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Narrative in the Moral Theology of Tom Shaffer

John D. Ayer

University of California at Davis School of Law

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Essay Reviews

Narrative in the Moral Theology of Tom Shaffer

Thomas L. Shaffer, *American Legal Ethics: Text, Readings, and Discussion Topics*. New York: Matthew Bender, 1985. Pp. xxix + 645 + 92 apps. \$32.50.

———, *Faith and the Professions*. Provo, Utah: Brigham Young University Press, 1987. Pp. ix + 337. \$29.50.

Reviewed by John D. Ayer

I. Character Ethics

Early in his thick, rich, provocative coursebook, *American Legal Ethics*, Thomas Shaffer refers to the notion "that the exercise of virtue is a matter of identity."¹ He says the idea is "no doubt obscure,"² but I suspect it is clear enough, even to the casual reader, just what sort of idea Shaffer is driving at. Shaffer's first purpose is to ally himself with a particular tendency in the study of ethics. Ethics for Shaffer is not just a matter of what we *do* but rather of who we *are*. Ethics involves not just finding, defining, analyzing, or even *following* a particular set of rules but rather choosing rightly in the situation.³ Shaffer connects particularity (the idea that we live our lives in the world, here and now) with character (the notion that our life is the sum of our choices⁴) and suggests that it is in narrative that people live out their particularities and make their characters. Shaffer has done much to establish—or to reestablish—the culture of the law in its narrative roots.

Shaffer, currently the Robert E. and Marion D. Short Professor at Notre Dame Law School, is hardly alone in his concerns; he has allies both inside and outside the community of legal education.⁵ He is quick—at times almost too quick—to acknowledge his sources and his inspiration. Beyond Shaffer's avowed sources, he clearly belongs in the company of a number of

John D. Ayer is Professor of Law, University of California at Davis School of Law.

1. Thomas L. Shaffer, *American Legal Ethics: Text, Readings, and Discussion Topics* 27 (New York, 1985).
2. *Id.*
3. "Situation" is a much abused and misunderstood term in modern ethical thought. My intention is to appeal not to the vapid modern formulation of "situational ethics" but to the rather more ancient and honorable Hegelian tradition of *Sittlichkeit*. See generally Charles Taylor, Hegel 376–78, 385–88 (Cambridge, England, 1975).
4. On "character," see especially Richard Wollheim, *The Thread of Life* (Cambridge, Mass., 1984).
5. A good introduction to contemporary nonlegal work in this vein may be found in *Revisions: Changing Perspectives in Moral Philosophy*, ed. Stanley Hauerwas & Alasdair MacIntyre (Notre Dame, Ind., 1983).

others who have sought to stake out a claim for the place of character and narrative in legal education. They are a diverse lot. Some, such as Gary Bellow,⁶ David Binder,⁷ Edwin Greenebaum,⁸ and Jack Himmelstein,⁹ have fairly clear roots in the clinical/activist generation. Others, such as Richard Weisberg¹⁰ and James Boyd White,¹¹ find their provenance in a tradition that is more literary, more academic. A third strain situates itself in a tradition more conventionally religious—Jewish, in the case of the late Robert Cover,¹² or Christian, in the case of John Noonan¹³ or Shaffer himself.

For the most part, these students of narrative and character seem to have developed separately, although there is some evidence of conversation and cooperation. One is tempted to say that they represent a new departure, at least in legal education. Twenty or thirty years ago, such pursuits would have had no place in a “respectable” law school; we were all too busy, too self-confident. We knew what law schools were supposed to do; we mastered, we articulated, and we imparted “rules.” If we had any time at all left from our particular “law” studies, then we had to hurry off and learn economics—a rule-bound activity if there ever was one. Today, it is hard to find anyone who would *deny* the importance of the new perspectives. This is not to say that there are no opponents. Quite the contrary, there are probably plenty of people around who think the study of character and narrative is still too soft, too rooted in sticky experience. But for the moment, at least they are quiescent—or on the defense. Narrative, it seems, has arrived.¹⁴

6. See Gary Bellow & Bea Moulton, *The Lawyering Process: Materials for Clinical Instruction in Advocacy* (Mineola, N.Y., 1978).
7. See David A. Binder & Susan C. Price, *Legal Interviewing and Counseling: A Client-Centered Approach* (St. Paul, Minn., 1977).
8. See, e.g., Edwin H. Greenebaum, *How Professionals (Including Legal Educators) “Treat” Their Clients*, 37 J. Legal Educ. 554 (1987), and *Attorneys’ Problems in Making Ethical Decisions*, 52 Ind. L.J. 627 (1977).
9. See Jack Himmelstein, Elizabeth Dvorkin & Howard Lesnick, *Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism* (St. Paul, Minn., 1981); Jack Himmelstein, *Reassessing Law Schooling: An Inquiry Into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. Rev. 514 (1978).
10. See, e.g., Richard H. Weisberg, *The Failure of the Word: The Protagonist As Lawyer in Modern Fiction* (New Haven, Conn. 1984); John Ayer, Book Review, 85 Mich. L. Rev. 895 (1987) (reviewing *The Failure of the Word* (1984)).
11. See, e.g., James Boyd White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston, 1973), *When Words Lose Their Meaning* (Chicago, 1984), and *Heracles’ Bow: Essays on the Rhetoric and Poetics of Law* (Madison, 1985). For more on White, see John Ayer, *Law, Literature, and the “Conversation of Mankind,”* 4 Cardozo Arts & Ent. L.J. 261, 266 (1985).
12. See, e.g., Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, 1975), *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983), *The Folktales of Justice: Tales of Jurisdiction*, 14 Cap. U.L. Rev. 179 (1985), and *Violence and the Word*, 95 Yale L.J. 1601 (1986).
13. John K. Noonan, *Persons and Masks of the Law: Cardozo, Holmes, Jefferson and Wythe As Makers of the Masks* (New York, 1976).
14. I wrote this before I had read David Friedrichs’s contribution to this symposium, in which he says that “narrative has been a marginal form of discourse in contemporary academia and in legal education,” a position about as far from my own as it is possible to get. See David Friedrichs, *Narrative Jurisprudence and Other Heresies*, 40 J. Legal

II. Shaffer's Project

Shaffer has developed his own views in nine books over eighteen years and many articles.¹⁵ His earlier work prefigures his later interests. His "hard" specialty is the law of inheritance, and his first book develops a fundamental insight into the lawyer's life—the idea that death is just a big drag for everyone, and that a lawyer cannot avoid making a human, as well as a technical response to it.¹⁶ Paralleling his work in the law of inheritance, Shaffer pioneered the study and teaching of lawyer-client counseling—one of the new fields to emerge from the "clinical revolution" of the 1970s.¹⁷ A third theme in Shaffer's work is reflected in two books that deal with two groups of people not often or obviously bracketed together—law students and the mentally retarded.¹⁸ One risks appearing flip by making this association, but an important theme emerges. In each case, Shaffer is asking: How do we deal with people who, by their position in relationship to others, may be seen as specially vulnerable to abuse? How do we recognize not only *their* dignity but also *our own*?

With the publication of *On Being a Christian and a Lawyer*¹⁹ Shaffer continued to pursue his familiar themes, but he did so in a far more distinctive mode—the discursive essay—and with a far more specific ideological (or at least theological) framework. For a writer such as Shaffer, trained to the caution and formality of the law, this departure probably took courage. We are not, after all, taught to think of ourselves as artists. It is one thing to smuggle your own notions into a coursebook or a handbook for students—both conventional forms, conventionally tame. It is quite another to commit yourself as personally as the essay requires.

Educ. 3, 4 (1990). Friedrichs deserves a more extended response than I can provide in a footnote, but let me offer two thoughts. First, Friedrichs follows his own remark with a quotation from Robert Cover, a student of the narrative voice who, in his tragically short life, achieved about as much prestige as it is possible for a law professor to achieve. Second, although I doubt that the narrative strategy is marginal, it is certainly true that a lot of the writing about narrative is marginal. The problem is that this kind of potted criticism is like adolescent guitar playing: anyone can do it badly, and far too many get an audience.

15. Shaffer's works include *Death, Property, and Lawyers: A Behavioral Approach* (New York, 1970), *The Planning and Drafting of Wills and Trusts*, 2d ed. (Mineola, N.Y., 1979), *Legal Interviewing and Counseling in a Nutshell* (St. Paul, Minn., 1976) (2d ed., 1987, coauthored with James Elkins), *The Mentally Retarded Citizen and the Law* (New York, 1979) (coedited with Michael Kindred, Julius Cohen & David Penrod), *Lawyers, Law Students, and People* (Colorado Springs, 1977) (coauthored with Robert S. Redmount), *Legal Interviewing and Counseling* (New York, 1980) (coedited with Robert S. Redmount), *On Being a Christian and a Lawyer: Law for the Innocent* (Provo, Utah, 1981); *American Legal Ethics*, *supra* note 1; *Faith and the Professions* (Provo, Utah, 1987).
16. See *Death, Property and Lawyers*, *supra* note 15; see also *The Planning and Drafting of Wills and Trusts*, *supra* note 15; Robert E. Rodes, Jr., & Thomas Shaffer, *Law for Those Who Are to Die*, in *New Meanings of Death*, ed. Herman Feifel, 291 (New York, 1977).
17. The AALS Directory of Law Teachers (1989–90) includes "Legal Counseling" under the heading "Law Office Management." It lists 145 teachers as involved in the field. Only nineteen, including Shaffer, are listed as having been involved for more than ten years. See, e.g., *Legal Interviewing and Counseling*, *supra* note 15.
18. See *The Mentally Retarded Citizen and the Law*, *supra* note 15; *Lawyers, Law Students, and People*, *supra* note 15.
19. *On Being a Christian and a Lawyer*, *supra* note 15.

Now, a matched pair of recent works gives the fullest and most explicit expression yet of Shaffer's ideas. The bigger (and the more interesting) is *American Legal Ethics*, published in 1985.²⁰ For lack of a better name, one might call it a "coursebook"—kin to a law school "casebook," though without many cases, and far from a "textbook," though it contains some "text." The skeptic might want to dismiss it as a triumph of xerography. It is nothing of the sort. The materials are selected with imagination and orchestrated with care. The coursebook mode, seemingly so casual, justifies itself in two ways. First, the materials were prepared for use in a classroom, where the tonsorial and agglutinative has long been the custom. The second and more important justification is that the mode of presentation precisely reflects Shaffer's strategy as a student and teacher and practitioner of legal ethics, which is to engage the reader, to induce a response, to inspire conversation; in short, to tell a story of lawyering with a moral content.

The burden of Shaffer's message is that *engagement* is the essence of the ethical life: we live our lives, both professional and personal, as creatures who cannot escape responsibility for our actions, bound with other creatures who share the same fate. Our task—or, if you wish, our opportunity—is to conduct that engagement so we get the most out of ourselves and out of the others with whom we are engaged. Shaffer extends the inquiry in *Faith and the Professions*, published in 1987.²¹ It would be unfair to call *Faith and the Professions* merely an extension of *American Legal Ethics*. A survey of the index to each book makes it clear that while there is a good deal of overlap, there is also much that is new. For one unfamiliar with Shaffer's work, however, *Faith and the Professions*, because it is a conventional narrative, represents a more tractable introduction.

For the casual observer, surely the most obvious feature of Shaffer's recent work is its explicitly religious base. A strictly theological message is not quite so evident in *American Legal Ethics* and *Faith and the Professions* as in *On Being a Christian and a Lawyer*, which marked a major departure. Although the title of the latest book abandons the precise "Christian" for the more noncommittal "faith," the religious underpinning remains. In the index to *American Legal Ethics*, "God" runs a strong third behind George Sharswood and David Hoffman (cofounders of *American Legal Ethics*) and just ahead of Aristotle.²² In *Faith and the Professions*, the specific references are fewer, but the tone is similar. Not typical stuff for a law textbook, not even, I suspect, at Notre Dame.²³

20. *American Legal Ethics*, *supra* note 1. See the review by James R. Elkins, *The Reconstruction of Legal Ethics As Ethics*, 36 J. Legal Educ. 274 (1986).

21. *Faith and the Professions*, *supra* note 15.

22. By my somewhat arbitrary count, Sharswood gets 33, Hoffman 29, God 20, and Aristotle 18. If you were a true Trinitarian, you would want to give God credit also for the eight references to Jesus, but that still leaves him in third place with 28. I find no references in the index to the Holy Ghost, although I assume She is there in spirit.

23. Shaffer acknowledges the influence of his friend and colleague, Robert E. Rodes, Jr. See generally Robert E. Rodes, Jr., *The Legal Enterprise* (Port Washington, N.Y., 1976), and *Law and Liberation* (Notre Dame, Ind., 1986). Shaffer did spend the years from 1979 to 1988—in scholarly terms probably his most productive—at Washington and Lee. But he was on the faculty of Notre Dame from 1963 to 1980 and returned in 1988.

Whatever you think of his project, you have to admit that he has his work cut out for him. Shaffer is, after all, writing a book not only about law in general but about law as it is lived—about lawyering in the everyday. Christianity's relation to the law is, heaven knows, complex, but any way you look at it, Christianity tends to stand apart from or over against the kind of dailiness that lawyering represents. The relationship works itself out in at least two ways, which on the surface may seem antithetical, but which for present purposes come down to the same thing.

What are these two approaches? It seems to me that the first is the idea of the law as fulfilling our vision of the best in society. This is the perspective of the Old Testament, the religion of the Ten Commandments, of the law and the prophets. The second is the idea of law as representing the *failure* to fulfill our vision of society. John Bunyan, the Puritan allegorist, writes on being a Christian and a lawyer from the second perspective:

Ye cannot be justified by the works of the law, for by the deeds of the law no man living can be rid of this burden. Therefore Mr. Worldly Wiseman is an alien, and Mr. Legality a cheat; and for his son Civility, notwithstanding his simpering looks, he is but an hypocrite, and cannot help thee. Believe me, there is nothing in all this noise that thou hast heard of this sottish man, but a design to beguile thee of thy salvation, by turning thee from the way in which I had set thee.²⁴

No fulfillment in the law there. But there is a common thread that unites the two ideas of the law: the ideal of a society beyond corruption, either *because* or *in spite of* the law. Such a utopian vision has certain obvious advantages. Because it is not wedded to society, a vision of a world beyond corruption can serve as a mirror, a critic, a goad to a society in which corruption has its place. Indeed, its unworldly character is the source of such central Christian values as charity or forgiveness, which no worldly society can ever generate, much less achieve.

Shaffer's task, then, is to find a way to live in the world through a faith whose primary characteristic is that it is not much interested in living in the world—or at least not in any world that most lawyers would recognize. Precisely because it is an unworldly religion, Christianity has never been able to provide an adequate or convincing guide to how to live in the world. Heaven (or St. Augustine or St. Thomas) knows that many have tried. But it is a mug's game. To the extent that a "Christian" text presents an adequately convincing model of how to live in the world, it can do so only by abandoning its specifically Christian premises, which establish its reason for being in the first place.²⁵ To the extent that it remains convincingly

24. John Bunyan, *Pilgrim's Progress* 30 (1678; reprint, New York, 1964). In the same vein, recall how John Donne placed the law in the catalog of evils:

All whom the flood did, and fire shall o'erthrow,
All whom war, dearth, age, agues, tyrannies,
Despair, law, chance, hath slain

John Donne, *Holy Sonnet VII*, in *John Donne: The Complete English Poems*, ed. Albert J. Smith, 311 (London, 1974).

25. This is obvious enough in the great catalog of pious frauds who try to use a kind of ersatz Christianity as a justification for oppression. It is more poignant in the case of a genuinely decent and constructive social critic such as Reinhold Niebuhr, whose ethic

Christian, it is unliveable. And an unliveable religion faces two risks: one is that it becomes irrelevant; the other is that, if its adherents seek to realize heaven on earth, it becomes far too relevant. If you share the conception of heaven, then well enough. If you do not, then the idea is a frightening prospect.

The defect is not peculiar to Christianity, of course. It is a problem with any social movement that begins, as Christianity began, in an outsider's critique—nineteenth-century socialism, for example, or the whole range of neosocialisms so prevalent in academic life. It is important, however, to recognize that utopianism is not a necessary characteristic of a religion. It simply is not the case that you must cut yourself free from time and place in order to get inspiration or edification. The Greeks did without utopianism. Judaism, though a far more complicated story, often did without it as well.²⁶ And although it may not be obvious at first, nonutopian critiques have virtues of their own to which the utopians can never aspire. For one thing, never having presumed to live out of this world, they are better equipped to deal unflinchingly with the problems of living in it.²⁷

Evidently recognizing the central discontinuity in Christianity, Shaffer approaches his task through the motif of what he calls "the two kingdoms."²⁸ Although he does not specify exactly what he means by the phrase, it seems clear that the idea is sufficient to freight in any number of Christian dichotomies: Heaven and Hell, the Heavenly City and the Earthly City,²⁹ or "grace" and "law."³⁰ Perhaps of greater practical relevance, the notion of "the two kingdoms" can be understood as a metaphor for what William James called "the divided self, and the process of its unification."³¹

seems convincing in almost everything except its theological roots. See, e.g., Reinhold Niebuhr, *Leaves From the Notebook of a Tamed Cynic* (New York, 1930), *An Interpretation of Christian Ethics* (New York, 1963), and *Moral Man and Immoral Society* (New York, 1960).

26. Shaffer, like so many contemporary Christian writers, tends to blur the distinctions between Christianity and Judaism. As an antidote to a long history of Christian paranoia and oppression, this is a welcome touch of generosity. But as a picture of Judaism, it is unfortunate, because it obscures the distinctiveness of Judaism and the characteristics of Judaism that did not carry over to Christianity at all.
27. Ronald Beiner makes a similar argument in appraising Aristotle at the expense of Kant. Beiner argues that Kant, by creating an ethic too pure for the world, leaves himself vulnerable to a shocking instrumentalism when he addresses questions of "mere" politics. See Ronald Beiner, *Political Judgment* (Chicago, 1983). Aristotle's "worldliness" surely explains his current—or recurrent—popularity in ethical thought. Attempts to assimilate Aristotle into the Christian tradition may succeed in keeping the essence of Aristotle, but it is far from clear that they preserve the essence of Christianity.
28. American Legal Ethics, *supra* note 1, Part II, at 167–361; Faith and the Professions, *supra* note 15, at 78–110.
29. The central text is, of course, Augustine's *The City of God*.
30. "For sin will have no dominion over you, since you are not under law but under grace." Romans 6:14. "But now we are discharged from the law, dead to that which held us captive, so that we serve not under the old written code but in the new life of the Spirit." Romans 7:6. "You are severed from Christ, you who would be justified by the law; you have fallen away from grace." Galatians 5:4. For Shaffer's discussion of Paul, see *On Being a Christian and a Lawyer*, *supra* note 15, at 178–83.
31. This is the title of Lecture VIII in William James, *The Varieties of Religious Experience* 140 (New York, 1958). A modern reader may be impelled to question how far the notion of "the divided self" ought to be regarded as a religious idea. The phrase "the divided self" is perhaps best known as the title of Ronald Laing's highly influential manifesto of

Shaffer asks the practical question, How can I be true to myself (or my ideals, or my god) and still meet the demands of the profession?³² Although the problem may be universal, it presents itself with special urgency to anyone determined to live in the world as a lawyer must.³³

Of the many possible particular approaches to the problem, Shaffer addresses some, but not others. One possible approach is through the question of justice: How is it possible to participate in a world with so much obvious injustice? As a lawyer, can I do enough justice (or prevent enough injustice) to do justice to myself? This question is certainly implicit in Shaffer's work, and he has a great deal to say about it. But it is not the explicit focus of his writing.

A second approach might be summarized in the question, Who is my neighbor? Shaffer devotes some of his best efforts to how people deal with one another—not necessarily at the most intimate level but rather in the more complex “second circle,” in which such elusive concepts as “friendliness” or “civility” hold sway. He is particularly interested in “power relationships,” specifically the relationship of lawyers (as persons with or in power) and clients (as persons without power). Shaffer tries very hard to work out ways in which lawyers might deal with clients on an equal plane, without either dominating or being dominated by them. As a religious idea, the obvious modern progenitor is Martin Buber.³⁴

Finally, there is the matter of sources. Shaffer's generosity with acknowledgments is more than instinctive charity or mere scholarly fussiness, although both may be involved. Rather, this fealty (or “piety”) bespeaks an attempt at *linkage*—an attempt to locate himself in a particular narrative sequence, or, as Shaffer might prefer, a community. The profession of law may, of course, be seen as a community, with its heroes and villains, its rites of passage, and so forth. But the burden of Shaffer's recent work is that the profession of law, at least as commonly understood, has let itself become an impoverished community. It is a community that needs to be enriched with—or perhaps restored to—its heritage in a more nurturant tradition. Such a tradition is what Shaffer attempts to expound.

radical psychotherapy. See R. D. Laing, *The Divided Self* (New York, 1969). On the relation of psychotherapy and religion, see generally Philip Rieff, *The Triumph of the Therapeutic: The Uses of Faith After Freud* (New York, 1968).

32. For a stimulating discussion of education from a similar perspective, see David Nuechterlein, *Athens and Jerusalem in Indiana*, 57 *Am. Scholar* 353 (1988) (discusses author's experience at Valparaiso University).

33. This characterization seems to imply that there is a “private” world—e.g., the world of the family and friends—that may be regarded as “Christian,” in contrast to a “public” world—e.g., the world of the law office—that may be regarded differently. I think this is Shaffer's view. Lasky, in a helpful commentary on Shaffer, argues for a somewhat different analysis of the public-private distinction. For Luther, “private” means man's relation with his God, while “public” means his relation to the world in any form. “This means that for Luther all of the moral life belongs to the public realm, including both what Shaffer, following common usage, terms personal [and what he terms] public morality. Luther's two kingdoms doctrine really entails a one kingdom ethics.” Dale G. Lasky, *Comment: Is One Ethic Enough*, 17 *Val. U.L. Rev.* 41, 46, (1983), *reprinted in* *Faith and the Professions*, *supra* note 15, at 292–93.

34. The principal sources would be Martin Buber, *Between Man and Man*, trans. Ronald Smith (Boston, 1972), and *I and Thou*, trans. Walter Kaufman (New York, 1970).

Although Shaffer obviously accepts the metaphor of the two kingdoms more as a challenge than as a problem and looks to the culture of the faith to sustain him in a kind of creative tension, his Christianity is a curiously muted affair. One does not want to say "tepid," exactly; he is far too explicit for that. But Shaffer's Christianity is not the kind of aromatic brew of sin and redemption that you find in, say, Flannery O'Connor.³⁵ Nor is it the tamer but still unmistakably mystical Christianity of Walker Percy.³⁶ At the end of the day, there is nothing in Shaffer's Christianity that will offend even a moderately robust heathen.

As the reader may have surmised, I write as a moderately robust heathen. Yet I find Shaffer's restraint (if I can call it that) a shortcoming. One suspects at times that Shaffer's very insistence on his Christian roots may succeed in alienating a potential audience that would have no particular quarrel with the message but would be offended by the packaging. Anyone willing or even eager to permit Shaffer his Christianity may be hard put at times to figure out just why he insists on it so much. Flannery O'Connor proceeds by a more circuitous path, slipping an awful lot of Christianity past you before you even begin to suspect what has been done to you.³⁷

Shaffer is most specifically Christian when he is citing the work of his friend and sometime coauthor, Stanley Hauerwas.³⁸ Shaffer quotes with seeming sympathy as Hauerwas says that "God's kingdom is in fact a historical reality and . . . we as Christians have the great opportunity to live in accordance with its laws."³⁹ Moreover, Hauerwas argues, we simply are not up to doing it on our own. "For the wisdom and support needed to live a life of forgiveness and truth," he says, "cannot be sustained by the individual."⁴⁰ Is this Shaffer's view of things? Remarkably, in the context of

35. For Flannery O'Connor on law, see in particular *The Life You Save May Be Your Own*, culminating in the dialogue between Mr. Shiftlet and the old woman:

"It didn't satisfy me at all."

"It satisfied the law," the old woman said sharply.

"The law," Mr. Shiftlet said and spit. "It's the law that don't satisfy me."

Flannery O'Connor, *The Complete Stories* 145, 153 (New York, 1971). The case of Flannery O'Connor is interesting partly because she undertakes to be so specifically "Christian" a writer, and even more because she gets away with it.

36. See in particular Walker Percy, *The Moviegoer* (New York, 1973), *The Second Coming* (New York, 1980), and *Lancelot* (New York, 1977). On Percy, see generally Robert Coles, *Walker Percy, An American Search* (Boston, 1978). Robert Cover is much more fervent in tone than Shaffer. See *supra* note 12.

37. For a Christian explication of Flannery O'Connor, see Jill P. Baumgaertner, *Flannery O'Connor: A Proper Scaring* (Wheaton, Ill., 1988). Of course, there remains the possibility that Shaffer has slipped a lot by me that I have not noticed. But I do not really think this is his strategy.

38. Shaffer acknowledges Hauerwas as the coauthor of *Thomas More's Hope*, chapter 19 of *On Being a Christian and a Lawyer*, *supra* note 15, at 199-206; cf. Stanley Hauerwas & Thomas L. Shaffer, *Hope Meets Power: Thomas More and the King of England*, 61 *Soundings* 456 (1978), reprinted in 54 *Notre Dame Law* 569 (1979) as *Hope in the Life of Thomas More*.

39. Stanley Hauerwas, *On Living Between the Times*, 1 *Val. U.L. Rev.* 55 (1983), quoted in *Faith and the Professions*, *supra* note 15, at 291. Although the quoted passage criticizes Shaffer, he seems to accept the substance of Hauerwas's criticism.

40. *Id.* at 55.

Hauerwas's comments, Shaffer is not quite ready to commit himself. Although he discusses Hauerwas at length and with sympathy, he comes up short of committing himself to the kind of creative tension that Hauerwas exemplifies.

If Shaffer is muted in his religious vision, he is similarly muted in his conclusions. Despite his fluency and fecundity, the substance of his argument proves maddeningly difficult to summarize. It is one thing to say that a person ought to have "character"; it is quite different to say just what sort of character a person ought to have. It is one thing to say that we should treat our clients decently, quite another to tell just what decency entails. What, in the end, is Shaffer after? Does he think we should be more assertive with our clients—or less? Does he think we should listen more to our clients—or talk more? Does he (in the end) think lawyers can maintain their integrity⁴¹ and their place at the bar? Shaffer does not say.

I expressed some reservation about the modesty of Shaffer's religious vision. Some might take a similar view of his apparently equivocal substance. If Shaffer does not commit himself (they would say), then it must be that he cannot say, or at least has not said, and therefore does not justify our listening to him.⁴² I do not agree, although it is a hard notion to argue against. One point of a "character" approach to ethics is that our moral being is not subject to "rules," at least not in the sense that "walk facing traffic" is a rule or even in the sense that "put the curtain inside the tub" is a rule. Events are too damnably unique for that. You can learn a lot from events—from examining them, from scrutinizing them, from assessing praise or blame. But what you cannot learn is how to generalize. Or better—you can discover that it is better *not* to generalize. I think the best way to sustain this point is to show how it works itself out in three particular areas of Shaffer's work. First, I want to offer some comments on narrative and its place in Shaffer's work. Second, I want to offer a word or two about his idea of "community." And finally, I want to add a note on a topic dear to the hearts of all law professors—the matter of relations with law students and, in particular, the matter of grading.

III. Storytelling

Shaffer's *modus vivendi* is, of course, the story. Whether one considers Shaffer's emphasis on storytelling "religious" depends on one's point of view. If one insists on the religious context, one might say that Shaffer believes in the power of parables. If one's bent is literary, one might see him simply as a critic. It is, however, easy to trivialize storytelling as an activity not worth the attention of serious adults, although I must say I have never understood why. Certainly lawyers have no business criticizing storytelling: their whole life is a series of stories. And what is the case method if not a

41. My choice of words. I assume Shaffer would rather say "faith."

42. This is a criticism that one might sustain both from the left and from the right. A first principle of contemporary left legal thought is that "mainstream" legalism is indeterminate. Mainstream legalism, for its part, generally undertakes to meet the charge by denying it. Another strategy would be to admit it and deny that it is a vice.

(more or less interminable) series of stories? Lawyers should know as well as anybody the virtues of storytelling as a method of studying ethics. It gets you down to brass tacks. It gives you an episode, an event, a situation, and a person in that situation about whom we may ask: Did he do wrong? Why?

There is a whole universe of stories available for telling or retelling, and any individual writer's choices must be rigorously exclusionary. Given that fact, it is a fair inference that you can tell something about the teller from the stories he chooses to tell. Shaffer's choices are tolerably diverse, but some generalizations are possible. He is, for the most part, relentlessly middlebrow. With only a couple of exceptions,⁴³ you will find none of the parade of classics that you find in James Boyd White⁴⁴ or Richard Weisberg.⁴⁵ Shaffer's choices are less ambitious: Harper Lee's *To Kill a Mockingbird* (clearly his favorite),⁴⁶ Louis Auchincloss's *The Great World and Timothy Colt*,⁴⁷ Arthur Train's "Ephraim Tutt" stories,⁴⁸ and the "Kennedy" novels of George V. Higgins⁴⁹ set the tone.⁵⁰ Shaffer's selections do not necessarily reflect his literary taste. For purposes of cultural criticism, you may be able to get as much mileage out of the *Saturday Evening Post* as Dr. Eliot's five-foot shelf. Nevertheless, some inferences still seem in order.

First, Shaffer's protagonists represent a mainline bunch. Henry Knox, Henry Colt's mentor and the principal of the Wall Street law firm that bears his name, is as mainline as they come.⁵¹ Even more so, though in a different way, is Atticus Finch, the father of an admiring daughter in *To Kill a Mockingbird*,⁵² and who, courtesy of Gregory Peck, became the very emblem of responsible liberalism in the 1960s.⁵³ So, surely, is Ephraim Tutt, the fictional protagonist of some 120 short stories about exploits at the New York Bar.⁵⁴ Shaffer, however, seems to think of Mr. Tutt as some sort of a

43. The only clear exception is George Eliot's *Middlemarch* (London, 1871-72). See Faith and the Professions, *supra* note 15, at 114-26, 156-72; see also *infra* notes 73-85 and accompanying text. Some might also choose to count Sinclair Lewis's *Arrowsmith* (New York, 1925). See Faith and the Professions, *supra* note 15, at 146-49.

44. See *supra* note 11.

45. See *supra* note 10.

46. See American Legal Ethics, *supra* note 1, at 3-57, 139-44, 175-77; Faith and the Professions, *supra* note 15, at 5-98 *passim*; On Being a Christian and a Lawyer, *supra* note 15, at 73, 164, 167. Cf. Thomas L. Shaffer, The Moral Theology of Atticus Finch, 42 U. Pitt. L. Rev. 181 (1981).

47. See American Legal Ethics, *supra* note 1, at 368-415, Faith and the Professions, *supra* note 15, at 138-40, 150-53. Cf. Thomas Shaffer, Henry Knox and the Moral Theology of Law Firms, 38 Wash. & Lee L. Rev. 347 (1981).

48. See American Legal Ethics, *supra* note 1, at 471-540; Faith and the Professions, *supra* note 15, at 175-78, 184-301 *passim*.

49. George V. Higgins, *Kennedy for the Defense* (New York, 1980), and *Penance for Jerry Kennedy* (New York, 1985). See Faith and the Professions, *supra* note 15, at 188.

50. *Faith and the Professions* also finds room for Dr. Paul Craig of *St. Elsewhere* and for "Mark Trail" (from the comic page). Mark Trail really does seem to be pushing things a bit. On *St. Elsewhere*, see Faith and the Professions, *supra* note 15, at 3, 7, 14-15, 140, 150, 183, 240, 274. For "Mark Trail," see Faith and the Professions, *supra* note 15, at 73, 93.

51. Louis Auchincloss, *The Great World and Timothy Colt* (Boston, 1956).

52. Harper Lee, *To Kill a Mockingbird* (Philadelphia, 1960).

53. Peck won his Academy Award for his portrayal of Atticus Finch in the 1962 motion picture version.

54. Shaffer focuses on two: Tutt and Mr. Tutt: Case Number 4—In Re: Sweet Land of Liberty, *Saturday Evening Post*, Aug. 16, 1919, at 18, and Tutt and Mr. Tutt: In Witness

renegade. He discusses Tutt's career under "Dissent" in *Faith and the Professions*⁵⁵ and under "Malcontents" in *American Legal Ethics*.⁵⁶ Of course, Tutt is nothing of the sort. Or if he is a dissenter, then he is to "dissent" more or less what the 1976 Bicentennial was to the idea of "revolution"—dissent packaged and sanitized so that it can do no harm.⁵⁷

Indeed, as the case of Tutt may suggest, Shaffer's notion of "dissent" is decidedly odd. In *Faith and the Professions*, his principal examples (besides Mr. Tutt) are two. One is Jeremiah (Jerry) Kennedy, the Boston Irish lawyer, a creation of George V. Higgins and the hero of two novels that bear his (Kennedy's) name.⁵⁸ The other is Fanny Holtzmann, a New York lawyer of the Depression.⁵⁹ It is hard to know just what to make of their two stories.⁶⁰ They are both interesting characters, trying to make their way in a fairly chaotic world, sometimes successfully, sometimes not. Kennedy is alert, decent, wry. Holtzmann is colorful and abrasive—rather a pain in the neck, I gather, but amusing at a safe distance. But *dissenters*? Seventeen years after Watergate and 540 years after Jack Cade's Rebellion,⁶¹ you would think he could have come up with something more forceful.

Whereof, Saturday Evening Post, May 7, 1921, at 181. See also Arthur Train, *Yankee Lawyer: The Autobiography of Ephraim Tutt* (New York, 1943).

55. *Faith and the Professions*, *supra* note 15, at 175–78 and *passim*.

56. *American Legal Ethics*, *supra* note 1, at 403–528.

57. Shaffer stresses, without seeming to note the irony, that Mr. Tutt's immense popularity extended to the leadership of the American bar. His "autobiography" was reviewed in both the *Harvard Law Review* (J. M. Maguire, Book Review, 57 Harv. L. Rev. 258 (1943)) and the *Yale Law Journal* (Arthur Train, Book Review, 52 Yale L.J. 945 (1943). (Note that the Yale review is by Mr. Tutt's creator.) In fact, the *Index to Legal Periodicals* for 1943–46 lists eleven separate reviews of *Yankee Lawyer*, along with two others of Train's 1945 collection, *Mr. Tutt Finds a Way* (New York, 1945). See 1943–46 *Index to Legal Periodicals* 791.

58. See Kennedy for the Defense, *supra* note 49; Penance for Jerry Kennedy, *supra* note 49. See also George V. Higgins, *A Choice of Enemies* (New York, 1984).

59. See Mary Case Harriman, *Miss Fixit* (pts. 1 & 2), *New Yorker*, Jan. 30, 1937, at 21, and Feb. 6, 1937, at 22. See also Ted Berkman, *The Lady and the Law* (Boston, 1976). Holtzmann, unlike Jerry Kennedy, also figures prominently in *American Legal Ethics*. See *American Legal Ethics*, *supra* note 1, at 624–42, in which Shaffer reprints an excerpt from the *New Yorker* piece and also a thoughtful, interesting commentary by one of his Washington and Lee law students.

60. It is fair to recall that Jerry Kennedy is, in some sense, fictional, while Fanny Holtzmann is, in some sense, fact. But by the time they have been processed and packaged in Shaffer's book, it is scarcely possible to tell the difference—and scarcely relevant.

61. As recreated by Shakespeare:

BUTCHER. The first thing we do, let's kill all the lawyers.

CADE. Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? that parchment, being scribbled o'er, should undo a man? Some say the bee stings; but I say, 'tis the bee's wax; for I did but seal once to a thing, and I was never mine own man since.

William Shakespeare, *King Henry VI Part II*, act IV, scene ii.

Cade staged his rebellion in 1450. Shakespeare's play was first published in 1594. Shakespeare was apparently working with sources referring to events of 1380. See Robert Turner, Introduction to the Second and Third Parts of *King Henry VI*, in *William Shakespeare: The Complete Works* 473–75, ed. Alfred Harbage (Baltimore, 1969). Jack Cade may fairly be regarded as part of our culture. A stage play, *Jack Cade*, was a staple of the American stage from 1835 until 1887. Robert E. Spiller, Willard Thorp, Thomas H. Johnson, Henry Seidel Canby, Richard M. Ludwig, and William M. Gibson, eds., *Literary History of the United States: History 1001*, 4th ed. rev. (New York, 1978).

This problem points to another more general problem in his choice of material: many of his accounts involve the vice of excess admiration. Scout Finch adores her father;⁶² Timothy Colt admires Henry Knox; Jerry Kennedy's wife sees her diamond in the rough. In addition to those already discussed, Martin Arrowsmith admires Max Gottlieb.⁶³ And it is not only the characters who admire one another; it is clear that the authors admire the characters and that Shaffer admires them for their admiration. It seems to me that this is a palpable and pervasive weakness. Scout may admire Atticus, but Scout is a child, and when Harper Lee sees Atticus through Scout's eyes, she is seeing him through the eyes of a child. Timothy Colt is not a child, but his admiration of Henry Knox is uncritical. Not understanding Knox, Colt does not know how to behave when Knox dies. That is all very well for a character; the trouble with the novel is that because the author does not understand Knox any better than Colt does, Auchincloss cannot tell any really convincing story about how Colt behaves after Knox is off the scene. A law professor, reviewing the book on publication, remarked that

... Mr. Auchincloss' novel has no doubt been having a considerable vogue among the legions of associates and junior and senior partners of the downtown law factories. For these men, although trained to a certain appearance of toughness, are really "delicate children of life" like the rest of us. Highly conscious of themselves, they are as uncertain of their identities as most of the population; so they go hopefully to the artist to tell them who they are.⁶⁴

Although this may provide a fairly good picture of Timothy Colt himself, it is not the one that Auchincloss sketches.

The problem is that Shaffer does not bring to his work a sufficient sense of irony. Irony is a much misunderstood word,⁶⁵ so let me be clear what I mean. I am not talking about a mere trick of showmanship or a particular kind of jokey style. I am talking about irony in the larger sense: the idea that things are not what you thought they were, and certainly are not as simple as they initially appeared. Irony of this sort is what life is all about, and it also shapes great art. It may seem odd to say that a Christian perspective, as the perspective of an outsider, could lack irony, for is not the ironic perspective *necessarily* that of the outsider? That is certainly the popular prejudice. But I think the popular prejudice is wrong. It is true—by definition—that the outsider has a different perspective from the insider.

62. William Faulkner's *Intruder in the Dust*, which Shaffer cites throughout his account of Atticus Finch, has a similar structure. A black man (Lucas Beauchamp) commits a crime; a young white man (Chick Mallison) learns about life and the world through watching the work of an older and much-admired lawyer (Gavin Stevens). See William Faulkner, *Intruder in the Dust* (New York, 1948).

63. Sinclair Lewis, *Arrowsmith* (New York, 1925), discussed in *Faith and the Professions*, *supra* note 15, at 146–49.

64. Benjamin Kaplan, Book Review, 70 Harv. L. Rev. 1132 (1957). For another helpful review by another lawyer, later himself a law professor, see Victor Brudney, Book Review, 67 Yale L.J. 176 (1957).

65. In common usage, "irony" seems almost to have degenerated into a becoming a synonym for "disappointing," as in: "It was ironic that it rained on Sunday, so we couldn't go to the beach." There is an excellent analysis of the concept of irony by Norman D. Knox in 2 *Dictionary of the History of Ideas*, ed. Philip P. Wiener, 626–34 (New York, 1973).

But having a different perspective is one thing; a sustained, through-and-through, ironic perspective is quite another.

Although I do not suppose anyone is the complete ironist, and I am not at all sure it would be a healthy prescription for living, there are degrees and degrees. To explain, let me take a closer look at *To Kill a Mockingbird*. The hero⁶⁶ is Atticus Finch, the small-town Alabama lawyer who defends a black man, Tom Robinson, before a local jury on a charge of rape. In defense, Atticus⁶⁷ argues that the "victim" falsely accused Robinson after failing—or being interrupted—in her attempt to seduce him. Atticus loses, and Robinson is sentenced to death. Atticus conducts himself throughout in a manner that commends him as a model to the narrator, his eight-year-old daughter, and, of course, also to Shaffer.

Lee's novel enjoyed a considerable success when it was published in 1960, particularly as refashioned in the 1962 movie. Surely it is, among other things, a consoling fable of the civil rights revolution: a story of vengeance and injustice against a vulnerable black man, and of the obligation of decent white people to stand up against the tyranny of the mob. Beyond that, it is shot through with earnest pieties that even a child can understand. Despite its timeliness in the 1960s, the novel seems surprisingly dated today. For one who was young in the 1960s, it harbors the same shock of discontinuity that one experiences on revisiting *La Dolce Vita* or *The Manchurian Candidate*: My heavens, we thought it was only yesterday, but it seems so far away. Have we changed so much? The answer seems to be yes, we probably have changed, although not necessarily for the better. Take another look at the story. It is, first of all, the story of Atticus the lawyer, not the story of the accused or the accuser. It is also Atticus' story as told through the eyes of an adoring child who has him largely to herself (her mother has conveniently died)—Athena to Atticus' Zeus. Is it possible to imagine any myth more out of vogue than the story of the kind father and the adoring daughter?⁶⁸

The novel also calls up an important Biblical legend, though not one that Shaffer discusses; the story of Potiphar's wife.⁶⁹ She is the woman (not named in the Bible) who deals with Joseph the Israelite just the same way Mayella Ewell deals with Tom Robinson—she tries to seduce him and accuses him of rape after he rebuffs her. Or so we are led to believe. Fifteen years after Harper Lee, Susan Brownmiller dealt with the legend of

66. Shaffer undertakes on page 4 of *American Legal Ethics* "to explain how it is that Atticus Finch is a hero and how it is that lawyers have become heroes in America."

67. I follow Shaffer in using the first name.

68. "Furious women will refuse to follow the man-made model of Dionysus' sister, Athena, the brain-child of Zeus, who is obsessed with abetting and supporting the Battles of the Boys. For we can see that she is M-A-D with Male Approval Desire." Mary Daly, *Gyn/Ecology: The Metaethics of Radical Feminism* 71–72 (Boston, 1978). See also Jean Shinoda Bolen, *Goddesses in Everywoman: A New Psychology of Women* 75–106 (San Francisco, 1984); Christine Downing, *The Goddess: Mythological Images of the Feminine* 99–130 (New York, 1981).

69. Genesis 39:6–23 ("Now Joseph was handsome and good-looking . . .") (RSV). I am grateful to my colleague, Leslie Kurtz, for pointing this out to me. So far as I can tell, Shaffer does not even make the point. The principal modern retelling is Thomas Mann's novel, *Joseph and His Brothers* (New York, 1948), in which Potiphar's wife is called Mut-em-inet.

Potiphar's wife in *Against Our Will*, her influential study of the culture of rape. The legend, she declares "in some form or other is a familiar staple in many ancient cultures."⁷⁰ And she continues:

The universal promulgation of a parable of rape that places the full burden of blame squarely on a lascivious female of another race or nation can hardly be accidental: Aggressive warlike peoples must have found it highly expeditious to promote this sort of legend as they went about their routine business of conquering others. What better way, after all, to absolve themselves from guilt as they plucked the fruits of victory?⁷¹

One dreads to think of what a 1980s retelling of *To Kill a Mockingbird* might look like: Mayella Ewell as an authentic victim with Atticus as her persecutor, seeking to silence her lest she reveal his unspeakable passion for his own child (Robinson, somehow, gets lost in the shuffle). I do not especially look forward to the modern retelling. Although I do not mean to endorse Brownmiller's analysis uncritically or to reject Shaffer's out of hand, I do think their approaches suggest a central problem with a storyteller's ethics. That is, a good story lends itself to multiple interpretations. Every frontier is a horizon. The elephant stands on four turtles.⁷² Lee is not up to that kind of irony, and Shaffer does not choose to supply it.

The one exception to this unironic view of life in Shaffer's canon is George Eliot's *Middlemarch*.⁷³ *Middlemarch* is a natural for teaching—indeed, it is hard to imagine how you could teach professional ethics without it. It is one of those novels—Garcia Marquez's *One Hundred Years of Solitude* is another—that creates a world so complex and so fully realized that you cannot believe it does *not* exist. Moreover, for teaching purposes, it has not just one good story but two. First, there is the story of Dorothea, who longs to devote her life to a good cause. She makes the classic blunder of the Victorian heroine: a disastrous marriage. Nothing is more striking, nothing more central, to the whole history of the novel than the scene in which Dorothea recognizes her own fate and realizes that she is *stuck* with it.⁷⁴ And from there, she goes on to reweave the threads of her life.

70. Susan Brownmiller, *Against Our Will: Men, Women and Rape* 14 (New York, 1976).

71. *Id.* at 14. One possible answer to Brownmiller would be that Mayella Ewell and Potiphar's Wife are hardly "the fruits of victory," in that Joseph and Thomas Robinson are part of the underclass. Although women in general are dealt with more unjustly than men in general, some men are treated more unjustly than some women, and if you serve women rather than justice, you will necessarily perpetuate some injustice and create more. Janet R. Richards develops this argument at length in *The Sceptical Feminist* 10–11 (Boston, 1980).

72. And after that, the story says, "it's turtles all the way down," which is not the same as saying that every interpretation is as good as another.

73. Taken as a whole, George Eliot's career provides useful support for my point. *Adam Bede* (Edinburgh, 1859) is the story of a craftsman—earnest, honest, hardworking. It is easy to identify Adam with Eliot's father. In her hands, his story is lovingly told, but with too little detachment. *Middlemarch* (1871–72; reprint, New York, 1981) represents progress into a detached maturity.

74. "[S]he was sobbing bitterly, with such abandonment to this relief of an oppressed heart as a woman habitually controlled by pride on her own account and thoughtfulness for others will sometimes allow herself when she feels securely alone." *Middlemarch*, *supra* note 74, at 189. Eliot stages the same cruel awakening, with almost equal facility, in the story of Gwendolyn Harleth and Henleigh Grandcourt in *Daniel Deronda* (Edinburgh, 1876). Isabel Archer makes the same kind of discovery, with its own kind of elegance, in chapter 42 of Henry James's *The Portrait of a Lady* (London, 1881).

More directly relevant for our purposes is the interleaved story of young Tertius Lydgate and how he embarks on his professional career. Although Lydgate is a doctor, not a lawyer, his aspirations are comprehensive enough to cover a range of career niches. Lydgate comes to Middlemarch full of zeal to do well and to do good. He will be a healer and a discoverer; at the same time, he will live in comfort and amity with his neighbors, basking in the warm glow of general admiration and gratitude. Lydgate's first mistake is that he fails to conceal his contempt for his elders. He refuses to stoop to the petty venalities that smooth their routine, and he makes no secret of his refusal. Lydgate soon finds that his life has become far more problematic than he ever anticipated. He (like Dorothea) makes a bad marriage; he runs short of money and finds himself compelled to put himself in the debt of old Bulstrode. He tells himself that he has perfectly good reasons for acting as he does. But Bulstrode is a fraud and, what is worse, a pious fraud. When Bulstrode at last meets his comeuppance, Lydgate finds that he, too, has been compromised:

He was ready to curse the day on which he had come to Middlemarch. Everything that had happened to him there seemed a mere preparation for this hateful fatality, which had come as a blight on his honorable ambition and must make even people who had only vulgar standards regard his reputation as irrevocably damaged.⁷⁵

George Eliot is certainly judging Lydgate in this passage, but I think it is important to isolate just what she is—and is not—judging. Lydgate *may have* done something absolutely wrong in mortgaging his soul to Bulstrode, but I am not certain, and I do not think George Eliot is certain, that he did in fact. What he certainly did buy is a bad conscience; he cannot be sure whether he has done wrong or not. Further (and in Eliot's eye this may be his worst failing), he bought it at far too high a price, because he was callow and thoughtless and did not know that he was vulnerable to the same pitfalls that lie in wait for any person.

Not only does Lydgate come to see himself in a bad light, he also knows that others see him so as well, and that he cannot give them the lie. He finds himself judged not merely by "others"; he stands exposed "even [to] people who had only vulgar standards"⁷⁶ (that is, all the people with whom he dealt so dismissively before). In other words, Lydgate has found out that he is only human, and it hurts.⁷⁷ There is plenty enough for an ethics professor to chew on here, and Shaffer chews on a good deal of it. But in the end, I cannot agree with his interpretation. With all courtesy, it seems to me that he trivializes the story. He seems to offer, as a moral of the story, the proposition that Lydgate should have listened to his elders because they know better.⁷⁸

75. *Middlemarch*, *supra* note 73, at 715.

76. *Id.*

77. The late Vivian Bresnahan, who taught the Shakespeare course at Antioch College in the 1950s, liked to tell the story of another handsome, callow, charming young man about Lydgate's age who met a bitterer fate, Mercutio, who is mortally wounded in a duel at the beginning of the third act of Shakespeare's *Romeo and Juliet*. Bresnahan said that Mercutio "didn't realize he wasn't immortal."

78. Lydgate was "unfair to those whom convention would expect him to honor as his elders in the profession." Faith and the Professions, *supra* note 15, at 126.

It seems to me it is far more complicated than that. Lydgate, says Shaffer, "had good intentions and good character but was in the wrong."⁷⁹ I am tempted to say the reverse: he had bad intentions and bad character but was in the right. Despite Shaffer's account of the older doctors, I think Lydgate had the better of the issue in strictly professional terms (in the right). I think he wanted to do right by his patients and society (good intentions) but also enjoyed vexing those whom he perceived as his moral and intellectual inferiors (not so good). And I think he fell into error by his unmediated, unironic self-acceptance (bad character).

Dorothea and Lydgate both pay for the error of their ways, and not only in money.⁸⁰ The price of their error is that they lose their freedom of motion—which is to say, their freedom to do good, or at least the freedom to do good in the way they like. Lydgate leaves Middlemarch; he repairs to a prosperous resort, where he is able to maintain his (largely unappreciative) wife in the manner she chooses. Although it is perhaps morally commendable to show such loyalty to so undeserving a woman, it certainly was not what he had in mind.

Middlemarch is, as Richard Poirier has said, "among the strongest and most tough-minded novels ever written. . . ."⁸¹ George Eliot recounts (Poirier again) "the failure of a variety of efforts . . . to create forms of coherence and knowledge. . . ."⁸² But yet (he might have added) life goes on. Indeed, *Middlemarch* offers something that is almost impossible to achieve even in the best of novels, a satisfactory ending.⁸³ It does so by *not* ending, which, after all, is the way of life, not art. The characters go on about their business—perhaps chastened, perhaps not, but they go on anyway, because that is their only choice.⁸⁴

Frank Kermode rightly says that *Middlemarch* "has, in the manner of masterpieces, proved very resistant to criticism."⁸⁵ I would not pretend to comprehend it here. But if I had to draw a single moral from it all, I think I would say: doing good is tricky. It is harder than it looks. Good intentions are not enough. Rather, it takes all the resources you can lay your hands on. Given those resources, plus hard work and good luck, you may accomplish something. But do not get your hopes up.

I suppose I may be accused of cynicism here. My message seems to be: If you want to get along, go along. Well, yes. But I would put it more spaciouly. The point is that *you have no choice*, at least not this side of the grave. It is an illusion to search for the life without sin. The trick is to be discriminating about which sins you choose. You trade on moral capital in

79. *Id.*

80. In Lydgate's case, shortage of money is as much the cause as the consequence of his downfall.

81. Richard Poirier, *The Renewal of Literature* 162 (New York, 1987).

82. *Id.* at 154.

83. Another important novel that passes this test is Tolstoi's *War and Peace* (Moscow, 1863–69, 1873). This may help to explain why a novel about a European war and a novel about life in an English village can seem so much alike.

84. At least in the sense that the choice is, ultimately, theirs to make. Shaffer would say that I cannot separate myself from my choice without refusing my obligation of care. I think I agree; at least I am acting as if I agree.

85. Afterword to *Middlemarch*, *supra* note 73, at 813, 815.

this world: you earn it, you save it, you spend it. Lydgate spent his moral capital and found he had run out. I said I thought he was ultimately right in his original dustup with the older doctors. If he was right, then why should he not spend his capital? The question is quite beside the point: I could perfectly well answer that Lydgate can spend his capital as he pleases; it is all one with me. The point (again) is that he spent it thoughtlessly, without knowing whether or how he might need it another day.

I suggest that Lydgate's experience is peculiarly relevant to the lives of law teachers. One of the characteristics of the young is idealism, and one of the consequences of idealism is disappointment. Far too often, one of the consequences of disappointment is frustration—and alienation. One of the jobs of the teacher of ethics is to help these moral skydivers negotiate a soft landing, to help them retain their aspirations while putting the aspirations in touch with reality. And one way to do this is to cultivate a sense of irony. I do not say Shaffer does not know this. As a matter of fact, I rather suspect he does. But if he does, he knows better than he tells. And I think the difficulty lies in his commitment to—or, if you prefer, his search for—too perfect a vision.

Finally, a word about one other story, the story of Harvey the Pooka—the six-foot rabbit, friend of Elwood P. Dowd, and protagonist (though never seen) of the play that bears his name.⁸⁶ *Harvey* is good fun, even if, after all, pretty thin soup. Shaffer likes Harvey (and Elwood), and who cannot? “Regards to you,” says Elwood, “and anyone else you happen to run into.” As a figure of disinterested kindness, he is hard to beat. At the risk of taking it too seriously, it probably is fair to note that *Harvey* rests on another familiar motif, the theme of the healing power of innocence. As a literary theme, it has many manifestations—*Don Quixote* is only one. But it is the ultimate Christian theme, the idea of the path to glory on which A Little Child Shall Lead Them.

How do you feel about the healing power of innocence? Here is one place where your theological perspective may be critical. Innocence can do good. But certainly by any measure, innocence (or Christianity) has wreaked untold havoc on the world. If you believe in the apocalyptic Christian vision, then all the misfortune, damage, and bloodshed is a side issue, a small price to pay in recompense for everlasting glory. But taken on his own terms, this Christian god has a lot of explaining to do, unless you can swallow all the complicated theodicy. Let us concede for the moment, at least for the purposes of analysis, that Christianity has introduced (or popularized) some important social ideas in the world—charity, grace, forgiveness.⁸⁷ The question would remain, Has the game been worth the

86. Mary Chase, *Harvey*, in *Best American Plays*, supp. vol. 1918–1958, ed. John Gassner (New York, 1961). The play won a Pulitzer Prize on Broadway, and the movie was also a success. Frank Fay played the stage role and Jimmy Stewart, the movie (as Elwood, not the Pooka).

87. There are really at least two issues here. One is whether these are virtues at all. The other is whether Christianity can claim credit for them. On the first question, Nietzsche answers an emphatic no, arguing that the Christian “virtues” are vices in disguise. See Friedrich Nietzsche, *The Genealogy of Morals* (New York, 1897); cf. *The Failure of the Word: The Protagonist As Lawyer in Modern Fiction*, *supra* note 10. As to whether

candle? Do the burdens outweigh the benefits? It seems to me the issue is still very much open to debate.

IV. Community

I suggested before that I think one of Shaffer's animating ideas is the notion of community: broadly, we learn from each other; we teach each other; we cannot avoid partaking of one another's lives. I suggested in the last section that it takes skill to be good. Shaffer might add that it also takes help. We need all the help we can get, and we owe that kind of help to others as well. Shaffer is surely on to something. The idea of community is a familiar theme in American thought. It has been enjoying something of a resurgence. Intellectually, its modern avatar is Robert Bellah and his group.⁸⁸ Community, however, is another idea with a curiously ambivalent character. That is, the idea of "community" sounds like an insider idea. Is it not the individual (the dissenter, the malcontent) who provides a foil to the spirit of the community? Yet recurrently the idea of community is the organizing principle of the outsiders as well. This is surely the root teaching of the ideology of socialism in all its manifestations.⁸⁹ There is no necessary contradiction in this. It makes perfect sense to think of insiders as a community, and perfect sense to picture outsiders as banding together to form a countercommunity—after all, who could need it more?⁹⁰

The insight does call attention to some of the difficulties in communitarian zeal, however. For one thing, communitarianism always includes a fairly large dose of utopian vision. "Every man," wrote Chateaubriand, "carries within him a world which is composed of all that he has seen and loved, and to which he constantly returns, even when he is travelling through, and seems to be living in, some different world."⁹¹ In a remarkable essay, Raymond Williams shows how this vision abides in us as not simply a vision of community but also as the attendant vision of *loss* of community. Williams shows how, characteristically, we locate the moment of loss at a time more or less around the time of our own birth.⁹² And he

Christianity can claim "credit," again I assume there is plenty of room for argument. But I think it is at least fair to assume that the "virtues" I identify are nowhere evident in, say, Aristotle.

88. Robert N. Bellah, Richard Madsen, William W. Sullivan, Ann Swindler & Steven M. Tipton, *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley, 1985). I recognize that by using a single name to denote a group effort, I am trivializing its very principle, but I can think of no convenient alternative. *Habits of the Heart* is in the bibliography of *Faith and the Professions* but is not otherwise cited, perhaps because it appeared too late to weave its way into the fabric of Shaffer's text.

89. For socialism as a response to a sense of rootlessness, see James Billington, *Fire in the Minds of Men: Origins of the Revolutionary Faith* (New York, 1980); Peter L. Berger, Brigitte Berger & Hansfried Kellner, *The Homeless Mind: Modernization and Consciousness* 38 (New York, 1973).

90. On the social dynamics of a fringe religious community, see Leon Festinger, Henry W. Riecken & Stanley Schacter, *When Prophecy Fails: A Social and Psychological Study of a Modern Group That Predicted the Destruction of the World* (New York, 1964).

91. Chateaubriand, *Voyages en Italie*, entry dated December 11th, *quoted in* Claude Lévi-Strauss, *Triste Tropiques*, trans. John Weightman & Doreen Weightman, 44 (New York, 1975).

92. See Raymond Williams, *The Country and the City* (New York, 1973).

asks, "Where, indeed, shall we go, before the escalator stops? One answer, of course, is Eden, and we shall have to look at that well-remembered garden again."⁹³ It is all very well to say that we have lost, and that we need, the nourishing ties of family, of church, of community, to help keep us centered and responsible. But those of us—I count myself among them—who have spent most of our lives trying to disentangle ourselves from the ties of family, church, and community know just how constraining these ties can be, and that we have our reasons for our behavior. Once again, we find a literary motif—this time Balzac. Read one Balzac novel, or five or ten, and the one thing you remember is the sheer fluidity of urban life: the ambition, the greed, the hundred faces of betrayal. But you remember also the energy, the excitement. And if you think a bit harder, you can remember also the sheer choking *dullness* of rural life, from which so many of Balzac's Parisians have undertaken to flee.⁹⁴ The much-vaunted "flight from commitment" is not only—or even primarily—an instance of shortsightedness or moral failing. Any appeal to communitarian values that does not face up to this reality is bound to fail.⁹⁵

If "community" is so far gone as to need recreating, just how do you recreate it? Suppose we all "go back"—who will be waiting for us? A brass band? Not likely. Someone probably pawned the tuba for a bus ticket to town. And those of us (most of us?) who have spent so long trying to disentangle from community will find that we have lost the knack for it through long desuetude.

To be sure, there is no shortage of forces from inside "the church" who are doing their best to respond to this lack in our lives—everything from clear-channel television stations down through door-to-door missionaries. The TV ministries, besides providing a fair amount of indecent hilarity, have certainly made their mark, although I doubt that Shaffer would count a TV congregation as a "community." The door-to-door missionaries are, I think, a more interesting story. I suspect that this sort of cultural imperialism has done quite a bit to add to the ranks of "believers," and that if one likes this sort of thing, then this is the sort of thing one likes. But I also suspect that aggressive proselytizing, while it certainly makes converts out

93. *Id.* at 21.

94. There are any number of choices here. For ambition, greed, and betrayal, probably the best example is *La Cousine Bette* (1846); for the stifling dullness of rural life, *Eugenie Grandet* (1833); for tying the two together, *Illusions Perdues* (1837).

95. Consistent failure or unwillingness to face up to this fact accounts for a good deal of confusion in recent feminist thought. See, e.g., a book such as Barbara Ehrenreich's *The Hearts of Men: American Dreams and the Flight From Commitment* (Garden City, N.Y., 1983), which alternately revels in women's capacity to do anything they damn please and rages against men for not taking care of women as they used to. For the very murky crosscurrents in divorce reform, see Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York, 1985). Although Weitzman suggests that the enormous social cost of the divorce revolution was unintended and unforeseen, her own evidence belies her argument. The evidence shows that the cost was foreseen perfectly clearly by a number of interests, some of whom simply did not care who got hurt and some of whom tried very hard to prevent the revolution to prevent the cost.

of some people, offends or scares the living daylights out of others. The missionary spirit probably does fully as much to divide a society as it does to bind it.

The recent record of “intentional” communities—communes, tribes, and the like—suggests that communitarianism *without* some kind of religious tradition is pretty insipid stuff. I had a friend a few years back who was a somewhat ambivalent Episcopalian. A friend told her she ought to try the Unitarians. “No thanks,” she said, “I’d miss the pain and the passion.” One thing can be said for pain and passion: they do keep popping up. You cannot (completely) control them; you cannot (completely) predict them; they have a way of throwing a monkey wrench into all our efforts to order our lives. And it is precisely their disruptive force that can provoke the turn toward community. Or, for that matter, toward religion.

Where does Shaffer’s work fit in this model? It is not entirely clear. It is very clear that he sees religion functioning as a part of a community, and that he values religion and community alike. Virtually all his stories can be read as stories of people living in communities. But I cannot tell just what he makes of them, and I suspect that he cannot quite tell himself. Indeed, I think *Faith and the Professions* displays him as striving but not arriving at a mature view of just how individual and community function together. Some may regard this as a defect, but I see it as a virtue. Shaffer is right to raise the question of community and to try to explore its importance. But he is equally right to leave off without a final statement.

V. Grades

I cannot resist a word or two on a final topic that is central to how Shaffer and I make our living: law school grades. Shaffer appears to have strong views on the subject, and I take issue with them.⁹⁶ Shaffer is against them, and I am for them. Shaffer makes a familiar case here. He argues that they are destructive and countereducational. He is right. But the response to a great truth is another great truth, so here is a try. Our students need more judging from us, not less, and they need it, in the time-honored phrase, for their own good. They need it for precisely the reason that protagonists of Shaffer’s stories need it: so they can break out of the shell of self-acceptance. They need it so they can learn about themselves. They even need it so they can learn to cope with disappointment, because that is part of adulthood. They need it so they can learn to cope with themselves.

Yes, I have heard about win-win negotiations; I have heard about mastery learning. And I know that grading can be awful. In my own student days, I got A’s and got D’s, and (paraphrasing Sophie Tucker) I know which is better. Closer to home, I must say that reading student evaluations can be like swallowing a dung sandwich, bite by bite.

It is conventional to say—Shaffer says it—that we send our students into the world with too low an opinion of themselves. I suspect that, too often,

96. See *Faith and the Professions*, *supra* note 15, at 229–67. In fairness, Shaffer speaks through the voice of some hypothetical “others,” but I see no reason to believe that he dissociates himself from their remarks.

it is just the reverse.⁹⁷ We leave them untested and untried. As a result, we leave them brittle and vulnerable, far too ready to have their flanks turned by an only moderately malign fate. In an ideal world (we do not come close), law school ought to be the toughest thing they ever do in their (professional) lives, so that everything else will look easy.

There are all kinds of reasons we might choose to live this way. We do it because it is easy; we get fewer hassles from students when we give them good grades. We do it because we swallowed and digested too much of the self-indulgent rhetoric of the 1960s. Ironically—and here is the real puzzler—we do it precisely because it is so painful to undertake the ethic of care that Shaffer so eloquently describes. LaRoche foucauld says that our enemies' appraisal of us is generally more just than our own. I do not know where Tertius Lydgate went to school,⁹⁸ but I would not be surprised if it was pass-fail.

VI. Conclusion

This review, despite its length, is incomplete. Shaffer's work is extensive, and it is rich in incident—so rich that one cannot get hold of it without going on at great length. But the effort is not wasted. Shaffer provokes thought; he does so in his own way, and it is a good way. In short, I like Tom Shaffer. On the basis of what I have read alone, I am so forward as to call him a friend, for he certainly has been a friend to me. I think that if I met him, I would like him in person also—a tad garrulous perhaps, but among professors that is an occupational hazard. But I think he lacks a sense not of *sin*, exactly, but of what a Christian might call the enormity of sin, the sheer awfulness that makes sin so interesting and Christian forgiveness so heroic. Let me close as he did in *Faith and the Professions*, with a word from Elwood P. Dowd, friend of Harvey the Pooka: Regards to you, Tom Shaffer, and all you run into. But keep your eyes open, one of those pookas just might be packing a grenade.

97. Even if Shaffer is right, I am not sure I would draw his conclusions. For example, if our "C" graduate has a low opinion of himself, is it because he feels he is an evil person, or because he fears he truly is not equipped to face the demands of the profession? Suppose he felt that, notwithstanding the "C," he was capable of responding to any challenge the legal profession had to offer. Would he mind so much then?

98. Except as set forth in chapter fifteen of *Middlemarch*, *supra* note 73.

