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NO OTHER GODS:
ANSWERING THE CALL OF FAITH IN THE PRACTICE
OF LAW

Howard Lesnick[†]

I the Lord am your God
who brought you out of
the land of Egypt,
the house of bondage:
You shall have no other gods besides Me.
*Exodus 20: 2-3.**

It is one of the oldest stories around: A few or perhaps a dozen centuries ago, a person walking by a group of stone masons in a work crew at a half-finished cathedral asked each one in turn, "What are you doing?" The first replied, "I'm cutting stone." The second said, "I'm earning the money I need to feed my family." The third answered, "I'm building a cathedral."

If today our passerby were to make a similar inquiry of three lawyers entering a courthouse, the answers might be, from the first, "I am going to argue a case," and from the second, "I am working—billing some time—to feed my family." If the third happened to have been influenced by Professor Thomas L. Shaffer, however, his response might be a bit more arresting. For over the past fifteen years Shaffer has been articulating with increasing clarity his perception that a lawyer is a person "called out of the church, sent out from [a] particular people, to do something that is religiously important."¹ I propose to inquire what it

[†] Jefferson B. Fordham Professor of Law, University of Pennsylvania. This article grew out of an informal talk given at a lawyers' retreat at The College of St. Catherine, St. Paul, MN. I thank the Sisters of St. Joseph of Carondelet for their hospitality. I also thank Milner Ball, Marie Failing, Joan F. Goodman, Thomas L. Shaffer, Amelia Uelmen, Laura Underkuffler, and James Boyd White for extremely helpful insights and suggestions along the way.

The translation is that of The Rabbinical Assembly, in *Eitz Hayim: Torah and Commentary* 442-443 (David L. Lieber et al. eds., The Rabbinical Assembly 2001). The title means "Tree of Life," which is how the Torah is described in the liturgical passage recited at the point in the service when the Scroll is returned to the Ark at the rear of the altar.

1. Thomas L. Shaffer, *The Tension between Law in America and the Religious Tradition*, in *Law and the Ordering of Our Life Together* 28, 45 (Richard John Neuhaus ed., Wm. B. Eerdmans

might mean for us to take this characterization very seriously, to think of our taking up legal work as being "called out of" our differing religious traditions, and to think of our work as lawyers as "religiously important." I want to begin by sharing my understanding of Shaffer's own response to this question, as he has worked it out in some dozen essays that have richly repaid my recent re-reading.² I will then venture some questions that arise out of this response.³

One would not expect lawyers to underestimate the importance of their work, but how many of us can say that we regard our work as

Publ. Co. 1989) [hereinafter Shaffer, *Tension*]. He spoke specifically there about businesspersons, but the thought applies to law practice as well, as Shaffer and others have recognized.

2. See *Tension*, *supra* n. 1; Thomas L. Shaffer & Mary M. Shaffer, *The Community of the Faithful*, in *American Lawyers and Their Communities: Ethics in the Legal Profession* 196 (U. Notre Dame Press 1991) [hereinafter Shaffer, *Faithful Community*]; Thomas L. Shaffer, Review Essay: *Stephen Carter and Religion in America*, 62 U. Cin. L. Rev. 1601 (Spring 1994) [hereinafter Shaffer, *Stephen Carter*]; Thomas L. Shaffer, *Human Nature and Moral Responsibility in Lawyer-Client Relationships*, 40 Am. J. Juris. 1 (1995) [hereinafter Shaffer, *Human Nature*]; Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, 71 Notre Dame L. Rev. 605 (1996) [hereinafter Shaffer, *Law Office*]; Thomas L. Shaffer, *Maybe a Lawyer Can Be a Servant: If not . . .*, 27 Tex. Tech. L. Rev. 1345 (1996) [hereinafter Shaffer, *Servant*]; Thomas L. Shaffer, *The Christian Lawyer—An Oxymoron?*, 175 America 12 (Nov. 23, 1996) [hereinafter Shaffer, *Oxymoron*]; Thomas L. Shaffer, *Towering Figures, Enigmas, and Responsive Communities in American Legal Ethics*, 51 Me. L. Rev. 229 (1999) [hereinafter Shaffer, *Towering Figures*]; Thomas L. Shaffer, *Should a Christian Lawyer Sign Up for Simon's Practice of Justice?*, 51 Stan. L. Rev. 903 (Apr. 1999) [hereinafter Shaffer, *Simon*]; Thomas L. Shaffer, *Nuclear Weapons, Lethal Injection, and American Catholics: Faith Confronting American Civil Religion*, 14 Notre Dame J. L., Ethics & Pub. Policy 7 (2000) [hereinafter Shaffer, *American Catholics*]; Thomas L. Shaffer, *More's Skill*, 9 Widener J. Pub. L. 295 (2000) [hereinafter Shaffer, *More's Skill*]; Thomas L. Shaffer, *Jews, Christians, Lawyers, and Money*, 25 Vt. L. Rev. 451 (Winter 2001) [hereinafter Shaffer, *Money*]; Thomas L. Shaffer, *Legal Ethics and Jurisprudence from Within Religious Congregations*, 76 Notre Dame L. Rev. 961 (Apr. 2001) [hereinafter Shaffer, *Religious Congregations*].

3. Shaffer's work has inspired an entire generation of lawyers, earning him wide recognition as "the father of the religious lawyering movement," Russell G. Pearce, *Foreword: The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 Fordham L. Rev. 1075, 1078 (Mar. 1998), and in a very real sense triggering what has become a flood of personal testimony and legal argumentation about the relation between a lawyer's faith and his or her practice. For recent collections, see Symposium, *Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent*, 26 Fordham Urban L.J. 821 (Apr. 1999); Russell G. Pearce, *Foreword: The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 Fordham L. Rev. 1075 (Mar. 1998); *Faith and the Law Symposium*, 27 Tex. Tech. L. Rev. 911 (1996). See Joseph G. Allegretti, *The Lawyer's Calling: Christian Faith and Legal Practice* (Paulist Press 1996) [hereinafter Allegretti, *The Lawyer's Calling*]; Abbe Smith & William Montross, *The Calling of Criminal Defense* 50 Mercer L. Rev. 443 (Winter 1999); Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 Cardozo L. Rev. 1577, 1578-1579 (May 1993) [hereinafter Levinson, *Jewish Lawyer*]. Having dedicated an earlier work to Shaffer, Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 Fordham L. Rev. 1469 (Mar. 1998) [hereinafter Lesnick, *The Religious Lawyer*], my tribute to him here is to attend in careful detail to the content of what he has been advocating. But for the norms of scholarly writing, I would have entitled this essay, *Taking Tom Shaffer Seriously*.

religiously important? Let me come at this question by acknowledging a need to offer a word on behalf of the second stonemason—or lawyer. Islamic scholar Seyyed Hossein Nasr attributes to the Prophet Muhammed the thought (which I believe finds resonance in the Jewish and Christian traditions as well) that “when a man works to feed his family he is performing as much an act of worship as if he were praying.”⁴ By now, the idea is hardly new that almost *any* work may be a vocation or calling, may have religious importance.⁵ The “religious connotation”⁶ of the work is there to be perceived and acted upon, and the task of seeing past the inevitable encrustations of work-a-day life is perhaps no less challenging for masons than for lawyers. Perhaps it is also no less *achievable* either, at least at times, for a mason building an office tower than a cathedral, or for a lawyer drafting an opinion letter in a loan application than a brief in a major civil-liberties suit.

Understanding the religious significance of working to feed one’s family infuses it with meaning, for it makes of work the beginning of the assumption of responsibility for the well-being of another—but only the beginning, for the focus is still on material well-being and on those “others” closest to the worker. Indeed, this understanding complicates the task of deciding how one is to go about one’s work, for commitment to the material well-being of one’s family is a moral hazard as well, with the potential for blinding one to the moral significance of the costs that decisions made in work (better to “feed one’s family”) may impose on others.

By contrast, the third mason, and Shaffer’s lawyer, open themselves to both the deeper meaning and the lurking greater complexity of work. By understanding that its religious significance inheres in the manner in which work is carried on and in the radiating consequences of its completion—a cathedral, a business financing, a major civil-liberties decision—the third worker acknowledges responsibility for its effects on a community that extends far beyond one’s family, and may recognize as well that what one’s family (especially children) needs goes far beyond material sustenance.⁷

In moving toward this broader vision, the question that might first come to mind may be termed a substantive one: How does an awareness

4. Seyyed Hossein Nasr, *Ideals and Realities of Islam* 98 (1967).

5. For a concise discussion of the evolution of the meaning of the words, *vocation* and *calling*, see Allegretti, *The Lawyer’s Calling*, *supra* n. 3, at 27-32.

6. Nasr, *supra* n. 4, at 98.

7. Arthur Miller’s *All My Sons* is a classic text illuminating both aspects of this complexity. Arthur Miller, *All My Sons: A Play in Three Acts* (Reynal & Hitchcock 1947).

of religious significance change what we do and don't do in our work? One answer to this question is that this awareness sets limits on what we will do or decline to do in our professional life. Much of the writing to date of the "religious lawyering movement" seeks to illustrate or claim legitimacy or respect for such limits. It is advocacy by or on behalf of assertedly religious lawyers, addressed to the law itself, making a claim on that law as manifested in the governing norms of professional responsibility.⁸

Shaffer's deeper, more far-reaching challenge is directed not to the law but to religious lawyers themselves. He poses a "procedural" question, one that has the power to reorient our professional lives and the role of "professional guidance" within them: Where do we turn for guidance in answering what I have called the substantive question? His response: "Called out of the church" as we are to enter the practice of law, it is there we return for guidance in carrying it on.

[T]he lawyer stands in the community of the faithful and looks from there at the law When the study or practice of law becomes painful or confusing for her, she returns to the community of the faithful, and talks there, in that religious community, about her professional life.⁹

It is the meaning and significance of this response that I propose to examine here.¹⁰

8. I have examined the legal question that arises when religiously grounded limits and professionally grounded norms directly conflict, in Lesnick, *The Religious Lawyer*, *supra* n. 3. The specific context there was the assignment of an attorney, conscientiously opposed to abortion on religious grounds, to represent a minor seeking a judicial "bypass" of parental consent to an abortion.

9. Shaffer, *Faithful Community*, *supra* n. 2, at 198.

10. It is important to note two observations about the boundaries of this essay.

First, I focus more on the implications of Shaffer's fundamental stance, looking at the profession from within the lawyer's community of faith, than on the merits of an initial decision to take that approach. Jack Sammons is perhaps the leading proponent of the polar stance, seeking to articulate and apply norms that are to be found *within* the practice of law itself. For the most recent and most fully articulated statement of his view, see Jack L. Sammons, "Cheater!": *The Central Moral Admonition of Legal Ethics, Games, Lusory Attitudes, Internal Perspectives, and Justice*, 39 Idaho L. Rev. 273 (2003). It hardly rebuts his position for me to acknowledge that it bespeaks a faith in the moral resources of the legal profession that I no longer can muster.

Second, it should be borne in mind that the following discussion deals only with the state of mind with which a lawyer approaches a client. The action that the lawyer ultimately takes depends also on the resulting lawyer-client interaction. For some of Shaffer's thoughts on the "moral conversation" between lawyer and client, see Shaffer, *Simon*, *supra* n. 2; Shaffer, *Human Nature*, *supra* n. 2. For other thought-provoking discussions of this difficult question, see e.g. Robert E. Rodes, Jr., *Forming an Agenda—Ethics and Legal Ethics*, 77 Notre Dame L. Rev. 977 (Mar. 2002) [hereinafter Rodes, *Agenda*]; Amelia J. Uelmen, *Can a Religious Person Be a Big Firm Litigator?*, 26 Fordham Urb. L.J. 1069, 1093-1109 (Apr. 1999) [hereinafter Uelmen, *Religious Person*]; Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons*

"Church" is Shaffer's short-hand Christian term for this community of the faithful, but he does not mean by it his institutional Roman Catholic Church, whether his Bishop, pastor or parish. First, he insists, "any reservation of the responsibility for moral discernment to a specialist must be challenged, . . . especially if that specialist is understood to hold authority partly because he is one of a category of persons separated from the life-situations of people making moral choices."¹¹ His parish congregation, too, falls short; it "gathers for worship on weekends, and once in a while for a picnic or a fish fry. It does not gather for moral deliberation."¹² It is only in congregations of "fundamentalists, Pentecostals, Orthodox Jews, and Anabaptists" that the members are likely to be "sufficiently isolated by choice or circumstance" for Shaffer to be able to "suppose" that "the worshipping community and the deliberating community are *routinely* the same."¹³

Shaffer has found "church" in a Presbyterian Sunday School class, with "the sister and brother Christians with whom I prayed, broke bread, cried and argued."¹⁴ He has found it among "the circle of believers I live and work with, some close by, some who talk to me on the telephone or in letters, who take seriously the enterprise of being Jews or Christians in the American legal profession."¹⁵ He has found it in "a circumstantial group of believers on a university faculty—in somebody's office, in the hall, on a walk outside, or at lunch,"¹⁶ and also, I believe, in the group of faculty and student colleagues with whom he practices law in the Notre Dame legal aid clinic.¹⁷

"Believers," it seems evident from his examples, need only be people of faith, not necessarily members of a specific congregation or even of the same religious tradition. The presence of a religious

from Dostoyevsky, 35 Hous. L. Rev. 327, 378-397 (Summer 1998); Paul R. Tremblay, *Practiced Moral Activism*, 8 St. Thomas L. Rev. 9 (Fall 1995).

11. Shaffer, *Religious Congregations*, *supra* n. 2, at 976 (quoting the Mennonite scholar John Howard Yoder, *The Priestly Kingdom: Social Ethics as Gospel* 64 (1984)). Compare Shaffer's moving description of the education of Fr. Samuel Ruiz Garcia, former Bishop of San Cristobal, by his parishioners: "Bishop Ruiz *discovered* the Church in Chiapas." *Id.* at 980 (emphasis added).

It is important to note and bear in mind that Shaffer is careful to acknowledge "respect for teachers—for what Catholics call 'the magisterium' of the church This respect . . . has nothing to do with papal infallibility; in my view it is best understood as resembling the rabbinical tradition in Judaism." Shaffer, *Servant*, *supra* n. 2, at 1351, n.18.

12. *Id.* at 1350-1351. See Shaffer, *Religious Congregations*, *supra* n. 2, at 968.

13. Shaffer, *Servant*, *supra* n. 2, at 1352 (emphasis in original).

14. Shaffer, *American Catholics*, *supra* n. 2, at 22.

15. Shaffer, *Faithful Community*, *supra* n. 2, at 199. For his explanation of the oddity of the use of "church" in speaking of Jews, see Shaffer, *Servant*, *supra* n. 2, at 1356.

16. Shaffer, *Servant*, *supra* n. 2, at 1353.

17. Shaffer, *Law Office*, *supra* n. 2, *passim*, especially at 609-613.

congregation is neither sufficient nor necessary to provide a "church" in the present context, for Shaffer's church is a gathering of people defined not by its ecclesial standing, but by its conception of its task. What is required is, and is only, that "questions of priority and behavior are resolved in discussion," in a manner that gives the participants warrant to believe that the Holy Spirit sat with them and joined in.¹⁸

What are the characteristics of participation in Shaffer's "churchly" processes of ethical discernment? Shaped though they are by the particularity of his religious consciousness, the first, and the most fundamental, characteristic is one that would apply to virtually any religiously based approach: The processes and outcomes of moral deliberation, grounded as they are in the sovereignty of God, have *priority* over those of the profession. "[We] talk about the government as a problem for faith, rather than faith as a problem for government."¹⁹ Shaffer quotes a 19th Century Lithuanian Rabbi—"Israel was created to be an illumination unto the nations"—and adds: "Not to learn society's lessons, but to teach other lessons to itself and to 'society.'"²⁰ Learning *professional* responsibility, what we all learned and some of us teach, moves us (in Sandy Levinson's words) toward "the creation, by virtue of professional education, of almost purely fungible members of the respective professional community."²¹ To Shaffer, such a practice is "[a] pernicious form of corruption," a "familiar complex of pretenses."²²

It is essential to bear in mind what tends to fade into the background in Shaffer's discussion, focused as it is on particular moments "when the study or practice of law becomes painful or confusing."²³ The consciousness of "religious importance" in law practice, of being "called out of the Church" to become a lawyer, affects one's stance toward lawyers' work in its entirety, not merely one's search for ethical discernment in problem situations. Indeed, specific searches are grounded and oriented by the more fundamental infusion of meaning that is enabled by the recognition that, in the words of Shaffer's long-time colleague Robert Rodes, "we are all put here to love and

18. Shaffer, *Servant*, *supra* n. 2, at 1350-1351, referring to the letter to the Gentiles approved by the Council of Jerusalem: "The Holy Spirit and we have agreed . . ." Acts 15: 28.

19. Shaffer, *American Catholics*, *supra* n. 2, at 10.

20. *Id.* at 10-11 (quoting the Netziv of Volzhin from J. David Bleich, *Tikkun Olam: Jewish Obligations to Non-Jewish Society*, in *Tikkun Olam: Social Responsibility in Jewish Thought & Law* 61, 91 (David Shatz, et. al. eds., 1997)).

21. Levinson, *Jewish Lawyer*, *supra* n. 3, at 1578-1579.

22. Shaffer, *Tension*, *supra* n. 1, at 49.

23. Shaffer, *Faithful Community*, *supra* n. 2, at 198.

serve."²⁴ The experience of meaninglessness, laying so heavily on many lawyers today, is (hopefully) transformed by this reorientation.²⁵

A second distinguishing characteristic of "churchly" moral discernment is that it is inescapably *communal*. Shaffer is at his most energetically critical of the legal profession when he engages the deep-seated individualism of our contemporary culture. "Our students," he observes, "however sensitive and well meaning, are captives of an ethic that leaves each of them . . . morally alone; each of them as her own moral tyrant; each of them . . . a captive of the Enlightenment's exaltation of abstract masculine reason."²⁶ Shaffer quotes liberation theologian Gustavo Gutierrez: "[T]he following of Jesus always supposes membership in the assembly, the *ecclesia*. The following is . . . a personal, free decision on my part, but I cannot live it out except in a community."²⁷ "It is not biblically sufficient," Shaffer asserts, "for a believer to go off by himself, alone with God, and figure out how his faith is to be reconciled with what he works at, or how his faith is to inform what he does when he works."²⁸

While to some degree the communal quality of religiously grounded moral discernment seems inherent in a religious world-view, it is an outlook particularly expressive of a Roman Catholic, and perhaps also a Jewish, outlook. There are certainly religious traditions in which a "believer alone with God," at least when he or she is accompanied by Scripture, is not a self-contradiction. More seriously, Shaffer's juxtaposition of an insistence on the communal aspect of religiously ground moral discernment, with his willingness to admit that shifting groups of individuals of diverse religious commitments and affiliations can act as "church," gives rise to an important latent difficulty, which I

24. Rodes, *Agenda*, *supra* n. 10, at 977. The objects of Rodes' verbs are, of course, God and neighbor. Cf. M. Cathleen Kaveny, *Billable Hours in Ordinary Time: A Theological Critique of the Instrumentalization of Time in Professional Life*, 33 Loyola U. Chi. L.J. 173, 184 (Fall 2001) [hereinafter Kaveny, *Ordinary Time*]: "[I]t is a serious mistake for lawyers charging for their services to think that they are selling something that is exclusively theirs, despite the fact that they are billing their time."

25. This in no way suggests that the transformation is easily brought into daily awareness. See Allegritti, *Lawyer's Calling*, *supra* n. 3, at 20-21, 32-33; Howard J. Vogel, *The Terrible Bind of the Lawyer in the Modern World: The Problem of Hope, the Question of Identity, and the Recovery of Meaning in the Practice of Law*, 32 Seton Hall. L. Rev. 152 (2001).

For a stunning suggestion of the possibilities of transformation that a Christian consciousness might bring to the practice of law, see William Stuntz's speculation on how Jesus carried on his trade as a carpenter—what might have been "his motivations and attitudes toward his work, the ways he treated his customers and his coworker." William J. Stuntz, *Christian Legal Theory*, 116 Harv. L. Rev. 1707, 1721-1722 (2003).

26. Shaffer, *Religious Congregations*, *supra* n. 2, at 963-964.

27. *Id.* at 965.

28. Shaffer, *Servant*, *supra* n. 2, at 1353.

will address below.

Shaffer's conception of religiously grounded decisionmaking has a third aspect that, while it is in no way idiosyncratic, is often not linked with the emphasis on communal discernment that he insists upon. For, to Shaffer, *process* has a priority over outcome, and decisionmaking is relational rather than hierarchical.²⁹ Recognition of divine sovereignty gives rise to a *teaching* rather than a governing model. What goes on in Shaffer's church is that we "sit down together and think things out,"³⁰ "what is important to communal discernment, after one assumes the presence of God in the discussion, is that everyone be allowed to speak, and that everybody else feel bound to pay attention."³¹ The answers given are "not inevitable" and "only provisional."³² No "specialist" has authority.³³ It is this principle, I believe, that leads Shaffer to adopt what I have termed his fluid concept of "church."

This lack of emphasis on answers and on the authority of text or cleric is uncongenial in contemporary America. Our culture—most emphatically including our legal culture—wants always to know which side is the "winner" (here, has the winning moral argument), and the "command-and-obey" approach to religion is ready at hand to believers and skeptics alike. Yet, Shaffer, while insisting that ethical questions are preeminently religious and that religious discernment is preeminently communal rather than individualist, rejects authoritarian religion and emphasizes a search for ethical discernment that seems almost unconcerned with its outcome. This stance, congenial as I find it,³⁴ is counter-intuitive for many.

Shaffer doesn't even say a great deal about what considerations should go into the process of ethical discernment—in lawyers' terms,

29. With Shaffer specifically in mind, Milner Ball quotes Paul Lehmann's assertion that "the environment of decision, not the rules of decision, gives to behavior its ethical significance." Milner S. Ball, *Commentary on the Work of Thomas L. Shaffer: Out of the West Rides an Unmasked Stranger* . . ., 10 J. L. & Relig. 339, 341 (1993-1994) [hereinafter Ball, *Unmasked Stranger*] (emphasis in original). Ball adds: "That is why lawyers' ethics is not a matter of individual choices but of communities and origins." *Id.*

30. Shaffer, *American Catholics*, *supra* n. 2, at 12. "[T]he way we believers decide whether an idea is good or bad" has greater significance than the answer. *Id.* at 23.

31. Shaffer, *Simon*, *supra* n. 2, at 917.

32. Shaffer, *Servant*, *supra* n. 2, at 1353 n. 25. "Questions" are more significant than "rules or principles." Shaffer, *Religious Congregations*, *supra* n. 2, at 966. "[W]hatever would come out of moral discernment for believers who are lawyers would not be, as to anyone, coercive." Shaffer, *Towering Figures*, *supra* n. 2, at 237.

33. See *supra* n. 11.

34. I have developed at some length my own understanding of the relation between God and humanity in Howard Lesnick, *Listening for God: Religion and Moral Discernment* (Fordham U. Press 1998) [hereinafter Lesnick, *Listening for God*]. This is not the place to rehearse or defend my views.

what "factors" are "relevant." I have learned much from some two decades of involvement in Quaker practice, where the *primary* route to moral discernment is silence.³⁵ So to me his emphasis seems to give cognition an appropriate place: After all, with his Sunday School classmates he "prayed, broke bread, cried *and argued!*" More seriously, prayer, tears, and table fellowship have without question proven themselves sound routes to moral discernment in the experience of many, and at bottom I believe that Shaffer's espousal of a process orientation is not so much a product of analytical engagement as of his *experience*.³⁶

In admitting to his "circle of believers" those of differing faith traditions, and emphasizing "discussion" as the primary way to carry on moral discernment, Shaffer may appear to discount the importance of participating in regular religious practice. To "take seriously" the profession of a religious identity may require ongoing participation in the *practices* expressive of that identity.³⁷ Milner Ball makes the point powerfully, in the language of his own tradition: "Exactly how does a believer receive community guidance in how faith is realized in work? Isn't it by hearing the Word preached and participating in the sacraments"?³⁸ Even mere "discussion" is something more—becomes a practice—when carried on with the possibilities, and within the constraints, of the language of a specific faith tradition. The shared belief of a tradition, James Boyd White observes, is "not so much belief in the propositions asserted . . . , but belief in the value, actuality, presence, vitality, and reality of the conversation—belief that this is the right way to talk."³⁹ Shaffer's writings, addressed as they are to readers

35. For a brief account of my experience in that regard, see *id.* at 91-92. Quaker silence, it hardly need be said, is "not the mere outward silence of the lips," but a challenging active practice requiring "a deep quietness of heart and mind, a laying aside of all preoccupation with passing things." Caroline Stephen, as quoted in Daniel A. Seeger, *Silence: Our Eye on Eternity* 8 (Pendle Hill Pamphlet No. 318, Dec. 1994). It is, moreover, primarily a communal act, with the Meeting an essential participant in an individual's discernment, though no words be exchanged.

36. Some two decades ago, I ventured to defend a willingness to admit tears, prayers, and even anger in argument, into thinking about legal questions, but on the rather limited ground that they in fact played a part in the lives and minds of the people who brought "legal questions" to lawyers. Howard Lesnick, *Legal Education's Concern with Justice: A Conversation with a Critic*, 35 J. Leg. Educ. 414, 418 (1985). I did not then acknowledge the role that those nonrational acts properly play in the formation of our own moral judgments as lawyers. See my more recent broader recognition in Lesnick, *Listening for God*, *supra* n. 34, at 89-90.

37. "[A] repetitive religious experience . . . comes in time to haunt daily life and cast a kind of indirect light upon it." Clifford Geertz, *Islam Observed: Religious Development in Morocco and Indonesia* 110 (Yale U. Press 1968) [hereinafter Geertz, *Islam Observed*].

38. Personal ltr. from Milner Ball to Howard Lesnick (Mar. 15, 2002) (on file with Howard Lesnick).

39. Personal ltr. from James Boyd White to Howard Lesnick (Apr. 1, 2002) (on file with

of secular professional journals, can be seen as regarding the ongoing religious practice of a person seeking moral guidance as no more than background to the concrete search for moral guidance in a discrete situation.

It is important not to hold this concern too tightly. Shaffer's turn to a fluid "church" is largely, I believe, a response to his dissatisfaction with much of the contemporary religious landscape. In turning to *ad hoc* assemblies of believers drawn from various traditions, he has focused on what its members *have* rather than what they lack, recognizing that it may be more salient that a community of moral discernment "take[s] seriously the enterprise of being Jews or Christians in the American legal profession"⁴⁰ than that it professes a single faith tradition. In actuality, the members of a Shafferian "discerning community," even if constituted *ad hoc*, will often share a faith tradition, or find significant commonalities in their (partially) differing traditions. In such cases they may turn naturally to specific practices through which moral discernment takes on a religious character. What is lost in coherence may be offset by the gain in spirit.

Shaffer's taciturnity about the outcomes and the specifics of the processes of religiously grounded moral inquiry should not obscure the fact that the inquiry is inherently not neutral. One of his articles, *Faith Tends to Subvert Legal Order*,⁴¹ underscores that reality: While lawyers and the law itself incline toward "the social, political, and economic opinions of those we serve . . . the wealthy and powerful,"⁴² the religious community of which he writes, rooted in "[c]are for the oppressed,"⁴³ is an "alien and unsettled community," "disturbed and disturbing," yet "gifted with enduring certainty"⁴⁴—a sure prescription for subversion! Yet, as is all too well known, religion has functioned as much to bolster as to subvert "legal order,"⁴⁵ and the presence of an institutional church is no more sufficient than it is necessary to meet

Howard Lesnick).

40. Shaffer, *Faithful Community*, *supra* n. 2, at 22.

41. Thomas L. Shaffer, *Faith Tends to Subvert Legal Order*, 66 Fordham L. Rev. 1089 (Mar. 1998).

42. Shaffer, *Religious Congregations*, *supra* n. 2, at 967.

43. *Id.* at 979.

44. The quoted words are the headings of sections of the text; see *id.* at 970-975.

45. Among many examples of the indictment of religion on this ground, see Daniel C. Maguire, *The Moral Core of Judaism and Christianity: Reclaiming the Revolution* (Fortress Press 1993); Sulak Sivaraksa & Tom Ginsburg, *Seeds of Peace: A Buddhist Vision for Renewing Society* (Parallax Press 1992); Merold Westphal, *Suspicion and Faith: The Religious Uses of Modern Atheism* (W.B. Eerdmans Pub. Co. 1993).

Shaffer's criteria of a proper locus of moral discernment.⁴⁶

It should occasion no surprise, therefore, to observe that, grounded though Shaffer's approach is in his Roman Catholic tradition, it can operate subversively against Catholic doctrines themselves. Shaffer recounts a telling example from the "advance directives" practice of the Notre Dame legal aid clinic. Faculty colleagues had argued "it is immoral for our office to prepare documents that might be used to disconnect artificially provided food and water from a healthy person."⁴⁷ The issue has generated countless articles and conferences. Nonetheless:

Lawyers who read what the judges and the "thinkers" say about it . . . and then talk to an elderly widow who is deeply persuaded that she does not want "the tubes" inserted in her body when she is dying . . . seem to have nothing interesting to talk about [We] honor the reluctance of any student lawyer who objects to preparing [such] documents [but] no lawyer has refused to prepare the documents; we see almost no indication that any lawyer in the office is persuaded by the objections of those who question what we are doing.⁴⁸

The call of faith is experienced through the concrete reality of a student's encounter with the moral dimension of his or her work on behalf of a specific person (the client), and that experience may trump the generalizations of a received religious tradition.⁴⁹

46. A sympathetic critic has eloquently described the problem in these terms: [The] attempt to describe the "community of the faithful" as a body of resident aliens is as theologically necessary as it is sociologically suspect. Skeptical, pragmatic, successful, individualistic, secular America shows up in church on Sunday morning. Lawyers show up, blissfully unaware that they have entered a closed-off, alternative polity.

These facts do not invalidate Shaffer's project. (To the contrary: they make it more urgent!) But they mean he will have a tough time getting a hearing. For his believer-lawyers will first have to learn to become the strangers, "minorities," and "Others" that Moses' God requires them to be [P]ower-holders have difficulty being outcasts.

Leslie E. Gerber, *Can Lawyers Be Saved? The Theological Legal Ethics of Thomas Shaffer*, 10 J. L. & Relig. 347, 365, 366 (1993-1994).

47. Shaffer, *Law Office*, *supra* n. 2, at 611.

48. *Id.* at 611-612.

49. Shaffer has elsewhere quoted the tellingly pertinent insight of Herbert Fingarette: You wrongly treat the virtue of honesty and truthfulness in terms of an abstract principle to be understood as a logical universal. This seems to me to be incompatible with the spirit of responding to particular human beings, rather than living a moral life conceived ultimately in terms of abstract principles.

Thomas L. Shaffer, *American Legal Ethics: Text, Readings, and Discussion Topics* 17 (Matthew Bender & Co., Inc. 1985). I am indebted to Milner Ball, who in personal correspondence has developed this thought with great power and eloquence.

Shaffer's emphasis on process should not, however, be misread as an invitation to moral lassitude or to easy rationalization of the call of self-interest. We are used to what I might term a "jurisdictional" approach to ethical decisionmaking. Some acts are forbidden, such as commingling client funds; some acts are required, for example, disclosing client perjury after unsuccessful attempts at remonstrance. These are in the zone of law.⁵⁰ The middle zone—where we "may" rather than "shall" or "shall not"—is outside that zone, and is for the most part met with professional silence. A lawyer, according to the *Model Rules of Professional Conduct*, is to be "guided by personal conscience and the approbation of professional peers," through the "exercise of sensitive professional and moral judgment."⁵¹ In one sense, this is as it must be, for the Rules are public law, and necessarily do not tell us what to do when we are legally free to choose. But lacking professional or cultural support for ways of thinking about difficult moral issues not subject to mandatory rules, we lawyers are, first, inevitably left "morally alone,"⁵² to decide as we will; more deeply, however, we find ourselves not at all alone, for we are in the dominating company of our clients', our partners', and our own self-interest, and in the grip of a reigning ideology of profession and culture that tells us that to balk at doing what is legally permissible is very likely an imposition on one's client.⁵³

In their origins, and in some versions of their practice, the religious traditions are a deep well of guidance for decisionmaking "beyond the rules." *Deuteronomy* admonishes us in words of obligation: "You must do what is right and good,"⁵⁴ "You shall walk in his ways";⁵⁵ and Jesus calls: "[F]ollow me."⁵⁶ But the idea of "a duty to reach beyond duty"⁵⁷

50. Rules 1.15(a) (commingling) & 3.3(a)(3) (2003) (as amended, 2002, but not yet adopted by any State) (client perjury), *Model Rules of Professional Conduct*, 2003 ed. (Am. Bar Assoc. 2002) [hereinafter *ABA 2003 MRPC*]. For the earlier version of Rule 3.3(a)(3), see ABA Model R. Prof. Conduct 3.3(a)(4) & Cmt. 11, in Stephen Gillers & Roy D. Simon, *Regulation of Lawyers: Statutes and Standards* 219 (Aspen L. & Bus. 2002).

51. *ABA 2003 MRPC*, *supra* n. 50, at "Preamble," paras. 7 & 9.

52. See Shaffer, *Religious Congregations*, *supra* n. 2, at 963-964.

53. For one carefully reasoned example among dozens of such suggestions, see Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613 (1986) [hereinafter *Pepper, Amoral Role*].

54. Deut 6: 18.

55. Deut 28: 9.

56. Matt 16: 24 (among several other moments).

57. See Aharon Lichtenstein, *Does Jewish Tradition Recognize an Ethic Independent of Halakha?*, in *Modern Jewish Ethics* 62 (Marvin Fox ed., Ohio St. U. Press 1975). Observes Rabbi Lichtenstein, we are commanded to "aspire." *Id.* at 81. I discuss this idea briefly in Lesnick, *Listening for God*, *supra* n. 34, at 143-144. For an imaginative analysis, from a secular perspective, of the question whether there can be a moral obligation to reach beyond moral

does not sit well with our mainstream faith communities, which despite their origins have been profoundly influenced by an understanding of personal autonomy as what Michael McConnell calls "willfulness—the ability to do what I want to do, when I want to do it, without being judged or constrained," apart from the constraints of positive law.⁵⁸ (More tradition-oriented faith communities may have a more demanding view of religiously grounded constraints, but outside the areas of constraint they are no less inclined to treat the choice as simply a matter of discretion). For this reason, most of us would likely find, with Shaffer,⁵⁹ that our faith communities, clerics and laity alike, would respond to a request for moral guidance with not much more than sympathy at the difficulty of the question and support for whatever we might come to decide is the right thing to do.

Shaffer won't let himself, and his "church," off the hook so easily. As we will see, the sorts of religiously grounded scruples that lead Shaffer to find aspects of law practice "painful or confusing"⁶⁰ are not simply the products of the categorical prohibitions expressed in or deduced from his religion. Shaffer, I believe,⁶¹ would concur with his Notre Dame colleague Cathleen Kaveny, who describes religion as:

best understood not as a set of isolated propositions to be understood, accepted or rejected, but as a 'comprehensive interpretive scheme[], usually embodied in myths or narratives and heavily ritualized, which structure[s] human experience and understanding of self and world.'⁶²

It generates, as Amelia Uelman felicitously puts it, not "precise maxims"⁶³ but "an internal conviction about the essence of [one's] nature as a person and the consequent relationships with God and with others," prompting the desire to act out of a "vision of the common

obligation, see Heidi M. Hurd, *Duties Beyond the Call of Duty*, 6 *Jahrbuch für Recht und Ethik* (Annual Review of Law and Ethics) (1998).

58. See Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, in *Christian Perspectives on Legal Thought* 5, 14 (Michael McConnell, et al. eds., Yale U. Press 2001). Stephen Pepper sees this understanding as a corollary of our prevailing political ethic. Pepper, *Amoral Role*, *supra* n. 53, at 616-617. For a brief critique of this position, see Howard Lesnick, *Being a Lawyer: Individual Choice and Responsibility in the Practice of Law* 49-51 (West Publ. Co. 1992).

59. See Shaffer, *Servant*, *supra* n. 2, at 1351.

60. See Shaffer, *Faithful Community*, *supra* n. 2, at 198.

61. I proceed cautiously here, aware that I am attributing to Shaffer views expressed by others, which I believe are congruent with his. The danger is that I may be influenced by the fact that they are congruent with my own.

62. See Kaveny, *Ordinary Time*, *supra* n. 24, at 176, quoting George A. Lindbeck.

63. See Uelman, *Religious Person*, *supra* n. 10, at 1091.

good."⁶⁴ The aim is to seek to grasp the underlying premises of a faith tradition, and to use them analogically rather than deductively.⁶⁵ Recent scholarship contains several rich examples of this conception.⁶⁶

By freeing the processes of communal moral discernment from the coercive influences of an authoritarian religion, and perhaps of the discerning community itself,⁶⁷ Shaffer makes it possible to open before himself, and lay before us, a more far-reaching set of moral challenges than we ordinarily hold still for. Consider first his responses to questions within the cognizance of the rules or principles of the professional codes:⁶⁸

1. Would it be warranted, *religiously*, for me to follow professional norms that permit or require me to treat "third parties"—that is, everyone other than my client—as outside the orbit of my care and concern, so that:

—having withdrawn from representing a securities registrant fraudulently claiming assets it did not have, I do not disclose the reason for my withdrawal to prospective successor counsel?⁶⁹

64. *Id.* at 1079. Indeed, Uelmen observes, a focus on "highly particular" maxims actually undermines support for religiously-influenced decisionmaking in law practice, for it "could portray a caricature of religious lawyers as immature and insensitive, lacking a basic sense of moral complexity, and awkward and bumbling in the course of their interactions in a pluralistic society." *Id.* at 1089.

65. For a penetrating discussion of the method of analogy in this context, see Marie A. Failing, *The Justice Who Wouldn't Be Lutheran: Toward Borrowing the Wisdom of Faith Traditions*, 46 Clev. St. L. Rev. 643, 655-660 (1998) [hereinafter Failing, *Lutheran Justice*].

66. In Uelmen, *Religious Person*, *supra* n. 10, at 1090-1091, Amy Uelmen questions the tendency of many commentators to pose one-dimensional questions of clashes between professional norms and flat prohibitions against participating in specific acts, such as abortions, blood transfusions, and divorces, neglecting the more far-reaching call of more subtle religious norms. In Kaveny, *Ordinary Time*, *supra* n. 24, at 181-214, Cathleen Kaveny articulates and contrasts the underlying premises of the conception of time prevalent in law practice (and the broader capitalist culture) with that of the Roman Catholic tradition, describing with particularity the profound influence of that set of implicit premises on lawyers' stance toward their work life. In Failing, *Lutheran Justice*, *supra* n. 65, at 665-701, Marie Failing tests some of the unacknowledged premises of Chief Justice Rehnquist's jurisprudence, which she describes as "a limited role for the judicial use of reason" (666), "a preference for 'order over liberty'" (667), the absence of a "moral critique available . . . to substantiate the propriety of particular legislation" (667), and "a thorough lack of rhetorical concern for the neighbor," (693) against some fundamental principles of Lutheran theology: law as divine gift rather than divine command, a paradoxical affirmation of and deep suspicion of power, and "the premise that neighbor-love is responsive to God's love." (693)

67. For the caveat, see *infra* nn. 82-84 and accompanying text.

68. Most of the examples that follow arose in Shaffer's practice as a legal aid lawyer in the Notre Dame Clinic.

69. Shaffer, *Oxymoron*, *supra* n. 2, at 12-13. To Shaffer, the "third parties" are not so much the lawyer's "brother and sister" attorneys but the "significant number of investors [who] were cheated when the securities were marketed." *Id.* at 13.

For a well-known discussion of a similar question a generation ago, see John M. Ferron,

—I agree to draft a will for my elderly client, leaving his considerable estate to neighbors who “look out for his welfare,” and totally (albeit lawfully) disinheriting his two adult children and their children?⁷⁰

—I agree to draft the papers for a grandmother seeking to adopt the infant child of her daughter so that she can qualify for an armed forces training program that will not accept her for the program so long as she has custody of a child, where the daughter has consented to the adoption and neither woman seems interested in pursuing instead available temporary shifts in custody?⁷¹

2. Would it be warranted, *religiously*, for me to follow professional norms that require me to subordinate what might be the greater justice of my client’s needs to the self-justifying premises of a deeply flawed political order, so that:

—I cannot allow a client who has adequate grounds to have his immigration status adjusted, notwithstanding that he has been working here illegally, to answer “none” to a question on the application seeking the name and address of the applicant’s employer?⁷²

—I cannot give or lend money (except for court costs) to a client?⁷³

The Corporate Lawyer’s Obligation to the Public Interest, 33 Bus. Law. 1253, 1257-1258 (1978). Ferren finds professional norms to preclude disclosure, a result that he criticizes, but on the ground that it permits using false information to “shop for a lawyer.” *Id.* at 1258. The endangered aircraft passengers in his account (like the defrauded investors in Shaffer’s example) are apparently off the radar screen.

70. Shaffer, *Human Nature*, *supra* n. 2, at 14. Here, although there is no professional rule requiring the lawyer to undertake this representation, the contours of ABA 2003 MRPC Rule 1.2 provide multiple reassurances that such a course of action bears no burden of justification.

71. Shaffer, *Simon*, *supra* n. 2, at 905-907; Shaffer, *Oxymoron*, *supra* n. 2, at 17; Shaffer, *Human Nature*, *supra* n. 2, at 4-9. Shaffer’s premise here is that, should the daughter later want to recover her parental rights and the grandmother then resist, local law might make it virtually impossible for the daughter to succeed; his “conscience says to [him] that God wants children to be with their mothers.” Shaffer, *Oxymoron*, *supra* n. 2, at 17. (On Shaffer’s understanding of the Indiana law, see Shaffer, *Human Nature*, *supra* n. 2, at 7; Shaffer, *Simon*, *supra* n. 2, at 905, *supra* n. 17.)

Ethical Consideration 7-8 of the ABA Model Code of Professional Responsibility, still in force in a number of States, famously authorizes the lawyer to include morally grounded considerations in his or her advice to the client. It is to remain clear that the ultimate decision is for the client, but attorney withdrawal to avoid carrying out the client’s wish is expressly permitted. Except for the assertion that the lawyer “should bring to bear . . . the fullness of his experience” in advising the client, there is again no burden of justification imposed for going forward without hesitation as the client wishes.

72. This example was supplied by Bill Simon; see Shaffer, *Simon*, *supra* n. 2, at 911-912. The question is a “trap.” Although employment is irrelevant to the merits of the petition, if it is disclosed “the petition is dead at the mailbox.” *Id.* at 911. But ABA 2003 MRPC Rule 3.3(a)(1) or (34) may prohibit non-disclosure of a client’s false statement if the Immigration Service is deemed to constitute “a tribunal.” Gillers, *supra* n. 50, at 219.

73. Shaffer, *Religious Congregations*, *supra* n. 2, at 973. ABA 2003 MRPC Rule 1.8(e) permits institutional defendants routinely to use the law’s delay to force necessitous plaintiffs to

—I should not allow an elderly woman, who has been sharing an apartment with another woman (whom she helps support but for whom she cannot claim a tax deduction) and is offered a rent-free apartment over her employer's garage, to exclude the rental value of the apartment from her gross income on the ground that she is living there "for the convenience of the employer"⁷⁴

In presenting these cases, I understand Shaffer to be making four assertions:

(1) *The public norms reflected in the rules or principles in question rest on political judgments, that is, contestable conclusions about the contours of a just polity.* Although law students, and law teachers, act at times (especially in first-year, common-law subjects) inconsistently with this proposition, I do not regard it as seriously debatable.

(2) *The plausibility of those judgments cannot foreclose the question whether it is consonant with "God's will" for a lawyer to apply a particular rule to the injury of a specific person or group of persons affected by that act.* From a religious orientation, one can support this proposition without debating the relative merits of act-oriented versus rule-oriented approaches to morality. The "proof text" is as fundamental as any can be: "You shall have no other gods before me."⁷⁵ Binding one's conscience to the positive law is a manifest act of idolatry.⁷⁶

(3) *In each instance there is reason at least to inquire seriously whether that consonance is lacking.* Shaffer does not argue the merits of

accept inadequate settlements. See the brief, veiled reference to this problem in Charles W. Wolfram, *Modern Legal Ethics* 509 (West Publ. Co. 1986).

74. Shaffer, *Simon*, *supra* n. 2, at 915-916. See Simon's discussion of the issue, in William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* 146-147 (Harv. U. Press 1998). The claim is presumably groundless under existing law. ABA 2003 MRPC Rule 3.1, probably therefore prohibits a lawyer from making or advising a client to make it. Gillers, *supra* n. 50, at 211. Simon would give much, and Shaffer little, moral force to the "statutory purpose" in restricting deductibility, and to the limitations on the ability of the IRS to discover on audit claims of deductions not warranted under the law.

75. Exod 20: 3.

76. Shaffer has made this point more than once. See e.g. *Tension*, *supra* n. 1, at 40; Shaffer, *American Catholics*, *supra* n. 2, at 10-12; Shaffer, *Servant*, *supra* n. 2, at 1347-1348. See Lesnick, *Listening for God*, *supra* n. 34, at 149, 158.

The great 20th Century Jewish philosopher Martin Buber put the matter this way: The atheist does not know God, but the adherent of a form of ethics which ends where politics begins has the temerity [sic] to prescribe to God, [whom he professes to know], how far his power may extend [W]e do give him up [W]e give up God . . . when we profess him in synagogue and deny him when we come together for discussion, when we do his commands in our personal life, and set up other norms for the life of the group we belong to.

Martin Buber, *And If Not Now, When?*, in *Israel and the World: Essays in a Time of Crisis* 234, 236 (First Syracuse U. Press Ed. 1932/1997-1948).

this assertion as to any of the above cases; nor will I. My own belief is that, at bottom, one's answer turns on how one understands the biblical admonition to love our neighbor,⁷⁷ or how one understands our responsibility for one another,⁷⁸ and how one regards the justice of the prevailing social order. These are momentous matters, happily not directly before me now, and many religious people hear different concerns in the voice of God than Shaffer does, or I do. For one who in any specific instance finds no serious moral problem following professional norms—one who does not find the matter "painful or confusing"⁷⁹—there is nothing more to be said.

(4) *The place to consider the question of lack of consonance is among the members of the lawyer's "church."* The call of faith is a call to process, carried on in community, without prejudgment or (so far as possible) rationalization. "Everyone [is] allowed to speak, and . . . everybody else [is] bound to pay attention."⁸⁰ In no case is Shaffer suggesting that the answer is a quick "yes," that the answer to the question is clear.

The question remains whether the ultimate discernment is left to the *inquirer* or the *community*. Here Shaffer is implicit at best, and perhaps a bit in the grip of conflicting premises. He is strongly drawn to the examples of the Apostolic and Reformation periods, of which it could have been said that "the worshiping community and the deliberating community [were] routinely the same,"⁸¹ and some of his language seems to give the discerning community dispositional authority.⁸² But today such congregations exist only "here and there,"⁸³ and Shaffer responds to his criticisms of contemporary "mainline"

77. Lev 19: 18. It was a lawyer who "stood up to test Jesus," Luke 10: 25-29, and prompted his profoundly challenging teaching on this text, in the Parable of the Good Samaritan. *Id.* at 30-37. For my understanding of the teaching, see Lesnick, *Listening for God*, *supra* n. 34, at 141-143.

78. Amy Uelmen, seeing the search for the common good as the fundamental motivating force of her work, grounds her understanding of that term in the Second Vatican Council's Pastoral Constitution on the Church and the Modern World, *Gaudium et Spes*: "Every group must take into account the needs and legitimate aspirations of every other group, and still more of the human family as a whole." Uelmen, *Religious Person*, *supra* n. 10, at 1079. "As such," she infers, "the common good is that which a person reaches only if it includes as a consequence, the good of the others." *Id.*

79. See Shaffer, *Faithful Community*, *supra* n. 2, at 198.

80. See Shaffer, *Simon*, *supra* n. 2, at 917 and accompanying text.

81. See Shaffer, *Servant*, *supra* n. 2, at 1352 and accompanying text (emphasis deleted).

82. Speaking of churches like the "communities of moral discernment" to be found in the 16th Century, Shaffer describes the community as "competent to decide matters of professional ethics." Shaffer, *Religious Congregations*, *supra* n. 2, at 979 (emphasis supplied). In such settings, he may see the autonomy of the individual as sufficiently embodied in "the fact that the individual made a free, adult, continuing choice to be in the congregation." *Id.* at 978.

83. *Id.* at 979.

congregations and denominations, not by reading them out of the fold, but by turning to more informal groups of "believers" assembled *ad hoc*. He may be led as a result to a broader view of the decisional authority of an individual within the community, in which the principal task of the community is not to act as decisionmaker, but to carry on a process in which the discernment of the seeker is guided and facilitated. In any event, where it is the seeker who has constituted the "discerning community," it is he or she who will charge it, with either a more facilitative or a more decisional role. The resulting guidance would be no less genuine and significant for its being ultimately less than binding.

In our present culture, many will find in such an allocation of decisional authority too vague and "soft" a resolution, open to idiosyncratic variations and self-justifying rationalization. We must understand, however, that Shaffer is not proposing a rule or standard to be applied *post hoc* to enable a third party to judge the morality of another's actions by probing the other's hidden motivations though circumstantial evidence adduced in adversarial proceedings. He is rather speaking *to* the individual facing a morally freighted decision. No one but the actor can judge whether he or she has sought honestly to discern and conscientiously to follow God's will; perhaps no one at all can judge whether he or she has done so successfully.⁸⁴

The controversy over the viability of a view of religious obligation like Shaffer's has a parallel in the dispute over the wisdom of the "legalization" of professional ethics in law. Richard Abel remarked two decades ago on the "progressive decline in normativity" of the professional standards, symbolized by the move from terming those standards "canons," then a "code," and then "rules"—dealing with, first, "ethics," then "responsibility," and finally "conduct;"⁸⁵ the decline has only accelerated in the era of the *Model Rules*. To many lawyers today, the notion of a self-imposed obligation is simply an oxymoron; the source of an obligation is definitionally outside the obligor.⁸⁶

84. I am reminded of the practice of a young man I met, a Westerner who had converted to Islam and was often asked, because of the way he dressed, whether he was a Muslim. He sometimes answered, "I don't know," and responded to the perplexed reaction this engendered by saying, "Muslim is an Arabic word meaning one who has surrendered to the will of God. Only God knows whether I am Muslim. I can only say I try."

85. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 Tex. L. Rev. 639, 686 n. 257.

86. George Cooper has brilliantly portrayed the competing outlooks in his fictional attorneys, Senior and Younger, as they engage one another's fundamentally differing approaches to "aggressive tax planning," the meaning of ethical practice and the idea of self-imposed obligations, indeed, the meaning and purpose of practicing law. George Cooper, *The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform*, 80 Colum. L. Rev. 1553, 1577-

In standing against that tide, Shaffer speaks from a religious perspective. But the conflict exists *within* both religious and secular perspectives (even within the same religious tradition), not between them. To many religious people, Shaffer is simply wrong about the means of discerning the Divine Will—to them, the decisions, general or case-specific, of authoritative interpreters of Scriptural and other admonitions of a particular tradition, *are* the voice of God—while to many others only a narrower position is tenable.⁸⁷ This is not the place to debate the question.⁸⁸ Suffice it to note that negative characterizations of Shaffer's approach as too subjective or permissive often reflect unspoken disagreement at a far more fundamental level.

1596 (Dec. 1980). See the discussion in Lesnick, *Being a Lawyer*, *supra* n. 58, at 206-209.

87. I recall hearing Roman Catholic natural-law philosopher Robert George, addressing a largely Catholic audience, advance as the dispositive criterion of moral judgment the simple question, "What does Jesus say?" To a questioner who objected that the Gospels are simply silent on many contemporary moral questions, George replied, "Jesus speaks through the Magisterium." Were one to have countered, "Who says so?," he would presumably have responded that Jesus himself did, in naming Peter as the keeper of the keys of the Kingdom, Matt 16: 19; *cf. id.* 18: 18, read by the editors of *The New Oxford Annotated Bible* as establishing that "[t]he authority to interpret Jesus' teaching extends to the community's judicial decisions." *The New Oxford Annotated Bible* 35n (New Testament pagination) (Michael D. Coogan, ed., 3d ed. 2001).

Compare what seems to me the far narrower view of another esteemed Roman Catholic scholar, Robert Rodes:

[M]any faith traditions recognize some privileged source of religious discernment within their foundation documents, the community of their believers, or the polity of their church. But only a few such traditions claim a broad sweep of privileged moral discernment. In my own tradition, Roman Catholicism, the higher echelons of the polity claim privileged discernment of a few principles of general morality that Catholic lawyers have to take into account in their practice. Some faith traditions go farther, but most do not go even as far.

Rodes, *Agenda*, *supra* n. 10, at 979.

A more fundamental divergence from George's view is expressed by Michael Perry, also writing out of the Roman Catholic tradition. To Perry (speaking through a hypothetical person, Sarah):

For Sarah, for whom God is love, not supreme legislator, some things are good for us to do or refrain from doing not because God commands them, but because God is what (who) God is, because the universe . . . is what it is, and, in particular, because we human beings are who we are.

Michael J. Perry, *What Is "Morality" Anyway?*, 45 Vill. L. Rev. 69, 77 (2000).

88. My teacher, Rabbi Marcia Prager, has eloquently articulated a religious consciousness that denies the necessity of dichotomizing external and internal sources of obligation:

The Living God speaks to each of us from the inside out, in our own voice. For my soul to recognize God's voice there must be an inner voice I hear, an imperative in the depths of my soul. The word "commandment" casts God's voice as if it were only a voice of external authority, but our teachers know that when we truly hear, we hear an inner voice and touch an inner knowing as well."

Marcia Prager, *The Path of Blessing: Experiencing the Energy and Abundance of the Divine* 156-157 (Bell Tower 1998). *Listening for God* is my attempt, congruent with this thought, to present a view of religion as "an expression not of a command but of a truth." Lesnick, *Listening for God*, *supra* n. 34, at 113 (emphasis deleted). In its final chapter, I suggest a parallel way of looking at legal obligation. *Id.* at 132-160.

In recent years, perhaps as a result of his direct work with poor people in the legal aid clinic, Shaffer has ratcheted matters up significantly. Going beyond specific acts of attorney blindness to his or her participation in immoral acts, he has powerfully broadened the challenge:

[M]oney is the number-one most serious moral problem for American lawyers and their clients The Rabbis teach that . . . God is the Creator of prosperity. One who ignores the obligation to the poor is an idolator who does not recognize the source of wealth.

The Book of Leviticus . . . says, "You shall not put a stumbling block in the path of the blind." The sages of Judaism decided that the rule does not apply to those who harass blind people as much as it applies to those who misuse the law, who are dishonest, but legal, who, "through perfectly legal transactions," mistreat vulnerable people—my debtor clients The Rabbis [also] say that those who use the law to protect their wealth are like those who buy from thieves⁸⁹

"Convicted" as he is by this challenge, Shaffer begins by questioning pervasive rather than particularized choices we make in the practice of law: the fondness of lawyers for work specializing in service to wealth, the failure of those lawyers who "are able to raise moral standards in business" to make serious efforts to do so, and the pervasive neglect by most lawyers of the ordinary legal needs of ordinary people.⁹⁰ But he cannot rest easy there. His self-described "tirade"⁹¹ goes on to question lawyers' relative wealth itself. Moreover, he does not speak only of large-firm partners and senior in-house lawyers.⁹² He challenges himself, and most of us, as well:

I do not worry about affording a vacation, or going to the dentist or the movies. I do not worry about a comfortable house, or new clothes . . . , or about safe living conditions. So, who is self-deceived about wealth? Not just those in \$11 million condos. Maybe what I need is a more truthful religious solution to my own

89. Shaffer, *Money*, *supra* n. 2, at 460. On my hypothesis as to a contributing cause of this stance, see the account of his experience in *Law Office*, and his own reflection:

Some of us [teachers and students] have moved radically to the left—perhaps in the way that Latin American liberation theologians have—as we [have] become involved in the lives of people from the American underclass whom we come to know, and as our clients show us what courage is.

Shaffer, *Law Office*, *supra* n. 2, at 610.

90. Shaffer, *Money*, *supra* n. 2, at 459, 454.

91. *Id.* at 458.

92. *See id.* at 451 n. 4.

situation, not so much in terms of theory and command as in particular answers being lived out by particular people.⁹³

He finds sobering salience in the stories of ordinary people striving consciously to limit their income and spending, and in the admonitions of the Jewish tradition and its "extensive rabbinic limits—against hoarding [and] temptations to corruption, . . . [its] positive injunctions to generosity, to philanthropy, to spending time with family and in religious study, and to social responsibility."⁹⁴

Despite the depth of Shaffer's challenge, recall that he asks people of faith only to *listen*, to be in his company as he listens to the call of his faith, and then to listen, *faithfully*, for that of their own. Nonetheless, he has no illusions about the reception his ideas would receive: Serious discussion of them among most Christian and Jewish congregations would, he suggests, be deemed "impertinent and intrusive."⁹⁵ As I have tried to listen to Shaffer, advertant to what it might mean for me to act on a consciousness of my work as "religiously important," I have found him about as intrusive and impertinent as their hearers might have found Moses, Amos, Isaiah, or Jesus. I can neither dismiss nor follow his call. What I *can* do is, first, acknowledge my abiding gratitude and admiration for his courage in raising with us these unwelcome questions; second, deflect (perhaps only for the moment) that part which most profoundly draws in question the way I live; and, third, raise a set of reservations about some radiations of his approach to moral discernment.⁹⁶

I understand Shaffer to be speaking primarily to people who think of themselves as living their lives within a faith tradition, but have allowed themselves to forget that it is inherent in religion that its moral claims are *prior* to those of "the world"—"*You shall have no other gods besides me*"—and should not so easily be accommodated to the values of the prevailing social order. Again, this priority is not a result of any argument or rational calculus; to a believer, it is simply a fact about the way the world is put together.⁹⁷ C.S. Lewis put it well: "God is to be

93. *Id.* at 465.

94. *Id.* at 468. For a similar theme, drawing heavily on the writing of Christian theologian Sondra Ely Wheeler, see Shaffer, *Religious Congregations*, *supra* n. 2, at 965-967.

95. *Id.* at 967.

96. In this, I can claim only a fragment of the wisdom of Milner Ball. Speaking of Shaffer's words as "prophetic"—"gentle but not the less powerful and prophetic"—he responds: "The appropriate response to prophecy is to receive and act upon it, not to make it the subject of law journal commentary. Accordingly, I offer a personal report rather than scholarly criticism." Ball, *Unmasked Stranger*, *supra* n. 29, at 344.

97. Cf. Michael Perry, *supra* n. 87; Amy Uelman, in Uelman, *Religious Person*, *supra* n. 10, at 1079 ("Religious reflection brings me to a sense of obligation—not because of an external

obeyed because of what He is in Himself. If you ask why we should obey God, in the last resort the answer is, 'I am.'"⁹⁸

I don't think that Shaffer is admonishing religious skeptics that they should become believers, or even suggesting that they would be better people if they did. Yet, to both "convinced skeptics" and those of us in that borderland between faith and doubt—and here I include myself⁹⁹—it is difficult not to think of the matter as one of the balance of advantage, whether as shallowly as "Pascal's Wager" or in some other version.¹⁰⁰ And so, reading a believer's comparison of ethical discernment from within a community of faith with that from outside it, it is easy to think of the believer as asserting some moral superiority of embracing a faith tradition.

Unlike many religionists whose triumphalist "testifying" makes such an imputation appropriate,¹⁰¹ I do not place Shaffer in that group.¹⁰² Nonetheless, in some ways Shaffer is hard for a religious skeptic or "fence-straddler" to read. Even if he is not telling us to mend our erring

command, but rather out of an internal conviction about the essence of my nature as a person and the consequent relationships with God and with others"). To Shaffer, "the religious tradition . . . has not understood itself as a philosophy or a preference or a point of view. It has understood itself as a sequence of facts that those in the tradition learn to remember." See Shaffer, *Tension*, *supra* n. 1, at 28.

98. C.S. Lewis, *Surprised by Joy: The Shape of My Early Life* 231 (Harcourt, Brace, & World, Inc. 1955).

99. I have set out my own beliefs and doubts in Lesnick, *Listening for God*, *supra* n. 34, at 25-43.

100. The entry on Blaise Pascal in *The Encyclopedia of Religion* vol. 11, 201, 203 (Mircea Eliade & Charles J. Adams eds., Macmillan 1987) describes his famous "wager" as "a way to persuade a skeptic that he ought to bet on God, however uncertain of God's existence he might be; it is . . . [not] another 'proof' of a theological truth. It is practical advice" You have much to gain if your "bet on God" turns out to be right, and much to lose if your bet against God turns out to be wrong.

101. For an especially noxious example, see (if you must) the testifying of Justice Scalia, preening himself on his assertedly superior insight into the Roman tradition and the consonance of the death penalty with Christian morality. Antonin Scalia, *God's Justice and Ours*, 123 *First Things: J. Religion & Pub. Life* 17 (May 2002). (available at <http://www.firstthings.com/ftissues/ft0205/articles/scalia.html>).

102. Shaffer has had critical things to say about what he and others term "American civil religion," into which most contemporary religious bodies have fit themselves, and which enables many to live comfortably in a religious community and forget or disregard the priority of religious claims. However, I believe that his complaint is that they do not live by *their own* professions. (Among the works cited in *supra* n. 2, *Oxymoron* has a very brief summary statement of this idea, *id.* at 13-14).

He also speaks critically of the norms of the legal profession, but it would be a mistake to read him as if he were calling for the Rules-drafters, Congress, or the Supreme Court to accommodate those norms to "the call of faith." (I have made a secularly-grounded claim along those lines, in Lesnick, *The Religious Lawyer*, *supra* n. 3, at 1469-1493.). He is rather saying how believing lawyers should respond to the "tension" between their beliefs and professional rules and norms; the problem is what the church should do about the government, not what the government should do about the church. Shaffer, *American Catholics*, *supra* n. 2, at 10.

ways, his words seem to characterize those of us not in the "circle of believers"¹⁰³ as living a relatively impoverished moral life: We are "captives of an ethic that leaves each of [us] . . . morally alone"; we are each our own "moral tyrant";¹⁰⁴ secular moral thinking, whether grounded in law, reason or experience, "lacks a depth that the religious tradition is able to remember"—the "call to tragedy."¹⁰⁵ So perhaps it is defensiveness on my part to suggest, as I now will do, that he too sharply dichotomizes communal and individual discernment, and too narrowly cabins the depth and power of secular rationality as a ground of moral discernment.

Shaffer has written recently of prophets, mentors and role models, and invoked, most eloquently, some favorite ones, ancient (Isaiah) and modern (Sr. Joan Chittister).¹⁰⁶ I can anchor my objection by recalling one who most assuredly deserves a place among their company, one, indeed, who stands with Moses and Jesus as our three greatest moral teachers. For Socrates in many ways personified rationalist individualism. When one of his interlocutors sought to justify laughing "instead of refuting" him by noting that he had "put forth views nobody would accept," Socrates responded:

[T]ry the kind of refutation I think is called for. For I . . . produce one witness to whatever I'm saying, and that's the man I'm having a discussion with See if you'll be willing to give me a refutation, then, by answering the questions you're asked.

.

It's you alone whom I call on for a vote¹⁰⁷

There is a "community" of sorts here, but hardly Shafferian—not only because of its strict limitation of size, but more fundamentally because of the individualism inherent in the relentlessly rational character of the "dialogue." "I am the kind of man," he tells his friend Crito, "who listens only to the argument that on reflection seems best to me,"¹⁰⁸ even when what is at stake is his refusal to allow his own life to be saved:

103. See Shaffer, *Faithful Community*, *supra* n. 2, at 199.

104. See Shaffer, *Religious Congregations*, *supra* n. 2, at 963.

105. See Shaffer, *Tension*, *supra* n. 1, at 47.

106. Thomas L. Shaffer, *The Biblical Prophets as Lawyers for the Poor, Address on Legal Ethics, Religious Values and Poverty Law*, given at Fordham University School of Law, Conference on Religious Values and Poverty Law: Clients, Lawyers & Communities, Jan. 31, 2003 (copy on file with the author).

107. *Gorgias* *474a-b, 476a in *Plato Complete Works* 791, 817-818, 820 (John M. Cooper ed., Donald J. Zeyl trans., Hackett Publ'g. Co., Inc. 1997).

108. *Id.* at *Crito* *46b, 37, 41 (G.M.A. Grube trans.).

[W]e must examine next whether it is just for me to try to get out of here when the Athenians have not acquitted me. If it is seen to be just, we will try to do so; if it is not, we will abandon the idea If it appears that we shall be acting unjustly, then we have no need at all to take into account whether we shall have to die if we stay here and keep quiet . . . rather than do wrong.¹⁰⁹

And die he did, taking the cup into his own hand—to those around him “a man who, we would say, was of all those we have known the best, and also the wisest and the most upright,”¹¹⁰ and to us an enduring example of the capacity of reason alone to guide us, not only in discerning the “just,” but in resisting the most powerful temptation not to act on that discernment:

[A]mong so many arguments this one alone survives refutation and remains steady: that doing what’s unjust is more to be guarded against than suffering it, and that it’s not *seeming* to be good but *being* good that a man should take care of more than anything, both in his public and his private life.¹¹¹

It is true that Socrates’ example is enduring in part because of its rarity. But how many true followers of Jesus do any of us know? Yet it does seem to be the case that rationality does not serve a person in moral doubt as well as religious faith,¹¹² not on some empirical ground—counting up exemplars and backsliders—but because of differences inherent in the two modes of response to morally freighted choice in life.

109. *Id.* at *48c, d, 43.

110. *Id.* at *Gorgias* *527b, 869.

111. *Gorgias*, *supra* n. 107, at *527b, 869 (emphasis in original).

112. Socrates’ commitment to acting on his rationally arrived-at discernments was explicitly grounded in his religion. “It is impossible,” he told his jurors at the “sentencing” phase of his trial, “for me to keep quiet because that means disobeying the god.” *Id.* at *Apology* *38, 17, 33 (G.M.A. Grube trans.). If to us that rings less powerfully than (for example) Martin Luther’s declaration to the Diet of Worms, “Here stand I; I can do no other” in (*Oxford Dictionary of Quotations* 432 (Angela Partington ed., 4th ed., Oxford U. Press 1992)), it may be so partly because Socrates’ “god” seems so foreign to us, and partly because we have learned to be rather cynical about the distinction between rationality and rationalization. Most fundamentally, however, I believe the reason is that to Socrates rational discourse seems to have been the only route to discernment of the Divine will. Charles Kahn describes the Platonic conviction that: “the unseen, intangible world, accessible only to rational thought and intellectual understanding, is vastly more meaningful, more precious, and more real than anything we can encounter in the realm of ordinary experience.” Charles H. Kahn, *Plato and the Socratic Dialogue: The Philosophical Use of a Literary Form* 66 (Cambridge U. Press 1996) (emphasis supplied). See James Adam, *The Religious Teachers of Greece* 337 (Ref. Book Publishers, Inc. 1965): “On questions of morality and conduct . . . [o]ur business is to determine [them] by the exercise of reason, and reason alone.” (On the complexity of Socrates’ thought, see *id.* at 320 *et seq*; Roslyn Weiss, *Socrates Dissatisfied: An Analysis of Plato’s Crito* 15-19 (Oxford U. Press 1998)). In our religious traditions, the route to “the god” is inescapably (although not entirely) noncognitive. See Lesnick, *Listening for God*, *supra* n. 34, at 89-101.

The "air" of reason tends toward the rarified, that of faith toward the saturated. Either may suffocate, but it seems inherently more difficult to enrich the former than to ameliorate the effects of the latter.¹¹³ Nonetheless, at least some of those to whom Athens speaks in ways that Jerusalem does not deserve a bit of encouragement, which Shaffer's words hardly supply.

Moreover, Shaffer's own fluid notion of the community of "church" counsels recognition that discerning communities may be found outside the religious tradition.¹¹⁴ My good friend, Carrie Menkel-Meadow, has written wisely as well as movingly about her own odyssey,¹¹⁵ where first from her parents' experience in the Third Reich, and then from her own in America during the 1960s, she learned that "religious birthrights can be replaced by formative experiences . . . that challenge, as well as reinforce, that into which we are born," and that "religious sources of values [can be] trumped by political commitments."¹¹⁶ In her life, those commitments "were informed by a respect both for individualism and a communalism that sought to be far more inclusive than traditional family, religious, or nation-state formations," and have been "as strong as any of the traditional pulls of religious or family-inspired morality."¹¹⁷

For Menkel-Meadow, "different kinds of sacred places and celebrations . . . [and] new kinship and loyalties"¹¹⁸ have supplied both the community and the "source[s] of spiritual and moral values"¹¹⁹ that Shaffer has sometimes found in his "church." After all, if I can come to accept, as I have, "church" as a fitting description of *Jewish* communities of moral discernment,¹²⁰ perhaps Shaffer should acknowledge coordinate status for the kind of quasi-secular communities

113. Marie Failing has written profoundly about the possibilities and limitations of professional and religious "communities of memory" in preserving what she terms "fidelity" to moral obligations. Marie A. Failing, *Is Tom Shaffer a Covenantal Lawyer?*, 77 Notre Dame L. Rev. 705, 767-784 (2002) [hereinafter Failing, *Covenantal Lawyer*].

114. In other writing, Shaffer does celebrate the moral discernment supplied to lawyers by the ethnic communities from which they have come. See e.g. Thomas L. Shaffer & Mary M. Shaffer, *American Lawyers and Their Communities: Ethics in the Legal Profession* (U. Notre Dame Press 1991). While those ethnic groups were characteristically religiously strong, their ethnicity may have been prior in generating the grounding to which Shaffer points. I owe my recognition of this point to Milner Ball.

115. Carrie Menkel-Meadow, *And Now a Word About Secular Humanism, Spirituality, and the Practice of Justice and Conflict Resolution*, 28 Fordham Urban L.J. 1073 (Apr. 2001) [hereinafter Menkel-Meadow, *Now a Word*].

116. *Id.* at 1076.

117. *Id.* at 1077.

118. *Id.* at 1078.

119. *Id.* at 1079.

120. See Shaffer, *Servant*, *supra* n. 2, at 1350 n. 16.

of which Menkel-Meadow, and many others, have "testified."¹²¹ Such communities do not require their members to "assume[] the presence of God in the discussion,"¹²² but I wonder whether, having accepted as "church" rather casual, ad hoc collections of persons of widely varying religious outlooks, Shaffer can continue to insist so strongly on this requisite. Of course, one can simply regard the assumption of Divine presence as definitional, but the question remains whether such a definition has real salience. In another context, he states the "essentials" for membership in the "people of God" as "communal quality of belief; local group as the place for moral discourse; respect for teachers."¹²³ This admirable catalogue applies as well to at least some communities that would not dream of seeking to be accounted "people of God."¹²⁴

The problem could be resolved by narrowing rather than broadening the concept of "church," to reject Shaffer's acceptance of non-congregational communities of moral discernment. I have referred above to Milner Ball's pertinent observation¹²⁵ that the lawyer coming to his or her community of faith for moral guidance does so profoundly oriented by a prior and ongoing engagement with the practices of that community's faith tradition. Shaffer would surely accept the salience of that insight. In coming nonetheless to find genuine "church" among ad hoc groupings of "believers" who differ in the nature and even the existence of their religious affiliations, he is probably led by his acute awareness of the moral failings in the triumphalism of conservative, and the accommodationism of liberal, congregations.

As my speaking of the "quasi-secular" suggests, I believe that the boundary between the religious and the secular is somewhat more

121. Menkel-Meadow speaks especially of "women's consciousness raising groups," but much more broadly of "alternative institutions" such as "communes, group homes, participatory networks, labor alliances, new relationships, and political organizations," insisting that "there was moral teaching in these movements." Menkel-Meadow, *Now a Word*, *supra* n. 114, at 1077-1078.

122. See Shaffer, *Simon*, *supra* n. 2, at 917.

123. Shaffer, *Servant*, *supra* n. 2, at 1350 n. 16.

124. Shaffer may well agree that its "communal quality" is more salient than the specifics of its "belief." "All that ['church'] can mean, by way of definition, is 'people of God', and only God knows who God's people are." Personal correspondence from Thomas L. Shaffer to Howard Lesnick (copy on file with the author).

Cathleen Kaveny understands Catholic thinking to use the term, "church," to refer "to all those, of whatever faith, who live in accord with divine will," explicitly including Jews and Moslems. Kaveny, *Ordinary Time*, *supra* n. 24, at 209 n. 97. Whether she, or the Roman tradition, means to include non-believers is not clear from her language or quotations. Martin Buber, in discussing what many today would regard as self-evidently an oxymoron, religious socialism, wrote: "[S]ocialism without religion does not hear the divine address, it does not aim at a response, yet still it happens that it responds." *The Way of Response: Martin Buber—Selections from his Writings* 158 (Nahum N. Glatzer ed., Schocken Books 1966).

125. Ball, *Unmasked Stranger*, *supra* n. 29, at 341.

porous than Shaffer's language implies. To me, the core of the religious experience is the encounter with transcendence, the experience of awe in the presence of the infinite, which grounds a palpable sense of wonder, an openness to mystery.¹²⁶ A secular morality typically abides not in wonder but in doubt, viewing mystery as a limitation to be overcome, if possible, by philosophical and scientific inquiry. The sense of "tragedy," which Shaffer notes as a special aspect of the moral equipment of religious people,¹²⁷ is kept at bay in much secular thinking.¹²⁸ To a substantial extent, then, Shaffer has good grounds for speaking as he has.

But there is nothing inherent in secularism, in particular in the rejection of theistic approaches, that requires the reduction of wonder to clarity. A secular consciousness that hospitably incorporates a sense of awe and wonder has much in common with a similarly oriented religious consciousness.¹²⁹

Beyond that, individuals have a complexity that resists neat classification. Philosopher-classicist (now law professor) Martha Nussbaum may provide an example. She speaks of "reverence and awe" for the norms of the moral law as means of committing ourselves to them, as means of deeming them obligations: "We picture them *as if* they stood outside of us, even though *in a sense* we are well aware that they stand within us."¹³⁰ She is moved by Immanuel Kant's description of the "ever-increasing awe" with which he experiences "the starry sky above me and the moral law within me." It is not that the moral law "is external;" she reads Kant to deny that explicitly. Rather, "he regards its presence in himself with the same awe with which he views the heavens." To Nussbaum, by language of transcendence we "express our wish to be bound" by the moral law, "even when we wish to do otherwise."¹³¹ We need not determine whether she belongs to a faith community to appreciate the capacity of her moral discernments to ground decisionmaking.

126. See Lesnick, *Listening for God*, *supra* n. 34, at 66-69; Lesnick, *The Religious Lawyer*, *supra* n. 3, at 1500-1501.

127. See Shaffer, *Tension*, *supra* n. 1, at 47.

128. See the quotations from the work of Sandra Schneiders, Cornel West, & Richard Rubenstein in Lesnick, *The Religious Lawyer*, *supra* n. 3, at 1500 n. 135.

129. See the brief discussion in Lesnick, *Listening for God*, *supra* n. 34, at 67-68, from which the two preceding sentences in the text are taken.

130. Martha C. Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, 6 Yale J.L. & Human. 197, 212 (Summer 1994) (emphasis supplied).

131. *Id.* Anthropologist Clifford Geertz understands this grounding of a sense of obligation as a primary function of "the religious experience" of ritual. Geertz, *Islam Observed*, *supra* n. 37, at 110.

More fundamentally, the "wish to be bound" is exactly the sort of self-imposed obligation that characterizes a non-authoritarian religious consciousness like Shaffer's. Just as he can, I believe, hold his own against dismissive characterizations of his approach by religious traditionalists as soft and permissive, so should at least some "quasi-secular" communities of moral discernment be able to claim a place of equivalent respect at his table.¹³²

Nonetheless, equivalent respect may require something short of table fellowship, and my reservations may support Shaffer's thoughts more than they undermine them. I only suggest, perhaps because of the tentative and limited quality of my own religious commitments, that a gentler characterization of the moral world of those who cannot find a home in the religious tradition is appropriate. The "circle of believers" of which he writes¹³³ should not too vigorously police its boundaries.¹³⁴

132. Sara Cobb, Director of the Harvard Project on Negotiation, has written insightfully (and movingly) of moments in the course of a mediation session when "something happens in the room, something that is more important than the agreement that is emerging, that the conflict is itself just a vehicle for the creation of something sacred, something whole, something holy." Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, 28 *Fordham Urb. L.J.* 1017, 1017 (Apr. 2001). Her article effectively combines experience and analysis to describe an approach that is neither religious nor secular.

133. Shaffer, *Faithful Community*, *supra* n. 2, at 199.

134. Marie Failingler, describing several forms of religious witness, characterizes them as relying on no force save the force of the story they tell. Yet, she notes, "for some who will not see or hear, the story still feels like force, because it demands them to consider the possibility that they have turned their eyes and ears away from the truth. But," she goes on:

understanding the response . . . also reminds the . . . storyteller that he does not need to use worldly forms of force—rules and sanctions, physical force, or social pressure—on his fellow non-believing lawyers [T]o be storytellers is ultimately to let go of [one's] own security . . . , to trust that the story is powerful enough to transform without the need for worldly forms of power.

Failingler, *Covenantal Lawyer*, *supra* n. 112, at 792. Tom Shaffer, she concludes, embodies this form of witness. *See id.* at 792-793.