June 1986

The Ethics of Dissent and Friendship in the American Professions

Thomas L. Shaffer
Washington and Lee University

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Legal Ethics and Professional Responsibility Commons, and the Legal Profession Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol88/iss4/4

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
THE ETHICS OF DISSENT AND FRIENDSHIP IN THE AMERICAN PROFESSIONS

THOMAS L. SHAFFER*

“No one would choose to live without friends, even if he had all the other goods.”
Aristotle

I. PART ONE: DISSENT

Ethics is a characteristic concern in the modern, organized professions. Legal and medical ethics are academic disciplines and courses of study in American medical and law schools. In both of these institutions, professional ethics is a creature of the establishment; it comes to use from the old boys who run things. As ethics, it is and has always been the study of what the better doctors and lawyers do. As professional regulation, it has for about a century been what the better lawyers and doctors impose on their colleagues and on the country—a negative matter, mostly, of what better professionals try to keep lesser professionals from doing.

The first systematic presentation of ethics for lawyers in the English-speaking profession was devised by a prosperous, social-climbing, Andrew Jackson-hating, utilitarian, Baltimore lawyer and law teacher named David Hoffman. Baltimore lawyers were, in Hoffman’s generation, the best in the country; they practiced with remarkable prosperity in the most affluent of America’s mercantile cities, and they charged the highest fees. Medical ethics for Britain and America were devised by a referee, Sir Thomas Percival, called in to soften a quarrel in the Manchester Infirmary in the 1790s. He wrote for gentlemen, he said; Percival’s ethics became influential because the better doctors adopted them.

Legal ethics were propounded for American business lawyers by a law teacher and judge in Philadelphia, George Sharswood. His original lectures on the subject were given in 1854, the year David Hoffman died. In the generation after Sharswood’s, legal ethics were codified for the first time, by a federal judge, Thomas

* Professor of Law, Washington and Lee University B.A., University of Albuquerque, 1958; J.D., University of Notre Dame, 1961.

References appear in Appendix B. A version of this article was delivered as the 1985 Edward G. Donely Memorial Lectures at the West Virginia College of Law. Copyright © 1986 by Thomas L. Shaffer.
Goode Jones of Alabama. Judge Jones was a Confederate war hero; he had been a legislative leader, a trial judge, and the governor of Alabama.

American medical ethics were first systematically propounded in Hoffman’s Baltimore; results of the doctors’ project there were published in 1832, the lawyers’ in 1836, and it is at least amusing that, at the time, Professor Hoffman had a bitter, rancorous quarrel going with the medical faculty. Medical ethics in America became an official subject in 1847, when the American Medical Association codified Percival’s ethics. Both the medical and legal projects reflect the popular ethical system of William Paley, which was a theological ethic for the successful: “The rights of the poor,” Paley said, “are not so important or intricate, as their contents are violent and ruinous. . . . Something may be done, amongst the lower orders of mankind, towards the regulation of their conduct, and the satisfaction of their thoughts.” The profession he recommended for the task was the lowest end of the clergy, the ill-paid curates who were as poor as their parishioners. (Trollope’s Josiah Crawley, for example, or the prolific Mr. Quiverfull.) Percival and Hoffman brought Paley’s view on the lower orders to medicine and to the law.

If you review the membership of the commissions and committees appointed since then to revise regulatory rules for doctors and lawyers, you will find many Percivals, many Sharswoods, and Joneses. You won’t find lawyers who do title opinions in the county seat or doctors who make house calls. You may find professors on these commissions, but not any who are awaiting tenure.

A. Retail Justice

Considering only legal ethics for a moment: I have wondered what sort of official ethics we lawyers would have in America if the creators of the subject had been frontier lawyers and urban defenders of street criminals. And what sort of revisions we would have today if the committees and commissioners of revision were made up of the flamboyant, the irreverent, and those who do their interviewing and counseling in prison cells. Hoffman, Sharswood, and Jones mostly ignored such lawyers, and when they did notice such lawyers they disapproved of them; they were the objects of the enduring words of professional disapproval—disreputable . . . unworthy . . . unseemly . . . unscrupulous . . . immoral . . . embarrassing . . . offensive . . . objectionable . . . scandalous . . . wholly unprofessional.

Frontier lawyers and urban defenders of street criminals have not used such words, of course. Which suggests that they might have a language of their own—an ethic of their own—that we might provisionally identify as the American legal ethics of dissent. Here, from one of the most popular of professional renegades, is a text, spoken in reference to the representation of criminals:

There is a direct relationship between crime and progress. . . . [T]hose who advocate progress are essentially criminally minded, and if they attempt to secure
progress by openly refusing to obey the law, they are actual criminals. Then if they prevail, and from being in the minority come into power, they are taken out of jail, banquets are given in their honor, and they are called patriots and heroes. [T]he criminal laws are administered, interpreted and construed in favor of the rich, as against the liberties of the poor, for the simple reason that the administrators of the criminal law desire to curry favor with the powers that be.

This renegade was Ephraim Tutt. During the generation between World War I and World War II, Mr. Tutt was the hero in some 120 short stories in *The Saturday Evening Post*. He was the creation of a New York lawyer named Arthur Train. Mr. Tutt’s long popularity was at least the equivalent of *Hill Street Blues*, which has not run for nearly as long and whose lawyers are not nearly as grumpy as Mr. Tutt was about his profession and about the law. (I will have to refer to him as Mr. Tutt, not because I have been reading the *Wall Street Journal*, but in order to distinguish him from his law partner, also named Tutt, who was not a relative and who has to be referred to as Tutt.)

Arthur Train published an autobiography of Mr. Tutt in 1943. It was to all appearances a legitimate autobiography; no authorship other than Mr. Tutt’s appeared in it. The center section of the book is a set of photographs of Mr. Tutt as a child, and of his parents, and of the house he was born in. The *Autobiography* was welcomed in the loftiest professional places, including law reviews published in Cambridge, Massachusetts and New Haven, Connecticut. Train wrote the review in the *Yale Law Journal*—of his own book. He almost succeeded in getting Mr. Tutt into *Who’s Who in America*. The review in the *Harvard Law Review* was written by Professor John M. McGuire, eminent teacher and scholar in the law of evidence, and was in content the story of Mr. Tutt’s—Major Tutt’s—service in the Army in World War I, possibly the only Mr. Tutt story not written by Arthur Train.

There is something significant about the popularity of a lawyer such as this among the readers of the *Saturday Evening Post*. The *Post* was, I think, the most ubiquitous magazine in the golden era of American magazines, a time with no television but with reliable mail service. You could subscribe to it, but many people got it from children who delivered it or sold it on the street for a nickel a copy. Readers of Russell Baker’s recent autobiography, *Growing Up*, may remember that he got his start in journalism by peddling the *Saturday Evening Post*. It is probably important that, in such a magazine, the enduring lawyer character was someone who dissented from the dominant professional myths—both from the myth of the rule of law and from the pretense that the legal profession is a monkish brotherhood devoted to the common good. “The fact of the matter is,” he said, “that honor and law haven’t anything to do with one another.”

Mr. Tutt was popular among American lawyers. One of several modern anthologies of the stories was edited, when I was in law school, by the late federal judge, Harold R. Medina. There have been several other anthologies edited by lawyers. Judge Medina said that Mr. Tutt was his hero when the judge was study-
ing law and that there were then "thousands of... young lawyers eager to believe that justice was not necessarily at the mercy of prosecutors who wanted convictions... or of the large number of unscrupulous persons in various categories... who seemed so often in real life to prevail over the righteous and the just."

Mr. Tutt was popular among older and more settled lawyers, too—lawyers who were in the situation the judge was in when he compiled the 1961 anthology. Judge Medina did not take up this curious popularity in reference to Mr. Tutt's truculent juris-prudence: "The law," said Mr. Tutt, "has inevitably been used for the benefit and aggrandizement of those in power." Inevitably!

Mr. Tutt dissented from the law, and from the legal profession. He refused the leadership and aristocracy that Toqueville said come with being a lawyer in America. He avoided the possibility of increasing the power he had from his license to practice and his wit. He declined appointment to the bench. He accepted a wartime commission in the Army, but he devoted himself to technical jobs rather than to command. He distrusted the profession's definition of the lawyer-client relationship, its rules on conflicts of interest, its notions about confidentiality, its idea of professional detachment, and the judgmental words with which it characterized lawyers who did not agree with the bar-association codes. He dissented from the principle that a responsible lawyer works within the system to make things better:

No doubt it is unsound charity to give a bleary-eyed old souse a dime for a cup of coffee, but when I look at his blistered feet bursting through the soles of his ragged shoes, I haven't the heart to tell him to walk two miles to a wood yard. It is bad philanthropy but it is good for the arteries... Let John Rockefeller deal in wholesale charity—I'm a retailer.

Mr. Tutt was not, though, an all-purpose curmudgeon. He was a retailer. He was generous and selectively loving. He had a sense of humor and more than ordinary wisdom. He adhered to conventional morals. He was, in fact, what his generation called a gentleman, both in the sense that his personal morals were admirable and in the sense that he could have had rank and position in the establishment, for the asking, if he had wanted them. His Yankee credentials were clean and bright; Calvin Coolidge was his neighbor and friend; he studied at Harvard, even if he was not content with the law he learned there nor the profession he joined there.

Mr. Tutt was not a revolutionary. He did not propose alternative political or economic systems—probably because he had no faith in systems. He did not propose an alternative ethic, either. He was a dissenter; he dissented from the proposition, common in his generation of lawyers and in the better law schools, that the practice of law was a school for virtue—that practicing law and following the leadership of prosperous lawyers was the way for a lawyer to become a good person. He dissented even more radically from the notion that the United States of America was, to use Jefferson's phrase, "God's new Israel," a righteous empire, a city on a hill. He dissented from the older and more English notion of the rule of law. The peculiar and vaunted boast of the Anglo-American system, the jury, were,
he said, "trained militiamen of the gibbet." The law, to Mr. Tutt, was a device to be used in his practice of retail justice. He did not share the view of his sometime ally, Miss Athea Beckman, who "prided herself equally upon her adherence to religious principle and the Acts of Congress." As a social and political phenomenon, American law was, in his view, something used by the better lawyers to make sure weak Americans remained weak. A practitioner of retail justice can use the law, but he cannot live with it unless he has a sense of humor.

Mr. Tutt's retail justice is one kind of dissent among American professionals. It is male W.A.S.P. discontent—individualistic, the eastern law-office version of the American frontier spirit. You get a contemporary and similar expression of dissent in medicine in Sinclair Lewis' young doctor, Martin Arrowsmith. Arrowsmith, torn between the professional myth of science in medicine and an ordinary human desire to heal the sick, went to St. Hubert's Island to treat victims of the plague. Arrowsmith had discovered in his laboratory what he thought might be a serum that would cure plague. But science—and, particularly, his mentor Dr. Gottlieb—insisted that he prove the value of the serum according to professional discipline. To do that, he had to have a control group, and that meant he had to pretend to treat some of the people who came to him. He had to give them injections of a placebo. They would worsen and die. Patients who got the serum would improve and live, if it was any good. Arrowsmith believed the serum would work. He ended up treating all of those who came to him, and resolving the demands of science with fraudulent research notes. Dr. Arrowsmith showed how retail justice works in the medical profession. Maybe you could call it retail science.

B. Dissent As Friendship

A different sort of dissent is in the stories of Mr. Tutt's contemporary, the entertainment lawyer Fanny Holtzmann, of the New York and California bars, and in George V. Higgins' modern stories about Jeremiah Francis Kennedy of the Boston criminal-defense bar. Neither Holtzmann nor Kennedy has Yankee credentials. Neither is a W.A.S.P.; only one of them is male.

Holtzmann's career as a lawyer is the story of a small, pretty, unmarried, Jewish woman from Brooklyn, the child of immigrants, the favorite granddaughter of a splendid, widowed Hasidic rabbi. Kennedy is a resolute Irish Catholic whose forebears worked with their hands, crossed themselves, went to church in Latin, and cursed the Protestant Brahmins of Boston. Miss Holtzmann studied law in the old Fordham night law school, on the twenty-eighth floor of the Woolworth Building. Jerry Kennedy went to Boston College. Both lawyers learned their law in urban Jesuit law schools whose mission was to offer vertical mobility to the children of immigrants. The difference between them and Mr. Tutt is that Mr. Tutt's ethic is an ethic of dissent as retail justice, and that Holtzmann's and Kennedy's is an ethic of dissent as friendship.

Fanny Holtzmann was the first woman to get an office in the new Bar Building,
at 36 West 44th Street. That building already housed some of the gray eminences of her day, including Benjamin Nathan Cardozo, who helped her get an office there. The headquarters of the New York City Bar Association was next door, but Fanny did not join it because it refused membership to women and admitted only a few safe Jews. She became a lawyer in 1923, at the age of twenty-one. The day she passed the bar examination she had more than a hundred show-business clients waiting for her to get her license; she had retainers from them. She argued for prompt admission so she could see to these clients—an argument she took all the way to the New York Court of Appeals, and won. She had already bought her office furniture—furniture for a one-woman law office, on the ninth floor. She had no partners; some of what she did was disapproved of in the more conventional law firm of her older brother, Jacob. She did, later, allow her younger brother, David, to practice with her as an associate.

Holtzmann was a magnificent, glittering success in life—both as a lawyer and as a leader. Her friends included the King and Queen of England, Justice Cardozo, Chief Justice Taft, Eleanor Roosevelt, and Winston Churchill—but not many practicing lawyers. Her clients included Noel Coward, Clifton Webb, Rudyard Kipling, George Bernard Shaw, John Galsworthy, the royal family of Russia, Tex Austin’s rodeo, Gertrude Lawrence, and Fred Astaire. She was probably the first film copyright expert in the American profession and the only lawyer in her generation who was objective about Hollywood. She was a brilliant negotiator, a consummate manipulator, a wise counselor, and a scholarly advocate.

There were virtually no women in practice in New York City then. Fanny did much of her professional work in England; there were not many women lawyers there, either. She suffered because of her sex. She never married; her only serious fiance expected her to give up her law practice if she became his wife. The London Daily Mail published an interview with her which said, among other things, that “seen from behind, she is reminiscent of Janet Gaynor.” Another London newspaper said that King George of Greece was a friend of hers and that she frequently broiled chops for the King in her Knightsbridge flat. Fanny said, “I didn’t go to London to broil chops for anybody. The King of Greece knew where the saucepans were; when he came to see me, he broiled his own chops.”

Those were the days when solicitation, advertising, and engineered publicity were mortal sins in legal ethics: “Disreputable . . . unworthy . . . unseemly . . . embarrassing.” When I became a lawyer, some forty years later, the profession still gave more attention to the size of the sign in the window than to what we did in the office. Hoosier lawyers got a looseleaf volume called The Indiana Code of Professional Responsibility Annotated, in the 1960s; at least a third of it was devoted to rules and rulings against advertising and solicitation. As late as 1977 the A.B.A. Journal thrice called lawyer advertising “the issue of the decade.”

This was the ethical climate in which Fanny Holtzmann practiced law. But she got into the newspapers regularly, and she went after any legal business that
came to her attention. Before she became a lawyer, she was a sort of law-firm paralegal, with her own branch office in the theater district. In that capacity, she got clients by writing collection letters for her law firm's client, a newspaper. She asked the debtors to come in and talk to her, without being specific about her capacity in the law firm. When they came, she signed them up as clients—her clients, even though they had to wait a year or two for her to get her license. This is the way she met Edmund Goulding, Hollywood actor, writer, and director, and her life-long friend and client.

Goulding owed the newspaper for a quarter-page Christmas ad. Fanny wrote him a collection letter, which was not answered. A year later, she wrote him again. She said she had heard many wonderful things about him, that the advertising bill was, she was sure, only an oversight, and that if he would come in and talk to her he would be able in the future to avoid such "quite unnecessary irritants." He came, brought her a bouquet of flowers he had bought on credit, and told her the story of his tangled professional and financial affairs.

"You're a man of imagination, Mr. Goulding," Fanny said. "You shouldn't be troubled with business matters."

"Who's going to handle them for me?"

"I will, if you wish."

"I wish," he said.

Later, after she had her license, she got wind of the fact that a Broadway revue called "Jubilee" made fun of the British royal family. She called the Lord Chamberlain and offered to quietly "wangle something," which she did. One reason she got that job was that the Lord Chamberlain had declined a similar offer from her, two years earlier, to wangle something regarding a movie called "As Thousands Cheer," which also was distasteful to the Royal Family. In the earlier case the Lord Chamberlain declined her offer and made a public protest instead; the publicity over the protest sold thousands of tickets.

What Miss Holtzmann said, by the way, to the producer of "Jubilee," was "Listen, dear, what are you trying to do, buck the British government? Maybe you don't want to put on a show in London ever again. Listen . . . ." The revue was rewritten. Fanny did not get a fee for her work, but, as a sketch in the New Yorker said, "The good will was worth thousands."

She got bad will, too, especially from her male elders in the profession. The barrister who defended the libel claim she brought for the Russian royal family against Metro-Goldwyn-Mayer called her a charlatan and a publicity hound. Fanny had learned of the libel case at a cocktail party, after other New York lawyers had turned it down. She recovered judgments and settlements running into the hundreds of thousands, about half of which she took as her fee. Louis B. Mayer, the principal defendant, was, before long, Fanny's friend and he was her confidant, although she represented people who had claims against his company.
Fanny Holtzmann did not follow the professional rules. She may even have engaged in what lawyers then called barratry, maintenance, champerty, self-laudation, and solicitation. She sometimes, apparently, charged excessive fees. I suspect the reason she stayed out of trouble was that the old boys in the bar association did not want to prosecute a small, pretty, Jewish woman—not until she did something really terrible, which she never did. Old boys and their ethics aside, Fanny Holtzmann was a good lawyer. Her clients became her friends; she was faithful to them and they were faithful to her, professionally and socially. Much of her success depended on her ability to call on the show-business fraternity to help her work her cases out. Justice Cardozo said to her, as she began practice, "'[Y]our true education will come from your clients... You will be a good lawyer because you have infinite curiosity.'"

She also became a significant force in American Zionism and in the creation of the State of Israel. She worked tirelessly, sometimes with the young brothers, Joseph, Jr., and John F. Kennedy, to get Jews out of Nazi Germany. She led a simple personal life, lived at home, supported her aging parents, and was generous to the poor and the homeless. A nice Jewish girl, to whom faith and moral tradition were not only important but definitional. But for her disregard of professional propriety—and, maybe, in spite of it—she would be remembered as a heroine of the profession. I teach with stories of American lawyers, and it is of course important that some of the stories I use be stories about women. Fanny's is the best such story I have found—and the students love her.

Dr. Carole Horn, internist and professor of medicine at George Washington University, could be Fanny's medical parallel. Dr. Horn is regularly criticized—like Dr. Fiscus of "St. Elsewhere"—because she doesn't wear a white coat. She says:

Psychologically it seems to separate me from those who have asked me to participate in their care. Some people expect it, but for me it's a distancing mechanism, and that's not something I like.

Occasionally, however, the absence of a white coat pays off in an unexpected way. One wizened little gentleman, charming but demented, was convinced that his social worker and I, since we do not wear those official-looking coats, were around the hospital for no better reason than to keep him company in bed. Regularly, he invited us to climb in and cuddle up. He wouldn't hear anything about 'doctor,' and by the time he finally left we were all a bit relieved.

But four days later there was a frantic call from the daughter-in-law who had kindly agreed to care for him at home, so he wouldn't need to be institutionalized. He was trying to get her twelve-year-old daughter into bed with him, she sobbed.

'Did he touch her?' I asked, immediately concerned.

'No, never. Only kept talkin' to her to come in.'

'Oh,' I replied, relieved, 'That's no problem, he always does that with me, too.' An audible gasp at the other end of the line. Then we talked about the confu-
sion that sometimes affects elderly people, and I explained that he seemed to be confusing women around him with his late wife. He had never pressed an invitation, I reassured her, and after his recent stroke I didn't think he ever could. She was able to tell her child that Grandpa just mistook her for someone he had once cared about, and she should ignore him.

Had he remained troublesome, I suppose we could have gotten the young woman a white coat.

C. Dissent Without Friendship

Calvin Trillin's story about immigration lawyers in Houston begins in a line outside the offices of the Immigration and Naturalization Service. The line leads to a waiting room that is, he says, like a bus station; this line is only for lawyers. The lawyers who wait in it are waiting for a seat in the waiting room, where they will wait to be heard by the low-level bureaucrats who decide the fate (and in many cases the life or death) of thousands of people who want to remain in America. The separate line is the product of organized professional pressure; it does not assure a prompt or adequate or fair hearing in the bureaucracy; some of the lawyers waiting there hope to provoke sympathy from the low-level bureaucrats they finally reach, but the more urgent business is to get the bureaucrats' attention. Another rule for lawyers in that office is that each of them is permitted to bring five exceptional old cases to the attention of the deputy director. There, too, the objective is attention, the hope is sympathy.

That office is not a manifestation of the American dream or the rule of law. If it is by some analogy a court, the lawyers who seek there to serve client interests do not think of themselves as officers of the court: The rule of practice, one of them says, is, “Don't let those bastards get you.” The reason behind the caprice in such a governmental operation, he says, is that “the bosses don't want strict enforcement; immigrants represent cheap labor.” Many of the cases these lawyers argue there fall under an administrative rule extending permanent status to aliens who have resided in America for seven years and can show both good moral character and extreme hardship. “Some poor bastard has been here eleven years. His wife's a permanent resident. You ought to hear them down there rank graduations of hardship! The bastards! I could tear them apart!”

Not all of them adjust to their law practice with such anger; not all of them are Mr. Tutts. Some of them become as bureaucratic as the bureaucrats. One such lawyer “takes only cases that do not disrupt the system [of forms and files] he has worked out for processing applications.” Another, who handles immigration cases involving corporate officials moving between countries, says, “A blueprint of the building is the key to the practice of immigration law.” Another says, “I beg to differ. The key to the practice of immigration law is knowing that an immigration examiner who wants to go to the bathroom has to pass through the waiting room to get there.” Most of the clients of these lawyers are immigrants from coun-
tries other than Mexico, because Mexicans have their own way of adjusting to the rule of law in American immigration practice: “Posting bond and going through a deportation hearing is expensive and difficult; coming back across the border in a few days usually isn’t.” The Mexicans are, therefore, for the most part, beneath professional notice.

The strongest hope these lawyers hold out to their clients is that the bureaucratic process will defeat its own purposes—that it will remain in lethargic motion, without being able to deport the client, until the client either grows old and dies in America or the law is changed. “Any immigration lawyer worth his salt would say, ‘Get here first!’”

The first adjustment for an immigration lawyer is an acceptance of this legal world—sometimes with irony and sometimes with the sort of resignation that says such a law practice is a way to make money that can then be spent doing something worthwhile or pleasant. A lawyer from the it’s-a-living school says, “Immigration lawyers are people who have an interest in seeing that some folders are on the top of the pile and some folders are on the bottom of the pile.” The ironic school is more creative—as, for example, in the part of the practice in which an immigrant is shown to be able to do something that an American employer cannot find a citizen to do. The professional task in that case is to draft a job description that sounds abstract but in fact describes abilities only the client has. It involves collaboration by client, employer, and lawyer. It is cynical about the law and takes its joy in verbal creativity: “Immigration law is taking a short-order cook and making him into an executive chef. What we’re talking about here is a matter of focus.”

Mr. Tutt would have enjoyed that. It was, I think, said with a smile, by a lawyer named Pete Williamson. He and his father Sam are immigration lawyers who react to their legal order with anger and irony rather than bureaucratic conformity. Sam Williamson is the lawyer who says “Don’t let the bastards get you.” His son Pete began law practice as counsel for the farm workers’ union. Sam Williamson is the son of Jewish immigrants; his name was originally Wishneweski. He says, “It comes natural for a Jew to become an immigration lawyer. There’s something vestigial, something in your blood. We’ve been strangers so long we resent it.”

“When he is angry,” Trillin says, “he punches the air with his index finger. He is usually angry.” Sam Williamson was heard by Trillin, shouting from the lawyers’ line outside the immigration office, “If Jesus tried to get into this country, they’d exclude him on a 212(a)(15).” That section of the Immigration and Nationality Act bars immigrants who are likely to become public charges. Another member of that small and informal professional association (thirty lawyers) says that it is characteristic of the rule of law in immigration that the people who are excluded from America are “the people who need the most help.” These include refugees from Central America whose home governments want to kill them. “The United States is not an innocent party.”
Sam Williamson explained to Trillin why he is an immigration lawyer: "It's a competent, involved, technical job in which, if you're successful, you can see the consequences of your actions. Also, I don't like the government." This is the practice of law as dissent. It produces a professional fraternity that is mutually supporting and probably more truthful than most professional fraternities are. Their consensus is, though, grounded only on dissent. They do not propose an ethic that can be an alternative to notions of the rule of law and civic responsibility that they scoff at. This fraternity in some ways joins the bureaucracy in oppressing the poor: The creation of the lawyers' line to the waiting room meant that people without lawyers would wait longer. "[O]ld people and women with babies remained outside in the cold." Lawyers in the line can apparently keep their clients with them. One such case involved a couple seeking permanent status for the husband, a waiter and a Turk. The law being invoked in that case permits permanent status for the spouse of a citizen, provided the bureaucrat in the case finds the marriage is not a sham. Much of the lawyer's art there is in anticipating the capricious bureaucratic categories that will be applied on the issue of sham marriage. Professional folklore says that marriages across racial lines are suspicious. The Turkish waiter in the case I am talking about was married to a black woman. A colleague of their lawyer came to their place in the line and struck up a terse conversation with their lawyer. "Three dollars," he said; that was the amount he was betting counsel on the outcome of the case. He was betting that the union of an American black woman and a Turkish waiter was, to the law, a sham.

It is hard to imagine that Fanny Holtzmann or Dr. Horn would have engaged in this esoteric transaction about clients who were standing close by. Dr. Horn speaks of patients inviting her to participate in their misery, and I think her notion would have appealed to Fanny Holtzmann. The point suggests a distinction in the stories of professional dissenter. Some of them dissent with anger or irony. Some of them dissent and see an alternative moral vision—a vision such as the professional as participant. From the alternative moral vision comes an alternative ethic. The alternative ethic is a second step, a step beyond the dissent that is evident among the Houston immigration lawyers and in the Mr. Tutt stories.

D. Dissent As Coming Home

The strongest alternative-ethic stories in the American professions are stories of immigrants. Calvin Trillin reported some evidence of an alternative ethic in the Williamsons—son and grandson of Jewish immigrants. I notice the alternative ethic more clearly in the stories of Fanny Holtzmann and Jerry Kennedy. These dissenters look with disgust, as Mr. Tutt would, or at least with disagreement, at the legal world of the Immigration and Naturalization Service in Houston, or the medical world that prescribes white coats. But then they turn to another ethic, an ethic they bring with them to their profession and find better than the ethic the profession offers them. This turning is, Michael Novak says, "not so much an individual
awakening as an individual's conscious and deliberate joining of a community" other than the professional community; a community "extended in time and space and into eternity. It is less like starting a new life, more like coming home."

Coming home makes it possible for the dissenters to practice the virtues as they practice law and medicine and to offer something useful to the rest of us. If I were going to stop with the immigration lawyers and Mr. Tutt, and their medical counterparts, I might try to work out an ethical theory that said that what you have in these stories are American professionals whose clients are more important to them than their institutions are. Clients and patients are more important than science or the rule of law, than the ideal that an American lawyer or doctor is a moral and political leader, and than the claim that being a lawyer is a way to become a good person.

The claim that clients are more important than institutions is less than I want to do with these dissenter stories, though—first because it is a negative argument and second because it is not very remarkable. I should be able to say something more, and to say something positive. I should be able to do more than to compare people whose lights are interpersonal with people whose lights are collective and social. I should, especially, be able to say something positive about the view of professional relationship that these doctors and lawyers have. I think I can do that with the story of Jerry Kennedy, who, I think, combines Mr. Tutt's retail justice with Fanny Holtzman's understanding of friendship.

Jerry is the principal lawyer in George V. Higgins' two recent crime novels, *Kennedy for the Defense* (1980) and *Penance for Jerry Kennedy* (1985). Jerry is, according to his wife Mack, the classiest sleazy criminal lawyer in Boston. His creator is himself a Boston criminal defense lawyer. Both Kennedy and George Higgins are Irish Catholics who went to law school at Boston College. Both are passionate about the Red Sox.

Anybody who knows Jerry Kennedy would say that he is a good friend. Friendship is both the secret of his moral life as a lawyer and the source of what his friends call his innocence. His best friend is his wife Joan McManus. He calls her Mack and—in violation of professional propriety—he discusses all his cases with her. "Any man who had the brains to marry Joan McManus probably shouldn't go badgering God about 'what have You done for me lately. . .,'" he says. "A stupid mistake is one thing—ingratitude is something else again, and I'll be damned if I'll put myself in a position where I have to cop a plea to St. Peter for having been ungrateful. Mack is my life."

Mack and Jerry have been married for twenty years. They have one child, a daughter named Heather, whom they call Saigon, because her timely birth kept Jerry in law school and out of Vietnam. Mack is in the real estate business and will this year make more money than Jerry makes from his law practice. She understands his law practice better than he understands her business. Mack says of Jerry's style as an advocate, "You sound different when you're saying something
that you really think, and something you just hope maybe you can get somebody else to think.’’

After Mack and Saigon, Jerry Kennedy’s closest friends are clients. He blusters about the adversary ethic and says that the only thing criminal defendants mean to him is fees, but this is an instance of his trying to get somebody else to think what he doesn’t think. Maybe it’s a way to live with the fact that he helps keep brutal pimps and loan sharks in business. Not all of his clients are friends, but those he does the best work for are. Here is what he says about one of them, a man who has been a client nearly as long as Mack has been Jerry’s wife, and who is known in his trade as Cadillac Teddy:

Teddy . . . is . . . one of the best car thieves on the eastern Seaboard . . . so good that he is able to support himself as a car thief. He has been arrested repeatedly, which is how he made my acquaintance, but he has never done time. That is because I am so good. It is also because Teddy is so good. . . . I . . . bill Teddy . . . for my travel time, just like any other plumber working door-to-door, and since he categorically refuses to substitute a lawyer living closer to the scene of his most recent infraction, I figure he wants . . . Teddy pays me with some of the money he gets from stealing cars.

Jerry helps Teddy when Teddy gets into trouble—as, for example, when a police officer, who failed to catch Teddy with a hot Cadillac, ate Teddy’s driver’s license and then arrested Teddy for driving without it. Teddy also helps Jerry when Jerry is in trouble. When Jerry’s family was being harassed by a thug, and Jerry told Teddy about it, Teddy said, “I know a guy that knows that area.” Teddy put the wheels of justice—retail justice—in motion. When Jerry offended the government and got into tax trouble, and needed the best tax lawyer in Boston, and couldn’t get an interview with this lawyer, Teddy called on a race-course friend and got Jerry his interview. The race-course friend was named Buddy Belcher. Jerry said, “Who the hell is Belcher . . . why should this guy help me out?” Teddy said, “Simple. I did him a favor.” Maybe Teddy got Belcher a Cadillac.

Jerry’s story teaches lessons about friendship that Paley, Percival, and Sharswood, with their talk of professional fraternity, did not know and did not think they needed. Jerry does not describe these lessons; often he does not have his own story straight. He says, “I go to my office to make a living, not to make a life. My life is at home.” But this is one of those things he hopes other people will think—that he doesn’t really think himself. The fact is that his friends are at and around his office and on the telephone, as much as they are in his life at home.

Much of the worldly threat he hopes to save his wife and daughter from is at home, and not at the office. He does not put pictures of Mack and Saigon on his desk, least some violent client get the wrong idea about influence or revenge, but that bit of protection doesn’t work; it doesn’t protect them from the violence of his work, because Jerry, who has covered pretty well the risks he takes in practicing law, is unable to protect his family from the risks he takes in his practice.
of the virtue of friendship. He takes the risks of friendship home. He talks to Mack about them. He in fact makes his life in his office as well as in his home, and he in fact takes his office home. He mixes the two together. He comes home for his professional ethics, as you might expect a healthy, busy, threatened Irishman to do. (An interesting comparison here, a businessman who did not practice the virtue of friendship in his work, and who did not take his risks home, is Thomas Mann’s stoic German businessman Thomas Buddenbrook, who suffered the burdens of a divided life, never said a word, and died young.)

Jerry hasn’t divided himself in two, the way the old boys’ adversary ethic says he should. The more cases he loses, as he grows older, the more he realizes that there is a relationship between his work and his practice of the virtue of friendship—that, for him, to practice law well is to practice friendship. Cadillac Teddy said to Jerry this year, “You’re only good when you really mean it,” and Jerry agreed. He would not have agreed when he first met Teddy, and Teddy would not have said such a thing then. But Teddy and Jerry have moved into the second half of life. They have begun to realize that they are participating in one another’s lives. They may not yet know what the score is, but they have begun to learn what it is not, and they try to be honest with one another. They have come home together.

In last year’s story, Jerry defended Lou Schwartz, an accountant who grew rich by doing tax returns for organized crime. Lou and Jerry first became friends when Lou did Jerry’s tax work. Jerry was Lou’s client then. Lou has been as careful as Cadillac Teddy, but he has not been able to do anything about the fact that he is attractive as a potential informer for the federal government. The United States Attorney came after Lou, on a relatively technical tax charge, and tried to force Lou to inform on his Mafia clients. Jerry thinks this is an abuse of civil liberties; the prosecutor, he said, “was willing to do with an indictment what the cops used to do with truncheons . . . before the Supreme Court decided citizens have rights.”

Lou and Jerry are friends. For that reason, Mack told Jerry not to take the case. Her argument was instinctive and protective, but the words she used were words of professional detachment, the argument for wearing a white coat. They were words Mack got from the old boys who invented American professional ethics. Jerry uses those words, too, but not when he’s serious. “Lou has done good work for me, and kept me out of trouble,” Jerry said. “Now Lou is in the gravy. I’ll see if I can get him out. Nothing wrong with that. . . . That is what I do. Do that sort of thing for lots of people. . . . It’s something that I have to do, something I wish I didn’t. The only problem with the sense it makes is that I wish it didn’t.”

Jerry feels too much; that is Mack’s argument. And the argument of our professional elders. Lou Schwartz, the client, knew that the case was a loser, and was resigned to that fact. “What you did was all I asked,” he told Jerry, after the trial, “all any man could do . . . do the best you can. Miracles I don’t expect. I’m not a Catholic.” Lou called Jerry a hopeless innocent, a hopelessly nice guy.
Lou could have had a more experienced lawyer, at Mafia expense, but he wanted Jerry. The Mafia boss, Nunzio, was afraid of Jerry. He wanted a lawyer for Lou who would make sure Lou did not become an informer. If Lou becomes an informer, or seems about to, the boss will kill him. Selection of counsel is a sober decision for Lou. Lou argued for Jerry, though, rather than a retained Mafia lawyer: “He’s tough and I trust him. He will go in and try a case, and he will hate to lose it. But he will not ham it up.” Lou wanted a friend to help him—someone who would not smother Lou’s integrity and who would respect Lou’s settled determination to go to prison rather than to inform—would respect that determination in Lou, rather than in the Mafia boss. Lou wanted his integrity taken seriously, and he therefore wanted a lawyer who had integrity of his own. He knew that Jerry is such a lawyer because Jerry is his friend.

Notice who is the advocate here. Jerry Kennedy had not done much work in federal court, and the little he had done involved heroin and sawed-off shotguns, not income taxes. Jerry, in the cases he knows, claims that he is like a person who can fix television sets: “What counts is not how long I spend turning screws and humming, but knowing which one is the right one when I open up the set.” Jerry could not offer that sort of help to Lou Schwartz. But Lou did not want a lawyer, however expert, who would hide Lou’s dignity behind technique and hypocrisy. He wanted a lawyer who had integrity and who knew how important Lou’s integrity was.

“This is my case,” Lou said to the Mafia boss, “and my hide. This is my time I’ll be doing. Jerry knows me, I know Jerry. I am comfortable with him.” He won his argument with the boss. He got Jerry for his lawyer, and later he wanted Jerry to know how much he had wanted Jerry to be his lawyer: “Oh, you would’ve been proud of me, how I fought for you,” he said, “It was almost as good, Jerry, as the way you fought for me.”

II. PART TWO: FRIENDSHIP

Let me pause to summarize a bit. The moral inheritance we have as American lawyers and doctors includes dissenters. Dissenters are those who: (a) do not believe (i.e., dissent from the professional teaching) that the way to be a lawyer or doctor and a good person in America is to follow the moral leadership of elders and guilds in the professions; (b) do not accept (i.e., dissent from the principle of American civil religion) that America is God’s new Israel; and (c) do not find, in American legal ethics a trustworthy commitment either to the rule of law or the principle that a responsible lawyer works within the system, nor in the American medical profession, a trustworthy commitment either to science or to healing.

Some of these dissenters offer (or, rather, they found or brought with them and now turn to) an alternative professional ethic. Their alternative ethic says that clients and patients are more important than institutions, that clients and patients
are more important than abstract and official ideals, and that friendship is more important than justice. The cultural reality—the history—behind their alternative ethic is that the dissenters have learned from their communities (i.e., from their families, their neighborhoods, and their religious congregations) how to be friends. The essence of their professional ethic, and the ground of their dissent from the official professional ethic, is that they seek to practice the virtue of friendship with their clients.

The next question has to do with who these friends are and with an ethical justification for preferring clients and patients who are friends over clients and patients who are not. It won’t do to say that all the clients in these professional stories are friends. That is not true, for example, of Jerry Kennedy. He actively dislikes some of his clients; he is personally indifferent, and therefore bored, with many others. The descriptive question for his story is how he comes to make friends among his clients: Which clients does he practice friendship with? The descriptive question is important because Kennedy does his best work for clients who are his friends, and fails most clearly for the clients he dislikes. Jerry hasn’t got time and energy for many friends. As it is, when he lies awake at night, it is usually for one of two reasons—either he is worrying about Lou Schwartz or he is talking on the phone to Teddy Franklin.

If friendship is understood in an ordinary way—as earthy and human—it becomes a difficult ethic, particularly so in a culture that values equality and fairness and that has tended to categorize its professions as if they were regulated utilities. The issues as I see them are:

(A) How does friendship come about?

(B) If it comes about as a preference for some clients over others, how is the preference justified?

A. The Issue of Preference: Is It a Moral Issue?

The key issue is preference. We usually think of our friends as people we prefer. But there is a view of friendship that is deterministic; if this view is persuasive, then the ethical issue is not how the professional chooses his friends but what he does about the friendship he just happens to have.

One school of thought would say that a lawyer such as Kennedy and a doctor such as Carole Horn come into friendship as a result of circumstance—or, if you like, of the will of God: My friend is a person who happened to come my way, and somehow we clicked. It is the click that makes the friend. As Martin Buber says it, “I become aware of him, aware that he is different from myself, in the definite, unique way which is peculiar to him, and I accept whom I thus see.... I can recognize in him, know in him, the person he has been (I can say it only is this word) created to become.” The identity of each of us, and the possibility
of integrity and constancy in each of us, lies in a fresh, focused benevolence. If this happens with some clients and not with others, the explanation is chance, or the will of God. The occasion is a miracle. If you see the hand of God anywhere in your life, you see it here.

This is C.S. Lewis’s view (and St. Augustine’s). Our friends are those whom God sends to us in a certain way. Lewis came to this view out of a radical disagreement with the classical (Greek) teaching on friendship. As much as he valued the love of friends, he could not go along with Aristotle’s ethics of virtue. Lewis did not find friendship to be a school for virtue. Friends are as likely to support one another in vice as in virtue, Lewis said. They are likely to end up, as professional associations and ethics commissions have in America, in Olympian superiority, or (as the professional Brahmins of Boston did) in Titanic tyranny, or (as Lou Schwartz’s clients in the Mafia did) in vulgar cruelty. Friends are as likely to work together in a garden of vice as they are to enrich one another’s goodness.

But Lewis also believed that friendship is love and that love is the ultimate virtue. He had a difficulty; the way he took out of the difficulty was to see his friend as one whom God sent his way. The purposes of the friendship keep it from being a school for vice, because those are the purposes of God. “[I]t is He who has spread the board and it is He who has chosen the guests. It is He, we may dare to hope, who sometimes does, and always should, preside. Let us not reckon without our Host.” 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.

It needs a healthy faith to see friends in professional practice in this way. Fanny Holtzmann probably had the faith. She didn’t say much about it, but she did not have the problem Jerry Kennedy has had of clients who suffered at her hands because they were not her friends. In any event, as a matter of professional ethics, it would be a useful discipline to look for the purpose in each client’s coming along. It would help take the professional person out of his egoistic self. It would save a doctor or a lawyer from looking at a person and seeing a routine instead of an adventure and from being surprised when he finds more than a routine. Fanny’s story shows how it works.

Mr. Tutt tended to see each of his clients as a piece of ammunition in his campaign to humiliate hypocrisy and power. He tended to assume devious evil in the wealthy people who came his way, and innocence in the poor. To ask what was going on when a stranger came to him would perhaps have been a way to ask who the stranger was and what made him who he was—to remove him from the injustice of Mr. Tutt’s categories. And that would have been a useful discipline. I doubt that Fanny Holtzmann was as much in need of this discipline. She was successful at being lawyerlike and feminine at the same time. She had learned from her grandfather, Rabbi Hirsch Bornfeld, a useful, daily curiosity about the purposes of God, the Hasidic God who is in all things, in all people.
Mr. Tutt, out of social and economic prejudice, did not notice many of the people he met in the practice—including some people whom you and I would say were his clients. In the most quizzical of all of his cases, he purposively drafted an invalid will for Caleb Baldwin. Mrs. Baldwin, whom Mr. Tutt believed to be a wicked, designing woman, commissioned the will. It was she who came to his office, but Mr. Tutt acted to protect Mr. Baldwin from Mrs. Baldwin. Mrs. Baldwin was either his client, or she was the victim of his plot to deny her any legal help at all. He made no attempt to know her; he called her "old chiselface." And he defended himself with the profession's sophistry on conflict of interest, sophistry that he would in another case have condemned as tosh.

In 1919, in one of the earliest stories, Mr. Tutt defended a tramp named Hans Schmidt, who had been arrested when asleep inside the house, and in fact on the bed, of an inoffensive but wealthy old man named John DePuyster Hepplewhite. Mr. Tutt was contemptuous and sarcastic when he had Mr. Hepplewhite at his Titanic mercy on the witness stand: "Aha! The police 'attended' to my client for you, did they? What do you mean—for you? Did you pay them for their little attention?" It turned out that Mr. Hepplewhite did not want to prosecute the old tramp, and it turned out also that the old tramp was in Mr. Hepplewhite's house to steal. The jury returned a verdict of guilty. The old tramp then told the judge, "Sure... I'm a burglar... When I heard the guy... coming up the stairs I just dove for the slats and played I was asleep." Mr. Tutt had no friends in the case. He perhaps sought one friend, but in vain. He refused to seek any human regard from Mr. Hepplewhite, or to give him any. Perhaps Mr. Tutt failed to see those God sent his way, and therefore failed to see God's purposes.

In any case, the purposes-of-God theory does not dispense with the question of preference. If my friends were chosen for me by God, and if I then treat them better than others who come my way—even though, as in professional practice, I am paid by the non-friends as well as by the friends—I need an ethical justification for the disparity in professional performance. In that reasoning the question of preference in service is similar to the question I would have if I regarded my friends as those I choose in the first place. The issue is in either case an issue about preference.

Jerry Kennedy exploits some of his clients; he throws their money away and does nothing of value for them. And when Mack says that the money he takes from pimps is blood money, Jerry says, "When you sell a house to somebody, do you make sure he's paying for it with clean money... If he got the down payment by cheating on his taxes, that's his worry, not yours." The specific benevolence of these lawyers toward their clients is not accounted for precisely enough by characterizing these lawyers as people who sit by the side of the road and make friends of those God sends along. That is a worthy thing to do, but it is not what they do. It is not what friendship means to them. The purposes-of-God theory may be a way to describe their professional situations but it does not provide a clear enough justification for their preferring some clients over others. The question is still a question about preference.
One argument would say that a lawyer or a doctor should seek friendship with every patient or client who comes along. Dr. Horn's stories, and some of the nineteenth-century doctor stories (such as Trollope's *Dr. Thorne* or George Eliot's *Middlemarch*) can be read to make that argument. So can Fanny Holtzmann's story. The logical consequence of the theory is that every client relationship that does not become a friendship is a moral failure—a matter either of refusing to offer friendship or of wrongfully spurning friendship when it is offered. This argument resolves the issue of preferential professional service by claiming that poorer service is the consequence of a sinful refusal to be friendly. The issue of preference is, on this view, an issue about moral fault. Lewis and St. Augustine argue that preference is not a moral fault—that we need not feel guilty about clients who are not our friends. (If we do need to feel guilty about clients who are not our friends, because sound morals require that we offer friendship to all clients, we depend on an ethic of universal, or *civil* friendship, which I discuss in Part III as an aspect of the ethics of friendship, sub-topic gentle cynicism.)

The argument that preference is not moral failure is deep in the classical literature on friendship, which understands preference as a fact of life, as a sort of psychological economy rather than as moral failure. "[S]uppose that you had a great deal of some commodity," St. Augustine said, "and felt bound to give it away to somebody who had none, and that it could not be given to more than one person; if two persons presented themselves, neither of whom had . . . a greater claim upon you than the other, you could do nothing fairer than choose by lot to which you would give what could not be given to both. Just so among men, since you cannot consult for the good of them all. . . ."

Fanny Holtzmann wanted to live and work in show business; the debt-collection office she opened, before she was a lawyer, was in a theatre building; it was a humble office but it had a bay window on Broadway. Jerry Kennedy, for all of his skepticism, appeals to those of his clients who see the world as he sees it; if he didn't, he would by now be a specialist in the defense of pimps. But these lawyers also have clients who are not their friends, are not among the people they reach out to. The difference between clients who are friends and clients who are not friends is a matter of preference; preference is the issue. The clients who are friends are the clients the lawyer prefers. The moral issue is not about a divine lottery; it is about choice. If friendship in professional life is tragic, it is tragic because of choice, and not because these lawyers try to make friends of *all* of their clients and often fail in the attempt.

The clients not chosen to be friends are at some disadvantage. They do not get as much good service as those who are friends. Sometimes the diminished service is also the product of moral failure—but, Augustine would say, the *preference* is not the moral fault, since "you cannot consult for the good of all." Still, the poorer service and the moral fault seem to be related and both seem to follow from the preference.

Jerry Kennedy worked for a while for a freelance mechanic named Donald
French. French was maintaining the engines on a boat used to smuggle drugs. He sought preventive legal advice from Jerry because he was worried about his situation. Jerry did not seek to make a friend of French. He took all of French’s money and spent it lavishly. He found out, but did not tell French, that French was the object of ominous designs by federal narcotics agents. Jerry failed to head off a raid and a shoot-out in which French killed one of the narcotics agents. He then represented French in some fairly humdrum plea bargaining on a homicide charge. French was, throughout, literally friendless.

Looking back on that case from middle age, Jerry would probably say that he should have turned it down. He would probably not say that he should have extended friendship to French, because, Jerry would say, he has only so much friendship to give. Maybe he would have done better work for French if French had been his friend. Maybe, reflecting on the truthfulness and mutual respect that characterizes his work for Cadillac Teddy or Lou Schwartz, Jerry would say that it’s too bad he was not Donald French’s friend. Too bad. As in tragic. But not as in sinful.

The same point could be made about Mrs. Caleb Baldwin. In order to treat her as he did, Mr. Tutt had to decide not only that she was evil but also that she was beyond turning from her evil. That prejudice was wrong, but his inability to prefer her as one of his friends was not wrong; it was just the way things are. A broader and more important argument to somewhat the same effect could be made about the scores of clients each of these lawyers had who were not treated unfairly, who got adequate professional service, but who were not offered friendship either.

But it does seem unfair for a professional person to prefer some clients and not prefer others. It seems undemocratic. If the issue is adequate professional service, preference among clients risks self-deception, as I tell myself that, while some of my clients are my friends, I do a sound professional job for all of my clients. Jerry Kennedy did not do a sound professional job for Donald French. Mr. Tutt not only failed to respect Mrs. Baldwin’s right to a lawyer; he came very close to defrauding her. Jerry told himself he could do a sound job for a client who was not a friend; Mr. Tutt told himself he was doing his duty for Mr. Baldwin, a client who was also his friend. Maybe there is an argument here, since a lawyer “cannot consult for the good of all,” for not exercising the preference at all, for not distributing the commodity of friendship St. Augustine talks about. Maybe there is an argument here for the dominant ethical tradition in the American professions that says a professional should maintain detachment from all of his clients; that he should avoid making them friends; and, if they become friends anyway, that he should drop them as clients.

The problem of preference is then a challenge to the dissenters’ ethic. If friendship involves preference, and preference involves disparities in care for clients, the bar association’s esteem for detachment appears as an alternative. Both the old
boys in the bar association and Jerry Kennedy would say that something went wrong in the Donald French case, but the moral lessons they take from it are opposites. Jerry would say (I think) that he should never have taken the case. The old boys would say he should have taken the case, should have treated French better, and should have treated Lou Schwartz and Teddy Franklin the same way he treated French—none of them as friends.

Here is where it is important to remember that we are talking about dissenters. Here is what the dissenters say: "Wait a minute," they say to the bar association's commission on ethics. "Do you suppose that you old boys are free from this taint of friendship? Do you suppose that you old boys are not taking care of one another? Do you suppose that the lawyer for banks who gets appointed banking commissioner doesn't continue to look after the banks, or that the physicians who run the A.M.A. are in favor of house calls? There is a difference between us dissenters and you proponents of objectivity and professional distance, but it is not the difference you think. Friendship is, for us, to be sure, a thing of difficulties; it may even be tragic. But your problem is that you are not telling yourselves the truth; and your moral fault is that you are exploiting everybody who is not in your circle of friends, and then denying that the exploiters you live and work with are a circle of friends."

The dissenter admits the fact of friendship and the fact that he does a better job for clients who are his friends than for clients who are not. The proponent of detachment denies both the fact of friendship and the fact that he does a better job for his friends. The dissenter admits the element of self-love in friendship, and the element of friendship in collective action; and that, for him, takes care of the issue of moral purity, as between him and those who say he should be detached from his clients. It probably does not take care of the pain he feels when he realizes that not all of his clients are his friends and that those who are his friends get a better deal from him. The hard job is to tell the truth, and there, at least, the dissenters think better than the old boys do.

B. Three Positive Moral Arguments For Preferring Friends

When the truth is told, the student of applied ethical theory notices that preference is a persistent issue in the ethics of friendship. Preference is a moral issue. I notice three approaches to it in the literature (and there may be others). One argues that preference in friendship is justifiable because the love that friends have for one another benefits all of the other relationships each friend has. In legal ethics, this first approach would deny that Jerry Kennedy's friendship for Teddy Franklin is what caused him to be a poor lawyer for Donald French. This approach suggests that his friendship for Teddy may even have made him a better lawyer for French than he would otherwise have been.

The second approach says that any friendship is a school for virtue, even what
Aristotle saw as the weak friendships (those based on advantage or pleasure), even the friendship among the old boys in the bar association. Friendship does entail disadvantage for other relationships, as, with Aristotle, the friendship among Athenian gentlemen that he idealized may have made things worse for Athenian slaves and Athenian women. For Aristotle the gain in virtue is worth the cost: after all, any morality is selfish in that it promises personal excellence to the person who follows it.

And the third approach says that preference is unnecessary. (This would or might also be to say that the exercise of preference in professional practice is wrong.) Friendship is a possibility in all relationships. There is no essential psychological economy in it. Being friendly is a method and a point of beginning for universal, or, as it is sometimes thought of, civic friendship. (This third approach largely set the terms for the debate about the lawyer as friend that was conducted some years ago between Professor Charles Fried and Professors Edward Dauer and Arthur Leff.)

The first two approaches say that preferential friendship is justified because it makes the friend a better person. They even make preference look better by arguing that a truly moral friend seeks no gain for himself, but only the goodness of the other. Kierkegaard spoke of this as hiding behind the dash:

He stands alone—by my help. . . . [I]n this little sentence the infinity of thought is contained in the most profound way, the greatest contradiction overcome. He stands alone—this is the highest; he stands alone—nothing else do you see. You see no aid or assistance, no awkward bungler's hand holding on to him any more than it occurs to the person himself that someone has helped him. No, he stands alone—by another's help. But this help is hidden. . . , it is hidden behind a dash.

The trouble with this way out of the problem of preference is that it is not plausible. It may be the case that, in some of our friendships, we come finally to be so unselfish that we do not even want our friend to know what we have done for him, and that, because of this unselfishness, the preference for the friend is justifiable. But we are not likely to get that far along without a preliminary period of relative selfishness; if we deny to ourselves what we get from friendship, we will never reach a friendship in which we can deny ourselves. Kierkegaard refused even this much validity to the hidden-behind-the-dash theory. He said that it is a mistake to see friendship as a ladder leading from self-love to mutual love to selfless love. In fact, he said, the self and the selfless are all mixed up with one another, right from the beginning and right to the end. Friendship begins with selflessness; selflessness is what makes mutual gain in friendship possible, just as selfishness—the element of self-love in friendship—is what keeps friendship going. Jerry Kennedy, for all his stumbling, knows that. Cadillac Teddy gets more from Jerry than Jerry would sell to anybody else, but—still—Jerry charges Teddy for his travel time.

The second approach to preference in friendship (the school-of-virtue approach) also admits that Jerry’s friendship with Teddy means that Teddy gets better profes-
sional service than Donald French does. It admits even that Mr. Tutt’s friendship for Caleb Baldwin and Hans Schmidt resulted in harsh treatment for Mrs. Baldwin and Mr. Hepplewhite. But, says the second school of thought, the gain from friendship makes the cost worth it.

Propounders of official American legal ethics have invoked this second approach to justify the principle that an American lawyer is free to refuse clients for personal reasons. If this results in some people not getting lawyers, the responsibility for correction lies primarily with professional institutions, which then admonish lawyers to think of their duty not to the person who has no lawyer but to the institution. The American profession has been less coherent in its answer to the lawyer who wants to drop the client he already has, but, logically, the same principle could apply there. It would, I think, have been applied there but for the fact that changing lawyers in the middle of cases poses problems not for clients, but for lawyers (fees, files, etc.) and for institutions (dockets, trial time, etc.).

Jerry Kennedy and Fanny Holtzmann might say that preference in friendship is as much a part of life on the earth as preference in erotic love is. They would probably be less interested in justifying preference than in trying to clean up and contain the disadvantage it seems to bring to other people, and particularly to those among their clients who are not friends. I think, for example, that Jerry Kennedy would admit moral fault in his treatment of Donald French, not in terms of anything being the matter with his friendships with Teddy and Lou, but in terms of the flawed relationship he had with Donald French. Mr. Tutt might admit—he should have—that the way he treated Hepplewhite was as bad as the way he imagined Mr. Hepplewhite had treated Hans Schmidt. But this would not have anything to do, one way or the other, with friendships.

The third approach to the problem of preference is the ideal of civic friendship. It may have begun with Aristotle, who said, “When people are friends they have no need of justice.” The ideal is that the old boys who run things are friends, not of one another but of everybody. In their commitment to the common good they have foresworn personal advantage; the Irish Catholics and the Jews have nothing to worry about. This is the notion of friendship as it has been appropriated by liberal democratic theory. It is the ideal that the dissenters dissent from; they dissent from it not only in terms of their experience and their gently cynical reaction, but from the deepest springs of their moral culture. If they used the rage of the prophets who are in their religious traditions they would probably call civic friendship hypocritical, self-deceived, pagan, and idolatrous. That prophetic rage is not as expected in this generation as it was in Mr. Tutt’s, or even in Fanny Holtzmann’s; we no longer believe that the groups that gather and preserve and dispense power in our society are unselfish, universal, republican forms of human association. Maybe we even understand that such a view of the state—or of professional commissions on ethics—is idolatrous. We understand at least why Mr. Tutt thought such a view of the law was (to use a word he liked) tosh, and why Fanny Holtzmann used such clout as she had to get what she wanted from the bar association and, after that, cheerfully ignored it.
C. The Ethics of the Job

There is a version of civic friendship that is stronger among us than it was among the lawyers of Mr. Tutt's and Fanny's generation; that is the teamwork notion that each of us has a job to do. That view is the moral core both of the American legal profession's embattled, fatuous, but still vital adversary ethic, and of the medical profession's claim to be scientific. There are a number of objections to the ethics of the job. One is that such an ethic is socially irresponsible. Objections to the legal profession's adversary ethic, for example, include prominently the argument that the lawyer who considers only his client's interest is immoral toward other people, or, as the argument is more commonly put, toward society. A related objection is that the adversary ethic makes a god of the state, in its Darwinian confidence—faith—that the best claim will survive and that the state can decide which is best. Another objection is that the ethics of the job is morally schizoid; it divides people up, at best, and, at worst, it gives them excuses for immoral behavior.

I don't think either of these objections would interest the dissenters. What the dissenters would most likely say about the ethics of the job is that friendship has nothing to do with jobs. In fact, the job ethic squeezes friendship out—denies it a place to live.

First, civic friendship is not friendship. Neither in its pure Jeffersonian form—in, say, the legal ethics of David Hoffman or the medical ethics of Sir Thomas Percival—nor in its modern expression as the ethic of the job. Civic friendship is only a strident way to appropriate the relatively spiritual love friends have for one another without the earthy love of self that makes spiritual love possible. Friendship—the ordinary way we talk about it among ourselves and in our stories—is inevitably self-seeking. Friendship of the pure sort that the civic-friendship argument supposes is not friendship at all because it is not earthy enough to be human.

Second, putting so much emphasis on a job kills the possibility of friendship. Gilbert Meilaender noticed that deadened friendship in the story of John Wesley, who was a warm man, a man nature had suited for many friendships, but who seems to have lacked the time for them because he had a job to do: a man never at leisure to have out his talk, to understand what serious (i.e., morally perilous) business a vocation could become. Such a calling leaves little place for self-indulgence within life. We may simply note, without in any way suggesting that folding one's legs and having one's talk is unworthy, that whole-hearted commitment to our calling may leave little time for such pleasures. The inevitable result is that deep personal relationships like friendship, without precisely being denigrated, become harder and harder to sustain. They are . . . squeezed out of life. Personal significance is found in one's calling—or it is not found at all.

I think of the negative example of Louis Auchincloss's young lawyer, Timothy Colt, who refused the friendship offered by his obstreperous client George Emlen and chose instead what he called friendship with a bulging briefcase. Or, for a
positive example, of the physicians who refuse to use placebos, not because placebos are ineffective in curing disease, not because of a commitment to an abstract notion of professional truthfulness, but because they betray earthy friendship. Dr. Richard C. Cabot, for example:

The majority of placebos are given because we believe the patient will not be satisfied without them. He has learned to expect medicine for every symptom . . . but who taught him to expect a medicine for every symptom? He was not born with that expectation. He learned it from an ignorant [busy] doctor . . . No patient whose language you speak, whose mind you can approach, needs a placebo. I give placebos now and then . . . to Armenians and others with whom I cannot communicate . . . but if I can get hold of an interpreter and explain the matter, I can tell him no lies in the shape of placebos.

Third and finally, the ethics of the job harm the doing of the job. This is especially so when the job involves, as law and the medicine do, the tending of human relationships. The lawyer who chooses civic friendship instead of earthy friendships with his clients is, in this view, like the surgeon who must kill the patient in order to cure him. “At the same time that the worker is called upon to find personal significance in his work . . . the work itself becomes increasingly impersonal and subject to rational economic calculation,” Meilaender says. Time records, 2200-billable-hours-a-year, overhead, fees for travel time, calculation of benefit and loss, and soon “one's place in that system is determined not by personal bonds like friendship but by considerations of efficiency and fairness. Devotion to the task at hand becomes of supreme importance.” The dissenting lawyers would likely say that the use of the word “personal” in reference to a job is an irony. What happens is that the only occasion on which a person is given full human attention is when he is also a job, and then only to the extent that he is the job. The moral argument that civic friendship, as expressed in the ethics of the job, is a way to serve many people's needs, is, then, logically and consequentially, a way of life without friends; and because a task done without friends is soon uninteresting, it is a task done without thought.

Rabbi Hirsh would say that it makes some sense to look upon one’s work as a way to serve one’s friend, or even to see one’s work as a necessary bit of discipline. But when you prefer work to friendship, you deny life itself.

The ethics of friendship that these stories bring to American lawyers and doctors is not democratically liberal civic friendship. But it is not merely a scoff or a grumble either. It is a different moral vision. An alternative moral vision for the practice of a profession—for a way to be both a professional person and a good person. I am trying here to examine the virtue of friendship as a focus for the alternative. The dominant professional culture—the one that has produced the resolutions, admonitions, codes, and rules of professional behavior—turns on Anglo-American, Protestant, Enlightenment civic religion, on the responsibility of every professional person for the purity of purpose implied in the grand claims that Americans make for America. This dominant ethic depended on a view of the per-
son as a lonely individual (the Jeffersonian yeoman farmer and the frontier settler, the cowboy and the ambitious businessman). Such a view was fundamental both for social ethics and for the realization of the American dream.

This tradition found expression in organized American professions. It applauded professional moral teachers who said what it wanted to hear, and then set up groups of individuals to proclaim standards and principles for lawyers and physicians and journalists and undertakers. Bar associations began to do this in the 1870s, medical associations a generation earlier. The professional associations assumed purity of purpose both in the associations and in their commissions on ethics. It—right there, and right from the first—gave the dissenters something to be cynical about.

The dominant professional ethic has used metaphors of friendship (or fraternity) to describe the duties that go with a doctor's or lawyer's membership in the American civil religion, but those are failed metaphors; friendship used that way is incoherent. The broad notion of political duty implied in the American civic religion rests on radical individualism, not on the love of friends for one another; on a morality of autonomy rather than the cultural morality of family, neighborhood, and religious congregation. When such autonomous people gather to see to what they call one another's freedom, they are not friends.

III. PART THREE: GENTLE CYNICISM

Friendship as defined in American Civil religion and in democratic liberalism is not the friendship of these dissent stories. It is not the professional ethics of friendship. Stories of dissenting professionals in America Show that friendships with clients, rather than the pursuit of justice or of health, is how lawyers and doctors know that what they do is worthwhile.

The dominant tradition in American medical and legal ethics offers worthwhileness through appeals to the needs of the state and to America’s divine destiny; David Hoffman spoke of the new republic's law as a temple and of lawyers as priests. The dissenters are not persuaded by these appeals. They do, though, find that their work is worthwhile. Friendship with clients is their way first to overcome the deficiencies and pretensions of the dominant professional ethic and then to retain energy and interest in professional practice. This rests on the practice of the virtue of friendship—not on friendship as a bit of good luck, but the virtue of friendship as these professionals have learned about it at home, in their immigrant communities—their neighborhoods, their families, and their religious congregations.

Friendship is personal gain and inspiration for professional life. It is also a social ethic, a political ethic. In its social and political manifestation it is what Michael Novak calls gentle cynicism. There is in America, he says, a “morality based upon a gentle cynicism and cultural pessimism, rooted in the traditions of Southern and Eastern Europe. It is, perhaps, a Catholic—and Jewish—cynicism, not . . . reflected in the puritan or other Anglo-American traditions.”
“Catholics and Jews tend to be ‘crass’ in their understanding of power and in their willingness to calculate special interests,” Novak says. “Both note a tendency on the part of unabashedly powerful Protestant leaders to surround their use of power with moral talk and, if possible, to insulate the true source of power and decision (through the use of studies, commissions, committees and other instruments) from direct contact with raw consequences. The man up front protects his moral image. . . .” The difference here is a difference in social and political ethic. The dominant professional social ethic begins with a grand moral claim where the gentle cynic begins with a friend.

A. Beginning With Persons

The cultural manifestation of this gentle cynicism in professional life is friendship. A theoretical basis for it is in Aristotle’s *Magna Moralia* and in the *Nichomachean Ethics*; what is interesting about this theoretical basis is that it is not a claim or a vision of society or state but an ordinary earthy interest in one’s self and people who come along one at a time:

> [T]he good man . . . takes pleasure in morally virtuous actions and dislikes vicious ones, just as a musician enjoys beautiful melodies and is pained by bad ones.

> [F]lourishing consists in living and being active, and the activity which is peculiarly one’s own is pleasant . . . we can study our neighbors better than ourselves and their actions better than those that are peculiarly our own . . . the actions of good persons who are their friends are pleasant to good people. . . . [I]f so, then the fully flourishing person will need friends of this kind, given that he chooses to study actions that are good and peculiarly his own, and the actions of the good person who is his friend are of this kind.

The argument is that friendship provides self-knowledge and that we want to know ourselves; we want to find ourselves interesting. Self-knowledge is a pleasant thing, and self-knowledge is like the knowledge we gain from observing a friend. Observing the friend is a way of gaining self-knowledge—in fact, Aristotle said, observing a friend is essential to self-knowledge: “[F]riends do take interest in and derive pleasure from one another’s thoughts and actions, and . . . the interest they take in them is akin to the interest they take in their own.” And so one finds his friend interesting, then he finds himself interesting, then he finds others around him interesting. When he comes to have a professional ethic or a social ethic it is one that derives from such entirely personal association.

The insight and the method were noticed by the giants of depth psychology early in the present century. Sigmund Freud and Carl Gustav Jung made introspection, projection, and displacement fundamental to their science. Even before, Aristotle had said:

> [W]e are not able to see what we are from ourselves. . . . [T]hat we cannot do so is plain from the way in which we blame others without being aware that we do the same things ourselves. . . . [T]here are many of us who are blinded by
these things so that we judge not aright; as then when we wish to see our own
face, we do so by looking into the mirror, in the same way when we wish to know
ourselves we can obtain that knowledge by looking at our friend. For the friend
is . . . a second self. . . . [T]he self-sufficing man will require friendship in order
to know himself.

We tend to find faults in others that are our own, and to find virtues in ourselves
that are not there. Friendship, Aristotle argues, is a way out of these two corrosive
products of self-deception. Friendship is also a way to discover and to learn to
value the virtues we have. Thus Lou Schwartz and Teddy Franklin show Jerry Ken-
nedy virtues he does not think of himself as having (innocence in Lou's case, truthful
advocacy in Teddy's).

Aristotle argues that this self-knowledge comes from friends, rather than (or
more than) other people. How so? First, because friends are similar in character—
so that the mirror is more accurate. In fact, mirror is a poor metaphor here; Aristotle
is not talking about a mirror. He is talking about the other self a friend provides.
Friends sense this similarity intuitively; it is both part of how they become friends
and why the friend is the other self—the "intuitive sense of kinship with another
person." And, second, self-knowledge comes from friends because associations with
friends are more intense and more prolonged than associations with others, so that
the knowledge gained has the additional validity provided by focus and testing and
maturation.

The latter argument from Aristotle is that friendship is pleasant and makes
pleasant the things we share with friends. This is an essential point for professional
ethics. Jerry Kennedy has become bored with much of his law practice, but not
with all of it. He still enjoys working for Cadillac Teddy and for Lou Schwartz—
or, if "enjoys" is too limp a word, he remains engaged and energetic when he
works for them (and therefore does better work). Is this because it is more fun
to work for a friend? Probably so, but it would be a mistake to stop there. Work-
ing for a friend in professional life is like making a knick-knack for your mother
in the high school industrial arts workshop (which is more fun to do than making
a knick-knack for a grade), but it is more than that. That quality of enjoyment
caused by expressing love in work is no doubt there; but, in addition, these lawyers
have more energy when they work for their friends because professional work done
in friendship is labor shared. Their clients, when friends, are involved in the pro-
fessional tasks. And, even more precisely, the professionals have a sense that their
clients are involved.

Jerry Kennedy and Teddy Franklin have this sort of professional relationship.
It is one that has taken time and discipline. It is not the sort of sharing in which
Teddy has become expert at Jerry's craft any more than their association has made
Jerry qualified to steal Cadillacs. But their relationship is one in which Teddy shares
not only in tactics and objectives but also in the development and critique of Jerry's
abilities as a lawyer and even in the morals involved in Jerry's abilities.

I am never at my best or fully comfortable on premises that tremble under me.
Mildly disappointed clients have suggested that this problem is the reason why I never did achieve . . . eminence. . . . Cadillac Teddy Franklin, whom I have kept out of jail for twelve or thirteen years now, against very heavy odds, admitted once that he was always just a little bit concerned when I rose to get him loose on some fragile technicality which the arresting officer had neglected when he brought Teddy in. ‘It’s not your line of bullshit, Jerry,’ Teddy told me worriedly. ‘Your brand of stuff is just as good as anybody else’s. It’s the way you act when you stand up to sling it, you know? Like you’re getting ready to put something over on the judge, and everybody else . . . make them do something that you don’t think anybody in his right mind ought to do. I’ve got to say, even though it’s always worked, at least when you’re representing me, it does make me a little nervous. I can see why other guys would get somebody else. You are only really good when you mean it.’

B. Finding Professional Work Worthwhile

This shared-task aspect of professional friendship can be taken apart, in a philosophical manner, and analyzed. For one thing, the professional worker, when the task is shared, is more engaged in his work. Jerry Kennedy was relatively disengaged when he worked for Donald French; he is always turned on when he works for Teddy Franklin. “[L]iving in isolation causes one to lose the capacity to be actively interested in things,” says John Cooper, a modern Aristotelian. “Even if the activity that delights one most is something that can be enjoyed by a solitary person (as is true of most intellectual pursuits) it tends not to be pursued with freshness and interest by someone living cut off from others. One tends to become apathetic and inactive without the stimulation and support which others, especially those whom one likes and esteems, provide by sharing one’s goals and interests.” Jerry Kennedy knows about isolation and engagement; he learned it when he was a child in his Irish neighborhood. He says it, now, in a characteristically ironic way:

A ragtag parade of young men, mostly, between eighteen and twenty-six, finds its way through the door . . . and I listen to their troubles. Some are sullen, some are defiant, repeaters are tired or embarrassed, and we try to treat them as though they were individuals. It is better when we succeed, and they and their cases permit this; clients like Lou Schwartz bring on emotional upsets and make me appreciate somewhat the long stretches of rank dullness.

In working for friends, Jerry knows that what he is doing is not only interesting but also worthwhile. It can be done alone, but need not be. When it is not done alone, when it is shared, he has the benefit of feeling another’s commitment to a goal and of knowing that the client-friend will contribute to the common effort. Part of the way he knows of this commitment and feels assured that the client’s part will be provided is the product of an intense relationship experienced over time. Put another way, the tendency to find professional work interesting is confirmed because another and valued person finds it so; the sense of being one in a partnership is present where it is not present in his more routine, more paternalistic professional cases. The sense of participation is pleasant and it is stimulating.
It occurs because of the emotions of friendship and because self-knowledge is taking place; a good person seeks self-knowledge.

The more important the work is, the more significant this confirmation is: "The sense of one's own worth is, for human beings, a group accomplishment," Cooper says. The two things—the pleasure in shared activity and the pleasure in self-knowledge—are related (they may in fact explain why a person enters a profession):

[It is clear enough that the satisfactions that derive from shared activity are especially needed in connection with those activities, whatever they may be, that are most central to a person's life and which contribute most decidedly to his flourishing, as he himself conceives it. For here the flagging of one's commitments and interests will be particularly debilitating; here more than anywhere else one needs the confirmatory sense that others too share one's convictions about which activities are worthwhile.

Part of the reason is this matter of self concept; part of it is more exactly moral: "For in order to know that some one is genuinely committed to moral values one must know him and his character pretty closely, since commitment here . . . is a matter of moral character or its absence."

The American immigrant lawyers know this, not from liberal-democratic philosophy, but from their communities—from such things as rites of passage in a family or a religious congregation. And so they go home for their worthwhileness. They take their cases home. They go home to be healed at times of demand and dismay. Home is sometimes where they eat and sleep and watch television, and sometimes it is not there but with a friend. But they go home to the friend because they have learned to go home to a home. Fanny Holtzmann, according to her biographer (who was also her nephew) found adventure and self-fulfillment in the practice of law that she had not found growing up as a middle child in a large immigrant family. She found self-knowledge and worthwhileness with her client-friends. Fanny found there much that she had not found at home. But she was able to be a friend and to make friends, in the way Cooper describes friendship, because she had learned at home, in sometimes painful ways, the importance of friendship.

The sadness that lingered in Fanny's life was that she did not also have—as Jerry Kennedy does—the sort of home her parents made with one another. She was wise enough, in the midst of personal and professional success, to realize that. Berkman says:

Fanny's bookshelves were crowded with autographed volumes and tributes . . . but the sense of personal isolation would not go away. At a family Bar Mitzvah celebration, she surveyed the quiet little house in the suburbs, one of thousands scattered along the route of the Long Island Railroad, with the inevitable swing in the garden and the Chagall prints on the living-room walls, and she sighed: 'This is what makes all the struggle worthwhile.'
C. *Friendship as a Social Ethic*

Fanny Holtzmann’s and Jerry Kennedy’s stories add to the story of Ephraim Tutt and of the immigration lawyers this focus on friendship as a cultural reality. This is so in two senses. First, it is clearer in Jerry’s story that friendship is what sustains him in the practice—what is really important to him. If you look at Mr. Tutt, and then at Fanny Holtzmann and Jerry Kennedy, then at Mr. Tutt again, you can see friendship rather more clearly, in all three stories.

In a second dimension, Jerry’s story shows how, in all three stories, friendship has a social dimension. We are inclined, in late twentieth century America, to be enthusiastic about friendship. We say a lot about it on prepared greeting cards and on banners and little signs for kitchens and desks. Friendship is the dynamic in, say, popular television crime programs. But we are less clear about friendship as a *professional* and *social* virtue. We suspect the understanding of friendship that made it possible for Aristotle to say that the *state* rests on friendship. We are therefore unclear about the understanding C. S. Lewis had, in our own time, when he stopped short of Aristotle’s conclusion but said that friendship makes life richer both for those who are friends *and* for the community. Friendship may not have survival value, Lewis said, but it has “civilization value.” It “helps the community not to live but to live well . . . it is one of those things which give value to survival.” *Social value.* Even without Aristotle’s politics.

This issue about whether friendship is a social virtue, whether it has social importance, whether it is something that affects people outside the friendship and is therefore not simply a personal indulgence, is important for the terms in which professional moral discourse is conducted now in America. It is possible that a dissenting lawyer such as Jerry Kennedy would say it is not important to him whether his friendship with Teddy Franklin results in social good. But, still, it may be possible to argue that it does. The argument Kennedy might make, if he wanted to argue, would, though, be different from the liberal-democratic argument one reads in law-review articles about notions of social duty or of abstract moral principle.

For example, the argument within the medical profession, about the use of placebos, is typically an argument conducted on individualistic premises rather than communal premises. The argument is usually an argument about an abstract duty to an abstract patient rather than an argument about how friends should treat one another.

“I knew a surgeon who thought nothing of performing an oblique lower right quadrant incision, then suturing without entering the abdominal cavity, in patients who had emotional problems manifested by pain in the abdomen,” one doctor says. “His results were excellent and, as one might expect, his operative mortality and morbidity were exceptionally low.” The surgical equivalent of a sugar pill. “I am certain that thousands of appendectomies and hysterectomies are done yearly as placebos.”
The liberal-democratic response to this utilitarian justification for deceit is not about the patient but about a contract:

[T]he . . . 'contract' between doctor and patient represents the legal convention of a fiduciary contract, in which one party to the contract undertakes a special responsibility to look out for the best interests of the other. The Georgia Supreme Court held in 1975. '[W]here a person sustains toward others a relation of trust and confidence, his silence when he should speak, or his failure to disclose what he ought to disclose, is as much a fraud in law as an actual affirmative false representation.'

This judicial reason for honesty in the doctor-patient relationship is the same reason that would be given for a medical-malpractice judgment if the patient should have had an abdominal operation and sued because he didn't get one. It rests on the duty that comes from a contract. It is an altogether different argument than saying the patient is a friend and one doesn’t lie to his friends.

The fiduciary-contract reasoning was advanced in a debate among physicians about the morality of using placebos. It was not advertently a discussion about the law, or what the law should be, but the abstract character of the discussion is not different than it would be if the discussion were about the law and if the decision was to be made by an official of the government. It is an individualistic, liberal-democratic, republican sort of argument. The link between two lonely individuals, and the only link between either of them and the community, is a link of contract between two citizens. The people involved are, to use another legal term, fungible. The doctor is a party to a fiduciary contract because he is a doctor, not because of who he is. The patient is the dependent party to the contract because, in concept, that is what a patient is—dependent. The ethical spirit of the argument is not at all like Dr. Cabot's (the placebo is a lie); nor is it like Dr. Horn's referring to her medical mandate as personal and interpersonal, as an invitation from a particular sick old man to participate in his healing of himself; nor is the fiduciary argument like the country doctors who make house calls and who do some of their well-baby examinations on the floor, playing with particular children—those, I suppose, who like to play on the floor.

Dr. Cabot, Dr. Horn, and the play-on-the floor doctors would not approach the placebo issue as a matter either of utilitarian deceit or fiduciary contract, but they have come up with both a rationale and a bit of clinical data to reconcile placebos with friendships. Howard Brody's report on several experiments shows how this works:

Fifteen patients visiting an outpatient psychiatric facility because of various bodily symptoms related to their neuroses were given sugar pills. They were told by the physician that these pills were in fact sugar pills; that there was no active medication in them; that patients who had taken these pills in the past often had dramatic relief; and that the physicians were hopeful that they would also have a positive response. The patients were instructed to take the pills for a week and then return. Fourteen of the fifteen patients did so and thirteen of them were found
to have significant symptom improvement. . . . [T]hose who were convinced that they were getting placebos, and those who were convinced that the physician lied to them and they were really getting active medication, had better relief of symptoms than those who were uncertain which was which. . . .

[A] team of Boston anesthesiologists . . . took two large groups of patients about to undergo surgery and randomly assigned them to the control or experimental group. The control group got the routine pre-operative visit from the anesthesiologist to take a medical history. The experimental group received a more in-depth interview, which emphasized teaching about the nature of postoperative pain, reassurance that adequate pain medication would be ordered if the patient needed it, and instruction on . . . simple techniques . . . to minimize pain in the postoperative period. The experimental group ended up requiring one half as much pain medication on the average as the control group and were able to be discharged from the hospital two days earlier. . . .

[A]n anxious individual . . . seemed unable to function in his daily life without tranquilizers, but . . . also had a considerable fear and anxiety about the known addiction potential of those medicines. The physicians presented to him as an option the use of a sugar pill so that he would have the emotional reassurance of knowing he was doing something to control his anxiety on a day-to-day basis and would also know that he was not running any risk of physiologic addiction. The patient agreed to a trial of placebos on this basis and had excellent results. . . .

[This is, Dr. Brody says,] the healing that comes . . . from the relationship between healer and patient, and the patients' own capacities to heal themselves through symbolic and psychological approaches as well as through biological intervention. . . . [A] broader understanding of the placebo effect indicates many creative and nondeceptive ways in which this powerful therapeutic tool can be used for the benefit of patients.

What is of interest in these placebo stories—at the moment—is how they bear on what I see as the first step in building a social ethic of friendship for professional life. The first step involves personal relationships—self and other—and self knowledge. The ethic derives from self-knowledge and the having of friends among clients and patients provides a feeling or conviction that what one is doing as a doctor or lawyer is worthwhile. And then it makes a link between this emotional (and intellectual) security and the common good. The link is provided by the earthy communities of family, neighborhood, and religious congregation. In this way friendship—not civic friendship, but earthy friendship—is a social ethic, a professional ethic.

Fanny Holtzmann found a community among her friends and clients in show business; she knew she had—she knew what a community was—because she had grown up in one, in her family and her neighborhood in Jewish Brooklyn. Ephraim Tutt found community, less well, among those he thought he was protecting; a persistent disposition in the gentleman-professional is that he seeks friends among those he is protecting. Jerry Kennedy finds community in Irish Boston and among the people he works with, most of them his clients. Police officers, retired and
on active duty, are in Jerry's community; there are more Irish police officers in it than lawyers of any kind. In one case, Jerry settled a case in a trade he made with the investigating officer. Jerry swapped information on an extra-limits automobile insurance policy for lenient treatment of his client, who drove drunk and badly injured another police officer. Jerry was able to get Cadillac Teddy bail in the driver's license case because the desk sergeant was in Jerry's community: "Look, Mister Franklin," Sergeant Finney said, "I dunno you. I don't even want to know you. I know him, and I've known him for a long time . . . and . . . because Jerry's in it, I'm letting you walk."

This is the functional equivalent of Fanny Holtzmann's getting Edmund Goulding to talk on the phone to Lord Auckland and to talk on the phone to Lord Auckland and to talk on the phone to Lord Auckland and to settle a dispute between Auckland and her client Francis X. Bushman, involving Auckland's dogs. Fanny learned this procedure when she made tea for litigants in the Bet Din court of her grandfather, Rabbi Hirsch Bornfeld, who held his court in his daughter's kitchen. In the case of Eli Stein and his petulant business associate Chaim, for example, Rabbi Hirsch discouraged a civil lawsuit. "What does a goyish judge, raised in Boston, know how things are between you and Chaim?" the rabbi said. Mr. Tutt was able in a similar way to call on livery stable operators, fishermen, and the inhabitants of New York's old Irish ghetto. All three lawyers tended, by the way, to violate professional rules against dealing with another lawyer's clients.

These communities are more like Aristotelian fraternities than the bar association commissions on ethics are. The dissenters' communities are not based on contract but on something much more intuitive—history, perhaps, or even biology. Dissenting lawyers rest their worlds on such fraternities, just as the Athenian world rested, in Aristotle's view, on friendship. But these are not professional fraternities. The professional ideal at the Harvard Law School, when Mr. Tutt went there, was that the fraternity of American lawyers was a system of Aristotelian friendships; such professional fraternities made their members better people. Mr. Tutt dissented from that idea, but he was less adept than Holtzmann and Kennedy at coming up with an alternative fraternity. Mr. Tutt never came home

Judge Sharswood said, "Nothing is more certain than that the practitioner will find, in the long run, the good opinion of his professional brethren of more importance than that of what is commonly called the public. . . ." Holtzmann and Kennedy have not found that to be the case. They have found instead that it is the good opinion of friends that makes a person better. They dissent from Judge Sharswood's claim—the claim that the professional fraternity is friendship, a source of goodness—but not from the notion that friendship itself, when and where you can find it, is a source of goodness. One difference between Judge Sharswood and Fanny Holtzmann or Jerry Kennedy is in where they find their friends. Another difference is in the validity and intensity of their friendships. Holtzmann and Kennedy are more likely than Sharswood to find among their friends, in the words of Novak, the "assurance that members of tribes and villages have extended to
one another for millennia, the assurance that no earthly adventure, from puberty to death, is unprecedented or incapable of being shared and that one's life is thoroughly witnessed and therefore not wasted."

In either situation—Sharswood's fraternity of lawyers or the communal and lawyer-client friendships you find in these stories—friendship is socially important; it is a social ethic. It is not an experience or a bit of good luck, but an ethic. "Friendship . . . seems to hold states together," Aristotle said. "When people are friends they have no need of justice, but when they are just, they need friendship in addition. . . . Friendship is noble as well as necessary: we praise those who love their friends. . . ." Aristotle did not advance the ethical concept of lonely integrity and rugged individualism that is evident in the debate on placebos; nor did he see friendship as a bit of good luck. The integrity he implied when he talked about friendship was as much a product of friendship as it was a condition for friendship.

Friendship as a social ethic depends on this communal (Novak calls it Mediterranean) notion that friendship is a source of goodness. It is a virtue, in the sense that Aristotle taught about virtue—a habit. It is both a good thing to do (not only to be, but to do), and a routine the practice of which makes a person good. It is in its character as a virtue that friendship has social significance. "Friendship is equality and likeness," he said, "and especially the likeness of those who are similar in virtue. . . . [Friends] neither request nor render any service that is base. On the contrary, one might even say that they prevent base services; for what characterizes good men is that they neither go wrong themselves nor let their friends do so. Bad people, on the other hand, do not have the element of constancy, for they do not remain similar even to themselves." They do not remain similar even to themselves. That was Lou Schwartz's argument, when he told the Mafia boss that Jerry Kennedy would defend him without hamming the case up.

This is not the ethics of loyalty. Not the same thing at the interpersonal level, and not the same thing at the social level, either. Loyalty is, at the interpersonal level, the disposition that requires you to hate where 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. But friendship, unlike loyalty, prevents base service. Friendship is the virtue that supports the other person in the good and, in the process, makes it possible for him to remain constant, to remain, as Aristotle puts it, similar to himself. The old-fashioned word here is integrity, being all together, being who you are. Friendship preserves integrity—as Lou Schwartz knew it would—because it does not turn on loyalty; it turns on faithfulness. What the dissenters say is that loyalty—the scout law to the contrary notwithstanding—is not a virtue. They value friendship more than loyalty.

The American literature of professional responsibility uses the terms fidelity (faithfulness) and loyalty in just this way. Faithfulness is the disposition that allows
a person to negotiate his way, with constancy, through competing moral demands: to, for example, be at the same time a scientist and a healer, or an advocate and an officer of the court; to be what the proposed Model Rules for lawyers call an intermediary in business practice or estate planning or a friendly divorce; to be what Justice Brandeis called "the lawyer for the situation;" or to be what country doctors describe when they talk about healers of the families of their patients.

The word loyalty is used differently in the regulatory literature. Loyalty refers to combat; it is often modified with adjectives such as blind, single-minded, or unwavering. It does not turn on the integrity of the person who is called patient or client; it turns on what the professional person defines as the interests of the person who is called patient or client. It is used, then, in contexts of unconditional demand: You have to be loyal or you have to get out; the regulators are not interested in your being true to yourself.

Loyalty is played out as a social and professional ethic in the liberal-democratic American legal ideal of the adversary, and in the American medical ideal of the doctor as a person who fights disease and death. The ethics of fidelity would say, with Aristotle, that society is preserved and made better through the behavior that friends encourage in one another; friendship is a school for social virtue, a place where leaders are trained and supported in their pursuit of the common good. The ethics of loyalty are a boast from social Darwinism; they turn on the optimism that narrow interest, pursued with vigor, results in justice because the fittest argument is the one that survives. I suggest that the lawyers in these stories—and, maybe, most American doctors and lawyers—talk about loyalty but believe in fidelity. The social ethics of fidelity, of friendship, are what we really think; the ethics of loyalty are what we try to get somebody else to think.

D. The Dissenter's Theory of Social and Political Power

My preliminary thought about the stories of Mr. Tutt, Holtzmann, Kennedy, and the immigration bar in Houston, and their medical counterparts, was that these stories show how dissenting professionals value clients more than institutions. I think that is true, but it is too flaccid a point. It does not do justice to these rich American stories. A more risky thought is that some of these stories also show how dissenting professionals value faithfulness more than loyalty and that they show this in their practice of the virtue of friendship. If this is true, then it follows, I think, that the dissenting lawyers and doctors value community more than institutions and that they value friendship more than justice or the defeat of disease and death—so that the first and flaccid thought is converted into something that may be interesting for social ethics: What is preferred to the institution is not only the client but also the community. Or, to put that another way, the dissenters value their clients more than their institutions because they have learned in their communities how to value their clients. That is, they have learned in their communities how to be friends, and, with their friends, how to be a community.
This is all relatively more clear in stories such as Holtzmann’s and Kennedy’s than it is in stories such as Mr. Tutt’s and Calvin Trillin’s description of the immigration lawyers in Houston. Holtzmann and Kennedy are immigrants. Their families came to America with strong, coherent, intact traditions of value. They compared their values with those they found in, say, Brahmin Boston and old New York, and they decided that what they brought with them was better than what they found.

Fanny Holtzmann’s grandfather, Hirsch Bornfeld, was an immigrant and a Hasidic rabbi. He was also an enthusiastic American, a resolute Republican, and a friend of Theodore Roosevelt. He once led a political parade through the streets of Brooklyn to the tune of “Onward Christian Soldiers.” But when it came to passing values along to his granddaughter, he did not talk about the stars and stripes any more than he talked about Christian soldiers. He talked about the Torah, the family, the evident and faithful will of God: “Never judge a fellowman by a single action,” Rabbi Hirsch told her.

Try to see his whole record. Every man has something good in his past; contemplate that... God has the greatest of bookkeeping systems. His angels keep track of every action you take, every thought in your head, awake or asleep. Nothing—good or bad—can be hidden from them. The more you give, the more the Lord will replenish your resources. And when your time comes to need help, you will have a fine credit rating; you will not be abandoned.

Those are conventional sentiments; some of them are the sort of thing we nodded over in Sunday school. Their importance to Fanny becomes clearer when you put them into the context of her family and her community—when you remember who said them, and where he said them; when you remember six thousand years of mitzvot and the persecutions of the Jews. When Rabbi Hirsch was dying, he said to Fanny, “For the rest of your life, you have nothing to worry about. I’ll be up there in Heaven, making sure you get what you deserve. It isn’t everybody who has someone standing guard there to see that God does his duty.”

When Fanny had disappointments in her professional life, she did not think of her professional forebears and elders in America or of the Pilgrim Fathers; she thought of her family and of the Jews. And she reacted less with grim determination than with some characteristic Jewish joke she had learned at home—such as that in Rabbi Abraham Ibn Ezra’s verse: “If I were selling candles, the sun would never set.” Rabbi Hirsch was disappointed in his grandson David, who showed no interest in religion, but, as he was dying, he gave David his prayer shawl and his prayer book. “That will ensure their perfect preservation through posterity,” the rabbi said.

Fanny’s approach to disputes was the one she learned in her grandfather’s court, in the kitchen in Brooklyn. “The task of the law [is] to solve problems, harmonize differences—not aggravate them.” When somebody mentioned the Supreme Court to Rabbi Hirsch, he pointed to the ceiling: “The true Supreme Court,” he said, “presides only up there!”
Much of the secret of Fanny's success as a lawyer was due to her ability to be relaxed, spontaneous, and constant, in any company—among rulers, among wealthy clients and their combatants, among taxi drivers and servants. Her biographer says that was because, "Humanity at large was for her an extension of the intimate, spirited household in which she grew up." She said, "I was comfortable in any company because I knew who I was and where I came from, and had no yearning to be anything else. My parents had never had material wealth, but they had given their children what money couldn't buy: culture, dignity, self-respect. I could never feel uprooted because wherever I went I took along my special square of soil—my sense of family." That sense is one that can rejoice, as Fanny did, in what we call the American dream, but its real home is in its community. The American dream was not always sound to Fanny; she knew it wasn't because she compared it with what she knew from her community. She compared the American dream and found it wanting. In that radical way, Fanny Holtzmann and Jerry Kennedy are dissenters.

It is religious tradition that holds these immigrant cultures together, I think, but there is much in them that is not obviously religious and even much that is mysterious and mystical. The ethos of the late immigrants—those who sent their children to the Jesuits for law school—is both reverent about culture and gently cynical, wary rather than sentimental, about exercises of power.

The ethos of gentle cynicism works more for the preservation of community than for the abstract and self-deceived notions of health and justice America preserved from its Puritan and Enlightenment past. It is on this view of power and justice that the gentle cynics seem to the adherents of American civil religion to be least republican (least American sometimes) and most immoral. The ethics of friendship seem undemocratic and unjust when they result in uneven professional or public service—and it is not an adequate answer to say that the WASPs also prefer their friends. This troubling aspect of the ethics of friendship is no doubt what caused Michael Novak to urge gentle cynicism more as a corrective to liberal-democratic self-deception than as an adequate ethic on its own.

In George V. Higgins's novel of politics, A Choice of Enemies (1984), Bernie Morgan, the Speaker of the Massachusetts House, visited a hospital that wanted public money. Bernie told the doctor in charge how to conduct her negotiations: "Now, what you've got to do is get your facility, that you want, by showing people like me how giving it to you will give us something we want. And that's the way you sell it." She said it appeared to be all a matter of self-interest. "Well," Bernie said, "it ain't beanbag, pal. But, you know, it's not exactly as grubby as you think it is. . . . We didn't come in here to pose—we came in here to make deals."

In that story, a leader of Boston's black community says his greatest frustration has been to convince his constituents that their failure to appreciate this gently cynical attitude explains why they don't gain more:

I've never been able to persuade them that in a good many cases where we haven't gotten what we wanted, it wasn't because the people that we had to get it from
hate [us]. It was because the people that we had to get it from looked at what we wanted and didn’t see anything in the request for them, so they torpedoed it. It wasn’t racial. It wasn’t even personal. It was just good business sense. I’m telling you, my friend, if I could’ve figured out a way for blacks in Roxbury to qualify for good jobs that would’ve ended unemployment for all the micks in Southie while it was training blacks in Roxbury to qualify for good jobs too, it would’ve slid through Bernie Morgan’s legislature like it’d been on skates.

The alternative to deal making, which is what the late immigrants found when they came to this country, was a moralistic public debate about institutional policies, with little evidence of the training in virtue that makes institutional moral argument coherent. They found lots of principle—principle coming out of the ears of American institutions that they also found to be hypocritical, self-deceived, and corrupt—but they found less virtue than such grand principles seem to require. And they decided to try to hold on to what they had brought with them, which was more Moses and Aristotle than it was Calvin and Thomas Jefferson.

In a way that I suspect Novak understands the debate now is not between republican professional ethics and gentle cynicism but between any and all claims of moral consensus and a *laissez faire* social and professional ethic that cannot locate any social substance other than the absence of mayhem. Christina Hoff Sommers, an academic philosopher, compares, for example, the individualistic way we have come to talk about morals in the professions and in the public schools:

> The literature of applied ethics, like the literature of values clarification and cognitive moral development, has little or nothing to say about matters of individual virtue. . . . Inevitably the student forms the idea that applying ethics to modern life is mainly a matter of learning how to be for or against social and institutional policies. . . . [T]he articles sound like briefs written for a judge or legislator. . . . At this moment the Moral Majority constitutes the only vocal and self-confident alternative to the ethics-without-virtue movement. . . . [H]alf-baked relativism . . . tends to undermine common sense. In a term paper . . . one of my students wrote that Jonathan Swift’s ‘modest proposal’ . . . was ‘good for Swift’s society, but not for ours.’ . . .

Rabbi Hirsh would say such a student needs to have a talk with one of his grandparents, not about institutional policies but about hungry babies in Ireland.

Novak is optimistic about the possibilities for synthesis. He suggests that gentle cynicism, the moral heritage of most Jews and most Roman Catholics in America, is now more an influence in our national moral life than it is a dependable ethnic or religious characteristic. He argues that it is an influence worth combining with the old American civil religion, that the one enriches the other. Looked at in that blended way, the ethic he describes as gently cynical tempers individualism with the reality of organic communities. Our social, legal, and professional relationships, in that view, turn on interpersonal commitment as much as on contract—on faithfulness as much as on promise. Organic communities foster relationships where contract fosters obligation. Because of relationship, which is fluid and flexible rather than specific, this synthetic view of transactions would allow for self-awareness
and growth in virtue; it might be like what Aristotle talked about when he talked about friendship. It might make it possible for friends to survive violence and falsehood and hypocrisy—as Jerry Kennedy's lawyer-client relationship with Lou Schwartz survived government connivance, Mafia threat, and prison.

IV. Conclusion

The picture of friendship that I find in these dissenting-professional stories combines an earthy spirit of commitment and faithfulness with the hope that our relationships, even our professional relationships, can be places to grow in. Some of this is covered by our ordinary, television-trained notions of friendship; much more of it is covered in the more reflective and classical teaching that friendship is a school for virtue and a social ethic. An enduring ethic of friendship is more specific and indicative for professional ethics than a political arrangement or a bit of good luck. It could be a way to endure the tragedy of professional life.

Liberal-democratic professionalism deals with tragedy by abandonment. We are told to come to our clients and patients with the implicit belief that the highest good we can hope for them is that they be free—that they be, in a word common in the literature of legal and medical ethics, autonomous. And that seems to mean that we care about our clients and patients only to a point—to the end of a road described by what we are expert at, what our job is, what our contract says we have to do. Beyond that, they can go to hell in a handbasket; or, at any rate, they do.

Skill or contract or official professional mandate then defines whatever relationship there is. When skill becomes ineffective, when the contractual promise is kept, or when the mandate is unclear, we return the client or patient who has come to us to the world of strangers. And we say that we do this because we respect his freedom. We would not be likely, as Jerry Kennedy is, to visit the prison to talk to the products of our failed skill as defenders of criminals. Most doctors are not interested in attending funeral services for their dead patients; Ann Landers says they shouldn't be expected to.

Autonomy then becomes a way of saying that the awesome circumstances that people bring to professionals—death, disease, dispute, ignorance, malaise, sin—are finally and inevitably and appropriately borne alone. It's all like the evening my wife Nancy came home after battling with a social worker all day on behalf of a welfare mother. "I'd like to help you," the social worker said, "but it's not part of my job description." What is left out is the sustaining sense of community that causes Nancy to be good at working with poor people—the sense Fanny Holtzmann had from her family, that Jerry Kennedy finds in Irish Boston: Community is a place where circumstance is met, even when expertise will not answer. A professional in such a community does not stop where his expertise stops. He may then stop being technically skillful, but the point at which his technique stops is not the point at which his being in the community stops. These stories say that is because the community teaches the professional how to be a friend.
APPENDIX A

Dissenters’ Ethics Applied to Lawyer-Client Relationships*

Assume that Mr. Tutt or Fanny Holtzmann or Jerry Kennedy would read all of this and agree that, by and large, I describe their ethic correctly. Suppose, then, that I were to ask them, or one of them, to say more specifically how such moral lessons can be derived from their stories. What would they offer, as applied ethics, to, say, law students in 1986 in West Virginia?

Fanny Holtzmann was influenced by Rabbi Hirsh Bornfeld, her grandfather, and was probably more accustomed to didactic moral direction that either Mr. Tutt or Jerry Kennedy were. Fanny might accept the invitation to provide some applied ethical direction to modern law students; I am almost sure that Mr. Tutt and Jerry Kennedy would decline the invitation. Speaking, then, as Fanny might, but taking into account the evident ethics of Mr. Tutt and Jerry Kennedy:

1. *Participation is fundamental.* The moral ideal in the professional relationship of lawyer and client is the participatory ideal: the client is a partner and might become a friend. The client should (to borrow some examples from Douglas Rosenthal’s book, *Lawyer and Client: Who’s in Charge?* (1974)) 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. The client invites the lawyer to join in his misery; the lawyer stands before—not a problem, but what Justice James Wilson called the noblest work of God.

2. *The goal is relationship.* The notion of friendship with clients is derived from the client’s friendships elsewhere (as well as the lawyer’s); what is being tended to in the lawyer-client relationship is the set of other relationships the client had before he came to see the lawyer. One or more of those relationships is disrupted; that is usually the source of the difficulty the client is having. The goal of professional representation is the repair of disrupted relationships. The *facts* the lawyer is after are the common ground that is in those relationships (as Rabbi Hirsh began his work with Eli and Chaim on common ground—on their lives with one another, including their Jewishness). The search is not primarily for claims the disputants make on one another (which are commonly expressed as rights or claims or liabilities or duties) but for what they still have together. The skill with which common ground is sought and expanded is taught analytically, and in terms of professional technique, in courses in mediation and conciliation—*alternative dispute resolution* in the trendy phrase. It is exhibited and has traditionally been learned by lawyers in law offices, as is evident from the fact that more than ninety per cent of all lawsuits, civil and criminal, are settled out of court.

* Prepared at the request of the editors.
3. The professional relationship begins with an offer of friendship. There is a global and abstract way to put this, one that is found in the literature of counseling, and specifically in the literature of legal counseling and in courses on interviewing, counseling, and law-office practice. It is explicated by such teachers of counselors as Carl Rogers, James Elkins, David Binder, Andrew S. Watson, and even me. The idea, as Rogers puts it, is that the lawyer offers to enter the client's world. (Maybe the lawyer even goes to the client, as the country doctors go to the children they examine on the floor.) In an unglobal and concrete way, friendship is offered by the professional who takes an interest in the client—by seeing to the client's comfort, by noticing and saying something about the client's discomfort (his upset, his being nervous or thirsty or curious or out of breath). The lawyer knew about unglobal and concrete friendship when law school started; if these habits of friendliness have been forgotten in law school, they are revived, as Novak says it, by coming home.

4. The professional pay-off comes not from the government, or the bar association, but from the client. The argument here has been that this dissenter's way of looking at the situation is as much a social ethic as liberal democracy is. The unglobal and concrete point is that the ordinary, friendly tests of effectiveness are the vital ones: (1) Will the client do what we have decided together should be done? (Not what I have told him to do, notice, but what we have decided together should be done—which is probably as unlike what I thought, on my own, he should do as it is unlike what he thought he should do, on his own.) (2) Will this client come back to me when he again thinks he needs to talk to a lawyer? This question might even be, will he come back to me, a lawyer, when he might, but for this present experience, have gone to a cleric or a doctor or to some other friend?

5. The overall model—the image that is in the lawyer's mind as the work with the client goes on—is not "What does a lawyer do?" but "What does a friend do?" We all know what a friend does because we have friends and we have been friends; we grew up with friends; we know them at home and in church and next door. The trick is to remember what we all know.

APPENDIX B

SELECTED BIBLIOGRAPHY


ARISTOTLE, NICOMACHEAN ETHICS (Martin Ostwald trans. 1962) (Books Eight and Nine) excerpted in T. SHAFFER, AMERICAN LEGAL ETHICS [hereinafter A.L.E.]; EUDEMIAN ETHICS; MAGNA MORALIA.

St. Augustine, On Christian Doctrine.


M. Buber, Between Man and Man (Smith trans. 1947), M. Buber, I and Thou (Kaufmann trans. 1972); M. Buber, The Knowledge of Man (Friedman & Smith trans. 1965) (all quoted more extensively and discussed in T. L. Shaffer, On Being a Christian and a Lawyer ch. 1-3 (1981)).


Harriman, Miss Fixit, New Yorker 21 (Jan. 30, 1937); Harriman, Miss Fixit, New Yorker 22 (Feb. 6, 1937).

S. Hauerwas, Truthfulness and Tragedy ch. 6, 13, 14 (1977).


David Hoffman, A Course of Legal Study (2nd ed. 1836).


Jones, Code of Ethics Adopted by the Alabama State Bar Association, in Alabama Reports xxiii (1899).


J. W. McClelland, Biography as Theology (1974).


Medina, Mr. Tutt at His Best (1961).


"**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.

---