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Preface

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PREFACE

THOMAS L. SHAFFER*

I.

Several years ago, when I lived in Indiana, I got a grant to write a book about lawyers. The newspaper ran a story about it; the paper said I was to study the morals of lawyers. A friend of mine sent me a clipping of the story with a note that said, "It won't take long."

My friend held the common Hoosier view that lawyers have no morals. A frontier story tells of the Indiana lawyer who died and whose body was laid out in a room and left for the night. When morning came, there was nothing left in the room but an open window and the smell of brimstone.

Americans have always had a love-hate relationship with their lawyers. One day a poll will come out showing that Americans rate the integrity of lawyers with that of used-car salesmen—and the used-car salesmen will complain. The next day tears will flow as we watch old lawyer-hero stories on television—stories such as "To Kill a Mockingbird," "A Man for All Seasons," or, for us old timers, that superb television series of the 60's, "The Defenders." Even the polls, when examined closely, reveal this ambivalence in what we think of lawyers: Americans think lawyers are an amoral lot, but Americans who have dealt with lawyers think their lawyers are exceptions to the rule.

And so I begin this beginning to this book for beginners in the legal profession with a guess: My guess is that the beginning law student shares these ambivalent feelings about lawyers.

A student of mine, one of the new generation of female law students that Professors Swygert and Batey talk about, said during her first weeks in one of my classes: "There seems to be a strong identification in the public's mind of a lawyer being a loud mouth, double-talking kind of person. He is characterized as searching for loopholes in order to win something for his clients. I even sense many people feel this way about their own lawyers, distinguishing a certain one, whom they like, as 'not like most lawyers, you know.' One neighbor friend's comment to me, on learning that I was going to law school,

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was: 'Don't you think this neighborhood already has enough smart asses?' " My student felt ambivalent—pulled in two directions. Most lawyers do.

Where does the ambivalence come from? First, I think, from the fact that we lawyers enter into the sticky messes of other people's lives, and we seem to do it with a license to be immoral. I remember a colleague of mine—a law professor, mind you—who said, of my valiant efforts to obtain civil liberties for a man convicted of child rape, "Well, if you get him out, I hope he moves in next door to you." He was ambivalent about what I was doing. To tell you the truth, so was I.

Another reason for the ambivalence is that a lawyer's life, far more than any other professional life, is a life of temptation to steal, to cheat, to betray trust, and, even worse, temptation to do a shoddy job because in the mysterious territory of the law clients are not able to tell a shoddy job from a good job. Our professional lives are lives in which, in the most routine, Wednesday-morning ways, we receive appalling amounts of trust from our fellow citizens—trust placed by people who are at best distressed and at worse consumed with fear and hatred. People who have to trust such professionals, or who fear they may have to, are inclined to Carl Sandburg's ugly question, "Why does the hearse horse snicker when they carry a lawyer away?"

It does not help that our profession goes around describing us in grand, pretentious ways. It is very hard for us and for our clients to fit the rhetoric (some of the rhetoric in this book, by the way) with the reality of lawyers who are like characters played by Peter Falk or Paul Newman. The rhetoric of the speeches that welcome students to law school, the pictures mounted in the halls of the law building, the first pages of the law school catalogue—all these seem to say that the practice of law is a special, moral way of life. They seem to say that being a lawyer is morally adequate. The rhetoric and the images we have of lawyers are mildly dissonant; they don't fit together.

There is truth in the grand claims, of course: truth in the demonstrated development of virtues in the profession that forms the core of Dean Jacob's essay, some legitimate ground for the hope that stands behind Professor Bodensteiner's description of clinical legal education. The truth—especially for Americans—is that ours is a society led by lawyers, from the school board to the White House. We are a society that defines its great moral issues in legal terms and then turns them over to lawyers and judges for solution.

But some of the grand claims American lawyers make for them-

selves are false claims. It is not, for example, true that the American lawyer-hero finds his moral substance in the profession. By and large American lawyer-heroes, from John Adams to Atticus Finch, brought moral character from their culture to their profession. They were, to use a quaint word, gentlemen first, before they were lawyers. They found their moral substance, as you find yours, in their families, their churches, and their communities. The lesson they teach is that lawyers of character, lawyers worthy of the moral leadership America thrusts on them, were good lawyers because they were good people to begin with. Becoming lawyers may, in some ways, have made them better people but probably not. Their becoming lawyers gave them something useful to do with their goodness. They had the goodness before they became lawyers. The moral challenge in their learning the law was to hold on to what they already had.

The lesson for beginners is that it is important to hold on: to hold on, for one thing, to the ambivalence about lawyers that beginners bring to law school; to hold on as you learn a new and puzzling way to be. It is important not to be buffaloed by the wall-to-wall answers to everything that law school sometimes pretends to offer. It is important, even, to ask out loud, and ask again: Is it possible to be a good person and a lawyer? (My own answer, at the moment, after twenty-two years in the profession, is usually yes. But I see, more and more, the importance of repeating the question.) The habit of law teachers assumes the answer to the question to be yes. We give most of our attention to a second question: How is it possible to be a good person and a lawyer? That "how" question is difficult; it is easily evaded; it is easily answered with self-deception.

Why is this second moral question so difficult? Why can't you be a good person and a lawyer in the same way you can be a good person and a plumber? The answer is that lawyers, unlike plumbers, live vicarious moral lives; we act not for ourselves, but for our clients. We do not fix sinks; we fix lives, the lives of others, as *they* want them fixed. "Attorney" means someone who goes to town for you. You remember Miss Maudie in "To Kill a Mockingbird," who says of Atticus Finch, "We have Atticus to go for us." We have Atticus to make sense for us out of the law, out of racial hatred, out of the twentieth century, out of ugly, destructive violence. We lawyers go to town for good people like Miss Maudie. We also go to town for Mafia dons, polluters, rapists, and murderers. We go to town for people who are angry, desperate, selfish, and afraid. And that means that when I am being a lawyer, my own personhood, my identity, my sense of who I

am, is at risk. I am called to act for someone else, to act in morally critical ways unknown to the other professions in the community, to act and still to be myself and to keep on being myself. It is sometimes hard to be admirable when that is your calling, and it is often even harder to keep your sense of who you are.

And when something is hard for us, what do we do? We find an easy answer. We take false moral comfort in a job description. We suppose that assisting a client to corrupt the community, and to corrupt himself, is all right because we are, after all, only plumbers doing what our customers want to have done. Fixing this client's life is like fixing his sink; my identity is not involved. And when that comfort begins to slip we can always prop it up by saying that jobs such as ours are important to the state, that the system needs advocates who will act for anybody who comes along, without reference to what the person who comes along is up to. That comes out offending our common sense. As my student's friend said, the neighborhood doesn't need such people.

II.

The only way I know out of the ambivalent discomfort of being a lawyer is to hold on to both of the causes for it—both the moral common sense and the profound importance of a professional life, a calling, in which someone is able to go to town for others.

The organized profession is not necessarily helpful in this. Most of the American legal profession's talk about not having to worry about what we do for clients is bluster. The bluster is all about what the blusterers call the adversary ethic, the importance to society of having value-free advocates. But in fact most lawyers don't believe the bluster; if they did, they wouldn't bluster so much. Lawyers try to be, and are, positive moral influences on their clients. Lawyers are powerful moral influences in business, in labor, among the poor, and among criminals. And in fact most lawyers admit that their moral lives are enriched by their clients. Clients do not corrupt lawyers; lawyers do not corrupt clients. The processes in which people corrupt or ennoble one another are more complicated.

It is possible—it happens routinely in the law offices of America—to say to the person who comes to me: I am on your side, not because the system needs me to be on your side, but because *you* do. And being on your side means that I have an interest in your doing the right thing as well as the profitable thing, in your being a good person as well as a prosperous person. Clients do not choose

lawyers for their moral insensitivity; clients return to lawyers whom they have found to be *worth* listening to.

Much of your professional life will be spent working with other lawyers to protect the profession from its worst members and to make the law work better in the community. That point is at heart of the essays you will read here by Professors Bruce, Van Doren, Finch, Marks, Bodensteiner, Clark, Swygert, and Batey. What this finally comes down to is a commitment by lawyers to honor the claim we and our professional forefathers in America have made—the claim that the United States is a society of liberty under the law. This claim means we have an individual and collective responsibility to see to it that:

- lawyers are available to everyone, because if they are not, our claim for liberty under the law is a cruel lie;
- even the worst scoundrel in the community can get a lawyer to help him, not because the government needs to have that be so, but because the scoundrel is more important than the government. That sounds so radical, but the moral justification for advocacy rests on it. My favorite argument for it came from one of the founding fathers, one of the first justices of the Federal Supreme Court, a sturdy old Scots Presbyterian from Pennsylvania named James Wilson. “The state,” he said, “is the noblest work of man. But man himself . . . is . . . the noblest work of God.” We represent scoundrels because of who they are, not because of who the government says they are;
- what the law means is a deliberate, thoughtful, and public determination, a determination removed as far as people can manage from the distortions of bias, confusion, competition, and hatred;
- our personal integrity is preserved, as we act in this way for our clients and our communities, because the integrity of our clients and of our communities depends on our own integrity.

III.

These useful essays rest on the faith that the lawyer-client relationship is valuable. It is important to remember that, particularly of the relatively technical essays by Professors Gozansky, Brown, Hiller, Bickel, Eleazer, and McCarter and by Mr. Snyder. That means, to begin with, that the lawyer-client relationship is a relationship. It is what Martin Buber called an “I” meeting a “Thou.” Moral decisions made in the law office — and almost all lawyer client decisions are moral decisions — are products of the relationship, which means that the relationship itself is a moral place. The heart of a worthy law

practice is the lawyer's respect for the goodness that is in his client, and the client's respect for the goodness that is in his client, and the client's respect for the goodness that is in his lawyer. These are the noblest works of God.

Lawyers bring to their relationships with clients all of the moral tools they possess. The most useful of these moral tools are those they brought to law school and managed not to lose. The important thing in law school is to hold onto and sharpen your moral tools — common sense and the values of the family, community, and church. Law professors are deeply interested in moral questions; we are deeply bothered, not to say obsessed, by moral questions. We disagree a lot, and when we are at our best we are clear about our disagreement, our bother, and even our obsession. We offer our moral deliberations to students in the hope of providing insight and persuasion. That is what we do when we are at our best; at our worst we bluster and bully and sound more cynical than we are. The important thing for students to remember as they weather these moral thunderstorms is that, in morals, the argument from authority is the weakest of all possible arguments. In morals, the only competent forum is conscience. Even when we law teachers bluster, our fondest hope is that our students will learn to wrestle with moral questions, as Thomas More put it, in the tangle of the mind.

Justice is, as the essays here by Professors Van Doren, Finch, and Marks say, the special province of lawyers; we claim to be specialists in justice; we are even forgiven in advance, as William Faulkner's lawyer said, for preferring justice over truth. But we need to remember that people do not get justice from the government; justice is a gift people give to one another. Lawyers and judges can help justice along, but they cannot dispense it.

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