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MONROE FREEDMAN'S INFLUENCE ON LEGAL EDUCATION

*Peter A. Joy**

I. INTRODUCTION

Monroe Freedman's influence on legal education was profound by any measure. He was much more than a gifted scholar and teacher, though he was both of those, as well as an accomplished lawyer.¹ He was also the antithesis of a law professor disconnected from the practice of law, who produces scholarship that has little to no relationship to the

* Henry Hitchcock Professor of Law, Washington University School of Law. I thank Susan Fortney and Eric M. Freedman for their very helpful comments and suggestions. Some of the thoughts expressed in Part III build upon a short tribute to Monroe Freedman that appeared in the *AALS Section on Professional Responsibility Newsletter*. See Peter A. Joy, *Monroe Freedman*, AALS SEC. ON PROF. RESP. NEWSL., Spring 2015, at 22-23 (on file with the Hofstra Law Review).

1. Monroe Freedman's list of achievements and honors is extensive and includes trial and appellate litigation in several state and federal courts and before administrative agencies; election to the American Law Institute and as a Fellow of the American Bar Foundation; and several state and national bar awards for his contributions to the field of professional responsibility, influential scholarship in the field of lawyers' ethics, and contributions to legal education and public service. Monroe H. Freedman, *Qualifications of Monroe H. Freedman as an Expert Witness on Lawyers' and Judges' Ethics*, MAURICE A. DEANE SCH. L. HOFSTRA U., http://law.hofstra.edu/pdf/directory/faculty/fulltimefaculty/ftfac_mfreedman_qualifications.pdf (last visited Apr. 10, 2016) [hereinafter Freedman, *Qualifications of Monroe H. Freedman*]. As a law professor and a lawyer, he was the first to argue and successfully litigate that the ABA lawyer advertising restrictions violated the First Amendment. Ralph J. Temple, *Monroe Freedman and Legal Ethics: A Prophet in His Own Time*, 13 J. LEGAL PROF. 233, 233-34 (1988). In 1970, while teaching at George Washington University School of Law, he also directed the Stern Community Law Firm in Washington, D.C., to conduct public interest litigation. The public interest law firm ran advertisements that drew complaints leading the legal ethics and grievance committee of the District of Columbia Bar Association to investigate. Monroe Freedman, *Solicitation of Clients: For the Poor Not the Privileged*, JURIS DR., Apr. 1971, at 10, 11-12 [hereinafter Freedman, *Solicitation of Clients*]. The bar committee ruled that, based on the First Amendment to the Constitution as well as other reasons, nonprofit law firms could advertise, which was the first such ruling in the United States. *Id.* at 12. Six years later, in *Bates v. State Bar of Arizona*, the U.S. Supreme Court held that the First Amendment protected truthful advertising of routine legal services. 433 U.S. 350, 384 (1977). The Court cited to Freedman for the idea that the legal profession's failure to advertise may create public disillusionment with the legal profession. *Id.* at 370 & n.21 (citing MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 115-16 (1975)).

practice of law.² Instead, Monroe Freedman's scholarship was singularly focused on the difficult ethical issues lawyers face in the practice of law, and he was fully engaged with the practicing bar. In many ways, he was the epitome of "the law professor viewed as a superior lawyer,"³ not only producing scholarship useful to practitioners, but also scholarship that helped other law professors teach law students to become effective, ethical lawyers. Much of his scholarship was on the leading edge of what was to become the field of legal ethics and the teaching of professional responsibility in law schools.⁴

Monroe Freedman raised questions about lawyers, their role in an adversary system, and the importance of loyalty to clients. He also demonstrated that law professors could effectively teach legal ethics not only in a Legal Ethics course but also in other courses, using his first-year Contracts course as an example. Through his scholarship and his teaching, Freedman greatly influenced legal education in the content of Legal Ethics courses, as well as how those courses are taught. This Essay focuses on Monroe Freedman's influence on legal education.

II. CONTRIBUTIONS TO THE DEVELOPMENT OF LEGAL ETHICS IN THE LAW SCHOOL CURRICULUM

Monroe Freedman began teaching in 1958, long before legal ethics was a recognized field of scholarship and more than a decade before a course in legal ethics (today, usually titled, "Professional Responsibility")

2. Commentators have argued that law professors have been disconnected from the practice of law, especially in terms of producing legal scholarship that has little value to practicing lawyers or judges. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 *passim* (1992); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1235-36, 1236 nn.13 & 16, 1238-39, 1243, 1252, 1256 (1991); Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421, 1451, 1460 (1995); George L. Priest, *The Increasing Division Between Legal Practice and Legal Education*, 37 BUFF. L. REV. 681, 681 (1989). More recently, Chief Justice John Roberts stated, "Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic who wrote it, but isn't much help to the bar." Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. TIMES, Oct. 22, 2013, at A15. Chief Justice Roberts further stated, "About 43 percent of law review articles have never been cited in another article or in a judicial decision." *Id.*

3. Considering the history of legal scholarship, Judge Richard Posner explained the concept of the law professor as a superior lawyer by stating:

It used to be that law professors were in the university but of the legal profession. . . . The job of the professor was to produce knowledge useful to the practitioner. To be useful it had to have a credible source and to be packaged in a form the practitioner could use. The source was the law professor viewed as a superior lawyer.

RICHARD A. POSNER, *OVERCOMING LAW* 82-83 (1995).

4. In this Essay, I use professional responsibility and legal ethics interchangeably.

or “Legal Profession”) was a required subject in law schools.⁵ Although Ohio State College of Law was the first law school to have a lecture series on legal ethics in as early as 1898, most law schools that followed only offered ungraded, non-credit-bearing ethics instruction consisting of lectures by judges or lawyers, which “were generally short on content and long on platitudes.”⁶

A survey of ABA-accredited law schools conducted in the fall of 1957 and published in 1958, the year Freedman began teaching, showed that only 54 of the 128 ABA-accredited law schools⁷ reported that they offered a course in legal ethics (at that time usually under the title, “Legal Ethics” or “Legal Profession”).⁸ Of the 54 law schools offering a course, 43 reported giving academic credit, and of those, 39 reported awarding grades as in other graded courses.⁹ Additionally, 34 of the 54 schools reported that the course was for one semester hour, 6 reported two semester hour courses, and the report does not break down how many hours the remaining 14 schools required in their courses.¹⁰ As this survey reveals, some law schools were taking the teaching of ethics more earnestly than at the turn of the twentieth century, but only a small number reported treating the subject seriously by requiring courses of at least two semester hours.

While law schools during the first two-thirds of the twentieth century were little focused on legal ethics, Freedman turned his attention to developing legal ethics as a field of study. In 1966, Freedman wrote an article for a symposium at the University of Michigan on professional ethics, which advanced the view that policies underlying the adversary system, the presumption of innocence, the burden of proof beyond a reasonable doubt, the right to counsel, and the duty of confidentiality a lawyer owes the client in a criminal case all require a the lawyer to resolve three of hardest questions facing a defense lawyer in favor of the

5. See *infra* notes 7-10 and accompanying text.

6. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 35 (1992).

7. See ABA, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, 1957 REVIEW OF LEGAL EDUCATION 5-15 (1957). In 1958, when the survey was published, there were still 128 ABA-accredited law schools. See ABA, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, 1958 REVIEW OF LEGAL EDUCATION 5-15 (1958).

8. Caleb Foote et al., *Report of the Committee on Education for Professional Responsibility*, 1958 ASS'N AM. L. SCHOOLS 169, 171 (1958). The survey was distributed in the fall of 1957, and the results were published in 1958. *Id.* at 169. The deans of eighty-five law schools responded. *Id.* In a subsequent survey of ethics courses in the law school curriculum in 1977, the ethics courses were usually under the title “Professional Responsibility” or “The Legal Profession.” See MICHAEL J. KELLY, LEGAL ETHICS AND LEGAL EDUCATION 55 n.3 (1980).

9. Foote et al., *supra* note 8, at 171.

10. *Id.*

client.¹¹ Those three hardest questions for defense lawyers were, and remain, the following: (1) whether it is proper to cross-examine for the purpose of discrediting the testimony of an adverse witness the lawyer knows to be telling the truth; (2) whether it is proper to put a witness on the stand when the lawyer knows the witness will commit perjury; and (3) whether it is proper to give legal advice to a client when the lawyer believes that the advice will tempt the client to commit perjury.¹² The well-known article that espoused these three questions—*Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*—was based on a lecture Freedman had presented earlier in the District of Columbia, which triggered an unsuccessful bar disciplinary complaint lodged by some lawyers and judges urging his disbarment or suspension.¹³

The same year his article was published in the *Michigan Law Review*, authors of a highly popular criminal procedure casebook incorporated almost the entire article into their textbook.¹⁴ Since then, the article has been reprinted or excerpted in over forty textbooks.¹⁵ By exploring issues that lawyers face in practice, Freedman was providing thoughtful guidance to the practicing bar and judges, and he was demonstrating to law faculty the need to incorporate legal ethics material into their casebooks to help foster the development of professional judgment in law students. Freedman was demonstrating that legal ethics, properly understood, should focus on the difficult issues practitioners face.

A year after exploring the difficult issues criminal defense lawyers face, Freedman turned his attention to the professional responsibility of prosecutors.¹⁶ In explaining why he was focusing on prosecutorial ethics, Freedman stated, “[T]here can be no area of professional ethics more in need of analysis than that of the prosecuting attorney, since there are a substantial number of ethical problems that are unique to his high and difficult calling.”¹⁷ Freedman then proceeded to examine six of those

11. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1471 (1966) (analyzing the three hardest questions regarding professional responsibility of criminal defense lawyers).

12. *Id.* at 1474-75, 1478.

13. *Id.* at 1469 n.1. The judges included then-U.S. Court of Appeals Judge for the District of Columbia Circuit, Warren Burger, who would later become Chief Justice of the U.S. Supreme Court. Ronald D. Rotunda, Book Review, 89 HARV. L. REV. 622, 622 n.3 (1976).

14. LIVINGSTON HALL & YALE KAMISAR, MODERN CRIMINAL PROCEDURE 783-93 (2d ed. 1966).

15. Freedman, *Qualifications of Monroe H. Freedman*, *supra* note 1, at 5-7.

16. Monroe H. Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030, 1032-34 (1967).

17. *Id.* at 1034.

problems, which unfortunately persist to this day.¹⁸ Seeing the relevance of this scholarship to the subject matter of their courses, authors soon incorporated portions of his article on prosecutorial ethics in their textbooks on criminal justice and criminal procedure.¹⁹

To dispel any beliefs that difficult ethics issues were confined to the practice of criminal law, Freedman published an article focusing on the professional responsibility of the civil practitioner in 1969.²⁰ In that article, Freedman explored a number of difficult issues civil practitioners face, and he explained how these could be incorporated into a first-year course in contracts, which he had already been doing. The article had been originally presented at a national conference devoted to education for professional responsibility,²¹ and Freedman was part of a session promoting teaching professional responsibility in law school through the pervasive approach.²² Indeed, in 1967, he had written a contracts casebook, which not only covered doctrine but, as an added feature, also explored “the advantages and disadvantages of an adversary system, including methods and ethical problems of drafting, construction, and negotiation directed toward obtaining favorable settlement from existing or potentially adverse parties.”²³

18. The six problems he discussed were as follows: (1) cases in which the primary motive to prosecute is unrelated to the crime for which the person is being prosecuted, such as prosecuting Al Capone for tax evasion; (2) plea bargaining tactics that are beyond the scope of court supervision; (3) covering up police abuses, such as excessive use of force, perjury, and unlawful arrests, searches, and interrogations; (4) suppressing evidence favorable to the accused, coercion of witnesses, and the introduction of false and misleading evidence; (5) attempting to preclude court review of important issues by dismissing prosecutions; and (6) failing to advise the court regarding, and at times taking advantage of, ineffective assistance of counsel. *Id.* at 1034-41.

19. See, e.g., Freedman, *supra* note 16, at 1034-45, as reprinted in JOHN KAPLAN, CRIMINAL JUSTICE: INTRODUCTORY CASES AND MATERIALS 246-47 (1973); Freedman, *supra* note 16, at 1034-35, as reprinted in LIVINGSTON HALL ET AL., MODERN CRIMINAL PROCEDURE 748-49 (3d ed. 1969).

20. Monroe H. Freedman, *Professional Responsibility of the Civil Practitioner: Teaching Legal Ethics in the Contracts Course*, 21 J. LEGAL EDUC. 569 (1969). Abbe Smith, a long-time friend and co-author of Monroe Freedman, recounts the following speech that he would deliver to students about the ethical issues in the practice of law: “As you contemplate the practice of law you should understand that you may be called upon to represent people who, out of sheer greed, will hurt and even kill other innocent people. And if you can’t handle that then you should not go into the practice of corporate law.” Abbe Smith, *Monroe Freedman—Heart and Mind*, 23 PROF. LAW., no. 2, 2015, at 14, 18.

21. Freedman, *supra* note 20, at 569 n.*.

22. See T.A. Smedley & E. Wayne Thode, *Summary and Evaluation Report*, in EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER 115 (Donald T. Weckstein ed., 1970). The pervasive approach was described as one in which “professional responsibility matters are to be considered as a natural component of the regular law school courses and that the teaching of professional responsibility is to be undertaken as an integral part of instruction in the substantive and procedural law.” *Id.* at 116.

23. MONROE H. FREEDMAN, CONTRACTS: CASES AND MATERIALS, at xv (1973).

While Freedman was raising legal ethics front and center through his scholarship and teaching, law schools were still lagging behind in requiring legal ethics instruction of all law students despite ABA resolutions, starting in the late 1920s, recommending that law schools require legal ethics to be taught.²⁴ A commentator reported that “the Association of American Law Schools strenuously opposed the requirement, fought a kind of delaying tactic by conducting a number of surveys of ethics teaching in law schools, and succeeded in outlasting the ABA.”²⁵ That changed in the aftermath of the Watergate break-in and cover-up in 1973,²⁶ in which approximately one-half of those indicted or convicted for Watergate-related crimes were lawyers.²⁷ In 1974, the summer that President Richard Nixon resigned as a result of Watergate, the ABA adopted an accreditation standard that ABA-accredited law schools require of all students “instruction in the duties and responsibilities of the legal profession,” which must encompass “the history, goals, structure and responsibilities of the legal profession and its members, including the ABA Code of Professional Responsibility.”²⁸

Although the Association of American Law Schools (“AALS”) had opposed legal ethics as a required course,²⁹ as had law school administrators, almost all law schools complied with the required ethics course once the ABA issued its new standard.³⁰ In a 1985 survey on the teaching of professional responsibility, 143 of the 176 ABA-approved law schools responded.³¹ Of those responding, ninety-five percent reported requiring a separate professional responsibility course as a graduation requirement, and the remaining five percent reported that a professional responsibility course was

24. KELLY, *supra* note 8, at 9.

25. *Id.*

26. The Democratic National Headquarters at the Watergate complex in Washington, D.C., was burglarized on June 17, 1972, by five men, including the chief security officer of the Republican National Committee and of the Committee to Re-Elect the President, Richard Nixon. LEO RANGELL, *THE MIND OF WATERGATE: AN EXPLORATION OF THE COMPROMISE OF INTEGRITY* 30 (1980). On October 10, 1972, the *Washington Post* reported that the break-in was part of a conspiracy and campaign of sabotage waged by the White House and the Committee to Re-Elect the President. *Id.*

27. Donald T. Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261, 261 (1975).

28. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS Standard 302(a)(iii) (AM. BAR ASS’N 1978) (current version at ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS Standard 303(a)(1) (AM. BAR ASS’N 2015)).

29. *See supra* note 25 and accompanying text.

30. Rhode, *supra* note 6, at 39.

31. Lisa L. Milord et al., *A Survey on the Teaching of Professional Responsibility*, 1986 A.B.A. CTR. FOR PROF. RESP. 1, 1.

optional.³² The standard did not require that the instruction be in a separate course, so presumably, a small number of schools without a required course provided some instruction in lectures or through the pervasive method in other courses.³³

Not long after the ABA required ethics instruction, starting in the early 1970s, Freedman published *Lawyers' Ethics in an Adversary System*.³⁴ This book built upon, and was largely based on, several of his earlier articles and other writings exploring the serious questions of legal ethics that had not yet been explored.³⁵ Like his articles, his book is firmly grounded in the adversary system of the U.S. justice system, and he quotes the following statement from Lord Brougham in his representation of the Queen in the *Queen Caroline* case to help explain the contours of zealotry demanded of lawyers:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.³⁶

After quoting the passage, Freedman explained, "Let justice be done—that is, for my client let justice be done—though the heavens fall. That is the kind of advocacy that I would want as a client and that I feel bound to provide as an advocate."³⁷ Freedman's reliance on Lord Brougham's statement to illustrate the lengths to which a lawyer should go in representing a client soon became a central point of discussion in professional responsibility courses.

32. *Id.* at 3.

33. As late as the 1995-1996 academic year, some law schools, such as Boston University School of Law, University of Michigan Law School, Stanford Law School, and Yale Law School, reported satisfying the ethics requirement with lectures, discussion groups, or courses with some ethics content. See Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 147 n.14 (1996).

34. FREEDMAN, *supra* note 1.

35. See generally, e.g., Freedman, *supra* note 20; Freedman, *supra* note 11; Freedman, *supra* note 16; Freedman, *Solicitation of Clients*, *supra* note 1; Monroe H. Freedman, Book Review, 16 AM. U. L. REV. 177 (1966) (reviewing JEROME CARLIN, *LAWYERS' ETHICS: A STUDY OF THE NEW YORK CITY BAR* (1966)).

36. FREEDMAN, *supra* note 1, at 9 (quoting Trial of Queen Caroline 2 (1821)).

37. *Id.*

Freedman's influence on legal education was wide and deep, and it was deepest among his students and colleagues at the Maurice A. Deane School of Law at Hofstra University. A colleague of his, Susan Fortney, described Freedman as a servant leader who "respected, supported, and motivated others."³⁸ She recounts several instances in which he inspired students and colleagues.³⁹ Roy Simon, another colleague who sat in on a number of Freedman's classes, stated that Freedman's "teaching technique was effortless and effective" and "his focus in the classroom was not on theory but on practice."⁴⁰ Simon affirmed: "He was beloved by his students, and he loved them."⁴¹

III. CONCLUSION

Throughout the United States, professors and students continue to discuss and debate Monroe Freedman's position on zealousness. His other positions, such as the right for lawyers to advertise, and the difficult issues facing lawyers in civil practice, criminal defense, and prosecution, are similarly discussed and debated. He began writing and teaching legal ethics at a time when few did, and he helped to develop the subject both as a field of scholarship and a focus for teaching. Today, an ABA standard states that every ABA-approved law school must require "one course of at least two credit hours in professional responsibility that includes substantial instruction in the history, goals, structure, values, and responsibilities of the legal profession and its members."⁴² In those ethics courses, Freedman's ideas and influence can still be felt.

Freedman was not afraid to question conventional wisdom, especially when the ways lawyers and judges approached and resolved issues were not only wrong but also harmful to clients and the public, such as the ban on lawyer advertising. He championed the cause for defense lawyers to be truly effective, for the Sixth Amendment right to counsel to be meaningful, and for prosecutors to understand and follow their professional responsibilities. As William Simon noted, "Freedman

38. Susan Fortney, *Monroe Freedman: Servant Leader, Bridge Builder*, 23 PROF. LAW., no. 2, 2015, at 18, 20.

39. *Id.* at 20-21.

40. Roy Simon, *Monroe Freedman, the Consummate Colleague*, 23 PROF. LAW., no. 2, 2015, at 23, 25.

41. *Id.*

42. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 303(a)(1) (AM. BAR ASS'N 2015).

focused attention on intensely contestable issues, the 'hardest questions' as he put it"⁴³

Freedman understood what it means to be a lawyer and, more importantly, what clients, especially those facing the government in criminal cases, need in their lawyers. He identified the three hardest questions, and he answered them. Not everyone agreed with his answers, but his commitment to seeking answers to hard questions that have a real impact on ordinary people helped shape legal education, as well as the field of legal ethics.

Ralph Temple, a former colleague of Freedman's in the practice of law, and who taught with him in the early 1960s,⁴⁴ referred to Freedman as a "Prophet in His Own Time" in the title of an essay published in 1988.⁴⁵ Temple concludes the essay noting that Monroe Freedman's views "have justly had the greatest impact on legal ethics in our time."⁴⁶ That was true in 1988, it is true today, and it will remain true long into the future.

43. William H. Simon, "Thinking Like a Lawyer" *About Ethical Questions*, 27 HOFSTRA L. REV. 1, 2 (1998) (quoting Freedman, *supra* note 11, at 1469).

44. Temple, *supra* note 1, at 233 n.*.

45. *Id.* at 233.

46. *Id.* at 239.
