



April 2014

Avalon Ethics (Review of Shaffer & Shaffer: American Lawyers and Their Communities: Ethics in the Legal Profession)

Thomas D. Eisele

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



Part of the [Law Commons](#)

Recommended Citation

Thomas D. Eisele, *Avalon Ethics (Review of Shaffer & Shaffer: American Lawyers and Their Communities: Ethics in the Legal Profession)*, 67 Notre Dame L. Rev. 1287 (1992).

Available at: <http://scholarship.law.nd.edu/ndlr/vol67/iss4/10>

This Book Review 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.

Avalon Ethics

**AMERICAN LAWYERS AND THEIR COMMUNITIES:
ETHICS IN THE LEGAL PROFESSION. By Thomas L.
Shaffer[†] (with Mary M. Shaffer^{††}). Notre Dame:
University of Notre Dame Press, 1991. Pp. xi, 272.
\$24.95.**

*Reviewed by Thomas D. Eisele**

A gentleman-lawyer displays the moral formation he has taken from his culture. [Sir Thomas] More finally says that what others have taken for eccentricity [in his refusal to take the Oath] is the integrity he learned from his persecutors—and from the common law itself. He also says that his culture's ability to teach integrity depends on the exercise of integrity by individuals such as himself, that the statesman who betrays conscience leads his country by a short route to chaos. More's direction was political as well as professional, and professional—legal—as well as personal. He was *not* an autonomous moral hero making lonely choices; the "adamantine sense of self" that Robert Bolt celebrated in his play about More was cultural before it was personal. More, like everybody else, had to learn how to be good.¹

† Robert & Marion Short Professor of Law, Notre Dame University; and father of coauthor, Mary M. Shaffer.

†† A.B., University of Virginia; M.A., The Johns Hopkins University; and daughter of coauthor, Thomas L. Shaffer. Mary M. Shaffer, a teacher and student of Italian literature, now lives in Paris.

* Associate Professor of Law, University of Tennessee; B.A., University of Wisconsin, 1970; J.D., Harvard University, 1973; Ph.D. (Philosophy), University of Michigan, 1984.

1 THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITY: ETHICS IN THE LEGAL PROFESSION* 83 (1991). All emphases in quotations from this book given here are emphases in the original.

Mary Shaffer helped to compile and write Chapters Five through Seven, dealing with Italian-American lawyers and their communities. Nevertheless, since most of my questions and concerns relate to the philosophical or jurisprudential claims made throughout the book, and since Thomas Shaffer explicitly absolves his daughter from being implicat-

From whom or from what do we—we humans, we lawyers—learn to be good? And how do we go about learning it? Is ethical learning, or instruction in morality, different for lawyers than for lay people? If so, how so? And if not, why not?

These are among the tantalizing questions posed us by *American Lawyers and Their Communities*, but throughout the course of the discussion they remain just that, questions: topics of thought, wonder, and bemused puzzlement. By the end of the book they have received no final answer. This is an observation, not a criticism. Self-restraint in reaching conclusions is one of the powers of the book, one of its merits; but it may also be a source of frustration for the book's readers. We so much want "answers" in this aspect of our lives, especially now, I think; we professionals, we lawyers, want answers to the unsettling questions in which our professional lives and persona engage us. Yet, this book does not offer us anything that looks like an answer (although it may well have suggestions of another kind it wishes to make available to us).

Having said this, however, I must also register a competing perception, namely, that the book is written in an assertive fashion, one that is apt to bother, even to disconcert, some readers. For an author who does not seem to have the answers to our questions, and who does not seem to want to claim to have them, this author can sound awfully sure of himself, even authoritarian. Tom Shaffer is not afraid to speak his mind, to have his say on an issue.

There is a set of genuine problems here, some of which I shall discuss in the following pages. For the moment, though, I want simply to suggest to those who might be offended or put-off by such a form of authorial address that this is Tom Shaffer's way of being truthful, being virtuous, and of treating us as he would wish others to treat him: as a human being capable of speaking his or her mind truthfully while also capable of hearing the voice of others whose hearts, minds, and perceptions differ from his. This rapprochement is not a matter of agreeing to disagree, so much as it is one of agreeing to try to teach one another, while also being willing to learn from one another. The hope of eventual agreement sanctions the activity and its effort.

ed in these matters, for the sake of consistency and clarity in this review, I shall speak in terms of the singular "Shaffer" as author. I in no way intend this stylistic device to demean or deprecate the contribution to this book made by Mary Shaffer.

Perhaps all of this only goes to say that *American Lawyers and Their Communities* is fully prepared to vie with its readers, especially with their expectations. These materials are both provocative and disturbing—perhaps it is more accurate to say, provocative because disturbing. They raise such questions as those posed above and then address them philosophically, taking them to be matters deserving such attention and mode of address. I am in agreement with the task and its aim, convinced as I am that the teaching and learning of virtue, and the teaching and learning of law, and their interrelations, are philosophical matters in the best sense. They repay inquiry and interrogation, even though they rarely supply an answer or conform to a theory that promises once and for all to put them in their place. Nevertheless, I am somewhat uncomfortable with certain aspects of the way in which the task and aim have been carried out; in particular, I wish to discuss Shaffer's way of making his points (what he calls his "argument") and the juxtaposition in which he leaves these materials.

I. AN ANTHROPOLOGICAL APPROACH TO ETHICS

The argument of the book can be stated in a few words, and I chose my prefatory quotation as a way of framing that argument: we all are members of a culture, or various cultures, and we learn our ethics there, in the culture(s) we inhabit and from which we come. This seems to mean or imply at least two things about legal ethics. First, if we are to understand the ethics of the legal profession, we must understand the law and its profession as a culture. Accordingly, we should investigate the law and its ethics in the manner in which we humans have learned to investigate any practice or culture—which is to say, we need to look at them anthropologically. The second implication or suggestion is that we must give equal time and attention to the cultures outside of law to which we lawyers belong and from which we come. The insight is that, while of course we lawyers do take root within the culture of the law and its profession, this legal culture is not our only or exclusive community, it is not our only source of belonging or membership. Other nonlegal cultures shape and tutor the members of the legal culture as much or more than does the adopted culture of law. So, the argument goes, we must pay attention to the societies, locales, and cultures where lawyers come from, where they have lived and grown before they became lawyers, and where they continue (or begin) to live and grow while they are lawyers.

This is an unusual but not unintelligible amalgam. Given the premise that our ethics or morals can be examined by studying from whence we come, where we hail as home, it is a small step to saying that we come from a variety of places or cultures, some professional and some personal, and only a short leap to realizing that all such places should be studied as a way of trying to comprehend the ethics or morals we lawyers possess (or, as the case may be, that we deny). But small steps and short leaps still require insight to name, and sometimes courage to affirm, and often faith to make credible; so you will understand when I say that what the Shaffer father-and-daughter team has achieved here is something remarkable and well worth doing.

The book has eight chapters which compose four parts. It begins with an opening chapter ("Legal Ethics After Babel") that briefly sets out the book's argument. This chapter is followed by three chapters that characterize the dominant ethic within the legal profession, which Shaffer calls the ethic of "the gentleman-lawyer"; then three more chapters that characterize a significantly different ethic, that of Italian-American lawyers; and then a final chapter ("The Community of the Faithful") that offers one way in which a lawyer, who discovers himself or herself committed to and coming from a community outside the law, might use his or her location, his or her sense of scene and self, to challenge the law even while remaining faithful to both the law's best ideals and the outside community's sense of difference from the law.

The beginning chapter states that the aim of the book is not to study the law of lawyering—as so many books on legal ethics do²—but rather to study the ethical side of lawyering, and to do so by asking, "Where do lawyers' ethics come from?" Shaffer says that ethics emanate from our belonging to a community, from our being members of some group, by means of which we take on the

2 This is not to say that all books on legal ethics merely study the law of lawyering; in fact, my impression is that the trend is currently in favor of studying ethics at least as much as studying the law in this area. David Luban's recent book is a notable example of a philosopher trenchantly discussing both the law and the ethics of lawyering. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988). In addition, two of the most recent casebooks in the field have a generous helping of ethical materials in their selection and discussion of legal ethics. See GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, *THE LAW AND ETHICS OF LAWYERING* (1990); and DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* (1992), both published by Foundation Press, Inc. But, as a generalization about books on legal ethics available over the past decade or so, Shaffer's claim is surely correct.

characteristics and characteristic ways of thinking and acting that any such group will have. In this, Shaffer seems to me to be right, and valuably so. But he knows that such a claim is controversial and goes against the grain of the dominant mode of philosophical discussion in ethics.

Much of what passes for ethical and moral analysis, Shaffer notes, assumes that we are isolated individuals who are rational actors and decision-makers, and that we act as ethical or moral selves only in so far as we prove capable of deliberating our own actions and calculating our own choices. Generally, this means that our current language of morality and ethics focuses our attention on "individuals" who are valued—or on their "rights" which are protected—because they implicate the values of "autonomy" and "choice." The idea is that true ethical or moral judgment requires isolating each of us individually from one another, so that we can compare and assess each of our own individual actions and judgments without any prejudice to our free choice coming about by possible influence from others outside the self.

Most of those who labor in legal ethics use the language of rights and accept the liberal premise that what makes a moral rule binding is that the moral actor chooses it. If that is so, it is both legally and ethically necessary to secure the isolation of the moral actor, so that his choices can be his own and not somebody else's. Rights provide the isolation [This] means that legal ethics is *choice centered*, rather than *relationship centered*. To use the old words, legal ethics is concerned with autonomy rather than with character.³

The language of rational choice and rights may or may not draw our attention to important aspects of our thought and behavior, but it certainly draws our attention away from what must be equally important about us and our situation: that we exist in a world where others are constantly, pressingly with us and who are in fact a part of our "selves," thus constraining and modifying our sense of self and our willingness or ability to see ourselves as somehow separate from these others. The best place in which to appreciate this fact of our lives seems to me to be in the context of the family. Any family member who does not understand himself or herself as a part of the group, as being fundamentally related to and bound up with his or her parents, siblings, spouse, and

3 SHAFFER & SHAFFER, *supra* note 1, at 15.

children (and others more removed), is missing something about reality, is not getting right something about life in this world of ours. Similarly, any language that fails to provide us terms in which to see and speak about such realities fails us too.

We lawyers are able to sit down with our students and talk about "rights" in the law, but the language of rights is purposefully shallow—made to be shallow, so that it can serve a legal order that claims to be free of values, free of traditions, free of the horror and charm of human life. The language of rights does not communicate well when the subject is how to be a good person.⁴

Moreover, such a language ignores or denies the fact that the methods we have for making our choices and deliberations spring from norms of thought and action made available to us by our culture and the media it gives us through which to think, act, and express ourselves. They spring, as well, from the whole person we are—our character—more than they do from some discrete or isolatable rational faculty or dispassionate capacity we may possess. In this sense, our norms for acting and thinking or our ways of acting and thinking are both cultural inheritances and personal attributes or acquisitions. As Shaffer says about Sir Thomas More, his act of conscience in refusing to take the Oath "was political as well as professional, and professional—legal—as well as personal."⁵

Shaffer suggests we need a language that recognizes the facts and values that we acquire by living in, and that we gain by working in, the communities to which we belong or from which we come. This means that, rather than autonomy or choice, our ethical language should recognize and acknowledge the fact that our actual, everyday conversations tend to be about relationships and the ties that bind us together. Shaffer also suggests that, rather than rights, we should be talking about what a good person might look like to us, or whom we might be willing to say has a good character, and why we might be willing to claim that attribute for a specific person. Such discussion and claims would, on Shaffer's view, be undertaken not so as to construct a model of "the good person" for every time and place, but rather to help us begin to clarify the actual criteria we have for ascribing good character to a person here and now, in this context or situation, in this time and in this place.

4 *Id.* at 13.

5 *See supra* note 1 and accompanying text.

Consideration of persons (lives, relationships, cultures) proceeds differently—as I hope I can show. The fundamental difference is anthropological: Deep down, *a person is not just a chooser*. There are things about persons (or, as moral philosophy often says it, moral agents) that are more interesting than the choices they make, or the sum of all the choices they have made.

.....

What I am suggesting, of course, is that it is useful in legal ethics to focus on the good person instead of on the chooser. Focus on the good person will imply a prominence for relationships in ethics—putting people back together again, or, rather, putting people back into ethical theory, noticing that we people are connected to one another, connected radically (at the roots). Connected organically: We belong; we are creatures who belong with one another. It is not that we belong because of our choices, but that we make the choices we do because we are connected to the people we are connected to. We belong before we make choices; we make the choices we make because we belong.⁶

This means, on Shaffer's terms, that we must confute the liberal emphasis on rights, autonomy, and choice in legal ethics—an emphasis that leads teachers of legal ethics to think and speak about discrete ethical issues in terms of "problems," "quandaries," and "moral dilemmas." Shaffer wishes, instead, to re-emphasize in our ethics the aspect of moral membership. The ethics or morals we display in our thoughts, words, and deeds are connected to the fact that we are members of communities and are also connected to the fact that it is in such communities that we receive our ethical training and instruction, or in which we form our moral instincts and intuitions.

Shaffer's type of ethical investigation cannot be carried out theoretically; it must be done anthropologically, which for Shaffer means narratively:

we do not know any more about that [i.e., a person's actions or choices] after we hear his theory than we knew before. If we want an ethic for *that*, we have to tell his story, get into his *life* and into the lives of people he loved and lost and the lives of people who loved and lost him.⁷

⁶ SHAFFER & SHAFFER, *supra* note 1, at 16-17, 20-21.

⁷ *Id.* at 20. See also *id.* at 66-67.

This requires anthropological or narrative descriptions of the people and places in which troublesome actions, thoughts, or words are done, thought, or stated—descriptions that also consider what these matters may mean there and then. Thus, Shaffer's heavy reliance on stories is a kind of cultural anthropology, akin to Clifford Geertz's work.⁸ (Here I am thinking of Geertz's claim that his kind of cultural anthropology generates "thick descriptions" of the humans and human structures under study.⁹)

Shaffer reports that he discovered in the classroom this alternative way of looking at and doing legal ethics, because it was in classroom discussions where he discovered that "students' responses to moral questions [or moral quandaries] indicated no sense of culture—no sense of where they had come from or of the community they were being prepared for."¹⁰ When they were pushed to respond further to ethical concerns, Shaffer says that his students would eventually take a stand on who they were, which meant, they would tell him where they came from. Shaffer then realized that "[p]eople show what their morals are by claiming where they come from [P]eople tend to explain their morals by claiming membership in a community—a family, an ethnic group, a region of the country, or . . . a congregation. We account for our morals—unintentionally—by naming what we belong to."¹¹

Both the inquiry (which in an ethics class would have been stated as a quandary) and the moral explanation relate to a "we-feeling," a feeling th[at a] person gets when he looks to the left and to the right and says to himself, "I am one of these. When I speak of this people, I can say 'we.'" It is not that he belongs because he made the right choice, but that he is right because he belongs.

. . . .

Influences . . . are at work here, whether we see them or not. They are prior, in time and in potency, to quandaries, choices, rules, principles; they are prior to deductive reasoning, or logic, or scripture, or threat. Belonging explains reality.¹²

8 See, e.g., CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* (1983); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973).

9 CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 6-10 (1973).

10 SHAFFER & SHAFFER, *supra* note 1, at 24.

11 *Id.* at 25.

12 *Id.* at 27-28.

II. CONFRONTING SHAFFER'S STYLE

I could continue to describe the rest of the book, noting the details of its remaining three parts: Shaffer's finding that the law incorporates or expresses a "gentleman's" ethic; both co-authors describing a quite different ethic, an "immigrant" ethic common to Italian-American lawyers; and the last chapter discussing the "community of the faithful," in which Shaffer suggests that a lawyer who finds himself or herself committed to a religious tradition or community might bring that religious commitment to bear on the "idols" of the law. But this seems to me to be less useful than trying to engage with Shaffer on his own terms and questioning some of his characteristic moves and gestures that a reader confronts throughout this book. I group my questions under the alliterative categories of *assertion*, *allusion*, and *argument*.

A. *Assertion.*

Begin with the closing remark in the immediately preceding quotation from the book, where Shaffer says, "Belonging explains reality."¹³ This states one of Shaffer's fundamental commitments in this book and, as such, perhaps we should not expect any argument for its truth or falsity. Still, I find it difficult to credit the claim that belonging "explains reality," and I wonder what I am supposed to do with such a remark. What does Shaffer expect of me as a reader? How does he expect me to take this assertion? Is its truth, its acceptability, supposed to be patently clear? If it is, I can only respond by saying that its truth is not patently clear to me.

I would concur in the view that the experience of "belonging" is fundamental to human beings and, in this sense, is also basic to the reality of which we are a part. But to say this is only to say that belonging is a basic ingredient in human experience; this fact in no way warrants the further assertion that belonging thereby somehow "explains" (all of) reality. In the context in which this remark is made, I do not understand Shaffer to be inviting me to consider, to weigh and evaluate, the truth or falsity of his claim; his remark does not seem to me to be an invitation to thought and exploration. Rather, Shaffer's assertion strikes me as

13 See text accompanying note 12.

something that I am supposed to agree with or accept uncritically, to take on faith or credit, to swallow. And in this context, I find that I cannot—or that I do not want to—do that. I get my back up at the suggestion that I should.

This is a delicate matter, and I do not want to make too much of it; still, as I mentioned earlier, I think this writing will frustrate at least some of its readers, in part because of the kind of considerations that I am now trying to articulate. The tone of Shaffer's remark in this context is conclusory and seems to me to be meant to close a thought, to nail down an argument. But bare assertion rarely concludes an argument (and it certainly should not in philosophy). Assertion more likely initiates an argument—and often not the one that the assertive author wishes to initiate with the reader. My guess is that we readers are meant at this point in Shaffer's text to see what he sees and thus to experience a kind of epiphany; that is the tone that I take him to be adopting here. I find, however, that I cannot accede to it, cannot accept it as a gesture with which I am comfortable or toward which I am receptive.

Shaffer himself seems to me to acknowledge that at least part of the time the assertiveness of his writing bothers him too, and he sometimes even seems to chafe at the difficulties his prose presents. I have in mind, for example, his fine aside, a remarkable piece of self-insight, in a footnote appended to his unpacking of the gentleman's ethic in the legal profession. There Shaffer allows that his words may be more forceful and more affirmative than, ultimately, he wishes to be in relation to the ethic he is describing. He nonetheless suggests that, for the moment, he must be allowed to have his say in this particular voice:

I must ask [the reader] to forgive me for seeming credulous in the affection with which I introduced the subject [of the gentleman's ethic] in the last chapter, and with which I will proceed to account for it in this chapter and the next. Credulity is the way my poor mind works: Liberal education is said to create skepticism, and I occasionally notice that effect in my children and my students, but forty years of it have not made my mind work that way. I need to buy whatever is being sold before I can begin to think critically about it—and I *will* get around to criticism.¹⁴

14 SHAFFER & SHAFFER, *supra* note 1, at 50 n.2.

Any person who can see so clearly and dispassionately a part of himself, his own ways, in the work he has produced, deserves to be honored, not scolded. Then perhaps what a reader must do in the face of such self-acknowledgment is to hold the author to his promise (to get around to criticism) and vie with the author whenever his remarks seem unfairly assertive or suspiciously "self-evident." I suspect that it is Shaffer's need "to buy whatever is being sold before . . . [he is able] to think critically about it" that lends a certain assertive quality to his remarks. He seems to be endorsing a view when in fact he may only be describing it; the vividness or vivacity of his description reads for us as though it were a kind of endorsement. Since I think that we need such matters to be revived, or revived, I also believe that we must tolerate some of the assertive energy that accomplishes that aim. But then we also must assess it, weigh it, to see if and when it is adequate, and if and when excessive. This may be the best we can do and, in any event, it seems to be the fair thing to do.

B. *Allusion.*

In saying, as I did before,¹⁵ that Shaffer's assertion about belonging explaining reality is probably intended to evoke in us an epiphany, a kind of insight or intuition, I am trying to record not only something about the assertiveness of his writing, but also something about its allusiveness. He wants us to see certain things, certain possibilities—new connections, new relations, new juxtapositions—in the materials, actions, and media of our lives, things we heretofore have not seen there and then: Opportunities ignored, roads not taken. To do this, we must see and say what he sees and says there and then. Do we?

In the extensive notes to this book, Shaffer at one point refers to his "anthropological argument—that we get our morals from our culture,"¹⁶ and then goes on to say that his argument, as with "[a]ny interesting communitarian argument[,] rests to a certain extent on intuition, which is easier for a poet than for a professor, and on . . . a 'master story.'"¹⁷ In view of the humble truth that what he is trying to do here is difficult—doubly so in this, the genre of professorial, assertive writing which must forgo

15 See *supra* text following note 13.

16 SHAFFER & SHAFFER, *supra* note 1, at 222.

17 *Id.*

both the tools and the forms of poetic writing—I think that Shaffer's writing is allusive in the best sense. It works by drawing together many different strands of meaning, suggestion, and implication, and it also draws upon many different materials (legal works, philosophical texts, literary pieces, theological writings, and other works of art, such as movies). Shaffer's allusive writing is powerful, powerfully integrative in its ability to make our disparate world whole again.

But in any such writing, the danger is that the reader simply will not know the works being alluded to (which says more about our impoverishment than it does anything about Shaffer's writing), or that the reader simply will not be able to follow Shaffer's allusions. We readers may not see what he sees. This is not a minor or tangential matter, as Shaffer recognizes. Being able to see what is what, and being able to say what is what, are moral acts and arts. "Seeing is a moral art."¹⁸ If this is so (and I am inclined to think it is), then whether we readers see the connections that Shaffer sees is a fundamental issue posed by this book, something to be confronted, not avoided or excused.

The allusiveness in his writing, however, also presents another reason why I think that some readers are apt to find this writing frustrating. The book glances at connections, states themes, and mentions morals of stories without always following them out as systematically or as methodically as I would like. Perhaps this merely says that in my pedantry I am failing to keep up with the poetry of Shaffer's writing. Fair enough; it will not be the first time that I have failed in this regard.

C. Argument.

I said at the beginning of this Review that this book is written in a way so as not to offer us answers (which denial of the existence of answers to such questions as are posed, we may find frustrating). Yet, the book also is written, as I have said, in a way that often seems to be assertive, as though the author knew the answers but simply was not about to bother to elaborate on them (which refusal to provide the answers he has to such questions as are posed, we also may find frustrating). This tension, or paradox, illustrates the problematic nature of Shaffer's writing. So far, I

18 *Id.* at 38. See also *id.* at 166, 167, and 233 ("a matter of seeing and saying as moral arts").

have suggested that it is assertive and allusive in ways that risk incomprehension, if not outright dismissal. My aim is not to adduce grounds for its dismissal, but rather to caution this book's readers against any too hasty rejection of the book. It has its several difficulties, but also its rewards.

There is a third and final aspect of Shaffer's writing that I need to register: Tom Shaffer has a quite generous notion of what constitutes argument. For anyone who is trained in philosophical argument, much of what he says may seem too assertive and ungrounded, or too loose and allusive, and perhaps even too hyperbolic, to fit that which contemporary Anglo-American philosophy calls "argument." This does not mean that what Shaffer says can therefore be ruled out, as though his writing must fit some paradigm of philosophical writing or else be considered ineffectual. What it does mean, however, is that the diverse readers who are apt to read this book must realize that they bring a varied set of backgrounds and expectations to the book, and Shaffer is trying to speak to all of them. This is a daunting goal, one not easily accomplished. I think we need to afford Shaffer the freedom to make his case (to put it in legalistic terms, without trying to be pejorative), while at the same time seeing to it that he does not have *carte blanche*. Not just anything goes.

As a way of illustrating this last point, let me once more study Shaffer's claim, "Belonging explains reality."¹⁹ My hesitancy to endorse or embrace this remark has to do at least in part with its hyperbole. "Belonging" "explains" "reality"? Those three words are hard words to grasp, difficult to put together in the way in which Shaffer puts them together. Also, they are significant words, expressing important values and connections in our world and our culture, in our community. I cannot simply string these three words together in the way in which Shaffer does and rest content in doing so. The claim these words in this order make seems to me to so outstretch anything I could claim to know or to imagine, that I simply do not feel confident (as Shaffer seems to feel) either in asserting them or in accepting them as asserted.

Philosophy so often works in hyperbole, in exaggerated claims to know, in hyperbolic notions of explanation and comprehension of reality, that it is incumbent upon us to see hyperbole for what it is in this field: an occupational hazard, a constant and continu-

19 See *supra* note 12 and accompanying text.

ing temptation. Accordingly, it is something against which we must guard ourselves and our words when we are engaged in any kind of philosophizing.²⁰ I am fully willing to grant Shaffer his notion that the cultures and communities to which we belong as persons or as professionals are fundamental to understanding our subsequent actions, thoughts, and words. It is one of the achievements of this book that Shaffer shows so well that such a claim has to be taken into account if we are to reach any satisfying understanding of lawyers and their ethics. But then I also want us to recognize that belonging is not everything and that it cannot explain everything; it is simply one more piece in the mosaic that our lives comprise. (It may be a larger piece than I allow or a smaller piece than Shaffer suggests; then the point must be to get on with trying to understand and place it better in our overall understanding of our lives and our world.)

Philosophers, or for that matter any writer, cannot guard themselves, their claims and assertions, all of the time; they cannot everywhere hedge their words. I do not suppose that we would want them to do so even if they could—such writing would be irredeemably dull. Under such conditions, our reading must become an act of assessing the claims and assertions made, an act in which the author and the reader vie with one another over what can and cannot be comfortably or conscientiously said or suggested in any given line, paragraph, or context. For my part in this process, I am saying that Shaffer's remark about belonging and reality leaves me uncomfortable in a place where I do not find the discomfort of the remark justifiable. But there are times and places when such a remark might not bother me.

III. SHAFFER'S JUXTAPOSITION OF TWO ETHICS

The bulk of this book is devoted to a development of two contrasting ethics, the traditional ethic of the gentleman-lawyer, and the nontraditional ethic of certain Italian-American lawyers. So far, I have done very little with this material, and nothing in this Review will amount to a considered discussion of that material.

20 That philosophy is a constant battle, among ourselves and within each self, to give expression to our temptations but not to give them our credence, is a lesson I can say that I have learned from the later writings of Ludwig Wittgenstein and the work of Stanley Cavell. For those wishing to learn more about these matters, I would point to two books for beginning one's studies: LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 3d ed. 1968); and STANLEY CAVELL, *MUST WE MEAN WHAT WE SAY?* (1969).

There are limits to what I can do. But I do wish to suggest one way in which the body of the book, which juxtaposes three chapters on the gentleman-lawyer's ethic with three chapters on the Italian-American immigrant's ethic, leaves me wondering what is intended by this juxtaposition.

When Shaffer turns his attention directly to the ethics of lawyers, he finds that the legal profession continues to rely upon a traditional ethic of the gentleman-lawyer.

The morals of the gentleman are an ethic for the professions. Television preserves for us an old and still prevalent way to be a lawyer (or a physician) and a good person: Be a gentleman. The gentleman's ethic is described in our stories, even our most popular and most trendy stories, which is to say that, whatever the gentleman's ethic is, we have not managed to get rid of it.²¹

The result is that we find the ethic of the gentleman everywhere in Anglo-American culture; it is something that we all share as an ethical inheritance. "[T]he gentleman is the most vivid and the most enduring figure in American professional ethics The morals of the gentleman are the American lawyer's unavoidable ethical inheritance We cannot abolish the gentleman's ethic from the professions; we could more easily abolish our grandparents."²²

The value of Shaffer's insight is that he is forcing us to see something about ourselves that we would like to believe is not true; we would like to think that we are beyond it, that we have grown past it. In this day and age in our culture, we so much want to deny that the ethics of the gentleman may still inhabit and in fact direct our professional, legal ethics. Such an insight is especially threatening to our shared, cultural wish for egalitarianism. But Shaffer thinks that we must confront this fact of our legal and ethical inheritance, not deny it, for he believes that we can still live with and work within this ethic of the gentleman.

It may be that the gentleman's morality, with its elitism a thing as old as Aristotle's ethics, can be described carefully enough so that its persistence in the legal profession will be useful and not merely inevitable.²³

21 SHAFFER & SHAFFER, *supra* note 1, at 34.

22 *Id.* at 51, 52.

23 *Id.* at 52-53.

In fact, far from being a liability, Shaffer finds the ethic of the gentleman to be an asset, one of the hidden strengths of our inherited cultural ethic, if we only can learn to see how we might work within the ethic to empower ourselves. "Scholars in moral philosophy and theology have, I think, too quickly come to ignore or reject the notion that the gentleman is an ethical argument."²⁴ Shaffer's claim is that, contrary to this scholarly neglect or rejection, if we look closely and carefully at the attributes of the gentleman, we shall find that they roughly track, *mutatis mutandis*, the attributes of the Aristotelian "man of practical wisdom," or the "Athenian gentleman."²⁵ To this extent, then, we shall discover that these attributes form a more coherent picture of a good person, or a good character, than we might otherwise imagine. (I think that Shaffer makes his case on this point. In a series of vignettes and analyses, he very usefully describes some of the contemporary attributes he understands a "gentleman" to have in our Anglo-American culture. The list includes civility, self-possession, discrimination, and diffidence.²⁶)

But Shaffer does not accept the gentleman's ethic entirely. He finds it useful as a resource, but also fallible as a guide to our actions or our characters. In particular, he finds fault with it as an ethic to the extent that it "does not know how to account for the suffering of others."²⁷ The claim is that gentlemen-lawyers tend to deny the suffering of others, because they are uncomfortable with it; or else they deny the inevitability of the suffering of others. That is, they deny that it is inevitable that they themselves, gentlemen-lawyers, cannot do anything to change the suffering of others, and that morality has its costs and consequences, including causing others to suffer.

Shaffer concludes that:

the gentleman's ethic . . . contains within itself both the cultural endurance and the coherence to come to terms with the objections that it is elitist, racist, and sexist; that it is in complicity with the abuses of power; that it is unable to endure tragedy; and that it is not able to understand that the gentleman must suffer for his goodness. But I [that is, Shaffer] can-

24 *Id.* at 38.

25 *Id.* at 38-39.

26 *See id.* at 43-46.

27 *Id.* at 87.

not locate a way to say that the ethic of the gentleman-lawyer comes to terms with the suffering that the moral life brings to others.²⁸

It is on this note that Shaffer turns (with the help of his daughter) to another culture, that of Italian-American lawyers who have managed to maintain their attachment to their immigrant culture even while they became members of the legal profession. Shaffer sees this as a useful image of the kind of balance, of the Aristotelian mean, that we need to achieve. The idea is not to assimilate one culture to the other, but rather to preserve the two cultures in balance, in a mutually respectful relation.

We suggest that such a figure [i.e., a lawyer trying to bridge two cultures] has two ways of using legal power to deal between cultures—ways that are different in their effect on both cultures. One way is to conform the other culture to the gentleman's culture: That is the way of *assimilation*. The other way is to protect the other culture and, as the lawyer manages to locate openings in the law and politics of the time, to manipulate the gentleman's culture into coming to terms with it. That is the way of *preservation*.²⁹

In describing how this feat has been achieved by a variety of Italian-American lawyers, the Shaffers concentrate on the Italian virtue of *rispetto* (said to be untranslatable³⁰).

Our understanding of *rispetto* is that it is a good habit, through which the person learns, practices, teaches, and remembers her membership in the family The practice of this virtue is what allows a modern American lawyer to be in and of her civic and professional community without loss either of dignity or of her sense of self.³¹

28 *Id.* at 94-95.

29 *Id.* at 107.

30 *See id.* at 135 n.6.

31 *Id.* at 135-36. The Shaffers further describe *rispetto*, stating:

Rispetto was a way for each member of the family to be formed both in the ability to be in the family and in the ability to be in the family without loss of self. Such a formation [of the self] makes it possible to be in other associations, and to be present there as the family (even when one goes there alone), in an effective, realistic way, without loss of self, self-respect, or respect for the family.

Id. at 140.

For additional comments on and developments of this central concept in the book, see *id.* at 166, 175, 178, 182, 194.

All of this argument is consistent with what I take to be Shaffer's main point, which amounts to the following:

No one is born a lawyer. Those who come to American law schools come with a moral order that is ignored or explicated, challenged or supported, as part of their legal education and of their apprenticeship in the American legal profession. Their moral order affects the way they look at the law; it determines their jurisprudence. It determines as well the way they look at their clients, their colleagues in the practice, and the opponents of their clients. The moral order a person brings to the profession determines whether she even thinks about the question of how to be a good person and a lawyer.³²

I do not quarrel with the Shaffers' impressive gathering of materials to support their reading of Italian-American ethics, or with Tom Shaffer's careful and innovative reconstruction of the virtues and vices embedded in the gentleman-lawyer's ethic. I do wonder what it all comes to, however, what it means for us and our understanding of our ethics (professionally or personally). Just what are the implications of what Shaffer claims about lawyers and their ethics, lawyers and their communities? If what Shaffer says about our legal ethics is true, then we still do not know where this puts us, either as lawyers or as human beings.

There are at least two aspects of his argument which bother me. These aspects are related to one another, but I shall try to discuss them one at a time. First, while Shaffer emphasizes that the virtues of an ethic are learned in the process of personal formation and not in any didactic teaching of the ethic, he also wants to say that we can gain entry to, or an understanding of, a foreign culture in which we have not been formed or trained. How is this possible? Secondly, while he denigrates the importance of the ethics of choice (or autonomy), it seems to me that our ability to make sense out of any culture or ethic (foreign or domestic), and our ability to make use of it, will implicate those very values of reasoning, criticism, choice, and autonomy that Shaffer dismisses.

As to the first aspect, Shaffer often remarks that we humans are born into an ethic and take it on as our own not as a matter of choice or any kind of ratiocination, but rather as a kind of inheritance or formation of the self. We gain it because we belong to it. While one's cultural inheritance may look or sound nothing

32 *Id.* at 127.

like formal instruction in moral reasoning or ethical argumentation, I question what the proposed dichotomy really shows. After all, the Shaffers make a great deal of use of the Italian-American virtue of *rispetto*, and yet I do not know that either of them was reared or formed in that ethic. What enables them to adopt and incorporate the virtues of an Italian-American ethic? It is, I suppose, the kind of study, data collection, and critical thinking that Chapters Five through Seven evidence in this book. This very fact—that the Shaffers can do what they did—suggests that we too can learn about another ethic without belonging to it, and can learn enough about it to use its virtues in our own lives and doings. I do not see that the Shaffers ever account for this fact, or that they can account for it, given their overemphasis (as I see it) on the need to belong to an ethic in order to absorb or possess its insights and values. Surely, formation in an ethic by being a member, by belonging to it, is sufficient; but is it necessary? I doubt it. The Shaffers' implicit suggestion behind the juxtaposition of the gentleman-lawyer's ethic and the Italian-American ethic—namely, that we lawyers would do well to adopt the practice of *rispetto* and carry it over to our practice of law—is not a coherent criticism of the way we currently act and think as lawyers, unless some appropriation of a foreign ethic is possible short of actually belonging to it.

Perhaps it is inappropriate to expect any further response to this issue from this particular book; after all, simply raising the issue is sufficiently valuable and difficult at this time. Then I respectfully ask for further guidance in the future on this point: How is it that we can seem to learn or appropriate an ethic of which we are not members without our misconceiving or misinterpreting that ethic? If it is true that we can do this usefully, then I wonder about the emphasis that being a member of an ethic receives in this book. Is the emphasis necessary, or correct?

This question leads me to the second troublesome aspect of Shaffer's argument. In discussing the lesson of Sir Thomas More, Shaffer makes the following claim:

But this [moral] formation is not radically individual; that is what was behind More's point about the statesman's conscience: No one becomes virtuous alone. We learn in the community what virtue is and how to practice it: We learn as we

are part of the community.³³

Yes, we learn from the community into which we are born and from the communities into which we are received or initiated (such as the legal profession). But we also remake those communities and reshape them, either by pursuing further or by rejecting some of the possibilities that those communities offer us for acceptance. I certainly would not want to contend that communal acceptance and rejection, cultural pursuit and divergence, are solely matters of ratiocination or calculated choices. At the same time, however, it is not clear to me that choice, reasoning, and criticism (of one's self, of what one has become in this culture, or of what one threatens to become in it; and of one's culture, what it has become or what it threatens to become) are therefore irrelevant to these processes of acceptance and rejection, pursuit and divergence. I do not see how they can be irrelevant, even though I cannot offer an account of how they operate in the process of our moral education. Yet, some of what Shaffer says about choice, autonomy, and reasoning in morals seems to me to deny them any place or function in these matters. I think that this is a mistake, or a misemphasis, that bears correction.

Here is one way in which I find this emphasis to be off the mark. As Shaffer reaches the conclusion of the section devoted to a description and discussion of the gentleman-lawyer's ethic, he says:

But we do not choose our morals; the best we can hope to do is to describe them, as we describe ourselves You cannot select a professional ethic as you would decide on a husband or a place to live or a church to go to. A professional ethic is mostly something you have.³⁴

This remark strikes me as being both true and untrue. We do begin our lives being born into a family and a community—even, a series of communities: ethnic, religious, political, social, economic, and the like—and we are formed by the communities of which we are a part. Just as surely, however, at least in Western culture, we come to think of ourselves as separate individuals, people who have a life and an existence separate and apart from the life and existence we have as a member of these groups. The recognition or realization of individuality may come afterward, may be later in

33 *Id.* at 84.

34 *Id.* at 96.

the sequence of our experience, but that fact alone does not mean that this later aspect of our experience is therefore secondary in importance to the prior experience of belonging, of being a member of a group. Truly, just as Shaffer claims, we do not *initially* "choose our morals"; but this alone does not mean that we therefore *never* can choose our morals or that the element of choice in our ethics or morals is a minor one.

I earlier quoted Shaffer as saying, "We belong before we make choices; we make the choices we make because we belong."³⁵ I think that, generally speaking, the first clause in this quotation is true, but the truth or falsity of the second clause depends too much on specifics to be generalizable. We may or may not make the choices we make *because* we belong: the "whys" and the "wherefores" of such a claim are too dense and difficult to be susceptible to an easy generalization.

In this regard, it also is useful to recall the quotation with which this Review opens,³⁶ where Shaffer uses the example of Sir Thomas More. He says that "what others have taken for eccentricity [in More's refusal to take the Oath] is the integrity he learned from his persecutors—and from the common law itself."³⁷ This is a claim not about the ethics or morality into which More was born, but rather about the ethics or morality into which More became initiated or acculturated when he became a common-law lawyer. It would appear to me that More's case shows exactly that sometimes we *can and do* "choose our morals," at least in the sense in which More worked out a moral conception of himself as lawyer, as religious believer, and as loyal subject of the king—a conception that he for one found capable of assent. Perhaps this is not exactly a case of choosing one's morals, at least not in the same sense in which one might choose roast beef or chicken for dinner or might choose between playing cards or chess for entertainment. Yet, More's case illustrates, I think, an element of choice-among-competing-moral-orders that I find contrary to Shaffer's suggested view. More found a way to choose between the morals of the ordinary English person of his time and the morals of his professional, common-law ethic. He also found a way to choose between the competing morals of the professional ethic of the courtiers or politicians of his time (including some of

35 See *supra* note 6 and accompanying text.

36 See *supra* note 1 and accompanying text.

37 SHAFFER & SHAFFER, *supra* note 1, at 83.

the English clergy) and the morals of More's learned, adopted ethic of the professional common-law lawyer. I do not say that this is all there is to More's story, or that this sense of moral choice is an easy matter to isolate in these facts or about which to speak in this case; but I do say that Shaffer's emphasis on choice-depend-ing-upon-belonging seems to me to leave the full story untold, or underdeveloped.

I believe Shaffer's argument in response to my criticism would refer me to his distinction between a "first moral order" and a "second moral order."³⁸ I do not myself happen to find that distinction helpful, in part because I think it falsely portrays the nature of ethical learning, criticism, and communication. This distinction claims that critical self-reflection is not an integral part of one's moral inheritance, but rather that such critical self-possession transforms a "first moral order" into a "second moral order," transforming something intuitively lived, as it were, into something didactically learned. For my part, however, I believe that both the need for self-reflection and criticism of one's inherited moral tradition or ethic, and the means of achieving them, *come with* the initial inheritance; they are a part of the culture one inherits. In fact, I think that we are instructed in this need and these means by the very ethic or tradition we inherit. *How* the ethic or tradition does this, I am not at all sure I can say; but *that* it does this, I am willing to claim.³⁹

This issue is particularly important to address in view of the fact that many writers and thinkers in professional ethics see "virtue ethics" or "character ethics" of the kind that Shaffer pursues here to be a deadend, even an irrelevancy. For example, in a new casebook, *Legal Ethics*, Deborah Rhode and David Luban argue:

To focus on virtue in legal ethics means to turn attention away from the nature of particular actions and their consequences and to focus instead on the character of the lawyers who perform these actions Yet to critics, this approach yields no

³⁸ See *id.* at 127-30.

³⁹ It seems to me that the collection of stories from Italian-American lawyers supports my point here. In at least two of the stories collected by the Shaffers, we are told that the person speaking eventually discovered that he or she had to recognize that, for all of the love and concern he or she had received in an Italian-American family, one also had at some point to break free of the family and to realize or to establish one's distance from the family. See, e.g., *id.* at 166, 186. This kind of individual choice is taught a member of the culture or ethic by that very same culture or ethic. How does such teaching take place?

more determinate conclusions than other frameworks. As subsequent discussion will note, the central question for legal ethics is often what the good lawyer should do under circumstances of moral complexity or competing values. An approach that focuses on character as a unitary concept may not be helpful in addressing the demands of particular roles under such circumstances.⁴⁰

Shaffer and others could respond in a variety of ways to this criticism, including questioning the apparent request for "more determinate conclusions" and denying the charge of relying upon "a unitary concept" of character. But the gist of the complaint will not go away, regardless of these defensive measures, and I think that all those working in this area (among whom I number myself) need to think long and hard about the implications of our claims concerning "virtue ethics" for our understanding of the morality of human actions and decisions. I may agree with Shaffer that rational choice and autonomy are overemphasized by the traditional writers in the area of professional ethics (as well as in other philosophical fields); but this does not mean that such topics and matters can be dismissed. Choices, even tragic choices, cannot be denied as a part of our experience and our lives.⁴¹ In particular, two matters of ethical choice or growth must be studied: (1) How do we come to accept some elements of an ethic, and yet not its other elements? Are we able to develop the strengths of an ethic without also being simultaneously hobbled by its weaknesses? (2) When two ethics conflict (as, for example, where Shaffer says the professional ethic of the gentleman-lawyer conflicts with the immigrant ethic of Italian-Americans), how are we able to choose between the varying visions and virtues offered us by those conflicting ethics? Or does choice have nothing to do with it?

IV. NARRATIVES AND CRITICISM: COMPREHENDING CULTURAL CONTRADICTIONS

American Lawyers and Their Communities is a thoroughly original book, and deserves to be honored as such. All the same, it derives some of its points of departure and some of its critical terms and arguments from a renewal of interest in "virtue ethics" or "charac-

40 RHODE & LUBAN, *supra* note 2, at 10.

41 Cf. SHAFFER & SHAFFER, *supra* note 1, at 82.

ter ethics." Shaffer's book is, then, a contribution to an ongoing debate or conversation. The premier book in this renewed discussion is Alasdair MacIntyre's *After Virtue*.⁴² In that book, MacIntyre argues that moral philosophy has lost its way in failing to follow or develop the Aristotelian tradition, and MacIntyre tries to show in a preliminary way how that moral tradition might be recovered and resuscitated in the late twentieth century. MacIntyre's later book, *Whose Justice? Which Rationality?*,⁴³ goes further in developing the promises and projected claims of the earlier book in terms of rescuing the Aristotelian tradition for contemporary life. Shaffer, in his appeal to the Aristotelian tradition and in his use of narratives to develop and understand the ethics of the gentleman-lawyer and of the immigrant Italian-Americans, is proceeding in the direction first sketched and surveyed by MacIntyre (after Aristotle).

At the same time, Shaffer is continuing work done by Robert Bellah and others on the crisis of commitment in American life and the deterioration of our sense of community (most notably reported in the best-selling book, *Habits of the Heart*⁴⁴), and work done by Stanley Hauerwas on the recovery of Christian virtue and vision through the study of narratives.⁴⁵ Finally, Shaffer also is responding to and furthering feminist writing concerned with radical criticism of the ontological and ethical assumptions and the models of human experience put forth by liberalism—feminist writing that, in particular, importantly depends upon women finding their own voices and telling their own stories.⁴⁶ This is a vast canvass on which to be working, and a complex one too. Here, I want to consider only one aspect of this complicated genealogy in Shaffer's project.

What Shaffer says and what he shows in this book cannot be said and shown except through the use of stories. It is only through the narrative collection and collocation of descriptions of how we lawyers, we immigrants, or we believers think and feel and speak and act that we shall come to understand who we are and what our ethics or morals truly are. This is the faith of this book,

42 ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984).

43 ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

44 ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* (1985).

45 See, e.g., STANLEY HAUERWAS, *THE PEACEABLE KINGDOM* (1983); STANLEY HAUERWAS, *VISION AND VIRTUE* (1974).

46 From a vast literature, I would for this purpose call attention to two works: CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); and Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

one of its central tenets, and the book cannot work on the reader if the reader does not grant Shaffer this fundamental premise, at least as a working hypothesis. Although it may seem (by the foregoing criticisms) that I do not grant Shaffer this courtesy, I hope that I can truthfully say that I do, and that I have tried to participate in the spirit and the mode in which he approaches these matters. I do because, in part, I agree with Shaffer, MacIntyre, and Bellah (and others) whose work shows that, if we are concerned with an integrated and complete whole—say, an ethic, a tradition, a society, a community, or a person—then we must try to understand that whole in its integrity and completeness. “Being concerned with the whole does not mean a mere adding together of facts from the various specialized disciplines. Such facts become relevant only when interpreted in terms of a frame of reference that can encompass them and give form and shape to a conception of the whole.”⁴⁷ Narratives or stories are one way human beings have found to provide a frame of reference and to give form and shape to their experience and to the matters that most interest and implicate them. “Narrative is a primary and powerful way by which to know about a whole. In an important sense, what a society (or a person) is, is its history.”⁴⁸ Yet, having said this, I find that I also want to say: Stories are not enough.

In studying a culture, a community, or an integrated ethic, we are studying a whole. In learning it from the inside or the outside, in belonging to it or distancing ourselves from it, we are (I believe) always asking ourselves, “Where does this fit the pattern of the whole? What does not fit? What can I accept? What must I reject?” (And so on.) We are able to do this because, as Lionel Trilling said:

A culture is not a flow, nor even a confluence; the form of its existence is struggle, or at least debate—it is nothing if not a dialectic. And in any culture there are likely to be certain artists who contain a large part of the dialectic within themselves, their meaning and power lying in their contradictions; they contain within themselves, it may be said, the very essence of the culture, and the sign of this is that they do not submit to serve the ends of any one ideological group or tendency.⁴⁹

47 BELLAH ET AL., *supra* note 44, at 300.

48 *Id.* at 302.

49 LIONEL TRILLING, *THE LIBERAL IMAGINATION* 9 (1950).

Narratives are powerful and important because they can encompass and express these cultural contradictions in a way that theories or abstract writing never can. Stories can make explicit to us the cultural contradictions, the cultural dialectic, into which we are born or into which we are initiated, thereby allowing these tensions or contradictions to gnaw at us, urging or challenging us to resolve them. Nonetheless, I doubt that narrative alone, stories alone, can resolve the contradictions with which our culture saddles us. Stories may present these matters to our attention or our consciousness, but something else must follow.

There is a sense in which such cultural contradictions are never resolved: they never can be and they never should be. To resolve them would take the dynamic tension out of one's culture and leave it flaccid, deadened, spent. But we are always in the process, nonetheless, of working them out, of pursuing them to the next cultural balance, and then to the next crisis, and so forth. As Michael Oakeshott puts it:

Politics is the activity of attending to the general arrangements of a collection of people who, in respect of their common recognition of a manner of attending to its arrangements, compose a single community This activity, then, springs neither from instant desires, nor from general principles, but from the existing traditions of behaviour themselves. And the form it takes, because it can take no other, is the amendment of existing arrangements by exploring and pursuing what is intimated in them. The arrangements which constitute a society capable of political activity, whether they are customs or institutions or laws or diplomatic decisions, are at once coherent and incoherent; they compose a pattern and at the same time they intimate a sympathy for what does not fully appear. Political activity is the exploration of that sympathy; and consequently, relevant political reasoning will be the convincing exposure of a sympathy, present but not yet followed up, and the convincing demonstration that now is the appropriate moment for recognizing it.⁵⁰

And while telling and studying narratives may be a necessary and important part of this process of pursuing the intimations in one's culture or ethic, I cannot believe that it is the whole of it. Criticism must come sometime, and by my lights criticism is not narration. Stories are not enough.

50 MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS* 123-24 (1962).

It seems to me that, in his own way, Shaffer realizes this, or says as much, when he suggests (as he has in another forum⁵¹) that law students ought not accept uncritically the stories told them and the professional code offered them by their professional elders.

From this Socratic point of view, the A.B.A. Report is a dismal piece of attempted persuasion. Its section on training in professionalism in law school proposes that law teachers *instill* the "principles of professionalism" in law students. The Report calls for examinations and investigations, and for forcing law students to watch videotapes in which "experienced lawyers" discuss moral issues in a "Socratic" fashion.

Socrates would be appalled. *None* of that is education. None of it is "professional." None of it is ethics. Ethics is talking together about morals. Socrates did not set his students down and make them listen to him; he asked questions and listened to them [E]thics does not *instill* principles. Ethics *questions* principles.⁵²

I would not deny for a moment that a part of Socrates' power (or perhaps it is Plato's) is his power of narration, his ability to tell a telling story. But that is not the whole of his power, because after telling a story (or after hearing a story told by one of his interlocutors), Socrates almost inevitably subjects it to criticism—to scrutiny, probing, questioning, and checking. This critical scrutiny seemingly never ends, because criticism—like narration, and unlike theory—can incorporate or comprehend contradictions and proceeds by endlessly working out their tensions and implications.

Liberalism has its own stories, as does any culture or any ethic, and as such, we need to examine these stories even as we study the other, competing stories from other, competing cultures and ethics. Given the history of Western civilization and the central role liberalism plays and has played in it (which is not to deny the equally central role played in Western civilization by the Aristotelian tradition), I do not think that it will repay us to reject the liberal tradition out of hand. For all its perhaps misplaced emphasis on individualism, rights, autonomy, and choice, liberalism has

51 See Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393 (1990/91).

52 *Id.* at 410 (emphases in original; footnotes omitted). Shaffer has incorporated some of the material from this lecture into *American Lawyers and Their Communities*, but I do not find this particular segment of the lecture reproduced in the book.

proved to be an enduring inheritance, one that is importantly implicated in whatever progress human beings have made on this earth. The stories of liberalism are worth hearing and worth pursuing, as are the stories of its many competitors, be they in the form of the ethic of the gentleman-lawyer or in the form of the immigrant Italian-American or in yet another form or voice.⁵³ Dismissing liberalism out of hand will not work and will not do. Absorbing its insights and transforming them, even transcending them, may. Only time and effort will tell.

V. AVALON ETHICS

Two years ago, in 1990, Barry Levinson gave us a movie called *Avalon*,⁵⁴ in which he recalled and evoked the passage through which his family went in becoming Americans. The movie takes place in Baltimore from 1914 to, roughly, 1970 and is the story of the Krichinsky family.

The opening scene is the arrival of Sam Krichinsky in America on the Fourth of July in 1914. The scene is repeated several times throughout the movie, as in a reverie Sam recalls for the benefit of himself and his listeners, usually younger members of the Krichinsky family, what it was like to set foot in America. The opening words of this scene become Sam's signature, the way he thinks of himself and the way he identifies who he is and where he is: "I came to America in 1914, by way of Philadelphia; that's where I got off the boat. And then I came to Baltimore. It was the most beautiful place you've ever seen in your life." When he arrived in Baltimore on the Fourth of July, he didn't know what holiday it was; and he came to think of the celebration of light and life that he witnessed that night as a welcome for him. "What a welcome it was; what a welcome." Sam walks through the streets with the exploding fireworks, the brilliant sparklers, and the dancing people enveloping him in a festive atmosphere. Then, he finds

53 Sometimes Shaffer seems to suggest that he agrees with this rehabilitative view of liberalism. See, e.g., SHAFFER & SHAFFER, *supra* note 1, at 194. But at other places Shaffer suggests that he rejects this view of liberalism. See, e.g., *id.* at 237 (speaking of H. Jefferson Powell, who helped Shaffer with this book, Shaffer says: "Powell . . . retains . . . more respect for liberalism than Hauerwas and I have.").

54 AVALON (Tri-Star Pictures, Inc. 1990).

Only after submitting this review for publication did I learn that Tom Shaffer reviewed this movie in a column for the *South Bend Tribune*. Thomas L. Shaffer, *Levinson's "Avalon" cuts away when God joins the dinner table*, S. BEND TRIB., Nov. 7, 1990, at A17. (Copy on file with Notre Dame Law Review.) It is a searching and sensitive review which I recommend to the reader.

that his four brothers have moved from the address of the last letter they sent him. A man who knows where his brothers now live takes Sam to the right building, which has its name emblazoned above its door: "Avalon." The man calls up to the second or third story windows, "Krichinsky," and out pop the four smiling, expectant faces of Sam's brothers. Sam is home.

The remainder of the film works out the story of Sam's family, mostly through his life and his wife's life and the lives of their son (Jules) and grandson (Michael), but also paying some attention to the lives of Sam's brothers, their wives, their children, and grandchildren. Because the Krichinsky family is that, a family, with all of its extensions, contentions, joys, and sorrows: what affects one affects the others.

By the end of the film, Sam's wife has died, and Sam has moved out of Jules' house and into a nursing home. The final scene is Michael taking his son, Sam, to see Sam, the patriarch of the family. Great-grandfather meets great-grandson and namesake. The elder says that he visited Avalon, the old neighborhood, a few weeks ago, and it was gone, everything had been removed for urban renewal. The same was true, he discovered as he traveled around Baltimore, for his wife's old neighborhood, and for other of his old stomping grounds. Nothing was the same. "For a moment, I thought I never was." Then he says, "If I knew things would no longer be, I would have died to have remembered it better." Michael tells Sam, "I miss you." Michael and his son leave Sam in the nursing home and walk hand-in-hand down its front steps, where the great-grandson turns to his father and says, "Daddy, that man talks funny."

In its depiction of a family growing together and drifting apart, of a family and a culture discovering and losing itself, a country growing and receding, *Avalon* seems to me to capture an essential dynamic in American life. We find ourselves only to lose ourselves; and then we once more go through the quest of finding ourselves again. Sam Krichinsky's life and the lives of his family enact what I want to call "the ethics of immigrancy." Such an ethic has two sides to it, only one of which I find to be fully acknowledged in Shaffer's book. One side of an ethic of immigrancy is the fact of human belonging: We all come from somewhere. We start from there. So far, and so stated, Shaffer and I agree. But where are we headed?

The other side of an ethic of immigrancy is the fact that we humans are always on a quest or a journey, and consequently, we

are always in the midst of leaving as well as arriving. Shakespeare put it well: "Men must endure/Their going hence even as their coming hither;/Ripeness is all."⁵⁵ What enables us to endure our journeying is partly our critical skills and self-possession, those things that we may originally gain from one ethic or culture but which are transportable and which may come to be planted and bear fruit in a quite different ethic or culture. Immigrancy implies both that we come from somewhere else *and* that we have the capacity to project ourselves into new and different contexts or cultures. Criticism of one's inherited ethic or culture (old and new) is what I believe gives us the ability or capacity to sustain such dislocation and relocation.

Does our immigrancy ever end, ever stop? I do not think so. In this I find a different emphasis than the one stated and struck in Shaffer's *American Lawyers and Their Communities*. Any ethos of belonging must necessarily imply its counterpart: An ethos of questing or journeying, of leaving the place where one has come from and finding a new place to belong. It is not clear to me either how this transition is managed or how we are to understand the tensions between the old and new cultures or communities. Yet it is in our ability to go through both processes—finding and losing, celebrating and mourning—while remaining human, or finding our humanity, in which I place my hope. In this, I suspect, Shaffer and I are brothers. We may not be of one and the same mind on things, but we are of the same family.

55 WILLIAM SHAKESPEARE, *KING LEAR* act 5, sc. 2. This quotation is one of the two mottoes used by F.O. Matthiessen for his classic study of American literary immigrancy and questing—*American Renaissance*—and Matthiessen tells his readers that this same quotation was marked by Melville in his copy of *King Lear*. F.O. MATTHIESSEN, *AMERICAN RENAISSANCE* vi (1941).