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Book Reviews: The Conscience of a Lawyer

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THE CONSCIENCE OF A LAWYER. By David Mellinkoff,† St. Paul, Minnesota: West Publishing Co. 1973. Pp. x, 304. $6.50. Reviewed by Eugene J. Davidson.††

"[C]onscience is the guardian in the individual of the rules which the community has evolved for its own preservation."—Maugham[1]

"[P]olicy sits above conscience . . . ."—Shakespeare[2]

Maugham or Shakespeare—Shakespeare or Maugham; which is it to be? Is it to be winning or how the game is played? Is it more important to re-elect the incumbent President or shall the former Attorney General of the United States disclose the "Watergate Horrors?"

For many conscience versus policy never becomes a serious problem. Most will go through life making ad hoc decisions of policy over conscience or vice versa with hardly an awareness that the decision was made. However, lawyers, particularly criminal trial lawyers, are not so fortunate. Frequently they are confronted with the hard choice. For them it may be more than how the game is played, since a client's property, freedom or, perhaps, life itself is at stake.

Do the rules evolved by society permit lawyers not only to defend a self-confessed felon but to use their every skill and resource to persuade the jury to acquit a known to be guilty defendant. Our morality and our legal system dictate granting the guilty a fair trial. We take pride in declaring that better one hundred guilty go free than one innocent person be convicted. However, as Professor Elliott E. Cheatham observed:

> For the layman, it is never easy to understand, much less to sympathize with, the adversary system for the administration of justice. . . . It troubles the sensitive man entering the profession. He understands why the soldier should fight his nation's enemy, or why the physician should fight disease, the common enemy of mankind. But what is the justification of the lawyer, "an officer of the court," fighting for what is not just?[3]

One would suppose that by the last quarter of the twentieth century a well delineated mode of conduct for defending the admitted felon would have evolved, so that all would know precisely what is *prescribed* and what is *proscribed*. Yet, even today the problem remains a dilemma. Judicial decisions, The Code of Professional Responsibility and the writings of eminent authorities are ambivalent.

The United States Supreme Court admonishes defense counsel to be

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1. W. MAUGHAM, THE MOON AND SIXPENCE 79 (Heritage Press ed. 1941).
2. W. SHAKESPEARE, TIMON OF ATHENS act 3, scene 2, line 94.
3. Cheatham, *The Lawyer's Role and Surroundings*, 25 ROCKY MT. L. REV. 405, 409-10 (1953).

an advocate and not amicus;[4] a Federal Judge proclaims the defendant to be "entitled to the faithful and devoted services of his attorney uninhibited by the [attorney's] dictating conscience;"[5] and a legal commentator writes, "A trial is not a dispassionate and coöperative effort by all the parties to arrive at justice. . . . [T]he adversary system for the administration of justice . . . involve[s] . . . the deliberate reliance on partisan representation. . . ."[6]

Can defense counsel be a partisan advocate divorced from his conscience and still true to his pledge "not [to] counsel or maintain . . . any defense except such as I believe to be honestly debatable under the law of the land . . . [to] employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor?"[7]

It is on this seeming conflict that *The Conscience of a Lawyer* focuses attention. The framework for the author's exploration into the moral and ethical problems confronting defense counsel is the celebrated Victorian trial of Benjamin F. Courvoisier for the murder of his employer, Lord William Russell.

As related by Mellinkoff, the investigation of the crime and the trial make fascinating reading. It contains all of the drama, suspense, and surprise of a television mystery as well as the moral overtones of a daytime television soap opera. The cast of charaters run the gamut: a bumbling and evasive constable who is capable of perjury; a frightened servant girl who may be the murderess; a mystery witness whose morality and credibility are suspect and who comes forward just as the prosecution's case appears to be crumbling; and, of course, the defendant himself, a Swiss domiciliary who stands accused of murdering his employer, an English nobleman. Add to this potpourri a public aroused by an attempt only a week before on the life of young Queen Victoria and a press that determined the defendant Courvoisier guilty even before the first witness was heard. Clearly the lot of defense counsel was not to be an easy one. It became almost intolerable when the defendant on the second day of the trial quietly told counsel, "I committed the murder;"[8] that he would not plead guilty and expected counsel "to defend me to the utmost."[9]

The book is not merely a tale of a lawyer's trials and tribulations; it is an inquiry into important, albeit difficult, issues that have and will continue to plague the legal profession.

Using the story teller's art (an art in which the author evidences great

4. Anders v. California, 386 U.S. 738 (1967).
5. Johns v. Smyth, 176 F. Supp. 949, 953 (E.D. Va. 1959).
6. Cheatham, *supra* note 3, at 409.
7. Recommended Oath of Admission; AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICIAL ETHICS, 55 (1971).
8. D. MELLINKOFF, THE CONSCIENCE OF A LAWYER 132 (1973) [hereinafter cited as MELLINKOFF].
9. *Id.* at 133.

talents) and the technique of narrative instruction (which as Theordore White has suggested is the best kind of instruction), Mellinkoff explores the ethical problems confronting counsel in continuing with the defense. Should he withdraw or should he continue with the case? If he remains, how vigorous may his defense be? May his cross-examination seek to destroy the credibility of the police and to cast suspicion on an innocent servant girl? How far may he go in proclaiming his client's innocence during summation to the jury? In short, does he act as though he was not the repository of his client's secret or does he seek an accomodation between justice and his client's desire of an "utmost"[10] defense?

These problems, their impact on the legal profession, the role of the press, and the public's reaction which sees the Bar as screening the guilty and varnishing crime are explored by Mellinkoff in an absorbing as well as scholarly fashion. He also traces the developments of Anglo-American concepts regarding the defense of the hated and the role of counsel as advocate and officer of the court. Mellinkoff's views understandably shape his handling of the material. He, however, is at his best when commenting on the manner in which the legal profession supports those principles which would make more complete the ideal of equality before the law. Typical is his righteous concern with a system that enables conservative United States Supreme Court Justice George Sutherland to state: "The right [of an accused] to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel"[11] and, nevertheless, fails to mandate the Bar to defend the same accused. The Bar and the public well may ponder Mellinkoff's query: "If the accused is entitled to a lawyer, is the coin blank on the other side? Or is it also 'a logical corollary' that an American lawyer has a duty to defend? And that, regardless of what he thinks of the man or his cause?"[12]

Lawyers speak proudly of Andrew Josiah Quincy and Arthur D. Hill for acting in the highest tradition of the bar by undertaking to represent the nonconformer or the hated. Yet, the modern Code of Professional Responsibility does not obligate a lawyer, absent a court appointment or a request by the Bar Association, to refrain from declining to represent an accused because of the latter's identity or counsel's belief of guilt.[13] Significantly EC 2-26 makes the unequivocal statement: "A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client."[14] While it continues to declare that lawyers should not lightly decline proferred employment, this admonition is tempered by the concluding

10. *Id.*
11. Powell v. Alabama, 287 U.S. 45, 68-69 (1932).
12. MELLINKOFF 168.
13. AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICAL ETHICS, EC 2-29 (1971).
14. *Id.* at EC 2-26.

sentence which states: "The fulfillment of this objective requires acceptance by a lawyer of his *share* of tendered employment which may be unattractive *both* to him *and* the bar generally."[15]

Another of Mellinkoff's discussions worthy of reflection by lawyers and laymen alike is the chapter *To Defend a Guilty Man* wherein he points:

> Some men, perhaps most, who confess . . . are guilty, morally and legally. Yet it is not invariably so. And it is some mark of a civilized society that it will take pains to make sure before condemning anyone. The pains . . . go by the lawyer's name of "procedure," to some by the dirty word "technicalities" (as indeed they are). . . . Any system of justice has its procedures, its technicalities. . . . It is often only a choice of procedures that separates savagery or tyranny from civilized life. Head-hunting is a procedure; so is the rack.[16]

Francis Bacon reminded us that "some books are to be tasted, others to be swallowed, and some few to be chewed and digested."[17] *The Conscience of a Lawyer* is one of the few. It is worthy of both the time and attention of the Bench and the Bar. For the law student the book is, perhaps, a must. Undoubtedly all will have a clearer understanding of the conduct of defense counsel in some of this decade's more notorious prosecutions after reading *The Conscience of a Lawyer.*

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15. *Id.* (emphasis added).
16. MELLINKOFF 153.
17. FRANCIS BACON, *Of Studies*, in ESSAYS OR COUNSELS CIVIL AND MORAL (1625).