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On Living One Way in Town and Another Way at Home

Thomas L. Shaffer

The Tabor Lecture

ON LIVING ONE WAY IN TOWN AND ANOTHER WAY AT HOME*

THOMAS L. SHAFFER**

The title of this Lecture is from Harper Lee's novel *To Kill a Mockingbird.* The occasion for the proposition is when the smalltown southern gentleman-lawyer Atticus Finch is given an opportunity to lie to protect his son from harm. He refuses. He says that the most important thing he has for his son is not protection but integrity. He says, "I can't live one way in town and another way in my home."[1]

The aspiration has had a particular focus among lawyers in the United States. It crosses generations and is resolved across the sexes in Louis Auchincloss's fussy little novel *Diary of a Yuppie.*[2] Auchincloss' usual staid New York law firm has been dragged kicking and screaming to the "M and A" practice—into mergers and acquisitions, corporate takeovers. The elder lawyer-mentor, Braders Blakelock, has gone along with the development, although he suspects that takeover practice is no work for a gentleman. The younger lawyer, the yuppie, Robert Service, is enthusiastic for representing corporate raiders. He is about to be made a partner, due in no small part to his skill in that sort of legal combat.

In one of the firm's cases, the "target" company, Shaughnessy Products, is attacked by the firm's client, Atlantic Rylands. Shaughnessy, the target, is headed by a golfing partner of Mr. Blakelock's named Albert Lamb. Mr. Lamb is resisting the takeover; his company has adopted inconvenient "shark repellents"; his lawyers are putting up a fight, which so far does not complicate

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* This was the inaugural Glenn Tabor Lecture in Legal Ethics, at Valparaiso University, February 13, 1997. In the program for the occasion, Mr. Tabor's "county seat law practice" (to use his title for it), in Valparaiso (Porter County), Indiana, was identified as "a model of a small community of colleagues who care about one another and who live the same ethical commitments in the law office that they do in their homes." I dedicate this printed version of the lecture to Mr. Tabor, in appreciation for his example to Hoosier lawyers and for his generosity to Valparaiso University.

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1. HARPER LEE, TO KILL A MOCKINGBIRD 267 (Fawcett Popular Library ed. 1962) (1960).
2. LOUIS AUCHINCLOSS, DIARY OF A YUPPIE (1986).

his playing golf with Mr. Blakelock. So far they are both able to act like gentlemen.

The problem is that Mr. Lamb's shark repellents may be successful. The raider, Atlantic Rylands, and its lawyers, Blakelock and Service, are in need of ways to pressure Mr. Lamb to sell his company. Robert Service, the Yuppie, without asking anybody, has employed informants who collect and go through the trash from Mr. Lamb's office. Robert calls the contents of the trash bags "abandoned property."

He pastes together a shredded accounting document and finds that Mr. Lamb has given his ne'er-do-well brother Hendrickson a job at the company and has covered up Hendrickson's subsequent thefts from company funds. Mr. Blakelock knew about this: "Al has always looked after the poor nut," as he puts it. This came at no cost to the company: Mr. Lamb reimburses the company for Hendrickson's salary and restores everything Hendrickson steals.

Service suggests that Mr. Blakelock's client threaten a shareholder's derivative lawsuit against Mr. Lamb, based on the irregular way Mr. Lamb looks after his brother. The legal ground is weak, but it is on the safe side of frivolous; there is nothing in the professional rules that prohibits the threat. The embarrassment and pressure will be significant: Mr. Lamb will perhaps cave in and sell his company after the threat is made. If not, the suit might result in Mr. Lamb's being removed as the company's chief executive officer, and then Mr. Service will perhaps face a more tractable target. "What can we lose. . .by taking the chance?" Service says.

Mr. Blakelock refuses the suggestion. He and Robert have a noisy and fruitless argument about it. Mr. Blakelock invokes what sound like moral propositions, without giving them substance—words such as "duty" and "obscene," and especially "honor." He seems to think it should be obvious to young Robert Service that those words fit what he calls Robert's "mud slinging." Service wonders what is wrong with mud-slinging, in reference to duty and honor. Mr. Blakelock believes that if Service has to ask there is no answer that would persuade him; he does not say what is wrong with mud-slinging in the practice of law or wherein mud-slinging offends duty; what he says is that using trash for information is obscene, and threatening an immaterial lawsuit is not honorable.

Service is not moved by what Mr. Blakelock says about duty and honor. Mr. Blakelock is not moved by Robert's insistence that what he wants to do is within professional rules (which it is) and within a lawyer's loyalty to the lawyer's client. "I'd sling any mud I could make stick," Robert says. The two lawyers are in moral gridlock; they are unable to get into the give and take of

discussion. What they say to one another is not like the ethical discourse both of them looked at in college. It would not have interested Socrates and Protagoras, or the Rabbis of the Talmud.

Finally, his "shoulders . . . stooped with . . . a rather melodramatic expression of dismay and grief," Mr. Blakelock says to Mr. Service: "Go home, Robert! Go home before I lose my temper! Take the weekend off; stay away from the office. Tell your darling wife what you have told me and listen carefully to what she says. . . . Let her help you, my boy. Let her guide you! I fear I must have been a false leader."[3]

* * *

The Blakelock-Service encounter is a kind of moral argument; that is, it is an argument in which the people involved use moral words. But it is not a discussion in *ethics*. Ethics is an intellectual activity in which the participants talk about morals and exercise in conversation the arts of insight and persuasion, without coercion. In ethics, the people involved hope to *reach* one another. Think here of Aristotle's academy, of Thomas Aquinas at the University of Paris, or of Bill Moyers and his friends discussing Genesis, and of the ethics courses taught here at Valparaiso by Professor Laura Dooley and Deans David Vandercoy and Edward Gaffney. You could get some good talk going, in any of these places, about duty and honor. Not so, for some reason, in Mr. Blakelock's law office.

But Mr. Blakelock's order that Service take the weekend off and talk to his wife suggests the hope that conversation in ethics might occur at home—and it does. The conversation at home[4] is not ethics in the law office. You could say that ethics occurs in this story, at home, but legal ethics, in town, does not. You could even say that the story says that, while there may be such a thing as ethics for lawyers, there is no such thing as legal ethics. Issues are certainly resolved in the Blakelock law office. No derivative lawsuit is filed, for example. But the resolution is the result not of ethical discourse, but of power:

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3. *Id.* at 11; this part of the story is in ch. 1, 1-11.

4. Examples of lawyers talking ethics at home—one that has proved popular among modern American lawyers—are in Robert Bolt's play about Sir Thomas More, A MAN FOR ALL SEASONS (Vintage Books ed. 1962) (1960). In that story, for several instances among many, (i) More and the eminently corruptible Richard Rich talk, in More's home, about the moral advantages of Rich's being a school teacher rather than a politician (*id.* at 3-6); (ii) More and his daughter's fiance William Roper talk, in More's home, about the ethics of Lutheran piety (*id.* at 35); (iii) More, Roper, and Lady Alice discuss, in More's home, the morals of law practice (*id.* at 37, 54); and (iv) More and his daughter Margaret talk, on the road to More's home, about the ethics of martyrdom (*id.* at 72-73).

Mr. Blakelock orders Service not to proceed (and, by the way, the hostile takeover fails).

The story also suggests that a lawyer of Robert Service's sort is willing to live one way at home and another way in town, Atticus Finch to the contrary notwithstanding. It suggests a subject for this Tabor Lecture.

* * *

The separation of town from home is an old one in the history of lawyers in America. When you trace the nineteenth-century development of legal ethics, from David Hoffman's first *Resolutions on Professional Deportment*, of 1817,[5] through the first A.B.A. *Canons* of 1908,[6] you find the exact separation of moral spheres that you find in Robert Service's law practice: On the "town" side there is an exalted ideology that doesn't dig in enough to be either insight or persuasion.[7] When you focus on, say, the 1890s, you notice that American law-firm ideology is like the portraits of dead partners on the law-office wall: It is for announcement, not for disputation. The town side of a lawyer's life, at least since the days of the robber barons, has invoked an exalted set of grand words while it lived by a consistently crude set of professional rules that would not, and did not, get in the way of getting ahead.[8]

Which does not mean that life in town has had no moral point of reference: The practice of law in America has depended, not on its grand words in town, but, as Mr. Blakelock seemed to understand, on what lawyers have at *home*. When American lawyers have taken moral pause, it has been because of a restlessness evoked in them by their *home* side—by the selves they have from family, neighborhood, congregation, and friends at home. From mothers, I think, mostly.

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5. Reproduced and discussed in THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS 59-164 (1985).

6. PROFESSIONAL RESPONSIBILITY STANDARDS, RULES AND STATUTES 347-62 (1995) (John S. Dzienkowski ed. 1995).

7. The "meta-ethical" argument here owes a good deal to Alasdair MacIntyre, *Does Applied Ethics Rest on a Mistake?*, 67 THE MONIST 498 (1984).

8. Michael Schudson traces the history in *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. OF LEGAL HIST. 191 (1977), *reproduced and discussed in supra* note 5, at 183-86, 315-30, *and in* Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988). The American Bar Association's rule-making effort culminated, for the present, in the 1983 proposed Rules of Professional Conduct, *reproduced in* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES AND STATUTES, *supra* note 6, at 3-128, adopted as modified by the Supreme Court of Indiana, IND. R. OF CT. 357-94 (West 1995), which generally excise traditional American-lawyer words of ethical argument.

American lawyers learn the moral virtues—truthfulness, courage, justice, and the other virtues—at home. They learn them at home from early childhood, in the way Aristotle and the Book of Proverbs say they should learn them: by formation, begun even before they learn to talk, formation that is well along, as Aristotle—and Sigmund Freud—said, before moral choice is even intelligible. And when the child's mind seeks words for *ethics*, she finds that she has already learned the words, as Miss Manners says, "[T]he language of behavior, like other languages, is most easily learned when one is too young to think about it."[9]

In Auchincloss' story, at home, Robert Service's wife Alice zeroes in not on mud-slinging but moral quality. Not on what Robert is *doing* so much as on what he is *becoming*. She worries, she says, about "the *glee* with which you ferret around in ash cans." She reminds Robert of the person he was when he read poems to her in college. She gets his attention, as Mr. Blakelock could not, when she notices that he is drifting: His virtues are drifting; his character is drifting. You have become, she says, "hard boiled. Or perhaps I should put it that you're trying to get hard-boiled. As if you thought there was something desirable about being cool and clear and above it all and looking down on poor scrapping mortals."[10] My wife Nancy made a similar observation about me, when I was a young lawyer.

That is ethics. It is insight. It turns out to be provocative for Robert. He later writes in his diary, "I was cruelly hurt"[11] at what Alice said. Alice didn't read that. If she had, she might have responded with a few words from St. Paul's first letter to Corinth, from a text that was probably read at their wedding: "Love rejoices in the truth."[12] That, too, would have been ethics.

What I want to identify is the possibility that Robert might want to live in the office as he lives at home. Perhaps he might want his law office to be a place of ethical discourse as well as a place where power is imposed. I wonder why he cannot stay in town and talk—really *talk*—to Mr. Blakelock about the morals of using "abandoned property" for corporate threat.

I suppose the answer is that our divided moral system has had the advantages Service claimed for it. The principal advantage has been moral freedom in using legal power—power enough for lawyers to have done great

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9. Judith Martin, *Parents Seeing Light, Teaching Their Children Manners*, S. BEND TRIB., Jan. 26, 1997, at F2.

10. AUCHINCLOSS, *supra* note 2, at 23-29.

11. *Id.* at 25. Robert Service turns out to be a moral pigmy, but also turns out to be under the continuing ethical influence of Alice.

12. 1 *Corinthians* 13:6.

things in America: to have devised charters for economic expansion, for the development of the West, for the Industrial Revolution. Legal power, thus freed from moral reluctance, invokes bravery and cleverness. It ties its creativity—much of it more disgusting than the use of "abandoned property"—and its brilliance to the grand claims that this country has a special destiny, that we are the "indispensable nation," that American law is an altar, and that American lawyers are a priesthood.[13] The interesting thing for present purposes is that these ambitious moral claims seem not to have been discussable; they have not been interesting for ethics.

That result is illustrated by occasional radical dissent. The late Christian lawyer William Stringfellow, for one example, said he avoided thinking of himself as a "professional." He was, he said, a biblical person who worked as a lawyer.[14] He remained on the home side of his moral consciousness, I suppose. He resolved our question by despairing of finding useful moral guidance in town, as I think the organized profession, and Mr. Blakelock, and the courts have done.[15] From any of these points of view, there is now no such thing as legal ethics. The moral claims American lawyers make on Law Day and in bar-journal pep talks are without ethical content. By which I mean that they cannot be discussed seriously in town. Neither duty-and-honor, nor the Bible, encourages discussion in town on how a biblical person goes about working as a lawyer. Duty and honor are made not to *mean* anything, and few lawyers pull anything concrete from the Bible—not in town.

Why, if that is so, is the subject of "professional conduct" in town called "legal *ethics*?" Why do its practitioners still invoke that title?[16] Well, for one thing, the system called legal ethics (or "professional responsibility") has a number of advantages for a licensed aggregation of people who exercise power in a "pluralistic" society. When it comes to getting the job done, as Robert Service finally admitted in his conversation with his wife, it is better not to say

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13. SHAFFER, supra note 5, at 65.

14. Discussed in Milner S. Ball, *A Meditation on Vocation*, *in* RADICAL CHRISTIAN AND EXEMPLARY LAWYER 129 (Andrew W. McThenia ed. 1995), and *in* Bill Wylie-Kellermann, *"Listen to This Man,": A Parable Before the Powers*, 53 THEOLOGY TODAY 299 (1996).

15. Professor William J. Stuntz argues, for example, that the modern American judiciary is "too proud, too sure of its own ability" and at the same time too timid about "standing up for what's right"—on the one hand inclined to be a braggart, where exercise of power is the issue, and on the other inclined to moral cowardice. William J. Stuntz, *Pride and Pessimism in the Courts*, FIRST THINGS, Feb. 1997, at 22, 27.

16. The Rules of Professional Conduct, *supra* note 8, of course, do not, nor do those law schools that have substituted "professional responsibility" for legal ethics. Nonetheless (as to law schools), there is a fair amount of vigorous ethical discourse in sessions of the required courses in the field. Schools, possibly because they stand between home and town, seem able to detect the remnants of moral impulses that make ethics possible.

anything coherent—understandable, thoughtful, open to reasoned response —about moral reasons for what we do.

I imagine that Mr. Blakelock might have obtained agreement on his policy against what he calls mud-slinging from three randomly selected partners of his, if he had asked them for a ruling on what Robert Service planned to do to Mr. Lamb. But it would have threatened his purpose to get into their *reasons* for disapproval. One partner might have reasoned that a derivative lawsuit against Mr. Lamb would have been a misuse of the judiciary. Another might have thought it a form of what we old-fashioned Catholics learned to call "detraction." Mr. Blakelock himself, if pressed on what he means when he talks about "honor," might have said that, after all, he and Mr. Lamb belonged to the same country club. Three partners might have agreed on a result. Stating their reasons for agreement would, though, have undermined the agreement.

Mr. Blakelock did not consult his partners; he resolved the crisis with power: Robert Service was not to sling mud and he was to take the weekend off and talk about morals with his wife. But if Mr. Blakelock had sought a governing committee's resolution, it would have been best to limit the transaction to a conclusion—a moral conclusion, probably, but not an ethical conclusion. Best to keep ethics out of it. I don't argue that what Robert wanted to do to Mr. Lamb was immoral, although maybe it is, it being, perhaps, as wrong to hit someone on the head with the law as to hit him on the head with a club. My *ethical* observation is that these lawyers seem to have had only coercive ways to work together—not ethics but power with a moral label—a moral label with a warning: *Don't ask.*

Don't ask. It was important to keep the moral *label*, to keep the grand words "duty" and "honor," provided those words were not to be poked at "in the tangle of [the] mind."[17] Power, the ability to keep things as they are, the ability to retain advantage for those who have advantage, *needs* moral words. Words, among American lawyers, such as those we append to the label "officers of the court," for example; words, among Americans in general, of patriotism and civil religion. People are moral creatures; they require moral words. But these are cases of moral words whose meanings are not to be talked about. Officers of the court, patriotism, and civil religion are about power, not about ethics.

William Gladstone was a pain to his colleagues in the House of Commons, to the Queen, and to Benjamin Disraeli, because he did not understand this. He

17. The phrase is from Bolt's More, *supra* note 4, at 73: "God made the *angels* to show him splendor—as he made animals for innocence and plants for their simplicity. But Man he made to serve him wittily, in the tangle of his mind!"

was routinely accused of being moralistic; Queen Victoria hated to talk to him and despised his letters, because he took every opportunity to preach to her. He did not follow, with everybody else, the modern moral tradition for exercising state power. He once said of himself that he had a manner that tended to turn every conversation into a debate. He was too interested in ethics; he did not understand that grand moral claims by the state are not for ethical discussion.[18]

A quaint set of examples closer to home are nineteenth-century American judicial opinions and bar-association pronouncements on why women cannot be lawyers.[19] That bad judicial poetry on the delicacy and moral superiority of women, and on the crude necessities of law practice, trace to the beginnings of the Industrial Revolution, when families were divided between female parents, who formed children in the moral virtues, and male parents who went out from home to develop America; Auden later said they were "bound for a borough all bankers revere."[20] The male parents spoke of manifest destiny, of America as the city on the hill, God's new Israel. Those words were not for ethical analysis. The more perceptive users of them knew that; for the others, the grand moral words were marketed with an implicit warning on the label: Don't ask.

You can find other examples in the literature on moral dilemmas that we professors assemble for students in courses on "professional responsibility." One example is a persistent reluctance to talk seriously about the American lawyer's adversary ethic; another is the extension of the adversary ethic to law-office practice. The unexamined moral pronouncement on the adversary ethic, as practiced in court, is that the state requires contention; justice is not something you get from lawyers; you get justice from the state. A minority on the commission that drafted the old Code of Professional Responsibility in the 1960s asked why the adversary ethic is applicable in office practice, where the state is not involved, where justice is something people give to one another. The answer from the majority was: Don't ask.[21]

Another example is the rule against providing "financial assistance to a client in connection with pending or contemplated litigation."[22] Under that rule and its predecessors, lawyers are haled before bar committees and courts for giving clients money to feed their children.[23] I have wondered if I violated it,

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18. Geoffrey Wheatcroft, *Most Eminent Victorian*, ATLANTIC MONTHLY, Jan. 1997, at 88.

19. SHAFFER, *supra* note 5, at 412-15.

20. W.H. AUDEN , THE AGE OF ANXIETY 73 (1947).

21. Harry W. Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957 (1978), *reprinted in* SHAFFER, *supra* note 5, at 436.

22. IND. R. PROF. CONDUCT ANN. Rule 1.8(e).

23. See the cases identified in MODEL RULES OF PROFESSIONAL CONDUCT 143-44 (1992).

years ago, when I left five dollars at the Indiana State Prison, so my client there could have cigarettes. (Legal analysis says not, since his smoking was not in connection with litigation. I was trying to get my client out of prison, not to get him money for tobacco.) I now, in legal-aid work, frequently have clients I want to help out a bit—with my own money. It is best, when I really must do that, to launder my money through some other agency in town. There is nothing remarkable about that, nothing interesting for ethics. It is to deal with the professional rule the way we lawyers deal with the Internal Revenue Code.

Some lawyers I know took a risk, just before Christmas, for a client after a judge told her she could have her baby with her for the holidays if she had a bed for the baby. She had no baby bed and no money to buy a baby bed. It was the week before Christmas; the Christ Child Society was closed; her lawyers bought the bed and kept their heads down—until this startling revelation from me.

The Virginia State Bar adopted a rule, when I was teaching down there, requiring a lawyer to report her client's stated intention to commit a crime—*any* crime. I talked to a cross-section of Virginia lawyers about that rule; all of them said they would not follow it unless the crime was very serious. Suppose, one of them said, a client wondered about submitting a post-dated document for tax purposes. The lawyer would, of course, refuse to prepare the document. Then, suppose, the client said, "Okay, I will do it myself." That is a stated intention to commit a crime. Some lawyers said they would violate the rule against reporting the client. That was a case, I suppose, of life at home intruding on life in town. Others suggested that the thing to do was to inform the client of the new Virginia "whistle blower" rule; at which point, surely, the client would say, "All right. I won't do it," and the ethical dilemma would be removed. That was to use legal analysis in town, to avoid ethics. One solution is like the baby-bed case; the other is like laundering money. None of those lawyers would tell on their clients. No Virginia lawyer I talked to had ever told on a client.[24]

One wonders, given that reaction, why Virginia lawyers adopted a whistle-blower rule. The answer is, I think, that it is a "don't ask" case. It and the Indiana financial-assistance rule involve bits of law that are, in the morals one has at home, to be violated, or, in the morals one has in town, to be dealt with the way lawyers deal with rules of law—with analysis and evasion. At home

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24. I discussed these episodes in more detail in Thomas L. Shaffer, *Beyond the Rules: The Responsibility and Role of Continuing Legal Education to Teach Alternative Ethical Considerations*, *in* AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION, C.L.E. AND THE LAWYER'S RESPONSIBILITIES IN AN EVOLVING PROFESSION 493 (Report on the Arden House III Conference 1988).

such a resolution is virtually instinctive—"virtually," as in "virtue"; in town it is merely legal.

I am not free, in town, to make a moral argument for being able to buy my client a baby bed; that rule is not available for moral argument. It was obtained through the collective power of insurance-company lawyers, who won the only argument necessary when they got the rule adopted. I am not free to make a moral argument in favor of deserving my client's trust when, in his trust, he tells me he will violate the criminal law; that rule is not available for moral argument. It is maintained in the "officer of the court" tradition among patrician Virginia lawyers who won the only argument necessary when they got the rule adopted.

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You no doubt have thought about moral arguments questioning every step I have taken here. I hope so; our talking about it would be ethics, and I like ethics. I even wish there might some day come to be such a thing as legal ethics. Perhaps we could discover legal ethics together, as Socrates said he and Thrasymachus would discover together what justice is.[25] But, for now, I need to return to the question I mean particularly to present. These examples all show, I think, how American lawyers have learned to live one way in town and another way at home. If one of us proposed to try to live the *same* way in town and at home, and if she wanted guidance worthy of university discussion on that aspiration, where might she turn?

She would not be happy with what she would find if she turned to the history of lawyers in America. The separation of home and town goes back to the presidency of Thomas Jefferson. A modern lawyer seeking to live the same way at home and in town would not be much happier with the current judicial, bar-association, and journalistic efforts to encourage *civility* among lawyers.[26]

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25. Republic I:348, *in* EDITH HAMILTON & HUNTINGTON CAIRNS, PLATO: THE COLLECTED DIALOGUES 597 (1961):

> If then we oppose him in a set speech enumerating in turn the advantages of being just and he replies and we rejoin, we shall have to count up and measure the goods listed in the respective speeches and we shall forthwith be in need of judges to decide between us. But if . . . we come to terms with one another as to what we admit in the inquiry, we shall be ourselves both judges and pleaders.

26. *See, e.g., D.C. Bar Standards for Civility in Professional Conduct*, D.C. BAR REP., Aug.-Sept. 1996, at 8; Thomas J. Paprocki, *Ethics in the Everyday Practice of Law*, 35 CATH. LAW. 169 (1994); Monroe H. Freedman, *Civility Runs Amok*, LEGAL TIMES, Aug. 14, 1995. For a more general discussion of cultural civility, see Ken Moore, *U.S. Led in Technology . . . and Into Rudeness*, S. BEND TRIB., Dec. 8, 1996, at F7; Ellen Goodman, *Civility May Be Making Long-awaited Comeback*, S. BEND TRIB., Jan. 3, 1997, at A4; Mark A. Doty, *The Decline of Civility in*

The civility campaign appeals to the "values" of the American gentleman-lawyer. There is nothing the matter, certainly, with being civil. We admirers of Miss Manners are, in fact, likely to praise and admire civility, even if we also remember how often Miss Manners insists that she does not mean to be writing about ethics.[27] Civility is as inoffensive as General Lee's rule, for his little college in Virginia,[28] that a person should say hello when he passes another person on the sidewalk.

Miss Manners and the American gentleman-lawyer seek to avoid causing pain to others. American lawyers would surely be better off if they tried harder not to cause pain to others. But they would deceive themselves if they thought that not causing pain was an adequate morality for what lawyers do. Lawyers *necessarily* cause pain to others. Robert Service, in seeking to attack the noble Albert Lamb, was right to point that out. It is too bad that he and Mr. Blakelock could not then have talked about it.

I do not find the promise I would hope for in the history of American lawyers or in the tradition that gives rise to pronouncements on civility. I see promise in two other sources. One is feminist ethics. The other is religious ethics. I will leave off here with a few hints on what those familiar sources might offer to lawyers who want to live the same way in town and at home.

Feminist ethics occurs to me immediately because it is not solemn about rules. In the nineteenth century, the mothers who were left at home to form their children in the virtues understood and practiced a morality of good habits in which rules are reminders of deeper formation, formation begun long before the imposition of rules.[29] The rule against telling lies, for example, comes later than formation in the virtue of truthfulness. It is not pressed to the point

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America, CHRISTIAN CENTURY, Nov. 23, 1983, at 1093. "Decency" is perhaps a similar moral appeal, as in HENRY M. CLOR, PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW, AND PORNOGRAPHY (1996).

27. Ethics, she says, derives its authority from morals, whereas etiquette derives its authority from manners. JUDITH MARTIN, MISS MANNERS RESCUES CIVILIZATION 123 (1996).

28. Washington and Lee.

29. SALLY B. PURVIS, THE POWER OF THE CROSS: FOUNDATIONS FOR A CHRISTIAN FEMINIST ETHIC OF COMMUNITY (1993); Kathryn Tanner, *The Care That Does Justice: Recent Writings in Feminist Ethics and Theology*, 24 J. RELIGIOUS ETHICS 171 (1996); Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, ETHICS, Jan. 1989, at 275; William C. Spohn, *Liberating Conscience*, AM., Jan. 18, 1997 (discussing Anne E. Patrick's new book of that name).

where a person cannot lie to save a life, or even lie to keep his mother from being bothered by salesmen. There is a difference between being truthful, which is a good habit, and not telling lies, which is a rule.[30]

Because of its emphasis on formation in good habits—and on *experience*, to use a word common among feminist scholars—feminist ethics is likely to blink at a court rule that is marketed with the "don't ask" label. Feminists are likely to insist on *ethics*, that is, on persuasion and insight, in *town*—now that women have come to town. Catharine MacKinnon speaks thus of the *crunch*, which, she says, is the noise the law makes when it collides with somebody's life.[31]

It is mildly perilous to generalize broadly from the vast literature of feminist ethics, but I am willing to guess that its influence among lawyers will mean:

- an emphasis on character formed in community, which could redeem the deepest aspirations of the traditional American gentleman-lawyer;
- a procedure of mutual respect in ethical deliberation, rather than a reliance on moral rules announced by authority; and
- a stance among at least some lawyers, women and men, that sees and talks about the evils in the systems we lawyers manipulate, control, and impose.[32]

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30. A point argued at some length, with some dependence on feminist ethics, in Thomas L. Shaffer, *On Lying for Clients*, 71 NOTRE DAME L. REV. 195 (1996).

31. Quoted in Fred Strebeigh, *Defining Law on the Feminist Frontier*, N.Y. TIMES MAG., Oct. 6, 1991, at 28, 30.

32. Spohn, *supra* note 29, at 24, generalizes to four moral concerns in Patrick's work: (i) (Substantive) justice as the central moral concern in an ethic of justice; (ii) responsibility and mutuality, rather than (or tempering) domination and obedience; (iii) a universal call to holiness arising from baptism; and (iv) less what is wrong and what is left, and therefore permissible, than (instead) "a more prophetic stance to challenge the systemic evils in society and the church." He says,

> Conscience . . . relies on communal wisdom rather than individual insight over against the group. Conscience should not be limited to applying moral principles in cases. It is the capacity to . . . shape the quality of one's character, the sort of person one is becoming. For those tasks an ethics of virtue and character allied to spirituality is more fundamental than an ethics of rules and individual acts that relies on moral philosophy.

Id. *See also* Anne E. Patrick, *Rosamond Rescued: George Eliot's Critique of Sexism in Middlemarch*, 67 J. RELIGION 220 (1987); NANCY WOLOCH, WOMEN AND THE AMERICAN EXPERIENCE (1984); and Ann Taves, *Mothers and Children in the Legacy of Mid-nineteenth Century American Christianity*, 67 J. RELIGION 203 (1987).

Religious ethics occurs to me because I am a religious person. I consciously consult my faith in deciding what to do—and so do most of you. The interesting thing about religion as material for ethics in the practice of law, or in any other public calling (and *all* callings are public), is that it is, when soundly developed, novel and unsettling. Novel because giving religious reasons for what we do is unfashionable in "pluralistic" America.[33] And unsettling because that is what biblical faith is among Jews and Christians—it is unsettling.[34] It challenges the notion that any *system* is competent or adequate for charting a destiny—for charting the destiny of a people, or a group of people, or a person. Think of Moses. Think of the Hebrew prophets railing at the ruling authority in biblical Israel. Think of Francis of Assisi and Martin Luther. Think of Dr. King, who was always and everywhere and openly a

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33. As in DAVID R. BLUMENTHAL, GOD AT THE CENTER: MEDITATIONS ON JEWISH SPIRITUALITY 29 (1988):

> Our personal anxieties are real, but meaningless. Our personal fears are poignant, but without a greater setting. Only God's relationship to Israel gives significance to our lives, and only when fear is rooted in significance is it worthy of our human energy. Meaning is a function of chosenness, not an assumption of personal judgment.

Or as in WALTER BRUEGGEMANN, *Covenant as a Subversive Paradigm*, *in* A SOCIAL READING OF THE OLD TESTAMENT 45 (Patrick D. Miller ed., 1994). "[C]ovenant is possible, not because of a suitable partner but because this God has broken with conventions." *Id.* "The [biblical] poet knows that, even in a world like ours, songs must be sung, dreams must be kept, visions must be practiced. And none of it yields to the despairing cynicism that the Babylonians want so much to encourage." *Id.* at 52.

The novelty in such sentiments may explain some of the furor over the argument that it is immoral for an American believer to give religious reasons for her politics or jurisprudence. Professor Stephen Carter made a forceful argument to the contrary in THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993); my review at 62 U. CIN. L. REV. 1601 (1994) was, I hope, part of a consequent ethical conversation between (among) believers.

34. As in LAWRENCE KUSHNER, GOD WAS IN THIS PLACE AND I, I DID NOT KNOW (1991), or WALTER BRUEGGEMANN, *The Prophet as a Destabilizing Presence*, *in* A SOCIAL READING OF THE OLD TESTAMENT, *supra* note 33, at 221, 225:

> The Truth is that because of the enormous fear in our social context, our government and its allies have constructed for us a fanciful world of fear, threat, security, and well-being that has little contact with the data at hand. But because we are managers and benefactors of the system, we find it easy and natural to accept this imagined world as real.

Id. In THE THREAT OF LIFE: SERMONS ON PAIN, POWER, AND WEAKNESS (1996), Brueggemann argues that all of Hebrew scripture is subversive in this way.

Ronald J. Sider, *Christian Ethics and the Good News of the Kingdom: Doing Christian Ethics in an Eschatological Key*, *in* WITHIN THE PERFECTION OF CHRIST 13, 24 (Tery L. Brensinger & E. Morris Sider eds. 1990), argues that an ethical approach that focuses on the last things (the messianic age, the second coming) produces six implications for Christian ethics, the third of which is: "The Christian community is always in every society a disturbing counterculture challenging the status quo at every point that it is wrong and very aware of the great gulf between the church and the world." Stringfellow said, "God's people are called now, not now and then." Wylie-Kellermann, *supra* note 14, at 118.

Baptist preacher preaching. Think not only of the persistently unsettling content of biblical ethics, but also of the mandate that comes with biblical ethics—the mandate to Abraham and his children, to be a priestly people for the nations; and the mandate to Christians, to *proclaim* what Jesus teaches them. These are mandates to discomfort. Novel and unsettling for a comfortable, overpaid, modern American legal profession.

I conclude, then, with two sources on the creation of legal ethics, two sources from which to learn about living the same way in town and at home. The sources are not motherhood and apple pie. They are motherhood and the Bible. And they are more radical than you might think.