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Lawyers, Religious Faith, and Virtues: Reflections on Tom and Nancy Shaffer

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TRIBUTE

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Thomas L. Shaffer was my teacher, mentor, co-author, and friend for forty-three years. Tom set me on the path of exploring the relationships between religion, law, virtue, and law practice, and I have been on it ever since. Most of what I know about those subjects, I learned through his guidance. I started this as a tribute to Tom, but almost every section included a memory of his wife Nancy’s care and guidance, as well as that of Tom. I decided to make this a tribute to her as well. As you will see, they seemed to share every aspect of one another’s lives.

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I. MY INTRODUCTION TO TOM AND NANCY:
OPENING CLASS WITH PRAYER AND CLOSING WITH BEER

Tom was a visiting professor at the University of Virginia during 1975–1976, my third year of law school. He had just finished serving as dean of Notre Dame Law School. Tom volunteered to teach a course on law and religion, in addition to his regular courses at UVA. The Dean allowed it. Tom taught the course in his and Nancy’s rented home. At the time, it was a unique course in an unusual location, and it was particularly unusual for a professor to volunteer to teach an extra course.

I signed up for the class, expecting it to have about five members (as did Tom). Twenty showed up. Three aspects of the class stand out. First, we went around the room and explained why we were taking the course. All of the students identified themselves as Christians (though we might not have recognized one another as such). There were people of almost every imaginable Christian tradition—including Catholic, Methodist, Mennonite, Armenian Orthodox, and Presbyterian. Tom said, “Well, since we are all Christians, someone open us in prayer.” I bowed my head as one of my classmates prayed and imagined Thomas Jefferson, founder of the University and advocate of a “high wall of separation” between church and state, looking down on us; he was not pleased. The rest of the class included sharing our traditions’ very different notions of the relationship between Christian faith and law (the subject of one of my later essays¹).

The second thing that struck me was that when we finished class, Tom said that he and Nancy had some beer for us. That would have been troubling to my Baptist forbearers, but to me, it seemed to balance things out. I envisioned my Baptist forbearers looking down on us; they were not pleased.

II. LAWYERS AND RELIGIOUS FAITH:
“THE VIEW OF THE COURTHOUSE FROM THE CHURCH”

The third thing I recall from Tom’s class was a message that runs through Tom’s books. He evaluated law and law practice from the perspective of the Christian faith. Prior to the class, I lived a somewhat schizophrenic existence. I saw little connection between what I did in church on Sundays and what I learned in law school during the week. The following metaphor

1. Robert F. Cochran, Jr., *Christian Traditions, Culture, and Law*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 242 (Yale University Press, 2001).

from Tom's *American Lawyers and Their Communities* captures Tom's call to Christian lawyers.

Tom envisions a town square. As in many American towns, on one side is the church, and on the other is the courthouse. "We American lawyers learn to look *at* the community of the faithful, rather than *from* it. We stand in the courthouse looking at the church. We see the [church], even when we claim to belong to it, from the point of view of the government."² This way of seeing is a product, in part, of legal education.

[The legal] part of the academy, more than any other, has systematically discouraged and disapproved of invoking the religious tradition as important or even interesting. It ignores the community of the faithful so resolutely that even its students who have come to law school from the community of the faithful learn to look at the [church] from the courthouse, rather than at the courthouse from [the church].³

Tom encourages lawyers to "walk across the street and look at the courthouse from the church."⁴ "Faithfulness to the tradition of Israel and of the Cross means that the lawyer stands in the community of the faithful and looks from there at the law. Faithfulness means that a lawyer imagines that she is first of all a believer and is then a lawyer."⁵

From the vantage point of the church, Tom called on lawyers to do several things.

1. *Consistency*—A lawyer should be (as was said of Atticus Finch in *To Kill a Mockingbird*) the same person in town that he or she is at home.⁶ Lawyers should be consistent. They should bring the values that they are taught at home and church—truthfulness, justice, and mercy—to the legal profession.

2. THOMAS L. SHAFFER & MARY L. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* 209–10 (1991).

3. *Id.* at 214.

4. *Id.* at 210.

5. *Id.* at 198.

6. THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS AND DISCUSSION TOPICS* 169 (Matthew Bender 1985) [hereinafter SHAFFER, *AMERICAN LEGAL ETHICS*]; THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 32–33 (2d ed., West Publishing Co. 1996) [hereinafter SHAFFER & COCHRAN, *LAWYER, CLIENTS, AND MORAL RESPONSIBILITY*].

2. *Concern for All*—Lawyers should be concerned about the interests of all who might be affected by their legal representation. Lawyers should resist the “radical individualism” encouraged by an exclusive focus on a client’s worst instincts.⁷ Tom is especially critical of the “adversary ethic, which teaches that lawyers are not responsible for what their clients do.”⁸
3. *Concern for Clients*—Lawyers should be concerned with the whole client. “[T]he goal and purpose of a virtuous life in a profession is to help others become good persons”⁹
4. *Moral counsel*—The tensions between concern for other people and clients should be overcome by lawyers raising moral issues in client counseling as they would with a close friend—not imposing their values but raising them for serious discussion. This is an Aristotelian notion of friendship.¹⁰
5. *Reject Power and Speak Truth to Power*—Christian lawyers should not seek power but should speak prophetically to those in power (to both government officials and wealthy clients). The church “forgets to remember its particularity when it becomes responsible for the government”¹¹
6. *A Preferential Option for the Poor*—Tom advocated what Catholic doctrine refers to as “A Preferential Option for the Poor,” and Tom lived it out. As the holder of a prestigious professorial chair at Notre Dame, he chose to serve poor people in the law school legal clinic (one of the less prestigious positions at most law schools). Nancy joined him and served as a paralegal in the legal clinic.
7. *The Criminal Defense Attorney as Companion to the Guilty*—The criminal defense attorney should follow in Christ’s footsteps and be a companion to the guilty. Tom says, “The problem of whether to serve the guilty is answered with stories of Jesus having lunch with tax collectors and choosing his friends from among prostitutes,

7. See generally Thomas Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 986–91 (1987).

8. *Id.* at 131–32.

9. *Id.* at 94.

10. SHAFER & COCHRAN, LAWYER, CLIENTS, AND MORAL RESPONSIBILITY, *supra* note 6, at 46–52.

11. *Id.* at 209.

thieves, violent revolutionaries, and Samaritans—‘many bad characters,’ Matthew says (9:10)’¹²

Tom’s law and religion class was wonderful. It was the class that has stimulated more thinking, for more of my life, than any other. I began to see connections between my religious faith and my legal vocation.

The class appears to have had an impact on Tom as well. A few years later, he published a ground-breaking book, *On Being a Christian and a Lawyer*. In the Afterword, he says:

I began this enterprise, and continue it, as a law teacher—nothing more than that, but nothing less. Not a word is written *ex cathedra*. How could it be? But every word is written because my students raise personal, confusing questions about being lawyers and Christians and Jews. My confusion was blessed, early on, by a group of law students at the University of Virginia, in 1975 and 1976. They were members of the Christian Law-Student Fellowship there and were enrolled in a group-study venture, in which I taught and learned, that was called law and religion. All of them are now about their professional apostolates; I think of them often as a special audience for what I write. They are [and he lists each of the members of the class by name].¹³

Tom’s Afterword taught me how to think about students, teaching, and scholarship. A teacher should treasure his or her students. They are treasures from God. They can be the source, as well as the recipients, of learning.

III. TOM’S RELIGION

Tom’s religious background was unusual. He was raised in the Baptist church and spoke highly of it and its influence on him. He used to say that he became Catholic as a matter of youthful teenage rebellion. A crush on a pretty teenage girl who went to the Catholic Church—Nancy—initially drew him to the Catholic Church.

In Tom’s teaching, he drew from (and exposed his students to) a very broad range of Christian (and Jewish) traditions. His assignments included readings and discussion of Thomas Aquinas (and through him, Aristotle),

12. THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* 227 (Brigham Young University Press 1981) *quoted in* Joseph Allegretti, *THE LAWYER’S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* 7–23 (1996).

13. *Id.*

Augustine, Dietrich Bonhoeffer, Martin Buber, John Calvin, Martin Luther King, Jr., Martin Luther, Alasdair MacIntyre, Gilbert Meilaender, Reinhold Niebuhr, and Michael Novak.¹⁴ Almost no one in legal education—other than Tom and his students—were talking about any of these people. Tom was particularly influenced by Christians in the Anabaptist tradition, including John Howard Yoder and Stanley Hauerwas.

As noted above, Tom encouraged his students to “view the courthouse from the church,” but his definition of “church” was not the usual one. Church is “the place where the connection between faith and work is developed, talked about, described truthfully. It might be a religious congregation . . . a Bible-study group or the regulars at a series of prayer breakfasts or the *minyan* at a synagogue.”¹⁵ Tom identified the church from which he viewed the courthouse as “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.”¹⁶ Tom particularly encouraged his students to go deep into their own religious faith while learning from all of them.

Though Tom drew from a wide range of Christian and Jewish sources, he had little use for a generalized “spirituality.” He once appeared on a panel on “Law and Spirituality” at the annual meeting of the Association of American Law Schools. He spent a substantial portion of his allotted time on the panel, gently lecturing the group on why the notion of “spirituality” did not describe his religious life. Unlike “spirituality,” religion is particular and substantive and has a history. It will wake you up at night, convicting you that you should do something unpopular, maybe something you do not want to do. It might cause you to demand justice for someone. It might get you into trouble.

IV. TOM AS MENTOR, FRIEND, AND CO-AUTHOR

After several years of law practice, I started thinking I might like to go into law teaching. Tom was one of the first people to whom I turned. I sent him a resume and a very personal letter, expressing my hopes and doubts, as well as my interest in teaching. I saw teaching (possibly) as a Christian calling. I wanted to know whether Tom thought I had what it

14. See SHAFFER, AMERICAN LEGAL ETHICS, *supra* note 6, at 149–51 (listing prominent Christian and Jewish thinkers).

15. SHAFFER & SHAFFER, *supra* note 2, at 199.

16. SHAFFER & SHAFFER, *supra* note 2, at 199.

took. Without consulting me, Tom xeroxed my resume and letter and sent them with a cover letter to several deans at religiously-affiliated law schools around the country. These included my future dean Ron Phillips at Pepperdine. I was taken aback. My interest in teaching was quite tentative at the time. As usual, Tom was five steps ahead of me. I suspect Tom's letter had some influence. As the dean at Notre Dame—a well-established, prestigious religiously affiliated law school—Tom had been one of the strongest advocates for and defenders of a new crop of religiously-affiliated law schools of all stripes—Catholic, protestant, and Jewish—which were looked upon within the legal establishment with a bit of suspicion. These deans were likely to take a recommendation from Tom seriously.

During the time I was considering the possibility of teaching, Tom and Nancy were living in a cabin outside Lexington, Virginia. He was teaching at Washington & Lee. My new wife, Denise, and I visited them there. Tom talked to me about the vocation of teaching as he chopped wood outback. Tom and Mary opened their cozy home to us, as they have done for many students and former students over the years.

Tom continued to mentor me after I entered law teaching. He was always available when I had questions. His writings and work in the Notre Dame legal clinic inspired a group of students and me to start Pepperdine's Union Rescue Mission Legal Clinic, which is still in operation these many years later.¹⁷

One of the greatest honors of my life was to co-author *Lanyers, Clients and Moral Responsibility*¹⁸ with Tom. It considers the ways a lawyer might address two questions: (1) Who controls the representation? And (2) Are the interests of other people taken into consideration in the representation? Nancy served as Tom's (and my) editor, and she was not hesitant to correct us. She gently pointed out several of my grammatical errors (including when a period goes outside a parenthesis at the end of a sentence). (She also taught me when it goes inside.)

I only remember having two disagreements with Tom during the development of the book. My original proposal to Tom was that we call the book *Lanyers, Clients and Moral Choices*. He did not have an alternate title but objected that the word "choices" smacked too much of Enlightenment Liberal individualism. The moral life is more one of exercising virtues than

17. For a bit of that story, see Roger P. Alford, *The Professor as Institutional Entrepreneur*, 47 PEPP. L. REV. (forthcoming Jan. 2020).

18. SHAFFER & COCHRAN, *LAWYER, CLIENTS, AND MORAL RESPONSIBILITY*, *supra* note 6.

making choices. Morality grows out of our experiences in our families, religious congregations, and communities. Tom and I went around and around. In the end, we settled on *Lawyers, Clients and Moral Responsibility*.

The second disagreement came because, in our different sections of the first draft, we each used different terms for the tendency of lawyers to exert too much influence over client decisions. I referred to this as “paternalism”; he referred to it as “parentalism” (the spell checker on my computer—non-existent at the time—indicates that “parentalism” still is not a word). Tom thought the term “paternalism” was sexist—that mothers were just as likely to be controlling as fathers. As I thought of certain mothers I had known—not my own or my wife Denise—I had to agree, though the odd term seemed to me to be unnecessarily distracting. But Tom won. The first edition (1994) consistently used the (non)term “parentalism.” When we published a second edition (2009), I asked Tom what he thought about changing “parentalism” to “paternalism.” He asked where we had come up with the odd term “parentalism” in the first edition. He suggested that it sounded “trendy.” I did not tell him that “parentalism” had been his term. We changed it, and everyone was happy. For other reasons, we offered a mild objection in each edition to its term (parentalism and paternalism). Acknowledging that between us, we had fathered eleven children (Tom, eight; Bob, three) we noted: “It seems to us, two fathers, a shame to use parenthood as a morally objectionable image.”¹⁹ We argued, by the way, that though lawyers should raise moral issues for discussion, they should not be parents to their clients.²⁰

V. LAWYERS, VIRTUES, AND LITERATURE

Tom was a proponent of virtue ethics in life (in general) and in law practice (in particular). He was critical of the ABA, which had developed an ever-expanding list of rules governing lawyers but gave little help in defining the good lawyer. Tom argued that people learn to be good, not so much by learning rules, but by developing virtues, good habits, that they come to act on without thinking. They learn such virtues from practice—including law practice—from doing good until it sinks in and become habitual. Many of

19. SHAFFER & COCHRAN, *LAWYER, CLIENTS, AND MORAL RESPONSIBILITY*, *supra* note 6, at 8.

20. SHAFFER & COCHRAN, *LAWYER, CLIENTS, AND MORAL RESPONSIBILITY*, *supra* note 6, at 8–10, 40, 50, 53–57.

these virtues are crucial for those in law practice: truthfulness, faithfulness, justice, civility, practical wisdom, and friendship.²¹

People learn virtues from stories and from observing mentors. Tom mentored many law students, but he also taught stories. He was at the forefront of the law and literature movement, drawing moral lessons for lawyers from stories. Tom taught from a broad range of lawyer heroes, both from fiction (the lawyers of Louis Auchincloss, William Faulkner, Anthony Trollope) and real-life (Abraham Lincoln, David Hoffman, George Sharswood, Louis Brandeis, and Thurgood Marshall). Some lawyers fit both categories. Tom taught from the real Thomas More and the one from Thomas Becket's Thomas More of "A Man for All Seasons. Coming from Tom, literary lawyers seemed real. It was several years after Tom introduced me to Atticus Finch that I realized Atticus was a literary character from Harper Lee's "To Kill a Mockingbird," not a real Alabama lawyer. (That is not actually true, but coming from Tom, Atticus became real.)

Tom's legal ethics "casebook," *American Legal Ethics*,²² has very few cases, which are the usual fodder of law school and legal ethics casebooks. Most legal ethics cases are about lawyers who have committed malpractice or violated the legal ethics rules; they deal with lawyer errors or lawyer evil. They are about the bad lawyer. One can learn a lot from studying lawyer errors, but it is also important to learn from lawyer heroes. Tom's book is composed almost entirely of stories about lawyer heroes—real and imagined—from the list above, as well as from the essays of the theologians and philosophers listed in the first section of this tribute. (One of the senior leaders of the professional responsibility community once told me that he did not know what to make of Tom's book.)

I saw a striking example of the way virtues can impact a life several years ago as a result of teaching from Tom's book. At an alumni event, a student who had been in my legal ethics course told me about one of her cases. She was a very thoughtful student and lawyer but had always struck me as being fragile, vulnerable, and insecure. At one point, she agreed to take on a case that was outside her usual type of practice. It was a sex discrimination case, in which she represented a female client who had been abused. My former student was up against a big corporation, a big insurance company, and a big law firm. She said that as she walked to the courthouse, everything in her wanted to turn and run in the other direction. But a couple of sections from Tom's book, read years earlier, came to mind—Aristotle on the virtue

21. SHAFFER, *AMERICAN LEGAL ETHICS*, *supra* note 6, at 3, 158.

of courage as the mean between recklessness and cowardice and Atticus Finch standing up to the lynch mob on the jailhouse steps. She soldiered on.²² I do not recall how the case turned out. Her point was that those reflections had affected her character and gave her strength. She had become a more courageous person through the thought of Aristotle and the role model Atticus Finch.

VI. OUR LAST VISIT

Denise's and my last visit with Tom was bittersweet. Toward the end of his life, he was in a memory care facility. Nancy warned us that though Tom was pleasant, he was not very responsive. She said that one of the few things that seemed to touch Tom were the old Baptist hymns of Tom's youth—which predated her relationship with him. I could help on this front. They were the hymns of my youth as well. I came loaded with copies for all of us—"The Old Rugged Cross," "Softly and Tenderly Jesus is Calling," "What a Friend We Have in Jesus." The old hymns had us all in tears.

Nancy, may God bless you and the rest of your family. I miss you Tom and I look forward to seeing you when we will all be together again. Thank you both for all you have taught me.

22. SHAFFER, AMERICAN LEGAL ETHICS, *supra* note 6, at 6, 132–36.