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Geoffrey C. Hazard

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BOOK REVIEW

FAITH AND THE PROFESSIONS, By *Thomas L. Shaffer*. Brigham Young University Press, 1987

*Geoffrey C. Hazard, Jr.**

In this work Professor Thomas L. Shaffer, once before and now again Professor of Law at the University of Notre Dame, addresses the relationships among belief, normative standards, and action in the practice of law and medicine. He offers rich and complex narratives about these two professions in an exposition that could apply to other professions — the ministry, social work, teaching, and accounting — or at least to some aspects of them. I will address his exposition as it relates to law practice, with which I am familiar.

Professor Shaffer's medium is itself part of his message. He proceeds chiefly through narratives, "stories" and vignettes. The stories include familiar ones in the novels *To Kill a Mockingbird* and *The Great World of Timothy Colt*, the *Mr. Tutt* mysteries, and Bolt's play about Thomas Cromwell, *A Man for All Seasons*. The book's special Index of Stories is a guide to the places in the text where the stories are located.

A story by definition does not state its point, for if it undertook to do so it would be an essay or simply a badly told story. A story makes a point, or several different points, by indirect demonstration. Through a verisimilitude of life it invites the reader to reach his own conclusions as to the lesson to be learned. It engages the reader in the situation and, having done so, induces him into reflection to "solve" or make sense of the events portrayed. Telling a story operates pedagogically like the case method of instruction when that method is properly done. The audience is given the raw material out of which to construct an analysis, or several divergent or contradictory analyses, and invited to make the attempt. The attempt itself is the learning experience. An important part of the learning experience is that no single interpretation of a situation is the only interpretation, and no single answer entirely complete. Reality is more extensive than any proposition about it.

By using this method himself, Professor Shaffer argues for its use as a method of teaching professional ethics. He contrasts it to another approach to professional ethics, which he deploras, wherein professional ethics is taught in terms of rules. Professor Shaffer thinks it deplorable that legal ethics has come to be regarded as a set of problems about legal rules — their drafting, their meaning, their application. In particular, he thinks it deplorable that the Code of Professional Responsibility — a *code* — and now the Rules of Professional Conduct — *rules* — have come to constitute the organized bar's expression of what professional ethics is.

* Sterling Professor of Law, Yale University

Professor Shaffer thus seeks to demonstrate that professional ethics is something much more than rules. For if professional ethics were only a matter of rules, we would not need stories or cases to reveal what ethical deliberation and ethical behavior is all about.

In this Professor Shaffer is certainly right. At any rate, he is right if he means, as I understand him, that professional ethics is not solely and exclusively a question of What the Rules Are. I shall return in a moment to some of the implications of the fact that this matter of ethics involves more than rules. Alternatively, Professor Shaffer might be read as saying that legal rules have no relation to legal ethics, properly considered, and hence are not part of ethical deliberations and the problems of ethical behavior. Such an assertion would in my opinion be mistaken.

Legal rules are of very great importance in professional ethics, particularly professional ethics of lawyers. In the ethical dilemmas arising in law practice, legal rules are both part of the solution and part of the problem. It is helpful to recall that legal rules are of two general kinds, prescriptive and constitutive. Prescriptive rules state what one must or must not do under various circumstances. For example, the rule that a lawyer may not reveal a client's confidences is a prescriptive rule.¹ Constitutive rules define the personages to whom or about whom such prescriptive rules speak. An example of a constitutive rule is the rule that only a person who is admitted to the bar may render legal advice to others for compensation.² That rule *constitutes* a member of the bar a legally authorized legal advisor. This distinction parallels a similar one in the law at large. For example, the rule that "No person shall steal" and "All citizens shall pay a 10% income tax" are identifiable as prescriptive rules, while rules like "A person with X qualifications shall, upon Y appointive event having occurred, be a judge" and "Under Z conditions, an acceptance of an offer results in a contract" are different.

To be sure, there is no tidy distinction between these two kinds of rules. Indeed it may be more accurate to say that most legal rules usually have both prescriptive and constitutive elements. Even when this is so, however, the constitutive element in a rule restricts the rule's scope to a particular segment of the community. A rule referring to "lawyers" speaks to lawyers as such and changes their legal status in the community as compared with that of everyone else.

The starting point for consideration of ethical problems arising in the practice of law, then, is that *being* a lawyer is a legal status created by constitutive rules. If, but only if, a person is a "lawyer," then according to the law certain special consequences follow that have ethical significance as well as legal significance. Perhaps the most important rule in this regard is that in general a lawyer is not permitted, even under legal compulsion, to disclose confidential communications received from a client for the purpose of receiving legal advice.³ All confidential agents have a general duty not to disclose confidential information, except

1 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

2 See, e.g., *In re Amalgamated Dev. Co.*, 375 A.2d 494 (D.C.), cert. denied, 434 U.S. 924 (1977).

3 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

under subpoena or similar legal compulsion.⁴ A confidential agent who is a lawyer, however, has a further duty not to disclose such information even under a subpoena,⁵ with very limited exceptions. Professor Shaffer brings this rule into focus in one of the vignettes from *To Kill a Mockingbird*, where Atticus breaches the rule of confidentiality in order to teach his children something.

The legal rule imposing a strict duty to maintain client confidences radically changes the lawyer's ethical situation. The change goes in the directions both of increasing the lawyer's political power, by making him a recipient of very sensitive information, and of reducing his right to intercept his client's questionable or clearly wrongful acts. The ethical situation that results from the lawyer's legal status contrasts with the ethical situation of a person who is not a lawyer, but only a lay confidant.⁶

A non-lawyer confidant to whom a friend confides that he has committed fraud or other harm to another faces an ethical dilemma: Should he turn in the friend? Try to rectify or mitigate the friend's conduct? Moreover, if the law enforcement authorities become suspicious that the confidant has relevant knowledge, they can subpoena him to tell what he knows. Such a confidant has greater freedom of action than a lawyer in deciding whether to testify. That freedom increases the ethical stress in deciding what action to take but decreases the stress that may result from not being able to do anything about a harmful situation. Of course, the non-lawyer's legal vulnerability to subpoena does not relieve him of all moral choice. He still must decide whether to defy the law by refusing to testify.

A lawyer does not face the same dilemma because the law forecloses the initial option of going to the authorities that is open to the non-lawyer confidant. The lawyer, however, has an ethical dilemma of a different kind precisely because of his role as a lawyer: How should he proceed in light of the fact that legally he cannot disclose a client's confidences? That is a difficult dilemma,⁷ but it is different from that which the lawyer would have if it were not for the constitutive rule that made him a lawyer in the first place. This is what I meant by saying that legal rules are part of the lawyer's ethical problem. It also suggests why comparing a lawyer to a friend is imperfect and potentially misleading.

Legal rules are also part of the lawyer's ethical solutions. Many legal rules resolve ethical problems, at least under the normal conditions in which law is usually assumed to operate. Consider the problem of client perjury in criminal cases. I believe an ethically coherent case can be made that a lawyer should present testimony of an accused as though it were true, whether or not the lawyer believes it is true or indeed even if he believes the testimony is knowingly false. (I will not stop to argue why that case is ethically coherent.) I also believe that an ethically coherent

4 RESTATEMENT (SECOND) OF AGENCY 395 (1958).

5 See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

6 COMPARE Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976).

7 See *People v. Belge*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975), *aff'd*, 41 N.Y.2d 60, 390 N.Y.S.2d 867, 359 N.E.2d 377 (1976).

case can be made that a lawyer should *not* be permitted to present testimony of an accused that he believes is perjury. (I will not stop to argue that case either.) If it is accepted that either of these rules would be ethically coherent, then the question arises as to which rule a lawyer should follow.⁸

The legal system can intercede to specify the rule that shall prevail.⁹ Such a legal rule serves not only a legal purpose but a coherent and useful *ethical* purpose. The rule speaks to a person who, being a lawyer, faces a debatable ethical choice under circumstances where he must act in one way or another, but where he cannot (owing to the duty of confidentiality) go outside the lawyer-client relationship to get an authoritative resolution. To have a legal rule for such a situation — a rule that is authoritative within the community at large — at least moderates the complexity of the lawyer's deliberation and may ease her burden of trying to act responsibly. Legal rules reduce, even if they do not eliminate, the frequency and extent to which it becomes necessary to reexamine the foundations of ethical conduct every day.

Legal rules of conduct for professionals therefore have significance in professional ethics, and should be respected and appreciated as such. But legal rules are not everything, as Professor Shaffer demonstrates.

I think he also demonstrates, through the method of illustration, that the legal profession has come to put too much weight on codes and rules as the medium of discourse about professional ethics. More is needed than the codes or rules to make sense of the subject of professional ethics. According to Professor Shaffer, that need is met at least in part by illuminating narrative.

Narrative reveals dimensions of events that rules cannot. These dimensions at a minimum include specification of the social context in which an ethical dilemma arises and the identity and character of the participants. The social context in which an ethical problem arises is both part of the problem and part of the solution. For example, the social context in which the lawyer Atticus Finch found himself in *To Kill a Mockingbird* — a small Southern town a half century ago — makes it possible to understand why it was especially difficult for Atticus to represent a black man accused of crime. So also Timothy Colt's situation in practice in an elite New York law firm was part of the professional ethical problems he faced. But social context can also be part of the solution. The social context in *To Kill a Mockingbird* included the fact that Atticus was a member of, or at least related to, the local white establishment. That relationship permitted him to undertake representation of the black man on terms and with consequences that were far different than if Atticus had been a Yankee lawyer appointed *pro hac vice*.

More generally, as Professor Shaffer observes, a lawyer's immediate situation in practice — the firm in which she practices, for example — is likely to provide the most significant ethical tutelage to which she will be

⁸ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983); C. WOLFRAM, MODERN LEGAL ETHICS, p. 660 (1986).

⁹ See *Nix v. Whiteside*, 475 U.S. 157 (1986).

exposed on a continuing basis. The work setting, and the social context in which it is embedded, will count far more in this respect than the rules of professional conduct, or the bar examination on the subject of professional ethics, or the law school process of professional socialization. And the influence of a lawyer's "situation in practice" can be adequately conveyed not simply by rule or precept,¹⁰ but only by narrative, whether fictional or anthropological.

This is a profoundly important point, perhaps worth stating flatly: Ethical deliberation and ethical conduct are unintelligible if considered only in terms of rules or principles or precepts, apart from situation. "Situation" is the constraining factor that makes ethical analysis a serious undertaking, just as "shortage" is the constraining factor that makes economic analysis a serious undertaking. Neither type of analysis makes sense if the constraint of circumstance is not taken into account.

There is another aspect of narrative, particularly fictional narrative, that Professor Shaffer might have developed more fully. This is subjective awareness on the part of the central actors. In a fictional account, the narrator can present a "true" statement of what the actors perceive. Indeed, the narrator can present a "true" account of the actor's self-consciousness: How the actor interprets the situation to himself and relates it to what he has been, what he must do, and what he will become. The narrator can compare this set of subjective images in the mind of an actor with what is "actually" happening and with the counterpart subjective images in the minds of other actors.

That there can be discrepancies between what two different actors perceive in a situation is an insight that adults take for granted. We also take it for granted that an actor can perceive a situation differently from what the situation "actually" is. In real life, we do not actually know others' perceptions of situations as they view them. We cannot know — at least for sure — whether we or they see the situation as it "actually" is. Strictly speaking, indeed, in real life it is meaningless to talk about a situation as it "actually" is. We are able only to discuss our respective solipsistic impressions.

Narrative fiction, in contrast, can stipulate what a situation "actually" is. It similarly can stipulate what the various participants perceive and believe the situation to be. Shakespeare mastered such narrative. The soliloquy in *Hamlet*, for example, presents Hamlet's perception and interpretation of his situation along with an opportunity for us to perceive and interpret his situation. Such a stipulation permits development of insight into ethical dilemmas that is deeper, and hence emotionally more real, than the limited perception of ethical dilemmas that we have in real life.

In real life, we know that we do not really "know" what others know or perceive in the same way that we know what *we* "know." That uncertainty is often part of an ethical problem. However, the inability really to know what is happening in a real world situation is also often part of a solution to ethical dilemmas. For example, if we do not know whether

10 Compare MODEL RULES OF PROFESSIONAL CONDUCT Rules 5.1 and 5.2 (1983).

someone is lying we are not compelled to take action that would be ethically obligatory if the person is in fact lying.¹¹ Cognitive dissonance is a friend to every troubled conscience.

More generally, ethical dilemmas arise from the juxtaposition of norms and situations. The norms may be legal, ethical or admonitory in some other sense. In any event a norm is a conceptual idealization of conduct — literally an idea about conduct. Norms may be formulated as rules or examples, and their terms may be more or less agreed upon. But however formulated and however widely agreed upon, they are abstractions. Yet norms are intelligible as guides to specific conduct only as they refer to a concrete situation. A rule that “thou shalt not kill,” if understood at all, must be understood to refer to a situation in which there is another person whom the actor is in a position to kill. Otherwise, what is the point of the norm?

In narrative, as suggested above, the narrator can stipulate whether there “actually” is another person in the situation (as distinct say from, an animal or an apparition) and whether the actor “actually” knows he is there and “actually” is in a position to kill him, etc. In real life, however, these facts cannot be stipulated. Everyone — actor, alleged victim, and eventually judge and jury — has to conjecture what the situation “actually” is.

An implication of this point is that in professional ethics, the relevant actor is the professional himself. In the real life of a professional, only the professional himself knows what he perceives and what he believes about it. For one reason or another he may not be very sure what he perceives, and may not want to be very sure. Cognitive dissonance is also the friend of professional conscience, perhaps an especially good and needed friend.¹² But narrative, particularly fictional narrative, is not so inhibited. A story can reveal to us moral aspects of life that otherwise are simply inaccessible.

That is an ethical truth, or a truth about ethics, that Professor Shaffer compels us to confront. Moreover, it is a truth that lawyers do not readily acknowledge. At least, lawyers are not very good at contemplating this truth when deliberating *en bloc*, as they do in bar associations. Perhaps that is one reason the legal profession speaking *ex officio* rarely seems to be able to talk profoundly about ethics of professional conduct. Their natural medium is rules. As Professor Shaffer's medium demonstrate, that medium limits the message.

11 See *Nix v. Whiteside*, *supra* note 9. G. HAZARD & W. HODES, *THE LAW OF LAWYERING* 339-344 (1985) (“What Does a Lawyer ‘Know’?”).

12 Cf. K. MANN, *DEFENDING WHITE COLLAR CRIME* (1985), *passim*.