseling, supra* at text accompanying note 43-45. She argues that a case's context should determine the lawyer's response. In that respect, she is in agreement with the collaborative school of legal counseling. *See infra* at text accompanying notes 36-39. I include Rhode within the directive school of legal counseling because she, as well as Luban and Simon, appear to be much more willing than those in the other schools of client counseling to assert control of moral issues that arise in the lawyer/client relationship.

12. DAVID LUBAN, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 118 (David Luban ed., 1984).

13. WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 138 (1998). It may be that there will not be a great deal of difference between Deborah Rhode's "[lawyers'] own principled convictions" standard and Simon's "legal ideals" standard. The "legal ideals" that a lawyer discerns are likely to look a lot like the lawyer's ideals. There is a danger that Simon's model will cloak the lawyer's moral judgment in legal jargon, giving it the authority of law.

14. *Id.* at 138.

for legal experts.[15] Simon's model places moral judgment on the lawyer's turf.[16]

The directive lawyer is part of a venerable tradition among American lawyers.[17] David Hoffman, who in the 1830s drafted the first guidelines for American lawyers, said, "[the client] shall never make me a partner in his knavery."[18] Judge George Sharswood said, "[i]t is in some measure the duty of counsel to be the keeper of the conscience of the client; not to suffer him, through the influence of his feelings or interest, to do or say anything wrong . . . ."[19] Judge Clement Haynsworth put it, "[T]he lawyer must never forget that he is the master. He is not there to do the client's bidding. It is for the lawyer to decide what is morally and legally right."[20]

Unlike the other two schools of lawyering represented in this symposium, the directive school has not developed its theory into a step-by-step method of client counseling. What does the conversation between lawyer and client look like when the lawyer decides that moral concerns should influence the representation? Does the lawyer persuade the client to adopt her viewpoint? Does the lawyer threaten to withdraw if the client does not agree with her? Or, as William Simon's theory might suggest, does the lawyer merely present her conclusions of what justice requires as being what the law requires?

There are troubling aspects of the directive approach. First, there is the danger that, as to moral issues arising in the representation, the lawyer will be wrong. Humility is justified when approaching such issues. These issues

15. The task which Simon identifies for lawyers seeking to identify justice requires highly technical legal judgment. He identifies three tensions which lawyers face in making such judgments: substance versus procedure, purpose versus form, and broad versus narrow framing. SIMON, *supra* note 13, at 139-56. For a discussion of the highly technical ("exceedingly professorial") nature of the determination that Simon envisions, see David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 893-95 (1999).

16. For a further treatment of Simon's arguments, see Robert F. Cochran, Jr., *The Rule of Law(yers): A Review Essay of William H. Simon's* The Practice of Justice: A Theory of Lawyers' Ethics, 65 MO. L. REV. 572 (2000).

17. Simon praises the ethical precepts of Hoffman and Sharswood. SIMON, *supra* note 13, at 63-64. *See also,* RHODE *supra* note 11 at 51 (praising Hoffman, but suggesting that Sharswood was ambivalent about the role of the lawyer; Rhode quotes Sharswood's assertions that the lawyer is "not morally responsible for. . . maintaining an unjust cause" and should not assist a client who is "aiming to perpetrate a wrong" (quoting George Sharswood, *Essay on Professional Ethics*, 84-85 (3d ed. 1869)).

18. THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS 64 (1985) (quoting DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752-54 (2d ed. 1836)).

19. *Id.* at 225 (quoting George Sharswood, *Essay on Professional Ethics* (1854).

20. Clement F. Haynsworth, *Professionalism in Lawyering*, 27 S.C. L. Rev. 627, 628 (1976), *quoted in* FREEDMAN & HOFFMAN, *supra* note 1, at 52. For a more developed critique of the directive approach, *see* SHAFFER & COCHRAN, *supra* note 1, at 30-39.

are likely to be difficult. I do not suggest that there are not objective moral standards, but none of us has perfect ability to discern those standards or to determine how they should apply. There is a danger that lawyers will be confident of their moral judgment when confidence is not justified. Generally, two consciences in conversation are more likely to get to moral truth than one.

A second concern is that the directive lawyer is likely to impose her values on the client. Directive lawyering is inconsistent with client dignity. There is no place in the directive lawyer's office for the morals of the client. The lawyer robs the client of the opportunity to grow morally. People grow morally through exercising moral judgment. They develop virtues through practice, as an athlete develops physical skills through practice. Lawyers who prevent clients from moral exercise—from deliberating, making moral judgments, and acting on them—deny clients the opportunity to become better people.

B. The Client-Centered Approach

"Client-centered counseling"[21] is designed to craft legal solutions which satisfy client interests. David Binder, Paul Bergman, and Susan Price, the founders of the client-centered approach, in their *Lawyers as Counselors: A Client-Centered Approach,* state: "Because client autonomy is of paramount importance, decisions should be made on the basis of what choice is most likely to *provide a client with maximum satisfaction.*"[22] Paul Tremblay, who contributes an essay to this symposium, will join Binder, Bergman, and Price in the next edition of that book. Other leaders of the client-centered school include Robert Bastress and Joseph Harbaugh.[23]

In the client-centered view, the lawyer should not act in ways that would influence the client's choice. The lawyer should be "neutral"[24] and "non-judgmental."[25] Whereas the client has a very limited role in resolving moral issues under the directive model, the lawyer has a very limited role in resolving such issues under the client-centered model.[26] The danger for the client-

21. *See* BINDER ET AL, *supra* note 1; BASTRESS & HARBAUGH, *supra* note 1; and DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977).

22. BINDER ET AL, *supra* note 1, at 261 (original emphasis). *See also* BASTRESS & HARBAUGH, *supra* note 1, at 256.

23. *See* BASTRESS & HARBAUGH, *supra* note 1.

24. BINDER & PRICE, *supra* note 21, at 166; BINDER ET AL, *supra* note 1, at 288-89.

25. BASTRESS & HARBAUGH, *supra* note 1, at 57.

26. The client-centered counselors suggest that the lawyer might legitimately raise moral concerns when the client makes a decision which the lawyer believes is "morally wrong." The lawyer might try and persuade the client to change his mind. *See* BASTRESS & HARBAUGH *supra* note 1, at 334-35, and BINDER ET AL., *supra* note 1, at 282-84. However, there are likely to be problems with moral discourse at this stage.

centered lawyer is that she becomes merely a hired gun in the hands of the client.[27]

When a decision is to be made in legal representation, the client-centered lawyer and the client list on a sheet of paper all of the alternative courses of action and the "consequences to the client" of each.[28] The lawyer asks probing questions that will help lawyer and client to more fully understand the consequences for the client. The lawyer converts client statements into advantages or disadvantages,[29] and the client chooses from the options.

The client-centered counselors' framework claims to be neutral, but in fact, it steers the client toward a particular method of moral analysis, consequentialism. Decision-making under the client-centered counselor model is a matter of cost-benefit analysis. The client-centered counselors' framework excludes the moral imperatives and virtues that are a part of the moral framework of many. Under some standards of morality, one should do the right thing in spite of the negative consequences.

In addition, the client-centered counselors' framework steers clients toward making self-serving choices. The client considers only "Consequences *to the Client*." This ignores the importance of other people. In the illustration that one client-centered book gives of its counseling method, a client is considering suing his neighbor over a zoning violation. Among the "consequences for client" of filing suit are: "Time and effort required," "[m]oney to pay for fees and expenses," "[e]xposure to deposition and trial examination," and "[s]train on relationship with [the neighbor]."[30] The client is to consider the consequences to the neighbor solely in light of the effect that they will

---

> First, client-centered counselors' moral discourse comes into play only when the lawyer feels that the client wants to do something that is "morally wrong." Morality (in and out of the law office) is not generally a matter of choosing whether to do something that is "morally wrong"; more often it is a choice between something that is better and something that is worse. It may not be often that the client will make a choice that the lawyer feels is "morally wrong," but clients constantly are faced with issues that have moral implications. We feel that those moral implications should be considered during the decision-making process.

SHAFFER & COCHRAN, *supra* note 1, at 23-24.

> Second, the method of moral discourse suggested by the client-centered counselors is likely to be ineffective. After lawyers encourage the client to see things solely from the client's perspective and the client makes a decision, it will be difficult for lawyers to shift gears and reverse the direction of the counseling.

Id. at 24.

27. For a more developed critique of the client-centered counselors, see SHAFFER & COCHRAN, *supra* note 1, at 19-24.

28. BINDER & PRICE, *supra* note 21, at 184; BASTRESS & HARBAUGH, *supra* note 1, at 246-49; BINDER ET AL, *supra* note 1, at 307.

29. BINDER & PRICE, *supra* note 21, at 168.

30. BASTRESS & HARBAUGH, *supra* note 1, at 246.

have on the client; the neighbor has no independent moral significance. The client-centered approach imposes a framework of client selfishness. It may advance the autonomy of clients, but that autonomy comes at the expense of the autonomy of other people. It is likely to advance the autonomy of those who can afford lawyers at the expense of those who cannot.

In some situations, it may be that the client-centered counselors' focus on client empowerment is justified. Generally, poor people need empowerment. In those cases in which the lawyer represents a poor client against a rich opponent, there is probably little need for the poor client to worry about the interests of the rich opponent–the rich opponent will likely have plenty of lawyers to look out for his interests. But when the lawyer represents the wealthy client against an (often unrepresented) poor party, the lawyer's exclusive focus on client autonomy is likely to result in injustice. If clients with great power make decisions based solely on "consequences to the client" they can cause great harm to others.

C. The Collaborative Approach

The lawyering models discussed thus far each identify one party who dominates decisions raising moral concerns. Under the directive approach, the lawyer controls such decisions; under the client-centered approach, the client controls such decisions (and the lawyer is careful not to influence the client). Under the collaborative model, the lawyer and client resolve moral issues together through moral discourse.[31] The client makes the ultimate decision, but the lawyer is actively involved in the process. Thomas Shaffer, who represents the collaborative approach in this symposium, uses the traditional notion of friendship to describe how a lawyer might raise and discuss moral issues with clients.[32] A lawyer should approach moral issues with a client in the same way that she would approach such issues with a friend, raising such issues for serious discussion, but not imposing her will on the client. Other proponents of a collaborative approach to client counseling include Anthony Kronman, John DiPippa, Martha Peters, and me.[33]

---

31. It appears that the first use of the term "collaborative" to describe how a lawyer and client might resolve issues arising in representation was in JAMES E. MOLITERNO & JOHN M. LEVY, ETHICS OF THE LAWYER'S WORK 86 (1993), though their focus was not on the resolution of moral issues arising in the representation.

32. *See* Thomas L. Shaffer, *A Lesson From Trollope for Counselors at Law*, 35 WASH. & LEE L. REV. 727 (1978); SHAFFER & COCHRAN, *supra* note 1, at 40-54. The collaborative lawyers' use of the friendship analogy to describe the lawyer's role in resolving moral issues should be distinguished from Charles Fried's use of the friendship analogy to explain why a moral lawyer can prefer clients to other people. Fried's lawyer may be more like a client-centered lawyer, primarily pursuing client autonomy, though in a portion of his article that has received little attention, he acknowledges that moral counsel may be a proper role for his lawyer-as-friend. *See* Charles Fried, *The Lawyer as Friend*, 85 YALE L.J. 1060, 1088, 1089 (1976).

33. *See, e.g.*, ANTHONY KRONMAN, THE LOST LAWYER, *(1993)* at 131-32; COCHRAN, ET AL., *supra* note 1. Monroe Freedman is one of the leading proponents of client autonomy as the goal of

Lawyers cannot become friends with every client, but they might discuss moral issues with clients in the way that they discuss moral issues with friends. Central to the traditional notion of friendship was a moral component: friends help friends become better people. People today generally think of friendship in terms of pleasure, but the traditional notion of friendship as a moral relationship is not entirely lost. Imagine that a close friend comes to you and confesses that he has embezzled something from his employer. You are likely neither to push your friend to confess, nor to ignore the wrong that your friend has done. You are likely to try and help your friend think through the matter. You might offer an opinion, but you would be likely to do so in a tentative fashion, respecting the dignity of your friend. As Aristotle said, friends collaborate in the good. A friend is unlikely to impose his or her will on a friend, but neither will a friend sit by and let a friend go down a wrong path.

The lawyer as friend engages in moral conversation with the client but generally leaves decisions to the client. One of the best ways to raise such issues is by asking questions that come naturally in the course of decision-making. As to each alternative under consideration, the lawyer can ask the client, "what will be its effect on other people?" The lawyer and client should consider all of the consequences that might arise from various alternatives, not merely the consequences to the client. When it comes time to make a choice among alternatives, the lawyer can ask, "What would be fair?" Note that this question does not impose the lawyer's values on clients; it calls on clients to draw on their own sources of moral values.

Anthony Kronman identifies sympathy and detachment as two qualities that make the counsel of both friends and lawyers valuable.

> Friends take each other's interests seriously and wish to see them advanced; it is part of the meaning of friendship that they do. It does not follow, however, that friends always accept uncritically each other's accounts of their own needs. Indeed, friends often exercise a large degree of independent judgment in assessing each other's interests, and the feeling that one sometimes has an obligation to do so is also an important part of what the relation of friendship means.

---

legal representation. In his most recent legal ethics book, he and Abbe Smith adopt the "client-centered" label for their theory of legal ethics. Nevertheless, on the matter of the lawyer's role within the counseling relationship, they come down clearly on the side of moral counsel. They recognize that moral counsel is not inconsistent with client freedom. Moral counsel gives the client the benefit of the moral resources of the lawyer. *See* FREEDMAN & HOFFMAN, *supra* note 1 at 60-62. For a more developed critique of Freedman's position, *see* SHAFFER & COCHRAN, *supra* note 1, at 24-27.

> What makes such independence possible is the ability of friends to exercise greater detachment when reflecting on each other's needs than they are often able to achieve when reflecting on their own. A friend's independence can be of immense value, and is frequently the reason why one friend turns to another for advice. Friends of course expect sympathy from each other: it is the expectation of sympathy that distinguishes a friend from a stranger. But they also want detachment, and those who lack either quality are likely to be poor friends.[34]

As with the other models of lawyering, there are difficulties with the collaborative model. To raise and discuss moral problems thoughtfully with another requires wisdom, a quality that comes in part with age and experience. It is difficult to combine the sympathy and detachment that is the heart of good lawyering (it may be that the lawyers for Enron erred too much on the side of sympathy and were not able to give the dispassionate advice that their clients needed). In addition, we live in an individualistic age–we do not collaborate very well. That may be why each of the other models of client counseling identifies one of the parties to the relationship as the party in charge. Moral counsel also requires time, a scarce commodity in the hourly billing-driven practice of the corporate lawyer or the heavy case-load practice of the legal aid lawyer.

In addition, differences in power between lawyer and client may make collaboration difficult. There is a danger that either the lawyer or the client will dominate the other. In many lawyer/client relationships, the lawyer is in the dominant position. The lawyer has the knowledge of the law and the trappings of power. The lawyer sits behind the big desk in the elevated chair. But in another world of lawyering, the client is likely to be in the position of power. The lawyer may be little more than an employee of the corporate client. If the lawyer is in-house counsel she *is* an employee of the corporate client. The CEO is likely to sit behind the bigger desk, in the more elevated chair. The power within the relationship can also be a function of a host of other factors: age, education, experience, sex, social class, race, and status.[35] The lawyer in either situation may have to work to attain a level of mutuality with the client. She may need to empower the weak client; she may need to assert herself with the strong client.[36]

---

34. *Id.* at 131-32.

35. I do not mean to suggest that these factors *should* affect the power in the relationship or that one cannot overcome a lack of power, but that lawyers should be aware that these factors may affect the level of influence that the lawyer will have over a client.

36. The lawyer's natural instincts will, of course, be in the opposite direction. The powerful lawyer (with weak clients) is likely to feel comfortable asserting power; the weak lawyer (with powerful clients) is likely to be hesitant to raise moral concerns (and may fail to give the independent advice that the client needs). If the lawyer is to both involve the client in moral discourse and not

The lawyer may be able to attain mutuality in part by regulating the intensity with which she engages the client in moral discourse. A lawyer can engage a client over a broad range of intensity levels. That intensity can be expressed both in the emotions the lawyer displays and the statements she makes. The lawyer can vary the level of intensity, depending on the client and the circumstances.[37] Those circumstances include whether the client has the ability to go to another lawyer,[38] differences in client and lawyer values, and the power balance between the lawyer and the client. When the determinants of power are primarily on the lawyer's side, the lawyer should be more hesitant to push during moral discourse. When the determinants are equal or primarily on the side of the client, the lawyer is unlikely to overcome the client and can more freely address moral concerns.

A final factor that should influence the level of intensity with which the lawyer addresses moral concerns is the risk that the representation creates for other people. If one of the client's options will create danger to other people, the lawyer should address the moral concerns with greater intensity. The greater the danger, the greater the intensity. If the lives of other people are at risk, the most directive moral counsel would be justified. If such counsel fails, disclosure of confidential information may be justified.[39]

As can be seen from the above descriptions, each school of client counseling has its strengths. The directive school seeks to implement the lawyer's perception of the good; the client-centered counselor seeks to protect the client's autonomy; the collaborative school seeks to work with the client to identify the good with the client. As noted, each school has its challenges as well. The articles and discussion which follow seek to address both the strengths and challenges of each model. Many thanks to those who contributed to this symposium. It is our hope that the symposium will help to define what it means for the lawyer to serve as a wise counselor.

---

overcome the client, she may need to act against her instincts. The powerful lawyer may need to work to respect the dignity of the weak client; the weak lawyer may need courage to confront the powerful client.

37. For further discussion of the factors that should cause the lawyer to vary the intensity of moral discourse and the ways that the lawyer might vary that intensity, *see* Cochran, *Lessons From Dostoyevsky*, *supra* note 1, at 391-96.

38. In the case of clients who have court-appointed lawyers, such a change may be difficult. *See* ABA Model Rules of Prof'l Conduct, MR 1.16(a)(3), (c), and comment 5 (2002).

39. *See* FREEDMAN & HOFFMAN, *supra* note 1, at 144-47.

II. ETHICS IN COUNSELING

Deborah L. Rhode**

It is a pleasure to be here, or as much of a pleasure as an 8:30 panel on a Saturday morning can be. This time slot at least insures that we are among the truly committed; the souls less interested in salvation are still slumbering or having a civilized breakfast elsewhere. But those of us on the path of righteousness, thanks to Professor Cochran's diligence, can muse on what ethics entails at a historical moment when morality is in fashion, not just among the truly committed, but in the nation generally. This is a boom time for those of us in the integrity industry: it is not often that the president of the United States calls for more focus on "right and wrong" in professional schools.[40] But what right and wrong means in the context of corporate counseling is, of course, much more complicated than most of the post-Enron commentary acknowledges, so this is a timely occasion to reflect on first principles.

In the description of this panel, Professor Robert Cochran divided the counseling jurisprudence into three schools of thought and paid each panelist here the compliment of having our own school. Under the circumstances, it seems ungrateful, perhaps even churlish, to quibble with the division, but I cannot help wondering if the conceptual boundaries are as sharply drawn as the description implied. I, in the very good company of my coauthor David Luban and colleague William Simon, am anointed a leader of the "directive" school, which encompasses lawyers who are "willing to assert control of moral issues that arise during representation."[41] This approach is contrasted with the "client-centered" model, which makes the client's own values preeminent, and the "collaborative" model, which invites the client, in consultation with the attorney, to "draw on his own moral resources" in resolving ethical questions.[42] The distinctive "danger for the directive lawyer is that she will impose her values on the client."[43]

**Deborah L. Rhode is the Ernest W. McFarland Professor of Law and Director of the Center on Ethics at Stanford University.

40. White House, Office of the Press Secretary, *President Announces Tough New Enforcement Initiatives for Reform, Remarks by the President on Corporate Responsibility*, available at http:www.whitehouse.gov/news/releases/2002/07/print/20020709-4.html (last visited July 12, 2002).

41. Robert Cochran, *Legal Ethics, Client Counseling, and Moral Responsibility*, Prof. Resp. Sec., NEWSLETTER, (Assoc. of Am. L. Sch.), Fall 2002, at 1,2.

42. *Id.*

43. *Id.*

A. Contextual Frameworks

With all respect to a conscientious critic, this does not quite capture my position. Nor do I think it does justice to Simon's or Luban's views, although I will leave to them the right to clarify their own approaches. The term I use to describe my own framework in *In the Interests of Justice*, is not "directive" but "contextual." In essence, such a framework would require

> lawyers to accept personal moral responsibility for the consequences of their professional actions. Attorneys should make decisions as advocates in the same way that morally reflective individuals make any ethical decision. Lawyers' conduct should be justifiable under consistent, disinterested, and generalizable principles. . . .[U]nlike the bar's prevailing approach, this alternative framework would require lawyers to assess their obligations in light of all the societal interests at issue in particular practice contexts. Client trust and confidentiality are entitled to weight, but they must be balanced against other equally important concerns. Lawyers also have responsibilities to prevent unnecessary harm to third parties, to promote a just and effective legal system, and to respect core values such as honesty, fairness, and good faith on which that system depends . . . [t]he less confidence that attorneys have in the justice system's capacity to deliver justice in a particular case, the greater their own responsibility to attempt some corrective.[44]

What that entails in a particular counseling context depends on a range of factors, such as the significance of the ethical concerns at issue, and the lawyer's information, responsibility, and capacity to affect outcomes. A morally justifiable response need not involve imposing values on a client. In some instances, such as those identified below, a lawyer may find ethical

---

44. RHODE, *supra* note 11, at 66-67. As I also note,

> [I]n accommodating those responsibilities, lawyers should, of course, be guided by relevant legal authority and bar regulatory codes. Respect for law is a fundamental value, particularly among those sworn to uphold it. Adherence to generally accepted rules also serves as a check against the decision maker's own bias or self-interest. But . . . [m]ost ethical dilemmas arise in areas where the governing standards already leave significant room for discretion. . . [W]hether to accept or withdraw from representation, and whether to pursue certain tactics, [are matters for individual attorneys to decide.] In resolving those questions, lawyers need to consider the social context of their choices. They . . . [need to] assess their actions against a realistic backdrop, in which wealth, power, and information are unequally distributed, not all interests are adequately represented, and most matters will never reach a neutral tribunal."

Id.

justifications for deferring to a client's decision despite ethical reservations about its substance. In other contexts, where lawyers are unwilling to assist a course of action that they find morally unacceptable, the result will not necessarily be an imposition of their values. Rather, the lawyer's willingness to take a stance may simply encourage clients to reconsider their position, or to accept the financial and psychological consequences of finding alternative counsel.[45]

For purposes of this panel, the key issue is how this contextual approach converges or parts company with client-centered or collaborative alternatives. That is no small task, particularly since each of these schools encompasses commentators who differ in some important respects. But a brief overview may at least identify concerns that are worth more exploration by those of us who care about ethics in counseling.

B. Client-Centered Frameworks

What distinguishes client-centered counseling, as the term suggests, is the priority that it places on client autonomy.[46] This approach has much to recommend it, particularly in the clinical settings in which its adherents have been most influential. At its most fundamental level, the lawyer-client relationship is one of agency, and it makes sense to defer to the values of those who generally are directing or paying for the representation and will have to live with its results.

A framework that promotes clients' interests is especially justifiable where clients are relatively disempowered and protecting their rights has value independent of the merits of their particular claims. So, for example, deferring to a criminal defendant's desire for a trial, even where the lawyer believes that the client is guilty and that a trial would be costly for all concerned, can be ethically justified on systemic grounds. As I argue in *In the Interests of Justice*, society's commitment to due process and individual rights depends on a justice system that guarantees effective representation to all whose life, liberty, and reputation are at risk.[47] Without counsel willing to pursue defendants' interests as they perceive them and to challenge the government's case, law enforcement officials would have inadequate incentives to respect constitutional rights or to investigate the facts thoroughly. Insuring client-centered representation for defendants who are guilty is crucial to protecting those who are not.[48] So too, some civil cases raise analo-

45. *Id.* at 57-58.

46. BINDER ET AL., *supra* note 1, at 17; BASTRESS & HARBAUGH, *supra* note 1, at 26-27; BINDER & PRICE, *supra* note 21, at 147-48; Robert M. Bastress, *Client-Centered Counseling and Moral Accountability for Lawyers*, 10 J. LEGAL PROF. 97, 99 (1985).

47. RHODE, *supra* note 11, at 54-55.

48. *Id.*

gous concerns of protecting individual rights and preventing abuses of governmental power. For example a lawyer may be ethically justified in defending the free speech rights of white supremacist organizations, even while profoundly disagreeing with the moral content of their message.[49]

Despite these strengths, a client-centered approach is limited in several key respects. As a descriptive matter, it does not accurately reflect the role that ethical values in fact play in counseling relationships. And as a normative matter, it does not capture the role that values *should* play, in order to serve both client and societal interests.

In describing counseling relationships, most client-centered commentary assumes that clients seek legal assistance to pursue interests that are autonomously determined and that lawyers' basic responsibility is to provide "neutral," "nonjudgmental" assistance.[50] Yet, as many commentators have noted, including some from client-centered as well as collaborative and contextual schools, this approach is both "unworkable and implausible."[51] The way that lawyers present information cannot help but shape clients' conceptions of their own goals and interests.

A well-known example comes from Professor William Simon's years in practice.[52] The client, Mrs. Jones, was an elderly black woman accused of leaving the scene of a minor traffic accident without identifying herself. She denied having done so and claimed that the other driver, who was white, had caused the accident and had left without stopping. Based solely on the white driver's uncorroborated claims, the state charged Mrs. Jones with a misdemeanor carrying a maximum six-month sentence. The case was weak and involved significant evidence of racial bias by law enforcement officials. Recognizing as much, the prosecution offered a plea of *nolo contendre* and probation. Mrs. Jones asked what Simon thought that she should do. True to the client-centered approach, Simon declined to make a recommendation because the "decision was hers."[53] Rather, he described the pros and cons of a plea bargain and concluded "if you took their offer there probably

49. *See id.* at 74-76.

50. BINDER & PRICE, *supra* note 21, at 166; BINDER ET AL., *supra* note 1, at 288; BASTRESS & HARBAUGH, *supra* note 1, at 57; Stephen Ellmann, *Lawyers and Clients*, 34 U.C.L.A. L. Rev. 717, 733-79 (1987).

51. William Simon, *Lawyer Advice and Client Counseling*, ETHICS AND PRACTICE 165, 172 (Deborah L. Rhode ed., 2000). *See also* SHAFFER & COCHRAN, *supra* note 1, at 23-24; *Ellmann*, *supra* note 50, at 761-75; Stephen Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 908 (1988). For a general critique of the early counseling literature see William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980).

52. Simon, *supra* note 51.

53. *Id.* at 167.

wouldn't be any bad practical consequences but it wouldn't be total justice."[54] Mrs. Jones and a minister who had accompanied her, responded in unison, "[w]e want justice."[55]

Simon reported this decision to an experienced practitioner whom he had enlisted as co-counsel. It was a pro bono matter and Simon had never handled a criminal case before, so he wanted assistance from a more seasoned practitioner. He got it. This lawyer engaged in his own version of client-centered counseling. He, too, refrained from saying what he thought Mrs. Jones should do, but ended by describing at somewhat greater length the very remote possibility of a jail sentence if she lost at trial. He did not mention justice. She accepted the plea.

In retrospect, Simon believes that he did his client a disservice, particularly in light of psychological evidence indicating that people tend to overvalue risks that have a very low probability of occurring but highly adverse consequences if they do.[56] A fuller discussion in which Simon aired his own views about the value of exposing racist practices might have empowered the client to make a different decision, one that would have better expressed her highest values.[57] In any case, the primary moral of the story is how difficult it is to banish morals entirely. Lawyers' own values often unconsciously shape their assessments and presentations of relevant choices. And those presentations inescapably shape clients' understandings of their own interests and values. The full autonomy and neutrality that are central to client-centered theory are not realizable in practice; nor should they be.

A second limitation of client-centered approaches is the extent to which they promote client self-interest at the expense of other values. As moral philosophers including David Luban have noted, individual autonomy does not have intrinsic value; its importance derives from the values it fosters, such as personal creativity, initiative, and responsibility.[58] If a particular client objective does not, in fact, promote those values, or does so only at much greater cost to third parties, then deference to that objective is not ethically justifiable. [59]

Lawyers manage to avoid this conclusion only by selectively suspending the moral principle they claim to respect. Under client-centered approaches, the legal rights and personal autonomy of clients assume paramount concern; the rights and autonomy of third parties play only a walk-on role.

---

54. *Id.*

55. *Id.*

56. *Id.* at 168-72. For the psychological evidence see PAUL SLOVIC, STANLEY FISCHHOFF, & SARAH LICHTENSTEIN, *Facts versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 493-518 (Daniel Kahnemann et al. eds., 1982).

57. Simon, *supra* note 13, at 174.

58. David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, AM. B. FOUND. RES. J. 637, 639 (1986).

59. Luban, *supra* note 12; RHODE, *supra* note 11, at 57-59.

There is, to be sure, some difference in how commentators view that role and how much scope they give to lawyers' own ethical assessments of societal and third party interests. According to some commentators, lawyers should raise considerations that implicate clients' values, but should refrain from introducing their own values.[60] Unless a client's decision "violates the law or is clearly immoral, principles of client autonomy suggest that client values prevail."[61] Other commentators take a stance closer to my own contextual approach; a lawyer is entitled to raise moral objections, and if they are serious and incompatible with the client's objectives, the lawyer should refuse to proceed.[62]

From an ethical standpoint, the more restrictive view of the lawyer's role is hard to justify even on its own terms. If clients' autonomy is the preeminent value, why shouldn't their interests always take priority unless they are illegal or clearly immoral, a circumstance that lawyers rarely report encountering in practice? In the only systematic survey to date, only two percent of sampled lawyers recalled giving advice regarding the "public interest" and seventy-five percent claimed never to have encountered a serious ethical conflict with any client during their entire career.[63]

Of course, as a practical matter, lawyers' reluctance to challenge clients' self-interest makes perfect sense. These individuals are, after all, generally footing the bill for the lawyers' services. But from a moral standpoint, the priority on client autonomy is impossible to justify, particularly when the client is an organization. A corporation's "right" to maximize profits through unsafe or misleading but imperfectly regulated methods, can hardly take ethical precedence over other individuals' right to be free from reasonably avoidable risks. Client-centered representation has led to lawyers' complicity in some of the most socially costly enterprises in recent memory: the distribution of asbestos and dalkon shields; the suppression of health information about cigarettes; and the financially irresponsible ventures of savings and loan associations and corporations such as Enron.[64]

---

60. BINDER & PRICE, *supra* note 21, at 9; BINDER ET AL., *supra* note 1, at 8, 28, n.49. *See* SHAFFER & COCHRAN, *supra* note 1, at 19-23.

61. BINDER ET AL., *supra* note 1, at 280, 282.

62. BASTRESS & HARBAUGH, *supra* note 1, at 334-35.

63. Robert L. Nelson, Ideology, *Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 533 (1985).

64. *See* PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL, (1985); SUSAN PERRY AND JIM DAWSON, NIGHTMARE: WOMEN AND THE DALKON SHIELD 208 (1985); David Margolick, *Tobacco Its Middle Name, Law Firm Thrives, For Now*, N.Y. TIMES, Nov. 20, 1992, at A1; Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901 (D.C. 1990); Deborah L. Rhode & Paul Patton, *Lawyers, Ethics, and Enron*, 8 STAN. J. LAW & BUS 9 (2002).

As officers of the court and gatekeepers in imperfect regulatory processes, lawyers have obligations that transcend those owed to any particular client.[65] Honesty, trust, and fairness are collective goods; neither legal nor market systems can function effectively if lawyers lack a basic sense of social responsibility for the consequences of their professional acts. To the extent that lawyers were implicated in the recent moral meltdowns, the problem was too much client-centered representation, not too little.[66]

A related problem with client-centered approaches is that they socialize lawyers to a restrictive role that often ill serves even client interests. Survey evidence suggests that lawyers significantly underestimate the extent to which clients would welcome non-legal advice.[67] Even where they do not, they might ultimately benefit from it, even in contexts where their decision is not clearly immoral or illegal. As Elihu Root famously put it, "[a]bout half the practice of a decent lawyer consists in telling would-be clients that they are damn fools and should stop."[68]

The need for such counseling is greatest when a client's judgment is impaired. The impairment may spring from multiple causes: youth, mental health difficulties, peer pressures, economic constraints, or psychological traumas such as divorce.[69] Under such circumstances, individuals may be poorly situated to take a longterm view of their interests or live up to their own moral values.

A variety of cognitive biases often prevent even seemingly rational business clients from accurately assessing facts that are economically inconvenient to acknowledge. Donald Langevoort and Richard Painter have extensively documented the ways that situational influences and psychological predispositions converge to lead corporate management to overlook or rationalize unsafe and fraudulent activity.[70] For example, short-term profit incentives often tempt decisionmakers to discount less quantifiable considerations such as public reaction and the risks of detection.[71] Once managers

65. RHODE, *supra* note 11, at 65-66; Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns*, ETHICS AND PRACTICE 42 – 54 (Deborah L. Rhode ed., 2000); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990).

66. Rhode & Patton, *supra* note 64.

67. Edward A. Davies, *Attorneys Underestimate Clients Desire for Business Involvement, Survey Shows*, PREVENTIVE L. REP., Dec. 1988, at 15.

68. PHILIP C. JESSUP, 1 ELIHU ROOT 133 (1930).

69. *See* sources cited in DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 424-27, 592-615 (3d ed. 2000).

70. Donald C. Langevoort, *The Epistemological Dilemma of the Corporate-Securities Lawyer: Beliefs, Biases, and Organizational Behavior*, 63 BROOK. L. REV. 629 (1997); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75 (1993); Richard W. Painter, *Irrationality and Cognitive Bias at a Closing in Arthur Solmssen's* The Comfort Letter, 69 FORDHAM L. REV. 1111 (2000).

71. Langevoort, *The Epistemological Dilemma, supra* note 70, at 668-669; Messick & Braverman, *Ethical Leadership and the Psychology of Decision Making*, SLOAN MGT. REV., Winter 1996, at 10-11.

have committed to particular projects, they are often inclined to construe events in ways that confirm prior beliefs and to adhere to such commitments in the face of countervailing evidence.[72] Such "cognitive conservatism" may blind decision-makers to evidence of deception or adverse social consequences.[73] Group decision-making processes can compound the problem. Diffusion of responsibility and fears (often justifiable) of alienating colleagues may work to suppress unwelcome information.[74] As subsequent discussion indicates, lawyers, no less than clients, are subject to such cognitive biases. A definition of professional role that encourages deference to clients' current preference may poorly serve their ultimate interests.

A similar problem arises when clients are entities that can only speak through agents with competing concerns. Managers' desires to maximize their own income, power, or status within an organization may encourage decisions that are not in the broader interest of other stakeholders. Since lawyers' ethical responsibilities run to the entity, and not to any particular constituent, their counseling responsibilities need to take account of such conflicting concerns.[75] Yet most client-centered commentary ignores these responsibilities, and assumes a kind of dyadic counseling relationship that is out of touch with organizational complexities. Under these circumstances, as Robert Gordon notes, lawyers can readily become "cheerful abettors" of corporate abuses.[76]

---

72. Langevoort, *The Epistemological Dilemma*, *supra* note 70, at 642; Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 142-43; Painter, *supra* note 70, at 1132; Barry M. Staw , *The Escalation of Commitment to a Course of Action*, 6 ACAD. MGMT. REV. 577 (1981); Ramona et al., *Escalating Commitment to a Failing Course of Action: Separating the Roles of Choice and Justification*, 79 J. APP. PSYCH. 360 (1994).

73. Langevoort, *Organized Illusions supra* note 72, at 135-39; Painter, *supra* note 72, at 1131; Langevoort, *The Epistemological Dilemma*, *supra* note 70, at 641-42; SUSAN T. FISK & SHELLEY E. TAYLOR, SOCIAL COGNITION, 149-51 (2d ed. 1991); NISBETT & ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 167 (1981).

74. CHRIS ARGYS, OVERCOMING ORGANIZATIONAL DEFENSES: FACILITATING ORGANIZATIONAL LEARNING (1990); I JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN POLICY DECISIONS AND FIASCOS (1972); ALBERT BANDURA, SOCIAL COGNITIVE THEORY OF MORAL THOUGHT AND ACTION, IN 1 HANDBOOK OF MORAL BEHAVIOR AND ACTION 45, 84-86 (Kurtines & Gewirtz eds., 1991); Langevoort, *The Epistemological Dilemma, supra* note 70, at 637, 640, 651-52; Deborah L. Rhode, *If Integrity is the Answer, What is the Question?*, FORDHAM L. REV. (forthcoming).

75. *See* ABA Model Code of Prof'l Responsibility, MR 1.13 (2002).

76. Robert W. Gordon, *A Collective Failure of Nerve: The Bar's Response to Kay Scholer*, 23 LAW & SOC. INQUIRY 315, 316 (1998).

C. *Collaborative Frameworks*

Collaborative frameworks offer many of the same strengths as client-centered approaches while at least partly compensating for some of their major limitations. As the term suggests, collaborative counseling envisions lawyers and clients as co-venturers in problem solving and jointly responsible for its ethical implications. The advantages of this approach stem from its protection of individual liberty and autonomy, and its checks on paternalistic or domineering lawyer intervention. The client's preferred course of action prevails unless the attorney finds it "morally wrong."[77] Yet collaborative frameworks also envision a broader scope than client-centered paradigms for lawyers' own values, including concerns for societal and third party interests. Collaborative counseling treats the lawyer-client relationship like one of friendship, and urges participants to cultivate virtues central to moral discourse, such as "compassion, tolerance, humility, courage, honesty, care, and persistence."[78] Unlike client-centered models, collaborative approaches dispel the illusion that "neutrality" is possible or desirable.[79] Rather, they recognize that one of a lawyer's most valuable contributions is to engage and enlarge their client's moral vision, and to encourage decisions that express parties' highest principles.

A promising extension of this approach is reflected in a branch of family law practice that has claimed the same term. These "collaborative lawyers" offer a more cooperative form of dispute resolution than traditional client-centered adversarial processes.[80] Under their approach, parties commit to collaborate with each other as well as with their lawyers in an attempt at mutual problem solving. Each client is represented by counsel, and signs a retainer agreement providing that the lawyer is to assist them in reaching a fair, out-of-court agreement. If the parties fail to reach such a settlement, the lawyers may not represent them in further proceedings. The clients also commit to act in good faith and to disclose all relevant information.[81] This dispute resolution process involves joint settlement meetings with parties and their lawyers, all of whom have a substantial stake in maintaining cooperative relationships and engaging in creative, mutually beneficial problem solving.

This approach is not, of course, practical for all dispute resolution settings. Nor is it a substitute for the morally engaged dialogue that the term collaborative counseling originally implied. By definition, parties who are

77. SHAFFER & COCHRAN, *supra* note 1, at 51.

78. *Id.* at 54.

79. *Id.* at 27.

80. *See* Pauline H. Tesler, *Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It*, 13 AM. J. FAM. LAW 215 (1999); Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 Psych. Pub. Pol'y & Law 967 (1999).

81. Tesler, *Collaborative Law: What it is*, *supra* note 80, at 220-21.

most in need of ethical advice are probably among those least likely to commit to fair and cooperative problem solving. Such a dispute resolution process also cannot compensate for inequities in substantive law, gross inequalities in power, or the absence of representation for third parties like children whose welfare is directly implicated.[82]

A still more fundamental limitation, one shared by other collaborative approaches, is the risk that lawyers will too closely identify with clients' interests, at least where it is financially advantageous to do so. The recent spate of corporate scandals offers ample case studies of what happens when the "inner resources" of corporate managers prove inadequate to the occasion, and their lawyers are unable to notice. Seldom was the conduct so unambiguously illegal or immoral that counsel were unable to rationalize their assistance. Vinson & Elkins, the law firm representing Enron, managed to find their highly misleading accounting strategies "creative and aggressive," not deceptive or fraudulent.[83] Collaborative approaches invite lawyers to empathize with clients – to walk in their shoes.[84] However, as research on organizational misconduct amply demonstrates, what is generally needed from lawyers is less empathetic identification and more independent judgment.[85] Yet the counseling literature is all too silent about the socioeconomic constraints that get in the way.

D. Contextual Frameworks Revisited: The Need for Structural Analysis

A final limitation of both collaborative and client-centered approaches to counseling is the lack of attention to its structural foundations. The romanticized portrait of lawyers as friends obscures the financial dimensions of professional relationships. Yet economic considerations are a large part of what has encouraged excessive deference to clients who can afford it, and

82. Penelope Eileen Bryan, *Collaborative Divorce: Meaningful Reform or Anther Quick Fix?*, 5 PSYCHOL., PUB. POL'Y & LAW 1001 (1999); Pauline H. Tesler, *The Believing Game, the Doubting Game, and Collaborative Law: A Reply to Penelope Bryan*, 5 PSYCHOL., PUB. POL'Y & LAW 1018 (1999).

83. Patti Waldmeir, *Inside Track–A Failure to Squeal*, FIN. TIMES, Jan. 24, 2002, (quoting Vinson & Elkins memorandum). For discussion of the misleading nature of Enron's conduct, *see* sources cited in Rhode & Patton, *supra* note 64; William C. Powers, Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp., Feb. 1, 2002. For a similar example, *see* Mitchell Pacelle, *As Firm Implodes, Lawyer's Advice Is Point of Contention*, WALL ST. J., Oct. 29, 2002, at A1, A16.

84. Thomas L. Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 728 (1975); SHAFFER & COCHRAN, *supra* note 1, at 131.

85. *See* Langevoort, *The Epistemological Dilemma*, *supra* note 70, at 654-56; 666-67; 676; Langevoort, *Where Were the Lawyers?*, *supra* note 70, at 635; Painter, *supra* note 70, at 1131, 1137.

inadequate representation for those who cannot. The "lawyer-as-friend" analogy discretely overlooks an obvious distinction: the lawyer becomes the client's friend only for money, which is the classic definition of a very particular type of friendship, an occupation with which law has often been uncharitably linked.[86] But when money is absent, so also are many professional friends.

That point is scarcely lost on the general public. Lawyer humor collections often include variations on the friendship analogies embraced in counseling commentary. But in satirists' rendition, the metaphor has a pragmatic cast. Lawyers are advised that "[b]efore you judge your client, walk a mile in his shoes. Then, when you get around to judgment, you'll be a mile away and you can keep his shoes." Just as life imitates art, law imitates parody. To take only the most recent example, many lawyers connected with Enron were happy to suspend judgment until the organization imploded. Then they shared the shoes. In the first four months after the company declared bankruptcy, a dozen firms reportedly pocketed nearly $64 million in fees and expenses.[87]

In short, lawyers' counseling role is influenced by interests as well as values. The legal profession is by no means exempt from the natural human tendency to adjust beliefs in expedient directions. Self-serving biases inevitably affect the way lawyers see the world and assess their clients' options.[88] For example, in Robert Granfield and Thomas Koenig's recent survey of ethical decision making in legal practice, many attorneys acknowledged shifting or suspending judgment in the course of representing clients.[89] Some lawyers, whose initial sympathies ran to victims in medical malpractice or environmental hazard cases, ultimately came to identify with their clients on the other side.[90] Other practitioners put their principles on hold. As one survey participant reported: "I used to care about how the things I did as a lawyer affected people, but I don't find myself asking these questions anymore."[91] So too, it is scarcely coincidental that Vinson & Elkins' admiration for Enron's "creative" accounting methods involved a client that had accounted for more than seven percent of the firm's annual revenue, and had employed some twenty of the firm's former lawyers.[92]

---

86. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29, 108-09 (1978). *See also* RHODE & LUBAN, *supra* note 69.

87. Lisa Stansky, *Enron Fees: $64 Million-So Far*, NATIONAL L. J., July 8, 2002, at A1, A12.

88. For discussion of how lawyers' cognitive biases implicate them in unethical conduct, *see* LUBAN, THE GOOD LAWYER *supra* note 12, at 95; Langevoort, *Where Were the Lawyers?, supra* note 70, at 75.

89. Robert Granfield & Thomas Koenig, *"It's Hard to be a Human Being and a Lawyer": Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, (forthcoming).

90. *Id.*

91. *Id.*

92. Mike France, *One Big Client, One Big Hassle*, Bus. Week On line, Jan. 28, 2002, available at http://www.businessweek.com:/print/magazine/content/02_04/b3767706.htm?mainwindow (last

By contrast, client allegiance is noticeably weaker where financial considerations run in the opposite direction. In the vast majority of cases involving indigents, crushing caseloads and ludicrously low statutory fees make effective counseling an unaffordable luxury.[93] Related problems arise in contexts where client resources or financial stakes are too limited to underwrite effective representation or where such representation will antagonize individuals whose support is critical to lawyers' self-interest. For example, studies of attorneys working in small towns or handling small consumer claims find that these practitioners frequently curtail their representation.[94] Over the long run, they are reluctant to provoke ill will among opponents likely to supply or refer future work. Similar difficulties emerge with other particularly vulnerable clients. Research on legal aid programs and divorce cases finds that many individual needs are inadequately met. [95] "Cooling the client out" is a common technique; parties' expectations are revised downward to accommodate overworked or under-compensated attorneys.[96]

So, to borrow Lenin's unfashionable phrase, "[w]hat is to be done?" Here the counseling literature is helpful to a point, but falls considerably short. It directs primary attention to training, and calls on law schools to offer better instruction in counseling skills.[97] This is surely right as far as it goes. In *In the Interests of Justice*, I fault legal education for treating skills education as a poor relation, and for failing to prepare students for the interpersonal dimensions of legal practice.[98] The current curriculum is equally

visited July 29, 2002); John Schwartz, *Questions from Congress for Enron's Law Firm*, N.Y. TIMES, March 12, 2002, at C1.

93. *See* RHODE, *supra* note 11, at 61-63; DAVID COLE, NO EQUAL JUSTICE; RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 83 (1995). Most court-appointed counsel do not have sufficient resources to hire the experts and investigators who may be essential to an adequate defense. Catherine Greene Burnett, Michael K. Moore, & Allan K. Butcher, *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. TEX. L. REV. 595, 597, 622, 641 (2001); *No Fair Trial Unless You Can Buy One*, ATLANTA-J. CONSTITUTION, Sep. 9, 2001, at D8

94. DONALD D. LANDON, COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE 136, 142 (1990); Richard Abel, *Revisioning Lawyers*, in RICHARD ABEL AND PHILIP LEWIS, LAWYERS IN SOCIETY: AN OVERVIEW 6 (1995); Stewart Macaulay, *Lawyers and Consumer Protection*, 14 LAW & SOC'Y REV. 115, 136-141 (1979).

95. AUSTIN SARAT & WILLIAM FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS (1995); KAREN WINNER, DIVORCED FROM JUSTICE, (1996); Paul E. Lee & Mary M. Lee, *Reflections from the Bottom of the Well: Racial Bias in the Provision of Legal Services to the Poor*, 27 CLEARINGHOUSE REV. 311 (1993).

96. Abraham Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW AND SOC'Y REV. 15 (1967).

97. SHAFFER & COCHRAN, *supra* note 1, at 49.

98. Rhode, *supra* note 11, at 198-99.

inattentive to the organizational, psychological, and financial pressures that work against effective counseling relationships. If, as ample research suggests, many lawyers talk past concerns that are most crucial to their clients, and fail to raise significant ethical issues, then we, as educators, are partly responsible—but only partly.[99]

Much of the problem lies deeper, and involves the structural constraints and cognitive biases noted earlier. None is easily altered. Moreover, a related bias involves individuals' natural tendencies to overstate the importance of personal flaws and undervalue the role of situational influences in explaining ethical lapses.[100] It is less threatening to blame individual deviance than institutional pressures that could affect us all. But it is also less productive. The massive misconduct revealed in Enron *et al.* involved failures of counseling, but the solution is not simply better counseling education. Changes are needed in regulatory structures and reward systems.[101] Lawyers, managers, accountants, and those who oversee them all must be subject to greater accountability.

A timely reminder is captured in one of the *New Yorker*'s collection of business cartoons. It features a corporate boardroom filled with well-heeled executives, presumably including legal counsel, and a meeting chair who announces, "this might not be ethical. Is that a problem for anyone?"

As teachers and scholars of professional responsibility, our aim should be to ensure that if our former students are in that room, someone has a problem. And we should also help ensure that if no one does, adequate regulatory structures are in place to hold them accountable later. More ethically sensitive counseling is part of the answer. But we also need greater attention to the institutional structures and professional self-interests that get in the way.

---

99. *See* Granfield & Koenig, *supra* note 89 at 39; Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. LEGAL EDUC. 43, 44, 53 (1991);.

100. LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 87-89, 140-41 (1991); Fiske & Taylor, *supra* note 74, at 72-75; KELLY G. SHAVER, THE ATTRIBUTION OF BLAME: CAUSALITY, RESPONSIBILITY AND BLAMEWORTHINESS 132-36 (1985); Langevoort, *Where Were the Lawyers?*, *supra* note 71, at 108.

101. For reform proposals, *see* Langevoort, *Where Were the Lawyers*, *supra* note 70, at 113; Rhode & Patton, *supra* note 64.

III. CLIENT-CENTERED COUNSELING AND MORAL ACTIVISM

Paul R. Tremblay***

I am delighted to be here this morning to talk about client counseling and moral responsibility, a topic which intrigues me a great deal, as I am sure it intrigues you. I am even happier to be able to share a panel with three people whose work I have admired for so long. The challenge for us to consider today, and for the profession generally, is to develop a workable and ethical role for lawyers who confront injustice, corruption and unjustified harm to others in their practices. My role here is to represent the "client-centered" approach to counseling, in contrast to the alternative perspectives of Professors Rhode and Shaffer. I am happy to do that, but in doing so I note the challenge of that particular responsibility. For many, there is a short leap between client-centeredness and "hired gun," and once we are there, I am expected then to shill for the lawyers for Enron, for WorldCom, for Tyco, and all the other corporate scalawags. I confess that I am not sure if I am really up for that kind of shilling this morning. In a sense, though, I will offer a guarded defense, in the end, of what those lawyers do and of their behaviors, but perhaps not in the way that you might expect.

Allow me to present a brief preview of my ideas. I will start by defending the idea of client-centeredness in what I will call its "instrumental" use. But accepting the role of neutrality of the lawyer in that setting does not, it seems to me, require the same neutrality when questions arise about what is good, or what is right. I am an adherent, or at least I have some interest in, this idea of casuistry,[102] and I am persuaded by the casuists that lawyers can have reasoned discussions about right and wrong, as those discussions tend to turn more on questions of fact than on questions of value. This all sounds pretty promising so far, until we realize that lawyers are subject to some powerful, persistent, and stubborn heuristics and biases that cause them to believe and to know what they want, or what their interests want them, to believe in. And to work as a moral activist, as I understand the message of the adherents of that stance, a lawyer must have considerable certainty about

---

*** Clinical Professor, Boston College Law School. This essay represents a slightly different version of my remarks at the Annual Meeting of Association of American Law Schools, the Section on Professional Responsibility, January 4, 2003. Because of the early Saturday morning time for this panel, I opted to leave out all footnote references during my talk at the Annual Meeting. I thank F. Miguel Flores, Boston College Law School Class of 2004, for able research assistance.

102. *See* Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 498-503 (1999).

the injustice to which activism responds. My sense is that such certainty is far less often attainable than we otherwise expect. That realization, in turn, leaves the activism stance in a rather frustrating place.

Let me start then with the client-centered conception. As a baseline orientation for counseling, it seems to make a lot of sense. The Binder, Bergman and Price book,[103] whose second edition I have been working on, pioneered the idea of client-centeredness as the best way to avoid misunderstanding or interfering with a client's autonomous choices.[104] The counseling method designed by Binder, Bergman and Price is rather elegant.[105] It recognizes that *instrumental* decisions—for instance, whether to settle, what terms belong in a deal, the choice of strategy, and the like—turn on considerations of risk aversion, weighing harms and benefits, psychological comforts and so forth. There are no analytically correct solutions in those instrumental counseling contexts, and lawyers have no special expertise on the questions that really matter.[106] The model, therefore, encourages neutrality on the part of the lawyer and respect for the *preferences* of the client. I deliberately avoid use of the term "values" when we talk about those preferences, because I intend, in a moment, to distinguish between an individual's values and her preferences. The client-centered counseling model urges neutrality, lest the lawyers' preferences seep in and influence the choices to be made. That, according to the model, would be wrong, and would be a bad thing, because there is really no reason why the lawyer's preferences should matter on those scores.

Now, if we agree with that analysis, then the question becomes, should the same neutrality apply when questions of what is good, or right, arise? If we oppose a lawyer influencing a client on instrumental matters, one might think that it follows that we would equally oppose a lawyer influencing a client on questions of values. I argue that such a conclusion does not follow. Here's the problem with assuming that neutrality about tactics and decision making requires neutrality about values. The client-centered model's commitment to neutrality is premised on the lawyer's lack of any real expertise about what is most important to the client. But there is no analogous reason, with one important exception, to assume that the lawyer lacks expertise about harm that the client's scheme might cause to innocent folks, to the widows and orphans, or to the small investors and the like.

---

103. BINDER, BERGMAN & PRICE, *supra* note 1.

104. In truth, the earlier iteration of that text better deserves the credit for pioneering the client-centered lawyering model. *See* BINDER & PRICE, *supra* note 21. For other early path-breaking work on the underpinnings of client-centeredness see DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE (1974); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 50 (1979).

105. *See* BINDER, BERGMAN & PRICE, *supra* note 1, at 16-24, 287-308.

106. *See* Ellmann, *supra* note 51, at 717; Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501(1990).

The client's personal preferences and risk aversion are truly peculiar to the client. The lawyer might be very, very good at learning what is most important to that client, but she literally can never know it as well as the client can (absent some evidence that the client is succumbing to distorting biases).[107] But harm to third persons, and questions of justice, are not personal to the client at all. Both the lawyer and the client, and perhaps the lawyer more expertly than the client, can observe and predict pain, harm, unconscionability, and injustice. So the call for neutrality on questions of the good is not a by-product of a client-centered approach.

I know, as well as you perhaps, that the dividing line between what is instrumental and tactical, on the one hand, and what is unjust or morally troublesome, on the other, is not as clear as my discussion gives it credit for. But let me elide that problem for a moment, because I want to use my scarce time here to think out loud about where we are left if we agree that the lawyer ought to recognize, and influence her client about, sleaze or injustice or nastiness.

Now, some might say, as in fact some have said,[108] that the non-neutrality that I have just described tolerates and even encourages lawyers to "impose values" on a client. A genuine worry surfaces frequently about lawyers imposing their values on clients, and I find that worry to be an odd thing. It implies, rather directly it seems, that values are somehow personal or idiosyncratic or ungrounded. Consider the following: as a lawyer I happen to believe that enriching executives, and their lawyers, at the expense of investors and employees who themselves were misled and tricked by those very executives and lawyers, is a bad thing. If I urge that on you, are we worried that perhaps your value system tends to hold that state of affairs to be good, and that my conception of injustice will be imposed unfairly on yours? This idea of "imposing values" is essentially a relativist, or perhaps subjectivist idea.[109] As Bradley Wendel[110] and others[111] have written within

107. *See* text accompanying notes 133-45 *infra*.

108. *See, e.g.*, MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 7 (2d ed. 2002); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617 (1986),](worrying that a moral activist stance leads to moral decisions imposed by "an oligarchy of lawyers"). The idea that values may be "imposed" is a variation on the widely accepted notion that values may be (and perhaps ought to be) "inculcated." *See, e.g.*, Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 69 (2002) ("[v]alues inculcation is an inherent by-product of the educational process, and it would be absurd to hypothesize a vibrant democratic society absent such a process").

109. For a development of this idea at greater length, *see* Paul R. Tremblay, *Shared Norms, Bad Lawyers, and the Virtues of Casuistry*, 36 U.S.F. L. REV. 659, 695-704 (2002);W. Bradley Wendel, *Ethics for Skeptics*, 26 J. LEGAL PROF. 165, 167-75 (2002).

the tradition of casuistry, we just do not run our lives that way. We do not treat values as though they were that idiosyncratic. Imagine for a moment how relativist or idiosyncratic you think value judgments are the next time some jerk cuts in front of you in a long line for World Series tickets. Maybe you cannot prove that the jerk is wrong, but the folks in line with you would show him, and in no uncertain terms, that they know he's wrong. (Now I am from Boston, so for me this example is just a thought experiment, but you understand the basic point.)

So the message from the casuists is that we tend to have common, shared sentiments about the good, and we can reason about that ideal. But if we accept that assumption, we are a bit puzzled, because our world is all too cluttered with moral and political controversies that seem to resist this kind of shared, consensus-based reasoning.[112] Who could possibly disagree that we argue about all kinds of moral and political issues? Certainly not I.

People disagree all the time about just about every important moral and political issue. But when you parse out their disagreement, it is almost invariably about facts, not about values as such.[113] People who debate complex issues rely on arguments that are grounded in assertions about what will happen, what has happened, or what accounts for what has happened. You oppose welfare expansion, and support strict workfare, because you believe that welfare recipients are lazy, and need incentives to find work.[114] I support welfare expansion, and oppose strict workfare, because I believe that welfare recipients are oppressed, discriminated against, and need the money to survive and to raise their children.[115] You never argue that welfare recipi-

110. *See, e.g.*, W. Bradley Wendel, *Teaching Ethics in an Atmosphere of Skepticism and Relativism*, 36 U.S.F. L. REV. 711, 734 (2002).

111. The idea that values are not idiosyncratic, but are shared and represented by paradigm cases, is a central tenet of casuistry. For a review of the leading casuist literature, see for example, HUGO ADAM BEDAU, MAKING MORTAL CHOICES: THREE EXERCISES IN MORAL CASUISTRY (1997); ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING (1988); MARK G. KUCZEWSKI, FRAGMENTATION AND CONSENSUS: COMMUNITARIAN AND CASUIST BIOETHICS 81 (1997); Carson Strong, *Justification in Ethics*, MORAL THEORY AND MORAL JUDGMENTS 193 (Baruch A. Brody ed., 1988). *See also* AARON LEONARD MACKLER, CASES AND JUDGMENTS IN ETHICAL REASONING: AN APPRAISAL OF CONTEMPORARY CASUISTRY AND HOLISTIC MODELS FOR THE MUTUAL SUPPORT OF NORMS AND CASE JUDGMENTS (1992) (unpublished draft, on file with the author). The casuists' notion of shared norms is similar to the moral philosophers' arguments supporting an objective view of morality. *See, e.g.*, THOMAS NAGEL, THE LAST WORD (1997);Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996).

112. The common reference to "culture wars" is a ready example of the kinds of deep disagreement to which I refer here. *See, e.g.*, JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1992).

113. *See* Tremblay, *Shared Norms*, *supra* note 110, at 661.

114. *See, e.g.*, Brian M. Riedl & Robert E. Rector, *Myths and Facts: Why Successful Welfare Reform Must Strengthen Work Requirements*, THE HERITAGE FOUNDATION BACKGROUNDER No. 1568 (July 12, 2002); John Engler, *The Liberal Rout: Why Conservatives are Winning in the 1990s*, 81 POL'Y REV. (January-February 1997).

115. *See, e.g.*, Mark Neal Aaronson, *Scapegoating the Poor: Welfare Reform All Over Again and*

ents who really will die without the money should die. I never argue that lazy people should get money so they can sit home and buy vodka. Our values are not so different. Our views of the facts, though, are terrifically different.

Most current political debate fits this scheme. Consider this: as the Bush administration repeatedly and persistently relaxes the environmental regulations that were implemented in the Clinton administration, the Bush administration and the corporate lobbyists defend their positions by claiming that the relaxed regulations will in fact, in the long run, lead to cleaner air and cleaner water.[116] They do not defend their policies by arguing that more pollution is good. They use arguments, grounded in conceptions of fact, to show that in the long run things will be better under their scheme, calling upon norms shared by their audience. Just about any other issue we can imagine will evidence the same kind of disagreement, grounded far more on fact assumptions than on anything plausibly considered "values." Think affirmative action.[117] The war in Iraq.[118] Tax cuts for the rich.[119] Rent control.[120] You name it.

---

the Undermining of Democratic Citizenship, 7 HASTINGS WOMEN'S L.J. 213 (1996); Peter Edelman, *The Worst Thing Bill Clinton Has Done*, 279 ATLANTIC MONTHLY 3, March 1997, at 43-58; Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation & Debate*, 22 FORDHAM URB. L.J. 1159 (1995); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992).

116. *See, e.g.*, Jeffrey Ball, *Changing Climate: New Market Shows Industry Moving On Global Warming, Even as Bush Opposes Kyoto, Firms Are Trading Rights To Emit Greenhouse Gases*, WALL ST. J., Jan. 16, 2003, at A1; John J. Fialka, *The Economy: EPA Shifts Emissions Rules for Utilities, Factories*, WALL ST. J., June 14, 2002, at A2.

117. The debate about affirmative action has resurfaced with a marked intensity in early 2003, as the United States Supreme Court hears arguments in the challenge to the admissions program of University of Michigan Law School. *See* Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002), *cert. granted*, No. 02-241 2002 U.S. LEXIS 8677 (U.S. Dec. 2, 2002). For a sampling of the debate, showing how the supporters and opponents rely on contested factual and predictive claims see, e.g., DEREK BOK & WILLIAM G. BOWEN, THE SHAPE OF THE RIVER (1998); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 409-26 (2000) (supportive of a program like that used by the University of Michigan); John A. Bunzel, *Affirmative Action in Higher Education: A Dilemma of Conflicting Principles*, HOOVER INSTITUTION, ESSAYS IN PUBLIC POLICY (July 1998); TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (1996) (opposing programs like that used by the University of Michigan).

118. *See, e.g.*, John F. Burns, *The World; How Many People Has Hussein Killed?*, N.Y. TIMES, Jan. 26, 2003, at 1C; Robert P. George, *The Cost of Fighting . . . A Just War in Iraq*, WALL ST. J., Dec. 6, 2002, at A14 (supportive of the war); Zbigniew Brzezinski, *The End Game*, WALL ST. J., Dec. 23, 2002, at A14 (opposing the war).

119. *See, e.g.*, John D. McKinnon, *Are Tax-Free Dividends the Best Medicine? White House Says They Would Cure Economy's Anemia, but Other Opinions Abound*, WALL ST. J., Jan. 17, 2003, at A4; Dean E. Murphy, *Politics and the Economy: The National Mood; Deep Divisions on Who Will Benefit From Bush Tax Plan*, N.Y. TIMES, Jan. 9, 2003, at A22.

120. *See, e.g.*, Michael Jonas, *Small Property Owners Group Makes Big Splash in Rent Debate*,

If we accept this hypothesis, though, we encounter a serious problem. It is the following, which I exaggerate here for some effect: on these important, contested questions, *we do not know anything for sure.* I do not really *know* whether welfare recipients are lazy. When I read studies telling me that they are,[121] I find faults in the studies, many faults. When I encounter studies telling me that workfare programs will fail because welfare recipients are anything but lazy or unmotivated, I find them utterly convincing. I run my life like I know that I am right, but do I really know that? When I see my welfare clients in our office in my clinic, everything that I see reinforces my belief that these are good, motivated, hard working people who just got the world's worst breaks. Some of my students, meeting those same people, see a confirmation of their opposite stereotypes—the clients miss meetings, they are disorganized, they claim to be disabled because of "stress," their parents were on welfare and their kids are on welfare, some of them are involved in drugs. It all fits.

Now, what does this have to do with lawyers and counseling and Enron? As you might have guessed, I think it has a lot to do with those topics. Here is why: the moral activism project, as I will call it, correctly urges lawyers to take responsibility for the unjustified harm that their actions generate.[122] Lawyers must attend not just to what is legal—everyone, activists and non-activists alike, agrees that lawyers cannot participate in schemes which are not legal[123]—but also to what is immoral, or unjust. The message continues: when you encounter the injustice or the corruption or the unconscionability, you cannot merely rely upon its legality. You must confront its moral problems. You must do something.[124] Talk to your client.[125] Maybe withdraw.[126] Maybe sabotage the scheme.[127] But if you go along just be-

---

BOSTON GLOBE, CITY WEEKLY, Dec. 1, 2002, at 6; Juan Leyton & Roxan McKinnon, *A Return to Rent Control? Yes, It Will Stop Displacement*, BOSTON GLOBE, OP-ED, Nov. 16, 2002, at A19.

121. It is probably difficult to find a credible study (as opposed to, say, a letter to the editor or an op-ed piece in a tabloid newspaper like *The Boston Herald*) claiming that welfare recipients are "lazy." But there are studies from the conservative researchers who make equivalent claims, arguing that without state-imposed incentives welfare mothers will not find work and will succumb to the dependency syndrome. *See, e.g.*, Riedl & Rector, *supra* note 115. *See also* Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274 (1991) (discussing popular images of welfare mothers as morally inadequate).

122. *See* RHODE, *supra* note 11.

123. *See, e.g.*, Pepper, *Amoral Role*, *supra* note 108, at 6.

124. This is a central message of the moral activism project. *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); SIMON, THE PRACTICE OF JUSTICE, *supra* note 13. For a review of the activist tradition, *see* Paul R. Tremblay, *Moral Activism Manqué*, 43 S. TEX. L. REV. (forthcoming 2003).

125. *See* SHAFFER & COCHRAN, *supra* note 1, at 66-67; Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1563 (1995) (noting the importance of moral dialogue).

126. *See* Rhode, *supra* note 11, at 6; Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1665 (2002).

127. *See* David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship:*

cause it is lawful, we will hold you responsible. You no longer have the "it was legal" excuse. You lost that defense some time around 1983.[128]

But for this advice to apply, the lawyer must "know" and recognize the injustice, the corruption, and the unconscionability. In the stories that inhabit the moral activism literature, the bad stuff is unambiguous factually (if legally ambiguous). A story used by both David Luban[129] and Bill Simon[130] tells us of the rich man who owes a just debt to the poor man, and the statute of limitations if asserted would defeat the claim outright, but it would be wrong (Luban's view) or not lawfully correct (Simon's view) for the lawyer to assert the statute, even if the court would dismiss the case based on the statute. With that story established, the moral activist scholars debate whether a law can be used in such a technical and unfair way. The moral premise is not really in question—rich people should repay their debts, especially if they admit them. The facts are not in dispute—the debt is owed, one guy's rich, the other guy's poor, and nobody lost any documents or had a memory failure over the years.

But in law offices, clients and client agents do not present unambiguous stories of injustice, corruption, or unconscionability. Well, maybe they do, but it is always *the other side* who fits that description. I do not know what really happened[131] in the *Zabella v. Pakel* case,[132] the reported decision that fits the facts of the rich guy and the just debt and the statute of limitations, but I will bet that when those types of cases come to a lawyer, the creditor does not say:

> I owe the money. I can afford to pay it. I have not lost any papers and my memory is clear. The guy's a good guy, and he is poor, and he needs the money. But let us screw him. Can we find some technicality?

A Reply to Stephen Ellmann, 90 COLUM. L. REV. 1004, 1035-43 (1990) (responding to Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116 (1990)).

128. The year 1983 saw the publication of one of the most important contributions to the activist debate, a collection of essays edited by David Luban called *The Good Lawyer*. *See* LUBAN, THE GOOD LAWYER *supra* note 12.

129. *See* LUBAN, THE GOOD LAWYER, *supra* note 12, at 683 (discussing Zabella v. Pakel, 242 F.2d 452 (7th Cir. 1957)).

130. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1098 (1988); SIMON, *supra* note 49, at 29, 31-36 (but not citing *Pakel* by name).

131. *Compare* Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63, 102-03 (1998) (reporting research into the fabled case of Spaulding v. Zimmerman, 116 N.W. 2d 704 (Minn. 1962)) *with* Roger C. Cramton, *Legal Ethics: Lawyer Disclosure to Prevent Death or Bodily Injury: A New Look at* Spaulding v. Zimmerman, 2 J. INST. STUD. LEG. ETHICS 163, 172 (1999).

132. Zabella v. Pakel, 242 F.2d 542 (7th Cir. 1957).

The rich guy has excuses; he has accusations about the poor guy; he has a history that makes his case far more complicated. *Justice is on my side*, he says. The lawyer may suspect that all of this is just twaddle, but for him to betray his client he must be sure—ever so sure—that it is indeed twaddle.

I suspect that lawyers are very seldom so sure. Not only do we have the generalized fact uncertainty I described above, but we also have another critically important phenomenon—that of the influence of cognitive biases about what people, including lawyers, know and believe.

We all know about the influence of the self-serving bias,[133] the endowment effect,[134] the confirming evidence trap,[135] and the hindsight bias.[136] The cognitive psychologists, led by the early work of Amos Tversky, Paul Slovik, and the now Nobel laureate Daniel Kahneman,[137] have been showing us, quite vividly at times, that so much of our understanding about what we know, what we believe, and what we find fair or right is not exactly rational or logical.[138] It is instead, the product of stubborn, sophisticated, and remarkably predictable cognitive processes which are sometimes rather rational, but other times deeply distorting.[139]

The most important "cognitive illusion" to mention here is the self-serving bias. "I'll see it when I believe it" is a famous quote, a slip of the tongue in fact, from one of the researchers in this area.[140] This bias predicts that we will see ourselves in a favorable light, regardless of the true state of

133. *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780 (2001).

134. *See, e.g.*, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1107-13 (2000) (discussing the endowment effect, which leads individuals to value what they already have over what they may aspire to have).

135. *See, e.g.*, JOHN S. HAMMOND, RALPH L. KEENEY & HOWARD RAIFFA, SMART CHOICES: A PRACTICAL GUIDE TO MAKING BETTER DECISIONS 198 (1999) (coining the "confirming-evidence trap" phrase to describe individuals' tendencies to interpret evidence in ways that confirms what the individuals already believe, or is in their self-interest to believe).

136. *See, e.g.*, Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89 (1995); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 66-70 (2000).

137. *See* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Amos Tversky, Paul Slovik & Daniel Kahneman eds. 1982). Daniel Kahneman received the 2002 Nobel Prize in Economics. *See* Daniel Altman, *A Nobel That Bridges Economics and Psychology*, N.Y. TIMES, October 10, 2002, at C2.

138. See, e.g., PAUL SLOVIC, STANLEY FISCHHOFF, & SARAH LICHTENSTEIN, *Facts versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahnemann et al. eds., 1982).

139. *Id.* In a talk presented at the Alternative Dispute Resolution Section's meeting at the AALS Annual Meeting on January 3, 2003, Christopher Guthrie (substituting for Robert Mnookin) presented a very helpful and extensive overview of the most common heuristics and biases affecting decision making and attitudes.

140. THOMAS GILOVICH, HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 49 (1991) (quoting the slip of the tongue of psychologist Thane Pittman).

affairs.[141] The Lake Wobegon effect[142] applies to many areas of our lives. We tend to rank ourselves as above average, and quite good, at ethical commitment, job performance, leadership skills, sociability, and things like driving ability. This bias also predicts that we will interpret ambiguous and even unambiguous data in a way that supports our self-interest or our currently held attitudes. Think of me reading studies about welfare recipients.[143]

In fact, according to those who study the self-serving bias, its influence is so powerful and so pervasive that the only people who do not seem to be subject to it are those individuals with low self esteem, or who are depressed.[144] Note that several other biases and illusions operate much like the self-serving bias. Studies show that lawyers and agents generally are somewhat, but not completely, immune from these biases.[145] There is no doubt that clients are subject to them.

Here is where I offer my thesis. Why is it that lawyers sit by their clients' side and participate in these noxious schemes? What happened to the activism that we taught them in law school? I do not think that the lawyers lose their souls, as such, or that they aim to enrich the fat cats at the expense of the 401(k)s of the employees and the small investors. What I suspect happens is this: these lawyers work with people who, either honestly or not, defend their schemes with arguments that are not assuredly false, and may even be quite attractively credible. Either the lawyers believe the arguments, which the biases help them to do, or they do not have enough of a grasp of the external facts or predictions to be so sure that the arguments are wrong to support a betrayal, especially when so much is at stake. Remember that by definition the scheme is *legal*, so if the lawyer experiences serious doubts about whether to abandon or sabotage the plan, that fact (while not counting as a trump in the moral activism project) influences the balance, one imagines, a great deal.

---

141. *See* Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 110 (1997); Linda Babcock, Henry S. Farber, Cynthia Fobia & Eldar Shafir, *Forming Beliefs about Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289, 293-94 (1995).

142. GILOVICH, *supra* note 141, at 77 (citing CHANCE, NEW DIRECTIONS FOR STATISTICS AND COMPUTING 5 (1989)). In Garrison Keiller's Lake Wobegon, on his Prairie Home Companion radio show, "the men are strong, the women are good looking, and the children are all above average."

143. For further experimental evidence of the power of ideology to influence how persons perceive and understand facts see Roger Giner-Sorolla, Shelly Chaiken & Stacey Lutz, *Validity Beliefs and Ideology Can Influence Legal Case Judgments Differently*, 26 LAW & HUM. BEHAV. 507 (2002).

144. Babcock & Loewenstein, *supra* note 142, at 116 (stating that "individuals who have accurate self-evaluations are either low in self-esteem, moderately depressed, or both").

145. *See* Rachlinski, *supra* note 137, at 70-74.

If all of this is indeed true, if what I am saying is right, then where does it leave us? If I had more than just two or three minutes left, I would happily provide you with all of the answers, but I am nearly out of time, so let me just offer three quick reactions.

My first reaction is this: if the heuristics and biases work as we have been told, and if what we know (or believe) depends a great deal on where we are situated, then the long-standing suggestion that ethics should be taught in context[146] needs to be rethought. I do not, and cannot, suggest that ethics should not be taught in context, but the heuristics and biases literature does teach us that it is precisely the context that creates the distortion in beliefs and attitudes. Once a lawyer identifies with a client, she now sees things differently from before, directly as a result of that allegiance.[147] It seems, we need to teach not just "in context," but about how the context affects attitudes and beliefs—what some might otherwise call "values."

A second reaction, following from all the above, is that institutional developments like the Sarbanes-Oxley Act,[148] in fact, might be quite valuable as remedies for some of the biases we have observed. The SEC's proposed regulations required organizational lawyers to proceed "up the ladder" in en-

146. It is well-accepted among professional responsibility educators that teaching about legal ethics requires explicit attention to context and nuance. *See, e.g.*, Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357, 370-73 (1998); Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 LAW & CONTEMP. PROBS. 193 (1996); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 515-23 (1990) (suggesting that "[c]ontext must replace universality" in training lawyers, and offering "five contextual categories" for ethical standards); David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, in EVERYDAY PRACTICE AND TROUBLE CASES 68-108 (Austin Sarat et al. eds., 1998).

147. *See, e.g.*, Linda Babcock, George Loewenstein & Samuel Issacharoff, *Creating Convergences: Debiasing Biased Litigants*, 22 LAW. & SOC. INQUIRY 913 (1997) (subjects assigned randomly to one side or the other of a litigated dispute formed different attitudes, about the justice or fairness of the underlying events, dependent on the side to which they were assigned).

148. Section 307 of the Sarbanes-Oxley Act, 15 U.S.C § 7245 (2002), directs the Securities and Exchange Commission (SEC) to promulgate:

minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company.

Id. In December, 2002, the SEC promulgated proposed rules implementing Section 307 of the Act, including requirements that a lawyer withdraw from representation and notify the SEC if efforts to remedy organizational fraud were unsuccessful. *See* SEC Release No. 33-8150 (November 21, 2002). The organized bar responded to the proposed rules with passionate opposition. *See, e.g.*, Comment Letter, Alfred P. Carlton, Jr., President, American Bar Association (December 18, 2002), *available at* http://www.abanet.org/poladv/letters/other/comment_letter.pdf (last visited February 1, 2003). On January 23, 2003, the SEC approved new rules but eliminated, temporarily, the "noisy withdrawal" language from the regulations. *See* SEC Release No. 2003-13 (January 23, 2003), *available at* http://www.sec.gov/news/press/2003-13.htm (last visited February 1, 2003). The Commission voted to extend for sixty days the comment period on the "noisy withdrawal" provisions. *Id.*

tities when they encounter misconduct, and then to withdraw "noisily" to the SEC if the entity's agents failed to respond adequately to the evidence of misconduct.[149] Corporate lawyers have identified a genuine and warranted concern about those regulations: the influence of the hindsight bias. Their concern was that things that may look pretty innocent to a working lawyer at the moment might look quite damaging when viewed by the SEC or by a jury months later, with the benefit of hindsight and after investors have been injured.[150] As just noted, the worry is warranted. At the same time, the presence of such regulations will alter the life of an organizational lawyer in ways which might overcome the effects of the self-serving biases. The lawyer after Sarbanes-Oxley will possess incentives to measure conduct which she normally would process via her self-serving biases by a new standard—what that conduct might look like to a later observer after things have gone wrong. From the limited evidence available on debiasing individuals, it appears that such an exercise may work to overcome the usual self-serving influences.[151]

The third reaction follows from this consideration of the Sarbanes-Oxley Act. The SEC rules apply, of course, only to organizational lawyers. For the rest of the bar, their day-to-day work is governed by the ongoing self-serving and self-confirming biases, without any opposing incentives now felt by corporate lawyers. Thus, as my thesis has expressed, one would rarely expect an activist stance among those lawyers, because of those influences. Assuming (as I do) that such a state of affairs is overall a bad thing, we might start to think about measures to create similar Sarbanes-Oxley-like incentives for non-corporate lawyers. The most apparent idea is that of enhanced third-party liability. By and large in 2003, lawyers are not responsible for injuries caused to third parties, with rather limited exceptions.[152] Expansion of those duties, while no doubt complicated by the sustaining original obligation to one's client, would have the salutary effect of overcoming somewhat the persistent tendency of lawyers to support, genuinely

149. *See* SEC Release No. 33-8150, amending 17 C.F.R § 205.3(d) (2002).

150. *See* Kamin & Rachlinski, *supra* note 137; Rachlinski, *supra* note 137, at 67-74.

151. *See* Babcock, Loewenstein & Issacharoff, *supra* note 148, at 922-23.

152. *See, e.g.*, Spinner v. Nutt, 631 N.E. 2d 542, 544-46 (Mass. 1994) (attorney for a trustee does not owe a duty to the beneficiaries); Kurker v. Hill, 689 N.E. 2d 833, 835-36 (Mass. Ct. App. 1998) (attorney for a shareholder in close corporation did not owe a fiduciary duty to other shareholder even though the shareholders owed each other a fiduciary duty). *See generally*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000) (documenting limited liability to nonclients); Edward S. Cheng, *An Attorney's Duty to Non-Clients*, 37 NEW ENG. L. REV. 55 (2002).

and in good faith, the positions of their clients, even in the face of apparent injustices to others.

IV. THE VIRTUE OF FRIENDSHIP IN LEGAL COUNSELING

Thomas L. Shaffer****

I have been a clinical law teacher for the past eleven years, after nearly thirty years in classroom teaching. I suppose the word "virtue" in my title points to the pre-clinic years, when I wrote about ethical subjects such as the virtues, and perhaps the "friendship" part points to the clinical years, to my work with student lawyers and their clients, whom I regard as friends, as I regard the people I am with today as friends.

I mean "friends" in an ordinary, whenever-we-get-together way. The notion is advertently *personal*: a client in our clinic is somebody, *some body*. When I talk about my client as my friend, my student's client as my friend, my student as my friend, I mean to talk about *some body*. In that way my being asked about my client as my friend is like Willard Pedrick's story of the fellow who was asked if he believed in baptism. "Believe in it," he said, "man, I've *seen* it!"

One of the student-lawyers in our clinic, Joe, who had a paper to write in our clinical ethics seminar, coped with Bob Cochran's and my disquisition on friendship[153] by figuring out who he would lie for. He said he would lie for his friend but not for his client. That, he wrote, is the problem with Cochran's and my theory on the virtue of friendship in legal counseling: it does not take account of the fact that a friend is somebody you would lie for, but a client is not.

The point is not about telling lies. Joe and I can talk about that some other time. For now, we agree that telling a lie is serious and dangerous and, as we both hope, a very infrequent event. But we also agree that a good person will sometimes tell a lie.[154] The issue Joe raised is whether there is a difference between a lie for a friend and a lie for a client. If you are really aged, you may remember Charles Curtis's famous little essay of 1951, illustrated with three cases he had observed or experienced or both. In two of the three cases a good person lied, and in the third – in Curtis's view – he should

**** Adjunct Professor of Law, Valparaiso University; Robert and Marion Short Professor of Law Emeritus, University of Notre Dame; Supervising Attorney, Notre Dame Legal Aid Clinic; member of the Indiana Bar.

153. SHAFFER & COCHRAN, *supra* note 1, at 40-54, 95-101.

154. *See id.* at 82-92. *See also* Thomas L. Shaffer, *On Lying for Clients*, 1 JOURNAL OF THE INSTITUTE FOR THE STUDY OF LEGAL ETHICS 155 (1996), *reprinted in* 71 NOTRE DAME L. REV. 195 (1996).

have. In our book, Bob Cochran and I added the biblical matriarch Rebecca, who lied for her child, and Atticus Finch, who lied for his neighbor.[155]

Joe understands those stories. Where he balks is in adding clients to the people he might find himself telling lies for. Joe makes the distinction Charles Curtis refused to make: "The relation between a lawyer and his client is one of the intimate relations." Curtis said:

> You would lie for your wife. You would lie for your child. There are others with whom you are intimate enough, close enough, to lie for them when you would not lie for yourself. At what point do you stop lying for them? I don't know and you are not sure.[156]

Atticus Finch, Southern Gentleman lawyer, would also say he does not know. He told a lie to protect his neighbor, who might well have been his client, but he would not pretend (as Letwin said of Trollope's gentlemen)[157] that he had not lied.[158] This is the sort of reflection my friend Joe invited me to undertake, as he left me with two things to scratch my head about.

First, Joe's reading of Cochran's and my position leaves our friendship theory too thin – leaves it sounding too much like Charles Fried's lawyer-as-friend theory.[159] Joe drove me to think of a third analogy, keeping secrets. I think of the tilting Deborah Rhode and I have done over her severe proposal to limit confidentiality,[160] which, maybe, can be thought of as her saying there are circumstances in which a lawyer, although he would not tell on his friend, should tell on his client. The analogy is that perhaps Joe would tell on his client, but not tell on his friend. (I did not ask.)

When the Virginia Supreme Court adopted its whistle-blower confidentiality rule, I got assigned to a Continuing Legal Education slot, to explain what the court had done. I prepared by talking to a succession of seasoned Virginia lawyers, all of whom told me they did not care what the Supreme Court said; they would never tell on a client. I sensed that their morals in that regard were fundamental to their understanding of themselves in law

155. *See* SHAFFER & COCHRAN, *supra* note 1, at 87-90.

156. Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951), *reprinted in* THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS, at App. II-3 to II-5 (1985).

157. SHIRLEY ROBIN LETWIN, THE GENTLEMAN IN TROLLOPE: INDIVIDUALITY AND MORAL CONDUCT 72 (1982).

158. HARPER LEE, TO KILL A MOCKINGBIRD (McClelland & Stewart) (Reprint 1988);this episode is described and discussed in SHAFFER, AMERICAN LEGAL ETHICS, *supra* note 155, at 11-16.

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

160. RHODE, *supra* note 11, at 106 (2000); Thomas L. Shaffer, *The Irony of Lawyers' Justice in America* 70 FORDHAM L. REV. 1857 (2002).

practice. Confidentiality, to them, is an important element in a broader understanding of themselves as lawyers — a matter of *trust* is the way many of them put it.[161]

I suspect that the way Joe feels about his friend, whom he would lie for, is like the way those Virginia lawyers feel about their clients. In both cases the conversations I had were less about concepts than about personal experience. To quote a line that has come up several times in our discussions in Washington, a statement of our agenda — the question is: how do you bring your morals to your client? (And maybe the answer is like the one on the first page of Heidegger's metaphysics: why do you ask?)

One answer to that question seems to me to assume that my client is a means to somebody else's end – my own, for example, or the state's. I need to tell my friends Deborah Rhode and Bill Simon (I think I have) that they need to be on the lookout for that possibility when they propose systems for regulating lawyers.[162]

The other kind of answer, the one I hope my friend Joe will come to, is that my client is a *Thou*, in Martin Buber's sense of that word.[163] The state – the law – may be the noblest work of humankind. But my client is the noblest work of God. (That quotation is not from the Bible; it is from the *U.S. Reports*.[164]) This other, my client, is the context; the law is not the context; the law is a tool box. My favorite memory from practicing law in a large corporate law firm is a corporate lawyer who would listen carefully to his client's business project, and then say, "that is a *good* idea." He would then think about what he had in his lawyer's tool box and add, "there must be some way we can do it."

What I hope for Joe is that he will use the sense of friend he brought with him to law school, that he will find a way to think of his clients that way, which is the way Virginia lawyers think of their clients, that he will find the skill for listening to them as he listens to his friends, and that he will listen until he sees who they are and knows what they need from him.

The second thing about my exchange with Joe is this: does Aristotelian friendship, the most substantive of traditional notions,[165] fit into what Joe is talking about? I think it does fit, if Aristotle or I can persuade Joe that friendship is dynamic. Friendship is collaboration in the good; friends have

161. Thomas L. Shaffer, *Beyond the Rules: The Responsibility and Role of Continuing Legal Education to Teach Alternative Ethical Considerations*, *in* C.L.E. THE LAWYER'S RESPONSIBILITIES IN AN EVOLVING PROFESSION 493, 587 (American Law Institute) (1988).

162. SIMON, *supra* note 13; Thomas L. Shaffer, Should a Christian Lawyer Sign Up For Simon's Practice of Justice, 51 STAN. L. REV. 903 (1999).

163. As in "where You [Thou] is said there is no something. . .no borders. . .the world as experience. . .the world of relation." MARTIN BUBER, I AND THOU 55-59 (Walter Kaufmann trans. 1972).

164. Chisholm v. Georgia, 2 DALL. 419, 462-63 (1793).

165. ARISTOTLE, NICOMACHEAN ETHICS, BOOKS VIII AND IX, (Martin Oswald trans. Prentice Hall College Div.) (1962).

no need of justice. It is all of that, as Aristotle said, *but* a lawyer and her client have to make their way to friendship. They do not start out not needing justice.

My favorite example is the relationship between Jerry Kennedy, George V. Higgins's street-wise Boston criminal defense lawyer, and his client, Cadillac Teddy Franklin, designer car thief. Jerry keeps Teddy out of jail. Teddy helps Jerry make his style in the courtroom more honest: "You're only good when you mean it," he says.[166] Before the story fades away (with George Higgins's death), Teddy has stopped stealing cars and Jerry has stopped making a distinction between clients as customers and clients as friends.

What I want to say to Joe is this: young people do not need a *theory* to understand what it is to have a friend or to be one, any more than Cadillac Teddy did. Student lawyers come to law school and come to us in the clinic from friendships – many of them, and many of them deep friendships. They easily and quickly come to work with us and with one another as friends. And they form friendships with their clients as they form friendships with their classmates.

It almost frightens me to remember who these client-friends have been; a clinical student, many years ago, who worked for a man who was in prison for life for raping a child; another client waiting on death row after being sentenced for murdering a police officer. In both cases there was friendship, not as a theory but as an attitude and even a habit–candor with one another, mutual respect, "some kind of reciprocal equality," as David Hollenbach puts it in his definition of what friendship is,[167] and which, of course, is seriously unprofessional.[168] (Few of our clients in the clinic are rapists or murderers, but many of them are irresponsible, violent, wimpy, or addicted – not the kind of people you would want your kids to be friends with.) These student lawyers show me that friendship is not a piece of good luck so much as it is a skill, a disposition, a good habit. Aristotle called friendship a virtue. Jewish and Christian theology calls it love of neighbor.[169]

Each of these observations is a way to say that friendship is something that can be worked at – moved from what Aristotle called friendships for profit or for pleasure – or for academic credit, in Joe's case – to friendship as collaboration in the good. Friendship, from that classical point of view, is

166. GEORGE V. HIGGINS, PENANCE FOR JERRY KENNEDY (1985).

167. Richard J. Higgins, *A Public Affair*, BOSTON COLLEGE MAGAZINE, Summer 2002, p. 60, 61.

168. An aside I cannot avoid .*See infra* note 18 and accompanying text.

169. *See* Stanley Hauerwas, Happiness, the Life of Virtue and Friendship: Theological Reflections on Aristotelian Themes, 45 ASBURY THEOLOGICAL JOURNAL 5 (1990).

not something that happens to a person; it is a way to be that one can choose to nourish and develop. Aristotle called it benevolence, wishing well. Will Rogers was talking about friendship as a skill when he said he never met a person he didn't like. Every person he met was a place to start.

In the play *Harvey*, Elwood P. Dowd spoke about friendship as a virtue. He said to Dr. Chumley that his mother told him there were two ways to get along in the world – to be oh, so smart, or oh, so pleasant. Elwood told his therapist that he had tried smart and recommended pleasant.

A. Three Cases

i. First case: Bad news

I had a client in October, a middle-aged woman, the only child of her parents. Her mother died last year, leaving a wife's interest in the paid-for family home to her husband, my client's father. My client's father, the widower, has four other children, all born out of wedlock. My client's father told my client he planned to leave the house to one of his other children. The lawyer who drew the late woman's will sent this client to me, after having learned about her father's will. The lawyer sent her to me to see if there was something she could do to wrest the house away from her father, or, after he dies, from her half-sister.

I don't think there is anything I can do for her. The issue for a legal counselor is how to talk to her as I give her the bad news. The answer, thinking of my own life with friends, is probably not to talk very much. One of the things lawyers learn poorly, and that students in the clinic are particularly poor at, is listening. I often wish I could find and hang up in the clinic a copy of the banner that was popular in the 1960s (attributed I think, to Daniel Berrigan). It said: "Don't just do something. Stand there." (I have to admit I have friends who are better than I am at being friends, and they sure do talk a lot.)

ii. Bush League Cause Lawyering

We have two or three clients who have been ripped off by a real-estate operator who is a cheat, a liar, and a swindler. I have been working for one of his victims; another clinical teacher, working with other student lawyers, is working for a second victim. The city attorney's office has a list of others.

The crook took over my client's vacant house, took an assignment of the bank loan on it, and rented the house to a young widow. He has been collecting the rent, without making payments on the loan. The loan is in default. My client came in, as most legal-aid clients do, late in the game. The lender had already filed a foreclosure action and moved for summary judgment on it – and, of course, the lender's motion included a deficiency judgment against my client.

Our Clinic director, Bob Jones, and I got together with the students working on two other cases involving this crook and decided we ought to figure out some way to join forces and go after him. The problem with my client going after him, for the common good, a worthy cause, is that it involves a risk he need not take. I can make a deal that will get my client out of the case without any liability – and that is very much where my client wants to be. If I leave him in the case – for the common good – it will be at the risk of taking a deficiency judgment, although he will then be in a position to join our other clients and go after the bad guy, which is what the common good seems to require.

I do not know if I think my client, who is my friend, should take the risk. If this case were to become a piece of bush-league, local-cause lawyering, I could talk my client into taking a chance for the cause. It would be like Dean Houston keeping his segregation clients on the boat, at considerable risk of harm.[170] I do not know whether Dean Houston even knew his clients, let alone whether they were his friends. Cause lawyers are often in that situation. I know my client. I think of him as my friend. This is not now a cause case, and I do not know if I want to persuade my client to turn it into one.

iii. Cause Lawyering

"Cause lawyering" of a more cosmic sort is the third case. The lawyer in Maryland, who specialized in family law but refused to represent any men, is one example. She is like William Kuntsler, champion of war protesters thirty and forty years ago, who said he would not represent a person he did not love. Both of those positions seem less than "professional," to use a word I do not often use and do not like much.[171]

Maybe I can avoid professionalism with an Aristotelian analysis. The problem with these two lawyers is that they do not give friendship a chance. They treat it as a matter of status. The point of view I am urging would be to treat it as something to be worked at.

170. G.R. McNeil, *Charles Hamilton Houston: Social Engineer for Civil Rights* BLACK LEADERS OF THE TWENTIETH CENTURY (J.H. Franklin and August Meier eds.), at 221-240, *reprinted in* Shaffer, *supra* note 18, at 546-555. I am indebted also to Professor Douglas O. Linder's manuscript "Before Brown: Charles H. Houston and the Gaines Case."

171. As Professor Nancy J. Moore says, in *'In the Interests of Justice': Balancing Client Loyalty and the Public Good in the Twenty-First Century* 70 FORDHAM L. REV. 1775, 1791 (2002), "the concept of lawyer professionalism has been both misunderstood and overused." *Id. See also* Thomas L. Shaffer, *Lawyer Professionalism as a Moral Argument*, 26 Gonzaga L. Rev. 393 (1990).

Robert F. Cochran:

Let me exercise my rights as moderator and ask a question to my former law professor Tom Shaffer. I guess I have a comment and a question. Professor Shaffer implied that there would never be a time when you would tell on your friend or your client, but I think there would be times when you would tell on either. I think of the example of the Unabomber. It was his brother who turned him in,[172] and I think it was right of him to do so. In my view, there are times, unusual times, when it would be right to turn in your brother, your friend, or your client.

The question I have for Tom Shaffer is as follows: our model is the lawyer-as-friend. One thing that is striking about the Enron affair is that the executives at Enron were friends with their lawyers at Vinson & Elkins, at least in the sense that the term "friend" is used commonly today. They were out on the golf course together and they were members of the same community boards. Is that what you have in mind with your notion, our notion, of the lawyer as friend?

Thomas L. Shaffer:

I don't know if I am a great admirer of the Unabomber's brother. If the Unabomber had been killed by the state of California we might not admire his brother quite so much.

The last thing you said is what interests me, and it seems to me that it is interesting because it is in the corporate setting. I have been in the corporate setting, both as a lawyer and as a member of the board of directors of a Fortune 500 company (as a member of the compensation committee and of the audit committee). In that setting it seems to me that it is not a question of whether you bring your morals to the relationship with your client, but of how you do it. The how speaks to the question of self-deception. Self-deception is a very risky charge to make to somebody. It tends to get people upset when you say to them that they are victims of false consciousness, or, if you are a Marxist, self-deception. One of the most useful ways to think of it in these compensation contexts is to raise the interests of the people at the bottom, the kind of people Paul Tremblay and I work for. Roman Catholic thought has invented a phrase with which Protestants and Jews have expressed agreement, and that is "preferential option for the poor." Raise the interests of the man or woman at the bottom of the economic pile in the business enterprise and see how that person will be affected by the compensation decision. Some journalists are now doing this when they compare

172. *See, e.g.*, Wes Smith & Gary Marx, *U.S. Seizes Unabomber Suspect; Family's Tip Leads FBI to Recluse*, Chicago Tribune, April 4, 1996 at 1 and James D. Davis & Damon Adams, *Honor Thy Brother?; Unabomber Case Stirs Family, Duty Question*, Sun-Sentinel (Ft. Lauderdale, FL), April 12, 1996 at 1A.

paying the boss 10 million dollars a year in salary and god knows how much in other benefits. How does that look when compared with the worker on the floor —the last guy hired on the floor of the plant?

Robert Ackerman of Pennsylvania State University:

At 8 o'clock this morning I know the panelists were busy with their last minute preparations but I had the luxury of still being in my room, listening to two modern western philosophers, that is the Car Guys (Tom and Ray Magliozzi) on National Public Radio. They happened to be talking about friendship. One of them said "a friend will help you move, a good friend will help you move a body." I thought of that in terms of what I cannot help but think are some economic and social distinctions that have a real practical effect, if subconscious in some instances, on the nature of the lawyer-client relationship and therefore the type of counseling that lawyers provide. I was hoping the panelists might comment on that. One of the principal examples the panel has provided regarding lawyers willing to look the other way involves Enron's counsel, Vinson & Elkins, with some 64 million dollars in billings. As much as there may have been a friendship developed between the clinical student and the lifer described by Professor Shaffer, the prospect of that clinical student ever going out on the golf course together with that lifer and developing the kind of relationship that Enron executives had with their lawyers is very remote. I cannot help but think that the differences in status might impinge on not only the relationship but the type of advice, the type of counseling that follows.

Deborah L. Rhode:

I think it is not entirely coincidental that twenty of Enron's lawyers had been at Vinson & Elkins before going to Enron. So you are talking about people who worked together and formed those kinds of relationships and then found themselves sitting across the table, having some quite uncomfortable conversations, but ultimately deciding that it was not "their role" to give moral advice. That is where I think the counseling literature cuts in. I agree totally with Professor Tremblay that so many of these situations are ones where people manage to convince themselves that the facts do not raise moral issues for all the cognitive reasons his and my paper discuss.

But I think there is also another role dimension that was present in Enron as well. One study that I discuss in my essay is a survey that Robert Granville and Tom Konig have done on ethical decision making in practice.[173] They surveyed graduates of the Harvard Law School and asked some questions about their Professional Responsibility courses which, according

173. Granfield & Koenig, *supra* note 90.

to the graduates, were completely useless in helping them resolve real world issues. To the extent that is true elsewhere, it suggests we all have some work to do, or at least those of us at Harvard.

A lot of what surveyed graduates encounter in practice they just do not think about very much in moral terms. One of those interviewed in the study said, "you know I used to care about how the things I did as a lawyer affected people, but I don't find myself asking those questions any more." [That is where I think that] role discussions may have an impact in practice, even where there are psychological and financial pressures at stake. You know we want that little voice to be going off and saying, "yeah, but what's on the other side?" Of course I would like it if part of what is informing that little voice is that the SEC might sue the lawyer and her law firm. I do not want to overstate the role that moral musings once heard in a law school classroom are going to have in changing the course of business conduct. But, I do think that socializing folks in a way to think self-critically about those questions is key.

Robert F. Cochran:

I will just give one reaction. It seems to me that a friend might hear those conversations on the golf course and not say anything but that a good friend would raise questions about it. When you learn that your good friend is doing something that is morally questionable, I suspect that you are going to raise questions about it. I disagree with the Car Guys' definition of a good friend.

Paul R. Tremblay:

A law school clinic, like the legal services civil clinic where I work, seems to me the easiest place in the world to be a moral activist in the strong sense that Professors Luban, Simon, and Rhode (maybe Luban and Simon more than Rhode), might suggest, where you might have to betray your client. It is easy to be an activist there. We give the students Luban to read, we give them Simon, we teach the activism message. Our clients have no other place to go, our students have substantial cultural and class differences from their clients. You would think that to get an "A" you might betray a client and show the teachers that you are really taking this stuff seriously. My students, however, resist it enormously; even the conservative students resist it. They might have all kinds of trouble empathizing with their clients but if the question is, whether, as a matter of moral responsibility, we should not go through with some strategy or we ought to report something, they do not have the courage to accept that responsibility. They rationalize that they do not really know enough so we ought to give the benefit of the doubt to the client. But if it does not work in the clinic, it is really hard to work in Vinson & Elkins.

David McGowan of the University of Minnesota:

I wanted to put a case to the panel because I am having a hard time understanding how in practice the differences in the approaches would work,

and it is a case that I recommend to everyone because it will resonate with your students.[174] Enron's a little bit too easy because nobody is going to stand up and raise the flag for fraud.

The entity, Napster, is created to distribute file sharing software which individuals use to trade files of music. Some of that music is not copyrighted, the overwhelming majority of it is. Your students, if you have a wireless network as we do, may well be doing it in your ethics class. You will not convince them that this is wrong. They do not believe that copying copyrighted music is wrong. There are lawyers who advised and participated in the creation of the entity, whose modal use was a violation of the copyright laws. If we go to the computer law section at this meeting, there will be reputable academics who offer substantive defenses of that conduct. (Napster has a free speech defense, it has a utilitarian defense. If you want to talk about bottom up and making the least well off better off, there is Pareto superior copying. If really poor people cannot afford to buy the records, then the record companies do not lose a sale. And the people who copied the music are better off.)

What would you say the lawyer in creating Napster should do?

Deborah L. Rhode:

Well, I would not do it. For me that is not a hard case. But I do not have a sick mother and five children to put through college; the bill collector is not at the door.

For me the hard cases are the ones like Professor Tremblay's earlier case, where he said, "if moral directive approaches don't work in the clinic, where would they work?" Those, to me, are the hard cases. The most difficult case that I have ever faced was a welfare case. I still recall it from when I was a law student. This particular client had real subsistence needs, and we needed to do everything we could to keep her benefits while she was in an educational program so she could graduate and become self-sufficient. Nonetheless, if I did not yield to a lot of cognitive biases, I was going to have difficulty with that position based on what I thought the facts were. The reason I was willing to stretch in that case, is because I thought the substantive law was so unjust, because she a had sick infant who needed benefits. Those reasons had nothing to do with my own economic self-interest.

Thomas L. Shaffer:

Well just to take a piece of it, and maybe this is obvious, I would say certainly there is a moral issue, but I do not get my morals from the law, and I do not want my student to. So, the state of the law would not resolve the

174. Cf. UMG Recording v. MP3.Com, 2000WL 1262568 (S.D.N.Y.)

moral issue for me, and I hope it would not resolve it for my students. In my clinical work, what happens is there are some things we just keep talking about. If we have had to go ahead and resolve it in order to serve a client, we have done that. But, we still keep talking about it.

Paul R. Tremblay:

The lawyers ought not to have participated and probably will be held responsible, if it really was plainly illegal. Even if one wants to read activism (as some do) to say you may do things which are illegal because the law is so unjust, this seems like an odd use of activism in the case you describe. If, on the other hand, it is not illegal, then the question is, whether it is so immoral that a lawyer should not participate? I do not know whether it is immoral or not, based on the facts. I know there are respected arguments that operations like Napster make good economic sense. So one would have to sort that out to decide whether what the lawyers did was immoral, even if the law did not prohibit it.

Kimberly O'Leary of Thomas Cooley Law School:

I recently wrote a law review article[175] that looked at the issue of context in this matter. We should stop talking about lawyers and clients as if you can talk about them as one group, because there are many different types of clients. The power difference between lawyers and clients is a critical lens. For example, if your client is less powerful than you are, I think you should always default to client-centered counseling because you should not be imposing; you are going to risk reproducing the power problems in society by being more directive with less powerful clients. If there is relatively equal power, I think the friend model, that professors Shaffer and Cochran have proposed is wonderful. However, if the client is more powerful than you are, I would go for the directive approach.

Attorneys also vary greatly. The experience level of the attorney, I think, is critical. Inexperienced law students are not capable of offering very valuable moral advice, most of the time. I try to teach my students that as you get older and you experience life more, you will be able to do more with the friend model than you are able to do now. Having someone who is 24 years-old trying to tell someone this is what they should be doing with their life just does not ring very true because I think they do not know enough as a general rule.

Robert F. Cochran:

I have actually argued that a lawyer-as-friend would take context into consideration in much the way that you suggest.[176] If you have a friend who

175. *See* Kimberly E. O'Leary, *When Context Matters: How to Choose an Appropriate Client Counseling Model*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 103 (2001).

176. Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons From Dostoyevsky*, 35 HOUS. L. REV. (1998). *See also* Cochran's introduction to this symposium, *infra* notes 1-35, and accompanying text.

is less powerful than you, as a true friend you are going to try to empower her. If you are equals you can share an equal sort of a relationship and be candid. With friends who are more powerful than you, you may not need to worry about over-reaching – you might argue pretty aggressively that they should do something different. The difficult thing about this for the lawyer is that the incentives are likely to be in exactly the opposite direction. When you are representing a poor client, you typically have time pressures and not enough time to empower that person and the tendency is to be more directive. If you are working for a wealthy corporation, your tendency is to defer to whatever the managers want you to do.

Bruce Frohnen of Ave Marie School of Law:

I would like to address the purpose of this friendship model, or maybe purposes to which I think it is open. I think this is shown by some sections from Aristotle that were not referenced. Two, in particular, concern me. First is Aristotle's position that a good person cannot be friends with a bad person,[177] and that the attempt to do so over time will in fact corrupt and ruin the character of the good man and turn him into a bad man.[178] The second passage that concerns me is Aristotle's view of friends as cooperating in pursuit of the good.[179] I think it is pretty clear that Aristotle would not consider undermining the justice of the polis as a good. That is in fact an evil thing to do. I wonder if this does not point to the sense in which this model does not in fact cover a conception of the good in one's dealings, but in fact ends up allowing one to smuggle in, if you like, one's own conception of the good. In particular, if one views the law as either being so morally corrupt or so irrelevant that it need not be paid attention too. The lawyer-as-friend model does not appear to have the view of law-abidingness as a good that ought to be pursued by both the lawyer and the client in common, upholding the purposes of the law and the state that put it into effect.

Thomas L. Shaffer:

It is really refreshing to get Aristotle discussed this way at an AALS meeting. I think, as a Christian, I have some difficulty classifying somebody as a bad guy. I am not trying to evade the issue you put, however. What I want my student, Joe, to learn from Aristotle is that friendship is dynamic. Young people so often think friendship is just a piece of good luck. "She and I became friends." But, why? How did that happen? Friendship is

177. ARISTOTLE, NICOMACHEAN ETHICS, 1159a30 (Terence Irwin trans. 1985) (when there is a great gap in virtue between two people, they would not even expect to be friends).

178. *Id.* at 1165b15 (a bad person is not lovable, and one who becomes a friend to him will himself become bad).

179. *Id.* at 1156b5 (good people join in pursuing what is truly good).

something to be worked at. That is what I want to suggest to my friend Joe, and ultimately the reason why I do not like Aristotle saying you cannot associate with bad guys. First of all, you have to posit that somebody is bad before you can do that. Aristotle said, friends have no need of justice.[180] That is, friends who collaborate in the good will figure out what justice requires. You read Aristotle to have ruled out the disobedience of the law, or of the establishment, or of the old boys who run things. To be sure, the state rests on friendship, but that works out to mean obedience only when the state is not corrupt. I do not understand him to have said that for friends to resist the law (Aristotle did not use words like this), or the establishment, or the old boys, is a corrupt thing to do. If that is what he said, then I am confused about how to work it out.

Bruce Frohnen:

Is there not a fairly clear distinction in Aristotle between personal relationships and political relationships? That is, friendship belongs in the realm of social interaction and more specifically economic interaction, whereas the polis, because it has to set up the rules by which we live, has to use a sense of distributive justice because it enforces rules. Friends do not need rules because they can act on charity.

Thomas L. Shaffer:

No, I would argue with that. The state rests on friendship, he said,[181] so I do not see that. Certainly operationally there are some distinctions to be made there, but ultimately not essentially.

Linda Beale of the University of Illinois:

I have to begin with an apology. I am a tax lawyer, not a professional responsibility lawyer, and actually I come very recently from practice on Wall Street with one of the major firms that works with Wall Street financial institutions. So my question in this setting relates especially to the Enron-type situations. It is, in essence, an observation. I think of the "friend" analogy in terms of the way I thought of friendship growing up. You have sort of "friend-friends" and "true friends." The problem with the "friend-friend" aspect of the friend analogy is that you are getting sort of chummy in a smooth way with your client when you are after the money and that is what is dominating the relationship. However, the problem with a "true friend analogy," I think, is that it suggests too blind a devotion to the friend. The professional responsibility of "zealous loyalty to client" ultimately worries me in this respect because if you really think about it, there is underlying any action a primary purpose that usually drives people's behavior. We have to be concerned about this aspect of "zealous loyalty to the client," which is where moral relativism in context comes in. Otherwise it can lead to this ba-

180. *Id.* at 1155a25.

181. *Id.* at 1155a20.

sic underlying principle taking on too much power. That value, zealous loyalty, should not become so predominant that it blinds us to our ability to do the kind of thing we really should do in the situation.

Robert F. Cochran:

My comment is the same as the comment I made about the Car Guys' "good friend." I disagree with you. My guess would be that in your experience, if you think about your true friends, if you were a true friend to someone who was thinking about doing something that was morally questionable, for example leaving his older wife for a younger secretary, you would probably not just cheer him on. You would probably say something like, "Well, think about your wife. Think about your kids. Would that really be a good thing to do? Are you going be able to look at yourself in the mirror ten years from now?" That strikes me as the true friend.

Linda Beale:

I should add one thing to what I was trying to say. It is not that a true friend might not ultimately work as a model if what that really meant to everyone was reverence and respect for humanity and the human condition, and taking into consideration all contexts. My point is that I think in terms of the real world of practice, that analogy will be misleading to lawyers and *not* helpful, and that what you need in the real world of practice is some real emphasis on context and the much broader context of moral issues that have to come into lawyering.

Robert F. Cochran:

Our time is up. Many thanks to our panelists and those of you who raised questions for a very engaging discussion.

***