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"What's Love Got To Do With It?"[1] - "It's Not Like They're Your Friends for Christ's Sake"[2]: The Complicated Relationship Between Lawyer and Client

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1. Movie directors, *see, e.g.*, Brian Gibson, WHAT'S LOVE GOT TO DO WITH IT? (Buena Vista 1993), law professors, *see e.g.,* David Fraser, *What's Love Got To Do With It? Critical Legal Studies, Feminist Discourse and the Ethic of Solidarity*, 11 HARV. WOMEN'S L. J. 53 (1988); Susan Bandes, *What's Love Got To Do With It?* 8 WM. & MARY J. WOMEN & L. 97 (2001); W. Burlette Carter, *What's Love Got to Do With It? Race Relations and the Second Great Commandment, in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 130 (Michael W. McConnell et al. eds., 2001), mathematicians, *see e.g.,* Michael Brooks, *What's Love Got To Do With It?,* 168 NEW SCIENTIST 38 (2000), and people generally (a Google search turns up over one million links to the expression), ask this question all of the time, but for me the question always will belong to Ike and Tina Turner.
2. Richard Gere, as criminal defense lawyer Martin Vail, describing his view of clients to another lawyer while sitting at a bar having a drink, in the movie PRIMAL FEAR (Paramount Pictures 1996). The statement takes on different meaning, of course, depending upon whether one accents "friends" or "Christ's." I use it in only the latter sense.

I. INTRODUCTION

Should lawyers love their clients and try to be their friends?[3] Some legal commentators seem to think so,[4] and the idea has a long and venerable history.[5] Highly regarded scholars have defended the "lawyer-as-friend" analogy[6] enthusiastically in the past - Charles Fried is perhaps the most well-known example[7] - although usually they have relied on a more contractual understanding of friendship, and one more compatible with traditional concepts of adversary advocacy than the understanding currently in vogue. These past efforts were widely criticized by other legal commentators on a variety of grounds,[8] however, and after a period of debate on the topic, support

3. Love and friendship are necessarily intertwined. The Latin word for friendship (*amicitia*) is derived from the word for love (*amor*) and love is the prime mover in the mutual affection characteristic of friendship. Almost no one in the long history of the friendship literature disputes that friendship is based on love.

4. *See* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994); ROBERT F. COCHRAN, JR., JOHN M.A. DIPIPPA, & MARTHA M. PETERS, THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING (1999).

5. William Simon suggests that a form of the friendship idea underlies the early justification for the privileged communication rule in the law of evidence. *See* William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics,* 1978 WIS. L. REV. 29, 107 (1978) ("it appears that the attorney-client evidentiary privilege was first rationalized in the 17th century precisely as safeguarding a valuable personal relationship"); *see also* Charles P. Curtis, *The Ethics of Advocacy,* 4 STAN. L. REV. 3, 7-9 (1951) (describing how a lawyer might be privileged to lie for a client in the same way one might lie to save a friend or close relative); CHARLES P. CURTIS, IT'S YOUR LAW 1 (1954) ("Justice is a chilly virtue. It is of high importance that we be introduced into the inhospitable halls of justice by a friend.").

6. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation,* 85 YALE L. J. 1060 (1976); Edward A. Dauer & Arthur Allen Leff, *Correspondence: The Lawyer as Friend,* 86 YALE L.J. 573 (1977). Whether friendship is an analogy, metaphor, or simile, seems to be in dispute. Fried uses both metaphor and analogy, *see, e.g.,* Fried, *supra,* at 1071 (analogy), 1072 (metaphor), but seems to prefer analogy, while Dauer and Leff use metaphor and simile, *see, e.g.,* Dauer & Leff, *supra,* at 576 (metaphor), (577) (simile), but seem to prefer metaphor.

7. Fried, *supra* note 6. Dean Kronman's well known argument for the lawyer as the embodiment of practical wisdom also relies on the friendship analogy. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 131-132 (1993).

8. For example, Fried's definition of friendship, "[to] adopt [another's] interest as [your] own," Fried, *supra* note 6, at 1071, would seem to include airline pilots and gas station attendants, among others, within the category of friends, and this is not an intuitively obvious understanding of friendship. Fried denies that a law-

for the friendship analogy appeared to wane.[9] That is until recently, when other writers, looking at the topic from a more religious perspective, found the analogy congenial once again, and having refined it, have re-asserted it as the proper model for the lawyer-client relationship. It is this rejuvenated love-and-friendship view that I want to examine in this article, to consider whether, after all these years, there is now good reason to believe that lawyers should be thought of as their clients' friends.[10]

I will say at the outset that I do not believe an adequate conception of lawyer-client relations can be grounded in an analogy to intimate personal relationships. Self-conscious attempts by lawyers to behave as friends can come across as insincere (as they often will be, although not malevolently so), condescending, and arrogant. They can also pro-

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yer is only a "public purveyor of goods," and that the lawyer-client relationship is like any other commercial transaction, *see* Fried, *supra* note 6, at 1075, but Simon has cast considerable doubt on this claim. *See* Simon, *supra* note 5, at 108-109.

9. *See* discussion notes 146-220 *infra,* and accompanying text.

10. The nature of lawyer role also was the topic for discussion by the Section on Professional Responsibility of the Association of American Law Schools at its January 2003 annual meeting. The program brought together, "possibly for the first time," representatives of the "three schools of thought . . . [that] have emerged among legal ethicists and legal clinicians" to discuss lawyer role obligations when faced with the prospect of harming third parties as a consequence of client-representation. *See* http://www.aals.org/am2003/6190.html.

The present analysis is limited to the social dimension of the lawyer-as-friend argument, that is, I take up only the question of whether the two relationships have personal and social properties in common. Since the argument fails at this level, I do not discuss the question of whether a social (as opposed to a moral and political) conception of lawyer role is adequate. For Aristotle, friendship and politics were one and the same, but not everyone agrees. *See* James J. Friedberg, *A Comment for Tom Shaffer: The Ethics of Race, The Ethics of Corruption,* 88 W. VA. L. REV. 670, 676 (1986) ("Tom Shaffer would have his virtuous lawyers practice [friendship] without politics, and I do not believe that is possible. . . . Without the moral content of fair and egalitarian social ends, [friendship] can be perverted to a philosophical justification for corruption of public life and oppression by the newly empowered.").

The idea of lawyers identifying or bonding with clients, whether emotionally, politically, or financially, is not new of course. One thinks of Bruce Cutler with the mob, William Kunstler with political activists, John W. Davis with industrialists, and the like. It is also the stuff of popular culture, *see, e.g.,* THE DESPERATE HOURS (Metro-Goldwyn-Mayer (MGM) 1990) (starring Mickey Rourke, Anthony Hopkins, and Mitzi Green, in which a lawyer who becomes romantically involved with a client helps the client escape from prison and terrorize the judge who sent him there) (a remake of a 1955 William Wyler film of the same name). But the second generation version of the friendship conception of the lawyer-client relationship, the one now in vogue, differs slightly from these more familiar conceptions. It sees lawyers more as co-children of the same god, or co-fellow human travelers, than ideological or economic compatriots, and is committed to a more abstract and idealized notion of social relationship, although one based on love, than the conceptions of lawyer-client relations based on money or power.

voke self-demeaning and childlike behavior in response, as clients dutifully try to play out their assigned role as designated beneficiaries of their lawyers' help. When both types of pretense are combined, lawyer-client conversations often take on the qualities of an elaborately coded performance in which each side signals its genuine beliefs and wants in unnecessarily convoluted and confusing ways. Interacting in this fashion over a lifetime in law practice can cause lawyers to become cynical about client attitudes and less respectful of client ends. In fact, perhaps the biggest difficulty with the lawyer-as-friend view is that it can cause lawyers to become less friendly over the course of a career.

I will discuss these issues by examining two generations of scholarly argument for the lawyer-as-friend view, and a description of the approach in operation in an actual legal case. I take the former from the debate sparked by the Fried article mentioned above, and two recent books on interviewing and counseling by Thomas Shaffer and Robert Cochran,[11] and the latter from Phyllis Goldfarb's *A Clinic Runs Through It*,[12] a highly regarded article in the Clinical Law Review describing Goldfarb's representation of Christopher Burger, a death row inmate in the Georgia prison system.[13] Each of these discussions shows in detail what sorts of questions a lawyer-as-friend takes up, how he or she divides or shares representational tasks with clients differently from lawyers who use more traditional approaches to legal representation, and how the personal psychological experience of representing a client as a friend compares with the experience of representing a client as a fiduciary and agent. In the course of the discussion, I will compare the idea of legal friendship with views of friendship taken from western literature and philosophy generally, identify the comparative advantages and disadvantages of the legal friendship model, and conclude by defending a more traditional way of thinking about the relationship between lawyers and clients. Ultimately, I will argue that it is descriptively more accurate and normatively more attractive to think of a lawyer as a client fiduciary and agent (albeit of a friendly sort) than as a friend. This is because a fiduciary/agent view asks lawyers to treat clients with respect rather than love, and respect is a better basis than love on which to build a working relationship in the multi-cultural, secular, and communitarian world of lawyers and clients. The fiduciary/agent view also avoids cheapening, or watering down, the idea of love, something the friend-

11. Shaffer and Cochran were the only authors of the first book, but Cochran wrote the second in collaboration with other people. *See* SHAFFER & COCHRAN, *supra* note 4; COCHRAN ET AL., *supra* note 4.

12. Phyllis Goldfarb, *A Clinic Runs Through It,* 1 CLINICAL L. REV. 65 (1994).

13. The case was the celebrated one of Burger v. Kemp., 483 U.S. 776 (1987).

ship conception has a difficult time avoiding when applied to all types of law practice settings, and all types of clients.

II. THE PROBLEM - THE HUNT FOR THE ELUSIVE RELATIONSHIP ANALOGY (OR METAPHOR)

In the dedication to a new book on interviewing and counseling, Robert Cochran thanks his "mentors, Tom Shaffer and John Acuff, who taught me to love my clients."[14] This seems an odd thing to say. It is not odd that Tom Shaffer and John Acuff could be mentors. Professor Shaffer is a prolific and insightful commentator on lawyer-client relations (and on a wide variety of other subjects as well), and for many years has been an intellectual and characterological model for generations of lawyers, law students, and law professors. While I do not know Mr. Acuff, I am willing to believe that the same is true of him. What is odd is that Professor Cochran learned to love his clients, or more specifically, that he felt compelled to try. Clients frequently are not lovable in any sense of the term, and when they are it is usually because of qualities that have little if anything to do with their status as clients. They are not family, where the decision to love is more or less inherited, and they usually are not social friends where the decision to love is chosen. Moreover, they often ask lawyers to do selfish and mean-spirited things to other people that lawyers would not do if it were up to them personally, and mean-spiritedness is not lovable. Clients can be rude and demanding in the way they insist that lawyers do their bidding, and can be oblivious to, or unappreciative of, lawyer efforts to help them realize their goals in more socially acceptable ways, even when lawyers do nothing to provoke these attitudes. As partners in social relationships they are frequently imposed rather than selected, and tied to lawyers by money as often as shared values, common beliefs, or joint purposes. Lovable clients are often the proverbial oxymoron then, the anomaly rather than the norm, the result of fortuitous circumstance more than conscious action, and yet Professor Cochran seems to see it just the other way. How can that be?

It turns out, unsurprisingly, that this is just a new version of an old question. Conceptions of lawyer-client relations have always been contested, complicated, and controversial. David Hoffman and George Sharswood, the earliest American commentators on lawyer role, differed over the relative strengths of the obligation to pursue client objectives versus the duty to protect societal and third party interests,

14. COCHRAN ET AL., *supra* note 4. Since Cochran is not the book's only author, and different sections of the book appear to have been written by different people, it would be more precise to say that Cochran dedicated his part of the book to Shaffer and Acuff.

for example, usually under the rubric of asking whether a lawyer was principally an advocate for the client or an officer of the court.[15] Louis Brandeis argued that lawyers should act as their clients' "conscience,"[16] as did Elihu Root, who declared that "about half of the practice of a decent lawyer is telling would be clients that they are damned fools and should stop,"[17] while at about the same time

15. *Compare* DAVID HOFFMAN, A COURSE OF LEGAL STUDY: ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY (1968) (1836), *and* GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1993). *See also* Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673 (1979). For different perspectives on the Hoffman-Sharswood debate, *see* SHAFFER & COCHRAN, *supra* note 4, at 33-35; David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83, 84 (David Luban ed., 1983); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 10 (1988); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 51-52 (2000); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 63-64 (1998); Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 493-498 (1998); James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court,"* 48 BUFF. L. REV. 349, 366-76 (2000); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992); Thomas L. Shaffer, *The Ethics of Dissent and Friendship in the American Professions,* 88 W. VA. L. REV. 623, 656 (1986).

16. Brandeis' own phrase was "lawyer for the situation," coined at his confirmation hearings for the Supreme Court. *See* John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965); *see also* PHILIPPA. STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 40 (1984) (describing a Brandeis memorandum recommending that a lawyer should "Advise client what he should have – not what he wants."); LOUIS BRANDEIS, *The Opportunity in the Law, in* BUSINESS – A PROFESSION 315 (1914) (speech to the Harvard Ethical Society encouraging law students to engage in law reform activities and to steer clients in the direction of the public good); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 720-731 (1988) (describing political theory of "progressive professionalism" underlying Brandeis' view of lawyer work); William H. Simon, *Babbit v. Brandeis: The Decline of the Professional Ideal,* 37 STAN. L. REV. 565, 565-71 (1985) (same). Luban points out that Brandeis' did not view the lawyer's obligation to act as a conscience to corporate clients "as arising from any partisanship for the people. . . . [Instead, he] was worried about civil unrest, and possibly revolution." Luban, *supra*, at 722. As Luban explains, "[T]he lawyer stands outside the fray, observing the clash of interest-groups, then makes the proper adjustments in order to stabilize the mechanism. This is truly the 'lawyer for the situation.'" *Id.*

17. PHILIP C. JESSUP, 1 ELIHU ROOT 133 (1938); *see also* McCandless v. The Great Atlantic and Pac. Tea Co. Inc., 697 F.2d 198 (7th Cir. 1983) ("We agree with Elihu Root that 'about half of the practice of a decent lawyer [is] telling would-be clients that they are damned fools and should stop.' *Quoted in* A. Kaufman, Problems in Professional Responsibility (1976)."). On the other hand, Root also was allegedly famous for the adage that "the client never wants to be told he can't do what he wants to do; he wants to be told how to do it, and it is the lawyer's business to tell him how." *See* 1 ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS, 1819-1947, at 667 (1946). This, though, may be apocryphal. *See* JESSUP, *supra,* at 186 (explaining how the "helping clients do what they want" reputation came about, and quoting an associate of Root's to the effect that Root was "the type of

Charles Curtis defended a view of lawyer-client relations based on impersonal fealty to disembodied craft.[18] The American Bar Association resolved the tension between duty to clients and duty to society one way in its Canons of Professional Ethics,[19] another in its Code of Professional Responsibility,[20] and yet a third in its Model Rules of Professional Conduct,[21] so that if one looked to the organized bar for

lawyer who, knowing the law and seeing the very right of the matter, advise[d] his clients in accordance therewith, and insist[ed] upon his clients following his advice so long as the relation between them continue[d]."). Robert Gordon discusses the civic republican tradition of lawyer responsibility underlying the comments of Brandeis and Root. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14-30 (1988). *But see* Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Ethics*, 71 FORDHAM. L. REV. 1397 (2003).

18. *See* Curtis, *The Ethics of Advocacy*, *supra* note 5, at 18-23.
19. *See* ABA CANONS OF PROF'L ETHICS (1908), Canons 22 and 41 (explicit duties to disclose client fraud and criminality), Canons 29 and 31 (suggested duties to disclose client fraud and criminality), Canon 37 (duty to keep client confidences, unless confidential information relates to client fraudulent or criminal activity). The overall tenor of the Canons emphasized the lawyer's responsibilities as "Officer of the Court" more than her or his responsibilities as "Adversary Champion." In a series of Formal Ethics Opinions in the early part of the twentieth century, however, the ABA Committee on Professional Ethics and Grievances interpreted the Canons to make preserving client confidences as the higher priority. *See* ABA Comm. On Prof'l Ethics and Grievances, Formal Ops. 155 (1936), 287 (1953); *see also* Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons,* 24 LAW & SOC. INQUIRY 1 (1999) (analyzing the debate among the members of the ABA Committee drafting the Canons over the lawyer's duty to monitor the justice of a client's cause).
20. Like the Canons, the first version of the Model Code of Professional Responsibility made disclosing client fraud and criminality a higher obligation than preserving client confidences. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B)(1) and 4-101(C)(2)(1969). In effect, the Model Code repudiated the position of Formal Opinion 287, and reinstated the conception of lawyer role embodied in the Canons. This version of the Code was amended in 1974, however, to except from the duty to disclose all information learned as part of a "privileged communication." In Formal Opinion 341, the ABA interpreted this unnecessary and incoherent amendment to include client "secrets" as well as privileged communications, thereby wiping out the lawyer's duty to disclose information about client fraud and criminality as long as the information was learned in the course of representing the client. *See* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 341 (1975). As with the Canons, the ABA promulgated one rule in the text of its formal ethics code, and then interpreted that text to mean the opposite of what the code said.
21. In the Model Rules of Professional Conduct, the ABA repeated the pattern found in the Canons and Model Code, of saying one thing in the text of the rules, and then interpreting it to mean something else in its formal ethics opinions, but this time in reverse fashion. The original text of the Model Rules made the obligation to preserve client confidences a higher priority than the obligation to disclose client fraud or criminality, in effect, codifying the position taken in Formal Opinion 341. *Compare* MODEL RULES OF PROF'L CONDUCT, R. 3.3(a)(2)&(4) with R. 1.6. In fact, the obligation to "prevent" client fraud was deleted from the text of the penultimate draft of Rule 3.3 in 1981. But again, as with the Canons and Code, the

guidance on this issue, what one learned depended upon when one tuned in. State ethics codes differ yet again from the ABA and from one another on the question of lawyer loyalties,[22] adding to the confusion. Sometimes, it almost seems as if there is a greater likelihood of developing a unified field theory of the universe than a consensus theory of lawyer-client relations.[23]

The obstacles to a consensus conception of lawyer role are not superficial or trivial, but instead are endemic to the nature of law - the relationship of a system of legal regulation to a social system generally, and the lawyer's role in operating within each. Law exists, in the main, to assign blame and punishment for deviant social behavior (criminal law), and to prevent opportunistic advantage taking of the ignorant, weak, and gullible by the unscrupulous, ruthless, and greedy (civil law). Everyone else is left to fend for themselves through private arrangements (many of which law enforces). In addition, legal rules, both statutory and common law, are usually expressed in general terms not tied to particular factual circumstances, so that law will have predictive power for all types of situations, and will treat all categories of citizens equally. Given this character of general pronouncement, however, law inevitably grows by accretion. As new types of deviant and opportunistic behavior appear, new rules are created to keep the behavior in check. But since pre-existing deviant and opportunistic behavior does not go away simply because new forms are devised, new rules usually piggyback on rules already in place rather than replace them. In addition, since legal rules do not apply themselves they must be interpreted in the context of specific fact situations for their operational meaning to be clear. So a sophisticated system of legal regulation contains an overlay of fact-specific interpretive commentary - case decisions in the American legal system - that also must be understood for law to be clear. When these elements are

ABA's Standing Committee on Professional Responsibility, in Formal Opinion 353, interpreted the Rule in just the opposite fashion, reading it to make the duty to disclose client fraud and criminality a higher obligation than the duty to preserve client confidences. It seems fair to say that the Bar's nearly one hundred year history of struggling with the question of whether a lawyer's obligations to clients are more important than her or his obligations to the legal system and third parties, reflects an extreme ambivalence, at best, on how that question should be answered.

22. *See, e.g.,* THOMAS D. MORGAN & RONALD D. ROTUNDA, 2003 SELECTED STANDARDS OF PROFESSIONAL RESPONSIBILITY 163-66 (2003) (describing the differences among state rules defining the lawyer's obligation to disclose evidence of client fraud and criminal conduct).

23. According to Steven Weinberg, the development of a unified final theory of the physical universe is not only not in doubt, it is imminent. *See* Steven Weinberg, *The Future of Science, and the Universe,* NEW YORK REVIEW OF BOOKS, Nov. 15, 2001, at 58. *See also* TIMOTHY FERRIS, THE WHOLE SHEBANG: A STATE-OF-THE-UNIVERSE(S) REPORT (1997) (overview of current research and a forecast of where cosmological theory is heading).

combined - general rules, growing by accretion, in unison with a corresponding overlay of interpretive commentary - the result is a complicated system of regulation that is virtually unintelligible to someone not trained to decipher it, and that is where lawyers come in.

Social problems become legal problems when individuals bring them to lawyers and legal institutions for resolution. When they do this, as they have with increasing frequency in recent years,[24] individuals have a right to know what the legal system requires for their interests to be protected, and the right to the technical assistance needed for carrying out that task.[25] Lawyers effectuate these rights both by explaining law to clients and, as Stephen Pepper has shown,[26] by manipulating law to further client ends. The textual generality that permits legal rules to apply to all types of situations equally allows them to be interpreted in a wide variety of ways. One person's understanding of what it is to act negligently, for example, can be another person's understanding of what it is to act reasonably, without either person violating the obligation to interpret the concept of negligence in good faith. Clients regularly ask lawyers to argue for interpretations of law favorable to their (the clients') particular interests, and disadvantageous to the interests of others, and they are permitted to ask this. Lawyers are agents, not principals, and clients are entitled to protect their legal rights. In the American legal system, in fact, one might even say that clients are encouraged to protect their legal rights.[27]

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24. *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 36-43 (1983) (describing the extent to which citizens' use of courts for ordinary disputes has increased).
25. This is a moral right. *See* Alan Donagan, *Justifying Legal Practice in the Adversary System, in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 123 (David Luban ed., 1983).
26. *See* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering,* 104 YALE L. J. 1545, 1552-54 (1995) (describing the way in which lawyers manipulate law for clients); *see also* Saul Levmore, *Strategic Delays and Fiduciary Duties,* 74 VA. L. REV. 863 (1988) (discussing strategic delay by beneficiaries who "wait-and-see" whether particular investments prove profitable and when such delayed litigation is objectionable).
27. It is not that clients are not good communitarians, they believe in community (or at least the idea of community), as much as the next person (after all, they are the next person), and like the rest of us, they like to see themselves as co-equal parts of a harmonious, compatible, and tightly knit social group. But, as Robert Post has shown, clients also sometimes want to separate from the group and be recognized for their distinctive attributes and interests. They want to be both ordinary and special, in other words, often at the same time, and do not recognize the inconsistency in these ends. *See* Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass,* 75 CAL. L. REV. 379, 389 (1987) (describing "the tension we all experience between the desire for an embracing and common community and the urge toward individual independence and self-assertion; between the need for a stable, coherent, and sincerely presented self and the frag-

When lawyers argue for client rights, however, they can sometimes harm third parties unjustifiably, needlessly, or out of proportion to the benefits to the client. Most of the time this occurs when lawyers make truth claims (many of which they do not believe) on behalf of clients to third parties and their representatives, under circumstances in which those third parties are encouraged, and may be entitled, to rely on what the lawyers say.[28] When these claims are false or intentionally misleading, as is sometimes the case, another set of background norms kicks in. Ordinarily, one may not intentionally deceive another, everything else being equal, and acting as a lawyer does not excuse one from this default social and moral obligation. Lawyer relationships are personal as well as professional, governed by social and moral norms as well as legal ones, and harming others gratuitously, disproportionately, or without justification, is almost always problematic behavior morally.[29] Lawyers can find themselves in situations, therefore, in which they have social and moral obligations to behave in one way, and legal and professional obligations to behave in an-

mented and disassociated roles we are forced to play in the theater of modern life"). As a consequence, they often send confusing, but also sincere, signals to lawyers about what they would like to have done for them.

28. For example, lawyer statements in negotiation sometimes may be binding and enforced by adverse lawyers. *See, e.g.,* N.L.R.B. v. General Elec. Co., 418 F.2d 736 (2d Cir. 1969), *cert. denied* 397 U.S. 965 (1970); Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507 (E.D. Mich. 1983); Hansen v. Anderson, Wilmarth & Van Der Maaten, 630 N.W.2d 818 (Iowa 2001); In the Matter of Forrest, 730 A.2d 340 (N.J. 1999); Fire Ins. Exchange v. Bell, 643 N.E.2d 310, 313 (Ind. 1994); Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267 (Wis. 1965); Spaulding v. Zimmerman, 116 N.W. 2d 704 (Minn. 1962); Creamer v. Helferstay, 422 A.2d 395 (Md. App. 1980). *But see* Gray v. Eskimo Pie Corp., 244 F. Supp. 785 (D. Del. 1965). For an excellent discussion of the negotiator's duties to other negotiators, and a collection of cases, *see* Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations,* 87 KY. L. J. 1055 (1998-99); G. Richard Shell, *When Is It Legal To Lie in Negotiations?*, 32 SLOAN MGT. REV. 93 (1991); *see also* E. Allen Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 239-42 (1987) (the general duty of good faith and fair dealing in both the Uniform Commercial Code and the Restatement (Second) of Contracts does not extend to negotiations). *But see* Rex R. Perschbacher, *Regulating Lawyers' Negotiation*, 27 ARIZ. L. REV. 75, 133-36 (1985) (extending the duty to bargain in good faith to third parties generally a likely change in the definition of lawyers' ethical duties); SEC. OF LITIG., A.B.A., ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS 2.3 (2002) ("best practices dictate honor and fair dealing" in settlement negotiations).

29. Assisting clients to act in this manner, without raising the issue of whether the action is proper in the first instance, also is usually a failure within the lawyer-client relationship itself, since moral actors owe it to those with whom they interact to raise questions about the propriety of morally dubious conduct in which they are both implicated.

other.[30] When norms collide in this fashion, when what a client asks is legal but also unfair or destructive of societal interests generally, lawyers face a difficult question. Should they be moral or legal, social or self-interested, communitarian or individualistic, or as some put it, persons or lawyers? This choice - admittedly not the standard fare of day-to-day law practice but a regular feature of it nonetheless - and the concerns it causes lawyers are the principal sources of the need felt within the legal profession for a consensus conception of lawyer role.

Ultimately, the search for a consensus conception of role is the search for a general social analogy or metaphor for the lawyer-client relationship, as much as it is a search for a list of role-specific skills or set of legal and ethical role-bound prescriptions. Metaphors, as Orwell noted, usually "assist[ ] thought by evoking a visual image"[31] of the process to be understood, but in the case of lawyer role they do more. Metaphors from social life provide a source of substantive ideas for defining the content of professional role, suggestions for extending role into uncharted terrain, and a set of critical limits for helping one know when the obligations of role have run out. They also serve important psychological, moral, and political functions in ordering lawyers' lives and legitimizing the legal system as a whole.

Lawyers often are accused of assuming a privileged moral status for themselves in their work, one which excuses them from the moral standards applicable to citizens generally. They are sensitive to this criticism, and prefer to think of the morally problematic behavior they sometimes are required to use as just unusual variations on social behavior generally, different in form perhaps from ordinary behavior, but governed by the same moral standards. Being able to show that their relationships as lawyers are of a piece with their relationships as

30. *See* David Luban, *The Adversary System Excuse, supra* note 15, at 84 (describing how moral and professional norms can collide).

31. George Orwell, *Politics and the English Language*, *in* THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL VOL. IV 127, 130 (Sonia Orwell & Ian Angus eds., 1968). *See also* Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225 (1995) (suggesting the need for new metaphors because the dominant metaphors for the adversary system often foster unacceptable actions and attitudes); Leonard Greenhalgh, *Relationships in Negotiations*, 3 NEGOT. J. 235, 237 (1987) ("negotiator's choice of guiding metaphor[ ] is crucial . . . [b]ecause it affects how they define the relationship . . . how [they] behave toward . . . other part[ies] and what behavior is elicited in response"); Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L. J. 1207 (2002) (describing the role of metaphor in defining the nature of the legal regulation of cyberspace); WILLARD GAYLIN, M.D., HATRED 183 (2003) ("To a creature that lives in the world of its own perception, the symbol transcends actuality in importance. Human beings respond to metaphor, for good and bad."). Metaphors also are a methodological staple in science, history, and art. *See* JOHN LEWIS GADDIS, THE LANDSCAPE OF HISTORY 2 (2002).

citizens, that their two lives form one, coherent, integrated whole, helps make this case. It justifies the problematic behavior often required by professional role and allows lawyers to avoid the psychological dissonance a more dichotomized view of professional and personal life would produce. Showing how lawyer-client relations are a subset of social relations generally[32] also helps the organized bar depict lawyer role in more personal, humane, and caring terms than those associated with the traditional but more mechanical conception of lawyer role, as a cog in an adversary machine, and this, in turn, makes it easier for the bar to argue that lawyers, and ultimately the legal system itself, are worthy of respect. A lot rests, then, on the project to link lawyer role to social life generally. In the never ending hunt for the social equivalent of lawyer role, several analogies and metaphors have been suggested.[33] A lawyer, it has been said, is an agent,[34] alter

32. Professional role is not biologically grounded or culturally inculcated. It is a set of socially constructed rules and principles for interacting with others when performing as a professional, defined by the needs of the institutions and systems that make the role necessary, and constituted by a kind of Hart and Sacks legal process method of reasoning outwardly from core cases of social relationships. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC MATERIALS IN THE MAKING AND APPLICATION OF LAW 1116-1126 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958) (describing the legal process method of analogizing from core cases). For discussions of the special problem of role morality, see LUBAN, *supra* note 15, at 104-127; SIMON, *supra* note 15, at 15-18.

33. The idea that professionals are bound by a separate set of role obligations, independent of social role generally, is a controversial one because it seems to permit (and sometimes require) what would be morally problematic behavior in social settings generally (even at the highest levels). *See* ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE 5-7 (1999) (summarizing and criticizing the argument for a special professional role morality). The issue arises in all types and at all levels of social and religious organization. (For example, "Question: Why is there so much evil, sickness, famine, and the like in the world? Answer: Because God has to do things in a professional capacity that he would not do if it were up to him personally.") Identification with social role is an important part of the development of personality. Role helps guarantee the unity of the self by providing a social place separate and distinct from all others, but since everyone has identities beyond those defined by the roles they play, social role constrains development as well. To paraphrase Roberto Unger, "[Role] saves you from being nothing, but [it does] not allow you to become yourself." *See* ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 61 (1975). Perhaps the most well known statement of role's capacity to constrain personal development is Randall Jarrell's description of President Robbins, the protagonist in Jarrell's classic piece of academic satire, PICTURES FROM AN INSTITUTION. "President Robbins was so well adjusted to his environment that sometimes you could not tell which was the environment and which was President Robbins." RANDALL JARRELL, PICTURES FROM AN INSTITUTION 11 (1954). *See also* 2 ARTHUR SCHOPENHAUER, PARERGA AND PARALIPOMENA: SHORT PHILOSOPHICAL ESSAYS 210-11 (E.F.J. Payne trans., 2000) ("Our civilized world, then, is only a great masquerade; here we meet knights, parsons, soldiers, doctors, barristers, priests, philosophers, and the rest. But they are not what they represent themselves to be; they are mere masks beneath which as a rule money-

ego,[35] alter id,[36] artisan,[37] business associate,[38] colleague,[39] conscience,[40] free-lance bureaucrat,[41] friend,[42] rhetorician (or, less flatteringly, mouthpiece),[43] statesman,[44] technician,[45] therapist,[46]

makers are hidden. . . . In this respect, merchants constitute the only honest class, for they alone pass themselves off for what they are; and so they go about unmasked and therefore stand low in rank."). For a highly sophisticated discussion of the nature of the role morality argument, *see* Daniel Markovits, *Legal Ethics from the Lawyer's Point of View*, 15 YALE J.L. & HUMAN. 209 (2003).

34. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 8-9, 76-77 (2002) ("the central concern of lawyers ethics is . . . how far we can ethically go . . . to achieve for our clients full and equal rights under law"); *see also* Theodore I. Koskoff, *Introduction, in* THE AMERICAN TRIAL LAWYER'S CODE OF CONDUCT iii (Monroe Freedman rptr 1980) ("the basic precept of the Code is that American lawyers serve clients, and that they serve the public interest by serving the interests of their individual clients one at a time"); Polk County v. Dodson, 454 U.S. 312, 318-19 (1981) ("[A] defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'"). One is reminded of Al Capp's: "What's good for General Bullmoose is good for the country."
35. Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 182 (1996) (the criminal defense model of representation "assumes an unintelligent, or at least unsophisticated, client who is unable to navigate the legal system; in essence, one who cannot make reasonable decisions effectuating his rights unless his lawyer serves as his alter ego"). *But see* H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 RUTGERS L. REV. 719, 757 (2000) ("the idea that the lawyer is in all respects the bound servant - the 'alter ego' as it is sometimes said - of the client is repugnant").
36. Dauer & Leff, *supra* note 6, at 583.
37. Curtis, *The Ethics of Advocacy*, *supra* note 5, at 22.
38. *See* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L. J. 239, 246, 253-55 (1984).
39. STEFAN H. KRIEGER ET AL., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 22-23 (1999); *see generally* DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 30-34 (1974) (measuring client participation).
40. *See* note 16, *supra*. *See also* CANONS, *supra* note 19, Canon 15 (a lawyer "must obey his own conscience and not that of his client").
41. Dauer and Leff, *supra* note 6, at 581.
42. Fried, *supra* note 6, at 1071-72. *Compare* Curtis *supra* note 5, at 8 ("[t]he relation between a lawyer and . . . client is one of the intimate relations") *and* LUBAN, *supra* note 15, at 166-69 (lawyer as "spouse").
43. Jack L. Sammons, *Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counseling in the Law Office*, 18 U. ARK. LITTLE ROCK L. J. 1, 43-58 (1995); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985). *But see* Johnson v. U.S., 360 F.2d 844, 846 (D.C. Cir. 1966) (Burger, J., concurring) ("One result of these fallacious and blurred conceptions of the advocate's function is the public image of the 'criminal lawyer' as the servile 'mouthpiece' . . . of the accused.").
44. KRONMAN, *supra* note 7, at 11-14.
45. *See* STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 45 (1984) ("adversary process assigns each participant a single function. . . . Counsel is to act as a zealous advocate. . . . [W]hen each actor performs only a single function the dispute before the court will be resolved in the fairest and

transaction cost engineer,[47] and translator;[48] and lawyers as a group, additionally, have been described as tricksters, heroes, helpers, champions, godfathers, gurus, and hired guns.[49] The very number and variety of the possibilities suggest the difficulty involved in finding a metaphor or analogy on which most can agree.

While scholarly interest in the subject is longstanding, most of the currently popular writing on the nature of lawyer role dates from the 1950's and thereafter, and much of that writing is connected in one way or another with the clinical education movement in American law schools, the first systematic attempt to make lawyer practice skills a formal subject of study. The earliest conceptualizations of lawyer role in the clinical literature appeared principally in the work of writers

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most efficient way."); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities,* 1986 AM. B. FOUND. RES. J. 613; Murray Schwartz, *The Professionalism and Accountability of Lawyers,* 66 CAL. L. REV. 669, 672-75 (1978) (describing the two principles that make up the standard conception of lawyer role: the principle of professionalism – lawyers are obligated to maximize the client's chances of prevailing, and the principle of non-accountability – lawyers are not morally accountable for the client's choice of ends or means). *But see* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637. The lawyer as technician also is the view embodied in the Sixth Amendment ineffective assistance of counsel standard. *See e.g.,* Strickland v. Washington, 466 U.S. 668 (1984); Nix v. Whiteside, 475 U.S. 157 (1986); Wheat v. United States, 486 U.S. 153 (1988).

46. *See* Odeana R. Neal, *Transference and Countertransference in the Clinical Supervisory Experience*, preliminary draft presented at the Clinical Theory Workshop, New York Law School (1995) (describing the use of a psychoanalytic conceptual framework in the supervision of law student clinical practice) (on file with author).

47. *See* Gilson, *supra* note 38, at 246, 253-55; Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?,* 61 FORDHAM. L. REV. 275, 296-97 (1992). *But see* Royce de R. Barondes, *The Business Lawyer as Terrorist Transaction Cost Engineer,* 69 FORD. L. REV. 31, 35, n.18 (2000) (describing the commercial negotiation practice of taking property "hostage" to increase joint transaction value as a form of terrorism, and lawyers who do it as "terrorist transaction cost engineers").

48. Clark Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1331-39 (1992). In a variation, Daniel Markovits has suggested that lawyers also may be thought of as poets. *See* Markovits, *supra* note 33, at 278-84.

49. *See* Marvin W. Mindes & Alan C. Acock, *Trickster, Hero, Helper: A Report on the Lawyer Image,* 1982 AM. B. FOUND. RES. J. 177, 179-81; Michael I. Krauss, *The Lawyer as Limo: A Brief History of the Hired Gun*, 8 U. CHI. L. SCH. ROUNDTABLE 325 (2001); Joseph Allegretti, *Have Briefcase Will Travel: An Essay on the Lawyer as Hired Gun*, 24 Creighton L. Rev. 747 (1991); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1055 (1975) ("We should face the fact that the quality of 'hired gun' is close to the heart and substance of the litigating lawyer's role."). *But see* Robert W. Gordon, *Why Lawyers Can't Just be Hired Guns, in* ETHICS IN PRACTICE 42 (Deborah L. Rhode ed., 2000).

such as Andrew Watson and Robert Redmount,[50] and were based on extrapolations from psychiatric and psychological models.[51] These conceptualizations were widely adopted in the early years of clinical instruction, in part because they were grounded in sophisticated and mature theory, always a plus in law school (especially so for a program whose subject of study was practice skill rather than doctrine);[52] in part because at the time psychiatry and psychology were the most popular "other" disciplines in the inter-disciplinary study of law and; in part because proponents of those early models had the *imprimatur* of the principal funding source for clinical education, the Council on Legal Education for Professional Responsibility.[53] The popularity of psychiatric and psychological models was short-lived, however, notwithstanding Herculean efforts by some to sustain them,[54] because they proved too difficult to implement in their own right for persons trained only in law, and were more complicated than they needed to

50. Robert S. Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation,* 109 U. PA. L. REV. 972 (1961); ANDREW S. WATSON, M.D., THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS (1976).

51. This is not surprising since Watson was a psychiatrist and Redmount a psychologist. These models were concerned more with practice skill effectiveness than morals, however, and had little or nothing to do with love or friendship. *See* Dauer & Leff, *supra* note 6, at 581 n.37.

52. The 1960's and 70's were a time of particular concern for legal theory. Law was attacked for not being an independent intellectual discipline, and thus not legitimately part of a university education. In defending their discipline, law professors often were "more Catholic than the Pope," emphasizing the importance of "theory" in the study of law, and held some parts of legal study, particularly those focusing on "practical skills," to a higher than normal standard in this regard. Thomas Bergen expressed the theory-practice angst of the time best. *See* Thomas F. Bergen, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968). For a more recent discussion of the question of whether law is an autonomous discipline, see Brian Bix, *Law As An Autonomous Discipline*, *in* THE OXFORD HANDBOOK OF LEGAL STUDIES (Peter Cane & Mark Tushnet eds., 2003).

53. The Council, known as CLEPR, sponsored conferences and workshops on Watson's method, for example, and published articles and videotapes demonstrating how it was to be used. Psychiatry and psychology seemed natural disciplines for law to draw on for its study of lawyer practice skill, concerned as they were with the subject of human interaction in its broadest sense, but it turned out that lawyers did not need to understand abnormal psychology to function effectively in client relationships most of the time.

54. *See* Neal, *supra* note 46; Don Peters, *Forever Jung: Psychological Type Theory, The Myers- Briggs Type Indicator and Learning Negotiation*, 42 DRAKE L. REV. 1 (1993); Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 261 (1999) ("It is the doctrine of countertransference - misplaced emotions by the attorney on her client - with which this Article is primarily concerned."); Susan Bandes, Repression and Denial in Lawyering (2000) (unpublished manuscript, on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=223079.

be to resolve most of the role-based problems arising in day-to-day legal practice.[55]

Once these early efforts had run their course, the first consensus and stable conception of lawyer role to emerge from the clinical literature was the so-called "client-centered" model of lawyering. This model also was based on psychological theory, but this time on the humanistic ego psychology of Carl Rogers and Abraham Maslow rather than the more difficult "scientific" constructions of Freud and Jung. As a kind of psychoanalysis lite, ego psychology was the perfect foundation for a conception of role that, of necessity, limited itself to prescribing appropriate lawyer behavior rather than underlying motives.[56] The groundwork for the client-centered view was laid by Douglas Rosenthal and his influential 1974 book, *Lawyer and Client: Who's in Charge?*[57] Rosenthal was the first to show on the basis of empirical evidence, and not just aesthetic arguments, that "[c]lients who participate actively in the conduct of their claim[s] get significantly better results than clients who passively delegate decision responsibility to their lawyer[s]."[58] In a carefully constructed study of New York personal injury cases, Rosenthal found that clients who took an active role[59] in their representation got "good" results (when compared to an expert panel's assessment of what the cases were worth) almost twice as frequently as clients who left representational decisions mostly to their lawyers.[60] He also argued in convincing fashion that the factual assumptions entailed in the participatory and traditional models of client representation were true for only the participatory model.[61] While his study ultimately may have discovered not much more than a "squeaky wheel" effect,[62] Rosenthal's arguments were convincing to most clinical teachers at the time. The par-

55. *See* COCHRAN ET AL., *supra* note 4, at 109-110 (describing the differences between legal and psychiatric/psychological models of lawyer-client relations).

56. For a lively, and rarely friendly history of the humanistic psychology movement, see JOYCE MILTON, THE ROAD TO MALPSYCHIA: HUMANISTIC PSYCHOLOGY AND OUR DISCONTENTS (2002). Milton blames the "therapeutic culture" of the present day United States on humanistic psychology.

57. ROSENTHAL, *supra* note 39.

58. *Id.* at 3.

59. For example, Rosenthal's active clients sought medical attention on their own rather than wait for their lawyers to help them find it, expressed special needs they had for reassurance or information about their cases, made follow up demands for attention, sought second opinions about the value of their cases, and helped marshal evidence to support their claims, all without waiting for their lawyers to suggest or approve of such actions. *Id*. at 41-56. They were demanding consumers, in other words.

60. *Id.* at 56-57.

61. *Id*. at 7-27 (describing participatory and traditional models of client representation, and analyzing assumptions underlying each).

62. *See* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 545 (1990).

ticipatory model was already widely preferred for aesthetic and political reasons, and Rosenthal seemed to give it a hard, scientific pedigree as well. It is not surprising, therefore, that when the client-centered model was first formally articulated a few years later, few commentators registered serious objection.

The first authoritative description of client-centered lawyering appeared in David Binder and Susan Price's 1977 book on interviewing and counseling,[63] and then again, in revised form, fourteen years later in what was, in effect, a second edition of the same book, this time with Paul Bergman as an additional author.[64] According to Binder, Price, and Bergman, "client-centered lawyering emanates from a belief in the autonomy, intelligence, dignity, and basic morality of the individual client."[65] Its ultimate goal, as with all theories of good lawyering, is "maximum client satisfaction,"[66] but unlike traditional theories, which see "client problems primarily in terms of . . . doctrinal pigeonhole[s]"[67] that lawyers fill in, client-centered lawyering "assumes that most clients are capable of thinking through the complexities of their problems" themselves;[68] "that they are usually more expert than lawyers when it comes to [understanding] the economic, social, and psychological dimensions of [their] problems[,] . . . [and] usually are better able than lawyers to choose satisfactory solutions."[69] As a consequence, "[i]n a client-centered world," it is the lawyer's obligation to make sure that "clients actively participate in identifying their problems, formulating potential solutions, and making decisions" in their legal cases.[70]

Client-centered lawyers also "recognize[ ] that client[ ] emotions are an inevitable and natural part of [client] problems,"[71] and thus, unlike traditional lawyers, they stress "that problems have nonlegal as well as legal aspects and . . . emphasiz[e] the importance of clients'

63. DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977).

64. DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991). I say "in effect," because the second book had an additional author and different title from the first, and was not described as a second edition. Yet, while there are some differences in organization and content, the second book takes up the same issues as the first, and resolves them according to the same general theory. A "third" edition of the book is forthcoming, with Paul Tremblay as an additional author. *See* http://www.aals.org/am2003/6190.html. For other, closely related views, see ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (1990); KRIEGER ET AL., *supra* note 39.

65. BINDER ET AL., *supra* note 64, at 18.

66. *Id.*

67. *Id*. at 17.

68. *Id.*

69. *Id.*

70. *Id.* at 18.

71. *Id.* at 17.

expertise, thoughts and feelings in resolving [these aspects of their] problems."[72] While they assume that "most clients seek to attain legally legitimate ends through lawful means,"[73] client-centered lawyers also recognize that "from time to time [they will be] require[d] . . . to support client values and decisions with which [they] disagree."[74] When "clients seek to go beyond the bounds of what is legal or just,"[75] however, client-centered lawyers do not "disregard fundamental legal concepts and moral values."[76] They share their reservations fully with clients, but in a manner that does not "state [their] values so forcefully that [they] override clients' capacities to make their own decisions."[77] Because clients are not "wrong" to act on their own values, client-centered lawyers express their concerns in "language that recognizes rather than denigrates" clients' values.[78] They also raise moral concerns sparingly, since being quick to object to client decisions on moral grounds can turn a lawyer into something of a "moral know-it-all," and convert conversations with clients into "morality plays,"[79] and "few clients want attorneys to conduct regular moral check-ups."[80] After the inevitable honeymoon period, client-centered lawyering began to be criticized on a number of grounds. Some argued that its focus on practice technique promoted lawyer manipulation of clients, or at least made such manipulation more likely, and that this contradicted the theory's espoused commitment to collaborative lawyer-client relationships. Others objected that it depersonalized and depoliticized lawyer-client interaction by reducing it to a bundle of moves or maneuvers that excluded moral and political factors, and thus trivialized the relationship. Still others complained that it condemned lawyers to a "lonely" and "independen[t]" relationship with clients that left clients "more focused on their own interests, and less concerned with the interests of others, than they were when they came into the relationship."[81] And finally, some argued that in attempting to avoid the problem of psychological reductionism, the theory expanded the concept of client-centeredness to make it synonymous with whatever was good for clients by whatever standard one chose to use, thus making the entire theory question-begging and circular. Put another way, this criticism charged that the definition of

72. *Id.* at 18.
73. *Id*. at 17.
74. *Id.* at 18.
75. *Id.* at 18-19.
76. *Id.* at 19.
77. *Id.* at 18.
78. *Id*. at 283.
79. *Id*. at 284.
80. *Id.*
81. *See* SHAFFER & COCHRAN, *supra* note 4, at 24, 22.

what it meant to act in a client-centered manner lacked any fixed meaning.[82]

While each of these criticisms was a cause for concern, perhaps the one that bothered proponents of client-centered lawyering the most was the claim that the theory lacked a morality and politics. Yet there may be something to the claim. Binder, Bergman, and Price have always been a little uneasy about the prospect of lawyers raising moral and political concerns with clients.[83] The original Binder and Price book discouraged lawyers from expressing personal opinions of any kind, perhaps (as the preface to the second book puts it), out of an "over-reaction to the tendency of many lawyers to tell their clients what to do."[84] After they were criticized for this "lonely" and "independen[t]" view,[85] the authors amended the theory to include "Moral, Political and Religious Consequences" in their list of "typical nonlegal concerns" a client-centered lawyer was permitted to raise,[86] and expressed the belief that "[e]ffective counseling inevitably requires that [a lawyer] elicit information about [the] nonlegal aspects [of a client's problem] and factor them into [the] problem's resolution."[87]

This concession may have been only a feint in the direction of the first book's critics, however, since the revised edition of client-centered theory did little more than acknowledge that clients have moral, political, and religious values, and that such values are "often intertwined with one or more other nonlegal concerns."[88] It did not give examples of how lawyers might raise such concerns in conversations with clients, or describe the circumstances in which it would be appropriate to do so. In fact, the authors state that there is no standard by which a

82. Client-centered lawyering has had the good fortune to attract excellent critics. Robert Dinerstein, Stephen Ellmann, and Deborah Rhode, among others, have written critical but sympathetic reviews of the theory, and the above criticisms (and more) are described in detail in their articles. In fact, I dare say no one has ever written a more comprehensive review of any subject than Professor Dinerstein's review of client-centered lawyering. *See* Dinerstein, *supra* note 62. *See also* Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Deborah Rhode, *Ethics in Counseling*, 30 PEPP. L. REV. 602, 604-09 (2003).

83. Even the editing of the book reflects this ambivalence in an unintendedly ironic manner. For "suggestions on [how to] counsel[ ] clients who seek to achieve immoral . . . ends," BINDER ET AL., *supra* note 64, at 19 n.12, the authors refer the reader to section 5(B) of Chapter 15. Yet, there is no section 5(B) in chapter 15. Since Binder, Price, and Bergman are criticized most frequently for having little if anything to say about the moral dimension of lawyer-client interaction, it is perhaps fitting that their own reference for where to find such a discussion has no referent.

84. BINDER ET AL., *supra* note 64, at xxii.

85. SHAFFER & COCHRAN, *supra* note 4, at 24.

86. BINDER ET AL., *supra* note 64, at 9.

87. *Id.* at 5.

88. *Id*. at 9.

lawyer might judge when it is appropriate to bring up moral and political concerns with clients.[89] So the principal proponents of client-centered lawyering still seem a little uneasy about the prospect of lawyers talking about moral and political concerns with clients, believing that to do so is inevitably to imply that lawyer "values are more important than . . . client's."[90] If lawyers do raise such concerns and clients reject them, they also believe that lawyers should either "accede to the client['s wishes], . . . ask [the] client[s] voluntarily to seek other counsel, or . . . withdraw."[91] This reluctance to permit lawyers to discuss morality and politics left many commentators somewhat unsatisfied with client-centered theory, and ultimately prompted some to express the hope (and prediction) that a richer and more complete conception of lawyer-client relations would be developed.[92] Responses were not long in coming.

III. THE LAWYER AS FRIEND

The first sophisticated attempt to construct a richer conception of lawyer role came not from clinical scholars, but from a Contracts professor and philosopher instead. Charles Fried argued, in full-blown and unapologetic fashion, that lawyers ought to be thought of as their clients' friends (or at least friends for purposes of using the legal system), and as such be entitled, on moral grounds, to do for clients the legal equivalent of what social friends are entitled to do for one another. While not everyone agreed with Fried's argument, in fact many ridiculed it,[93] it turned out that the argument "had legs," as the expression goes, or at least that it would not die. In this section, I examine the lawyer-as-friend argument in detail, starting with Fried's first generation version and the criticisms made of it, and then a rejuvenated form of the argument made by Professors Thomas Shaffer and Robert Cochran. The Shaffer-Cochran view is the most extensively developed since Fried's, and has the interesting feature of being grounded in Aristotelian virtue ethics and Christian love, two seemingly disparate bodies of thought.[94]

89. *See id*. at 284.
90. *Id*. at 282.
91. *Id*. at 284.
92. *See, e.g.,* John K. Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. REV. 781, 810 (1987).
93. Even Fried backed away from the argument in response to the criticisms. *See* CHARLES FRIED, RIGHT AND WRONG 179 (1978).
94. These features notwithstanding, the Shaffer and Cochran view has not produced much of a reaction in the legal literature. *But see* Sammons, *supra* note 43; Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers as Strangers and Friends: A Reply to Professor Sammons,* 18 U. ARK. LITTLE ROCK L. REV. 69 (1995). Others - David Luban, Deborah Rhode, and William Simon are prominent examples - have developed more complete and more sophisticated theories of the lawyer-cli-

A. Charles Fried - Friend as Hired Gun

Antecedents of the legal friendship argument can be found in articles dating back to the 1950s and beyond,[95] but Fried was the first to develop the analogy explicitly and fully, and the first to use it as a complete grounding for a conception of lawyer role.[96] He also is its most well known modern proponent. Like *Marbury v. Madison* and *Pennoyer v. Neff*, therefore, Fried's article is the intellectual wellspring for a body of doctrine, this time on the subject of legal friendship, and as such is the inevitable starting point for an analysis of that subject. Fried took up the question of whether "a good lawyer [can] be a good person,"[97] that is, whether "the traditional conception of the lawyer's role [is compatible with] the ideal of moral purity,"[98] where moral purity is understood as living "one's life . . . in fulfillment of the most demanding moral principles, and not just barely within the law."[99] He was not interested in the limits imposed on lawyer conduct by positive rules of law or ethics codes; he assumed that lawyers would observe those rules scrupulously. Instead, his inquiry was "one of morals," of whether the lawyer "whose conduct and choices are governed only by the traditional conception of the lawyer's role, which . . . positive rules reflect, lead[s] a professional life worthy of moral approbation, worthy of respect - ours and his own."[100] Or, put another way, he was interested in whether "a decent and morally sensitive person

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ent relationship subsequent to Fried's discussion, but these theories are not grounded principally on the friendship analogy, at least not as completely as Shaffer and Cochran's, and thus are not relevant to the present discussion. *See* LUBAN, *supra* note 15; RHODE, *supra* note 15; SIMON, *supra* note 15. Still others have produced rejuvenated versions of the hired gun model of lawyer-client relations subsequent to Fried's discussion, *see, e.g.,* LANDSMAN, *supra* note 45; Pepper, *supra* note 45, but again, these views are outside the scope of the present discussion.

95. *See, e.g.*, Curtis, *Ethics of Advocacy*, *supra* note 5, at 8 (describing how a lawyer might be privileged to lie for a client in the same way one might lie to save a friend or close relative); CURTIS, YOUR LAW, *supra* note 5, at 1 ("Justice is a chilly virtue. It is of high importance that we be introduced into the inhospitable halls of justice by a friend.").
96. Fried acknowledged that the friendship argument is "just a fragment which must be fitted into a larger theory" of justice, which explains how conflicts between the various roles a lawyer must play are reconciled, and how obligations to clients are harmonized with duties to citizens generally. Fried, *supra* note 6, at 1071, n.24. To do this, he would adopt "something like the principles put forward" by John Rawls in his THEORY OF JUSTICE, modified somewhat to "leave sufficient scope for the free definition and inviolability of personal relations - to a greater extent perhaps than Rawls allows." *Id.* For more recent versions of the argument, see Stephen R. Morris, *The Lawyer as Friend: An Aristotelian Inquiry*, 26 J. LEGAL PROF. 55 (2001-2002); Sammons, *supra* note 43, at 8-24.
97. Fried, *supra* note 6, at 1060.
98. *Id.* at 1061.
99. *Id*.
100. *Id.*

can conduct himself according to the traditional conception of professional loyalty and still believe that what he is doing is morally worthwhile."[101]

For Fried, the answer to this question was not complicated or controversial. It was "morally right," in his view, for "a lawyer [to] adopt as his dominant purpose the furthering of his client's interest . . . [and to] put [that] interest[ ] . . . above some idea, however valid, of the collective interest[ ]."[102] "[T]he traditional conception of . . . [lawyer] role," as he saw it, "expresses a morally valid conception of human conduct and human relationships, [and] one who acts according to that conception is to that extent a good person."[103] Indeed, "the traditional conception is so far mandated by moral right that any advanced legal system which did not sanction [it] would be unjust."[104] The basis for this belief, Fried explained, is "our intuition that an individual is authorized to prefer identified persons standing close to him over the abstract interests of humanity" in general.[105] We find this idea expressed in many parts of the culture, but perhaps most sharply "in our sense that an individual is entitled to act with something less than impartiality to that person who stands closest to him - the person that he is," and to persons related to him by friendship and kinship.[106] "There is such a thing as selfishness," Fried admitted, "yet no reasonable morality asks us to look upon ourselves [and our family and friends] as merely plausible candidates for the distribution of the attention and resources [that] we command."[107] "Such a doctrine may seem edifying, but on reflection it strikes us as merely fanatical."[108]

Fried did not ground his view on the simple utilitarian claim that "efforts [we] expend for [people close to us] are more likely to be effective because [we are] more likely to know what needs to be done."[109] If administrative efficiency were the sole basis for the right to prefer friends, he pointed out, then it "would be [a] duty [in each individual case] to determine whether [one's] efforts might not be more efficiently spent on the collectivity, on the distant, anonymous beneficiary," rather than on those close to us.[110] But this inquiry, Fried argued, flies in the face of our shared intuition that we always have a right to

101. *Id.* at 1065.
102. *Id*. at 1066.
103. *Id.*
104. *Id*.
105. *Id*.
106. *Id.*
107. *Id*. at 1066-67.
108. *Id*. at 1067.
109. *Id*. Though he admits that "the individualized relations of love and friendship (and perhaps also their opposites, hatred and enmity) have a different, more intense aspect than do the cooler, more abstract relations of love and service to humanity in general." *Id*. at 1070.
110. *Id*. at 1067.

prefer our family and friends. It is not possible on purely utilitarian grounds, he concluded, to hold that the general good is our only moral standard and at the same time steadfastly adhere to our special obligations to friends and kin.[111] Some sort of intrinsic justification[ ] is needed for the right to prefer one's own, therefore, and the "stubborn ethical datum affirming such a preference grows out of the profoundest springs of morality: the concepts of personality, identity, and liberty."[112]

In perhaps the most important paragraph in his article, Fried described, in a kind of individualism manifesto, the necessary connection between the right to prefer friends and the preservation of these fundamental moral interests of personality, identity, and liberty.

> Before there is morality there must be the person. We must attain and maintain in our morality a concept of personality such that it makes sense to posit choosing, valuing entities - free, moral beings. But the picture of the moral universe in which my own interests disappear and are merged into the interests of the totality of humanity is incompatible with that, because one wishes to develop a conception of a responsible, valuable, and valuing agent, and such an agent must first of all be dear to himself. It is from the kernel of individuality that the other things we value radiate. . . . The human concern which we . . . show others is a concern which first of all recognizes the concrete individuality of that other person just as we recognize our own.[113]

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111. *Id.* at 1068. Dauer and Leff agree. *See* Dauer & Leff, *supra* note 6, at 574 n.11 ("Fried [rejects] . . . the utilitarian justification for the 'goodness' of friendship, noting quite rightly that . . . an instrumental justification cannot be validated empirically, and that its strictures are seemingly contrary to the normal expectations of modern life.").
112. Fried, *supra* note 6, at 1068.
113. *Id.* at 1068-69 (footnotes omitted). Fried quotes Thomas Aquinas for the same view.

> It is written (Lev. xix 18, Matth. xxii 39); *Thou shalt love thy neighbor . . . as thyself*. Whence it seems to follow that man's love for himself is the model of his love for another. But the model exceeds the copy. Therefore, out of charity, a man ought to love himself more than his neighbor.
> . . . .
> We must, therefore, say that, even as regards the affection we ought to love one neighbor more than another. The reason is that, since the principle of love is God, and the person who loves, it must needs be that the affection of love increases in proportion to the nearness to one or the other of those principles.

Id. at 1069, n.22

Fried was a Contracts teacher (among other things) when he wrote the Lawyer as Friend article, so it is perhaps not surprising that his idea of friendship has a kind of quasi-contractual quality about it. Individuals free to reserve certain areas of concern for themselves are able to build up a reservoir of moral capital, made up of time, talent, and energy, he explained in his reply to Professors Dauer and Leff, *see* Charles Fried, *Author's Reply*, 86 YALE L.J. 573, 585-86 (1977), that they are then free to share with, lavish on, or exchange with others for "whatever reasons [they] liked, including pay." *Id*. *See also* Peter Goodrich, *Laws of Friendship*, 15 LAW & LITERATURE 23, 32 (2003) (describing the lawyer's professional role as involving a "formal or contracted sense of friendship . . . as comradeship in

Fried agreed that it is the essence of morality to push beyond individual concerns to the fair and logical conclusions of one's premises, to generalize outward to others and accord them the same rights as oneself. If morality is to be transcendent, it must transcend particularity, because "[t]hat is what justice consists of."[114] But he also argued that "justice is not all of morality; [that] there remains a circle of intensity [that] through its emphasis on the particular and the concrete continues to reflect . . . the source of all sense of value - our sense of self."[115] He concluded:

> Therefore, it is not only consonant with, but also required by, an ethics for human beings that one be entitled first of all to reserve an area of concern for oneself and then to move out freely from that area if one wishes to lavish that concern on others to whom one stands in concrete, personal relations.[116]

Putting aside the question of whether this argument works as far as it goes - that is, whether it justifies a natural person's right to prefer family and friends[117] - it does not yet help much with the question of whether lawyers are entitled to prefer clients. Fried recognized this, admitting that the argument as thus far developed did "no more than widen the problem," since it was still necessary to show that clients stand in the same relationship to lawyers as family and friends stand in relation to oneself. To deal with this difficulty, Fried introduced the idea of a "limited purpose friend."[118] Fried said:

> A lawyer is a friend in regard to the legal system. He is someone who enters into a personal relation with you - not an abstract relation as under the concept of justice. That means that like a friend he acts in your interests, not his own; or rather he adopts your interests as his own.[119]

That, said Fried, is "the classic definition of friendship." While the lawyer's "range of concern" is limited to matters arising in the legal representation, "within that limited domain the intensity of [the] identification with the client's interest[ ] is the same" as that of a natural friend.[120]

The connection between friendship and kinship on the one hand, and lawyer-client relations on the other, is not an intuitive or obvious

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combat," to be distinguished from the "heterotropic image of the real friend, the friend who exists in the arbours of poetry or in the imaginary domain where respite replaces antagonism, and difference gives way to the inert fantasy of the same"). Goodrich continues, "There is . . . a contract at the root of friendship in which a double equivalency is spelled, namely that friends are alike, or bound by resemblance, and act alike, or in reciprocity." *Id.* at 27.

114. Fried, *supra* note 6, at 1070.
115. *Id.*
116. *Id*. In his response to critics, he described this as building up a "moral discretionary fund." Fried, *supra* note 113, at 585.
117. Dauer & Leff have strong reservations on this point. *See* Dauer & Leff, *supra* note 6, at 575.
118. Fried, *supra* note 6, at 1071.
119. *Id*.
120. *Id*. at 1071-72.

one. Friendship and kinship are natural social relationships, but the relationship between lawyer and client, while arising within a social context, is created by systemic and institutional needs and expectations more than natural social urges, and as a consequence, it might more properly be defined in terms of collective rather than individual good. Fried rejected this conclusion, arguing instead that "law must leave us a measure of autonomy, whether or not it is in the social interest to do so. Individuals have rights over and against the collectivity,"[121] and these rights are violated if, through ignorance or misinformation, individuals refrain from pursuing wholly lawful purposes. To insure that this does not happen, law must create and support the specific role of legal friend to help individuals understand their legal rights, "[f]or the social nexus - the web of perhaps entirely just institutions - has become so complex that without the assistance of an expert adviser an ordinary layman cannot exercise that autonomy which the system must allow him."[122] Understood in this way then, a lawyer's role is morally grounded in "the need to maintain [a client's] integrity as a person,"[123] by helping him "preserve and express [his] autonomy . . . vis-a-vis the legal system."[124] Assisting someone to understand and exercise his legal rights, therefore, as Fried saw it, was an intrinsically moral act.[125]

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121. *Id*. at 1073.

122. *Id*. For Fried, a legal friend not only provided what justice demands, but also exemplified the ideals of personal trust and personal care, which (as in natural friendship), are good in themselves. *Id*. at 1075.

123. *Id*. at 1073.

124. *Id.* at 1074. This is the principal basis for Fried's argument for the right to prefer friends. That right, says Fried, "is a product of our individual autonomy." *Id*. Dauer and Leff protest that they "can't locate [the autonomy] argument exactly [in Fried's article], but even if [they] could [they] would be unimpressed." *See* Dauer & Leff, *supra* note 6, at 576 n.18. "One's choice of vocation is and should be unfettered by law," they agree, but it is equally true that

> the available choices are those among various callings all of which have some positive intrusions from felt social necessity. No one is ever coerced into becoming the manager of a public utility, but once one is that sort of person the freedom to refuse to deal equally with the public in that capacity is not unrestrained. . . .

Id. "Law *and* morality limit autonomy all the time," they continue, "indeed, that's what they're for. Citing the lawyer's autonomy-as-a-person therefore begs the important issues . . . ." *Id*.

125. Fried, *supra* note 6, at 1075. Morality and law are almost indistinguishable in Fried's view of the world. As he puts it in his reply to Professors Dauer and Leff,

> The rule of law is not only a constitutional principle, it is a moral principle. Since it is immoral for society to limit another's liberty other than according to the rule of law, it is also immoral for society to constrain anyone from discovering what the limits of its power over him are. And finally it follows that it is immoral for society to constrain anyone from informing another what those limits on that other's autonomy are. Thus, by counseling and helping others to operate the legal system a lawyer assists in the realization of rights.

Fried applied his conception of legal friendship to the resolution of two of the most difficult problems in professional role: whom to serve, and how to serve. We need not pause on his discussion of the first of these topics,[126] but his thoughts on the second add important qualifi-

See Fried, *supra* note 113, at 586. He continues, "rules and institutions [are not necessary evils, but instead] the inevitable ways in which complex human relations must often be structured [in a modern society such as ours], if moral rights and therefore humanity are to be respected." *Id.* at 587.

Fried disposed of two additional objections to the friendship analogy perfunctorily. The first argues that while natural friendship is reciprocal, friends exchange care and concern for one another in equal measure, in legal friendship "[t]he lawyer . . . is devoted to his client's interest[ ] but it is no part of the ideal that the client should have any reciprocal devotion to the interests of his lawyer." Fried, *supra* note 6, at 1074. Moreover, while the right to choose friends is grounded in autonomy, only the client creates the lawyer-client relationship and thus only the client acts autonomously. Fried responded that while natural friendship emphasizes the freedom to bestow, "surely that freedom must imply a freedom to receive," and "it is the right of the client to receive . . . an extra measure of care . . . as much as the lawyer's right to give it." *Id.* In natural friendship the focus is on the free gift of the donor, but in legal friendship it is the recipient's need that defines the relationship.

The second objection is based on the fact that lawyers are paid for their friendship, that in "contrast to natural friendship, the usual motive for agreeing or refusing to provide legal services is money." *Id.* The lawyer is thus "a public purveyor of goods," the objection continues, and "the lawyer-client relationship [is] like that underlying any commercial transaction." *Id.* at 1075.

To this objection Fried responded that the lawyer has "obligations to the client . . . beyond those of other economic agents." *Id.* He "may not refuse to give additional care to an individual who cannot pay for it if withdrawal of [his] services would prejudice that individual," for example, and in this way his duty to the client "transcends the conventional quid pro quo of the marketplace." *Id.* "[T]he content of the relation is determined by the client's needs . . . [and] not . . . by the mere coincidence of a willingness to sell and a willingness to buy." *Id.*

126. Fried rejects the idea that lawyers must expend their efforts where they will do the most social good. To require that, he believes, would be to treat lawyers as a scarce resource, and it would be "monstrous" to treat a person as a resource. This was a matter of liberty.

> Just as the principle of liberty leaves one . . . free to choose a profession according to inclination, so within the profession it leaves one free to organize his life according to inclination. The lawyer's liberty - moral liberty - to take up what kind of practice he chooses and to take up or decline what clients he will is an aspect of the moral liberty of self to enter into personal relations freely.

Id. at 1078. He continued:

> If there are really not enough lawyers to care for the needs of the poor, then it is grossly unfair to conscript the legal profession to fill those needs. If the obligation is one of justice, it is an obligation of society as a whole. It is cheap and hypocritical for society to be unwilling to pay the necessary lawyers from the tax revenues of all, and then to claim that individual lawyers are morally at fault for not choosing to work for free.

Id. at 1079-80. Dauer and Leff criticized this view for "contribut[ing] virtually nothing to the existing dialogue" over the more important "issues with which the profession and the society must presently grapple," such as whether "[a] market system for the distribution of legal services may be thought to employ wealth as a

cations to the argument for the lawyer-as-friend. A legal system which respects the lawyer's right to insure client autonomy inevitably must allow that autonomy sometimes to be exercised in ways that harm third parties and the public at large, Fried argued, but this is acceptable as long as the lawyer keeps his assistance within the limits of the law,[127] and the "quasi-official rules defining . . . lawyer[ ] advocacy."[128] The most difficult problems arise when a lawyer is asked to press an unfair claim or participate in a dishonorable or distasteful scheme against another discrete individual. "[H]ere we have a specific victim as well as a specific beneficiary. The relation to the person whom we deceive or abuse is just as concrete and human, just as personal, as to the friend whom we help."[129] "[W]hat pinches," Fried explained, "is the fact that the lawyer's personal engagement with the client is urging him to do that to his adversary which the very principles of personal engagement urge that he not do to anyone."[130] For "[i]f personal integrity lies at the foundation of the lawyer's right to treat his client as a friend, then surely consideration for personal integrity - his own and others' - must limit what he can do in friendship."[131] As Fried pointed out, "not only would I not lie or steal for myself or my friends, I probably also would not pursue socially noxious schemes, foreclose on widows or orphans, or assist in the avoidance of just punishment."[132] The risk, as he candidly acknowledged,

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modulator of access not only to justice, but even to those distributive shares that have been politically guaranteed," and "whether there is a need for some very fundamental restructuring of the reality of lawyering." Dauer & Leff, *supra* note 6, at 584 n.42. "The far more important question," say Dauer and Leff, "may be, indeed, whether a *society* with lawyers-for-fees can be 'good.'" *Id*.

127. Fried, *supra* note 6, at 1080-81. Fried would not require lawyers to help clients realize the benefits of unjust laws. For example, he believes that the action of a lawyer defying a law that "grossly violates what morality defines as individual rights . . . travels outside the bounds of legal friendship and becomes political friendship, political agitation, or friendship *tout court*." *Id*. at 1081. "The moral claims which a client has on his lawyer," in his view, "can be fully exhausted though that lawyer contains his advocacy strictly within the limits of the law." *Id.* He would make an exception to the friendship argument, therefore, for legal systems that were not "generally just and decent." *Id.* at 1085.

128. *Id*. at 1081. Presumably Fried has in mind here such things as Hazard's notion of bargaining conventions, *see* Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S. C. L. REV. 181, 193-96 (1981); or the practice standards implicit in ethics rules and malpractice doctrine that Simon discusses, *see* William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 496-98 (1984). *But see* Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99, 100-103 (1982) (questioning the effectiveness of practice conventions for regulating truthfulness in negotiating and arguing, instead, that the default standard should be "caveat lawyer").

129. Fried, *supra* note 6, at 1082.

130. *Id*. at 1083.

131. *Id.*

132. *Id*. at 1084.

is that "the whole [friendship] argument [might] unravel on us at this point."[133]

To restore force to the argument, Fried introduced his well-known distinction between "wrongs that a reasonably just legal system permits to be worked by its rules and wrongs which the lawyer personally commits."[134] There is a difference, he argued, between "humiliating a witness or lying to [a] judge," on the one hand, and "asserting the statute of limitations or the lack of a written memorandum to defeat what you know to be a just claim against your client," on the other.[135] "In the latter case," he explained, "if an injustice is worked, it is worked because the legal system not only permits it, but also defines the terms and modes of [its] operation. Legal institutions have created the occasion for your act. What you do is not personal; it is a formal, legally-defined act."[136] But in the former, the immorality of "lying or abuse obtains both without and within the context of the law."[137] Fried believed that a lawyer "is morally entitled to act in this formal, representative way even if the result is an injustice, because the legal system which authorizes both the injustice . . . and the formal gesture for working it insulates him from personal moral responsibility."[138] The wrong is "wholly institutional; it . . . has no meaning outside the legal framework."[139] To lie to a judge, on the other hand, is personally to betray the invitation to belief implicit in every speech act. It is not possible to lie in just a representational capacity. "The injury and betrayal are not worked by the legal process, but by an act which is generally harmful quite apart from the legal context in which it occurs."[140] In short, "[a] lawyer is not morally entitled to engage his own person in doing personal harm to another, though he may exploit the system for his client even if the system consequently works [an] injustice."[141]

133. *Id*.
134. *Id*.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id*. at 1085.
140. *Id*. For the abusive and humiliating cross-examination example, the relevant distinction is between "exposing a witness to the skepticism and scrutiny envisaged by the law and engaging in a personal attack on the witness." *Id.* at 1086. In cross-examining, the lawyer's "probing must not imply that the lawyer believes the witness is unworthy of respect." *Id*.
141. *Id*. at 1086. When what the client asks is personally repugnant to the lawyer, or when the lawyer is the last lawyer in town, Fried distinguished between actions taken to "establish a legal right of some significance," where the lawyer must do what the client asks, and actions taken as part of "a routine, repetitive business operation, part of which just happens to play itself out in court," where he need not. *Id*. at 1086-87.

Fried did not try to dissuade lawyers from giving moral advice to clients, or ask lawyers to assume that clients are interested only in complying minimally with the law, and have no desire to fulfill their moral obligations to others. On the contrary, as he said, to make such an assumption "is itself a form of immorality because it is a form of disrespect between persons."[142] Instead, he proposed a general way of looking at the "central and clear" cases in the problem of legal representation that "account[s] for a kind of callousness toward society and exclusivity in the service of the client which otherwise [would] seem quite mysterious."[143] It was his purpose to show that "there is a vocation and a satisfaction even in helping Shylock obtain his pound of flesh or in bringing about the acquittal of a guilty man,"[144] because such actions affirm the

> moral liberty of a lawyer to make his life out of what personal scraps and shards of motivation his inclination and character suggest: idealism, greed, curiosity, love of luxury, love of travel, a need for adventure or repose; only so long as these lead him to give wise and faithful counsel.

"It is the task of the social system as a whole," as Fried saw it, and not individual lawyers, to create the "conditions under which everyone will benefit in fair measure from the performance of . . . lawyers" and law.[145]

If the power of an argument exists in proportion to the stature of its critics and the intensity of their criticism, then Fried's argument was powerful indeed, since highly-respected commentators jumped all over it immediately upon its publication. Professors Edward Dauer and Arthur Leff, both then of the Yale Law School,[146] were the first to respond. In the issue of the *Yale Law Journal* next following Fried's, and in the form of a letter to the Editors (and, *a fortiori*, to Fried), they took Fried to task on a number of counts.[147] While not disagreeing with the basic claim that a good lawyer can be a good person, they

142. *Id*. at 1088.
143. *Id*. at 1087.
144. *Id.* at 1088.
145. *Id*. at 1088-89.
146. Dauer is now Dean Emeritus at the University of Denver Law School, and Leff, one of the truly original minds in the history of American legal education, died in 1981.
147. In addition to being the first to criticize Fried's argument, Dauer and Leff also were among the most insightful and comprehensive. Their letter to the Editors of the Yale Law Journal has within it, in one form or another, almost every point made by commentators to follow, and this in spite of the fact that they did not think much of Fried's topic to begin with. As they put it, "[w]hether a lawyer can be a good person is a question that is philosophically interesting, perhaps even significant if extrapolated systematically. But it is not among the issues with which the profession and the society must presently grapple." Dauer & Leff, *supra* note 6, at 584 n.42. More important, as they saw it, were the questions of whether the reality of lawyering ought to be fundamentally restructured, and the balance of values in the judicial process reassessed. *Id*.

objected to the "route" by which Fried arrived at that conclusion, and to the lack of qualification or nuance in his description of the obligations of friendship.[148] "Assum[ing] for [a] moment that grounding an ethical system on what people in fact believe and do [is] not [mere] twaddle,"[149] they stated, then it is no doubt intuitively correct "to some extent," to say that one is permitted to "favor oneself and one's friends . . . *more than* abstract others."[150] But the difficult issues, they continued, are "in what ways, and how much," "[f]or almost no one believes that totally individualistic selfishness is 'good' either," and on these issues Fried does not have much of anything to say.[151] Moreover, Dauer and Leff argued, the concept of friendship does not, by itself, help determine who is qualified to be a friend,[152] and being able to make this determination correctly is central to the legitimacy of Fried's entire scheme.[153]

The criticism that seemed to sting Fried the most,[154] however, was the charge that he resorted to "quasiutilitarian props for a tottering nonutilitarian argument."[155] Fried had rejected a utilitarian defense of the legal friend theory in *The Lawyer As Friend* article, one will recall, arguing that the right to prefer friends is based on reasons inherent in the "concepts of personality, identity, and liberty,"[156] and not on the idea that we have a better understanding of "what needs to

148. *Id.* at 573.

149. *Id*. at 575. Leff had previously argued that such an effort was "ultimately doomed," but was having second thoughts based on a reading of Unger's KNOWLEDGE AND POLITICS. *Id.* at n.13.

150. *Id*. at 575.

151. *Id*. (footnote omitted).

152. *Id.* at 577 n.20

> All right, then. Maybe it is "good" for us to prefer ourselves, because we're us. And maybe we can even, morally, prefer our kin because no one else will, or because we're genetically programmed to do so, or whatever. But then, when we face the prospect of choosing other "friends," how can we validate that? "Friendship as good" doesn't take us very far . . . .

Id.

153. *Id*. They also thought that "when isolated and extended a bit," the entire friendship argument is "circular, or at least self-sealing." The argument:

> goes something like this. Question: "Can it ever be morally good to lavish one's care on one concrete individual to the detriment of the wider social good?" Answer: "Yes, when that lavishing is done within the dyad of friendship." Definition of a friend: "Someone on whom such care is lavished." Conclusion: "We cannot gainsay any such selfish (socially nonoptimal) acts, since the doing of them makes the relationship one of (albeit, limited purpose) friendship, and friendship validates the doing."

Id. at 575 n.12.

154. This criticism left Fried "'a quivering jelly' of indignation." *See* Fried, *supra* note 113, at 586 (quoting Dauer & Leff).

155. Dauer & Leff, *supra* note 6, at 574-75 n.11.

156. Fried, *supra* note 6, at 1068.

be done"[157] in the case of friends. Yet, as Dauer and Leff pointed out, in Fried's world lawyers are entitled (if not obligated) to get clients "what they want in any way that is not illegal," because the

> system of law is fundamentally just, and if it provides that persons in the clutches of that system be fully represented, then it is not unjust (or morally bad) to do the representing, even if some of the things one must do in the course of that representation look not only not socially optimal, but downright nasty . . . .[158]

This answer is interesting, said Dauer and Leff, because it is so obviously "the ordinary rule-utilitarian lawyer-defending argument after all."[159] The good effects produced by the legal system as a whole excuse individual bad lawyer acts. But what if, on rule-utilitarian grounds, asked Dauer and Leff, "the system - the rule - . . . is more unjust than it needs to be? Is it still 'good' to serve a bad system within its own rules?"[160] Fried apparently thought so, they concluded, because when a lawyer harms others on behalf of a client it is "the legal system which authorizes . . . the injustice . . . and the formal gesture [of] working it insulates [the lawyer] from personal moral responsibility."[161] The utility of following the rule wipes out the disutility of harming discrete others. But if this is what Fried meant to say, concluded Dauer and Leff, then his "argument against the 'utilitarian' critique of lawyering was at least partly disingenuous."[162]

Dauer and Leff also criticized the friendship analogy directly,[163] denying that a client is like a friend.[164] There is at least one point of overlap between the two, they admitted - both a lawyer and a friend adopt others' interests as their own - but even that similarity comes about mostly because Fried defines friendship in terms of that one quality. For Fried, they argued, "a lawyer is like a friend . . . because

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157. *Id.* at 1067.

158. Dauer & Leff, *supra* note 6, at 579 (footnote omitted).

159. *Id. See also id.* at 576 n.17 (while there is "some ambiguity about whether the metaphor of friendship is empirical or normative. . . . [a]t the critical points . . . the propositions seem to be empirical.")

160. *Id*. at 580.

161. *Id*. (quoting Dauer & Leff, *supra* note 6, at 1084.

162. *Id*. at 579. Fried agreed that rule-utilitarianism is "a philosophically false, incoherent doctrine," and denied that "any argument of utility" underlay his claim for the right of a lawyer to prefer clients as friends. *See* Fried, *supra* note 113, at 586-87. But he did not respond directly to the particular objections made by Dauer and Leff.

163. Dauer & Leff, *supra* note 6, at 577-579. Fried denied that the friendship analogy was the "starting point of [his] argument." Fried, *supra* note 113, at 586. The idea of friendship, he said, was used simply to dramatize the point that the expenditure of moral resources by a lawyer is similar to the expenditure of moral resources by a friend. *Id*. None of Fried's critics seem to believe this claim.

164. As Dauer and Leff asked, "Does the simile hold?" Dauer & Leff, *supra* note 6, at 577. This is the only example I can find anywhere in the "friendship" debate where Fried's argument is described as a simile.

. . . a friend is like a lawyer."[165] But most of the time in real life, they suggested, there are more differences than similarities between the "affective commitment to friends' causes and the espousal of [the causes] of clients."[166] For example, when one prefers a friend to others, one

> has typically injured others only in the sense that he has withheld from [them] what they may never have had to begin with. But when one acts as lawyer, he is often in the position of . . . tak[ing] away from some other person something which that other person already "has," or giv[ing] as little as possible [for it] in return.[167]

This suggests, advised Dauer and Leff, that "lawyers should sometimes be *more* constrained in pursuing their friendship[s] than others need to be,"[168] but Fried does not consider this possibility.

In addition, said Dauer and Leff, "except in reasonably rare circumstances, if the attorney finds espousing his client's cause too morally 'costly,' both the formal and unwritten standards of the profession permit [the lawyer] to get rid of the client."[169] Moreover, "when there is a flat conflict between the attorney and his client, the same rules allow the attorney to be loyal to himself, even if that involves using the client's confidences against him."[170] And "[s]till further, insofar as an attorney can predict [a conflict in advance], he is almost perfectly free to refuse to take on that client in the first place."[171] Given all of this, argued Dauer and Leff, "whatever the actual contingency and chilliness of the lawyer's relationship to his client, it is firm, wholehearted, and ardent compared to the client's reciprocal feelings" for the lawyer.[172] As Fried sees it, Dauer and Leff said,

> A lawyer is a person who, without expecting any reciprocal activity or inclination thereto, will attempt to forward or protect the interests of a client, within the rules of a legal system, so long as he is paid a sufficient amount to do so, and so long as doing so does not inflict any material unforeseen personal costs.[173]

"That's 'friendship'?"[174] they asked.

For all the difficulties it created, one wonders why Fried bothered with the friendship analogy in the first place. Why not just argue for a lawyer's right to prefer clients directly, or as Dauer and Leff asked, "[s]ince it was so easy to define a friend as good, why not just do the same for the lawyer?" The answer writes itself. Since "[l]awyers fre-

165. *Id*. at 577-78.
166. *Id.*
167. *Id*. at 577 n.23.
168. *Id.*
169. *Id.* at 578.
170. *Id*.
171. *Id*.
172. *Id*. at 579.
173. *Id*.
174. *Id*.

quently do feel guilty about what they do for a living, and the public pretty thoroughly agrees that they ought to," Fried's move of "declaring human opinion to be the measure of goodness," will not work nearly as well if he begins his argument by asserting that we know intuitively that lawyers are entitled to prefer clients. In fact, argued Dauer and Leff, proceeding in this way would make the "callow prestidigitation of the original friendship-justifying move too painfully obvious."[175] Fried's metaphorical opening is an "absolute necessity," they explained, "for [Fried] must say that while human opinion and intuition defines the good, in [the case of lawyers] it happens to be wrong . . . . [H]e must convince people to change their views. And for persuasion there's nothing like [a] metaphor."[176]

These criticisms, strong as they were, did not shake Fried's faith in the friendship analogy. On the contrary, in his reply to Dauer and Leff he still found the analogy "fruitful,"[177] and continued to defend it. But it turned out that the criticism was just beginning. Other commentators, following up on Dauer and Leff's initiative, made new objections, or restated familiar ones, usually in stronger language.

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175. *Id*. at 577 n.22.

176. *Id*. For their own part, Dauer and Leff see lawyers as

> free-lance bureaucrats, not tied to any major established bureaucracy, who can be hired to use, typically in a bureaucratic setting, bureaucratic skills - delay, threat, wheedling, needling, aggression, manipulation, paper passing, complexity, negotiation, selective surrender, almost-genuine passion - on behalf of someone unable or unwilling to do all that for himself.

Id. at 581. "In brief, a lawyer is one who helps . . . further his client's interest in reducing everyone and everything else into something to be escaped or consumed." *Id*. at 583. A lawyer achieves goodness in this process "by being - professionally - no rottener than the generality of people acting, so to speak, as amateurs." *Id*. at 582. Dauer and Leff admit that neither their view, nor Fried's, is "wholly accurate," but believe theirs "explains something . . . Fried's . . . makes inexplicable: the considerable degree to which the public, including . . . clients, distrusts and despises [lawyers]." *Id.*

Dauer and Leff might have found Henry Louis Mencken a kindred spirit. For Mencken, friendship was like romantic love, which he described as "a wholesale diminishing of disgusts, primarily based on observation, but often, in its later stages, taking on a hallucinatory or pathological character." He continued: "Friendship has precisely the same constitution, but the pathological factor is usually absent. When we are attracted to a person and find his or her proximity agreeable, it means that he or she disgusts us less than the average human being disgusts us - which, if we have delicate sensibilities, is a good deal more than is comfortable." H.L. MENCKEN, A MENCKEN CHRESTOMATHY 44 (1982) (1949). *See also* 2 SCHOPENHAUER, *supra* note 33, at 210 ("we see the four-footed friendships of so many men of a better nature; for how could we recover from the endless dissimulation, duplicity, perfidy, and treachery of men if it were not for the dogs into whose open and honest eyes we can look without distrust").

177. Fried, *supra* note 113, at 586.

William Simon,[178] for example, found Fried's definition of friendship "clearly an error."[179] "The classical definition of friendship," said Simon, "emphasizes, not the adoption by one person of another's ends, but rather the sharing by two people of common ends. . . . [It also] includes a number of other qualities foreign to the relation Fried describes . . . [such as] affection, admiration, intimacy, and vulnerability."[180] Moreover, continued Simon, "if Fried's definition is amplified to reflect the qualification . . . that the lawyer adopts the client's interests *for money,* it becomes apparent that Fried has described the classical notion, not of friendship, but of prostitution."[181] "Fried's lawyer," added Simon, "is a friend in the same sense that your Sunoco dealer is 'very friendly' or that Canada Dry Ginger Ale 'tastes like love.'"[182]

The friendship analogy, charged Simon, was an example of one of those "self-validating, analytical propositions" Herbert Marcuse criticized for closing the universe of discourse.[183] As Marcuse explained:

> The unification of opposites which characterizes the commercial and political style is one of the many ways in which discourse and communication make themselves immune against the expression of protest and refusal. How can such protest and refusal find the right word when the organs of the established order admit and advertise that peace is really the brink of war, that the

178. Simon is now the William W. & Gertrud H. Saunders Professor of Law at Stanford Law School, but when he wrote the original draft of the *Ideology of Advocacy* he was a third year student at Harvard Law School. The *Ideology* article rivals Professor Amsterdam's famous *Vagueness* note, *see* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960), for being the greatest piece of law student writing ever produced.

179. Simon, *supra* note 5, at 108.

180. *Id*.

181. *Id.* Simon finds the "conflation of the ideas of friendship and prostitution . . . typical of the moral obfuscation which pervades [Fried's] article. . . . The task of helping a 'disagreeable dowager' tyrannize her relatives [for example], deserves the same intensity of commitment [in Fried's view], as the task of 'defending the civil liberties case of the century.'" *Id.* (quoting Fried, *supra* note 6, at 1064).

182. *Id*. at 109. Fried argued, one might recall, that legal rights are different from commercial interests, and that this distinguishes a lawyer from an ordinary purveyor of goods. *See supra* note 125. Simon rejected this distinction as untenable. While agreeing that some clients, particularly criminal defendants, may be "involved in a 'critical assault on one's person' or at least in a situation implicating their 'concreteness and individuality,' others cannot." *Id.* at 110 n.182. He continued,

> If a finance company's attempt to foreclose on a poor widow or a wealthy person's attempt to evade taxes - both examples used by Fried - can be viewed as implicating concreteness and individuality, then it is difficult to think of any effort to satisfy any desire which could not be so viewed. . . . [F]or people who do not have secure employment or independent wealth it is precisely in the material dealings with landlords, employers, and bureaucrats that their individuality is most at stake. . . . For them, concreteness and individuality would be better served by a friendly landlord than by a friendly lawyer.

Id.

183. *Id*. at 109.

> ultimate weapons carry their profitable price tags, and that the bomb shelter may spell coziness? In exhibiting its contradictions as the token of its truth, this universe of discourse closes itself against any other discourse which is not on its own terms.[184]

Discourse of this sort flattens out personality rather than respects it, argued Simon, and evidence of this can be found in Fried's discussion. For example, "Fried celebrates the farnkly [sic] exploitative alliances of convenience between desperate, selfish little men . . . [and] explicitly strives to infuse with pathos and dignity the financial problems of the tax chiseler and the 'disagreeable dowager.' By collapsing traditional moral categories," said Simon, "[Fried's] rhetoric reflects the homogenization of previously distinct personal characteristics. Fried can assert that the lawyer affirms the client's individuality because . . . Fried's clients have almost no individuality."[185]

Simon also criticized Fried for defending the lawyer-client relationship as a good in itself,[186] "to the exclusion, not only of substantive consequences, but of the other elements of the judicial proceeding as well."[187] "The most striking feature of Fried's position," he explained, "is that the 'moral foundations of the lawyer-client relation' have so little to do with law of any kind."[188] Fried's decision to separate lawyers and clients from law, charged Simon, makes the legal system itself no longer a "warm, comfortable setting in which the litigant's identity is affirmed."[189] Social norms embodied in law become burdens to be avoided rather than sources of satisfaction or relief. The irony, said Simon, is that while the friendship analogy celebrates the legal profession more openly than many previous defenses of adversary advocacy, it also tacitly "acknowledg[es] the failure of the . . . profession to accomplish the task for which the lawyer's role was created in the first place, the reconciliation of public and private ends."[190] "In emphasizing the remoteness . . . of public ends," asserted Simon, "the friendship analogy admits that the magic with which the lawyer once claimed he could resolve the clash of individual wills is a fraud."[191] "Unable to justify [lawyer] role in terms of public means

184. HERBERT MARCUSE, ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY 88, 90 (1964).

185. Simon, *supra* note 5, at 109. Simon's criticisms contain the harshest and most unforgiving language anywhere in the lawyer-as-friend debate.

186. *Id*. at 107.

187. *Id.* at 110.

188. *Id.* (paraphrasing Fried, *supra* note 6, at 1072).

189. *Id*. at 111.

190. *Id*. at 112.

191. *Id*. Like Dauer and Leff, Simon criticized Fried's attempt to distinguish between wrongs of the system and personal wrongs, but for slightly different reasons. Using the familiar example of the perjurious client, Simon criticized Fried's argument that the lawyer was more "like the letter carrier who delivers the falsehood" than one who makes a direct "speech act invit[ing] belief," by pointing out that

and ends," said Simon, "[Fried] urges that it be accepted as an end in itself."[192]

David Luban,[193] a moral philosopher by training, and a prolific and highly respected commentator on legal ethics as well, also took issue with Fried's view. In one of the best discussions of the legitimacy of the American adversary system anywhere in the literature,[194] Luban reviewed the justifications typically offered for adversary justice. Among the "intrinsic justifications," he included Fried's argument for "enhancing . . . client[ ] autonomy and individuality . . . [as] an intrinsic moral good."[195] Luban admitted that Fried's system of "concentric-circles morality" captured, "albeit in a distorted form," some of the legitimacy in the idea of "professionals as devoted by the nature of their calling to the service of their clients."[196] In other words, said Luban, "Fried's analogy contains a grain of truth."[197] But it does not excuse lawyers from being morally accountable for actions they take on behalf of clients, he continued, because "we are *not* - except for Nietzsche's Teutons and G. Gordon Liddy - willing to do grossly immoral things to help our friends, nor should we be."[198] And Fried's method for saving his argument, the distinction between personal wrongs and institutional wrongs, said Luban, "has not been very popular since World War II."[199]

The problem, argued Luban, "is that Fried takes the lawyer to be the mere occasion rather than the agent of morally-bad-but-legally-legitimate outcomes."[200] It was as if he believed that when bad things happened it was because "[t]he system did it; it 'was just one of those things difficult to pre-visualize - like a cow, say, getting hit by light-

"the competent trial lawyer must invite the trier's belief with his appearance and gestures just as much as with his speech, with the questions he asks and the way he asks them just as much as with the statements he makes." *Id*. at 111-12 n.188. "The distinction between speech and conduct," he continued, "is meaningless [since] personality is engaged in both, and in both it intentionally misleads." *Id.* at 112 n.188. "On a more practical level," said Simon, "Fried ignores [the fact] that the lawyer will have to argue explicitly to the jury that the client's lie is credible in his summation." *Id*. The second problem with Fried's argument, said Simon, is "that the client's lie . . . will, if successful, probably lead to an unjust result. The letter carrier analogy would be more truthful if the letter contained a bomb likely to blow up in the face of the recipient." *Id*.

192. *Id*. at 113.

193. Luban is the Frederick J. Haas Professor of Law and Philosophy at the Georgetown University Law Center.

194. Luban, *The Adversary System Excuse*, *supra* note 15, at 83.

195. *Id.* at 105.

196. *Id*. at 106.

197. *Id.*

198. *Id.*

199. *Id*. at 107.

200. *Id*.

ning.'"[201] This is false in three respects, argued Luban. First, "it discounts the extent to which the lawyer has . . . a creative hand in [influencing] . . . outcome, at times even reversing the law . . . . Second, [a legal system] is not an abstract structure of propositions but a social structure of interacting human beings, so that the actions of its agents *are* the system. [And] [t]hird, . . . [a] lawyer is indeed acting *in propria persona* by 'pulling the levers of the legal machinery.'"[202] Fried's view, said Luban, "seems to trade on a Rube Goldberg insight: if the apparatus is complex enough, then the lever-puller doesn't really look like the agent. But that cannot be," he continued, because "I chop the broccoli, whether I do it with a knife or merely push the button on the blender. The legal levers are pulled by the lawyer: no one else can do it."[203]

Even some of Fried's philosophical fellow travelers, those with views on the lawyer-client relationship substantively similar if not identical to Fried's, disagreed with the use of the friendship analogy. Alan Donagan, for example, now deceased but formerly a Professor of Philosophy at the University of Chicago and one of the world's leading Kantian philosophers, found the friendship overlay a kind of non-consequentialist gilding of the lily.[204] Thinking of a lawyer as a friend, he said, "will no doubt be . . . funny [to] anybody who has recently paid a lawyer's bill. For while it is true that the lawyer and the client may be friends, like the butcher and the baker, what they do for each other for the sake of money are not offices of friendship."[205] The "lawyer as friend" analogy, said Donagan, "was as unnecessary [to Fried's argument] as it is misleading. If [Fried] had contented himself with likening lawyers to other hired professionals, his argument would have been clearer and would have appeared less ridiculous."[206] Fried's argument for the right to prefer friends, in Donagan's view, should have gone (and did go, properly understood) something like this:

> A society fails to respect the human dignity of those within its jurisdiction if it denies them a fair opportunity to raise questions about what is due to them under the law before properly constituted courts, and to defend themselves against claims upon themselves or charges against themselves; it would so fail if it denied them the opportunity to hire legal advisers whose professional obligation would be to advise them how best to do these things and to represent them in doing them. This justification demands that lawyers be willing to suspend their own beliefs about the merits of their clients' aims or the truth of

201. *Id.* (quoting GALWAY KINNELL, THE BOOK OF NIGHTMARES 43 (1971)).
202. *Id.* (paraphrased slightly from Fried, *supra* note 93, at 192 and Fried, *supra* note 6, at 1085).
203. *Id.* at 107-108.
204. Donagan, *supra* note 25, at 126, 128. Donagan described Fried's article as "notorious," but admitted that he owed it much, and felt that it did "not deserve Simon's denunciation of it as an Orwellian 'moral obfuscation.'" *Id.* at 128.
205. *Id.*
206. *Id.*

> what they attest, provided that the morality of their aims be rationally defensible and that what they attest be possibly true.[207]

Donagan agreed that there are limits on what lawyers may do for clients. For example, "[i]f a client's testimony is inconsistent or irreconcilable with physical or documentary evidence,"or if disbelief in it "can be suspended only at the price of calling into question beliefs . . . about physical nature or about how certain kinds of documents are produced," then "no intelligent attorney can treat it as possibly true."[208] Similarly, "if the only principles on which a client's claim can be morally defended appear to the lawyer to be morally pernicious, the lawyer cannot treat the client's position as rationally defensible."[209] On the other hand, "[i]f a lawyer's personal disagreement with a client's moral position depends on complex deductions from moral principles the lawyer considers established, especially if those deductions turn on disputed premises about matters of fact, the lawyer will as a rule be justified in treating the client's position as defensible."[210] Fried recognized all of this, said Donagan, and did not intend the friendship principle to be interpreted to "entail[ ] every remote consequence" that could be drawn from it. In his (i.e., Fried's) own formulation and application of the principle, continued Donagan, "in no case [did] he fail to specify that it has to do with a client's autonomy."[211]

Donagan agreed with Fried's claim that "a lawyer . . . may act to bring about a wrong to a third party that the legal system permits without thereby committing a personal wrong," and saw this as a "morally significant" distinction.[212] "In drawing attention to what the law requires in a client's case, even though it injures a third party," said Donagan echoing Fried, "a lawyer merely sets the judicial system in motion; in lying in a negotiation or legal proceeding he or she does more, by introducing into that negotiation or proceeding an injurious factor for which the legal system is in no way responsible."[213] While approving of the "wrongs of the person - wrongs of the system" distinction, therefore, Donagan also thought that it needed to be refined, because even in generally just and decent legal systems, a lawyer acting as the system permits may do morally intolerable things if the laws of

207. *Id.* at 133. This is Donagan's paraphrase of the argument he thought Fried wanted to make. Donagan's full discussion of the argument is much more elaborate, and each of the ideas expressed cryptically in the above paragraph, particularly the ideas of "rationally defensible aims," and "possibly true" assertions of fact, is a good deal more complicated than the above paragraph may make them seem. *See id.* at 128-133.

208. *Id.* at 131-132.

209. *Id.* at 133.

210. *Id.* at 132.

211. *Id.* at 129.

212. *Id.* at 137-38.

213. *Id.* at 138.

that system enjoin or permit violations of morality.[214] With these limited qualifications, however, Donagan thought Fried's understanding of lawyer role was just about right.

Others found fault with the lawyer-as-friend argument as well - Jerrold Auerbach thought the idea of a "limited-purpose friend" was a "limited-purpose analogy,"[215] and Thomas Shaffer and Robert Cochran saw it as just a sophisticated version of the "hired gun" view[216] - but the above criticisms give one a pretty complete sense of the range of objections made to Fried's argument. One of the most important themes in these criticisms is the diminished, if not almost non-existent, role accorded mutuality and reciprocity in Fried's view of friendship.[217] A Friedian friend is not a "best enemy"[218] in the Nie-

214. *Id*. at 125-26. As examples, Donagan listed the Fugitive Slave Act of 1850, which permitted slaves to be repossessed as property; a 1980 Illinois statute which allowed tax-delinquent real estate to be sold without giving owners notice of the sale or a chance to pay the taxes and a rule of evidence prevalent in American jurisdictions in the 1970s that made a rape victim's sexual life a proper subject of inquiry for purposes of impeachment. *Id.* at 125-126. The social-juridical systems of the United States in the 1850s and the 1970s, and Illinois in 1980, were generally just and decent, said Donagan, so, on Fried's terms, it "would . . . have been morally permissible for a lawyer, practicing . . . in those societies, to represent a slaveowner in repossessing [a slave], . . . a real estate speculator in purchasing the dwelling of an aged and ailing person who was unaware that it was being sold," and a rape defendant trying to show that the victim must have consented because she was promiscuous. *Id*. And yet each of these acts would have been morally intolerable. "Is it then simply a delusion," asked Donagan, "that doing an institutional wrong may not be a personal wrong? Or are some institutional wrongs personal wrongs and others not?" *Id*. at 138. The latter, said Donagan, because there are two kinds of institutional wrongs, those "introducing wrongs where there were none before . . . and [those] failing to redress or punish wrongs already done." The first was improper in Donagan's view, and the second was not. *Id.* at 138-39.

215. *See* Jerold S. Auerbach, *What Has the Teaching of Law To Do with Justice?,* 53 N.Y.U. L. REV. 457, 468 (1978) ("The one-sided nature of the attorney-client relationship, its origin in special circumstance, and its cash nexus - all of which [Fried] recognizes - are probably sufficient in themselves to transform a 'limited purpose' friendship into a limited purpose analogy.").

216. SHAFFER & COCHRAN, *supra* note 4, at 44 n.3.

217. The concept of mutuality describes an equivalence in values, character, purpose, and the like (i.e., friends are the same kind of people); whereas the concept of reciprocity describes an equivalence in contribution to, and participation in, the relationship (i.e., both sides open up to one another equally, and help one another in roughly equal fashion).

218. FRIEDRICH NIETZSCHE, THUS SPAKE ZARATHUSTRA 51 (Thomas Common trans., 1967) ("In one's friend one shall have one's best enemy. Thou shall be closest unto him with thy heart when thou withstandest him."). Thinking of Nietzsche as a theorist of friendship might seem odd, if not misguided, given his more familiar association with an ethos of ultra-individualism, glorifying independence and solitude. Friendship is a powerful feature of his writing in his so-called "middle period," however, where he treats the capacity for friendship as a central characteristic of higher individuals. *See* Ruth Abbey, *Circles, Ladders and Stars: Nietzsche on Friendship,* 2 CRITICAL REV. OF INT'L SOC. AND POL. PHIL. 50, 50-64

tzschean sense, someone who is equal in character, has a shared sense of ends, and is free to criticize one's projects when they do not do justice, and free to be criticized on the same grounds in return.[219] These are important omissions. Mutuality and reciprocity have always been part of the understanding of friendship in the western literary and philosophical tradition, and their absence in Fried's view is a major flaw in his understanding of the subject. A brief survey of the friendship literature will show just how much of a break Fried makes with this western tradition.[220]

B. Friendship Historically

The closest historical analogue to Fried's understanding of friendship is the view of the just man defended by Polemarchus in Book I of Plato's Republic.[221] For Polemarchus a just man was someone who did good to one's friends and harm to one's enemies,[222] a definition not all that different from "making another's interests your own."[223] This

(1999). For examples of "best enemy" friendships, at least from the perspective of one of the participants, see Goodrich, *supra* note 113, at 39-43 (Peter Goodrich describing his relationship with Duncan Kennedy); Peter Gabel & Duncan Kennedy, *Role over Beethoven*, 36 STAN. L. REV. 1, 21-22 (1984) (Peter Gabel describing his friendship with Duncan Kennedy).

219. Dean Kronman also has described the "critical" function of friendship. *See* KRONMAN, *supra* note 7, at 131-132.

> 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 judgement 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.

220. Stacy Sauls, a former student and now the Episcopal Bishop of Lexington, Kentucky, first introduced me to the friendship literature over twenty years ago. I apologize to him for taking so long to recognize its importance.

221. THE REPUBLIC OF PLATO I, at 3-34 (Allen Bloom trans., 1968).

222. *Id*. at 10-11. Polemarchus' conception of the just man is a little more flexible than Fried's conception of a friend, as we will see shortly in the discussion of Socrates' response to Polemarchus.

223. Fried, *supra* note 6, at 1071. *Compare Proverbs* 19:6, "Many will intreat the favour of the prince: and every man is a friend to him that giveth gifts." Or E.M. Forster's famous "[I]f I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country." E. M. FORSTER, TWO CHEERS FOR DEMOCRACY 68 (1951). Or Schopenhauer's "wholly disinterested sympathy with another's weal and woe." *See* 1 ARTHUR

view may seem a little primitive to modern ears, lacking any notion of altruism, or the Christian concept of universal love,[224] but it has a certain dignity of its own. As Allan Bloom explains, "[t]hat dignity consists in unswerving loyalty, loyalty to the first, most obvious attachments a man forms - loyalty to his family and his city."[225] And a loyalty based conception of friendship is powerful, Bloom continues, "because of its exclusiveness; it stays within the limits of possible human concern."[226]

It is not hard to see how one could prefer the interests of those close to one over the abstract interests of humanity in general (though some argue that friendship is immoral when it entails preferring those who may neither need help, nor deserve it, over those who do),[227] but

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SCHOPENHAUER, PARERGA AND PARALIPOMENA: SHORT PHILOSOPHICAL ESSAYS 458 (E.F.J. Payne trans., 2000

224. Christian belief transformed the world of late antiquity, including its views of friendship. As David Konstan explains, "[u]nder conditions of collective living, where group cohesion and spiritual progress were central concerns, the emphasis fell more on generalized charity and the need for honesty than on ties between pairs of individuals, which might be disruptive to the community." DAVID KONSTAN, FRIENDSHIP IN THE CLASSICAL WORLD 153 (1997). For Christians, friendship had more of the quality of brotherly love, founded not on a special preference for specific others, but on a joint commitment to shared religious beliefs. In fact, many Christian writers avoided the language of friendship altogether, perhaps, Konstan suggests, because an understanding of friendship based on a mutual awareness of virtue seemed incompatible with the idea of Christian humility and the belief that personal virtue ultimately was the fruit of God's grace. *Id*. at 159-60. A world view which magnifies charity inevitably nudges friendship to the periphery of social life and the displacement of *philia* from the center of social life was a major part of Christianity's transformation of Western Civilization. This shift also helped create the modern focus on equality rather than special preference as the central focus of public consciousness. *See* Gilbert Meilaender, *Who Is My Friend?*, FIRST THINGS, May 1999, at 57, 60. For an excellent overview of the relationship between Christian and classical conceptions of love, see IRVING SINGER, THE NATURE OF LOVE: PLATO TO LUTHER, 159-363 (2d ed. 1984). Other important studies include ST. AUGUSTINE, CITY OF GOD, BK. XI, 1, 26-28, 33; BK. XIV, 1, 6-7, 9-13, 28; BK. XV, 22; BK. XIX, 13-14, 25, 27-29, 30 (David Knowles ed., Henry Bettenson trans., 1984); MARTIN C. D'ARCY, REVELATION AND LOVE'S ARCHITECTURE (1976); ANDERS NYGREN, AGAPE AND EROS (1982); DENIS DE ROUGEMONT, LOVE IN THE WESTERN WORLD (1983); C.S. LEWIS, THE FOUR LOVES (1988).

225. Allan Bloom, *Interpretive Essay*, *in* THE REPUBLIC OF PLATO 305, 318 (Allan Bloom trans., 1968).

226. *Id. But see* Shaffer, *supra* note 15, at 657 ("Loyalty is, at the interpersonal level, the disposition that requires you to hate where [sic] the person you are loyal to hates. It often seems, in professional life, to be the demand that you set your conscience aside, that you be untrue to yourself, that you lose the integrity and constancy that Aristotle talks about - because someone who has captured your attention expects you to do so.").

227. THE OXFORD BOOK OF FRIENDSHIP 2 (D.J. Enright & David Rawlinson eds., 1991). "With the ancients friendship was one of the chief elements in morality. But *friendship* is only limitation and partiality; it is the restriction to one individual of what is the due of all mankind, namely, the recognition that a man's own na-

it is more difficult to understand why one would want to harm enemies, or even more so, why one needs enemies at all. There are two reasons why this might be so. First, as an empirical matter, there are unjust people in the world who would destroy the good life for others if they were not prevented from doing so, and it is sometimes necessary to harm such people in order that good may be preserved. And second, because good things are scarce, individuals often must compete for them, and with competition comes the need for alliances and associations. As Fried puts it, "[I]f everybody's interests coincided, if there were no scarcity, if we all agreed about what was good, if we could have enough for all by hunting in the morning, fishing in the afternoon, and criticizing after dinner, then perhaps we would not need lawyers or rules or institutions at all."[228] When one draws a clear line like this, between what is one's own and what is not, and between who is to be helped and who is to be harmed, "[t]he good life of one group of men leaves other groups outside who would like, and may even be compelled, to take away the good things of the first group."[229] In such a world, often it is simply impossible to benefit friends without harming enemies. Sometimes one must rob Peter to pay Paul.

More than dignity, however, there is a certain respectability, perhaps even nobility, to a loyalty based conception of friendship. Again, from Bloom:

> If the distinction between friends and enemies, and the inclination to help the former and harm the latter, were obliterated from the heart and mind of man, political life would be impossible. This is the necessary political definition of justice, and it produces its specific kind of human nobility expressed in the virtue of the citizen.[230]

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ture and that of mankind are identical. At most it is a compromise between this recognition and selfishness." *Id*. at 22 (quoting ARTHUR SCHOPENHAUER, PARERGA AND PARALIPOMENA).

228. Fried, *supra* note 113, at 587. Fried adds, "I must confess that people who criticize the real world because it fails to correspond to this picture have always frightened me. If you look at what such people have done you might understand why." *Id*. Compare James Madison's well-known view that social and political groups inevitably divide into factions "who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." THE FEDERALIST NO. 10, at 57 (Jacob E. Cooke ed., 1961) (James Madison). Madison rejected the Anti-Federalist view that government could educate citizens to avoid dividing along the lines of petty self-interest, believing instead that "[t]he latent causes of faction are thus sown in the nature of man." *Id.* at 58.

229. Bloom, *supra* note 225, at 318. Compare Hume's view that "our natural uncultivated ideas of morality, instead of providing a remedy for the partiality of our affections, do rather conform themselves to that partiality, and give it an additional force and influence." DAVID HUME, A TREATISE ON HUMAN NATURE 262 (1878).

230. Bloom, *supra* note 225, at 318.

Bloom's "political-life" gloss notwithstanding, friendship for Polemarchus was principally a means for preserving life and property. It had instrumental or utilitarian rather than intrinsic value.[231] It was a political concept to be sure, but one having to do with organizational politics more than social justice, and as such, it stood or fell with the dignity of one's political associations.

Socrates challenged the Polemarchan conception of friendship (also in Book I of the Republic), by arguing that its underlying theory of justice could be made worthy of respect only by modifying its central term.[232] Again, Bloom explains, "Polemarchus meant that one gives to friends the things they want and denies to enemies the things they want. Socrates changes Polemarchus' meaning by concentrating not on the wants of men but on what is objectively proper for them."[233] In making this argument, Socrates drew on certain background understandings central to Platonic philosophy. In Platonic philosophy only the just could have friends; association among the bad was strictly utilitarian. The tyrant, the opposite of the just man, was surrounded only by sycophants. A tyrant could join in a sort of political community founded upon common interests, but the relationship would be purely political, not friendly, and would dissolve as soon as the common interest were satisfied or defeated. The primary disposition of the just, on the other hand, was not to give friends what they wanted, but to do what was objectively good for them. One who served the interests of friends loyally, without considering the goodness of those interests, would sometimes help those who were bad, and harm those who were good. But true friends wanted what was objectively good for their friends and not simply what the friends thought was good for them. Friends were not simply those who "are around us."[234] This distinction, between what friends want and what is objectively good for them, is fatal for a loyalty-based conception of friendship, however, since making another's interest one's own, without any consideration of what that interest requires, does not guarantee that one will do justice, to friends or others.

Plato's idealism dominated his rendering of the dialogue between Polemarchus and Socrates. In the Platonic world-view, friendship involved a certain harmony of the soul, which was synonymous with jus-

231. *But see* KONSTAN, *supra* note 224, who argues that the element of usefulness built into classical conceptions of friendship like Polemarchus's did not reduce friendship to a selfish or mercenary relationship. "The Greeks," Konstan writes, "saw helpfulness as confirmation of kindly intentions" rather than as a ground or basis for those intentions. *Id.* at 57. They "exploit metaphors of succor and riches to exalt, not reduce, the sense of an unselfish relationship." *Id.*

232. PLATO, *supra* note 221, at 8-13.

233. Bloom, *supra* note 225, at 319.

234. Bloom, *supra* note 225, at 323.

tice, and inspired trust in the just man.[235] Grounded in shared values, friendship involved a common striving for wisdom and justice.[236] Pleasure and utility were a part of friendship, but they were never its source, or its essence. A community of friends was a community defined by a shared vision of the good. As such, friendship was intrinsically rather than instrumentally worthwhile, an end rather than a means, important for its own sake rather than for what it could help one achieve. Fried also defended his conception of friendship on what he described as intrinsic grounds, but this was misleading, for "making another's interest one's own" promotes individual instrumental advantage rather than objective good. It is self-interested and utilitarian rather than communal and virtuous because it is concerned with material things rather than the soul or justice. Platonic views may not be the proper measuring rod in a modern consequentialist world, however, where references to "soul" or *philia* can provoke confusion, skepticism, and sometimes hostility. To be fair to Fried, therefore, we must bring our understanding of friendship up to date, by determining how, if at all, that understanding has changed since Plato.[237]

The first step takes us only a short distance, to Aristotle, who also wrote famously about friendship.[238] While more empirical and prag-

235. *See* HORST HUTTER, POLITICS AS FRIENDSHIP: THE ORIGINS OF CLASSICAL NOTIONS OF POLITICS IN THE THEORY AND PRACTICE OF FRIENDSHIP 100 (1978); PLATO, THE LAWS 837, 334-35 (Trevor J. Saunders trans. 1970).

236. HUTTER, *supra* note 235, at 94.

237. David Konstan challenges the popular belief that modern conceptions of friendship did not exist prior to the Renaissance. Friendship in ancient times is usually thought to be more economic and political than personal, marked more by obligatory reciprocity than sentiment. Modern and classical views also are thought to differ in the relative importance they place on individual or idiosyncratic traits, and the role of self-disclosure as the basis for intimacy and trust between friends. *See, e.g.*, Gerald D. Suttles, *Friendship as a Social Institution, in* SOCIAL RELATIONSHIPS 95, 100 (G. J. McCall et al. eds., 1970) (In the modern view of friendship, "[T]he person who is a friend must be appreciated as a unique self rather than simply a particular instance of a general class."); Jacqueline P. Wiseman, *Friendship: Bonds and Binds in a Voluntary Relationship*, 3 J. SOC. & PERS. RELATIONSHIPS 191, 198 (1986) (survey of modern views of friendship shows that in describing "characteristics they believe are integral to their friends' make-up, respondents often imply a uniqueness in their combination"). Konstan argues instead that an "abiding image of friendship as an intimate relationship predicated on mutual affection and commitment" has persisted from ancient times to our own. KONSTAN, *supra* note 224, at 19. He acknowledges, however, that: "[T]here may in fact be no precise moment at which to date . . . a transformation" from ancient to modern conceptions of friendship. "[A]t any time, including today, sundry conceptions of friendship co-exist, and not all conform to the dominant fashion." *Id*. at 18.

238. Probably the most important and influential classical writing on friendship is in books VIII and IX of Aristotle's Nichomachean Ethics. *See* ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICHOMACHEAN ETHICS (J.A.K.Thomson trans., Penguin Classics rev. ed. 1976). For a thoughtful discussion of these books, see David

matic than Plato, Aristotle's notion of true friendship, the highest form of friendship, looks a lot like Plato's notion of a harmony of souls. Aristotle divided friendship into three types, one based on pleasure, another based on utility, and a third based on virtue. Friendship based on utility was the lowest form of friendship because it was entirely self-oriented. It also was less permanent than other forms of friendship, including even that based on pleasure, because those engaged in pleasurable friendship "are attracted by a kind of goodness, and by something similar to themselves,"[239] but those "who are friends for the sake of utility part as soon as the advantage ceases, because they were attracted not by each other but by the prospect of gain."[240] Friendship based on utility and pleasure was available equally to both good and bad persons, but true friendship was available only to the good.

> Thus where the object is pleasure or utility friendship is possible between two bad men, or between one good and one bad man, or between one who is neither good nor bad and one who is of any character; but obviously only good men can be friends for their own sakes. For bad people take no pleasure in each other unless there is a chance of some benefit.[241]

Relationships founded on utility and pleasure were called friendships "since people describe as friends those who are attracted to one another only for reasons of utility . . .; or of pleasure, as children do; . . . "[242] But such relationships only resembled true friendship. True friendship was possible only among men who loved one another for their own sake. "In perfect friendship the friend is loved for his goodness of character, and goodness is an enduring quality."[243] True

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Konstan's translation of three of the earliest known commentaries on the Ethics. ASPASIUS, ANONYMOUS, MICHAEL OF EPHESUS ON ARISTOTLE NICHOMACHEAN ETHICS 8 AND 9 (David Konstan trans., 2001). The structure of the Ethics is built on the desire for eudaimonia, or personal happiness, but an ethic of self-realization has a difficult time making the good of others the center of one's concern. It is in books VIII and IX of the Ethics that Aristotle tries to do just that, and in the process move the understanding of friendship beyond the confines of self-realization. Konstan argues that Aristotle is successful in this attempt and is able to show how *philia* is not derived from self-love. He notes, for example, that Aristotle never suggests that two people who are useful to one another are automatically friends on that basis alone. They may become friends, of course, but "in such a case, [while] the origin of the *philia* is in utility, . . . the affection is not reducible to the mutual appreciation of one another's serviceability." *See* KONSTAN, *supra* note 224, at 72. While Konstan's full argument is forceful, the relevant passages in the Ethics are difficult and confusing, and not everyone would agree with his interpretation.

239. ARISTOTLE, *supra* note 238, at 265.

240. *Id.* Friendship based on utility is the Aristotelian equivalent of Fried's conception of friendship based on bargaining.

241. *Id*.

242. *Id.*

243. HUTTER, *supra* note 235, at 108; *See* Aristotle, *Nichomachean Ethics, in* THE OXFORD BOOK OF FRIENDSHIP, *supra* note 227, at 7.

friendship required virtuous character, time together, and the sharing of intimate experiences, and this combination of qualities was rare.[244]

True friendship also had a communal element for Aristotle, though what was shared was virtue rather than equality of possessions. Friends had similar attitudes and outlooks on life, and were familiar with the ways of their friends.[245] Shared virtue allowed friends to overcome inequalities in possessions and social station. "Amity is equality," as the saying had it.[246] Friendship was a disposition and not just an emotion. One could become emotionally attached to inanimate objects, but mutual affection between friends was a matter of deliberate choice that sprung from a fixed and selfless disposition. "Men who in all and everything strive to act in accordance with their higher, reasonable selves will always do the right and correct things by their friends. To benefit and help one's friends is a virtuous activity, and so it cannot come in conflict with benefiting oneself."[247] For Aristotle, true friendship was the prototypical social and political relationship, the standard against which all other associations, including base friendships, were to be judged. "[I]f we understand the psychodynamics of friendship in the narrow sense, we thereby also understand

244. ARISTOTLE, *supra* note 238, at 264. Shaffer, following Robert Bellah and his colleagues, describes the difference between friendship based on utility and friendship based on a shared commitment to the good as the difference between modern and traditional conceptions of friendship. *See* SHAFFER & COCHRAN, *supra* note 4, at 45. *See also* Konstan, *supra* note 224, at 18 ("There may in fact be no precise moment at which to date . . . a transformation" from ancient to modern conceptions of friendship. "[A]t any time, including today, sundry conceptions of friendship co-exist, and not all conform to the dominant fashion."). *But see* LORNA HUTSON, THE USERER'S DAUGHTER: MALE FRIENDSHIP AND FICTIONS OF WOMEN IN SIXTEENTH-CENTURY ENGLAND 61 (1994) (challenging the common view that sixteenth-century literature on friendship reflects the "transition from the instrumental and socially unequal ties of friendship fostered by feudal society, to a new 'modern' concept of friendship . . . preceding and exceeding all instrumentality").

245. *See* ARISTOTLE 1156b, *supra* note 238, at sec. 263. For another view on the idea of friends becoming one with one another, see GEORGE SANTAYANA, SOLILOQUIES IN ENGLAND 55-56 (1922) ("I do not refer to the 'friendship of virtue' mentioned by Aristotle, which means, I suppose, community in allegiance or in ideals. It may come to that in the end, considered externally; but community in allegiance or in ideals, if genuine, expresses a common disposition, and its roots are deeper and more physical than itself. The friendship I have in mind is a sense of this initial harmony between two natures, a union of one whole man with another whole man, a sympathy between the centres of their being, radiating from those centres on occasion in unanimous thoughts, but not essentially needing to radiate.").

246. Aristotle, *Nichomachean Ethics, in* THE OXFORD BOOK OF FRIENDSHIP, *supra* note 227, at 7; *see also* Goodrich, *supra* note 113, at 27 ("Aristotle is . . . the source of the much repeated maxim that good legislators pay more attention to friendship than to justice. [footnote omitted] Amity, in his view, was a stronger bond of community, and more likely to ensure harmonious co-existence, than any code of laws. Friendship was a prior or first law of community, and without it there could be no justice in the sense of government and law.")

247. HUTTER, *supra* note 235, at 114.

the nature of other human associations. All human associations are forms of friendship, even if only imperfectly."[248] While Fried's understanding of friendship does not look much like true Aristotelian friendship, his suggestion that friendship is the appropriate basis from which to understand the lawyer-client relationship finds some support in Aristotle's view.

Epicurean philosophy saw friendship as grounded in utility more than virtue, though it was not as blatantly goal-oriented as Aristotle's notion of base friendship. "What helps us in friendship is not so much the help our friends actually give as the assurance we feel concerning that help."[249] According to the Epicureans, friendships formed to assist individuals in the search for happiness could grow beyond these origins and develop to the point where friends were loved more for their own sake than for what they could do for one another.[250] The Epicureans saw friendship as a way of avoiding the imperialism that had crept in to the Greek democracy; as an escape from political life more than an embodiment of it. The Epicurean Garden was "a symbol of this withdrawal of individuals for whom the political world has become too large and too unmanageable."[251] Some aspects of this philosophy, such as its emphasis on the importance of social circumstances in the formation of friendship, support Fried's conception of friendship. Just as friends helped individuals cope with complex social institutions for the Epicureans, lawyers (as friends) help individuals cope with complex legal structures for Fried. But these commonalities have more to do with utility than justice, and ultimately, Fried seeks to justify his view in terms of doing justice.

In Stoicism, friendship was tied to virtue and right reason perhaps even more so than in Platonic philosophy.[252] Friends were equal in character, had similar opinions about right and wrong, and were attracted to one another by shared rational faculties rather than individual personality characteristics. Stoic friendship was a communion of reason in which the rationality common to each friend, and not the friends themselves, were what was loved.[253] But thus understood,

248. *Id*. at 115.

249. Epicurus, *Gnomologium Vaticanum, in* THE OXFORD BOOK OF FRIENDSHIP, *supra* note 227, at 10.

250. HUTTER, *supra* note 235, at 118-19.

251. *Id.* at 120.

252. As Hutter explains, "[for the Stoics] right reason and virtue equal friendship, wrong opinion and vice equal enmity." *Id.* at 124. Charles Curtis also drew on Stoic philosophy for his conception of adversary advocacy. *See* Curtis, *The Ethics of Advocacy*, *supra* note 5, at 18-23.

253. This emphasis on abstract reason leads to a paradox for the Stoics. Only the wise possessed the requisite rationality to be friends, but since one of the characteristics of the wise was self-sufficiency, the wise had no need of friends. On the other hand, the vast majority of people who needed friends were incapable of making them because they were fools and fools lacked the necessary rational faculties to

Stoicism also provides little help for Fried's argument. In Fried's world, clients depend on lawyers to make the legal system work, and as such they cannot be the lawyers' rational equal; *a fortiori*, they also cannot be their friends.

For the Romans, friendship had many of the same attributes as it did for the Greeks. Cicero, for example, like Aristotle, distinguished between common friendship and true friendship, and saw true friendship as the relationship between those of equal virtue and character.[254] It required a complete "accord in all things, human and divine, conjoined with mutual good will and affection . . ."[255] It was lasting, not temporary, and did not dissolve when its instrumental objectives had been realized. Like Plato's discussion of sycophants, Roman philosophy also warned against mistaking flatterers for friends.[256] Flattery was the "pretense of friendship, having some of the characteristics of real friendship, for the purpose of gaining advantages that normally are the result of friendship,"[257] but unlike true friendship, flattery's commitment was pretend and strategic, rather than real and personal. Like Greek philosophy, Roman views of friendship are not much help to Fried. Fried's lawyer is committed to personal moral autonomy, his own and the client's, rather than mutual good will and affection. He takes up the interests of clients, not out of a commitment to the clients as persons, but out of a commitment to their instrumental ends. Equality of virtue and character are rare and accidental in Fried's view of friendship, not pervasive and necessary. Fried's lawyer feigns friendship for the sake of the advantages friendship procures, rather than expresses a true commitment to the other for his own sake. In Roman terms, he is a flatterer rather than a friend.

Post-classical notions of friendship build on classical models and make many of the same distinctions, including that between friend-

make friends. (The Stoics denied the possibility of a rational community between wise persons and fools - the wise and the foolish could form only political associations.)

254. HUTTER, *supra* note 235, at 154-56; *see also* Goodrich, *supra* note 113, at 29-30 (describing Cicero's views on friendship). Cicero, like the authors of several of the other principal treatises on friendship, was a lawyer. *Id*. at 27. Goodrich hypothesizes that "lawyers . . . write of friendship because it is what they most lack." *Id*. at 28.

255. HUTTER, *supra* note 235 at 161 n.68 (quoting Cicero *Laelius* 6.20).

256. *See also* FRANCIS BACON, *Of Frendship, in* THE ESSAYES OF FRANCIS BACON 83, 88 (1972) ("So as there is as much difference betweene the Counsell that a Frend giveth, and that a man giveth himselfe, as there is between the Counsell of a Frend and of a flatterer.").

257. HUTTER, *supra* note 235, at 166. *See also* 1 SCHOPENHAUER, *supra* note 223, at 458 ("Just as we have paper money instead of silver, so in the world, instead of true esteem and genuine friendship, there circulate outward demonstrations and mimic gestures thereof which are made to look as natural as possible.").

ship based on virtue (true friendship), and friendship based on utility (base friendship), but they also are more sympathetic to the Polemarchan notion of favoring one's own, and thus, more distinctly instrumental than the views of Plato, Aristotle, and their contemporaries. In the post classical period, friendship often was defined in terms of social role, and relationships grounded in social role "are predominantly . . . contractual . . . leav[ing] little room for non-institutional, diffuse, and open-ended" interaction.[258] Social role tends to suppress the personal qualities that make true friendship possible, however, because personal attachment makes it difficult to think objectively and dispassionately about difficult role choices that need to be made.

Some post-classical writing on friendship is idealist.[259] For example, Michel de Montaigne, a sixteenth century essayist and philosopher, viewed friendship as an almost mystical experience. Friends were brought together as if by heaven, and partook of a union "so perfect and so entire that it is certain that few such can even be read about, and no trace at all of it can be found among men of today. So many fortuitous circumstances are needed to make it, that it is already something if Fortune can achieve it once in three centuries."[260]

258. HUTTER, *supra* note 235 at 176-77. Fried's view, in which friendships are formed through the "exchange of moral capital," is a case in point. *See* Fried, *supra* note 113, at 585-86. Francois, duc de La Rochefoucauld also thought that "friendship is nothing but an association, a reciprocal management of interests, and an exchange of good offices; in short it is nothing but a transaction from which the self always means to gain something." Francois, duc de La Rochefoucauld, *Maximes*, *in* THE OXFORD BOOK OF FRIENDSHIP, *supra* note 227, at 20.

259. Most of the best writing about friendship was done either in classical times - C.S. Lewis believed friendship was the "crown of life" for the Ancients - or in the sixteenth and seventeenth centuries. In both periods, "[u]nder the unpredictable sway of corrupt emperors and despotic rulers, friendship with someone of known integrity was much to be desired, and could prefigure the possibility of a better, more generous, and humane society." THE OXFORD BOOK OF FRIENDSHIP, *supra* note 227, at 2; *see also* CYRIL CONNOLLY, THE UNQUIET GRAVE 38 (Rev. ed., Persea Books 1981)(1944) ("the seventeenth and eighteenth centuries elaborated friendship and all but made it their religion. In the circle of Johnson, of Walpole and Madame du Deffand or of the Encyclopaedists nobody could live without his friend."). Connolly, like a lot of intellectuals writing during the second world war, despaired of ever seeing humane times again. *Id*. at 39. ("Now the industrialization of the world, the totalitarian State, and the egotism of materialism have made an end to friendship; the first through speeding up the tempo of human communication to the point where no one is indispensable, the second by making such demands on the individual that comradeship can be practised between workers and colleagues only for the period of their co-operation and the last by emphasizing whatever is fundamentally selfish and nasty in people, so that we are unkind about our friends and resentful of their intimacy because of something which is rotting in ourselves. We have developed sympathy at the expense of loyalty.").

260. MICHEL DE MONTAIGNE, *On Affectionate Relationships*, *in* MICHEL DE MONTAIGNE, THE COMPLETE ESSAYS 205, 207 (M.A. Screech ed. & trans., 1991); *see also id.* at

The souls of friends are "yoked together in such unity, and contemplate[ ] each other with so ardent an affection, and with the same affection reveal[ ] each to each other right down to the very entrails, that not only [does one soul] know [the other's] mind as well as [his] own but [he] would . . . entrust[ ] [him]self to [the other] with greater assurance than to [him]self."[261] By contrast, what we commonly call friendship, continued Montaigne, is

> no more than acquaintances and familiar relationships bound by some chance or some suitability, by means of which our souls support each other. In the friendship which I am talking about, souls are mingled and confounded in so universal a blending that they efface the seam which joins them together so that it cannot be found.[262]

Echoing Aristotle, Montaigne saw the relationship between friends as "that of one soul in bodies twain,"[263] and the end of that relationship as "seeking the good of the other, so that the one who furnishes the means and the occasion is in fact the more generous, since he gives his friend the joy of performing for him what he most desires."[264] The relationship between Fried's lawyer and client is pretty far removed from this all-consuming and seamless union that Montaigne had in mind. In Fried's world, lawyers and clients choose one another consciously, even a bit capriciously; heaven is rarely involved. And once chosen, they share an identity of ends more than a union of souls, and divide labor and responsibility unevenly more than act jointly to exercise it.[265]

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215 ("One single example of [true friendship] is moreover the rarest thing to find in the world."); CLARENCE DAY, THIS SIMIAN WORLD 17 (1931) ("The real friendships among men are so rare that when they occur they are famous."); 1 SCHOPENHAUER, *supra* note 223, at 458-59 ("true friendship is one of those things which, like colossal sea-serpents, are either legendary or exist somewhere, we know not which.").

261. Montaigne, *supra* note 260, at 213.

262. *Id*. at 211-12. Harold Bloom thinks this union of the soul is better found in reading than in friendship. Reading, he argues, is "the most healing of pleasures," it returns us "to otherness" and yet also makes us "wholly ourselves." While a solitary activity, it "alleviates loneliness" and provides a replacement for friendship, which is "so vulnerable, so likely to diminish or disappear, overcome by space, time, imperfect sympathies, and all the sorrows of familial and passional life." *See* HAROLD BLOOM, HOW TO READ AND WHY 19 (2001).

263. Montaigne, *supra* note 260, at 214.

264. *Id.* This friendship was all consuming and indivisible, one in which "each gives himself so entirely to his friend that he has nothing left to share with another." *Id.* At 215. "[L]ove takes possession of the soul and reigns there with full sovereign sway," and this "can not possibly be duplicated." *Id.* However, Jonathan Swift contends: "I believe every man is born with his quantum [of friendship], and he cannot give to one without Robbing another." Letter from Jonathan Swift to Alexander Pope (Sept. 20, 1723), *in* THE OXFORD BOOK OF FRIENDSHIP, *supra* note 227, at 11.

265. Montaigne described the relationship with a lawyer as a "superficial acquaintanceship," an "alliance[ ] which only get[s] hold of us by one end, [and one in

Other Renaissance writers were less mystical than Montaigne, but no more supportive of Fried. Francis Bacon, for example, one of the first great popularizers of empiricist thinking, and author of one of the best-known essays on friendship (and also a lawyer), criticized utilitarian conceptions of friendship. He believed that friendship was made up of three distinct elements. The first was an "ease and discharge of the fulnesse and swellings of the heart, which passions of all kinds doe cause and induce."[266] A friend was one with whom one shared an emotional life, in other words, and on whom one depended for emotional sustenance and support. As Bacon put it, "no Receipt openeth the Heart, but a true *Frend*, to whom you may impart Griefes, Joyes, Feares, Hopes, Suspicions, Counsels, and whatsoever lieth upon the Heart, to oppresse it, in a kind of Civill Shrift or Confession."[267] The second element was counsel or advice. Friends gave honest and objective opinions about the wisdom of proposed courses of action, even when disagreeable. In Bacon's words, "There is as much difference, betweene the *Counsell* that a *Frend* giveth, and that a Man giveth himselfe, as there is betweene the *Counsell* of a *Frend*, and of a Flatterer."[268] And the third was "Aid and Bearing a Part in all actions, and occasions."[269] Friends helped friends do things they would or could not easily do for themselves.

> How many things are there which a man cannot, with any face or comeliness, say or doe himselfe? A man can scarce alledge his owne merits with modesty, much lesse extoll them: a man cannot sometimes brooke to supplicate or beg: and a number of the like. But all these things are gracefull in a Frend's mouth, which are blushing in a man's owne.[270]

For Bacon, a friend was like another "you," or an extended you, someone to carry on your projects in the future, for "Men have their Time, and die many times in desire of some Things, which they principally take to Heart: the bestowing of a Child, the Finishing of a Worke, or the like. If a Man have a true *Frend*, he may rest almost secure, that the Care of those Things will continue after Him. So that a Man hath as it were two Lives in his desires."[271]

At first, Bacon's views might seem to describe at least part of the modern relationship between lawyer and client. Clients bring emotionally charged matters to lawyers - divorce, probate, personal injury, and the like - which have serious, and sometimes catastrophic, conse-

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which] we need simply to provide against such flaws as specifically affect that end." *See* Montaigne, *supra* note 260, at 216.

266. BACON, *supra* note 256, at 83-84.

267. THE OXFORD BOOK OF FRIENDSHIP, *supra* note 227, at 9.

268. *Id.*

269. BACON, *supra* note 256, at 89.

270. *Id.* at 90.

271. Sir Francis Bacon, *Of Friendship, in* THE OXFORD BOOK OF FRIENDSHIP, *supra* note 227, at 2, 9.

quences for client lives, and in doing so, they ask for emotional sustenance and support as well as help in resolving the legal issues such matters present.[272] Emotional sharing in the modern lawyer-client relationship, however, runs mostly in one direction Clients learn little if anything about their lawyers' emotional lives, including about the concerns generated by the clients' problems themselves. Lawyers share their hopes and fears with clients to the extent psychiatrists share their hopes and fears with patients, or pastors with penitents, which is to say not at all. Bacon's idea of a reciprocal relationship, undertaken by equals, joining fully in one another's emotional lives, bears little resemblance to the one-way emotional interaction between Fried's lawyers and clients. The same is true with respect to Bacon's idea of friends helping friends do things they would not do for themselves. Bacon did not have disreputable or morally questionable conduct in mind in making this suggestion. For him, friends help one another overcome the embarrassment of self-promotion, for example, not the shamefulness of behaving badly, or help neutralize false modesty, not deserved guilt.

For Joseph Addison, the eighteenth century essayist about whom Samuel Johnson once said, "Whoever wishes to attain an English style, familiar but not coarse, and elegant but not ostentatious, must give his days and nights to the study of Addison,"[273] honest and open communication was the defining characteristic of true friendship. Friendship required a total exposition of the self. Friends were transparent to, and spontaneous toward, one another. "On these occasions, a man gives loose to every passion and every thought that is uppermost, discovers his most retired opinions of persons and things, tries the beauty and strength of his sentiments, and exposes his whole soul to the examination of his friend."[274] "Giving loose to every passion and every thought" might not conjure up images of modern lawyer-client conversation, but there is a certain similarity between Addison's image and Fried's view of lawyer-client relations. The lawyer-client

272. This is true only for natural persons. Organizational and institutional clients do not have emotions. Those who speak for them do, of course, but it is hornbook law that it is the entity and not the constituent that is the client. *See* MODEL RULES OF PROF'L CONDUCT, R. 1.13 cmt. 1 ("An organizational client is a legal entity . . . . Officers, directors, employees and shareholders are the constituents of the corporate organizational client.").

273. Samuel Johnson, *Addison (1672-1719), in* WORKS OF THE ENGLISH POETS WITH PREFACES, BIOGRAPHICAL AND CRITICAL (1779), reprinted in SAMUEL JOHNSON: THE MAJOR WORKS 643, 676 (Donald Greene ed., 2000) (Sometimes called JOHNSON'S LIVES OF THE ENGLISH POETS.).

274. Joseph Addison, *On Friendship, in* A LITTLE BOOK OF FRIENDSHIP 50, 51 (Joseph Morris & St. Clair Adams eds., 1925); *see also* Montaigne, *supra* note 260, at 215 ("The unique, highest friendship loosens all other bonds. That secret which I have sworn to reveal to no other, I can reveal without perjury to him who is not another: he *is* me.").

privilege and the confidential information rule, for example, are designed to encourage clients to share whatever is uppermost in their minds without worrying about whether their lawyers will reveal that information to others. In this limited sense, and with respect solely to legal matters, it is fair to say that clients are encouraged to "expose their whole souls" in the manner Addison describes. What keeps the analogy from being perfect is that communication between lawyers and clients is one-directional. There is no reciprocal exposure of the soul by lawyer to client, and without reciprocity, true friendship is not possible.

Jeremy Taylor, a seventeenth century bishop, theologian, Fellow of two Cambridge colleges, chaplain to King Charles, and sometime political prisoner (under Puritan rule), is a little more supportive of Fried's view. Taylor agreed that there are limits on the formation of friendships imposed by the limits on human nature. As he saw it, ". . . all [society] cannot actually be of our society, so neither can all be admitted to a special, actual friendship."[275] With Fried, Taylor believed that friendship had a necessary utilitarian dimension, manifest essentially as a political preference for one's own. Friends had to be useful in Taylor's view. "He only is fit to be chosen for a friend who can give counsel, or defend my cause, or guide me right, or relieve my need, or can and will, when I need it, do me good . . . ."[276] The utilitarian demands of friendship were not without normative limits for Taylor, however, since he also warned against undue paternalism in giving advice to friends, even when the advice was in the friend's best interest.

> 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.[277]

Taylor thought that true friends had to be of equal virtue, even though some sort of affection was possible between unequals. "I confess it is possible to be a friend to one that is ignorant, and pitiable, handsome and good for nothing, that eats well, and drinks deep, but he cannot be a friend to me; and I love him with a fondness or a pity, but it cannot be a noble friendship."[278] He believed that friendship could not require one to do something dishonorable. "The first law of friendship is, they must neither ask of their friend what is undecent;

275. JEREMY TAYLOR, *A Discourse of the Nature, Offices and Measures of Friendship, With Rules of Conducting It, in* JEREMY TAYLOR, THE MEASURES AND OFFICES OF FRIENDSHIP (1662) (1984), *reprinted in* A LITTLE BOOK OF FRIENDSHIP, *supra* note 274, at 59.
276. *Id.* at 60.
277. *Id*. at 66.
278. *Id.* at 61.

nor grant it if themselves be asked."[279] And he refused to excuse wrongs on the ground that they were done for a friend; wrong action was wrong action whatever its motivation. While more supportive of Fried than other commentators, therefore, Taylor parts company with him in the belief that friendship is the pursuit of the objectively good and virtuous, and not simply the practically advantageous or legally permitted.

Samuel Johnson, the eighteenth century English literary icon whose conversations were memorialized in James Boswell's Life of Samuel Johnson[280] (putting Johnson in the very small club of writers, along with Socrates and Alice B. Toklas, for example, whose most famous words were written down by someone else), author of what is often, though mistakenly, thought to be the first English dictionary, and, after Shakespeare, probably the single-most quoted prose author writing in English, also wrote memorably about friendship.[281] There are certain qualities, Johnson said, that clearly are not conducive to friendship. Among those is mutability, or being easily attracted to new objects of affection, softness, or being easily influenced by others' views, impatience with the contrary opinions of others, excessive privacy, and a willingness to be equally open with everyone. In Johnson's view, intimacy was not possible if one was too public in his dealings with others. As he explained, "nor can the candor and frankness of that man be much esteemed, who spreads his arms to humankind, and makes every man, without distinction, a denizen of his bosom."[282] While this quality "may be useful to the community, and pass through the world with the reputation of good purposes and uncorrupted morals, [it is] unfit for close and tender intimacies."[283]

279. *Id*. at 64.

280. JAMES BOSWELL'S LIFE OF JOHNSON: AN EDITION OF THE ORIGINAL MANUSCRIPT, 1766-1776 (Yale Editions) (Elizabeth Goldring contributor & Bruce Redford eds., 1999). Boswell originally was thought to be no more than a faithful stenographer of Johnson's life (and a "fool" in Macaulay's view), not writing a life as much as taking it down, and the virtues of the book were thought simply to reflect the virtues of the subject himself. With the advent of the industry of Boswell scholarship made possible by Yale University's acquisition of most of Boswell's papers in the 1940's, however, that view has begun to change. "[C]ritical opinion of Boswell has now so reversed itself," says Charles McGrath, "that in some academic circles Johnson, the moral and intellectual touchstone of his age, has been relegated to the passenger seat, where he tags along as Boswell's creation." Charles McGrath, *The First Real Biographer,* N.Y. TIMES, August 19, 2001, at 12 (reviewing ADAM SISMAN, THE MAKING OF THE LIFE OF DR. JOHNSON (2001)). *See also* Richard Holmes, *Triumph of an Artist*, NEW YORK REVIEW OF BOOKS, Sept. 20, 2001, at 28 (same).

281. See ROBERT DEMARIA, JR., THE LIFE OF SAMUEL JOHNSON 110-28, 308-09 (1993).

282. Samuel Johnson, *The Requisites to True Friendship, in* A LITTLE BOOK OF FRIENDSHIP, *supra* note 274, at 71.

283. *Id.*

Johnson agreed that, at its core, friendship consisted of a preference for one's own. But he also believed that for this preference to be "fond and lasting, there must not only be equal virtue on each part, but virtue of the same kind; not only the same end must be proposed, but the same means must be approved by both."[284] Equality of virtue was present, he thought, only when friends were in complete and voluntary agreement on both purpose and approach. Friendship was an amalgam of both love and esteem, deriving "from one its tenderness, and its permanence from the other."[285] Johnson did not distinguish, as Fried did, between personal wrongs and representational wrongs, or wrongs of the individual and wrongs of the system. A friend, in his view, did not avoid individual responsibility for acts performed as a friend. This was because "friendship may well deserve the sacrifice of pleasure, though not of conscience."[286] In true friendship, virtue trumped utility.

On this side of the Atlantic, Ralph Waldo Emerson and Henry David Thoreau, two of the most influential American literary figures of the nineteenth century, linked for a time in the 1840s as part of the Transcendentalism movement, but ultimately destined to go their own ways as very different types of thinkers,[287] also wrote importantly about the nature of friendship. Emerson's philosophy, an original mixture of German idealism, eastern mysticism, and democratic optimism, celebrated the boundless possibilities for human fulfillment found in social relationships. Friendship, said Emerson, resembled the immortality of the soul[288] in that it was too good to be believed, but he believed in it nonetheless. "I awoke this morning with devout thanksgiving for my friends, the old and the new. Shall I not call God the Beautiful, who daily showeth himself so to me in his gifts?"[289] For Emerson, two qualities were essential for friendship. The first was truthfulness, or sincerity in communication. This allowed friends to trust one another in day-to-day communications and made them safe to be near.

284. Samuel Johnson, *The Requisites to True Friendship*, *in* SELECTED ESSAYS FROM THE RAMBLER, ADVENTURER, AND IDLER 116 (W. Jackson Bate ed., 1968).

285. *Id.*

286. Johnson, *supra* note 282, at 73.

287. JOEL PORTE, EMERSON AND THOREAU: TRANSCENDENTALISTS IN CONFLICT (1985); HARMON SMITH, MY FRIEND, MY FRIEND: THE STORY OF THOREAU'S RELATIONSHIP WITH EMERSON (1999).

288. Ralph Waldo Emerson, *Friendship, in* THE ESSENTIAL WRITINGS OF RALPH WALDO EMERSON 201, 204 (Brooks Atkinson ed., 2000). This was in part because, for Emerson, friendship was a creation of God. "My friends have come to me unsought. The great God gave them to me. By oldest right, by the divine affinity of virtue with itself, I find them, or rather not I, but the Deity in me and in them derides and cancels the thick walls of individual character, relation, age, sex, circumstance, at which he usually connives, and now makes many one." *Id.* at 203.

289. *Id.*

> A friend is a person with whom I may be sincere. Before him I may think aloud. I am arrived at last in the presence of a man so real and equal that I may drop even those undermost garments of dissimulation, courtesy, and second thought, which men never put off, and may deal with him with the simplicity and wholeness with which one chemical atom meets another.[290]

And the second was tenderness, the capacity to treat friends with care and concern, and to identify with them emotionally and spiritually.[291]

> The end of friendship . . . [is] aid and comfort through all the relations and passages of life and death. It is fit for serene days, and graceful gifts, and country rambles, but also for rough roads and hard fare, shipwreck, poverty, and persecution. It keeps company with the sallies of the wit and the trances of religion.[292]

Like most of his thinking, Emerson's understanding of friendship was more mystical than utilitarian, and concerned more with the union of souls than the realization of material gain. He would have seemed a strange duck to Fried, just as Fried would have to him.

Thoreau made the classical distinction between true and base friendship, but thought that most relationships described as friendships were base; that true friendship was rare.

> To say that a man is your Friend means commonly no more than this, that he is not your enemy. Most contemplate only what would be the accidental and trifling advantages of Friendship, so that the Friend can assist in time of need,[293] by his substance, or his influence, or his counsel; but he who foresees such advantages in this relation proves himself blind to its real advantage, or indeed wholly inexperienced in the relation itself. Such services are particular and menial, compared with the perpetual and all-embracing service which it is. Even the utmost goodwill and harmony and practical kindness are not sufficient for Friendship, for Friends do not live in harmony merely, as some say, but in melody.[294]

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290. *Id.* at 207. Emerson continued, "[s]incerity is the luxury allowed, like diadems and authority, only to the highest rank; that being permitted to speak truth, as having none above it to court or conform unto . . . Almost every man we meet requires some civility - requires to be humored; he has some fame, some talent, some whim of religion or philanthropy in his head that is not to be questioned, and which spoils all conversation with him. But a friend is a sane man who exercises not my ingenuity, but me. . . . A friend therefore is a sort of paradox in nature. I who alone am, I who see nothing in nature whose existence I can affirm with equal evidence to my own, behold now the semblance of my being, in all its height, variety and curiosity, reiterated in a foreign form; so that a friend may well be reckoned the masterpiece of nature." *Id.* at 207-208.

291. *Id.* at 208.

292. *Id.* at 208-209.

293. *Compare* Ogden Nash, *A Friend In Need Will Be Around In Five Minutes*, *in* OGDEN NASH, GOOD INTENTIONS 58 (1942); 1 SCHOPENHAUER, *supra* note 33, at 450 ("no sooner have we become friendly with a man than he too is in need and wants us to lend him money"); *see also* SAMUEL LANGHORNE CLEMENS, MARK TWAIN'S NOTEBOOK 344 (1935) ("The proper office of a friend is to side with you when you are in the wrong. Nearly anybody will side with you when you are in the right.").

294. Henry David Thoreau, *Friendship, in* A LITTLE BOOK OF FRIENDSHIP, *supra* note 274, at 100.

For Thoreau, friendship did not require one to do something personally dishonorable. "I have a Friend who wishes me to see that to be right which I know to be wrong. But if Friendship is to rob me of my eyes, if it is to darken the day, I will have none of it."[295] Friends were ones who "loved [one] another, that is, . . . [who stood] in true relation to [one another]," because "between whom there was hearty truth, there was love." Their lives were "divine and miraculous," in proportion to the "truthfulness and confidence" they had in one another."[296] These views track the classical idea of true friendship, and as such, are at the other end of the spectrum from the self-interested and utilitarian conceptions of Polemarchus and Fried.[297]

As the foregoing discussion illustrates, certain themes recur in Western literary and philosophical attempts to define the nature of friendship. Most writers agree that friendship can be either true or base, and that only true friendship promotes justice and is worthy of respect. True friendship is possible only between people of equal character and virtue, engaged in a common striving for wisdom and justice, according to a shared vision of the good. Bad people form what they call friendships, but these are only the associations of sycophants or flatterers, created for the advancement of common instrumental interests, and as such, end when the common interests are either realized or lost. True friendship is based principally on love rather than self-interest.[298] While there are utilitarian dimensions to friendship, true friends are loved for their own sake and for the goodness of their character, not for the advantage they can help one realize. True friendship is open-ended and diffuse. Friends may call on one another at any time, for any kind of help. True friends give wise and honest counsel. They are candid but tender, critical but fair, and caring but honest. They are not flatterers, and do not act dishonorably, or ask their friends to do so on their behalf. They do only what is objectively good for one another even when asked to do what is selfish or self-interested. True friends keep their friends' confidences. One can unburden one's soul to a true friend. And finally, and most importantly, true friendship is reciprocal. True friends share in, and become one

295. *Id*. at 111. "A friend will help you move; a good friend will help you move the body." Anonymous, but repeated by the Car Guys on Weekend Edition with Scott Simon, broadcast on WETA, Washington, D.C., January 4, 2003.

296. Thoreau, *Friendship, in* A LITTLE BOOK OF FRIENDSHIP, *supra* note 274, at 102.

297. The above discussion omits many notable categories of writing on friendship. There is no examination of feminist, gay and lesbian, or psychiatric treatments of the subject, for example, and many important literary discussions, such as those of Proust, also are missing. I have tried only to provide a sampling of the intellectual tradition within which Fried wrote, and not an exhaustive survey. Some lines had to be drawn if the discussion was ever to end.

298. Even Fried seems to agree, or at least did at one time. *See* FRIED, *supra* note 93, at 174 (describing the "love and affection implicit in friendship").

with, one another's lives. It is reciprocity that allows true friends to trust one another to the extent necessary to carry out the critical obligations of friendship. There are few barriers - psychological, emotional, or intellectual - between true friends.

It is not hard to see the difficulties involved in trying to map the idea of true friendship onto Fried's idea of legal friendship. The differences between the two are numerous and obvious, and they begin with the manner in which each type of friendship is formed. In Fried's view, lawyers form legal friendships for a wide variety of reasons, but the most common and overriding reason is financial gain. It is not wildly off base to say that, for Fried, lawyers make friends for money. Fried attempts to distinguish lawyer-client relationships from ordinary commercial relationships by arguing that lawyers may not withdraw from representation when clients are unable to pay, and that the content of the relationship takes its shape solely from the needs of the client - that money is just an accidental feature.[299] But this argument is not entirely successful. While it is true that there are legal and ethical constraints on a lawyer's right to withdraw, often they are honored in the breach more than the enforcement, and even when this is not true, the constraints are easily avoided by refusing to serve clients altogether, or by limiting the scope of one's representation, for economic reasons. As numerous commentators have pointed out, when these qualifications are taken into account, Fried's lawyer resembles an ordinary purveyor of goods more than a special-purpose friend. William Simon was probably not far off when he described Fried's view as closer to the classical notion of prostitution than friendship."[300]

Fried's idea of legal friendship also lacks the reciprocity characteristic of true friendship. In legal friendship lawyers care about and participate in the intellectual and emotional lives of their clients only to the extent demanded by the ends of the representation, and clients do not care about or participate in the intellectual and emotional lives of their lawyers at all. The fact that care is limited and runs in only one direction should not weaken the analogy, argues Fried, because the moral freedom of lawyers to give implies the moral freedom of clients to receive.[301] Legal friendship is recipient rather than donor focused, in other words, emphasizing client need to receive more than lawyer ability to provide. But if the moral freedom to give implies a moral freedom to receive, surely it also implies a moral duty to reciprocate, and the reciprocity traditionally required is reciprocity of character, affection, and contribution to the relationship. As Hutter explains, the "receiver of benefits in a friendship must reciprocate for

299. Fried, *supra* note 6, at 1075.
300. Simon, *supra* note 5, at 108.
301. Fried, *supra* note 6, at 1074.

the simple reason of avoiding the appearance that he might be in the relationship for the sake of the benefits rather than for the sake of his affection for the giver."[302] Clients have contractual duties to lawyers - they must pay their lawyers' fees for example - and this may seem to make the lawyer-client relationship reciprocal. Clients are the economic friends of lawyers in the way that lawyers are the legal friends of clients, so to speak. But this kind of commercial reciprocity, defined by social structure and bargained-for agreements rather than affect and shared commitment to the good, is very far removed from the spontaneous reciprocity of true friendship. As Hutter again explains, "the standards by which mutuality is evaluated [in friendship] are not set structurally, nor are they set in terms of institutionalized modes of equalization such as through money, exchange of services, or any other form of reciprocal bargaining."[303] While utilitarian concerns figure in the process of making friends, only Fried attaches the label of friendship to a relationship that has no other motive, purpose, or dimension. Friendship is a union between persons in the same role, that of friend, not of persons joined in role-pairs such as doctor-patient, priest-penitent, or principal-agent.[304]

It also is peculiar that Fried's notion of legal friendship, which is limited in its purposes and objectives, demands more than true friendship, which is open-ended and diffuse. For example, true friendship does not require one to do personally dishonorable things. In fact, acting dishonorably is antithetical to true friendship. But legal friendship sometimes requires one to act against one's sense of what is morally appropriate. If being dishonorable is not required by the larger category (true friendship), however, then surely it should be outside the bounds of the lesser-included category (legal friendship) as well. Fried deals with this difficulty by separating the lawyer into personal and representational halves, making the former morally responsible, and the latter not. But this is an especially dubious move for someone whose system of thought is built on the principle of autonomous action. The moral freedom on which autonomy is grounded necessarily implies a moral responsibility that cannot be swept under the rug with a concept as facile as representational harm.

Finally, legal friendship and true friendship differ in the role each accords to qualities such as love, admiration, vulnerability, trust, and the like. Fried admits that friendship, like all intimate relationships, is based on love. The only "differences [between friendship and other types of intimate relationships] have to do with the degree of intensity and significance of the relation, and with the appropriate modes of

302. HUTTER, *supra* note 235, at 20.
303. *Id*. at 18.
304. *Id.* at 4.

expression."[305] Yet, love for person plays no part in the idea of "making another person's interest your own." Lawyers and clients associate around interests, not feelings, beliefs or values, and pursue instrumental ends, not relationships for their own sake. Even Fried may doubt the analogy, for he says in another context:

> *[I]f* a person's sole reason for valuing another is what that other can do for the person, then the object of the emotion (whatever that emotion is) is viewed as an instrument alone, a means only to the valuing person's end. He uses his object, for it is *only* in terms of the object's usefulness - in the broadest sense - to him that he values the object. What is lacking in this attitude is an appreciation of the other person as a personality, a recognition of the other person as an entity valuable in itself and quite apart from any advantage or pleasure to the valuing agent.[306]

Fried seems to recognize here, as Dauer and Leff had argued,[307] that the analogy to friendship is mostly a rhetorical move, designed to bootstrap an unconvincing argument (we know intuitively that lawyers are entitled to prefer clients) by linking it to, or attempting to confuse it with, a convincing one (we know intuitively that friends are entitled to prefer friends). In this way, he is able to mask the emotional distaste one feels for the first argument with the emotional appeal one feels for the second. But "to defend a course of action as love-like or friendship-like when it is, much of the time, no such thing, is not to explain reality," Dauer and Leff point out, "but to trump it with the slyly appropriated affect of an altogether different realm of relationship."[308] Fried acknowledged that friendship was just an analogy, and not an identical case to the lawyer-client relationship, and he also admitted that, as an analogy, it helped mostly in understanding central, clear cases of lawyer-client interaction rather than cases at the boundary.[309] One might well wonder, however, about the value of an argument which explains only cases that were not difficult to understand in the first place

305. CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 80 (1970).
306. *Id.* at 77 (emphasis in original).
307. Dauer & Leff, *supra* note 6, at 577 n.22.
308. *Id.* at 583-84 (while use of the friendship metaphor was "callow prestidigitation," it was an "absolute necessity" for Fried's rhetorical strategy). They added, "And that, we think, is what Professor Fried did." *Id*. at 584. "It will not do," they pointed out, ". . . to avoid whatever necessary conflict there might be, not by changing the reality of ourselves, our profession, or our society, but by changing only the way we talk about who we are, what we do, and how we and those things function in modern American life." *Id*. at 573.
309. Fried, *supra* note 6, at 1087.

C. Thomas Shaffer and Robert Cochran: Friend as Moral Advisor

The near uniform criticism of Fried's argument sent the friendship analogy into temporary eclipse. Even Fried repudiated parts of his argument the next time he discussed the subject of the lawyer-client relationship in any detail.[310] There must be something that loves a friendship analogy, however, because at about the same time Fried's version was being interred,[311] a new and in some ways more pernicious strain, grounded in Aristotelian virtue ethics[312] and the doctrine of Christian love,[313] was being born. This creation, principally the

310. Fried, *supra* note 93.

311. Shaffer's first discussion of the "lawyer as friend" subject appears in a 1978 article in the Washington & Lee Law Review. *See* Thomas L. Shaffer, *A Lesson From Trollope*, 35 WASH. & LEE L. REV. 727 (1978). Fried's *Lawyer as Friend* article was published in 1976, and two of the principal criticisms of the article, those by Dauer & Leff, and Simon, were published in 1977 and 1978. Shaffer probably wrote the *Trollope* article with Fried, Dauer & Leff, and Simon's articles in front of him.

312. Gerald Postema has described virtue ethics in operation in this way:

> Judgement is neither a matter of simply applying general rules to particular cases nor a matter of mere intuition. It is a complex faculty, difficult to characterize, in which general principles or values and the particularities of the case both play important roles. The principles or values provide a framework within which to work and a target at which to aim. But they do not determine decisions. Instead, we rely on our judgement to achieve a coherence among the conflicting values which is sensitive to the particular circumstances. Judgement thus involves the ability to take a comprehensive view of the values and concerns at stake, based on one's experience and knowledge of the world. And this involves awareness of the full range of shared experience, beliefs, relations, and expectations within which these values and concerns have significance.

Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 68 (1980). *See also* Adam Thurschwell, *Friendship, Tradition, Democracy: Two Readings of Aristotle*, in 5.2 LAW • TEXT • CULTURE 271, 293-301 (2001) (reinterpretation of Aristotelian conception of friendship in light of Kantian moral theory and Judeo-Christian model of service to God); Morris, *supra* note 96 (refinement of the lawyer-as-friend argument based on Aristotle's conception of "advantage-friendship").

313. While the Shaffer and Cochran book does not discuss the Christian love basis of the friendship analogy to any great extent, in an earlier work Shaffer explained that the analogy was based on the view of C.S. Lewis and Augustine, that "friends are those whom God sends to us in a certain way." Shaffer, *supra* note 15, at 639. In meeting a client for the first time, according to Shaffer, a lawyer should think that "God sent this person to me, and He at the same time sent to each of us the interest, curiosity, and attractiveness that make love possible between us." *Id.* "If you see the hand of God anywhere in your life," says Shaffer, "you see it" in the lawyer's ability to manifest a "fresh, focused benevolence" in interactions with clients. *Id.* While admitting that all lawyer-client relationships do not develop to this extent, and that it is common to prefer (i.e., become friends with) some clients over others, when it does happen, says Shaffer, it "is a miracle." *Id. See also* Shaffer & Cochran, *supra* note 94, at 80 and 71 (explaining that their "criticism of the traditional [conception of] lawyer [role] . . . has its

source in . . . religious tradition," and that their "choice of friendship as a model comes . . . from [their] own experience with . . . small intimate Christian fellowship groups . . ."); Thomas L. Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 738, 753 (1975) (analogizing the Code of Professional Responsibility to "St. Matthew's Gospel," and comparing the lawyer's experience with client projects with the "human experience Jesus identified as the source of his salvation"). *But see* DAVID SLOAN WILSON, DARWIN'S CATHEDRAL 1-48 (2002) (describing how Christian love, seen from the perspective of evolutionary biology, is a biologically and culturally evolved adaptive mechanism that enables human to function as groups rather than collections of individuals, and thus increases their chances of physical survival); Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 U. PA. L. REV. 661, 678-79 (2001) ("if all lawyers [combined their religious beliefs with the practice of law], instead of pressing adversarial interests and adverse rights, I confess I would worry"); Gaylin, *supra* note 31, at 179-80 ("The injunction 'to love thy neighbor as thyself' has always seemed to me the most unreasonable directive in the New Testament. . . . [It] seems . . . beyond the reach of most human beings. . . . [Yet] it is deemed so central to the Christian ideal that this . . . directive appears at least five times in the New Testament. But then Christianity is a religion that motivates its followers by an image of admittedly unattainable perfection. The New Testament simply wants you to try, and allows for forgiveness."). Shaffer and Cochran are ecumenical in their grounding of the friendship analogy, drawing on the work of Martin Buber, Thomas Aquinas, and Karl Barth, among others.

There is a problem in defining friendship as an opportunity sent by God, of course, since the "logical consequence of [such a] theory is that every client relationship that does not become a friendship is a moral failure . . . ." Shaffer, *supra* note 15, at 641. Put another way, in the "friend is sent by God" point of view, "poorer [client] service is the consequence of a sinful refusal to be friendly." *Id*. We need not worry about this, however, says Shaffer, since for reasons "deep in the classical literature on friendship," *id.,* the preference for some friends (or clients) over others is just "a fact of life, as a sort of psychological economy rather than as moral failure." *Id*. As Augustine said, "you cannot consult for the good of them all." *Id*. Shaffer and Cochran's "Christian lawyer" may be a next generation adaptation of Luban's "New Wave Progressive Professionalist" lawyer of the late 1960s and early 1970s, with religion now making up for the loss of faith in the progressive professionalist vision. *See* Luban, *supra* note 16, at 731-734 (describing how "New Wave lawyers with [a] . . . liberal-Christian . . . perspective, viewed their clients' interests as universal interests within society . . . [and] . . . thus . . . [believed they] . . . could advance the public interest simply by pursuing their clients' interests.") Defining the relationship between religion and legal practice is a complicated and difficult task. Minow provides an excellent summary of the literature, a list of the principal issues in dispute, and a few cautious guideposts. *See* Minow, *supra.*

The link between Aristotelian and Christian models of friendship is not an obvious one. As Jacques Derrida pointed out, the Judeo-Christian model, marked by the value of love of an infinite God, "depoliticizes the Greek model," marked by the value of reciprocity, and thus could be seen to make a clean break with it. *See* Jacques Derrida, *The Politics of Friendship*, 85 J. PHIL. 632, 643-44 (1988). (Derrida backed away from this conclusion somewhat in the final version of his argument, claiming only that classical and Christian models of friendship cannot be understood as either in opposition or rupture, but instead as in a form of continuity he characterized as a "generative graft in the body of our culture." JACQUES DERRIDA, POLITICS OF FRIENDSHIP 185 (George Collins trans.) (Verso 1997)).

work of Professors Thomas Shaffer and Robert Cochran, received its most developed expression in two 1990s books on interviewing and counseling.[314] The first of these books (Shaffer and Cochran)[315] set out the intellectual foundations for a rejuvenated friendship argument, described a conceptual framework for thinking about possible approaches to lawyer-client relations generally, and illustrated the rejuvenated legal friendship view in operation through a series of lawyer-client stories and (seemingly) hypothetical law-office conversations.[316] The book's discussion was more religiously grounded than earlier treatments of the subject, though it was not as empirical or systematic as Rosenthal's, as psychologically sophisticated as Watson's or Redmount's, or as philosophically subtle as Fried's. It has the quality of "some thoughts on the subject of lawyer-client relations" about it. The second book (Cochran),[317] refined many of the Shaffer and Cochran book's arguments, described their implications for lawyer skill practices, and secularized the new model somewhat by making friendship a synonym for social collaboration generally, thus linking it to psychology based treatments of the lawyer-client relationship.[318] Both books distinguished their rejuvenated

In a sophisticated "radical reinterpretation" of Aristotle's Ethics, Adam Thurschwell re-formulates Derrida's analysis, arguing that "something resembling the Judaeo-Christian belief in an obligation to an infinite God that transcends any obligation to one's self is already presaged in Aristotle's ethics." *See* Adam Thurschwell, *supra* note 312, at 277, 292-301. The real problem with attempting to revive Aristotelian virtue ethics in a modern world, argues Thurschwell, is that modern life "has incorporated Kant's [moral] premises – above all the respect due each individual *qua* moral subject regardless of the 'content of her character'–that not only shapes our modern institutions but limits what we recognize as an acceptable ethical/political/legal argument." *Id.* at 285.

314. *See* SHAFFER & COCHRAN, *supra* note 4; COCHRAN ET AL, *supra* note 4. Shaffer and Cochran have written extensively about the Christian perspective on the lawyer-client relationship independently of these two books, and I will draw on that writing when it is helpful to do so. *See, e.g.*, Shaffer, *supra* note 15; Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987); Thomas L. Shaffer, *Moral Theology in Legal Ethics*, 12 CAP. U. L. REV. 179 (1982); Thomas L. Shaffer, *Advocacy as Moral Discourse*, 57 N.C. L. REV. 647 (1979).

315. While the book was written by both Shaffer and Cochran, as the preceding note makes clear, its arguments for legal friendship come mostly from earlier articles written by Shaffer alone.

316. When I say "seemingly," I mean to suggest only that the conversations do not appear to be verbatim transcriptions of actual conversations, but I would not be surprised to learn that they are based loosely on real cases.

317. I mean no disrespect to Cochran's co-authors in this shorthand. In this article, I consider only the book's discussion of the friendship analogy, and that discussion seems to be mostly the work of Cochran, since it tracks so closely the arguments of his earlier book with Shaffer.

318. *See, e.g.*, COCHRAN ET AL, *supra* note 4, at 31-35 (describing the practice skills characteristic of a lawyer acting as friend). Cochran may not have intended this link with psychological models, since other parts of the book criticize exclusively

version of legal friendship from the client-centered approach of Binder, Bergman, and Price, which they found "too lonely and independent," and from Friedian legal friendship, which they found insufficiently critical, and ultimately just a "hired gun" view.[319]

Shaffer and Cochran described the world of lawyer-client relations in terms of four general and, by now, familiar[320] models: lawyer as godfather, lawyer as guru, lawyer as hired gun, and lawyer as friend (or collaborator, in Cochran).[321] Godfather lawyers are those who take control of all of the decisions that arise during the course of legal

psychological approaches to defining lawyer role. *See id*. at 4-6. The book simply may have been expressing a preference for communitarian social theory over virtue ethics, for Amitai Etzioni over Aristotle, so to speak. Nevertheless, Cochran's particular variation of the friendship model is virtually indistinguishable from Hurder's lawyer-as-collaborator conception of the lawyer-client relationship (which Cochran re-produces, *see id*. at 25-29), among others, and Hurder's view is grounded in a dialogic version of civic-republican social theory rather than religious doctrine. *See* Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration,* 44 BUFF. L. REV. 71 (1996). The principal difficulty with a civic republican view, and with dialogue-based social theory generally, as the above discussion makes clear, is that it lacks a decision procedure for situations in which dialogue fails to produce a consensus choice. *See* notes 379-389 *infra,* and accompanying text. Also, because the lawyer-as-collaborator view is committed to an equal sharing of authority and responsibility between lawyers and clients, it must be based on a workable conception of equality for relationships in which just about every relevant property (i.e*.,* experience, education, tolerance for risk, and the like) is distributed unequally. In what way lawyers can be said to be the dialogic equals of their clients is a very difficult question, and proponents of the lawyer-as-collaborator view do not discuss this issue in very much detail. *See* John Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1050 (1982) ("It is difficult to conduct a dialogue between equals, however, when one monopolizes the legal knowledge and the other's interests are at stake.").

319. SHAFFER & COCHRAN, *supra* note 4, at 24 (lonely and independent), and at 44, n.3 (hired gun). *See also* COCHRAN ET AL, *supra* note 4, at 5-6, 173-76 (describing how the client-centered view is too selfish, too unilateral, too irresponsible, and too manipulative). Cochran admits that the client-centered view promotes lawyer empathy for clients, *see id*. at 5, something Shaffer and Cochran recommend in describing their own lawyer-as-friend view. *See* SHAFFER & COCHRAN, *supra* note 4, at 100.

320. While Shaffer and Cochran's terminology was new, the substantive content of their models of the lawyer-client relationship was not. The models overlapped with Rosenthal's categories of "traditional" and "participatory" lawyer-client relationships, and with Binder, Bergman, and Price's categories of "client-centered" and "traditional" lawyering. *See* ROSENTHAL, *supra* note 39, at 9-13; BINDER ET AL., *supra* note 64, at 17-18. Cochran seems to prefer the terms "Authoritarian" and "Client-Centered," over Shaffer's "godfather," "guru," and "hired gun," *see, e.g.,* COCHRAN ET AL., *supra* note 4, at 2-6, but he also makes it clear that the content of his categories is the same as Shaffer's. *Id.* at 165-76.

321. COCHRAN ET AL., *supra* note 4, at 176 (Cochran uses the terms "friend" and "collaborator" as synonyms throughout his discussion, and the section of the book discussing the friendship model is entitled "Collaborative Lawyers: The Lawyer as Friend.").

representation and make those decisions from the perspective of what is economically best for their clients, irrespective of the consequences for third parties or the social system as a whole.[322] As in the Mario Puzo novel, and the Francis Ford Coppola films, godfather lawyers tell clients to "leave it all to them."[323] They treat representational questions as technical, decide what is best "without consulting their clients, or . . . persuade their clients to accept lawyers' views on what their interests are,"[324] and disavow any responsibility for moral issues imbedded in their choices. They live in a schizophrenic moral world in which life at the office is judged by a different set of standards than life at home.[325]

Guru lawyers also control representational choices, but they do so from the perspective of both their clients' interests and those of the social system as a whole.[326] They base decisions on moral reasons as well as economic ones, and ground moral views on their own perceptions of what is required for the common good.[327] They are the "gen-

322. SHAFFER & COCHRAN, *supra* note 4, at 8.

323. *Id.* at 7.

324. *Id*. at 8.

325. *Id*. at 13-14.

326. According to Cochran, the principal difference between godfather and guru lawyers is the extent to which they consider the effects of their decisions on persons other than their clients. *See* COCHRAN ET AL., *supra* note 4, at 166.

327. SHAFFER & COCHRAN, *supra* note 4, at 31. Cochran uses a story from Harrop Freeman's pioneering book on interviewing and counseling to illustrate guru lawyering in operation. Freeman's lawyer describes how he advised a woman in her late twenties who wanted to leave her "good, devoted husband" and three children to marry a man with whom she was having an affair.

> Mrs. G was a silly, stupid person in spite of her education. My reaction was that she could use an old fashioned horse whipping and I told her so frankly. I told her that she had sex confused with love. I told her that I did not think there was any future in the proposed divorce. I told her that I felt that if the third person was such an individual that he would abandon his own wife and two sons, I could not see any hope in the future of a home with him and her three children. In short, I attempted to dissuade her from the idea of a divorce . . . . I told Mrs. G that I felt that the lover never had any intention of marrying her, that he was putting a veneer on a sordid arrangement, that she was heading straight to destruction - even worse. I pointed out that marriage was economic, family, societal, etc., and not merely lovers coming together. I outlined how much she had: a good husband, good home, children, economic security, social position, acceptance by friends and society . . . . Finally, I gave it to her quite frankly . . . she could have her children and the separation; she could have a divorce and her husband would retain custody of the children . . . . She was not entitled to both. She herself was seeking her own vanity and selfishness. The children's future was not with the lover even if she should marry him. If she was not agreeable to my counsel and advice, she might try another lawyer.

COCHRAN ET AL., *supra* note 4, at 167-68.

tleman lawyers," real and imagined, of American legal legend,[328] whose principal calling, like gurus generally, is to "tell their followers what to do."[329] Unlike godfathers, they avoid moral schizophrenia by following the same moral compass, their own, whether at home or at the office.[330] They exercise power explicitly when that is sufficient, but are not above using indirection and manipulation when it is not.[331] Former Judge Clement Haynsworth expressed the guru (and godfather) manifesto best:

> [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, and, as a professional, he cannot give in to a client's attempt to persuade him to take some other stand.[332]

Guru lawyers care deeply that their clients do the right thing in particular cases but are less concerned that they learn to do it on their own in the future. They want clients to *be* good, in other words, but not necessarily to *become* good.[333] They are self-perceived moral elites, or self-appointed consciences of the community, and the closest thing to a class of Platonic guardians one can find in the American legal culture. There are not many guru lawyers left, or at least not many clients willing to permit lawyers to be gurus, but there are several highly respected commentators who bemoan their passing.[334]

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328. SHAFFER & COCHRAN, *supra* note 4, at 32. *See also* COCHRAN ET AL., *supra* note 4, at 169 (the guru lawyer "is part of a venerable tradition among American lawyers . . . . [T]he 19th century's statements of good lawyering practice . . . encouraged lawyers to take charge of legal representation and to tell clients what they should do."). Real life examples of guru lawyers would include such legal luminaries as David Hoffman, George Sharswood, Louis Brandeis, John W. Davis, and Elihu Root, as well as fictional ones such as Atticus Finch.

329. SHAFFER & COCHRAN, *supra* note 4, at 32.

330. *Id*. at 33.

331. Cochran describes many of the forms this manipulation can take. *See* COCHRAN ET AL., *supra* note 4, at 14-25.

332. Clement F. Haynsworth, *Professionalism in Lawyering*, 27 S.C. L. REV. 627, 628 (1976).

333. SHAFFER & COCHRAN, *supra* note 4, at 39; *see also* COCHRAN ET AL., *supra* note 4, at 170 ("the guru lawyer . . . robs the client of the opportunity to grow morally"). Shaffer uses a story about a lawyer ordering a employer client to do the morally correct thing by integrating a factory workforce to illustrate guru lawyering in operation, but he faults the lawyer for not helping the client to make the decision on his own. SHAFFER & COCHRAN, *supra* note 4, at 38-39. It is not clear from the story, however, whether process or outcome is the higher priority for Shaffer, whether it is more important that the client do the right thing, or that he make the decision to do the right thing by himself. The book argues that clients should "freely make right choices," but also acknowledges that a lawyer is faced with a difficult problem when what the client "freely" wants to do is not the "right" choice as the lawyer sees it. Shaffer's answer is "moral conversation," *id.* at 48, but this brings us back to the problems with dialogue based social theory generally. *See* note 318 *supra*.

334. *See, e.g.* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Luban, *supra* note 16.

Hired gun lawyers operate at the other end of the spectrum from gurus and godfathers, in that they take their direction about how to proceed in legal representation exclusively from their clients. Consistent with "the ethics of the Enlightenment and the American political tradition [of] 'Don't tread on me,"[335] they believe that a client's highest end is to be free, and that as a consequence, they have a responsibility to protect the client autonomy interest of controlling legal representation and "not to question [a] client's morality."[336] The most well known manifesto for hired gun lawyering is Lord Brougham's defense of his hardball representation of Queen Caroline against Kind George IV's charge of adultery.[337]

> 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 consequences, though it should be his unhappy fate to involve his country in confusion.[338]

Hired gun lawyers acknowledge that there is "some place for the lawyer's conscience" in the representation of clients, but disagree over the nature and extent of that place, both among themselves and with others.[339]

Of all of the models, Shaffer and Cochran are the most critical of hired gun lawyering. They find it to be a "moral schizoid" point of view,[340] incompatible with ordinary "moral impulses," and tantamount to a "surrender [of] moral responsibility."[341] Its appeal, so far as they can tell, is based on a certain "machismo" quality, attractive mostly to men, who like to see themselves (metaphorically) as "riding

335. SHAFFER & COCHRAN, *supra* note 4, at 17.

336. *Id.* at 16. Cochran seems to find the autonomy rationale more appealing than does Shaffer. *See* COCHRAN ET AL., *supra* note 4, at 3-4, 172.

337. SHAFFER & COCHRAN, *supra* note 4, at 18. Shaffer and Cochran see the hired gun lawyer as just another manifestation of client-centered lawyering. *See* COCHRAN ET AL., *supra* note 4, at 173-76.

338. 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821). The speech was "a tacit threat to reveal [the King's] secret marriage to a Catholic, a marriage that, were it to become public knowledge, would cost [the King] his crown . . . [and] thereby 'involve his country in confusion.'" It was, as David Luban says, a "nation-shaking act of blackmail," or in more mundane terms, a hardball bargaining move, perhaps the mother of all hardball bargaining moves. *See* LUBAN, *supra* note 15, at 55. For a more complete discussion of the lawyer's "ethical obligation to compete" in bargaining, *see* Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 68-78 (1992).

339. SHAFFER & COCHRAN, *supra* note 4, at 18-27.

340. *Id*. at 29.

341. *Id.* at 26.

in for the shoot-out in Deadwood Gulch."[342] Women, by comparison, are likely to see going along unquestioningly with client choices as a "violation of self," akin to "being forced into a sex relationship you didn't anticipate," or like being "screwed,"[343] and Shaffer and Cochran endorse this latter view.[344] While they admit that hired gun lawyers can sometimes be persons of character,[345] they think that when this happens it is because of qualities other than the fact that the lawyers "will do for [clients] whatever they want done."[346]

The fourth of the Shaffer and Cochran models, and the preferred one,[347] is a rejuvenated form of the lawyer as friend approach. Their version of legal friendship, in effect, borrows aspects of Rosenthal's idea of "participatory relationship,"[348] Nietzsche's idea of "friend as best enemy,"[349] and Aristotle's idea of "true friendship," to produce an unsentimental, no-holds-barred "friend as personal moral trainer," or "friend as drill sergeant," (probably "friend as pastor" for Shaffer) sort of view.[350] It is a set of marching orders for the committed moral proselytizer, the avenging angel, and the religious crusader, and will not appeal to those who believe it is not ordinarily their responsibility to take the initiative in raising questions about other people's morality.[351] It is friendship with teeth.[352]

342. *Id*. at 29.
343. *Id*. *See* RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 112 (1989).
344. SHAFFER & COCHRAN, *supra* note 4, at 29 ("There may be a basis for the sense of guilt that these [women] lawyers express.").
345. *Id*. at 27 (describing Monroe Freedman, the leading exponent of the hired gun view, as a person of character).
346. *Id*. at 26-27.
347. COCHRAN ET AL., *supra* note 4, at 177.
348. Shaffer acknowledges his link to Rosenthal. *See* Shaffer, *supra* note 15, at 663 (the "moral ideal in the professional relationship of lawyer and client is the participatory ideal," citing to Rosenthal).
349. NIETZSCHE, *supra* note 218, at 71 ("In one's friend one shall have one's best enemy.").
350. Less flattering descriptions would include "friend as busybody," "friend as nosy neighbor," or "friend as buttinski." Why Shaffer and Cochran want to revive the friendship analogy is not clear. They recognize, for example, that lawyers cannot "restrict their law practices to clients who are already friends," SHAFFER & COCHRAN, *supra* note 4, at 98-99, or even to clients who are attracted to the lawyers as persons, but nonetheless suggest that it "may" be possible for lawyers to "learn something about counseling [clients] from the counseling of friends." *Id*. at 99. In the next sentence, however, and without any new reasons or evidence, they conclude that friendship "provides the *best* model for the way that lawyers and clients might approach moral problems" that arise in legal representation. *Id.* at 99 (emphasis added). How a possible model for lawyer-client interaction turned into the best model, without any intervening argument or evidence, is never really explained.
351. Only in their critique of guru lawyers do Shaffer and Cochran admit to limits on a lawyer's obligation to provide moral advice. There, they agree that "a bit of humility is justified when approaching the moral issues that arise in the law of-

fice. These moral issues are likely to be difficult. People disagree over what sound ethics require . . . . [N]one of us has perfect ability to discern those standards or to determine how they would apply in every situation . . . . In most human associations it is the case that two consciences, in conversation, will get to the moral truth of the matter better than one." *Id*. at 36. This excerpt nicely captures a principal flaw in the Shaffer-Cochran argument. Because Shaffer and Cochran believe that most moral questions are easy to spot, that they have right answers, and that conversation with others will uncover these answers if they are not immediately apparent, they do not expect that lawyers will be required to override client decisions very often. Instead, they expect that "dialogue" with the client will make most differences of opinion go away. But this view largely avoids the central issue in the lawyer-as-friend debate. Defining lawyer role in relations with clients is a difficult task only when lawyers and clients disagree about the morality of representational choices after each side has said all it has to say in defense of its particular position. Shaffer and Cochran hope this situation will not arise very often, and so does everyone else I expect, but they do not have much to say about it when it does.

352. Shaffer and Cochran encourage lawyers to judge the morality of their clients' decisions, in part, because they think that the failure to do so amounts to a tacit approval of client behavior. *See, e.g.,* COCHRAN ET AL., *supra* note 4, at 175. Reminiscent of the politician who believes that "If you're not with me, you're against me," Shaffer and Cochran seem to believe that it is not possible for lawyers to remain morally neutral with respect to client projects once they know about those projects. This "guilt by association" view (usually discussed in the context of whether an ACLU lawyer representing the Ku Klux Klan or Nazi party's right to hold a demonstration tacitly approves of racism, see LUBAN, *supra* note 15, at 161-62, and RHODE, *supra* note 15, at 74-75, for discussions), has been popular at different times in the past, and perhaps it is making a comeback, though it is not the position of the organized bar. *See* MODEL RULES OF PROF'L CONDUCT, 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.").

Its grounding in Christian love also may help explain Shaffer and Cochran's eagerness to have lawyers give moral advice to clients. Individual Christians see themselves as parts of a single organism, in service to one another, as the embodiment of the spirit of Christ. *See, e.g.,* Andreas Ehrenpreis & Claus Felbinger, *An Epistle on Brotherly Community as the Highest Command of Love, in* BROTHERLY COMMUNITY - THE HIGHEST COMMAND OF LOVE: TWO ANABAPTIST DOCUMENTS OF 1650 AND 1560 at 9, 15 (Plough Publishing House eds., 1978) ("True [Christian] love means growth for the whole organism, whose members are all interdependent and serve each other. That is the outward form of the inner working of the Spirit, the organism of the Body governed by Christ. We see the same thing among the bees, who all work with equal zeal gathering honey . . ."); E.E. EVANS-PRITCHARD, THEORIES OF PRIMITIVE RELIGION 64 (1965) (crediting Durkheim with the insight that "a psychological fundamental of religion [is] the elimination of the self, the denial of individuality, its having no meaning, or even existence, save as part of something greater, and other, than the self."); WILSON, *supra* note 313, at 151 ("Perhaps the most radical innovation of the early Christian Church was to provide a membrane and a social physiology comparable to Judaism for anyone who wanted to join, regardless of their ethnicity. This combination of permeability with respect to membership and impermeability with respect to interactions is a remarkable piece of social engineering. Anyone could become a Christian, but those who did were expected to overhaul their behaviors under the direction of a single God in a close-knit community that could easily enforce the new norms." This "membrane[ ] allow[s] wonderfully complicated self-sustaining

A lawyer's most important objective, according to Shaffer and Cochran, stated over and over again,[353] is the pursuit of "client goodness," where goodness consists of helping clients to become better persons.[354] As the book puts it, "At its root, being a lawyer is helping people . . . . [and] [t]he deepest and most important way we can help them is when we help them to become better people."[355] Lawyers fulfill this role by exerting strong moral influence in conversations with

processes to take place inside the cell amidst [the] larger outside world of chaos" which confronted the early Christians.) When all are one, advising others is functionally the same as advising oneself, and just as it is not impertinent to correct oneself, it is not impertinent to correct others.

When this "single organism" understanding of social life is combined with a proselytizing perspective which sees non-Christians as inchoate Christians waiting to be converted, it is easy to understand how Shaffer and Cochran would not be bashful about recommending unilateral lawyer intervention in the moral lives of their clients, Christian or otherwise. Interestingly enough, though, they are not equally hard on all types of clients. For example, Cochran believes a lawyer should "regulate the intensity with which [he or she] engages the client in moral discourse," depending upon the type of client and the factual circumstances in which the issue comes up. The lawyer "might remain relatively neutral," for example, when representing "a poor woman charged with petty larceny," but read the riot act to "a corporate executive [who] approved the sale of defective kidney dialysis machines." *See* COCHRAN ET AL., *supra* note 4, at 184. There is paternalism and condescension in such a suggestion, of course, and a Robin Hood politics that not all would support.

353. Cochran does not emphasize this point as much, but he does endorse it.

354. SHAFFER & COCHRAN, *supra* note 4, at 44 ("Goodness is not primarily doing the right thing - it is being and becoming a good person - developing skills for goodness."); *see also, id*. at 44 (good lawyers are "concerned about what type of person the client is becoming"); Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U.L. REV. 319, (1987) ("The distinctive feature of ethics in a profession is that it speaks to the unequal encounter of two moral persons. Legal ethics, which is a subject of study for lawyers, therefore, often becomes the study of what is good – not for me, but for this other person, over whom I have power. Legal ethics differs from ethics generally: ethics is thinking about morals. Legal ethics is thinking about the morals of someone else. It is *concern*[ed] with the *goodness* of someone else."). Cochran's discussion of lawyer objectives is slightly more instrumental and pragmatic. It emphasizes the extent to which a lawyer-as-friend promotes "wise" lawyer-client decision-making, based on "practical wisdom," more than morally correct decisions based on virtuous ethical judgment. *See* COCHRAN ET AL., *supra* note 4, at 6-9. But Cochran also acknowledges that a lawyer-as-friend addresses the "moral issues that arise in the law office," *see id*. at 165, 177 ("central to the traditional notion of friendship [is] a moral component"), and accepts the idea that "one of the main duties of friends [is] to help one another to be better persons." *Id.* at 177 (quoting ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 115 (1985). Shaffer's desire to save others from themselves will strike a familiar chord with anyone familiar with any proselytizing religious tradition.

355. SHAFFER & COCHRAN, *supra* note 4, at 135; *see also, id.* at 26 ("Lawyers should be concerned that clients be and become better people, just as friends are concerned that one another be good.")

clients,[356] by raising and discussing moral issues clients fail to raise on their own, and by forcing clients to consider choices in light of the "consequences for others," and not just the consequences for themselves.[357] Like friends generally, lawyers are at their best when they "take moral problems seriously and resolve them in conversation."[358] Sometimes this makes for "intense" relationships, but that is a good thing, because "[p]eople involved in intense relationships . . . change."[359]

This is a lot to ask of lawyers, or anyone for that matter, in relationships with relative strangers. Why would clients welcome unsolicited moral critique and exhortation, for example, rather than dismiss it out of hand as uninvited work of busybodies, or overly nosy interlopers? It is perhaps a little impertinent, after all, to tell people you hardly know, when they have not asked, and who have come to you for legal help, that their moral perspectives are narrow or self-centered, mostly because they are not the same as yours ("wrong"[360] in Shaffer and Cochran's terminology).[361] This objection is overcome, say Shaffer and Cochran, when lawyers "care deeply" for clients. Caring is the key because clients are "likely to become open to . . . moral insight when [they] work with someone who cares for [them] deeply."[362] Thus, in true Rogerian fashion, lawyers are encouraged to hold clients in a kind of empathic, unconditional positive regard,[363] judging only

356. *Id.* at 21-22. Shaffer and Cochran criticize the client-centered model for failing to exercise such influence, or more accurately, for failing to exercise it consciously and positively.

357. *Id*.

358. *Id*. at 99.

359. *Id*. at 22.

360. COCHRAN ET AL., *supra* note 4, at 186-87 ("When lawyer and client disagree, so long as the lawyer does not believe that the direction that the client wants to go would be wrong, we believe that the lawyer should defer to the client."). Shaffer and Cochran are fond of finding other people "wrong." *See, e.g.,* Shaffer & Cochran, *supra* note 94, at 70 (responding to a criticism by a commentator by saying "He is wrong about that.")

361. Shaffer and Cochran solve this problem most of the time by using examples in which lawyers and clients have longstanding relationships outside of their present case. They either will have worked together on past cases, or have been personal friends before entering into the lawyer-client relationship, and then draw on these experiences to resolve disagreements that come up in the cases. Many times, the examples are set in small towns which Shaffer, in particular, tends to see in highly romanticized, Jimmy Stewart-like, terms. Shaffer practiced in a small town, *see* Shaffer & Cochran, *supra* note 94, at 79, but the town seems to have been a good deal different from the one I grew up in. For a more robust picture of life in small-towns, warts and all, *see* RICHARD RUSSO, EMPIRE FALLS (2001), or RICHARD RUSSO, NOBODY'S FOOL (1993).

362. SHAFFER & COCHRAN, *supra* note 4, at 47.

363. *Id.* at 99-100. "Rogerian fashion" takes its name from Carl Rogers and his theory of humanistic ego psychology. *See* CARL R. ROGERS, ON BECOMING A PERSON: A THERAPIST'S VIEW OF PSYCHOTHERAPY (1961).

their behavior and not their person.[364] So positioned, they are able to give the "fraternal correction" and "conditional advice"[365] needed for clients to "know [themselves]"[366] and their interests fully, all without the risk of having their (the lawyers') motives misinterpreted.

Shaffer and Cochran recognize that any care expressed for clients must be genuine, otherwise it will be "difficult for lawyers to convey . . . that . . . they *do* care,"[367] but this raises an immediate difficulty. How does one care deeply and genuinely for someone one knows little or nothing about, or what's worse, knows a lot about and cannot stand (since lawyers cannot limit their practice only to people they like, as Shaffer and Cochran acknowledge)?[368] The answer, say Shaffer and Cochran, is to "look into the client's heart" using the skills of "listening" and "empathy,"[369] (to see what, is not explained). Advice of this sort is easy to agree with, of course, but it can be hard to act on. It is a little like telling a baseball pitcher having trouble finding the plate to "throw strikes." "Sure," he might reply, "but how?" Perhaps sensing

364. SHAFFER & COCHRAN, *supra* note 4, at 99 (recommending unconditional regard for the client, but not for "what the client wants to do"). This is reminiscent of the religious distinction between sinner and sin, and Fried's distinction between wrongs of the person and wrongs of the system.

365. *Id*. at 48. The concept of "fraternal correction" is taken from Thomas Aquinas, and "conditional advice" from Karl Barth.

366. *Id*. at 47.

367. *Id.* at 115. ("There is more to being a good person than pretending to be nice."). Interestingly, while touting authenticity and care, Shaffer and Cochran also describe a set of "skills" lawyers can use to convey a caring attitude. The skills consist mostly of "small talk" techniques (e.g., "take some time to get to know the client" by asking about the kids, work, and other such things; "keep[ ] eye contact;" "react[ ] sensitively to what the client says;" and the like, *see id*.), common to commercial interaction, and while no doubt they would be as useful to lawyers as they are to realtors, it is not clear how they convey genuine care. *See also* DOUGLAS STONE ET AL., DIFFICULT CONVERSATIONS 167-68 (1999) ("Scores of workshops and books on 'active listening' teach you what you should *do* to be a good listener . . . [but y]ou emerge from these courses . . . only to become discouraged when your friends or colleagues complain that you sound phony or mechanical . . . The problem is this: you are taught what to say and how to sit, but the heart of good listening is authenticity. People 'read' not only your words and posture, but what's going on inside of you. If your 'stance' isn't genuine, the words won't matter.").

368. SHAFFER & COCHRAN, *supra* note 4, at 98-99; *see also* Shaffer, *supra* note 15, at 638 (lawyers sometimes "actively dislike" their clients); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., TEACHER'S MANUAL TO ACCOMPANY LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 30 (1984) (at times clients "seek out a lawyer because the lawyer is not one of their friends"). Cochran admits that lawyers "cannot become friends to every client," *see* COCHRAN ET AL., *supra* note 4, at 177, but suggests nonetheless that lawyers should discuss moral issues with clients "in the way that they would discuss moral issues with a friend." *Id*. This advice would seem to create an authenticity problem for lawyers, however, unless Cochran can explain how it is possible to act as a friend without being one, or how to pretend to have feelings, beliefs, and purposes one does not have.

369. SHAFFER & COCHRAN, *supra* note 4, at 100.

this, Shaffer and Cochran, describe empathic understanding a little further.[370] To empathize with others is to "see [others] and what [they] are feeling and doing from [their] point of view, [to] enter [their] private world and see it as it appears to [them]."[371] Again, this may help a little I suppose, but it also raises new questions as it resolves old ones. Putting aside a variation of the so-called "other minds" problem (of whether it is ever possible to take on the perspective of another),[372] one would like to know whether Shaffer and Cochran ask lawyers to imagine themselves in the position of clients, construct client thoughts and feelings hypothetically from that imagined perspective,[373] and then make representational decisions based on *faux* conversation with these imaginatively constructed clients. This seems to be the tenor of their comments, and in a sense imagination is all that is left when direct experience is missing, but there are well known problems with an "imaginative reconstruction" approach to deducing other people's states of mind that Shaffer and Cochran do not discuss.[374] For example, even if it were possible to construct client

370. Other commentators discuss the process of empathizing with clients, but at the same level of generality. *See* BINDER ET AL., *supra* note 64, 40-42; KRIEGER ET AL., *supra* note 39, at 209; BASTRESS & HARBAUGH, *supra* note 64, at 116-26; *see also* Philip M. Genty, *Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 CLINICAL L. REV. 273 (2000); Joshua D. Rosenberg, *Teaching Empathy in Law School*, 36 U.S.F. L. REV. 621 (2002); C. Duan & C.E. Hill, *The Current State of Empathy Research*, 43 J. COUNSELING PSYCHOL. 261 (1996).

371. SHAFFER & COCHRAN, *supra* note 4, at 100 (quoting Carl Rogers). Cochran has a more extensive discussion. *See* COCHRAN ET AL., *supra* note 4, at 215-216. Carl Rogers has perhaps the most well known rule for demonstrating empathy for others. "Each person can speak up for himself only *after* he has first restated the ideas and feelings of the previous speaker accurately, and to that speaker's satisfaction." *See* ROGERS, *supra* note 363, at 332. How one protects against the first speaker overinterpreting the second speaker's restatement, hearing what he expects or wants to hear (should he restate the restatement to the second speaker's satisfaction, for example, and so on and so forth), is not clear.

372. *See* THOMAS NAGEL, WHAT DOES IT ALL MEAN? 19-26 (1987) (discussing "other minds" problem, and the related problem of understanding the "subjective character of experience"); *see also* THOMAS NAGEL, MORTAL QUESTIONS 166-75 (1979). The process of attributing mental states to another is discussed in the cognitive science literature under the rubric of "mindreading." For a description of that literature and an extension of it to the process of reading one's own mind, see Shaun Nichols & Stephen Stich, *Reading One's Own Mind: A Cognitive Theory of Self-Awareness*, *at* http://ruccs.rutgers.edu/ArchiveFolder/Research%20Group/Publications/Room/room.html (2003); *see also* KENNETH WINSTON, ON THE ETHICS OF EXPORTING ETHICS: THE RIGHT TO SILENCE IN JAPAN AND THE U.S., *at* http://ssrn.com/abstract%20_id=421180 (Harvard University, Faculty Research Working Paper Series No. RWP03-027, 2003).

373. Dean Kronman makes this suggestion. *See* KRONMAN, *supra* note 7, at 129-130.

374. *See also* KRONMAN, *supra* note 7, at 133 ("it is only through a process of joint deliberation, in which the lawyer imaginatively assumes his client's position and with sympathetic detachment begins to examine the alternatives for himself, that the necessary understanding [of his client's state of mind] can emerge"). The

views imaginatively,[375] in doing so how does a lawyer avoid being constrained by a sense of what is reasonable, since it would be unfair to the client to assume anything else? Yet, if a client's imagined thoughts and feelings are the same as what the lawyer thinks reasonable they are likely to look a lot like the lawyer's actual thoughts and feelings, since the lawyer's views also are reasonable or presumably they would be different. The ensuing conversation between lawyer and imagined client is then likely to adopt the lawyer's views about what to do, since client views will be thought to be pretty much the same.[376] When this happens, empathic identification with the client will have become just an indirect and subtle way of telling the client what to do, or another form of godfather or guru lawyering, something Shaffer and Cochran reject when done self-consciously and directly.

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best discussions in the legal literature of the problem of investigating another's state of mind imaginatively are about the process of deducing "legislative intent" in the interpretation of statutes. *See e.g.,* Kenneth A. Shepsle, *Congress Is A "They," Not An "It" Legislative Intent as an Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992). The classic argument for the impossibility of deducing collective intent is in Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71 (1930) ("Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence . . . ."). Roscoe Pound is usually given credit for formulating the modern idea of "imaginative reconstruction." *See* Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907) (One can "find out directly what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy."). Pound's statement is taken from the commentary to Eyston v. Studd, 2 Plowden 459, 467, 75 Eng. Rep. 688, 699 (K.B. 1574), paraphrasing ARISTOTLE, THE NICHOMACHEAN ETHICS, bk. 5, ch. 10, (W.D. Ross tr., rev. ed., J.O, Ormson 1984). Learned Hand also was a well known practitioner of the method. *See* Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 553 (2nd Cir. 1914); Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785, 788-89 (2nd Cir. 1946).

John Lewis Gaddis discusses a variation of the "imaginative reconstruction" process as it arises in the context of writing historical biography, *see* GADDIS, *supra* note 31, at 113-118, and Spike Jonze parodies it in the movie BEING JOHN MALKOVICH (USA Films 1999).

375. Presumably it is easier to imaginatively reconstruct the intentions of a single individual than those of a group, and this should make the problem of deducing client intent in the lawyer-client relationship more manageable than that of constructing legislative intent.

376. Dean Kronman is very straightforward about this. *See* KRONMAN, *supra* note 7, at 131 ("The lawyer . . . must consider matters from the standpoint of the client's interests and desires. Once he has assumed this standpoint, however, he proceeds just as if he were attempting to answer a personal question for himself."). To paraphrase Judge Easterbrook, "even the best intentioned will find that the imagined dialogues [with clients will] have much in common with their own conception of the good." Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 551 (1983).

Collectively, the Shaffer-Cochran models reduce to three discrete responses to the archetypal problem of what to do when lawyers and clients disagree about how to proceed in the client's case.[377] Clients can tell lawyers what to do (the hired gun model), lawyers can tell clients what to do (the godfather and guru models), or lawyers and clients can talk further about what to do (the friend and collaborator models).[378] These are not equivalent responses, of course, since the first two describe a procedure for making a decision, while the third describes a procedure for avoiding or delaying it, in the hope, perhaps, that the need for a decision will go away on its own. A conception of role must tell lawyers how to act, however, not how to avoid action, or it is useless as a conception of role. When lawyers and clients agree about how to proceed, lawyers have no need for self-conscious resort to role. They simply do what they and the clients think best.[379] It is only when they disagree, and there are still representational decisions to be made, that lawyers must turn explicitly to role for guidance, and when that happens, a conception of role that provides an avoidance mechanism rather than a decision procedure is not yet a conception of role.[380]

Shaffer and Cochran might respond, "if lawyers and clients disagree after having heard everything each other has to say, lawyers should defer to client choices unless those choices are morally wrong." In fact, they do say something essentially like this.[381] Now, perhaps this is correct, certainly it is the received wisdom in many quarters,[382]

377. While Shaffer and Cochran, by their own terms, list four (and perhaps five) separate responses to the lawyer-client disagreement problem, ultimately these responses reduce to three. The differences between godfather and guru lawyering are more formal than substantive, as are the differences between the friendship and collaboration responses.

378. SHAFFER & COCHRAN, *supra* note 4, at 7-8, 19-27, 32, 44-46.

379. I assume here that what clients seek to do is legally permitted and only morally controversial. If clients ask lawyers to disobey the law, lawyer are prohibited from doing so by formal limitations on role, among other things.

380. Ironically, Shaffer and Cochran take Professor Sammons to task because he "does not tell us how the lawyer and client make decisions" in his "lawyer-as-rhetorician" conception of lawyer role. *See* Shaffer & Cochran, *supra* note 94, at 81.

381. *See* SHAFFER & COCHRAN, *supra* note 4, at 51 ("When lawyer and client disagree, so long as the lawyer does not believe that the direction that the client wants to go would be morally wrong, we believe that the lawyer should defer to the client."); *see also* COCHRAN ET AL., *supra* note 4, at 186-87 (same). *But see* KRONMAN, supra note 7, at 131 ("Of course, if a lawyer continues to believe that his client is acting impetuously, but is unable to persuade the client of this, a time will come when he must decide whether to do the client's bidding nonetheless. A lawyer may elect to do so, assuming the client's objective is a legal one, without violating any norm of professional responsibility as these are at present defined.").

382. Simon adopts a variation of this view, *see* Simon, *supra* note 128, at 485-89, as does Kronman, *see* KRONMAN, *supra* note 7, at 128-34 and Luban, *see* LUBAN, *supra* note 15, at 159-174; *see also* Peter Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests*

but if so, it is important to recognize that, again, it is just another, and slower, way of "telling clients what to do," another form of guru lawyering, since even guru lawyers tell clients what to do only when they (the lawyers) know the morally correct choice, and clients fail to make it on their own. In fact, to give instructions under any other conditions would be useless, or irrational.[383] Seen in this light, however, as slow guru lawyering in disguise, Shaffer and Cochran's lawyer-as-friend model, again, is just an indirect and subtle form of an approach they reject.

Shaffer and Cochran do not see their lawyer-as-friend in this way, of course, perhaps because, like all good communitarians,[384] they have an abiding and almost unlimited faith in the power of dialogue to produce agreement. They think that if people would just continue to talk with one another about their differences they would discover that they really do not disagree after all, that instead they are simply confused or mistaken about what they want or believe. Shaffer and Cochran seem to have this near-absolute faith in the power of dialogue[385] because they believe there are single, correct answers to

of Nonclients, 68 N.C. L. REV. 213, 215-20 (1990) (arguing for the adoption of professional responsibility rules requiring lawyers to discuss the moral, political, and psychological consequences of client legal action on third parties).

383. If Shaffer and Cochran mean to say that lawyers should go along with client decisions unless those decisions are *clearly* wrong, or wrong beyond any reasonable doubt, and the consequences of the decisions are severe, then they need to describe how a lawyer knows when these conditions are met (e.g., when is a moral error "clear," and what kind of consequences are bad enough), but they do not discuss this issue in any detail. The most sophisticated program for differentiating among degrees of client error, including the description of a decision procedure for determining when to override client decisions, is David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454.

384. Shaffer and Cochran's communitarianism is straightforward and unapologetic, *See* SHAFFER & COCHRAN, *supra* note 4, at 27 ("We are radically connected to one another. The human person comes to *be* in relationships . . ."), as is their preference for dependency over autonomy in the hierarchy of social values ("surely, ordinary dependence is a good thing. When we hear people speak of autonomy as if it were the greatest good, we are reminded of C.S. Lewis's picture of hell: Autonomous people on the outskirts of a city who continually move further and further away from one another. [Citing C.S. LEWIS, THE GREAT DIVORCE, 18-19 (1946).] That does not strike us as the good society, nor as a good thing for people.") SHAFFER & COCHRAN, *supra* note 4, at 28; *see also*, COCHRAN ET AL., *supra* note 4, at 177 ("Like the classic Aristotelian virtues, the good may be a mean between two extremes . . . [and] the mean between authoritarianism and individualism is community.").

385. Communitarians seem to assume that people do not think much about what they want to do, or believe is correct, before getting into conversations with others. If a person's views are carefully considered, for example, and based on conversations with many others, one would not expect to be able to tell that person anything new much of the time, and to try to do so could come across as insulting. Yet, communitarians believe that conversation almost always has the potential for learning and change, and thus, that it is almost always possible to tell others

moral questions most of the time, and that people are bound to discover them if they just keep talking.[386] No doubt, sometimes this will happen. When parties share background normative beliefs, continuing to talk may help them learn this, and this new learning, in turn,

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something new. Why one would expect people who have not learned all that well in private, on their own, so to speak, will learn well in public, in disagreements with strangers, is never really explained. If anything, the added stress of the second setting would seem to make conversation less conducive to learning. For an enthusiastic defense of the "dialogic model" of lawyer-client relations, *see* Reed Elizabeth Loder, *Out From Uncertainty: A Model of the Lawyer-Client Relationship*, 2 S. CAL. INTERDISC. L.J. 89, 92-96 (1993).

386. SHAFFER & COCHRAN, *supra* note 4, at 49 ("there is more moral commonality in America than" one might think; "[l]awyers and clients often share a moral culture - religious as well as civic;" a "rough consensus" exists on philosophical, theological and ethical principles and there is a "common understanding of moral obligations"). SHAFFER & COCHRAN, *supra* note 4, at 50 (quoting ROBERT N. BELAH, ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 140 (1985)); *s*ee also Shaffer & Cochran, *supra* note 94, at 72 ("ninety percent of the population in the United States identify themselves as part of the Christian and Jewish traditions and these traditions have significant moral overlap. The popularity of William Bennett's BOOK OF VIRTUES: A TREASURY OF GREAT MORAL STORIES among diverse social groups in the United States provides support for our suggestion that . . . [there] are values that lawyer and client can fruitfully discuss and practice in the law office."); COCHRAN ET AL., *supra* note 4, at 186 ("We share significant moral values with even the most different cultures."). Cochran cites to C.S. Lewis's THE ABOLITION OF MAN to support this conclusion, but Lewis believed that moral values were shared because we are all children of the same god, and this is a proposition not everyone is likely to accept.

Shaffer and Cochran think that the failure to act according to consensus moral norms is the result of "weak moral motivation," rather than reasonable disagreement over correct moral choice. SHAFFER & COCHRAN, *supra* note 4, at 129. This view is most evident in the book's discussion of hired gun lawyering, where it excoriates lawyers who are "controlled by a morality other than their own" (i.e., a morality of role). *Id*. at 29. Interestingly, however, none of the stories and conversations used to illustrate the legal friendship model include examples of conversations between lawyers and clients holding clearly developed and opposing moral beliefs. Characters whose moral views differ from the authors' are cardboard cutouts, and easily knocked down. In Shaffer and Cochran's world, lawyers and clients do not negotiate the determination of right and wrong from equally developed but different points of view, but instead, most of the time clients come to see the narrowness of their perspectives and adopt their lawyers' larger world views. While Shaffer and Cochran acknowledge that belief systems can differ, and "that lawyers should remain open to the moral influences of their clients," *id*. at 26, they do not take that possibility seriously enough to illustrate it in operation in actual case studies. Instead, they dismiss the possibility in a sentence, asserting that the greater risk is shying away from exercising moral influence, *see id*. at 49-50. The most important thing, according to Shaffer and Cochran, is that lawyers "not surrender their own moral responsibility." *Id*. at 26. Ironically, this kind of authoritarian rhetorical move, "asserting standards with dogmatic certainty," is criticized in the excerpt from Bellah's HABITS OF THE HEART, that Shaffer and Cochran rely on earlier in the same passage. *Id.* at 50. The Cochran book seems a little less rigid on these issues. COCHRAN ET AL., *supra* note 4, at 182-186.

may lead to changed views, which can lead to agreement. But it is not inevitable that this will happen. Disagreement in life can be rooted in competing and incommensurable conceptions of the good as much as mistaken perceptions of interest,[387] and when it is, as in the proverbial Kipling-Marx debate, conversation can continue indefinitely without the parties coming any closer to a principled resolution of their differences. In such circumstances, more dialogue is as likely to lead to intransigence, capitulation, impasse, and polarization, as it is to consensus, and its outcome, when it reaches one, is as likely to be based on stamina, deceit, and obstreperousness, as it is on insight and learning.[388] Even ostensible agreement can be misleading if the person more skilled at "dialogue" (*i.e.*, more glib), has simply silenced rather than convinced the person less skilled, by talking him into the ground.[389] In the end, there are only two principled courses of action open to lawyers who are unwilling to withdraw from a representation,

387. As H. L. A. Hart explained, it is "romantic optimism" to believe "that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another." *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 620 (1958). James Griffin explains the basis for our pluralism. "We have to give up the hope," he states, "that we can actually arrive at moral norms shaped solely by moral reasons for action, in contrast to the norms shaped, in no small degree, by convention and arbitrary decision that we have now. . . . Since life with these less than ideal norms is the only moral life we are ever going to have, we must get on with it." *See* James Griffin, *On the Winding Road from Good to Right, in* VALUE, WELFARE, AND MORALITY 176-77 (R.G. Frey & Christopher W. Morris eds., 1993). He goes on: "Our norms are unlikely to have grown in a way that would make them a system; they have grown, by fits and starts, in response to pressing, heterogeneous practical needs. They have taken their shape partly from the kinds of circumstances we found ourselves in, from the sorts of problems that we faced. Since the problems were different - sometimes large-scale political, sometimes small-scale personal, sometimes about dispositions for facing moral life generally, sometimes about the way to decide out-of-the-way cases - it would not be surprising for different clusters of norms to have emerged." *Id.*, at 171-72. "I think we tend to come to ethics with a false assumption," he continues. "We expect the content of morality to derive from one kind of source - namely, from principles of one sort or another. We expect it to derive from the good, or from the right, or from fairly normative standards of rationality. The reality seems to me quite different. When we understand the forces shaping moral norms of property, say, we see how heterogeneous the forces are." *Id.* at 174.

388. The outcome of the conversation also will depend upon cultural, political, and social forces external to the conversation. The person with more social and political power, formal and otherwise, will get his way more often, everything else equal, than the person with less power. On this topic generally, *see* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000).

389. This is a famous complaint about lawyers from relatives and friends. Owen Fiss once explained to Shaffer how additional talk does not inevitably resolve disagreement, but the point seems not to have registered. *See* Owen M. Fiss, *Out of Eden,* 94 YALE L. J. 1669, 1672 (1985).

and who disagree with their clients about how to proceed.[390] They can do what the clients say, or they can coerce the clients into accepting their (the lawyers') views instead. Shaffer and Cochran reject both of these options in favor of more talk, but more talk is a conversational form of a "confession and avoidance," and not a role-based procedure for resolving an impasse.

While unconvincing at the level of syllogism, Shaffer and Cochran's argument might look better at the level of evidence; that is, they might be able to show, with hard data, how the idea of lawyer as moral advisor has a basis in fact, and can be made to work in lawyer-client conversation. Unfortunately, the "empirical evidence" for their arguments consists mostly of fictional and Janet Malcolm like (*i.e.,* airbrushed, or too good to be true)[391] stories about, or office conversations between, lawyers and clients in small towns, on television, and in the movies,[392] and several features of these stories make

390. Lawyers can sometimes withdraw from the relationship with the client, though not always. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16.

391. *See* Masson v. New Yorker Mag. Inc. et al., 501 U.S. 496, 502-08 (1991) (describing Janet Malcolm's empirical method of "paraphrased quotation," in her celebrated 1983 interview of Jeffrey Masson in the New Yorker Magazine); *see also* JANET MALCOLM, THE JOURNALIST AND THE MURDERER (1990), for a illustration of Malcolm's "theory of quotation," so to speak, in operation. For the end of the line in the Masson-Malcolm controversy, *see* Masson v. The New Yorker Magazine, Inc., 85 F.3D 1394 (9th Cir. 1996). Commenting on one of his stories, Shaffer states, "[t]he lawyer-client dialogue in the story fits neatly into the categories we suggest." SHAFFER & COCHRAN, *supra* note 4, at 114. A little too neatly, one might say.

392. SHAFFER & COCHRAN, *supra* note 4, at 49-50. Shaffer and Cochran find support for their conclusion that "[l]awyers and clients often share a moral culture" in the "stories of small-town lawyers . . . in L.A. Law . . . [and] in the stories of Louis Auchinloss." *Id*. at 49. They do not seem concerned about relying on stories for evidence, notwithstanding that stories are more often constructed scenarios designed to make predetermined points than they are snapshots of objective reality. Moreover, they seem to find agreement with their viewpoint everywhere they look. For example, in their law school classes, "when [they] suggest that students might talk with clients about moral issues as they would with a 'close friend,'" they find that "the notion seems to ring true [to the students]." *See* Shaffer & Cochran, *supra* note 94, at 71. They do not describe how they tested this conclusion, or explain what it means to say that "the notion seems to ring true." Did their students agree expressly with the "lawyer as friend" point of view, for example, and make new arguments and give new evidence to support it, or did they simply fail to disagree, and Shaffer and Cochran interpret the lack of disagreement as assent? If the students reported on successful experiences of acting like a friend with clients, did Shaffer and Cochran monitor these interactions to check the accuracy of the reports to be sure that the students were not simply going along with what appeared to be Shaffer and Cochran's preferred view, for example, on the theory that the best way to do well in law school is to agree with your professors? Shaffer and Cochran need to be a little less casual about their empirical methods generally if they want their "evidentiary data" to be taken seriously. For examples of carefully done empirical studies of lawyer-client interaction, *see, e.g.,* Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Be-*

them difficult to take seriously. First, the stories always have a clearly identified right answer. There seem to be no hard issues in Shaffer and Cochran's moral universe, or issues on which reasonable people could disagree. Shaffer and Cochran deny this, of course, but one is hard put to find examples in the lawyer stories of parties expressing equally sophisticated and opposing points of view. The stories are always conversations between angels and devils, told from the perspective of the angel.[393] One never hears the devil's views, or at least the reasonable views the devil might have, but suspects that the "right answer" would be more difficult to determine if one did. In addition, when lawyers give moral advice in Shaffer and Cochran's fictional world, clients understand the error of their ways and immediately give up strongly felt beliefs to the contrary.[394] Only rarely do they argue back (and when they do they are usually unsuccessful), in an attempt to show lawyers that it is their thinking that might be wrong. Many of the stories also are too cryptic either to support or undercut the conclusions Shaffer and Cochran draw from them, and some support conclusions opposite from the ones drawn.[395]

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tween Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking, 47 KAN. L. REV. 1 (1998); William Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992); Herbert M. Kritzer, *The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study,* 1984 AM. B. FOUND. RES. J. 409.

393. The story about the Johnson family business, *see* SHAFFER & COCHRAN, *supra* note 4, at 40-42, is a good example. The story is so overdrawn in order to make its point that it bears almost no resemblance to an ordinary lawyer-client conversation. It is hard to know what lesson, if any, to take from it.

394. The story about the half way house zoning controversy, *see id.* at 116-29, is a good example. Occasionally Shaffer describes a lawyer going along with a client choice with which the lawyer disagrees. A good example is the Wendell Berry story about a lawyer who drafts a will to leave an estate to an illegitimate son, bypassing a legitimate heir in the process. *Id.* at 53-54. Shaffer approves of the lawyer's action because it was based on an acceptance of the client's different value system, and the preferences that flowed from it. The irony in this conclusion is that a hired gun lawyer would have drafted the will in the same way, and faster, while a true friend might have tested the client's wishes a little more carefully before drafting (by explaining that the legitimate heir might contest the will, and that a court might not enforce it), to be sure that the client knew the risks he was taking.

395. *See, e.g.,* the story of Sir Abraham taken from Anthony Trollope's novel THE WARDEN. SHAFFER & COCHRAN, *supra* note 4, at 101-107. Sir Abraham is a lawyer for Septimus Harding, the protagonist in the story and warden of a charity hospital, who is being sued to allocate a larger percentage of the trust income supporting the hospital (and Harding), to patients. Shaffer and Cochran accuse Sir Abraham of being a poor counselor for challenging Harding's decision not to contest the lawsuit, and to give up a house and an income of £800 a year, when he has few other means of support for himself and his family. *Id.* at 104. Sir Abraham eventually goes along with Harding's decision, but not before making several arguments against it, and advising Harding to consult with his friends before mak-

In short, the stories are less independent data on lawyer-client interaction than they are argument in dialogue form for points already made declaratively in other parts of the Shaffer-Cochran text.

There also is a "genetic"[396] problem with the Shaffer-Cochran argument, just below the surface in all of the stories, which sometimes is more troubling than the substantive content of the argument itself. Shaffer and Cochran defend their views, and attack those who disagree with them, so uncompromisingly, one might even say triumphantly,[397] that one wonders whether they truly are open to anything

ing the decision final. Shaffer and Cochran's criticism of Sir Abraham is some of the harshest in the book. Sir Abraham, in their view, "has surrendered any feelings," "destroyed a moral dimension in himself," "deceived himself into supposing that 'trudging on time to a tidy fortune,' . . . is a sufficient goal for a human being," and "deluded himself . . . into believing that corruption in such things as charitable trusts is inevitable and that the highest moral guidance one can aspire to is what powerful people think." *Id.* at 106. Sir Abraham's "goals with his client[s] are selfish and personal." *Id.* "He acts as he does because of his own needs, and he seeks for his client the same limited, inadequate, acquisitive success that he seeks for himself." *Id.* Shaffer and Cochran assert all of this even though their purpose is "not to condemn . . . as much as it is to notice" the acquisitive disposition of lawyers. *Id.* Sir Abraham was not a friend to Harding, and for this Shaffer and Cochran find him wanting.

Whether a lawyer should act as the client's friend was the question to be investigated in Shaffer and Cochran's discussion, however, and not the conclusion to be assumed. They see Sir Abraham's behavior as based on greed, but it may be that Sir Abraham simply wanted Harding to be certain of a decision that had such fateful implications for himself and his family. He may have been checking to be sure that Harding knew all of the consequences that would follow from a decision not to contest the lawsuit, that he had thought carefully about them, and that, so far as he could tell, he would be happy with his decision in the future as much as in the present. All lawyers have had the experience of clients coming back after settlements have proved difficult to live with and saying, in effect: "Why didn't you tell me that such-and-such would happen?" A friend, one would think, would raise such concerns before the decision to settle was made, while there was still time to do something about them, and not wait until after the consequences occurred, when it would be too late. Shaffer and Cochran's criticism of Sir Abraham is a good example of finding in a story what one wants to find in it, and yet another example of why stories are more often paraphrases of argument than independent data about reality. For another example of forcing a client to take a long-range perspective when the client wants to think short-term, see Cochran's discussion of the ubiquitous Arnie Becker's counseling a divorce client whose husband is having an affair. COCHRAN ET AL., *supra* note 4, at 170-172. David Luban's *Paternalism and the Legal Profession* is still the best discussion of this very difficult problem. *See* Luban, *supra* note 382.

396. *See* RAYMOND GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS & THE FRANKFURT SCHOOL 36-39 (1981) (describing "genetic" critique).

397. Shaffer and Cochran's response to Professor Sammons' argument about the nature of Aristotelian friendship, that his argument is just "wrong," is a good example. *See* Shaffer & Cochran, *supra* note 94, at 69-70. Readers can make up their own minds, of course, but Sammons' argument seems to make more sense than Shaffer and Cochran's most of the time. Shaffer has debated the friendship question in more temperate terms with others, *see, e.g.*, Carl M. Selinger, *The Ethics*

but complete assent with what they have to say. They write in such a relentlessly sermonizing fashion that their stories about lawyer-client behavior exist in perfectly circular relationships with their conclusions about how lawyers should behave. While professing interest in, and tolerance for, other viewpoints, they see disagreement with their views as manifest error, so that the espousal of open-mindedness and tolerance comes across as lip-service to principles that cannot credibly be dismissed more than the statement of sincerely held personal beliefs.[398] There is something fundamentally arrogant (or religious, or

of Dissent and Friendship: A Response to Tom Schaffer, 88 W. VA. L. REV. 666 (1986) (responding to Shaffer's article); James J. Friedburg, *A Comment for Tom Shaffer: The Ethics of Race, the Ethics of Corruption*, 88 W. VA. L. REV. 670 (1986) (responding to Shaffer's article), but perhaps this was because on those occasions he was opening the debate rather than closing it. *See also* HOWARD LESNICK, LISTENING FOR GOD: RELIGION AND MORAL DISCERNMENT 53-65 (1998) (describing "triumphalism" as a manner of professing a belief, especially a religious belief, as if the speaker alone was privy to the truth).

398. This pattern of trying to have it both ways is evident in Shaffer and Cochran's description of the way lawyers exercise moral influence in conversations with clients. "Lawyers should help [clients] make moral judgements," say Shaffer and Cochran, "without imposing their moral values." SHAFFER & COCHRAN, *supra* note 4, at 126. This means, among other things, that "when clients indulge in the natural tendency to see the situation solely from their own perspective . . . lawyers can provide objectivity . . . [by] introduc[ing] moral judgement as a legitimate objective, . . . [and] bringing moral considerations into the discussion." *Id*., at 126. "[O]bvious procedure[s for doing this are] to ask questions, . . . suggest moral values that . . . raise[ ] sympathy for the other party," and discuss the "harsh outcomes that some alternatives might have on those other than the client." *Id*. at 126-28. In doing this, lawyers should "use tentative language . . . [so as not to] stifle moral discourse, [and should] approach the conscience of the client . . . as a friend who respects the partner's moral insight . . . ." *Id*. at 127.

In the dialogue used to illustrate these suggestions, however, a lawyer who is told something she does not agree with ("It seems to me that the zoning should remain as it is."), *id.,* at 128, argues against the client's position until the client waivers in his resolve. She then professes a willingness to help "either way," even though she also makes it clear that the "fair" result would be not to oppose the zoning change. The client could reasonably believe that if he continued to disagree he would be in for more argument about what was fair. Only the most intrepid client would persist under these circumstances. Moreover, the question of whether the client was free to see the zoning issue as simply a legal one, and assert his legal rights without considering the question of what was moral in some larger sense, was not open for discussion. In fact, Shaffer and Cochran are explicit about this. Basing decisions on moral reasons rather than legal ones is a requirement of the client's obligation to be "good." Sammons criticizes this particular lawyer, I think correctly, for manipulating her client, but Shaffer and Cochran think Sammons "has it backwards." The forced visit of the client (by the lawyer), to the halfway house to get its perspective on the zoning variance, they believe, caused the client, with St. Paul, to discover the "love [that] rejoices in the truth." The possibility that the client was guilt-tripped into doing the lawyer's bidding seems at least as plausible a reading of the scenario, however, and Shaffer and Cochran do not discuss the relative merits of these two contrasting interpretations. *See* Shaffer & Cochran, *supra* note 94, at 73-74. This is yet another

perhaps only Catholic[399]), in thinking that all views other than one's

example of Shaffer and Cochran's habit of seeing complex moral questions as having single, correct answers.

Shaffer and Cochran are frank to acknowledge that lawyers can manipulate clients into adopting lawyer views because of the inequality in the relationship, *see, e.g.,* Shaffer, *supra* note 354, at 319 ("ethics [generally] . . . speaks to the unequal encounter of two moral persons . . . [and] legal ethics . . . [is] the study of what is good . . . for this other person, over whom I have power"), but they think that "[t]his inequality can be overcome when the focus of the conversation is on the moral values of the client." SHAFFER & COCHRAN, *supra* note 4, at 51. *But see* COCHRAN ET AL., *supra* note 4, at 182-184 ("there is too much distance between the professional and the client for mutuality . . . the sides are too unequal [to be] . . . on the same plane," quoting MARTIN BUBER, THE KNOWLEDGE OF MAN 171-72 (1965)); Montaigne, *supra* note 260, at 207 (friendship cannot exist between parent and child because of the excessive inequality of the relationship). In such a conversation, say Shaffer and Cochran, the lawyer's purpose is to "enable the client to bring all of the client's moral resources to the fore and . . . offer[ ] the client the lawyer's moral resources" to help in this process. SHAFFER & COCHRAN, *supra* note 4, at 51. This would seem to make the lawyer the client's psychologist as well as lawyer, however, and raise new inequality issues connected to the process of helping the client understand her values and interests (and not just her legal rights). Shaffer and Cochran do not discuss this issue. Cochran's response is for lawyers to "empower" clients through the use of skillful interviewing and counseling technique. COCHRAN ET AL., *supra* note 4, at 183. "Throw strikes," in other words. *See* note 369 *supra,* and accompanying text.

399. A dogmatic and arrogant conversational style is commonly associated with proselytizing religious traditions, and while Catholicism is not the only proselytizing Christian sect, it is one of the most aggressive. *See, e.g.*, JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM 27 (2003) (describing the polemical approach of the "shock troops of the Catholic revival" in nineteenth century America). McGreevy quotes the leader of the American Redemptorists as representative of this approach: "It betrays weakness to confine ourselves to the defensive. We are children of the Church and of the truth; our adversaries are heretics or unbelievers; it is, then, our duty to take the offensive and to expose to the public the erroneous doctrines of Protestantism and impiety." *Id*. For recent examples of proselytizing, see David Van Biema, *Should Christians Convert Muslims?*, TIME, June 22, 2003, *at* http://www.time.com/time/magazine/article/0,9171, 1101030630-460157,00.html?CNN'yes. To anticipate the inevitable accusation of "Catholic bashing," (an epithet now nearly as ubiquitous, and as mindless, as "class warfare," or "politically correct"), let me add that I have been inoculated with Catholic anti-bodies in every way imaginable in life. I was raised by a loving and devout, but not rabid, Catholic family, the members of which worked assiduously for the Church in their spare time and took great pride in the friends and relatives who became priests and nuns. I was baptized, made my first communion, was confirmed, served as an alter boy (with only good experiences to show for it), went to a Catholic lower (or elementary) school, middle (or junior high) school, high school, college, and law school (nineteen years in all), and off and on over the years, have been an active member of several Catholic social and service organizations. I do not think that I bash Catholicism, but if I do, it is from an informed insider's point of view. I also do not harbor any lingering anger or frustration with my Catholic upbringing. Catholicism spared me a lot of the angst of childhood that kept my friends up at night, and for that I will be eternally grateful. I was misled regularly about the nature of life, the universe, and everything in it, of course, but this was done negligently rather than intentionally, in the

own are in error, even when this sentiment is expressed in a soft-spoken, low-key, qualified, and semi-apologetic manner,[400] and arrogance is always a cause for concern in judging the soundness of an argument. It is not clear why Shaffer and Cochran write in this way. Perhaps it comes from believing that they are plugged into absolute truth and feeling a corollary obligation to let others in on the secret - their writing has a little of this "bringing the good news" quality about it - but whatever the reason, this propensity to sermonize makes their arguments more difficult to evaluate.

At its root, Shaffer and Cochran's argument seems based on a confusion of friendship with friendliness. Friendliness is a form of low-level, social acting (in the Erving Goffman sense of the term).[401] It consists of using a familiar set of communicative motor skills - smiling, making eye contact, asking about the kids, listening attentively, and the like - to present the self in an agreeable, respectful, and courteous manner.[402] The need for such skills pervades social life, of course, and while such skills may be used consciously, or out of habit, in neither case do they signify a deep caring for the other persons in the conversation. Friendliness is simply a social practice designed to make day-to-day interaction pleasant and efficient by removing the friction produced by overinterpretation of the other's motives. One can be friendly toward anyone, even an enemy, under just about any

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form of fairy tales more than misstatements of fact, and no one can be angry about being told fairy tales as a child, by adults. Beside, as Harvey Cox explains, "[a]ll human beings have an innate need to hear and tell stories and to have a story to live by. Religion, whatever else it has done, has provided one of the main ways of meeting this abiding need." HARVEY COX, THE SEDUCTION OF THE SPIRIT 9 (1973). In fact, religious stories may be more useful in this regard than rationalist and secular ones, particularly if species survival is the goal. As David Wilson argues, "[R]eligious belief does not represent a form of mental weakness but rather the healthy functioning of the biologically and culturally well-adapted human mind. Rationality is not the gold standard against which all other forms of thought are to be judged. Adaptation is the gold standard against which rationality must be judged, along with all other forms of thought. . . .It is the person who elevates factual truth above practical truth who must be accused of mental weakness from an evolutionary perspective." *See* WILSON, *supra* note 313, at 228. Law, on the other hand, can have "too theocratic a cast." *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 465 (1990).

400. One might think of this as substantive, as opposed to stylistic, arrogance, that is, arrogant in what is said, rather than how it is said. William Stuntz points out how "arrogance, and not some theory, poses the greatest danger to the kind of pluralist legal order that America must have," though he finds arrogance to be a secular characteristic, and thinks that "making legal thought more Christian [will] also make it more tolerant." *See* William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1745-47 (2003).

401. *See generally* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

402. COCHRAN ET AL., *supra* note 4, at 207-209 (describing "rapport-building rituals and patterns").

circumstances, and should be most of the time, but one can be a friend to someone only under the demanding conditions described above, and even then, only when the other person wants to be a friend in return, and is willing to invest the time and energy needed to develop the relationship. Shaffer and Cochran almost certainly understand the distinction between friendship and friendliness - they use it themselves - and they also admit that clients may want only friendliness from lawyers most of the time,[403] yet they press their argument for legal friendship nonetheless. Why they do this is hard to understand. No doubt they would like to see a world in which there is more cooperation in pursuit of common social goals in all kinds of relationships, including work relationships, than in the world we presently inhabit. Who would not? But there is no reason to believe that increased moral hectoring of clients by lawyers will bring this world about, and increased moral hectoring by lawyers is the only certain consequence of the Shaffer-Cochran program for making lawyers their clients' friends.

In the end, the conceptualist arguments for legal friendship, including Shaffer and Cochran's rejuvenated version, do not work. There are simply too many features of the lawyer-client relationship that are impossible to reconcile with any reasonable understanding of true friendship. Lawyer-client relationships typically are not long-standing ones, for example, in which the parties have learned, over time, to trust in one another to raise and resolve disagreements about emotionally charged issues of morality and politics for legitimate and not destructive reasons.[404] Moreover, lawyers and clients limit their

403. SHAFFER & COCHRAN, *supra* note 4, at 46. Shafer and Cochran agree that "being *friendly*" is most of what lawyers should "work to bring about" in law offices, but they are reluctant to use this terminology because it has "been hopelessly diluted by commercialism." Shaffer & Cochran, *supra* note 94, at 71. Since the idea of friendliness has lost all meaning, they argue in effect, one should pursue friendship instead. Friendliness also may be what the inmates in Martha Gaines survey of attitudes toward lawyers had in mind when they rated emotional and personal engagement highest among lawyer traits. *See* Kruse, *infra* note 441. For recent discussions of the structural impediments to lawyer-client moral conversation, *see* Deborah L. Rhode, *What Does It Mean to Practice Law "In the Interests of Justice" in the Twenty-First Century?*, 70 FORDHAM. L. REV. 1543 (2002); Deborah L. Rhode, *The Profession and the Public Interest*, 54 STAN. L. REV. 1501 (2002).

404. To see friendship as defined by moral critique rather than mutuality and reciprocity is perhaps Shaffer and Cochran's most questionable view. Most of the time, critique without reciprocity is just abusiveness. *See* Goodrich, *supra* note 113, at 49 (describing the role of critique in friendship). Clients must be involved in lawyers' lives as much as lawyers are involved in clients' for the lawyer-client relationship to be reciprocal, and this quality does not appear in Shaffer and Cochran's stories about lawyers. They assert their belief in the importance of reciprocity, *see* Shaffer, *supra* note 15, at 649-50, 664, but like a lot of what they say, the assertion is not corroborated by their "data" (i.e., their stories). It is as if

contacts to formally scheduled and paid for meetings, in offices (and on golf courses), to talk about work, whereas real friends have the home phone number, meet when needed, anywhere, and at any time, and talk about everything important in one another's lives. Friends know one another as persons, their hopes, their fears, their beliefs, their tastes, their hobbies, what they like to do for fun, what they lie awake at night worrying about, what they hope to make of their lives, what concerns they have for their children, what they are most proud of or most embarrassed about having done, and the like. They are chosen for their qualities as persons, how loving, forgiving, understanding, insightful, and honest they are, and not for any technical skill or specialized knowledge they might possess. It takes effort and luck to find friends, and time to develop their friendship; friendships do not form according to plans, or irregularly as the dictates of work bring people together.[405] Most importantly, friendship is mutual and reciprocal, not hierarchical and unilateral. What one friend knows about and does for the other, more or less the other knows about and does for the first. These qualities are almost impossible to reproduce in the truncated, narrowly focused, formally scheduled, self-protective, strategic, hierarchical, and circumspect world of lawyer-client relations. It is not that lawyers and clients can never be friends, but just that when they are it will be because of qualities independent of their status as lawyers and clients. Put another way, lawyers and clients will be friends when they would be friends if they were not law-

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they think a lawyer can be a friend without having one. *But see* Michael Plaxton, *Deconstructing Diplomacy: Derridean Political Theory and U.N. Deal-Making*, 11 LAW & CRITIQUE 73, 75-76 (2000) ("friendship implies the possibility of being unrequited . . . . [T]he impossibility of proving friendship carries with it the possibility that one has invested oneself in a relationship where the advantages of friendship are experienced only by the beloved."). They almost say as much. *See id*. at 664 ("friendship is offered by the professional who takes an interest in the client," - there is no mention of the client taking an interest in the lawyer). True friends are able to criticize one another on moral grounds because they have learned, over time, to trust one another not to criticize for improper motives. Otherwise, they would not have become friends. Because of this, criticism from friends is heard as in one's best interest, and not based on self-aggrandizing or punitive reasons. Lawyers and clients who are not already friends have no such history to draw on, however, and they cannot create one instantly by making eye contact, smiling, asking about the kids, or holding one another in unconditional positive regard, even if they all are children of the same god. Criticism can come from persons other than friends, of course, often the most telling (and helpful) criticism does. *See* 1 SCHOPENHAUER, *supra* note 33, at 459 ("Friends say they are sincere; enemies are so. We should, therefore, use their censure as a bitter medicine for getting to know ourselves."). My point is just that lawyer criticism usually is not the criticism of a friend.

405. *See* Goodrich, *supra* note 113, at 49 (Like Nietzche's description of learning to love music, to Goodrich "Friendship is a knowledge of, as well as passion for, the friend. It is learned over time, an erudition in eroticis, a temporality as well as an intensity that leads eventually, through love, to friendship.").

yers and clients; being lawyers and clients has nothing to do with forming friendships, one way or the other.[406]

IV. PHYLLIS GOLDFARB: A NARRATOLOGICAL PERSPECTIVE ON THE LAWYER AS FRIEND

Until now, the argument for the lawyer-as-friend has foundered, either for lack of internal coherence, logical consistency, real-world evidentiary support, or, on occasion, all of the above. Defenders of the analogy have had to twist the definition of friendship out of all recognizable shape, or create fanciful examples of lawyer-client behavior, in order to make the argument convincing; and when they have done this countless others have been waiting in the wings ready to point it out. There is another (and more fashionable) way to argue for the lawyer-as-friend analogy, however, one based on a resort to narratology so to speak,[407] that in the long run may prove more supportive of the analogy than the arguments looked at thus far, and it is to that strategy we now turn. In a well-known article[408] in the Clinical Law Review, Phyllis Goldfarb describes her use of the friendship model (though she does not use that term) in the representation of Christopher Burger, one of the defendants in the celebrated Supreme Court case of *Burger v. Kemp*.[409] The argument implicit in Goldfarb's piece goes well beyond the analytical sleights of hand of Fried, and the imaginary stories of Shaffer and Cochran, to illustrate, as well as any discussion could, both the potential for, and risks inherent in, extended emotional engagement with clients. In doing so, it throws the strengths and weaknesses of the friendship model into sharp relief.

406. Many of Shaffer and Cochran's stories involve lawyers and clients who were friends before they were lawyers and clients, or who have relationships outside of work, *see e.g.,* Shaffer, *supra* note 15, at 627-630 (Fanny Holtzman story), at 633-637, 650-651 (Jerry Kennedy story), but this is not typical of lawyer-client relationships generally. It is not surprising that lawyers and clients could become friends. Working together, under stress, on important matters, for extended periods of time, are the kinds of conditions in which friendships can form, but it is not inevitable that this will happen. Conversations with psychotherapists, tax planners, and spiritual advisors, for example, are usually about important matters, often are stressful, and can go on for extended periods of time, but psychotherapists, tax planners, and spiritual advisors are not famous categories of friends. As a rule, the relationships are not sufficiently reciprocal.

407. *See* Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737 (1997). On the topic generally, also see David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L. J. 797 (1998); Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives,* 45 STAN. L. REV. 807 (1993); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

408. Goldfarb, *supra* note 12.

409. Burger v. Kemp, 483 U.S. 776 (1987). The case articulates the relationship between the conflict of interest and ineffective assistance of counsel doctrines, among other things.

Goldfarb begins by describing her espoused theory of lawyer-client relations, an original view derived in different parts from Martha Nussbaum's notion of "complex, allusive language of narrative,"[410] Stephen Ellmann's variation on Carol Gilligan's "ethic of care,"[411] and Kimberly O'Leary's idea of lawyer-client "partnerships."[412] Goldfarb's view asks lawyers to adopt a "merciful, gentle, and patient attitude" toward [clients], so as not "to treat clients callously or inhumanely."[413] As part of the "ethical inquiry about how . . . [to] live,"[414] lawyers should "[make] human connection[s]" with clients, and "respond to [their] client's personal and legal needs."[415] When they do this, Goldfarb asserts, they will "[move] beyond the boundaries of [their] parochial lives, . . . [to] feel and consider a wider range of possibilities than [they] would otherwise identify,"[416] and as a consequence, will be "more willing to be touched by life's complexity and variety, mystery and uncertainty."[417] Goldfarb intends her conception of lawyer role to be the opposite of "the dominant model of the detached professional advocate," which "demean[s] and dehumanize[es]" clients.[418] In her view, a lawyer's personal and professional lives are one and the same, and because of this, the "ethical perspective that urges the development of [social] connection[s] [applies] with equal force [in each]."[419]

Goldfarb illustrates her argument with examples from her work on the Burger representation, which she joined during the summer after her first year in law school. She describes the factual background of the case (to an extent),[420] reproduces a letter from Burger, written

410. Goldfarb, *supra* note 12, at 67-68.
411. *Id.* at 69-70.
412. *Id*. at 69 n.18.
413. *Id*. at 68.
414. *Id*. at 66.
415. *Id*. at 69.
416. *Id*. at 67.
417. *Id.* at 67.
418. *Id*. at 68. Shaffer and Cochran's friendship model also is a response to the traditional, detached conception of lawyer role.
419. *Id*. at 71. Goldfarb does not use "friendship" to describe her view of the lawyer-client relationship, and of the work she draws on, only Ellmann uses the term at all, and then only grudgingly, admitting that "some caring lawyer-client relationships" might grow to the point where "lawyer and client become truly, rather than metaphorically, friends." *See* Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers,* 81 GEO. L. J. 2665, 2695 (1993). For Shaffer and Cochran, however, and probably Fried, Goldfarb's relationship with Burger would count as a friendship.
420. Goldfarb does not say anywhere in the article what Burger did to cause the State of Georgia to convict him of murder. This is a strange omission. The murder is the reason Goldfarb and Burger had a relationship to begin with, and thus, it would seem to be an essential part of Burger's story. The Supreme Court described the murder in this way:

> The sordid story of the crime involves four soldiers in the United States Army who were stationed at Fort Stewart, Georgia, on September 4,

1977. On that evening, petitioner and his coindictee, Thomas Stevens, both privates, were drinking at a club on the post. They talked on the telephone with Private James Botsford, who had just arrived at the Savannah Airport, and agreed to pick him up and bring him back to the base. They stole a butcher knife and a sharpening tool from the mess hall and called a cab that was being driven by Roger Honeycutt, a soldier who worked part-time for a taxi company. On the way to the airport, petitioner held the knife and Stevens held the sharpening tool against Honeycutt. They forced him to stop the automobile, robbed him of $16, and placed him in the backseat. Petitioner took over the driving. Stevens then ordered Honeycutt to undress, threw each article of his clothing out of the car window after searching it, blindfolded him, and tied his hands behind his back. As petitioner drove, Stevens climbed into the backseat with Honeycutt, where he compelled Honeycutt to commit oral sodomy on him and anally sodomized him. After stopping the car a second time, petitioner and Stevens placed their victim, nude, blindfolded, and hands tied behind his back, in the trunk of the cab. They then proceeded to pick up Botsford at the airport. During the ride back to Fort Stewart, they told Botsford that they had stolen the cab and confirmed their story by conversing with Honeycutt in the trunk. In exchange for Botsford's promise not to notify the authorities, they promised that they would not harm Honeycutt after leaving Botsford at the base. Ultimately, however, petitioner and Stevens drove to a pond in Wayne County where they had gone swimming in the past. They removed the cab's citizen-band radio and, while Stevens was hiding the radio in the bushes, petitioner opened the trunk and asked Honeycutt if he was all right. He answered affirmatively. Petitioner then closed the trunk, started the automobile, and put it in gear, getting out before it entered the water. Honeycutt drowned. A week later Botsford contacted the authorities, and the military police arrested petitioner and Stevens. The two men made complete confessions. Petitioner also took the military police to the pond and identified the point where Honeycutt's body could be found. Petitioner's confession and Private Botsford's testimony were the primary evidence used at Burger's trial. Burger v. Kemp, 483 U.S. 776, 778-79 (1987).

There was evidence that Stevens, rather than Burger, was primarily responsible for the plan to kidnap Honeycutt and the decision to kill him. Botsford testified that, "Tom Stevens said that he thought they should kill him. And, I told him I thought he was crazy. And, Burger didn't like the idea of killing him either. Burger said that they ought to let him go, that they ought to drive off in the woods somewhere and let him out, and then take the car somewhere and put it like, I think somebody mentioned the ocean." *Id*. at 802. In Botsford's view, Burger "was just sorta going along, sorta doing sorta like Stevens was telling him to do." *Id*. Stevens was twenty years old at the time, and Burger was seventeen. A defense psychologist testified that Burger had an IQ of 82, and functioned at the level of a twelve-year old child. *Id*. at 779. (These conclusions are hard to reconcile with the Burger's "eleventh hour" letter to Goldfarb, and her description of their conversations during the course of their relationship. *See* Goldfarb, *supra* note 12, at 88-91). By all accounts, he also had an exceptionally unhappy and unstable childhood. His mother married Burger's father when she was fourteen, and the father was sixteen. They were divorced when Burger was nine. His mother remarried twice, and neither of her new husbands wanted Burger in the home. One of them beat his mother in Burger's presence, and the other "got him involved with marijuana, [to where] that was the whole point of his life, where the next bag was coming from, or the next bottle of beer. And, this was the kind of influence that he had." *Id*. at

after one of his "eleventh-hour stays of execution" (describing his feelings about his life and impending death and the relationship between the two),[421] and comments on the nature of her relationship with Burger.[422] For thirteen years, while the post-conviction relief process ground on, Goldfarb listened attentively to Burger, took his views seriously, and became involved in the emotionally draining task of helping him make sense of his life. In "letters, drawings, telephone calls, and occasional visits," she "became adrift in the strangeness of [another's life]," suffering with Burger, comforting him on the day he died, and ultimately being "redeemed" by the quality of her relationship with him.[423] It seems fair to say that, in Goldfarb's view, she and Burger became friends.[424] Certainly, no one who reads her description of the relationship will doubt the strength of her feelings for Burger, just as no one who reads Burger's "eleventh hour" letter to her (about how "facing my death has taught me what living means")[425] can fail to admire his insight, courage, integrity, and eloquence.[426] It is a deeply moving letter. Yet, all strong feeling is not friendship, and other parts of the article raise interesting questions about the nature of Burger and Goldfarb's relationship, and the extent to which it provides a model for lawyer-client relations generally.

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790. When his mother moved from Indiana to Florida, Burger ran away from his father and hitchhiked to Tampa. His mother returned him to Indiana, where he was placed in a juvenile detention home until released to his father's custody. Except for an incident of shoplifting, being absent from school without permission, and being held in juvenile detention, Burger had no criminal record before entering the Army. At trial, Burger never expressed remorse for his crime, and he may even have bragged about it on the witness stand. Burger's lawyer thought that Burger enjoyed talking about the crime, and was worried that the jury might regard his attitude on the witness stand as indifferent or worse. *Id*. at 790-91.

For a history of the Burger litigation, *see* Burger v. State, 242 Ga. 28 (1978) (murder conviction affirmed, sentence vacated, case remanded for re-sentencing), Burger v. State, 245 Ga. 458 (1980) (death sentence affirmed), *cert. denied*, 448 U.S. 913 (1980), Blake v. Zant, 513 F. Supp. 772 (S.D. Ga. 1981) (writ denied as to conviction but granted as to death sentence), *rev'd*, Burger v. Zant, 718 F.2D 979 (11th Cir. 1984), *reh'g en banc denied*, 726 F.2d 755 (11th Cir. 1984), vacated, Burger v. Zant, 467 U.S. 1212 (1984) (remanded with instructions), Burger v. Zant, 741 F.2d 1274 (11th Cir. 1984) (limited remand to district court), Burger v. Kemp, 753 F.2d 930 (11th Cir. 1985), Burger v. Kemp, 483 U.S. 776 (1987).

421. Goldfarb, *supra* note 12, at 87-88.

422. *Id*. at 87, 90-91.

423. *Id*. at 87 (quoting GITA MEHTA, A RIVER SUTRA 25 (1993), 91.

424. *See, e.g.*, *id.* at 90 ("Chris hugged me vigorously when I arrived and gripped my hand tightly through much of the visit. He was holding on for strength from those people from whom he had long gathered his strength."). Goldfarb also describes Burger's feelings for those "who had come to say good-bye" as "love." *Id.*

425. *Id*. at 88.

426. I assume the letter is reproduced verbatim, and not edited. If so, Burger was a gifted writer.

Goldfarb's principal focus in the article is on Burger's growth and development during the course of their time together.[427] She describes in eloquent detail, for example, how his intense suffering, which he shared with her and others, ultimately helped him discover that honest relationships were what was important in life, and how he learned to face death without rage, or self-pity, and with a "need . . . to make right anything he could in his relationships with others."[428] Perhaps surprisingly, however, Goldfarb says very little, if anything, about the effects of the relationship on her.[429] When she first met Burger she was a rising second year law student with very little experience as a lawyer, and none in capital cases. She probably was a little unsure about what she could contribute to so serious a matter, or how she could relate to someone presumably so very different from herself.[430] In the thirteen years that followed, many of which were spent discussing the daunting topic of human mortality, she no doubt learned quite a bit about herself, and Burger must have had something to do with this. Yet, if so, she does not tell us what that was. Taking the article's description of the relationship as complete, one would have to conclude that only Burger grew during those thirteen years; that at the end of their time together Goldfarb was perhaps a little wiser,[431] but fundamentally the same person as when she entered the relationship.[432] This is improbable, of course, but if it is

427. Goldfarb characterizes Burger at the beginning of their relationship as "like a child struggling to grow up." Goldfarb, *supra* note 12, at 86.

428. *Id*. at 87, 91.

429. Goldfarb does not describe any changes in beliefs or values produced by her relationship with Burger, even though she thinks that "we are redeemed by the quality of our relationships, including the relationships that we form in professional settings," *id.* at 91 (referring to her relationship with Burger), and that when she spent her last day with Burger, she "felt as if [her] 'life until [then] had only been a purification' for [that] visit." *Id.* at 89-90. The use of "purification" and "redemption" imagery makes Goldfarb's discussion look a little like Shaffer's and Cochran's.

430. *Id*. at 86.

431. Goldfarb acknowledges that she modified her "image of a person [who could be] convicted of murder," *id*. at 87, and strengthened her conviction that the death penalty is not justified, at least in cases like Burger's. *Id*. at 91.

432. It is strange that Goldfarb would depict her relationship with Burger in such one-directional terms (at one point she describes the lawyer's role as "respond[ing] to others' needs," *see id*. at 72, a classic one-directional conception of the relationship, if taken literally), in an article extolling the virtues of "richly-described narratives," full of "sufficient vivid detail." *Id*. at 66, 67. The story of the relationship also is told in a surprisingly compressed fashion. It takes up only five and a half pages (one of which is Burger's "eleventh-hour" letter to Goldfarb), of the twenty-six pages in the article as a whole, and consists mostly of cryptic evaluative comments about briefly summarized events. Burger's "eleventh-hour" letter is the only piece of direct evidence anywhere in the article.

Even if the article is limited to the topic of Burger's growth and development, there are many additional details one would like to know. A "richly-described

true, or even if it is just Goldfarb's public take on the relationship, it is hard to see how one could think of such a relationship as a friendship. Friendship, as we have seen, is mutual and reciprocal. Friends share in, and influence, one another's lives in roughly equal measure. For Goldfarb and Burger to have become friends, Burger would have had to help shape Goldfarb's growth and development as much as she did his. Yet, according to Goldfarb's account of the relationship, there is no evidence that this happened; all influence in the relationship was one-directional.[433]

In taking his leave on the day he died, Burger thanked Goldfarb for "bringing 'culture' into his life, for remaining caring and steadfast for so many years, and for helping him become a person in whom he could take some pride."[434] Again, these comments suggest that some kind of strong emotional bond formed between the two, but they do not necessarily suggest that the bond was friendship. Burger was twenty years old when he first met Goldfarb, and had been on death row for three years. If his "eleventh-hour" letter and Goldfarb's descriptions of him are representative, he was intelligent, articulate, full of ideas about how to conduct his defense, lonely, and grateful for Goldfarb's interest and help. In Goldfarb he found someone who was only a little bit older, interested in him as a person and not just as a cause, and

narrative" about growth and development, for example, ought to provide a baseline against which to measure that growth, yet Goldfarb tells us almost nothing about Burger at the beginning of the relationship. (There are brief reference to his pettiness, manipulativeness, and meanness, but examples are not given, and the points are not developed. *See id.* at 87.) She had years of letters, drawings, phone calls, and visits to draw on, so the absence of detail does not seem to be explained by a lack of evidence. Nor is it explained by the issue's lack of importance, or constraints of space, since Burger's growth is the central analytical point of the story. Moreover, Burger had authorized Goldfarb to write about him "as a person not as a cause," *see id*. at 71, so it is unlikely that Goldfarb held back out of a concern for Burger's privacy.

More information about Burger as a person also would help a reader test Goldfarb's analysis of what happened in the relationship. Perhaps Burger grew and developed, as Goldfarb concludes, or perhaps he was complex and mature all along, and it took Goldfarb a while to see past her stereotypes of murder defendants to realize this. She volunteered to work on the case in the first instance, in part, because she "did not know how [she] would be affected by [the] experience [of working on death row] or whether [she] would even want to look past the acts of which these inmates had been convicted to see the human beings beyond. Yet [she] wanted to try." *Id*. at 86. And, during the course of the representation she changed her "image of a person [who could be] convicted of murder." *Id*. at 87. So it may be that Goldfarb grew and developed as fast, or even faster than, Burger. Without a more "richly described narrative" it is hard to tell.

433. No doubt the story is more complicated than Goldfarb's article lets on. My point is simply that one does not learn about these complications from Goldfarb's account, and that it is interesting that she chose to tell the story from the perspective of only one side.

434. *See* Goldfarb, *supra* note 12, at 90.

willing to answer his letters and take his phone calls with a greater degree of enthusiasm, no doubt, than that of the older lawyers on the case. Anthropologically, each also was probably somewhat foreign territory to the other, and each appears to have been curious. Add to this the fact that there was a lot to like (admire, respect, love, who knows) about Burger, that he and Goldfarb had interests in common, and that death penalty cases operate in a kind of battlefield atmosphere where even ordinary feelings become magnified, and it is not surprising that the two would become emotionally close. Anyone who has ever done legal services or defender work has a similar story to tell. But not all strong emotional attachment is friendship (feelings of paternalism and *noblesse oblige,* for example, are equally powerful, and always possibilities in dependency relationships, notwithstanding Goldfarb's espoused commitment to "an extreme sort of egalitarianism . . . derived from [her] readings and . . . visceral discomfort . . . with relationships of imbalanced power.").[435] Perhaps Goldfarb and Burger became friends, or perhaps they just came to admire and respect one another for their obvious strengths and contributions they made to the relationship. Admiration, respect, concern, care, and the like, also can be intense feelings, but they are not love (although they can be part of it), and friendship ultimately is grounded in love.[436]

If there is more to the story of the relationship than Goldfarb relates (almost certainly the case), and Burger and Goldfarb, in fact, did become friends, the fact that they were lawyer and client was the occasion of their friendship and not the cause. On this more complete telling of the story, two people would have become friends while acting in the roles of lawyer and client, and not because they were lawyer and client.[437] Lawyers and clients, like anyone else, sometimes will discover that they have feelings for one another that carry their relationship beyond the office, so to speak. All friendship begins in some kind of encounter that itself is not an act of friendship, otherwise one would have to believe, with Montaigne, that friendship is a mystical thing, created full-blown by some supernatural being or force. But until a

435. *Id.* at 86. David Luban points out that a *noblesse oblige* conception of lawyer-client relations is not personal. *See* Luban, *supra* note 16, at 722 ("Brandeis did not view the requirement to become a people's lawyer as arising from any partisanship for the people.").

436. Under the right conditions, one can care for, admire, and respect a business associate, a neighbor, a fellow demonstrator, or even a person one sees on the evening news, but it does not follow that any of these people are one's friends. Friendship is a function of mutuality and reciprocity, not intensity of feeling.

437. Lots of corporate practitioners tell stories about how they became friends with the officers and directors of companies for whom they worked, but again, the lawyer-client relationship was the occasion for the formation of those friendships, not the cause.

relationship develops beyond work, it is just an intense work relationship, and not a friendship.

The strength of Goldfarb's article is its description of how people on death row are people too, how they can act with the same nobility of character as people in any other situation in life. Chris Burger confronted his execution with understanding, courage, and honesty, in a manner anyone could be proud of, notwithstanding that he might not always have acted that way in the past; and as such, he is entitled to everyone's respect. Goldfarb's most compelling point - that killing[438] people like Chris Burger (probably killing anyone, but there are hard cases), diminishes a society and everyone in it - is all the more powerful for the indirect and understated way in which she makes it. Ultimately, however, her article is more about the injustice of the death penalty, the imperfections of the criminal justice system, and her extraordinary good fortune (albeit also tragic) in knowing Chris Burger, than it is about the proper way to think about lawyer-client relations generally. The prototypical lawyer-client relationship has very little in common with Goldfarb's representation of Burger, as Goldfarb herself seemed to recognize when she said, "I am also aware that my relationship to [Burger] came at a cost. I did not develop this level of relating with other death row inmates with whom I worked, in part due to my assessment of the level of connection that they desired and, in part, due to the lesser intensity of my own feelings."[439] Most lawyers have one Chris Burger representation in them in a lifetime, if they have any at all,[440] but a viable conception of lawyer-client relations must work in all types of representation, day in and day out, in big cases and small, with nice people and nasty ones, and over the course of a career rather than just once. "Burn with a hard gem-like flame" is a prescription for writing poetry more than for representing clients.

Goldfarb's account is as good an example as one will find any where in the legal literature of a lawyer acting as a client's friend.[441] Goldfarb was caring, respectful, and honest. She invested tremendously of herself in the relationship, and by Burger's own testimony, succeeded beyond all reasonable expectations in making his represen-

438. This is Goldfarb's term. *See* Goldfarb, *supra* note 12, at 91.

439. *Id*. at 87 n.135.

440. *But see* Abbe Smith, *Carrying On in Criminal Court: When Criminal Defense is Not So Sexy and Other Grievances,* 1 CLINICAL L. REV. 723, 731 (1995) ("I loved every part of life as a defender: the clients, the colleagues, the court battles . . . . I left the Defender Association . . . to become a clinical law teacher for many of the same reasons that drew me to become a public defender. I like the clients and I like the students."). This was early in Professor Smith's career as a defender, and I wonder if she would answer in the same way now.

441. At least where the parties were not already friends before they became lawyer and client.

tation personal, humane, and comforting. But it is not correct to say, at least if we take Goldfarb's description as accurate, that she became Chris Burger's friend. At most, she became a "limited purpose friend" of the sort Fried had in mind, a friend for purposes of helping Burger, first, try to prevent, and then ultimately come to grips with, his execution. It is true that Goldfarb played a large role in Burger's life. She was a source of emotional support, a sounding board, a font of insight and wisdom, and an intellectual and spiritual companion in life's darkest moment, but there is no indication that Burger played a comparable role in hers.[442] The relationship as a whole, at least as described in Goldfarb's article, lacked the mutuality and reciprocity that is the hallmark of true friendship. This is not a criticism of Goldfarb's lawyering. By any standard, she did more than almost any lawyer would have done in the same circumstances. The point, simply, is that being a lawyer, even a wonderfully caring and humane lawyer, is not the same as being a friend. It is the friendship analogy, and not Goldfarb-like representation of clients, that the profession should jettison.

442. Goldfarb's approach is probably best described as an example of what Katherine Kruse calls "engaged lawyering," that is, representation characterized by the "expression of respect, caring, and emotional involvement in the client's case." *See* Katherine R. Kruse, Engaged Lawyers and Satisfied Clients: Lessons Learned from the Gaines Thesis 19 (Feb. 2, 2002) (unpublished manuscript, on file with author). Kruse's discussion is based on a survey of Wisconsin prison inmates, conducted by Martha Gaines, that was designed to discover what the inmates liked and disliked about their criminal defense lawyers. Gaines found that lawyers rated most highly by the inmate-clients she interviewed were those who demonstrated personal and emotional engagement with the clients by: 1) visiting them in jail and allowing them to tell their stories; 2) paying attention to their nonlegal needs and doing personal favors for them (even to the extent of lying to third party employers, *id*., at 24); 3) expressing positive assessments of them in person or in public settings; 4) expressing emotional support for their plight; and 5) offering friendship and counsel. *Id.* at 4. It is clear from Kruse's discussion that she and Gaines have a one-directional kind of emotional and personal engagement in mind, however, one that lacks the mutuality and reciprocity characteristic of true friendship (notwithstanding that Kruse occasionally seems to confuse any strong feeling of emotional engagement with friendship). *Id*. It seems more of a *noblesse oblige* view of friendship, than a reciprocal or mutual one. *See e.g.,* Luban, *supra* note 16 (discussing the *noblesse oblige* conception of lawyer role). For a similarly confused understanding of friendship, one which equates empathy with reciprocity, see Charles J. Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1271 (1993) ("my empathy [for my client] was based on my ability to relate to him as a person and to develop a friendship with him"). It is not surprising that inmates would value lawyers who listened to them and treated them humanely more than lawyers who did not, though it would be interesting to learn whether they would reach the same conclusions if they knew that the less friendly lawyers did a better technical job of the representation (*i.e*., got them back on the street sooner). The closest Gaines comes to taking up this question is when she recounts a story of a lawyer who was rated "bad" by the client but who negotiated an "extraordinary plea agreement, but she does not say whether the client was aware of the extraordinary nature of the agreement. Kruse, *supra,* at 27-28.

V. THE LAWYER AS FRIENDLY FIDUCIARY AND AGENT

If lawyers are not their clients' friends, what are they?[443] What social or work world analogy best describes the relationship between the two, and thus provides the best guide for defining the nature of lawyer role? Consider the possibility that this might not be the right question to ask. The lawyer-client relationship has a number of dimensions, each one of which is analogous to a different type of social or work world relationship, and it is difficult, if not impossible, to understand lawyer-client relations in all of their complexity if, at the same time, one must confine lawyer role to the boundaries of some single, all-encompassing metaphor, such as friend, hired gun, or even free-lance bureaucrat.[444] A better course would be to accept the lawyer-client relationship for the complex social and political phenomenon that it is, recognize its idiosyncratic combination of qualities and dimensions, and devise a correspondingly complex conception of lawyer role for operating within it. Any other approach, of necessity, must oversimplify reality and obscure what is really going on between lawyer and client, and it is always a mistake to make the world conform to one's analytical categories, rather than the other way around.

If the various stories of lawyer-client interaction told by Fried, Shaffer, Cochran, Goldfarb and others are representative, there are certain common themes in the collective understanding of lawyer role. At the most basic level, lawyers are purveyors of goods and services in the same fashion as all other commercial actors. They sell retail, in other words, and as such, have an obligation to be sociable to the same extent as do merchants generally. They should be courteous, pleasant, interested in what clients (customers) have to say, respectful of different values and belief systems, considerate of others' particular circumstances and constraints, kind, compassionate (and passionate), and generally in command of the social skills needed to be friendly

443. I will not try to answer that question here. The article already is overly long, and a complete answer would be nearly as long again. Instead, I will sketch what I take to be the central components of a proper conception of lawyer role, and describe how those components relate to one another.

444. Professor Wendel makes a similar objection to what he describes as "monism" in legal ethics analysis, the view that "a single, impersonally justified value can serve as a polestar for any moral agent's deliberation about her ethical responsibilities. . . . [T]he foundational normative values of lawyering," he continues, "are substantively plural and, in many cases, incommensurable . . . . Lawyers promote multiple worthwhile goals, including not only preserving individual liberty, speaking truth to power, showing mercy, and resisting oppression, but also enhancing order and stability in opposition to the 'ill-considered passions' of democracy, aligning individual action with the public good, and shaping disputes for resolution by particular institutions such as courts and agencies." *See* W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113, 115-17 (2000). In promoting these many goals, it is my point that lawyers must play many roles.

and likeable. They should be pleasant to deal with rather than difficult, and make people want to come back to them rather than avoid them at all costs. It also would help if they liked people generally, and took a genuine satisfaction in helping them realize their goals, by making the interaction with the stressful, complicated, and often frightening world of law as tolerable as possible. Think of all of this as the duty of sociability or friendliness (but not friendship), owed by merchants to customers and, in a sense (although this is more controversial), by persons to strangers. It is not so much a special obligation of lawyers as it is one of citizenship, or social relations generally, and it is an important one at that.

Lawyers also are their clients' fiduciaries.[445] Clients have no choice but to depend upon lawyers if they are to use the legal system to enforce their rights. It is not just that lawyers know substantive law and legal procedure and clients do not, but also that clients must tell lawyers their innermost thoughts and feelings (insofar as they relate to the representation), even if they are embarrassing or painful, if lawyers are to use their expertise to protect client rights. Clients must become unilaterally vulnerable to lawyers in other words, with no expectation that lawyers will do the same in return.[446] When one

445. *See generally* Paula A. Monopoli, *Fiduciary Duty: A New Ethical Paradigm for Lawyer/Fiduciaries,* 67 MO. L. REV. 309 (2002); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1406-1411 (2002) (describing the nature of fiduciary duty).

446. How friendship, which requires mutuality and reciprocity, can form under conditions of dependence, is a difficult and nearly intractable question. As a former colleague of mine put it in reflecting on her own practice experience:

> It may be one thing [to say that lawyers and clients can be friends] when the lawyer and client either have been friends prior to the representation, or when the lawyer has represented a business on a continuing basis for a long time, but I was an employment lawyer, and many times I represented people who had lost their jobs. I could give them legal and practical advice, and could direct them to resources where they could obtain other kinds of help, but my clients often were people whose lives had fallen apart and they could be extremely dependent. Ours was not an equal relationship. Telling them, under these conditions, that I was their "friend" would have had implications that could have been unhealthy and potentially disastrous, and that would have produced even more harm when the representation ended, as it eventually had to. On the other hand, saying to them, "I am interested in your problems as your attorney, and in representing you ethically to the best of my ability," and maintaining enough emotional distance from their situation to be able to make intelligent decisions about what advice to give, gave them something far more powerful than friendship, and something which only a lawyer - not a friend - could give, concerned advocacy.

Email from Mary Cornaby, former Assistant Dean for Academic Technology, University of Maryland School of Law, to Robert J. Condlin, Professor of Law, University of Maryland School of Law (Sept. 12, 2002) (on file with author). Tom Wolfe would probably agree that a client would do better with a lawyer than a friend.

is coerced into being dependent and vulnerable as a condition of using a public system such as law, agents of that system should minimize the risk inherent in such dependence and vulnerability by adhering to a heightened standard of honesty and fair dealing in return. This means that lawyers must be truthful with clients, and not hold back information selectively, or for self-interested or paternalistic reasons. They must not take advantage of information they learn from clients to make better-than-market deals for themselves, with clients or others. They must be candid about where their own interests lie, and put client interests ahead of their own whenever there is the possibility that the two will conflict. They must provide clients with the information needed to make fully informed decisions about their cases (with respect to issues assigned to clients by law and the profession's ethical codes), and give them the opportunity to consider that information freely and without pressure. Finally, they must not judge clients or client projects unfairly or harshly simply because they disagree with them, or pull punches in the advancement of those projects as a consequence of this disagreement, by failing to take actions that would be effective but also personally distasteful. This cluster of obligations is best captured in the familiar and longstanding concept of lawyer as client fiduciary.[447]

Lawyers also are their clients' agents, in the sense that they are the instruments of their clients' wills. They have an obligation to put client plans into effect successfully insofar as that is possible, but, at a minimum, in a manner that gives those plans their greatest possibility of being realized. This means that lawyers must be aware of and use the full range of skills available to competent practitioners working in the field, be imaginative and clever in the use of these skills, pursue client objectives diligently, and also have the courage to use methods that step outside of conventional or preferred ways of doing things when something out of the ordinary is needed, even if it entails some risk to the lawyers' reputations or personal interests. The only limit on this instrumental dimension of lawyer role is the familiar one of positive law, that is, in protecting client rights lawyers always must operate "within the bounds of law."

Finally, lawyers are persons in their own right, with moral principles and limits of their own. They are entitled to act in accordance with these principles by placing restrictions on whom they represent

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> What did I tell you the first time you walked into this office? I told you two things. I told you, 'Irene, I'm not gonna be your friend. I'm gonna be your lawyer. But I'm gonna do more for you than your friends.' And I said, 'Irene, you know why I do this? I do it for money.' And I said, 'Irene, remember those two things.' Idd'n 'at right? Did'n I say that?

See TOM WOLFE, BONFIRE OF THE VANITIES 382 (1998).

447. Shaffer discusses these qualities to a limited extent, *see* Shaffer, *supra* note 15, at 657-58, under the rubric of fidelity or faithfulness.

and what they will do for persons they choose to represent. For the most part, however, they should honor these principles by avoiding relationships in which the principles are likely to be compromised, rather than by refusing to do things for persons they already have agreed to help. Extreme cases excepted, they should not withdraw from or compromise representation when what clients ask conflicts with the lawyers' own sense of what is right. While they can and should argue about moral and political issues with clients, they should not coerce clients, explicitly or *sub rosa*, into changing their minds about what to do when they (the lawyers) lose these arguments. Lawyers are agents, not principals, and their primary responsibility is to make the public good of the legal system available to citizens generally. As such, they are a form of public good themselves, and public goods cannot be denied for purely private reasons.

When the foregoing obligations of sociability, fiduciary loyalty, instrumental competence, and personal integrity, are combined, the image of lawyer role that emerges, if one needs a single image, is that of friendly fiduciary, so to speak.[448] This is an unremarkable, even commonplace, conception of lawyer role, not at all catchy or emotionally evocative, and without any ring of moral or political novelty about it. But when understood properly, it includes all of the qualities commentators like Fried, Shaffer, Cochran, and others demand in a conception of lawyer role, and it has the added advantage of being compatible with what positive law and the legal profession's ethics codes demand of lawyers as well. It does not liberate lawyers from the constraints of ordinary morality, a *sub rosa* goal of some efforts to construct an independent conception of lawyer role, and this should make it even more

448. While this description will be true for lawyer role generally, the particulars of role obligation will change as the nature and circumstances of the work changes. Criminal defense work raises different types of issues and requires different types of responses, for example, than trusts and estates work, just as legal services work imposes different obligations and permits different strategies than corporate work. *See* Morris, *supra* note 92, at 794-800 (describing how lawyer role obligation varies by context and client). If the above view looks a lot like client-centered lawyering that is because I think the client-centered view is fundamentally correct. It is not as clear about the role of moral and political principles in lawyer-client conversation as it could be, but otherwise, I believe it describes the nature of lawyer role appropriately. While there is much to like in the more sharply defined, morally activist views of Luban, Rhode, and Simon, *see* note 15 *supra*, and reason to prefer those views over Shaffer and Cochran's similar lawyer-as-friend conception (for example, Luban, Rhode and Simon justify intervening in the moral lives of clients on the ground that it is sometimes necessary to protect the moral integrity of lawyers and the legal system itself, rather than on the messianic need to make clients good), I do not have the same clear sense of morally correct choices that seems to drive their arguments. With Alan Donagan, I am more comfortable respecting client decisions, as long as they are made in good faith and are factually defensible, even when I disagree with them. *See* Donagan, *supra* note 25, at 132.

attractive to critics such as Shaffer and Cochran. Most importantly, this particular combination of faithfulness and friendliness does not require that lawyers be their clients' friends, since obligations in the relationship run in only one direction. Lawyers must do all of the above whether clients reciprocate or not.

It is a mistake to try to convert every kind of social connection into a deep or intimate relationship. Intimate relationships are based on love, and love is a rare quality in work, notwithstanding the fact that the language of modern marketing professes to find it in all sorts of chance or fleeting encounters, with both people and things.[449] The idea of intimacy loses all meaning, however, as Samuel Johnson reminds us, when one "spreads his arms to humankind, and makes every man, without distinction, a denizen of his bosom."[450] While this quality "may be useful to the community, and pass through the world with the reputation of good purposes and uncorrupted morals, . . [it is] unfit for close and tender intimacies."[451] To make every relationship a love relationship is to destroy rather than enrich the notion of love. As Dworkin explains, "[i]f we felt nothing more for lovers or friends or colleagues than [we do for] fellow citizens [i.e., clients], this would mean the extinction not the universality of love."[452] It is just wrong to believe that one can and should care deeply for everyone. Most relationships in life, of necessity, are superficial and fleeting, but that does not mean that they cannot have an integrity of their own.[453] The genuine expression of a "lesser" emotion, such as respect, tolerance, understanding, concern, compassion, sympathy, or the like, is a perfectly fine basis on which to ground a relationship, and a much better one than the pretend expression of a "greater" emotion, such as love.[454] Genuine feeling, whatever its nature, has integrity, and integrity is a precondition of all social relationships worthy of the name.[455]

449. Dauer & Leff, *supra* note 6, at 582.
450. Johnson, *supra* note 281, at 71.
451. *Id*. at 70.
452. RONALD DWORKIN, LAW'S EMPIRE 215 (1986).
453. This is because "love is not all there is to goodness." Dauer & Leff, *supra* note 6, at 583. One can love others because they are god's children, and not because of any particular emotional attachment to them as persons, but this is an intellectualized kind of love, based on belief (or faith) and not feeling. It has about the same relationship to real love as fantasizing about sinking a putt to win the Masters has to actually sinking the putt.
454. *See* Alan Ryan, *Call Me Mister*, NEW YORK REVIEW OF BOOKS, February 27, 2003, at 32 (Reviewing RICHARD SENNETT, RESPECT IN A WORLD OF INEQUALITY) ("Not assuming too easy a familiarity with [clients], not seeming to enter too heavily into their lives, trying to offer help without intrusion, [are] ways of allowing clients to keep their self-respect in situations that seriously threaten it.").
455. *See* 1 SCHOPENHAUER, *supra* note 33, at 458 ("I attach more value to an honest dog wagging his tail than to a hundred . . . gestures and demonstrations" mimicking friendship.). For a description of attorney-client relations based on the

Many years ago, in a broadcast on WPIX television in New York City, Howard Cosell, the one-time flamboyant television personality and sports commentator, was interviewing Tracy Stallard, a journeyman pitcher for the New York Mets at a time when the Mets were the worst team in baseball. Cosell began the interview with his customary hyperbole, describing Stallard as one of the greatest pitchers of all time, a future Hall of Famer, a legend in his own time, and the like. Stallard, unaware that the interview was being broadcast live, and thinking that Cosell was just being Cosell, responded by saying, "Yeah, you keep bull shitting me Howard, and I'll keep bull shitting you." Professing to love one's clients is a little like describing Tracy Stallard as one of the greatest pitchers of all time. Lawyers can say it, and clients, like Stallard, can agree to play along, but as Stallard also recognized, it's all just bull shit (in the technical sense of the term, of course), and true love must be based on a less slippery footing.

"lesser" qualities of candor, honesty, and straight-dealing, see Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981). *But see* Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 365 (1997) (describing the economic incentives encouraging lawyers to systematically mislead clients in legal counseling).