University of Arkansas at Little Rock Law Review

Volume 18 | Issue 1 Article 3

1995

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John M.A. DiPippa
University of Arkansas at Little Rock William H. Bowen School of Law, jmdipippa@ualr.edu

JACOB'S BLESSING: A REVIEW OF SHAFFER'S AND COCHRAN'S MODEL OF MORAL COUNSELING

John M.A. DiPippa[*]

American lawyers have a love/hate affair with the relationship of morality and the practice of law. Early legal ethics scholars asserted an inescapable connection between a lawyer's personal morality and his professional behavior. The early lawyer codes grew out of the elite bar's aversion to the morals of the marketplace. Lawyers asserted the moral superiority of "professionalism" over "commercialism."

In the twentieth century, two developments have helped drive moral discourse from law practices. The first, the codification project, sought to establish clear, minimally acceptable standards for lawyer behavior. The codification project created a climate in which ethical behavior was equated with following the rules. But rules, as every lawyer knows, can be manipulated, rationalized, and explained away. Thus, lawyer ethics was reduced to a branch of statutory interpretation. The second development, the professionalism project, sermonized the need for lawyers to become more "professional" and pursue the public interest. This development created a nostalgia for a golden age that never existed. In its tritest forms, bar associations encouraged lawyers to return morality to the practice of law by shaking hands after cases and returning phone calls.

As a consequence (or perhaps as the cause of the professionalism and the codification projects), most American lawyers want to avoid "imposing" their morals on their clients. They assert that their role in the adversary system is to serve the client's goals, not to evaluate them. Other lawyers argue that lawyers should not judge the client's goals or character because to do so robs the client of human dignity. Finally, some lawyers admit the necessity of moral discussion but despair of finding common language with which to discuss these matters with their clients.

I. LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY

Into this fray step Thomas Shaffer and Robert Cochran with their book, *Lawyers, Clients, and Moral Responsibility.*[1] Shaffer and Cochran locate

* Professor of Law, University of Arkansas at Little Rock School of Law. B.A., 1974, West Chester University; J.D., 1978, Washington & Lee University Law School.

1. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSBILITY (1994). An earlier version of this book review was previously published in the newsletter of the American Association of Law School's Section on Professional Responsibility. My thanks to then-editor Professor Teresa Collett for her encouragement and assistance.

This review is published here to offer a different view of Shaffer and Cochran's work

morality at the center of the lawyer-client relationship. Their book argues against the conventional exclusion of morality from law office conversation. They offer a vocabulary for lawyer-client discourse and propose a model for taking lawyers' and clients' morals into account.

Shaffer and Cochran's book may persuade readers that moral discourse pervades the practice of law. It is not certain whether readers will accept the authors' virtue-based remedy; nevertheless, their book forces lawyers and, especially, law professors to confront their failure to raise and resolve moral issues during legal representation. At best, the book is persuasive that Shaffer and Cochran have found a practical way to overcome the longstanding obstacles to the introduction of moral discourse into the law practice. At worst, the book forces consideration of alternate ways to accomplish this task.

Shaffer and Cochran's book adverts directly to religious values in two ways. First, if lawyers are to raise and resolve moral questions with their clients, they must raise and rely on the lawyer's and the client's religious values. Second, Shaffer and Cochran's approach heavily relies upon a neo-Aristotelian philosophy with a special emphasis on Thomas Aquinas.

Shaffer and Cochran tailor their book for legal ethics, law and religion, and interviewing and counseling courses. It focuses directly on the counseling behavior of lawyers and includes an examination and critique of prevailing norms of legal ethics. This book should not be limited to these courses, however, because teachers can easily adapt the book to a variety of programs. The breadth of the material and the manner of its presentation make the book suitable for inclusion in almost any course or program that examines the relationship of law and morality. The book seems especially well-suited to "professionalism" programs, either during orientation or during the first year. The curriculum and their clerkships have not yet socialized students into the adversarial ethos. Students may be more receptive to the book's message before their perceptions about proper lawyer behavior harden. Pervasive-method programs can also use the book in their curricula.

The authors also provide an excellent teachers' manual for use with their book. Each section of the manual first summarizes the book's material, then provides suggested exercises and role-play models for use in the classroom. The manual then discusses the issues raised by the exercises and models. These discussions are themselves worth the price of admission. Each contains additional information not included in the book, sometimes apparently taken

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from that presented in Jack Sammons' earlier, more detailed article. Juxtaposing these two viewpoints is also a continuation of an e-mail conversation between us concerning the influence of a lawyer's religious values on that lawyer's practice. My thanks to Jack for challenging me to look for God's hand in the work lawyers do.

from the authors' private correspondence. The manual thus makes the task of teaching moral discourse less daunting.

The book debunks the suspicion that moral theory is for the philosophically trained. As a result, it might be quite useful in continuing legal education courses and in law firm in-house training programs and retreats. The book presents complex material in an understandable way. It fairly explains various approaches and fairly critiques them. Unlike most academic presentations on the subject, the book avoids jargon and theorizing. Readers are not left to ponder abstract universal maxims, insoluble dilemmas, or veils of ignorance. Instead, the authors return the reader to his or her own moral values. That is, the authors insist that moral theorizing begins with the moral values of real people and ends with moral struggle and practice. There are no easy answers, only the invitation to "wrestle" with the moral questions raised by law practice.

The authors hope the book will stimulate conversation about how clients and lawyers "can decide what they ought to do."[2] The authors argue that all law office conversations between lawyers and clients are moral discourse. All law office decisions will help some people and harm others. Moral decisions provide the opportunity for both the lawyer and the client to become better persons. Moral discourse helps preserve individual autonomy.

Shaffer and Cochran divide their book into three sections. In the first section, the authors critique four typical conceptions of the lawyer's role. In the second section, they discuss the moral considerations that permeate law practice. In the last section, the authors propose a method for raising and resolving moral questions within the context of law office conversations.

A. The Lawyer's Role with Morality

In the first section, Shaffer and Cochran begin by proposing four metaphors that describe typical approaches to the lawyers' relationship with morality: *the lawyer as godfather, the lawyer as hired gun, the lawyer as guru, and the lawyer as friend.* Drawing on their extensive publications and from a cornucopia of interdisciplinary research, the authors make a case against the first three and offer the fourth as their preference.

In the lawyer as godfather approach, the lawyer controls all aspects of legal representation. The lawyer decides the goals of the representation and the means used to achieve them, ignoring the concerns of third parties. Moral issues are extraneous to client victory.

In the lawyer as hired gun approach, the lawyer defers entirely to the client's judgment for the goals of the representation and the means used to

2. SHAFFER & COCHRAN, *supra* note 1, at 2.

accomplish those goals. If the client raises moral questions, the lawyer listens but does not offer any advice or judgment about how to resolve the questions. Instead, the lawyer seeks to have the client decide the course of action based on the client's interests. The goal is not victory but client autonomy.

In contrast, in the lawyer as guru approach, the lawyer decides whether to raise moral questions with the client and asserts complete control over the resolution of those moral issues. The goal with this approach is neither victory nor autonomy but client rectitude, *i.e.*, that the client do the right thing (as determined by the lawyer).

Finally, in the lawyer as friend approach, the lawyer engages the client in moral conversation using friendship as a counseling skill. In this respect, the lawyer does not seek to dominate the client as the lawyer/godfather or lawyer/guru does. The lawyer/friend does not guarantee a nonjudgmental acceptance of every client decision; instead, the lawyer/friend seeks to focus moral conversation on the actual moral values of the client. Practicing the intellectual virtues of reflectiveness, tolerance, humility, honesty, and care, the lawyer/friend engages the client in a conversation that aims not only at victory, autonomy, or rectitude but also at client goodness. Ultimately, this final approach aims to make the lawyer and the client better people than they were when the legal representation began.

Lawyers have long described the moral and social desiccation that results from uncritically adopting the adversary ethic. A good portion of this critique has been presented before by the authors and others. When lawyers play the advocate at work, they eventually lose the ability to leave their advocate's mask at work. Soon they see the world from the distorted perspective of the trial lawyer. Competition, ruthlessness, and aggression dominate cooperation, kindness, and accommodation.

What is most interesting about section one, however, is its critique of even benign forms of the standard conception of advocacy. Shaffer and Cochran effectively expose the problems of the "client-centered" method of counseling. The standard conception is that client-centered counseling is an alternative to hard-ball lawyering. Far from a gentle alternative to traditional lawyering, the authors show how client-centered counseling damages the lawyer, the client, and society. The lawyer does not raise moral issues thus atrophying his or her moral skills. The client suffers similar atrophy. In addition, client-centered counseling adopts a method of short-term psychological counseling that may not be appropriate for legal representation. More damaging, however, is that the client considers the world solely from his own perspective. Doing so inculcates a socially corrosive individualism in which personal interest simply trumps the moral demands of others. In the end, the authors argue that client-centered counseling is not neutral. It requires the

lawyer to defer completely to the client. In this respect, it is as morally vacuous as the lawyer who accepts without question his client and his client's goals.

B. Moral Consideration in the Law Practice: Raising and Resolving Moral Questions

Sections two and three constitute the heart of the book. These sections contain the specific form of moral discourse the authors recommend and practical suggestions for incorporating this discourse into law office conversations. Chapter five establishes that moral conversation begins with the moral values of both the lawyer and the client. Rejecting the limitation of moral conversation to "legal values," the authors argue for the inclusion of the moral values of the lawyer and the client. These values come from the lawyer's and client's appropriate traditions and necessarily include religious values and "secular" values.

Chapters six, seven, and eight take up the moral considerations of justice, mercy, and truthfulness that permeate the practice of law. The authors use a combination of stories, academic analysis, and moral persuasion to illustrate how these considerations can come to life in a law office. The chapter on mercy/care is particularly interesting. Drawing on a diverse group which includes Carol Gilligan, Rand and Dana Crowley Jack, Rabbi Hillel, Jesus, Martin Buber, and John Calvin, the authors insist that lawyers must recognize justice and mercy's unique demands. At the very least, the lawyer must help the client identify the harm that may befall third parties if the client insists on "justice." The authors go on to point out how our religious traditions place radical demands for believers to go beyond conventional views of justice. Instead, prominent American religious traditions admonish believers to a life of peace, forgiveness, and reconciliation even in the face of a believer's legal right to controversy, vengeance, and retribution.

The authors point out that "[l]awyers should . . . talk to their clients about the risk that if they allow their competitive attitude toward the opposing party to have full reign, it will develop into a destructive, corrosive hatred."[3] Thus, lawyers must engage fully in what Thomas Aquinas called "fraternal correction" and what Karl Barth called "conditional advice."[4] Within the metaphor of friendship, the authors see the lawyer offering the client an alternate vision of justice tempered with mercy. The lawyer argues with the client, states things the client does not want to hear, and points out the client's failings. As a friend, the lawyer remains open to the possibility that the client

3. SHAFFER & COCHRAN, *supra* note 1, at 80-81.
4. SHAFFER & COCHRAN, *supra* note 1, at 47-48.

will not change. The kind of moral conversation demanded by the authors puts the lawyer at risk for change as well. The lawyer going into a moral conversation may not be the same lawyer who comes out. This, to the authors, is the essence of the moral life.

In chapters nine and ten the authors set the essential components of the moral conversation they advocate. The book devotes chapter nine to a discussion of styles; that is, styles of moral discourse and styles of counseling. The chapter comes largely from Shaffer's article, *A Lesson from Trollope.*[5] Shaffer uses characters from Trollope's novel, *The Warden,*[6] to create a typology of three lawyer counseling styles: the bishop displays empathetic understanding; the lawyer displays acquisitiveness; and the archdeacon displays parentalism. The authors prefer the bishop as the model for the moral conversation they advocate.

The bishop's empathetic understanding came through in the comfort he gave during the interview. Septimus Harding did not know what he wanted beyond "comfort for his doubts."[7] He found it in the bishop's quiet acceptance and physical contact. At the same time, the bishop sought to avoid a row. He wanted to refer the matter to someone else. He also tried to persuade Septimus to follow a particular course of action. He wanted Septimus to avoid instability and the destruction of tradition. Lawyers and clients may also confront difficult choices that require client sacrifice. Lawyers may not well serve a client who "is not interested in proving himself right as in being right."

Septimus also sought familiarity before counseling skill or advice. Like many clients, Septimus came to the bishop because he liked him personally. In return, he hoped that the bishop would at least accept him, warts and all. The counseling occurred within the context of their mutual personal regard, warmth, and intimacy. Thus, lawyers, who may not be friends with all their clients, should take a clue from the characteristics of counseling among friends. Silence and unconditional regard for the client create an atmosphere of friendship in which the client is free to work out the moral and legal dilemmas the problem presents. The lawyer should not unconditionally accept the client's goal. Like a friend, the lawyer accepts the person who is his client, but remains free to disagree and, perhaps, reject the goals his client seeks.

Shaffer and Cochran argue that lawyers can learn empathetic counseling. "The skills of friendship, as Aristotle taught, are traits of character."[8] As such, the more one exercises these skills, the more likely they are to become a part

5. 35 WASH. & LEE L. REV. 727 (1978)
6. ANTHONY TROLLOPE, THE WARDEN (1855).
7. SHAFFER & COCHRAN, *supra* note 1, at 97.
8. SHAFFER & COCHRAN, *supra* note 1, at 100.

of a person's character, thus, becoming second-nature. In the end, moral choice has less to do with logic and more to do with character and values:

> One's moral life is more the product of the sort of person one is, and aspires to be, than of logic. We use logic to *explain* our moral choices, more than we use logic to make moral choices, just as logic is often used to explain legal choices rather than to make legal choices. A friend, because he or she knows who I am, has insight into my moral life, and to some extent is able to predict as well as understand my moral logic. This knowledge and insight are the principal assets a counselor has.[9]

The book ends with a framework for moral discourse in law practice. Here the authors lay out a pragmatic way for lawyers to put the moral virtues and counseling styles into practice. The authors believe that lawyers and clients work best together when (1) the client is involved as a partner in resolving moral issues; (2) the lawyer and client are sensitive to the effect the representation may have on others; (3) the lawyer and the client apply moral values to decide the right thing to do; and (4) the lawyer and the client do what the client decides is the right thing.

Chapter ten then explains in more detail the four principles of client involvement, moral sensitivity, moral judgment, and moral motivation. The authors rely heavily on transcripts of lawyer and client interactions to illustrate each principle. These transcripts make up the bulk of the chapter, which makes this section particularly useful in a law school setting where students may not have the professional experience necessary to understand the book's principles in context. Moreover, it should be easy to make a videotape of these transcripts for extra visual impact.

The book concludes where it began. The authors urge a new vision of law practice as a helping profession. Lawyers may enjoy law practice more if they view clients as opportunities to serve and see their clients as miraculous gifts in which they encounter a new person and themselves. The authors end by quoting Martin Buber:

> I become aware of him, aware that he is different from myself, in the definite, unique way which is peculiar to him, more or less, the person he has been (I can say it only in this word) created to become.[10]

III. CONCLUSION

To be sure, the book has its faults. The book understates the influence lawyers may have on even the most sophisticated clients. It is not just the

9. SHAFFER & COCHRAN, *supra* note 1, at 101.
10. SHAFFER & COCHRAN, *supra* note 1, at 135.

battered spouse after thirty years of abuse who may be moved by the intervention of a lawyer. The intrusion of a lawyer's "ultimate judgment" is tantamount to the bumper sticker one sees on the car of religious literalists: my lawyer said it, I did it, and that's that.

The book also makes some unsupported claims about lawyers' behavior. For example, the authors suggest that lawyers may often engage in the kind of moral discourse that leads to moral improvement;[11] however, they offer no citation for this proposition. Such claims may be impossible to validate. Discussions of this type between lawyers and clients happen behind closed doors. Lawyer self-reporting may exaggerate the extent to which they actually raise such issues with their clients.

Sometimes the authors make contradictory claims. For example, they suggest that lawyers do more of this kind of counseling than academic lawyers believe.[12] At another point, they suggest that lawyers do not routinely engage in such counseling. They tell the story of the client counseling competition in which neither the students nor the lawyer-judges even noticed the significant moral issue lurking in the competition's problem.[13] This apparent contradiction is confusing. The authors' point appears to be that some lawyers have always engaged in moral discourse. Modern lawyers, however, may not recognize the opportunities to do so. To that end, Shaffer and Cochran's book serves to point out the ubiquity of moral discourse and offers a way to introduce express moral discourse into the practice of law. Nevertheless, sometimes the authors leave the reader wondering whether they are describing the current state of good legal practices or describing the goal to which lawyers today must aim.

The book ignores research showing the highly contextualized nature of moral behavior. Thus, the authors suggest that "practice makes perfect." Lawyers will get better at this kind of conversation the more they practice. Some research shows that practice may not make perfect moral agents, however. Slight changes in the context significantly influence moral behavior. Practice may only allow the lawyer to repeat the moral conversation in similar situations with similar clients.

The book assumes that lawyers and clients can readily engage in moral conversations. It asserts that the common moral background of the lawyer and the client will facilitate these conversations. There are at least three problems with this position. First, a common moral background may make it less likely that lawyers will challenge client behavior. Second, the increasing diversity

11. SHAFFER & COCHRAN, *supra* note 1, at 46-47.
12. SHAFFER & COCHRAN, *supra* note 1, at 46-47.
13. SHAFFER & COCHRAN, *supra* note 1, at 12-13.

and mobility of contemporary lawyers make it more likely than ever that lawyers and clients will not come from the same background. Third, the book does not realistically confront the problem of billing clients for moral advice. Law office economics and client reluctance to pay for "sermonizing" may make it difficult for many lawyers to engage in a fruitful moral exchange with their clients.

The book contains an altogether too brief discussion of distributive justice. Although the authors state that "[d]istributive justice is a legitimate concern of powerful clients and their lawyers,"[14] their discussion does not sufficiently develop this point. Instead, the book seems to consign such problems primarily to the "professional" distributors, the legal services lawyers. However, legal services lawyers are lawyers just like other lawyers. Some of them pursue distributive justice through law reform and other activities. Some of them pursue another notch in their litigation belt, like other litigators. Many of them practice law for poor people without any reference to distributive justice questions--either by personal choice or institutional priorities. In addition, the distributive issues are likely to arise in other practices as well. The lawyers who represent housing agencies, welfare departments, large employers, and real estate developers may often confront distributive issues. Their clients' decisions may have a greater distributive impact than the law reform efforts of a few legal services. The authors could have used some examples like the ones listed above to clarify this point.

Finally, some sections of the book cry out for an editor's knife. In places the prose grows weak, the style becomes flaccid, and the words multiply. Nevertheless, none of these flaws detracts from the ultimate value of the book. The authors not only make a persuasive argument for the inclusion of morality in lawyer-client conversations; they also demonstrate the very kind of moral discourse they recommend with a focus on common values. They gently, but effectively, confront the alternate positions on the subject. In the end, while wrestling with the intellectual and human dilemmas of their position, they remain open to the possibility of change.

The authors repeatedly use the word "wrestling" to describe the interaction of lawyer, client, and morality. This is reminiscent of the story in *Genesis*[15] where Jacob wrestles with the mysterious stranger. Jacob and his family reach the Jabbok river crossing. Jacob sends his family ahead and waits for a nighttime encounter with a mysterious stranger. Until now, Jacob has been a trickster or, in modern terms, a con man. He may have decided to lie in wait for the stranger, hoping to obtain from him some undeserved favor.

14. SHAFFER & COCHRAN, *supra* note 1, at 63.

15. *Genesis* 32:22-32.

Jacob and the stranger wrestle. During the contest, the stranger gets the better of Jacob, but Jacob is relentless. He refuses to let go although the stranger injured his leg. Finally, the stranger relents and gives Jacob his blessing. This blessing transforms Jacob. He is no longer Jacob, the heel-clutcher, but Israel, progenitor of a nation. Later, Jacob believes that he had wrestled God and survived. From that point on, Jacob's character and life change. His defrauded brother warmly receives him. He establishes a family and a nation. He is regarded as a wise and just ruler. In the end, his encounter transformed both him and the society in which he lived.

Shaffer and Cochran hold out the same hope for lawyers, clients, and society. They recommend that lawyers engage in a Jacob-like wrestling match with clients concerning the moral value of legal representation. They suggest that there is value to the contest even if the lawyer's initial motivation is for a fee. In the end, they hope that stubborn lawyers and their clients will be transformed, Jacob-like, from clever tricksters to men and women of character and distinction. If enough Jacobs transform into enough Israels, the legal world and the larger society just might be a better place to live, move, and have our being.