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# The Communitarian Work and Vision(s) of Robert Cochran (and Thomas Shaffer)

Richard W. Garnett\*

## *Abstract*

*Professor Robert Cochran's work and thought were powerfully shaped by those of his friend, mentor, and teacher, the late Professor Thomas Shaffer, a towering figure in the religious lawyering movement. A leading theme in Shaffer's writing, one that has continued through and been developed in Cochran's, is "community." This Essay explores and unpacks this theme and highlights several ways that the idea of "community" functions in their vision of the lawyer's role and vocation.*

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Robert Cochran's work and thinking, in the profession and in the legal academy, has been shaped and inspired by that of the late Thomas Shaffer.<sup>1</sup> Mine has, too.<sup>2</sup> Cochran has spoken and written often about the significance—for his vocation, for his formation, and for his faith—of a small seminar course on “Law and Religion” that he took while a law student at the University of Virginia.<sup>3</sup> That seminar was taught by Shaffer, who visited for a time at Virginia after serving as the dean of Notre Dame Law School, his alma mater and, for decades, his academic home.<sup>4</sup> The seminar participants often gathered at Shaffer's home, and it has been reported that one of the ways he expressed his Catholic faith—and, perhaps, evangelized—was by serving and sharing beers.<sup>5</sup> Such courses were relatively rare at that time<sup>6</sup> and this one's readings and discussions ranged well beyond the now-standard fare of Supreme Court First Amendment precedents, doctrines, and tests. Cochran has written that, “It was a wonderful class, one that has stimulated more thinking, for more of my life, than any other. I began to see connections between two aspects of my life that had heretofore been separate, my religious faith and my legal vocation.”<sup>7</sup>

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1. See, e.g., Robert F. Cochran, Jr., Book Review, 16 J.L. & RELIGION 751 (2001) (reviewing THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* (1995)) (“Much of what I know about law and religion, even that part that serves as the basis for my occasional criticism of [Thomas Shaffer], I learned through [Shaffer's] guidance.”).

2. See, e.g., Richard W. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795 (2002) [hereinafter Garnett, *Sectarian Reflections*]; see also, e.g., Rick Garnett, *Prof. Thomas L. Shaffer, RIP*, PRAWFSBLAWG (Feb. 28, 2019), <https://prawfsblawg.blogs.com/prawfsblawg/2019/02/prof-thomas-l-shaffer-rip.html>.

3. See, e.g., Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 319 n.48 (2000).

4. Nell Jessup Newton, *In Memoriam: Professor Thomas L. Shaffer, '61 J.D.*, U. NOTRE DAME L. SCH. (Feb. 27, 2019), <https://law.nd.edu/news-events/news/in-memoriam-professor-thomas-l-shaffer-61-j-d/>.

5. See generally Cochran, *supra* note 1, at 752–53 (describing the seminar and its impact on him).

6. See Cochran, *supra* note 3, at 319 (“I know of only five law school professors in the United States who have taught seminars exploring religious teachings and the practice of law.”).

7. Cochran, *supra* note 1, at 752. I was also blessed with the opportunity, as a law student, to encounter and engage with Shaffer's work, thanks to a seminar taught by a visiting professor. David Luban, visiting at Yale Law School from Georgetown University Law Center, assigned his “Legal Profession” students Shaffer's critique of the *Legal Ethics of Radical Individualism* article. See Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987) [hereinafter Shaffer, *Radical Individualism*]. This article provoked and inspired my own seminar paper, which I would eventually share with my colleague Tom Shaffer, and led me to his and Cochran's legal-ethics

Shaffer, in turn, credited this “group-study venture” with raising “personal, confusing questions” that inspired his own work, and he identified the participants as his “special audience.”<sup>8</sup>

Among the seminar’s themes was the crucial role—in the lives and formation of American lawyers generally and of Christian lawyers in particular—of community.<sup>9</sup> As Shaffer put it in one of his books, using a town-square metaphor:

We American lawyers learn to look *at* the community of the faithful, rather than *from* it. We stand in the courthouse looking at the church. We see the particular people, even when we claim to belong to it, from the point of view of the government. When we are able to change the place where we stand, when we walk across the street and look at the courthouse from the church, we notice a couple of things . . . .<sup>10</sup>

For Cochran, his law-school seminar with Shaffer and the years of conversation and collaboration that followed were an extended invitation to “cross the street.”<sup>11</sup> And, in turn, a signature feature of Cochran’s own teaching, writing, and mentoring has been how they have helped so many others make that trip and see from that perspective.<sup>12</sup>

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model of the “lawyer as friend.” See Thomas L. Shaffer & Robert F. Cochran, Jr., “*Technical*” *Defenses: Ethics, Morals, and the Lawyer as Friend*, 14 CLINICAL L. REV. 337 (2007) [hereinafter Shaffer, *Technical Defenses*].

8. THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT 227 (1981).

9. See Leslie E. Gerber, *Can Lawyers Be Saved? The Theological Legal Ethics of Thomas Shaffer*, 10 J.L. & RELIGION 347, 347 (1993) (noting that Shaffer’s legal theory is analogous to other approaches that are centrally focused on “moral communities”).

10. THOMAS L. SHAFFER & MARY M. SHAFFER, AMERICAN LAWYERS & THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION 209–10 (Stanley Hauerwas & Alasdair MacIntyre eds., 1991).

11. See Rick Garnett, *Prof. Robert Cochran Remembers Prof. Thomas Shaffer (RIP)*, MIRROR JUSTICE (Feb. 28, 2019), <https://mirrorofjustice.blogs.com/mirrorofjustice/2019/02/prof-robert-cochran-remembers-prof-thomas-shaffer-rip.html>.

12. See, e.g., Robert F. Cochran, Jr., *Tort Law and Intermediate Communities: Calvinist and Catholic Insights*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 486–504 (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001) (“Many tort rules are not individualist in character; many were designed to protect and many others to make demands on intermediate communities—the families, religious congregations, and other associations that stand between the individual and the state.”).

We can understand better the role that the idea, and the lived reality, of “community” have played in Cochran’s work if we highlight their place in Shaffer’s. I propose that, for the latter, “community” functioned in at least three ways. First, and perhaps most straightforwardly, Shaffer always wrote, talked, and thought about the vocation of lawyering—of “ordinary, county-seat, Wednesday-afternoon law practice”<sup>13</sup>—in terms of faithful service to clients and communities, especially the vulnerable and the marginalized.<sup>14</sup> He was radically and prophetically committed to promoting the common good through lawyering specifically and preferentially for the poor.<sup>15</sup> And, of course, he understood the “common good” not in a simplistic, utility-maximizing, “greatest good for the greatest number” sense but instead in the deeper way that is proposed and developed in the social teachings of his Catholic faith tradition.<sup>16</sup> Lawyering, properly understood, helps to realize and secure the conditions for human flourishing.

Good lawyers, Shaffer emphasized, see their clients not merely as individuals but as persons who are situated, embedded, and connected; they see themselves, as Louis Brandeis once put it, as “counsel for the situation”<sup>17</sup>:

Like Brandeis, they take up positions outside the confines of the adversary ethic; they confront persons who are situated, in contexts and communities; they allow the relationships between persons to construct, define, and guide their projects as lawyers. And, in exercising moral judgment, they are not able to ignore those whom the client-centered norms of professionalism, or the doctrines governing third party standing, tell us are outsiders.<sup>18</sup>

The wise resolution of a matter, Shaffer appreciated and emphasized, involves not only the consideration, in a “hired gun” sort of way, of a particular client’s

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13. Shaffer, *Radical Individualism*, *supra* note 7, at 983.

14. See Thomas L. Shaffer, *The Biblical Prophets as Lawyers for the Poor*, 31 *FORDHAM URB. L.J.* 15, 22 (2003) (noting Shaffer’s hope that his students would be like the biblical prophets who both practiced law and served poor people and would wield the law as a toolbox).

15. See *generally id.* (arguing that lawyering can and should be used to serve the common good, with a preference for the poor).

16. See, e.g., *CATECHISM OF THE CATHOLIC CHURCH*, ¶ 1906 (1994) (citation omitted) (“By common good is to be understood ‘the sum total of social conditions which allow people, either as groups or individuals, to reach their fulfillment more fully and more easily.’”).

17. See, e.g., Thomas L. Shaffer, *My Client the Situation*, 49 *RES GESTAE*, Oct. 2005, at 24.

18. Garnett, *Sectarian Reflections*, *supra* note 2, at 824 (citation omitted).

wants but also of effects on and needs of his or her surrounding and supporting communities.<sup>19</sup>

Second, the “community” is regularly, and persistently, identified in Shaffer’s work as a crucial and privileged site of moral reflection and formation for lawyers. This identification was developed extensively in *American Lawyers and Their Communities*, but not only there.<sup>20</sup> Over and again, Shaffer’s call, and his challenge, to lawyers wrestling with dilemmas, tragedy, uncertainty, and doubts is to take them to their communities, that is, to their churches and congregations, their families, their neighborhoods, their Bible study groups and bowling teams, and—as with Cochran and his classmates—their “Law and Religion” seminars.<sup>21</sup> It was not that Shaffer promised, or believed, that these various communities-of-formation were “safe spaces” or mechanisms for the easy dispensation of cheery affirmations.<sup>22</sup> Instead, they are seen as locations for discernment, and accountability, and there is no guarantee, Shaffer insisted, that what is discerned will be comfortable, easy, or welcome.<sup>23</sup>

Finally, for present purposes, the realities of connection and community are at the heart of Shaffer’s moral anthropology, that is, his “account of what it is about the human person that does the work in moral arguments about what we ought or ought not to do and about how we ought or ought not to be treated.”<sup>24</sup> A moral anthropology is, in a way, an answer to the Psalmist’s question, “What is man that thou art mindful of him?”<sup>25</sup> This question, it turns

19. See Shaffer, *Radical Individualism*, *supra* note 7, at 969–70.

20. See, e.g., Thomas L. Shaffer, *The Legal Profession’s Rule Against Vouching for Clients: Advocacy and “The Manner That Is the Man Himself,”* 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 145, 169 (1993) (noting the importance of the “development of professional communities that are able to form lawyers in the virtues necessary for the practice of law”). See generally SHAFER & SHAFER, *supra* note 10 (discussing the relationship between communities and lawyers).

21. See, e.g., Thomas L. Shaffer, *Legal Ethics and Jurisprudence from Within Religious Congregations*, 76 NOTRE DAME L. REV. 961 (2001).

22. See, e.g., *id.* at 967 (arguing that difficult questions should be asked, such as “what the congregation should do with its money”).

23. See, e.g., *id.* at 968 (explaining that these types of discussions “will involve both facts and feelings about facts that [people] would rather not admit, let alone admit in a meeting”).

24. Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 541, 543 (2003) (quoting MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 7 (1998)).

25. *Psalms* 8:5 (Douay-Rheims).

out, is not only a prayer, it is also, Shaffer knew, “a starting point for jurisprudential reflection.”<sup>26</sup> He returned to this theme, and this foundational claim, again and again: it is a fact, a truth, about us—one that matters for law and lawyering—that we are situated, relational, embedded, dependent, vulnerable, and created.<sup>27</sup> Just as sick roots yield bad fruit, he warned, a flawed, incomplete, or untrue moral anthropology will yield unsound policies, ethics, and law.

My own introduction to Shaffer’s thinking was his powerful critique of the legal ethics of “radical individualism,” in which he—among other things—called attention to the unsoundness and untruthfulness of ethics that neglects the anthropological fact that “organic communities of persons are prior in life and in culture to individuals—in other words, that the moral agent is not alone.”<sup>28</sup> As he insisted, “Ethics properly defined is thinking about morals. It is an intellectual activity and an appropriate academic discipline, but it is valid only to the extent that it truthfully describes what is going on.”<sup>29</sup> And, a truthful description incorporates the recognition that every human person, the ““noblest work of God[,]’ [is] infinitely valuable, relentlessly unique, endlessly interesting.”<sup>30</sup>

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Now, this volume is a study and celebration of the scholarly and many other contributions of Bob Cochran, not Tom Shaffer. I have suggested, though, that the former was inspired and influenced by the latter. And, in turn, Cochran has made his friend and teacher’s insights his own, developed and explored them, applied them in new ways, and contributed immeasurably to the formation of reflective, other-regarding, and faith-filled lawyers.

Each of the three communitarian themes, identified above, that run through Shaffer’s teaching, scholarship, service, and law practice have been echoed, re-capitulated, and harmonized in Cochran’s. Here, I want to highlight the second one, that is, the idea that lawyers’ communities are and should

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26. Richard W. Garnett, “*There Are No Ordinary People*”: *Christian Humanism and Christian Legal Thought*, 56 J. CATH. LEGAL STUD. 77, 79 (2017).

27. See, e.g., Thomas L. Shaffer, *The Legal Ethics of Belonging*, 49 OHIO ST. L.J. 703, 705 (1988) (emphasizing the “primacy of human relationships, the fact that we people are connected to one another, and connected radically (at the roots)”).

28. Shaffer, *Radical Individualism*, *supra* note 7, at 965–66 (footnote omitted).

29. *Id.* at 965.

30. Thomas L. Shaffer, *Human Nature and Moral Responsibility in Lawyer-Client Relationships*, 40 AM. J. JURIS. 1, 2 (1995) (quoting *Chisholm v. Georgia*, 2 U.S. 419, 462–63 (1793)).

be regarded, and appreciated, as special sites of formation, reflection, and discernment.

In my view, there is no one in American legal education who has done more, and who has better led by example, in the building and sustaining of formative faith community than Cochran has. The point here is not just that he has helped to focus our attention on and develop “Christian Legal Thought,” although he has.<sup>31</sup> It is not only that he has participated and contributed to what has been called “the Religious Lawyering Movement.”<sup>32</sup> I have in mind, instead, his vital, indispensable contribution to the development of a community—some might say a “network,” but that is not nearly so nice a word—that has strengthened and affirmed hundreds of legal scholars across a variety of disciplines, at different institutions and at different kinds of institutions, from different faith traditions, and of different generations. I and many others are deeply grateful for his efforts. For me, and for others, gathering over the last few decades at the “Law Professors Christian Fellowship” programs, working together on common projects such as the “Evangelicals and Catholics Together on Law” statement,<sup>33</sup> and meeting with old friends and new at the annual conferences at Pepperdine University put on by the Nootbaar Institute on Law, Religion, and Ethics were not simply opportunities for professional development, or boondoggling in Malibu. They were, instead, immersions of formative and discerning communities of the kind that Shaffer held up, to which I and others came to feel we belonged, to which we felt accountable, and for which we are thankful. Bob Cochran did the work to build the community that, if I want to take to heart the proposal of our mutual friend, teacher, and colleague Tom Shaffer, I need to listen to, learn from, and journey with.

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31. See generally Cochran, *supra* note 12 (reflecting Cochran’s contribution to developing “Christian Legal Thought”).

32. On the Religious Lawyering Movement, see, for example, Marie A. Failing, *Twenty-Five Years of Law and Religion Scholarship: Some Reflections*, 30 *TOURO L. REV.* 9 (2014); Samuel J. Levine, *Further Reflections on the Role of Religion in Lawyering and Life*, 11 *REGENT U. L. REV.* 31 (1998); Russell G. Pearce, *Faith and the Lawyer’s Practice*, 75 *ST. JOHN’S L. REV.* 277 (2001); Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 *CASE W. RES. L. REV.* 127 (2004); Robert K. Vischer, *Heretics in the Temple of Law: The Promise and Peril of the Religious Lawyering Movement*, 19 *J.L. & RELIGION* 427 (2003).

33. Joint Statement by Evangelical and Catholic Legal Scholars, *Evangelicals and Catholics Together on Law: The Lord of Heaven and Earth*, 3 *J. CHRISTIAN LEGAL THOUGHT*, Summer 2013, at 2–9. The statement is also available at: <http://mirrorofjustice.blogs.com/files/evangelicals-and-catholics-together-on-law--the-lord-of-heaven-and-earth.pdf>.



There is another, fourth sense of “community” that was noted occasionally but not much developed in Shaffer’s work, but that Cochran has invoked and highlighted often.<sup>34</sup> This theme sounds less in legal ethics or professional formation than in political theology. Drawing on both the Catholic social-thought tradition and on the thinking of Abraham Kuyper, Cochran was ahead of the curve in reminding us that, in Christian thinking about political communities and authorities, there has long been a recognition that the relationship between persons and the state is—or, at least, should be—buffered and mediated by a dense, protective array of non-state associations and institutions, which Cochran calls “intermediate communities.”<sup>35</sup>

These “intermediate communities” include “the families, religious congregations, and other associations that stand between the individual and the state” and that are “crucial to the health of both the individual and the broader society.”<sup>36</sup> In Cochran’s “intermediate communitarian theory,”<sup>37</sup> these non-state, and in important senses, pre-political institutions play at least two roles: First, they face the state, challenging its claims, constraining its reach, and cooperating as appropriate to promote and protect the common good. Next, they face persons, and—as Shaffer emphasized in the lawyer-formation context—educate, develop, equip, train, and inculcate.<sup>38</sup> Cochran applied his intermediate-communitarian theory in a number of contexts, including one of his many fields of expertise, the law of torts, noting the ways that tort law rules and doctrines can protect, or undermine, these intermediate communities and both their state-facing and person-facing functions.<sup>39</sup> Again, Cochran’s

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34. See, e.g., Thomas L. Shaffer, *Review Essay: Stephen Carter and Religion in America*, 62 U. CIN. L. REV. 1601, 1619 (1994) (reviewing STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993)) (discussing the “community of the faithful” and its connection to the state).

35. Robert F. Cochran, Jr., *Catholic and Evangelical Supreme Court Justices: A Theological Analysis*, 4 U. ST. THOMAS L.J. 296, 304 (2006) (“The Catholic doctrine of subsidiarity and the evangelical Dutch Calvinist doctrine of sphere sovereignty (both developed in the late nineteenth century) hold that a broad range of intermediate communities between the individual and the state are essential for human flourishing.”); Cochran, *supra* note 12, at 490–92 (discussing the “value of intermediate communities”).

36. Cochran, *supra* note 12, at 486, 487.

37. *Id.* at 487.

38. *Id.* at 490–91. I attempted to develop a similar account of mediating associations’ two “faces” in Richard W. Garnett, *The Story of Henry Adams’ Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2000–2001).

39. See Cochran, *supra* note 12, at 492–93.

social ontology certainly complements Shaffer's persistent emphasis on community and communities. Perhaps we can say, though, that while Shaffer tended to look to intermediate communities for prophetic denunciations and witness, Cochran also sees and values the structural role they play in the social and constitutional orders.

Cochran's emphasis on civil society, intermediate associations, and mediating communities is both insightful and timely. Thinkers from across the political and ideological spectrum have called worried attention to the fact that, for a variety of reasons, this crucial "middle space" is struggling.<sup>40</sup> What some thinkers have called "liquid modernity" seems to be taking its toll on the traditional carriers and transmitters of social capital.<sup>41</sup> Online tribalism and increasingly bitter forms of identity politics seem to be crowding out authentic community.<sup>42</sup> As my colleague Patrick Deneen has described in his widely discussed book, *Why Liberalism Failed*, our individualistic anthropology and our modern understandings of "liberty" and "rights" are leading—perhaps counterintuitively—to both an increasingly supervisory and intrusive state and to a thinning-out, or evaporation, or pulverization of civil society.<sup>43</sup> Deneen has been criticized for not identifying detailed policy solutions or other responses to the developments he describes, but it strikes me that Cochran's "intermediate communitarianism" is a rich resource that could be mined for such purposes.

Perhaps Cochran is looking for some retirement projects?

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40. See, e.g., CHRIS ARNADE, DIGNITY: SEEKING RESPECT IN BACK ROW AMERICA (2019); YUVAL LEVIN, THE FRACTURED REPUBLIC: RENEWING AMERICA'S SOCIAL CONTRACT IN THE AGE OF INDIVIDUALISM (2017); Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995).

41. See, e.g., ZYGMUNT BAUMAN, LIQUID MODERNITY 14 (2000).

42. See generally BEN SASSE, THEM: WHY WE HATE EACH OTHER—AND HOW TO HEAL (2018).

43. See generally PATRICK J. DENEEN, WHY LIBERALISM FAILED 6–9 (2018).

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