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TOWERING FIGURES, ENIGMAS, AND RESPONSIVE COMMUNITIES IN AMERICAN LEGAL ETHICS*

Thomas L. Shaffer**

Jeannine Guttman, an editor for the *Maine Sunday Telegram*, said in a few lines last month what I want to say here. She was once a reporter in what she calls "a tiny Iowa town," doing a story about AIDS.¹ Her focus was on a truck driver who got into extramarital affairs when he was on the road, contracted the disease, and brought it home to his family. She asked this man if he would mind having his name revealed when she told his story. He said that would be all right. She could tell, though, that "publishing his name would make him and his family outcasts."² She went to her editor. "Use his name," the editor said. "You surprise me . . . You're getting soft."³

And so Guttman published the man's name. "Within a few weeks, he and his wife and three children had to leave the tiny Iowa town. I don't know where they ended up. . . ."⁴ Now, more than a decade later, Guttman is an editor herself. She looks back and decides that her editor in Iowa made a moral mistake. Not so much a mistaken *decision* as a mistaken *process*. His moral mistake was isolation:

I learned from my editor's mistake, which was to avoid heart- to-heart conversations about troubling ethical issues. Today, I may make the same wrenching decision my editor made, but I first will encourage conversation and soul-searching. . . . [S]uch discussions make the journalism stronger, not "softer." There is an obligation inherent in being a journalist; some of that obligation is to our profession and some of it is to the community and the people we cover.⁵

The headline on the Guttman column said objectivity is a matter of heart, and heart, I think, is a matter of community.

Guttman invokes here the ethics I learned from one of the most influential of modern American teachers of ethics, H. Richard Niebuhr. What Guttman learned from experience, I read in the published version of lectures Niebuhr gave to an audience of Scots theologians. The basic questions for morals, he said, are two:

- (1) To whom am I responsible?
- (2) In what community?⁶

Guttman seems to have implied, as Niebuhr might have, a second set of questions:

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1. See Jeannine Guttman, *Objectivity: It's a matter of heart, too*, MAINE SUNDAY TELEGRAM, Oct. 25, 1998, at C1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. See H. RICHARD NIEBUHR, *THE RESPONSIBLE SELF* 68 (1963).

- (1) When I need to decide what responsibility requires, to whom do I talk?
- (2) In what community do I talk about which community I am going to be responsible in?

The first thing Niebuhr and Guttman are telling us to do is to look around and figure out what is going on around us. With that in mind, it has seemed to me that, at the simplest, a lawyer (or a journalist) functions in at least four communities, any one of which might be a community to talk about lawyers' moral questions in.

My inquiry, then, is an inquiry in communitarian legal ethics, using a Guttman-Niebuhr focus on responsibility. I infer a further question about communities of moral discernment—that is, not only where a modern lawyer is responsible but also where she can talk about being responsible. I am, in other words, trying to imply, from my mentors' interest in responsive actors, an interest in responsive communities. I propose to take these ethical questions to locations for four possible answers: the civil community of the American republican vision; the circumstantial gathering of lawyers we usually mean when we talk about "the bar"; the intentional and institutional gathering of lawyers into the modern American law firm; and the community a lawyer has with clients. Finally, I want to ask about the possibility of a backup community of moral discernment, on the possibility that none of the four is ethically adequate. The scheme, then, is three questions, asked in each of five communities.

First: A lawyer works in a civil community—a town or city. She defines herself in that community, or is defined in it, as somebody who helps people cope with the law in that place, among those people.

For the American lawyers who adapted British common law to American democracy in the two generations after our Revolution, this civil community was a community of moral discourse. These lawyers were towering figures who lived in and dominated this civil community. They thought they had achieved a republican, Jeffersonian ideal, a commonwealth ruled by land-holding, adult white males. The late Professor Willard Hurst called this era the Golden Age of American Lawyers.⁷

These men became lawyers almost as an incident of their positions of dominance. They functioned, when they practiced law, as a priesthood, in a temple of constitutional order. Alexis de Toqueville said they were American democracy's aristocrats.⁸ The towering figure I most think of here is David Hoffman, who practiced and taught law in Baltimore between 1820 and 1850. Hoffman came from a prosperous family; he enjoyed membership in the social elite. He was well educated in liberal studies (at St. John's in Annapolis), and in the law. He was a resolute Anglophile, as most American lawyers in the nineteenth century were.

Hoffman invented American legal ethics. He published two editions of what he called *Resolutions in Regard to Professional Deportment*,⁹ bits and pieces of which linger in the Maine Bar Rules. The essence of his program for being a good

7. See JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950); JAMES WILLARD HURST, *THE THOMAS M. COOLEY LECTURES, NINTH SERIES: LAW AND SOCIAL PROGRESS IN UNITED STATES HISTORY* (1960).

8. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 273-74 (Phillips Bradley ed., Alfred A. Knopf 1945) (1835).

9. See DAVID HOFFMAN, *Resolutions in Regard to Professional Deportment*, in *A COURSE OF LEGAL STUDY* 752-75 (Philadelphia, Thomas, Cowperthwait & Co. 1846).

person and a lawyer—both at the same time—was the acceptance of the burdens an aristocrat takes on in an aristocratic legal order. Hoffman's *Resolutions* were praised by Justice Story¹⁰ from one direction and by the Calvinist theologians at Princeton from the other. It is fair to guess that his legal ethics also appealed to lawyers of prominence approximately equal to his and Story's, and that they were ignored by lesser lawyers—for example, by the lawyers Abraham Lincoln was learning from in frontier Illinois, or my own forebears at the Indiana Bar.

Hoffman's system is interesting for what it did *not* say. He did not find it necessary to say anything about either of the mainstays of modern professional responsibility courses: confidentiality and conflicts of interest. He trusted the conventional morals of his place and his class; he seemed not to have to worry about his students betraying clients' secrets or getting themselves into binds that their instincts as gentlemen could not deliver them from.

What he did say demonstrated that what his clients wanted from him was subordinate to what the aristocratic bar understood to be good for the country. He took criminal defense cases, but he offered only diminished representation for defendants he had decided were guilty.¹¹ He refused to plead "technical" defenses to civil liability.¹² He said he would not settle a case in which his client's "reputation" was at issue.¹³ He refused to argue for legal interpretations that, if successful, would weaken the law.¹⁴ Hoffman may have had moments of moral doubt. It is hard to find evidence of this, but I imagine, for present purposes, that he did, and I wonder where he turned for moral advice. He certainly did not turn to his clients, whom he seems to have regarded as children. He did not turn to other lawyers unless they were people he and Mrs. Hoffman would have invited to dinner.

I cannot tell that he or the other Christian gentlemen-lawyers of the Golden Era turned to religious communities for moral direction. Although Hoffman was interested in theological questions, and was well read in both the Bible and the literature built around it in eighteenth century Anglicanism, he seems not to have had much to do with a particular religious community. This is a trifle odd, in him and in his professional contemporaries, particularly so when one considers that most lawyers of that era were church-going Christians, and some of them, in contexts other than ethics, were making religious arguments in public—among the Abolitionists, for example, or among the more sophisticated followers of the revival preachers.

Hoffman liked to visit different churches on Sunday mornings and compare the quality of the sermons he heard there, but I suppose he did not detain any of those congregations to discuss whether, as he once put it, a lawyer should allow his client to make of him "a partner in . . . knavery."¹⁵ Hoffman's theology was enigmatic, but he was clear and emphatic about his gentleman's honor.

If Hoffman turned to anybody for advice on being a lawyer and a good person, I suppose it was to other white male Protestant landholders. If there was disagree-

10. See Maxell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 *Md. L. Rev.* 673, 688-89 (1979).

11. See HOFFMAN, *supra* note 9, Resolution XV.

12. See *id.* Resolutions X, XII-XIII.

13. See *id.* Resolution XXII.

14. See *id.* Resolutions XI, XIV.

15. THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS* 169 (1985).

ment among such people—as, of course, there was—Hoffman turned to members of the faction that usually agreed with him in politics. In his case, that would have been the Whig politicians who despised Andrew Jackson and Martin Van Buren, and who saw to the election of William Henry Harrison to the presidency. He left his law practice to campaign for “Tippecanoe and Tyler, too.” After Harrison was elected, Hoffman sought (in vain) to be appointed minister to Austria; he was invited to settle for membership on the Mexican Boundary Commission.

The civil community, then, is one possibility for answering Niebuhr’s questions:

- (1) I am responsible to the leaders among my neighbors and fellow citizens; and
- (2) I am responsible in my civil community—in my neighborhood, in my town, ultimately in my country.

The men who dominate those communities are for me the community of moral discernment.

David Hoffman may seem to you a quaint example.¹⁶ I think anyone here could give additional examples from her own generation. I think perhaps that these answers are what I am given by my students, here, this semester, as they remind me that Maine is made up of small, morally significant communities. That thought moves me to notice a second moral community.

Second: A modern American lawyer might turn, not so much to her neighbors, as to the lawyers she meets in her practice, the local bar, not leaders primarily but *lawyers*. She could, in that community, be defined, or define herself, in terms of whatever is left of an old fraternal heritage, especially so when her community of lawyers shows itself capable of moral discernment. I think here of the sketch, published last year in the *ABA Journal*, of the bar in Aroostook County.¹⁷

The towering figure of the generation of American lawyers after Hoffman’s was George Sharswood, Chief Justice of Pennsylvania and a founder of the law school at the University of Pennsylvania. Sharswood wrote the second compilation of American legal ethics that has attracted lasting notice.¹⁸ His essay (which was also a lecture) was a principal source for the ethics codes that began to appear about 1890 and that became the 1908 Canons of Professional Ethics¹⁹ promulgated by the American Bar Association and adopted as court rules virtually everywhere.

Sharswood was no less a member of the gentleman class than Hoffman had been and no less an Anglophile. He did not, though, seek moral discernment in the undifferentiated community of gentlemen, as Hoffman had. His reluctance to do that may have been because the industrial world around his Philadelphia was changing; or, perhaps, because war was in the wind; or, perhaps, because members of his economic class were, in general, a less dependable enclave of British manners and morals than the Philadelphia bar was. He could not assume, as Jefferson (and

16. See generally Bloomfield, *supra*, note 10. I have published bits and pieces about Hoffman, some in my course book, SHAFER, *supra* note 15; writing about Hoffman remains a project for me.

17. Steven Keeva, *Northern Exposure*, 83 A.B.A. J. 52 (1997).

18. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (Philadelphia, T. & J.W. Johnson & Co. 1854), reprinted in SHAFER, *supra* note 15 at 177-78.

19. CANONS OF PROFESSIONAL ETHICS (1908).

Hoffman) had, that the prosperous were good. In any event, Sharswood pointed his students not to the civil community, but to the community of lawyers:

Nothing is more certain than that the practitioner will find, in the long run, the good opinion of his professional brethren of more importance than that of what is commonly called the public. . . . The good opinion and confidence of the members of the same profession, like the King's name on the field of battle, is "a tower of strength."²⁰

A young lawyer could have taken that advice in one of two directions. First, a lawyer who feared he would become a partner in his client's knavery might turn to nearby lawyers and put his worries to them; "the bar," in that sense, would be a discerning community for him. Lawyers in Philadelphia did that, and no doubt still do. Lawyers in my Indiana still do. The membership of "the bar," in that sense, is porous, but it is stable enough to belong to, stable enough to pass along important moral traditions, even if it has, from time to time, and particularly at present, great difficulty in formulating what those moral traditions mean.²¹

The other way to take Sharswood's advice was to turn the bar into an institution. Urban lawyers did that: They produced the first organized, formal bar associations. These associations were born in New York City; they came with the introduction of corporate law firms there, and with lawyer specialization. Even more, they came by way of response to significant moral discomfort at what New York lawyers were up to: Prominent business lawyers were representing the most disgusting members of the new commercial oligarchy—lawyers such as David Dudley Field, Samuel J. Tilden, and Thomas Shearman representing clients such as Jay Gould, James Fisk, and Commodore Vanderbilt.²²

The bar association, as a way to take Sharswood's advice, did what institutions do: It drafted articles of incorporation and bylaws. And then it promulgated *codes* of legal ethics. The first of these codes were borrowed by lawyers in the North from the elegant gentleman's code of Judge Thomas Goode Jones of Alabama.²³ These codes had in them more etiquette, and more about civility, than Hoffman's or Sharswood's manifestoes had, and they were more moralistic.

The codes added an historically critical feature: The bar associations used their power to get these codes adopted by the courts and legislatures as rules. The codes became *legal* documents. They became regulation. They could be used to

20. SHARSWOOD, *supra* note 18, at 75-76.

21. There is a significant ethnographic difference between where young lawyers in the 1850s in America came from and where American lawyers in the twentieth century have come from: The American bar in Hoffman's and Sharswood's days was socially, economically, and ethnically elite. The American bar in the last century has, by contrast, been a ladder of vertical mobility—notably so for the male children of the late immigrants.

22. See Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191 (1977), reprinted in SHAFER, *supra* note 15 at 315-29. See also Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988).

23. See ALABAMA STATE BAR ASS'N CODE OF ETHICS (1899). For example:

The attorney's office does not destroy the man's accountability to the Creator, or loosen the duty of obedience to law, and the obligation to his neighbor; and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery, for the client's sake.

Id. ¶ 10.

punish errant lawyers, and that was something new: Hoffman and Sharswood had been content with disapproval, with snubbing the bad actor and addressing gentlemen instead.

The addition of legal force to written legal ethics initiated a process that accompanied or followed or led to the official elimination of ethics from American legal ethics; they turned the bar into a regulated public utility.

The 1908 national Canons contained perhaps a little less moral admonition than Judge Jones's Alabama Code had in it. What is more significant is more than a half century of interpretation of the Canons by national ethics committees. Most of the thinking was done by the eminent Philadelphia lawyer Henry Drinker. Drinker, more than anyone else, translated the language of the Canons into regulatory advice for local bar associations and courts.²⁴

After World War II and the Korean Conflict, the nationally organized bar turned to updating the Canons. Those authorities retained and even expanded the moral admonition they had from Sharswood and Jones and Drinker, but, for the first time, they separated the ethics they had received from republican gentlemen from the law that had come with the codes. The text of the Maine Bar Rules²⁵ is based on the 1969 ABA regulatory rules.²⁶ Maine went a step further and eliminated the ethical admonitions entirely. The result is called legal ethics, but it is not ethics as Aristotle or Aquinas or Immanuel Kant would use the word. It is to lawyers what the driver's license book is to teenagers who want to drive their parents' cars.

I suppose my students here would tell me not to worry. The old ethical admonitions are not necessary here because Maine is a state made up of small communities. In other words, Maine lawyers take seriously the *first* direction suggested by Judge Sharswood, and depend on their local, circumstantial aggregations of lawyers to see to what has to be seen to if other lawyers are of any use as a discerning community.

That would console me for any distress I feel when I read decisions of the Ethics Commission of the Board of Overseers of the Maine Bar, and of judges deciding disciplinary cases in this State—console me, but for the fact that these expressions of what is called legal ethics have been rigorously purged of moral discernment.

Thus, in this first way of taking Judge Sharswood's appeal to "the good opinion of . . . professional brethren,"²⁷ but not in the second, I would say, in answering Niebuhr:

- (1) I am responsible to other lawyers;
- (2) in the community I have with other lawyers; and
- (3) in that community I can seek moral discernment.

A *third* community to consider, for Niebuhr's questions and as a community of moral discernment, is the *other lawyers in my law firm*. For many—perhaps half—of all American lawyers, as it was for me, the profession, in a morally coherent sense, is the law firm.

24. See William P. Armstrong, Jr., *A Century of Legal Ethics*, 64 A.B.A. J. 1063 (1978), reprinted in SHAFFER, *supra* note 15 at App. I-23 to I-30.

25. ME. BAR R. (1984), reprinted in SHAFFER, *supra* note 15, at App. I-3 to I-23.

26. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

27. SHARSWOOD, *supra* note 18, at 75.

This began to be true in the history of American legal ethics when lawyers found it profitable to gather in firms, and when they found they could offer better service to their clients if they operated as clinics made up of specialists. New York City, of course, led the way in both respects. There soon were firms of the New York sort everywhere, even if lawyers in New York didn't know it.

What seems to have happened was that the communal focus for lawyers leaped over the bar associations. After the dust raised by the robber barons cleared, there were growing numbers of bar associations in the country, but they proved to be—and are—weak at moral discernment. Occasionally, they have become sources of moral degeneration. But perhaps in law firms, by contrast, there was, and is, some possibility of moral discernment. I may be able to answer Niebuhr's questions there when I cannot answer them in a bar association.

A focus for this odd development is the founding in 1870 of the Association of the Bar of the City of New York, the first bar association in the country. The founders of that group were reacting to the dismay of non-lawyer moral leaders (including no less a figure than Henry Adams) at the "market morality" of prominent lawyers in the city. The bar association founders proposed a professional association that would exclude the disreputable lawyers and adopt statements of principle for the public that would explain the expulsion.

Neither effort succeeded. When the New York Association finally worked out its membership list, eighty percent of the lawyers in town were excluded, but Field, Shearman, and Tilden were included. When the statements of principle for public consumption were written, they were evasive and disingenuous, largely worthy of being ignored, which they largely were.²⁸

The law firm, by contrast, offered the possibility of a guild that could carry out Judge Sharswood's extravagant commission: The law firm was capable of being a tower of strength for the young lawyers coming into it.

The relentless observer of that development and of that possibility—and its greatest poet as well—is Louis Auchincloss, still writing in advanced old age, I think. He is the literary successor to Henry James and Edith Wharton; an elegant, incisive writer who knows and even loves law firms, and who has spent his life in them.

The Great World and Timothy Colt,²⁹ for one Auchincloss example among many, describes a classical law firm partner as both a towering figure and an enigma—a lawyer educated at all the right schools, comfortably situated among those who dominated the bar in New York in the 1930s, not exactly from old money, but from a New England clerical, prep school ancestry, which was even better. This lawyer, Henry Knox, perceived, as he gained power in his law firm, that his partners, or at any rate the associates he could influence, would listen to a moral argument that the firm should practice law in service to clients and for the common good.

Knox attached these moral principles to an elitism he could not shed. Any lawyer destined for partnership in his firm had to have the right social and economic pedigree. From principle and pedigree came high standards of craftsman-

28. See Schudson, *supra* note 22 (describing the episode more fully).

29. LOUIS AUCHINCLOSS, *THE GREAT WORLD AND TIMOTHY COLT* (1956).

ship, and from principle, pedigree, and craftsmanship came coherent communal ideals—so that a lawyer coming into the firm, as Timothy Colt did, could say to Niebuhr that he was responsible to those he practiced with, in the community that was his law firm. He could turn to his law firm as a community of moral discernment. Of course, it only worked so long as the law-firm community could, without self-deception, practice law under those principles and standards. As its poet, Auchincloss would say, I think, that it often did, and often does. But his character Henry Knox, faithful to his New England roots, would say that eternal vigilance to pedigree is the price paid for communal morality, and that the ideals of the firm are at risk from the *new* people who keep coming in—women; people who went to public high schools and state universities; Jews, who are supposed to have their own law firms; and members of other ethnic minorities—people who lack the background needed for practice in grand law firms.

Knox's snobbery is fading, I think—although not as steadily as law firm recruiters say it is. But that sort of snobbery, along with other kinds of snobbery and undue economic power, may leave a young lawyer uneasy about the firm as a morally responsive community. There is, maybe, in this commitment to the law firm as a moral community, a possibility for disenchantment that tends to suggest to the lawyer in one of these firms that she should probably think about somewhere else—not as a substitute for law firm communal discernment, but as a kind of backup.

With that wariness, I can speak for many lawyers of my generation and say that the law firm did provide for us a way to answer Niebuhr's questions:

- (1) I was responsible to the other lawyers in my law firm; and;
 - (2) I was responsible in the community they formed as lawyers who practiced well, and who would and did function as a community of moral discernment.³⁰
- I speak here of myself nearly forty years ago. I don't know if the same answers can be given with any comfort by my students of the last twenty years. Such advice as I give them, and such direction as they might find in what I write, would probably say that they need a backup, especially so if they are female, Jewish, African-American, or Hispanic.

There is a *fourth* possibility—the most obvious of all. What of the lawyer who will respond to Niebuhr by saying:

- (1) I am responsible to my clients; and
- (2) I am responsible in my clients' community.

The community of moral discernment will then be the community I enter with my clients.³¹

Hoffman and Sharswood rejected this fourth possibility, and Henry Knox, for all of his talk about service to clients and the public good, was painfully self-deceived about it.³² But in Hoffman's and Sharswood's cases, in turning to other gentlemen and to other lawyers for moral discernment, they acted against a background (or at least a memory) of republican civil order. There was—or they thought there was—a community capable of moral discernment around them. They thought

30. Described with perhaps a bit of sentimentality in THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS 131-140 (1987).

31. See generally THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 1- 104 (1981).

32. See SHAFFER, *supra* note 15, 367-415.

their clients' morals would reflect that moral discernment. They probably thought their clients' morals, when stripped of selfishness and fear by the influence of wise lawyers, would be like their own morals.

A better example of this fourth possibility is in John Grisham's recent novel *The Street Lawyer*.³³

It seems to me that a young lawyer may find a community of the sort Niebuhr talked about, as well as a community of moral discernment, in any of these four places. With optimism, that is true of what remains of civil community in a state of small communities, of some local aggregations of lawyers (as in Aroostook County perhaps), of law firms, and of relationships with clients. Each of the four possibilities I have attempted to outline here has promise for the ethics of Niebuhr.

But in any of these cases, as I think about it, not only as to law firms, I would want to suggest to this young lawyer that she needs a backup. I propose to conclude by suggesting a backup—that is, an alternative community in which moral responsibility is claimed and supported and discussed. The backup I have suggested in my own recent work has been the religious community.³⁴

About two-thirds of American lawyers claim membership in a faith community, and attend services offered in such communities. I suggest that the lawyer who is also a believer is able to say:

- (1) I am responsible to the members of my faith community, in that community; and
- (2) in that community, I will find moral discernment for my life as a lawyer.

One thing such an adventure would turn up is that religious ethics is *interesting*. Most of the prominent aggregations of believers in America claim rich, deep, deposits of realistic moral reasoning. The liturgy and education that goes on in these communities remind members of these deposits. And these faith communities are served by strong, persistent scholarship—most of it academic, too little of it legal-academic.

These faith communities are usually able to engage in moral discernment—what the late Professor John Howard Yoder called “the communal quality of belief.”³⁵ They offer moral advice to local communities and to the country, on political issues ranging from the distribution of wealth to protection of the environment to nuclear weapons. If this moral advice were to include moral advice for lawyers, notice please that:

- (1) whatever would come out of moral discernment for believers who are lawyers would not be, as to anyone, coercive;

33. JOHN GRISHAM, *THE STREET LAWYER* (1998). The law firm in Grisham's novel is a more brutal and oppressive institution than the New York firm Auchincloss describes, but Grisham reflects, as Auchincloss does, a certain logical consistency in the way it operates. Grisham even inserts at the end a sort of conversion of one of the oppressors, who comes to notice some of the poor people down on the street outside the firm's office building. The plot is the story of a young lawyer who leaves the inhumane but prosperous law firm life for a street-law practice in Washington, D.C. The firm ends up being on the other side of a case; the young lawyer violates professional rules for his clients (among them rules on conflict of interest) and comes out, as Grisham's lawyers tend to do, outside the profession. *See id.*

34. *See, e.g.,* Thomas L. Shaffer, *Faith Tends to Subvert Legal Order*, 66 *FORDHAM L. REV.* 1089 (1998); Thomas L. Shaffer, *Should a Christian Lawyer Sign Up for Simon's Practice of Justice?* 51 *STAN. L. REV.* 903 (1999).

35. *See* JOHN HOWARD YODER, *THE PRIESTLY KINGDOM* 15-45 (1984).

- (2) the product of such discernment would be available to anyone who wants to think and does not exclude faith from what he thinks about; and
- (3) these moral determinations would come from a community that invites any lawyer who is interested to join in, if not as a member, then as a welcome guest for the discussion of particular issues.

For most of us, this suggestion of a backup moral community does not suggest anything new. It is true of this community of faith, as it is true of a modern civil community, that for most of us consulting this community would be more like coming home than moving to new moral territory.

It must have been that way for David Hoffman. I think of him, sitting in church, in Baltimore, on a Sunday morning in 1828. I wonder what he thought he was doing there, who he saw when he looked around him, who he saw when he looked out from the church, as he decided whether the sermon was better or worse than the one he had heard a week before in a different church.

It is anachronistic to think of David Hoffman as a wary visitor, comparing homilistic styles and attending to substance, if at all, with predetermined hostility or querulousness. I doubt that he thought of himself that way, but the possibility would illustrate the way we modern law students meet the church³⁶ when we study law: We meet the church as a problem for the law. Thus, the subdivision of constitutional law we call "church and state." Church comes first in that title only as a matter of courtesy. As a matter of law, state comes first. The church comes to law students as an unwelcome intruder. Hoffman might, more plausibly, be in church as a believer, and in that case he might be looking *at* the law *from* the church, rather than the other way around. He would then see the law as a problem for the church.

Still, the comparison is an anachronism. Hoffman's generation of anglophilic Christian gentlemen thought this country was God's new Israel. It did not matter whether you looked at the law from the church, or at the church from the law. Whichever way you were looking, you saw the same thing: The aristocracy of gentlemen-lawyers was as properly in place as the king had been in Europe. It seems clear to me today that one does not look in from the state and see what one sees when one looks out from the church. Whatever America is, it is not God's new Israel.³⁷

Finally, then, I agree with Guttman that professional ethics is impoverished, and maybe even impossible, absent "heart-to-heart conversation . . . soul-searching,"³⁸ in communities that are capable of moral discernment.

But I need to say, in agreeing with her and in imposing on her argument the ethics of H. Richard Niebuhr, that the description I attempt here is not a smorgasbord. I do not suppose that we lawyers choose among these enigmas and towering

36. I need to note that when I say "church," I do not mean to exclude other communities of faith, most notably Jewish and Islamic communities of faith in America. I say "church" as shorthand and because I have not thought of a clearer way to state the contrast between law and faith.

37. My colleague, teacher, and friend Professor Robert E. Rodes, Jr., has more optimism about this than I do. See ROBERT E. RODES, JR., *THE LEGAL ENTERPRISE* 140-71 (1976); ROBERT E. RODES, JR., *LAW AND LIBERATION* 211-17 (1986); ROBERT E. RODES, JR., *PILGRIM LAW* 140-70 (1998); Robert E. Rodes, Jr., *Pluralist Christendom and the Christian Civil Magistrate*, 8 *CAP. U. L. REV.* 413, 416 (1979).

38. See Guttman, *supra* note 1, at C1.

figures in our professional past. The psychology of responsibility in community is less a matter of choosing than it is a matter of noticing where we are when we think about being responsible.

The reality of our lives in communities is that we are in all of these communities at the same time. And, even more significantly, we have been in some of them from the first. When we turn to them with more than usual advertence, we are coming home.

No doubt, listening to these communities and discerning in them moral courses of action is a skill—a skill in the sense Aristotle meant when he talked about the virtues.³⁹ Particularly the virtue he saw as the key to character, the virtue of prudence, of reasoning well—attending not only to logic but also to instinct, intuition, habit, and heritage.⁴⁰

Still, most of this is a matter of coming home.

I was asked to give a seven-minute talk to the graduating law class at Notre Dame several years ago, which meant I had to be more concise than I have been here. I told these young lawyers not to forget the morals they brought to law school, not to let law professors dissuade them from what they had learned from their mothers and their towns, from their religious formation and from their friends and teachers in college. I finished with time to spare. That is pretty much where I come out when I try to learn from the towering figures and the enigmas in our professional history, too.

39. See ARISTOTLE, *NICOMACHEAN ETHICS*, Book 2.

40. See *id.*

