3-1-2002

Is Tom Shaffer a Covenantal Lawyer

Marie A. Failinger

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Recommended Citation
Available at: http://scholarship.law.nd.edu/ndlr/vol77/iss3/1

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
IS TOM SHAFFER A COVENANTAL LAWYER?

Marie A. Failinger*

It must be a strange moment of recognition for a scholar to read contemporary work in his field, only to discover that some of those essays which at publication marked him as a Lone Ranger riding his own trail\(^1\) or a professional kook\(^2\) are becoming such commonplaces in the field that they are proffered without the perceived need to defend them. Or to be named the father of a new disciplinary movement,\(^3\) even while his tough words of truth have lost their sharp edges by retranslation in others' works.

Surely Tom Shaffer must have such moments of recognition more than occasionally. The narrative argument which he has played a key role in introducing into the study of legal ethics\(^4\) certainly has become more than respectable; it seems almost a preferred mode of argument in some areas, such as the ethics of representing the disad-

---

* Professor of Law, Hamline University School of Law, and editor of *The Journal of Law and Religion*. Milner Ball, Tom Shaffer, Jack Sammons, and Walter Brueggemann all made helpful suggestions in the kindest way, for which I thank them. Thanks also to Sarah Manica, who served as my research assistant.


And, though the field of legal ethics still has its share of defenders of an Enlightenment-framed conception of the lawyer as independent adversary, that seemingly once-unquestioned model that Shaffer took on years ago has been toppling under the weight of critiques by religious, feminist, minority, and other academic lawyers. If his once somewhat lonely critique has been followed, revised, even tamed by other ethicists into a view of the profession increasingly


7 Shaffer has been assailing this model since at least 1972 when his book on wills and trusts was first published. See Thomas L. Shaffer, The Planning and Drafting of Wills and Trusts 5, 11 (1st ed. 1972) (discussing the “inhumane and unresponsive legal profession” that results from a profession that cultivates lawyers to be exclusively analytical, cool-headed, aggressive, and focused on order); see also Thomas L. Shaffer, On Being a Christian and a Lawyer: Law for the Innocent 5-9 (1981) [hereinafter Shaffer, Christian/Lawyer] (discussing adversary ethics).

8 See, e.g., Shaffer, On Living, supra note 6, at 890 (discussing the changes to be expected from feminist ethics); White, supra note 5, at 4-9 (comparing the historical treatment of the speech of women and men). Jack Sammons also credits Shaffer with introducing the possibility of moral counseling into the profession’s sense of ethics. See Jack L. Sammons, Rank Strangers to Me: Shaffer and Cochran’s Friendship Model of Moral Counseling in the Law Office, 18 U. ARK. LITTLE ROCK L. REV. 1, 2 (1995).
taken for granted within the academy\textsuperscript{9} (while Shaffer himself has continued to issue sharply prophetic pronouncements),\textsuperscript{10} the most important remaining question is what promise Shaffer's work carries for a constructive vision of law practice in the future.

This project will consider what Shaffer's work may share with "covenantal" ethics, a form of ethical argument I will suggest is not interchangeable with other traditions familiar from Shaffer's body of work, such as the ethics of friendship or care\textsuperscript{11} or the ethics of virtue.\textsuperscript{12} I will explore just a few of the complexities that flow from the development of themes in covenantal ethics in a professional context, themes such as the creation of obligation by historical decision, which has implications for the treatment of strangers; the ambivalence of covenantal ethics on the value of equality as it meets difference, critical to interaction with the vulnerable and the wicked; the covenantal relational dynamic of giftedness and entrustment rather than obliga-


\textsuperscript{10} See, e.g., Shaffer, Christian/Lawyer, supra note 7, at 8–9, 163 (noting the difficulty for a Christian to serve the adversary system believing that the government can provide justice); Thomas Shaffer, Faith Tends To Subvert Legal Order, 66 Fordham L. Rev. 1089, 1099 (1998) [hereinafter Shaffer, Subvert] (arguing that relevance of religion to lawyering is as subversive politics, which challenges lawyers' comfort); Thomas Shaffer, Maybe a Lawyer Can Be a Servant; If Not..., 27 Tex. Tech. L. Rev. 1345, 1352, 1355–56 (1996) [hereinafter Shaffer, Servant] (castigating the church for failing to be a place of moral deliberation; and stressing the importance of confronting the "brute existence of dominion"); Thomas L. Shaffer, Jews, Christians, Lawyers, and Money, 25 Vt. L. Rev. 451, 451–52 (2001) [hereinafter Shaffer, Money] (castigating lawyers for their relationship with wealth).

\textsuperscript{11} Shaffer himself used the language of the "ethics of care" about the same time that Carol Gilligan's widely quoted book in this area came out. See Carol Gilligan, \textit{In a Different Voice: Psychological Theory and Women's Development} (1982); Shaffer, Christian/Lawyer, supra note 7, at 21–33. In his work, Shaffer described an ethics of care as one that assumes that lawyer and client depend on and influence each other, and where both aspire that each care for the other. See id. at 22. He develops similar themes in his work on the ethics of friendship, see, e.g., Shaffer, Faith/Professions, supra note 6, at 188–217, and in his work with H. Richard Niebuhr's ethics of responsibility, id. at 259–67.

\textsuperscript{12} See, e.g., Thomas L. Shaffer with Mary M. Shaffer, American Lawyers and Their Communities: Ethics in the Legal Profession 165–69 (1991) (discussing Aristotelian virtue and \textit{rispetto}, the disposition to practice membership in the family). In legal ethics, the virtue tradition has been highly influenced by the work of Alasdair A. MacIntyre. See, e.g., Alasdair MacIntyre, \textit{After Virtue: A Study in Moral Theory} (2d ed. 1984).
tion and desert; and the way that covenantal ethics looks at loyalty and accountability.

At the outset, I need to acknowledge that borrowing from the covenant tradition straight into a vision for professional ethics carries two inherent difficulties which I will admit and explore later, but have not by any means resolved here. The first difficulty is that covenant theology and the ethics that flow from it are inherently communal in nature: the covenant story is always the story of one people covenanting with another people, or with God. In the first Part, I will mostly slide past this problem, moving directly from communal history to interpersonal ethics, as if the dynamics and values that underlie covenants between peoples (or a people and God) are similar in one-on-one lawyer-client relationships. Though I will later consider how the profession might take more seriously the communal nature of the covenantal tradition by creating a community of memory, I want to acknowledge that I neither assume nor demonstrate that one can so quickly move from a communal to an interpersonal ethics.

Second, it is important to acknowledge the difficulties in translating, or borrowing from, a story of religious faith in developing a vision for a profession whose members share many faiths, religious and secular. The Jewish and Christian covenant traditions are more important for the stories they tell about God and how God is in relationship with humankind than as a source of ethical inspiration for the legal profession. Walter Brueggemann has argued that the Old Testament, the wellspring of Jewish and Christian covenant theology, is largely a testimony about who God is and what God does—each "witness" tells us of the God who creates, promises, delivers, commands: who covenants. Indeed, in terms of an ethic, these stories are subversive, undercutting much of what secularized communities assume about our experience of the world around us and our concomitant ethical responsibilities to each other. These stories tell of Someone whose shoes no human person can fill, whose goodness no one can imitate. Because my project is to consider how the legal profession might re-understand itself, I have chosen mostly not to tell these stories of God, precisely because the focus of my project—the pluralistic community of American lawyers and their clients—cannot live as a people of God in the same way as a Christian (or other religious) community formed in a direct relationship on the promise of God. (I am not suggesting that the legal profession cannot and does not live in relationship with God, only that it cannot be the same relationship as a gathered community of

believers. An elaboration of the varieties of Christian views about how God is in relationship with the created world, unbelievers and believers alike, is beyond my scope.) Toward the end, I take a stab at this, the toughest problem with using theological resources in a religiously pluralistic legal profession: can we even talk about a professional covenant without the God who is central to the biblical covenantal narrative?

This attempt to honor Thomas Shaffer's work by journeying a little on one road that leads from it is Shaffer-like and unShaffer-like at the same time. Contra Shaffer, it compares Shaffer's work to a specific tradition of ethics, when he has consistently resisted fitting into any one tradition or category. To be sure, Shaffer has argued for some values consistently—the value of faithful relationship, the necessity of painful and prophetic truth telling, the importance of recognizing one's location in a community. Yet, these arguments waft in and out of his essays much like a symphony's themes; just when one begins to imagine one can pin down the criteria for, and claims of, Shaffer's ethics, he shifts to other language, or subverts those criteria.

To borrow another sense-metaphor, to know what Shaffer claims, one must be careful not simply to study individual brushstrokes, but stand far enough back to see how they make a telling image. Insofar as human communities themselves and the narratives which truly illuminate them reflect a confluence of intellectual traditions, Shaffer's refusal to pigeonhole lawyers or their ethics into specific traditions strikes me as an honest attempt to reflect "what has been" and "what is" (and what should be, perhaps) rather than to force what he sees into academic categories. His thoughtful (apparent) eclecticism also profoundly mirrors the influence of Shaffer's intellectual friends—a

---

14 See, e.g., Shaffer, Faith/Professions, supra note 6, at 28–32 (describing character in community); id. at 38 (comparing lawyers to prophets); id. at 221 (describing importance of friendship); id. at 260 (describing the importance of community); Shaffer, Christian/Lawyer, supra note 7, at 43 (describing the need for "theology of the client"); id. at 114–15 (describing the advocate's claim as prophetic); id. at 207–14 (relating story of Franz Jagerstatter, an Austrian farmer beheaded for refusing to serve in Hitler's armies). But see Thomas L. Shaffer, On Lying for Clients, 71 Notre Dame L. Rev. 195 (1996) (discussing the complexity of truthfulness in cases where complete honesty may prevent a lawyer from protecting a client from oppression).
motley crew; it is a practical ethics reflective of his own views that one cannot "live one way in town and another way at home." Since Shaffer himself has only occasionally used covenant language to describe his ethics, this exercise might seem somewhat misdirected. However, covenant language has now been introduced into legal ethics in the work of Joseph Allegretti and touched upon by others who would acknowledge some debt to Shaffer. And, thinking how Shaffer's work may be used constructively in coming ages of reflection on legal ethics, there are good reasons for studying the distinctive claims of covenantal ethics. For one thing, to my mind, religious traditions steeped in covenantalism influence much recent work in law, religion, and ethics, so its premises are important. For another, scholars attracted to the new ethics that Shaffer and others have wrought may be tempted to use covenantal language when they really mean care ethics or virtue ethics (or even autonomy ethics), even though these theories differ from each other in as many ways as they are similar. In my view, it would be a wrong turn of events for legal ethicists to use these languages interchangeably, thereby stripping each tradition of its historical and religious vitality and obscuring

15 If one reads the acknowledgments he makes directly in his text, Shaffer has been influenced by thinkers from as strongly differing traditions as mainline Protestantism (e.g., Niebuhr), feminism, modern Judaism (e.g., Martin Buber), liberal/radical Catholicism (e.g., Robert Rodes), Anabaptist and "conservative" Protestant movements (e.g., John Howard Yoder and Stanley Hauerwas), and others. See, e.g., Shaffer, Faith/Professions, supra note 6, at 103 (Rodes); id. at 236–39 (Buber); id. at 287–88 (Hauerwas and others); id. at 290–92 (Hauerwas and Yoder); Shaffer, Christian/Lawyer, supra note 7, at 236–39 (Hauerwas and others); Shaffer & Shaffer, supra note 12, at 9 (Hauerwas and others); Shaffer, supra note 2, at 641–42 (Hauerwas and Yoder).

16 See, e.g., Shaffer, On Living, supra note 6, at 879 (quoting Harper Lee, To Kill a Mockingbird 267 (Fawcett Popular Library ed. 1962) (1960)). We would expect a friendship ethicist who respects Atticus Finch's homey way of describing what integrity means to reflect the influence of his friends in his work.


the limitations of each tradition as well. Finally, there may be warrant for suggesting that Tom Shaffer has lived covenantally, even in Brueggemann's sense of the term.\(^\text{19}\)

As I have suggested, any attempt to describe "the" tradition of covenantal ethics risks inescapable oversimplification. The course of the covenant tradition from ancient suzerainty treaties through the Hebraic tradition and then Christian use of the category is complex and fluid, hence, the need to focus on just a few facets of the tradition.

I. "BEHOLD, I MAKE A COVENANT":\(^\text{20}\) HISTORICAL FEATURES OF THE TRADITION OF HUMAN COVENANTS

An even greater difficulty with "covenant" is that it is not necessarily one idea.\(^\text{21}\)

Employing the language of covenant theology to understand the lawyer's place in her community is tricky business, for theologians do not even agree about the exact elements of a covenant, the nature of the covenantal relationship, or the obligations which follow from covenant formation.\(^\text{22}\) Even among those Christians who understand covenant in the larger theological sense of a witness about God's action

19 See, e.g., Shaffer, Servant, supra note 10, at 1347 (describing the covenant story in Deuteronomy 7); id. at 1349 (discussing the conversation among the faithful). Perhaps that has something to do with his Western roots. Daniel Elazar notes, Frontiersmen—that is to say, people who have gone out and settled new areas where there were no preexisting institutions of government with which they identified and who, therefore, have had to compact with one another to create such institutions for themselves—are generally to be found among the most active covenanters.


20 Exodus 34:10.


22 See, e.g., DENNIS J. MCCARTHY, OLD TESTAMENT COVENANT: A SURVEY OF CURRENT OPINIONS 1-9 (1972) (describing the variety of ways in which biblical scholars have used the term covenant); Peter A. Lillback, The Continuing Conundrum: Calvin and the Conditionality of the Covenant, 29 CALVIN THEOL. J. 42, 45 (1994) (noting the elasticity of the term "covenant theology"); see also HILLERS, supra note 21, at 1 (arguing that the idea of a covenant "is apt to become 'dark and doubtful' with the passage of time"); John Stek, "Covenant" Overload in Reformed Theology, 29 CALVIN THEOL. J. 12, 15, 25-27 (1994) (describing how, in the Reformed tradition, the term covenant has been cut loose from historical covenant traditions and has been improperly used to denote any kind of biblical promise, whether or not in covenantal form). Despite the variations in the description of the tradition, the covenant continues to be central to Protestant, particularly Reformed, thought. See id. at 12-16; John Witte, Jr., Blessed Be the Ties That Bind: Covenant and Community in Puritan Thought, 36 EMORY L.J. 579, 581-82 (1987) (describing the centrality of the covenant to Puritan tradition).
in history, theologians have described the number and nature of these divine covenants in different ways.

Berkhof, for example, described a “covenant of redemption” between God the Father and God the Son that emanates from eternity; a later “covenant of works” by which God “administer[s] [a] kingly rule over humanity”; and a final “‘covenant of grace’ by which God sovereignly administers the salvation of [God’s chosen].” Other Reformed theologians would omit the covenant of redemption; still others would talk about one covenant of grace while claiming that earthly life is administered through a form of God’s rule embraced in the language of “kingdom.” Among those working from the biblical narrative, Van Gelder gives a complex enumeration of five historical biblical covenants: the Noahic covenant regarding the sanctity of life; the Abrahamic covenant of chosenness through the grace of God in faith; the Mosaic covenant of sanctification expressed through law keeping; the Davidic covenant expressing God’s eternal reign over the world; and the new covenant prefigured in Jeremiah and later described in Matthew and Acts, which describes the power to live in obedience as God’s people.

Despite these theological disputes, and arguments over when covenantal forms began to influence the Hebraic tradition, “there is

23 Stek, supra note 22, at 14 (quoting Louis Berkhof, Systematic Theology 265–71 (1949)); see also Lillback, supra note 22, at 45 (describing three covenants recognized by Fred Lincoln and Charles Ryrie as covenants of works, grace, and redemption).

24 See, e.g., Lillback, supra note 22, at 45 (noting that Charles McCoy describes these two covenants); Witte, supra note 22, at 581 (describing the two Puritan covenants: of works, which related to Abraham, Moses, and the Torah; and of grace, relating to Christ and the Gospel). Additionally, Lillback notes that theologian Jurgen Moltmann mentions only one covenant in his definition. Lillback, supra note 22, at 45.

25 See, e.g., Craig Van Gelder, The Covenant’s Missiological Character, 29 CALVIN THEOL. J. 190, 193 (1994); see also Witte, supra note 22, at 589 (describing the prophetic, priestly, regal, and communal covenants as “rooted in the covenant of works” and as being “species of the general covenant of grace”).

26 Van Gelder, supra note 25, at 195. Van Gelder notes that each covenant has both relationship aspects and missional aspects since mission is a fundamental part of the covenants God has made with humans. Id.

27 See id. at 195.

28 There has been significant dispute about the exact historical influence the prebiblical covenants such as the Hittite covenant form have had on Old Testament covenant theology, much less its New Testament transformation. For a brief summary, see Edward McGlynn Gaffney, Jr., Of Covenants Ancient and New: The Influence of Secular Law on Biblical Religion, 2 J.L. & RELIGION 117, 126, 135–36 (1984) (describing the critique of George Mendenhall’s argument that the entire history of Israel can be reconstructed from similarities between the Hittite treaties and the Decalogue).
strong consensus that all of the law codes found in the Bible are cast within the framework of a covenant that forms and reforms a people gathered together in that covenant." The covenant form of relationship has been described as "a solemn promise made binding by an oath, which may be either a verbal formula or a symbolic action [that] establishes obligations, regulates the behavior between parties, introduces a measure of trust and predictability into social and political life, and creates new bonds between peoples." Hillers and other biblical historians claim that covenant is a pre-biblical metaphor shaped from plural, even conflicting, traditions: the suzerainty covenant between a powerful nation and its vassal people has a very different dynamic than a parity covenant between equally powerful nations attempting to create peaceful relations, for example.

In the pre-biblical paradigms that still give some shape to Jewish and Christian understandings of covenant, even conceding how the covenantal history as a narrative of God transforms the covenant, biblical scholars identify common elements. Six elements are regularly present in suzerainty covenants, a common form of treaty between

Mendenhall notes, however, that the biblical covenants have no exact replica of some elements of the earlier covenantal forms, such as the Hittite forms that include the provision for deposit of the text, the witnesses, the curses and blessings, and the oath. George E. Mendenhall, Law and Covenant in Israel and the Ancient Near East 39–40 (1955). However, he argues that there are analogous safeguards implicit in the biblical covenants due to the presence of God. See id.; see also McCarthy, supra note 22, at 11–13 (discussing Mendenhall’s argument).

29 John T. Noonan, Jr. & Edward McGlynn Gaffney, Jr., Religious Freedom: History, Cases, and Other Materials on the Interaction of Religion and Government 8 (2001). Noonan and Gaffney note that scholars find roots for, or similarities to, the biblical codes in Egyptian and Mesopotamian instructions, the Code of Hammurabi, Hittite, and Assyrian suzerainty treaties (on which forms this Article will rely) and direct origins from “worshiping communit[ies].” Id. at 6–8.


31 Hillers, supra note 21, at 5. Indeed, Hillers points out that covenant is not only an idea or metaphor, something that suggests something else, but is in fact a real “legal” relationship between God and Israel. Id.; see also McCarthy, supra note 22, at 14 (claiming that evidence regarding the use of the treaty/covenant form by Israel is irrefutable).

32 Compare, e.g., Stek, supra note 22, and Van Gelder, supra note 25, at 29 (exemplifying biblical and relational approaches to covenant analysis), with Hillers, supra note 21, at 25–45 (exemplifying the historical approach and discussing ancient Near Eastern covenants); see also McCarthy, supra note 22, at 2–4 (discussing the philological approach to the Hebrew term “berit,” meaning “covenant”).

33 But see supra notes 27–28 and accompanying text.
superior and inferior (vassal) nations in the pre-biblical period. The first element, the preamble, recites the greatness of the suzerain who will "cut" the covenant and suggests that the power to grant the treaty and name its terms rests in the suzerain. The historical prologue that follows attests to the past relationship between suzerain and vassal nation, establishing that the vassal obeys not only because of the suzerain's physical power, but also because of their past history. The stipulations which follow spell out in detail the responsibilities of the vassal to the suzerain. What distinguishes a suzerainty treaty is the absence of reciprocal obligations by the overlord: the suzerain "intends to behave in an upright way, but he will not, so to speak, put it in writing and there is no chance of taking him to court before the gods if he offends the vassal king." Then come the "provisions for deposit of the text and for public reading." The treaty is placed into the most sacred shrines of the chief gods of the two lands involved, for an obvious purpose: so that the gods could read it and be reminded from time to time of the provisions of the oath sworn in their presence. But men also should remember the oath, so it is stipulated that each year someone should read the text to the vassal-king and his nobles. At the end of the covenant, the parties call upon the gods as witnesses, both the gods of the suzerain nation and the gods of the vassal nation.

34 Stek distinguishes suzerainty treaties from royal grants, where the king promises a "reward for loyalty shown and services rendered" under oath. See Stek, supra note 22, at 26–27. He suggests that the biblical covenants where God makes the unilateral promise, for example, to Noah after the flood, are in this form. See id. at 27; see also Donald S. Lutz, The Evolution of Covenant Form and Content as the Basis for Early American Political Culture, in COVENANT IN THE NINETEENTH CENTURY- THE DECLINE OF AN AMERICAN POLITICAL TRADITION 31, 35 (Daniel J. Elazar ed., 1994) (describing five elements of the early American Protestant covenant: recitation that God is a witness, explanation of why the agreement is necessary, description of how the covenant creates a people, description of how it creates a church, and definition of the kind of people the covenantors chose to become).

35 See HILLERS, supra note 21, at 30 (example of preamble); MENDENHALL, supra note 28, at 32 (describing preamble). The suzerainty treaty is of ancient origin, the term for a relationship in which vassals are bound to an important king. See id. at 26.

36 See HILLERS, supra note 21, at 31 (providing an example of historical prologue); McCARTHY, supra note 22, at 13 (explaining the language in Old Testament Decalogue as historical prologue); MENDENHALL, supra note 28, at 32–33.

37 See HILLERS, supra note 21, at 32 (example of stipulations).

38 Id. at 35; MENDENHALL, supra note 28, at 30.

39 HILLERS, supra note 21, at 35 (example of this section of the treaty).

40 Id.
who are listed, one by one, as witnesses to the covenant. The witness list is followed by the most intriguing part of all: the vassal’s “self-cursing oath.” In one treaty, for example, the vassal calls upon the gods, if ever he should break his word, to destroy him “together with his person, his wife, his son, his grandson, his house, his land and together with everything he owns.”

The second form of treaty, the parity covenant, was made between relatively equal adversaries where the ties of kinship and tribe, stronger lords and their enforcement powers, were not available to limit the use of violence between these adversaries. In the parity treaty, since neither party is strong enough to take the other by force, the nations must find a way to live with each other under specific terms, and therefore call upon those exterior to themselves—the gods—to enforce the covenant. Both the suzerainty and parity covenants are “cut”: the visible sign of the validity of the treaty which usually involves cutting animals for a covenant meal to seal the relationship.

These treaty forms are also used by biblical scholars to describe Israel’s relationship with Yahweh in ways that carry currents even

41 See Mendenhall, supra note 28, at 34 (noting the invocation of deities as witnesses to the covenant).
42 Id. at 26, 34.
43 See Hillers, supra note 21, at 37 (from the Hittite Mursilis treaty with Duppii-Tessub, king of a state in Northern Syria).
44 See William Johnson Everett, God’s Federal Republic 106 (1988) (noting the biblical parity covenants between individuals, such as Jacob and Laban, Jonathan and David, and Abimelech and Abraham).
45 See Mendenhall, supra note 28, at 34 (noting the oath requirement in covenant).
46 See Hillers, supra note 21, at 40-41 (noting other rituals for making the covenant valid, for example, “by oil and water, by drinking from a cup, by ‘puppy and lettuce’”; McCarthy, supra note 22, at 30-31 (explaining that a ritual was necessary to establish God’s covenant with the Israelites). Hillers suggests that the vassal should identify himself with the slaughtered animal, should he break his word. Hillers, supra note 21, at 40-41. McCarthy notes that different language is used for each treaty: the parties “cut a covenant” (krt berit) between equals; but a suzerainty treaty is “cut . . . for/with” a vassal (krt berit e’im). McCarthy, supra note 22, at 3. The parties talk about “rais[ing] up a covenant” (hegym berit) with God, because God will “make it stand up,” that is, keep the covenant. Id.; see also Max Stackhouse, Covenant & Commitments: Faith, Family and Economic Life 141 (1997) (discussing the ritual meal as a “sacrificial and celebrative rite that invokes the presence or witness of God”).
47 See McCarthy, supra note 22, at 14; see also Gaffney, supra note 28, at 125. My focus here on Christian biblical scholarship reflects my own limitations; for example, numerous Jewish biblical scholars and ethicists have similarly focused their work on the history of covenant. See, e.g., David Novak, Covenantal Rights 77-117 (2000).
into today's covenantal ethics, as well as in ways that have been lost to us. For example, McCarthy cites Moran's work on the Deuteronomic word that commands love for Yahweh, showing that the word 'ahab is the same word used for what the vassal owes the lord in these covenants, that is, the duty of obedience and faithfulness. Such an understanding of "love" is certainly at some distance from that meaning with which moderns employ the term.

From these particulars of the treaty form emanate themes that give shape to the values and oppositions of covenantal ethics. This Article will utilize these themes to consider how a covenantal ethics might make distinctive claims about lawyers' relationship to clients and each other, by holding them up to the light along with Tom Shaffer's work to see what similarities and differences are apparent.

II. "I WILL MAKE ALL My GOODNESS PASS BEFORE You": Ethical Features of the Covenant Tradition

Like most living religious traditions developed in response to the realities of heaven and earth, covenantal traditions account for the complexity and even paradox of both divine word and human nature, realities that lawyers and other distinction-makers are reduced to describing as oppositional binaries—sameness vs. difference, given vs. chosen, freedom vs. order. In these religious traditions, of course, such binaries are often recognized as being true at one and the same time—we are slave and free, sinners and saved, as examples. Yet, the real world in which we live is profoundly shaped by our imaginations about which word in the binary is more important: the political state constructed from an imagination focused on freedom differs radically from one constructed primarily from an imagination focused on order (even though all nation-states that have a chance for survival will embody both freedom and order). So too, the real life of lawyers and their clients will differ dramatically, depending on which value of a contrasting pair is emphasized in the tradition.

Covenantal traditions also take a stand on these binaries: they tend to emphasize freedom over the orderliness of organic systems, reciprocity over equality, giftedness over desert, and temporally open-ended responsibility over closed-ended, chosen duties. These empha-


49 Exodus 33:19.
ses portend a profound difference in the lives of lawyers and clients who embrace that tradition. As I will suggest when I tease out the advantages and difficulties with each choice of emphasis, Shaffer's ethics struggles with each of these issues, embracing the paradox more often than one opposition in the binary, but in a way that is more often covenantal than not.

1. The relationships between freedom and nature, and between the stranger and the community, are key questions of any ethic. Some traditions of ethics (siding with human freedom) more strongly emphasize that human beings can construct moral obligations without any significant historical or external constraints, while others (we might call them organic) suggest that the actor's situation, including his community's history, gives rise to a set of obligations to others over which the individual or even the community has very little choice. Covenants are relationships of freedom and obligation at the same time. In one sense, the covenant tradition reflects a preexisting, growing relationship among Yahweh and His people, as humankind begins to reflect upon the moral and ethical demands that His protection and mercy make upon them. In another sense, covenant is freedom's break with the shackles of the past, a promise to a community extending beyond history and blood-kinship to a chosen people who agree to keep God's commandments.

2. Covenant, the agreement between ancient nations or groups of people, originally signifies not equality but inequality of power between the parties to the covenant. The suzerainty treaty reflects the sheer inequality of the sovereign who offers the covenant of protection and virtually demands its acceptance. Yet, the covenant recognizes the possibility that even unequal parties can free themselves from the coercion of that inequality to bind themselves to each other "as if" they were equals.

3. Covenant emphasizes gift over desert. The covenant is, particularly in its suzerainty form, a form of gift that is not deserved offered to a vassal nation that entrusts itself to the suzerain. While covenants

51 See, e.g., MacIntyre, supra note 12, at 122.
52 See Hillers, supra note 21, at 20–21.
53 See Elazar, supra note 19, at 30–32 (distinguishing between covenants, compacts, and contracts, and noting that the first two are public and broadly reciprocal, while the contract is private).
54 See Mendenhall, supra note 28, at 31–32; cf. Hillers, supra note 21, at 49, 52, 65 (discussing constrained freedom Israel had in choosing to accept God's covenant).
are formed from mutual need, at bottom, the covenant is a gift that the vassal nation has no just basis to demand.\textsuperscript{55}

4. Covenants, given by oath, bespeak fidelity and accountability even despite the lack of explicit mutual promises. In the suzerainty covenant, only the vassal nation explicitly promises fidelity,\textsuperscript{56} while some of the Biblical covenants invert the one-sidedness of the promise: it is God who makes the explicit and unconditional promise, with the people’s fidelity implicit.\textsuperscript{57} Because the covenant is between strangers, however, accountability is required. The suzerain demands that the vassal call upon not only its own gods, but also the gods of the covenantee to crush the vassal if he fails to keep his covenant.\textsuperscript{58} This requirement is breathtaking because, as Hillers suggests, “[the vassal] will have no hiding place if he ever breaks his word.”\textsuperscript{59}

5. Covenants are predominantly communal, not individual. Indeed, covenants survive because of the public ritual in which they are regularly read and remembered to subsequent generations: they create a community of memory which transcends each particular generation. The covenantal tradition recognizes the need to make the covenant public, so that the people understand that they are accountable not only to the suzerain and to the gods to whom they sworn their oath, but also to their own people.

These five themes, which I will explore in more depth, make covenant a distinctive ethical tradition that places dramatically different emphases on several key ethical concerns compared with seemingly similar forms of ethics.

\textbf{A. A Chosen People: Covenantal vs. Organic Models of Ethics}

Any tradition of professional ethics, just as any other ethics, must always grapple with the nature of human freedom in community, since the resolution of this issue is key to understanding who is counted as within the embrace of ethical norms and what standards of the ethic not only permit individuals within that ethical community to flourish, but also guard against the corruption of the community. Ethical systems emphasizing human freedom may be ultimately more inclusive of the stranger or outsider than organic systems of ethics.

\textsuperscript{55} See Mendenhall, \textit{supra} note 28, at 32.
\textsuperscript{56} See id. at 30.
\textsuperscript{57} See id. at 36.
\textsuperscript{58} See Hillers, \textit{supra} note 21, at 38 (noting the oath is aimed at the destruction of the offender, covering all contingencies for escape, and not proportionate to the crime); Mendenhall, \textit{supra} note 28, at 26–27.
\textsuperscript{59} Hillers, \textit{supra} note 21, at 36–37.
which tie responsibility to past relationships, provided they reckon with the reality of human response to threats from the Other. Ethics that emphasize human freedom also must account for the potential corruptions of freedom, including self-interest and human isolation from need.

Covenant ethics embodies a high regard for human as well as divine freedom. Covenant theology turns predominantly on a series of historical moments where God “chooses” or “decides” to make a covenant with His people, and His people become co-covenantors, for the covenant is a product of human freedom, chosen by the people rather than imposed. The creation of a covenant provides a universalizing element that focuses the community’s attention onto its character as a moral community. Covenantal ethics thus breaks with traditional ethical models that assume an organic ethical order or claim that certain “natural” relationships give rise to more significant ethical duties.

In this sense, covenantal ethics is dramatically different from virtue, friendship, and care models that employ this more organic understanding of human community. In organic political societies, “institutions, constitutional relationships, and power alignments emerge in response to the interaction between past precedent and changing circumstances with the minimum of deliberate constitutional choice.” The traditional form for legal and social relationships in such societies has been kinship, the bonds of blood, marriage, or tribal affiliation, and the social customs that arise from such relationships that extend over generations. To some extent,

60 Mendenhall calls this “not merely a stage in the history of religious concepts, but... an event which had a definite historical setting and the most surprising historical consequences... [for example, the] foundation for [a] normative conception that in this event Yahweh became the God of Israel.” MENDENHALL, supra note 28, at 25; see also STURM, supra note 30, at 129 (describing the covenant as a “dynamic process of interaction that began at a particular time and place and that constituted the people as a people”).

61 The covenantal tradition relies heavily on the creation of public ritual to make the covenant truly generational. See HILLERS, supra note 21, at 30–31, 35–41 (discussing suzerainty treaty rituals); Witte, supra note 22, at 587 (describing the Puritan view of covenant).

62 See HILLERS, supra note 21, at 65; Witte, supra note 22, at 587.

63 See STACKHOUSS, supra note 46, at 106.

64 But compare Thomas Shaffer’s ethics of friendship, SHAFFER, FAITH/PROFESSIONS, supra note 6, at 193–222, with Charles Fried’s, Fried, supra note 6, passim.

65 ELAZAR, supra note 19, at 36.

66 See MACINTYRE, supra note 12, at 122 (noting that the “key structures” in Homeric society were kinship and household); Everett, supra note 50, at 557.
these political theories are highly dependent upon attendant moral theories holding that obligation follows these natural relations: that our first, and some might argue only, responsibility is to parents, children, family members, clan, and ethnic group.67 In these views, the natural order of human society shapes our moral relationships not only because we are biologically and historically tied to these other human beings, but because our interaction with them largely shapes our own character, history, and purposes.68

Virtue ethics, a constant refrain in Shaffer’s work,69 centers on the organic formation of dispositions or traits of character in response to situations arising in a concrete community from which the description of those virtues arises. In its Homeric form, virtue ethics posited almost a perfect correspondence between individual character and community cohesion, focusing on the development of those habits which would fit one for the social position in which one found oneself by virtue of birth,70 so that a bricklayer’s sons would be expected to develop different virtues than a patrician’s child.

At least some later theories of virtue ethics, including Christian theologies, have tended to stray from situated virtues toward universalizing some of the “cardinal” virtues, and zeroing in on the telos (eudaemonia or its salvific equivalent) to which the virtues are relevant.71 As such, they have freed individuals from moral bondage to

---

67 See Shaffer & Shaffer, supra note 12, at 134 (noting that Italian immigrants knew “from centuries of cultural memory that the way a community of people survives is to take care of its own [family]”); Thomas L. Shaffer & Robert F. Cochran Jr., Lawyers, Clients and Moral Responsibility 72 (1994). I hope Bob Cochran will forgive me for hereinafter referring to this text as Shaffer’s, given the context for the reference.


69 Shaffer argues that such ethics comes about from “such things as what our communities are and what our families have been,” Shaffer, Faith/Professions, supra note 6, at 14; see also Eisele, supra note 68, at 1304-05.

70 See MacIntyre, supra note 12, at 122-24.

71 See id. at 167-69 (describing medieval views that suggest virtues are those character qualities that permit people to keep the divine law, while vices are breaches of that law); see also Shaffer, Christian/Lawyer, supra note 7, at 27 (explaining that the goal of “conversion” of the client is to serve the client’s goodness). Jack Sammons reminds us that some later virtue theories focus on telos not in order to universalize, but to relativize virtues. Email from Jack L. Sammons, Professor of Law, Mercer Law School, to Marie A. Failinger, Professor of Law, Hamline University School of Law (Sept. 27, 2001).
the virtues which would befit their parents' occupations. Yet, the notion that virtues should reflect the social position and occupation of the virtuous person has lingered in some recent forms of virtue ethics, such as Jane Austen's description of the virtues of the well-bred young woman. Thus, the notion of fittedness, that the virtues allow one to take one's place in some naturally well-organized community, continues to follow this kind of ethical argument.

Consistently with situational virtue theories, Tom Shaffer's narrative work, which locates the good lawyer in a particular place and time, relationship and role, similarly suggests an organic understanding of obligation. Shaffer takes great pains to reiterate, time and again, that even the most stalwart and independent of Shaffer's narrative heroes, Atticus Finch, derives his identity not from any choice or self-construction but from the town of Maycomb where he has grown up, lived, and worked: he cannot be what he is other than out of interaction with those with whom he has lived. As a "character in community," a good lawyer or professional "comes from a family," "comes from a church," and "has a town." He "would not be

72 See MacIntyre, supra note 12, at 148–49 (describing Aristotelian views of the virtues as relating to aims or telos, not to status, as in Homeric societies). For the Homeric view, see id. at 122–23.

73 See id. at 239–40.

74 See id. at 184–85 (describing historical changes in the rationale for the nature and purposes of virtues, including the Homeric and Austen's views that virtues are those qualities which allow people to fulfill their socially defined roles, the Aristotelian view that virtues are necessary to achieve the telos of "man as such," the New Testament view that described telos according to supernatural criteria, Franklin's utilitarian view of the virtues, and others); id. at 204–05 (describing the failure of the unity of the self when an individual is separated from his role).

75 See, e.g., Shaffer, Faith/Professions, supra note 6, at 28–32; see also MacIntyre, supra note 12, at 205.

76 Indeed, Shaffer even uses the word "organic" to describe such relationships. See, e.g., Shaffer, On Living, supra note 6, at 883, 889; Shaffer, supra note 17, at 965–66, 971; Shaffer, Subvert, supra note 10, at 1099; see also Eisele, supra note 68, at 1304–05.

77 See Shaffer, Faith/Professions, supra note 6, at 33. However, some forms of covenant theory, particularly following Ursinus, treat the covenant as if it were natural law "given by God to Adam in the very fabric of creation," and thus in the nature of human beings. Stackhouse, supra note 46, at 149–50; see also Daniel Elazar, Covenant and Commonwealth: From Christian Separation Through Protestant Reformation 174 (1996).

78 Shaffer, Faith/Professions, supra note 6, at 28–32 (referring also to Fanny Holtzman and fictional characters Henry Knox, Dr. Thorne, Jerry Kennedy, and others).
who he is if it were not for his sturdy Methodist ancestors and the other 'people of background' from whom he came."\textsuperscript{79}

Even more dramatically, the more recent "characters in community" described in the Shaffers' \textit{American Lawyers and Their Communities} are shaped by and practice the virtue of \textit{rispetto}, "a good habit, through which the person learns, practices, teaches, and remembers her membership in the family."\textsuperscript{80} The "first-order moral community" of the Italian-American individual is "naturally, organically locat[ed] in the family," although "[the community's] genius is its ability to extend [that relationship] beyond the organic community."\textsuperscript{81} Indeed, the Shaffers almost describe such a virtue as inbred, a "tendency to reach out, to include, and to integrate. . . . [Italians] 'are accustomed to large numbers of people, and they seem to have developed an emotional facility in dealing with them. . . . The professional community . . . becomes the next family.'"\textsuperscript{82} Like Finch, the Italian-American lawyer may imagine himself as separate from community, but ultimately, even to the extent he is dissenting, it is a prophetic dissent: the lawyer is attempting to remind the community what it is, in its very best imagination of itself, not calling the community to be what it is not.\textsuperscript{83}

Organic political models, however, take on a visible shape which clearly demarks insiders from outsiders. As Elazar says, even within the recognized community, "in the course of time elites emerge from the population and political power gravitates into their hands . . . they form the core of the polity, leaving the others outside of the governing circle."\textsuperscript{84} Real strangers are even more of a threat to the organic community, for the contours of their otherness cannot be easily recognized by a community that grows inexorably rather than purposefully.

As constructions that emphasize human freedom, by contrast, both covenantal and autonomy models elevate the decision of the individual or community, even the decision to give up their future freedom through promise, as the central aspect of human relationship.

\textsuperscript{79} \textit{Id.} at 29.

\textsuperscript{80} \textit{Shafer \& Shafer, supra note 12, at 135.}

\textsuperscript{81} \textit{Id.} at 136.

\textsuperscript{82} \textit{Id.} at 139 (quoting Stephen S. Hall (internal quotations omitted)).

\textsuperscript{83} \textit{See Shafer, Faith/Professions, supra note 6, at 25, 27–28, 38; Shafer \& Shafer, supra note 12, at 74–78 (describing how Gavin Stevens, in \textit{Intruder in the Dust}, sees that his community's memory protects it from seeing the truth of its evil and protects him as well).}

\textsuperscript{84} \textit{Elazar, supra note 19, at 36.}
Thus, both of these models at least theoretically\textsuperscript{85} recognize the possibility that, at least at the moment of covenant or contract, human beings may disregard their organic locations and make commitments to strangers which are morally equal to the commitments which arise out of their relationship with their organic communities.\textsuperscript{86} While even organic communities may attempt to break free of their constraints by acknowledging hospitality as a virtue, as do Shaffer’s Italian-American families in exercising \textit{rispetto}, the balancing act between recognizing membership in organic communities and welcoming the stranger is precarious.\textsuperscript{87}

Shaffer’s work has been a long and careful journey to point out the unhappy results of taking a focus on individual freedom to its ultimate conclusion. If there is one thing he beats home, it is that the individual is located within, and is inseparable from, his community.\textsuperscript{88}

\textsuperscript{85} It is only fair to notice that the real instances we have of covenanted communities display a tendency toward clear boundaries marking those who are in the community and those who are not. Rothman provides a possible explanation when she notes that admission and exit from Puritan communities were difficult as a result of the fact that people who had committed to the covenant were expected to live perfectly according to the code of religious practice, and attempted departures were viewed as (what we might call) “false consciousness.” \textit{See} Rozann Rothman, \textit{The Covenant in the Expanding Universe of the Nineteenth Century}, \textit{in COVENANT IN THE NINETEENTH CENTURY: THE DECLINE OF AN AMERICAN POLITICAL TRADITION} 111, 111-12 (1994).

\textsuperscript{86} \textit{See} Everett, \textit{supra} note 44, at 19, 106, 112 (noting that confederation and law replace tribalism and paternal decree as sources of authority, and that covenantal associations may extend to a world order of communities); \textit{see also} 1 Walther Eichrodt, \textit{Theology of the Old Testament} 39 (J. A. Baker trans., Westminster Press 1961) (noting that the nation of Israel, built on covenant, “draws no clear line to exclude the stranger, but is continually absorbing outsiders into itself”); Mendenhall, \textit{supra} note 28, at 15 (noting that covenants are not needed when groups are held together by traditional ties). \textit{But see} Eisele, \textit{supra} note 68, at 1304 (noting that such ethical systems may be learned in community, though they may be appropriated into other cultures by reasoning). We should also note Shaffer’s own transition from a Baptist community and culture to a Catholic one. Shaffer, \textit{Servant}, \textit{supra} note 10, at 1345-46.

\textsuperscript{87} \textit{See} Shaffer & Shaffer, \textit{supra} note 12, at 136, 141-42 (describing \textit{rispetto} not only as related to the family, but as a virtue extended beyond the organic community, including a shared sense of peoplehood, and a respect for the place of being an outsider). The Shaffers acknowledge the difficulty of keeping up that sense of hospitality and mutual respect between family members and outsiders, however, noting that the vices which accompany \textit{rispetto} are “respectability” (putting the desire to be accepted by outsiders to the family before conscience) and, as one of their interviewees described it, “a we-versus-them attitude about Italian families . . . a sort of nationalism . . . [and] prejudice toward outsiders . . . .” \textit{Id.} at 167-69.

\textsuperscript{88} \textit{See} Shaffer & Cochran, \textit{supra} note 67, at 89; \textit{see also} William F. May, \textit{The Physician’s Covenant: Images of the Healer in Medical Ethics} 42-49 (2d ed. 2000) (discussing anti-paternalism through Brian Clark’s play \textit{Whose Life Is It Anyway?}).
Yet, as much as he uses "organic" language, he is finally unwilling to take that language to its ultimate conclusion, in the end affirming the importance of moral freedom for lawyers, as well as clients within their location in the community. 89

Perhaps there is good reason for Shaffer's reluctance to embrace organic models fully. For one thing, the traditions emphasizing moral freedom are more prepared to deal with the fact that, as Jack Sammons says, most modern persons, including most lawyers and their (even regular) clients, are "rank strangers." 90 This is a hard fact that Shaffer himself will admit, even though Sammons has taken him and Robert Cochran to task when they have painted too rosy a picture of what values and history people actually share in local communities. 91 In modern life, MacIntyre's "society of strangers," even lawyers and clients from the same communities, are unlikely to share any significant personal history that would guarantee that their virtues are formed within the same tradition.

I was never so struck by the reality that even small communities may not be able to name a common history and values as the time I stopped at the main gas station in a tiny Minnesota town to ask how to get to "the Swanson farm," a query that in a recent past would have produced not only exact directions, but also a story about how the station owner knew members of the Swanson family. Instead, the proprietor had to find my friends' name and address in the phone book. If in such a setting people have become strangers, it is unlikely that, in the more complex local, national, and international settings where people work and live, any constants will help shape value similarities between lawyers and clients except at some unhelpfully abstract level. While recent upswell in patriotism in response to the September 11th World Trade Center and Pentagon attacks may prove me wrong, television interviewees attempting to express what Americans hold in common seem most often to refer to general themes like "freedom," rather than to specific value aspirations or to family membership metaphors, in describing why they feel bonds to those who have suffered.

---

89 See examples in SHAFFER & COCHRAN, supra note 67, at 51-52 (noting that lawyers have to make a moral decision to refuse to represent a potential client), and SHAFFER, CHRISTIAN/LAWYER, supra note 7, at 104 (noting that "[t]he moral choice may be to abandon the client").
90 See Sammons, supra note 8, at 7 (citing the gospel song Rank Strangers to Me).
91 Shaffer recognizes this at other times in his work. See, e.g., Shaffer, supra note 2, at 627-28 (agreeing with MacIntyre that America is a "society of strangers" but arguing with Robert Bellah that American society continues to have bonds that hold it together, though they are difficult to talk about); see also SHAFFER & SHAFFER, supra note 12, at 212-13 (describing the lack of a common political theology in America).
As the civil liberties efforts in the aftermath of that tragedy also point out, theories based on human freedom can reckon with the unpleasant reality that strangers are all around and that they do, indeed, threaten us in a way that still permits us to have moral relationships with them. Both of the original covenantal models—the suzerainty covenant and the parity treaty—arose precisely because of the very real threat that strangers pose to the community. In fact, the suzerainty covenant is fully focused on “friend/enemy” as the metaphorical dynamic that governs the suzerain’s life: the superior nation extracts its loyalty oath in repetitious detail so that the vassal nation might not join its rival, and the vassal seeks the protection of the superior to avoid being crushed by the superior’s enemy. Virtually all of the promises that the vassal makes have to do with this enmity relationship: the vassal is called not only to renounce relationships with the enemy, but also to help the sovereign nation defend itself should the enemy come calling.

Indeed, the suzerainty covenant, a likely influence on the Sinaitic covenant, recognizes that threat is all around, even among friends. To be sure, the vassal nation signs the covenant in part because of the threat that the suzerain will destroy the vassal nation if it does not keep its promise of loyalty, by forsaking for other suzerains. Yet, even apart from trading loyalties, the vassal nation poses a threat to the suzerain, since the suzerain’s political life depends, in part, on the vassal’s promise to provide sustenance and protection for the suzerain. The treaty covenant, signed between two relatively equal nations, is similarly driven by the fact that they are threats to each other, unless they can make a lasting peace by utilizing freedom to surrender freedom.

Thus, the historical covenant not only protects the covenantors against the outside world, but also against each other. A key protective promise of the traditional covenant is that each party agrees not to infringe upon the autonomy of the other in all of his activity (in the case of a vassal king, his governing) except in those obligations spelled out by the covenant. The treaty thus secures a large area of freedom for the vassal, who is not only protected against the enemy’s incursion, but also against his suzerain’s intrusion into his own kingdom. Thus,

92 See Hillers, supra note 21, at 33.
93 See id. at 33–34.
94 But see supra note 32.
95 See Mendehall, supra note 28, at 33; see also Thomas L. Shaffer & Julia B. Meister, Is This Appropriate?, 46 Duke L.J. 781, 781 (1997) (noting that in an ethics of isolation, where the only criterion for the right is choice, every person “is her own tyrant”).
ironically, the freedom preserved by the covenant is significantly greater than the freedom surrendered.

In this way, covenants are similar to contractual or autonomy ethics: they respect the dignity of the Other, protecting his freedom precisely through the frank recognition that the promisor could overwhelm him absent the covenant. The concern to preserve an area of autonomy against the threat of intrusion is not limited to relationships of vastly unequal power. We might similarly remember the covenant made between Jacob and Laban, after Laban and Jacob each had used their cunning to cheat the other out of herds, and Jacob had run off with Laban's daughters and his stolen household gods. Jacob and Laban, even these kinsmen, could not trust each other, so they made a covenant to build a wall between them, witnessed by God, that each might live in peace on his side of the wall.

In the world of modern professional practice, of course, the threat of the stranger is not usually a threat of physical and material violence. The stranger threatens more often in the space in which the client or lawyer takes risks, lets down his guard, opens herself to vulnerability. For one thing, both lawyer and client are threatened with shame if they fully disclose to the other who they are and the wrong that they have done. Theologian Karen Lebacqz reminds professionals that this is one of the most powerful obstacles to trustworthy relationship between professional and client. As her argument would suggest, in order to secure his ends, the client is forced, by the circumstances of litigation, to disclose virtually his entire private life. (Indeed, the lawyer may well threaten that if he does not come clean with the most intimate, shameful details of his story, the client will not get good representation.) By contrast, the professional hardly ever discloses any intimate details of his life that would permit the lawyer to be equally vulnerable to the client. Not only does the lawyer mask himself through professional dress, but he keeps to himself the details of his private life: the average lawyer does not give out his private telephone number, much less confide in the client his secret sins.

96 See Genesis 31:25--55.
97 See Genesis 31:45--55.
98 See Allegretti, Perspective, supra note 18, at 1120.
101 See id. (discussing how clients are often in positions of vulnerability).
102 See id. (describing how professionals distance themselves from clients).
In addition to the threat of shame, as care ethics reminds us, the stranger may threaten us with his need. On the positive side, care ethics has made an important correction to modern autonomy arguments in reminding us that human relationships are not only threatening: Gilligan's project helped ethicists to see that while some (male?) human beings organize their moral universe around the unhappy experience of threat from the other, others (female?) organize their moral field out of the unequally unhappy experience of separation from the other. Or, putting aside the gender essentialism of which Gilligan has been accused, care ethicists have been another reminder that human relationship is necessary for human fulfillment and that an ethical universe constructed solely upon the threat of the other will lead to the impoverishment of human life.

Yet, in emphasizing the goodness of interpersonal community, the ways in which it fulfills the human body and spirit, care ethics runs the similar danger of obscuring the fully complex, paradoxical reality about human relationships: they are both fulfilling and threatening; the stranger is both necessary to and destructive of our lives. To borrow Levinas's image, as we interact with our clients, we may find ourselves peering into the Face of the Other, towering over us in his need. The Face not only demands a response of our whole being, the giving of everything we have. It also demands that we give up the pretense that we control the world and the Other by totalizing him, for example, reducing him to a stereotype or a set of behaviors or virtues/ves that we can understand, instead of the immense, unknowable, uncontrollable Other that he is.

105 See Jack & Jack, supra note 103, at 11.
107 See Failinger, supra note 103, at 2074.
108 For a fuller description of Levinas' argument, see id. at 2103-05 (citing Emmanuel Levinas, Totality and Infinity: An Essay on Exteriority (Alphonso Lingis trans., 1969)).
110 See Failinger, supra note 103, at 2104-05.
Virtue ethics and care ethics struggle in this paradoxical, modern situation, in which we are all strangers to each other, all needing each other and yet threatened by the Other's violence as well as his need. Virtue ethics, arising from the conditions of a closed society, assumes that social structure will largely control the threats posed by its members to each other, through social sanction. Failing that, in virtue societies, those who are strangers, or insiders who will not conform, can be controlled by expulsion, just as Shaffer's gentleman lawyers expelled those who crossed the boundaries of the elite community and endeavored mightily to keep the "riff-raff" out of the profession. Thus, virtue ethics does not readily accommodate the possibility of an ongoing relationship with strangers or with challengers.

Covenantal ethics bespeaks freedom in the decision of human beings to bind themselves to others, even strangers, now and in the future. As a system of promise that limits and frees at the same time, it recognizes the dignity of both the promisor and the Other not to be controlled by the human desire to play God or to manipulate individuals as means to an end. Yet, covenantal forms of responsibility are not perfect ethical systems either. Since humans have limited abilities to relate to others in multiple, conflicting dimensions at the same moment—parents find it difficult to be loving and just in the same act, for example—our freedom (not) to covenant can become repressive to the Other: in the moment we say how we are obliged to the Other, we also say how we are not obliged to the Other. We pretend we can limit the limitless need with which the Other towers over us by our own choice, a delusion of divinity. Our self-delusion can be somewhat limited by naming it: for example, in his ethics of solidarity, Robert Rodes attempts to do so by recognizing both human limits on one's ability to give of oneself and human responsibility for creating a just

111 See, e.g., Thomas L. Shaffer, Towering Figures, Enigmas, and Responsive Communities in American Legal Ethics, 51 Me. L. Rev. 229, 235-36 (1999) (describing attorney Henry Knox's view that women, people who went to public school, Jews, and members of other ethnic minorities should be excluded from the profession).

112 Walter Brueggemann notes that Yahweh's covenant with Israel is at one and the same time conditional and unconditional, and that "[t]he attempt to factor out conditional and unconditional aspects of the covenant is an attempt to dissect and analyze the inscrutable mystery of an intimate, intense relation that, by definition, defies all such disclosure." BRUEGGEMANN, supra note 13, at 419. Brueggemann notes that other passionate commitments share this seemingly paradoxical quality. Id. Yet, even complex human commitments rarely exhibit the complex multi-valency and contradiction at the very same moment, as Brueggemann describes the relationship between God and God's chosen people.
social order that can ameliorate those limits. Yet, even frank acknowledgment of our limits does not ameliorate the fact that we choose every day not to do our best for the other’s need, as individuals and as members of the political community.

For the lawyer and client, a covenantal relationship is not, at bottom, the beginning of a virtuous life or even the creation of an ideal relationship. Rather, it is the recognition of the very non-ideal situation in which the covenanting parties live, a realistic attempt to adjust the reality of danger and opportunity which each Other poses. The covenanting lawyer and client use the vehicle of covenant not only to oblige themselves to each other, but also to protect themselves from each other and from the threats that await them outside of the relationship.

In Shaffer’s and Cochran’s words, the covenant prevents the lawyer from becoming a godfather, guru, or hired gun, either putting the client at her mercy or being at the mercy of the client. “Godfather lawyers either decide what the clients’ interests are, without consulting their clients, or they persuade their clients to accept lawyers’ views on what their interests are. [They] are not only technicians; they are also parental . . . limiting someone’s freedom for the sake of his or her own good . . . .” Covenanting tries to avoid this power move in two ways: it recognizes the limits of the lawyer’s competence (he probably does not know what is “for the good” of the client, given that the client is a stranger), and it protects the client from being exploited for the sake of the lawyer’s self-interest.

The covenant similarly protects the client’s moral freedom from the “lawyer as guru.” The covenantal lawyer does not understand his responsibility to be ensuring “that [his] clients do the right thing”

---

113 See Robert E. Rodes, Jr., Social Justice and Liberation, 71 Notre Dame L. Rev. 619, 620–21 (1996) (arguing succinctly: “I do not owe any poor person a share of my wealth, but I owe every poor person my best effort to reform the social institutions by which I am enriched and he or she is impoverished.”).

114 Shaffer & Cochran, supra note 67, at 8. See also May’s description of the parental metaphor, May, supra note 88, at 54–56.

115 See, e.g., Sammons, supra note 8, at 29–32 (discussing the story of Jaramillo told by Shaffer and Cochran that suggests the inability of the lawyer to understand the client’s situation and morality).

116 Covenants bind lawyers not to take what is their clients’, nor use their clients for economic, political, or ideological ends. See May, supra note 88, at 148 (discussing covenants with physicians). Thus, covenants recognize the limits of the lawyer’s right to power.

117 Shaffer & Cochran, supra note 67, at 32, 34 (discussing how “gentlemen–lawyers” take control through manipulation and other efforts).
or insisting that his client defers to his conscience.\textsuperscript{118} Rather, the covenant marks the boundaries that permit the client's moral freedom: using candor rather than manipulation,\textsuperscript{119} the covenantal lawyer gives the client not only the right but also the responsibility to make moral choices that arise in representational situations.

Finally, the covenant at least in theory protects the lawyer's space of moral freedom, moving away from the model of the lawyer as a "hired gun,"\textsuperscript{120} though this image has been one of the most visibly debated in recent legal ethics literature.\textsuperscript{121} That is, by assuming that covenanting leaves both lawyer and client more freedom than obligation,\textsuperscript{122} it implicitly recognizes the possibility that the client cannot justly demand that the lawyer pursue a course of action that violates his conscience anymore than the lawyer can justly expect the client to do so. Of course, covenants do not do so simply by their nature, since the substance of a covenant, like the substance of a contract, is largely up to its makers: a lawyer could covenant to give up his moral freedom and follow his client's wishes in a legal matter, even against his better judgment. In a sense, the "hired gun" dispute is a dispute about whether the lawyer-client relationship is essentially a covenant in which the lawyer gives up his moral freedom or essentially a covenant in which he retains that freedom.

Shaffer proposes a different way around the godfather/guru/hired gun problem through an ethics of friendship. Citing Aristotle and Bellah, he notes that such "friendship had three essential components. Friends must enjoy one another's company, they must be

\textsuperscript{118} \textit{Id.} at 33.

\textsuperscript{119} As suggested by Shaffer and others, the covenant also protects the client from the lawyer's paternalism, his temptation to take over the vulnerable client's life, and control it for the client's own sake, because the lawyer believes he knows the client's bests interests better than the client himself. \textit{See Shaffer & Cochran, supra note 67, at 34–35; cf. May, supra note 88, at 34–35 (describing paternalistic physicians). For example, covenantal lawyers refuse to trick their clients into taking their moral advice by disguising it as legal advice, for example, by suggesting that something is legally required or a common practice when it is only morally required of the client. Thus, Shaffer and Cochran castigate the lawyer who tells a client that she should not leave her property in thirds to her daughter and two grandchildren of her dead son because that was "not the way it is done"; rather, according to the lawyer, she should leave the daughter half, and a fourth to each of the grandchildren. Shaffer & Cochran, supra note 67, at 34–35.}

\textsuperscript{120} Shaffer & Cochran, supra note 67, at 28–29.

\textsuperscript{121} \textit{See Lewis, supra note 6, at 130–32 (contrasting Shaffer's approach as the suffering client approach and Freedman's as the suffering lawyer approach, and suggesting that fair notice of the moral limits of the lawyer's advocacy in advance of any conflicts might ameliorate such suffering).}

\textsuperscript{122} \textit{See Mendenhall, supra note 28, at 33–34.}
useful to one another, and they must share a common commitment to
the good."123 In Shaffer's and Cochran's view, the lawyer will pro-
perly see his client (and the client his lawyer) as a collaborator in the
good, someone who will help him become a better person, who will
teach him to care for others, who will help him decide what the right
thing is to do, and who will tell the truth when the other wishes to
deceive himself.124

With an ethics of friendship, Shaffer is trying in part to avoid the
problem posed by what he views as the distortion of the modern con-
tractual or "autonomy" model of ethics, which Shaffer more usefully
calls "the ethics of isolation."125 Shaffer points out that no ethical
model, even one grounded primarily on human freedom like contrac-
tualism or autonomy, must necessarily start from the assumption that
individual human beings are ethically isolated decisionmakers who do
not take into consideration the views or concerns of others.

The aspiration to autonomy assumes moral conversation because it
assumes that moral decisions are important and that none of us
makes his moral decisions alone. . . .

. . . .

Autonomy allows for, and may even require, Aquinas's "fraternal
correction" or Barth's "conditional advice." . . . Autonomy is open
to moral conversation in a deeper way than isolation is, because au-
tonomy involves the self of the client as well as the client's
dilemma.126

Whether described as an ethics of friendship, or a corrected au-
tonomy ethics, however, such an ethics depends upon a shared com-
mitment to the good as well as to the Other.127 Yet, as suggested, in a
society of strangers, a shared commitment to the good cannot be as-

123 Shaffer & Cochran, supra note 67, at 45 (quoting Robert N. Bellah et al.,
Habits of the Heart: Individualism and Commitment in American Life 115 (1985)).

124 See id. at 47; see also Thomas L. Shaffer, The Legal Profession's Rule Against Vouch-
ing for Clients: Advocacy and "The Manner That Is the Man Himself," 7 Notre Dame J.L.
Ethics & Pub. Pol'y 145, 175 (1993) (discussing how friends work out common inter-
ests in collaborating on the good).

125 Shaffer, Christian/Lawyer, supra note 7, at 13-20; see also Shaffer, supra note
17, at 969-70 (describing the ethics of radical individualism).


127 See Sammons, supra note 8, at 11 (quoting Shaffer & Cochran, supra note 67,
at 45 n.41 (indicating that traditional friendship is thought to involve love, acknowl-
edgment, reciprocity, likeness or similarity, permanence, sharing, and shared activity)).
Nor do lawyer and client explicitly recite that shared commitment in the course of establishing a relationship, as the parties recited their history and commitments in the suzerainty covenant, so that they may securely know that they share a common understanding of the good. Despite today’s complex retainer agreements, I doubt whether very many of them describe lawyer’s and client’s shared moral values even if they are shared.

A key difference between covenantal and friendship ethics as traditionally conceived, one that bears on the problems of strangers and professional goodness, rests on the different way in which each ethics creates a shared commitment to the good and to the Other. Friendship is largely based on intuited affinity—we find our friends because they share similar history or values, and they become more our friends the more we find our personal history and values coming into consonance with each other. In these ways, our relationship with friends is very unlike the relationship with strangers we encounter, even those we see regularly and at close range. Indeed, even the way in which strangers perceive “natural” duties or the moral universe might be vastly different: only a “naive” view of natural law, Shaffer suggests, would assume that by counseling with our clients, we will come to the same perceptions about what “the natural law” requires.

By contrast to friendship ethics, covenantal ethics is not intuited but explicit—not necessarily specific, as in contracts, with each detail spelled out—but explicit. There is a moment of time in which the parties decide that they will be bound to each other, which is not defined solely by their past history. Prior to that moment, there is no

---

128 See id. at 15, 26–27. Shaffer and Cochran want to change this situation and admit that these differences in the culture exist, but they still insist that modern Americans share moral values across traditions, particularly in localities where lawyers practice. Shaffer & Cochran, supra note 67, at 49–50 (discussing differences and similarities between the moral values of lawyers and clients). When Shaffer at another point suggests that lawyers are responsible to each other as “professional friends,” he ultimately gives a different reason than shared values: “When I deal with the lawyer for the other side, who is not my enemy, I deal, within a community and within concentric circles of communities, with the noblest work of God, as much as when I deal with my own client.” Shaffer, supra note 14, at 208. This notion of friendship as given, rather than chosen, sharply contrasts with modern understandings of friendship.

129 See Thomas L. Shaffer, Human Nature and Moral Responsibility in Lawyer-Client Relationships, 40 Am. J. Jurs. 1, 1–16 (1995) (describing the lawyer’s dilemma over counseling a client who seems to want the lawyer to violate common perceptions of human nature, for example, that mothers and children belong together, that a tenant’s cleanliness is an obligatory virtue, that people who can work should not take advantage of a welfare system, and that parents should not disinherit their children).
covenant, and beyond that moment, there is always a covenant, apart from how the parties to the covenant feel about each other or what they might share. Covenantalists do not become un-obligated by virtue of the fact that they can no longer remain friends because of betrayal or historical drift.

Contractualists similarly create relationships with strangers that do not depend on history or affinity. What separates covenantalists and contractualists is their different emphasis on who the covenantor understands himself to be: the contractualist asserts freedom of the individual in isolation from his community, while the covenantalist asserts the freedom of the individual already located in and responsible to his community. As Shaffer notes, the contractualist’s assumption of moral insularity is an opportunity for perversion: it may shield the lawyer from offering an argument for discussion in an ethical dilemma, from being challenged, and from taking moral risks.¹³⁰

These same risks would seem to attend a virtue ethics practiced in the American age, where no organic community exists to reinforce the importance of the virtues for social life and the individual feels left to his own moral devices. Of course, the person who wishes to be good might follow Benjamin Franklin’s lead, focusing on the development of virtues for some non-moral good, if not to be healthy, wealthy, and wise, then in order to accomplish the client’s goals.¹³¹ He might thus imagine that, by sheer force of will and personal habit, he can live a virtuous life without the influence of community.¹³² The individual who tries to go it alone as a virtuous person faces some tough obstacles, however. It is not just that he may delude himself about the good, perhaps the greatest risk that Shaffer sees.¹³³ In addition, he may come to resent the fact that others are ethical free-riders, not bound by the rules he lives by, or the fact that he can be duped or controlled by strangers who do not share his values. As a sinner, he may simply tire of the self-expenditure, responsibility, and self-control required by the virtues. And, as care ethics has suggested, he may simply tire of caring where there is no guarantee that care will be reciprocated.¹³⁴

¹³⁰ See id. at 16–20.
¹³¹ See MacIntyre, supra note 12, at 185 (describing Franklin’s account of the virtues as teleological, a means to the end of happiness as success and prosperity).
¹³² See id. at 113–14, 220 (describing, inter alia, Nietzsche’s argument that in a world without natural foundations for an objective morality, individuals must construct their own version of the good).
¹³³ See Shaffer, CHRISTIAN/LAWYER, supra note 7, at 19–20.
¹³⁴ See, e.g., JAcK & JAcK, supra note 103, at 150, 152–54 (describing how care ethicists respond to tension over their inability to meet all of their clients’ needs by
Shaffer's ethics of friendship, which he expands beyond its traditional borders, is a tellingly different image that may inspire lawyers, one by one and small group by small group, to re-imagine their relationships with clients in a much more creative way. It proposes a solid response to the dangers of "solo virtue ethics" by positing that a friend is someone who will not only shatter any delusions of the good the virtuous person harbors, but will also reciprocate friendship virtuously. And it has an answer to the problems identified with care ethics: because the friend is a good person, the problems identified with care ethics—such as resentment of free-riders or the suspicion that one is being ripped off in caring for another—are significantly ameliorated.

Yet, such an ethics of friendship may be an inapt paradigm for a structure of professional responsibility. The value of real-life friendship relies on the episodic and unpredictable moments in which those we know are truly our friends act like friends. As Shaffer admits, the ethics of friendship is dependent largely upon a providential view of human relationships: he thinks perhaps that a friend is one whom "God sends to us in a certain way." We cannot create or order friendships according to some good we have in mind, as virtue ethics would suggest. And yet, professional relationships suggest some amount of ordering, precisely because they are for a purpose.

Moreover, friendships, while not uncommon, are not universal: unlike shared moral intuitions (at least in some theories like the "naive" natural law theories Shaffer is unsure of), not everyone has a friend, especially if we take seriously Shaffer's description of a real friend. Nor can we lay a claim of right to friendship within the legal profession. And most of those human beings who do have the kind of friends Shaffer talks about cannot realistically expect those friends to be constant, to be always for them what they hope to be for themselves, persons of integrity, whose lives reflect a clear moral narrative.

Thus, covenantal ethics, which relies on many of the same dynamics as friendship but is based on explicit commitment rather than the episodic intimacy of friendship, may offer a better model for a com-
prehensive system of ethics. Yet, the notion of covenanting with clients no doubt makes even most Christian lawyers uncomfortable. Among the problems that come with the scourge of modernity, problems that Shaffer’s work on communal virtues implies that we should be overcoming, is our sense that moral beliefs are private “sentiments,” that sharing lawyers’ private selves would be creating an untoward intimacy with clients. (In the autonomy model, such intimacy can actually harm the clients because the lawyer might get “too close” to the client to be any good to him.) Second, moderns have the intuition that morals do not belong in a conversation between lawyer and client, because the legal world is a world of “fact” separated from the world of moral “value” at the heart of the modern dogma described by Wayne Booth and by Shaffer himself. Third, it is very difficult for modern people to get over the “common sense” that prophesying and advocating for values and world views that conflict with their own is a form of coercion of the other.

However, even the lawyer who is willing and able to get beyond the problems of the modern dogma might well recognize covenanting with the client to be a precarious enterprise because it requires formation of an enduring relationship that neither the client nor the lawyer may be willing to enter. Again, to go back to the intuition that informs the ethics of friendship, as well as the history of covenant making, even though the suzerain and vassal nation stood in a relationship of threatening strangers to each other, in some respects, they had some basis on which to decide whether they wanted to covenant together. Their forefathers had a history, either one of violence or one of mutual loyalty, with each other. They had learned, if even through war, what kinds of values and habits their covenanting partner possessed. They had learned, by watching what happened with other suzerain or vassal nations, how likely that nation was to be trustworthy, to keep its covenant. They had a history, if you will, with strangers.

Most lawyers and clients do not have such a history at the outset. They walk into the unknown protected only by the law and the code

139 See Shaffer & Shaffer, supra note 12, at 84.
141 See Shaffer, supra note 17, at 965–66; see also Shaffer, supra note 129, at 17–25 (describing how moral deliberation in the law office is unlike moral deliberation among friends, because it is constrained by law, and “fact follows law,” and yet how it is unlike moral deliberation in court, in that it is theological, a testimony by believers from Scripture and the memory of the church).
of ethics, neither of which promises them swift and sure justice if it turns out that their Other is a scoundrel. What makes it possible for a Christian lawyer (or client) to enter into such a relationship in a covenantal fashion is not that he is personally more courageous in the face of risk than any other lawyer, nor that he is immune from the potential threats which the other brings. What makes him able to enter into such a relationship is his belief that the risks he takes, both emotionally and morally, are not ultimately important. The risk that his client will commit violence against him is not lessened by the relationship; it simply becomes less significant. Similarly, the risk that he will be shamed, or even the chance that the need of the other will threaten his very life, the comfortable life he wishes to protect, is similarly not lessened because he is a Christian. The difference is that the Christian understands these potential losses to be only penultimate.\textsuperscript{143}

Absent such a religious understanding, however, the problem of how we construct an ethics for a whole profession remains. Is it possible for a legal ethicist to counsel every lawyer to enter a covenantal relationship with a client? That is, can an ethicist argue, even though you do not believe that these goods you are likely to lose are merely penultimate, you are morally obliged to open yourselves to a covenant with the stranger?

B. "I Am the Lord Your God"\textsuperscript{144} Equality, Difference, and the Vulnerable Covenanting Partner

A key theme in recent covenantal ethics and politics is the value of equality between the covenanting parties. Elazar, for example, claims, "[c]ovenantal foundings emphasize the deliberate coming together of humans as equals to establish bodies politic in such a way that all reaffirm their fundamental equality and retain their basic

\textsuperscript{143} See Martin Luther, Temporal Authority: To What Extent It Should Be Obeyed, in Martin Luther's Basic Theological Writings 655, 669 (Timothy F. Lull ed., 1989). Or, as Martin Luther once put to music,

\begin{verbatim}
And take they [devils] our life,
Goods, fame, child, and wife,
Let these all be gone,
They yet have nothing won;
The Kingdom ours remaineth.
\end{verbatim}


\textsuperscript{144} Exodus 20:2.
rights. Even the Hobbesian covenant . . . in principle maintains this fundamental equality.”

To be sure, covenants are “essentially two-sided.” Yet, we must ask what could be meant by the claim that covenantal ethics is an ethics of equality, in light of the history of the human covenant. Historical covenants did recognize an important form of political equality—but within each of the covenanting communities. The covenant tradition is credited with breaking kingships that relied for legitimacy upon divine authority conferred upon the king as mediator for the people. In the Puritan covenant, for example, the people rejected the concept of a higher mediator: in the covenantal community, all could sign on to the document which made them a political people under God. Yet, this sense that each was included in the process of deciding to covenant, each “equally,” did not mean that the Puritans believed they were the equal of the God with whom they covenanted. Roger Williams was so taken with the awful majesty of the Lord that he believed his community unworthy of understanding and enforcing the covenant against non-believers. So it is, ironically, that his political community’s document, forged in the recognition of God’s superior majesty rather than man’s equality with God, became not one of the many religious covenants made by communities arriving in the New World, but its first secular compact.

Likewise, the suzerainty covenant, a likely model for the Sinai covenant, showed no recognition that equality of the covenanting partners is an essential, much less a valuable, feature of a covenant. The

145 ELAZAR, supra note 19, at 38; see also EVERETT, supra note 44, at 104 (describing the principle of “mutual consensus among equals as the basis for common life”); Robin W. Lovin, Equality and Covenant Theology, 2 J.L. & RELIGION 241, 251-52 (1984) (citing JOHN PRESTON, THE NEW COVENANT OR THE SAINT’S PORTION 331 (London 1624)).

146 EICHRODT, supra note 86, at 37 (citing Genesis 21:23; Genesis 26:29; Joshua 9:1 et seq.; 1 Samuel 11:1; and other covenantal agreements).

147 See ELAZAR, supra note 77, at 149, 154; Witte, supra note 22, at 592-93 (Puritan view); see also EVERETT, supra note 44, at 111.

148 See Lutz, supra note 34, at 40.

149 See ELAZAR, supra note 77, at 28 (noting Church fathers’ transformation of the Jewish covenant which assumed an equal partnership between God and the individual to the concept of mutuality between God and humans, with God remaining superior).

150 See Rothman, supra note 85, at 113, 115.

151 See Lutz, supra note 34, at 40-41 (noting that a secular covenant was written because there was no minister in the colony and therefore could be no church with the “authority” to create a religious covenant). The distinctions between covenants and compacts, both “constitutional or public” and the private form of agreement, contract, are beyond the scope of this Article. For further discussion, see ELAZAR, supra note 19, at 22-31.
covenant maker, whether suzerain or the Lord, tells—*tells*—the other covenanting party that he *will* make a covenant with him.\(^{152}\) The opening salvo of the Hittite covenant is a paean to the majestic might of the covenant maker; it claims, “These are the words of the Sun Mursilis, the great king, the king of the Hatti land, the valiant, the favorite of the Storm-god . . . .”\(^{153}\) The second exalts the covenant maker for all he has done for the vassal covenantee, even extolling his ability to conquer the vassal nation.\(^{154}\)

The biblical covenants are no different in this respect. The Sinai covenant similarly begins with a recitation of the power and majesty of God. “I am Yahweh your God,” it thunders, “who brought you out of the land of Egypt, out of the house of bondage.”\(^{155}\) And, the Covenantor continues, “I, Yahweh your God, am a jealous God, one who brings the iniquity of fathers upon their children even to the third and fourth generation for those who hate me . . . .”\(^{156}\) Therefore, the Covenantor demands, “You shall not have other gods besides me . . . .”\(^{157}\) This Covenantor pretends no equality with the people of Israel—in might or in the justice with which he pursues perfidy (or rewards fidelity) from generation to generation. Just like the suzerainty king, the Covenantor clearly stands over the people. Neither the threat nor the benevolence inherent in this speech connotes equality as similarity, nor imagines covenantors as equals standing on level ground. Indeed, even mutuality, in the way we normally think of that word, is missing from this covenant:

\[T\]he historical introduction stresses the good record of [the covenantor] and the good intentions of the reigning monarch . . . . 

[But e]xcept for this sort of very general assurance of decent treatment of the vassal, the overlord does not promise a thing . . . .

---


\(^{153}\) Hillers, *supra* note 21, at 29.

\(^{154}\) In this covenant, for example, the covenantor recites that the vassal rebelled against his father, but finally submitted and stayed faithful to his treaty; he “remained loyal toward my father and did not incite my father’s anger.” *Id.* at 30. Reciprocally, the covenantor’s father “was loyal . . . he did not undertake any unjust action against him or incite his or his country’s anger in any way.” *Id.* And when the vassal’s father died, “in accordance with your father’s word I did not drop you . . . . I sought after you . . . but although you were ailing, I, the Sun, put you in the place of your father and took your brothers (and) sisters and the . . . land in oath for you.” *Id.* at 30–31.

\(^{155}\) *Id.* at 48; *see also* Everett, *supra* note 44, at 106 (recognizing suzerainty nature of Abrahamic and Mosaic covenants).

\(^{156}\) Hillers, *supra* note 21, at 48.

\(^{157}\) *Id.*
[Though the king] intends to behave in an upright way . . . he will not, so to speak, put it in writing. . . .

Nor do the unilateral covenants where God, not the human, is the one who gives something suggest a relationship of equality in any traditional sense. God says, “I am hereby establishing my covenant with you.” God then continues with the promise never to destroy the earth with flood, setting God’s “bow” as a sign in the heavens to bear witness to the promise. Although the obligations here described are God’s to people, instead of the Sinai people’s duties to God, “[t]his [covenant] is simply a unilateral promise of God, and it makes no difference what Noah does.”

Thus, traditional covenantal theology does not remove or obviate the situational inequality of the covenanting parties, nor does covenant theology find value in suggesting some abstract equality between covenanting partners that does not exist in fact. Indeed, covenantal theology takes pains to point out the inequality, the sheer incommensurability of the situation of covenantor and covenantee. God is always the more powerful, the one to be obeyed, the one who can unilaterally declare a covenant can be made, the God who leaves God’s self the freedom to unmake the covenant. These passages remind us that, in the typical covenanting relationship, one party does have the means to do the other in, physically, economically, psychologically, or even morally. The covenantee can reject the covenant, not because he is equal, but because the covenantor permits him the freedom to do so.

Given the inequality which so often exists in covenanting relationships, it is important to recognize the dark side of the covenantal metaphor in human hands. It is true that covenantal professionals will accept responsibility for the vulnerable client or patient, even where they have no blood or community ties which would demand the

---

158 Id. at 34–35.
159 McCarthy, supra note 22, at 2.
160 See Hillers, supra note 21, at 101.
161 Id. at 102; see also Richard A. Muller, The Covenant of Works and the Stability of Divine Law in Seventeenth-Century Reformed Orthodoxy: A Study in the Theology of Herman Witsius and Wilhelmus A. Brakel, 29 CALVIN THEOL. J. 75, 84–85 (1994) (describing Witsius’s view that the divine covenant is a “covenant ‘of one party’ . . . grounded in ‘the utmost majesty of . . . God’ and incapable of being initiated by any but God”); Witte, supra note 22, at 586 (noting that Calvin, Zwingli, and Bullinger held that “God set the terms of the covenant. He determined its parties. He gave man the faith which the covenant required. He promised fidelity to the covenant, regardless of man’s infidelity.”).
162 See Hillers, supra note 21, at 65.
163 See May, supra note 88, at 132–33.
acceptance of such responsibility. Yet, the temptation which accompanies the acceptance of a role that carries such prestige and power is that human beings, who are not God, will try to mimic the God of the covenant. They will "look down" at a client from an authoritarian position, imagining that they know what is best for the client or deluding themselves that their needs and wants are intrinsically more important than the client's.164

According to covenantal ethicist William May, the modern antidote offered for authoritarianism practiced under the guise of covenantal ethics is contractualism,165 or what Shaffer calls the ethics of autonomy.166 Where the authoritarian ethicist demands blind trust by his patient, the contractualist ethicist offers the ritual of informed consent167 to put himself on the patient's level—the patient is given as much information as objectively as possible and asked to select a course of action without influence by the professional. The contractualist model encourages respect for the dignity and autonomy of the patient and emphasizes symmetry or mutuality between professional and patient.168 To use ecclesiastical language, the informed consent model "laicizes" authority, encouraging collaboration between professional and patient.169

Indeed, this emphasis on equality in the form of equal respect for each individual's human dignity and autonomy, or on mutuality as sharing information and collaborating in decisions, seems to be precisely what covenantal ethicists are also arguing for when they claim covenant as a basis for doing ethics. Joseph Allen, for one, suggests that covenantal ethics means the right of each human being to equal respect, to an appreciation that each person has equal worth as a child of God.170 Similarly, Joseph Allegretti talks about "affirming the sacred worth of all persons without distinction."171 In this understanding of equality, the words "equal" or "without distinction" become

164 See id. at 50-58, 123-24.
165 Id. at 124-26.
167 See id. at 124.
168 See id. at 124-25. To translate this idea into "equality" terms, the notion of equality that May follows is more like the Puritan notion of equality as consent or the dignity of all persons, rather than equality as equivalency. Equality as consent means that "persons voluntarily accept the positions and duties required for the good ordering of society and perfect themselves in the role they play in that common moral task." Lovin, supra note 145, at 252.
169 See May, supra note 88, at 129.
171 Allegretti, Calling, supra note 18, at 42.
superfluous—to affirm the sacred worth of a person as a child of God is an activity that does not require comparison to anyone else.

To consider whether equality is really an essential value in a lawyering relationship, then, we might consider its potentially evil uses, just as we considered the evil consequences of the covenantalist’s recognition of inequality, the paternalism or condescension that comes with unequal position. The risk of “equality” language is that the contractualist will be blind to the Other’s difference in the name of equality. Equality language can be pernicious in a number of ways. First, an individual’s use of equality as a relationship paradigm will inevitably mean that he pretends not to see that the Other is different in his pain or in need or that treating one person exactly the same as another will result in unequal outcomes.\textsuperscript{172} In lawyering, equality language pretends that “informed consent”—e.g., the full disclosure of information and potential benefits and risks of particular courses of action to clients who come from very different life circumstances and who may be differently vulnerable—is likely to achieve equal levels of autonomy.\textsuperscript{173} (And thus, that fully informed clients will act in just the same way that the lawyer would act, if she were in the client’s shoes.)

Lucie White poignantly illustrates the pathos created by the illusion of contractual equality in the now almost mythic story of Mrs. G.\textsuperscript{174} Mrs. G is a welfare mother who has come into a lump sum of money as settlement of a car accident and must show the welfare office that she spent the money for necessities so she does not get terminated from her welfare assistance.\textsuperscript{175} Her lawyer believes that she has carefully described Mrs. G’s legal options so that Mrs. G can choose to craft her appeal testimony in a way that will keep her on welfare.\textsuperscript{176} White is dumbfounded and furious when Mrs. G goes to see the fraud investigator on her own and then insists on testifying that she spent some of the lump sum on Sunday shoes for her daughter, something the lawyer knows will seem frivolous to the welfare department.\textsuperscript{177} She slowly learns that in her haste to treat Mrs. G as an equal, an

\textsuperscript{172} \textit{See Martha Minow, Making All the Difference: Inclusion, Exclusion and American Law 40–43 (1990) (describing the effects of failure to see the differences between men and women in the workplace).}

\textsuperscript{173} \textit{Cf. Max, supra note 88, at 124, 132–33 (explaining that “[t]he notion of physician as contractor . . . emphasizes informed consent rather than blind trust,” but basing a physician-patient relationship on contract “simply augments the power of the more preponderant of the two bargainers”).}

\textsuperscript{174} \textit{See White, supra note 5, passim.}

\textsuperscript{175} \textit{Id. at 23–24.}

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} \textit{Id. at 23–24, 31–32.}
autonomous person, she has failed to understand that Mrs. G is indeed the Other in many ways. Mrs. G's own values, her priorities, even her ways of understanding what her lawyer is trying to tell her, are so profoundly different from her lawyer's that neither can really communicate with the other toward an effective resolution.

Second, equality language may imply that the responsibility for caring for the Other flows only from the similarities we see in him to ourselves. The "if-then" of equality ethics is often figured thus: "if the other is my equal (which I assume until I know otherwise), then I must treat him as my equal." As Martha Minow suggests, this logic involves several perverse assumptions about difference, most importantly that our own situation and reference point for identifying and judging difference is objective and normative for all situations. As such, contractualism ultimately replicates the very hierarchies and injustices that have put us on different tragic trajectories in the world. Once the differences in our contracting partner are disclosed, the equality principle justifies our condescension and paternalism, for the "fact" of inequality leads to the right to "act" in a different way than the way we should expect to be treated. Contractualism, practiced as a vice, thus leads to the same end as pernicious covenantalism, with the additional insult that the condescending contractualist holds his client at arms' length (instead of caringly close) and pretends to an equality with his client that he does not live.

Of course, our refusal to see difference, or acknowledge that the standpoint from which we judge is not objective or necessarily normative, may also bite us back. It may put us at unnecessary risk: when we pretend that a charming client "is equal" to us, we may falsely assume that he or she shares the same values and therefore will "do the right thing"; that is, the thing we would do if we were in the same shoes. Ultimately, we may be shaken to know that a corporate client has utilized our trusting and earnest advocacy as a guise for getting a waiver from an environmental regulation he very well could have (and should have) obeyed. Or we may discover, perhaps painfully during cross-examination in a custody case, that our client-mother who inno-

178 See id. at 47.
179 Minow identifies the five unstated assumptions which I collapse into this summary as follows: (a) difference is intrinsic rather than an expression comparing individuals; (b) we assume that our own reference point is the proper one for judging difference; (c) we do not judge from a particularly situated perspective but from an "objective" vantage point; (d) our clients' perspectives are not relevant or are already considered through our own; and (e) the existing situation is natural and given, or the result of personal choice, and thus should be preferred to a change. Minow, supra note 172, at 50–74.
cently and convincingly portrayed herself as the victim of a vengeful, powerful husband who "bought his justice" has in fact lost her children because of her own chaotic parental history.

It is probably no accident that Tom Shaffer has avoided "equality" language in his description of the ethical relationship between lawyer and client. Recognizing the inequality of the encounter between lawyer and client, he more often uses the language of mutuality or reciprocity in his work,180 which is also more apt language for what is at stake in covenantal ethics. That is, a covenant is an exchange of promises of obligation between two parties. Minimally, they have agreed not to annihilate the Other, to destroy his physical integrity or his moral autonomy. More positively, covenant is the agreement to listen and respond (not usually in kind) to what each covenantor offers the Other, to have regard for the concerns of the Other, and to hold one another to account. Shaffer uses Martin Buber's language to describe that reciprocity as follows:

One who meets the other in a deep way, who meets the One in the other, is changed by such a meeting, but this change need not include a conscious change of mind. However, the assumption of moral discourse is that each of the discoursers is open to change. . . . [T]he tendency of the [I-You] relationship was "as far as possible to change something in the other, but also to let me be changed by him."181

Such a relationship is not equal in the sense that the needs of the lawyer and of the client are the same: the lawyer does not ask the client for his advocacy, nor the client his livelihood from the lawyer. Nor is the covenant a relationship of equilibrium: neither the responsibilities nor the texture and form of the relationship are the same on the lawyer's side of the relationship and on the client's. Yet, covenant portends the hope that inequality or dissimilarity—in life-situation, needs, or hopes—does not preclude reciprocity. Indeed, it is not required that the lawyer and client share the same set of values, that they would come to the same moral conclusions, or even that they would make the same choices about their actions. This is ultimately what Shaffer seems to drive at when he suggests that, at some point, having exhausted his moral advocacy, the lawyer should not force the client who has not been convinced to do things his way or be forced to

180 See Shaffer, Christian/Lawyer, supra note 7, at 30–32; Shaffer & Cochran, supra note 67, at 51.
181 Shaffer, Christian/Lawyer, supra note 7, at 28 (quoting Martin Buber, citation not provided). Indeed, Shaffer's ethics might be best described as dialogical. See Shaffer, supra note 129, passim.
act as the client would want.\textsuperscript{182} While Shaffer uses the language of friendship or mutual respect,\textsuperscript{183} I would suggest that this is, in part, his implicit recognition of the depth and value of difference, the friendship's "otherness" as much as its sameness.

C. "Who Brought You Out of the Land of Egypt, Out of the House of Bondage"\textsuperscript{184} The Problem of Gift and Entrustment

Giftedness lies at the core of covenantal ethics.\textsuperscript{185} It is no accident that the recitation that precedes either demand or promise in the ancient covenant explains in dramatic detail what the covenantor has done for the covenantee in the past. The prologue sets the stage for the understanding of what is to follow. In the ancient suzerainty covenants, the overlord, whatever his other motivations, extends protection to the vassal not because the vassal has earned that protection or can fully pay for that protection, but because the suzerain chooses to extend it.

In the Christian tradition, this element of giftedness in the transaction is more dramatically absolute. The Sinai covenant recites the original gift of God to God's people, their deliverance into freedom from slavery in Egypt, and the recitations that follow later covenants remember the decision of God, again and again, not to hold God's people to their original promise, which they have stubbornly and pridefully broken over and over.\textsuperscript{186} Rather, God tells them, their Lord will extend the promise to them once again.\textsuperscript{187} The Gospel's "new covenant" similarly remembers the ultimate gift—the sacrifice of God's self to a completely and utterly undeserving people whom (God knows even as He speaks it) will turn aside from their covenantal vows every day of their lives.\textsuperscript{188}

Another way to describe the completeness of the covenantal gift is by contrast to the incomplete giftedness inherent in the ethics of care. Ultimately, according to Gilligan and others, what distinguishes

\textsuperscript{182} See Shaffer, Christian/Lawyer, supra note 7, at 28–29; Shaffer & Cochran, supra note 67, at 51–52.
\textsuperscript{183} See Shaffer & Cochran, supra note 67, at 44–48.
\textsuperscript{184} Exod. 20:2.
\textsuperscript{185} See Witte, supra note 22, at 586–87; see also Eichrodt, supra note 86, at 52 (describing Yahweh's courting the trust of the people and looking for a "spontaneous [response] from the heart").
\textsuperscript{186} See Sturm, supra note 30, at 129; see also Allegretti, Calling, supra note 18, at 41.
\textsuperscript{187} See Witte, supra note 22, at 586–87 (describing the Puritan view that God promises fidelity apart from human infidelity).
\textsuperscript{188} See Allegretti, Calling, supra note 18, at 41–42; Elazar, supra note 77, at 28.
care and rights ethicists is not where they end, but where they start. Rights ethicists consider their own interests first, then incorporate the interests of others; care ethicists consider others' concerns first, and then finally incorporate their own. Focusing on the problem of prioritizing the incomplete resource of human care, neither care ethics nor rights ethics is able to respond completely to the need of the Other. Care ethicists elude this problem by a self-deceptive dance about who really needs them and how much, while rights ethicists employ their own form of moral deception, suggesting that it is just for them to consider their own needs first, and then, if possible, the needs of others.

By contrast to the debate between the rights ethicist and care ethicist about whose needs should be served in a situation of scarcity, Christian covenantalism does not begin with either-or, distinguishing, weighing, or prioritizing self-interest as against the interest in others’ welfare. The Christian paradox of God’s self-giving love, reflected in the covenantal model, is that God is always absolutely the Other, never to be confused with any person; and yet, God gives God’s very and entire self for the sake of each person even to the point of entering the nothingness of death, the very un-Godness of existence. Yet though God is everything other than ourselves, our own good cannot be at odds with the good of our Creator, no matter how we falsely imagine it to be. The story of God’s love is the very antithesis of scarcity, of comparison, and of the need to decide whose interests should be counted first—in short, of the ways in which we measure and understand human relationships.

May argues that, like the giftedness of God’s covenant, the human covenant is also a matter of gift, albeit a gift denied by the recipient. Dissecting the Hippocratic oath, May shows how the gifts of the community, and most particularly the physician’s teacher, have made the professional an undeserved beneficiary of the wisdom, talent, and skill that he possesses. Moreover, the “countless ex-

189 See Gillican, supra note 11, at 100, 139–42, 149; see also Jack & Jack, supra note 103, at 8–10.
190 See May, supra note 88, at 120–23; see also Shaffer, Christian/Lawyer, supra note 7, at 32 (regarding justice as a gift, not a government commodity).
191 See May, supra note 88, at 116–17. May notes that beyond the physician’s teachers, the physician owes the public for investing in the training of physicians as well as medical research. Id. at 121–22. Similarly, those who actually are admitted to professional school owe society for the privilege of practicing their profession, since they are selected from among many who cannot all be admitted. See id. at 122. Finally, the physician is the beneficiary of “extraordinary social largesse that befalls the physician, in payment for services.” See id. Lest we get too nostalgic about the professional teacher of old, we are reminded that lawyers who apprenticed clerks in their
changes between colleagues" enhance this gift, and thus the indebtedness to the teacher.¹⁹² These are gifts, rather than contractual debts, not because no response is appropriate, but because the response demanded is filial obligation—duties which do not fulfill the debt, but only acknowledge and seek to honor it by mimesis. The Hippocratic oath thus calls upon the physician to remember and care for his teacher and to treat the sick with the same generosity with which he was educated.¹⁹³

Beginning with giftedness as the model for the professional relationship, May artfully exposes the pretense of professionals that their whole life is deserved, a lie that contractarians are particularly apt to be attracted to, though virtue ethicists also may come to believe that there should be a direct correlation between virtuous behavior and reward, material or eudaemonic. It is most tempting for modern professionals to conclude that the power, status, and comfortable life they derive from practice is deserved because of what they have achieved and that their services must be "justly" compensated. Even from the beginning, many law students view their admission to law school as a matter of right, as a good they should be allowed to purchase if they have the money, or even as a deserved benefit that should be provided to them by society.¹⁹⁴ Many "consume" their education, demanding services and educational experiences that are comfortable, rather than asking for challenge and complexity.¹⁹⁵ Lawyers, too, imagine their work more like a trade than a profession, with an emphasis on

---

¹⁹² See May, supra note 88, at 117.
¹⁹³ Id. at 117.
¹⁹⁴ Even though law students often perceive themselves to have financed their own education and therefore deserving of their diplomas, they ignore the hidden subsidy in their education. See generally Luize E. Zubrow, Is Loan Forgiveness Divine? Another View, 59 GEO. WASH. L. REV. 451 (1991) (describing substantial grant and loan subsidies received by law students who are not low-income or underprivileged).
¹⁹⁵ See Richard A. Matasan, The Two Professionalisms of Legal Education, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99, 110 (2001) (describing the way in which students must decide to "buy" a legal education and are consumers of services, including career counseling, books, grades, etc.); see also Nathaniel C. Nichols, Decanal and Administrative Opportunities in the New Millennium, 6 WIDENER L. SYMP. J. 175, 180 n.21 (2000) (describing student expectations that administrators will intercede for them in
money and profit, rather than on service and justice. With ever growing specialization, personal horizons have narrowed, hours have become longer, and the focus on law as an enterprise driven by the demands of the marketplace has become more and more central.

Lost in both of these developments is the concept of the law as a vocation, in which the lawyer and the law professor owe principal duties not only to self and to client (or to student), but to the courts, to the institution of legal rules, and ultimately to the public.\textsuperscript{196}

Conversely, particularly where the lawyer is providing pro bono services or hiring subordinates, he may see what he gives as wholly gratuitous, a favor he is doing the client "out of the nobility and generosity of his disposition and the gratuitously accepted conscience of his profession."\textsuperscript{197} In response, he expects the client or subordinate to humbly debase himself in response to the charity he has received. The result of an ethics of desert and charity is that the bar spends significant amounts of time in self-congratulation and in resisting efforts to establish pro bono as an expected obligation rather than an act of charity or an act pro bono publico.\textsuperscript{198}

The ethics of desert and charity inverts the covenantal argument that the professional relationship is a gift, and that gifts are not one-sided but reciprocal. In the covenantal view, services rendered by the

\begin{footnotes}
\footnote{196}{Donald B. Ayer, Stewardship, 91 Mich. L. Rev. 2150, 2151 (1993).}
\footnote{197}{MAY, supra note 88, at 120–21.}
\end{footnotes}
lawyer are responsive rather than gratuitous—they recognize not only the gifts of the teachers and colleagues that have created the professional’s opportunities, but also the fact that the patient (or client) gives up his very life into the hands of the physician, who learns from “practicing” on his patient, and who is, in part, himself precisely in the practice of his profession.199

In the ethics of desert, one party provides, and the other party owes. In the covenantal relationship, as Allegretti has argued, one person gives and the other entrusts himself to the giver.200 For reciprocity or mutuality to occur, the metaphor must be completed: as the professional or client opens his hand to give himself to the Other, the Other must open his hand to receive what is given. We might remember the covenant ritual of feudal property conveyances: as the lord offers just a token of the real property, a twig, as a sign of an enduring relationship, so the vassal must open his hand to the lord’s hand to show that he bears no sword, or place his hand within the hands of the lord, as if to say, “I am willing to trust my very life to you.”201

But, as Allegretti reminds, “[t]here is an element of risk here—when we entrust ourselves to another, we become vulnerable to betrayal.”202 No kidding. One covenantor may betray the other by violence, manipulation, or deceit, since entrustment opens those aspects of our lives that are vulnerable and malleable enough to be harmed, stolen, or twisted. Or, the trusting party may be betrayed if the giver “serves other gods,” for example, puts other things before the need of the trusting Other. But too often, the violation of trust occurs simply because of the misunderstanding that is endemic when lawyer or client confronts the Other. To return to the story of Mrs. G, both Lucie White and Mrs. G did precisely what Allegretti is calling for. Each placed herself (Lucie her professional credibility, Mrs. G her welfare benefits) trustingly in the hands of another. And each entrusted party, quite unsuspectingly, betrayed the other.

Shaffer recognizes the risks accompanying the moment when one human being opens his hand to offer this kind of gift and the other to accept, including the most common risk—that offerings will fail to be

199 See May, supra note 88, at 122–23.
200 See Allegretti, Calling, supra note 18, at 42 (citing Allen, supra note 170, at 18 (“Entrustment goes beyond mere trusting. It is 'actually to place ourselves or something of value in another's hands.' There can be no covenant unless each party entrusts himself to another.”)).
202 See Allegretti, Calling, supra note 18, at 42 (relying on Allen, supra note 170, at 33).
accepted or reciprocated.203 Discussing an ethics of care, which is "distinctive in its mutuality and interdependence," Shaffer notes that such "mutuality is rarely realized in professional relationships; it may not be even possible to realize it."204 Indeed, he reminds us that Martin Buber, who named this relationship of open entrustment, was not sanguine about the possibility of an "I-Thou" relationship in a professional situation, considering such a relationship as "even more terrible than what we call tragic" because we cannot change the fact that the client is not interested in the professional as a Thou.205

The most common human response to the risk that a giver will be exploited is to try to deter or at least punish the exploiter by creating a system to make him accountable. Unfortunately, in a contractual world, accountability systems aimed at professional misbehavior like lawyer malpractice or ethical violations can only offer minimalist responses to betrayal. Lawyers can be both sued and disciplined, but only if they transgress the rock-bottom boundaries of professionalism, if they wittingly betray their clients. (Some inaction is punished, but only if it is flagrant.) Even more minimally, clients can be sued if they do not pay or if they malign their lawyers' services too loudly, but they are not held accountable for more. As Allegretti urges, this form of regulation effectively places contractualism as a foundation under a covenantal approach: if the lawyer or the client fails to be covenantal, there's always the enforceable contract to protect the other party.206

The problem with a contractual "backup plan" to safeguard covenantors against risk is that it subverts the covenantal form, both literally and in its spirit. Covenants are not appropriate or even necessary in a world where contracts are possible, where worldly power is available to enforce the loyalty of one party to another. Both the suzerainty covenant and the parity covenant begin with the assumption that there is no outside worldly power capable of enforcing the promise(s) that vassal and/or covenanting partner make to each other. In both forms of the covenant, the parties are required to call upon the gods for enforcement. Mendenhall suggests that, in this respect, ancient political covenants are similar to modern international law: while

203 See Shaffer, Christian/Lawyer, supra note 7, at 28–29 (discussing risks accompanying openness to client).
204 Id. at 30.
205 Id. at 30–31.
206 See Allegretti, Perspective, supra note 18, at 1128; see also Hazard, supra note 5, at 395–96 (describing legal rules as part of the solution for dealing with the complexity of choices moral persons have).
expectations are fairly clear, the possibility that they can ever be enforced by the sword on this earth are extremely slim.207

In a world in which contracts are enforceable, professionals and clients who pretend at covenant relationships are also subverting the spirit of covenant, which is precisely to risk on behalf of the other. The lawyer's offer of services loses its gratuitous edge if he is prepared to demand his fee from his client through a lawsuit.208 Similarly, the client who puts himself in the lawyer's hands, thinking in the back of his mind that he will file a grievance if things don't turn out to his liking, is hardly exhibiting the sort of "entrustment" Allegretti calls for.

Of course, the practicing bar might hold out a covenantal model as simply an ideal for the profession, as what was once called an "aspiration," while protecting lawyers and clients against "real life" through contractualism. The idealization of covenant might be justified by arguing that covenanted is an impossible prescription for the pluralistic lawyering community, which includes many lawyers who have neither the hope of alterity, nor the courage to covenant in a risky world.

I doubt that Shaffer would be friendly to the suggestion that covenanted should be merely an aspiration, however. To the complaint that professionals should not be required to risk everything for their clients without protection, I suspect Shaffer's response would be, "but isn't the alternative you propose worse than the risks that accompany covenanted? If lawyers are not prepared to take these risks, aren't they settling for an ethics of isolation that makes a good life impossible?" One of Shaffer's conversation partners, Stanley Hauerwas, writes that the success of the community (of rabbits) in Watership Down

depends on the [community's] ability to trust in the gifts each brings to the group's shared existence. [Its members] must in a certain sense "be out of control," often dependent on luck to help . . . .

....

---

207 See MENDENHALL, supra note 28, at 26–27. Although the creation of international tribunals and governmental organizations is slowly changing this former reality about the enforceability of international law, the point still stands as evidenced by glaring examples today, for example, the failure of enforcement of human rights law against all but a few of the Serbian leaders accused of genocide.

208 See MAY, supra note 88, at 130–31, 148–50 (discussing how doctors' financial and liability concerns result in overtreatment and undertreatment of patients, and "grudging . . . calculating responses by doctors").
When rabbits yearn for and try to secure complete safety, their nature is perverted. They can only continue to rely on their wit and their courage and each other.²⁰⁹

Or, Shaffer might argue, "if you do not trust in a more ultimate protection than your own self and what the law can be made to give you, you are a fool." In Shaffer’s view, though the chance that the professional and client can create an I-Thou relationship is likely to be futile, to venture anything less is to deny the possibility of surprise, to refuse even the distant possibility of hope.²¹⁰ In Shaffer’s world, the only safety is in continuing witness to the truth and the hoped-for moment of justice. And, indeed, in Shaffer’s world, the risk is simply not as great as those who would hold on to contractualism would suggest: the point of covenanting is to face our worst fears and to act despite them.²¹¹ We give and entrust ourselves to each other also to remind ourselves of the gift of freedom and the freedom of gift that come from the covenantor and from within the covenant community. Stanley Hauerwas notes that the ability to take great risks in a relationship of trust depends upon the entruster’s recognition that the original gift of the covenant, which comes from outside the human parties to the covenant, is the promise that makes us secure.²¹²

In acknowledging the risk that covenant partners inadvertently will fail each other, covenantal ethics is precisely not virtue ethics. Virtue ethics, at least as it has been incorporated into legal ethics, continues to hold onto the security of the present while moving toward the future: it points the way toward what is desirable but not existing, which is not now but could be. In a sense, the virtue ethicist is shielded from acknowledging his present failures because he can distinguish between what he is now and what he could be: perfect virtue is an aspiration, something to work for, but so long as a person is on the path toward virtue, he is to be admired for his effort rather than castigated for his failure.

²¹⁰ Shaffer usefully explains what he means by this in his characterization of Judge Horton’s decision to set aside a guilty verdict against one of the Scottsboro defendants (black men accused of raping two white women on a train Alabama in 1933), knowing that the defendant would most certainly be convicted on retrial. See Shaffer, Christian/Lawyer, supra note 7, at 144–52. In Shaffer’s view, Horton knew that his action would not ultimately free the defendant, but it would alter history if only because it would be seen as an act of truth and conscience, and in this way was a hopeful act. Id. at 149–52.
²¹¹ See id. at 31.
²¹² See Hauerwas, supra note 209, at 25.
The covenantal model subverts the distinction between obligatory and aspirational by declaring that now, today, I am obliged to keep the covenant and nothing less than keeping it will be satisfactory. As such, the covenant recognizes continual failure, continual unworthiness of the professional. The covenantal lawyer cannot make do with the excuse, I have done well enough for today, or settle for complying with the minimalist expectations of the explicit contract. Rather, the covenant calls the lawyer and client to account for their failure to keep their promises here and in today’s world.

Such a demand necessarily leads covenantors outside themselves to find hope. Were my client’s life or welfare dependent upon my success at keeping the promise—or my ability to be perfectly virtuous as a lawyer—both my client and I would be tragic figures, and the only sensible response would be despair and paralysis. Yet, the Christian covenantalist faces failure not with deception or self-satisfied acceptance of less than what she has promised. Rather, the Christian covenantalist calls a merciful God as her guarantor, one who will neither call her to ultimate account for this utter failure, nor allow her client to bear the full weight of her inadequacy. The Christian covenantalist recognizes that despite her failure, and even sometimes out of her failure, God is creating a trustworthy world, both for her and her client.

D. “You Shall Have No Other Gods Before Me”.213 Temporality and Fidelity

Covenantal ethicists also think about time and relationship differently than other forms of ethics. Covenantors, like virtue ethicists, look backward as well as forward, while contract and care ethicists focus largely on the present. As compared with virtue and care ethics which imagine duties that arise almost seamlessly from a past, covenantal ethics is marked by the contingencies and choices of a historical moment. Each of these aspects of covenantalism has some impact on what it means to be faithful and accountable in covenantal systems as compared to others.

Covenantal and contractual ethics differ significantly in the extent to which the historical relationship of the partners informs the reasons for and nature of the commitments. Contractual ethics is ahistorical, focused upon the present agreement. As she decides to be bound in a future relationship, a pure contractualist gives past and potential future relationships no special weight in the process of mak-

---

213 Exodus 20:3.
ing a moral choice. Care ethics similarly focuses on the Other as she presents herself in her immediate need; what is past is not as irrelevant as in contractualism, but past relationship recedes under the weight of the vulnerability with which the needy person approaches. By contrast, the traditional covenant is built upon some kind of past relationship. A key covenantal recitation describes in detail the past relationship of the parties, whether it involves benevolent relations, significant hostilities, or merely the economic trading that serves as a prelude to and reason for making the treaty.

In its reference to both past and future, covenantal ethics is like virtue ethics, but they differ in one important way. Virtue ethics is largely forward looking, considering the ways in which individuals and communities can be oriented to their proper ends. For virtue ethicists, the past helps to define and provide a context for arete, but virtue ethicists focus on a future goodness, a goodness which may not be fully known. In fact, as Jack Sammons suggests, virtue ethics, which are built upon narratives, not only point toward the future, but they also can point toward possibilities beyond themselves: the community which can be embraced by the narrative from which virtues are built can be, though it is not always, larger than the community which tells the story. For covenantalists, by contrast, the future is always being drawn back into the past and is always shaped by recitations about the historical moment of the promise; the future must be faithful to that promise, no matter how great its aspirations for the future.

Yet, the moment of covenant does not enclose and limit the covenantor's ethical duties toward the other: just as the suzerainty treaty specified loyalty, but not always the specific actions required to demonstrate that loyalty, so covenantal relationships are temporally

214 See Allegretti, Perspective, supra note 18, at 1125; see also Lovin, supra note 145, at 245 (stating that the decision of a contractor depends on prudential estimate of self-interest).


216 See Hillers, supra note 21, at 31.

217 See Everett, supra note 44, at 127 (describing the covenantal view of time as the "struggle of our hopes," the "journey toward promise embedded in our visions").

218 See MacIntyre, supra note 12, at 148, 184 (describing Aristotle's and Aquinas's views).

219 Id. at 122 (noting that the word "arete," later translated as "virtue," meant "excellence of any kind" in the Homeric period).

220 See Email from Jack L. Sammons to Marie A. Failinger, supra note 71.

221 See Stackhouse, supra note 46, at 41-42 (noting preservation of the historical identity of people while they are being reconstituted through covenant).
open-ended. While contracts anticipate closure at the end of a particular case or solution of a legal problem, covenantal ethics tends to deny the possibility that a date certain for the end of obligation can be set precisely because what is at stake is a relationship, not a project. For the covenantalist, the client does not signify a problem, but an opportunity for engagement, even for learning. The distinct expectations of the covenant are more fluid than contracts precisely because they are adjusted by the nature of the relationships being formed; while they are founded on promises of explicit obligation, they also "serve unpredictable needs."

In his ethics of friendship, Shaffer frames his understanding of professional responsibilities around the past, present, and future: the client's (and lawyer's) current need, their history of relationship with each other and their community, and with the telos that drives the responsibilities of each party. However, unlike care ethics, Shaffer focuses not so much on the immediate needs of the covenanting partners. For him, the clients' very practical needs to have something done are important, but not nearly as important as the relational possibilities that the client presents the lawyer. For example, he suggests that a key moment in a lawyer's attempt to respond to a family estate fight is when the lawyer reconceptualizes his relationship as one with a family and not a series of individuals. Sometimes, the actual outcome of the client's case seems unimportant to him as compared with the change in the community of lawyer and client that follows from an ethics of care or ethics of friendship. In his view, lawyer and client come to change who they are, not because they set out to change, but because the nature of human existence is to be changed in a serious encounter with the Other. Thus, in his view, limiting a relationship

---

222 See May, supra note 88, at 203 (discussing HMOs as covenanted institutions with emphasis shifting away from acute care to better preventive and rehabilitative care).
223 See id. at 113; see also Everett, supra note 50, at 558–59 (distinguishing the difference between covenant and contract as an intimate community vs. detached legalism, a fundamental commitment vs. specific promise).
224 See May, supra note 88, at 122 (describing gift patient bestows on a physician by presenting her body for learning); Shaffer & Cochran, supra note 67, at 47.
225 May, supra note 88, at 127–28, 130 (discussing members of the "so-called helping professions").
226 See Shaffer, Faith/Professions, supra note 6, at 182, 192, 196, 204–06 (rejecting civic friendship for its focus on telos and focusing on friendship as faithfulness and the willingness to love and help others with integrity for God's purposes).
227 See Shaffer, supra note 17, at 968–71.
228 See Shaffer, Christian/Lawyer, supra note 7, at 27; Shaffer & Cochran, supra note 67, at 46–47.
by totalizing the person into a problem or a case, or artificially setting some termination date for a relationship, does not make room for the "gratuitous, growing edge" that constitutes a genuine human relationship.\textsuperscript{229}

It may not be difficult to find at least some examples of professionals who reflect Shaffer's focus on relationship rather than practical outcomes. Lawyers in long-term, intensive relationships who share a goal with their clients, such as business lawyers who are working with clients to finance developing projects, often find themselves to be friends after a period of time, though they might compartmentalize and stylize their relationship when they are acting as lawyer and client rather than tennis partners or dinner companions. Shaffer's Fanny Holtzman, one of New York's first women lawyers, whose ability to make friends of clients was legendary, certainly reflected Shaffer's ideal, calling upon her vast, loyal network of relationships to help her other clients.\textsuperscript{230}

Yet, I would doubt that most lawyers and clients view their "relationship" with the other as a friendship, or like the relationship they have with a family member or close friend, and intentionally so.\textsuperscript{231} But if Shaffer is right that human beings find themselves in their relationship with others and not in satisfaction of specific needs, we might ask why they would make this deliberate choice not to make friends of their lawyers (or clients). Perhaps it is because the expectations of friendship, as Shaffer understands them, are simply too difficult in the lawyer-client situation, and it is easier for both lawyer and client to fall back into a relationship that is merely functional. For Shaffer, a key difference between a contractual relationship and a friendship is a difference in interpersonal accountability. In arguing for an ethics of friendship focusing on the goodness of the person, Shaffer falls in line with the covenantal tradition's essentially ethical claim: the focus of the Sinaitic experience is not simply an agreement, but a law-giving, a commitment to a certain way of life on behalf of the Other.\textsuperscript{232} Contractualists hold each other accountable for violating explicit behavioral guidelines or for failing to achieve the goal of the relationship, but contracts are not essentially or necessarily focused on the ethical.

\textsuperscript{229} See May, \textit{supra} note 88, at 127–28.

\textsuperscript{230} See Shaffer, \textit{Faith/Professions}, \textit{supra} note 6, at 178–82.

\textsuperscript{231} Shaffer recognizes this fact in his story of immigration lawyers who practice dissent against the system without friendship for clients, thus participating in oppressing their clients. See id. at 183–87.

\textsuperscript{232} See Stackhouse, \textit{supra} note 46, at 141–42 (noting that what is at stake in the covenant is "sacred, life-giving, enduring and transcendent").
By contrast, care ethicists, Shaffer argues, hold each other accountable for who they are—for virtues and vices they exhibit in their daily lives with others, whether “inside” the professional relationship or outside. Indeed, Shaffer’s shift to describing his ethical view as an ethics of friendship may be intended as a move away from his earlier focus on mutual regard and concern (which remains an instrumental, if not a secondary intrinsic, good) to the question of how professional and client hold each other accountable for the benefit of the community.

In this move, Shaffer returns to what sounds much like a virtue ethics argument. In covenants, loyalty is a key value: the suzerainty covenant spelled out in repetitious detail, in the stipulations, the responsibility of loyalty from vassal to suzerain, often reminding the vassal of the suzerain’s loyalty in return. For Shaffer, loyalty sounds a little contractualist: it is, to be sure, an open-ended temporal commitment to the Other, but one that does not have any “substantive” moral shape. He argues that in some of the modern communities we come from, mere loyalty—the longstandingness of a relationship—is considered a mark of virtue, even if the relationship is corrupt. We might think of this as the Eva Braun theory of loyalty: the notion that the loyal partner who stands by and supports her friend even when the friend is doing great evil is a good person, even when her loyalty essentially contributes to that evil.

Shaffer would trade in loyalty for fidelity, the foedus of covenant, only with a virtue ethics twist. He argues for fidelity, an open-ended commitment to the Other which has at its core the promise to tell the Other the truth, most particularly the truth that the Other is

233 Among the stipulations described by Mendenhall: the vassal may not show any enmity against any vassal or others under the great king’s sovereignty, may not change its relationship with other vassals, or become a slave or dependent of the vassal. See Mendenhall, supra note 28, at 33. The vassal has to answer any “call to arms” the king makes, to hold “lasting and unlimited trust in the King,” not “entertain malicious rumors that the King is acting disloyally toward the vassal,” nor “permit any evil words against the King.” Id. The vassal may not shelter any refugees, and must submit any controversies with other vassals to the king. See id.

234 See Shaffer, Faith/Professions, supra note 6, at 86–87 (describing the view that professionals’ only moral obligation is to advance the goals of their clients); id. at 220–21 (describing loyalty as “set[ting] your conscience aside”).

235 See Stackhouse, supra note 46, at 143 (noting that covenant has been read as the term foedus, from which we derive the term “federation” and, later, the concept of a federated civil society); see also Elazar, supra note 77, at 21–24 (discussing the application of federal devices during the rule of the Hellenic–Ionian Leagues).
morally wrong.\textsuperscript{236} In Shaffer's view, the ethics of friendship is the seamless intersection of our good wishes for our friend's \textit{arete}, which in an Aristotelian sense cannot separate doing well and being well, in which our happiness depends on our goodness.\textsuperscript{237} Indeed, the core of Shaffer's ethics from beginning to end, though described differently over time, is the question of how the professional relationship moves the client to be (or to become) good, and how it moves the lawyer to be (or become) good.\textsuperscript{238} It is a teleology of the person.

Yet, we should mark some orneriness, some suspicion about perfectionism that can accompany virtue ethics, in Shaffer's friendship ethics in particular. In arguing that the ethics of friendship is marked by a concern for the good of the other, Shaffer has stubbornly resisted the notion that the value of a friendship is found in its conformance to certain "criteria" or its aim for goodness. Jerry Kennedy, the criminal defense lawyer, is Shaffer's most memorable example of the virtue of friendship among the imperfect. Jerry gets Cadillac Teddy, his long-term client and friend, off on numerous car theft charges, while Teddy plays Jerry's mediator to a good tax lawyer when Jerry is in IRS trouble.\textsuperscript{239} Similarly, Jerry helps his client and friend, organized crime tax accountant Lou Schwartz, keep his "integrity" by protecting him against pressure to "inform on" the mob to authorities.\textsuperscript{240} Jerry's clients who are not his friends do not get such great treatment: he lavishly spends his client (and drug-smuggling mechanic) Donald French's money and fails to inform Donald that he is the target of a federal narcotics sting, though offering to keep representing Donald when he is busted in connection with the sting.\textsuperscript{241}

Still, Shaffer believes that Jerry Kennedy's friendship with his clients is virtuous\textsuperscript{242} and that he is a kind of hero, even though Jerry sometimes engages in shady activity in support of his friend-clients (thereby not holding them accountable), asks for their help in skirting the law in return, and blithely takes some advantage of his non-friend clients.\textsuperscript{243} Sure, Jerry does not live up to the \textit{ideal} of friendship,
but that does not make him lacking in virtue. Or, as Shaffer more loftily puts it, such friendships as Jerry's combine "an earthy spirit of commitment and faithfulness with the hope that our relationships, even our professional relationships, can be places to grow in."  

As illustrated by the Kennedy story, Shaffer's ethics of friendship is ultimately both more pessimistic and optimistic than the covenantal model. To the extent that it may expect much less of Jerry Kennedy than a covenantalist might, it is more pessimistic about the demands one can make on human beings. In covenantal ethics, which hearkens back to the past, people are held accountable to what they have promised to be; the covenanting partner assumes the ability and willingness to keep the promise of fidelity made by his partner.  

Covenantors demand that the promise be kept, even as the "edges" of the commitments grow. As such, in some ways, the covenantal tradition counts tremendously upon the capacity of the human in his own skin to choose to be for the Other and to be faithful to God over a length of time he cannot anticipate.  

Insofar as the re-telling of the covenantal story is also a history of how people have failed to be what they were capable of being, friendship ethics sets perhaps a more optimistic tone. Covenantal history reminds us, over and over, how human beings have failed to do what they promised they could and would do. The story that follows the making of the covenant is the story of a stubborn people, choosing "other gods" again and again over the one true God. Indeed, the recognition of human sin that is the hallmark of Christian theology is a recognition that the covenant is certainly to be broken, because the promisors will choose to break it, not because they are destined to do so.

Shaffer, by contrast, does not dwell upon the brokenness of past covenants, but situates his collaborating partners in the present, looking forward to a better future. As suggested earlier, his main ethical concern is not that the covenanting partners fail to keep a promise

244 Id. at 227 (emphasis added).
245 See Witte, supra note 22, at 586-88.
246 See MAX, supra note 88, at 128 (noting covenants have a "gratuitous, growing edge"); Lovin, supra note 145, at 242 (noting the other side, for example, that the commitment is always unfulfilled, because it is vague).
247 See Witte, supra note 22, at 588, 589, 595-96, 600.
248 See STACKHOUSE, supra note 46, at 157 (describing covenant forms as a means of grace and as distorted); see also ALLEN, supra note 170, at 26 (describing Hosea's likening of a breach of covenant to the faithless marriage of a harlot).
249 See ALLEN, supra note 170, at 76.
250 See Lillback, supra note 22, at 68-71 (describing Calvin's views on covenant breaking).
but that covenantors fail to hold each other to account for a future character, a self that grows toward grace. \(^{251}\) Both covenantal and Shafferian ethics imagine that relationships will grow, so that contractual stipulations about specific behavior and concrete "goals" are foolish. But covenantalists suggest that it is always in the covenantor's power to act in ways demanded by the covenant, if only he will choose to do so; while Shaffer's friendship ethicist mostly imagines the covenanting parties as unfinished works of God. (We would have to say "mostly" in recognition of the significant volume of contrary work in which Shaffer plays a gloomy Nathan to the sinful Davids of the profession and the nation. \(^{252}\) While the covenantalist is focused upon the brokenness of human experience, the friendship ethicist waits and hopes to grow toward the completeness, the truly-humanness, that God intends for her. In that sense, Shaffer's constructive work sounds to me more like traditional natural law than covenant theology.

Again, this significant theological difference between Shaffer's work and covenant theology also affects how ethical accountability is practiced. If human beings will inevitably choose (that paradox, that freedom will inevitably be exercised wickedly) to break the covenant—if the key problem in ethics is the human will, as Luther would say \(^{253}\)—then the most important role for professional ethics would be to serve as a covenant of the law, to hold out the full expectations of professional practice embedded in the promise which lawyer and client have made to each other, and ultimately to serve as a mirror of their failure to do so, with appropriate consequences.

Shaffer's ethics demands quite a different response from legal institutions to lawyers' imperfections than covenantal ethics would. Shaffer's ethics of friendship mostly imagines each day as a potential movement forward toward wholeness. In his view, it is in the nature of the good person, the person that each lawyer and client strives to be, to move the other to goodness. \(^{254}\) Shaffer thus calls upon the lawyer and client to exercise heroic virtues toward each other and to call the

\(^{251}\) See Shaffer & Cochran, supra note 67, at 47-48; Shaffer, supra note 166, at 329-30.

\(^{252}\) See, e.g., Shaffer, Subvert, supra note 10, at 1093 n.10; Shaffer, Money, supra note 10, at 452-65 (arguing that money is the most serious problem for American lawyers and clients); Shaffer, Servant, supra note 10, at 1354-57. See generally Thomas L. Shaffer, Should a Christian Lawyer Sign Up for Simon's Practice of Justice?, 51 Stan. L. Rev. 903, 906-17 (1999).


\(^{254}\) See Shaffer, Faith/Professions, supra note 6, at 165 (discussing George Eliot, Middlemarch (N.Y., Nottingham Society n.d.); Shaffer, Christian/Lawyer, supra note 7, at 96-97.
other to account when he fails to live up to an ideal standard, with the view that each will move toward the purpose to which God is calling him.\textsuperscript{255} If his approach centrally influenced professional culture, as his own work on legal education attests,\textsuperscript{256} lawyers and clients would concentrate on identifying what it is to be a good person striving toward a good end, believing that each is possible, if not in this life. What would be critical to the professional culture would be how lawyers are trained and mentored—how they are first taught the virtues of the profession by modeling and then how they practice day-by-day to live by them.

Shaffer's approach does have its drawbacks, however. Following Shaffer's path of training in the virtues may give rise to the professional temptation that the bar might come to understand training of virtuous lawyers as, in some senses, a salvific act, a substitute for the act of grace that God gives only to those who recognize themselves to be sinful. Institutionally and individually, lawyers might be tempted to say, "I'm (our profession is) getting better, so I (we) must be good" or "I've (we've) gotten to be good enough." However, complacency and self-delusion are not particular marks of virtue ethics as compared to other forms of ethics; they affect people no matter what their ethical imaginations.

Moreover, a covenantalist might argue that Shaffer's ethics may risk becoming only aspirational—serving as a great ideal to which everyone should assent in theory, but which does not carry the teeth of the covenant's demand. Covenantalists would argue that their view of ethics makes it still possible to enunciate minimal, concrete norms which everyone is expected to follow by virtue of being a lawyer, norms which can be as specific as how one may advertise or as general as the directives to be faithful, zealous, keep secrets confidential, etc. Such a "Protestant" legal ethics would be largely concerned with setting out the nature of expectations at the beginning of the relationship, even allowing for a "growing edge" and with calling to account anyone who transgresses them. Such a "Protestant" legal ethics would not have any salvific expectations, since salvation arises from outside the law. Covenantal ethicists might be thus more comfortable with a rule-based ethics, though it risks the minimalism of contractualism, because it is a constant and clear mirror not only of what is de-

\begin{itemize}
\item \textsuperscript{255} See Shaffer, Faith/Professions, supra note 6, at 196–97, 220–21.
\item \textsuperscript{256} See, e.g., Thomas L. Shaffer, On Teaching Legal Ethics in the Law Office, 71 Notre Dame L. Rev. 605 (1996) (describing his experience in teaching legal ethics, specifically in the Notre Dame Legal Aid Clinic).
\end{itemize}
manded, but also what the lawyer has consented to and therefore can legitimately be expected to be bound to do.

III. "Speak to the People of Israel":257 Institutional Implications of Covenantal Ethics

As I have suggested, the choice of an ethics has important implications not just for an individual lawyer's life, but for the nature of professional practice as well. Embedded throughout Shaffer's work is a profound ambivalence for the institutional bar, both its informal and formal manifestations. While he sometimes recognizes the value of institutional community, he harbors a deep Anabaptist-style suspicion of the corruptions inescapable in such a community: the corruptions of elitism and self-satisfaction, the corruptions of narrow vision, and the abuse of power.258 I find this ambivalence about the public institution of the bar invaluable in the search to re-create a vibrant (perhaps particularly a covenantal) institutional community of lawyers. The problem of creating a healthy institutional form from our intuitions about healthy interpersonal relationships is an old and pervasive one. The question must be, how important is the larger community in calling individual lawyers and clients to account—that is, are ethics essentially individual or communal? And if they are communal, what communities might most successfully serve as these "communities of memory"? If such communities of accountability are smaller than the entire bar, how should the individual lawyer, one who draws his work's meaning from those smaller communities, interact with members of the wider bar?

A. "... And You Shall Be My People":259 Ethics as Individual or Communal?

If there is only one thing one should learn from Shaffer's work, it is that lawyers are born into a community and that they never escape it, however much they should like to imagine that their professional decisions are products of autonomous choice.260 However, Shaffer

257 Exodus 25:2.
258 See, e.g., Shaffer, Faith/Professions, supra note 6, at 108–10 (describing tendency of people in institutions to "suppress . . . discoveries about human nature," "act in favor of . . . order," and "turn other people into commodities"); Shaffer & Shaffer, supra note 12, at 1–8 (describing the history of morality as it was transformed into codal American legal ethics).
260 See, e.g., Shaffer & Shaffer, supra note 12, at 20–21; Shaffer, supra note 17, at 970–71.
has been honest about the fact that traditional American lawyer cultures—whether the predominant professional culture of the gentleman lawyer, or the second-wave rispetto culture of the Italian community lawyer—are fading and have faded. If things are worse than Shaffer admits, and covenantal ethics only makes sense in the context of a community which gives birth to them, we must ask what the lawyer is to do in the modern circumstance, which rejects the demands of community: whether he should live out an ethics all by himself, even if he is living out a logical inconsistency, or work to find or re-create a community which gives an ethics its lifeblood.

Contractual, covenantal, and virtue ethics have very different understandings about the nature of the relationship between the individual and community in the formation of ethics, and they also differ from Shaffer’s “ethics of friendship.” As Shaffer has noted, in contractual models or the “ethics of isolation,” choices are made based on the ethicist’s needs and values, limited only by his minimal contractual obligations. To the extent that a tradition of values shapes contractualists’ lives, it is likely to be “chosen” and reflect not intellectual consistency but a pastiche of personal history, education, personal taste, and instinct. The contractual approach is both radically contingent and radically free—all values and outcomes depend upon the momentary decision of the individual, and he is only bound to the specific commitments he makes in the context of a particular contract.

Virtue ethics, by contrast, has both individual and communal aspects. Individuals are highly dependent upon the community’s intentional actions in educating young people—or in our case, young professionals—into the ethical habits which permit them to be virtuous (or not). Virtue approaches are often very optimistic about human nature, anticipating that education (given by the community, received by the individual) and hard work (practicing right actions until they become habits) will create ethical persons over time. The relationship between individual and community also changes over time: while young people are highly enmeshed with their communities during the virtue formation period, as a person grows to adulthood, it is assumed that he bears more and more responsibility for his own virtue.

261 See Shaffer & Shaffer, supra note 12, at 72-73 (acknowledging that no connection exists between gentleman lawyer ethic and current professionalism ethic).
262 See Shaffer, CHRISTIAN/LAWYER, supra note 7, at 17-19 (describing isolation of choice); Shaffer & Cochran, supra note 67, at 19-20.
263 See Shaffer, supra note 2, at 638-39.
264 See, e.g., Shaffer, CHRISTIAN/LAWYER, supra note 7, at 207-16 (story of Franz Jagerstatter).
The parts of Shaffer's work that sound in virtue ethics bear this out. To focus on perhaps his most famous example, Atticus Finch is clear about his beholdenness to the community, which formed and shaped his values, but as a mature adult, he is much more influenced to do what is right by "his own lights," formed and shaped as they were in the community, than by the immediate interaction he has with members of the community.\(^\text{265}\) Indeed, the story of Atticus Finch displays the hope of virtue ethics: that men of virtue will be so solid in their values that they are capable of turning back to their communities and warning them prophetically when those communities stray from their own taught values.

Covenantal ethics understands the relationship between individual and community, individual freedom and community influence, in a somewhat different way. In the covenantal tradition, the covenant is, first and foremost, "cut" with a people, and it is only in the context of a community's covenant that an individual finds his responsibilities to others.\(^\text{266}\) The covenant tradition is not uniform in this regard: for example, the Puritan stream of this tradition was highly dependent upon the notion of dual covenants, one directly between the individual and God, and one between the community and God.\(^\text{267}\) However, the importance of the community's covenant cannot be gainsaid, even in such streams of covenantalism.

These differences in location of responsibility between the individual and community have a significant impact on the way in which professional institutions will be understood. To borrow Craig Van Gelder's typology of the relationship between the individual, the church, and the wider polity, we might distinguish between "evangelical," "liberal," and "covenantal" approaches to professional regulation of lawyers.\(^\text{268}\)

"Evangelicals," including modern (or at least not Homeric) virtue and friendship ethicists, would want to locate ethical responsibility in the personal relationship between the individual lawyer and the cli-

\(^\text{265}\) See Harper Lee, To Kill a Mockingbird 75, 146 (1961) (describing Atticus's need to tell the truth despite the town's demands in order to "hold his head up").

\(^\text{266}\) See Lovin, supra note 145, at 247-48 (describing how covenantal theory redirects individual desires toward the common good); see also Mendenhall, supra note 28, at 5-6, 16 (describing the covenantal decision as familial, and the covenantal community's need to exclude violating members to prevent punishment from being meted out to the entire community).

\(^\text{267}\) See Witte, supra note 22, at 599.

\(^\text{268}\) See Van Gelder, supra note 25, at 190-93.
ent, and/or his God, and/or his professional friends.\textsuperscript{269} In this vision of ethics, individuals may choose either to participate in or opt out of the wider professional community with no significant damage to their ethical behavior or growth, because ethics begins (and largely ends) with the individuals (or God) with whom they come into contact. In this vision, the professional institution is, to borrow Van Gelder’s language, “a consequence of individuals' own ethical action and vision] rather than a context for it.”\textsuperscript{270} For an evangelical lawyer, since being good is largely a personal (or interpersonal) responsibility, the institutional bar serves largely as an opportunity for fellowship with other good people.

The “evangelical” model is probably not the most effective way to create a pervasive atmosphere of virtuous lawyering within the larger bar. While any number of small cells of lawyers concerned about ethics and spirituality have begun to spring up, they probably will be difficult to sustain over time if they follow the “evangelical” model. When an ethical community’s health depends on the commitment of professionals who believe that the real and only ground for their ethical or spiritual lives is the individual encounter with clients and family members, and that the ethical peer group or “cell” is a secondary manifestation of those lives, the ethical “cell” will become one more committee meeting for a busy lawyer, its only benefit the chance to unload the miseries of a conflicted professional who is trying to be ethical and still stay in business. Members of groups built on the evangelical model will have no sense that they are grounded in a history or that they have a responsibility to the future to grow together as a community. After the glow has worn off, the pressures of clients and family may make it more and more difficult for the lawyer to attend such cell meetings, because the ethical and personal identity of the lawyer is not at stake in these encounters.

By contrast, the “liberal” approach to professional accountability, designed to liberate and include everyone, embracing the diversity of background, culture, and practice in the profession, submerges the institution as a separate community into “a broader socio-political agenda” of the regulatory state.\textsuperscript{271} In the liberal approach, aligned with ethical contractualism, the bar is not a distinct fellowship of people tied to a vision and a promise, but a collection of individual busi-

\textsuperscript{269} Id. at 191 (suggesting that evangelicals want a “personalized salvation contract” between God and themselves); see also Everett, supra note 44, at 105; Everett, supra note 50, at 561 (noting the growth in the classical period of the distinction between corporate covenants and individual covenants with God through Christ).

\textsuperscript{270} Van Gelder, supra note 25, at 191 (describing salvation).

\textsuperscript{271} See id.
ness people who should be regulated just like government, corporations, used car salesmen, and others. The bar also serves as an enforcement agency for a set of minimalized rules that spell out basic wrongdoings shared with other regulated industries—for example, fraud, self-dealing in fiduciary situations, disclosure of secrets, etc.\textsuperscript{272} These rules become the implied warranties of the lawyer-client contract, while the lawyer and client negotiate its express terms.

In the liberal view, minimal legal/ethical duties are the only threads that can hold such a diverse profession together without coercing some lawyers' freedom, and, thus, the only legitimate basis for calling a lawyer's actions into question.\textsuperscript{273} To the extent that the bar comes together in the liberal model, it is only to review, clarify, and occasionally add to the rules in response to new forms of socially unacceptable conduct, such as lawyer-client sexual relationships or Internet advertising. And the liberal bar will meet to "do business," for example, conventioneering with other professionals who may be able to help lawyers "get ahead," hawking professional "wares," demonstrating "product," and "becoming updated" on "technological advances" and "trends" in their field, under the thin mantel of lofty pronouncements from the association president about quaint and seemingly outmoded professional values.

The social problems with the liberal/contractual model, especially its ethical minimalism, have already been well-documented,\textsuperscript{274} so I will not attend to them here. However, it is important to recognize how the liberal/contractual model can harm the individual lawyer of good will who wishes to go beyond ethical minimalism. The liberal/contractual model puts tremendous pressure on an individual attorney not only to construct an ethical system sui generis, but also to hold himself accountable for keeping it. This means that the man of good intentions, like Shaffer’s hero, must hold fast to the integrity of his vision not only when the major crises of professional life occur and it is clear what a hero should do, as when Atticus Finch sits in the jailhouse door to prevent a mob from lynching his client.\textsuperscript{275} In the liberal/contractual bar, the good lawyer must also be a person of integrity in those incessant, mundane yet ethically demanding moments.

\textsuperscript{272} See Shaffer & Shaffer, supra note 12, at 5–8, and Shaffer, supra note 111, at 232–54, for a discussion of the history of this development.

\textsuperscript{273} See Shaffer, \textit{Christian/Lawyer}, supra note 7, at 5 (detailing Shaffer's description of this position).


\textsuperscript{275} Lee, supra note 265, at 150–55.
when the lawyer faces a conflict between seeming goods—for example, the fair demands of family members, partners who want the firm to prosper, community members who need his skills, and clients. If the insights of the major Western religions into the complex goodness and evil of human nature are accurate, then the individual is not just subject to the daily pressure to do wrong, a pressure he will have a hard time resisting. Even more tellingly, the reality of human finitude means that the dilemma of deciding among competing goods is a moral burden any one individual cannot hope to bear.

The covenantal approach would reject both the evangelical and the liberal views of the role of the bar in the life of practicing lawyers. In the Jewish and Christian communities, covenant bespeaks a distinctive relationship between a people and God, which separates them out as a unique and special community with a unique mission and destiny. It is decidedly historical: the past, or the tradition, and the future are indissolubly bound.

If these religious models were imitated by the professional bar, no lawyer could understand who she is without exploring how the legal community has continuously kept and breached the covenant, a history to which Shaffer’s forays back into professional history give a nod. The covenantal bar would represent the context and location for working out the destiny of a legal community, not just a pleasant afterthought of virtuous lawyers who enjoy the company of like-minded peers. It would be grounded in the honest recognition that every lawyer is shaped and formed as a professional within her peer community and is helpless to be the lawyer she is without it. The covenantal lawyer would recognize that he is bound by the covenant that his profession has made with the people, whether or not he wishes to opt into that covenant or is personally benefitted by that covenant. And the lawyering community would keep the individual lawyer constantly in mind of his covenantal obligation to his peers as well as his clients. Without the recognition that this separate community is formed by the living covenant that lawyers by their oath have commit-

---

276 See Eichrodt, supra note 86, at 39 (noting creation of solidarity between Israelite tribes). But see Van Gelder, supra note 25, at 192–93 (noting the danger of making the church a privileged position before God).

277 See, e.g., Shaffer, Christian/Lawyer, supra note 7, at 59–69 (describing the work of David Hoffman, who first developed a system of legal ethics in America, and George Sharswood, whose work influenced the ABA Canons); Shaffer, Faith/Professions, supra note 6, at 47–53 (same); Shaffer & Shaffer, supra note 12, at 58 (patriarchy in the legal profession); id. at 107–26 (Italian-American lawyer tradition).

278 See Allegretti, Perspective, supra note 18, at 1123.
ted to, the integrity of the community will be compromised and trivialized.279

How would such a bar create a community that would form professionals, and hold them accountable? The major sea change that would need to occur, in my mind, is for the bar to begin thinking of itself as a community of memory, a community which has, and remembers, its history as part of its future.

B. "For This Is a Sign Between Me and You Throughout Your Generations":280 Creating Covenanting Communities of Memory

Of the five parts of the traditional covenant, three—the historical prologue, the provisions for deposit of the text and public reading, and the calling upon divine witnesses—depend on the understanding that the memory of what has gone before is a critical aspect of what is yet to come.281 The historical prologue in the covenant recites all of the acts of generosity and loyalty that the sovereign and his ancestors showed toward the vassal ruler and his ancestors, a recitation which often spills into the stipulations.282 The provision for deposit of the text ensures that a copy of the text will be preserved in places where both gods and mortals will remember it. And preservation is accompanied by a promise of recitation; a common stipulation is that “each year, someone should read the text to the vassal king and his nobles. Implicit in this command is the idea that the treaty should be in a language that the sworn parties could understand.”283

The community of memory that preserves these covenants is not a form of nostalgia about the past, a trivialization of the Fourth of July. Rather, such community rituals are critical to the continuation of the covenant. Biblical historians posit that the regular reading of the covenant was essential to prevent the agreement from breaking down, safeguarding it in three important ways. First, the yearly reading reminded new vassal kings that they needed to follow the covenant as a matter of obligation for past gifts given by the lord, thereby ensuring continuity of loyalty to the suzerain even when mortal flesh gave way to a new ruler.284 Second, the reading reminded members of the vassal nation not present when the original covenant was cut of their duty

279 See Van Gelder, supra note 25, at 191.
280 Exodus 31:12.
281 See Hillers, supra note 21, at 30, 32–33.
282 See Mendenhall, supra note 28, at 32–33.
283 Hillers, supra note 21, at 35–36.
284 See McCarthy, supra note 22, at 6; see also Mendenhall, supra note 28, at 331–34 (noting that a vassal’s right to name a successor depended on the consent of the suzerain, who merely wanted a loyal heir).
to obey the covenant though they were not parties to it, thus preserving the communal character of the relationship and ensuring that individuals would understand and accept the covenant as theirs.\textsuperscript{285} Third, it recalled to vassal community members their own responsibility to their king, as part of the network of relationship created among the covenanting peoples, and was aimed at increasing respect for the vassal-king in his relations with the suzerain.\textsuperscript{286}

Communities of memory are important to the preservation of fidelity in a relationship. In non-professional life, birthday and anniversary parties, baptisms, and bar mitzvahs remind all those participating of the value of future faithfulness by reciting past history that binds covenantor and covenantee, whether light-hearted moments or serious struggles. In some settings, the "reading of the covenant" may be mimicked in some form, such as university graduations, which include rituals such as academic dress, public exhortations to graduates, and recollections of the university's history. At my own Methodist-affiliated university, for example, the tradition has evolved to give graduates Wesley's charge to

\begin{quote}
Do all the good you can  
By all the means you can  
In all the ways you can  
In all the places you can  
At all the times you can  
To all the people you can  
As long as ever you can.\textsuperscript{287}
\end{quote}

In a more ancient time, the covenant and its history served as a central, defining feature of Israelite life, even during its greatest periods of instability.\textsuperscript{288} Indeed, what arguably served to keep the people of Israel together during their long wanderings was the fact that the covenant went with them in the tangible form of the Ark of the Covenant; it had to be physically carried from one place where the people laid their heads to the next place.\textsuperscript{289} Thus, the covenant was not

\textsuperscript{285} See Mendenhall, supra note 28, at 34.  
\textsuperscript{286} See id.  
\textsuperscript{288} See Eichrodt, supra note 86, at 36; Elazar, supra note 19, at 320 (noting the importance of covenant act in restoring broken principles of polity).  
\textsuperscript{289} For the importance of the covenant to Israel's political life, see Elazar, supra note 19, at 297 (capture of the Ark of the Covenant); id. at 307–08 (move to Jerusalem and constitutional sign of relationship between religion and monarchy); and id. at 315.
something visible or relevant only on the day of communal worship; rather, members of the Israelite nation literally could not get through the day without passing by the evidence of their promises to God.

It is almost impossible to imagine such a large, physically intrusive sign of the mutual promises of God and the people in this modern age, a sign that could not escape notice. As just one example, one might have to imagine that towering crucifix (just to use a familiar Christian symbol) were present right in the middle of every law school classroom or on the table at every business meeting to remind those present what they were engaged in. Of course, in modern Jewish and Christian covenantal communities, the covenant of the one God is still literally taken down and read among the people as a remembrance of their own duties to be sure, but more powerfully, of the greatness of the One who covenanted with them. But even in Jewish and Christian communities, excepting special religious environments like yeshivas and seminaries, that ritual normally occurs only in the time and place set aside for weekly worship.

To my mind, modern lawyers similarly have no similar regular community of memory, either with their clients or with each other. Only a wry imagination would see the day when disputing clients and lawyers would orally read aloud their fee agreements to make sure that they both resisted the temptation of infidelity and remembered why they should be faithful to each other. Or, imagine lawyers gathering on a regular basis for a ritual recitation of their history and their oath. Indeed, rare is the moment when a lawyer can recite the story of a leader who serves as an example to him, and when the stories are told, they are more likely to be about a fictional than a real lawyer. The occasional bar association meeting speech (attended by a small portion of the bar) may attempt to remind lawyers of their professional tradition, celebrate living leaders, and exhort them to future


291 Two of my research projects over the past couple of years brought this home to me. One was a lecture about the history of women in the legal profession; there were some, but not many stories about women early in the profession and most were brief anecdotes rather than extended biographies. The other was a law review article I wrote on the National Equal Justice Library and the history of poverty lawyers: again, and particularly in the contemporary literature, I could find many more general statements than specific stories. That is part of what makes some of Shaffer’s work so remarkable, even while one is tempted to pass over “lawyer history” stories as unimportant to ethics.
virtue, but it is a brief and thin copy of the real covenantal ceremony.\textsuperscript{292}

It is probably not hard to understand why lawyers do not engage with their fellow lawyers in the ritual ceremonies that religious communities, universities, and other such communities of memory perform. Most lawyers, trained in Enlightenment ideals, no doubt think that rituals outside the courtroom are "irrational" because they demand a recognition of another kind of human experience besides dispassionate fact-based, option-focused, logical thinking. As quintessential moderns, moreover, lawyers do not like their expressive or "true" selves to be "outed," and rituals can be embarrassing when they disclose a part of the self that is thought to be "only human" rather than "truly human."\textsuperscript{293} Ritual ceremonies represent, to many, a bygone era when people were less sophisticated, and they may be considered "hokey." However, as observers of public ritual behavior like theologian Patrick Keifert have argued, rituals like the recitation of the covenant actually serve not to increase vulnerability, but to create a safe space for the expression of human emotion within a community of strangers.\textsuperscript{294} They permit strangers to put self-consciousness behind them to participate in a fuller experience, while providing a "safe" way for strangers to interact without disclosing their "true" selves.\textsuperscript{295}

The consequences of the legal profession's failure to preserve a community of memory, something which Tom Shaffer's narrative work is in significant part about, can be readily noticed. Without the "reading of the covenant," new generations of lawyers have no reason to feel bound by it for they have not become a part of the covenant, by hearing and taking it into their own lives through a ritual which moves beyond rational assent and requires the same commitment of the whole person that a religious vow entails. Absent a shared moral tradition that is revisited on a regular basis, incoming lawyers' practices will reflect not only a cacophony of moral traditions, but also the failure of moral responsibility which occurs when individuals are set adrift between their communities of origin and a fading legal profession's moral principles.

Without the "reading of the covenant," such lawyers will not fully appreciate that they stand as recipients of a historical chain of gift giving from one lawyer to another through generations of experience,

\begin{footnotes}
\item[292] See Shaffer, On Living, supra note 6, at 884, for Shaffer's description of the emptiness of Law Day and bar journal "pep talks."
\item[293] See Keifert, supra note 99, at 16–23.
\item[294] See id. at 109–12.
\item[295] See id. at 112, 114–16.
\end{footnotes}
the making of law, etc. What they are missing can be shown by the few contrary examples that still preserve a community of memory. For example, at least until recent years, the lawyers of the civil rights movement have been able to sustain their work through terrible threats and temptations precisely because they have kept reciting to new generations that they stand in the shoes of sacrifice and courage of specific individuals who are part of their common history, like Thurgood Marshall or Martin Luther King.296

In the absence of a "covenant community" for lawyers, Tom Shaffer has suggested that lawyers can draw on many other communities to hold lawyers to account to the history and the future. He explores the possibility that the wider community, particularly those professionals, business people, and others who hold power in the community, can speak truth to the lawyer.297 A second option he explores is the bar; the third, the lawyer's firm; the fourth, the community that the lawyer and client create between themselves.298

Yet, recognizing the sinful nature of human beings, Shaffer also demonstrates the problems with creating a community of memory and accountability, reciting historical and fictional examples of lawyers who relied on just such communities to their detriment. For example, Shaffer tells us about the physician Sir Thomas Percival, whose community of accountability was his social peer group of the late nineteenth century.299 Along with the "sensitivities and etiquettes" of Percival's class, which included stoicism as courage, distaste of emotion, and a careful tongue,300 Shaffer notes also the sins of elitism. For example, Percival's mentor, William Paley, suggested that those who should care for the poor were the "lower orders" of Anglican clergy, not gentleman doctors and lawyers;301 and by all means the profession should exclude those, such as women, who were not considered fit for this elite world.302

David Hoffman, "the father of American legal ethics"303 and among the first important legal educators, also chose a wider commu-

297 See Shaffer, supra note 111, at 231–32.
298 See id. at 232–37.
299 See SHAFER, FAITH/PROFESSIONS, supra note 6, at 40–41 (discussing Percival and his code of gentleman's ethics).
300 Id. at 42–43.
301 Id. at 41.
302 Id. at 45–46 (describing the fictional Dr. Arrowsmith's pique at his wife's insistence on sharing a world with him).
303 Id. at 47; Shaffer, supra note 111, at 230–31.
nity of accountability, describing lawyers’ place in that community as “ministers at a holy altar.” Yet, relying upon this community to hold him to account to the standards of a gentleman lawyer, he similarly participated in the kind of exclusionary elitism described in the Percival account, viewing the gentleman lawyer as superior to his clients. George Sharswood similarly relied on the bar as his community of memory, exhorting young lawyers to gain the good opinion of other lawyers first; but many who followed him pursued instead the course of regulation, focusing on codes and punishment of offenders to the neglect of ethics.

Even the community law firm, which Shaffer gives credit as the place he learned ethics as a young lawyer, fails ultimately to present a coherent institutional memory capable of being handed down or used to hold lawyers accountable. Shaffer’s reports of lawyers who taught him to do the right thing are focused entirely on their own personal character and not the institutional setting in which they operated. His seemingly obvious point that lawyers will be taught to be good by other good lawyers conceals an important institutional defect: if the ability of the profession to teach depends upon the moral virtue of individual lawyers rather than a pervasive set of expectations, then accountability can be expected to be minimalist and spotty, limited to those locations where there are virtuous lawyers.

If we take the institutional bar to be the proper community of memory for lawyers, we might properly despair of the changes that would be required before the bar was organized and governed along covenantalist lines. First, the bar would have to be reconceptualized as a covenantal community by the institutions which influence it, from the legal academy to both general and specialized legal associations ranging from the ABA and disciplinary commissions to ATLA and the patent bar. These institutions, carrying on their covenantal responsibilities, would expect all lawyers to participate in ethical conversation about the visions of legal practice they hold dear and to help create the “mediating structures” that would carry these visions out in daily practice. The bar would create and embody diverse and multiple locations of accountability, now understood not just as putting the “bad guys” out of the profession, but creating the possibility for daily mo-

304 Shaffer & Shaffer, supra note 12, at 212; see also Shaffer, Faith/Professions, supra note 6, at 50–51; Shaffer, supra note 111, at 230–32.
306 See id. at 252–34.
307 See Shaffer, Faith/Professions, supra note 6, at 132–37.
ments of confession, forgiveness, and nurturing for lawyers whose fail-
ures are measured against the "aspirational."

Two sorts of lawyer accountability would be critical, and I will bor-
row from two kindred professions in suggesting them. One sort of
accountability, following Shaffer's and Hauerwas's intuition that char-
acter is at stake even in covenantal communities,\(^{308}\) would be for
mentoring younger lawyers into the actions and habits that make for
virtuous lawyers. Most obviously, this need, which reflects a lifelong
approach to becoming a lawyer, would call for a complex of teaching
models, from CLE-type courses to seminars, talking circles and
mentoring relationships that permit lawyers to grow in their under-
standing of their professional roles informed by the great traditions of
our civilization, including philosophical and theological ethics. While
Shaffer, among others, has rightly decried the poor job that law
schools do in teaching wider ethical traditions to their
students,\(^{309}\) the more telling moment when these traditions become meaningful is
when a lawyer must make a real, complex choice affecting real people.

There is no reason that the bar should not consider itself to have
a greater role than law schools in teaching ethics to lawyers. If the bar
took its teaching role seriously, its institutional structures would re-
quire not only conscious attention to the principles and ideals of the
profession in law school ethics courses and CLEs, but also the creation
of trust relationships between senior and junior lawyers, a relationship
which would require intensive participation together over time.
Within the law firm, this sort of mentoring is often done by the senior
partner for whom the associate works. But such a system is haphazard,
making the mistake of assuming that lawyers can choose to develop
virtues on their own, contra Shaffer's crucial insight that good lawyers
are formed in the interaction of the community around them, and
particularly among "friends" who can mirror their flaws as well as their
strengths back to them.

What would be critical for a truly engaged bar would be institu-
tions that truly do serve as communities of memory—that combine
teaching, support, and accountability functions. In the Christian
clergy, to rely on the religious community I know best, this sort of
mentoring is often supplied by a bishop, whose work it is to pastor the
pastors. Thus, a lone pastor of a congregation is expected, regularly
or as the need arises, to pray with and speak with the bishop about his

\(^{308}\) See Hauerwas, supra note 209, at 11, 67-69; Shaffer, Faith/Professions,
supra note 6, at 84.

\(^{309}\) See Shaffer & Cochran, supra note 67, at 49 (discussing law schools' failure to
teach moral skills).
hopes and failings, to hear the advice of the bishop, and to receive the comfort that comes from Shafferian friends who expect much but forgive much as well. Although this ritual of guidance, nurturing, repentance, and forgiveness depends ultimately upon the grace that both pastor and bishop recognize to be the moving force in their encounter, such a public system of regular interaction within the bar might yield some of these benefits, if not all.

The key difference between the current "system" of law office mentoring and the clerical system of accountability is that the bishop is assigned his role as a representative of the entire church: he does not choose the person to whom he holds himself out as mentor, nor is he chosen by the pastor/mentee. This religious system has the strength of public accountability: the congregational pastor must account to someone whom the church has chosen, so that he does not succumb to the temptation to choose to be accountable only to someone he chooses, someone who too easily might overlook his failings. Moreover, the bishop does not give merely his own personal endorsement or criticism of the pastor’s work, like a friend. Rather, the bishop serves to encourage, hear, teach, reprove, and forgive the pastor on behalf of the whole church and the smaller community of his fellow pastors, a ritual that binds him to the communities he serves and works with, both in accountability and in forgiveness for his limitations.

A more covenantal model of lawyer accountability, through a system of regular visiting by "professional elders,"310 would not be logistically very difficult to set up in the legal profession. In most states, the bar has two ready-made institutions which play some of these roles: the local ethics committees311 and the voluntary associations of lawyers who respond to other lawyers’ substance abuse problems, such as Lawyers Concerned for Lawyers.312 Currently, however, these associations imagine their mission as much smaller than that proposed. Ethics committees have largely functioned as mediators and judges to find facts and sanction attorneys who may be "too far gone" to move back to the road of virtue. The substance abuse peer groups depend mostly on individual abusing lawyers’ voluntary cooperation, and they

310 See Shaffer, supra note 2, at 624, 627–29, for Thomas Shaffer’s use of this language.
311 For a discussion of the varying roles that ethics committees perform in setting and enforcing rules in the various states, see Whitney A. McCaslin, Empowering Ethics Committees, 9 GEO. J. LEGAL ETHICS 959, 965–66, 968–69 (1996).
mostly provide counseling and interpersonal accountability, not public accountability. Yet, the rise of substance abuse peer groups attests to the fact that lawyers understand instinctively that something more than a "legal" sanctioning system is necessary for making lawyers good. They intuit, if they cannot articulate it, that interpersonal commitment and forgiveness are an integral part of a truly effective system of accountability. Thus, some combination of the ethics committee and the substance abuse peer group, which re-focused some of the bar's energies from the most desperate cases of malpractice toward attorneys still on the crossroads between professional virtue and vice, might well produce a more virtuous and certainly a more fully accountable bar.

To enhance the effectiveness of another community of memory Shaffer describes, the law firm, the bar might advocate formalization of ethics through law firm equivalents of "morbidity conferences" used by hospitals after the death of patient. For one thing, the pervasive use of such conferences would ensure that ethical questions are consistently debated and resolved within a communal setting, instead of depending on the individual lawyer to seek out a trusted person to counsel with. As Shaffer suggests in his discussion of the TV show St. Elsewhere, the morbidity conference can be a place where physicians are forced to shed the demeanor of the divine and come to tell the truth about their failures and their despair at them.\(^{313}\) Instead of a forum where physicians simply justify the actions they took in connection with a patient's death, the morbidity conference can create a ritual of truth telling and forgiveness, starting with an "objective" examination of what took place followed by critical appraisal by colleagues who have been in the doctor's shoes.\(^{314}\)

Moreover, the morbidity conference at least holds out the hope of remorse and forgiveness, if the physician is able to go beyond justifying himself to accounting both for his errors and his limitations, and opening himself to receive his peers' understanding as well as criticism. Of course, not all morbidity conferences will exhibit this ideal: in some, the physician on the spot will never get beyond justifying his action; in others, the examining doctors will play "cover up" for their friend, hoping that he will do the same for them someday; in still others, up-down politics will turn the morbidity conference into a ve-

\(^{313}\) See Shaffer, Faith/Professions, supra note 6, at 27; Shaffer & Shaffer, supra note 12, at 31–32 (discussing Dr. Craig).

\(^{314}\) See Shaffer, Faith/Professions, supra note 6, at 27; Shaffer & Shaffer, supra note 12, at 31–32 (discussing Dr. Craig).
hicle for shaming, threatening, or punishing the doctor. But such are the risks of any system of accountability, so long as sinful humans run them.

The second great need is for the bar to take seriously, in its institutions, the notion that resolving ethical issues prospectively is also a community endeavor. The ethics committee, that staple of large hospitals, has not been duplicated by the legal profession to any significant extent. A committee of lawyers in each firm, which served as the “public” authority for the firm’s commitment to ethics, could embody the roles of the hospital ethics committee and morbidity conference. Such a committee could become a setting where firm lawyers could debate and select a course of action for ethical problems that must be resolved and, where things have gone wrong, bring truth telling and forgiveness to lawyers who have made ethically disastrous mistakes. Such an institution in each firm would go a long way toward providing the accountability that both virtue ethics and the covenant community require.

To serve the need for a longer-term vision of how one lives as a good lawyer, more is required than teaching and accountability, however. Research on healthy Christian congregations suggests that in any public institution, such as a congregation or the bar, people also need more intimate structures to enable them to meet personal needs and form the kinds of ethical friendships that Shaffer speaks about. As part of its work to promote collegial relationships among lawyers practicing in the same field, the institutional bar could support the proliferation of small groups of lawyers who gather around common concerns to consider how their own lives are changed by their revisioning of the practice, through bar sections and other organizations of attorneys. As with small groups in congregations, these groups might be formed around the accomplishment of community tasks, such as the passage of legislation or the provision of services; needs for personal support such as alcoholism or divorce groups; shared inter-


ests such as film, food, or motorcycling;\textsuperscript{317} or learning the great ideas of legal tradition or the law of their own field.\textsuperscript{318}

These institutions would, of course, only be viable if the bar has come to a new understanding of its own role, one that integrates early and contemporary visions of a lawyer’s practice, or, to use our language here, an understanding that can describe in a compelling way the “covenant” the practicing bar has with the people. This continuing, often healthily conflicted conversation over what the shape of the bar’s covenant with the people would continually re-imagine the profession as it encountered not just individual clients, but the entire society, which looks to lawyers for leadership as well as for representation.

C. “You Shall Keep My Sabbaths.”\textsuperscript{319} The Religious Community as an Alternative Community of Memory

In the end, despairing of the flaws of other communities of memory such as the professional bar or community leadership, Shaffer has come to advocate the religious communities as the communities most likely to hold a lawyer to moral account.\textsuperscript{320} He argues that these are the places where lawyers should find their moral homes, because they are lawyers’ communities of origin, the communities that have taught them the virtues to which they are being held to account. Thus, community members are the people who fairly can ask a lawyer why he is not practicing what he has been taught.\textsuperscript{321}

Second, Shaffer would argue, the religious community is not confused about in what form, how much and to whom the professional is accountable. As Shaffer puts it, “acceptance of the Lord is the first

\textsuperscript{317} Among my own colleagues, for example, one person has been involved with lawyers who are interested in making and viewing movies; another, my late colleague Richard Oakes, regularly rode his motorcycle to Sturgis, South Dakota with his lawyer friends for a CLE and a meet-up at the annual motorcycle bash there every summer; and still others get together for a book night or card night.

\textsuperscript{318} See generally DAVID STARK & PAT TAYLOR ELLISON, BEING TOGETHER: HOSTING A RELATIONSHIP-BUILDING SMALL GROUP (1999) (providing general guidance for building community and faith in small groups).

\textsuperscript{319} Exodus 31:13.

\textsuperscript{320} See, e.g., Thomas L. Shaffer, Legal Ethics and Jurisprudence from Within Religious Congregations, 76 Notre Dame L. Rev. 961, 978–79 (2001) (suggesting that religious communities can best offer answers to questions of professional ethics); Shaffer, Subvert, supra note 10, at 1090, 1093; Shaffer, Servant, supra note 10, at 1350–51; Shaffer, On Living, supra note 6, at 891–92. But Shaffer speaks of the church not as a bureaucracy, but as the people of God. See Shaffer, Servant, supra note 10, at 1351.

\textsuperscript{321} See generally SHAFFER, CHRISTIAN/LAWYER, supra note 7, at 218–24 (describing Shaffer's own upbringing).
day in a life which the Lord is then seen to rule. Everything gives way before that lordship."322 There is no confusion about the fact that the law is not what should be worshiped, but is "more like the gods of Canaan," and that the lawyer must always ask whether, indeed, it is possible for a Christian to be a lawyer.323

Third, the major religious communities have a tradition for such consultation, even if it has desiccated in modern religious communities. Shaffer notes:

The prescriptions for [resorting to the worshiping community to resolve vocational questions] and the requirement of it, are clear in Christian scripture, and, I think, in rabbinical tradition. Both Jews and Christians represent and think of themselves—on moral questions put by individuals, as well as in terms of religious witness in the wider society—as communities; in unavoidable ways they understand themselves as standing before God together, and therefore, in unavoidable ways, as accounting collectively not only for what they do together, but also for what each member of them undertakes to do. It is not biblically sufficient for a believer to go off by himself, alone with God, and figure out how his faith is to be reconciled with what he works at, or how his faith is to inform what he does when he works.324


Fourth, the religious community tends to be more heterogeneous than the community imagined by Sir Thomas Percival or David Hoffman as his community of accountability.326 As a wider community than either the lawyer’s firm or his client, the religious community will reflect a diversity of human need that the self-interest of lawyer, client, or firm may prevent the lawyer from wanting to see. Generally, the religious community will not screen out those whose voices are in the minority, or whose demands are sharp. It will not play “mirror” to the selfish interests of the lawyer, assuring him that what he does is perfectly all right, because everyone does it.

Perhaps the greatest strength (or, to a conservative profession, the greatest threat) of the religious community is that it will tend to

322 Shaffer, Servant, supra note 10, at 1346.
323 See id. at 1348–49; SHAFFER & SHAFFER, supra note 12, at 215 (describing teachers in a “community of the faithful” as “agents of memory”).
324 Shaffer, Servant, supra note 10, at 1352–53.
325 Shaffer, supra note 320, at 969.
326 See SHAFFER, FAITH/PROFESSIONS, supra note 6, at 40–53.
hold the professional accountable in the most radical way for keeping the lawyer’s covenant to the client. For example, in violation of virtually every story lawyers are told about what is a central virtue of their profession, the religious community may instruct lawyers to lie to prevent deportation of an alien or to manipulate the IRS agent who has come to break up a living arrangement that permits someone without a home to have one. More broadly, the religious community will hold the Christian lawyer to account with the Bible which, as Shaffer says, “tends to subvert the legal order” by challenging the “false consciousness and hegemonic ideology of the dominant class,” among them lawyers. It does so simply by demanding that lawyers, and others, take seriously the radical demand of the Gospel upon their lives and their work, the demand that they do justice to the poor and the unseen.

Of course, we should also identify the potential drawbacks of the religious community as one’s community of accountability. The most obvious problem is that religious communities, made up of the same sinners that occupy the professions, may fail in their call to be faithful to the radical demand of God, as Shaffer has himself despaired. Second, they may fail to understand what lawyers really are called to do. Shaffer's lawyers like George Sharswood believed that the institutional bar was their primary community of accountability, perhaps because they instinctively knew that any skillful critique of a profession depends on understanding of its social purposes and how it actually functions, though perhaps only because of their elitism. We can expect that religious communities, as much as any other diverse public community, will share misconceptions and prejudices about lawyers and their role in society. One has only to survey members in one’s own religious community about the notorious lawsuit du jour to understand that religious communities can be as uneducated and unreflective as the next body. Changing those prejudices will require a

327 See Shaffer, supra note 17, at 989–90 (speaking of faith’s radical demands on lawyers).
328 See Shaffer, supra note 252, at 911–16. For an example of how lawyers might be compelled to violate legal ethics regulations, see Shaffer, On Living, supra note 6, at 886–87 (describing violation of financial assistance ethics rules by lawyer who bought baby bed so mother could get her baby back before Christmas).
329 Shaffer, Subvert, supra note 10, at 1097–98.
330 See id. at 1099.
331 See Shaffer, Servant, supra note 10, at 1351–52.
332 See Shaffer, supra note 111, at 231, 233–36 (noting their beliefs that lawyers’ superior craftsmanship and morality stemmed from their pedigree or place in the aristocracy).
significant commitment of a religious community to learn about life in the various professions as well as to demand their accountability.

Third, religious communities may be diverse in some ways, but not in others. While they may reflect more socioeconomic, ethnic, and geographical diversity than the institutional bar, they also may not in any particular religious community. More importantly, specific religious communities are unlikely to reflect the religious and ethical diversity of the wider community, a factor which may be critically important in establishing a vision for any one lawyer's practice or for the bar in general. Just as a concrete example, a person who relies only on his Christian community as his community of accountability may never even hear about, much less appreciate, the harm that results when Muslims in his community are being denied the right to religious practices in the workplace, or when secular children are being made to pray in public schools. Interreligious diversity also serves to bring the lawyer to account for the public role she serves.

As a final problem, though Shaffer's religious community solution may work for those who live intensively in responsible, vibrant religious communities, many lawyers are not part of such communities. The goodness of these lawyers is also at stake in a pluralistic profession. A question which Shaffer's work, as well as the covenantalists' work, raises is whether it is possible to adopt a covenantal model in a practical way without the Covenantor.

D. "That You May Know That I, the Lord, Sanctify You": Covenants Without God?

Ultimately, what sustains the Christian or Jewish covenantal community is the reality that one covenanting partner is a God active in human affairs. This reality must be greeted with decided ambivalence, especially if one takes seriously Milner Ball's argument that the Word of God in the covenantal event is *dabar*: "What is said is done." God's telling of the covenant at Sinai makes the ethical demand a live reality for the people; indeed, to follow Levinas, it makes ethics, not personal existence, the first reality. This is a strange form of freedom given to people, not to negate the reality of the covenants God gives but to turn their eyes and ears away, choosing not to

334 MILNER S. BALL, THE WORD AND THE LAW 109 (1993); see also McCARTHY, supra note 22, at 2-4 (noting that the Hebrew phrase "raise up a covenant" is used to describe the divine covenant because of the surety that God will keep God's word, or make the covenant "stand up").
335 LEVINAS, supra note 109, at 197–201.
see that ethics is reality and choosing not to hear the covenant being spoken by the Most High. The people are free, all right, but free to bring down upon themselves the consequences of their choice or hear upon themselves. As Ball says, in prophesying that they “[h]ear and hear but do not understand; see and see but do not perceive,” Isaiah “unleashes words that will do what they say.”336 The Word of the Lord “will make the heart of the people dull and their ears heavy, and will shut their eyes. The people will not understand and will not perceive and will therefore not turn and be healed—because of those operative words.”337

The terribleness of the God with whom the people covenant, whose reality the people choose in the moment of covenant to see, even though they will choose not to see again and again and thereby seal their fate, is pronounced unmistakably in the covenant story. This is not the usual man-made covenant, complete with the ominous threat of the suzerain, demanding every loyalty he can imagine of the subject nation. This is not the ordinary frightening call for all of the gods to utterly destroy the covenant maker, to make his life as dark and painful as the gates of hell and obliterate all his beloved family and all of his possessions and every sign that he has lived, if he should not obey the oath.338 This is a covenant with God, who so demands the people’s being that the people cannot even gaze upon the Maker or they will surely die.339 To risk trivializing, this is the God who explodes as a nuclear weapon, who, should the great Sinai cloud part or should the people even touch the mountain,340 will sear the eyes of the children of Israel shut and burn their flesh straight through. This is the God who brings the covenant into being by speaking it so violently that the sky tears open in explosive light and sound, and the mountain begins to smoke a thick darkness over the whole people.341 This is the God who is so exacting about the perfect performance of His covenant that even the zealous additional offering to the Lord, a gift beyond the terms of the covenant, is treated with fury: God consumes Aaron’s well-meaning sons with fire.342

336 Ball, supra note 334, at 110 (internal quotation marks omitted).
337 Id.
338 See Hillers, supra note 21, at 36–38.
339 See Exodus 19:21 (“And the Lord said to Moses, ‘Go down and warn the people, lest they break through to the Lord to gaze and many of them perish.’”); see also Milner S. Ball, Called by Stories: Biblical Sagas and Their Challenge for Law 11 (2000).
341 See Exodus 20:18–:21.
342 See Ball, supra note 339, at 11 (quoting Leviticus 10:2).
Yet, in the Christian and Jewish traditions, this covenanting God is also the only One who is capable, time after time, of forgiving the covenant breaches of His people, indeed, not with resentment but with love, giving them the opportunity once more to keep the covenant. This is the God who makes covenants literally out of nothingness: when there is nothing left of the world but a handful of living creatures, God promises Noah that He will never destroy life again; when David has made of his kingdom a moral wasteland, through lies, betrayal, murder, adultery, arrogance, and selfishness, God promises to save his house forever.

This is the God who makes his covenant with a people who—fully knowing that His presence can consume them any moment at Sinai—are breaking the covenant at the very same moment the covenant is being made, finding protection for themselves not in their Lord but by praying to other gods.  

This paradoxical reality about the one true God that informs the covenantal thought—this mysterium of the terrible One standing over us as we breach the covenant who at the same time is the only One willing to forgive such unremitting, arrogant breaches—is evidenced in the way in which the language of covenant changes over time. Where the Old Testament language for covenant was foedus, or faithfulness, the New Testament language is often testamentum, the promise of the future. Biblical scholars argue that this shift suggests a change in understanding the divine covenant as a contract in which two parties agree to a future relationship, to seeing it as a last testament, in which the Divine Covenantor gives a gift which demands no certain response. The change from foedus to testamentum can be found in a series of important covenants which God gives in the scriptures. While the Sinai covenant, central for communities that live under a covenant of law, is in the foedus form, a demand for obedience, the Noahic and Davidic covenants are in the testamentary form. In those covenants, God who binds Himself unilaterally not to destroy the earth or the House of David, respectively, no matter how deeply and pervasively human beings sin.

The biblical covenants, so dependent upon this paradox of the terrible demand for perfect obedience coupled with startling forgiveness, sound as a poor model for secular covenants. For covenantal Christians and Jews, at least, to speak of a covenant between human

---

343 See Exodus 32:1–6.
344 See Muller, supra note 161, at 82–83; see also Elazar, supra note 77, at 26.
345 See, e.g., Muller, supra note 161, at 82–83.
beings is to speak of a relation that is only faintly mimetic of the solemn covenant that is their existence, and mimetic only of its promise, not of its fulfillment. Even the pre-biblical “human covenants” depend upon the witness of the gods and the self-cursing oath, calling for divine self-destruction for disobedience. What the biblical story adds to the self-curse is the grace within God’s covenants, the freedom of God not to keep God’s word, as it were, God’s freedom to disregard the terrible punishment promised for human disloyalty, the divine freedom to be unsurpassing love. Absent all lawyers’ acceptance that God’s threat to destroy the earth for breach of covenant is real—or that there is a God who can forgive that inevitable moment of breach—we must ask whether covenantal ethics provides any way forward for the profession, or whether the ethical minimalism that Shaffer has been so effective in demolishing is all we have.

There is, in fact, a real danger of speaking about human relationships in covenantal terms without the Covenantor present, a danger that for religious believers is worse than not “being covenantal” at all. That is the very likely possibility of idolatry. Lawyers may forget that their covenants merely resemble, barely, the real thing. They may start to imagine themselves as gods, insofar as they “righteously” demand that their clients perform the covenant—that their clients give up the baby that they cannot take care of, or stop polluting the river, or even pay their bills on time. They may come to believe they are as free as God to disregard the terms that bind them, cutting corners on trial preparation so they can take another client or get in a round of golf. Or worse, they may start to believe that they are capable of creating a covenant that will save them or their clients. They may place their ultimate hopes upon the fulfillment of the human covenant and inexorably fall into despair when the inevitable breach occurs, either as their clients betray them, or as they betray their clients in all of the

347 Erich Auerbach argues that the biblical stories are different from the Greeks’ stories because “their religious intent involves an absolute claim to historical truth.” Erich Auerbach, Mimesis: The Representation of Reality in Western Literature 14 (Willard R. Trask trans., 1st paperback ed. Princeton Univ. Press 1968) (1946). “What [the biblical writer] produced, then, was not primarily oriented toward ‘realism’ . . . ; it was oriented toward truth. Woe to the man who did not believe it!” Id. at 18.

For [Old Testament heroes] are bearers of the divine will, and yet they are fallible, subject to misfortune and humiliation—and in the midst of misfortune and in their humiliation their acts and words reveal the transcendent majesty of God. There is hardly one of them who does not, like Adam, undergo the deepest humiliation—and hardly one who is not deemed worthy of God’s personal intervention and personal inspiration.

Id. at 18.
daily choices that violate the all-consuming, self-giving nature of the covenant.

Indeed, that is the very scary thing about covenantal ethics. Contractual ethics has no such pretensions that the act of contract creates a new relationship between persons that will transform their lives. But covenantal ethics is quite different, and the consequences of “playing God,” of playing the part of a God who makes covenants, can be more terrible than the consequences of doing a very bad job keeping a contract. The likelihood that the demand of the Other will be seen and heard, that the human covenantor will be able to imagine fully that the different world of his covenanting partner is small. The possibility that the human covenantor will be humbled into compassion by his own inability to keep the covenant like the One who is his model for perfect law and perfect grace is almost infinitesimal. And yet, covenantal ethics places before the profession the hope that we can play in the image of God without playing God, that we can imitate the compassionate heart rather than constructing our own towers toward heaven.348

It is a tremendous gamble, this gamble of hope. Especially in a profession that has not, as a whole, signed onto the real Covenant, the one which creates a relation between humans and God and makes it at least possible that people will live in the image of God rather than playing God. I would then turn to the problem of how we speak to each other about a professional institution where covenantal ethics is a meaningful claim, in a way that has significance for lawyers’ common life.

E. “And All the People Among Whom You Live Shall See the Work of the Lord”.349 Public Covenanting in a Religiously Plural Profession

If a public covenantal ethics is ultimately dependent upon a daily turning toward the Covenantor, we must ask what such an ethics might possibly hold for a religiously diverse bar that includes not only those who recognize no Covenantor, but also those whose living relationship with the divine Other is expressed in other language.350 I will pass by the task of constructing a lawyering community as a “naked

348 See Genesis 11:1–9 (story of the Tower of Babel); Shaffer & Shaffer, supra note 12, at 1–13 (describing “Legal Ethics After Babel”).
349 Exodus 34:10.
350 I want to avoid the problem of the use of coercion to enforce any such community vision upon those who do not accept it, a problem which has been tackled at length by law and religion theorists as well as legal ethicists. See Robert Audi, The Place of Religious Argument in a Free and Democratic Society, in LAW & RELIGION: A CRITICAL ANTHOLOGY 69, 75–79, 82–84 (Stephen M. Feldman ed., 2000) [hereinafter LAW &
public square” in which covenantal commitments are not publicly recognized. This is the professional world we already know. This is the world in which bar leaders, clearly aware of the great gifts bestowed upon them by the practice of law and moved by the plight of those they serve, still have trouble finding language to insist why it is the lawyer’s obligation to serve pro bono the poor and hated, or why excessive fees are not right, or why self-dealing is unethical. This is the professional world in which ethical precepts have been stripped of their aspirational language for the contractual minimalism of clear and enforceable rules.

In Nomos and Narrative, Robert Cover gave us one possible image for an institutional bar within which some lawyers live by the covenant, and others do not even recognize its existence. Indeed, one might argue that Cover’s image describes the professional community currently being formed as religious lawyers attempt to recapture the relationship between faith and their profession in friendship groups, study circles, and conferences and start anew to look at the law itself from within their own religious traditions. Imagining the legal profession through Cover’s eyes, we might see the formation of paideic communities of lawyers, who recover and re-create a legal tradition for themselves, a tradition which, as Cover reminds us, “includes not only a corpus juris, but also a language and a mythos”—narratives that establish the paradigms for behavior, building a bridge “between the normative and the material universe, between the constraints of reality and the demands of an ethic.” These communities, as small as Scripture study groups and as large as national religious bar associations, might begin the task of what is called, in Christianity, “formation.” They might begin to tell the stories, not only of their Scriptural antecedents but of their professional antecedents as well. These stories might enable young, religious lawyers to understand not just the “corpus juris” of the covenant they make with their clients, their profession, and their community, but also the “demands of an ethic,” the ways in which the covenant takes them beyond “the constraints of reality” to an alterity unmarked by human finitude and stubbornness.


353 Id. at 9.

354 Id.
That is to say, Tom Shaffer may be among the first, but not the last, to tell the stories of the “faith” to the generations.

If Cover’s narrative is also the profession’s, we should begin to see such “paideic” communities of lawyers invigorated with a renewed “sense of direction or growth that is constituted as the individual and his community work out the implications of their law.”355 In such communities, goodness will flourish, for those who grasp the paideia will obey the “law” of the profession taught to them as a coherent way of life, not simply a set of rules.356 Perhaps most importantly, given the stories we hear about lawyer disillusionment, these communities will help make lawyering hopeful and fresh again to the wider bar, because they will create the necessary interpersonal commitments involving “reciprocal acknowledgment, the recognition that individuals have particular needs and strong obligations to render person-specific responses.”357 And they will create such bonds within a new “[d]iscourse [, ritualistic and informal, that] is initiatory, celebratory, expressive, and performative, rather than critical and analytic.”358

It is hard to imagine that any lawyer would not rush to find a place in one of these paideic communities, given the current alternative—the “naked public square,” or as Cover describes it, the imperial community. In the imperial community, ethics are minimalist, and norms are created through “objective” discourse and enforced universally by institutional sanctions.359 In this kind of community, the “law of lawyering” does not need to be taught as paideia (that is, believed or embraced) as long as it is effective.360 In a legal/imperial community, “[i]nterpersonal commitments are weak, premised only upon a minimalist obligation to refrain from the coercion and violence that would make impossible the objective mode of discourse and the impartial and neutral application of norms.”361

Its members share no common awareness of their relationship to God, and such an awareness cannot be an element in the legal system . . . . No appeal can be made to the Word or Spirit of God in the running of its affairs. The . . . community as such is spiritually blind and ignorant. It has neither faith nor love nor hope. It has

355  Id. at 13.
356  See id.
357  Id.
358  Id.; see also Everett, supra note 50, at 567–68 (discussing lifelong commitment in professional paideic communities).
359  See Cover, supra note 352, at 13.
360  See id.
361  Id.
Cover and Barth are here describing the civil political community, but they could as well be speaking about the bar.

Cover paints for us the struggle that comes of a world in which paideic communities co-exist with each other in an imperial world. As the paideic communities through mitosis create new, distinct law-giving communities, they fight for the hegemony of their own law as against other paideic communities, and "expel" and "exile" their own members who challenge their interpretation of their own tradition. Resort to the imperial community is necessary to keep peace. It takes no real imagination to match Cover’s "ideal-typical pattern" observations with actual histories of paideic legal communities. The mitosis of the critical legal studies movement as a paideic community comes immediately to mind, and the struggles within religious communities—Muslim, Jewish, and Christian—to describe a professional ethics lies right below the public surface of the profession. In legal ethics, one can recognize that there has been a stronger call for a return to an imperial understanding of lawyering as quasi-paideic communities—religious lawyers, feminists and care ethicists, minority lawyers, crits and virtue ethicists—have begun to undermine the imperial consensus about the nature of the lawyer’s role. And, one might note the (admittedly genteel and intellectual) way in which these new ethics movements have jockeyed for first place in the hearts of ethics teachers, students, and lawyers everywhere.

In a sense, Tom Shaffer has played a significant part in reconstituting the wider community of lawyers from a "naked public square" to this more "jurisgenerative" situation because he has helped carve a respectable space for paideic communities. Yet, we must acknowledge that, as he has worked with and through many stories of real and fictional lawyers, he displays ambivalence about reconstructing the professional bar, paralleling the diversity with which Christian communities respond to the imperial world. In some of his work, he seems resigned to teaching individual students and lawyers to go it alone, as persons of integrity, to live out the virtues they have been taught in their other communities of origin, even though the legal world is an imperial place, and even though they are the only ones...
living virtuously. In other places, he displays some optimism about the possibility of community "where two or three [lawyers and/or clients] are gathered together" in the divine name, or in service of the common good.

In still other venues, Shaffer has counseled the course of locating lawyers squarely in their non-lawyer paideic communities, living out their vocation as one among the many in their community, one who just happens to have legal skills. In these works, the professional bar is almost non-existent, or at least incidental to a good life. In others, he calls lawyers to be prophets to the legal community, suggesting that they are raised within ethnic or religious paideias which give them a tradition. As prophets from that tradition, he claims, they can speak Nathan's truth to David's power—that the bar and the community have ignored the poor, lived off ill-gotten gains ripped from others, pretended to majesty they do not have, and lied to themselves about what evil they have done.

The Coverian model of paideic and imperial communities, of course, would seem to embrace all of these options: the option of Lone Ranger virtue-lawyering; the option of lawyering communities that shut out the "sinful world" of the profession; the option of lawyers who don’t bother with the profession at all; and the option of lawyers whose chief calling is to bother with and bother the profession, whose main goal is to get thrown out of the American Bar Association. All of them are probably better worlds than the world in which paideic traditions are banished from the lawyering “public square” guided only by the imperial minimalism of the Model Rules of Professional Conduct, for reasons paideists within the profession have described better elsewhere.

Certainly, some of these paideic communities will be covenantal, if only because their members come from covenanting traditions. Our question is whether there is any role for covenantal lawyering in the larger imperial community. Here, it is important to distinguish among covenantal traditions a little more closely, avoiding what I suspect is the legal academic assumption that all Christian traditions are

364 See, e.g., Shaffer, Christian/Lawyer, supra note 7, at 199–206 (discussing the story of Thomas More).
365 E.g., Shaffer & Cochran, supra note 67, at 76–78, 97–98; see also Shaffer & Shaffer, supra note 12, at 3.
366 Id. at 198–203.
Puritan. While the Puritans, like much of the Reformed tradition, recognized two divine-human covenants of works and of grace, they departed from the mainstream in some important ways. First, they opened the possibility for “evangelical” lawyering by framing the idea that God creates covenants directly with individuals as well as with believing communities, thus setting the stage for a moral universe, which focuses heavily upon expectations of individualized moral perfection.

Second, the Puritans imagined the covenant of works as universally applicable, not particular to a chosen people who accepted it as their own. That is, the Puritans believed that the covenant of works was a

“providential plan for creation.”... defining for man his telos or purpose, his role in the unfolding of God’s divine plan, his responsibilities towards God, his neighbor, and himself. ... establishing for him basic values of devotion and piety, honesty and honor, discipline and diligence, humility and charity. ... instituting basic human relationships of friendship and kinship, authority and submission. ... and adumbrating basic principles of social, political, familial, and moral life and thought.

In Coverian terms, the covenant of works just described is, in the Puritan imagination, the law of the imperial community, and it may be enforced against every person, “regenerate” or not, with sanctions both worldly and eternal. That is, the Puritan covenant is universalist and unforgiving in this life: all lawyers are bound to live by its terms, whatever their beliefs, or suffer the earthly consequences.

This understanding of the covenantal tradition, placed into a situation of pluralism, runs smack into the same problems as every other claim for universalist, monological, imperial standards for all persons, including secular ideologies. While Shaffer’s Christian gentleman lawyer might have had some basis to argue that the Puritan covenant of works, with its demand for perfect consistency between individual virtue and political and social institutions, was the lawyer’s covenant, the diversity of the profession today makes that claim impossible.

And, apart from its public acceptability, there is an underside to the Puritan image that the lawyer community is a divinely selected,

369 See Everett, supra note 50, at 561.
370 See Witte, supra note 22, at 599; see also Everett, supra note 50, at 561.
371 See Witte, supra note 22, at 580–83.
372 Id. at 584.
373 See id. at 592–94 (describing the Puritans’ belief that civil power could be used to enforce national covenant).
chosen people who have the destiny "to be a light to the nations." \(^{374}\)

In any sinful community with power, the covenantal tradition can be subverted into a sort of "manifest destiny" imagination that Shaffer rails about when he describes the lives of otherwise seemingly virtuous lawyers such as David Hoffman. \(^{375}\) In the legal bar of manifest destiny, systems of accountability—of pointing to the bar, like Nathan, and saying, "You are that man"—are not considered necessary because gentleman lawyers know what is expected of them, and the ritual of accountability is already embedded in the culture of the class. \(^{376}\)

In that bar, both violators and critics are excluded, shunned, or in other polite ways eliminated from serious consideration as members of the community, along with those who are thought not to exhibit the virtues of the chosen.

However, I would suggest that, in imagining how covenantalism might be part of the institutional public life of a pluralistic bar, it is not necessary for religious lawyers to choose between either Cover's imperial-paideic conceit or the coercive covenantal tradition of the Puritan. There are other options for religious lawyers besides separating themselves from the imperial community, hunkering down in their own self-chosen religious or professional communities, or imagining that from the safety of their paideic communities they should point their Nathanaic fingers at the unregenerate bar. Rather, religious lawyers who want to live out of covenant in a religiously pluralistic profession might seek help from one of the Christian traditions that imagines people of God to be engaged fully in their (even secular) professional institutions because they understand themselves to be, not outsiders, but full members. \(^{377}\)

\(^{374}\) See id. at 589.

\(^{375}\) See Shaffer, supra note 111, at 230–32; see also Shaffer, Faith/Professions, supra note 6, at 48–53; Shaffer, supra note 2, at 632 (describing idolatry of gentlemen lawyers).

\(^{376}\) See Shaffer, supra note 2, at 630–31 (discussing Sir Thomas Percival's eighteenth-century code of ethics for physicians, who were assumed to be gentlemen).

\(^{377}\) H. Richard Niebuhr described these traditions through the models "Christ Above Culture," "Christ and Culture in Paradox," and "Christ the Transformer of Culture," including synthesis-dualists and conversionists. H. Richard Niebuhr, Christ and Culture 116–229 (1951). Synthesists understand the role of the Christian to affirm and harmonize contending aspects of faith and the world, see id. at 120; dualists recognize that human beings and institutions are saved and fallen at the same time, necessitating a paradoxical view and a skeptical but participatory approach to human institutions, see id. at 155–59; and conversionists aim to transform earthly life believing that God reconciles the world to Himself and that all things are possible through their actions, see id. at 191–96.
Or, in covenant terms, religious lawyers could borrow the Calvinist or Genevan idea of covenant, the language of testamentum rather than foedus. That is, rather than imagining the legal profession as under the yoke of a bilateral suzerainty-type (Sinai) covenant with God, which each individual lawyer is bound to fulfill by her personal belief and obedience, religious lawyers might follow Calvin in understanding the covenant as God's unconditional promise to man which God fulfills in the incarnation, crucifixion, and resurrection of Christ.378 This view understands the covenant not as a content-based set of rules that all must follow regardless of their personal consciences, but as the narrative of a relationship between God and humankind, a redemptive history,379 a being and a doing. Religious lawyers who live as a community under covenant would understand themselves and their profession, including those who are not believers, "to be in relationship with God with certain privileges and responsibilities. . . . [and] to see the corporate privileges and responsibilities of God's people as intrinsically related to His kingdom purposes in all of creation."380

That their fellow lawyers, persons from other religious and secular traditions, would not agree to be bound by a foedus-type covenantal relationship would not prevent covenantal lawyers from responding to the unilateral covenantal gift, even as they go about their business with lawyers who do not believe one word of what is the center of their beings. That is because, where the response to the Puritan's covenant is compelled obedience to law, the response to the testamentum is witness. To witness in the bar would mean that religious lawyers would tell the covenant story, even more in acts than in words, even to lawyers and clients who do not know it or accept it. It would mean living in the world as a sign, such a sign that even those who wish to turn away from the promise of the covenant cannot avoid hearing and seeing.

As Van Gelder says, that witness may take many forms, not simply the form of the "prophetic" Nathanic witness, a finger pointed at the bar for its many transgressions. Paralleling the many covenants which God has made with the human community, that witness can also take the Noahic covenant form of maintaining the sanctity of all creation.381 For religious lawyers, that might mean participating in law-

378 See Lillback, supra note 22, at 48.
379 See id. at 46 (quoting Jurgen Moltmann, Föderaltheologie, in Lexikon fur Theologie und Kirche 190 (1960)).
380 Van Gelder, supra note 25, at 193.
381 See id. at 195.
making and dispute resolution in a way that makes a trustworthy world for both humans and other forms of life. It might also take the Abrahamic form, recognizing the reconciliation of God to the people by grace through faith.\textsuperscript{382} Out of that covenant, religious lawyers might work with clients to show them that they cannot put their trust in the power of the law, or the power of violence, or the power of money, modeling that message through their own pro bono work, as well as by putting aside the powers of their office. The religious lawyers’ witness might be Davidic, testifying to the reign of God over the creation,\textsuperscript{383} as with the prophetic witness Shaffer talks about lawyers making to the principalities and powers that they ultimately are not the last word. Or the Mosaic covenant witness may be made as such lawyers serve as an example of God’s truthfulness to all the nations through holy living.\textsuperscript{384} Such witness may remind other lawyers that it is within them to live in obedience to God, to be a light to those in the community, or, in Shaffer’s terms, to be a good person and to encourage one’s clients and peers to be good people as well.

This sort of understanding of covenant breaks through the barriers between paideic and imperial, because it does not rely on force, except the force of the story. To be sure, for some who will not see or hear, the story still feels like force, because it demands them to consider the possibility that they have turned their eyes and ears away from the truth. But understanding the response to the covenant as witness also reminds the covenant storyteller that he does not need to use worldly forms of force—rules and sanctions, physical force, or social pressure—on his fellow non-believing lawyers, except to combat the truly oppressive actions of the wicked toward the vulnerable. It reminds covenantal lawyers that to be storytellers is ultimately to let go of their own security-gods, to trust that the story is powerful enough to transform without the need for worldly forms of power.

So perhaps Thomas Shaffer is a covenantal lawyer after all. For what he has done, in many ways and through many stories of many people, is to bear witness,\textsuperscript{385} to try to tell a persuasive story, attesting to the grace of God infused into every person and every community, even as sin makes the storyteller ambivalent about the characters in his story. Ultimately, he has not confined himself to one paideic community, even the community of Christian (or Catholic) lawyers

\begin{itemize}
  \item[{\textsuperscript{382}}] See id.
  \item[{\textsuperscript{383}}] See id.
  \item[{\textsuperscript{384}}] See id.
  \item[{\textsuperscript{385}}] See, e.g., Lesnick, supra note 290, at 323; see also Shaffer, Christian/Lawyer, supra note 7, at 224–26 (describing the role of a religious person as bearing witness to God’s power and human limitation).
\end{itemize}
though he moves among them often. And he has not confined himself to Nathanic finger-pointing covenantal stories. What may seem like an eclecticism of story and voice may be Tom Shaffer's way of witnessing within the imperial community. He who has ears to hear, let him hear.