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Book Reviews

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An End of Innocence

ON BEING A CHRISTIAN AND A LAWYER. By *Thomas L. Shaffer*. Provo, Utah: Brigham Young University Press. 1981. Pp. x, 271. $12.95.

*Reviewed by Mark H. Aultman.**

> LeCarre's George Smiley says, "I think it is safer to stay with institutions . . . . In that way we are spared the embarrassment of personalities. After all, that's what institutions are *for*, isn't it?" . . . . But in old age Smiley says: "I invested my life in institutions . . . and all I am left with is myself."
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> Thomas L. Shaffer

Thomas L. Shaffer, a long time Professor, and former Dean, at the Notre Dame Law School, has shown an uncommon interest in the realities of the legal profession, legal education, and legal ethics. His writings have been unusual for an American law professor, both for their specifically Christian character and for the depth of their psychological insight. Brigham Young University Press has recently published a book that Thomas Shaffer had been working on for over five years. Those who looked to Notre Dame and its professors for moral guidance could reasonably have looked forward to the event.

The book is called *On Being a Christian and a Lawyer*. Its subtitle is "Law for the Innocent." I was asked to write a review of the book and (more or less) innocently I accepted. I now have the sad realization that the book is no longer written for me — or, more accurately, that the book was written for a person I no longer am. Innocence does not survive this book.

It is a melancholy time to consider legal ethics. The American Bar Association has appointed a Commission (The Kutak Commission) that is attempting to redefine the American legal profession.[1] The Kutak Commission is opposed in this attempt by the American

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1 *See* Proposed Final Draft, *Model Rules of Professional Conduct*, May 30, 1981, American Bar Association Commission on Evaluation of Professional Standards (77 S. Wacker Drive, Chicago, IL, 60606). A later "proposed final draft," dated June 30, 1982, was the one recommended by the Commission to the ABA House of Delegates meeting in San Francisco in August 1982.

Trial Lawyers Foundation (ATLF), which proposes its own code[2] and redefinition of the American legal profession. The Kutak Commission is also opposed by the National Organization of Bar Counsel,[3] which argues, for not very good reasons, in favor of retaining the basic structure of the present Code of Professional Responsibility and adding a few new rules, mostly unreasonable, to it.[4]

Thomas Shaffer's book comes at a time, then, when the legal profession is undergoing an identity crisis. One of the first things "innocents" must learn about ethics codes is that they have nothing to do with ethics as we usually understand the word. Legal ethics codes, and their interpretive opinions, are verbal smoke screens. The more elite lawyers use such codes to define and redefine ethics so they can make the most money and exercise the greatest power by representing those who have the most money and power.

In American law this has usually been accomplished through use of the legal fiction of "client." When a lawyer is representing a person accused of murder by the state, it does not take too much effort to figure out who the client is. Persons are autonomous moral agents, who *exist*. The client can be *that person*.

The lawyer who represents a corporation, on the other hand, has a problem. At some point the lawyer knows who the client is not (the attendant at the gas station on the corner, for example). But when it comes to other individuals who might constitute the corporation (e.g., officers, directors, or shareholders) it can get confusing. Every attempt to resolve the dilemma is through another legal fiction — relying upon a legal definition of decision-making authority and procedures. This results in the growth of the large impersonal organization, with various procedures, effective and ineffective, for making decisions. The overall social effect is a process in which both information and decision-making power gradually become more diffuse and removed from rational control, or law. The major issue raised by law in modern societies is whether the integrity of the human being can be maintained in the face of the social evolution of large impersonal organizations, both private and public.

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2 *See The American Lawyer's Code of Conduct*, Roscoe Pound-American Trial Lawyers Foundation (10 S. Thirty-First St., N.W., Washington, D.C. 20007), Public Discussion Draft, June-1980, and Reporter's Draft, August-1981, and Revised Draft, May-1982.

3 *See Report and Recommendation*, National Organization of Bar Counsel, adopted August 2, 1980 (c/o Charles W. Kettlewell, Suite 109, 360 South Third Street, Columbus, Ohio 43215); *Proposed Amended Disciplinary Rules to the ABA Model Code of Professional Responsibility*, adopted August 8, 1981; and *Report of the Special Review Committee*, dated June 4, 1982.

4 *See* Aultman, Mark H., *Journal of the Legal Profession*, Vo. 7, 1982 (forthcoming).

The problems of both individual and corporate integrity arise with disturbing clarity in the ethics codes being prepared by the Kutak Commission and the ATLF. Monroe Freedman, the reporter and principal drafter of the ATLF code, argues for an extreme view of client rights, asserting, for example, that an attorney has an obligation to present perjury if that is what the client wants.[5] He draws upon compelling examples from the criminal process: situations in which attorneys defend persons accused of crimes. He concludes that "client autonomy" is the highest value for a lawyer and defends the adversary system. His philosophical position, at least in its later forms, is grounded in the Judeo-Christian tradition of the worth and value of the individual person,[6] though he does not make the necessary distinctions to avoid having the same rationale apply to organizational "clients."

Geoffrey Hazard, Jr., the reporter for the Kutak Commission, starts from somewhere other than the personal client and, understandably, ends up somewhere else. In his *Ethics in the Practice of Law*[7] he considers the role of attorneys who represent large organizations, corporations, and government agencies. The book is brilliant and insightful in a way that Monroe Freedman's writings are not, but this is because Hazard studies a world where ideas, not personal problems, dominate. He studies the lawyer as part of an organizational decision-making process and, not surprisingly, does not feel nearly so strongly as Monroe Freedman about "client autonomy."

The different philosophies behind the two ethics codes now being drafted by the Kutak Commission and the Trial Lawyers' Institute have thus far resulted in substantially different codes. The ATLF code counsels lawyers to do whatever their clients — personal or organizational — tell them.[8] The Kutak Commission is not so clear in its advice. The commission seems to tell lawyers that, if they have a personal client who proposes to do harm or commit a serious crime, they may disclose their client's confidences. If a lawyer's client is an organization, the lawyer may disclose the "confidence", but only if the lawyer first discusses the matter with higher authority in the organization, if the higher authority persists in the wrongdoing and is personally profiting at the expense of the organization, *and* if

5 M. FREEDMAN, *Lawyers' Ethics In An Adversary System* (1976), Chapter 3.

6 Freedman, *Personal Responsibility in a Professional System*, 27 CATHOLIC UNIVERSITY LAW REVIEW 191 (1978).

7 G.C. HAZARD, ETHICS IN THE PRACTICE OF LAW (1978).

8 *See* note 3 *supra*, Rule 2.5.

the illegal activity will harm the organization.[9] If illegal activity harms innocent third parties, apparently attorneys must acquiesce in it if it is being done by an organization. We are never told why attorneys must favor organized wrongdoing over the less efficient kind.[10]

Jethro Lieberman's reference to the process by which legal ethics are rationalized as "the unethical ethics of lawyers,"[11] it seems, is not unjustified. Thomas Shaffer's book, in all probability the truest book you will ever read on legal ethics, could not have come at a better time. Taken seriously and read with care, Shaffer's book cuts *very* deeply into the human heart. More deeply, I fear, than most people are able to go. So let's draw back and analyze structure instead.

One can usually start with a book's promotional jacket as the best place to be misled. Almost everything about this one is wrong. The jacket is overstated PR that misses the point by saying what it thinks it is supposed to say. It calls the book a "tour de force." The dictionary defines this as "a feat of strength or virtuosity." But one of the striking characteristics of the book is its simplicity, the way it disdains strength and virtuosity to simply tell the truth.

The jacket goes on to say that the author's stand is that the "lawyer is professionally and morally bound to seek after truth and the real good in the face of nearly overwhelming national attitudes that seek lesser or contrary goals." This misses an important point — the conflict between what a lawyer is *morally* bound to do and *professionally* (if the American Bar Association is considered a legitimate authority) bound to do. To gloss over this tension is to miss what distinguishes this book from so many others on legal ethics.

Finally, the jacket concludes that the book is "thoroughly researched, well documented, and expertly written." The first and last descriptions are accurate enough, but the book is not well documented. For someone in Shaffer's tradition, this is both a strength and a weak point. There are no footnotes, except explanatory ones, referenced by asterisks. Though quotations abound throughout the book, they are never referenced to a page number. Sometimes there are no references to the work from which the quotation comes, and sometimes there are no references to the author. This can get frus-

9 *See* note 2 *supra*, Rules 1.6 and 1.13.

10 Note that this interpretation refers to the rules and comments in the "proposed final draft" dated May 30, 1981, and that there may be changes, perhaps significant ones, subsequent to that draft. Since this paragraph was written, the Kutak Commission, in still another proposed final draft, dated June 30, 1982, has amended Rule 1.13, making clear that Rule 1.13(c) does not prohibit disclosure of information not protected by Rule 1.6.

11 J. LIEBERMAN, CRISIS AT THE BAR (1978).

trating when quotations are particularly good, as they often are. On page 51, for example, a quotation states that the deviant "is not a bit of debris spun out by faulty social machinery, but a relevant figure in community's overall division of labor." Given the context, the statement is probably Kai Erickson's, but one would never know from this book.

This is an important point for a couple of reasons. Shaffer tells us to think less like a lawyer and more like a person. This is directly in the Biblical tradition ("It is written but I say unto you") where the scribes and legalists are more a part of the problem than the solution. This tradition has received considerable reinforcement of late from Marshall McLuhan who, in pointing out that technologies of communication condition modes of thought,[12] issued a warning especially applicable to lawyers — that they will become anachronisms without considerable readjustment in the process of "thinking like a lawyer."

Shaffer thus makes his argument person to person without the intrusion of references to "authorities" viewed as binding, persuasive, or somehow "governing the matter." But documentation still has value, even if it is no longer "controlling." Documentation to assist the reader in the search for truth and documentation to impress or to cite to authority which a writer wishes to impose upon a reader are two different matters. And though it is difficult, particularly in times of massive changes in social image-creating processes, to maintain the proper balance, I would have preferred a different balance in this book.

The book is divided into four sections, entitled "Clients," "Advocacy," "Lawyer Culture," and "Institutions." When Shaffer speaks of a client in the earlier chapters he refers to a human person. In the section on advocacy Shaffer starts to consider the difference between representing a client who is a person, and representing a truth that may not be. "Lawyer Culture" contains Shaffer's meditations on the state of legal academia. Properly understood, these are astounding chapters — barely controlled time bombs that Shaffer is having trouble keeping in check. He seems to be afraid that the reality they describe so obliquely may explode, destroying the communities he loves and has tried for so long to warn.

By the time the reader gets to the last section, "Institutions," Shaffer is no longer writing about the American legal system or

12 *See* M. MCLUHAN, THE GUTERBERG GALAXY (1962) and UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964).

American legal education. Shaffer has broadened the ambit of tragic communities to include, as well, the Roman Catholic Church. Shaffer, as he usually does, speaks in code to protect the ones he loves, but nonetheless insists on bearing witness to the truth. These are very striking chapters.

Quotations are one of the strong points of the book, usually reflecting basic philosophy. Several of the chapters, and some of the sections, have introductory quotations upon which the reader may wish to meditate before starting to read. Chapter Three, "The Ethics of Care," is introduced by a quotation from Karl Barth: "We must learn again to speak to each other with authority and not as the scribes. At present, we are all much too clever and unchildlike to be of real mutual help."

Another significant theme throughout Shaffer's writings is touched upon in a quotation from Reinhold Neibuhr: "(T)he significant unit of thought and action in the realm of historical encounter is not a mind but a self" (p. 71). This abhorrence at the idea of a "disembodied mind" and at the "delusion of power" that accompanies it is a recurring theme with Shaffer. Salvation, even for lawyers, is to be found in the interpersonal and not in ideas. This book is very carefully written to make it difficult for the reader to zero in on any one statement which may be taken as a "premise," or precedent from which things "follow." The book, in other words, is meant to speak to *you* and not to your ideas.

Thomas Shaffer is not afraid to appear to contradict himself. There is, as a result, a certain movement, or growth, to the book that is difficult to summarize. At its beginning, the book's underlying philosophy seems to be interpersonality. By the end of the book, the strictly interpersonal has passed through a stage in which the lawyer "sees himself" as representing a person, through a consideration of impersonal, and depersonalizing, institutions and organizations, to a last chapter in which Shaffer talks of the person he *used* to be. The memory of innocence is almost palpable by the time one gets to this last chapter.

Early in the book (p.3), Shaffer objects to a position that has most prominently been represented by Monroe Freedman. Ethics cannot, Shaffer says, be defined by a lawyer's role in the system. Freedman argues that where a client wishes to act one way, but the lawyer seeks to impose his own values on that client, the lawyer is acting improperly and paternalistically if there is a legal way to do what the client wants. Shaffer would agree (so long as the word is

"impose"), but points out that Freedman's solution is paternalism in another guise. Those who rely on arguments from competitive politics, free enterprise, or an "adversary system," will say that one should permit (or assist) clients to do whatever they want, because there will be a counterbalancing force which will be reconciled in "the system" as a whole. But this argument only removes the "pater" in paternalism from the professional to the regulatory apparatus, the government, or the court. There is, in other words, a psychological projection in which pater "keeps coming back" in the form of the idealized system.

The ideal of the adversary system comes from the courtroom, where the judge acts as neutral "pater." Now, however, lawyers do much of their work in offices, and many never venture into court. Shaffer points out that during the drafting of the 1969 Code of Professional Responsibility an attempt was made to codify the difference between rules governing law office practice and court work in order to tone down the adversary system imagery (p. 7). The attempt failed, and dominant bar leaders now argue for "suspended conscience": an accused murderer, Dow Chemical, cigarette manufacturers, and industrial polluters all should have the right to expect the same zeal from their attorneys, despite the fact that there may be no adversary on the other side and no neutral arbiter involved in what is being done.

Public interest lawyers find this appalling. They claim the right, says Shaffer, to determine whether the client's purposes are worthy or moral. They work towards social goals with which they agree (p. 7). Public interest lawyers are different from poverty lawyers and civil liberties lawyers in that the latter provide individuals with representation that would not otherwise be provided. Shaffer might also have noted that, particularly since the development of class actions, public interest lawyers do not necessarily represent real persons, while poverty and civil liberties lawyers more often do.

Shaffer is opposed to Monroe Freedman's ethics of role. Freedman argues that the U.S. constitution and the American legal system require lawyers to elicit perjury on behalf of a client.[13] Shaffer says that this idea leads to totalitarianism. If a lawyer must present perjury because the system demands it, then there will be other requirements it can impose too. But Shaffer has a much more subtle way to reach totalitarianism. He would say God, not the system, requires us to be faithful to our client and to present perjury on the client's be-

13 *See* note 6 *supra*.

half. In considering collaboration, Shaffer says, rather paternalistically, that "a lawyer should not abandon his 'perjurious' client. His client is dependent on him . . . . The lawyer has promised, either expressly, or implicitly by holding himself out as a member of the profession, to be faithful to his client" (p. 94). Shaffer later says "if he abandons his client only because of his client's statement" (by this he means "only" because his client insists on telling a lie under oath), "what he says about himself is that the client is merely a means to the lawyer's end (fee, fame, or whatever) — a means that can be abandoned when it appears that the client may prove unreliable" (p. 95).

How are we to respond when the well-intentioned totalitarian suggests that a lawyer must represent a client even if the client proposes to lie. At least when Monroe Freedman insisted we had an obligation to present perjury, the obligation was only to the system. If our conscience told us something (lying for example) was wrong, we could still say, "I'm sorry, there are some things more important than the system's definition of what a lawyer must do." Shaffer would, with only a small escape hatch (the individual conscience, which Shaffer leaves with no reasons to defend its decisions), put God on the side of the system which requires a lie. "What?", the Grand Inquisitor of the Disciplinary System will say, "you reject both your legal system *and* your God, and refuse to participate in a lie to our courts that do not want to hear the truth? What possible excuse could there be for not disbarring you?"

Shaffer might better have considered, at this point, why a legal system should have to be lied to, and what that says about the delusions of the system in general. Later in the book Shaffer does consider the effects of lying (p. 204), but, curiously, does not seem to see any connection between an illegitimate social interest in avoiding truth and a statement that attorneys can be obligated to present perjury.

There are very good reasons why law professors might want to give the impression that there is something ethically wrong with refusing to represent a client who proposes to lie (or who cannot pay a fee for that matter) but they are all defenses of a system which does not provide adequate legal representation for most people. These defenses pass on to individual lawyers the guilt which the powerful ought to feel over what "the system" does to define society's deviants. Lying and collaboration both, however, have traditionally been considered wrong. Refusing to represent clients because they cannot afford to pay a fee has been considered wrong, if at all, only for lawyers

who have sufficient income from other sources to represent indigent clients without incurring financial hardship.

In other words, all lawyers must be elite lawyers for the legal system, as currently structured, to work. Those who are not elite lawyers cannot afford the luxury of never abandoning their clients for some reason as pedestrian as inability to pay. Furthermore, they do not have the social status to "get away with" collaboration in helping a client to lie. A "gentleman" may participate in a lie and remain a gentleman. But when non-elite lawyers participate, they are really *part* of the lie. They don't "rise above it" by virtue of social status.

Shaffer's area of expertise (he calls it marketability and appears to distinguish this from identity) (p. 3) is trusts and estates. Let's reflect for a moment on the nature of a "trusts and estates" practice. This is a peculiar kind of practice for several reasons. The individual on the other side of the desk has, within very broad limits, the right to decide what to do with the property. The client faces an individual decision about property, made in a context in which his personal feelings (about a beneficiary and about property) govern. A client in this situation has an unusual degree of autonomy. The situation requires very personal counselling. Other kinds of practice (divorces, for example) are just as personal, perhaps more so, but the client does not have as much autonomy, or as many options. There the client must consider the demands of the spouse "on the other side."

Other kinds of practices offer different degrees of both personal involvement and client autonomy. A lawyer working for a corporation or a government agency may never have to make a decision that substantially affects the personal life of those with whom the lawyer is dealing. On the other hand, the person with whom the attorney is dealing may have substantial autonomy to conduct the organization's affairs, and how this is done may substantially affect the lives of many people with whom the lawyer may have no personal contact. Thus, to use a model of trusts and estates counselling as the basis for how a lawyer should act will: 1) not speak to what many lawyers do, and 2) base legal ethics on a model of counselling which is coming to be antiquated.

The "trusts and estates" image of lawyerly behavior is no more useful in providing a model for legal ehtics than is the adversary image of Monroe Freedman drawn from the criminal process. Nonetheless, Shaffer is on the right track in suggesting an ethic based upon whether the lawyer is representing a person or, perhaps, a community of persons, rather than an organization or an idea. One can,

however, be on the right track and still be moving in the wrong direction.

In Chapter Ten, entitled "The Practice of Reconciliation," Shaffer starts to deal with the problem of advocacy concerning organizations. He considers different kinds of advocacy, which I will call "outside" advocacy and "inside" advocacy. In this chapter, Shaffer seems to identify psychologically with "inside" advocacy, an identification that weakens Shaffer's discussion for those not so fortunate as to be on the "inside" of organizations with decision-making power. As examples of outside advocacy, Shaffer cites the civil rights movement and Vietnam War resistance. This advocacy, he says, 1) is almost always moral advocacy, 2) seems prophetic, and 3) is ineffective. The problem with outside advocacy is that, by being irritating, it often fails to "reach" those who will make the desired decision. Though the advocacy is moral and the advocate is at risk, the advocate is not at risk in the light of a shared morality. The feeling "of something in common" or "something shared" is lacking.

Shaffer suggests that in a moral encounter involving social justice, there is a public to which the advocate speaks, and a group of decision-makers. Within the decision group (say, a board of directors) some individuals are likely to become prophets. These insiders have advantages in that they speak to the others from a shared morality, know the language of the group, and are trusted. They are the ones to whom the outside advocate should address moral positions.

The outside advocate is at a disadvantage in moral discourse. Such discourse tends to polarize, making it more difficult for either side to admit mistake (p. 116). There is a difference between being involved in power and alienated from it. Alienation from decision-making tends to make one ineffective (probably in much the same way that Kai Erickson's deviant is ineffective). The outside advocate can improve things within the circle of power by initiating moral discourse (most probably with potential prophets within). The outside advocate can also nurture with thought and concern — rather than by making demands on an organization as if it were a monolith and could do whatever it wanted. Confrontation and legal or philosophical demands should be avoided. Demands made from principle make decision-makers defensive, and throw potential prophets and decision-makers together in opposition. One does better to argue for particular people and problems rather than for causes.

Shaffer states, after this, that "the moral demand that corporate

lawyers should call for independence from chief executive officers who are their employers is a demand in principle" (p. 120). Instead, he counsels advocacy viewed as moral discourse rather than as warfare. I suppose that if our only two choices are between reasoned conversation and warfare, conversation is better. This does, however, load the dice a bit. If these are our only choices, we do not need lawyers (or law) anyway. Shaffer's tactical advice is correct (i.e., don't go to your corporation president and announce that you are going to start making the decisions on environmental pollution). But it does not follow that individual lawyers, lawyers as a group, the organized bar, or the public through the legislative process should not insist on more independence of lawyers from corporate executive officers. That is, the weaknesses that Shaffer sees in outside advocacy are the result of assuming that the necessary decision can only be made by those within the group being influenced. If that is true, however, we have abandoned all hope of a rule of law.

Other methods can also be effective in influencing social decisions. First, the outside advocate may, rather than directing thoughts and concerns to the organization, want to present an effective image of opposition. This need not be so that the opposition will prevail but rather so that the prophets inside the organization will push the organization in the desired direction. Unreasonable opposition, in other words, does not have to drive the organization to unreasonable reaction. This assumes that there is no reasonable inside advocate who is able and willing to use the moral claims already under discussion, and the perceived threat created by the opposition, to pursue moral action.

Another effective method of advocacy more difficult to achieve is for the opposition to grow into a separate force capable of counterbalancing, or even overthrowing, an old concentration of power. Examples include the labor movement and the abolition movement. This can not be counted on, however, for such movements require a moral cause around which strong feelings are beginning to coalesce, peculiar historical forces, and people who know how to "read" forces. Such movements usually occur only after the failure of both inside and outside advocacy to obtain a reasonable response from some concentration of power.

The question of the lawyer on the "inside" representing powerful organizations comes up again when Shaffer considers Thomas More (chapters 18 & 19). By this time Shaffer is no longer indentifying with only the lawyer who represents the person against power —

the imagery of Monroe Freedman and Shaffer's chapter on collaboration — nor with the lawyer who feels that his only obligation is to the powerful organization. Power, he says, can be used wisely. He says here that the problems of how to use power, how to live with it, and how to leave it behind, (p. 189) are always with us.

Thomas More, writes Thomas Shaffer, was a lawyer who exercised power at a time when power was concentrating about him. Others adjusted to the concentration of state power in nationalism, but not More. More was powerful, political, clever and subtle. Why did he not admit that the King could claim power over the church and continue serving both as best he could? Was he the existential hero hearing only God's voice? That explanation, Shaffer suggests, misses almost everything.

More knew the difference between optimism and hope. Optimism is hope without (or ignoring) truth. It can therefore be perverted and defeated by power. But hope still looks for alternatives and is therefore an alternative to power. As one comes more to trust in power, hope, and thus one's sense of alternatives, declines. Character, knowledge and analysis matter, and More used those traits with skill, not confronting power, but calling it to rationality. More resigned from serving the King with such seemingly improvident futility because hope required it; and it, not optimism, was the test. He was being asked to "bend a little" to power. He felt he would be deluded and no longer be "quite" himself. And when you are not "quite" yourself, what are you?

Compromise was not possible, Shaffer says, because compromise was based upon a delusion of power, not on truth. Therefore, to acquiesce would have justified the view that society could be based upon power, not truth. When compromise becomes institutionalized, we end up concluding that the social world cannot be held together by truth. Depending upon how far compromise based upon power has gone, we may be right. Truth may then become more of a problem than a glue for social institutions. Dangerous business this truth.

Power corrupts, Shaffer continues, by gradually convincing the powerful that effectiveness is what matters most. The powerful define themselves by their roles, and lose the sense of private selves. Acting truthfully and not for power, however, is not just a decision for the self, says Shaffer. Living hopefully, or truthfully, has social consequences beyond the self. Shaffer says this is because social consequences depend upon maintaining the sense of self. He also points

out that society depends upon truth: "the truth is finally the only safeguard a society can have" (p. 204).

The question thus comes up again. What of the attorney who assists a client in lying to the court? Both Monroe Freedman and Shaffer use examples of otherwise defenseless clients in need of help to establish credible arguments that at least sometimes an attorney may be justified in eliciting perjury. Their basic image is of a defenseless individual threatened with harm by a powerful institution. These arguments lose their force, however, for lawyers representing power. In a different world, then, Shaffer's argument would probably come down to this: when representing the weak, there are instances in which we may elicit perjury; when representing the powerful, we should tell the truth. But Shaffer draws no such line between the weak and the powerful — for him even a Mafia Don or a Hitler would be "presumed innocent."

Shaffer's failure to draw lines corresponds to a real world in which clients do not walk into the office labeled "weak" or "powerful." The simplicity that exists in a "rule of thumb" based upon the weak and the powerful can exist only on paper. But the distinction between the weak and the powerful is not the one that Shaffer draws. He distinguishes, rather, between "the person" and "power." And while "power" may be a concept that is somewhat amorphous, persons do walk into the office, and the attorney can make decisions based upon whether one is representing a person or a non-person (i.e., an organization).

Perhaps, in other words, the Kutak Commission, in its attempts to distinguish between a possibility of eliciting perjury and a duty to tell the truth based upon whether an attorney is involved in a civil or criminal action, has been on the right track but in the wrong depot. Civil versus criminal is not the relevant distinction. Weak versus powerful may be, but the distinction cannot be applied in a functioning legal system. Person versus organization, however, can be. Attorneys representing persons could be given the benefit of the doubt as to perjurious testimony. Attorneys representing an organization, such as corporations or governments, could be made to disclose material facts to a court. Part of this distinction is already made in rules distinguishing between the duty of a prosecutor (who represents what is, by definition, "power") and defense counsel. This concept could be extended to other organizations that are placed in privileged positions by the fiction of "legal person" (which organizations, in fact if not by definition, also constitute power).

Thomas Shaffer, however, is no longer addressing his comments to the American Bar Association and its code drafters. Chapter Twenty is entitled "Franz Jaggerstatter's Hope," and nothing will ever be the same again. This is where Shaffer, in talking about the delusions of power, has been taking this book. It is not just the powerful that this chapter takes on, but also collaborators with power. A quotation from David Burrell and Stanley Hauerwas begins the chapter: "The complicity of Christians with Auschwitz did not begin with their failure to object to the first slightly anti-Semitic laws and actions. It began, rather, when Christians assumed that they could be the heirs and carriers of the symbols of the faith without sacrifice and suffering. It began when the very language of relevation became an expression of status . . . ." (p 207).

But this story cannot be told here, for it is too long, and space, as so often happens, does not permit. Besides, the story is better read in Shaffer's own words, for there is something about them that cannot be captured in a review. It is in the book, if you read carefully enough.

On Being a Christian and a Lawyer bears the notation "Notre Dame, Indiana, Lexington, Virginia, January, 1981" at the end. By the time of the publication of "The Moral Theology of Atticus Finch," from which the introductory quotation for this review was taken, Thomas Shaffer was no longer a professor of law at Notre Dame. He had left there and is now a professor of law at Washington and Lee University in Lexington, Virginia. It is quieter in Lexington and the institutions there are smaller. They are, probably, easier to manage on a human scale, and the danger of corruption probably seems less. Still, I wonder. Is there nothing, between the supposed innocence of small scale and the corruption of great power, that can use organization wisely? Must all institutions and organizations inevitably corrupt us?

Maybe the important lesson is that we need institutions that *do* leave us with ourselves. It is the institutions that leave us with nothing, and the institutions that cannot leave us at all, that constitute the real danger.*