Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counseling in the Law Office

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I. MORAL COUNSELING

Creon has shown that there is no greater evil than men’s failure to consult and to consider. Sophocles, ANTIGONE 1439-39 (trans. Richard Emil Braun 1973).

The subject of moral counseling is now at the center of legal ethics courses in this country, having inherited this position from its logical predecessor, “lawyer-client decision-making” with its glorification of client autonomy. Of course, legal ethicists try to teach much more than this. We try to teach ethical rules and their application. We try far less successfully to teach the complex interaction of these rules with the law governing lawyers. Beyond the rules, we sometimes teach bits and pieces of the moral context of practice along with some instruction in what seems to us to be ordinary prudence for lawyers. But in those special and guarded moments when the class discussion of a troubling hypothetical pauses in...
dissatisfaction at what has been heard so far, and in anticipation of what might be added, the idea of moral counseling is what we offer our students.\(^2\) If you pressed most legal ethicists, they would probably provide some understanding of moral counseling as what they cared most about in their teaching.

Thanks largely to the work of Tom Shaffer,\(^3\) moral counseling is now there for us when the clients in our hypotheticals or in our cases ask their lawyers to take actions that may harm others.\(^4\) For the best of legal ethics teachers, as for the best of lawyers, moral counseling is there as a subject long before this breakpoint arises. But it is at least there at the breakpoint for almost all legal ethics teachers. We have learned, however, that for it to "be there" for all our students as well, much groundwork must be laid first. Many of our students are so very well-schooled in the individual relativism that liberalism can lead to, and so protective of its understanding of freedom, that they must be very gently introduced to the idea that it is not somehow immoral (if not unconstitutional!) to even raise the question

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\(^2\) It is when moral counseling fails that most legal educators turn to their second favorite topic, the division of role morality from personal morality. This, as I argue below, is an extremely unfortunate development in the teaching of legal ethics. *See infra* part IV.


\(^4\) I am thinking of direct harm to others here, but moral counseling is also there, if less obviously so because it is more demanding of an impartiality that many lawyers and clients cannot muster, when the harm is indirect as, for example, harm to the fairness, participation, and orderly conversation that the adversarial system seeks to provide.
of morality with clients. To raise, for these students, is to impose (perhaps because for many this has been their primary experience with moral conversations to this point in their lives), as they respond to the teacher’s suggestion of moral counseling with an image of clients coming to law offices with fully-formed and well-grounded moral opinions on all the issues to be raised by the dispute that the lawyer somehow knows and yet are so private that they cannot be discussed even when they appear to the lawyer to be completely stupid or, at least, wrong. (Miss Manners, I am sure, would permit none of the inherent rudeness of this appeal to a false autonomy.) When we address these student concerns in class, if we do it well, we again rely upon the good work of Tom Shaffer (and his friends).  

The real good that comes from laying this groundwork, of course, is that we have to consider with our students the nature of the relationships between the lawyer and the client, begin thinking about what types of relationship permit moral counseling and what types do not, and, for the really well-schooled students, determine whether we can make moral judgments at all.

So much time is spent in laying this groundwork, however, and so much time is spent in getting the hypotheticals or the cases to force the moral issues we want forced that, by the time we get to the breakpoint, we usually just throw down this idea of moral counseling with a great sigh of relief (and perhaps a brief discussion with the cynics, the economists, the abused, or the sinners in the class about human nature and what to do about it) and go on from there to the next substantive topic, a topic that will likely return us at the end of our discussion of it back to moral counseling. Maybe, if we have time, we will conduct some hypothetical counseling sessions with hypothetical clients to see how the conversation might go—an exercise that is bound to be false because the relationships can never be instantly created. But usually we do not return to the relationships we explored before to ask how one might go about creating such relationships—surely the legal practice’s central moral issue—and in my

5. See supra note 3.

6. If you are a law teacher—law school, continuing legal education, or other—and if you are like me, the more you try to force the moral issue, the more legal mistakes you make in the analysis of the hypothetical. I think there is something profound in this, something that Ted Schneyer commented upon about ten years ago and should comment on again. See Ted Schneyer, Moral Philosophy’s Standard Misconception of Legal Ethics, 1984 Wis. L. Rev. 1529 (1984).

7. By “sinners” I mean those students who know that man is fallen and who wish me to confirm that good moral counseling cannot rely on man’s inherent goodness, but must instead have something to do with the virtues of hope and patience required of God’s children, something I am more than happy to do, and something I think fits well with what the practice of law requires of us.
almost twenty years of teaching legal ethics I have never once had a student in the basic course ask me how one might go about becoming a moral counselor! Surely this says something horrible about my teaching. I try to present moral counseling as an unmistakable excellence of our practice, as a skill requiring virtues that can only be acquired through long legal experience by the best of us, as a good and sufficient reason for wanting to be a good lawyer, and yet even my twenty-four or twenty-five year old students come away from my course apparently thinking they already know how to do it well!

Of course, the truth of the matter, as I have admitted before, is that I don’t know how to do it well either, so I guess I am usually relieved that the “how to” question is not asked.

But I cannot get away with any of this anymore. Nor can other legal ethicists. For here comes Tom Shaffer again, this time with Robert Cochran Jr.’s expert assistance, to teach us how to teach this odd subject that has moral counseling at its center and, in doing so, to help recreate our subject for us. These two do so in a new supplemental text for legal ethics courses, Lawyers, Clients, and Moral Responsibility. This is an important text for legal ethics teachers and our students. It summarizes and responds to almost all the interesting thoughts on the subject over the past fifteen years; it forces us to think through our subject better than we have before; and, if we understand moral counseling as determining both whom the client is in the dispute and what practical wisdom we offer as lawyers, moral counseling as they describe it could serve as a central organizing principle for all of legal ethics. This could also be an important text for practitioners as well for the legal profession is surely in the midst of a paradigmatic crisis. It is clearer to us now than it ever has been before that, as Stanley Hauerwas has said of medical ethics, the greatest difficulty we face in developing an adequate account of legal ethics is to know how to describe what kind of activity the practice of law is. The way is wide open, it seems, for a re-imaging of who we are as lawyers and of what it means to say that someone

11. My own efforts to show how this might work are in Jack Sammons, Lawyer Professionalism (1988).
12. “For, odd as it may sound, our greatest difficulty in developing ‘medical ethics’ has been to know how to describe what kind of activity medicine involves.” Stanley Hauerwas, Truthfulness and Tragedy: Further Investigations into Christian Ethics 186 (1977).
is a good one. These are precisely the tasks that Shaffer and Cochran undertake. So if moral counseling is now at the center of legal ethics courses, as I claim it to be, it could later be at the center of a new understanding of our practice. Accordingly, it would be good for everyone in the legal profession to pay attention to what Shaffer and Cochran have done here.

These two authors are my friends (and I hope they will remain so after this article). After I delivered critical comments on a draft of their text, they pushed me in a rather public way to convert those comments into a review as a way of carrying on the conversation. Rather than reviewing their work as a text for students and teachers, however, what I think would be more interesting is to treat their text as what it is, the first good heuristic model we have for moral counseling in the law office, and respond to it as such because—well—I think they have the model all wrong. And, although I do not footnote it, for my criticism of his own work with Bob Cochran, I rely upon the good work of Tom Shaffer yet again, for there is nothing I say here that I have not learned how to say from him in one way or another.

In brief summary, their model for moral counseling rests upon a foundation of friendship and moral commonalities. Moral counseling in the law office, they say, should be done by the lawyer as if in a traditional friendship with the client, that is, as someone concerned with the client's goodness for the client's own sake. A concern with victory, autonomy, or even rectitude—doing the right thing in other words—is simply not enough for good moral counseling. They demonstrate this in a very clever and useful manner through narrative descriptions of three approaches to moral choices in the law office: the lawyer as godfather (representing the client for victory), the lawyer as hired gun (representing the client for autonomy),


14. In some ways this may be unfair because they wrote the text for pedagogical purposes and not as a formal exposition of their model. For such unfairness, I ask their forgiveness, and I hope for their response.

15. This is literally true. After writing this article, and in preparing the footnotes, I looked at some of my well worn copies of Shaffer's early articles only to discover that there will be absolutely nothing in this article that is a new thought to him. Some of what I thought were my best insights turn out to have been rooted in my reading early Shaffer.


17. *Moral Responsibility*, *supra* note 10, at 5-14. The image of the lawyer as godfather comes from the movie *The Godfather* (Paramount Pictures Corp. 1972) in which Don Corleone "represents" Johnny Fontaine, a washed-up singer, who has been denied a part in a movie. Corleone promises him the part and, when asked how we will do it, Corleone responds: "I want you to leave it all to me." What he does is to make an "offer [the
and the lawyer as guru (representing the client for rectitude). These approaches all fail, they conclude after analyzing each narrative, because good moral counseling always has as its central issue the type of person the client is becoming in the representation. This they find only in the lawyer as friend (representing the client for goodness). Of course, there are many different ways of being friends, even many “traditional” ways. The traditional way they have in mind is Aristotelian (not surprisingly given Shaffer’s well-known proclivity toward virtue ethics).

Now, counseling as if in a traditional friendship will certainly require some sharing of moral values. For these, Shaffer and Cochran recommend

director] can’t refuse.” The director understands the offer when he awakes with his prized horse’s severed head in his bed. Apparently, Fontaine never knows anything about this. Shaffer and Cochran find an analogy to this kind of “representation” in the true story of a law firm’s representation of one brother against another in a law suit concerning the management of the family business. In the representation, not only is the relationship destroyed but, melodramatically were it not true, one brother dies from cross-examination. What the client got was victory, as did Johnny Fontaine.

18. MORAL RESPONSIBILITY, supra note 10, at 15-29. The lawyer as hired gun is very familiar. What Shaffer and Cochran do with it is connect it to autonomy and through autonomy to the “client centered” model of counseling that has dominated legal education and continuing legal education for at least a decade. The lawyer as hired gun understands his task to be to protect the client from the influence of others, including the lawyer, so that clients will “be their own [moral] rulers.” MORAL RESPONSIBILITY, supra note 10, at 17. They do this, as Shaffer and Cochran emphasize, with great harm to others. The story they use to demonstrate this is from Steven Wexler, Practicing Law for Poor People, 79 YALE L.J. 1049, 1053-54 (1970). In this story the lawyer sits back while his poverty clients bully doctors to obtain an unfair advantage over other presumably poor people in having medical services provided to one client’s sick child. He justifies his neutral role in this, for his presence certainly made a difference, as “empowerment” of clients. According to Shaffer and Cochran, the hired gun lawyer’s alleged neutrality probably shapes his clients towards such self-serving choices. Like the lawyer as godfather, the lawyer as hired gun does not represent client interests, properly understood, for he never enters into the dialogue required for the client to both discover and express what those interest might be. In addition, in the process of representing clients, the hired gun abandons his own morality by denying his moral responsibility for the harm the client does to others.

19. MORAL RESPONSIBILITY, supra note 10, at 30-39. The lawyer as guru is concerned with the client doing the right thing. He does not abandon his moral responsibility for others, as the hired gun did. Instead, he imposes his morals upon his clients to insure that the client will do the right thing. Shaffer and Cochran tell the story, a familiar one for Shaffer’s legions, of Tom Shaffer as a young lawyer watching one of his mentors in the practice tell his client that integrating his factories in the South was what he “ought” to do despite the facts that the law was not clear on this and the client had little awareness of the consequences that would follow. The problem with this is that the client had no role in doing the good and, therefore, cannot become good himself. Returning to Shaffer’s best known themes, the authors see the lawyer as guru following from the traditional moral exemplar of the gentleman-lawyer, as elitist, as encouraged by claims of professionalism, and as depending far too much upon the personal morality of lawyers acting alone.

20. MORAL RESPONSIBILITY, supra note 10, at 40-54.

21. MORAL RESPONSIBILITY, supra note 10, at 45-47.
that lawyers not draw upon legal values, as William Simon has argued,\textsuperscript{22} or conventional moral values,\textsuperscript{23} but instead upon those moral values that clients and lawyers have identified in their personal traditions, especially, in this country, in their religious traditions.\textsuperscript{24} These values are accessible, if the moral context is truthfully described, by appealing to the conscience of the client. The lawyer and the client may still not share these moral values, but the extent of their moral differences, they tell us, will be mitigated because law practice is primarily "local" which means that clients and lawyers will often participate together in "mediating associations such as religious congregations, neighborhoods, and towns." Also, clients are likely to self-select lawyers whose values match their own.\textsuperscript{25} Lawyers, then, will often share, "or at least be familiar with,"\textsuperscript{26} the clients' morals—enough, they claim, for counseling as if in a traditional friendship to occur.\textsuperscript{27} More to the point, the primary values this type of moral counseling in the law office requires are justice, mercy, and truth. These moral values, they believe, are sufficiently shared among different moral and religious traditions to serve as common moral ground for good counseling. To demonstrate how these values would work for the lawyer as friend, Shaffer and Cochran offer three more good stories, one each on justice, mercy, and truth.

My arguments against a model for law office moral counseling based on friendship and moral commonalities lead me, and I hope will lead them and you, to the conclusion that we would be far better off thinking of our clients as, in the words of the gospel song, "rank strangers."\textsuperscript{28} And we would be better off relating to these strangers not as if in a traditional friendship but as the rhetoricians that I believe our lawyering tradition teaches us to be. But whether I have our tradition's lesson right or not, and I only invite you to consider that possibility here, I think any heuristic model for moral counseling in the law office has to start with an interpretation of the story of which we lawyers are a part. For this is where we are likely to find our best moral resources for counseling and the firmest grounds for them. Shaffer and Cochran, because they accept a hostile academic critique of the practice, one that separates role morality from personal morality in defense of a false integrity, have failed to do this and,

\textsuperscript{22} \textit{MORAL RESPONSIBILITY}, \textit{supra} note 10, at 56-59 (citing William Simon, \textit{Ethical Discretion in Lawyering}, 101 HARV. L. REV. 1083 (1988)).
\textsuperscript{23} \textit{MORAL RESPONSIBILITY}, \textit{supra} note 10, at 58-59.
\textsuperscript{24} \textit{MORAL RESPONSIBILITY}, \textit{supra} note 10, at 59.
\textsuperscript{25} \textit{MORAL RESPONSIBILITY}, \textit{supra} note 10, at 50.
\textsuperscript{26} \textit{MORAL RESPONSIBILITY}, \textit{supra} note 10, at 50.
\textsuperscript{27} \textit{MORAL RESPONSIBILITY}, \textit{supra} note 10, at 50.
\textsuperscript{28} ALBERT BRUMLEY, \textit{Rank Strangers to Me} (BMI). It was never done better than Bob Dylan's version on \textit{DOWN IN THE GROVE} (Columbia Records, 1987).
in so failing, have not been able to provide an adequate heuristic model for moral counseling in the law office.

II. FRIENDSHIP

"The proper office of a friend is to side with you when you are in the wrong. Nearly everybody will side with you when you are in the right." Mark Twain, Notebook, 1935.

To be a good advocate, Shaffer and Cochran tell us, the lawyer must consider all aspects of the client's life, including the client's relationships with others, and only then can they determine with the client what the client's true interests might be and how these interests should be represented.\(^{29}\) The lawyer as godfather (victory) cannot do this for he denies the client participation in the representation and ignores the interests of others. The lawyer as hired gun (autonomy) cannot do this, even though his clients do participate in the representation, because hired gun lawyers have a very limited understanding of what client interests might be. The hired gun lawyer values freedom, especially freedom from others, far too highly. Despite claims of neutrality, such a lawyer shapes both the client and the representation to match this self-centered understanding of client interests.\(^{30}\) The lawyer as guru (rectitude) cannot achieve this either because guru lawyers dominate the moral concerns of the relationship. They deny the client moral participation in her own dispute, thus, denying to her the opportunity the dispute presents for becoming good.

What true advocacy requires instead is wanting the client's goodness and:

A lawyer who is concerned with the goodness of the client will be concerned with the effects the client's actions (and the lawyer's actions on the client's behalf) have on other people, but the lawyer will also be concerned about what type of person the client is becoming during the representation. Goodness is not primarily doing the right thing—it is being and becoming a good person—developing skills for goodness. (Socrates called these skills virtues.) It comes about in those who

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29. MORAL RESPONSIBILITY, supra note 10, at 42-43.

30. Although Shaffer and Cochran do not discuss it, the belief that the client is self-centered is also produced by the hired gun's choice of what he believes are neutral analytical means such as cost/benefit analysis and the like. As James Boyd White says of Odysseus in JAMES BOYD WHITE, HERACLES BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985): "As for his choice of means, Odysseus' attention to probability and improbability, to costs and benefits, locates the authority for that choice outside the self, in the world, for the only question is what will work best. Such a mind cannot constitute a self." Id. at 21. What it does constitute is a conception of the person as acquisitive.
exercise their ability to do the right thing. And, as Martin Buber taught, the moral life centers in relationships with other people; the center of the client's life—the very stuff of it—is in relationships with other people.31

Now, of course, a concern with the client's goodness and a concern for others is not sufficient to constitute good lawyering. The good lawyer will also be concerned with victory, autonomy, and rectitude. What makes concern with the client's goodness central, however, is that it is only through such a concern that the lawyer can determine the client's true interests. It is only in this way, in other words, that the lawyer can be said to truly help the client. And so, following Socrates, they advise: "When you embark upon a public career, pray will you concern yourself with anything else than how we citizens can be made as good as possible."32

Shaffer and Cochran know well that we need much more here before this moral lesson about lawyering can be well learned. The terms used, "goodness," "autonomy," "victory," "rectitude," "virtues," and so forth, are so very slippery33 that, as Virginia Woolf once described talking to children, using them is like throwing stones in a deep well: You are fairly certain what they are when they leave your hand, but as they sink deeper and deeper below the surface, changing shapes as they go down, you lose

31. MORAL RESPONSIBILITY, supra note 10, at 44.
32. MORAL RESPONSIBILITY, supra note 10, at 44 (citing Socrates, Gorgias).
33. Shaffer and Cochran have their own troubles with the terms they use. Surely, for example, rectitude and goodness cannot be so sharply distinguished in any account that claims to be Aristotelian. Also, they are just as ambiguous about the value of autonomy and confused about its meaning as the rest of us. It seems to me that the idea of autonomy starts taking on different meanings at different places in Shaffer and Cochran's text, especially if we compare how it is used when it is applied to lawyers with how it is used when applied to clients. For Shaffer and Cochran, serving the client's autonomy is a necessary thing, but full of moral risks; for autonomy means the myth of self-rule and often means harm to others. Serving the lawyer's autonomy, on the other hand, is an almost risk-free preservation of personal integrity. It means being true to personal traditions. When talking about what lawyers do as a "role," autonomy comes to the rescue because the morality of the role is something lawyers did not choose for themselves and is, therefore, illegitimate. Here we get Shaffer and Cochran, saying things like "[I]awyers who are controlled by a morality other than their own are at moral risk." MORAL RESPONSIBILITY, supra note 10, at 29. This is an extraordinary thing for a very good Catholic like Shaffer to say . . . or maybe not. In any case, it helps make my point, argued below, that when legal ethicists start talking about personal and role moralities they do so at their own moral risks. Of course, given our general confusion about autonomy, it would be very surprising if Shaffer and Cochran could use the idea of autonomy consistently. Nevertheless, what consistent sense one tries to make of autonomy often determines much of what is to follow in any moral analysis. If we try to understand autonomy, for example, as the sine qua non of integrity or authenticity, and then understand the ethics of authenticity, as Charles Taylor does, as against a cultural background of demands that emanate from beyond the self that gives it moral force, we would have a very hard time holding on to Shaffer and Cochran's criticism of the hired gun's service to client autonomy. See CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY (1992).
confidence that what hits the bottom is what you threw in at the top. What is clearly needed here, as it would be in talking to children, is a good analogy; they find the one they need in "friendship."

The model that we advance for the lawyer who is concerned with the goodness of the client is the lawyer as friends. We are not suggesting that the lawyer can become a friend to every client, but that the lawyer and client should deal with moral issues that arise in representation in the way that friends deal with moral issues. Our point of view here . . . [turns] on being like a friend as a counseling skill. 3

This analogy is not just there, as it might be for children, as a simplified way of saying what has already been said about a concern for the goodness of clients. Rather, it is really expected to do much of their hard work for them. They rely on this analogy to friendship as an earthy way of communicating to law students and lawyers what to do in moral counseling, how to do it, how to learn how to do it (by studying friendships, especially narratively), why it is worthwhile, and as a way of justifying the special preference we give to our clients over others. 3

Now for friendship to carry this load dependably it must draw upon readers' experiences with the hope that those experiences will come close to matching what the authors mean. This is a problem here, however, for

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34. MORAL RESPONSIBILITY, supra note 10, at 45. Shaffer and Cochran struggle, as I do in this article, to be consistent in their use of friendship. Usually, for them, it is an analogy, that is, a way of learning what good moral counseling in the law office is by comparing it with how good friends would counsel each other. Sometimes, however, it is more. Sometimes, despite what they say in the quoted section in the text, they write as if the lawyer and the client are in fact good friends and, more disturbingly, good Aristotelian character-friends (see infra text accompanying note 38 and following for a discussion of character-friendship and its requirements). It is very hard to keep these uses separate in their analysis because it is so hard, as I argue below, to understand what counseling as in an Aristotelian character-friendship might be if one is not in an Aristotelian character-friendship, but is instead counseling people who are strangers.

35. This last use is from subtext. Charles Fried's classic use of the lawyer as friend was a way of understanding and justifying the special preference we give to clients. Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship, 85 YALE L.J. 1060 (1976). For why should we prefer their interests over the interests of others and why should we seek to advantage those interests? Why indeed! The Kantian ethic so dominant in our culture, premised as it is on what is owed to the person qua person, has great difficulty accounting for the special preferences we give in relationships such as friendship. Aristotle, of course, has little difficulty with this, but great difficulty with an ethical concern for "the furthest Mysian," those with whom we have no personal ties, that the Kantian never faces. Shaffer and Cochran never discuss the ethical issue of preference directly. They never ask, as Fried does, why we should even consider serving the good of the client instead of the good of others. Nonetheless, it seems to me that Shaffer and Cochran necessarily invoke Fried's friendship justification for special preferences just by using the analogy, and so I have included this in the list in the text.
the authors know the friendship experiences most readers will have not only fail to match what they mean by friendship, but will likely lead their readers astray. Thus, they say: "[Our] understanding differs in important respects from the way that people commonly understand friendship today, as we live in what Alasdair MacIntyre describes as a society of strangers."36

Because they are working against their readers' experiences, then, Shaffer and Cochran need to be very clear about their model of friendship. This they do by telling us not to be too interested in modern friendship—pleasure friendships as they characterize them. Pleasure is an important aspect of all friendships, to be sure, and it offers guidance for the approachability that good lawyering requires,37 but it is not enough to make friendship good. Rather than modern friendships, what Shaffer and Cochran mean by friendship is Aristotle's highest form of it, character-friendship, as John Cooper calls it.38 This type of friendship depends upon a "common commitment to the good,"39 one in which each friend moves the other toward goodness. It is a friendship that by "teaching us to care for friends as they care for us," also teaches care for others, and a friendship that makes fraternal correction possible when one friend wants what is "inconsistent with the good."40 The book's message is that lawyers are to counsel their

38. John Cooper, Aristotle on Friendship, in Essays on Aristotle's Ethics 301, 308 (Amelie Oksenberg Rorty ed., 1980) [hereinafter Cooper, ARISTOTLE]. Philia, the Greek word for friendship, refers to a much broader range of associations than it does for us. When he talks of philia, Aristotle is interested in all relationships that involve a reciprocal liking, a "wanting for someone what one thinks good for his sake and not for one's own." Id. at 302. He thought nonpersonal civic friendships, "fellow citizens who are not otherwise personally connected [who] ought nonetheless to be predisposed to like one another and to wish and do each other well," were essential to all human good. Id. at 303. But in the discussion in Nicomachean Ethics, relied upon by Shaffer and Cochran, he focuses upon three basic types of friendship: pleasure-friendship, advantage-friendships, and character-friendships. The final type is the perfect model for friendship. (Cooper calls it character-friendship to counter the impression Aristotle gives that such perfect friendships are only possible for those who are perfect moral specimens. Id. at 308.) And Aristotle is primarily interested in it because he wants to answer the question of whether the perfect human specimen, the flourishing person, would have any need for true friendships in a life well-lived. Id. at 317. See also Francis Sparshott, Taking Life Seriously: A Study of the Argument of the Nicomachean Ethics ch. 4 (1994) [hereinafter SPARSHOTT, SERIOUSLY]. Aristotle is primarily interested in approaching the topic this way, of course, because his account is teleological.
40. Moral Responsibility, supra note 10, at 47. "Friends are enough for one another to confront one another when the occasion demands the painful truth. This aspect of friendship (and of lawyering) is the primary concern of this book." Moral Responsibility, supra note 10, at 48.
clients as if in such Aristotelian character-friendships.41

There is no wonder that Shaffer and Cochran wish to separate themselves from modern friendships. For, without this “common commitment to the good,” as C.S. Lewis reminded us in his Aristotelian account of friendship, phília is the most dangerous of all loves.42 It is a “second thing” in danger of becoming a first.43 The judgment of friends is suspect, Lewis says, because friends are “armed against influences from without,” overvaluing each other’s approval and undervaluing the suffering and moral values of outsiders.44 Lewis presents the dramatic image, for example, of a cadre of aristocratic friends who would die for each other but not give up one bottle of wine to save an entire village from massacre. Friendship of this sort, he says, is “a resistance movement,” one that can resist “God as well as society”; a “corporate pride” bound together by loyalty, and not transforming at all for “it raises all for good or for ill.”45

41. The characteristics of Aristotle’s character-friends as described by various authors are: love, acknowledgment, reciprocity, likeness or similarity, permanence, sharing, and shared activity. See Cooper, ARISTOTLE, supra note 38, at 322; SPARSHOTT, SERIOUSLY, supra note 38, at 275; and, JULIA ANNAS, THE MORALITY OF HAPPINESS 254 (1993) [hereinafter ANNAS, MORALITY]. I have avoided directly criticizing Shaffer and Cochran for failing to match up the relationship they describe with these lists, especially with the requirement of reciprocity—for why would a client be so interested in my goodness—for they wish to use character friendship only as an analogy. Their moral counseling is to be “as if in” this relationship as I have had occasion to say now numerous times. Nevertheless, the problems remain. For example, Aristotle says that if it is not reciprocated, the well-wishing involved in all friendships is reduced to being “well-disposed” towards another. This he sharply distinguishes from friendship. How then could a lawyer counsel (and be counseled in return) as if in this relationship if this well-wishing is not reciprocated. In other words, this reciprocity seems essential to whatever guidance for moral counseling this kind of friendship might offer. Furthermore, as Hauerwas notes, “[F]riendship itself is an activity necessary for us to acquire the steadfastness necessary for our being true friends.” Stanley Hauerwas, Happiness, the Life of Virtue and Friendship: Theological Reflections on Aristotelian Themes, 45 ASBURY THEOLOGICAL J. 5, 39 (1990). It is, in other words, transformative in a way that would then make possible the kind of moral counseling Shaffer and Cochran seek. As such, you can’t have one without the other.


43. Id. In other words, as C.S. Lewis says, it treats those things that are almost absolute—notions such as ‘stand by your friends, stick to the firm, or go down with the ship’—as if they were absolutes. Id. at 28.

44. Id. at 81-82. Friendship of this sort is, then, a return to the morality of the Athenian conception of justice that both Plato and Aristotle struggled against: Do good to your friends and harm to your enemies.

45. Id. at 80-83. For example, “Ten people join together to steal a beam, and are not ashamed in each other’s presence.” THE BABYLONIAN TALMUD, KIDDUSH at 80b, quoted in RABBI JOSEPH TALUSHKIN, JEWISH WISDOM 210 (1994). It is this kind of friendship Auden must have had in mind when he issued his challenge to Aristotle, “A vice in common can be grounds of a friendship but not a virtue in common. X and Y may be friends because they are both drunkards or womanizers but, if they are both sober and chaste, they are friends for some other reason.” See SPARSHOTT, SERIOUSLY, supra note 38, at 305 n.31.
Such friendship, Lewis concludes, is inherently morally ambiguous. Thus, as Shaffer and Cochran know, there is very little guidance for moral counseling in the law office in modern friendships, divorced as they are from a common commitment to the good; there is only the warning of the dangers the relationship itself might hold.

If, however, Shaffer and Cochran can successfully describe the friendship of the lawyer as friend as an Aristotelian character-friendship and show us how this fits into our moral world, they can avoid these problems. For, while it is notoriously difficult going, Aristotle's account of friendship is a fully coherent account within his moral world that neatly avoids the moral ambiguity of modern friendship. So, we have to ask, is the friendship they describe Aristotelian?

The first thing we should note in trying to answer this question is how odd this use of Aristotle appears to be. What Aristotle struggled to do was to show how friendship fit with the self-regard his understanding of morality depends upon. He wanted to show how, despite the fact that we care for our friends, the good man was really being "selfish" in having friends. To do this, selfishness must be understood as within a polity in which there is but one good way to serve the true self and friendship must be shown to fit that way. (It is important to recognize that this selfishness is the selfishness of the good man, someone whose interests are truthfully defined by that happiness that comes from virtuous activities. Such men, as Sparshott says in his reading of Aristotle, "ought to be selfish if that means seeking to do what they judge best for themselves." Because of this focus on selfishness, Aristotle said little about the care of others. For the most part, he took it for granted that those living within the polis would care for each other. As most read him, however, it is quite clear that this concern

46. LEWIS, supra note 42, at 84.
47. ARISTOTLE, NICOMACHEAN ETHICS 1166a-1166b [hereinafter NE]. Following convention, references to Aristotle's work are based on the first modern edition by I. Bekker, commissioned by the Prussian Academy (Berlin 1831). The indicators are to Bekker's page, column, and line numbers.
48. For an excellent discussion of the relationship in Aristotle of friendship, self-concern, and other-concern, see ANNAS, MORALITY, supra note 41, at ch. 12 (1993).
49. SPARSHOTT, SERIOUSLY, supra note 38, at 297; see also NE, supra note 47, at 1169a-1169b. 
50. ANNAS, MORALITY, supra note 41, at 253. See also NE, supra note 47, at 1155a, 1159a25-1161b10. The role the "other" plays in Aristotle is very controversial. There are "others" lurking around all over the place in NICHOMACHEAN ETHICS primarily because of the central role justice plays in understanding the virtues. It would be very fair, I think, for someone to argue that his entire analysis depends upon this other-concern being there. But my point is the simpler one that he has little to say about where this care of others comes from. Instead, he simply assumes that it will be there. I think this is just as true of his treatment of friendship as it is of his treatment of justice. My thanks to Alexandria Penas,
for others does not extend to the “furtherest Mysian,” that is, to someone with whom we have no personal ties. Yet here Shaffer and Cochran are working in the opposite direction. They want friendship to teach us care for others and, perhaps especially, those others with whom we have no personal ties or only the weak ties that a society of strangers provides. They want friendship as a counter to the selfishness of our culture.

What Shaffer and Cochran also want from this analogy to character-friendship is for it to teach us how to counsel clients (and be counseled in return) about becoming good. Now, Aristotle does tell us that good men do not let their friends go wrong, and this admonition is perfectly consistent with Shaffer and Cochran’s model of friendship. But Aristotle’s character-friends form in a recognition of a settled goodness that is essential in the other. In fact, it is the non-transitory nature of the friends’ goodness that distinguishes this form of friendship from the lesser friendships of pleasure and advantage. Character-friends wish each other well because of the settled excellence of their character. The goodness they want for each other is a “response to what the [other] person is and [has] done rather than merely the expression of a hope as to what he will be and may do in the future.” To want the good for a character-friend for his own sake, then, is to wish the world to be the fitting sort of place in which his good character, his “goodness,” will be well-rewarded. In such a scheme the

a graduate student in philosophy at Princeton, and a good e-mail buddy, for her thoughts on the role of the other in Aristotle.

51. ANNAS, MORALITY, supra note 41, at 251.
52. Throughout the section on friendship I have used the male pronoun as a reminder—sometimes a stark reminder—to the reader that Aristotle was talking about men.
53. NE, supra note 47, at 1159b6.
54. NE, supra note 47, at 1156a6-1156b31. See also ANNAS, MORALITY, supra note 41, at 250. The lesser friendships of pleasure and advantage are friendships only by analogy to the true friendship of the good. NE, supra note 47, at 1156b31. See also Stanley Hauerwas, Happiness and the Life of Virtue and Friendship: Theological Reflections on Aristotelian Themes, 45 ASBURY THEOLOGICAL J. 5, 37 (1990).
55. Cooper, ARISTOTLE, supra note 38, at 311. As I have noted previously, Cooper argues that this is not to say that only paragons of virtue can form character-friendships—although this is certainly how Aristotle discusses it—for it is possible, he says, to have character-friends based upon a conception of the other as morally good in some respect or in some degree even though the other’s character is not perfectly virtuous. But the central point remains that the friendship is formed in a recognition of the good moral qualities of the other and is certainly not open to all. Id. at 307. For a more inclusive view of Aristotle’s character-friendship than mine and one that may fit better with Cooper’s, see Stanley Hauerwas, Happiness, the Life of Virtue and Friendship: Theological Reflections on Aristotelian Themes, Part III: Companions on the Way: The Necessity of Friendship, 45 ASBURY THEOLOGICAL J. 35 (1990).
56. Cooper, ARISTOTLE, supra note 38, at 311.
57. This is, of course, more than just a wish that circumstances will be favorable, although it is that, for as Rabbi Mordechai Kaplan said: “Expecting the world to treat you
crucial virtue, as the common understanding of the English version of this morality certainly attests, is the ability to discern who is a person of good character and who is not. To treat someone who happens to walk in the lawyer's office door as if he or she were in a character-friendship with the lawyer, as Shaffer and Cochran would have us do, would make no sense to Aristotle. This would be viewed by him as a serious moral threat to the lawyer's client, or as foolish tempting of personal corruption. It is likely that this practice by itself would be enough to call into question the lawyer's capabilities to counsel as a character-friend for the lawyer would lack the judgment about people necessary for such a task.

Furthermore, beyond the definitional characteristic of being concerned with the good of the other for his own sake, it is not at all clear how a character-friend would counsel in the law office (or anywhere else for that matter). The value of the character-friend in Aristotle, the reason character-friends are essential to eudaimonia, is that the character-friend is a second self. The relationship is so intimate, friends share so much and fairly because you are a good person is like expecting the bull not to charge you because you are a vegetarian.” RABBI JOSEPH TELUSHKIN, JEWISH WISDOM 220 (1994) (quoting RABBI HAROLD KUSHNER, paraphrasing Rabbi Mordechai Kaplan in WHEN ALL YOU'VE EVER WANTED ISN'T ENOUGH 91 (1965)). It is also a wish that Aristotle's eudaimonism will be true, that is, that the constancy of character the friend displays will be the flourishing upon which eudaimonia is bestowed.

58. I want to be clear here that the problem of selecting character-friends is not of deciding who are good and who are bad people. This is something that might be reducible to a private morality and a private judgment at complete odds with Aristotle. The problem of selecting a character-friend is to be able to accurately discern those who have got morality right and those who have not. The discernment itself, then, is an act of character for it is only good people’s notions of what good people are like that is true. SPARSHOTT, SERIOUSLY, supra note 38, at 278. What is needed is the ability to see that the other has the indeterminacy, inconsistency, or frivolity that can lead one astray from the good and, thus, prevent that person from serving as a second self for one who is good. SPARSHOTT, SERIOUSLY, supra note 38, at 278.

59. It would be a threat because it might be flattery. See NE, supra note 47, at 1159a15. Or deceit. NE, supra note 47, at 1165b5. But, in any case, it is not true character-friendship. See NE, supra note 47, at 1156b30.

60. According to C.S. Lewis, it is a hallmark of philia, something that distinguishes it from eros and storge, that friends do not want to know each other's affairs. Friends, he says, will talk about anything other than each other. C.S. LEWIS, THE FOUR LOVES 70. They are joined as “naked personalities” free from their connections to others. Id. at 71. Thus, it is difficult to know what guidance of the “how to” sort an analogy to friendship offers for moral counseling.

61. NE, supra note 47, at 1166a30. For discussion, see Cooper, ARISTOTLE, supra note 38, at 319-22; SPARSHOTT, SERIOUSLY, supra note 38, at 287-89; and ANNAS, MORALITY, supra note 41, at 253. As you can see, this is closely related to my previous point about the need to be careful in the selection of character-friends. If one is worried about the “goodness” of a character-friend, that person cannot, by definition, serve as a character-friend, and the decision to be made is whether to sever the friendship entirely or, if the
become so alike, that each friend serves as a moral true mirror for the other. This is how character-friends counsel. They become, in the beautiful Rastafarian expression for “me and my friends,” I&. In fact, this is one way that Aristotle reconciles self-regard with friendship. We profit from friendships, he says, by being able to see our own activities in the activities of our friends so that we, as good men, can reason about our self-interest correctly. This odd form of Aristotelian fraternal correction is certainly very different from Shaffer and Cochran’s moral counseling in the law office with its rather delicate personal appeals to the consciences of clients with whom so little may be shared.

But is so little shared? The root cause of each of the three differences I have just noted between Aristotle’s account of character-friendships and Shaffer and Cochran’s use of it for guidance in moral counseling is the central role Aristotle’s teleological account of the good for men plays in his understanding of character-friends. This may be obvious, but if it is not, notice, for example, the enormous difference this teleological account makes in characterizing the dissolution of a character-friendship when a friend is in the wrong. Without Aristotle’s teleological account, the modern understanding of friendship would have loyalty as the central virtue of the activity of being a friend—as the quotation from Twain reminds us—and betrayal as the central vice. If this is true, then some understandings of integrity could require loyalty and forbid dissolution when a friend is in the wrong because loyalty would be a consistent commitment to a moral authority that is not just a matter of arbitrary personal choice within a private sphere. For the only thing of any permanence shared between modern friends is their loyalty toward each other. And, in fact, this is often failure is curable, retain some lesser form of friendship. NE, supra note 47, at 1165b.

62. “One recognizes the quality of one’s own character and one’s own life by seeing it reflected, as in a mirror, in one’s friends.” Cooper, ARISTOTLE, supra note 38, at 322. This is not for self-awareness sake, but for an objectivity that is similar to the objectivity that science used to seek.

63. Cooper, ARISTOTLE, supra note 38, at 322. This is one of the two reasons he sees for friendship being essential to eudaimonia—the other is shared activities—but it is not why we enter into friendship.

64. In Aristotle’s scheme, it is only vicious people who would allow their conscience to determine right and wrong because this simply enshrines the biases they happen to have, the biases that character-friendships could correct. See SPARSHOTT, SERIOUSLY, supra note 38, at 294. Such people simply do not care enough about getting their own interest right and, therefore, do not care enough about the good to be character-friends.

65. Loyalty, that is, would be definitional of the self in the friendship. Surely this is a very odd account of integrity mixing, as it does, fragments of various moralities none of which could possibly fit together in a coherent fashion. But, as a society of strangers, this may be the situation we are in. See generally ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1984).
how we think of modern friendships. As we shall see, however, with Aristotle’s teleological account in place, such a dissolution of a character-friendship is not a vice at all; it is not betrayal, but is itself an exercise of integrity.

Loyalty plays almost no part at all in Aristotle’s brief treatment of the dissolution of friendships. When a friend does not remain as he was, Aristotle sees “nothing strange” about breaking off the friendship. This is obviously true, he says, for the lesser friendships of pleasure or advantage, but also true for character-friendships. For when a character-friend does not remain as he was, either he was not such from the beginning or else he has become wicked. If he was not such from the beginning, then either he deceived you or else you have only yourself to blame. If he has become wicked, then he simply cannot serve as a character-friend. In all cases, we owe the former character-friend no affection at all for “only the good—not just anything—is the object of affection. What is evil neither is nor should be an object of affection for a man must not be a lover of evil, nor must he become like what is base. As we have said, like is the friend of like.” Thus, as a matter of your own integrity as a good man, you dissolve the friendship. The only thing that troubles Aristotle about the harshness of this account is whether a true character-friendship gone wrong (not one that was mistaken from the beginning) should be broken off at once. On this, he says, “[p]robably not in every case, but only when the friend’s wickedness has become incurable,” for we should come to our friend’s aid if there is a chance of reforming him. Nonetheless, “no one,” he says, “would regard a person who breaks off such a friendship as acting strangely.” Almost as an afterthought to soften the harshness, Aristotle concludes the section with

66. "If I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country." This statement by Mr. E.M. Forster reminds us how far we have wandered from the ancient conception of friendship, of treating a kindred soul as an ends and not a means.” THE OXFORD BOOK OF FRIENDSHIP 19 (D.J. Enright & David Rawlinson eds., 1991) (citing CYRIL CONOLLY, THE UNQUIET GRAVE (1944)).
67. NE, supra note 47, at 1165b.
68. NE, supra note 47, at 1165b.
69. NE, supra note 47, at 1165b.
70. NE, supra note 47, at 1165b. Failure of friendship is also open to challenge as not being the true love of self. If I made a mistake in the discernment of the character of the friendship, my failure could be understood as an inadequate love of myself.
71. NE, supra note 47, at 1165b.
72. NE, supra note 47, at 1165b.
73. NE, supra note 47, at 1165b. Notice that the relationship between the reforming friend and the wicked one could not possibly be described as a character-friendship so, in this way, the character-friendship has already ended and a lesser friendship begun as soon as the wickedness is known.
74. NE, supra note 47, at 1165b.
a reminder that we should at least show some consideration to our former friends for "old friendship's sake," unless it was our former friend's wickedness that drove the friendship apart. It is only in this concluding comment that Aristotle even considers loyalty as a candidate for virtuousness.

Aristotle's account of dissolving friendships makes sense, of course, only because of his teleology. Dissolving a character-friendship in this way could never be betrayal, and thus, there is no issue of loyalty, because the friend who has abandoned the good is no longer who he was. You cannot betray him because he has already betrayed the friendship by abandoning the good that was constitutive of it. Aristotle never discusses dissolving character-friendships for any other reason, presumably because there is no other reason for doing so. Circumstances may pull friends apart, he notes, but it is the nature of character-friendships that they are lasting because the good that they share between them is a permanent and essential thing.

Notice how sharply this account contrasts with modern friendship and now notice how it differs from Shaffer and Cochran's account of dissolving friendship in the law office when the lawyer disagrees with the morality of a client's proposed course of conduct. Sensibly, neither of the positions I have described is acceptable to Shaffer and Cochran. My guess is that they want to avoid modern friendship's understanding of loyalty as a form of integrity, and yet correctly suspect that Aristotle's casual abandonment of friends would, to more modern eyes, be seen as betrayal. What they try to do in their model is split the difference.

Shaffer and Cochran argue:

Friends are faithful to one another; they hesitate to part company, and we think lawyers should be that way with their clients. Nevertheless, parting may come.

What determines when parting comes is the lawyer's integrity as it

75. NE, supra note 47, at 1165b.
76. See also Cooper, ARISTOTLE, supra note 38, at 312, and ANNAS, MORALITY, supra note 41, at 250.
77. I confess that I regret having to turn to this subject. To me, describing the lawyer-client relationship, as many academics are prone to do, from the perspective of what happens when the lawyer and the client have come to a moral impasse is like describing a marriage based on who got what in the divorce. But the subject seems central to Shaffer and Cochran's analysis because they present dissolution of the relationship as required to maintain the integrity the lawyer needs to counsel as if in a character-friendship. It is much more interesting to me, however, and much more fruitful, and Shaffer and Cochran are of far greater help here, to puzzle over how such an impasse could have been avoided through good lawyering.
78. MORAL RESPONSIBILITY, supra note 10, at 26.
would be for Aristotle. This is not integrity as Aristotle understood it, however, nor is it the integrity of loyalty. Using the example of Thomas More's refusal to take the Oath of Supremacy for his friend the King, as depicted in Robert Bolt's play, *A Man for All Seasons* 79 (required reading in almost all legal ethics seminars), Shaffer and Cochran tell us that "lawyers should remain open to the moral influences of their clients, but surely they should not surrender their own moral responsibility in the process." 80 The lawyer should hold on to a "little area where he is himself," 81 a "little area" he turns to when he must follow his conscience as More did. 82 In fact, they add, the fraternal correction that character-friendship permits requires that this integrity be mutually understood for "moral advice depends on character and on the perception, in the person seeking advice, that the adviser is a person of character." 83

They are being very Aristotelian, of course, in saying that the good of friendship depends on integrity, but the integrity that is now required is no longer a matter of conformity to the good that constituted the friendship, the good that Aristotle said required dissolutions of the friendship when a friend turned wicked. It is much lonelier than that. Integrity is now consistency with something that is not shared with the friend (or with anyone else for that matter), something within that "little area" in which people are themselves and in which their personal consciences reside. This is why Thomas More is so appealing to Shaffer and Cochran for when More's old friend, the Duke of Norfolk, tells More that he should take the Oath of Supremacy out of fellowship, More replies, "[W]hen we stand before God, and you are sent to Paradise for doing according to your conscience, and I am damned for not doing according to mine, will you come with me for fellowship?" What More implies is that Paradise will be there for both if both follow their conscience, but if God is from Athens and an Aristotelian (as Catholic theologians sometimes think), it is far more likely that both are headed the other way for thinking they were character-friends when they

79. ROBERT BOLT, A MAN FOR ALL SEASONS (1962).

80. MORAL RESPONSIBILITY, supra note 10, at 26.

81. MORAL RESPONSIBILITY, supra note 10, at 26.

82. We have to be careful here because although More understood himself to be following his conscience he was, of course, following the church. For the real More was no respecter of private conscience. He was just the opposite, a rigorous, even furious, pursuer of conscientious heretics—candidates, he said, for the torch. His actual role in the burning of heretics is controversial. See generally LOUIS L. MARTZ, THOMAS MORE: THE SEARCH FOR THE INNER MAN (1990), especially, pages 3-27; and RICHARD MARIUS, THOMAS MORE (1984). Oddly enough the unintended image of More one gets from Martz is of a man badly divided between a public and a private self—just the opposite of the integrity Shaffer and Cochran would want us to see in him.

83. MORAL RESPONSIBILITY, supra note 10, at 26.
clearly were not. Given Aristotle’s teleology, it would simply be impossible to understand More’s differences of conscience with the Duke as the product of different moralities for a different morality of this sort would have to be “like an alternative possible world order opposed to the order that prevails but somehow relevant to it.”

By trying to split the difference, what Shaffer and Cochran have done is to make the abandonment of clients tragic. Now, I am certainly not arguing that it is not tragic. I strongly believe that it is. The point is that all three positions, the modern, Shaffer and Cochran’s, and Aristotle’s, are fully determined by the extent to which each accepts or rejects a teleological account. Thus, the teleology behind Aristotle’s account of character-friendship is so central to it that, if Shaffer and Cochran expect their analogy to provide guidance for moral counseling in the law office, they must first provide an adequate substitute for the shared morality Aristotle’s teleological account provides.

This they try to do. Despite our diversity, Shaffer and Cochran contend, “North Americans are likely to share moral values.” Now, of course this may be true to some extent, but the question is whether our shared moral values are sufficient for moral counseling in the law office as if in a character-friendship. They argue it is for numerous reasons. The

84. SPARSHOTT, SERIOUSLY, supra note 38, at 293. The quote continues: “I do not think that would make sense to Aristotle. For him, either the world is such as to determine a single way of life . . . as good or it is not. If it is not, one cannot say what eudaimonia is and the project of the Ethics has a negative outcome. But, if it is, all view of human life other than that determined as good by the sort of argument that Aristotle uses are demonstrably incoherent and simply incapable of determining a way of life that can be judged satisfactory.” SPARSHOTT, SERIOUSLY, supra note 38, at 293.

85. I am not sure this characterization is correct. I consider this tragic, rather than just a giving of priority to one value in conflict with another, because there does not seem to be a good way to address the moral remainder left after the choice is made. The relationship cannot be restored to what it was. Also, although Shaffer and Cochran do not discuss it as such, this dissolution of the lawyer-client relationship has the appearance of a conflict of duties, as in Antigone or Agamemnon for example, generated by the fragmented quality of the agent’s life. But, on the other hand, the use Shaffer and Cochran make of integrity has the appearance of resolving the tragedy because, as I argue below, this integrity becomes for them a universally shared moral claim—a Kantian claim—we make upon each other. It says: “You cannot ask this of me because I could not ask it of you and therefore I am justified in abandoning you as you would be in abandoning me.”

86. MORAL RESPONSIBILITY, supra note 10, at 49.

87. I hope it is quite clear that the issue here is not whether there is sufficient agreement for moral discourse in a pluralistic society. Whatever extent of agreement is required for such discourse, and whether we have that or not, no one, I believe, argues that our “society,” whatever that might mean, provides the kind of shared morality that moral counseling among strangers, associates, or even friends within this society would require, nor do Shaffer and Cochran. Jeffrey Stout, for example, argues in his oft-cited book on this issue, ETHICS AFTER BABEL, that we can and do, in fact, “muddle through” moral discourse
practice of law is "local" in that lawyer and client usually come from the same communities and share a moral culture. 88 The diversity that does exist within these communities is reduced by "mediating associations such as religious congregations, neighborhoods, and towns." 89 Also, clients are likely to self-select lawyers who share their moral values. 90 And, most broadly, and therefore most importantly, the crucial values in moral counseling in the law office, i.e., justice, mercy, and truth, are values that are shared across many different moral and religious traditions. 91

by appealing to the moral agreements we do have and that complete disagreement is a conversational impossibility. JEFFREY STOUT, ETHICS AFTER BABEL, 212-19 (1988). See also id. ch. 1. "There are," he says, "vast regions of moral terrain in which we carry on perfectly well." Id. at 212. But Stout is not talking about our issue, for the "vast regions" he refers to do not include moral agreement on those values that Shaffer and Cochran say are most likely to be central in moral counseling issues in the law office. Stout's areas of agreement are much thinner, including only such issues as whether torturing innocents for fun is a good thing or whether Charles Manson should be considered a moral exemplar for young children. Id. at 214. (I knew a couple of people in high school who might have given sincere arguments about the morality of both of those propositions, but I guess Stout never met them. More seriously, apparently Stout did not give much thought to how we determine who is innocent and who is not—if, as some cynics say, our interests in Iran are really for the protection of oil profits in a land of obscene abundance by the world's standards, then the children of Iran deprived of food from our embargo are being tortured for our "fun"—things that are beyond our needs—and we believe this is a good thing because we think of it as necessary. Nor did he think much about why some crazies who kill as social revolutionaries—"helter skelter" was, after all, a political idea about how to act in a racially corrupt society—are deemed heroes and moral exemplars while others are not. My point, of course, is not to question the immorality of his examples but to note how careful we must be in thinking of any of "our" moral claims as universal.) The issues that are likely to come up in the law office are examples of issues Stout describes as showing "[our] great diversity...confronting us...close up every day. We must either devise means for living with this fact of modern life or be at each other's throats." Id. at 215.

88. MORAL RESPONSIBILITY, supra note 10, at 49.
89. MORAL RESPONSIBILITY, supra note 10, at 50. It is not clear to me what Shaffer and Cochran mean by "mediating associations" in this context for they are not using the term in a political way. I think they mean that whatever differences lawyers and clients may have as autonomous individuals are mediated if the lawyer and the client both belong to the same groups. If so, then this seems to be a very sensible proposition.
90. MORAL RESPONSIBILITY, supra note 10, at 50.
91. MORAL RESPONSIBILITY, supra note 10, at 49. There are other candidate sources for the morals required, legal values and conventional morality, for example. But Shaffer and Cochran reject legal values as a source of shared morals for counseling, arguing, against William Simon, that legal values are unlikely to provide clear resolutions of the issues that are likely to arise, that the law is a poor source for moral values, that reliance on legal values can destroy important relationships, that legal values remove moral responsibility from those to whom it must belong, and that the moral sense of the individual will atrophy if we continue to rely so heavily upon the law for our morals. They also reject conventional morals as a source for shared morals for counseling for they are difficult to discern, likely to be in conflict, and not the best source for morality because they are conventional and, therefore, lack the ability to judge morals that are pervasive but wrong. In that their resort
For Aristotle, the sharing of moral values between character-friends is not a chance event and it is not a matter of just living in the same communities. Character-friends can share moral values because both were morally formed in a *polis*°2 whose primary business is moral formation. Thus, what is shared between them runs very deep indeed.°3 So we have to ask if any of Shaffer and Cochran's listed associations are the equivalent of a shared rearing in such a *polis*. Without belaboring the point, I think the only reasonable candidate for this would be "religious congregations." But, even if so, would not this mean, as my friend Rabbi Michael Goldberg has often said to me, that the solution to the problem of moral counseling in the law office is to have Orthodox Jewish lawyers for Orthodox Jews, Southern Baptist lawyers for Southern Baptists, Mennonite lawyers for Mennonites and so forth?°4 Shaffer and Cochran, I think, would argue that this would to conscience is described as a resort to traditions such as church, family, community, and so forth, it is not at all clear to me how conventional morality differs other than by being an apparent appeal to a broader community. Most of what they describe as the problems of conventional morality are there within these traditions as well. And thank goodness for this! For I cannot imagine a less interesting world than one in which morals are easy to find, never in conflict, and universal. Sounds to me like the moral world of the ant.

°2. Aristotle's account is not utopian; he is nothing if he is not a practical philosopher. How then, you may wonder, could a community as large as Athens come to have a such a strongly shared conception of the good of men? The answer, according to Alasdair MacIntyre, is friendship:

"How can a population of such a size be informed by a shared vision of the good? How can friendship be a bond between them? The answer surely is by being composed of a network of small groups of friends, in Aristotle's sense of that word. We are to think then of friendship as being the sharing of all in the common project of creating and sustaining the life of the city, a sharing incorporated in the immediacy of an individual's particular friendships. The notion of the political community as a common project is alien to the modern liberal individualist world. This is how we sometimes at least think of schools, hospitals, or philanthropic organizations; but we have no conception of such a form of community concerned, as Aristotle says the *polis* is concerned, with the whole of life, not with this or that good, but with man's good as such. It is no wonder that friendship has been relegated to private life and thereby weakened in comparison to what it once was.

ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 156 (2d ed. 1984).

°3. Without a shared formation within the *polis*, for example, one friend would not be able to counsel another at all. He could tell his friend what goodness required, of course, but his friend could not understand this because for Aristotle it is only those who are raised right within the *polis* who can appreciate the good that comes from being virtuous. In other words, what the friend would say would necessarily lack rational justification for the other friend. See generally ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? ch.7 (1988).

°4. Alasdair MacIntyre, at times, seems to suggest something similar as one strategy for being a professional in a society of strangers. See STANLEY HAUERWAS, SUFFERING PRESENCE: THEOLOGICAL REFLECTIONS ON MEDICINE, THE MENTALLY HANDICAPPED, AND THE CHURCH 53 (1986) (citing Alasdair MacIntyre, Patients as Agents, in PHILOSOPHICAL
not be the case because justice, mercy, and truth would still be shared widely enough among these different religious traditions.

To find such moral commonalities, however, Shaffer and Cochran must reduce justice, mercy, and truth to extremely thin accounts that are, I think, far from sufficient for addressing moral concerns in a counseling session in a law office. For what they must do to show commonality is to divorce justice, mercy, and truth from the traditions in which they have been deeply defined through the long narrative processes of interpretive communities.

MEDICAL ETHICS: ITS NATURE AND THE SIGNIFICANCE 197-212 (H.T. Engelhardt, Jr. & S.F. Spicker eds., 1977)). Of course, if this were the case, one lawyer would not be able to offer moral counseling as if in a character-friendship to very many clients. This is something that Aristotle would be sure to agree with. See, e.g., NE, supra note 47, at 1156b25-30, 1158a10-16. But I can promise you that the bar will find it very troubling. This is much less so for truth than for the other values. I have no doubt that some form of truth is essential to all moral and religious traditions. Part of what it means to be a tradition is to hold out “some distinctive conception of the human good presented as—true.” Alasdair MacIntyre, A Partial Response to my Critics, in AFTER MACINTYRE: CRITICAL PERSPECTIVES ON THE WORK OF ALASDAIR MACINTYRE 295 (John Horton & Susan Mendus eds., 1994). This is true even if the distinctive conception is that there is none or that there is no truth. MacIntyre goes on: “And although these claims to truth are supported within different traditions by appeal to rival and often de facto incommensurable standards of rational justification, no such tradition is or can be relativistic either about the truth of its own assertions or about the truth.” Id. I think this is right, although it is certainly not without challenge, and that all traditions must manifest some ethical respect for the truth. This thin account of a shared respect for truth among traditions, however, is not at all what Shaffer and Cochran have in mind. They are interested in a much more earthy, fully lived, truthfulness (as they demonstrate very well in the story of a representation involving an appealing falsehood in an SSI application which the client eventually rejects.) And I think they are right that you can find within almost all moral and religious traditions some ethical regard for such a truthfulness for reasons similar to the reason that all moral and religious traditions must accept the thin account of truth MacIntyre describes. Some degree of a lived truthfulness, it seems to me, is a sine qua non of any moral or religious tradition in which some consistency of self is required. But this still seems to be a very thin account for it offers no resources for accounting for the judgments that such truth will require, a judgment that Hauerwas tells us “people cannot seek . . . unaided.” HAUERWAS, SUFFERING PRESENCE, supra note 1, at 45. Nor does it offer resources for locating this truthfulness with other virtues, for it is only within a specific tradition that we could know the relative worth of such a truth.

96. MacIntyre also suggests that there are moral goods—justice, truthfulness, courage, etc.—that work similar to the way Shaffer and Cochran suggest these values do. But he goes on to argue: “[T]he central invariant virtues are never by themselves adequate to constitute a morality. To constitute a morality adequate to guide a human life we need a scheme of the virtues which depends in part on further beliefs, beliefs about the true nature of man and his true end.” Alasdair MacIntyre, How Virtues Become Vices: Values, Medicine, and Social Context, in EVALUATION AND EXPLANATION IN THE BIOMEDICAL SCIENCES 104-05 (H. Tristram Engelhardt & Stuart Spicker eds., 1975). As Stanley Hauerwas summarized this same passage: “In my language the invariant virtues require a narrative if they are to be displayed in a manner that can guide our lives.” STANLEY HAUERWAS, TRUTHFULNESS AND TRAGEDY, FURTHER INVESTIGATIONS IN CHRISTIAN ETHICS 245 (1977).
In doing so, I fear, they must inevitably distort these values by treating them as traditionless principles. For example, in discussing a "biblical perception of justice" and how justice might be reconciled with mercy, \textsuperscript{97} they say:

The Mosaic law is full of laws that require mercy as justice—farmers are to leave part of the crop on the field for the poor; workers are to be paid before sunset; money is to be loaned without interest; every fifty years land is to be returned to the families that originally owned it.\textsuperscript{98}

The first thing to notice here is that the Mosaic law \textit{does} treat justice as requiring mercy or charity and is thus different in a very significant way from other common understandings of justice. For a good Jew, mercy is not a choice, but a command, and, while voluntary heartfelt giving to others may be best, what the community must value most is following the ritualistic command. One simply could not talk to a good Jew in a law office about justice without taking this understanding into account. It may be quite possible for a non-Jew to do this—I am struggling toward an answer to that question—but certainly not as an Aristotelian character-friend who sees the other as a moral mirror of himself or as a conscience counselor in search of moral commonalities.\textsuperscript{99}

The second thing to notice is that these examples of Mosaic law make sense to Jews because they are good ways of being Jewish. The reason there is a prohibition on money being lent with interest, for example, is that it would be a denial of the Exodus and of the God of Israel not to share freely with those in need in the Jewish community. Such sharing is not only constitutive of being Jewish, but also a reflection of the unity of the Jewish people which is itself a reflection of the unity of God. Or, to take an example Shaffer and Cochran did not use, but perhaps should have, the \textit{Halakhah} prohibition on Jewish lawyers representing Jewish plaintiffs in a civil suit before a secular court and Rabbi Caro's Sixteenth Century commentary in the \textit{Shulhan Arukh} stating in no uncertain terms that Jews could not go before non-Jewish judges even if they applied Jewish law and even if both litigants agreed has little to do (as one might think in a search

\textsuperscript{97} \textit{MORAL RESPONSIBILITY}, \textit{supra} note 10, at 76.
\textsuperscript{98} \textit{MORAL RESPONSIBILITY}, \textit{supra} note 10, at 76.
\textsuperscript{99} Joseph Raz, for example, talks of "detached normative statements" as a way of understanding how conversation between different traditions might work. He gives the example of a Christian saying to an Orthodox Jewish friend about to eat a pork-filled dumpling mistakenly: "You ought not to eat that." Serena Stier, \textit{Legal Ethics: The Integrity Thesis}, 52 OHIO ST. L.J. 481 (1991) (citing \textit{JOSEPH RAZ, PRACTICAL REASON AND NORMS} 175-77 (1975)). But, of course, this is hardly counseling of the type we are discussing, and, even in this example, the way the admonition would be heard from a Christian friend is different, I think, from the way it would be heard from another Orthodox Jew.
for moral commonalities) with rejection of force or a preference for peaceful mediation, but instead with maintaining respect for Jewish courts. In hard cases, for example when a Jewish defendant refuses to accept the authority of the Jewish court, the primary concern becomes whether the plaintiff and her lawyer have adequately complied with the requirements of respect. If so, then they are perfectly free to call out the dogs of the state. So what was important in both these biblical prohibitions is the Jewish community itself—precisely what is not and cannot be shared in moral commonalities of the sort the lawyer as friend relies upon.

Furthermore, Shaffer and Cochran also tell us that overarching concepts of justice, such as John Rawl’s liberal account, are not helpful simply because they are overarching; that is, to avoid being contingent they must treat everyone as “rational, independent, and autonomous.” Since they do not believe such people exist, it is just not helpful, they say, to try to think this way about justice in the law office. Instead, lawyers should help clients “apply the concepts of justice they gain from their family, community, church, and synagogue, the sources of insight that Rawls asks the lonely individual to leave behind” in a determination of justice. The concepts they will find there, they continue, are likely to treat justice as an Aristotelian virtue, as a matter of character, and as something we give to each other because we want to do so to be just. But to seek commonalities among these concepts as a basis for moral counseling, as if the commonalities were shared morals, is not to turn to family, community, church, and synagogue at all, but is itself an overarching concept of justice, and one that may be more dangerous than Rawl’s because it is not

100. MORAL RESPONSIBILITY, supra note 10, at 67 (citing JOHN RAWLS, A THEORY OF JUSTICE (1971)).
101. MORAL RESPONSIBILITY, supra note 10, at 67.
102. MORAL RESPONSIBILITY, supra note 10, at 68. I think this is all unfair to John Rawls because I believe his project is quite different from the way Shaffer and Cochran describe it. It seems to me to be primarily political, and it also seems that something like his account of impartiality is needed as part of any full understanding of justice. Also, my guess is that Rawls would say that much of his account is at least part of what is to be found there in the family, community, church, and synagogue that Shaffer and Cochran turn to, although, of course, many would disagree. But I am not sure about any of this. In a recent presentation at the Annual American Association of Law Schools Meeting in New Orleans, law professor Emily Fowler Hartigan asked Rawls if there were possibilities for conversation between someone like her, a Christian feminist, and he. Rawls responded that they certainly could talk, if she wanted to, but they would have to draw straws to see who went first! So maybe Shaffer and Cochran are right about Rawls.
103. MORAL RESPONSIBILITY, supra note 10, at 42.
104. The only way I know of to find common ground among different traditions is by the complex process of the vindication of rival claims described by Alasdair Maclntyre in THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPEDIA, GENEALOGY, AND
recognized as such.

What we are seeing behind Shaffer and Cochran's analysis of these three values, quite understandably I think, is an imagined community trying to replace the polis that is entirely missing from their Aristotelian account.105

But enough of this! If you are the reader I take you to be, you are angry with me at this point. For by now you are entitled to ask: "So what? What if their account of friendship is not Aristotelian? The book is obviously eclectic in its philosophy anyhow and no reader could reasonably expect a fully consistent philosophical account in a textbook! What if they

TRADITION (1990). MacIntyre's description is the opposite of a process of searching for commonalities that necessarily distorts what each tradition represents in order to replace its morality with one that is more universal, less threatening, and more peaceful. See also Alasdair Maclntyre, A Partial Response to My Critics, in AFTER MACINTYRE 284-394 (John Horton & Susan Mendus eds., 1994).

105. Because it would be badly belaboring the point I have already made about their use of Aristotelian character-friendships, and because Shaffer and Cochran neither stress nor rely upon an Aristotelian understanding of justice as much as they do an Aristotelian understanding of friendship, I have not argued in the text that they cannot divorce Aristotle's description of justice from an Aristotelian polis as they have attempted to do here. Justice, in the Aristotelian tradition, requires some evaluation of human worth to be shared so that what is deserved and what is not can be determined. The polis is how that evaluation is arrived at and why it is shared. Accordingly, lacking such a polis, we should see the lawyer as friend tempted to believe that some conception of justice was held in common when, in fact, it was only a projection of the lawyer's own conception of human worth which may or may not be shared with the client. An excellent version of the argument that Aristotelian justice requires a polis can be found in ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 96-112 (1988). For MacIntyre, not only can Aristotelian justice not be divorced from an Aristotelian polis, it cannot be divorced from an Aristotelian cosmos. Id. at 101. But MacIntyre also adds, to avoid a charge that Aristotle's account is then irrelevant to societies such as our own, that "if at least those features of the polis which are minimally necessary for the exercise of justice and of practical rationality can be exhibited by forms of social order other than those of the polis, then the grounds for that charge of irrelevance may fail." Id. at 99. So the question of the Aristotelian understanding of justice pursued by Shaffer and Cochran would then become, as it did for friendship, whether the modern associations they describe are sufficient substitutes for a polis. Anyone familiar with MacIntyre's work knows that we can safely forget about neighborhoods, communities, towns and so forth as they are now constituted. He says little about religious congregations. The only viable candidates MacIntyre sees are "practices" that he carefully defined in AFTER VIRTUE as "any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the results that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended." MACINTYRE, AFTER VIRTUE, supra note 92, at 187. There are numerous problems presented by the definition—for example, whether external and internal goods can be so clearly separated and how the excellences of a practice, excellences that can only be truly appreciated from within it, relate to the larger community. MacIntyre returned to this definition recently in Alasdair MacIntyre, A Partial Response to My Critics, in AFTER MACINTYRE 284 (John Horton & Susan Mendus eds., 1994).
have not been analytically clear about what they mean by the lawyer as friend or what guidance we are to derive from the analogy to friendship? What difference does this make? They give various narrative accounts of what they do mean by their analogy to character-friendship and these do not describe what you have called modern friendship. They are describing something different even if it is not Aristotelian. Surely there are forms of "friendship" out there that can help us understand what lawyers should do in moral counseling.\textsuperscript{106} Perhaps you should pay more attention to the narrative accounts. After all, the stories are what most readers are likely to remember because stories, especially Shaffer’s stories, so often capture experiences that ring true with their own. This may not be the heuristic model for moral counseling you hoped for, but it is a good start on a heuristic model nevertheless.\textsuperscript{107}

I think, for the most part, this is exactly right.\textsuperscript{107} The problem, however, is if the world we live in is not as they have described it, if, that is, we do live in MacIntyre’s society of strangers, that the failure of their analogy to character-friendship is not simply academic. To attempt moral counseling of strangers as if they were not so, as if any friendships with them based on shared morals were possible, is surely to court moral failure. Given where we have seen the friendship analogy break down in a comparison with an Aristotelian account, we should expect this failure to show up in narrative accounts in two very particular ways, both involving the assumption of a teleology within a \textit{polis}. We should expect the lawyer as friend to fail to notice how his own morals are controlling the discourse and we should expect the lawyer as friend to ignore legitimate moral differences.\textsuperscript{108} So now I turn our attention to one of their narrative accounts to see if these expectations are met.

\textsuperscript{106} For another use of the “client as friend” metaphor, see, e.g., Thomas D. Morgan, \textit{Thinking About Lawyers as Counselors}, 42 FLA. L. REV. 439 (1990).

\textsuperscript{107} Tom Shaffer’s \textit{Pookas}, in TOM SHAFFER, \textit{FAITH AND THE PROFESSIONS} 269-82 (1988), for example, has probably influenced me more than any other legal ethics article I have ever read. I am at my best as a lawyer and as a law professor when I try to live true to that article. Yet I could not tell you why this is so without retelling the story he uses there entirely. I give that article to students at the end of my legal ethics seminar because I do not want to ruin it by discussion.

\textsuperscript{108} The first expectation is the same criticism Shaffer and Cochran make of the lawyer as hired gun who is oblivious to the impact his overvaluing of autonomy has on both the client and the representation. The second is a criticism they make of the lawyer as guru. So, to borrow their terminology, if I am right about Aristotle, we should expect the lawyer as friend is to be a “hired gun guru,” thinking he is neutrally serving the moral interests of his client while he is really imposing his own morality.
III. JUSTICE

"It is one thing to let justice roll down like waters; it is quite another to work out the drainage system." Anon.

Shaffer and Cochran tell the following story of justice in the law office adopted from a lecture given by Louis M. Brown, famed father of the Client Counseling Competition and a primary reason why law schools first turned their attention to the law office.109

Mr. Bartle has come to see his lawyer, a Mr. Jaramillo, about a $3000 rental commission bill he recently received from a local real estate broker, Ms. Skaggs. The commission was charged to him at the going rate. Dr. Bartle, however, did not think he had employed Ms. Skaggs to rent his property. He had employed her recently to help him find a building for his dental practice. At first, Dr. Bartle wanted her to find him something to rent, but rents in the area were much higher than he anticipated. So, rather than rent, he purchased a building Ms. Skaggs found for him. Initially his plans were to use only the second floor for his practice. Then, only two weeks after he moved in, a prospective tenant, Cody, approached Dr. Bartle about renting the first floor. Cody said he had learned about the availability of the office from Ms. Skaggs. After negotiating the rent, Dr. Bartle rented the floor. Shortly thereafter the bill from Ms. Skaggs arrived.

In the initial part of the conversation in the law office, Jaramillo finds out that there was no written agreement between Dr. Bartle and Ms. Skaggs concerning renting the first floor. He tells Dr. Bartle that because of this the statute of frauds makes her commission unenforceable.110 After Jaramillo explains that the statute of frauds does not mean that a fraud occurred, the conversation picks up as follows:

Bartle: But under this law, I could just tell her goodbye and leave me alone?

Jaramillo: There is nothing she can do about it.

Bartle: Maybe that is just what I will do. I will say my lawyer told me.

Jaramillo: But I think also you have some extralegal considerations that you shouldn’t lose sight of—in terms of your business reputation, I mean your reputation in the West View business community.

109. MORAL RESPONSIBILITY, supra note 10, at 63-65 & n.9.
110. Of course, this would not be a statute of frauds problem unless the agent thought there was an oral agreement between them.
In terms, too, of whether you are ever going to have dealings with Ms. Skaggs’s office or any other real-estate brokers there.

Bartle: What are you telling me then? That I should pay her or that I shouldn’t?

Jaramillo: I’m not telling you that you should pay her or not pay her, but I think, in making your decision, you have to consider not just your legal obligations, but also other considerations. It is up to you to decide how significant their obligations are to you. You see, we don’t know how difficult it would have been for you to get somebody to become a tenant in that building. And, after all, she did get somebody in there for you. Cody is now paying you for the rental. You’re getting money out of it that you might not have if Ms. Skaggs had not sent Cody to you. So you’re getting a benefit conferred on you right now.

Bartle: That’s true.

Jaramillo: It is also true that you may not technically be liable to her, and I am not saying that it shouldn’t be an important consideration. Obviously, it is.

Bartle: Well, all right. Thank you for your advice. I suppose I have to pay her.111

Shaffer and Cochran note that the problem presented here is a common one in the law office because “[c]lients often obtain a legal result that is inconsistent with justice.”112 To this example of the statute of frauds, they add the statute of limitations,113 the rising costs of litigation that make “so sue me” an effective strategy for avoiding a legitimate claim, the lack of legal regulation, and, finally, imbalances in the quality of representation.114

111. MORAL RESPONSIBILITY, supra note 10, at 64-65.
112. MORAL RESPONSIBILITY, supra note 10, at 65.
113. The statute of limitations permits clients to avoid legal enforcement of legitimate claims against them if a sufficient amount of time has passed prior to the plaintiff’s filing the complaint against them. For my take on the ethics of using the statute of limitations, see JACK SAMMONS, LAWYER PROFESSIONALISM (1988).
114. MORAL RESPONSIBILITY, supra note 10, at 65. Note that these are all ways of avoiding the legal conversation. The statute of frauds avoids the conversation as a matter of discouraging certain types of transactions. The statute of limitations avoids the conversation for efficiency reasons primarily. All the other ways, except for the lack of legal regulation, are corruptions of the system that prevent the legal conversation from occurring. The lack of legal regulations is, more often than not, a failure of the legal imagination to
For responding to the potential for injustice here, they praise Jaramillo for “show[ing] respect for the conscience of the client” and for pointing out the benefits he received from the broker’s efforts as a way of permitting the client to see this as a moral issue. As they put it: “Jaramillo treats the interests of others seriously; at the end, so does his client. Maybe, in fact, Dr. Bartle had this concern for others all along. Maybe he needed a lawyer who would help him follow his better instincts.” Jaramillo did all of this, they add, by drawing on the virtue of justice.

The reason this analysis has the appearance of justice is that the lawyer converts the client’s initial claim into one that involves standing on one’s rights, for surely such people are intolerable. But perhaps it is no such thing. Because the lawyer accepts this characterization, he denies the client the opportunity to understand his own morality, imposing upon him instead a morality that probably leads to a break in the relationship with the broker such that reconciliation with her will be very difficult, if not impossible. For while the question of justice in this situation is “benefit conferred,” as the authors say it is, it is also the value of the benefit conferred and this should not be the “going rate.” The lessors’ market for rentals was so good, as Dr. Bartle knew from personal experience, that he may well have decided that he did not need an agent to rent the ground floor because the cost of the agent would not be worth the benefit conferred (and Ms. Skaggs, as Dr. Bartle may suspect, may have seen this as well). By attempting to impose the going rate upon him, Ms. Skaggs would be dictating to him what the value of the benefit conferred should be. In economic terms, there was at least a loss of opportunity here that has to be considered if we are to determine what justice requires by looking at benefit conferred.

So, if such an injustice has been done to Dr. Bartle, what has been unconsciously advised here is that it is better to suffer an injustice than to do one. But these are not the only options. If the lawyer in the hypothetical was a little less invested in his own personal conception of how justice should work in this situation and a little more invested in working out justice, perhaps he would have taken more seriously the potential justice give adequate voice to a moral claim. I argue below that lawyers as rhetoricians have obligations towards maintaining the conversation between disputants. There is no wonder then that these ways of avoiding the legal conversation are troublesome to us.

115. MORAL RESPONSIBILITY, supra note 10, at 65.
116. MORAL RESPONSIBILITY, supra note 10, at 66.
117. MORAL RESPONSIBILITY, supra note 10, at 66.
118. I often tell my students that the only good claim we have to being a moral community is that most of us still know what it means to be an asshole.
of Dr. Bartle's claim or at least recognized the injustice his client felt. With more moral openness, even if he did not initially see what sense of injustice might move this dentist to take the drastic step of contacting his lawyer first, at least he would have wondered why a good person—as we must assume our clients are—would want to do this.

Even if Jaramillo does not see an injustice here, he should not characterize Dr. Bartle's initial position as a morally objectionable standing on rights; many in our society would see Dr. Bartle's reaction as one required by a morality of self-respect. This may not be a moral position that Jaramillo approves of—it is a morality of the therapeutic as Mary Midgley calls it—but it is, nonetheless, a moral claim that Dr. Bartle will have well confirmed by others within his community and should not be ignored if the representation is to be of Dr. Bartle and if the counseling is to be a moral conversation.

Jaramillo's failure to explore the potential morality of Dr. Bartle's position has terrible consequences for the representation because it creates a lasting division in the relationship between Dr. Bartle and Ms. Skaggs. Shaffer and Cochran tell us that they guess that Dr. Bartle pays the bill eventually. My guess is that they are right, but that he does so with a continuing resentment of Ms. Skaggs. I doubt that Dr. Bartle will do

119. See generally JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988). Perhaps there are just as many who, looking for opportunities for revenge wherever they can find them, would see Bartle's use of the statute as justified by the wrong Skaggs has done to him in violating his autonomy. Or perhaps there are those who would claim that all we have left of a shared morality is the law and we should not judge its application by some other standard and call that morality. (We should not, that is, individualize claims when a law, such as the statute of frauds, does not do so for to do so is to usurp the only legitimate authority that we have among us.) Now we may think that these are awful moralities, and they are. Revenge is, I think, wholly inconsistent with the lawyers' role I describe below, because it seeks to end the conversation by force. But, in some situations, as Martha Nussbaum reminds us in her insightful analysis of HECUBA, revenge is the way that some people find of reordering the world so that it makes sense when trust in others is not a possibility. Thus, revenge can be driven by an almost Aristotelian search for a moral order. See MARTHA NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 397-421 (1986).


121. MORAL RESPONSIBILITY, supra note 10, at 66.

122. Listening seriously to a victim's claim of injustice implicit in his resentment is a way of understanding the social character of justice. As Judith N. Shklar puts it, using the example of the injustice to Pickwick and Mrs. Bardell in CHARLES DICKENS, PICKWICK PAPERS:

Pickwick and Mrs. Bardell's story is meant to show that it is not enough simply to match the claims of the aggrieved against the rules of justice in order to settle firmly whether she was really treated unjustly or was merely out of luck. If we include the victim's version, not least her sense of injustice, in our understanding of injustice, we might get a far more completed account of its
business with her again, despite his lawyer’s belief that justice has been well served. I bet he will continue to feel wronged here, and the wrong he feels will have been made worse by his lawyer’s counseling. For what he will now understand is that his lawyer’s advice rested upon an implicit threat of what would happen to his business reputation if he did not pay the bill. Dr. Bartle must wonder, quite understandably, what kind of business community is this that endorses such an unjust custom through revenge on those who violate it? And what type of community is it that is not open to hearing his moral claim?

Finally, because the lawyer never considers the potential justice of Dr. Bartle’s claim, Ms. Skaggs has nothing to answer for. Without this moral question of why she did what she did (for surely her conduct must seem strange from Dr. Bartel’s perspective), gone is the possibility of a mutual characterization of this dispute as a simple misunderstanding in which both parties thought they were acting justly. Gone, too, is the possibility of forgiveness, for forgiveness requires a true change of heart about the other person that is simply not possible until injustice is recognized for what it is.123

It is quite likely that after this counseling session Dr. Bartle will condemn Ms. Skaggs to others for her conduct, a condemnation that is certainly unfair to her until her side is heard and something Dr. Bartle may

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social character. We may find it more difficult to tell an injustice from a misfortune, but we might also be less ready to ignore the implication of passive injustice as a part of the full career of human injustice. With these considerations in mind, the sense of injustice should assume a renewed importance, for it is both unfair to ignore personal resentment and imprudent to overlook the political anger in which it finds its expression. Above all, to think about these matters anew might at the very least make the many faces of injustice more visible and more easily recognized.


Such thinking about injustice anticipates much of what is to follow in the article, but I do want to say here that I think most lawyers learn this Pickwickian lesson about injustice from their practice and thus come to know the social character of justice. It is this social character that permits good lawyers to argue with integrity. Good lawyers tend to see valid claims of injustice on all sides of all disputes, and thus it is easier for them to side with their clients because they know that we cannot determine what justice might mean for us as a community in the context of this dispute without the client’s story being well told. This is also what drives the legal imagination to find ways of expressing the injustice the client feels as an injustice that our community should recognize as reflecting who we are. Furthermore, because they see blame everywhere, good lawyers tend not to blame, and yet, they know that blame is necessary if we are to continue trying to be the best of who we are. There are a lot of “we’s” in all this that are badly in need of explanation if I am not to commit the same error I have accused Shaffer and Cochran of making. This I try to do in the text below.

later come to regret. Her side cannot be heard, however, until Dr. Bartle’s lawyer helps him see that there are sides to be heard here—until, that is, he creates the moral conversation.

All this suggests to me that what Shaffer and Cochran have recommended through this story is not a very good way of taking seriously the interests of others.

Of course, one could counter that the lawyer here has only raised the subject of justice. Perhaps this course of action is the client’s unforced choice. This lawyer’s counseling, however, about “extralegal claims” that “shouldn’t be lost sight of,” and “other considerations” that “have to be considered,” when followed immediately by an appeal to fairness that accepts what he thinks must be Ms. Skaggs’s characterization of the dispute, and followed next by a description of the favorable law as “technical,” makes such an interpretation too improbable. Even if this were not the case, the results would likely be the same, for these results were not determined by the way Jaramillo conducted the counseling session, but by the way he first characterized the dispute. This characterization was, in turn, prompted by the way he understood his role. The results here were fully determined by the certainty of the personal moral vision Jarmillo thought he should bring to the conversation, a certainty that blinded him to other possibilities. And yet he goes away from this representation thinking that he only drew upon his client’s conscience to reveal a value of justice he shared with him.

What we can see in this narrative account of the lawyer as friend are exactly the results we expected. Jaramillo is trying to draw upon a thin account of justice in hopes that by keeping it thin he can find that he and his client live within a peaceful community in which moving toward goodness in this way makes good sense to both. Quite clearly, what is served here is not this client’s goodness, for the only way toward his goodness lies in a truthful confronting of his difference with Ms. Skaggs, but the lawyer’s abstract conception of justice. By trying to be a lawyer as friend, he has failed to notice how his own morals are controlling the discourse and has ignored what may be a legitimate moral difference.124

124. In being described as “technical,” the client is not only told to discount the law as unworthy of moral consideration, but also denied any opportunity to see the law as a moral communal project and the dispute as part of it.

125. I worry that it will appear that I have tried to make far too much of this one example. The analysis seems too picky. Perhaps, you may think, they just made a mistake in using this particular story. I think, however, that we can see the same sort of problem in all of the stories they use to demonstrate good moral counseling by the lawyer as friend. I have not discussed all of these examples in the text, but see, for example, my discussion of the story of a family concerned because a group home for retarded men is planning to move into their quiet residential neighborhood and the story of Septimus Harding taken from...
IV. INTEGRITY


To this point, it would be fair to characterize the mistake I am suggesting Shaffer and Cochran make is that they do not take MacIntyre’s admonition that we live in a society of strangers seriously enough. This is true of their treatment of Aristotle, and we could also describe Jaramillo’s counseling as a failure to see Dr. Bartle as a stranger to Jaramillo’s world of justice. This mistake, however, if it is such, is not driven by their wish to avoid characterizing our community as a society of strangers (they would, I think, tend to agree with Maclntyre). Rather, it is driven by their love for their students. For Shaffer and Cochran are deeply concerned with integrity. They rightly fear what will happen to their students’ integrity in practice.

To Shaffer and Cochran the practice of law is a moral threat. The threats are many, but the primary threat of the practice is its potential for dividing the lawyer against herself. We see this most clearly when the practice seems to require, as a matter of fulfilling the obligations of its role, that which the lawyer would not ordinarily do from good personal morals. Along with most other legal ethicists, Shaffer and Cochran’s response to the inevitable student question of what happens when moral counseling fails completely is that the lawyer must be true to herself. She must, that is, elevate her personal morality over the role morality of her practice by abandoning the client to retain her personal integrity. The threat to the Anthony Trollope’s novel THE WARDEN, infra note 150. From these examples, I think we can discern a pattern of the same problems I have described using Jaramillo’s counseling of Bartle.

126. MORAL RESPONSIBILITY, supra note 10, at 26. This is, of course, a message that goes over very well with many law students. I would say too well, for it feeds the rampant psychological egoism that dominates student conversations about ethics and necessarily undermines the practical wisdom of the practice and, in doing so, undermines the practice’s authority over the students as apprentices to it. When it does this, it takes from them the possibility of the practice being understood as a school for virtue. The students who react too well to this appealing, but appalling, message to stand alone in judgment of the practice are often the ones who also treat any suggestion that the lawyer should raise moral concerns with clients as an objectionable imposition. And quite rightly so from their perspective! Thus, we see legal ethicists creating in one class the views they then object to in the next.

127. "We are troubled when the system calls on a lawyer to play a role—to do something that is inconsistent with the person the lawyer is. Playing a role is, by definition, inconsistent with authenticity." MORAL RESPONSIBILITY, supra note 10, at 10. “Lawyer and law student are invited to live a schizophrenic moral life, the role at the office strikingly different from who the lawyer is at home. Schizophrenia is bad enough; the greater danger is that the
integrity of her practice, however, cannot be avoided just in these crucial moments, for it is so ubiquitous and so banal, and the demands of virtue are such, that the lawyer must be constantly on guard if she is to have the courage and moral vision needed to act well when the crucial moments arrive. Thus, the moral posture the lawyer must maintain if she is to be Shaffer and Cochran's person of integrity is as the moral rebel who stands apart from her practice and in judgment of it. By doing this, she frees herself for the personal moral reflection integrity demands.

We can see the authors' own moral rebellion throughout the book, primarily in the way they describe the practice. The impression one gets is that the adversary system is at best a necessary evil, there to serve the interests of the state and only of real value when lawyers use it to battle the obvious evils of our society such as racial discrimination. Law schools teach students that there are no limits on advocacy, to "counsel clients to want what advocates are trained to get," to talk too much of rights and too little of care, and to "apply the law to the facts" mechanically in contrast with the artistic way in which morals are to be done. Lawyers are those who "shout down" the "faint murmurs" of moral nonresistance they hear schizophrenia will be resolved in the wrong direction: The amorality of the advocate's role may come to dominate all of the lawyer's life." MORAL RESPONSIBILITY, supra note 10, at 14. "Hired gun lawyers, like godfather lawyers, play a role, a role that controls their moral choices. Lawyers who are controlled by a morality other than their own are at moral risk." MORAL RESPONSIBILITY, supra note 10, at 29. "The ethics of vicarious conscience, of role, is morally schizoid; at best, it divides people up, and at worst it gives them excuses for immoral behavior. 'Either the moral personality is entirely fragmented or compartmentalized, or it is shrunk to fit the moral universe defined by the role.'" MORAL RESPONSIBILITY, supra note 10, at 29 (quoting Gerald J. Postema, Moral Responsibility in Professional Ethics, 55 N.Y.U. L. REV. 63, 85-86 (1980)).

128. In a prior article I called this rebellious ethics and noted, "We teach, preach, and practice professional ethics in this country by holding on to such stories [as Albert Speer, Hitler's architect,] about the morally corrupting effects of our professional roles and the concomitant need to rebel against them." Jack Sammons, Rebellious Ethics and Albert Speer, 1 PROF. ETHICS 77 (1992), revised and reprinted in AGAINST THE GRAIN: NEW DIRECTIONS IN PROFESSIONAL ETHICS 123 (Michael Goldberg ed., 1993) [hereinafter Sammons, Speer]. In that article, I argued against the conception of both the practice and of the self, resorted to in this common understanding of professional ethics. I do not want to simply repeat those arguments here, but I do think they are on point and I have tried to build on them here.

129. MORAL RESPONSIBILITY, supra note 10, at 11. Apparently, when there are obvious evils, aggressive advocacy against them is fully justified, but then, it seems, advocacy on the other side would not be. In Shaffer and Cochran's terms, this is the lawyer as "social" guru sneaking into the authors' own analysis. For the fact that there was another side to what we now see as our most obvious evils is but a reminder that even our most fundamental moral concepts are complex and in need of good conversation.

130. MORAL RESPONSIBILITY, supra note 10, at 12.

131. MORAL RESPONSIBILITY, supra note 10, at 75.

132. MORAL RESPONSIBILITY, supra note 10, at 114.
from their clients in the lawyers' ever-present desire for battle and victory.\(^{133}\) The profession attracts excessively acquisitive people who, because they seek only wealth and advancement, assume their clients want the same.\(^ {134}\) Every bad act by every lawyer in every story they attribute to the professional and every good act to the person when opposite descriptions would work just as well.\(^ {135}\)

The role of morality that prompts this concern for integrity with its moral rebelliousness against the practice takes a variety of forms in the legal literature, but each form is some variation on the \textit{Technician}, the expert who is not accountable beyond his area of expertise, or who, in Shaffer and Cochran's phrase, "invites us to maintain a distance from moral problems, a distance that tempts us away from moral responsibility."\(^ {136}\) The \textit{Technician} claims his technique is morally neutral and he asks to be judged only by whether his means are the most efficient ones toward whatever end

\begin{itemize}
  \item 133. \textit{Moral Responsibility}, supra note 10, at 76.
  \item 134. \textit{Moral Responsibility}, supra note 10, at 105.
  \item 135. For example, at the end of the example of good lawyering they use to demonstrate the lawyer as friend, we find:

  After several meetings first with one party and then the other, and after a number of intervening complexities that threatened the collapse of discussions, a settlement was finally reached. At one point, with $1690 separating the parties, Robert told Warren that the deal was set. When asked how he could be sure, Robert said he would bill Johnson [his client] that amount and use the payment to cover the difference if need be. The deal done, Robert reflected: I have accomplished nothing more satisfying in the ten years of my practice than this. If I were not paid a penny for the work, I would have no complaint. \textit{Moral Responsibility}, supra note 10, at 41.

  Shaffer and Cochran describe Robert's motivation as: "He felt that much personal, 'unprofessional' investment in the case." But, of course, we can just as easily understand the "personal" as getting the fee—serving oneself. Then, the "professional" would be, as Robert's own words demonstrate well, that the internal goods obtained from the work were so sufficient that the external good of the fee was unnecessary. For Robert describes this as a satisfying bit of work, as part of his practice. He does not describe it as personal; he certainly does not see it as a rejection of his role.

  I think this is yet another example of the lawyer as friend imposing his values without realizing that he is doing so. This dispute was not just about the money involved. If the lawyer thinks that deceiving his client into paying the remaining difference between the disputants as attorneys fees is going to satisfy the client, he is truly a poor lawyer. He is naive about people in the way economists are. And he is certainly not concerned with the goodness of his client. In fact, he rejects the client's potential for goodness in favor of his own impatience and presumptuousness.

  136. \textit{Moral Responsibility}, supra note 10, at 13. "[H]e treats ends as given, as outside his scope; his concern is with technique." \textit{MacIntyre, After Virtue}, supra note 92, at 30. MacIntyre is describing the social character, "The Manager." Prior to modern times, those within the professions were distinguished from the \textit{Technician} because the professions carried with them a social status reflecting the understanding of the professions as a civic undertaking. \textit{See, e.g.}, R.D. GIDNEY & W.P.J. MILLAR, \textit{Professional Gentlemen: The Professions in Nineteenth Century Ontario} 12 (1994).
is given to him. 137

137. The most frequently used version of this in legal ethics, and the one Shaffer and Cochran rely upon, is Murray Swartz, *The Professionalism and Accountability of Lawyers*, 66 CIN. L. REV. 669 (1978). Swartz identified two principles required by the lawyer’s role as advocate: the principle of professionalism (acting to maximize the chance that the client will prevail) and the principle of nonaccountability (the lawyer is not accountable when in the role for the means used or the ends achieved.) MacIntyre traces this claim of moral neutrality to the fact/value distinction. This distinction serves an ideology of efficiency justifying the character of *The Manager*. MACINTYRE, *AFTER VIRTUE*, supra note 92, at 74-108. But we are not willing to simply abandon the character of *The Manager*, he says, because he is essential to the predictability of human affairs needed to complete his own justification! What we must do, and what we in fact do, is to define a self in reaction to *The Manager* in which the responsibility for morality resides. MACINTYRE, *AFTER VIRTUE*, supra note 92, at 31-35. Defining this self is, of course, a problematic proposition for the self ends up looking like the roleless authentic self of existential thought or someone very much like James Dean. Neither of these seem to be a very good foundation for moral reflection. See generally Sammons, SPEER, supra note 128.

Of course, if Swartz’s description of what the role requires is not an accurate one (and I do not believe it is), then the entire argument becomes problematic. Swartz’s description plays upon a strong distinction between personal responsibility and personal responsibility for a role. But this is very much like saying that I would not be acknowledging moral accountability if my actions as a father were those required by the moral standards of that role because those standards are not my own! Most who talk this way about roles lock in on strawman descriptions such as Swartz’s. But such descriptions are always corruptions, for no role is ever as settled as these descriptions imply—you could see this in Swartz by asking, rather than presuming, what it means to “prevail,” and what he means by “accountable.” Such descriptions almost always ignore the constant inquiry that goes on within all good practices about the morality of the role created by the practice. For the good practices that create good roles always include and require a questioning of their own teleology such that each good practice has a teleology that is constantly being formed in a dialectic within the practice. The good X (lawyer, doctor, architect, etc.) requires constant creation and recreation of the role of X and, therefore, constant self-questioning. There is no good role which does not depend upon such an ongoing reflection upon itself and no good role whose teleology is not shaped by it. The settled teleology of the moment, that is, the way in which we now describe the role, is the one that has best resolved the constant dialectical arguments until the next opening in it appears. We understand the next change in the teleology historically, and therefore, there is a sense of direction to this teleology, one that we will continue to argue over. But in this talk of role moralities we freeze roles, and thereby corrupt them. See, e.g., Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. QTR. 76 (1975). It is only from this frozen perspective that conversation about role versus personal make any sense at all. It is a matter of convention for argument sake, and it destroys a truthful understanding of the morality of roles. See generally Sammons, SPEER, supra note 128.

Another way of saying this is that Shaffer and Cochran’s book is about what the role of the lawyer is, for they are attempting to describe what it means to be a good one. If they successfully convince us that the good lawyer resorts to her personal morality for good moral counseling as the lawyer as friend, then they can no longer so neatly distinguish between the personal and the role. For the *practice* never requires anything as role that is not also good lawyering. If such is the case, then, Shaffer and Cochran’s objections to the hired gun, or the godfather are simply that they are not good lawyers—an objection I would whole heartedly endorse for both are surely corruptions of our role. Shaffer and Cochran, however, would never say it this way because for them the practice is a moral threat, and thus, being
According to Shaffer and Cochran, the primary moral mistake the lawyer as godfather (representing for victory) and the lawyer as hired gun (representing for autonomy) make is to violate their own integrity by accepting a role morality as their own. Such lawyers have become the Technician, denying moral responsibility for the harm they do. The model of the lawyer as friend, however, avoids the Technician, and thus protects the lawyer’s integrity, by permitting the lawyer to be true to herself both in counseling and in avoiding advocacy when not to do so would violate her personal morality.

Of course, the lawyer as guru (representing for rectitude) avoids the Technician as well. Nonetheless, Shaffer and Cochran reject the guru for his domination of clients, the problematic moral counseling his domination produces, and the guru’s neglect of client goodness. In a sense, they reject him because he imposes his integrity upon others, and this imposition is itself a threat to integrity. The lawyer as guru may not be divided by his role, but he is divided by a Kantian inconsistency in which he denies to others that which he must demand for himself, especially denying that the other is a moral source. In being blind to moral differences, the guru corrupts his own moral vision so that it would be difficult for him to know what he is doing well enough to act with the constancy that integrity requires. Thus, his own moral arrogance becomes a self-deception that a good lawyer is an insufficient criterion for morality as a lawyer.

138. See supra note 18.

139. Shaffer and Cochran’s views on this reflect the views of the vast majority of legal ethicists, I believe. We must maintain our integrity if we are to have the integrity that moral counseling requires. What has never been clear to me, and what, I think, could not be made clear on this understanding of lawyering, is why anyone would listen to the moral counseling of one who has chosen so poorly in his own life that he must rebel against his own job in a retreat to a private morality. In other words, anyone who would choose to be a lawyer on this understanding of it has shown such bad judgment that he should not be giving moral advice to anyone.

140. An opposing way of thinking about this is that the lawyer as guru in the segregated factories story, see supra note 19, did not do what he did (telling a client to integrate the factories because his own morals require them to do this) by refusing to exercise role morality as Shaffer and Cochran claim. Instead, what he did was how he understood his role. He thought he nicely avoided the temptation of a narrow definition of legal problem solving, and, in doing so, he nicely avoided a common corruption of the role. I must confess to you that I often find the lawyer as guru a far more appealing character than Shaffer and Cochran seem to—although I bet they like him more than they have let on here—and yet I agree with most of their criticism of him. I do not, however, think that he has much to do with the “gentleman,” the lawyer’s moral exemplar for most of the history of legal ethics. I have to work hard to find what he does in the story they tell of him here very troubling, far harder than I do with at least two of the stories they tell of the lawyer as friend. For the lawyer as guru at least knows that he is imposing his morals upon his client while the lawyer as friend, as I have argued, thinks he is not when he is.

141. MORAL RESPONSIBILITY, supra note 10, at 37.
prevents his having integrity. 142

For the lawyer as friend analogy to preserve integrity, as Shaffer and Cochran hope it will, the lawyer's integrity cannot be the sort that the guru commands. If not this, however, what is it?

As we have seen, Shaffer and Cochran argue that the values of justice, mercy, and truth are likely to be shared because they are commonalities among traditions that themselves may or may not be shared. Integrity, however, is different. It is procedural and universal. To be true to oneself is a matter of individual authenticity morally required of us all. This is what makes their reluctant endorsement of the abandonment of clients as a last resort acceptable.

In the last story in the book, a story they use to demonstrate a framework for moral counseling, Shaffer and Cochran present clients who have discovered that a group home for mentally retarded men is about to move into their quiet and secure residential neighborhood, a move their lawyer may be able to stop. What the lawyer as friend does for these clients is: (1) care for them to create the trust that good counseling requires; (2) recognize the issue as a moral one and structure the counseling to match; (3) stimulate moral judgment by adding the perspective of others, legitimizing the moral objective, and suggesting moral values without being judgmental—"approaching the conscience of the client with care"; and, (4) help provide the moral motivation, such as empathy, for doing the right thing. At the end of this story Shaffer and Cochran leave this client still wrestling with the problem and with their lawyer's affirmation that she is "with them either way." 143 But why is she with them either way? To most readers, I think, 144 it is quite clear what this lawyer thinks morality requires.

142. Additionally, the lawyer as guru necessarily deceives others by claiming for himself trust in areas that are outside the areas in which trust has been bestowed by the relationship. See Annette Baier, Moral Prejudices: Essays on Ethics 95-129 (1994). We can see this in the segregated factories story Shaffer and Cochran use to demonstrate the lawyer as guru. See supra note 19.

143. Moral Responsibility, supra note 10, at 128.

144. This has been confirmed to me in conversation with Professor Tim Floyd who used this text in teaching a legal ethics seminar. His students not only understood the lawyer to have a strong moral position that she wanted her clients to accept, but also as downplaying the potential risks of this morality to her clients. Instead of being honest about her morality, she seems to me to be intent on showing her clients that her good morals are in their best interests and, therefore, that they come without costs. This lawyer seems (as did Jaramillo, Bartle's lawyer, in Shaffer and Cochran's account of justice in the law office, supra note 111 and accompanying text) to discount any potential moral understanding of the claim the client brought to the office. In this group home story, such a claim, in its best form, would be about caring for family. Now I do not mean to be suggesting for a moment that battling the zoning change would be a good way of caring for family, but only to say that caring for family is tragic in a way not recognized here, as is the care for others that Shaffer and
here, and, despite frequent disclaimers from Shaffer and Cochran about the need for openness and so forth, most would read her, I believe, as working hard and cleverly to move her clients to this moral position. Now I certainly have no quarrel with what she sees as the appropriate moral outcome here. But if I am right about her, then it would seem that the integrity Shaffer and Cochran describe would require her not to be "with [her clients] either way." Rather, she should leave them, saying, in effect: You need not embrace the reasons my religion (for example) would give me for accepting the risk of harm from others by permitting the group home to come into the neighborhood, but you can certainly understand that my integrity prevents me from helping you do this as a lawyer. We must recognize in each other the need for our own integrity. I am, that is, not abandoning you because I am a Christian (again for example) for that would be gurushly wrong, but because I am someone just like you who depends upon a private integrity for my own sense of self worth.

Interestingly, such an integrity, unlike character-friendship and moral commonalities, locates very well within a society of strangers. It is at home there because it is, as I noted in the discussion of friendship, a lonely virtue—a circular, individual matter, one we cannot truly share, resembling nothing so much as death in this way. And this is how we now sometimes think of integrity—as a move of desperation, a morality of the last resort. Yet this is not the only way left to understand it; nor is it the way we most often understand it. To demonstrate a different way of understanding integrity I want to now use a characteristic of Southerners that those who are not from the South generally condemn. I offer this example not just to be an annoying contrarian, although I am that, but because, in a culture that presumes its values to be universal, these are the only good examples left.

Truthfulness as a value was there in the Southern tradition I grew up in, just as Shaffer and Cochran said it would be, but we did not rank it very highly, far below concord, for example, even on important matters. This

Cochran see as morally required. Their own morals are in conflict here, but this lawyer's drive for a peaceful shared moral order hides this as she searches for moral commonalities among strangers.

For example, she suggests and arranges a meeting between the client and the men at the good home to stimulate empathy. She wants her clients to see that the men are not dangerous and that the clients' children will not be afraid of them.

See supra part II.

My thanks to my friend Michael Goldberg for helping me see these characteristics of the way integrity is now being used by some moral philosophers. Such an understanding of integrity is, I think, the opposite of almost all that Shaffer and Cochran hold dear, but I believe that it is the understanding they are forced to by their friendship model for moral counseling.
was so because Southerners knew they were far too dependent upon communal civility to let a little lying get in the way. I have seen friends and relatives deny what everyone knew to be their most deeply held political or religious beliefs for the sake of keeping a meal pleasant or as a reward for hard work done in the kitchen. I have seen the most appallingly obnoxious comments by outsiders, from a Southerner’s point of view, accepted with an agreeable nod and a “Yes, I know what you mean.” This was not just a matter of civility, although it was often misunderstood as such. It was instead what integrity required of Southerners. For in this South, the person who did not do this, the person who spoke his mind at the family reunion for example, would be thought of as lacking integrity, as someone who simply could not be trusted, as someone who could not, in fact, be known, because he spoke his own mind.\textsuperscript{148} For to speak so boldly from within was to be completely subject to the winds of change, as any good Southerner knew. Those who defended such conduct with “This is who I am!” or “This is what I believe!” or “But it’s the truth!” simply declared their own adolescence. Such a defense was a sure sign to others that this person had not been sufficiently apprenticed to the Southern tradition to be worth listening to. For it was only those who did not speak their own minds who gained the integrity that made their thoughts worth listening to, their counsel worth seeking, and their criticism of the tradition, when such was needed, heard. Thus, in this South we understood integrity as something that required community in the same way that integrity did for Aristotle. It was not something that one could do for oneself or by oneself, but was instead an extraordinary skill of discernment to be passed from one Southern generation to another, mostly by mothers.

As a young man growing up in the South, civility over truthfulness seemed to me to be a shade better way of living than any of the alternatives I could think of—at least most of the time. There were enormous problems in such a tradition of course; lying is always a moral risk. And, at times, the entire tradition lied to itself about its racism and sexism, as so many other traditions have. There is no doubt that such a tradition depended heavily upon moral artists such as “the Christian gentleman,” or a Martin Luther King, to keep it healthy. But integrity, on this understanding of it, is always dependent upon the goodness of a few others,\textsuperscript{149} and for

\textsuperscript{148} My friend and colleague, Ted Blumoff, insists that I am really speaking of only civility here, but I continue to think not. In the South I am describing, civility became gentility which became integrity. The civility of a person of integrity, in other words, displayed his or her integrity.

\textsuperscript{149} This is something that liberals in Nazi Germany, for example, did not understand until it was too late. See Sammons, SPEER, supra note 128.
Southerners there were far greater moral risks in the romantic individualism that opposed their communal understanding of integrity.

This way of understanding integrity is that we never fully own our integrity, as we never fully own our morals. For integrity, too, is a tradition-dependent skill. We neglect this truth about it at our own peril. Yet the integrity that Shaffer and Cochran must defend if the lawyer as friend analogy is to work is one that is at home nowhere. Because this is true, it is an integrity that can only divide the self rather than unite it. For this resort to the personal for integrity as a lawyer is not a making whole; it is deception. It turns lawyers into gnostics who must deny what they do, and, in doing so, separates the moral from the prudential and, in doing that, only recreates the Technician Shaffer and Cochran were trying to avoid. We can see this, for example, by returning again to the last story they use in the book, the hypothetical involving the group home wanting to move into a residential neighborhood. As I have said before, after carefully counseling her client as a friend toward appreciating the morality of permitting the group home to move in, the lawyer told her clients that regardless of what they decide to do about this she was "with [them] either way." She would, that is, fight the move if they wished her to. The integrity Shaffer and Cochran describe, as I also said, should require her instead to abandon her clients. Yet Shaffer and Cochran know that this will not do. For this integrity is just too thin, too false, to justify abandoning one whom you are trying to help, and so, in this story, they leave her faithful to her client. But, now, because it is only in the personal that she understood her integrity as a lawyer, any subsequent advocacy for this client can only be pure hypocrisy, the hallmark of a divided self, for which she will blame her morally corrupting role.¹⁵⁰

¹⁵⁰ From her perspective, the only option she has to hypocrisy is piety. The resort to the personal always risks piety. I see this, for example, in Anthony Trollope’s novel, THE WARDEN, in the story of Septimus Harding that Cochran and Shaffer use to demonstrate good and bad styles of counseling and moral discourse. As they tell it, Harding, the Warden of Hiram’s Hospital, an institution endowed to support twelve poor, elderly men, is concerned because the income from the endowment for his position has become very lucrative. This has been brought to the public’s attention by a young man who believes these moneys should be used instead to increase the support to the men cared for by the Hospital. It also appears to Harding that the Church in administering the endowment had sequestered for his benefit monies that should be spent on the poor. After the public challenge, and after a law suit is filed, Harding seeks counseling from a friend, a lawyer, and an in-law archdeacon who sees his task as guarding the Church’s prerogative from this social and legal intrusion. Most of the counseling he got badly neglected the moral struggle by only reassuring Harding that there was no merit to the lawsuit and that the Church had done nothing illegal. His friend, the Bishop, did not do this, although he too opposed Harding’s assessment of the situation. Instead, the Bishop offered comfort, familiarity, empathy, and principles in engaging Harding’s moral struggle. Eventually, Harding decides to quit his post—as the lawyer might
This is why advising law students to be true to themselves as a way of maintaining integrity in a practice that is understood as a constant moral threat—which is what Shaffer and Cochran's resort to friendship, personal morals over role morals, and defense of integrity is all about—is such troubling advice as the quotation from Dylan suggests. For the morals students turn to in being true to themselves are necessarily inadequate for the moral task at hand. They must be. The morals turned to are never the morals of those who have acquired the extraordinary skill that integrity within the practice of law is.

V. RHETORICIANS

"Ring the bells that still can ring. Forget your perfect offering. There is a crack, a crack, in everything. That's how the light gets in." Leonard Cohen, "Ring the Bells" (1993).

Is there another integrity for lawyers? One located in our tradition, as integrity for Southerners is located within their tradition? One that avoids the Technician, but does not deceive and divide as I have argued the lonely integrity of the lawyer as friend does? Of course, there is. It exists now in the practice. Yet, for most legal ethicists, this idea of looking to the practice for integrity is appalling because the practice is the very thing that threatens abandon her client—to retain his integrity despite having to pay the high price of jeopardizing his unmarried daughter’s financial future and his own.

The hypothetical of the group home for retarded elderly men wishing to move into a residential neighborhood immediately follows this telling of THE WARDEN. And it shocked me. For it reminded me that what Harding had done to protect his integrity was abandon the poor who were in his care. As Shaffer and Cochran tell the story, we have no reason to believe that the archdeacon would do anything other than find a replacement warden for Harding, one who would not challenge his lucrative salary. The archdeacon had likely been hardened to this position by Harding’s piety. So while Shaffer and Cochran praise Harding for having considered the injunction of the prophet Micah: “Do justice and love mercy and walk humbly with your God,” MORAL COUNSELING, supra note 10, at 145, I think it would be fair to suggest that Septimus take another look at his walk. Perhaps a little less of this kind of integrity and a little more care would have served others a little better. Harding could have, if he had not been so pious, continued in the position and used his salary for the benefit of the poor enrolled in the Hospital, doing so with patience, with forgiveness, and in the hope that by God’s grace his witnessing would have moved even the archdeacon to reconsider. Sometimes, I think, the cross some are called to bear is the loss of their own “integrity.” For a discussion of the role of forgiveness in sustaining the constancy that integrity requires, and for a display of this through the works of Trollope, see Stanley Hauerwas, Constancy and Forgiveness: The Novel as a School for Virtue, in DISPATCHES FROM THE FRONT: THEOLOGICAL ENGAGEMENTS WITH THE SECULAR 31-57 (1994). As Shaffer and Cochran tell it, however, Harding’s integrity is enough to make me recall the comment I saw somewhere, attributed to Lyotard, that the divided self at least has the virtue of destroying the undivided self’s presumptuousness.
integrity the most. Nonetheless, the relevant integrity for lawyers must come from within the practice if we are to adequately account for what we do with our lives. Such a narrative wholeness must be understood as an excellence of our practice in much the same way that sailing a ship through a rocky pass in a storm is an excellence of sailing—one that can only be acquired by sailing and only truly appreciated by being a sailor.

I want to begin now the demanding task of arguing that the relevant integrity of the lawyer is that of the rhetorician, for it is, I claim, the role of the rhetorician that offers the best account of the activities of our practice. By rhetorician I mean, for now, no more than one who is called upon to speak persuasively for another within the legal culture. Of course, what clients bring to us are disputes to be resolved in their favor or prevented. The way they bring these disputes to us, however, is as stories of what has happened to them, what will happen to them, or what may happen to them; stories we are to tell for them as persuasive accounts. And the way they come to us is as strangers.

Describing lawyers as persuasive speakers for strangers is surely not enough to capture all that we do, but it may be enough to capture all that we do that is morally problematic. For it is our being instruments of the questionable interests of others in this way that creates the interesting ethical problems Shaffer and Cochran, and all other legal ethicists, address as legal ethics.

What I want to suggest here is that rather than making our role morally problematic, speaking persuasively for strangers is the most legitimate

151. The term “legal culture” is meant to be read as broadly as possible. Most of the law review articles on the lawyer as rhetoricians I have read in the course of writing this article have tied the idea of rhetorician to a rather narrow conception of law, one that leaves out the law office as academics have always been inclined to do. To the contrary, I think that in large measure what the “law” is, is what lawyers say to their clients in counseling sessions, what is discussed with lawyers on the other side, how rules are considered in negotiations, and so forth. Thus, the rhetorical conversations I am referring to here are much broader than those conversations a lawyer might have with the court about the interpretation of legal text. These conversations may be best understood as requiring a discipline-specific rhetoric with the discipline being understood broadly as the practice of law.

152. I hope it is clear how this change in understanding alone would have made quite a difference in the story of Bartle and Jaramillo. See supra note 111 and accompanying text.

153. There are of course other dimensions to legal ethics such as do not overcharge clients, do not neglect cases, do not commingle funds, do not have sex with clients, and so forth, but these aspects of legal ethics—situations in which we harm others or risk harming others for our own benefit and not for our clients—are rather ordinary matters, ethically speaking. Nevertheless, I believe that an adequate understanding of the activities of our practice as rhetoricians will have quite a lot to say about why we should not do these things, just as an adequate understanding of chess or baseball would tell you why cheating was not in your interest if you wish to achieve the internal goods of those good practices.
source of the morals we bring to moral counseling. To fully explore this suggestion, we would need to ask what good moral counseling is when it is considered as an excellence of our practice as rhetoricians. What relationship between the lawyer and the client does this rhetorical role define for us? What particular moral values does this role give us to bring to these relationships legitimately, i.e., as part of the moral authority of our craft? For if I am right about this, we will learn what we are to say to clients in our law offices about their disputes not from the personal morals we bring with us to the practice from our families, our towns, our synagogues or our churches, or from those morals as commonalities, but from our role as rhetoricians. For many, I think, this will be a disturbing suggestion.

Obviously, I cannot complete this argument here. I intend this to be only an invitation to you to think of the lawyer as rhetorician in this counseling context, leaving for another day the much harder work of answering in detail the questions I have just said we must ask. I do this inviting primarily through two stories\(^{154}\) and through a very heavy (and awkward) reliance upon the more careful thinking of two others: James Boyd White's understanding of law as a constitutive rhetorical practice\(^{155}\).

\(^{154}\) Since we are working with images of the practice, I want to use Shaffer and Cochran's methods for this and tell stories. The first one I have used before. See Jack Sammons, The Professionalism Movement: The Problems Defined, 7 NOTRE DAME J. L. ETHICS & PUB. POL. 269, 292-94 (1993). I hope I have also said enough about a potential counter-analysis of the stories Shaffer and Cochran have used in their book to have hinted in that way at the implications I mean for the model of the lawyer as rhetorician to have for moral counseling in the law office.

\(^{155}\) See generally JAMES BOYD WHITE, ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS (1994); JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (1984); JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985). It is difficult to describe White's work because the work is itself a performance of "constitutive rhetoric," especially his most recent efforts. Also, he writes against theoretical description. Nonetheless, in earlier work White described "constitutive rhetoric" as "a set of resources for claiming, resisting, and declaring significance. It is a way of asking and responding to questions; of defining roles and positions from which, and voices with which, to speak; of creating and maintaining relations; of justifying and explaining actions and inactions. It is one of the forms in which a culture lives and changes, drawing connections in special ways between past and present, near and far. The law . . . is a system of meaning; it is a language and should be evaluated as such." JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETIC OF THE LAW 205 (1985). Much of White's recent work can be understood as an elaboration on a 1985 article in which he first introduced his conception of constitutive rhetoric. See J. B. White, Law as Rhetoric, Rhetoric as Law: The Art of Cultural and Comural Life, 52 MICH. L. REV. 684 (1985). In that article he saw constitutive rhetoric as a response to a mechanistic understanding of law, not unlike that we have seen above in the Technician. White's claim for constitutive rhetoric is that we are formed by the way in which we speak. In conversation we decide who we are and what kind of people we are to be. Thus, the "we"
and Stanley Hauerwas's understanding of the authority of professions. Neither of these two would agree with all that I plan to say, for, in some ways, they are a very odd couple.

My two stories will be seen as counters to Shaffer and Cochran's stories of the lawyer as friend, but I do not intend them as such. My stories are not stories of moral counseling sessions in the law office. In neither story do we hear what the lawyer says to the client, nor what the client says to the lawyer. This surely must seem an odd way of proceeding, but it is, I believe, necessary. For, as I have said, we cannot adequately understand moral counseling without first trying to get clear about what the activity of the practice of law is. Thus, it is necessary for me to display the lawyer as rhetorician as fully as I can, for if I am right about this, how we are to do moral counseling in the law office will be a product of this display.

Nonetheless, because Shaffer and Cochran's model of the lawyer as friend so sharply distinguishes between counseling and advocacy—advocacy is only the misfortune that remains when moral counseling fails and, thus, could not be a communal task—it surely must be difficult to think of the role of rhetorician as carrying implications for counseling. One of the problems of the image, and one of its strengths, is when we think of rhetoricians we usually think of advocates. Yet, if there is what might be called a rhetorical integrity of our practice, perhaps the tasks of counseling and advocacy should not be so cleanly divided. As rhetoricians, I think, we would have to understand both counseling and advocacy as parts of one

that is the "we" of the lawyer's rhetorical world is the community created through a particular form of discourse. There are ties to skepticism in "constitutive rhetoric" because the initial orientation, the initial openness, is premised on a skeptical attitude towards morality—one in which all claims are potentially valid. But White's is not a skeptic's approach. There is no thought here of the quietude into which the true skeptics fall; there is just the opposite, for White's rhetoric endorses an ongoing and disturbing conversation as a moral enterprise.

I mean here to borrow James Boyd White's brilliant explication of the law as a constitutive rhetorical practice, but to perhaps disagree with him on the implications of such a practice for the relationship between the lawyer and the client, and to start drawing out, more than White has, the implication of our rhetorical function for moral counseling. I do not, however, spell out the parts of agreement and disagreement, nor have I attempted a full description of White's understanding. Neither, I think, would have been appropriate to the sketch of an alternative heuristic model that I want to present here.

156. See generally STANLEY HAUERWAS, SUFFERING PRESENCE, supra note 1; STANLEY HAUERWAS, TRUTHFULNESS AND TRAGEDY: FURTHER INVESTIGATIONS INTO CHRISTIAN ETHICS (1977).

157. They suggest this about advocacy as if there were no moral differences that did not require legal resolution—did not, that is, require the participation of the rest of us through our laws and legal system. As previously noted, they exclude from this harsh judgment advocacy against the true evils of our society such as racial discrimination. See supra note 19.
conversational task and as united in this common account. As rhetoricians, we cannot talk honestly of what we should do in moral counseling without also talking honestly of what we do in advocacy, and vice versa. It is, perhaps, because we have not yet given a sufficiently clear accounting of our activities as lawyers that we are faced with such limited choices of models for moral counseling as the friend, the guru, the hired gun, or the godfather. So what follows in these two stories, and what must follow before we can think about what good moral counseling in the law office might be, is a rhetorician’s account of lawyering.

Let us imagine, then, a modern variation on Sophocles’ familiar Greek tragedy *Antigone.* (I hope you will forgive me for returning to the Greeks. For odd reasons I have often thought about the lawyer’s role in the context of the Greeks, and it is now difficult for me to avoid using them.) Recall that the plot revolves around Antigone’s devotion to her brother, Polynices, who has been killed in a battle with their brother, Eteocles, and her defiance of her uncle, now the king, Creon’s ban on the burial of Polynices because Polynices had betrayed the city-state. But this time, rather than heading off quickly to bury her brother in violation of her uncle’s edict, to her own death, and to the death of those closest to her, let us imagine an Antigone who goes to see a lawyer.

Antigone’s proposed course of conduct for handling her dispute with Creon, according to Martha Nussbaum’s Hegelian reading of the play, is filled with the neglect of others and of community. Thus, she comes to the lawyer lacking the same

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159. Creon, as the city’s representative, was charged with enforcing the law that prevented burial of traitors within the city of Attica. Although it is not clear, it appears that Creon may have gone beyond what customary law required of him by denying to Polynices any burial at all.
160. Perhaps someone convinced Antigone to go to a lawyer before acting because, as a former exile with her father Oedipus, her judgment on such matters was at least suspect. See supra note 158.
161. MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY (1986). For Nussbaum, as for Hegel, Antigone’s flaw is a single-mindedness of vision, a flaw she shares with Creon. What Nussbaum emphasizes, that Hegel did not, is that this single-mindedness is a way of avoiding conflict in her moral order. *Id.* The simplified world of Antigone reduces everything to relations and all relations to family.

She draws, in imagination, a small circle around the members of her family: what is inside . . . is family, therefore loved one and friend; what is outside is non-family, therefore, in conflict with the family, enemy. If one listened only to Antigone, one would not know that a war had taken place or that anything called “city” was in danger.

*Id.* at 63-64.

But it is not just her connection to the city that Antigone ignores, for she fails to see that “her own religious aims cannot be fulfilled without civic institutions.” *Id.* at 66. For
connections of her conduct as did Dr. Bartle, as his lawyer, Jaramillo, understood him, and as did the family who wished to exclude the group home from their residential neighborhood, as their lawyer understood them. From Nussbaum’s reading, we could say that Antigone is proposing the theological equivalent of standing on her rights (or, at least, her familial theological duties) to the detriment of others. In this odd way—odd because Antigone appears to be acting not in a self-serving way at all but altruistically toward her dead brother and as a service to a truer community than that which the state could ever be—at some level the play (and the legal dispute I imagine) must be about which envisioned community, Creon’s or Antigone’s, is truthful—Antigone serves as a good stand-in for all the examples Shaffer and Cochran give us of the troublesome clients of the lawyer as friend, or so I hope.

Is there any doubt what the good lawyer as rhetorician would say to her and how it would be said? Certainly not as an Aristotelian character-friend whose deeply shared common morality with the lawyer needs only to be gently wrest from her private conscience, but as one who, as she is, makes a moral claim upon others, a claim about which she may or may not be right. What would be of primary interest to the lawyer as rhetorician is not to speak to her as a friend, but to speak for her to others. Thus Antigone comes to the lawyer as a stranger whose story needs to be told. (This, I suggest, is how Dr. Bartle’s lawyer, Jaramillo, should have welcomed him and how the lawyer of the family concerned with the group home for retarded men should have welcomed them. For such are the courtesies of the rhetorician’s reception of the good rhetorician.)

Antigone “improvised her piety, making her own decision about what to honor. She is a maker of her own law . . . .” Id. at 65.

162. MORAL RESPONSIBILITY, supra note 10, at 64-65.

163. Although in the text of the article I have not discussed the two other examples Shaffer and Cochran use to demonstrate the lawyer as friend, the same is true in these. For Antigone’s failure to connect to others is true of Mr. Johnson, as his lawyer, Robert, understood him, and certainly true of Septimus Harding, as his lawyer Sir Abraham, the archdeacon, his daughter, and I, for different reasons, understand him. See supra note 150.

164. The phrase “courtesies of reception” is from GEORGE STEINER, REAL PRESENCES 145-78 (1989). Steiner discusses reception in the context of receiving works of art and works of meaning. He uses the courtesies of reception, the “modulation . . . of stranger into guest,” as an instructional analogy for our reception of works of art and works of meaning. Id. at 176. He wonders in what sense these “moral motions of sensibility [are] essential to the communitive act.” Id. at 145. These rites of reception he calls “philology,” following Vico, I assume. Id. at 155. In my own thinking I keep coming back to Steiner because I think there are good connections with what he says about courtesies of reception in art and the relationship we are to have with others as lawyers.

There are, of course, close connections between these “courtesies of reception,” and other components of the relationship between the lawyer as rhetorician and her client and an
But before this can be done, three lawyerly tasks must be done first. The first is to *listen* to Antigone not as one so concerned with client goodness that her dispute is seen as the product of an Aristotelian or, perhaps more accurately, a Platonic character flaw keeping the client from the natural peace and harmony into which she was born. But instead, as Emmanuel Levinas says a good Jew must read even the most mundane passages of Torah, with an expectation of great wisdom.\footnote{Emmanuel Levinas, *The Jewish Understanding of Scripture*, 44 *Cross Currents* 488, 491 (Winter 1994-95).} For Antigone is the source of whatever wisdom the lawyer as rhetorician will speak.

After listening, the next lawyerly task is to *prepare to speak* for Antigone, or, when we understand that what we truly do as rhetoricians is re-present our client to others, to prepare to speak Antigone. Thus, as one who must speak persuasively for another and seeks to do this well, Antigone’s lawyer has no choice but to explore with her who she is and what it means to be who she is in this dispute in these communities with these values. In this conversation with the client, the rhetorician discovers and creates—creates because the conversation will change the client—who the client is and what is to be said for her. To see if the wisdom he heard in the story she brought to him is *her* wisdom and to see if it will be persuasive to the relevant others, the lawyer tests this wisdom against who Antigone is, against who she seems to be becoming in the conversation, against her culture as best he can, and against the morality of the communities in which the dispute must be heard. Sometimes clients’ moral claims will be very demanding upon others and upon communities, as Antigone’s certainly would be. And sometimes the moral claims upon our clients from others will be the same. From this we see how Shaffer and Cochran’s consideration of justice and mercy (and the forgiveness I wish they had talked about) become part of the stuff of which good moral counseling as a rhetorician consists. The lawyer as rhetorician talks about these with her client because such is the nature of the conversation of disputes. The good rhetorician, for example, would move the family in Shaffer and Cochran’s ending hypothetical to empathize with the men of the group home because the family cannot know their own position without feeling what is behind the moral argument on the other side of the one they brought to their lawyer’s office. The lawyer as rhetorician knows that at its

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Abrahamic theology of the stranger, the Christian version of which has been well stated recently by Parker J. Palmer in *The Company of Strangers: Christians and the Renewal of America’s Public Life* (1991). I have not explored the connections between the lawyer as rhetorician or the understanding of the client as stranger with Christianity in the text because to note the connections would raise more questions for most readers than I wish to address here.

\footnote{165. Emmanuel Levinas, *The Jewish Understanding of Scripture*, 44 *Cross Currents* 488, 491 (Winter 1994-95).}
\end{small}
most practical and fundamental level this dispute will be about the moral claim of accepting harm from those in need. If the rhetorician is to speak for them, this family must know well the moral claims made upon them. They must consider it, shape their own claim by it, and define themselves by it as well. There is no other way to be a good rhetorician for them.

It is in this process, this preparation for speaking, that lawyers explore morals with their clients and explore their clients’ connections with others, as Shaffer and Cochran would have them do for goodness’s sake. For rhetoricians know that the conversations they will have about disputes are always moral conversations. They know that if they are to be persuasive for their clients their clients’ claims must be heard as moral claims for morals persuade and morals determine much of the meaning of the rules, customs, and other civilities by which disputes are governed. They also know that the clients they speak for almost always understand themselves as moral, that is as social, people. Thus, they do not explore morals with their clients to move them as friends to what they believe are moral commonalities with them; instead, they explore morals with their clients because they cannot speak persuasively for them in any other way.

Finally, the lawyer creates the conversation in which Antigone’s moral claim can now be heard. Because rhetoricians know that conversations about disputes are always moral conversations, they also know that there are many communities in which these conversations should be heard. For example, Jaramillo (Dr. Bartle’s lawyer in his dispute with the real estate agent, Ms. Skaggs) knows, as all good lawyers already do, that the dispute Dr. Bartle brought to him is not just a legal one. Disputes are never just about the type of moral conversation we can have through the law, although they are certainly about that. He knows, as clients often do as well, that law

166. As Shaffer and Cochran put it in their Introduction: “Law office conversations are almost always moral conversation. This is so because they involve law and law is a claim that people make on one another. The moral context is often implicit, but it is always there.” MORAL RESPONSIBILITY, supra note 10, at 1. I would add that clients’ claims are almost always moral claims and that the worst of us make the most demanding moral claims.

167. This is true regardless of the way in which the dispute is resolved, I believe.

168. The representation is as Janus-faced as are our clients. It looks at the client and looks at the culture to see how the conversation can progress. Most of our clients will look at their disputes, with our prompting, both personally and impersonally because this is who they are and how they think. We prompt clients to do this because we cannot represent them well without exploring with them the way the conversation will work, for it will always consider both sides. This is true whether the conversation is the adversarial conversation the state provides or not. The lawyer’s prompting of clients to do this, and the lawyer’s sometimes unique ability to do this well, is something that lawyers learn in law school through analysis of the common law, and something that often matures for them, becomes them if you will, in a good practice over many years.
is only part of his conversational task. Thus, he knows that telling Dr. Bartle that his claim is barred by the statute of limitation is not the end of the required conversation about it. This is why, even if the claim is barred, he would suggest to Dr. Bartle that they call Ms. Skaggs to ask why she did what she did.

*All of these rhetorical tasks may change Antigone and the nature of her dispute, as they can change all clients and all disputes, and in ways she may not like.* These changes will be *imposed* upon her, as they are upon all clients, through whatever moral authority she recognizes the practice of law to have over her. The lawyer as rhetorician, listening, preparing to speak, and creation of the conversation, will change Antigone by requiring her to view her dispute as rhetorical. For Antigone came to her lawyer seeking, as most clients do, control over her life—either to create it or to have it restored. Thus, she came to him seeking security and yet what he offers is a reminder of her insecurity, a reminder that the control she seeks over her life can only come about honestly through trust in a conversation with others. Clients like Antigone must trust their lawyer, trust the other lawyer, trust the judge, trust the various magistrates of enforcement to perform their roles well, trust the community, trust conversation itself, and, very often, trust the party on the other side.

This understanding of clients seeking control mirrors Stanley Hauerwas' understanding of what patients seek from their doctors:

> It is ironic, though, that what people fear is not illness itself but loss of control. That fear is so all-consuming is an indication of the common misunderstanding of what control of the body entails. To control the body does not mean to “manage” or even, as Cassell suggests, to “soar” over the body, but rather to appreciate how the body’s limitations are also the source of the most creative and interesting possibilities available to us. By learning to live as embodied beings, that is, as people subject to disease and ultimately death, we learn how significant it is that we be capable of caring for one another through the

169. "By its very nature, then, authority seems to involve people’s willingness to accept the judgments of another as superior to their own on the basis of that person’s office and assumed skills." HAUERWAS, SUFFERING PRESENCE, supra note 1, at 40.

170. The change that comes about comes about through teaching as Stanley Hauerwas has helped me to understand in correspondence. Hauerwas adds: "I tend to think that one of the things you might develop is how rhetoric always involves teaching and therefore one of the forms that the law takes in terms of serving the client is to teach the client the world of the law through which the client is made part of a process that they might well not want to be part of but nonetheless helps them to understand their difficulties. Physicians do the same as they fundamentally teach patients how to be sick." (Correspondence from Stanley Hauerwas, July 21, 1995, on file with author.)
office of medicine. For through our bodies we are forced to face our
need for one another, and through learning to acknowledge that need we
discover our "control" comes only through trust in others.171

What I suggest is that what clients bring to their rhetorician lawyers is
"disease" as well and that the "body" in question is our relationships with
others and our communities. Because of the way the rhetorician understands
the disease of disputes, that is, that through the processes of interpretation
disputes become competing moral claims about who we are, the rhetorician's
message is that these "diseases" too are the source of what are the most
"creative and interesting possibilities available to us." This will be for
Antigone, however, as it is for most clients, a lesson of frightening
limitations: of the limitation of the contingency in which we live, of the
limitation of our dependency on others, and of the limitation of uncertainty
about our own moral claims.

Will Antigone listen to any of this? What the rhetorician asks of her
is an extraordinary honesty about herself—an honesty he requires of her so
that he can know for whom he speaks. Such an honesty can only happen
in the most trustworthy of relationships. (It is because we value what can
be accomplished in this speaking that we, as a society, protect this
relationship through the law more than almost any other. This is truly an
extraordinary thing that we do.) This question, then, is the central tension
of legal ethics, and it is not, as it is usually understood, a tension between
loyalty to clients and social obligations. For the rhetorician this tension is,
instead, one of craft. How do we maintain the relationships of trust with
our clients that our work requires when we are often asked by our clients to
do things inconsistent with that work?

The way good lawyers, as rhetoricians, move their clients in their
disputes, then, is towards seeing their disputes with a rhetorical
eye.172 This is the way they treat the "disease" clients bring to law office conversations.
What kind of vision this rhetoricial vision is can best be described, I hope,
by quoting at some length from James Boyd White's reading of Richard
Hooker's Preface: Books I to IV, to Of The Law of Ecclesiastical Polity:

And what are people like in [Hooker's] narrative world? They are
given to claim more knowledge, with greater certainty, than they should;
to value their own notions far above the peace and order of their communities; and to struggle for power under cover of a struggle for ideas. They are especially likely to assert that they know what in fact cannot be known, and to claim divine inspiration for this knowledge.

171. HAUERWAS, SUFFERING PRESENCE, supra note 1, at 50.
172. JAMES BOYD WHITE, ACTS OF HOPE, ch. 3 (1995).
They are in need of the intellectual and ethical discipline provided by a culture and its institutions. When they are seen from a distant point by a person who does not take sides over the matters that exercise them—by "posterity" in fact, for it is into a version of posterity that Hooker here transforms his audience—the intensity and tenacity of their disputes make them seem foolish and unpeaceable, and this on both sides. All this works as a call for discussion, for hesitation in affirming certainties, and for compliance with the judgment of others .... This is at its heart a rhetorical view of life, founded on uncertainty of knowledge and difference of opinion, and the way Hooker proposes to live on such conditions is rhetorical too: not by conclusive, logical, or factual demonstration, but by argumentative conference, by distinguishing between what matters essentially and what matters little, and by constant recognition of the fact that we need some way to live together or we shall split into tiny fragments .... It makes discussion of a certain sort its highest authority (saving always the plain commands of scripture); and the question what kind of discussion this should be, Hooker is answering by performance .... If Hooker elevates a kind of conversation to his central authority, how is this kind of conversation defined? .... [W]e can already see that the processes of mind and speech that Hooker enacts, and by enacting authorizes, include those of superordination and subordination: the subordination of the less to the more important; of the individual to the community; and of the community to the processes of judgment over time for which his word is "posteritie." In most things one’s judgment should be tentative and always given with an eye to their accommodation ... to the views of others. He rests his case ultimately on his view of human nature, including himself, as fallible, vain, self-centered, and self-glorifying, and he sees collective life, in the church and in this debate as a mode of collective self-correction. He thus leaves himself open to those who can persuasively argue that this or that particular truth is settled beyond discussion and to those who can answer his story, based upon his view of the way human beings work, with a story of their own.173

In trying to do all of this well—to listen, to prepare, to create conversation, to speak, and thus to counsel as I have suggested, the lawyer is himself shaped towards Hooker’s rhetorical vision as a matter of excellence of craft. To quote again from White, the person the lawyer as rhetorician becomes is one whose:

maturity of thought lies not in the attempt to reach statements of firm conclusion, not in conclusiveness at all, not in propositions asserted through the elaboration of system, but in tentativeness and inclusion, in

the capacity to hold in the mind at once, or in rapid sequence, a variety of incompatible ways of talking, none of which can be a master language. To think that we could articulate general premises of political authority, establish their truth, and from them by inexorable logic infer a set of subsidiary propositions, of which we could say, this is the truth, would in this world be a form of insanity. The most we can hope to do is to develop one way of talking as far as we can, then poise it against another; that is where the truth lies, in the relations between languages and the practice of life they entail, not in anything that can be said in any single language... and the concerns of justice too, for justice can be seen to be a way of giving each voice, each possibility for speech, its widest and fullest range.¹⁷⁴

This person, though, is far from being an unfamiliar character in the practice of law. Shaffer and Cochran tell us the lawyer as guru (representing for rectitude) is what remains of the “gentleman,” the moral exemplar that Shaffer has taught us to examine as the bearer of our ethical tradition as lawyers, as, that is, the primary source of our morals as a profession.¹⁷⁵ Gentlemen, they tell us, reject the moralities of role and take responsibility for everything that comes their way, making moral choices for others because they believe themselves to be responsible for their clients and for their communities.¹⁷⁶ The best of gentlemen control others through the candid exercise of a power they believe is fully justified by their refined

¹⁷⁴. JAMES BOYD WHITE, ACTS OF HOPE 78-79 (1995). Elsewhere, White says: “The rhetorician, like the lawyer, is engaged in a process of meaning-making and community-building of which he or she is in part the subject. To do this requires him or her to face and to accept the condition of radical uncertainty in which we live: uncertainty as to the meaning of words, uncertainty as to their effect on others, uncertainty as to our own character and motivation. The knowledge out of which the rhetorician ultimately functions will not be scientific or theoretical, but practical, experiential—the sense that one knows how to do things with language and with others. This is, in fact, our earliest social and intellectual knowledge... The rhetorician thus begins not with the imagined individual in imagined isolation (as Hobbes or Locke does), and not with the self, isolated from all of its experiences except that of cogitation (as Descarte does), but where Wittgenstein tells us to begin, with our abilities of language, gestures, and meaning.” J. B. White, Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life, 52 MICH. L. REV. 684, 695-96 (1985) [footnotes omitted].

¹⁷⁵. MORAL COUNSELING, supra note 10, at 32-38. Understanding a character type as an ethic is an Aristotelian way of going about morality. The way one became the Aristotelian “good man” I referred to so frequently in previous sections, the one who could form character-friendships, is by finding someone who was already a good man and imitating him. And how would you know one when you saw one? By being raised right within a good polis. The process was not circular, but step by step. Shaffer has convinced most legal ethicists, I think, that the gentleman has been our “good man” for most of the history of legal ethics in this country.

¹⁷⁶. MORAL COUNSELING, supra note 10, at 32-33.
judgment and social superiority. Yet in this elitism the gentleman-lawyer ignores the moral possibilities of the client, Shaffer and Cochran warn. He fails, that is, in the words of Martin Buber, to treat the client as a "thou" instead of an "it." All of this seems to be quite the opposite of the person White describes. Is this what has become of the gentleman-lawyer? Is he now a pious old man telling people to whom he does not listen what is in their best interests because he knows what is best for all? Instead of becoming pious, my guess is that the gentleman-lawyer has retreated from our society of strangers to his practice; retreated, that is, from a community that can neither provide the teleology he needs for his judgments for others to be true, nor provide the type of security of self that made him who he was. This gentleman-lawyer must retreat if he is to continue to exist at all. The very incoherence of his status in a society he must reject means that he cannot trust his own instincts and, because he cannot, the constancy that defined him is an impossibility. Yet, in retreating to his practice, perhaps this gentleman now rediscovers part of who he is and always has been. For the gentleman's life has always been filled with a defining tension. As Stanley Hauerwas puts it:

The gentleman often is described as having a talent for being agreeable in a variety of circumstances and with different people, but how he is to do that, and at the same time maintain the integrity or honesty that seems to exist at the heart of being a gentleman, is not easily explained. Again, the gentleman is expected to preserve a certain mildness, no doubt deriving from inner calm and self-possession based on a sense of his worth, but how such a demeanor is to be maintained while defending the helpless, fighting for the right, or maintaining lasting indignations is left unclear.

This is, of course, precisely the tension the lawyer as rhetorician struggles with in seeking the excellences of his practice. Perhaps it is in mastering his work as that of a rhetorician that the gentleman-lawyer now acquires the character "that allows [his] life to be narrated in an ever-

177. MORAL COUNSELING, supra note 10, at 32-33.
178. MORAL COUNSELING, supra note 10, at 32-33.
179. MORAL COUNSELING, supra note 10, at 37 (citing MARTIN BUBER, I AND THOU (Kaufman trans., 1942)). What Shaffer and Cochran say about the gentleman could be true for the gentleman lawyer in this country, but I am not sure that this description is at all fair to the English gentleman. See generally SHIRLEY ROBIN LETWIN, THE GENTLEMAN IN TROLLOPE: INDIVIDUALITY AND MORAL CONDUCT (1982).
changing but still steady manner.” For “[a] gentleman does not seek . . . to find certainty amid a world that offers none.” He is one who “stands firm while recognizing that what he is doing may be problematic.” To a gentleman-lawyer, then, “being moral is a matter of judgment to be worked out through the contingencies of our existence.” Of course, what the gentleman-lawyer can now offer to clients through his judgment is not what the gentleman well formed could, for we lack the shared teleology in which such judgments could make sense. Yet he can offer and must offer that judgment which is consistent with what his own practice teaches him about conversations, community, morality, authority, others, and the resolution of disputes. These lessons are now the legitimate source of the moral authority the gentleman-lawyer brings to the advice he gives to people who are strangers. This, then, is how the gentleman-lawyer, as bearer of our ethical tradition, remains with us within the role of the lawyer as rhetorician.

But, returning now to Antigone, we can see an objection. How can any of this rhetorical vision of disputes be truthful when the processes by which the conversations often go on are those of the state, and for Antigone the state is Creon? Lawyers know from their practice that sometimes our client’s moral claims can only be pursued through adversarial interpretation of the texts that the state says define us. Sometimes, that is, the only conversation the dispute permits is as adversaries through the system the state provides. There is no doubt that this system is finally one of force and that its force shapes it and shapes all other conversations we can have about disputes. Yet it would be a mistake to confuse the force that backs the

181. Id. at 35.
182. Id. at 36.
183. Id. at 39. Hauerwas’ article argues that the gentleman’s moral substance gives him the capacity to forgive and it is this capacity that provides the unique constancy he needs to remain a gentleman. Id. at 40-57.

“Through forgiveness a gentleman sustains the standard necessary to remain constant in his loyalty to others; yet at the same time forgiveness allows him not to remain indifferent to conduct that is clearly immoral. Moreover, it is through forgiveness that gentlemen can live together without violence. Their differences cannot help but entail conflict, but conflict is controllable because gentleman are as ready to accept forgiveness as to give it.”

Id. at 52.
184. Id. at n.13.
185. The lawyer as rhetorician seeks conversation whether it is the adversarial one the state provides or not. But because the one the state provides is almost always available, it shapes and creates all other conversations (conversations that are usually, but not always, to be preferred for a wide variety of reasons) such that the conversation is always a communal one at some level. It is always a question of what kind of people we are. This is another reason why the lawyer for Mr. Bartle calls Ms. Skaggs, the real estate agent, despite the protection of the statute of frauds. When the lawyer calls her to find out why she acted as she did, he is creating a communal conversation about justice.
state's decisions with the authority relied upon in deciding. For this authority is not the state, but is, once again as James Boyd White describes it, an authority created by and in the performance of the conversation itself, as it would be if Antigone and Creon were now to talk about the meaning of the words of his edict and the meaning of the burial requirements.

Surely, then, what Antigone's lawyer will say to her will be something to stop the drama; a mundane, temporary, earthly, pragmatic, technical, "lawyerly" course of action designed to create the conversation in which the lawyer can speak Antigone in a way she will be heard. Perhaps, the lawyer will suggest to Antigone that they talk to the zoning board about changing the city's boundaries to exclude Polynice's remains and to a burial company about erecting a structure over Polynices that will later collapse upon what is left of him. (These are, of course, selected because they are the kind of crafty moves for which lawyers are usually condemned.) Will this little bit of cleverness satisfy Creon that his edict (and the jurisprudence of man) has been sufficiently honored so that the city is not threatened? Will it satisfy Antigone that the burial requirements (and the jurisprudence of the gods) have been fulfilled? Who knows? It is not offered as a solution to either. For what the lawyer has done here is bought time, sought patience, changed the dispute into rhetoric, and created the conversation in which Antigone can now be heard. For now the moral

186. The rhetorician cannot be about force, for force is always the enemy of conversation. This is why the lawyer who seeks only victory cannot be considered a good lawyer.


188. This conversation would not be a true dialectic—it could not be and remain truly communal or truly representative—but it mimics the dialectic in bringing the parties in dispute together on those matters about which they must agree if there is to be a conversation at all.

189. The lawyer, that is, will surely try initially to reduce the generality of the claims made on both sides of this dispute and limit the level of abstraction as a way of seeking conversation. This, I think, is a typical lawyer's move, and it serves well the function of the rhetorician.

190. This move would create the issue of Creon's having gone beyond the customary law providing burial of traitors within the city and raised the issue of what kind of authority Creon was acting upon, an issue that must be decided by a different kind of authority.

191. Much as a good lawyer for Bartle might have suggested offering to Mr. Bartle that he, the lawyer, contact Ms. Skaggs, and offer the truer value of the service she rendered as a way of opening the conversation with her so that his counseled client might be heard, or the good lawyer for Septimus Harding might suggest telling the archdeacon of his plan to use the moneys for the poor while keeping the post of warden (and also telling the young man who filed the suit) as a way of reopening conversation, or the lawyer for the neighborhood suggesting community approval of those permitted to live in the group home and improvements of the group home's property to ward off an anticipated loss of property values
claim that Antigone thought was a lonely matter for her has been translated by the rhetorician into his language, into, that is, a communal claim about what type of community this community is and is to be and, most importantly for the lawyer (and most unsettling for Antigone), a claim about how this conversation should proceed.

It is in this way that the lawyer's task as rhetorician is always communal. For whatever community the dispute is in, the lawyer is concerned with the rhetorical conversational virtues he has learned from his practice, conversational virtues that see all claims as about potential moralities and thus entitled to be heard. The lawyer is always interested in teaching these rhetorical lessons—this specialized understanding of truth and justice as processes premised on a moral skepticism, as a communal "knowing how," as a skill passed along by rhetoricians—to every community.

This is why lawyers translate every dispute into questions of meaning to be heard in some community of interpretation with which community being part of the dispute. It is why maintaining the rhetorical conversational virtues we need to talk about disputes is the common project of all lawyers—the common activity of our practice.

as a way of keeping that conversation alive so that her counseled client might be heard. Often, I think, the ways of keeping the conversation alive are themselves enough to resolve the dispute, but this is not their purpose as the Antigone example makes clear.

192. For understanding Antigone's claim as a lonely one, see MARTHA C. NUSSEBAUM, THE FRAGILITY OF GOODNESS 51-82 (1986).

193. What the rhetorician does with Antigone and Creon is a form of peace-seeking, to be sure—all Shaffer and Cochran's good lawyers as friends sought peace as well—but it is a peace for the purposes of the moral conversation. It is important that this be distinguished because one way of understanding what Shaffer and Cochran do is to ignore the tragic to find a moral order in which peace can survive. The search for moral commonalties always runs this risk, I believe. It also tempts us to reject conflict by suppressing it—a strategy doomed to failure. As Stanley Hauerwas says of the practice of medicine: "for the constant temptation is to try to eliminate suffering through the agency of medicine rather than let medicine be the way we care for each other in our suffering." HAUERWAS, SUFFERING PRESENCE, supra note 1, at 17. It is possible to understand the hired gun, the godfather, the guru, and the lawyer as friend as driven by the need for a certainty and a clarity about the world that is just not to be found. For the hired gun, this need shows us as a demand for clarity of a client's objectives. The representation of a client is far too ambiguous a task for the hired gun to be comfortable doing it well.


195. I do not know if we can have conversations like these, careful conversations about who "we" are, anywhere else in any of our cultures. For Alasdaire MacIntyre is surely right when he describes our politics as civil war by other means; and, I think Christopher Lasch is also right when he describes the collapse of social conversation within what is left of our democratic community. See CHRISTOPHER LASCH, THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY (1995). Of course, for the conversations the rhetorician provides to work, there must be a community of rhetoricians who share a common understanding of the internal goods of the practice and a common understanding of the procedures necessary
VI. INTEGRITY AGAIN

"I don't know."
(New York Attorney Frank Armani's response when asked if he would do again what he did in the Lake Pleasant Bodies Case.)

But, it should be argued, this is all too easy. Despite Nussbaum’s reading, Antigone is far too sympathetic a character to most people. There is no doubt that her claim is a moral one. It is one thing to speak for her theological vision of what she is required to do, even if it is the private, limited, cold, and harmful vision Nussbaum claims it to be, and quite another to represent clients who will harm others for their own selfish gains. There is far less in the client Antigone that would prompt any tension between personal morality and role morality for the good liberals we all are. And this is certainly true. Most of us can speak for Antigone—even if Creon is right that she threatens the security of the community—without feeling the threat to integrity that prompted Shaffer and Cochran towards their model of the lawyer as friend. What, then, can we say about the integrity of the rhetorician?

I said that in speaking for his client, Antigone’s lawyer will describe her in the relevant communities and that it is the client that is being described for such is the nature of the conversation the lawyer provides. Antigone may want to talk of abstract propositions—the law of the gods versus that of man—but this will not be the way the lawyer shapes the talk. It will be as White describes the conversation of Plato’s Crito:

The kind of reason for which authority is claimed in the dialogue as a whole is very different in quality: its idea is not to make arguments good for all time, in all contexts and languages, but to carry on a conversation that is appropriate to this relation, with this person—or city—and this language, under these conditions of ignorance and uncertainty. This is true at once of Socrates’ conversation with Crito and of Plato’s with us, his readers. Both place at their center not abstract propositions of fact or value but the enactment of character and relations; both make the difficulty of thought and speech itself a central issue; both insist upon the primacy of the related questions, “What kind of person should I be?” and “What kind of city should Athens be?”

196. Supra note 161.
This way of thinking about argument is how White would have us respond to Plato’s challenge to the integrity of the lawyer as rhetorician in the Gorgias. White says that it is in understanding himself to be presenting the best argument the culture provides on the client’s behalf that the lawyer retains his integrity for he knows that this task is a communal one of truth and justice. Thus, the integrity we should find in the rhetorician is, as is the integrity of the Southerner I described above, a communal integrity. Whether he believes what he speaks for her, whether he thinks that it will move others towards truth or justice as he understands these, is simply not the question that this integrity presents to him.

This is certainly one way in which we could understand the rhetorician’s integrity. I want, however, to describe it in a different way for I think there is more to the integrity of the lawyer as rhetorician than the nature of the arguments we make for others. So I want now to tell another story, one more concerned with the kind of threats to integrity that most trouble Shaffer and Cochran, most legal ethicists, and most lawyers. This is the best known story in all of legal ethics—the Lake Pleasant Bodies case, also known as the Garrow case after the name of the defendant—because it is the clearest example we have of the conflict between role morality and personal morality threatening the kind of integrity Shaffer and Cochran wish to protect. It is the story of two lawyers, Armani and Belge. (Belge is no longer with us and his story is not well known, so I focus only on Frank Armani.)

This case, as many readers will remember, involved the murder of two young women whose bodies were buried by their murderer in a cave in Lake Pleasant, New York. The client, arrested on another charge, revealed

198. Gorgias was a sophist and a teacher of rhetoric at work in the time of Socrates. Plato’s dialogue, THE GORGIAS, is a conversation between Socrates and Gorgias and a number of Gorgias’ students. In this conversation, Gorgias represents advocacy; Socrates, philosophy.

White’s response to Plato is similar in some ways to Aristotle’s for Aristotle defined rhetoric in a unique way in an attempt to avoid Plato’s criticism of it. For Aristotle, rhetoric did not have persuasion as its end. Instead, the function of rhetoric was “to observe or discover the potentially persuasive arguments in a particular case.” EDWARD P.J. CORBETT, Introduction, THE RHETORIC AND THE POETICS OF ARISTOTLE XV (1954).


the location of these bodies to his court-appointed lawyer, Armani. Armani confirmed by visiting the site and seeing the bodies. On a claim of confidentiality because he feared that revealing the bodies would reveal his client’s participation in another murder, Armani refused to reveal what he knew to the parents of the two young women even though they did not know if their daughters were dead or alive, and even though they made personal appeals to him for knowledge about their children. For this Frank Armani was castigated by almost everyone in his communities; his practice was destroyed; his home and life threatened—sometimes by friends—and, for a time, he was also threatened with both a criminal prosecution (for failure to reveal the location of a body, an ordinance violation) and by a disciplinary action.

The arguments against what Armani did are obvious. The extraordinary harm to the parents of not knowing whether their daughters were dead or alive is a harm every parent who has ever waited up for a son or a daughter to return from an evening out can understand all too well. The undeserving nature of Armani’s client to any social consideration at all is something that many of us feel deep within our gut. From this perspective, the usual arguments for what he did seem weak. These arguments are something about fair procedure, or slippery slope arguments of what if everyone’s procedural rights were ignored, or what if other clients did not trust their lawyers, or arguments of a similar ilk.

What can we say about Frank Armani’s lawyering from the perspective of rhetoricians? How could Frank Armani possibly have integrity, as Shaffer and Cochran understand it, when he permitted his role to dictate something to him that was a clear violation of his personal morality. For, as we know from the video taped interviews with Armani, this is exactly how he understood his situation. He was tormented by his tragic dilemma, never denying for one moment the horror of what he was doing to the parents of the dead young women.

One thing we can say is that Frank Armani was called upon in this appointed case to be the one to raise the question: Can we as a community justify the harm that we are intending to do to this person? He was to play the essential rhetorical part that all defense lawyers do of asking of this community what it means to be a community for this client. We can understand him as doing this not just for his client, although his client is served by it, but for the community. For our rhetoricians, by insisting on the conversation, keep us careful in our use of the law, always reminding us that it is not the reflecting sword of Perseus stopping evil without contaminating those who use it. The law can and does contaminate those who use it, and it becomes force and violence when it does anything other
than help us be good. Rhetoricians must know this is what is asked of them, must know that the law as force is the end of conversation, and I believe that Frank Armani knew this well, although I am also sure he would not have said it this way.

But this is not enough. I think Frank Armani also knew that there was only one truly good conversation possible in his situation. This was not a conversation to be found within the one the law forced upon him. It rested instead entirely with Frank Armani’s client. The only honest conversation Frank Armani’s client could possibly have with this community—the only way there could be an acceptance of those things upon which we must agree if there is to be moral conversation at all and the only possible restoration of this community to the wholeness of a conversation with the person who had torn it—could only come about through his client’s cooperation with those he had harmed so brutally. It is only through this cooperation—and the confession it would require—that the moral conversation could possibly happen. For the moral claim this truly horrible person must make upon us is the most demanding one of all. It is a claim upon our forgiveness. And so it was Frank Armani’s task to hold open this moral possibility, however remote it may have been. It is a criminal defense lawyer’s lonely rhetorical task to maintain a relationship with someone like Frank Armani’s client, truly the scum of the earth, in which personal redemption and communal reconciliation remain at least a hope.

We can learn from Frank Armani; we can learn what it means to be shaped by a life of representing those who are not like us—strangers. For there is a temptation in talking of the criminal defense lawyer’s role this way to deny the harm done, and, as I noted before, Frank Armani avoided this temptation. What you do as a good lawyer in a tragic world is minister as best as you can to those who suffer, and you especially minister to those who suffer because of you. I think Frank did this to the best of his ability and that he learned to do this through his practice. He never denied the tragedy of his situation nor did he deny the harm he did. He got the strength to do this, and great strength it does require, because his practice demands such honesty of him if he is to be a good rhetorician.

But so what? The world of Lake Pleasant cannot wait for moral conversation here. It is simply not practical to think that someone like Frank Armani’s client will ever offer the good solution of his confession, whatever trusting relationship we may create—it is ridiculous to even consider it—and, in the meantime, justice must be served. And this is the way the world is. But what Frank Armani did for community is to hold on to the possibility that we could be patient people. Frank Armani is there, standing by his client, as a disturbing reminder of our own failure. He is
there as a little bit of space in which foolish hope—foolish on the world’s terms—can remain a possibility. And, in this, Frank Armani once again serves his community.

Criminal defense lawyers, like Frank, are people who, because of the special relationships they have with their clients, hold open for all of us possibilities for this good. They are there to remind us, even though we do not want to be reminded, that patience, hope, reconciliation, participation, forgiveness, and truthfulness about ourselves are still possible. They constantly witness to this for us, and they disturb us by doing so. They call us to a trust in humanity that we know we cannot give because we know that we have created a humanity which cannot be trusted. For this, those outside our practice often hate these lawyers and yet are fascinated by them.

This is the best that I can do to offer a rhetorician’s justification of Frank Armani—to see Frank as excellent in his functioning as a lawyer, as a sailor might see the one who navigated the rocky coast in the storm as excellent, and, thus, to see Frank Armani as having an integrity of the type I have described. Is it enough? Did Frank Armani do the right thing? The answer to this comes from Frank Armani, himself, of course. Near the end of the videotape I am relying upon, Frank’s wife, sitting next to him at their breakfast table, offers her opinion that if the same situation presented itself to Frank again he would most certainly do exactly as he did. She wants to see her husband as displaying the personal constancy of a man of integrity in this way. The interviewer then turns to Frank and asks: “Would you?” Frank’s reply is to look lovingly towards his wife and to say “I don’t know.” This is where Frank tells us how to be a good rhetorician and shows us that he is accomplished in this lawyerly way. For the integrity of the rhetorician would keep Frank from ever accepting one conclusion to his tragedy, one way of seeing it, one way of determining its “rightness” once and for all.

VII. CONCLUSION

Why on earth do we mortals take so much trouble to learn all sort of things, as is customary? Why do we waste our time, while Persuasion, the only tyrant of human beings, is not the object of our eagerness. Why do we not pay any price to be able to persuade others and so to get what we want. Euripides, HECUBA 814-19 (trans. S. G. Daitz 1973).

I cannot leave the argument there, for the claims that there are personal morals and role morals opposed to each other, that there are risks to personal integrity in the practice, and that we should be primarily concerned with goodness, both our clients’ and our own—all the claims upon which
Shaffer and Cochran base their model of the lawyer as friend—are far too powerful not to carry with them something of very great value. What these claims tell us, I think, is that the practice of law is limited. As there is a temptation within the practice towards the Technician when the practice forgets its rhetorical teleology, there is also a temptation towards something idolatrous when it does not remember to forget. For this understanding of the lawyer as rhetorician points beyond the practice toward that which the practice is not, and cannot be, and when it does, it too deceives by claiming that its virtues are virtues for tasks other than the conversational ones for which they were intended. If you thought of Antigone as a heroine—as most people do—then I think you already knew this from your own reaction to what I had her lawyer do for her and to her in moral counseling. (Or, if you now think that being a lawyer as rhetorician means endorsing Pyrrhonic skepticism as a way of life, you have already fallen onto the temptation.

For clients, especially Antigones, may reject the moral authority of the rhetorician as they may also reject the authority of the legal process. It is not likely, after all, that Antigone would have gone to a lawyer. Professor Robin West, in reacting to James Boyd White's reading of Planned Parenthood v. Casey,\(^{201}\) criticizes White's reading of the opinion as a balancing of the preservation of the legal tradition and the culture of the past that defines us with the need to critically appraise and reform both when needed as not "amount[ing] to a hill of beans if one is of the opinion that a fetus is human life and abortion is murder, regardless of whether [the court's opinion] is admirable in its moral stance towards past authority."\(^{202}\) White responded, as we might want to respond to an Antigone who rejects what the lawyer can provide:

> But here I assume, what I think to be the case, that this is an issue that divides people irremediably; nothing I could say would persuade the bulk of those who judge differently or vice versa. The central question we face, then, is not how to reach a shared view of the merits of the case—to some abortion is murder; to others, the criminalization of abortion is slavery—but how to reach a shared view of the way in which we can hope these differences can be lived with and addressed. Here too I cannot hope to persuade everybody: there are plenty of people for whom the merits of this issue are so salient that they are simply not interested in any other question then whether the Court came out their way. But it seems to me essential to ask what forms of thought and argument we should respect even in those who disagree with us.\(^{203}\)

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203. Id.
White then makes an appeal that the more bitterly divisive an issue is the more attention we should pay to how a court thinks and talks about it. He says that it is exactly on such issues that "fidelity to the law becomes an important ethical possibility." I have no doubt that this is true as a matter of keeping the peace, but I would question whether the peace that fidelity to the law provides in such circumstances is the one rhetoricians should be interested in. It seems to me that White is trying to claim too much for his understanding of the law as constitutive rhetoric. Sometimes, surely, we must, as an ethical matter, say to clients like Antigone to look elsewhere. Carry on your conversation with the state, if you are to have any at all, in another way, but not through us for you are not interested in the conversation we provide. This would be true, I think, whenever the inherent moral skepticism of legal processes—the skepticism, as White describes it: "[of] the argument that one is bound to fair procedures even when a particular result is wrong, so familiar to us as almost to amount to second nature"—is an impossibility for the client, as it may have been for Antigone, because the issue is "so salient."204 Such a client is to the rhetorical culture a "furtherest Mysian." We have nothing to say to her. To claim that the lawyer can do more than this is to tempt corruption and to leave the rhetorician's role. It is to change the very character of the community that the lawyer both creates and serves.

The question raised by Robin West is closely related to what White calls a possible response to Richard Hooker's rhetorical view described above. For Hooker recognized that for some the judgments he said needed to be rendered must satisfy their own minds as consonant with God's word and "to stand unto it not allowing, were to sinne against your own consciences."205 White says:

The vice of excessive self-reliance, of self-insistence, is one to which reform, and protestantism more generally, naturally tend, for the location of all teaching in the sacred text tends to free the self from the bonds of shared reason and culture that bind us together into a community and to justify whatever the individual happens to find there. It is Hooker's central claim that this right of self-judgment be given up, in favor of the community. To support this claim he invokes God's establishment of judges in the Old Testament.206

204. Id. at 21.
205. Id. at 110.
206. Id.
If the right of self-judgment is not given up, the community cannot be that which it seeks to be. *But sometimes this is exactly what should be done!* And sometimes the lawyer as rhetorician must exercise self-judgment in this way as well because our practice and our rhetorical view are, as I have said, limited.

In addition to being limited by the temptation towards idolatry I have described, our practice is limited by a dependency for its virtue upon its being a practice in good order. The order of our practice is one that is easily corruptible both from within—by no longer being the type of legal culture in which the trust that conversation requires is possible—or from without—by trying to cope with a society too impatient or too sick for the type of constitutive rhetorical conversation James Boyd White describes. We see both of these corruptions now, I think, in lawyers and clients who seek to control disputes in ways that are intolerant of all conversation. Thus, for them, persuasion of others—the persuasion of judges for example—is no longer the objective. In times such as ours rhetoric can easily become just another form of power as we see it described in the quotation from *Hecuba*. Another limitation is that our practice surely depends upon other practices to provide the sustenance practitioners need to be truly present to others in times of need, in times of uncertainty.

There are, of course, good moral resources within our practice for recognizing these limitations, correcting corruptions, and sustaining our work. We should not, however, deny that these resources, as Shaffer and Cochran's role morality arguments remind us, are not enough. Where, then, are we to find the moral resources our practice needs? If, for example, the role of the practice in understanding the integrity is as large as I have presented it here, how would we ever know that our practice is limited? How could lawyers ever become the kind of people who remained true to the virtues of their practice while still knowing of its limitations?

207. Hecuba's time, as described by Martha Nussbaum, *Fragility of Goodness*, supra note 122, at 415, was one in which:

   The reverger, being without trust, cannot rely on the accustomed usage of words. As Thucydides also saw, he or she must recognize that words can undergo a change in their relations to actions and objects, if the agents decide that this is in their interest. This means that words will become not bonds of trust, but instruments of ends; communication is replaced by persuasive rhetoric, and speech becomes a matter of taking advantage of the other party's susceptibility.

Martha Nussbaum, *Fragility of Goodness*, supra note 122, at 415

208. See generally Hauerwas, *Suffering Presence*, supra note 1. Hauerwas' understanding of the practice of medicine is as "suffering presence."
could we understand our integrity as being within a practice and yet stand apart from it when the appropriate time comes? And how would we know when that time comes? Should we not turn to those things that we bring with us to our practice from family, community, synagogues, and churches—perhaps not as sources for the morals we offer to our clients, but at least for the moral resources we need to know that our practice is limited? I do not believe we should because I do not believe that it is the nature of those things that we learn from our families, communities, synagogues, and churches that they can be “taken” from them and used in this way without themselves becoming corrupted. The question we need to ask is not where the “values” we need for judging our practice are to come from. The question, instead, as Walter Brueggemann puts it in wondering how a prophetic tradition could exist, is “if our consciousness and imagination have been so assaulted and coopted by the royal consciousness that we have been robbed of the courage or power to think an alternative thought.” The right question then is how can I be the kind of person for whom true consciousness and imagination remain possibilities regardless of what I do. With Stanley Hauerwas—and with Tom Shaffer and with Bob Cochran—I know of no way to do this that is not church.209

209. For how church could work in this way for our profession, see HAUERWAS, SUFFERING PRESENCE, supra note 1, at 63-82. I know that I have failed you by leaving my answer as “church” without explanation. I also know that simply asking you to read Hauerwas’s work is not fair, nor does Hauerwas explore all of the ways I suggest church might work for our practice. His primary interest is showing that the practice of medicine cannot be sustained without something that is very much like church. If you are interested in these issues, I am going to try to do more on them in a more personal way in Jack Sammons, On Being a Good Christian and a Good Lawyer: God, Man, Law, Lawyering, Sandy Koufax, Roger Maris, Orel Hershiser, Looking at the Catcher, and Corked Bats in the Kingdom (with a Brief Guest Appearance by Ty Cobb), ____TEX. TECH L. REV. ____ (1995) (forthcoming). For now, I want to at least be clear that “church” cannot teach us the limitations of our practice by offering good answers to the ethical issues we face in the practice for what does the church know of this? Neither can the church do this for us, as I suggest in this text, by teaching us “values” or “ethics” that we then apply to the practice. For there simply are no settled ethics that could be taken and used in that way. There are no ethics in church that could remain alive when treated so. What the church does instead is shape us into people for whom royal consciousness is not the truth. This does not mean that it shapes us against our practice; it means that it teaches us what our practices mean. Christian theology, I think, teaches that the lawyer as rhetorician is about our being called to insecurity; it is about an understanding of Christ as a destroyer of the categories of thought that underlie the false orders of our lives, thus exposing to us the inevitability of our humanity. It is a theology of awakening as children in God’s new world. It is of a Christ standing against those who seek security over truth. One who, through His body the church, holds the world open to other possibilities.