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Enlightenment Liberalism, Lawyers, and the Future of Lawyer-Client Relations

ROBERT F. COCHRAN, JR.*

To some, this conference's focus on Enlightenment liberalism may seem somewhat esoteric, the stuff of ivory tower academics. But liberalism is the air in which people in the West—and increasingly the rest of the world—breathe. It affects the way we view almost every aspect of life.

I am going to address, from a Christian perspective, liberalism's relationship to the role and responsibility of the lawyer. Whether a United States lawyer could define Enlightenment liberalism or not, it is likely that the role he or she plays as an attorney every day was in large part shaped by liberalism's focus on individual autonomy. At the request of the conference organizers, I am also going to reflect on the future of lawyer-client relations.

Liberal Lawyering - I begin with a story of law practice from legal aid lawyer and community organizer Steven Wexler.¹ At a welfare rights organization meeting, a woman asked the group for help. She had a malnourished child. The group went into the emergency ward of a local hospital, stopped a doctor, and demanded that he examine the baby. The doctor, through halting English, explained that malnutrition was not an emergency and that the baby should go to the medical clinic on Monday morning. The group surrounded the doctor and ordered him to examine the baby. "He did so, and, though he could not be forced to prescribe anything for the baby, he was induced to write the mother a note indicating that she had been to the emergency room and should be seen first at the Monday clinic." Wexler concludes:

I will not try to pick out the point at which I ceased to be emotionally in favor of the action; somewhere along the line my sympathy for people who have trouble speaking English, my faith in the doctors who had been so nice to a white boy in the suburbs, . . . and many other feelings of mine which the ladies did not share made me wish that I did not have

* Louis D. Brandeis Professor of Law and Director of the Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics. The arguments made in this Speech are more fully developed in THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (2d ed. West 2009).

1. Steven Wexler, *Practicing Law for Poor People*, 79 *YALE L.J.* 1049, 1053–54 (1970).

to stay with them. . . . I would never have thought of the relief that the ladies finally obtained. But forcing the doctor to write that note was a real victory for the ladies. No lawyer has a right to deny them that victory by structuring the alternatives as he sees them or by denying the ladies the chance to choose their own way and use their lawyer to achieve their end. A lawyer must help them do their thing, or get out.²

Wexler's type of practice is unlike that of most lawyers, but his explanation for his actions is not. The lawyer's job is to *empower* the client. "A lawyer must help [clients] do their thing, or get out." The lawyer's goal is the liberal ideal, the client's autonomy.

Liberal lawyering is rooted in two liberal doctrines emphasized earlier in this conference by Bruce Frohnen: (1) respect for human dignity will yield an objective of personal autonomy³ and (2) government

2. *Id.* at 1064–65.

3. See Bruce Frohnen, *Is Constitutionalism Liberal?*, 33 CAMPBELL L. REV. __ (2011). Immanuel Kant believed that autonomy would automatically lead to moral decision-making. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 59 (Lewis Beck trans., 1959). But his notion of autonomy was a far cry from the radical individualism of modern liberalism. For Kant autonomy was the absence of any influence other than reason and he believed that morality would follow automatically from reason.

[T]his "ought" [the moral law] is properly a "would" that is valid for every rational being provided reason is practical for him without hindrance [i.e., exclusively determines his action]. For beings who like ourselves are affected by the senses as incentives different from reason and who do not always do that which reason for itself would have done, that necessity of action is expressed only as an "ought."

See *id.* at 67–68. Anything that interfered with one's ability to act rationally interfered with one's autonomy and therefore one's ability to act morally. The following section from Kant suggests the value of moral influence (from whoever the "we" is that is doing the "present[ing]"):

When we present examples of honesty of purpose, of steadfastness in following good maxims, and of sympathy and general benevolence even with great sacrifice of advantages and comfort, there is no man, not even the most malicious villain (provided he is otherwise accustomed to using his reason), who does not wish that he also might have these qualities. But because of his inclinations and impulses he cannot bring this about, yet at the same time he wishes to be free from such inclinations which are burdensome even to himself.

Id. at 73. A Kantian attorney who had a goal of client autonomy might properly seek to assist clients in freeing themselves from their "inclinations and impulses" and other things that might interfere with autonomy and moral action. There are problems with Kant's assessment of the moral life. First, it is unrealistic. No one is free from his or her senses. This is a moral theory for a world that does not exist. Second, freedom from the senses would remove from people one of the most valuable sources of moral understanding and one of the most effective incentives toward moral action--empathy. Empathy moves us toward seeing the other person as our equal and drives us to care for

can be based on self-interest.⁴ Liberalism sees the primary good as freedom. In contrast, law practice rooted in a Christian understanding teaches that (1) respect for human dignity yields community and moral responsibility; (2) government must be based on virtues of the people and this should be reflected in choices made in the law office. Christianity also values freedom, but recognizes that true freedom requires community and moral responsibility.

The moral rationale for liberal lawyering was articulated by Monroe Freedman:

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. Toward that end, each person is entitled to know his rights with respect to society and other individuals, and to decide whether to seek fulfillment of those rights through the due processes of law

[T]he attorney acts both professionally and morally in assisting clients to maximize their autonomy. . . . [T]he 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.⁵

Freedman roots his theory in a liberal view of the US constitution. "[L]awyers' ethics is rooted in the Bill of Rights and in the autonomy and the dignity of the individual."⁶ Under this view of lawyering, the lawyer's moral task is to protect clients from the influence of others, so that clients will make their own rules, be their own rulers. Liberal lawyering reinforces liberal culture, a culture where we live in what Alasdair MacIntyre describes as a society of strangers.⁷

Liberal lawyering theory yields its own school of client counseling—the "client-centered" school.⁸ As one client-centered lawyer text puts it:

the other person. In addition, reason by itself will get you nowhere. It requires a moral starting place. By itself, it provides no reason to be other than self-serving. Reason is a tool that can be used for evil as well as good purposes.

4. See Frohnen, *supra* note 3.

5. See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 57 (1990).

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

7. See ALASDAIR MACINTYRE, AFTER VIRTUE 156 (2d ed. 1984).

8. See DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (2d ed. 2004); DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991); DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND

"Because client autonomy is of paramount importance, decisions should be made on the basis of what choice is most likely to *provide a client with maximum satisfaction*."⁹

When a decision is to be made in legal representation, the client-centered lawyer and the client list on a sheet of paper all of the alternative courses of action and the "consequences to the client" of each.¹⁰ The client makes choices in that light. The client-centered counselors claim to be neutral, but in fact, their decision-making framework steers the client toward making self-serving choices. It imposes a regime of client autonomy—clients are directed to make choices based on consequences to themselves. Clients are a bundle of rights and liberal theory suggests that the lawyer should enable them to become more and more independent of others. The Enlightenment liberal ideal is C.S. Lewis's picture of hell from "The Great Divorce": Autonomous people on the outskirts of a city who continually move further and further away from one another.¹¹

Of course, client autonomy has its costs, most obviously costs to other people, and to their relationships. In the malnourished child story, Steven Wexler advocates client autonomy for a group of powerless clients, but he and others also advocate autonomy for powerful clients.¹² In his case, a goal of client autonomy led to a small amount of harm to others: The doctor was harassed, his patients were delayed, and the clinic's patients lost their places in line on Monday morning. Because Wexler's clients had little power, their small claim to autonomy did little harm. But client autonomy for those with great power (those who produce dangerous products, have many employees, or have a great impact on the environment) can result in great harm to others. Ultimately, liberal lawyering is likely to advance the autonomy of those who can afford lawyers at the expense of those who cannot.

COUNSELING: A CLIENT-CENTERED APPROACH (1977); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (1990).

9. BINDER ET AL., *supra* note 8, at 261; *see also* BASTRESS & HARBAUGH, *supra* note 8, at 256.

10. BINDER & PRICE, *supra* note 8, at 184; BASTRESS & HARBAUGH, *supra* note 8, at 246–49; BINDER ET AL., *supra* note 8, at 307.

11. C.S. LEWIS, *THE GREAT DIVORCE* 18–19 (1946).

12. Wexler, *supra* note 1, at 1063; Charles Fried, *The Lawyer as Friend*, 85 YALE L.J. 1060 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 616–19 (1986).

In some situations, it may be that the client-centered counselors' focus on client empowerment is justified. Generally, poor people need empowerment. In those cases in which the lawyer represents a poor client against a rich opponent, there is probably little need for the poor client to worry about the interests of the rich opponent—the rich opponent will likely have plenty of lawyers to look out for his interests. But when the lawyer represents the wealthy client against the (often unrepresented) poor party, the lawyer's exclusive focus on client autonomy is likely to result in injustice. If clients with great power make decisions based solely on "consequences to the client" they can cause great harm to others.

Authoritarian Lawyering – Just as liberalism arose in reaction to the authoritarianism, liberal lawyering arose in reaction to authoritarian lawyering. Liberal lawyers distinguish themselves from lawyers who assert control of legal representation. The early American gentleman-lawyer asserted control of legal representation based on his superior social status, superior influence, superior intelligence, and superior moral sensitivity. The mid-nineteenth century drafters of the earliest American professional responsibility statements, trusted lawyers, not clients, to look out for the common good. "It is the duty of counsel," George Sharswood said, "to be the keeper of the conscience of the client; not to suffer him through the influence of his feelings or interest to do or say anything wrong."¹³ David Hoffman disapproved of lawyers who invoked statutes of limitation or the law of infancy to defeat otherwise valid claims. He said of his client who wanted him to make such a claim, "He shall never make me a partner in his knavery."¹⁴ Judge Clement Haynsworth, a modern lawyer/gentleman (quoted by Monroe Freedman as an example of authoritarian lawyering) put it, "[T]he 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. . . ."¹⁵

Some are surprised that as a Christian I do not advocate an authoritarian approach to lawyering. If a lawyer knows that he is right,

13. GEORGE SHARSWOOD, *ESSAY ON PROFESSIONAL ETHICS* (1854); 32 GEORGE SHARSWOOD, *REPORTS OF THE AMERICAN BAR ASS'N* (1907), *quoted in* THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS* (1985).

14. David Hoffman, *Resolutions on Professional Deportment*, in 1 DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* 752–75 (2d ed. 1836), *quoted in* SHAFFER, *supra* note 13.

15. Clement F. Haynsworth, *Professionalism in Lawyering*, 27 S.C. L. REV. 627, 628 (1976), *quoted in* FREEDMAN & SMITH, *supra* note 6, at 52. For a more developed critique of the authoritarian approach, see SHAFFER & COCHRAN, *supra* note *, at 30–41.

shouldn't he make sure that the client does the right thing. But there are troubling aspects of the authoritarian approach. Such an approach is inconsistent with the humility with which lawyers should view themselves and with the dignity which they should seek for their clients. There is danger that the lawyer will be wrong. Moral issues in legal representation are often difficult. None of us has perfect ability to discern moral standards or to determine how they should apply. There is a danger that lawyers will be confident of their moral judgment when confidence is not justified. Generally, two consciences in conversation are more likely to get to moral truth than one.

In addition, the authoritarian lawyer is likely to impose her values on the client. Authoritarian lawyering is inconsistent with client dignity, inconsistent with love of neighbor, inconsistent with a recognition of the client as a fellow child of God. The authoritarian lawyer robs the client of the opportunity to grow morally. People grow morally through exercising moral judgment. They develop virtues through practice, as an athlete develops physical skills through practice. Lawyers who prevent clients from moral exercise—from deliberating, making moral judgments, and acting on them—deny clients the opportunity to become better people.

Collaborative Lawyering – In my view, the relationship between lawyer and client should be a collaborative one.¹⁶ Tom Shaffer and I have used the analogy to friendship as a means of understanding how lawyers should counsel clients. 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.¹⁷ This model is based on Aristotle's notion that friendship includes a concern for the goodness of the friend. He argued that friends collaborate in the good.¹⁸ As John Inazu noted earlier in this symposium, freedom of conscience itself is an inherently

16. See, e.g., JAMES E. MOLITERNO & JOHN M. LEVY, *ETHICS OF THE LAWYER'S WORK* 86 (1993); ROBERT F. COCHRAN, JR., ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO LEGAL INTERVIEWING AND COUNSELING* (2d ed. 2006).

17. See Thomas L. Shaffer, *A Lesson From Trollope*, 35 WASH. & LEE L. REV. 727 (1978); SHAFFER & COCHRAN, *supra* note *, at 42–65; ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 131–32 (1993).

18. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. VIII (Martin Oswald trans., Bobbs-Merrill Co. 1962).

communitarian concept.¹⁹ Our consciences are formed in community with others as we influence them.

This notion of friendship differs in important respects from the way that people commonly understand friendship today. Robert Bellah and his colleagues describe the most important difference as follows:

The traditional idea of friendship included a shared "commitment to the good." For Aristotle and his successors, it was precisely the moral component of friendship that made it the indispensable basis of a good society. For it is one of the main duties of friends to help one another to be better persons: one must hold up a standard for one's friend and be able to count on a true friend to do likewise. Traditionally, the opposite of a friend is a flatterer, who tells one what one wants to hear and fails to tell one the truth.²⁰

The moral value of friendship is something that has been neglected in recent ethical theory (possibly because of the liberal obsession with autonomy and notion that people must be careful lest they be influenced).

Anthony Kronman identifies sympathy and detachment as two qualities that make the counsel of both friends and lawyers valuable.

Friends take each other's interests seriously and wish to see them advanced; it is part of the meaning of friendship that they do. It does not follow, however, that friends always accept uncritically each other's accounts of their own needs. Indeed, friends often exercise a large degree of independent judgment in assessing each other's interests, and the feeling that one sometimes has an obligation to do so is also an important part of what the relation of friendship means. What makes such independence possible is the ability of friends to exercise greater detachment when reflecting on each other's needs than they are often able to achieve when reflecting on their own. A friend's independence can be of immense value, and is frequently the reason why one friend turns to another for advice. Friends of course expect sympathy from each other: it is the expectation of sympathy that distinguishes a friend from a stranger. But they also want detachment, and those who lack either quality are likely to be poor friends.²¹

The collaborative lawyer engages in moral conversation with the client but generally leaves decisions to the client. These conversations are like the ordinary conversations we have with family and friends. We

19. See John Inazu, *Between Liberalism and Theocracy*, 33 CAMPBELL L. REV. ___ (2011).

20. ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (3d ed. 2008).

21. See KRONMAN, *supra* note 17, at 131–32.

propose, try out, suggest, and listen. We rarely issue moral pronouncements arrived at "independently" and outside of ordinary, tentative, mutual conversation.

Friends raise moral issues, without imposing their values on each other. As Jeremy Taylor, a seventeenth-century bishop and Cambridge fellow said:

Give thy friend counsel wisely and charitably, but leave him to his liberty whether he will follow thee or no: and be not angry if thy counsel be rejected... He that gives advice to his friend and exacts obedience to it, does not the kindness and ingenuity of a friend, but the office and pertness of a schoolmaster.²²

(By the way, as a schoolmaster, I acknowledge Taylor's implicit point about schoolmasters. Lawyers and fathers are not the only ones who tend to act paternalistically. I like to think of myself as a schoolmaster as friend.)

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.²³

Such discourse is unlikely in the liberal lawyer's office. The language of autonomy and self-fulfillment gives us little basis for making collaborative moral decisions. In our popular anthropology, individuals make moral decisions all alone, freeCor so they thinkCfrom moral influence. We need to recapture the ability to work together, to humbly seek after the good.

Differences in power between lawyer and client may make collaboration difficult. There is a danger that either the lawyer or the client will dominate the other. The lawyer may have to work hard to

22. JEREMY TAYLOR, *A DISCOURSE OF THE NATURE, OFFICES AND MEASURES OF FRIENDSHIP* (2010), quoted in Robert J. Condlin, "What's Love Got To Do With It?" "It's Not Like They're Your Friends for Christ's Sake": *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 263 (2003).

23. For discussion and an example of how such a conversation might be structured, see SHAFER & COCHRAN, *supra* note *, at 66–86.

develop the mutuality that is necessary for moral discourse. She may need to empower the weak client and assert herself with the strong one.

The Future of Lawyer/Client Relations - The organizers of this conference asked me to play the prophet, to speculate on the future of the legal profession. I must warn you that my attempts at prophecy in the past have not been very successful. I will mention only my attempts a few decades ago to predict the future of two then-new beverage ventures. I predicted that both the corner vendors of expensive coffees and the vendors of water in plastic bottles would be failures. Contrary to my vision of the future, people today drink a lot of Starbucks coffee and bottled water. Thankfully, we do not kill our unsuccessful prophets, as was the practice in ancient times.

Nevertheless, I will take my shot at the future of lawyer/client relations. In my view, lawyer/client relations tend to reflect the culture. In a more authoritarian age, lawyers were directive. In a liberal age, lawyers defer to client autonomy. The future of lawyer/client relationships may turn on the future of human relationships in general, and the future of moral friendships in particular.

One gauge of the future is the movies we watch. Like law, movies influence and are influenced by the surrounding culture. As my friend Drew Trotter, the Executive Director of the Consortium of Christian Study Centers, has noted, movies are made by creative people who pay special attention to the interests of the people within a culture. Each year Drew prepares a lecture entitled, "The Movies and America: What the Academy Award Nominees for Best Picture Tell Us About Ourselves."

This year, a central theme in the movies that people watched was the tension between personal autonomy and personal relationships. Six of the ten Best Picture nominees centered on family²⁴ and four on friendship.²⁵ The two pictures that most people predicted would win best picture, "The Social Network" and "The King's Speech" were all about friendship.

"The Social Network" is about the shallow nature of friendship in the modern world. It opens with college student and future Facebook founder Mark Zuckerberg being dumped by a girl friend. She asks if they can just be friends. He says, "I don't want to be your friend." She

24. These movies include: *Black Swan*, *The Fighter*, *Inception*, *The Kids Are All Right*, *127 Hours*, and *Winter's Bone*.

25. These movies include: *The King's Speech*, *The Social Network*, *Toy Story III*, and *True Grit*.

says, "I was just being polite. I don't really want to be your friend either." Zuckerberg becomes obsessed with status (possibly to fill a need for family and friendship), seeking admission to an elite Harvard club and creating Facebook. He has many relationships, but no real friends, despite the movie's tagline: "You don't get to 500 million friends without making a few enemies." At the end of the movie, he has the liberal ideal, complete autonomy, but he has no friends. He pauses for a rare reflective moment, goes on Facebook, and asks his original girlfriend to be his friend. The movie ends as he continually hits the refresh button to see if she has responded.

"The King's Speech" is a story of friendship. At the insistence of his wife, the future King George VI, goes to see Lionel Logue, a speech pathologist. Lionel insists that they share a personal relationship of trust and equality. Over the future king's objections, Lionel refers to him by his family name, "Bertie." Much of the movie is built around Bertie's difficulty adjusting to the notion of equality. Friendship is something new to the king. At one point of high stress, Lionel offers Bertie a drink of malt liquor. When Bertie objects, Lionel says "That's what friends are for." Bertie responds, "I wouldn't know."

Consistent with Aristotle's notion of friendship, Lionel is more than a technical advisor. He encourages Bertie to step up to the challenge of being king. He encourages Bertie to show courage when faced with the challenge of leading his nation through World War I over the then-new social medium—"the wireless" (radio). This movie's tagline is: "It takes leadership to confront a nation's fear. It takes friendship to conquer your own." Following the king's first triumphant speech, he says to Lionel, "Thank you, my friend." Lionel responds, "Thank you, your majesty," suggesting that friendship can exist even in a ruler/subject relationship.

The films that filmmakers chose to make and that Americans chose to watch this year, suggest that we are rethinking our obsession with individual autonomy. It is right that we do so. We were made for relationships, with God, with family, and with friends. It may be that relationships will make a comeback.

I began with a story in which the moral was that lawyers should help clients "do their thing, or get out." My hope is that lawyers will give clients help in determining what "their thing" is. I hope that the lawyer as friend (and I don't mean the lawyer as Facebook friend) will emerge as the dominant lawyer model, despite all of the cultural forces weighed against it.