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## PERSONAL RESPONSIBILITY IN A PROFESSIONAL SYSTEM\*

*Monroe H. Freedman\*\**

### I.

In speaking to you today, I cannot be unmindful of the signal honor that you have shown me, as a member of a different religious faith, in inviting me to speak in honor of Pope John XXIII. Surely, though, that is not wholly inappropriate, for Pope John's concerns were truly catholic and his message of peace and of social justice was directed to the consciences and for the benefit of all humankind. Indeed, I could readily take as my text today a paragraph from *Pacem in Terris*:<sup>1</sup>

The dignity of the human person . . . requires that every man<sup>2</sup> enjoy the right to act freely and responsibly. For this reason, therefore, in social relations man should exercise his rights, fulfill his obligations and, in the countless forms of collaboration with others, act chiefly on his own responsibility and initiative. This is to be done in such a way that each one acts on his own decision, of set purpose and from a consciousness of his obligation, without being moved by force or pressure brought to bear on him externally. For any human society that is established on relations of force must be regarded as inhuman, inasmuch as the personality of its members is repressed or restricted, when in fact they should be provided with appropriate incentives and means for developing and perfecting themselves.

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\* Delivered as the 13th annual Pope John XXIII Lecture at Catholic University Law School, Washington, D.C., October 28, 1977.

\*\* Senior litigating partner, Bartel Engelman & Fishman, New York City; former chairman, District of Columbia Bar Legal Ethics Committee; author, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).

1. *PACEM IN TERRIS*, Encyclical Letter of Pope John XXIII, para. 34 (April 11, 1963).

2. Before the Women's Liberation Movement had become a significant force, Pope John stressed "equal rights and duties for man and woman," and recognized that women, consistent with human dignity, must have "rights befitting a human person both in domestic and in public life." *Id.* para. 15, 41.

## II.

It is a singularly good thing, I think, that law students, and even some lawyers and law professors, are questioning with increasing frequency and intensity whether "professionalism" is incompatible with human decency—asking, that is, whether one can be a good lawyer and a good person at the same time. I have a special interest in that question because Professor John T. Noonan, Jr. (a personal friend, perceptive critic, and a previous speaker in this annual series) has drawn the inference from my book that I do not believe that a decent, honest person can practice criminal law or teach others to do so.<sup>3</sup> In fact, the title of today's paper derives directly from a challenge issued to me in the concluding paragraph of Professor Noonan's review of my book, urging that I write on "Personal Responsibility in a Professional System."<sup>4</sup>

At the same time I address the issue of professionalism and personal moral responsibility, I want also to discuss an integrally related question, one that is often expressed in terms of whether it is the lawyer or the client who should exercise "control" in the relationship between them. As it is frequently put: Is the lawyer just a "hired gun," or must the lawyer "obey his own conscience, not that of his client?"<sup>5</sup>

## III.

Voicing a viewpoint prevalent in the profession, lawyers sometimes use the phrase "client control" (that is, control of the client by the

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3. Noonan, Book Review, 29 STAN. L. REV. 363 (1977). Professor Noonan bases that inference, in substantial part, on my conclusion that a criminal defense lawyer will sometimes be compelled to knowingly present a client's perjury to the court and to argue it in summation to the jury. I base that conclusion on such considerations as the sixth amendment right to counsel, the fifth amendment privilege against self-incrimination, and the obligation of confidentiality, under which the attorney induces the client to reveal all relevant information with assurances that the attorney will not act upon that information in a way that will injure the client. Thus, I might ask rhetorically whether Professor Noonan believes that a good person can induce another to rely upon assurances of confidentiality, and then betray those confidences.

The difficulty, of course, is that the lawyer is frequently faced with conflicting moral obligations; here, either to participate knowingly in the presentation of perjury, or to violate the client's trust which the lawyer has induced (a problem that is discussed, more fully in M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975)). In view of that kind of moral dilemma, a cynic might conclude that one cannot be a good lawyer and a good person at the same time. I do not believe, however, that one can properly be charged with immorality because one is presented with a moral dilemma. If so, the human condition is one of guilt without realistic free will. On the contrary, however, I believe that in such circumstances, the only immorality lies in failing to address and resolve the moral conflict in a conscientious and responsible manner.

4. Noonan, *supra* note 3, at 370.

5. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1491 (1966) (quoting ABA CANONS OF PROFESSIONAL ETHICS NO. 15. (1908)).

lawyer) in expressing their professional pride in maintaining the proper professional relationship. In a law school commencement address titled *Professionalism in Lawyering*, Clement F. Haynsworth, Jr., Chief Justice of the Court of Appeals for the Fourth Circuit stressed the importance of professional competence in handling a client's affairs; but Chief Justice Haynsworth went on to say that of even "greater moment" than competence on the part of a lawyer is the fact that:

he serves his clients without being their servant. He serves to further the lawful and proper objective of the client, but the 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, and, as a professional, he cannot give in to a client's attempt to persuade him to take some other stand . . . [T]he lawyer must serve the client's legal needs as the lawyer sees them, not as the client sees them. During my years of practice, . . . I told [my clients] what would be done and firmly rejected suggestions that I do something else which I felt improper. . . .<sup>6</sup>

Surely those are striking phrases to choose to describe the relationship of lawyer and client—the lawyer is "the master" who is "to decide what is morally . . . right," and who serves the client's needs but only "as the lawyer sees them, not as the client sees them." Even more striking was the phrase once used by a sensitive and dedicated public interest lawyer, when he observed that as between the lawyer and client, it is the lawyer who holds "the whip hand."<sup>7</sup>

Thurmond Arnold, a prominent practitioner and a federal appellate court judge, held a philosophy similar to Chief Justice Haynsworth's. As described with approval by former Supreme Court Justice Abe Fortas, Arnold did not permit a client "to dictate or determine the strategy or substance of the representation, even if the client insisted that his prescription for the litigation was necessary to serve the larger cause to which he was committed."<sup>8</sup>

#### IV.

Critics of the legal profession argue not that such attitudes and practices are elitist and paternalistic, but rather, that not enough lawyers abide by them.<sup>9</sup> In an article on "Lawyers as Professionals: Some Moral

6. Haynsworth, *Professionalism in Lawyering*, 27 S.C.L.Q. 627, 628 (1976).

7. See Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1123 (1970).

8. Fortas, *Thurman Arnold and the Theatre of the Law*, 79 YALE L.J. 988, 996 (1970).

9. See, e.g., J. AUERBACH, *UNEQUAL JUSTICE* (1976); M. GREEN, *THE OTHER GOVERNMENT* (1975).

Issues,"<sup>10</sup> Professor Richard Wasserstrom recalls John Dean's list of those involved in the Watergate coverup. Dean had placed an asterisk next to the names of each of the lawyers on the list, because he had been struck by the fact that so many of those implicated were lawyers. Professor Wasserstrom concludes that the involvement of lawyers in Watergate was "natural, if not unavoidable," the "likely if not inevitable consequence of their legal acculturation." Indeed, on the basis of Wasserstrom's analysis, the only matter of wonder is why so many of those on John Dean's list were *not* lawyers. What could possibly have corrupted the non-lawyers to such a degree as to have led them into the uniquely amoral and immoral world of the lawyers? "For at best," Wasserstrom asserts, "the lawyer's world is a simplified moral world; often it is an amoral one; and more than occasionally perhaps, an overtly immoral one."<sup>11</sup>

Professor Wasserstrom holds that the core of the problem is professionalism and its concomitant, *role-differentiated behavior*. Role-differentiation refers, in this context, to situations in which one's moral response will vary depending upon whether one is acting in a personal capacity or in a professional, representative one. As Wasserstrom says, the "nature of role-differentiated behavior . . . often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts—and especially various moral considerations—that would otherwise be relevant if not decisive."<sup>12</sup>

An illustration of the "morally relevant considerations" that Wasserstrom has in mind is the case of a client who desires to make a will disinheriting her children because they opposed the war in Vietnam. Professor Wasserstrom suggests that the lawyer should refuse to draft the will because the client's reason is a "bad" one.<sup>13</sup> But is the lawyer's paternalism toward the client preferable—morally or otherwise—to the client's paternalism toward her children?

"[W]e might all be better served," says Wasserstrom, "if lawyers were to see themselves less as subject to role-differentiated behavior and more as subject to the demands of the *moral* point of view."<sup>14</sup> Is it really that simple? What, for example, of the lawyer whose moral judgment is that disobedient and unpatriotic children should be disinherited? Should that lawyer refuse to draft a will leaving bequests to children who

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10. 5 HUMAN RIGHTS 1 (1975).

11. *Id.* at 2.

12. *Id.* at 3.

13. *Id.* at 7.

14. *Id.* at 12 (emphasis added).

opposed the war in Vietnam? If the response is that we would then have a desirable diversity, would it not be better to have that diversity as a reflection of the clients' viewpoints, rather than the lawyers'?

In another illustration, Wasserstrom suggests that a lawyer should refuse to advise a wealthy client of a tax loophole provided by the legislature for only a few wealthy taxpayers.<sup>15</sup> If that case is to be generalized, it seems to mean that the legal profession can properly regard itself as an oligarchy whose duty is to nullify decisions made by the people's duly elected representatives.<sup>16</sup> Therefore, if the lawyers believe that particular clients (wealthy or poor) should not have been given certain rights, the lawyers are morally bound to circumvent the legislative process and to forestall the judicial process by the simple device of keeping their clients in ignorance of tempting rights.

Nor is that a caricature of Wasserstrom's position. The role-differentiated amorality of the lawyer is valid, he says, "only if the enormous degree of trust and confidence in the institutions themselves (that is, the legislative and judicial processes) is itself justified." "[W]e are today", he asserts, "certainly entitled to be quite skeptical both of the fairness and of the capacity for self-correction of our larger institutional mechanisms, including the legal system."<sup>17</sup> If that is so, is it not a nonsequitur to suggest that we are justified in placing that same trust and confidence in the morality of lawyers, individually or collectively?

There is "something quite seductive," adds Wasserstrom, about being able to turn aside so many ostensibly difficult moral dilemmas with the reply that my job is not to judge my client's cause, but to represent his or her interest.<sup>18</sup> Surely, however, it is at least as seductive to be able to say, "My moral judgment—or my professional responsibility—requires that I be your master. Therefore, you will conduct yourself as I direct you to."

A more positive view of role-differentiated behavior was provided in an article in the *New York Times* about the tennis star, Manuel Orantes:

He has astounded fans by applauding his opponent's good shots and by purposely missing a point when he felt that a wrong call by a linesman has hurt his opponent.

"I like to win," he said in an interview, "but I don't feel that I have won a match if the calls were wrong. I think if you're playing Davis Cup or for your country it might be different, but if I'm playing for myself I want to know I have really won."<sup>19</sup>

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15. *Id.* at 7-8.

16. Wasserstrom acknowledges that concern but rejects it. *Id.* at 10-11.

17. *Id.* at 13.

18. *Id.* at 9.

19. *N.Y. Times*, Sept. 11, 1975, at 43, col. 8.

That is, one's moral responsibilities will properly vary depending, among other things, upon whether one has undertaken special obligations to one's teammates or to one's country.

Taking a different illustration, let us suppose that you are going about some pressing matter and your arm is suddenly seized by an old man with a long gray beard, a wild look in his eye, and what appears to be an enormous dead bird hanging around his neck, and he immediately launches into a bizarre tale of an improbable adventure at sea. If he is a stranger and you are alone on a poorly lighted street, you may well call the police. If he is a stranger but you decide that he is harmless, you may simply go on to your other responsibilities. If he is a friend or member of your family, you may feel obligated to spend some time listening to the ancient mariner, or even to confer with others as to how to care for him. If you are a psychiatric social worker, you may act in yet some other way, and that action may depend upon whether you are on duty at your place of employment, or hurrying so that you will not be late to a wedding—and in the latter case, your decision may vary depending upon whether the wedding is someone else's or your own. Surely there can be no moral objection to those radically different courses of conduct, or to the fact that they are governed substantially by personal, social, and professional context, that is, by role-differentiation. One simply cannot be expected, in any rational moral system, to react to every stranger in the same way in which one may be obligated to respond to a member of one's family or to a friend.

## V.

Thus in an interesting and thought-provoking article, Professor Charles Fried has analogized the lawyer to a friend—a "special-purpose" or "limited-purpose" friend "in regard to the legal system."<sup>20</sup> The lawyer, thereby, is seen to be "someone who enters into a personal relation with you—not an abstract relation as under the concept of justice." That means, Fried says, that "like a friend [the lawyer] acts in your interests, not his own; or rather he adopts your interests as his own."<sup>21</sup>

The moral foundation upon which Fried justifies that special-purpose friendship is the sense of self, the moral concepts of "personality, identity, and liberty."<sup>22</sup> He notes that social institutions are so complex

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20. Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060, 1071 (1976).

21. *Id.*

22. *Id.* at 1068.

that without the assistance of an expert adviser, an ordinary lay person cannot exercise the personal autonomy to which he or she is morally and legally entitled within the system. "Without such an adviser, the law would impose constraints on the lay citizen (unequally at that) which it is not entitled to impose explicitly." The limited purpose of the lawyer's friendship, therefore, is "to preserve and foster the client's autonomy within the law."<sup>23</sup> Similarly, Professor Sylvia A. Law has written:

A lawyer has a special skill and power to enable individuals to know the options available to them in dealing with a particular problem, and to assist individuals in wending their way through bureaucratic, legislative or judicial channels to seek vindication for individual claims and interests. Hence lawyers have a special ability to enhance human autonomy and self-control.<sup>24</sup>

She adds, however, that

Far too often, professional attitude, rather than serving to enhance individual autonomy and self-control, serves to strip people of autonomy and power. Rather than encouraging clients and citizens to know and control their own options and lives, the legal profession discourages client participation and control of their own legal claims.<sup>25</sup>

The essence of Professor Fried's argument does not require the metaphor of friendship, other than as an analogy in justifying the lawyers role-differentiation. It was inevitable, however, that Fried's critics would give the metaphor of friendship the same emphasis that Fried himself does and, thereby, consciously or not, miss the essential point he makes, that human autonomy is a fundamental moral concept that must determine, in substantial part, the answers that we give to some of the most difficult issues regarding the lawyer's ethical role.

Thus, in a response to Fried,<sup>26</sup> Professors Edward A. Dauer and Arthur Allen Leff make some perceptive and devastating comments about the limited-purpose logic of Fried's metaphor of friendship. At the same time, however, Dauer and Leff express their own views of the

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23. *Id.* at 1073. As Pope John expressed in the quotation I read earlier, "The dignity of the human person . . . requires that every man enjoy the right to act freely and responsibly." See note 1 *supra*. See also Bresnahan, *Ethical Theory and Professional Responsibility: Possible Contributions of Religious Ethics to Dialog about Professional Ethics of Attorneys*, 37 THE JUR. 56, 77 (1977), in which the author refers to the human being's fundamental freedom "decisively to dispose of self, and therefore also to affect one's world."

24. S. A. LAW, AFTERWORD: THE PURPOSE OF PROFESSIONAL EDUCATION, LOOKING AT LAW SCHOOL 205, 212-13 (S. Gillers ed. 1977).

25. *Id.*

26. Dauer and Leff, *The Lawyer as Friend*, 86 YALE L.J. 573 (1977).



lawyer's role and character, views which I find to be both cynical and superficial. They see an "invariant element" of the lawyer-client relationship as follows:

The client comes to a lawyer to be aided when he feels he is being treated, or wishes to treat someone else, not as a whole other person, but (at least in part) as a threat or hindrance to the client's satisfaction in life. The client has fallen, or wishes to thrust someone else, into the impersonal hands of a just and angry bureaucracy. When one desires help in those processes whereby and wherein people are treated as means and not as ends, then one comes to lawyers, to us. Thus, if you feel the need for a trope to express what a lawyer largely is, perhaps this will do: A lawyer is a person who on behalf of some people treats other people the way bureaucracies treat all people—as nonpeople. Most lawyers are free-lance bureaucrats. . . .<sup>27</sup>

Despite that caricature, Dauer and Leff manage to conclude that "a good lawyer can be a good person." They do so, however, by defining "a good person" in the following limited terms: "In our view the lawyer achieves his "goodness" by being—professionally—no rotter than the generality of people acting, so to speak, as amateurs."<sup>28</sup> The best that can be said for that proposition, I believe, is that it is not likely to stop students with any moral sensitivity from continuing to ask whether it is indeed possible for a good lawyer to be a good person.

The most serious flaw in Professor Fried's friendship metaphor is that it is misleading when the moral focus is on the point at which the lawyer-client relationship begins. Friendship, like love, seems simply to happen, or to grow, often in stages of which we may not be immediately conscious. Both in fact and in law, however, the relationship of lawyer and client is a contract, which is a significantly different relationship, formed in a significantly different way.<sup>29</sup>

Unlike friendship, a contract involves a deliberate choice by both parties at a particular time. Thus, when Professor Fried says that friendship is "an aspect of the moral liberty of self to enter into personal relations freely,"<sup>30</sup> the issue of the morality of the decision to enter the

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27. *Id.* at 581.

28. *Id.* at 582. Other observations by Professors Dauer and Leff are less witty but more substantive.

29. It is interesting to note that contract plays such a major role as a construct in political theory and in jurisprudence, but is overlooked in discussions of lawyer-client relations. Let me hasten to add, however, that I am not suggesting "The Lawyer as Contractor" as an all-purpose analogy. It is relevant to the question of the lawyer's personal moral responsibility in selecting (and rejecting) clients, but it may well be useless in other contexts.

30. Fried, *supra* note 20, at 1078.

relationship is blurred by the amorphous nature in which friendships are formed. Since entering a lawyer-client contract is a more deliberate, conscious decision, however, that decision can justifiably be subjected to a more searching moral scrutiny.

In short, a lawyer should indeed have the freedom to choose clients on any standard he or she deems appropriate. As Professor Fried points out, the choice of client is an aspect of the lawyer's free will, to be exercised within the realm of the lawyer's moral autonomy. That choice, therefore, cannot properly be coerced. Contrary to Fried's view, however, it can properly be subjected to the moral scrutiny and criticism of others, particularly those who feel morally compelled to persuade the lawyer to use his or her professional training and skills in ways that the critics consider to be more consistent with personal, social, or professional ethics.<sup>31</sup>

As I have stressed elsewhere, however, once the lawyer has assumed responsibility to represent a client, the zealotry of that representation cannot be tempered by the lawyer's moral judgments of the client or of the client's cause.<sup>32</sup> That point is of importance in itself, and is worth stressing also because it is one of the considerations that a lawyer should take into account in making the initial decision whether to enter into a particular lawyer-client relationship.<sup>33</sup>

## VI.

In disagreeing with Professor Wasserstrom's criticism of role-differentiation, I did not mean to suggest that role-differentiation has not produced a degree of amorality, and even immorality, in the practice of many lawyers. The problem, as I see it, is expressed in the news item I quoted earlier regarding Manuel Orantes. Playing for himself, Mr. Orantes has earned an enviable reputation, not only for his athletic prowess, but also for his good sportsmanship—if you will, for his morality in his relations with his adversaries. Yet when he plays with teammates and for his country, he adopts different standards of conduct.

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31. Such criticism might be answered on the grounds that everyone is entitled to representation, but that response is not conclusive as long as there is, in fact, another lawyer who is willing to take the case.

32. FREEDMAN, *supra* note 3, ch. 2.

33. See LAW, *supra* note 24, at 213-14. It is possible, of course, that a client will decide upon a course of conduct, not foreseeable as a possibility at the outset of the lawyer-client relationship, that is so morally repugnant to the lawyer as to make it impossible for the lawyer to continue without a serious personal conflict of interest. In that event, the lawyer is permitted to withdraw, but only upon taking reasonable steps to avoid foreseeable prejudice to the client's rights. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-101(A), EC 5-2, DR 2-110(C)(1)(e), DR 2-110(A)(2)(1974).

I think that Mr. Orantes is wrong, in a way that many lawyers frequently are wrong. I do not mean that in Davis Cup play he is not bound by special, voluntarily assumed obligations to others. On the contrary, he is bound by his role as teammate and countryman to accept the decision of his teammates, which may well be that each player should play to win, without relinquishing any advantage that the rules of the game and the calls of the judges allow. Where Orantes is wrong, however, is in preempting that decision, in assuming that their decision is that winning is all. Perhaps if he actually put the choice to them, Orantes' teammates would decide that they would prefer to achieve, for themselves and for their country, the kind of character and reputation for decency and fairness that Orantes has earned for himself. Perhaps they would not decide that way. The choice, however, is theirs, and it is a denial of their humanity to assume the less noble choice and to act on the assumption without consultation.

In day-to-day law practice, the most common instances of amoral or immoral conduct by lawyers are those occasions in which we preempt our clients' moral judgments. That occurs in two ways. Most commonly we assume that our function is to maximize the client's position—the client's material or tactical position, that is—in every way that is legally permissible. Since it is our function not to judge the client's cause, but to represent the client's interests, we tend to assume the worst regarding the client's desires. Much less frequently, I believe, a lawyer will decide that a particular course of conduct is morally preferable, even though not required legally, and will follow that course on the client's behalf. In either event, the lawyer fails in his or her responsibility to maximize the client's autonomy by providing the client with the fullest advice and counsel, legal and moral, so that the client can make the most informed choice possible.<sup>34</sup>

Let me give a commonplace illustration. Two experienced and conscientious lawyers, *A* and *B*, once asked me to help them to resolve an ethical problem. They represented a party for whom they were negotiating a complex contract involving voluminous legal documents. The attorneys on the other side were insistent upon eliminating a particular guarantee provision, and *A* and *B* had been authorized by their client to forego the guarantee if the other side was adamant. The other lawyers had overlooked, however, the fact that the same guarantee, more broadly and unambiguously stated, was provided elsewhere in the documents. Having agreed to eliminate the guarantee provision, with specific refer-

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34. Cf. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-7 to 7-12, 7-26; DR 7-101(A)(1), DR 7-101(B)(1) (1974).

ence to a particular clause on a particular page, were *A* and *B* obligated to call the attention of opposing counsel to the similar clause on a different page? Or, on the contrary, were they obligated, as *A* put it, "to represent our client's interest, rather than to educate the lawyers on the other side?" Each of the lawyers was satisfied that, if he were negotiating for himself, he would unquestioningly point out the second guarantee clause to the other party. Moreover, each of them was more attentive to, and concerned about, questions of professional responsibility than most lawyers probably are—each of them, that is, was highly sensitive to the question of personal responsibility in a professional system. Nevertheless, it had occurred to neither of them that their professional responsibility was not to resolve the issue between themselves, but rather to present the issue to the client for resolution.<sup>35</sup>

Our discussion thus far has related to decisions that are clearly in the moral or ethical realm. What of tactical decisions? Are those significantly different and therefore within the lawyer's ultimate control?

At one time I had the notion, based on fantasy, that Alger Hiss had no involvement with Wittaker Chambers' nefarious activities, but that Hiss' wife did. Assuming such a case, imagine Mr. Hiss' lawyer advising him that the only way to defend himself would be to tell the truth about his wife's involvement, and Hiss replying that, in no way, directly or indirectly, was his wife to be brought into the case, even if it meant an erroneous conviction for himself. In those circumstances, I find it hard to believe that even Clement Haynsworth or Thurmond Arnold would insist upon conducting the case in such a way as to implicate the client's wife.<sup>36</sup>

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35. Moreover, the attitude of *A* and *B* does not appear to be the result of what Professor Wasserstrom refers to as the "acculturation" of legal training and practice. I have used that illustration and others like it as classroom problems early in the first semester of the first-year contracts course and, consistently, students who have had minimal exposure to the corrupting influence of law school, and no experience at all as practitioners, assume that the lawyer's proper function is to preempt the client's moral decision. As indicated by that response, and by other student responses to problems of lawyer's ethics, law teachers have a moral role to perform as an essential part of their professional responsibilities. Cf. Freedman, *Professional Responsibility of the Civil Practitioner: Teaching Legal Ethics in the Contracts Course*, 21 J. OF LEGAL EDUC. 569 (1969).

36. Compare, however, the report of a murder-kidnap trial of a group of Hanafi Muslims. According to the *Washington Post*, "the defendants are determined to share the guilt for crimes they may not have committed as a gesture of loyalty to their leader and belief in their faith." The *Post* quotes a defense attorney as saying, "They are willing to go down the tube for a principle."

Despite their clients' strong desires, which are based in part on religious conviction, the lawyers apparently intend to put on affirmative evidence and conduct adversary cross-examination of the group's leader (who is a co-defendant). The *Post* further reports that the lawyers believe themselves to be acting in accordance with their "duty to provide

Arguably, however, that case represents a moral decision rather than a tactical one. On the one hand, there is the client's love for and loyalty to his wife. On the other, there is the possibility of a wrongful conviction, and the likelihood that the client will give misleading, or even false, testimony in the effort to avoid implicating his wife.

A recent case in New Jersey, *State v. Pratts*,<sup>37</sup> would seem to come as close as possible to posing a tactical decision unencumbered by moral considerations. In that case, the lawyer representing a criminal defendant had interviewed a witness who had given the lawyer a statement helpful to the defense. The lawyer learned, however, that shortly thereafter the witness had given the prosecutor a different statement, damaging to the defendant. The lawyer's decision, therefore, was that the witness should not be called. For similar reasons, of course, the prosecutor also refrained from calling the witness.

The defendant disagreed with his lawyer. Fully aware of the risks of calling the witness, the defendant decided that the witness was part of the case he wanted presented on his behalf. Apprised of the situation, the trial judge accepted the decision of the defense attorney, and the witness was not called. The defendant was convicted.

On appeal, the Superior Court of New Jersey affirmed. The court stated the issue to be not "whether there was an abuse of discretion" by the trial judge, but "who was responsible for the conduct of the defense." The court held that "when a defendant accepts representation by counsel, that counsel has the authority to make the necessary decisions as to the management of the case."<sup>38</sup> Quoting a federal appeals decision, the court added that the defendant "has a right to be cautioned, advised, and served by [court-appointed] counsel so that he will not be a victim of his poverty. *But he has no right . . . to dictate the procedural course of his representation.*"<sup>39</sup>

I think the court was wrong. At issue is not the lawyer's day in court, but the defendant's—the defendant's right to trial, right to due process of law, and right to counsel.<sup>40</sup> As the Supreme Court has noted, under the

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what they think is the best defense possible," even though they are acting contrary to their clients' instructions. Further, the lawyers appear to have been encouraged in that view by the Bar Counsel of the District of Columbia Bar. Washington Post, July 10, 1977, § A at 1.

37. 145 N.J. Super. 79, 366 A.2d 1327 (1975), *aff'd per curiam*, 365 A.2d 928 (1976).

38. 145 N.J. Super. at 88, 366 A.2d at 1333.

39. *Rogers v. United States*, 325 F.2d 485, 488 (10th Cir. 1963) (emphasis by the New Jersey court).

40. The decision recalls to mind the elderly attorney who said, "When I was younger and less experienced, I lost many cases that I should have won. Now that I am more experienced, I win cases that probably should be lost. So you see, in the long run, justice is done."

sixth amendment, "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."<sup>41</sup>

Indeed, I would put the *Pratts* case, too, in the realm of morality. In a society such as ours, an essential purpose of a criminal trial is to manifest respect for the dignity of the individual.<sup>42</sup> Further, as we have already noted, a central element of human dignity is personal autonomy, particularly in matters that affect our own lives as substantially as those in which lawyers are needed for assistance. Moreover, the "assistance" of counsel that is guaranteed by the sixth amendment is just that. In the words of the Supreme Court, "an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant. . . ."<sup>43</sup> Otherwise, "counsel is not an assistant, but a master," with the result that the right to make a defense is "stripped of the *personal character* upon which the Amendment insists."<sup>44</sup>

As against those weighty considerations of human dignity and autonomy, which find expression in the Constitution, what reasons are there for the attorney to control such a decision? In *Pratts*, there would have been some saving of time at the trial. On the other hand, in a case in which the defendant prefers not to call a particular witness whom the lawyer wants to call, the client's decision would conserve time. In either event, the time element would not appear to constitute a compelling reason to deprive the client of the opportunity to make the decision in a matter of such importance to him. I suspect, in fact, that the real reason lawyers prefer to make the final decision, and judges are inclined to give it to them, is professional pride, with the emphasis on the word pride.

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41. *Faretta v. California*, 422 U.S. 806, 819-20 (1975).

42. See FREEDMAN, *supra* note 3, ch. 1.

43. *Faretta v. California*, 422 U.S. at 820.

44. *Id.* (emphasis added). The issue in *Faretta* was whether there is a constitutional right to waive counsel and proceed pro se. The Court held that there is such a right. In dictum, the Court said, "It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. . . . This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative." *Id.* at 820-21. Nevertheless, the cases cited by the Court (as well as the reasoning of *Faretta* itself) establish that basic rights cannot be waived by counsel without a voluntary and knowing consent by the defendant; moreover, those same cases strongly suggest that counsel can make no trial decision of consequence over the express objection of the defendant. See *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966); *Henry v. Mississippi*, 379 U.S. 443, 451 (1965); *Fay v. Noia*, 372 U.S. 391, 439 (1963). That understanding is reinforced by "right of privacy" cases which give constitutional status to "independence in making certain kinds of important decisions." See *Whalen v. Roe*, 429 U.S. 589 (1977).

That is, the lawyer does not want the judge or any colleagues present to think that he or she is so unskilled as to have called a witness who is so vulnerable to cross-examination. Insofar as the lawyer's response would be that the lawyer's real concern is with the client's welfare, I think it is another instance of misplaced paternalism.

## VII.

One of the essential values of a just society is respect for the dignity of each member of that society. Essential to each individual's dignity is the maximization of his or her autonomy or, as Pope John expressed it, "the right to act freely and responsibly . . . act[ing] chiefly on his own responsibility and initiative [and] . . . on his own decision."<sup>45</sup> In order to exercise that responsibility and initiative, each person is entitled to know his or her rights against society and against other individuals, and to decide whether to seek fulfillment of those rights through the due process of law.

The lawyer, by virtue of his or her training and skills, has a legal and practical monopoly with respect to access to the legal system and knowledge about the law. Legal advice and assistance are often indispensable, therefore, to the effective exercise of individual autonomy.

Accordingly, the attorney acts both professionally and morally in assisting clients to maximize their autonomy, that is, by counselling clients 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. Further, the attorney acts unprofessionally and immorally by depriving clients of their autonomy, that is, by denying them information regarding their legal rights, by otherwise preempting their moral decisions, or by depriving them of the ability to carry out their lawful decisions.

Until the lawyer-client relationship is contracted, however—until, that is, the lawyer induces another to rely upon his or her professional knowledge and skills—the lawyer ordinarily acts entirely within the scope of his or her own autonomy. Barring extraordinary circumstances,<sup>46</sup> therefore, the attorney is free to exercise his or her personal judgment as to whether to represent a particular client. Since a moral choice is implicated in such a decision, however, others are entitled to

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45. *PACEM IN TERRIS*, *supra* note 1.

46. The lawyer does undertake special responsibilities to society regarding the effective functioning of the legal system, and to that extent, the lawyer's autonomy may be circumscribed, e.g., by the obligation to represent someone who otherwise would be unrepresented. *See, e.g.*, ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-29 (1974).

judge and to criticize, on moral grounds, a lawyer's decision to represent a particular client.

Finally, those of us who teach law have a primary professional obligation to explicate the moral implications of the law in general and of lawyers' ethics in particular.

If we conscientiously carry out those personal and professional responsibilities, then I do believe that professionalism is consistent with decency, and I therefore conclude that one can indeed be a good lawyer and a moral person at the same time.



