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James J. Friedberg

West Virginia University College of Law, james.friedberg@mail.wvu.edu

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

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

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

JAMES J. FRIEDBERG*

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

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

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

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

from what he says and writes—he personally exudes the qualities of decency, friendship, and honesty that he describes and endorses in his work. It is easier to understand what he is talking about, because he himself *is* what he is talking about. This is not said to flatter, but to put criticism into context—for I am troubled by his essay (as I was by his Donley lectures that preceded it). To explain this discomfort, I will answer his stories with a story of my own.

COMMUNITY AND RACISM

While talking to a new friend and coworker in Tennessee at my first job after law school, our conversation turned to Boston. We both had attended law school there. In the process of comparing favorite restaurants, movie houses, country drives, etc., I mentioned the North End—how much fun my wife and I had had wandering the skinny, bricked streets of Boston's version of Little Italy, seeing old men playing Bocci ball in a church yard, ducking into a cafe where we ate cheese cannoli, sipped cappacino, and took in the warm, frenzied conversation that surrounded us. My friend said she was not able to share that particular Boston memory. Her husband is black. And, she informed me, mixed couples, or for that matter, blacks individually, were not welcome in the North End.

The story highlights a problem with Tom Shaffer's stories about immigrant lawyers. In that North End cafe and in those narrow alleys, my wife and I had enjoyed the sort of immigrant community of which Tom Shaffer and Michael Novak write. We had enjoyed its sense of warmth, ethnicity, and—well—belongingness. And though, technically, we ourselves did not belong, we were able to experience some of that feeling of community. This was partly because we were kindly treated "tourists", but also, I think, because of a nostalgic intuition we possessed for the life of our Eastern European grandparents and our first generation parents, who had lived in Fanny Holtzman's America in the first half of this century. I believe that Tom Shaffer and Michael Novak share this nostalgic intuition of an ethnic, immigrant past. I also believe that it can become a pernicious nostalgia that masks prejudice and excuses corruption.

Tom partly addresses this problem in his discussion of "preference", but I do not believe his answers are sufficient. He briefly touches the issue of community and racism toward the end of his article¹ where, once again, he instructs us with a story:

In that story [by George V. Higgins], 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

¹ Shaffer, THE ETHICS OF DISSENT AND FRIENDSHIP IN THE AMERICAN PROFESSIONS, 88 W. VA. L. REV. 623, 660-61 (1986).

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 that blacks in Roxbury to qualify for good jobs would've ended in 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.

This is bad instruction. The fact that a *fictional* black character *created by a white man* attributes the dilemma of black people to the black community's lack of political acumen does not make it so. Anyone who lived in Higgins's Boston during the early 1970s knows that it was not the failings of political horse trading that caused the South Boston school riots. It was racism and economic deprivation—racism in the very same ethnic community that spawned Jerry Kennedy. Anyone who doubts this, should go to the back issues of the *Boston Globe* from that era and read a couple dozen articles tracing the political career of Louise Day Hicks.

In fact, Higgins's solution proffered to black people is even *less* viable today than it might have been in the recent past (say, at the time of the South Boston school riots). And Michael Novak and his ideological compatriots are partly to blame. For Higgins's brand of political pluralism to work, at least two factors are necessary, both of which are more problematic today than they were ten years ago. First, the black community needs a willing trading partner. Second, it needs something to trade. The last decade, especially the last six years have seen blacks lose ground in each of these areas. Erstwhile white ethnic political allies—never fully reliable—have turned Republican and per capita black wealth, and concomitant economic power, has diminished. The “neoconservative” political philosophy represented by Novak and company is merely the theoretical (theological?) manifestation of Reagan's new majority. It provides a philosophical justification for the movement of many white ethnics away from the New Deal coalition. It is a spiritual pilgrimage from the Bronx to West Chester County. The movement seems to be dominated by Catholic and Jewish ex-liberal intellectuals who have discovered the true religion of self-interest. Its learned teachings can be found in the pages of post-detente *Commentary* magazine and other such places. And its logical consequences are anti-black. A loss of traditional political allies and diminished economic status are the bitter fruits blacks taste from the seeds of neo-conservatism. Not much to trade with, Mr. Higgins.

Without access to at least the back door of the corridors of power, gentle cynicism quickly becomes bitter alienation.

FRIENDSHIP AND CORRUPTION

In early January, 1986, the Public Broadcasting System aired a television program called *Rajiv's India*. It focused on the social and political climate in India under the new leadership of Rajiv Gandhi, son and grandson of India's two most powerful previous prime ministers, Indira Gandhi and Jawaharlal Nehru. An eighty-

year old Indian who publishes one of the country's major newspapers, the *Indian Express*, was interviewed during the program. He recalled his active public opposition to Indira Gandhi when, about a decade ago, she had threatened democracy in India by declaring a state of emergency that severely restricted civil and political rights. He had voiced such risky dissent despite the fact that he had been a long time friend of the Gandhi family. Essentially what he said on camera was this: Indira Gandhi was my friend; her husband had been my friend and colleague; but, friendship had to put aside—larger things were at stake—the good of the country.

The Indian publisher's dissent contains greater social virtue in its particular rejection of friendship than Jerry Kennedy's form of dissent contains in relying on friendship. When George Higgins's brand of friendship is raised above the more traditional "Jeffersonian" values of republican democracy in *public life*, the result is often not social virtue at all, but corruption.

Another example is in order. For a time it was fashionable among some revisionist observers of urban politics to argue that the corrupt (by Jeffersonian standards) city government of Richard Daley in Chicago was not all that bad. In fact, they argued, it was good. The snow was plowed, for example, and the garbage was removed. However, if it was good, it was only so for those persons and neighborhoods that supported the mayor. And only for as long as they supported him. Hopefully, by now, the failings in civic virtue of the Daley regime is beyond serious debate.

However, there is something in Tom Shaffer's article that seems sympathetic with Daleyism. In one of his presentations during his two-day Donley residency at the law school, Tom seemed to good humoredly acknowledge this possibility by—characteristically—telling a story. He told of an old Mayor Daley anecdote, in which his honor was purported to have responded to a charge of graft (granting a lucrative city insurance contract to a friend's son) by asking, "If a fellow can't help out a friend, then what are friends for?"

Where does friendship end and corruption begin in Tom Shaffer's world of community, of fidelity? Given his approving reference, as an example of community, to the Jerry Kennedy sequence, where our working class hero qua attorney springs his auto thief friend/client from police custody because of Jerry's relationship with the desk sergeant, he is willing to categorize as friendship at least some activity that many of us would call corruption. And before I am accused of priggish naivete regarding the behavior of street level bureaucrats, let's change the hypothetical a bit. (A hypothetical it is, of course, since Jerry Kennedy does not exist—he is Higgins's creation). Let's say Jerry's client sells heroin, rather than stealing cars. (Higgins has provided us with a character that conveniently only violates property rights and, thus, does not test our consciences). Wouldn't the bonds that link desk sergeant and Jerry and client still be those of community and friendship? But, we are told Aristotle teaches that friendship only schools us in good acts.² Perhaps by defini-

tion, Kennedy could not be the friend of a heroin pusher. The distinctions begin to strain. The reality of Chicago and Boston does not seem to be well predicted by Aristotle's view of friendship as a school for virtue.

Perhaps Tom would respond that I misconceive his vision of friendship as a social virtue, that I am missing his distinction between fidelity and loyalty, that Daleyism is a public manifestation of blind loyalty, not friendship. That the Indian publisher stood against dictatorship was not a rejection of friendship, but an expression of constancy. The problem is that the distinction between fidelity and loyalty does not work. And Tom's treatment of the closely related issue of preference is as unresponsive to the problem of corruption as it is to the problem of racial prejudice.

It is simply too difficult to identify a workable distinction between fidelity and loyalty, as Tom uses these concepts, which shows that friendship in civic life operates for social virtue, but not social evil. It is not enough to define loyalty, at Tom does, as hating a friend's enemy and fidelity as constancy. A public official can be constant in his corrupt nature and harmful to those not lucky enough to be his friends. Not all evil people are chameleons.

AN ALTERNATIVE ALTERNATIVE

Tom Shaffer is mostly right. The old boy ethics are flawed in the very ways that he and, implicitly, his dissenters reveal. The old boys do tend to *codify self interest* and call it professional responsibility. And they are less than honest in their denial of the role of friendship among themselves in maintaining their privileged status. The immigrants' "gentle cynicism" is a much more genuine reaction to the world as it is, reflecting an attitude less likely to alienate a lawyer from her environment. The immigrant lawyer's valuing of community does make work more meaningful and humane. With all this I agree. Where I dissent from Tom Shaffer is his failure to fully address two problems related to his analysis: the significant tension between friendship and fair dealing in public life and the monumental tension between community and equality in American racial relations. He seems to acknowledge these sort of tensions as problems of "preference", but does not adequately deal with them. He may be attempting to do so by his distinction between loyalty and fidelity and through some of his narratives. But his distinctions here are not convincing when applied to concrete situations, and his narratives, the fictional black politician and the Boston police desk sergeant for example, only seem to highlight, not resolve the problem of preference. There is an answer, however. Within the four corners of Tom Shaffer's analysis there are the seeds of an alternative alternative. Sam Williamson provides an example.

Tom Shaffer only briefly discusses Sam and Pete Williamson, the father and son immigration lawyers from Houston. He discusses them in the context of his first group of dissenters, the scoffers. We are told that the second group of dissenters, the "immigrant lawyers" with whom Tom is chiefly concerned, "turn, not so much

to anger or bureaucratic adjustment (as the scoffing immigration lawyers are presumed to do) as to an alternative ethic," friendship and community. There seem to be some missed ironies here. Most obviously, it is ironic that Sam and Pete Williamson, the *immigration* lawyers—persons who really aid today's *immigrants*—are grouped with the "scoffers", not with the "*immigrant* lawyers" who seem in Tom's analysis to have reached a higher stage of moral development with their alternative ethic. It is not just a verbal coincidence that we find immigrant "roots" in the appellation applied to both sets of lawyers. It is a further irony that Tom's sketchy description of the Williamsons, a sort of parenthetical remark to his extensive narratives on Holtzman and Kennedy, reveals on close scrutiny not scoffers, but perhaps a *third* group of dissenters, different from the two identified by Tom and more likely than either to promote social virtue. The alternative ethic of this third group incorporates the values of community and friendship practiced by Holtzman and Kennedy, but adds a teleological element that resists the problems of prejudice and corruption identified above.

Two quotes from Sam Williamson illustrates this alternative alternative ethic. "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."³ The second quote is also a part of Williamson's explanation for being an immigration lawyer. It is more succinct: "Also, I don't like the government."⁴ These remarks reveal a man practicing the values of community with a concern for social *ends* lacking in Tom Shaffer's second group of dissenters. In addition to being an *immigration* lawyer, Williamson's comments show him also to be an *immigrant* lawyer a la Shaffer. But the lessons he has learned in his American immigrant community teach him two things apparently lost on the Michael Novak and George V. Higgins school of immigrant legal practice. First, for the values of community to be socially virtuous in polyglot and racially divided America, they must be inclusive, not exclusive. It seems likely that Williamson would represent with equal fervor Haitians, Latinos, and Turks not so much because of the self-interested political pluralism described by Higgins, but because Williamson's *ethically based* notions of community were expansive enough to encompass the excluded and oppressed of any hue. Second, a certain political content in Williamson's attitude, expressed in his dislike for the government, makes one think he would line up not with Indira Gandhi, but with the newspaper publisher that opposed her, despite the pull of friendship. Although Tom attempts to distinguish friendship from blind loyalty, his own examples of the Boston police desk sergeant and the Massachusetts House Speaker, not to mention the still more convincing real-world examples of Gandhi and Mayor Daley, demonstrate that the values practiced in the name of community and friendship are often those of favoritism and corruption if moral ends are not held paramount.

³ *Id.* at 632.

⁴ *Id.* at 633.

Tom Shaffer would have his virtuous lawyers practice humanism without politics, and I do not believe that is possible. The humanism we learn from our immigrant communities is indeed an important lesson. It is preferable to the self-righteousness of the old-boy ethics, as Tom asserts, but it is not always enough. Without the moral content of fair and egalitarian social ends, it can be perverted to a philosophical justification for corruption of public life and oppression by the newly empowered.