Volume 88 | Issue 4 Article 5

June 1986

The Ethics of Dissent and Friendship--A Response to Professor Shaffer

Carl M. Selinger
West Virginia University College of Law

G. MEILAENDER, FRIENDSHIP (1981); G. MEILAENDER, THE THEORY AND PRACTICE OF VIRTUE (1984).

Nemethy, *Country Doctor*, VERMONT LIFE, 50 (Winter 1984).

M. NOVAK, IN PRAISE OF CYNICISM (OR) WHEN THE SAINTS GO MARCHING OUT (Poynter Center, Indiana University, 1977), Novak, *Catholics and Power*, NOTRE DAME MAG. 12 (Feb. 1980) *excerpted in* A.L.E. at 584-97.

T. PERCIVAL, MEDICAL ETHICS (1803), in C. D. LEAKE, PERCIVAL'S MEDICAL ETHICS (1975).

Sharswood, *An Essay on Professional Ethics* (1854), in 32 REPORTS OF THE AMERICAN BAR ASSOCIATION (1907).

Sommers, *Ethics Without Virtue: Moral Education in America*, 1984 AM. SCHOLAR 381.

P. TILLICH, SYSTEMATIC THEOLOGY (1943).

A. TRAIN, YANKEE LAWYER: THE AUTOBIOGRAPHY OF EPHRAIM TUTT (1943); Train, Book Review, 52 YALE L. J. 945 (1943).

Trillin, *Making Adjustments*, NEW YORKER, 50 (May 28, 1984).

Updike, *Personal History: At War with My Skin*," NEW YORKER, 39 (Sept. 2, 1985).

A. VORSPAN, GIANTS OF JUSTICE (1960).

"THE ETHICS OF DISSENT AND FRIENDSHIP"—A RESPONSE TO PROFESSOR SHAFFER

CARL M. SELINGER*

Tom Shaffer is, to my knowledge, the first legal scholar to assess the significance for the practice of law of real friendships, not just metaphorical ones, between lawyers and their clients.[1] But notwithstanding his interesting stories and his pioneering and worthwhile analysis, I would suggest that such friendships are probably less common in fact and more problematic as an ideal for lawyer-client relations than Shaffer would have us believe.

---

* Dean and Professor of Law, West Virginia University College of Law.

[1] A precursor to his present article, Shaffer, *The Ethics of Dissent and Friendship in the American Professions*, is Shaffer, 88 W. VA. L. REV. (1986). *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 725-27 (1975). The metaphor of friendship for lawyer-client relations is developed in Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

Consider first the likelihood of friendships developing.

Midway through his article, Shaffer criticizes the "individualistic, liberal-democratic, republican" view of professional relations for treating both professionals and their clients or patients as "fungible."[2] However, Shaffer himself fails to acknowledge relevant and significant differences among lawyers. An important sociological study of "role orientations" in the legal profession found that only some lawyers are "people-oriented," in that they obtain professional satisfaction mainly from feeling that they have helped clients as individuals; other lawyers are more oriented to solving problems ("trial lawyers," "technicians," "business organizers") or making money.[3]

Similarly, a major psychological study of first-year law students, employing a widely used instrument based on the work of Carl Jung, revealed that a personality type that is "characterized as one who is concerned chiefly with people, who values harmonious human contacts, [and] is friendly, tactful, sympathetic, and loyal" is significantly underrepresented among law students as compared, for example, with liberal arts undergraduates.[4] Some people are much more inclined toward friendship than others, and that seems to hold true among individual lawyers and, one would assume, individual clients.

There are also factors built into many lawyer-client relationships that are likely to inhibit the formation of friendships. First, in the field of criminal defense, there is the problem of the client's character. A sociologist's well-regarded analysis of criminal lawyers' work concluded that,

> Since he usually has been guilty of some crime (some previous crime, if not the one with which he is currently charged), the client of the criminal lawyer is typically an unreliable, dishonest person. Consequently, the status difference between attorney and client is disparate, taxing to the limit even the professionally defined relationship that is designed to ameliorate this problem.[5]

Second, there can be a feeling on the part of some clients who are involved personally in legal disputes that having to employ a lawyer is just another aspect of the same human injustice that the lawyer is supposed to rectify. That physicians are more likely to be perceived by their patients as allies may have something to do with a tendency to ascribe divine or deterministic origins to even medical problems with such calculable human causes as automobile accidents.

And third, the separation that can occur in a lawyer-client relationship between taking actions (the lawyer's job), on one hand, and being satisfied that there are

---

[2] Shaffer, THE ETHICS OF DISSENT AND FRIENDSHIP IN THE AMERICAN PROFESSIONS, 88 W. VA. L. REV. 623, 654 (1986).

[3] H. O'GORMAN, LAWYERS AND MATRIMONIAL CASES 120-32 (1963).

[4] Miller, *Personality Differences and Student Survival in Law School*, 19 J. LEGAL ED. 460, 466 (1967).

[5] A. WOOD, CRIMINAL LAWYER 250 (1967).

adequate moral justifications for those actions (the client's responsibility) may lead to real tensions and suspicions. Some lawyers will resent being required to act in ways that injure third persons in circumstances in which the harms seem unjustified to the lawyer and perhaps also to others in the community.

Meanwhile, some clients will be rather hesitant even to trust, much less like, an attorney who shows few compunctions about harming third persons. An analogy by Professors Dauer and Leff is interesting in this regard:

> [Y]ou don't need to love your hammer, for lovability is not its essence; its *areté* is to hit, and hit well, and most important, to hit not oneself, but what you want to hit. A hammer that is perfectly willing to hit you, and would, but for the fact that you have bought it and thine enemy has not, may be used, but that is no reason at all to lavish love on it.[6]

Shaffer clearly does not expect every transaction between an attorney and client to evolve into friendship, but he does appear to treat friendship as an ideal for lawyer-client relations. And here, too, I have some reservations.

Along with many other contemporary critics of the professions, Shaffer advocates a "participatory" or "partnership" model of relations between professionals and their clients or patients: in the case of lawyers, "the client should . . . participate in decisions on negotiation and trial strategy, choose witnesses, be given a second professional opinion if he wants one, help set the fee, help decide what the lawyer is to say to the world outside the law office."[7] That's very well, it seems to me, if the client *wants* to be a partner in making such decisions, and the option should be open to him or her without having to search interminably for a lawyer who will say something more than, "Just leave it to me."

But what of the client or patient who has consulted a professional precisely because he or she wants to *stop* worrying about his or her legal or health problems—what of the person who wants to turn them over, lock, stock, and barrel, to a doctor or lawyer? Why should that alternative not also be available to a client, without constantly having to overcome even the well-intentioned desires of professionals for partners or friends who will continue to be responsible in the main for their own legal or medical welfare?

This point can be put still more strongly. Shaffer says that a client's friendship, interest in the lawyer's activities for the client, and ongoing willingness to "contribute to the common effort" make the practice of law more stimulating and make it seem more worthwhile.[8] But this kind of client involvement can also become something of a "pain in the neck" to a lawyer—perhaps because of the lawyer's own personality, which we'll return to presently, but perhaps also because the lawyer

---

[6] DAUER & LEFF, *Correspondence: The Lawyer as Friend*, 86 YALE L. J. 573, 582 n.38 (1977).
[7] Shaffer, *supra* note 2, at 663.
[8] *Id.* at 651-52.

senses accurately a certain unhealthy obsessiveness on the part of the client about his or her legal problems. A client with such tendencies needs to be more realistic with regard to what can and cannot be expected from legal services and the legal system, and get on about his or her other business; he or she does not need an emotionally fascinating attorney-client relationship.

In fact, a client's greatest need may not be for a friendly lawyer at all, but rather for a lawyer whose role orientation or personality type makes him or her particularly adept at office or courtroom problem-solving, business organizing, logical thinking, or imaginative reasoning. Are we to understand Shaffer's remark that, "Most doctors are not interested in attending funerals for their dead patients; Ann Landers says they shouldn't be expected to,"[9] as an invitation to those who are not terribly sympathetic, and don't want to fake it, to pursue another line of work?

The legal profession as a whole provides, to my mind, suitable employment for persons with all manner of role orientations and personalities, and one of the principal obligations of legal education is to help each student to understand how his or her own strengths and weaknesses relate to the great variety of tasks that lawyers perform. I hope that Shaffer means by his reference to funerals only that friendship can be extremely valuable in certain kinds of practice and that no lawyer should be deterred from expressing genuinely felt affection, or grief, by some kind of artificial "code" of professional detachment.

Still, I think that Shaffer is too rough on the notion of lawyers' detachment, when he treats it as principally a device through which establishment lawyers have managed both to fool themselves into believing that they are *not* furthering the interests of *their* friends[10] at the expense of others, and to make ethnic lawyers feel guilty about being emotionally committed to the representation of people in their communities.[11]

It seems to me that the ideas that a lawyer *can* divide his or her professional life from his or her private life, that he or she is *not* obligated "to adopt a personal viewpoint favorable to the interests or desires of his client,"[12] that his or her representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities,"[13] and that, "when a lawyer purports to act on behalf of the public, he should espouse only those [legislative or administrative] changes which he conscientiously believes to be in the public interest"[14] are ideas that at different times in the past have helped to obtain effec-

---

[9] *Id.* at 662.

[10] *Id.* at 643.

[11] *Id.* at 636.

[12] MODEL CODE OF PROFESSIONAL RESPONSIBILITY [EC] 7-17 (1969).

[13] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b) (1982).

[14] MODEL CODE OF PROFESSIONAL CONDUCT EC 8-4 (1969).

tive legal representation for the unpopular clients and causes, and for minorities,[15] and have been conducive to more informed public decision-making.[16]

The notion of lawyers' detachment, in the sense of professional independence, is, I believe, a much more fragile ideal than those of friendship and communal solidarity, and one that is much more in need of nurturing, in the interests of society as a whole.

A COMMENT FOR TOM SHAFFER: THE ETHICS OF RACE, THE ETHICS OF CORRUPTION

JAMES J. FRIEDBERG*

Tom Shaffer does more than describe dissent. He endorses it. We know this by the commentary that he interweaves with his narrative of the dissenting lawyers, Fanny Holtzman and Jerry Kennedy. We know this still more by the approving, even affectionate language with which he portrays these two lawyers. Sincerely affectionate, although one of the two is a total stranger to him and the other is even less—a creation of fiction. He endorses their dissent and he endorses their alternative ethic, as he sees it: that of the "immigrant" lawyer.

It is difficult for me to reject the lessons of Tom's homilies. Not only did I intellectually share his regard for the values of community and friendship (which are, as he implies, insufficiently influential in our profession and our society), but I also *feel* a visceral, ethnic harmony with his theme of the salutary effects of the immigrant community, of the importance of "going home". I grew up in that Catholic/Jewish cultural millieu of which Tom writes. It shaped my values regarding friends and decency. It also nurtured my intuitive skepticism regarding authority. When I first heard Tom speak of "gentle cynicism", I immediately *understood* what he meant, although I might not have been able to articulate it immediately. Understanding what Tom means is made easier by the fact that he is not alienated

---

[15] *See generally* V. COUNTRYMAN, T. FINMAN & T. SCHNEYER, THE LAWYER IN MODERN SOCIETY 638-53 (2d ed. 1976).

[16] The 1981 Proposed Final Draft of Model Rule 6.4 would have prohibited a lawyer from participating in a decision of a law reform organization that "could have a direct material effect" on a client. However, as such a prohibition would have prevented organizations seeking reform in specialized fields like antitrust, tax, and securities law from taking advantage of the expertise of most practitioners in those fields, the final version of the rule only requires that a lawyer disclose that a client might be materially benefitted. PROPOSED MODEL RULES Rule 6.4 (1981).

* Associate Professor of Law, West Virginia University College of Law.