Person or a Lawyer

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ESSAY

A PERSON OR A LAWYER

Several months before I enrolled in law school, a third-year student allegedly committed a drunk hit-and-run homicide near the campus. He was tried in local superior court during my first year and acquitted. In the law school lounge one day after lunch, I was reading about his trial in the papers, and asked a classmate sitting beside me what he thought. "Well," he said, "as a person or as a lawyer?"

His answer reveals one of the prevalent ethical moves of the American lawyer: separating professional from personal morality. There are other ways of resolving the tensions between practice and personal life, of course; Thomas Shaffer has described four ethical cultures in American legal practice. \(^1\) First, the legal ethics of gentlemen meet the ethical demands of practice with what Shaffer would see as personal virtues: one can be a good lawyer by being a good person. Second, the ethic of "the two kingdoms" separates professional from personal morals and assigns each its own ethical standard. Third, professional legal ethics are defined by the profession itself; moral authority is found in one's professional elders. And the ethic of dissent, finally, describes those lawyers who reject in various ways the culture of practice, with its hierarchy of values, that has established itself in American law. \(^2\)

In this Essay I examine several works of fiction spanning the breadth of these cultures, and through them pursue, in its various forms, the question of the separation of legal from personal ethics.

Like my classmate in the student lounge, lawyers and law students like to move matters into compartments; we like black letter law, doctrinal structures with no loose pieces. Fiction doesn't indulge those tendencies, but accumulates insights about life and law that can't be pinned within an outline. Fiction and law are not as opposite as they might seem, since story is part of the way we understand law. Our reliance on judicial opinions reflects the ease and aptness of using

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2 *Id.*
stories. In them we think about legal doctrine, we teach it, we remember it, and we communicate with other lawyers about the ways in which that doctrine should or should not apply. What we call the facts introduces place, people, and narrative in which law can operate, and without which (whether hypothetical or not) law is abstract. More than that, fiction is a traditional way to understand ethical cultures. That is because fiction, like those cultures, is not primarily about ideas but about how people carry individual ideas into action in their lives, or don’t.

Four novels and two stories illuminate my discussion. Most are familiar in the contemporary literature of law, one is new to it. I begin with Harper Lee’s *To Kill a Mockingbird*, an exemplary depiction of the gentleman lawyer. A story by Arthur Train opens a brief window on the gentleman lawyer in another time and place. The *Great World and Timothy Colt*, by Louis Auchincloss, dramatizes the shift from the culture of gentleman lawyers to the culture of the modern firm, and his story, The *Fabbri Tape*, explores the career of an Italian immigrant in that culture. George Higgins, in *Kennedy for the Defense*, deals with another immigrant, this one rebelling against American legal culture. And William Maxwell returns us, in a work of incomparable beauty and honesty, to the gentleman lawyer in his downfall: *Time Will Darken It*.

I

Atticus Finch is the father and lawyer of *To Kill a Mockingbird*, a novel of the practicing professional in rural Alabama shortly before World War II. Atticus carries on a private practice in the courthouse square of Maycomb, Alabama, a county seat of perhaps a thousand. He walks to and from his office four times a day, covering about two miles—as we’re told in the voice of Scout, or Jean Louise, the younger of his two children and the story’s narrator. Atticus’s wife, of whom we learn little, has died. Scout is too young to remember her. Scout’s brother, Jem, is four years older, a young adolescent of unusual thoughtfulness. The family has a cook, Calpurnia, who, although she

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has a family of her own, mothers, disciplines, and teaches the children. She is the bright center of warmth in the family, as Atticus is its trusted and immovable foundation.

*To Kill A Mockingbird* is a novel about the relationship of a son and daughter to their father; about a father raising his children without his wife; about their relationship to Calpurnia; about children growing up into a world in which people are not always reasonable, classifying others by race, education, background, and history; and about learning to live in a world in which justice does not always prevail.

Early in the story Scout begins her first year of school, where she is reproved for knowing how to read already. She has learned by sitting in Atticus’s lap as he reads to his children each evening. She and Jem attempt to understand what categorizes the people who make up their particular community. Why Walter Cunningham, for instance, has ringworms and brings no lunch to school; why Burris Ewell lives by the dump, has lice, and comes to school only one day each year; why some people were considered Fine Folks; what it meant, exactly, for people to have Background; why blacks are treated differently.9

And it is a novel about the meaning of courage: how it is that when you know you’re licked before you begin, you go about your job anyway and see it through to the end, no matter what. That is how Atticus explains courage to his children. Although the encapsulation of this courage is seen in Mrs. Dubose’s fight to overcome her morphine addiction before she dies, each of the main characters embodies this courage, or fails for lack of it.

Tom Robinson, falsely accused, convicted, and sentenced to death for rape, stoically bears up until his courage fails, on the edge of doom, and he bolts to the fence of the prison’s exercise yard to be shot to death at its top. Miss Maudie, when her house (which is all she has) burns down, doesn’t falter for a second. “Always wanted a smaller house, Jem Finch. Gives me more yard.”10 And when Scout says, “You ain’t grievin’, Miss Maudie?” she replies, “Grieving, child? Why, I hated that old cow barn. Though of settin’ fire to it a hundred times myself, except they’d lock me up. . . . Don’t you worry about me, Jean Louise Finch.”11

When Atticus comes home bearing the news of Tom’s death, he stands ashen in the kitchen telling Calpurnia, Miss Maudie, Scout, and

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9 *To Kill a Mockingbird*, like other works of fiction I will discuss, deals with racial and social classifications in a way that some might find unnecessary or offensive. In order to work honestly with the novels—to bear faithful witness—I won’t sanitize them or write as if the problems they address do not exist.


11 Id. at 80–81.
Atticus's sister, Aunt Alexandra. Alexandra has come for an extended stay to provide a proper feminine influence on Scout. The women are entertaining a group of prissy Maycomb church ladies, the Missionary Society, in Atticus's dining room. Although Tom's death means that the truth of Maycomb's miscarriage of justice will never be officially acknowledged, and its false treatment of blacks will never be made clear even to the ladies sitting in the dining room, Miss Maudie is endowed with the courage to continue. In doing so she has to teach not only Scout but Aunt Alexandra that Tom's death was not in vain; their community is not wholly inattentive; that there is

"The handful of people in this town who say that fair play is not marked White Only; the handful of people who say a fair trial is for everybody, not just us; the handful of people with enough humility to think, when they look at a Negro, there but for the Lord's kindness am I."

... .

"Stop that shaking," commanded Miss Maudie, and I stopped.
"Get up, Alexandra, we've left 'em long enough."

Aunt Alexandra rose and smoothed the various whalebone ridges along her hips. She took her handkerchief from her belt and wiped her nose. She patted her hair and said, "Do I show it?"

"Not a sign," said Miss Maudie. "Are you together again, Jean Louise?"

"Yes ma'am."

"Then let's join the ladies," she said grimly.

Atticus embodies this courage in the most complex way in his personal and legal defense of Tom Robinson. He says to Tom more than once that they will likely lose the case. Which they do, of course, and which brings us to Atticus as a lawyer.

Atticus was admitted to the bar after reading law, or apprenticing, in Montgomery, Alabama. At the time of the story, he represents Maycomb County in the state legislature in Montgomery. His practice is largely of trusts and estates; he helps his clients plan their futures, and, sometimes, is present for them in court. When his farming clients have no money they pay him in meat or produce, and he is grateful.

Judge Taylor, of the Maycomb County Circuit Court, appoints Atticus to defend Tom Robinson, accused of rape. And Atticus, although he dislikes the practice of criminal law, quietly undertakes a vigorous defense. It is the one case in his lifetime, he tells Scout, that is affecting him personally. Every lawyer gets such a case, he says, and

12 Id. at 249-50.
this one is his. Its presence is of such proportion to him that he tells Scout that if he didn't do it, and do it right, he could never ask Scout to mind him again. He has to tell Jem and Scout, and repeat often to Scout, how to handle the reaction (arriving at school and elsewhere) to Atticus's representation of Tom Robinson. Don't fight, he says; keep your fists down, even when they ridicule me and taunt you.

What is peculiar about this, first of all, is the recognition that his work is connected to his life; and not only to his life but to his children's; and not only to their relations with the community but to their relationship with their own father. Atticus's professional ethic is forged to his parental ethic. Indeed, talk of an ethic of this or of that would be unfamiliar to him, because both professional and parental ethics for him obey a single, unitary morality. This distinguishes Atticus's morality from the ethics of the two kingdoms, which severs the personal from the professional. And also from professional ethics, which says that in one's job one should merely do what one's elders tell him to do.

Atticus claims that the personal and professional can be connected, and the novel as a whole demonstrates the truth that the two are connected, like it or not, by necessity. This implies that whether one realizes it, one's ethic at work is of a piece with one's personal ethic. Atticus not only realizes that they are inevitably connected (he cannot tell his children to obey him if he does not obey the rightful demands placed upon him; he cannot have his children's trust if he lies to his community), he works to bring about a truthful and harmonious connection.

That central part of Atticus's story is what I turn to now.

Professor Shaffer has quite rightly written that the primary ethic by which Atticus lives and works, and the way in which he is both a good person and an American lawyer, is by truth telling. Atticus is insistent on truth, not only in the larger matters of community and culture but in the smallest wrinkle of everyday living. He will not lie to Tom Robinson even a little about their chances of success. When he thinks, near the end of the novel, that Jem stabbed Bob Ewell to death and that Sheriff Tate is suggesting a coverup, he abruptly refuses: "[N]obody's hushing this up. I don't live that way." We never see Atticus as agitated as he becomes when he is forced to decide whether to participate in Sheriff Tate's untruthful explanation of Bob Ewell's death. Telling the truth—that Arthur Radley

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13 Shaffer, supra note 1, at 9–16.
14 Lee, supra note 3, at 287.
killed Ewell in defense of Scout and Jem—will destroy Arthur Radley’s quiet life. And the dilemma of choosing between factual truth and protecting Radley’s way of life brings Atticus to a personal crisis unlike even the loss of a death penalty case. His decision that the lie is the right thing to do is perhaps his most difficult and tortured. The significance of Atticus’s truthtelling has been amply explored, however, and I will concern myself with how it is, practically, that Atticus practices the virtue of truthtelling, and then how it is that by doing so he brings together and edifies his work, himself, his family, and his community. He does this in three ways.

In order to tell the truth, one must be aware of it, and one of the ways in which Atticus accomplishes this awareness is by looking at things not only from his own viewpoint but from others’ as well. To see the truth he makes a habit of standing in others’ shoes. The exhortation to do this is common to many religions. When Jesus tells a parable He invites you to stand in the place of another person. Works of fiction, striving to embody the mystery of the Word made Flesh, enable us to move within the skins of many.

Atticus explains to Scout: “[I]f you can learn a simple trick, Scout, you’ll get along a lot better with all kinds of folks. You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.” Atticus practices this himself in raising his children. As Scout tells her Uncle Jack, after he judges her behavior before knowing the whole truth, “When Jem an’ I fuss Atticus doesn’t ever just listen to Jem’s side of it, he hears mine too . . . .” And undoubtedly Atticus’s well-trained habit is one of the reasons he can see so clearly the truth of Maycomb’s culture, and the way in which each of its people fits into it.

When Jem finally succeeds in practicing this, he begins to see into Arthur Radley: “I think I’m beginning to understand why Boo Radley’s stayed shut up in that house all this time . . . it’s because he wants to stay inside.” Jem accomplishes this after being prodded by Atticus to consider things even from Bob Ewell’s point of view. Ewell was exposed and humiliated at Tom Robinson’s trial (it was Ewell who claimed his daughter Mayella had been raped) and after the trial when they met on the street Ewell spat in Atticus’s face and threatened to “get him.” Even under these conditions Atticus takes the trouble to understand the whole truth. “Jem,” he says, “see if you

15 Shaffer, supra note 1, at 3-57.
16 Lee, supra note 3, at 36.
17 Id. at 94.
18 Id. at 240.
can stand in Bob Ewell’s shoes a minute."\(^{19}\) And in so doing Atticus gives his family as well as his community the legacy of truth.

The most striking example of seeing the truth by standing in another’s shoes is embodied in a scene in front of the jailhouse. Tom Robinson has been moved from a neighboring town into the Maycomb jail, and the danger of his being lynched in Maycomb is so great that Atticus spends the night on the sidewalk in front of the jail, sitting on a chair transported from his office, reading the newspaper under the light of a naked bulb strung from an extension cord. The lynch mob arrives—men smelling of whiskey and pigpens in a dark semicircle around the light—and then Scout bursts through with Jem and Dill, their cousin. By carrying on an everyday conversation with the leader of the mob, who is the father of her classmate, she opens his eyes to the reality of Atticus as a person, and, through him, to the reality of Tom. The next morning Atticus says, "[Y]ou children last night made Walter Cunningham stand in my shoes for a minute. That was enough."\(^{20}\)

Polemic and exhortation and diatribe, as it turns out, aren’t the most effective ways of truth-telling. All that is necessary is to stand, or to make another stand, in the shoes of one who embodies that truth. How could Atticus have understood the nuanced untruthfulness of Maycomb’s racial culture except by standing in Tom’s shoes? How could he illustrate the truth to Maycomb other than by making the community, all those gathered in the courtroom, stand in Tom’s shoes through the medium of the trial? This act of standing in another’s shoes is related in at least two ways to the act of lawyering, or (as Calpurnia would say) of lawing. Not only does the attorney stand in the client’s shoes, representing him, but by putting on his client’s case, by telling his story, the lawyer makes the community and even the law stand where his client stood. This is what Atticus does in the courtroom. And it is one of the lawyer’s peculiar means of declaring the truth to his community and to the legal system.

Atticus accomplishes his role of truth-telling in Maycomb by bearing the community’s burden of pressing forward with the truth. There are times when a community is called upon to speak with a single voice, in a single act. A public trial can be one of those occasions, as the trial of Tom Robinson is. Maycomb is called upon to be truthful; it is going to bear responsibility for this public expression of itself, and Atticus is ready to speak for it. He is required to understand the truth, to be prepared with it, and to have the courage to

\(^{19}\) Id. at 231.

\(^{20}\) Id. at 168.
carry the truth forward to its conclusion. Atticus handles all his work in this way. Such occasions do not always announce their importance. Atticus makes a habit of understanding his community, preparing himself well, and courageously doing the mundane, and then, at the critical juncture, finds that he has spoken vicariously for an entire community. In Miss Maudie’s terms, a community with a lawyer like Atticus is privileged. “We’re the safest folks in the world,” she said. “We’re so rarely called upon to be Christians, but when we are, we’ve got men like Atticus to go for us.”

Miss Maudie, as usual, goes straight to the heart of things: because Christ, the incarnate and spoken Word, is the center of Christianity, so truth-telling, which is to say speaking and living that Word, is incarnate to the degree that Christians and characters in fiction practice it. It should also be at the center of the practice of law. No matter what the cost—even if a trusts and estates lawyer has to step from his worthwhile and comfortable practice into the edgy and dangerous practice of criminal law—Atticus is ready to carry the truth into practice. And although Jem is tempted to feel, as Elijah did, that the truth-teller is forsaken, Miss Maudie sets him straight: “You’d be surprised how many of us” he speaks for.

This speaking of the truth establishes the trust Maycomb bears to Atticus. Further, they trust him to do right, and this is a final way in which Atticus serves his community. He is a faithful repository of that trust. To say how this relationship of trust between Atticus and Maycomb is brought about and maintained is much more complicated than merely saying it exists. It is perhaps the quality of remaining fond of his community while telling the truth about it (pointed out once again by Professor Shaffer) that has most to do with the trust in which Maycomb esteems Atticus. Even though they disapprove of his defense of Tom Robinson, they elect him to the legislature. There is, in fact, no opposition, and this is not because Maycomb people are dull.

It is possible that, personal grudges aside, they trust him to stand in their shoes before the government. Sheriff Tate, for example, who testifies for the state in the rape prosecution, and is subjected to Atticus’s cross-examination, shows him not the slightest trace of animosity or mistrust afterward. Indeed, Tate is solicitous of Atticus and of his family’s well-being in the episode of Ewell’s attack on Jem and Scout. This is perhaps so because, in Miss Maudie’s words about At-

21 Id. at 228.
22 Id.
23 SHAFFER, supra note 1, at 3-57.
tics after the Robinson trial, "Whether Maycomb knows it or not, we’re paying him the highest tribute we can pay a man. We trust him to do right. It’s that simple."\(^{24}\)

A relationship of trust is brought about not by the mere performance of duties—and certainly not by mere professional duties—but by cultivating each personal relation and structure of authority in a community. Atticus had respect for Maycomb, for its ways, and for everyone in it, from Calpurnia to Bob Ewell. Scout had to go to school, and she had to mind her foolish New Method teacher. The recluse Arthur Radley was accorded as much respect as Judge Taylor.

Atticus, moreover, was part of that community. He did not hold himself apart from it for all its faults. And more than that, he liked the town. Perhaps he loved it. He told it the truth about itself but at the same time he provided legal services for its poor, free of charge, unobtrusively. He didn’t campaign for social revolution; he spoke the truth in its place. And when he was done with Tom Robinson’s case, when Tom was dead, he went about his work as before, not expecting Maycomb to change, only faithfully doing what he was called to do. The trust Atticus won was not the result of a professional code. It was a response to him. Here is where being a good lawyer requires that one be, at the same time, a good person. The trust that Atticus engendered as a lawyer—without which his story in Maycomb would not be nearly so significant—was brought about because he was not an insulated professional.

The good lawyer, in fact, cannot exist outside the good person.

The ideal of the gentleman lawyer changed, of course, with time and the confluence of other notions of justice. It is visible in some form in the makeup of many American lawyers of this century. Arthur Train published a series of stories about Ephraim Tutt in *The Saturday Evening Post* between 1919 and the 1940s. These stories embody the progressive gentleman’s dissatisfaction with complacent American justice. The state of that justice—wooden, dead at the center, toneless—is presented in a Tutt story from 1919 called *The Hepplewhite Tramp.*\(^{25}\)

The story is about an encounter of old New York with the grit of American street crime. Hepplewhite, a Fifth Avenue bachelor, lives an inherited life of wealth and idleness. He is nice; nothing ever excites or agitates him; nothing shocking or rough or unplanned intrudes in his life of sexless opulence. He has nothing to do but wait for his scheduled day to drone on, punctiliously mediated to him by

\(^{24}\) LEE, * supra* note 3, at 249.

\(^{25}\) TRAIN, * supra* note 4, at 151.
his butler, secretary, footmen, cooks, and maids. He is the façade of bourgeois propriety that is dry rot within.

One afternoon as he is waiting in his library for the precise moment when tea will be served (at which time a guest will be shown back in after settling herself into a guest room), bedlam erupts above. A street thief is sleeping in the pink silk guest bed. As the guest shrieks and Hepplewhite chokes in impotent disbelief, the police are called; they haul the intruder out with a heightened sense of the justice due to Hepplewhite as a man of status and wealth. The intruder is charged with burglary.

Enter Mr. Ephraim Tutt, hero. He is introduced in his law office, smoking a cigar and carrying on a long conversation with his law partner, known simply as Tutt. They are discussing jurisprudence and crime. Mr. Tutt propounds the then fashionable ideas (before World War II) of positivism and progress: crime is only what a given culture happens to forbid. There is nothing that is of itself wrong, only things that happen to violate the will of the powerful, as expressed at the moment in the statutes. A culture's criminal law is approximately the same as its body of social etiquette, Mr. Tutt espouses: each expresses a society's ideas and feelings. Progress, however, requires thinking for one's self and not bowing to tradition or accepting the status quo; therefore progress may require defying accepted notions of crime. That defiance is as valid as the tradition. And so on.

Mr. Tutt ends up representing the man caught in Hepplewhite's guest bedroom. He believes him to be a tired and curious tramp looking for a place to lay his head, thrown out on his duff and charged with everything in the book only because he was a poor nobody who raised the blood pressure of rich old Hepplewhite. It's a case of class conflict, Mr. Tutt tut tuts, of selective justice for rich white males, of the insiders using their property rights to oppress the outsiders.

The case becomes a political issue and goes to trial, where Mr. Tutt has his finest hour. The state presents a miserable case, ending in the disaster of Hepplewhite on the stand. Mr. Tutt has a brilliant cross-examination; his oratory is in the bravest tradition of American advocacy. The fact is he really believes what he is saying; he has personally taken on the cause, it seems, and he carries it out with moral authority. This is a mark of the gentleman lawyer. His work is not a mere technical device; it makes moral claims as well. One ought to practice what one believes.

But with Mr. Tutt there is a curious wrinkle. His practice does not quite match what he professed in the law-office conversation. In the Hepplewhite tramp case he champions rights that inhere in every person—society's moral duty to the poor, the injustice of special treat-
ment for the rich. What right has Mr. Tutt to get exercised about a miscarriage of justice? There is no justice; or, justice is whatever the popular will dictates at any particular moment. What right has he to think his claims are superior?

The Hepplewhite tramp, of course, represents progress. More accurately, Mr. Tutt uses the Hepplewhite tramp to champion his idea of progress. But if justice is merely society's current etiquette—if law is whatever the statutes say, and everything is equally valid—how are we to judge between competing claims of justice? In Mr. Tutt's positivist theory one can't judge, but in the Hepplewhite tramp case he still has the gentlemanly bombast to claim a moral superiority for social justice. The dissenting gentleman lawyer exists in spite of his ideas. Before long the wrinkle will be smoothed and the gentleman lawyer will disappear. Forget moral superiority; the lawyer is a tool to advance whatever claim his client pays for.

The jury finds the tramp guilty. Not even Mr. Tutt's grandiose advocacy could make them believe, as one juryman says, that the tramp went into Hepplewhite's house for anything other than to steal whatever he could lay his hands on. At his sentencing the tramp carelessly admits to the judge that he's a burglar, and has already been in jail three or four times. "But you can't give me more than a year for illegal entry," he admonishes. When he heard Hepplewhite's butler coming up the stairs, he says, he dove into the pink silk bed and pretended he was asleep.

And so it becomes apparent that the progressive American lawyer, champion of the disadvantaged, herald of the new egalitarianism, is as ignorant of the reality of the heart of man as the establishment he opposed was ignorant. All the histrionics of Ephraim Tutt only conceal the underlying moral duty when a stranger comes destitute into one's house. Instead of social justice bureaucratically imposed, perhaps one should give the stranger a cup of cold water and clothe him and feed him. This kind of justice—a personal gift to another, something like the retail charity Train refers to elsewhere—is barely hinted at in the story.

Which is at least partly because the Tutt stories are "idea" fiction. The characters are not real people but cartoon figures sent out to employ—or preach—the writer's ideas. These characters not only make frustrating reading, they are also often inaccurate with the truth. The Tutt stories give little account of a community in which the

26 Id. at 174.
27 See Matthew 25:31-46.
28 SHAFFER, supra note 1, at 496-98.
new gentleman lawyer lived or worked, or of any significant relationship with a client, or indeed any significant personal interaction at all. This may be because people seem to have been only incidentally necessary to the new gentleman’s politics.

II

Atticus Finch survives his troubles intact, even wiser; Timothy Colt is undone by his. Colt is the young New York lawyer of Louis Auchincloss’s *The Great World and Timothy Colt*, which presents a man of modest background making his way, with his young family, into the tangle of loyalties and politics and empty promises of the firm. Atticus seems to revolve, troubles and all, around an imperturbable core. Timmy (as he’s called), when his work brings him to face his own center, is sucked into the vacuity left by his traded-in professional soul.

Auchincloss wrote *The Great World* in 1956, four years before *Mockingbird* appeared. The seamless narrative span of *Mockingbird* is evident in contrast to the inferior art of Louis Auchincloss. Not a trace of the author intrudes in Scout’s voice. Reading *The Great World*, however, one feels the presence of the writer sitting in his smoking jacket in a dim and ornate study, sending and recalling his characters and handing them their speeches.

For all that, however, it’s an arresting tale, a cautionary parable for a law student beginning to work out the amount of time a legal career will take from family, or beginning to recognize the way in which law can alter conversations with one’s spouse.

A striking difference between Atticus’s Maycomb and Timmy’s world of Sheffield, Knox, Stevens & Dale is that Atticus was a part of a larger community. He dealt, on a more or less daily basis, with businessmen, farmers, lawyers, children, blacks, a judge, housewives, drunks, dying people, mad dogs, white trash, and, presumably, a local Methodist church. *The Great World* of Timmy’s community is straightened and reduced. His community has become his firm. The lawyer in such a firm, whether partner or associate, is at least one remove away from a local community—by which I mean interleaved families and individuals carrying on daily life. The lawyers in Sheffield, Knox are taking part in and serving the life of the firm, and the firm in turn is to serve various communities. In a large firm the immediate goal of caring for the life of the firm crowds out a lawyer’s connection to those outside, and has the power to submerge a lawyer’s sense of the

29 Auchincloss, *supra* note 5.
needs of anybody else. Timmy’s greatest ethical dilemmas rise from the conflict between serving the firm and serving somebody outside.

One of his first crises is whether to apologize to a client he has offended. The client, George Emlen, is small-minded and has second-guessed Colt throughout the corporate deal Colt is handling for him. Emlen finally publicly belittles Colt, who responds with a shrill and self-pitying public insult. The firm requires Colt to apologize, and he doesn’t have the humility to do it gracefully. On his terms (which are skewed) the choice is between yielding to the needs of the firm by soothing an important client, and serving the client right by telling him the truth in public. The real issue may be Colt’s adolescent ego, and there is certainly a better way to help his client than by a foolish outburst. But for Colt, who does apologize, the apology is a selling of himself to the firm. The goals of the firm—fast becoming a community with only its success in view—will now be his guide. In his words, he has sold his soul for a junior partnership. And the firm, when it becomes an end in itself, is an incestuous community indeed.

Near the end of his trajectory through the bottomless cavity of his interior, Colt reaches another dilemma. He must decide whether to fulfill his fiduciary duties as a trustee or to look the other way while an important client and the firm’s managing partner enrich themselves. He is to distribute a trust equally between three beneficiaries: George Emlen and his two sisters. George has proposed a distribution that appears equal, giving his sisters the cash they want, but handing himself stock of much more value than his rightful share of the trust. Sheridan Dale, the firm’s sleek new managing partner, has brought pressure to bear on Colt to conceal the fraud. This time Timmy falls to the right conclusion, placing the interests of the sisters, naïve outsiders, above the demands of the firm.

Timmy’s movement through his identity crisis (it’s that bland) isn’t satisfactory. He minces around with another woman, trying to appreciate avant-garde art and other Wonderful Things, needing space, and in the end goes back to his wife, Ann, and their two children, still not sure of himself, having neither faced his reason for living nor acted it through.

Henry Knox, dean of the firm until his death, predecessor of Sheridan Dale, is a much more complex figure. His life work has been to rebuild the firm from the soft rot of past greatness into a partnership of gentlemen. In his image the firm is genteel and organized but without the harsh and stainless-steel efficiency of other large firms. Lawyers work together in the shadow, supposedly, of the age-old tradition of lawyering. (They really work in the shadow of the life-
size portrait of Mr. Sheffield, Knox’s predecessor.) Associates were apprenticed—even fathered—under that gentlemanly tradition. In building a firm Knox has not lost sight of the moral aspects of a lawyer in a community. He himself as a young partner had taken a year’s leave of absence to raise funds for a divinity school. He and his wife see this as the embodiment of Knox’s status as a gentleman lawyer. He has been a good man as well as a lawyer. His brilliant legal career has bowed to and joined hands with his religious and moral self. And Knox is sensitive to the moral difficulties of lawyering:

“I’ve often wondered,” he mused. “Your client wants to do something grasping and selfish. But quite within the law. As a lawyer you’re not his conscience, are you. You advise him that he can do it. So he does it and tells his victim: ‘My lawyer made me!’ You’re satisfied, and so is he, and the moral question falls gently between the two schools.”30

At this moment he is talking to Ann, Timothy Colt’s wife, who is pleading for some relief from the volume and stress of Timmy’s work.

“You don’t believe a word of it,” she exclaimed, provoked by a detachment she knew was not genuine. “You know you believe the law is a great profession!”

“Do I, my dear? What makes you so sure?”

“Because you’ve created a world that believes it,” she replied, thinking suddenly that it was Timmy’s world, this world that he now affected to despise. “Could you have done that if you hadn’t believed it yourself?”

“I wonder. I wonder indeed.”31

Knox has used the image of Sheffield, one of the founding members of the firm, as the figurehead of his titanic new firm. He admits to Ann that there is artifice in his use of the Sheffield legend; in fact, he created the legend. Ann, in her distressed impetuosity, reveals one layer of his self-deception; he has created the legend not for the firm but for himself, so that he can believe. Knox is not dedicated to the truth to the degree Atticus Finch is, nor are those around Knox (Ann Colt and Mrs. Knox, for example) truth tellers equal to those surrounding Atticus: Calpurnia, Miss Maudie, Scout, and Jem. Knox declines to take full responsibility for himself. Unlike Atticus, he blames the system instead of telling the truth to the system. “I want you to remember,” he says to Ann, “that I, too, was a product as well as a cause. Of the whole bloody system.”32

30 Id. at 73.
31 Id.
32 Id. at 74.
Atticus is clear, in the end, about the connection of law to life. He can’t live one way in town and another way at home, he tells Sheriff Tate, rejecting Tate’s offer to cover up what he thinks is Jem’s killing of Bob Ewell. He can’t go to the courthouse and ask for Maycomb’s truthfulness if he won’t be truthful himself, as Knox was not. He can’t expose Maycomb’s lies to protect its own and go home and lie to protect his own or his life would disintegrate. He would not be able to ask for his children’s obedience. He could not have his children’s trust. He wouldn’t be able to hold his head up. Knox’s firm could not ask for lawyers who were good men, then subvert their lives at home; nor hold up the model of the great Sheffield while growing hollow with sterile specialists. This is what Timmy, in an incomplete way, is finally able to do, after a modicum of honesty in his work; he is able to hold up his head, however limp, in his home.

III

The story of Mario Fabbri is a helpful contrast to the failures of American legal culture. Mario is the son of an Italian immigrant; his parents came from Genoa to New York and opened a restaurant on Twelfth Street. Mario grew up with the benefit of his father’s attention. Through it, he got a job as an office boy in a Wall Street firm, where the managing partner took an interest in him, put him through college and law school, and hired him as a clerk. Mario becomes a member of the firm and succeeds his benefactor as its dean.

Along the way he marries the daughter of a partner. His bride, Pussy Fish, is a white Anglo-Saxon Protestant. She grew up in an old New York family and has acquired a progressive social consciousness. Mario’s success as a lawyer in this WASP culture (he calls it that) has accompanied his making peace with it. At least in some sense. He has accepted its definition of success: a townhouse in the East Sixties and a beach house on the north shore of Long Island. He gives up Catholicism, not for social reasons but because he doesn’t believe in it. His election to the country club is the social triumph of his life. What remains of his upbringing, besides his Italian love of good things, is, perhaps, his sense of loyalty and of family, which is several degrees more developed than your average Yankee’s.

Fabbri is disbarred for helping a friend conceal bribery. The friend, Gridley Forrest, is, or was, a judge on the United States Court of Appeals. The two become personal friends after Fabbri is voted into the country club; here Forrest asks Fabbri to join him in his

33 Auchincloss, supra note 6, at 149.
weekly eighteen holes of golf. Afterward they have drinks in the bar overlooking the riding arena. This is where Forrest tells Fabbri one Saturday that he accepted payment from one of the parties in a patent case to assure a decision. He took the bribe because he was hard up for money, he tells Fabbri, and had to save one of his investment properties from being foreclosed upon. He asks Fabbri, a patent expert, to help him write a legal memorandum to convince the judge who will write the opinion. Fabbri does it. Back in his office, without letting his secretary or any associates help (he calls this encapsulation, an elementary decency to keep from contaminating others), he sets about researching and typing the memo.

Very soon rumors begin to circulate that Judge Forrest is on the take, and a week later he is indicted. He comes to Fabbri asking for representation. Fabbri is stunned, and even more stunned when Forrest says he will deny the whole affair. On these terms Fabbri summarily refuses to represent him. To Forrest, the American, this is letting down a friend in need, and for this Forrest implicates Fabbri.

What is peculiar here is that Fabbri is perfectly clear from the start that writing the memo is an act of judicial subornation deserving disbarment, but he believes it nonetheless to be the right thing to do. And he still does:

Yet I was actually exhilarated! I was strangely clear in my mind and heart that I was not only justified but praiseworthy in my act of judicial subornation. I say "strangely," not because I have changed my opinion today, but because, in view of all the horror that ensued, it does seem curious that I should not have had more doubts. I think I may have felt some still unsettled debt to the great nation that had rescued my family from the sad poverty of its origin. I had believed in the American system, in hard work, in getting ahead, in a society that at least tried to be fair to the individual if that individual had only some respect for it, I had prospered in that society, and now there was something I could do to show my gratitude.34

What follows saves this from fatuousness. Fabbri acknowledges that what he did was a cover-up, and addresses the ethics of it:

The basic moral question is whether or not he who covers up believes, with any basis of reason, that the criminal will not repeat his crime. I believed, certainly, that Forrest had taken only one bribe and that he would never take another. And I accepted—and still accept—the principle that the concealer of a crime must be condemned, legally and perhaps even morally (though the latter may seem illogical), if his attempt fails. His is a lonely decision. He

34 Id. at 164–65.
has taken the law into his own hands. He must not complain if he is
cought. He has elected to be his own judge and jury. He has sen-
tenced himself.
But I refuse to hang my head; that's the point. Even today.\textsuperscript{35}

Fabbri and Judge Forrest are clearly different. Forrest is the tradi-
tional American Yankee gone corrupt. It's easier for the outsider to
condemn him. He turned to crime to get a little money, and once in
went whole hog. No honor. He got an innocent friend involved, with
no consideration of Fabbri's life or family. He refused to plead guilty,
and when Fabbri declined to lie for him to the bitter end, Forrest
pulled him along on his way down.

Fabbri is harder to figure. Why does he think it was right to do
what he did—to conceal as far as he did (but no further) a crime for a
friend? According to the most accepted canons of the profession, For-
rest not only had the freedom but the right to deny everything, plead
not guilty, and have the vigorous representation of a lawyer. But this
Fabbri would \textit{not} help him do.

He says, interestingly, that the concealer of crime must be legally
and morally condemned \textit{if he is caught}. Fabbri's conscience, however,
does not condemn the act. In fact his conscience very much approves
of it. If it is not the doing that is wrong, why should the discovered
concealer be legally and morally censured? And why does Fabbri ac-
cept the principle by which he's censured? How, indeed, can Fabbri
believe that it's not wrong to do it but it is wrong to be caught?

Early in the story he makes a distinction between technical
wrongs and moral wrongs. Perhaps this is the key. In his system of
goods, his own hierarchy of imperatives, it is not wrong to cover a
friend's fault if the friend committed it in a moment of weakness and
isn't going to make a habit of it. In fact I suspect Fabbri's conscience
would have condemned him had he not helped Forrest, even though
(as he knew) his duty in the legal system was to report Forrest. The
covert cover would in his eyes be a moral good (though not in the
sense that love covers a multitude of sins, which means forgiveness),
and only a technical wrong. So far, in my construction of Fabbri's
moral sense, only two people are involved: the criminal and the con-
cealer. The concealer can encapsulate his cover-up; he can prevent it
from seeping out and contaminating the community. And Fabbri be-
lies he ought to do that.

When the concealer is caught, however, more is involved. The
integrity of the community system is at stake. If the system were to
overlook crime (as the single person ought to) the entire system is

\textsuperscript{35} Id. at 165.
compromised. The system has to condemn and punish the wrongdoers and all aiders and abettors, or it has no moral justification in punishing anyone. This, perhaps, is why—or something like why—Fabbri believes it is right to conceal a crime but wrong to be caught concealing a crime. It also explains why encapsulation of his cover-up is necessary. Covering up is right only if private, so that no one else knows about the crime or the cover-up; that justifies it. As soon as the public becomes involved, however, public order is at stake, and the law has to be satisfied.

Fabbri's actions can be partly explained by pointing out that he was loyal. When his sense of loyalty to a friend came in conflict with what he knew to be—as he had accepted it—his WASP professional duty, he put loyalty first. This doesn’t, however, answer the question why public and private duty would come into conflict. Perhaps friendship was instinctively more important to Fabbri than propriety, at least until Forrest proved he was no friend. But at the root of this, I believe, Fabbri held two separate notions of morality: a public professional responsibility other than his private morality.

The claim of historical American ethics is that public professional ethics are public because they are right. Related to this is a legal truth; crime is never private. A crime is an offense against the public, not because it hurts someone, or someone has knowledge of it, but because it is wrong. It violates God's Word, or the nature of things, or the compact we have commonly agreed to, or the statute books; it's against the law. Encapsulation in American law has no moral or legal effect.

WASP professional ethics, which Fabbri had accepted for his public but not his private life, instructed Fabbri to report his friend. That was an unacceptable and probably unthinkable thing for him to do. Indeed it isn't what many would think the right thing to do. What neither WASP legal ethics nor Pussy could do was give Mario Fabbri an acceptable ethic for his private life. I believe it should have been this: go to your friend and tell him his fault. Counsel him, instruct him, implore him to confess his fault. You may forgive him; the law may or may not. Loyalty does not mean you keep your friend or classmate from facing the consequences of a deed. It means you help him in his or her best interest. That means you consider his ethical well-being, not only yours. If he refuses to face his wrong, as Forrest might have, then you report him. At that point it is in his best interest. The law is there not only to protect the integrity of public order but to drive wayward humans to their senses. They need to be restored.

Fabbri might have been in a position to understand this if he had belonged to a community. He had none. On his hedonistic climb to
American success he had abandoned the Catholic church, and thus a stratum not only of his culture but of his upbringing. Pussy Fish led a separate life and kept the children with her. All Fabbri had, in fact, was what he purchased: a country club membership and the fickle society of the wealthy.

IV

Legal ethics became an establishment in America largely through American Protestantism. Those who entered that establishment from other cultures and religions had to deal with its sometimes foreign rules and standards. Mario Fabbri encountered them, and they were his ruin. In the immigrant culture that came to form America, others proved more resilient.

Jerry Kennedy, "the classiest sleazy criminal lawyer in Boston" who narrates several of George V. Higgins's novels, also encountered those rules and standards. Unlike Fabbri or Mr. Tutt or Timothy Colt or Henry Knox, however, Kennedy practices law solo, which puts him in a different relationship to mainstream legal culture. Because he has shunned the law firm establishment he is able to bring his own beliefs and common sense to bear to a greater degree in his practice.

To begin with, Jerry Kennedy has a successful marriage, unlike any lawyer in the works of fiction so far considered. The above description of Kennedy as a lawyer is from his wife, Mack, whose real name is Joan. If you ask her what her husband does she'll say, "He's the classiest sleazy criminal lawyer in Boston," even if he's standing right there. She understands her husband and understands what he does. And he is interested in her. She and Jerry talk to each other easily and often, and their talk interpenetrates his work. In fact, they love each other, and I suspect their marriage is a large part of what makes Kennedy successful, on his own terms, at what he does. It is his wife who keeps him content with his work. It is his ongoing love, his conversations with Mack, that sustain his vital interest in that work.

I will look at two aspects of the story of Jerry Kennedy: the ethic of rebellion in American lawyering, and the problem, again, of a separate professional morality.

36 Higgins, supra note 7, at 16.
37 Id.
38 Unfortunately their marriage doesn't withstand further novels. At some point between Higgins's Penance for Jerry Kennedy (1985) and Defending Billy Ryan (1992) they divorce, and Jerry's professional life reflects the loss. But at this point in the narrative Mack and Jerry's relationship does, I believe, sustain his work.
Jerry Kennedy is a criminal defense lawyer. This is not white collar criminal defense going on behind quiet firm walls. Jerry represents street criminals. He has no one to please in his practice besides himself and his secretary, and Mack—no etiquette to maintain, no partners to satisfy. He does not rebel against the social or theoretical implications of the law, as Mr. Tutt did, nor is he a revolutionary of any sort. He is attempting neither social change with the law nor a change of the law itself. He is simply using the law (as it was developed by the profession) to make a living. In doing so he operates outside the current of the profession, which probably does not want to be troubled by, let alone immersed in, the application of American law to the subculture of petty and not-so-petty crime. Kennedy follows his own lights. He is of Irish immigrant stock, settled in Boston. No relation whatever to the real Kennedys, he hastens to tell you.

Kennedy works almost exclusively for those whom the law establishment finds too unsavory to handle. Prostitutes, a stooge in a drug ring, a professional car thief, a fetid homosexual who solicits an officer. In contrast to the rarified circles of large-firm clientele, Kennedy does his work among the scum of street culture. One cannot help being reminded of the contrast between the company the Pharisees kept and the company that Jesus kept. Lest one leap to an idealized conclusion, let me say that Kennedy does not give his clients the kind of help or message Jesus gave.

But Kennedy does seek out these people, at least those among them who can pay, and by doing good work for them without holding back, his reputation among them grows. His office is utilitarian: orange plastic chairs, a no-nonsense secretary. He is not too good for the lowest of lowlifes God created. At his best Kennedy becomes friends with his clients. Sometimes his clients befriend Kennedy. These friendships go home with him at night and involve Mack, through conversation. With this help Kennedy and his clients solve their problems. This is one aspect of Kennedy's dissent from the gentleman lawyer culture, at least from its perversion into quiet halls of snobbery. He is viewed with distaste by those members of the profession—"as a factotum similar to the garbage man, useful for the performance of certain unsavory tasks, much as a Mass. General cardiologist would contemplate an Army doctor turning up at a dinner party in Pride's Crossing . . ."39 Kennedy, not to be outdone, views his critics with similar disdain.

He also rejects any idealistic notions about his own practice of the law as anything more than a living. A good living, a fortunate way of

39 Higgins, supra note 7, at 61.
life, but a job nonetheless. I don’t suggest that any of these assessments are wrong or improper, only incomplete. Kennedy has no pretensions of bringing about justice through his use of the law, as Mr. Tutt did. Kennedy is grateful for his job, worn out by it, discouraged and rewarded by it, but in the end it amounts to something that merely lets him and Mack and Saigon (their teenage daughter) indulge in lobster and Heineken and a house on the beach. The ethics of his career is doing his job well. That, of course, is something the American Protestant culture ought to appreciate. But Kennedy lacks a moral perspective larger than his family and clients. His rejection of all else is another element of his dissent from the professional establishment.

Kennedy also practices a separation of professional from private ethics. This is apparent from the beginning of the story, in his discussion with Mack about a client who is a pimp. Jerry and Mack are talking about a neighborhood boy who is bad news, about how difficult it is to be a parent, and how awful the consequences of failing as a parent are—they sent their own daughter to Fontbonne, a “finishing school with a good curriculum where most of the students and teachers happen to be Catholics.”40 And then they get to Jerry’s client, a twenty-year-old pimp who beat up one of his hookers with a claw hammer. One elbow and forearm mended badly. He is up for assault and battery. He’s an animal, Jerry says, but he’ll get off easily.

“Will he?” Mack said.

“Sure,” I said. “What the hell do you think brought the victim with him to my office? She’s gonna back out of her story. The cops interviewed her while the emergency room people were setting the broken bones and fitting the casts. She was scared of him then, and she thought they could protect her, so she told the truth. He accused her of holding out some of the money and she denied it and he beat the shit out of her. Then she got out of the hospital and she refused to go home and she found out the cops couldn’t protect her after all. So she went back to her man, and back to the street, and now she’s hooking her tight little white ass off down on Stuart Street, to earn my fee and spring her man because she loves him.”

“You shouldn’t take that money,” Mack said. “That’s, that’s dirty money. That’s blood money.”

“It’s living off the earnings of a prostitute, I suppose,” I said. “I know where it came from and I know how it got there and I don’t like it either. But you could say that about almost every fee I get—it’s somebody’s ill-gotten gains.”41

40 Id. at 35.
41 Id. at 38–39.
Kennedy continues in a common justification (is it a rationalization?) of taking fees with knowledge of how they are got: a realtor, he says, isn’t under a duty to make sure that the commission she’s paid is untainted money. A transaction provides a moral cutoff, and the person receiving the money is not responsible for wrongs done upstream. Mack, who is a realtor, says this isn’t the same, and she’s right; the difference is the state of mind of the one being paid. Jerry is taking his fee with actual knowledge of the moral and legal wrongs that procured it. Mack’s state of mind in taking a realty commission is neither knowing, reckless, nor negligent, and she has every reason to believe the fee coming from the sale of a house is legitimate. Indeed, a very old legal principle says that in a transaction one who takes without knowledge of prior wrongs is innocent and will be protected. The bona fide purchaser of legal title cuts off equitable claims. One who takes with knowledge of illicit procurement, however, is in bad faith and will not be protected.

Mack’s common sense tells her this, but Jerry sees the matter in terms of a professional ethic. He never considers the interesting ethical question of where one’s duty lies when one does have knowledge that a fee is tainted. Instead he turns to the party line in the profession, to avoid his wife’s conscience, and he sees no need to reconcile the professional and the private. He simply concludes the discussion:

"Trouble is, the Constitution says every man’s entitled to counsel of his choice. He chooses me, I have my living to consider. The Constitution doesn’t say anything about it. Because not eating is unpleasant, I generally take the case."42

As with fees, so with clients. He does his best to do what his clients and the profession and the law tell him to do: get them off. He doesn’t allow other means of helping them to intrude. He doesn’t let concurrent duties to others involved in a legal problem modulate how he deals with his client. He is a man with a job, a good job, and he does it well, but it is a stripped-down notion of a profession. His success is measured only in how many clients he can please, and the fees he collects. The community he deals with would not acknowledge him as a truth teller, but as a manipulator with excuses more artful than any they can devise, yet a lawyer. A Pharisee.

V

William Maxwell wrote Time Will Darken It in 1948, one of his earlier books, and the earliest of the novels represented here. It is also

42 Id. at 39.
the best. Maxwell's writing is brilliant beyond words, informed by the quiet spirit of grace and wisdom that accompanies the language of a truthteller. It's a sad book, brutal, in fact, with an omniscient narrator hovering like a prophet over his characters, telling us what the world is really like after they have had their say or gone to bed. It is the story of Austin King, a lawyer in the small Illinois town of Draperville after the turn of the century, with a practice much like Atticus Finch's.

The office of Holby & King is on the north side of the courthouse square; its clients are farmers and small-town businessmen. Austin's father, a judge of local renown, began the firm and took on Mr. Holby, who is now Austin's senior partner. Austin occupies his father's office, larger than Holby's and with a view of the square, and he has kept it the way it was in his father's lifetime. But he is not his father. Judge King belonged to a previous generation of lawyers, dramatic figures with overblown rhetoric and leonine heads who practiced the art of legal drama. They were trained on Chitty, Blackstone, Kent, and Starkie, before the Harvard Law School case system, and they lived and argued the epic principles of law with a philosophic dignity, Maxwell tells us—all absent in the fact-driven and mundane currency of Austin's generation.

Judge King was the nearest Draperville had come to producing a great man. During the last years of his life honors had been heaped on him. (Austin still wears a watch publicly presented to his father after his most acclaimed case.) Besides legal and political talent and largeness of mind, Judge King loved stories, good living, and he was courtly and popular with women. Now, after seven years of practicing law in his father's office, Austin still does not feel it is his own. There is no evidence that Austin's father gave him any instruction, either by example or advice, on how to live and how to work. Austin lives and works in the beguiling emptiness of his father, where the entire novel dwells. It opens on Austin and his wife, Martha, having a fight upstairs while their dinner party guests arrive and fill the front room. The party is in honor of their houseguests, the Potters, a family from Mississippi that Austin invited for an extended visit. Martha did not want them to visit and now resents their intrusion. She is newly pregnant. Austin has invited the Potters in order to satisfy an old debt on his father's account, incurred when Judge King was a boy and Mr. Potter's father took him in and treated him as a son. The Potters' stay, and its aftermath, cast the darkening shadow of Austin's father over the entire novel.

What the Potters set in motion destroys Austin’s marriage, his relations in his community, and his law practice. But the way in which Austin invited the Potters—out of perfunctory obligation on account
of his father—underscores his reliance on perplexing whims, a form of indecisiveness, in larger matters. His decision to practice law was made with the same absence of purpose, and his practice continues in a kind of competent hollowness.

It was never [Judge King's] intention that Austin should become a lawyer. He died in 1901 before Austin knew what profession he wanted to follow. His father's memory, tenaciously preserved in the minds of the people who loved him, the sense of personal loss, and perhaps most of all the realization that he had never really known his father made Austin choose law as a career.43

This is an early indication of the lack of conviction that follows Austin in nearly everything he does—the ethical conviction that is necessary to sustain a gentleman lawyer's practice and life. If the gentleman lawyer is a good lawyer by being a good person, Austin King dramatizes that the person and the lawyer, if they don't stand together, fall as one. You can be neither a good person nor a good lawyer, we see in Austin, without moral truth. And within these two layers lies Austin's story. He is unable to either content himself with or move beyond the outline of his father, and he attempts to live and practice with no undergirding purpose.

I will look at these traits through three aspects of Austin's story: his deteriorating relationship with Martha, his handling of a group of clients via joint representation in a corporate venture that sours, and his relationship with Nora Potter, Mr. Potter's daughter. At age sixteen Nora falls in love with Austin and wants to study law in his office. In a form of passive defiance, the only glimmer of Austin's true feeling for his father, he accedes to Nora's wish.

While Austin and Martha's quarrel at the beginning of the novel is of the sort that most married couples experience, they grow more and more incapable of speaking to each other as the Potters' stay drags on. The imminent threat to their marriage is of course Nora, who has fallen in love with Austin. But this is a problem only because Austin allows it to be. Usually capable and true, he is disabled by Nora's talkative and single-minded search for honesty, and his ambivalent reaction to her arouses Martha's mistrust. By the end of the Potters' visit, when Austin and Martha are finally alone again, their conversation is only of trivialities. They are involved already in avoiding each other, and neither seems to care enough about the other to risk the endangering world of truthfulness. Austin pressured Martha

43 Maxwell, supra note 8, at 65.
into marrying him before she was ready, and when she didn’t meet his expectations, he decided

*I can make a marriage all by myself...* Well he hadn’t, and the only thing that seemed at all strange was that he had tried so hard, that it was so hard for him to stop trying, even when he no longer cared what happened unless possibly something inside him didn’t want to try, didn’t want their marriage to work out.  

At the end of the story, after Austin has attempted in his own way to right things and failed, Martha makes one last effort to speak to him about their marriage. They are in bed. Austin falls asleep while she is in midsentence.

Mr. Potter stays long enough with the Kings to get some of his new acquaintances in Draperville to invest in a business venture back in Mississippi. Austin declines to put down money, but represents the group and draws up the agreement and the documents of incorporation. Mr. Potter returns to Mississippi and it slowly becomes apparent that things are not going to work out as everyone had hoped, partly because Mr. Potter has not been entirely honest. Eventually a letter comes into Austin’s possession, revealing potential fraud by Mr. Potter, and Austin is advised by an old friend, not a lawyer, to bring it into the open. The shareholders—friends of Austin’s—end up losing their money, and naturally they turn on Austin. This Potter was a relative of yours, wasn’t he? Why didn’t you put money up? Did you have some reason to know this would happen?

Austin’s ethical duty to these shareholders, who were his clients in a joint representation, was to immediately inform them of anything he knew that affected their interests.  For his first inkling of Potter’s dishonesty, he should have acted on that duty. For their part, they see Austin as a friend, not a lawyer, and since they know him and don’t know Potter, they feel Austin is responsible. Potter would no doubt prefer Austin to conceal the fraud as if he were Austin’s sole client. Austin finally is unable to handle the conflicting private and professional duties. First he lets the matter go, then deals with it as best as he can, defending himself to the six Draperville shareholders and a

44 *Id.* at 327.

45 For a discussion of this duty of loyalty in conflict with the duty of confidentiality in joint representation, see, for example, New York State Bar Ass’n Comm. on Professional Ethics, Opinion No. 555 (1984). Rules 1.7, 1.9, 1.16, and 2.2 of the Model Rules of Professional Conduct (1996) would have required Austin to withdraw from representing any of the clients after they fell out with each other. And Rule 1.8(h) would have prevented Austin from settling any malpractice liability with former clients without first advising them in writing to get independent representation.
local judge in his study (at home on an autumn evening) with Martha listening to the raised voices from the living room and wishing Austin would smash his accuser’s jaw.

But Austin has his own questions to answer:

What to do when Martha (whose happiness was far more important to him than his own) let herself strike out at him, wildly and carelessly, as if it were a matter of complete indifference to her whether the next bitter thing she said would be the remark that neither of them would ever forget. And why what he did for one person took away from what he tried to do for another, so that no matter what he did or whom he tried to please, he still felt somehow in the wrong.46

Nora stays behind when her family returns to Mississippi, and lives with the next-door neighbor to Austin and Martha, a widow who is a failed artist. Nora could not bear the thought of returning to the tedious quotidian of her family’s plantation, where she knew exactly what would happen each day, where her spoiled brother and weak father and jaded mother plodded along. She comes to Austin’s office and tells him she is in love with him. He tells her she’ll get over it, but he doesn’t break off their communications. Eventually he allows her to read law in his office, and before long gossip about an affair with her causes his clients to go elsewhere.

Austin’s protective but efficient legal assistant (she is called a secretary) is filled with such rage at this young woman Austin has allowed into the office, she has a nervous breakdown and eventually leaves the firm. Mr. Holby suggests that Austin take an extended vacation with Martha, who is now very pregnant. Meanwhile Nora, applying Austin’s earnest permissiveness to daily troubles, sloshes kerosene on a feeble fire in a coal furnace and its explosion permanently disfigures her face. Austin is oblivious to his faithful secretary’s disintegration. He goes to Nora to clear things up with her, to tell her that although she has done nothing wrong she must stop thinking of love: “If anyone was to blame, he was, for not realizing sooner that there was no way he could guide her through an emotional crisis that he himself was the cause of.”47

But their meeting doesn’t work out as Austin hopes; he leaves Nora in hysterics, and begins to realize that he can’t do everything, that his desire to please will not solve everyday problems of injustice. Which brings Austin to the zenith of his personal trajectory: “If everything I do is wrong, Austin said to himself as he paced the length and

46 Maxwell, supra note 8, at 126.
47 Id. at 324.
breadth of his office overlooking the courthouse square, then I will not
do anything. I will not raise my hand."48

Austin’s habit is passive resistance; he allows to happen what will,
and so it does, and overcomes him. He lacks a reason to do anything
because he does not have Atticus Finch’s understanding of truth.
Maxwell writes:

People often ask themselves the right questions. Where they
fail is in answering the questions they ask themselves, and even
there they do not fail by much. A single avenue of reasoning fol-
lowed to its logical conclusion would bring them straight home to
the truth. But they stop just short of it, over and over again. When
they have only to reach out and grasp the idea that would explain
everything, they decide that the search is hopeless. The search is
never hopeless. There is no haystack so large that the needle in it
cannot be found. But it takes time, it takes humility and a serious
reason for searching.49

Austin has each of these—time, humility, and a serious reason for
searching. All are necessary to work out the demands of clients and
ethics and family in an imperfect legal system. However to persevere
in harmony with all of these a single truth must unite them. That is
what Austin King does not have, an incarnate truth at his center, me-
diating his actions and speech.

It’s as if a practitioner of Eastern religion, engaged in the practice
of law, has been set down in America at the beginning of the century,
in the midst of an aggressive mob. He tries to quell its unruliness by
extending unprincipled permissiveness to each individual. A recipi-
ent of that permissiveness, like Nora, may take it at first as thoughtful
generosity, magnanimity, even kind consideration, but it is the oppo-
site of the scrupulous restraint Austin practices in his own life, con-
tained as he is by the microcosm of his society (the plainly rural
people he represents in Potter’s investment scheme) and the con-
straints his father’s hollow specter imposes.

Austin’s passive permission is, finally, lawless. Caught in the dis-
crepancy between what he practices in his father’s firm and in his life
and what he encourages others to do, he is overtaken by an anomie as
dislocating as the affliction of Generation X. His own path must ap-
ppear to him as unvaried as enameled rails. In his existential self-loath-
ing he indulges in the only permission he grants himself: to take his
own life. But here his irresolution succeeds, or he is overcome by the
external interposition of grace. Grace is defined by the statutes of the

48 Id. at 325.
49 Id. at 86.
canon of both covenants of the Bible as *that which we do not deserve*. The agent of grace is not entirely clear. "The station master said something that Austin (with the light falling all around him from a great height) did not hear." Austin draws or is drawn back from an oncoming train he has stepped onto the tracks of the Draperville depot to meet head on. He has come to the end of attempting to balance what he would see as compassion with the gracious interposition of rightly practiced law. He has in the fullest sense stepped into the shoes of the other, those whose lives his permissiveness has destroyed (Martha's life eroded to the point of divorce, their children left in a broken home, Austin's spinster secretary who will not recover, Nora Potter's scarred face), and he carries the concern of the client to its ultimate conclusion. If there is no fair and just advocacy for the helpless, no way to join practice and life, there is no reason to live.

VI

When my classmate asked me, "As a person or as a lawyer?" it wasn't the first time I had encountered separate professional ethics, but it was the first time it struck so close to home. I was puzzled. It hadn't occurred to me to view what I was learning as a separate category from the rest of my thoughts and to evaluate it with a self-dealt standard.

I mentioned my surprise at his response, and he told me I would learn some day. That I was idealistic now, but in time I would realize you couldn't let your personal beliefs leak into the self-defining circle of the law. In two years I haven't seen enough to change my mind. I couldn't say whether my classmate has.

Fiction has the capacity to go before us as an example so that the young don't have to repeat the mistakes of their elders. Atticus was the same downtown as he was at home. Henry Knox was also, but he deceived himself both downtown and at home; Mr. Tutt widened the gap, practicing an idea of justice whose underpinnings he no longer believed. Fabbri, who allowed his original community to disintegrate, nevertheless tried to take the value, loyalty, out of it and plug that into the profession; it crumbled in his hands. Kennedy, in his own community and on his own terms, succeeded. Colt saw what was wrong at the firm, buckled, and destroyed himself personally. Austin King with his personal flaws destroyed his office, his community, and his home.

I worked among lawyers before coming to school, and one of the things I saw as an outsider was the separation of personal ethics from

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50 *Id.* at 337. See also *Acts* 9, where, on the road to Damascus, the Apostle Paul is dropped in his tracks by the stunning light of the Son of God.
practice. And the substitution of professional rules as ethics for the office. That separation bothers me as much from the inside as it did from the outside. I told my wife about the exchange in the law school lounge, along with all the other things I tell her that I learn every day, and she was attentive, attuned to the discrepancies. She helps me, and will continue to help me, I believe, to think things through accurately, with a healthy respect for commonsense truth. Atticus taught this also by example. To achieve a harmony of life and law one has to be a truth-teller both as a person and as a lawyer.

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