Rigorous, Relevant, and Right: The Scholarship of Monroe Freedman

By Alice Woolley

Alice Woolley is a professor in the faculty of law, University of Calgary.

The many tributes written on Monroe Freedman’s passing reflect the love and esteem of his colleagues and friends. In articles, blog posts, and comments, we noted his kindness, generosity, intellectual rigor, and — to use a cliché he would have roundly condemned because he hated clichés in general and this one in particular — that he was a gentleman. The tributes also consistently emphasized his place in the field of legal ethics, that he “invented legal ethics,”¹ was the “father of legal ethics,”² a “pioneer,”³ and a “giant.”⁴

Monroe merited those descriptors. He merited them not because he was one of the first or most controversial legal ethics scholars — although he was both those things — but rather because he was, and remains, one of the best. Monroe’s scholarship reflects his acute perception, his analytical rigor, his flexible consistency, his deep moral conviction, and his empathy and compassion. Monroe was not a flawless scholar, and I will note some of his occasional blind spots, but a blueprint for a distinguished career as a legal ethicist could be found in imitating Monroe’s scholarly method, and in emulating his moral conviction, empathy, and compassion.

One of the challenges for legal ethics is that lawyers who live the dilemmas of legal practice cannot always appreciate or deeply reflect on the issues those dilemmas raise, while academics who write about legal ethics cannot always appreciate the complexities and realities of the contexts in which the dilemmas arise. As a result, lawyers may not see what the dilemmas mean, while academics may not see what the dilemmas are. Monroe bridged that gap, perceiving accurately and clearly the ethical issues that arise in practice, and the conflicts of principle and policy that both create those issues and make them difficult to resolve.

His most famous paper — Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions — identified the ethical dilemmas arising from conflict between the lawyer’s duty of confidentiality to the client, the client’s right to counsel, and the lawyer’s duty of candor to the court. As he cogently argued, in some circumstances it is impossible for a lawyer to simultaneously satisfy all of these obligations; in a situation where they conflict the only issue is: which will be sacrificed?

At around the same time, Monroe also identified the core ethical dilemmas that arise for the prosecuting attorney⁵ and for the civil litigator.⁶ In both cases, he identified ethical issues that remain of central concern for lawyers practicing in those areas. For civil litigators, he emphasized the issues that arise...
from the client who wants to do something “that is not unlawful, but that is unconscionable,” pursuing a settlement where you know that if the facts were fully aired at trial your client would be likely to lose, and circumstances where the client’s case is “provable according to the rule of law, but is essentially unjustified.”

My own favorite insight of Monroe’s was his identification of the problem of witness preparation, and the fine line – which both practitioners and those who write about trial practice often gloss over – between helping a witness to remember and prompting a witness to fabricate recollections. As his work in this area demonstrates, Monroe recognized before others the significance of a more complex appreciation of human psychology to identifying and resolving ethical problems.

The acuity of Monroe’s ability to identify ethical problems was matched only by the cogency of his analysis of those problems. Often those who write and think about Monroe reduce his work to his propositions – e.g., “a lawyer should be a zealous advocate” or “sometimes a lawyer should present perjured testimony” – but his point was only secondarily about those ethical conclusions. Rather, in each paper he identified an issue (or issues) arising from conflicting principles, set out those principles and the costs and benefits associated with different resolutions, and made his argument in favor of a particular outcome. Monroe obviously believed his answers were the right ones, but he was fully aware of the arguments on the other side and was content with disagreement, provided the disagreement arose from analysis as fully and honestly engaged with the conflicting principles as was his own. He and co-author Abbe Smith disagreed on the proper resolution of several notable ethical controversies, and he had vigorous and respectful exchanges with Michael Tigar, Tom Shaffer and Andy Perlman, among others. His dismay – and occasional dyspeptic frustration – was reserved for those who misunderstood or misrepresented his analysis, or who failed to recognize the complexity and difficulty of the issues at stake.

Monroe also had a remarkable gift for brevity and clarity. His many articles are uniformly short, well-written, and unencumbered by the endless and useless footnotes common to almost all modern academic articles (including my own!). He used authority, but only to buttress his argument, not to demonstrate his own thoroughness and erudition.

As noted, Monroe’s scholarship focused on the resolution of ethical dilemmas arising from the conflict of principles in certain circumstances of practice. That focus, on both principles and on real-world instances of those principles conflicting, may also account for what I earlier described as his “flexible consistency.” By which I mean Monroe’s ability to combine an unshakeable belief in the central importance of certain legal principles and moral values with the recognition that the right answer to any given issue depends considerably on the specific circumstances in which that issue arises, and a willingness to evolve in his position and responses to particular ethical questions.

Throughout his scholarly life, Monroe maintained the importance of core legal principles – the presumption of innocence, the right to silence, the right to counsel, the lawyer’s duty of confidentiality – to understanding the duties of the lawyer in representing a client. And he never wavered for a moment in his belief in the right of each of us to respect for our dignity and autonomy, and the role of the lawyer in ensuring that the state grants to each of us the respect to which we are entitled.
Yet at the same time, Monroe also maintained consistently that the right answer to ethical problems depended on the facts, not on determinations made through “rigidly legalistic adherence to norms.”¹¹ In a response to critics of his *Three Hardest Questions* article, Monroe expressed frustration at their willingness to accept uncritically the cross-examination of a truthful witness, in that case a rape victim, despite it being clear in the posed hypothetical that “when the lawyer deliberately sets out to destroy the character and credibility of the truthful prosecutrix, he wreaks untold suffering on the girl, her family, and the minister to whom she is engaged.”¹² Monroe accepted that the cross-examination was necessary, but only through weighing the conflicting moral claims in the particular case, not because of a mindless conclusion that ‘cross-examination is always OK if not abusive or dishonest.’ In general, he said, the “system of professional responsibility I have been advancing in these articles...has been one that attempts to deal with ethical problems in context, giving full consideration both to motive and consequences.”¹³ For Monroe, legal ethics was not about avoiding moral dilemmas; “I do not believe...that one can properly be charged with immorality because one is presented with a moral dilemma.” Rather, “immorality lies in failing to address and resolve the moral conflict in a conscientious and responsible manner.”¹⁴

Further, Monroe’s own views evolved over time. While he held fast to his emphasis on the importance of zealous advocacy for ensuring the accomplishment of core legal values, as well as respect for the dignity and autonomy of clients, he became convinced of the moral accountability of lawyers for the clients they choose to represent, and for the importance of moral counseling and dialogue in the lawyer-client relationship. This evolution appears not to have arisen because of an adjustment in his underlying beliefs and values, but rather because Monroe came to see what those beliefs and values required in a somewhat different way, and with more complexity, particularly after dialogue with respected adversaries like Michael and Abbe.

Monroe’s emphasis on central constitutional values and human dignity and respect was coupled with a deep moral belief in the fundamental worth of all persons, and righteous indignation on behalf of those whose moral worth was denied or impaired by the state, or by those who enjoy privilege and power. In his response to Thomas Shaffer’s remarkable article *Legal Ethics and the Good Client*, Monroe distinguished his position from Shaffer’s by noting that Shaffer defined legal ethics through the lawyer’s relationship with a client over whom he has power, whereas Monroe would define legal ethics as about a relationship with “this other person, whom I have the power to help.” For Monroe, the central question of legal ethics is, “how far I can go as a lawyer in helping that person.”¹⁶ And in another article, on the relationship between his approach to legal ethics and his Judaism, Monroe said, “I stress rachmanut, or compassion, for a fellow human being who is suffering, even though his suffering may be his own fault.”¹⁷

Monroe also believed that lawyers and the legal system could be a force for good in redressing injuries, and in protecting people from oppression by the state or the privileged. For example, in a response to Carrie Menkel-Meadow’s critique of the adversary system and promotion of alternative methods of dispute resolution, Monroe noted the correlation between growth in the belief in ADR with increasing
access by the less advantaged to the legal system. To him, ADR was just “an effort ... on the part of some, to shunt these downtrodden people aside once again,” noting with some acidity that “those who most strongly favor ADR do not, themselves, rely on it when they have something important at stake.”

Monroe’s work was not flawless. He was, for example, unduly critical of the work of moral philosophers, not always appreciating that a deeper understanding of our moral values and political structure can helpfully influence our understanding of legal ethics, even if no one can “demonstrate a single significant effect that any... moral philosopher has had on any particular issue of legal ethics.” General insights matter as well as single significant effects. In addition, Monroe was inclined to view all clients as suffering and worthy of assistance, not always appreciating the very different nature of the relationship between the lawyer and a powerful corporate or government client, and the different ethical dilemmas and challenges to which those relationships give rise.

Those are, however, more quibbles than fundamental flaws. They do not detract from Monroe’s remarkable achievement as a legal ethics scholar – his identification of core ethical dilemmas in practice, his articulation of the principles relevant to creating and analyzing those dilemmas, his empathetic expression of the virtues and vulnerabilities of clients, and his rigorous analysis of what being a lawyer means and requires.

In a paper on the role of the litigation lawyer as a source of social reform, Monroe responded to skeptics who challenge the efficacy of lawyers who litigate specific cases to create social justice. And in doing so, he expressed far more eloquently and beautifully than I can, the virtue of the good lawyer’s life and, in a way, of his own:

The most one can expect to do in a lifetime is to deal with those situations with which he comes into contact, to try to help those unfortunate people whom he meets – recognizing that just as every man is of infinite value, the help you can provide to any man may also be of infinite value, even if infinitesimal in some broader scheme of things.

Endnotes
2. Bart Jones, Hofstra’s Monroe Freedman dies; eminent legal scholar was 86, NEWSDAY, Feb. 27, 2015.
7. Id. at 576.
10. See, e.g., Client-Centered Lawyering – What it Isn’t, 40 HOFSTRA L. REV. 349 (2011)
11. Prosecuting Attorney, supra note 5, at 1046.
12. Id.
13. Id. at 1047.