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# LAWYERS AS STRANGERS AND FRIENDS: A REPLY TO PROFESSOR SAMMONS

*Thomas L. Shaffer\**

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Our thanks to the editors of the University of Arkansas at Little Rock Law Journal for the opportunity to respond to Jack Sammons' review of our recent book.<sup>1</sup> We are honored to be taken seriously by someone as thoughtful as Sammons. We especially like his suggestion that, "[I]t would be good for everyone in the legal profession to pay attention to what Shaffer and Cochran have done here."<sup>2</sup> (We hope they all buy copies of the book.) We see his book review (as we know he sees it) as moral discourse among friends; we respond in the same spirit. Though Sammons credits us with "the first good heuristic model . . . for moral counseling in the law office," he thinks we "have the model all wrong."<sup>3</sup> We think that, in many respects, he furthers the understanding of what it means to be a lawyer and a good person; but, in some respects, he misreads us, and in other respects he is wrong.

## I. ARISTOTLE'S NOTION OF FRIENDSHIP AND OURS

In our book, we identify four models of lawyers, each of which gives a different combination of answers to the questions: (1) Who controls the representation? and (2) Are the interests of those other than the client important? The lawyer as godfather controls the representation and ignores the interests of others;<sup>4</sup> the lawyer-as-hired gun defers to the client and ignores the interests of others;<sup>5</sup> the lawyer-as-guru controls the representation and considers the interests of others;<sup>6</sup> the lawyer-as-friend raises moral issues, discusses them, and resolves them with the client.<sup>7</sup> The lawyer-as-friend is our preferred model.

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1. 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 (1995) (reviewing THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994)).

2. *Id.* at 5.

3. *Id.*

4. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 5-14 (1994).

5. *Id.* at 15-29.

6. *Id.* at 30-39.

7. *Id.* at 40-54, 113-34.

A concern with the goodness of the friend was central to the traditional notion of friendship.<sup>8</sup> Such a concern was also present in the notion of friendship modern American lawyers grew up with and learned to practice. Even if moral counsel is not as prominent as pleasure in the relationship of modern friends, it is always present in any relatively clear account of what friendship is—from theological ethics to television situation comedy.

Sammons takes us to task for our use of Aristotle in our model of friendship. He suggests that Aristotle's notion of friendship is intimately bound up in his notion of a city-state in which citizens share a common morality.<sup>9</sup> In that classical locale, friends can call one another to a common morality. Sammons suggests that modern American lawyers and clients are more often "rank strangers" and that the lawyer who pretends that she lives in an Aristotelian city-state and shares morals with her clients is likely to impose her values on clients (and to fool herself into believing that the clients participate in the decision).<sup>10</sup> Sammons claims that the lawyers with which we illustrate our model have such delusions. He is wrong about that.

Sammons errs first in assuming that we think the lawyer and client could be or should be what Aristotle called true friends. As we say often (and as Sammons at times acknowledges<sup>11</sup>) we use friendship as an *analogy* to the relationship we propose for the lawyer and client.<sup>12</sup> We no more suggest that our lawyer *is* an Aristotelian friend to all of his or her clients than that the lawyers in the other models that we explore head Mafia-related organizations, shoot people at the direction of the ranch's boss, or sit in lotus position while their followers offer worship. We chose the analogy of friends because we think it captures the combination of moral responsibility, respect for client dignity, and moral discourse that should be part of the lawyer-client relationship.

We point to Aristotle as one who talked about friendship as a moral relationship, but in this, as in so many other areas, Aristotle is part of a tradition, a tradition that extends over many ages and many different cultures. We use not only Aristotle but the Jewish philosopher Martin Buber,<sup>13</sup> the Catholic theologian Thomas Aquinas,<sup>14</sup> the Protestant theologian

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8. *Id.* at 44-48.

9. Sammons, *supra* note 1, at 22. Sammons emphasizes the difference between Aristotle's and our experience of friendship. What is more surprising are the similarities. Though separated by a few millennia and half a world, Aristotle's description of friendship as a moral relationship carries the ring of truth.

10. Sammons, *supra* note 1, at 27-28.

11. Sammons, *supra* note 1, at 10.

12. *See, e.g.*, SHAFFER & COCHRAN, *supra* note 4, at 45.

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

14. SHAFFER & COCHRAN, *supra* note 4, at 48.

Karl Barth,<sup>15</sup> the characters of modern novelist Wendell Berry,<sup>16</sup> modern playwright Robert Bolt,<sup>17</sup> and 19th century novelist Anthony Trollope<sup>18</sup> to describe our notion of friendship as a moral relationship. It is not a notion that is limited to the Greek city-state.

Our choice of friendship as a model comes also from our own experience of friendship. That experience has been, not in Aristotle's city-state, but in groups with which we share varying levels of difference, ranging from small intimate Christian fellowship groups—sometimes of only two or three—with whom we share much in common,<sup>19</sup> to groups composed of those who are quite different from us. With these others, the shared basis for the friendship is not as great, but, in some respects, with these other friends, the opportunity to learn is greater. Thus, it may be that a lawyer who shares her client's moral tradition will be quicker to point to the implications of that shared tradition and more likely to persuade a client to follow them; but clients from another tradition will be more likely to broaden the lawyer's moral insight.

In class, when we suggest that students might talk with clients about moral issues as they would with "a close friend" (Thomas Morgan's phrase),<sup>20</sup> the notion seems to ring true. We perceive that most people have friends with whom they can discuss the good. Though students do not initially talk of friendship as a moral relationship, it appears that their *experience* of friendship is better than their understanding of it. Just as Robert Bellah found that people in the United States have a hard time talking about their very real experience of community,<sup>21</sup> we find that students have a hard time talking about friendship as a moral relationship.

The important thing here is not the characterization of the friendship, but the goal and tendency of it—and, most of all, the exercise of the *virtue* of friendship. What we are after, in a book on legal ethics, is not what a lawyer will *find* in the law office; it is what she will work to bring about there. If the adjective had not been hopelessly diluted by commercialism, we would say that what we point to is being *friendly*, and then to Aristotle's understanding that the exercise of the virtue of friendship is possible in all

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15. SHAFFER & COCHRAN, *supra* note 4, at 48.

16. SHAFFER & COCHRAN, *supra* note 4, at 53-54.

17. SHAFFER & COCHRAN, *supra* note 4, at 26-27.

18. SHAFFER & COCHRAN, *supra* note 4, at 94-101.

19. An early such group in which we shared as teacher and student was the springboard to THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER (1981). *See id.* at 227.

20. Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439, 455-59 (1990).

21. ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985).

sorts of encounters, from “base” friendships for pleasure or profit to the richest and deepest “collaboration in the good.”<sup>22</sup>

Sammons suggests that there are insufficient common moral resources for moral discourse in the law office and that the assumption behind our lawyer-as-friend that there are common moral resources will lead the lawyer-as-friend to self-deceptively manipulate the client. We think that there is more room for common discourse than Sammons suggests: 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.<sup>23</sup> The popularity of William Bennett’s *The Book of Virtues: A Treasury of Great Moral Stories*<sup>24</sup> among diverse social groups in the United States provides support for our suggestion that justice, mercy, and truthfulness are values that lawyer and client can fruitfully discuss and practice in the law office.

Sammons suggests that we distort these values as they have been “deeply defined through the long narrative processes of interpretive communities” by “treating them as abstracted principles.”<sup>25</sup> But that is simply not an accurate characterization of our book. Among the dozen stories that we tell (or re-tell) is the story of the Good Samaritan,<sup>26</sup> a story from our Christian tradition which illustrates the virtue of mercy. It is our sense that it is a story that has power across cultural traditions. The stories that William Bennett repeats in *The Book of Virtues* come from particular traditions, yet its popularity suggests that Bennett’s stories speak of values that run through other traditions as well.<sup>27</sup>

It may also be that lawyers can call clients to the moral values of client traditions that they do not share. A lawyer may be at her best in moral

22. For a lengthy analysis of Aristotelian friendship in reference to two of the legal profession’s modern regulatory rules, see Thomas L. Shaffer, *The Legal Profession’s Rule Against Vouching for Clients: Advocacy and “The Manner That Is The Man Himself,”* 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 145 (1993).

23. SHAFFER & COCHRAN, *supra* note 4, at 60.

24. WILLIAM BENNETT, *THE BOOK OF VIRTUES: A TREASURY OF GREAT MORAL STORIES* (1993).

25. Sammons, *supra* note 1, at 23-24.

26. SHAFFER & COCHRAN, *supra* note 4, at 70.

27. Sammons’ own notion of the lawyer as rhetorician, discussed at Sammons, *supra* note 1, at 44-59 and at *infra* text accompanying notes 65-71, is dependent on a sharing of moral values over a much broader community than our notion of lawyer-client moral discourse. We assume that the lawyer and client will have a sufficient overlap in moral values to engage in moral discourse about issues that arise in legal representation. Sammons assumes that the community will have a sufficient overlap in moral values to resolve disputes if lawyers enable clients to tell their stories—he describes the lawyer as making “a communal claim about what type of community this community is and is to be.” Sammons, *supra* note 1, at 38.

counseling when she asks questions. For example, "What would be fair?" is likely to push a client to consider the teachings of his own moral tradition.

## II. OUR LAWYER-AS-FRIEND: ANN WELCH AND THE ZONING CASE

We introduce the concept of the lawyer-as-friend, a lawyer who brings moral issues into the discussion, but does not impose her values on the client, in Chapter Four of our book. We present our model of the lawyer-as-friend, our suggestion of "how to do it," in Chapter Ten. There, we suggest that moral discourse with a client will involve four elements:

1) *Client Involvement*: establishing the sort of relationship with the client in which the client will be comfortable talking about moral concerns.

2) *Moral Sensitivity*: recognition of the harm that different options might cause to other people. A lawyer might raise such a concern with the client by asking, as to each alternative that lawyer and client might pursue, "Who gets hurt?"

3) *Moral Judgment*: deciding what would be the right thing to do. A lawyer might raise this question with a client by asking, "What would be fair?" With most clients, this will cause the client to look to his own sources of moral value in deciding what to do.

4) *Moral Motivation*: deciding to do the right thing. Often empathy acts as a source of moral motivation. A lawyer might appropriately stimulate empathy by encouraging the client to interact with the other party.<sup>28</sup>

In the story that we use to illustrate our model of the lawyer-as-friend, a home for retarded men is seeking to have the zoning changed in a client's neighborhood so that they can move in. The lawyer, Ann Welch, pursues the agenda suggested above. Along the way, she proposes and arranges a meeting between the client family and the men from the home.<sup>29</sup> In the story, the meeting serves two purposes that facilitate moral decision-making. First, it increases moral sensitivity. It enables the clients to understand the harm that would come to the men if they have to remain in their old neighborhood. Second, the meeting creates moral motivation; the clients develop some empathy for the men.

Sammons criticizes Ann for encouraging the clients to meet with the men. He sees Ann Welch's actions in sending the client to the home as

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28. SHAFFER & COCHRAN, *supra* note 4, at 113-34.

29. SHAFFER & COCHRAN, *supra* note 4, at 124-25.

manipulative.<sup>30</sup> He has it backwards. Manipulation would have been to distort reality in order to push the client to do the lawyer's bidding. It would have been manipulative to present the men to the clients in a scrubbed-up, artificial way, on their best behavior in the law office, for example. By inviting the clients to go where the men lived, Ann Welch increased their understanding of reality. The visit might have confirmed the clients' fears. The point is, as St. Paul said, that "Love rejoices in the truth."

We find Sammons' criticism especially surprising in light of his model of the lawyer, the lawyer-as-rhetorician, one who encourages conversation.<sup>31</sup> Meeting the men began the conversation, a conversation that will continue if the clients decide to pursue negotiations. We doubt that much of a conversation would have occurred if the clients did no more than oppose the zoning change at a hearing before the zoning board.<sup>32</sup>

Sammons does not address our other suggestions for the lawyer-as-friend. Questions such as, "Who gets hurt?" (raising moral sensitivity) and, "What would be fair?" (stimulating moral judgment) can generate moral discourse, without imposing the lawyer's values on the client. Some might suggest that identifying the interests of others and raising the question of fairness is to impose. As Sammons says, some feel that to raise is to impose.<sup>33</sup> We do not suggest that the lawyer should not influence the client (some would suggest that to influence is to impose); there is a significant difference between influence and imposition. Sammons' lawyer may make the opposite error. For the lawyer to fail to raise these issues and talk only of the client's story and the client's interests would leave us with the lawyer-as-hired gun—and Sammons does not like that any more than we do.

### III. JARAMILLO AND THE REAL ESTATE COMMISSION

Sammons spends much of his review criticizing a lawyer in one of the stories that we tell. The lawyer Jaramillo advises his client concerning a

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30. Sammons, *supra* note 1, at 40.

31. Sammons, *supra* note 1, at 44. For our discussion of Sammons' model of the lawyer-as-rhetorician, see *infra* text accompanying notes 65-71.

32. Sammons emphasizes the importance of the client being able to tell his story. Often clients are unable to tell their stories in court or before government bodies: one of the most common complaints of citizens in litigation is that they are unable to tell their stories.

Sammons also suggests that Ann distorted the costs to the clients of allowing the men to move into their community. Sammons, *supra* note 1, at 40 n.144. She did not. For example, she asked how much the value of the client's home would go down if the men moved into the neighborhood. SHAFFER & COCHRAN, *supra* note 4, at 122.

33. Sammons, *supra* note 1, at 3.

real estate commission claimed by a real estate agent. The commission is probably unenforceable because of the statute of frauds. Jaramillo wonders out loud about the justice of claiming the statute of frauds. Sammons criticizes Jaramillo as if Jaramillo were our model of client moral counseling,<sup>34</sup> but Jaramillo is not our model.<sup>35</sup>

We tell the story of Jaramillo as a way to suggest our concern for the client's exercise of the virtue of justice. We present the dialogue as a teaching tool. We think it presents a realistic picture of the kind of moral conversation that goes on in law offices. We praise Jaramillo for leaving the responsibility of the decision on the client and for treating the interests of others seriously in the conversation.<sup>36</sup> We criticize him for his failure to involve the client in the decision-making process<sup>37</sup> and refer the reader to Chapter Ten where we present Ann Welch as a better example of lawyer-client moral counsel.<sup>38</sup>

In our teacher's manual, that accompanies copies of our textbook that the publisher sends to teachers, we suggest that the teacher have the class analyze the dialogue in the Jaramillo story.<sup>39</sup> It is our experience (and we think Jack Sammons') that students learn more if they have the good, the

34. Sammons, *supra* note 1, at 27, 28-34.

35. That Jaramillo is not our model, and that Ann Welch (discussed in the prior section) is our model, is quite clear in the book. Chapter Four of the book introduces the notion of the lawyer as friend at a theoretical level, with the discussion of Aristotle, Aquinas, Barth, etc. At the end of that chapter, we say:

We have yet to show how a lawyer might raise moral issues and focus the discussion on the values of the client. In Chapter Ten [Ann Welch's story], we will present a structure for moral discourse and illustrate it with a dialogue between a client and lawyer. But first, a look at the moral values that are likely to be the subject of lawyer-client moral discourse.

SHAFFER & COCHRAN, *supra* note 4, at 54. The story of Jaramillo, which we present in Chapter Six, illustrates the way that justice issues arise in legal representation. It does not illustrate our model of moral counsel. We introduce it merely as "a law office story that raises [a corrective justice] concern." SHAFFER & COCHRAN, *supra* note 4, at 63. It is not even our story; we credit it to Louis Brown, SHAFFER & COCHRAN, *supra* note 4, at 63 n.9, who also presented it, not as a model, but as an opportunity to critique the moral counsel that goes on.

36. SHAFFER & COCHRAN, *supra* note 4, at 65.

37. SHAFFER & COCHRAN, *supra* note 4, at 66.

38. SHAFFER & COCHRAN, *supra* note 4, at 67.

39. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *TEACHER'S MANUAL TO ACCOMPANY LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 39 (1984).

We realize that citations to teacher's manuals are not standard fare for law review articles, but our teacher's manual has already made one of the lesser known journals for the point, generated by our earlier exchange with Jack Sammons, that at times clients "seek out a lawyer because the lawyer is not one of their friends." Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 *YALE L.J.* 1545, n.133 (1995) (citing SHAFFER & COCHRAN, *supra* note 39, at 30).



bad, and the quizzical to discuss in a dialogue. We say that the story presents "an example of a moral conversation, but not a perfect example."<sup>40</sup> We criticize Jaramillo: "[H]e does operate a bit parentally: He does not ask his client about [moral concerns]; he tells his client about them."<sup>41</sup> Sammons carries on the criticism of Jaramillo in a way that we think a good teacher and a good class might do. (We may include his observations in the next edition of the teacher's manual.)

Sammons criticizes Jaramillo for failing to raise the question of the fairness of the real estate commission. If Jaramillo had followed our model for moral discourse, discussed in the prior section, the question, "What would be fair?" would have led Jaramillo and his client into the question of the fairness of the real estate agent's requested fee. (Unfortunately, Jaramillo does not follow our model, but then our book had not been published at that time.)

#### IV. INTEGRITY, WITHDRAWAL, AND BEING PART OF THE PRACTICE

Sammons also criticizes our position that lawyers should withdraw or refuse to take action for a client when they believe that the client wants the lawyer to do something that is morally wrong. He suggests that our model of the lawyer-as-friend grows out of our concern for our students' integrity,<sup>42</sup> and it does. But it also grows out of our concern for the integrity of their clients. Our model seeks to respect the integrity of lawyers *and* clients. Only a critic who is obsessed with autonomy—which Sammons otherwise is not—would suggest that this sort of integrity is misplaced.

Difficult moral issues—the kind that often arise in the law office—are likely to be issues over which reasonable people could differ. If forced to address such issues people would decide one way or the other, but most would be hesitant to say that theirs is the only moral solution. Some, of course, have a firm opinion about every moral issue. Examples include the county judge of courthouse lore, who was "often in error, but never in doubt," and Atticus Finch's sister, Alexandra, who "went to school [when] self-doubt could not be found in any textbook, so she knew not its meaning. . . . [G]iven the slightest chance she would exercise her royal prerogative: she would arrange, advise, caution, and warn."<sup>43</sup> We think that most lawyers, unlike Aunt Alexandra, understand the complexity of moral issues. (As Anthony Kronman has suggested, this perception of complexity may in

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40. SHAFFER & COCHRAN, *supra* note 39, at 42.

41. SHAFFER & COCHRAN, *supra* note 39, at 42.

42. Sammons, *supra* note 1, at 34.

43. HARPER LEE, TO KILL A MOCKINGBIRD 128 (1960).

part be a product of the case method in law school, under which students are forced to identify the strengths of opposing moral positions.<sup>44</sup>) At the opposite extreme, there are people who never think that anything is wrong, but we think there are few lawyers that fit into that category. (Kronman suggests that lawyers' habits are helpful here as well: Lawyers have to think about cases from the perspective of judges, from a perspective that considers the interests of others.<sup>45</sup>)

It is likely to be the unusual case in which a client's position is so clearly wrong that a lawyer must withdraw. In part this is because, as Sammons says:

Good lawyers tend to see valid claims of injustice on all sides of all disputes and thus it is easier for them to side with their clients because they know that we cannot determine what justice might mean for us as a community in the context of this dispute without the client's story being well told.<sup>46</sup>

But, at times, the lawyer's integrity will require her to withdraw.

Here again, the analogy to the way friends interact is helpful. If one of your friends discovers that, despite his best efforts, his son is selling drugs and asks you whether he should turn his son in, you might express an opinion on the issue, but you are likely to support your friend either way. If your friend is selling drugs, you might strongly oppose him and even distance yourself from your friend. If your friend is considering bombing the federal building to protest U.S. firearms policy, you might turn him in. We suggest that most moral problems that arise in the law office are like the first of these examples. Good people might resolve them in different ways, and the conscientious lawyer (though she might have decided differently than did the client) will support and work for the client.

This is the way we see the issue in the zoning story that illustrates our proposed method of moral counseling. We suppose that Ann Welch would have sought some sort of accommodation if it were her house in the zoning dispute—that is what creates the moral tension. But she does not believe that it would be morally wrong for the clients to oppose the zoning change, nor that it would be morally wrong for her to help them. If she had thought it would be morally wrong, we think that she would have withdrawn.<sup>47</sup>

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44. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 113-15 (1993). Kronman suggests that the case method leads to an understanding of the incommensurability of moral values, and ultimately to either stoicism or cynicism. *Id.* at 118. Our hope is that it might rather lead to humility in seeking truth.

45. *Id.* at 117-19.

46. Sammons, *supra* note 1, at 32 n.122.

47. Sammons wonders why Ann would be willing to go with the client either way.

Sammons appears to envision a lawyer who is quick to make moral judgments, and he suggests that the only moral options are a lawyer who withdraws whenever she would decide differently than the client<sup>48</sup> or a role morality in which the lawyer will make any argument for any client. We prefer our lawyer; we think she shows more respect for clients.

Sammons suggests that our position will encourage lonely moral autonomy and moral rebellion.<sup>49</sup> We do not discuss how the lawyer comes to the decision to withdraw, but in our experience it is far from the lonely autonomy suggested by Sammons. We see morals as communal in nature, and decisions such as this would be made following moral discussion with the client and within the law firm and (to the extent possible, respecting confidentiality) within the family and religious congregation.<sup>50</sup> Even if discussion within the family and religious congregation is not possible, the decisions for most lawyers will flow from morals learned in the family and religious congregation.

We were surprised to see Sammons' suggestion that, in encouraging lawyers to refuse to take actions when they find them to be immoral, we undermine the practice.<sup>51</sup> He finds our notion that lawyers might stand in judgment of the practice "appalling."<sup>52</sup> He sees our criticism of the profession as "moral rebellion."<sup>53</sup> Sammons wraps his vision of lawyering in the mantle of the practice, but, in fact, the practice is much broader than he suggests.

A practice, in the sense in which Sammons uses it here, is a tradition that generates internal goods, satisfactions from involvement in the practice that all within the practice can enjoy.<sup>54</sup> An example of an internal good for lawyers is the joy at seeing justice done in a case or reconciliation in a

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Sammons, *supra* note 1, at 39-40.

48. Sammons, *supra* note 1, at 40.

49. Sammons suggests that our argument that when confronted with moral conflict in the practice of law, the lawyer should be true to her moral values goes over well with students. On the contrary, we find that many students find this suggestion to be troubling. They find greater comfort in the prospect of a life that enables them to split their morals between home and work. Some would like to escape to a role.

50. We have in mind what John Howard Yoder calls the "communal quality" of belief and therefore of moral deliberation. JOHN HOWARD YODER, *THE PRIESTLY KINGDOM* 15-45 (1984).

51. Sammons, *supra* note 1, at 8, 34 n.126.

52. Sammons, *supra* note 1, at 34 n.126.

53. Sammons, *supra* note 1, at 35.

54. "Practice" is ambiguous in this context. What Sammons and we are talking about for the most part is the notion of the practice that is described, from Aristotle, in ALASDAIR MCINTYRE, 11 *AFTER VIRTUE* 475-83 (1982), *excerpted in* THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS* 417-24 (1985). Sometimes, though, Sammons and we use the term as it is used in "the practice of law." Our hope is that the two usages will describe the same reality.

neighborhood, whether the lawyers are involved in the matter or not. The practice may also generate external goods (money, power, prestige) which benefit the individual that accumulates them, but it is the internal goods that make something a practice. A practice teaches virtues. For example, there must be fidelity to those in the practice, truthfulness among those in a practice, and humility and a willingness to learn from those who have preceded one in a practice, before one can benefit from being in a practice.

To the extent that law continues to be a practice, we write within it. We write as lawyers who have had a broad range of experience practicing law. Each of us has practiced law for several years in addition to teaching, one of us in a general litigation practice in a small town, the other in a big city, big firm practice and in a legal clinic for poor people. Between us, we have trained thousands of lawyers in the nuts and bolts of law practice in both the substantive law of torts, family law, property, and trusts and estates, and the skills courses of trial practice, negotiation, client interviewing and counseling, as well as legal ethics. We speak within the practice, as beneficiaries of the practice, to the practice.

At one point, Sammons praises "the constant inquiry that goes on within all good practices about the morality of the role created by the practice."<sup>55</sup> We see our book as part of that inquiry, rather than something apart from it. Far from suggesting that one cannot be a good lawyer,<sup>56</sup> our attempt is to help to describe what a good lawyer does. We see the practice, not as a "moral threat,"<sup>57</sup> but as a moral opportunity.

Our argument that the lawyer should not play a role that is contrary to her morals is an argument that has a strong pedigree within the practice. The traditional lawyer, *e.g.*, Atticus Finch, of *To Kill a Mockingbird*, did not play a role. One of the themes of the book is that Atticus was the same person at the office that he was at home. The early lawyers in this country taught that the lawyer should not argue a position that he does not believe in.<sup>58</sup> Even today's Model Rules allow a lawyer to withdraw, in most circumstances, if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent."<sup>59</sup>

Sammons' suggestion that moral reform must come from within the practice<sup>60</sup> is right, but only in a sense—in the sense that the practice, being

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55. Sammons, *supra* note 1, at 37 n.137.

56. See Sammons, *supra* note 1, at 37 n.137.

57. Sammons, *supra* note 1, at 34, 37 n.137.

58. David Hoffman identified the professional ideal in his "Resolutions in Regard to Professional Deportment," in his *COURSE OF LEGAL STUDY* (2d ed. 1836), *reprinted in* SHAFFER, *supra* note 54, at 59ff.

59. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(3) (1983).

60. Sammons, *supra* note 1, at 44.

a theater for the virtues, is capable of moral regeneration. But people do not come into a practice without moral formation. The most important morals our students have are the morals they bring to us law teachers from family, neighborhood, and congregation. Our keenest obligation to them is to honor that moral formation.<sup>61</sup>

Often, reform of the profession comes from without. Our criticism of the traditional lawyer—that he is paternalistic—has its source in moral formation from outside of the practice: Our religious tradition taught us respect for personal dignity. Another example of a reform in the legal profession that has its moral roots outside the practice is the ADR movement; its roots are in religious practices of dispute resolution.<sup>62</sup>

We are as concerned as Sammons that the practice of law remain (or again become) a practice in which the members of the profession are concerned with the internal goods of the practice. We fear, as he does, that the practice of law is too concerned with external goods—power, prestige, money. But Sammons may here do what he accuses us of doing: He holds up an Aristotelian ideal that is so foreign to the experience of today's lawyers as to be counterproductive. Where we use Aristotelian friendship as an analogy for relationships with clients, Sammons suggests that the practice of law is the real Aristotelian thing. There is a danger there that the term "practice" will lose its moral roots and that the moral legitimacy which it carries will be used to justify the self-serving things lawyers do—just as the term professional (which originally meant to profess something<sup>63</sup>—in the case of lawyers, something about justice) has been coopted by the adversarial elitist advocates in the Bar. To the extent that Sammons equates the notion of the practice merely with what is common among lawyers, or with the adversary system, or with the rules of the profession, we fear that he furthers that process.

In the end, the strongest evidence that law practice needs moral influences from without is the state of the legal profession. As numerous observers of the legal scene, from late night comedians to law professors at

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61. See THOMAS L. SHAFFER AND MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES*, chs. 7 & 8 (1991), where such notions are explored in reference to Italian-American lawyers. Friendship, as described there is a good habit, a skill, that a lawyer has learned to practice in the family and therefore knows how to practice in neighborhood, town, and profession.

62. Andrew W. McThenia, Jr. and Thomas L. Shaffer, *For Reconciliation*, 94 *YALE L.J.* 1660 (1985).

63. See John T. Noonan, *Choice of a Profession*, 21 *PEPP. L. REV.* 381, 383 (1994).

our most prestigious law schools,<sup>64</sup> attest, morality in the legal profession is in a free fall.

#### V. SAMMONS' LAWYER-AS-RHETORICIAN

Sammons identifies James Boyd White's lawyer-as-rhetorician as his preferred model for good lawyering.<sup>65</sup> He suggests that enabling the client to tell her story and engage in a conversation with the community is the key lawyer skill. We join Sammons in praising this aspect of the lawyer's work, although we would prefer to think of the lawyer as storyteller, rather than rhetorician—rhetoric can distort,<sup>66</sup> and our understanding of Sammons lawyer is that he is one who accurately tells the client's story. Sammons identifies three tasks of lawyers that precede telling the client's story to the community: (1) listening to the client's story; (2) putting the client's story into language that is understandable to the community; and (3) finding the proper forum in which to tell the client's story.<sup>67</sup>

The lawyer-as-rhetorician (or storyteller) focuses on a different aspect of lawyering than our book does. Our book is concerned with moral counseling by lawyers. If we did a book on client interviewing, trial preparation, negotiation, or litigation we might choose the rhetorician as a useful reference. The notion that the lawyer's job is to present the story of the client to the community, to further the community's conversation about justice is compatible with our notion of the lawyer-as-friend. Our book, focuses on the lawyer's counseling activity, but helping the client tell her story is also the action of a friend. Perhaps the two notions meet when the lawyer who helps the client tell his story (Sammons' proposal) helps the client to understand the stories of others (our proposal). The conversation would move in both directions. We suggest that the lawyer should be concerned about both ends of the conversation. At their best, lawyers enhance communication on both ends of the conversation; at their worst, they distort it on both ends.

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64. See MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994) and KRONMAN, *supra* note 44.

65. Sammons, *supra* note 1, at 44-45.

66. Sammons cites Martha Nussbaum's description of "Hecuba's time": "[C]ommunication is replaced by persuasive rhetoric, and speech becomes a matter of taking advantage of the other party's susceptibility." Sammons, *supra* note 1, at 66 n.207 (citing MARTHA NUSSBAUM, *FRAGILITY OF GOODNESS* 415 (1986)).

67. MARTHA NUSSBAUM, *FRAGILITY OF GOODNESS* 90-95 (1986).

Sammons' lawyer can have a moral impact on the client. Listening to the client, exploring who she is, can change who she is.<sup>68</sup> As a part of preparation, Sammons suggests that lawyers discuss with clients the morals of the community and whether the story of the client will be persuasive to the community;<sup>69</sup> this can change the client. But Sammons gives us little account of the *moral* counseling of his lawyer; Sammons does not tell us how the lawyer and client make decisions.

Sammons suggests that for the lawyer-as-rhetorician, morals come into the conversation as a matter of technique. Sammons says, "[W]e explore morals with our clients because we cannot speak persuasively for them in any other way."<sup>70</sup> This is just not so: If the lawyer's only goal is to win, delay, deceit, and distorting the position of others, to name only a few, are also in the lawyer's bag of tricks; honest moral argument may be ineffective, *unpersuasive* simply because it is honest moral argument. (That may have happened to Atticus Finch in the trial of Tom Robinson.<sup>71</sup>) Sammons may have gotten moral discourse on the agenda of the lawyer-client conference, but we suggest that his lawyer is deceiving his client as well as himself.

Maybe Sammons would argue that distortion, delay, and deception are inconsistent with the ideal of the lawyer-as-rhetorician, whose goal is honest moral argument to the community. If so, it is now Sammons who is running counter to the trend in the legal profession; it is now Sammons who speaks from outside the practice. His model differs, at significant places, with the common teaching of the profession—a fact for which he takes our lawyer-as-friend to task. If the goal of the lawyer is to further discussion within the community, the profession has taken up odd ways of doing so. The practice of law often involves some level of deception, much of it allowed (some would say required) by the rules of the profession. Books on advocacy teach that lawyers should do their utmost to convince juries that they believe in their cause (without saying so); that they should do what they can to keep out damaging, even truthful (maybe especially truthful), testimony; that they should do what they can (within the bounds of the law) to keep the other side from gaining access to damaging evidence; that they should make arguments to judges based, not on what they believe the law should be, but on the interpretation of the law that would be in the client's interest; and that in negotiations they should lie about theirs and their clients' true valuation of claims. The danger of the adversary system gone

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68. NUSSBAUM, *supra* note 67, at 91.

69. NUSSBAUM, *supra* note 67, at 92.

70. NUSSBAUM, *supra* note 67, at 94.

71. He showed the jury their prejudice, when an appeal to white patronage might have been more successful.

wild is that the lawyer distorts the client's story in order to win, which does not further any conversation. For the lawyer-as-friend, the temptation toward distortion, delay, and duress should be the subject of moral discourse with the client.

#### VI. CONCLUSION: THE LAWYER'S INTEGRITY, THE CLIENT'S INTEGRITY, AND COMMUNITY

Sammons discerns that the motivation for our developing the lawyer-as-friend is a concern for the integrity of our students.<sup>72</sup> That is part of our concern: too often, the models of lawyers presented to students have no place for the students' integrity. But two other concerns also influenced the development of the lawyer-as-friend: the integrity of the client and respect for community.

There is a danger that the integrity of the client will be overwhelmed by the moral paternalism of the guru lawyer.<sup>73</sup> One of the strengths of Sammons' article is his identification of the risk that the lawyer-as-friend will be an unconscious guru, manipulating the client toward the lawyer's perception of right, rather than involving the client in moral discourse.<sup>74</sup> There is a danger that the lawyer will err either on the side of imposing her values or on the side of ignoring moral values. Developing the ability, the skill, to initiate and carry on such conversations without imposition is a challenge.

The risk of imposition, however, does not lead us to abandon our preference for the lawyer-as-friend, although we hope that we are and our students will be aware of the risks of moral imperialism and self-deception. Recognition of those risks is the first—and maybe the most important—step in dealing with the danger of lawyer imperialism. Even with the recognition of the risks, imposition is a danger. Lawyers cannot read their clients' minds, lawyers cannot know all of the effects of all of what they say on clients. Clients are used to being told what to do by paternalistic profes-

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72. Again, we see integrity, not in the lonely, individualistic way suggested by Sammons, but as a character trait that is formed and maintained in a moral community.

73. We are also concerned that the client's integrity will be overwhelmed by the amoral paternalism of the godfather lawyer. The godfather lawyer poses risks to both the integrity of the lawyer and the client.

74. Sammons' concern was also a concern of another thoughtful writer who has influenced our thinking, the Jewish philosopher Martin Buber. Buber concluded that moral counseling within a professional relationship would always be parental. He said, "I see that you *mean* being on the same plane, but you cannot . . . ." See SHAFFER & COCHRAN, *supra* note 4, at 37 (quoting MARTIN BUBER, *THE KNOWLEDGE OF MAN* 171-72 (M. Friedman & R. Smith trans., 1965)).



sionals; it may be difficult to get them involved as equal players. The moral life has risks, and there are risks to moral discourse. But we think that the risks are worth it.

The other motivation behind our development of the lawyer-as-friend is our respect for community, a hope that ours will be more than a society of rank strangers. Sammons draws the title of his review from the gospel classic, "Rank Strangers." He argues that lawyers should treat clients as rank strangers. Otherwise, he says, the lawyer's personal morality might slip in and influence the client; such are the dangers of friendship. The first verse and chorus of "Rank Strangers" reads (sings) as follows:

I wandered again to my home in the mountains  
where in youth's early dawn I was happy and free  
I looked for my friends but I never could find them  
I found they were all rank strangers to me.

Everybody I met seemed to be a rank stranger  
No mother or dad, not a friend could I see  
They knew not my name and I knew not their faces  
I found they were all rank strangers to me.<sup>75</sup>

The song is a longing for friendship, a desire for more than autonomy, a desire for community. This is a common complaint in America.

Our suggestion that the lawyer-client relationship might be a place for community may seem an odd one. Surely community is more the concern of home, neighborhood, and religious congregation than of the law office. Part of our argument for the law office as a place to start building community is that we all need to begin to rebuild community wherever we are: Bloom where you are planted. But in another respect, the law office may be a place where friendship is especially needed. Often, the people who come to lawyers are like the ones who sing *Rank Strangers*. They may have been abandoned by family and neighbors. They are in need of a friend. The subject of the lawyer's representation is likely to be the client's greatest concern, and the lawyer may be one person the client can trust with that concern.

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75. A. E. Brumley, *Rank Strangers to Me*.