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COLLOQUIUM INTRODUCTION

UNDERSTANDING LAWYERS' ETHICS: ZEALOUS ADVOCACY IN A TIME OF UNCERTAINTY

Katherine S. Broderick*

Can or should a lawyer representing an alleged terrorist ethically allow the government to tape her conversations with her client as a prerequisite to the representation? Can a public defender live up to the promise of *Gideon v. Wainright*[1] when he is carrying 100 serious felony cases? Should a lawyer who divulges a client confidence to bring down a corrupt judge be sanctioned? What ethical obligations obtain for the lawyer representing the CEO of a thriving start-up when the CEO admits that by over-reporting profits he believes that he has turned the company around? These questions, some of the toughest lawyers face in the post-September 11th, post-Enron and post-Worldcom world, were addressed in a panel discussion at the legal ethics colloquium sponsored in 2003 by the University of the District of Columbia David A. Clarke School of Law (UDC-DCSL) *Law Review* (the *UDC-DCSL Law Review*).

The colloquium celebrated the publication of the third edition of *Understanding Lawyers' Ethics* by Professors Monroe Freedman of Hofstra University and Abbe Smith of Georgetown University Law School.[2] It brought together regional clinical legal educators, local legal services providers, and law faculty and students for a dynamic exchange of viewpoints on challenging ethical issues and questions. Professors Freedman and Smith were accompanied on the panel by Professors Samuel Dash of Georgetown University Law Center, Paul Butler of George Washington University School of Law, and Laurie Morin of UDC-DCSL. Panel moderator Professor Wade Henderson,[3] holder of the Joseph L. Rauh Chair of Public Interest Law at UDC-DCSL, posed difficult hypotheticals and questions to the panel. Their intense discussions provided a jumping off point

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* Katherine S. "Shelley" Broderick, J.D., is Dean of the University of the District of Columbia David A. Clarke School of Law. Many thanks to Monroe Freedman and Abbe Smith for writing such a compelling book, so inspiring to all involved in the colloquium. Thanks also to Helen Frazer for her contributions to this introduction.

1 332 U.S. 365 (1963) (holding as a fundamental right the Sixth Amendment's guarantee of counsel).

2 MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (3d ed. 2004).

3 Professor Henderson also serves as Executive Director of the Leadership Conference on Civil Rights, a civil and human rights coalition comprised of more than 180 national organizations representing persons of color, women, children, organized labor, seniors, people with disabilities, gays and lesbians, civil liberties and human rights interests, and major religious institutions.

from which four of the five[4] panelists and Professor Ellen Yaroshefsky[5] of Benjamin N. Cardozo School of Law wrote essays and articles for this issue of the *UDC-DCSL Law Review.*

In this introduction, I will briefly note what sets *Understanding Lawyers' Ethics* apart from other treatises on lawyers' professional responsibility, and why it is such an important book for law students to read and think about as they begin their careers. I will also provide an overview of the colloquium articles included herein and hope to inspire you to read on. Each is well worth the effort.

Understanding Lawyers' Ethics

It is fitting that UDC-DCSL welcomes exploration of Professors Freedman and Smith's work, which expressly adopts a client-centered approach to lawyers' ethics. UDC-DCSL's predecessor, the Antioch School of Law, was a pioneer in the clinical legal education movement in the United States,[6] and UDC-DCSL today continues that tradition. Client-centered legal representation is at the heart of the pedagogy of clinical legal education.[7] This approach categorically rejects the notion that the lawyer knows what is best for a client, including, and especially, clients who have low incomes or a relatively low educational level. Instead, the client-centered lawyer or law student endeavors first to learn the client's goals and then to pursue those goals zealously.[8]

In *Understanding Lawyers' Ethics,* Professors Freedman and Smith characterize the client as a person whom the lawyer has a power to help, rather than as a person over whom the lawyer has power. The authors identify the central concern of lawyers' ethics as "how far [the lawyer] can ethically go" or "how [far the lawyer should] be required to go" so as "to achieve for [their] clients' full and equal rights under law."[9] For Freedman and Smith, client-centered law practice embraces the closely related and complementary notions of client autonomy and zealous advocacy.[10] They define client autonomy as the client's right to decide what her own interests are. They further encourage lawyers and law students to

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4 Professors Freedman, Smith, Butler and Morin. Professor Dash died in 2004 before he had completed his article.

5 Professor Yaroshefsky was unable to attend the Colloquium on the date rescheduled after a snowstorm.

6 For a history of this movement, see Margaret Martin Berry, Jon C. Dubin and Peter A. Joy, *Clinical Education for this Millennium: The Third Wave,* 7 CLIN. L. REV. 1 (2001).

7 *See, e.g.,* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement,* 32 ARIZ. L. REV. 501, 518 n.42 (1990) ("the origins of client-centered lawyering are inextricably the development of 'modern' clinical legal education itself").

8 *See generally* chapter two of DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977).

9 MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (2d ed. 2002), at 8.

10 *Id.*

assist in maximizing client autonomy by "counseling candidly and fully regarding the clients' legal rights and moral responsibilities as the lawyer perceives them and by assisting clients to carry out their lawful decisions."[11]

Similarly the authors encourage lawyers and law students in the ethic of zeal, quoting approvingly from Section 15 of the 1908 American Bar Association Canons of Professional Ethics, the lawyer's obligation to give "entire devotion to the interest of the client, warm zeal in maintenance and defense of his rights and the exertion of [the lawyer's] utmost learning and ability."[12] They define zeal as referring to the "dedication with which the lawyer furthers the client's interest."[13]

In examining these core precepts, Professors Freedman and Smith employ a panoply of provocative examples ranging from the defense of the Unabomber to Abraham Lincoln's representation of slave owners. They analyze the Model Rules, the Model Code and the Restatement of the Law Governing Lawyers. They also explore opposing views offered by a host of ethics scholars and commentators. Best of all, the authors challenge law students and lawyers to learn the rules of professional conduct by considering them from a client-centered perspective and by testing them against their own moral standards and reasoned judgment.[14] *Understanding Lawyers' Ethics* is thus an important contribution to the literature of professional responsibility, providing thoughtful guidance for developing ethical approaches to lawyering. The essays in this section of Volume 8 of the *UDC-DCSL Law Review* examine the ethical arguments in support of client confidentiality and truth-telling versus other moral values in the context of tough cases.

Professor Monroe Freedman, in *The Corporate Watchdogs that Can't Bark: How the New ABA Ethical Rules Protect Corporate Fraud,* emphasizes the importance of principled and consistent development of ethical rules. He presents a compelling hypothetical illustrating significant anomalies in the American Bar Association's recent amendment to the Model Rules of Professional Conduct. He reads the revised Model Rule 1.6 to protect the interests of a defrauded third party by allowing an attorney to blow the whistle on a client who has committed the fraud. In contrast, Professor Freedman notes that Revised Model Rule 1.12 forbids the lawyer from revealing a corporate client's fraud outside the company, unless the fraud is reasonably certain to be exposed anyway. He concludes that the new rules protect corporate clients far more than individual clients. Professor Freedman's analysis is clear and compelling. It sounds with the authority and perspective of a nationally recognized practitioner and scholar who has spent his career representing real clients in difficult cases.

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11 *Id.* at 79.

12 *Id.* at 70.

13 *Id.* at vii.

14 *Id.*

In *Broken Trust and Divided Loyalties: The Paradox of Confidentiality in Corporate Representation,* Professor Laurie Morin takes issue with a uniform rule of confidentiality in representing corporate versus individual clients, and proposes a principled exception. Professor Morin's views differ in this respect from those argued by Professors Freedman and Smith in *Understanding Lawyers' Ethics* and elucidated further by Professor Freedman in his essay in this issue. Still, Professor Freedman acknowledges, in *The Corporate Watchdogs that Can't Bark*, that Professor Morin makes an "insightful and powerful case" for her position, and I agree!

Professor Morin constructs an innovative ethical framework for rules of professional conduct that would "make principled distinctions between individual and organizational clients." She would recognize the corporation's special status as a legal entity that "owes its existence to the state," a status based on a "social compact that conveys certain rights upon the corporation in exchange for social benefits it offers investors and the national economy." In her view, however, corporations should not be "accorded human rights of autonomy and dignity." Because the corporation owes its special status to the benefits it offers, Professor Morin proposes "confidentiality rules that treat corporate clients differently from individual clients." Thus, when officers of a corporation "engage in criminal or fraudulent conduct that will harm shareholders and third-party beneficiaries" of the social compact, she concludes that the "corporation has broken trust with the state and the attorney's loyalties should shift to protect the social compact."

In *Telling Stories and Keeping Secrets,* Professor Abbe Smith reveals herself as both an avid storyteller, in fact a storyteller who makes her living as a criminal defense lawyer by "telling tales," and a "confidentiality absolutist." Confidentiality absolutists, she says, believe that the ethical duty to protect client confidences is inviolable, regardless of the cost to society. As in all her extensive scholarship, Professor Smith is clear-headed, provocative, engaging, and funny. She examines three "hard cases," concluding that confidentiality is required even when an innocent life is at stake, judicial corruption is ongoing, or corporate conduct may pose a danger to others. She mitigates this position by imposing a duty on lawyers in such situations to "engage in moral as well as legal counseling with their clients," and to do "everything they can to get clients to do the right thing." Still, Professor Smith makes a compelling case for her belief that "it is more important to maintain and preserve the principle of confidentiality—no matter how difficult the circumstances—than it is to affirm individual lawyer morality."

Professor Paul Butler, in *An Ethos of Lying*, includes laypersons in his analysis of ethical approaches to achieving a just legal system. Taking up Freedman and Smith's sketch of three exceptions they describe in *Understanding Lawyers' Ethics* where they conclude that "moral values . . . take precedence over truthfulness," he proposes a rationale based on situational ethics and system utilitarianism which asserts that in some circumstances lying can be an ethical

behavior. Professor Butler shows how system utilitarianism might apply in the legal system when a potential juror's honesty about her values or beliefs would tend to support the application of discriminatory law. He also discusses the shocking disparity between white and Black defendants in the imposition of the death penalty and the ethical dilemma this poses for some potential jurors. Anyone who truthfully discloses her belief in the sanctity of human life will be barred from serving on death penalty juries, ensuring the application of this discriminatory law. Thus to save individual lives and to promote systemic reform of the judicial system, Professor Butler proposes an ethos of lying. Professor Butler's rigorous and enlightening analysis of how laypersons might apply their moral values and reasoned judgment to achieve a more just legal system is both thoughtful and thought provoking.

Professor Ellen Yaroshefsky's article, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, pulls together significant data illustrating the depth and breadth of the problems extant within the prosecutorial system and proposes important systemic law reform. She provides widespread examples of prosecutorial misconduct and wrongful conviction cases across the nation and questions the lack of public sanctioning of implicated prosecutors. After examining reasons for failure to discipline prosecutorial misconduct, Professor Yaroshefsky proposes that independent commissions established by state and federal courts and legislatures could efficiently stem misconduct. The commissions would be charged with developing protocols for examining cases, making recommendations for systemic change needed to encourage reporting and to deter future misconduct, developing clear standards and transparent procedures, creating an accessible database on all sanctions imposed at any level of review, and developing educational programming designed to increase reporting and sanctioning of misconduct. Professor Yaroshefsky predicts that effective commissions would increase public confidence in the criminal justice system.

Understanding Lawyers' Ethics has been the starting point here for a collection or original and useful analyses of the role of ethics in the behavior of individuals in the legal system and in the creation of a more just legal system. Read together, all these articles make a compelling case that moral values and reasoned judgment are integral to a just legal system which, in fact, may perhaps only be maintained and developed by the principled application of ethics by all parties involved, and must be supported by social institutions constructed to create and enforce just rules and laws.