

# MONROE FREEDMAN AND LEGAL ETHICS: A PROPHET IN HIS OWN TIME

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Professor Monroe Freedman of Hofstra Law School is generally recognized as one of a small group of experts who dominate the field of legal ethics.<sup>1</sup> Indeed, Freedman has had a more original and profound impact on the profession's standards of ethics than any other scholar or authority active today.

The rules of ethics applicable to a number of today's critical ethical issues evolved from Freedman's creative thinking and advocacy. This is a fact that is easily overlooked, because some of his once controversial positions are now widely accepted.

As the Harvard Law School Bulletin said of Freedman's 1975 book *Lawyers' Ethics in an Adversary System*: "Those who read this book and recognize how contemporary its ideas have become in light of their past unacceptability will share this reviewer's pleasure in accounting Monroe Freedman a prophet with honor in his own time."<sup>2</sup>

To take a case in point, Freedman was the first scholar to argue that the American Bar Association's restrictions on advertising violated the first amendment and unduly restricted the extension of legal services to members of society who are most in need of information about their legal rights.<sup>3</sup> Creating a test case by advertising on behalf of a public interest law firm that he was then directing, Freedman won the first challenge to the bar's advertising prohibitions and brought about a

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1. See, e.g., *Business is Booming for Three Legal "Ethicists,"* NAT'L L.J., Nov. 23, 1987, at 5; Margolick, *At the Bar*, N.Y. Times, May 20, 1988, at B7, col. 2.

2. Cohen, Book Review, 27 HARV. L. SCH. BULL. 9 (Winter, 1976) (reviewing M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975)).

3. Freedman, *Solicitation of Clients: For the Poor Not the Privileged*, JURIS DR., Apr. 1971, at 10 [hereinafter Freedman]; M. FREEDMAN, *The Professional Responsibility to Chase Ambulances*, in *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* ch. 10 (1975) [hereinafter FREEDMAN, *ADVERSARY SYSTEM*]; Freedman, *Advertising and Solicitation by Lawyers: A Proposed Redraft of Canon 2 of the Code of Professional Responsibility*, 4 HOFSTRA L. REV. 183 (1976).

change in the rules in the District of Columbia Bar. Fred Graham, then legal reporter for the *New York Times* wrote of Freedman's victory: "For a profession that has forbidden lawyers to . . . send Christmas cards to prospective clients on the ground that such activities were unethical 'advertising', the activities approved in the new ruling are unprecedented."<sup>4</sup>

As a result of Freedman's pioneering, the Department of Justice sued the American Bar Association to stop its restraint on trade through advertising restrictions. Freedman testified on behalf of the United States, while Professor Geoffrey C. Hazard, Jr., another widely recognized authority on lawyers' ethics, testified on behalf of the ABA in defense of the advertising prohibitions.<sup>5</sup>

In advertising, as well as other areas, Freedman has emphasized that the rules of ethics frequently have the effect of limiting the availability of legal services for the have-nots as against those available to corporations and the wealthy. For example, in his classic piece, "The Professional Responsibility to Chase Ambulances,"<sup>6</sup> Freedman argued that the legal system should foster practices that will alert injured people to their rights, especially because insurance companies and their lawyers commonly induce uninformed victims who are unrepresented to compromise or forego legitimate claims.

Similarly, Freedman has articulated, as no one else has, that because lawyers' ethics rules can restrict clients' rights, those rules must be written and interpreted in the light of constitutional principles, including freedom of speech,<sup>7</sup> the right to counsel,<sup>8</sup> and the privilege against self-incrimination.<sup>9</sup>

Freedman is more than an advocate of new ideas. It is no exaggeration to say that his thinking, writing and lectures to bar groups have been the primary creative force in legal ethics today, both in the prac-

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4. Freedman, *supra* note 3, at 10.

5. Professor Hazard has since changed his position. See Hazard, Pearce & Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983).

6. *Supra* note 3.

7. In addition to the authorities cited in *supra* note 4, see Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607 (1977).

8. See, e.g., Freedman, *Lawyer-Client Confidences and the Constitution* (Book Review), 90 YALE L.J. 1486 (1981); Freedman, *Are the Model Rules Unconstitutional?*, 35 U. MIAMI L. REV. 685 (1981); Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939 (1988).

9. *Id.*

tice of law and in legal education.

Into the mid-1960's, for example, lawyers' ethics was a subject rarely taught in our law schools, and reference to the really difficult ethical questions was rarer still. No casebooks in the standard courses contained references to significant issues of professional responsibility. Students entered practice with little or no exposure to lawyers' ethics, and practitioners also avoided facing the hard questions.

That changed in 1966 when Freedman presented a lecture to a group of lawyers on "The Three Hardest Questions" for the criminal defense lawyer. He posed and attempted to deal with the especially difficult issue, up to then never resolved and seldom discussed — what to do when your indigent, court-assigned client insists on perjuring himself. Even to raise such an issue publicly was heretical — so much so that Warren Burger and two other federal judges unsuccessfully sought to have Freedman fired from his faculty position and disbarred merely for having given the lecture.

That same year, Freedman's lecture was published in the *Michigan Law Review*,<sup>10</sup> and Professor Yale incorporated the article into Hall & Kamisar's casebook on criminal procedure,<sup>11</sup> a major breakthrough for ethics in legal education. That experiment was successful, and the use of ethics materials in casebooks on criminal procedure and other subjects has since become commonplace.<sup>12</sup>

Probably more of Freedman's work has been used in that way than that of any other scholar,<sup>13</sup> and his *Michigan Law Review* article has been reprinted, excerpted, and cited more frequently than any article in the history of legal ethics. In addition, his writings probably have been cited more frequently in Supreme Court opinions and by federal and state courts than any other scholar in the field.<sup>14</sup>

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10. Freedman, *The Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) [hereinafter Freedman, *Criminal Defense*].

11. L. HALL, & Y. KAMISAR, CRIM. PROC. 783 (2d ed. 1966).

12. See, e.g., S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES (4th ed. 1983); R. LEMPert & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE (1984); ALLEN & KUHN, CONSTITUTIONAL CRIMINAL PROCEDURE (1985); J. HENDERSON & A. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS (1987).

13. *Id.*

14. See, e.g., *Bates v. Arizona State Bar*, 433 U.S. 350, n.2, *reh'g denied*, 434 U.S. 881 (1977). The Report of the District of Columbia Bar, which was included as an appendix to the *amicus* brief of the United States in *Bates*, and cited in the Court's opin-

In one of dozens of favorable reviews of Freedman's book, *Lawyers' Ethics in an Adversary System*, Professor Norman Dorsen wrote:

Although there may be nothing new under the sun, at times some striking rearrangements of familiar facts, or some sudden recognition of previously unnoticed relationships forces us to consider old problems in a new perspective. Two examples, the Hart and Wechsler casebook on the federal system and the Hart and Sachs casebook on legal process, spring to mind as *monumental contributions to legal education in the past generation . . . In the field [of] legal ethics, Monroe H. Freedman . . . has played this innovating . . . role for the past ten years . . .*

. . . The few who have disparaged the work have usually been either inaccurate in their analysis or insensitive to the values that Monroe Freedman undogmatically champions in a field where complacency has reigned for too long.<sup>15</sup>

That tribute to Freedman's work as a "monumental contribution" during the preceding decade was written a dozen years ago, before most of today's ethics scholars and experts had addressed the subject.

Another reviewer, Professor Charles Baron, wrote:

Not the least fascinating feature of this book is the strong sense it gives of the character of its author. Monroe Freedman is in the grand tradition of Socrates. . . . [H]e is essentially a moralist concerned with pointing out to those who consider themselves the defenders of public morality just how shallow and inconsistent their

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ion in footnote 22, was also authored by Freedman. See also *United States v. Wade*, 388 U.S. 218, 258 n.7 (1967) (White, J., concurring); *Nix v. Whiteside*, 475 U.S. 157 (1986) (Blackmun, J., concurring); *United States v. Ford*, 830 F.2d 596 (9th Cir. 1987); *Levine v. United States District Court for the Central District of California*, 764 F.2d 590 (9th Cir. 1985), *reh'g denied*, 775 F.2d 1054, *cert. denied*, 476 U.S. 1158 (1986); *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115 (3d Cir. 1977); *In re Stanton*, 532 A.2d 95 (D.C. Ct. App. 1987); *People v. Wade*, 43 Cal. 3d 366, 233 Cal. Rptr. 48, 729 P.2d 239 (1987) (Bird, C.J., dissenting), *vacated*, 47 Cal. 3d 975, 244 Cal. Rptr. 905, 750 P.2d 794, *cert. denied*, — U.S. —, 109 S. Ct. 248 (1988); *People v. Mozee*, 723 P.2d 117 (Colo. 1986) (Ericson, J., dissenting); *State v. Lee*, 142 Ariz. 210, 689 P.2d 153 (1984); *In re Hinds*, 90 N.J. 604, 449 A.2d 483 (1982); *State v. Bell*, 90 N.J. 163, 447 A.2d 525 (1982); *People v. Zimmer*, 51 N.Y.2d 390, 434 N.Y.S.2d 206, 414 N.E.2d 705 (1980); *Koffler v. Joint Bar Ass'n*, 432 N.Y.S.2d 872, 412 N.E.2d 927 (1980), *cert. denied*, 450 U.S. 1026, 101 S. Ct. 1733, 68 L.Ed.2d 221 (1981); *Coleman v. State*, 621 P.2d 869 (Alaska 1980), *cert. denied*, 454 U.S. 1090, 102 S. Ct. 653, 70 L.Ed.2d 628 (1981); *Mad-dox v. State*, 613 S.W.2d 275 (Tex. 1981); *In re Friedman*, 76 Ill. 2d 392, 30 Ill. Dec. 288, 392 N.E.2d 1333 (1979); *In re Kozlov*, 79 N.J. 232, 398 A.2d 882 (1979).

15. Dorsen, Book Review, 11 HARV. C.R.-C.L. L. REV. 764, 769 (1976) (emphasis added).



principles of public morality are. . . .

. . . He confesses error on several occasions regarding positions he has taken earlier and anticipates having to do it again on positions he hazards this time around. His is the old-fashioned, philosophical dedication to truth. He is not afraid to admit error, nor to take on sacred cows.<sup>16</sup>

On issue after issue, Freedman's thinking and writing in legal ethics have been seminal. He was the first legal scholar to see lawyers' ethics as rooted in the Bill of Rights,<sup>17</sup> the first to attack the restrictions on trial publicity by defendants and defense attorneys as violating the first amendment, while supporting limitations on publicity by prosecutors,<sup>18</sup> the first to argue that lawyers be required to divulge client confidences when human life or serious bodily harm is threatened,<sup>19</sup> the first to urge that law professors' sexual relations with students be recognized as unethical conduct,<sup>20</sup> the first to argue that the lawyer's decision to take a client is a moral one and subject to the moral scrutiny and criticism of others,<sup>21</sup> the first to analyze the ethical issues in preparing witnesses, bringing to bear the learning in behavioral psychology,<sup>22</sup> the first to

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16. Baron, Book Review, 1 NEW DIRECTIONS IN LEGAL SERVICES 42 (Aug. 1976) (reviewing M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975)).

17. See, e.g., Freedman, *The Kutak Model Rules Versus the American Lawyer's Code of Conduct*, 26 VILL. L. REV. 1165 (1981).

18. See Freedman & Starwood, *supra* note 7, at 607. Like Freedman's other positions, this one was ignored or denigrated for some time. See, e.g., C. WOLFRAM, *MODERN LEGAL ETHICS* 635 n.5 (1986). However, Freedman's view is currently receiving serious consideration and support by bar committees and courts. See, e.g., *PROPOSED RULES OF PROFESSIONAL CONDUCT AND RELATED COMMENTS*, Rules 3.6 and 3.8 (published for comment by order of the D.C. Court of Appeals, Sept. 1, 1988).

19. FREEDMAN, *ADVERSARY SYSTEM*, *supra* note 3, at 6; Freedman, *Lawyer-Client Confidences Under the A.B.A. Model Rules: Ethical Rules Without Ethical Reason*, 3 CRIM. JUSTICE ETHICS 3 (Summer/Fall, 1984) [hereinafter Freedman, *Client Confidences*].

20. Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 VAND. L. REV. 275, 277 (1986).

21. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. UNIV. L. REV. 191 (1978) (delivered as the 13th annual Pope John XXIII Lecture at Catholic University Law School, Washington, D.C., Oct. 28, 1977). Compare, Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1081 (1976) ("[I]t is false to argue that the lawyer is morally reprehensible if he furthers the interests of some clients and not others or some purposes and not others . . ."); MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.2(b) (1983) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's . . . moral views or activities.")

22. Freedman, *Counseling the Client: Refreshing Recollection or Prompting Perjury?*, 2 ABA LITIGATION 35 (Spring, 1976).

propose significant ethical standards for prosecutors for inclusion in the Model Code and in the Model Rules,<sup>23</sup> and the first to argue that it is ethical for legal aid lawyers to strike.<sup>24</sup>

Another of Freedman's major contributions that is now part of hornbook wisdom<sup>25</sup> is the recognition of the crucial role that the concept of "knowing" plays in rules. Further, no writer or thinker in legal ethics has struggled harder than Freedman, or articulated with such clarity and power, the vital moral, philosophical, and constitutional values of lawyers' ethics. Regardless of what a particular rule of professional responsibility might be, the lawyer ordinarily has no duty until a certain threshold of knowledge has been crossed. Freedman was the first to point out how lawyers have disingenuously denied knowledge (for example, of client perjury) or have used unrealistic standards of knowledge in order to evade difficult issues.<sup>26</sup>

The point is elementary but no less important for that reason. As late as 1980, for example, the Kutak Commission was drafting at least nine different standards of "knowing" into its Model Rules of Professional Conduct.<sup>27</sup> These ranged from whether the lawyer, subjectively, was convinced beyond a reasonable doubt, to whether the lawyer, objectively, had information indicating certain facts to be so. Moreover, there was no rational reason for the varying standards as they appeared in the Model Rules. Only after Freedman had again pointed out the error<sup>28</sup> were the Model Rules appropriately rewritten.<sup>29</sup>

Ultimately, the Model Rules appeared to reject Freedman's strict view of lawyer-client confidentiality. Contrary to the position that Freedman has championed,<sup>30</sup> Model Rule 3.3 seems to require that the lawyer divulge client perjury to the court. In fact, however, the bar has simply returned to the same disingenuous manipulation of the "knowing" standard that Freedman exposed more than two decades ago.<sup>31</sup>

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23. THE AMERICAN LAWYER'S CODE OF CONDUCT, PART IX (1983); Freedman, *Advances in Prosecutors' Ethics*, 1 ABA CRIM. JUST. 15 (Winter, 1987).

24. Freedman, *The Legal Aid Strike*, N.Y.L.J., June 25, 1975, at 1.

25. See C. Wolfram, *supra* note 18, at 655-56, 695-97.

26. Freedman, *Criminal Defense*, *supra* note 10, at 1472-73; FREEDMAN, ADVERSARY SYSTEM, *supra* note 3, ch. 5.

27. MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft, Jan. 30, 1980).

28. AMERICAN LAWYER'S CODE OF CONDUCT, Introductory Comment on "Knowing," 8-10 (Public Discussion Draft, June 1980).

29. MODEL RULES OF PROFESSIONAL CONDUCT, Terminology (1983).

30. FREEDMAN, ADVERSARY SYSTEM, *supra* note 3; Freedman, *Criminal Defense*, *supra* note 10, at 1469; Freedman, *Client Confidences*, *supra* note 19, at 3.

31. See Freedman, *The Aftermath of Nix v. Whiteside, Slamming the Lid on Pan-*

That is, under Model Rule 3.3, the lawyer who knows of client perjury is obligated to reveal it, but what the lawyer "knows" has since been interpreted in such a way as to ensure that Rule 3.3 will rarely, if ever, be triggered.<sup>32</sup> The result, of course, is consistent with Freedman's strict view of confidentiality. Ironically, however, in the name of the "candor to the court," the established bar has failed to emulate Freedman's candor in defending that result.

### CONCLUSION

When Professor Alan Dershowitz was wrongly charged with unethical conduct, he turned to Monroe Freedman. In relating the incident in his book, Professor Dershowitz referred to Freedman as "the country's leading authority on legal ethics in criminal cases."<sup>33</sup> So he is – but not just in criminal cases. Freedman has been teacher, scholar, reformer "in the grand tradition of Socrates,"<sup>34</sup> counsel to lawyers and law firms throughout the country, expert witness before state and federal courts and committees of Congress, litigator in both trials and appeals, and chairman of three professional committees on lawyers' ethics.

No writer or thinker in the field of legal ethics has articulated with such clarity and power the vital constitutional, moral, and philosophical values inherent in lawyers' ethics.<sup>35</sup> His innovative views – often initially dismissed by the established bar only to be later accepted – have justly had the greatest impact on legal ethics in our time.

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*dora's Box*, 23 CRIM. L. BULL. 25 (1987).

32. *Id.*

33. A. DERSHOWITZ, *THE BEST DEFENSE* 365 (1982).

34. *Supra*, note 17.

35. In addition to the writings of Professor Freedman cited throughout this Article, see Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U. L. REV. 331 (1987); Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. 1060 (1975).