Introduction

Several years ago in my legal ethics class, I wanted to see how far I could push my students in their embrace of the notion that the moral evaluation of conduct depends on the professional role one occupies. I asked students to imagine that they were medical researchers in Nazi Germany and that the authorities took them to a concentration camp, inviting them to experiment on live human subjects. Would they, as scientists, proceed with the experiments? The first three students I called on answered that they would do the experiments if it would advance the research. One explained that morality is constructed by society, and in that particular society, the experiments would not be considered immoral. Another wondered why, if their deaths were assured through

no fault of the scientists, we would not take the opportunity to advance the greater good. The third insisted that the job of the researcher is to expand scientific knowledge, and the job of the government is to define the limits of that research. Absent government prohibition, the researcher has no moral reason not to proceed.

These students, I am confident, did not believe what they were saying. They were engaging my question according to the rules of good lawyering, as they perceived them – figuring out a way around any and all obstacles standing between the actor and a given course of conduct. Indeed, much of the blame for their answers belongs with the implicit messages they receive about the values of the legal profession: that cleverness is valued over wisdom, and that the law is simply a problem to be solved, rather than an inescapably moral endeavor.

More pointedly, the third student's answer was an extreme example of the common conception that professional identity is premised on the actor's capacity to stay within his or designated role, and to treat as irrelevant any moral considerations that distract from the role's primary function. The primary function, when it comes to lawyers, is to attain the client's stated objectives to the extent permitted by law. The dominant view, which holds that lawyers are not morally accountable for these objectives,[1] presumes that

[1] *Model Rules of Prof'l Cond. R.* 1.2(b) ("A lawyer's representation of a client … does not constitute an endorsement of the client's political, economic, social or moral views or activities."), cmt 2

lawyers are able and willing to disconnect their own moral convictions from their evaluation of the causes and clients they are asked to represent.

In comparison to the era when the American Bar Association, via the 1908 *Canons of Professional Ethics*, could confidently instruct lawyers to "impress upon the client and his undertaking exact compliance with the strictest principles of moral law,"[2] today we are more skeptical about the existence of any "moral law," much less that it could or should be impressed upon the client. Recognizing the variability of moral convictions and complexity of moral analysis has understandably made lawyers reluctant to judge their clients by moral standards not reflected in positive law. But this reluctance to judge seems also to have produced a reluctance to engage the client on moral terms. The resulting technocratic view of law is evidenced far beyond the walls of my classroom. A refusal to acknowledge the moral dimension of legal practice has contributed to several of the leading lawyer-fueled scandals of recent years, as well as to the broader malaise that has afflicted the profession for some time.[3] Nevertheless, the prospect of putting morality onto the table of legal representation is unsettling to many.

("[L]awyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.").

[2] *ABA Canons of Prof. Ethics*, Canon 32.

[3] Patrick J. Schiltz, *On Being a Happy, Healthy, Ethical Member of an Unhappy, Unhealthy, Unethical Profession*, 52 VAND. L. REV. 871 (1999) (collecting statistics from various studies of attorney well-being).

Introduction

Lawyers are in a position to help bring their clients' consciences into play by bringing the moral dimension of the representation to the surface. This may strike nonlawyers as an obvious conclusion, but it unfortunately runs counter to some mainstream interpretations of the lawyers' obligations. For example, Stephen Pepper has famously compared a lawyer's client to "someone who stands frustrated before a photocopier that won't copy," and who needs "a technician . . . to make it go." The technician is ordinarily not concerned with "whether the content of what is about to be copied is morally good or bad."[4] At one level, this analogy tells us something important about what lawyers do: lawyers provide citizens with access to a machine that they would not know how to work on their own. Just as we do not want the photocopier technician telling us that he will only fix our machine if we promise not to use it to copy pornography or radical political literature, we do not want the lawyer restricting an individual's legally available options based on the lawyer's own moral convictions.

The legal profession is rightfully concerned about access to law if the lawyer's conscience operates as a trump card – that is, if the lawyer is primarily concerned about "resolving" whatever moral questions are presented by the representation. But the opposite extreme – the lawyer as

[4] Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613, 624.

a photocopier technician – is equally problematic. The law is not like a photocopier. When I copy something, I know exactly what I am putting in, and I know exactly what I get back, even if I do not understand everything that happens in between. By contrast, legal advice is neither self-contained nor self-defined. In terms of "input," legal advice does not derive exclusively from application of black-letter law to the client's stated objective. Extralegal norms – including, especially, moral considerations – are part of the equation, whether they arise from the lawyer's own moral perspective, the lawyer's perception of the client's (often unstated) moral perspective, or the lawyer's application of the profession's moral perspective.[5] Further, the "output" is not an exact reproduction of the input – that is, pursuing the client's objectives may have consequences beyond the attainment of those objectives. Those consequences – such as collateral effects on the client's public standing or moral integrity, harms to the opposing party or third parties, damage to the reputations of the lawyer or her colleagues – may not be readily apparent to the client. It is not difficult to appreciate what one hath wrought through the use of a copy machine; the same cannot be said for one's use of a lawyer.

It is not the lawyer's job to resolve the moral questions that clients face. To do so infringes on client autonomy, particularly if clients are not empowered to participate in the

[5] *See generally* Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEG. ETHICS 225 (2006).

resolution. In this regard, we do need lawyers to make sure that clients are aware of the moral questions that are often embedded in the legal questions raised by the representation. Especially in cases where the governing law is indeterminate, lawyers need to be able to engage their clients in a moral dialogue, which requires some familiarity with, and sensitivity to, moral reasoning. But lawyers' capabilities in this regard should not be deployed in order to resolve the moral questions; rather, they should be deployed in order to *assist the client* in resolving the moral questions.

Unless the lawyer can refuse the representation in the first place or withdraw early enough so as not to harm the client's interests, critics understandably are troubled by the prospect of a lawyer refusing to defer to her client's moral judgment. A lack of deference has the potential to impede a client's exercise of autonomy in choosing among legally permissible courses of conduct. But what often goes unnoticed is that the lawyer's failure to engage the client in moral terms also threatens a client's autonomy by failing to alert the client to the full scope of what is at stake in the representation.

To the extent that lawyers approach the client's objectives as fully formed and fixed and limit their own role to identifying the most effective technique for pursuing those objectives within the channels provided by law and counseling the client as to how the attainment of those objectives might impact the client's legal interests, they are implicitly making one of two presumptions. The lawyer might

be presuming that the client is not interested in questions beyond the maximization of her own legal interests – that is, that legal permissibility, not moral accountability, is the only question that matters to the client. Alternatively, the lawyer might be presuming that the client will work through, and resolve any concerns regarding, the nonlegal implications of a chosen course of conduct without the lawyer's help.

Either one of these presumptions is problematic. The first portrays human nature in a way that is unrecognizable, or at least severely inadequate, in light of the lived experiences of most human beings. Our self-interest is rarely just about the self. Our own flourishing is wrapped up with others' flourishing – not primarily in the tactical sense in which we mean that the consideration of each other's interests is to our mutual advantage, but in the ontological sense in which we mean that others' interests are actually part of our own. We are not islands by nature – even Robinson Crusoe was waiting for Friday – and it is rare that a person can define his or her well-being in strictly rights-maximizing terms or in isolation from a broader social context.

If the true scope of a person's interests goes beyond the law's narrow lines of individual rights and privileges, the lawyer is making a dangerous gamble by leaving those interests unacknowledged and unexplored. Perhaps the client is able to analyze the relationship between her broader interests and the course of the legal representation without the lawyer's assistance. In many cases, though, the client will lack the ability to navigate the domain of law with

a competence that would permit her to draw connections between legal and moral considerations. In some cases, it might not be a question of competence, but of inclination. A lawyer's finding of legal permissibility can function as an overarching seal of approval on the course of conduct under consideration, and the lawyer's failure to signal the narrowly technical nature of her conclusion may make it unhelpfully easy for the client to disregard bigger questions that remain beneath the surface. In either case, the client may be better served by a broader conversation with her lawyer.

The leading alternative model to the lawyer-as-amoral-technician paradigm does not capture this type of moral engagement between lawyer and client. The "cause lawyering" movement has inspired lawyers across a range of fields to invest themselves in the substantive ends of the representation.[6] Whether these lawyers advocate for an expansion of antidiscrimination laws, environmental justice, tenant rights, or the defense of private property, they have made themselves morally accountable for the identity of the clients and causes on whose behalf they labor. Cause lawyers "reconnect law and morality" by "using their professional work as a vehicle to build the good society."[7] The

[6] *See generally* Austin Sarat & Stuart Scheingold, *The Cultural Lives of Cause Lawyers* (2008); Austin Sarat & Stuart Scheingold, *Cause Lawyers and Social Movements* (2006).

[7] Austin Sarat & Stuart Scheingold, "Cause Lawyering and the Reproduction of Professional Authority," in *Cause Lawyering: Political Commitments and Professional Responsibilities,* ed. A. Sarat & S. Scheingold (1998), 3, 3.

problem is that the cause lawyering movement does not necessarily equip lawyers to reach a deeper level of moral engagement with *the client*. A sense of moral accountability for the ends of the representation may, in fact, reduce the depth and quality of engagement between the lawyer and client. As Derrick Bell recognized in the context of school desegregation work, there can be real tension between the interests of the clients and the lawyers' pursuit of systemic change.[8] Paying attention to the moral dimension of legal practice may lead a lawyer to be more deliberate about the type of cases she accepts without being more deliberate about the type of relationship she cultivates with clients.

Another well-known attempt to broaden the lawyer's vision of the interests implicated by a given representation falls short of authentic moral engagement. Nearly a century ago, Louis Brandeis encountered significant turbulence during his Supreme Court confirmation hearings when he labeled himself a "counsel for the situation."[9] Brandeis was attempting to justify his work in a bankruptcy case that appeared to involve his representation of conflicting

[8] Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (explaining that the lawyers' "determination to implement *Brown* using racial balance measures … involves great risk for clients whose educational interests may no longer accord with the integration ideals of their attorneys").

[9] *See The Nomination of Louis D. Brandeis to Be an Associate Justice of the Supreme Court of the United States: Hearing before the Subcomm. of the S. Comm. on the Judiciary*, 64th Cong. 287 (1916).

interests. He insisted that a good lawyer can help produce a more favorable outcome for all concerned by helping mediate among multiple interests in a given matter. Brandeis came closer to capturing the relational dimension of lawyering than today's profession does, but he had a different focus. He was concerned with the ability to counsel clients whose interests are competing, if not conflicting; the relational dimension arose from the context – for example, a bankruptcy matter involving several related parties – rather than from human nature itself. Put differently, while Brandeis broadened his professional view to include the relationships presented by "the situation," I am interested in broadening the view to include the relationships presented by the client herself.

This is not to suggest that encouraging lawyers to raise the client's relational interests to the surface of the representation is an entirely novel approach. Tom Shaffer, a pioneer in the academic study of legal ethics, complained of the "radical individualism" reflected in the modern profession's ethics codes.[10] Shaffer gave an example of a husband and wife who retain a lawyer to draft their wills. If one spouse were to disagree with the other spouse's wishes on designating beneficiaries, the profession's reflexive recommendation is for the lawyer to withdraw and recommend that the couple each retain their own counsel. In Shaffer's view, this

[10] Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 Tex. L. Rev. 963 (1987).