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Correspondence, The Lawyer as Friend

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Correspondence

The Lawyer as Friend

To the Editors:

We are, most of us, lawyers, or perhaps even worse, makers thereof. We would, most of us, also be good people if we could. It would be sad, socially and personally, if the act of being a lawyer necessarily conflicted in some way with being ethically "good." It will not do, however, either socially or personally, if we choose to avoid whatever necessary conflict there might be, not by changing the reality of ourselves, our profession, or our society, but by changing only the way we talk about who we are, what we do, and how we and those things function in modern American life. Thus, while we do not reject Charles Fried's conclusion¹ that good lawyers can be good people,² we must reject his route.

That route is roughly as follows. First, state the problem: "Can a good lawyer be a good person?"³ Second, scotch the obvious initial response (variously phrased versions of "Why the hell not?") by pointing out that lawyers as lawyers occasionally do some morally disquieting things. In particular, they often choose their clients in a way that does not necessarily optimize—indeed, often seems antithetical to—group welfare;⁴ and, in the name of serving the chosen client, they sometimes intentionally do grievous harm to other concrete individuals.⁵ Third, take such an objection with tentative seriousness. Then, finally, overcome it by arguing: (1) a friend can do these nasty things and still be a good person; (2) a lawyer is like a friend; and, therefore, (3) a lawyer can be a good person. The only sticky parts are establishing that both (1) and (2) are true.

I

Let's start with friends. That's who a lawyer under this scheme will have to be like in order to be good. So first, what *is* a friend? Well, a friend is apparently a person who "acts in [someone else's] interests, not his own; or

1. Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976). Fried's present work seems to be more or less a logical outgrowth, or at least a capitalizing upon the philosophical suggestions, of two of his prior books. C. FRIED, *AN ANATOMY OF VALUES* (1970); C. FRIED, *MEDICAL EXPERIMENTATIONS: PERSONAL INTEGRITY AND SOCIAL POLICY* (1974).

2. Or at least not worse people than people-in-general. See p. 580 *infra*.

3. Fried, *supra* note 1, at 1060.

4. "Critics contend that it is wasteful and immoral that some of the finest talent in the legal profession is devoted to the intricacies of, say, corporate finance or elaborate estate plans, while important public and private needs for legal services go unmet." *Id.* at 1062.

5. "Examples are discrediting a nervous but probably truthful complaining witness or taking advantage of the need or ignorance of an adversary in a negotiation." *Id.* (footnote omitted).

rather he adopts [someone else's] interests as his own."⁶ Professor Fried, at any rate, "would call that the classic definition of friendship."⁷ Being a friend, therefore, seems to involve undertaking a relationship very much like the one Professor Fried ascribes to lawyers, one which "permits, even demands, an allocation of . . . time, passion, and resources in ways that are not always maximally conducive to the greatest good of the greatest number,"⁸ and authorizes "tactics which procure advantages for [some distinct other] at the direct expense of some identified opposing party."⁹ If so, then friends might find it impossible to be good persons too.

But what if it could be shown that acting in ways not maximally conducive to the good of the greatest number, and knowingly inflicting harm on particular others, were not bars to the personal goodness of friends? That is exactly what Professor Fried tries to show. His argument proceeds in two stages, both of which demand the closest attention.

First, says Fried, it is clear that we may, each of us, choose to prefer ourselves over the collectivity. To deny that is to obviate all moral discourse, since moral ascription implies free and choosing beings—a conception totally incompatible with a duty always to act in the interest of the greatest social good. If we want to talk of morality, we must postulate the freedom to choose to act in a "nonutilitarian" way, at least with respect to ourselves. Therefore some selfish actions must be good; if all were bad, morality itself would be vacuous.

Next comes the jump from self-preferring to concrete-other-preferring. The critical passage is a short one:

[W]e recognize an authorization to take the interests of particular concrete persons more seriously and to give them priority over the interests of the wider collectivity. One who provides an expensive education for his own children surely cannot be blamed because he does not use these resources to alleviate famine or to save lives in some distant land. Nor does he blame himself. Indeed, our intuition that an individual is authorized to prefer identified persons standing close to him over the abstract interests of humanity finds its sharpest expression in our sense that an individual is entitled to act with something less than impartiality to that person who stands closest to him—the person that he is.¹⁰

The aggregate move, then, is to redefine goodness by asserting non-utilitarian criteria. It is not "bad" to favor oneself and one's friends and relations over "the wider collectivity" (even if the latter needs your favor more; even if, indeed, you make it worse off by your self-and-buddies regard), because—well, because people in fact *do* favor friends and kinfolk over abstract people-in-general, and don't seem to feel guilty about it. So doing it can't be bad.¹¹

6. *Id.* at 1071.

7. *Id.*

8. *Id.* at 1061.

9. *Id.* at 1062.

10. *Id.* at 1066.

11. Fried actually begins the argument by rejecting the utilitarian justifications for the "goodness" of friendship, noting quite rightly that such an instrumental justification

Correspondence

There are a number of unkind things that can be said about this argument.¹² Assume for the moment that grounding an ethical system on what people in fact believe and do were not twaddle.¹³ Even given that, Professor Fried's ideas about how people feel about each other is most likely not sufficiently true. Is it accurate to say that one "surely cannot be blamed" for preferring one's own children as the objects of attention, if other people's children are actually starving? *How* expensive an education can one provide at the expense of others' lives, health, or even comfort? Do all or most people really deeply object to redistributive taxation, which cuts into their ability fully to favor themselves and their kin over other needs of other people? When they do, do they really not court blame, even from themselves? After all, while the currently preferred translation of "*caritas*" may be "love," most modern religions don't exclude from the concept the idea of a reasonably abstract charity.

We do, of course, believe that Professor Fried's "intuition" is to some extent correct. That one can, in most cultures, favor oneself and one's friends and relations *more than* abstract others without being labelled or feeling basically corrupt is, we think, an obviously accurate anthropological observation. But the difficult issue in all of those cultures is not really *if*, but *who*, in what ways, and how much. If one is going to try to validate as "good" some level of selective selfishness by pointing out that some level exists in fact in the relevant society (that is, if one is going to counter a thoroughgoing utilitarian standard by showing that hardly anyone always believes or acts that way), one is obliged to do more than point it out. For almost no one¹⁴ believes that totally individualistic selfishness is "good" either.¹⁵

Professor Fried's key move, then, is to point out that unstinting utili-

cannot be validated empirically, and that its strictures are seemingly contrary to the normal expectations of modern life. *Id.* at 1067-68. This rejection is a potential source of embarrassment, however, since he eventually returns to quasiutilitarian props for a tottering nonutilitarian argument:

[I]n engaging that aspect of myself with the concrete aspects of others, I realize special values for both of us. Quite simply, the individualized relations of love and friendship . . . have a different, more intense aspect than do the cooler, more abstract relations of love and service to humanity in general.

Id. at 1070.

12. Some of which are simply picky. For example, that it's ultimately circular, or at least self-sealing when isolated and extended a bit. It goes something like this. Question: "Can it ever be morally 'good' to lavish one's care on one concrete individual to the detriment of the wider social good?" Answer: "Yes, when that lavishing is done within the dyad of friendship." Definition of a friend: "Someone on whom such care is lavished." Conclusion: "We cannot gainsay any such selfish (socially nonoptimal) acts, since the doing of them makes the relationship one of (albeit, 'limited purpose') friendship, and friendship validates the doing."

13. While one of us has argued elsewhere that such an effort is ultimately doomed, see Leff, *Law and Technology: On Shoring Up a Void*, 8 OTTAWA L. REV. 536, 542 (1976); Leff, Book Review, 29 STAN. L. REV. 43 (forthcoming; Apr. 1977), a very sophisticated version of the effort has at least initial plausibility. See R. UNGER, *KNOWLEDGE AND POLITICS* (1975).

14. The qualification is in deference to arguments like those in R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974), but even in that work it is not clear how total is the commitment to total self-regard.

15. Including Professor Fried. See Fried, *supra* note 1, at 1062 n.8.

tarianism (which he characterizes as treating everyone, including oneself, as an equal candidate for one's help and regard¹⁶) is hardly typical of human society; we all favor some people over others, notably ourselves. The more subtle "utilitarian" might answer that Fried has missed the point. What counts is not what people believe and do, but what they *ought* to.¹⁷ But even if the "utilitarian" accepts the questionable idea that virtue is what we in fact want to do, and not something a bit more aspirational than that, he may still ask what the operational content of Fried's alternative self-and-favored-few ethic might be. The key question is not whether utilitarianism can be allowed to swallow all of ethics, but where "individual autonomy," Professor Fried's intuitionistic alternative, itself starts to gag.¹⁸

That question is particularly important to a critical view of Professor Fried's analysis because he is, at bottom, arguing that since people can favor their friends, even at substantial cost to nonfriends, lawyers can favor their clients the same way. Although Fried's argument, even before the shift from friend-friend to lawyer-client, seems to take some account of the possibility that this selective favoring is not permissible without limit,¹⁹ the question of *creating* the friendship nexus is left all but unaddressed.²⁰ Can one totally arbitrarily (as a matter of "individual autonomy") choose whom one wants as a friend and then favor him? ("I wouldn't do this for

16. *Id.* at 1068-69.

17. Fried's essay exhibits, from time to time, some ambiguity about whether the metaphor of friendship is empirical or normative, making the argument a bit elusive, if not thaumatropic. At the critical points, however, the propositions seem to be empirical. If, on the other hand, Fried intended his statements to be ideals rather than facts, the flaws would be even more serious. It is curious enough to derive an ethical postulate from an empirical datum, but odder still to derive it from nothing. And finally, although Fried begins by rejecting utilitarian notions, *see* note 11 *supra*, he eventually does return to flirt with them.

18. There is, moreover, another bit of ambiguity in the structure of the argument. At times the "goodness" of acts of friendship seems to spring out of and around the relationship itself; at other times the goodness of the lawyer's acting seems to be predicated on the lawyer's autonomy as a person.

After the tour through love and friendship has nearly ended, Fried asserts that he has "argued that our right to be a friend to whomever we choose is a product of our individual autonomy." Fried, *supra* note 1, at 1074. We can't locate that argument exactly (*but see* p. 577 & note 21 *infra*), but even if we could we would be unimpressed: the autonomy argument is seriously flawed even as a matter of law, assuming (as we do) that law, too, expresses our collective sense of the "good" and the "wrong." True enough that one's choice of vocation is and should be unfettered by law. But equally true, the available choices are those among various callings all of which have some positive intrusions from felt social necessity. No one is ever coerced into becoming the manager of a public utility, but once one is that sort of person the freedom to refuse to deal equally with the public in that capacity is not unrestrained. Indeed, one might suppose that even professionals may not engage in those concerted refusals to deal which their autonomous collective hearts might otherwise desire. Law and morality limit autonomy all the time; indeed, that's what they're for. Citing the lawyer's autonomy-as-a-person therefore begs the important issues of whether autonomously following the biggest fee is sufficiently causative of social "bad" to justify its being marginally corralled.

19. *See* Fried, *supra* note 1, at 1066 (lying to save friends and relations).

20. It may again be the case that Professor Fried experienced some *ängst* about this lacuna, for when he returned to the two problem cases with which the essay began, he gave up on using friendship as the source of moral validation. To combine two criticisms (one regarding the missing link of choosing, and the other concerning the slippage in

anyone else, Ms. Borgia, but for old time's sake I'll see if I can free up a couple of bottles for you.")

Let us, however, pass on from the problems of choosing friends. For we are talking about lawyers, and we know how lawyers, most of the time, choose their clients. Assume then that the demands of individual autonomy²¹ require that people be allowed to choose friends any way they want and then to favor them over nonfriends thereafter. *Is a lawyer like a friend? Does the simile hold?*²²

Well, according to Professor Fried's own "classic definition of friendship": "... a friend ... acts in your interests, not his own; or rather he adopts your interests as his own."²³ There is, therefore, at least one overlap

(the logic of the argument), we should iterate the point just made, that none of this "friendship-acts" business goes to validate an initial *choice* of flush over impecunious potential clients; yet that very choice is the "test" which Fried has adopted for himself. To put it another way, suppose we were to admit, arguendo, that counseling dyads once undertaken imply duties like those of friendship, and that such duties deflect the claims of moral entitlement made by others. We still would not have gotten very far toward resolving the question of whether it is good to choose a wealthy businessman to be dyadic with as opposed to three or four (or even one) of the impecunious tenants of a slum. So what, that is to say, that lawyers may ideally be "friends" to such recipients as they may select? Fried's second problem case equally exposes the irrelevance of friendship. Even if it is "good" to injure *A* for the sake of *B* when *B* is already related by friendship, is it good to choose to be *B*'s friend when before the friendship sets in it is reasonable to believe that becoming *B*'s friend will necessitate doing harm to *A*?

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

21. See Fried, *supra* note 1, at 1078.

22. It might appear to the unsophisticated that this intermediate step is not strictly necessary. Since it was so easy to define a friend as good, why not just do the same for the lawyer? That is, why not just declare that since lawyers favor clients over the collectivity, and at the expense of particular others too, and don't feel guilty about it, then they can't be bad either? There are several problems with proceeding that way. First, it makes the callow prestidigitation of the original friendship-justifying move too painfully obvious. Second, insofar as the friendship move was worked by declaring human opinion to be the measure of goodness, the pseudoempiricism doesn't work nearly as well. Lawyers frequently do feel guilty about what they do for a living, and the public pretty thoroughly agrees that they ought to. So the metaphorical move is an absolute necessity for Professor Fried, for he must say that while human opinion and intuition defines the good, in this case it happens to be wrong. He cannot, that is, accept guilt and blame as the sole source of morality; he must convince people to change their views. And for persuasion there's nothing like the metaphor.

23. Fried, *supra* note 1, at 1071. It is meet to point out here that the metaphor fails to deflect the contrary common-sense notion that lawyers should sometimes be *more* constrained in pursuing their friendship than others need to be. If, for example, one prefers his friend to the collectivity when he is acting only as friend, he has typically injured others only in the sense that he has withheld from others what they may never have had to begin with. But when one acts as lawyer, he is often in the position of doing more than just lavishing protection on his client. His client, to put it crassly, often asks him to take away from some other person something which that other person already "has," or to give as little as possible in return. See p. 579 *infra*. We do not propose here that this observation is a sufficient basis upon which to establish an egalitarian ethic for lawyers. We mean only to indicate that Fried's route has done nothing much to establish the contrary position.

between reasonable perceptions of the friend-friend and the lawyer-client relationships. But note that even that single similarity comes about for the most part because Professor Fried has chosen totally to *define* friendship by reference to one (of many) of its indicia. In effect, a lawyer is like a friend even to this limited extent because, for Professor Fried, a friend is like a lawyer.

But let us pass even that by conceding that one of the indicia of some friendships is this lawyer-like adoption of another's interests. Ah, but the differences, oh my, the differences, between the affective commitment to friends' causes and the espousal of those of clients.

It is, for example, extremely rare that the lawyer's interest diverges from his client's during the course of representation. Under how many circumstances, after all, does it cost the lawyer anything to further his client's cause, except, of course, the use of his labor and time—for which the lawyer in any event is getting paid? One can think of short-run attorney-client conflicts of interest. If a lawyer chooses to go into contempt (and perhaps into jail) to preserve his client's secrets, that might present such a case. But even there the cost would seem to be only short-run; it can't be bad for business for the lawyer to show that much loyalty, and the "sacrifice," appropriately priced and discounted, might not be one at all.²⁴

Moreover, except in reasonably rare circumstances, if the attorney finds espousing his client's cause too morally "costly," both the formal and unwritten standards of the profession permit him to get rid of the client.²⁵ Not always, of course, but under most real-world circumstances he can just resign the whole bother. And when there is a flat conflict between the attorney and his client, the same rules allow the attorney to be loyal to himself, even if that involves using the client's confidences against him.²⁶

Still further, insofar as an attorney can predict in advance some conflict between his own interests or values and those of some potential client, he is almost perfectly free to refuse to take on that client in the first place.²⁷ Indeed, some of the most moralistic of commentators suggest that an attorney has a duty not to represent clients whose aims in life bruise the attorney's personal views of the right, the good, or the public interest.²⁸

Even more striking than that, the attorney is in almost all cases allowed under the rules to find in one particularly important characteristic of the client perfect justification for refusing to serve—the client's lack of money.²⁹ Insofar as the lawyer allocates his energies and skills, his friendship within

24. There are other hypotheses as well about the motivations for such sacrifice: Perhaps it is fealty not to the client, but to the profession-cum-client; or to the structure of the system which requires confidentiality; or even, more selfishly, to one's own moral sense, operable whether or not there is a living client thus to be protected.

25. See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101; *id.* EC 7-9, 7-10. But see *id.* DR 2-110.

26. See, e.g., *id.* DR 4-101(C)(4).

27. *Id.* EC 5-2. But cf. *id.* EC 5-1 (lawyer's duties once lawyer-client relationship has been established).

28. The question is addressed in, among others, M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 49 (1975); and Califano, *The Washington Lawyer: When to Say No*, in *VERDICTS ON LAWYERS* 187 (R. Nader & M. Green eds. 1976).

29. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25.

the legal system³⁰ is bought and paid for, if not in advance, at least at prudently planned intervals.

In addition, whatever the actual contingency and chilliness of the lawyer's relationship to his client, it is firm, wholehearted, and ardent compared to the client's reciprocal feelings and actions. A client has no legal, and most often no felt, duty to his lawyer (except to pay his fee) not shared by any other member of the public (*viz.*, not to commit a tort against him).

Thus the normal mode of the attorney-client relationship may better be described as follows: A lawyer is a person who, without expecting any reciprocal activity or inclination thereto, will attempt to forward or protect the interests of a client, within the rules of a legal system, so long as he is paid a sufficient amount to do so, and so long as doing so does not inflict any material unforeseen personal costs. That's "friendship"?

Thus almost the only similarity between the friend-friend nexus and the attorney-client one is Professor Fried's adoption-of-interests congruence, and even that depends mostly on trivializing the definition of friendship. True, metaphors do not assert identities. But there *are* limits. If it is proper to say a lawyer is like a friend, it is equally graceful to describe the ruddy complexion of one's beloved by "My love is as a pizza pie."

But once the power (such as it is) of the friendship metaphor dissipates, then all that is left is that a lawyer's autonomy³¹ allows him to choose his clients as he will (mostly in such a way as to maximize his own income); and, once having chosen them in this self-serving way, he may, perhaps must, get what they want in any way that is not illegal (or in Professor Fried's terminology "insofar as this is necessary to preserve and foster the client's autonomy within the law"³²). Why is it possible to do that and be "good" too? The answer is an interesting one: If the system of law is fundamentally just,³³ and if it provides that persons in the clutches of that system be fully represented, then it is not unjust (or morally bad) to do the representing, even if some of the things one must do in the course of that representation look not only not socially optimal, but downright nasty (like cross-examining a rape complainant to a quivering jelly about her prior chastity). That answer is interesting because it is so obvious; it is the ordinary rule-utilitarian lawyer-defending argument after all.³⁴

Therefore, even Professor Fried's argument against the "utilitarian" critique of lawyering was at least partly disingenuous. There may indeed be some naive utilitarians in the world who would criticize lawyers for not seeking social optimization with each and every one of their professional decisions, but there are not many. Against such critics it is indeed easy to say (and Professor Fried indeed finally says) that while some *acts* are by themselves morally questionable, the system those acts serve and are part of is, if not perfect, morally better than any feasible alternative. But that

30. Fried, *supra* note 1, at 1071-72.

31. *Id.* at 1078-79; *see* note 18 *supra*.

32. Fried, *supra* note 1, at 1072.

33. Professor Fried quite rightly finds this to be a more interesting case to discuss than, say, Nazi Germany's legal system. *Id.* at 1084-85.

34. And there comes to be, after all is said and done, not much to distinguish Professor Fried from Dean Freedman. *See* M. FREEDMAN, *supra* note 28, at 43-49.

opens up the following problem: What if the rule-utilitarian answers that it is the system—the rule—that is more unjust than it needs to be? Is it still “good” to serve a bad system within its own rules? Apparently it is, at least for Professor Fried. For when he actually gets to addressing the two charges raised against the goodness of lawyers—that they choose whom to help without regard to social optima and that they hurt determinate others while serving their some—it goes like this: (1) if choosing those who can pay is naughty, it is society’s fault for not assuring that everybody can pay;³⁵ and (2) if a lawyer wrecks some third party in serving his client, “a lawyer is morally entitled to act in this . . . way even if the result is an injustice, because the legal system which authorizes both the injustice . . . and the formal gesture for working it insulates him from personal moral responsibility.”³⁶

II

All right, why the big fuss? What difference does it make? This, after all, is not the first time in history that someone lit on the wrong metaphor and pushed it, though not far, easily too far. Well, it matters because we are lawyers and, more exposed than that, teachers of lawyers, and it can do nothing but harm, to us and our clients, to distort what we are really doing, we *and* our clients. For (subject to some important qualifications to be discussed in a moment) lawyers and clients are not being “friends” to each other, and together they are not being “friends” to anyone else. Indeed, the relationship between lawyers and clients and, together, as to others is frequently almost the antithesis of friendship. It is often a relationship not of concrete humanity or friendly individuation but of bureaucratic manipulation, both of each other and, joined for the nonce, of others still. That is one of the reasons why lawyers are hated so much and why they are so frequently moved to hate themselves.

Let us suggest a different approach from Professor Fried’s, just as an experiment. Instead of encasing something called “the lawyer-client relation” in an opaque abstraction pudding, let us try to picture—with just a little specificity—what it really is that clients ask lawyers to do for them, and what lawyers thereupon do.

Well, lawyers do lots of things for clients. They fill out forms, for instance, and draft documents—letters, contracts, memoranda, what all. They take part in negotiations with both governmental agencies and private parties. They tell clients what their chances are of getting into legal trouble with other people, including governments, if they do or don’t do something, and suggest how they can arrange to get more or less what they want without those risks. When their clients are challenged at law on the grounds that they have already done something of the sort, lawyers try to eliminate or reduce recompense or punishment. When their clients believe that something nasty has been done to them, lawyers help them get protection, recompense, or revenge. All of these things lawyers do across the whole range of law, with respect to crimes, and torts, and contracts, and property, and domestic relations, and so on. In each instance they try to

35. Fried, *supra* note 1, at 1079.

36. *Id.* at 1084.

Correspondence

help their clients keep or get what under the law may very well be theirs, be it goods, money, or freedom.³⁷

In most of these activities there is one invariant element. The client comes to a lawyer to be aided when he feels he is being treated, or wishes to treat someone else, not as a whole other person, but (at least in part) as a threat or hindrance to the client's satisfaction in life. The client has fallen, or wishes to thrust someone else, into the impersonal hands of a just and angry bureaucracy. When one desires help in those processes whereby and wherein people are treated as means and not as ends, then one comes to lawyers, to us. Thus, if you feel the need for a trope to express what a lawyer largely is, perhaps this will do: A lawyer is a person who on behalf of some people treats other people the way bureaucracies treat all people—as nonpeople. Most lawyers are free-lance bureaucrats, not tied to any major established bureaucracy, who can be hired to use, typically in a bureaucratic setting, bureaucratic skills—delay, threat, wheedling, needling, aggression, manipulation, paper passing, complexity, negotiation, selective surrender, almost-genuine passion—on behalf of someone unable or unwilling to do all that for himself.

This lawyerlike behavior, of course, need not always appear quite as icily nasty as its general description suggests. Especially when the client is an isolated person being injured by some true bureaucracy behaving like either a steamroller or a brick wall, helping the client looks and feels noble, even lovable. And when one thinks of those vast areas of lawyering not part of the usual litigation-fixated public image—planning, structuring, counseling—one tends to find relationships of lawyer and client, and of lawyer and client and third party, very much less bureaucratic and impersonal in technique, in purpose, and in tone.

But even conceding all that, and conceding that these “warmer” relationships do make up much more of legal practice than is usually realized, still, what lawyers do much of the time, even while only counseling, is help people who cannot in the particular instance relate successfully to each other as whole human beings to relate to each other as counters in each other's self-protecting and self-maximizing life plans.

Does that make lawyers bad people? Well, it does at least make them

37. We are not unmindful of alternative, and seemingly discrete, descriptions, which center about the “counseling” role of attorneys: “Counseling is a process that fosters party well-being. It is initiated by and because of the uncertainty and/or disagreeability relating to a party's experience.” Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98, 99 (1969). Goodpaster, Redmount, Watson, and Shaffer are the central expositors of such a view, which focuses on, as Shaffer might put it, counseling in the Sartrean sense of the word. Several points, however, should be made. First, each of these scholars presents the empathic viewpoint as a possibility and an aspiration rather than (like Fried) as a ubiquitous thing-in-itself. Secondly, the lawyer-client relationship, when it truly bears these empathic attributes, most often exhibits them *not* in circumstances that lead to the problematic cases Fried is discussing. And thirdly, this “better way” is indeed ultimately instrumental rather than either morally-validating or entered into for the purpose of creating the “special values” of love and friendship so central to Fried's analysis. See A. WATSON, *PSYCHIATRY FOR LAWYERS* 22-26 (1968); Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5, 8-9 (1975). Dean Shaffer's work is both exemplary and abundant. See, e.g., T. SHAFFER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 1-27 (1972); Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721 (1975).

people. The tendency for humans to treat each other as things to be manipulated is hardly an invention of lawyers, or for that matter of bureaucracy. Naturally, that's not the only way we treat each other. Love, social solidarity, even friendship do exist. Even "markets" are ambiguous as to whether they're conflictive or integrative, and markets often become "firms," which are even more ambiguous that way. But, by and large, deep relationships between whole persons do not typify human relationships in our society, and except for the usual "I-know-a-tribe-which . . ." exceptions, they don't seem to characterize the dominant mode of any other culture either. So if a good lawyer cannot be a good person, it is only because "good" is defined in such a way that achieving it is necessarily rather a rarity.

But, in addition, it does not make the "goodness" of lawyers any easier to see that they do what they do not, like friends, for ineffable reasons but coolly for cold cash. Much as we loathe the technique of using human intuition as a means of deciding what normative distinctions are "right," it is worth pointing out that most people do find some critical moral distinctions lurking in the difference between the motives of the lover and those of the whore, and that they can even contrast the avenger's impulse with the hit man's.³⁸

Oddly enough, however, Professor Fried and we have reached pretty much the same conclusion—that a good lawyer can be a good person. We have just gotten there by materially different routes. In our view the lawyer achieves his "goodness" by being—professionally—no rotter than the generality of people acting, so to speak, as amateurs. In Professor Fried's view, the lawyer achieves his honorific status by behaving analogously to one rather nicer subset of human actors, the "friends." Associated with this split is another, or rather the same otherwise expressed: We see the lawyer as skilled at the impersonal dimensions of personal and social relations; Professor Fried sees him as an emotive specialist in personal, concrete "human" behavior, concerned with the "autonomy" of his clients. Professor Fried's lawyer is a friend; ours is not. Neither he nor we are wholly accurate. But let us say on behalf of our view that it explains something that Professor Fried's view makes inexplicable: the considerable degree to which the public, including our clients, distrusts and despises us. If lawyers are like friends, one would expect the public to notice. But they seem not to. It is, we suppose, possible that the public is just mistaken in its perceptions and will begin to see lawyers as friends once Professor Fried's corrective views get sufficient exposure.³⁹ But we are strongly inclined to

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

39. Three of the most significant studies of client attitudes toward lawyers are B. CURRAN & F. SPAULDING, *THE LEGAL NEEDS OF THE PUBLIC* (1974); J. DONNELL, *THE CORPORATE COUNSEL* (1970); and *A Motivational Study of Public Attitudes and Law Office Management* 65-76 (Missouri Bar/Prentice-Hall survey 1963).

Attitudes towards lawyers may change over time as the public (and the profession) change. At present, however, observations such as the following, from F. MARKS, R.

Correspondence

doubt it. For it seems more likely that the public sees lawyers mostly aright, as the technically powerful embodiments of the public's own worst but often necessary instincts.⁴⁰ Indeed, if we are to keep on playing with allegedly clarifying metaphors, the lawyer can be seen, and is, we think, seen, not as friend, or even alter ego, but as alter id. In brief, a lawyer is one who helps indeed, but frequently what he helps to do is further his client's interest in reducing everyone and everything else into something to be escaped or consumed.⁴¹

III

Love is important to ethics. So are its cognates, like friendship and personal loyalty. It is a mistake to believe that one can be "good" if and only if one's caring is diffuse and hypothetical.

But love is not all there is to goodness. One can be too much a friend, to oneself or to another. More than that, the extent to which love and friendship are relevant to the evaluation of particular role behavior is, naturally, a function of whether or not love or friendship actually exists in that role. To defend a course of action as love-like or friendship-like when

HALLAUER & R. CLIFTON, *THE SHREVEPORT PLAN* 37 (1974), are typical of methodologically sound attitude surveys:

It is questionable whether any large groups within our society, other than wealthy individuals and large business enterprises, voluntarily consult lawyers on a regular basis. For most people, consulting a lawyer is neither routine nor familiar, nor is it viewed as pleasant. . . .

When an individual consults a professional, he feels a loss of control over both process and outcome

The matter of client attitudes and their implications for a society governed by law rather than tradition is explored more fully in a forthcoming work by one of us. L. BROWN & E. DAUER, *PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS*.

40. What does distinguish lawyers . . . is that they are feared and disliked—but needed—because of their matter-of-factness, their sense of relevance, their refusal to be impressed by magical "solutions" to people's problems. Conceivably . . . the ceremonial and mystification of the legal profession are, to a considerable degree, veils or protections underneath which this rational, all too rational, work of the lawyer gets done.

Riesman, *Toward an Anthropological Science of Law and the Legal Profession*, 57 *AM. J. SOC.* 121, 128 (1951). That is to say, clients use lawyers as ancient Arabs used goats (for Azazel); and lawyers toss it back on clients. Client: "That's up to my lawyer (and anyway, I can't be responsible since I don't understand all that stuff)." Lawyer: "The choices aren't mine, and the system demands that I protect my client." See generally L. BROWN & E. DAUER, *supra* note 39.

41. We might suggest in passing that if it is true that one of the key social roles of lawyers is to have everyone's worst impulses put into their skillful hands for execution, transference might help to explain the peculiar state of legal ethics. If people in society are projecting things about themselves which they don't much like, then one would expect them to punish those impulses by punishing the transferees. Direct punishment is hard: lawyers are too valuable to shun overtly. Far more subtle an approach would have it so that the lawyers punish themselves. One way to effect that (a way which we think is widely in effect) is to put the parties to be simultaneously used and hurt (*i.e.*, valued and punished) into a classic "double bind," a situation in which either course they take is "wrong." And one way to do that is to give them an ethical system complete with flatly contradictory commands—*e.g.*, (1) "Your obligation is to your client"; (2) "Your obligation is to 'justice'"—in a world in which, except by *coup de main*, no one can convince himself that he can always serve both at the same time.

it is, much of the time, no such thing, is not to explain reality, but to trump it with the slyly appropriated affect of an altogether different realm of relationship. That will not do. And that, we think, is what Professor Fried did.⁴²

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42. We did not, in text, comment on the narrowness of the question Fried set out to answer, mostly because we believe that, among scholars, criticizing the pragmatic relevance of a chosen topic is normally inappropriate. We do so now only to put Fried's essay in its proper place. Whether a lawyer can be a good person is a question that is philosophically interesting, perhaps even significant if extrapolated systematically. But it is not among the issues with which the profession and the society must presently grapple. As law continues to increase its jurisdiction over hitherto "un-lawed" areas of social and economic life, there arise increasingly serious real difficulties which must be addressed. A market system for the distribution of legal services may be thought to employ wealth as a modulator of access not only to justice, but even to those distributive shares that have been politically guaranteed. Yet, on the other hand, a nonmarket system may put at risk the putative clients' personal autonomies vis-à-vis government which a completely independent legal profession is thought to preserve. The arguments are complex, of course, but the issues are rather pressing. "The morality of the lawyer-client relationship" normally conjures up not whether one individual can be "good" and be a lawyer, but rather whether there is a need for some very fundamental restructuring of the reality of lawyering. The far more important question may be, indeed, whether a *society* with lawyers-for-fees can be "good."

Fried's other dilemma—which one might concretize by thinking of the humiliating cross-examination of the truthful victim in a rape case—is similarly more than just a philosophical imbroglia which might make the "good person" pause before choosing to be a criminal defense attorney. Its analysis necessarily implicates difficult reassessments of the balance of values which our juridical processes must encounter. The point is that there are problems enough to be wrestled with and pressing decisions presently to be made. Professor Fried's analysis contributes virtually nothing to the existing dialogue; he adopts, instead, the goodness of our present legal and organizational estates as givens. Some people don't. Thus even if lawyers are "good people," the temptation to beam sanctimoniously while clutching Volume 85, Number 8 of the *Yale Law Journal* will have to be resisted.

Author's Reply:

The editors of the *Yale Law Journal* have kindly offered me an opportunity to reply to Professors Dauer and Leff. It is not easy to do so; their essay, though unaccountably querulous in tone,¹ is like a pudding once described by Winston Churchill: it lacks a theme. Since I have already developed my position in detail in my original article, I shall confine myself here to noting what I believe are inaccuracies and misconceptions.

1. A small example, chosen at random: In note 1 the authors say that my article "seems to be more or less a logical outgrowth, or at least a capitalizing upon" some aspects of my other writings. The word "capitalizing" hints at some dark flaw. What are the authors getting at? Who knows? They seem to be generally annoyed with me.

At the outset of their communication Dauer and Leff summarize my argument thus: "(1) a friend can do these nasty things and still be a good person; (2) a lawyer is like a friend; and, therefore, (3) a lawyer can be a good person." They find the "sticky parts are establishing that both (1) and (2) are true." Hardly surprising, since (1) is false, and therefore by implication (2) is as well. I could not have been more explicit that the role of friendship does not justify a person's doing for another what it would be immoral, unjust, or indecent to do for himself.² Indeed it is my position that a lawyer is free to do for his client hurtful things which the client could not do for himself, and which a nonlawyer friend could not do for him. But Dauer's and Leff's incorrect characterization of my argument apart, I also argue explicitly that decency and respect for others forbid a lawyer, like anyone else, from engaging in unjustified assaults. Thus while Dauer and Leff attribute to me the position that I would justify turning a complaining rape witness "to a quivering jelly" my argument is precisely to the contrary.³

Professors Dauer and Leff misstate my thesis regarding our duty to help others, even abstract others. They launch at me the rhetorical question: "Do all or most people really deeply object to redistributive taxation, which cuts into their ability fully to favor themselves and their kin over other needs of other people?" I suppose there is no harm in a cheap shot which totally misses the mark. Once again, I could not have been more explicit that the right to show some preference for one's self or chosen others occurs within the context of just institutions. Moreover, I explicitly stated that I adopt at least as a first approximation of what such just institutions are like, "the principles put forward" in *A Theory of Justice* by John Rawls.⁴ Now it is well known that Rawls's second principle of justice—the so-called maximin principle—goes in for a great deal of redistribution. And thus it is misleading to say that my argument only "seems" to take account "of the possibility that this selective favoring is not permissible without limit." But I suppose saying something is also seeming to say it.

This last misrepresentation of my argument introduces what I consider to be the central misconception of the Dauer and Leff communication. My point was not to establish just how much redistribution and obligation to care for others the principles of justice require, but rather to argue that, however much they require, they stop short of requiring everything. My argument regarding the autonomy and integrity of the self was the argument that the obligation to care for others cannot be total, and that there are philosophical reasons (not just a report of how people think and act) for insisting that some discretionary realm be left over, inviolate to each person. Having argued for (not just stated) the existence of such an inviolate, discretionary realm, I went on to argue that the same principles that establish this moral discretionary fund, as it were, must necessarily permit us to spend that fund how we wish, that is to spend it on ourselves or on others—friends, kin, clients, patients—for whatever reasons we like,

2. Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1082-87 (1976).

3. See *id.* at 1084.

4. *Id.* at 1071 n.24 (citing J. RAWLS, *A THEORY OF JUSTICE* (1971)).

including pay. And, of course, if one person has a right to spend, the other has a right to receive. This moral discretionary fund consists not just of material resources but of time, talent, and energy. It is this, rather than the analogy to friendship, which is the starting point of my argument. The analogy to friendship is simply meant to dramatize that the expenditures of resources by a lawyer are referable to this discretionary fund, as are the expenditures of a friend. But the analogy is not an argument, and I do not treat the friendship analogy as if it were. We have already seen that the analogy is not complete, since lawyers may be able to do things for their clients which friends could not do for each other. My article indicates many other differences between a lawyer and a friend.

The moral discretionary fund, the right to give oneself and chosen others a certain measure of preference, is, however, only the start of my argument. The move to the particular situation of the lawyers is made on page 1073 of my essay, and is crucial. I argue that the principles of justice (including the principle of the rule of law) protect the autonomy of every person except as that autonomy is explicitly and properly limited by law. The rule of law is not only a constitutional principle, it is a moral principle. Since it is immoral for society to limit another's liberty other than according to the rule of law, it is also immoral for society to constrain anyone from discovering what the limits of its power over him are. And finally it follows that it is immoral for society to constrain anyone from informing another what those limits on that other's autonomy are. Thus, by counseling and helping others to operate the legal system a lawyer assists in the realization of rights. And that is a good thing. Of course it is only a good thing on the assumption that the system of law which the lawyer is helping his client to operate is a reasonably just one—an assumption I am explicitly willing to make about the United States.⁵ Thus the heart of my *argument* relates to autonomy and rights, and friendship is just an analogy. In spite of everything that Dauer and Leff say, I continue to find it a fruitful analogy.

The final inaccuracy in Dauer's and Leff's response, an inaccuracy which leaves me "a quivering jelly" of indignation, is the statement that my argument "is the ordinary rule-utilitarian lawyer-defending argument after all." I do not believe in rule-utilitarianism. I believe rule-utilitarianism is a philosophically false, incoherent doctrine. It is incoherent because it makes the maximization of utility the sovereign moral criterion while at the same time forbidding individuals to act directly on that criterion, rather requiring them to act according to utility-maximizing *rules*. Moreover, every statement of rule-utilitarianism can be shown to collapse into the black hole of act-utilitarianism, since it is not possible to state a rule in a truly utility-maximizing way without including so many exceptions that it ends up simply ordaining the general obligation to maximize utility under all the circumstances. These points have been amply demonstrated by proponents of act-utilitarianism such as J.J.C. Smart⁶ and by opponents of utilitarianism such as David Lyons.⁷ Now I am explicit in this article

5. *Id.* at 1085.

6. J. SMART & B. WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973).

7. D. LYONS, *FORMS AND LIMITS OF UTILITARIANISM* (1965).

Correspondence

and in my other writings (to which they refer) that it is not any argument of utility which leads me to favor individual autonomy. Rather, I am making an argument about rights, and I could not be more explicit that no satisfactory theory of rights can be shown to be derived from utilitarianism, act or rule.⁸

It is at the end of their piece that Professors Dauer and Leff disclose a system of attitudes seriously at variance with my own. I will simply state the contrast, and leave it to the reader to decide which is truer to the facts. Professors Dauer and Leff are unhappy about modern society, with its rules, roles, rights, and bureaucracies. It seems that they think people who work these institutions and work within them must inevitably treat each other as nonpersons. I do not think so. Professors Dauer and Leff think of institutions and the rule of law as necessary evils, while I see rules and institutions as the inevitable ways in which complex human relations must often be structured, if moral rights and therefore humanity are to be respected. I do not even know what it means to call this a necessary evil. To be sure if everybody's interests coincided, if there were no scarcity, if we all agreed about what was good, if we could have enough for all by hunting in the morning, fishing in the afternoon, and criticizing after dinner, then perhaps we would not need lawyers or rules or institutions at all. I must confess that people who criticize the real world because it fails to correspond to this picture have always frightened me. If you look at what such people have done you might understand why.

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8. See Fried, *supra* note 2, at 1067-68.