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COMMENTARY

LESS SUFFERING WHEN YOU'RE WARNED: A RESPONSE TO PROFESSOR LEWIS*

*Thomas L. Shaffer***

Professor Lewis' comment is a lucid brief for warning clients that their lawyers have moral limits. It begins with a generous description of the discussion Professor Freedman and I had on the subject of moral limits. I am able, as a result, to summarize the exchanges quickly: Professor Freedman's original proposition, in these pages, was that once the lawyer-client relationship is in place, it is immoral for the lawyer to refuse to seek the client's legal objectives; it is immoral for the lawyer to invoke her own conscience to prevent the client from obtaining what the law allows the client to seek.

The Freedman argument has been played out in a variety of contexts, often by Freedmanites who are cruder than Professor Freedman. Our discourse in 1987 provided examples from Freedman's law practice that show how his position is not the "hired gun" stereotype, but rather a subtle, interesting moral argument. Two of these examples included:

The landlord who proposes to evict the war widow and her child, for some legally sufficient reason such as non-payment of rent; and

The business client who proposes to take advantage of a careless error made by the other party to a business agreement.

In both cases, the Freedman procedure focuses on discussing the moral dimensions of the situation with the client. He would pursue this discussion to the point of moral advice and even moral argument: The moral question is whether it is wrong, even if the law allows it, to cast out widows and orphans; whether it is wrong, in part because it is bad business practice, to take advantage of an error made by a supplier or customer. It makes moral sense to consider the importance of trust and tolerance in the business

* Lewis, *Shaffer's Suffering Client, Freedman's Suffering Lawyer*, 38 CATH. U.L. REV. 129 (1988) (discussing Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U.L. REV. 319 (1987) and Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U.L. REV. 331 (1987), all in reference to Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U.L. REV. 191 (1978)).

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world—to think of the future, and even of the past. In business-world moral terms, the argument is likely to be phrased that way. The business-world argument is no less a moral argument than the argument that the other party to the contract is my neighbor.

In both cases, and in general, the Freedman position yields a final, determinative moral judgment by the client. In virtually all cases, the moral conversation Professor Freedman encourages (which I, too, encourage) will resolve the issue. Either the lawyer's moral argument will persuade the client, or the client's moral reasons for wanting done what he asked the lawyer to do will persuade the lawyer, or (most likely, I think) the relationship will produce its own moral position, a product of mutuality. The unrealistic but logical possibility is that the lawyer and client won't be able to agree. The Freedman position is that, in such a hypothetical case, the lawyer should do what the client wants done: It is immoral for the lawyer to invoke conscientious objection.

The Freedman argument on conscientious objection is a *moral* argument: It is *wrong* to refuse to do what the client wants done. The client should understand, during the moral conversation, that the lawyer will, when push comes to shove, do what the client wants, even when the lawyer and client do not agree. "[T]he lawyer's principal function is to serve the client's autonomy—to allow the client maximum freedom to exercise or to forego rights to which the client is legally entitled."¹ This argument is usually phrased in terms of *rights* and *duties*. The argument often is perceived as an adversary-ethic argument, perhaps because of the popularity of such moral language. Freedman's is not, however, an adversary-ethic argument. It does not depend, as the adversary-ethic argument does, on the assumption that the state, as provider of the law, is also a provider of justice.² Professor Freedman states his "meta-ethic" on this point when he says:

I . . . believe that the client is 'the noblest work of God' [and] will . . . accept the risks of the client's freedom of choice . . . [and] respect the client's moral decision; and, as a result of that acceptance and that respect . . . will maximize the chances that the client will achieve goodness in the only way that it truly can be achieved—through moral counseling and the uncoerced exercise of a free will.³

1. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U.L. REV. 331, 333 (1987).

2. See Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 698-99 (1988) (my comparison of Freedman's position with the American adversary ethic and Lutheran "two-kingdoms" moral theology).

3. Freedman, *supra* note 1, at 336; see also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 462-63 (1793) (opinion of Wilson, J.).

My quarrel with the Freedman position is a small quarrel, and I tried in 1987 to describe it carefully. Given the importance of moral conversation in the Freedman procedure, and given the fact that, in his examples, Freedman (a person of character, of wisdom, and of moral integrity) is the lawyer, the hypothetical possibility that the moral conversation will fail to produce agreement is probably only a law school possibility. This is often the case—probably always the case—when a lawyer is concerned enough about sound morals to be interested in the question of whether her sound morals should be “imposed” on her clients. Lawyers of less moral sensitivity will either (1) do what the client wants, as if practicing law were the moral equivalent of selling rat poison at the hardware store; or (2) demand, coerce, and manipulate the client into doing what the lawyer thinks is right.

So, my little argument with the Freedman proposition rests on a broad plain of agreement; but it is, still, in the way professors have of controlling their reality, an important argument. I argue that the lawyer should follow her conscience in the unlikely event that the Freedman procedure does not, in the end, result in agreement on the right thing to do. I argue that the reason the Freedman moral conversation works in the first place is that the lawyer has character, wisdom, and moral integrity: That is what attracted the client to him; it is what makes the lawyer-client relationship a moral enterprise—the practice of what Aristotle would call the virtue of friendship.

Professor Lewis proposes an overture to the Freedman procedure that, he claims, would leave Freedman free to resolve the failure of moral conversation his way, and leave me free to resolve it my way. Lewis calls this a “modest proposal for giving clients fair warning that their advocate’s qualms of conscience could leave them in the lurch.”⁴ The worst thing that could happen to a client who dealt with *Freedman’s* ideal lawyer, and could not get into a determinative moral discussion with him, would be the impression that the lawyer chosen is a moral patsy.⁵ The worst thing that could happen to a client who dealt with *my* ideal lawyer, and could not get into a determinative moral discourse with him, would be the impression that the lawyer chosen is a tyrant.⁶ Professor Lewis would avoid these risks by having the client told in advance how his lawyer will react if the moral conversation fails.⁷

4. Lewis, *Shaffer’s Suffering Client, Freedman’s Suffering Lawyer*, 38 CATH. U.L. REV. 129, 132 (1988).

5. Consequently, a client may change counsel to a lawyer who would provide more resolute moral advice.

6. Consequently, a client may change counsel to a lawyer who would provide more respect for his client’s autonomy.

7. I do not pursue here Professor Lewis’ suggestions and references regarding professional regulation. I do not find an interesting moral argument in that orientation. I am inter-

Professor Freedman's response to my argument in 1987 was that the client will suffer if the lawyer asserts conscientious objection.⁸ "Shaffer . . . thinks of the client principally as someone who is capable of being good . . . while I think of the client principally as someone who is in trouble, vulnerable, and in need of my help" ⁹ Freedman concludes from this distinction in perception that the ethical contrast is between my concern for the client's goodness and his concern for the client's freedom. I underline goodness and Freedman underlines freedom. Professor Lewis argues that clients who are burdened with the disadvantages of either emphasis will suffer less if they are warned in advance that the relationship could result either in (1) a lawyer who shifts moral responsibility to the client or (2) a lawyer who resists the client's lawful objectives and thereby declares her moral independence from the client. The sequence seems to be this:

(1) Freedman saying it is immoral not to leave ultimate moral responsibility for legal objectives in the client's conscience. (He *is* talking about conscience.)

(2) Shaffer saying that the moral course for the lawyer is to reserve to herself final judgment on what she does as a lawyer, even when the client wants her to do something else, and the something-else is lawful, adding (or having said) that no lawyer can hope to lead a moral life if she refuses to let others suffer as a result of her morals.

(3) Freedman saying that his procedure more exactly shows concern for the client's suffering situation—particularly in that the lawyer who leaves final moral authority in the client does not invite the client to suffer the price of the lawyer's morals.

(4) Lewis saying that, whichever way this burden-of-suffering issue is resolved, the client will suffer less if he is told in advance how the lawyer's conscience may work.

Lewis' warning-sign suggestion seems reasonable at first. Who can argue with the wisdom of a highway sign that informs the driver that there are

ested, as I think Professor Freedman is, in addressing the virtuous person and in arguing from the first principle of ethics—do good and avoid evil. Neither Freedman nor I have much to say to the lawyer who needs to be regulated for the common good, the lawyer who is not interested in doing good and avoiding evil.

8. That is not to say that Freedman makes no allowance for conscientious objection: He has always argued in support of an American lawyer's moral freedom to decline employment. The argument we have had concerns acting for a client who is already established as a client, and established as to the matter at issue. Freedman argues also that the lawyer may decline to proceed if the client gives her the freedom to decline. And, finally, he argues that the lawyer should feel free to withdraw from civil cases when the client has misled her on the moral quality of the case, and when withdrawal can be accomplished without violation of confidentiality.

9. Freedman, *supra* note 1, at 334.

curves in the road ahead; or of a fiancé who tells his beloved, in advance, that he snores; or of a physician who tells her new patient that the patient can expect regular and persistent nagging about the patient's cigarette habit? But there are some objections: One is an economy of concern, lest our clients have too many things to worry about. In the little argument between Freedman and me, the failure of moral conversation is as unlikely as death from tonsillectomy; it is disproportionate to warn of it when it is so unlikely. Another objection is that Lewis would make our *profession* look bad: One of the things a person should expect in a law office is moral concern.¹⁰ "Men of large affairs do not choose their legal advisers entirely or principally for ethical insensitivity."¹¹ We want people to think of law offices as humane places. People don't need—as a matter of sound professional public relations—to be warned that they may run into a conscience or two in a law office. They would need to be warned, however, if they may not confront such a conscience.

Those are relatively trivial objections to Lewis' idea. They are not solemn enough to justify identification as ethical objections. The ethical objections have to do, not with the way we want the profession perceived, but with the way we *want the profession to want to be*. I would say that we want it understood that a lawyer's conscience is not for sale—that a client who wants a lawyer to do something immoral may find that he cannot employ a lawyer. That would probably understate the richness of the market—witness the recent argument that divorce lawyers should no longer discuss reconciliation with their clients¹²—but it would not be a bad thing, in my view, for clients to expect conscientious objection from lawyers, without warning, as we expect the road ahead to be safe and need no road sign to tell us that it is; or as we expect a good night's sleep and do not need a warning from our potential spouses that they do *not* snore. Freedman and I want people to expect concern and advice from their lawyers. I think we agree that we don't want people warned that they may get it—maybe because such a warning would undermine professional aspiration.

But Lewis is not talking about moral concern and advice; he is talking about Freedman's and my little disagreement. The pre-ethical, trivial objection to a warning sign about our disagreement is that the situation that will invoke it is unlikely. It is like death from a tonsillectomy. But, if we must warn anyway, only *one* of us should warn. Lewis' procedure is morally appropriate for one of us but not for the other. The client should be warned

10. See Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957 (1978).

11. *Id.* at 973.

12. Crouch, *Ethics Aspects of Family Law Practice*, TRIAL, April 1989, at 63, 67-68.

about the eccentric alternative, but need not be warned about the conventional alternative. Our argument turns on the view each of us has of what the profession should want to be.

In the unlikely event that lawyer and client disagree, what is the profession's view on what the lawyer should do? If Freedman's position, that the lawyer should do for the client what the client wants done, is generally accepted in the profession, then lawyers who feel as I do should warn their clients that they are eccentric. This eccentric lawyer position is a curve in the road ahead, a snore in the middle of the night. Lewis's proposal would be reasonable in that case, if a warning is appropriate for unlikely risks.

Suppose on the other hand that my argument, which states that in the unlikely event of final moral disagreement the lawyer may claim conscientious objection, is (as I think it is) generally accepted in the profession. In that case, a lawyer who agrees with Freedman about serving client objectives should tell the client that she will *not* assert conscientious objection. The warning sign is necessary because the client probably assumes that the lawyer will *not* do something the lawyer thinks is immoral. (I retain that high view of lawyers' morals and of what people expect, not of lawyers in general, but of lawyers they choose to consult.) Warning is necessary here because the client's assumption depends on the fact that the lawyer will not compromise her conscience for the client's sake.

If I am right about what people think, Freedman should warn his clients that he does not agree. He is the eccentric. But if I am wrong, and people think lawyers will do what clients want even if what clients want is immoral, then I should warn my clients that I don't agree. I am the eccentric. The soundness of Lewis' warning sign depends on what people think of the morals of the lawyers they hire (not of the morals of lawyers in general).

I have made the issue sound empirical, but I doubt that it is. I doubt that Freedman's and my argument can be resolved with another of those polls in which people on the street are asked what they think (i) of lawyers and (ii) of their lawyers. Both Freedman and I want our fellow lawyers to be good persons. We devote most of our professional effort to that objective. We argue about what a good person does when she deals with another conscience. We agree, I think, that in the sort of professional world to which we devote ourselves, clients expect lawyers to be good persons. It would be silly and harmful to warn potential clients that their lawyers might be good persons, for the same reason it would be silly for a dentist to put on his office wall a sign that said: "Don't worry. I won't knock you out and steal all your money." Or for the highway department to put up a road sign that said, "The bridge ahead will not collapse."

If Lewis' suggestion is that broad (and I don't think that it is), if he thinks lawyers should warn their clients that morals will be relevant in the law office, then Lewis' suggestion is a bad suggestion because he is assuming an amoral—no, immoral—professional world. Neither Freedman nor I even want to be in a professional world where our arguments, which are moral arguments, are irrelevant and useless. If Lewis' suggestion is as narrow as Freedman's and my little argument, then Lewis' warning may do more harm than good, because the situation Freedman and I talk about is so unlikely. And, in any case, in the narrow interpretation of Lewis' suggestion, it is not necessary for both Freedman and me to warn clients; only one of us has to warn clients. Which one depends on what clients expect.

There is a third and deeper objection to what Lewis wants, even when we restrict his suggestion to the little area where Freedman and I differ. This deeper objection is that we cannot tell what will happen in a client's relationship with a lawyer. To assume we can, and therefore to package the relationship in a container that is measured in advance, is to deny the rich possibilities that come from two people working closely on something that is important to them.

A place to begin on this point is to look at the way Professor Lewis describes my position on the small area of disagreement I have with Professor Freedman: "If the client *rejects* the lawyer's moral counsel, and the lawyer feels strongly enough that the client's proposed course of action, although lawful, is morally repugnant, the lawyer has the *right* and the professional *duty* to desist."¹³ The important part of what Lewis says about my argument is derived from three words: rejects, right, and duty.

First, this is not a matter of rejection. I believe—and I will bet that Freedman believes—that rejection of moral counsel is not what we are talking about. Rejection of counsel is different, and it is not critical. Lawyers offer counsel constantly, and regularly see it rejected. Law teachers offer counsel more constantly and—particularly in "Socratic" discussion with students and during dreary faculty meetings—even more regularly see their counsel rejected.

The risk is not rejection of counsel. It is more ominous than that, and is even tragic: It is the risk of failure in a moral conversation. A moral conversation, as both Freedman and I made clear in our essays in 1987, is one in which each party counsels the other. It depends on a human relationship that has some of the depth of friendship, some of the depth of the relationship between people who love one another. It is a sad thing to see it fail. What makes Freedman's two examples, the landlord and the businessperson,

13. Lewis, *supra* note 4, at 130 (emphasis added).

so potent is that the lawyer-client relationship in both cases was obviously strong and that it *did not fail*. And when I say it did not fail, I do not mean that the client accepted (when he might have rejected) Freedman's argument. Rather, I mean that in each case two people talked together seriously about a moral issue, and came to agreement about it.

If the result had been the other way, it might have been because two strong, good people saw the situation differently and simply disagreed. That happens, but not very often in lawyer-client relationships. The more likely explanation for moral failure is that the skills of the two people in dealing with one another were inadequate or were inadequately employed. They did not listen to one another; they did not understand one another; one of them (and perhaps each of them) did not, as Glenn Tinder put it in describing the virtue of tolerance, "wait for the other."¹⁴ That is tragic; it is not a matter of rejecting an argument.

Right and duty. The assertion and counter-assertion of positions and opinions is, in some sense, the stuff of moral conversation, as straw is the stuff of bricks. Such assertions will often involve words such as right and duty. But those words do not describe the essence of the conversation any more than they would describe the essence of a serious conversation between friends regarding what one of the friends should do in an important matter. When—as rarely happens—the conversation fails and the relationship between the friends suffers (as it necessarily will), the deepest way to describe the situation of each of the friends will *not* be in terms of rights and duties.

Consider the eviction case and assume it ended in failure. The issue then would have been a what-to-do issue for the lawyer who had (1) heard his client ask that the lawyer evict a war widow and her child, (2) raised moral reasons why the client and the lawyer—together—should do something else, (3) heard his client's reaction, (4) listened to and understood his client's moral reasoning, and, (5) not having been persuaded, then (6) was told by the client that the client wants to evict anyway. What that lawyer has at the end of this episode—which, I think, is tragic and unlikely—is what the client had at the beginning of the episode: an issue about his character, about his moral integrity.¹⁵

How is a good person to warn that, when such an issue comes, she will follow her conscience? Either it should be taken for granted—in which case a warning states the obvious, an obvious position we lawyers do not want to

14. G. TINDER, *TOLERANCE: TOWARD A NEW CIVILITY* (1976).

15. The example is Freedman's. My argument with what he says he would have done if the moral conversation had failed is that he would have been *inconsistent*: It was his character and integrity that caused him to initiate the moral conversation. Conscientious objection, in the event of failure, was to be expected from such a lawyer.

have stated, simply because stating it will make it less obvious. Or it raises doubt about the obvious; it says, to the client and the community—and, more ominously, to the profession—that we can no longer depend on lawyers to exhibit moral integrity when they are asked to do immoral things.¹⁶

16. Professor Freedman, in a telephone conversation about the manuscript of this essay, said he did not find Professor Lewis' suggestion helpful, because the substantive morality that might come into play in a moral conversation is not necessarily known in advance. The lawyer might, for example, say, at the beginning of the relationship: "I will not do anything for you that is immoral." The client, who probably thinks of herself as a moral person, would likely reply: "Great. I wouldn't want you to." Suppose that it should develop later that the client's fiscal interest would benefit from the lawyer's assertion of a statute of limitations in her behalf. If the lawyer at that point says he thinks an assertion of such a statute would be immoral, and if the client believes that the assertion of statutes of limitation is a moral use of the law, the issue would not be whether a moral course of action should be followed, but what a moral course of action is. It would not have helped that the parties agreed, at the beginning, not to be immoral. The example (which is Professor Freedman's) is compelling; it is a point on which American lawyers have disagreed among themselves. See, e.g., D. Hoffman, *Resolutions on Professional Department* (Resolutions XII and XIII) in *A COURSE OF LAW STUDY* (2d ed. 1836), reprinted in T. SHAFFER, *AMERICAN LEGAL ETHICS* 64 (1985).

