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WHICH "CLIENT-CENTERED COUNSELORS"?: A REPLY TO PROFESSOR FREEDMAN

*Robert F. Cochran, Jr. **

I. INTRODUCTION

I am honored to have been asked to participate in the fortieth anniversary issue of the *Hofstra Law Review* and to respond to the comments of Professor Monroe Freedman. I have long admired Professor Freedman. Teresa Collett and I use several of his articles in our legal ethics casebook,¹ and I consider him to be one of the most thoughtful legal ethics commentators. More often than not, I agree with Professor Freedman. Invariably, he causes me to think more deeply about the important work that lawyers do for clients. I am particularly honored to join a conversation that began over three decades ago between Professor Freedman and our mutual friend (and my teacher, mentor, and co-author), Professor Thomas Shaffer.² In most of what I say about legal ethics, I am merely a poor echo of Professor Shaffer's thought.³

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1. See ROBERT F. COCHRAN, JR. & TERESA S. COLLETT, CASES AND MATERIALS ON THE LEGAL PROFESSION 25-28, 31-33, 133-36, 156-59 (2d ed. 2003) (excerpting MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 3.03, at 52-55, § 3.04, at 56, § 3.08, at 69-70 (2d ed. 2002) [hereinafter FREEDMAN & SMITH, ULE II] (arguing for client autonomy and lawyer advocacy)); Monroe Freedman, *Must You Be the Devil's Advocate?*, LEGAL TIMES, Aug. 23, 1993, at 19; Monroe Freedman, *The Ethical Illusion of Screening*, LEGAL TIMES, Nov. 20, 1995, at 24; Monroe Freedman, *The Morality of Lawyering*, LEGAL TIMES, Sept. 20, 1993, at 22.

2. See generally Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U. L. REV. 331 (1987) (disagreeing with Professor Shaffer's arguments); Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 204 (1978) [hereinafter Freedman, *Personal Responsibility*] (arguing that "the attorney acts both professionally and morally in assisting clients to maximize their autonomy"); Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319 (1987) (responding to Professor Freedman's position).

3. Much of what appears herein is more fully developed in THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 18-25 (2d ed. 2009).

I have been asked specifically to respond to Professor Freedman's comments concerning the luncheon speech that I gave at the *Campbell Law Review* symposium in the spring of 2011.⁴ In that speech, I criticized what I call "liberal lawyering" for its tendency to focus exclusively on the interests of clients, often at the expense of other people.⁵ It was a luncheon speech, so I painted in broad strokes, without the fine distinctions that might be drawn in a typical law review article. I spoke in general terms about the position of the "client-centered" counselors⁶ and I failed to identify an important respect in which Professor Freedman differs from the dominant position of the client-centered counselors. I welcome this opportunity to fill in some of the details. In this response, I hope to generate a conversation among those who identify themselves as client-centered lawyers as to the very significant differences between them in the matter of lawyer-client moral discourse. Finally, I will address the question raised in Professor Freedman's article (one that quite obviously is of concern to him): How can it be that his colleague and others, in the face of Professor Freedman's consistent and long-time advocacy of lawyer-client moral discourse, could conclude that he would favor a lawyer (as in *Kramer vs. Kramer*) who aggressively attacks the opposing party without client concurrence?⁷

II. CLIENT-CENTERED COUNSELORS, COLLABORATIVE COUNSELORS, AND MORAL DISCOURSE

As Professor Freedman notes in his piece, he and I agree about the importance of lawyers engaging clients in moral discourse about matters in legal representation.⁸ He notes that Professor Shaffer and I, in our book *Lawyers, Clients, and Moral Responsibility*, cite examples of thoughtful lawyer moral counsel from Professor Freedman's own law practice.⁹ In my view, this area of agreement on the importance of moral discourse is far more significant for the day-to-day practice of lawyers than our areas of disagreement.

4. Robert F. Cochran, Jr., *Enlightenment Liberalism, Lawyers, and the Future of Lawyer-Client Relations*, 33 CAMPBELL L. REV. 685 (2011).

5. *Id.* at 687-88.

6. *See id.* at 687-89.

7. Monroe H. Freedman, *Client-Centered Lawyering—What It Isn't*, 40 HOFSTRA L. REV. 349, 349-50 (2011).

8. *Id.* at 352.

9. *See id.* at 353 (citing SHAFFER & COCHRAN, *supra* note 3, at 25-26).

With the exception of the phrase below in italics, Professor Freedman favorably quotes my description of the collaborative school of client counseling¹⁰ to which Professor Shaffer and I ascribe:

[T]he relationship between lawyer and client should be a collaborative one. . . . Lawyers should advise clients about moral issues that arise in representation in the way that friends advise friends, raising such issues for serious discussion, but not imposing their will on the client. . . . One of the best ways to raise moral concerns in the law office is by asking questions which 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 (*as with client-centered lawyers*) merely the consequences to the client. The lawyer might also ask, "What would be fair?" Such questions call on clients to draw on their own sources of moral values.¹¹

Professor Freedman has advocated this position for several decades.¹² In his words (from 1978), lawyers should counsel their clients "regarding . . . moral responsibilities as the lawyer perceives them."¹³ Indeed, his arguments (along with those of Professor Shaffer) persuaded me to adopt this position. Note that in collaborative client counseling, as in Professor Freedman's client counseling, moral discourse occurs throughout the decision-making process. It is present from the time that the consequences of various alternatives are identified through the client's choice among the alternatives.

Professor Freedman's objection to my statement quoted above is that I contrast moral counsel with the practice of the "client-centered counselors."¹⁴ I confess that my statement would have been more

10. For a more detailed discussion of the collaborative approach to client counseling, see generally ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* (2d ed. 2006), and SHAFFER & COCHRAN, *supra* note 3, at 42-86.

11. Freedman, *supra* note 7, at 352-53 (emphasis added) (quoting Cochran, *supra* note 4, at 690, 692) (internal quotation marks omitted).

12. See MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 50-53 (1990) [hereinafter FREEDMAN, ULE I]; Freedman, *Personal Responsibility*, *supra* note 2, at 199-201. In Professor Freedman's comments on my *Campbell Law Review* lecture, he takes me to task for citing to the first edition of his book, rather than the most recent edition. Freedman, *supra* note 7, at 351. At various places in my lecture, I cite to various editions of his text. See, e.g., Cochran, *supra* note 4, at 687 nn.5-6, 689 n.15. My practice generally is to cite to the edition of a text in which I first learned of the author's position on the cited issue. On the primary question at issue herein, Professor Freedman has maintained strong support for lawyer-client moral discourse throughout the editions of his book.

13. Freedman, *Personal Responsibility*, *supra* note 2, at 204.

14. See Freedman, *supra* note 7, at 352-53.

accurate had I contrasted the collaborative view with the dominant position of the client-centered counselors. Professor Freedman argues that my description above of collaborative lawyering is also “a good summary of client-centered lawyering.”¹⁵ However, Professor Freedman and his co-author, Professor Abbe Smith, appear to be alone among the client-centered counselors in supporting the idea of moral counsel as an integral part of the decision-making process. I am pleased that my description above is a good summary of Professor Freedman’s view of lawyering, but it is not the view of the vast majority of client-centered lawyers.

Professor Freedman first publicly adopted the “client-centered” label for his theory of lawyering in 2002 in the second edition of his *Understanding Lawyers’ Ethics*, in which he was joined by Professor Smith.¹⁶ At the point at which he adopted that label, the “client-centered” school of legal counseling was well-established and explicitly rejected moral counsel as a part of the decision-making process.¹⁷

The founders of “client-centered” legal counseling include Professors David Binder, Susan Price, Paul Bergman, Robert Bastress, and Joseph Harbaugh.¹⁸ “Client-centered” lawyering, as defined by them, focuses on the desires of the client.¹⁹ They argue that because client autonomy is of paramount importance, “decisions should be made on the basis of what choices are most likely to *provide clients with maximum satisfaction*.”²⁰ The lawyer should not act in ways that would influence the client’s choice. The lawyer should be “neutral”²¹ and

15. *Id.* at 353.

16. Compare FREEDMAN & SMITH, ULE II, *supra* note 1, at vii, with FREEDMAN, ULE I, *supra* note 12, at ix.

17. See Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 774 (1987).

18. See generally ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 26-32 (1990) (presenting the “person-centered” approach of legal counseling); DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 1-13 (2d ed. 2004) [hereinafter BINDER ET AL., LAWYERS AS COUNSELORS II] (identifying the central components of client-centered counseling); DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 147-53 (1977) (advocating a client-centered approach to decision making). Paul Tremblay joined the Binder group for the 2004 edition and Ian S. Weinstein for the 2011 edition. DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (3d ed. 2012) [hereinafter BINDER ET AL., LAWYERS AS COUNSELORS III].

19. See BASTRESS & HARBAUGH, *supra* note 18, at 256; BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 18, at 3; BINDER & PRICE, *supra* note 18, at 147-49.

20. BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 18, at 272; BINDER ET AL., LAWYERS AS COUNSELORS III, *supra* note 18, at 318. See BASTRESS & HARBAUGH, *supra* note 18, at 256.

21. BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 18, at 300; BINDER ET AL., LAWYERS AS COUNSELORS III, *supra* note 18, at 346. See BINDER & PRICE, *supra* note 18, at 166. In his response to my *Campbell Law Review* speech, Professor Freedman emphasizes that his form of

"nonjudgmental."²² The lawyer should express empathy for the client's feelings, because "[y]ou communicate respect through . . . accurate empathy; your understanding of the client's feelings and experiences necessarily implies that the client has acted, or reacted, in a way that is natural and appropriate. That is, the client's feelings and experiences are 'understandable.'"²³ (As Stephen Ellmann has noted, "[i]t is hard to escape the conclusion that what is 'natural and appropriate,' and thus 'understandable,' is also 'right.'"²⁴)

When a decision is to be made in legal representation, these client-centered lawyer advocates suggest that the lawyer and client list on a sheet of paper all of the alternative courses of action and the potential consequences of each.²⁵ Under the Bastress and Harbaugh model, the consequences are labeled "consequences for client."²⁶ The lawyer asks probing questions that will help the lawyer and client to more fully understand the consequences for the client.²⁷ The client then decides among the alternatives.²⁸

The client-centered emphasis on client interests, at the possible expense of the interests of other people, is illustrated by an example in the Bastress and Harbaugh book. They suggest that prior to a counseling session, the lawyer prepare a counseling plan.²⁹ The hypothetical case that introduces and illustrates their method involves Ralph Kratzer, a long-time friend and neighbor of the client.³⁰ Kratzer has opened a bar in the client's neighborhood, which may violate a zoning ordinance.³¹ Bastress and Harbaugh set up a portion of the counseling plan as follows:

client-counseling is not "neutral." Freedman, *supra* note 7, at 351-52. In this respect, he differs with the dominant position among client-centered lawyers.

22. BASTRESS & HARBAUGH, *supra* note 18, at 57.

23. *Id.* at 130, quoted in Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991, 993 (1992).

24. Ellmann, *supra* note 23, at 993.

25. BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 18, at 301; BINDER ET AL., LAWYERS AS COUNSELORS III, *supra* note 18, at 345-46; BINDER & PRICE, *supra* note 18, at 184. See, e.g., BASTRESS & HARBAUGH, *supra* note 18, at 246-48.

26. BASTRESS & HARBAUGH, *supra* note 18, at 246.

27. See *id.* at 236.

28. See *id.*

29. *Id.* at 237-41.

30. *Id.* at 241.

31. See *id.*

Alternative	Consequences for Client	Probing Subjects
File Civil Action	Strain on relationship with Kratzer	How important to the client is his friendship with Kratzer? ³²

The counseling plan then lists several other potential consequences to the client of filing a civil action, but there is no mention of the effect of the action on Kratzer.³³ The consequences to Kratzer of the client's filing suit are to be considered solely in light of the effect that they will have on the client; Kratzer has no independent moral significance. The plan suggests that if Kratzer were not a friend, or if the client's friendship with Kratzer were not seen by the client as important, Kratzer would not be worthy of consideration.

Despite the claim among most client-centered counselors that their methods are "neutral," this method of decision-making is likely to influence clients to make self-serving choices. Under the dominant method of client-centered counseling, the lawyer and client consider alternatives in light of "consequences for the client," not consequences for others.

The client is likely to look to the lawyer to take the lead in the lawyer-client relationship, and if the lawyer identifies some considerations that are important (consequences to the client) and fails to identify other considerations (consequences to other people), the client is likely to assume that consequences to other people are not important. Far from being neutral, during decision-making, these client-centered methods steer clients to make self-serving choices.³⁴

Though most client-centered counselors do not raise moral concerns during the decision-making process, they do allow for lawyer conscientious objection once the client has made a decision. They allow lawyers to challenge client decisions that they believe to be morally repugnant and to withdraw if clients maintain their position.³⁵ The

32. *Id.* at 246.

33. *See id.*

34. Binder and Price, in their 1977 book, suggest that lawyers and clients consider "social consequences," but the focus is on the consequences to the client of effects on other people. BINDER & PRICE, *supra* note 18, at 145. In all of the examples they give of lawyers and clients considering "social consequences," the focus is on the consequences to the client. *See, e.g., id.* at 138-39, 145, 151. In the 2004 book from the Binder group, the authors note that if clients "fail to recognize that one or more of their possible alternatives may have a substantial positive or negative impact on third parties or society in general. . . . [Y]ou may well want to call such possibilities to their attention." BINDER ET AL., *LAWYERS AS COUNSELORS II*, *supra* note 18, at 308. *See* BINDER ET AL., *LAWYERS AS COUNSELORS III*, *supra* note 18, at 406-07.

35. BASTRESS & HARBAUGH, *supra* note 18, at 334-35; BINDER ET AL., *LAWYERS AS*

lawyer's conscience might legitimately come into play when the client makes a decision that the lawyer believes is morally wrong.³⁶ "[C]lient-centeredness need not cause you to wholly abandon your moral commitments. When clients opt for courses of action that you believe are morally repugnant (though lawful), self-respect for your own autonomy may make it appropriate for you [to] ask them to reconsider their decisions."³⁷

Professor Shaffer and I have raised concerns with this form of moral discourse:

First, client-centered counselors' moral discourse comes into play only when the lawyer feels that the client wants to do something that is "morally repugnant." 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 repugnant," 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.

....

There is an unjustified finality in the lawyer's moral impulse as it is described by the client-centered counselors. There is too much lonely independence in it. It is too little like the ordinary conversations we have with family, friends, and associates about what to do. In ordinary conversation we propose, try out, suggest, and listen. We rarely issue moral pronouncements arrived at "independently" and outside of ordinary, tentative, mutual conversation. We are not ordinarily conscientious objectors in our relationships with other people.

Second, we think that the method of moral discourse suggested by the client-centered counselors is likely to be ineffective. The client is likely to feel a sense of betrayal after the lawyer leads the client to consider a decision in terms of narrow client interest, and then challenges the client's decision. The client may well feel that the lawyer was involved in making the decision and has in some significant way become committed to it. In addition, when clients have

COUNSELORS II, *supra* note 18, at 292-95; BINDER ET AL., LAWYERS AS COUNSELORS III, *supra* note 18, at 338-41.

36. BASTRESS & HARBAUGH, *supra* note 18, at 334-35; BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 18, at 293-95; BINDER ET AL., LAWYERS AS COUNSELORS III, *supra* note 18, at 339. Binder and Price's earlier counseling book provides no place for moral counsel. See BINDER & PRICE, *supra* note 18, at 138, 144 (categorizing the nonlegal consequences that will arise upon choosing a given course of action as economic, social, and psychological, but omitting moral consequences).

37. BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 18, at 293. See BINDER ET AL., LAWYERS AS COUNSELORS III, *supra* note 18, at 339.

decided what to do following a counseling session, it is unlikely that they will admit that they were wrong. Once it is made, they are likely to grow in their commitment to the decision. Finally, lawyers are likely to recognize the futility of such a challenge and not even make the effort. After lawyers encourage the client to see things 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. Morals at that point seem too much like an intrusion on "legal business."³⁸

Here, as I did in my *Campbell Law Review* speech, Professor Shaffer and I may have painted with too broad a brush. We describe the dominant client-centered counseling position, one that is not shared by Professor Freedman. As we note in our book, Professor Freedman shares our view that moral discourse should be an integral part of the client-counseling decision-making process.³⁹

III. "MIS-UNDERSTANDING FREEDMAN'S ETHICS":⁴⁰ WHY IS IT SO COMMON?

Professor Freedman begins his comment on my speech with the story of one of his colleagues who showed his students a clip from the movie *Kramer vs. Kramer*. In the film, the father's lawyer tells the father that he is going to "play rough" in the custody fight, and he proceeds to do so.⁴¹ Professor Freedman notes:

The lawyer at no time makes any effort to counsel the client about the nature of hard-fought custody litigation, to suggest either an effort at conciliation with the mother or an amicable arrangement for sharing time with the child, or to seek out the client's true feelings and desires about possible courses of action.⁴²

Following the film clip, Professor Freedman's colleague told his students (to the distress of Professor Freedman) that the *Kramer vs.*

38. SHAFFER & COCHRAN, *supra* note 3, at 24-25 (footnote omitted). See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 23-24 (1994).

39. See *supra* notes 8-9 and accompanying text.

40. This is a play on the title of Professor Freedman's book, *Understanding Lawyers' Ethics*. See Teresa Stanton Collett, *Understanding Freedman's Ethics*, 33 ARIZ. L. REV. 455 (1991).

41. *KRAMER VS. KRAMER* (Columbia Pictures 1979).

42. Freedman, *supra* note 7, at 349. The *Kramer vs. Kramer* lawyer is an example of what Professor Shaffer and I have labeled the "godfather lawyer," a lawyer who attacks the opposing party on behalf of the client, whether or not the client wants the lawyer to do so. See SHAFFER & COCHRAN, *supra* note 3, at 7-10, 13-15.

Kramer lawyer's representation "is client-centered lawyering, which is favored by my colleague, Professor Freedman."⁴³

How can it be that Professor Freedman's colleague, in the face of Professor Freedman's consistent and decades-long advocacy of lawyer-client moral discourse, assumed that Professor Freedman would favor the *Kramer vs. Kramer* representation? One who has read Professor Freedman carefully will know that this sort of representation is inconsistent with his position. And yet, I believe that Professor Freedman's colleague is representative of many (if not most) law students, lawyers, and law professors who know of Professor Freedman's work. They would be surprised to learn that Professor Freedman advocates lawyer-client moral discourse. In this concluding section, I will briefly address two possible reasons for this misperception. Lawyers assume that Professor Freedman will always favor aggressive lawyer advocacy because he adopts "client-centered" as the label for his school of legal representation, and he consistently identifies "client autonomy" as the goal of that representation.

A. "Client-Centered" Representation

Professor Freedman and the other client-centered counselors have chosen a name for their school of lawyering that suggests that lawyers pursue client interests, irrespective of the harm that they might cause to others. Labels are important. The term "client-centered" suggests that legal representation should center around the client. The client is in the center; other people (like Mr. Kramer's wife and child) are on the periphery. The representation is all about the client. Moreover, the term "client-centered" is likely to be understood by the reader (whether consciously or not) as a play on the term "self-centered." We generally do not like self-centered people. They always seek their way. Why should lawyers create self-centered clients?

I realize that the term "client-centered" and its theory were originally designed to shift law practice away from being "lawyer-centered," to change the common practice of lawyers being in charge of legal representation.⁴⁴ But the common perception of client-centered

43. Freedman, *supra* note 7, at 349 (internal quotation marks omitted). Professor Freedman's colleague misunderstood not only Freedman's position, but that of the other client-centered counselors as well. They argue that the lawyer should operate at the direction of the client. See *supra* text accompanying notes 19-23.

44. See generally DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974) (advocating a move away from the traditional approach of professional predominant control, and toward a participatory approach where clients share control and decision responsibility with the professional).

lawyering is that it advocates that decisions in the representation be made solely in the client's interests. As I noted earlier in this Article, the client-counseling structure advocated by most client-centered counselors reinforces that perception.⁴⁵ If Professor Freedman and other client-centered counselors want lawyers and clients to consider the interests of other people who might be affected by their representation, they might consider another name for their school of client counseling. The current name suggests that it is all about the client.

B. "Client Autonomy"

A second reason that Professor Freedman's advocacy of moral counsel is often overlooked is his insistence that "client autonomy" is the ultimate end of legal representation. In an oft-quoted section from Professor Freedman's 1978 article and each edition of his *Understanding Lawyers' Ethics*, he couples his call for lawyer-client moral discourse with the following: "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 free exercise of his autonomy. . . . [T]he attorney acts both professionally and morally in assisting clients to maximize their autonomy."⁴⁶

There is ambiguity in Professor Freedman's use of the term "autonomy." In this and other statements, it is not entirely clear whether he is advocating client autonomy vis-à-vis only the lawyer or client autonomy vis-à-vis other people as well (for example, a client's neighbors, community, employees, or Mr. Kramer's wife and child). Again, I favor client control of the representation, but autonomy vis-à-vis the other people in the client's life should not necessarily be the end of the representation.

Note that in the quotation from Professor Freedman just above, he argues that client autonomy is important because it is "[e]ssential to each individual's dignity." Client dignity is the primary goal; client autonomy is a means to that end. However, Professor Freedman gives little or no attention to other aspects of client dignity. As Professor Robert Vischer has noted, proponents of aggressive lawyer advocacy commonly use the

45. See *supra* text accompanying notes 25-34.

46. FREEDMAN, ULE I, *supra* note 12, at 57. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 3.08, at 62 (4th ed. 2010) [hereinafter FREEDMAN & SMITH, ULE IV]; Freedman, *Personal Responsibility*, *supra* note 2, at 204. Other client-centered lawyers also identify client autonomy as the primary focus of legal representation. See, e.g., BASTRESS & HARBAUGH, *supra* note 18, at 256; BINDER ET AL., LAWYERS AS COUNSELORS II, *supra* note 18, at 272; BINDER ET AL., LAWYERS AS COUNSELORS III, *supra* note 18, at 318.

term client dignity interchangeably with that of client autonomy.⁴⁷ But there are other important aspects of client dignity that might be in tension with client autonomy, including community, responsibility, friendship, love, and even vulnerability.⁴⁸ Autonomy is commonly perceived to be freedom from all of those things. But full human dignity involves flourishing in all aspects of life, including one's relationships. Autonomy is an important aspect, but only one aspect, of client dignity. A constant focus on autonomy, freedom, and rights as the ends of representation in the writings of Professor Freedman and other client-centered counselors overshadows other aspects of client dignity. Lawyers can undercut client dignity by controlling the representation, but lawyers can also undercut client dignity by helping clients to do something that is beneath their dignity.⁴⁹

Context is important. Professor Freedman and other client-centered lawyers write in the context of an increasingly me-first, individualistic, materialistic culture that affects both clients and lawyers. They write to lawyers, who are likely to find it in their economic advantage to aggressively pursue client interests. Calls for moral discourse are likely to be drowned out by the culture's call to "be good to yourself."⁵⁰

47. Robert K. Vischer, *How Do Lawyers Serve Human Dignity?*, U. ST. THOMAS L.J. (forthcoming 2012) (manuscript at 1), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1957845.

48. *Id.* (manuscript at 13-14) (citing GEORGE W. HARRIS, DIGNITY AND VULNERABILITY: STRENGTH AND QUALITY OF CHARACTER 68-69 (1997)).

49. *Id.* (manuscript at 19 & n.101) (citing Herbert Spiegelberg, *Human Dignity: A Challenge to Contemporary Philosophy*, in HUMAN DIGNITY: THIS CENTURY AND THE NEXT 54-55 (Rubin Gotesky & Ervin Laszlo eds., 1970)).

50. Professor Freedman quotes my statement that the collaborative lawyer "engages in moral conversation with the client but generally leaves decisions to the client." Freedman, *supra* note 7, at 352 (emphasis added) (quoting Cochran, *supra* note 4, at 691) (internal quotation marks omitted). Professor Freedman wonders about the "generally." *Id.* As Professor Shaffer and I note in our text, we believe that moral discourse will usually generate agreement between the lawyer and client, but that there are times when the lawyer should refuse to join the client. See SHAFFER & COCHRAN, *supra* note 3, at 26. "In our view, a lawyer should withdraw from representation when the client wants her to do something that the lawyer believes to be morally wrong." *Id.* at 27. This appears to be consistent with the position of both Professor Freedman and the Restatement (Third) of the Law on the Law Governing Lawyers that withdrawal is permissible when the harm to other people from the representation would be greater than the harm to the client from withdrawal. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 32(4) (1998); FREEDMAN & SMITH, ULE IV, *supra* note 46, § 3.09, at 66. That restriction on withdrawal was added to the Restatement (Third) after Professor Freedman criticized an earlier draft that had no such limitation. See FREEDMAN & SMITH, ULE IV, *supra* note 46, § 3.09, at 66 n.110 (citing Monroe Freedman, *ALI to Clients: Drop Dead!*, LEGAL TIMES, May 31, 1993, at 26).

Relatedly, Professor Freedman wonders whether I would withdraw from representing Theodore Kaczynski, who objected to the insanity defense and thereby exposed himself to the death penalty because the insanity defense would undercut his ecology advocacy. Freedman, *supra* note 7, at 352. I would not. In my view, there are some principles worth dying for, and I would support

I have long advocated that lawyers allow clients to control decisions during legal representation.⁵¹ In my *Campbell Law Review* speech, in addition to criticizing client-centered lawyers for focusing on client autonomy at the expense of other people, I criticized authoritarian lawyers who control decisions during representation.⁵² In my earliest legal ethics scholarship, I too used the term “autonomy” for my preferred notion of client control.⁵³ But I gave it up. The term “autonomy” is too absolute. An autonomous person has no constraints. It suggests that independence is always good, dependence always bad. But dependence—on neighbors, on friends, on spouses, on parents, and on children (increasingly, at my age)—can be among the greatest joys of human life. And dependence on a lawyer, in the right circumstances, can be a good thing. Lawyers should not start off with the objective to “maximize” client autonomy. Whether the lawyer and client should “maximize” client autonomy should be the subject of the discussion between them.

IV. CONCLUSION

It may be too late in the day to hope that Professor Freedman will break from the client-centered lawyers and join Professor Shaffer, me, and others as a “collaborative counselor,” in a school of client counseling that better captures his call for lawyer-client moral discourse. Short of a complete conversion, my hope is that Professor Freedman will challenge the dominant client-centered position on this issue and seek reform from within.⁵⁴ Lawyer-client moral discourse should be an integral part of legal representation.

Kaczynski’s selection of the principles that he is willing to die for. I wonder whether Professor Freedman would defer to James Louis Holland, who wanted to accept the death penalty rather than risk getting a life sentence in a prison where he could not smoke. See *State v. Holland*, 876 P.2d 357, 360 n.3 (Utah 1994); *Death Wish Shallow*, DESERET NEWS (June 7, 1988, 12:00 AM), <http://www.deseretnews.com/article/6677/DEATH-WISH-SHALLOW.html>. I would not. The right to smoke is not a principle I would assist a client to die for.

51. See Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819, 830 (1990).

52. See Cochran, *supra* note 4, at 689-90.

53. See Cochran, *supra* note 51, at 830-33.

54. Professor Freedman’s only critique thus far of the other client-centered counselors is to note his (and Abbe Smith’s) “concern” that they practice “quasi-therapeutic lawyering.” FREEDMAN & SMITH, ULE IV, *supra* note 46, § 3.04, at 51 (citing Ellmann, *supra* note 17, at 739).