

TEACHING A LAWYER'S CONFESSIONS

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It would, I think, be hard to imagine a teacher who has not over years of teaching grown both familiar and fond of particular texts. We have witnessed this kind of fondness firsthand as students, perhaps in high school, later at the university. We remember a teacher who had a great love for Melville's *Billy Budd*, or a Shakespeare play. Later it may have been the sociology teacher who spoke ever so affectionately about C.W. Mill's *The Sociological Imagination*, or a work of Nietzsche or Plato. I am confident my colleagues and fellow teachers have judicial case opinions they teach every year, cases which have grown so familiar that a course in contracts or torts or constitutional law would be found deficient without them. One might imagine a colleague who has grown so comfortable and familiar with a particular selection of cases and case notes that he publically laments the new edition of the text, all changed and different, leaving out some favorite case.

In teaching ethics, I have a number of texts that I find to be exemplary teaching texts, believing that they offer the student possibilities for education more difficult to achieve by way of other sources. I assume that by offering a worthwhile teaching text to my students I have done something worthwhile as a teacher.

If a legal ethics course could ever be said to have a "leading case,"¹ or a text that deserves familiarity, I would nominate Seymour Wishman's *Confessions of a Criminal Lawyer*.² Wishman's book is certainly not a "leading" text in having gained canonical status or even frequent usage. So far as I know, no part of the book appears in a single legal ethics course book. The collection of articles in this Symposium offer reasons we might want to teach "texts" like Wishman's *Confessions*, and some caution and pessimism about our ability to make use of such a text. As far as my own teaching of legal ethics, I cannot quite imagine setting out to explore lawyer ethics without having Wishman's provocative *Confessions* to share with my students.

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¹ On the cognitive significance of story-based "leading cases," see John Batt, *Law, Science, and Narrative: Reflections on Brain Science, Electronic Media, Story, and Law Learning*, 40 J. Legal Educ. 19 (1990).

² Seymour Wishman, *CONFESSIONS OF A CRIMINAL LAWYER* (New York: Penguin Books, 1982)(1981). All page citations in the text are to the Penguin edition of *Confessions of a Criminal Lawyer*.

My task here is to try to explain how I have come to admire Wishman's book, and especially, the first chapter, "Accused: 'That's the Lawyer!'" I have assigned either the book or the first chapter to hundreds of students in professional responsibility and now in a seminar I call "Practical Moral Philosophy for Lawyers."³ I confess to having passed along copies of the book to teaching colleagues and being the instigator of this symposium in the *Legal Studies Forum*. What then makes Seymour Wishman's *Confessions* and his "war stories" as a lawyer such an exemplary teaching text?⁴

First, I should point out that there is nothing fancy, or on the surface, extraordinary about the story. Seymour Wishman is a lawyer and he does what one might expect a lawyer writing about his life to do; he tells stories about himself and his clients, stories about the practice of criminal law as a prosecutor and later as a defense lawyer, and his clerkship with a Judge who he admired and respected. Like many lawyers, Wishman has a sure hand when it comes to telling stories. The story vignettes he relates have just enough of an "edge" or "kick" to keep us reading. Wishman isn't out to replace John Grisham or Scott Turow, and doesn't attempt to tell their kind of "plotted" story, but we do find ourselves wanting to know more about Wishman and how his life as a lawyer turns out. What we have in *Confessions of a Criminal Lawyer* is a lawyer telling stories, talking about the sticky situations in which he has found himself, how his habituated responses as a litigation lawyer took over his life, and how this all became problematic. So, it is not the plot or action that keeps us moving through *Confessions of a Criminal Lawyer* but the immediate sense that Wishman's success (which he portrays in a most engaging and convincing way) has come at a cost.⁵ In Wishman's collection of "war stories" (a familiar genre for lawyers who take up writing), we see a lawyer both successful and devoted to the legal profession who tries, in the most careful fashion, to come to grips with the moral dimension of his professional life, a life devoted to

³ The use of Wishman's book is now more difficult because it is not readily available.

⁴ The participants in the Symposium have focused on the first chapter of Wishman's *Confessions*. See Seymour Wishman, *Confessions of a Criminal Lawyer*, 21 *Legal Stud. F.* 139 (1997). In my Essay, I flesh out some of Wishman's observations by drawing on his reflections in the remainder of the book.

⁵ We see something of a similar structure in Scott Turow's, *ONE L* (New York: G.P. Putnam's Sons, 1977)(vignettes of law school life celebrating legal education while showing that learning law has its costs). See James R. Elkins, *Book Review (One L)*, 3 *Am. Legal Stud. F.* 81 (1978).

litigation and the “practices” of criminal lawyers.⁶ Wishman’s celebration of lawyering, and he finds much to celebrate, is a masterful Zen-like moment, in which we see both the great power of the adversarial ethic and its psychological and moral undertow.⁷ It is this adversarial ethic at the heart of a lawyer’s professional life that every lawyer must come to grips.⁸ The power of Wishman’s story lies in the subtle way in which this tension between the excesses and the virtues of the adversarial ethic are portrayed.

Importantly, for a teaching text, the student learns to trust Wishman. He is a “real” lawyer, with many and varied experiences, working on behalf of interesting clients, and he gets pushed to his limits. Isn’t this exactly the hope that we have for ourselves as lawyers? The reader gets the sense that Wishman loves being a lawyer. If there is something wrong with our adversarial ethic, or it’s a good ethic but easily abused, then better to get the bad news from a lawyer like Wishman who not only understands but loves the work of which he has now become a critic; Wishman tells a “tough love” story. It helps that Wishman is a good story-teller and has a sense of humor. It matters to the reader that Wishman is good at what he does, enjoys it immensely, and has no ill-will against lawyers and the legal profession. For those who have set out to be lawyers, Wishman seems to be a worthy guide.

Having said all this, Wishman makes clear, from the opening pages of *Confessions*, that all is not well with Camelot. And it is this sense that something has gone wrong, something unintended, and something for which Wishman could argue that he had no warning, that opens the book.

⁶ Some legal readers will make much of the fact that Seymour Wishman is a criminal lawyer and that his story can be understood only in that context. In my view, Wishman evokes concerns that extend well beyond the particularities of criminal law practice. For example, when Wishman discusses the things he did in the name of the adversarial ethic, I think it becomes quite clear that he is talking about the kind of things we see and know are being done in the legal profession by lawyers generally. Wishman’s concerns about the adversarial ethic in the criminal trial can, with modest effort, be translated into a broader range discussion of the adversarial ethic.

⁷ It is Wishman’s capturing of the “moments” in which our adversarial zeal is most pronounced (and his criticism of lawyers who don’t have that zeal and the skills that accompany it), moments in which we can, without caution, overreach, that gets to the heart of what Tom Eisele has identified as the fundamental conflict in professional life, a conflict so fundamental and perplex that we tend not to teach it. See Tom Eisele, *From “Moral Stupidity” to Professional Development*, 21 *Legal Stud. F.* 193 (1997).

⁸ For an exploration of a course in legal ethics which places the adversarial ethic and its critique at the heart of the course, see James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 *Cap. U. L. Rev.* 735 (1992).

The first story vignette in *Confessions* concerns a late summer night confrontation in a Newark hospital with someone from Wishman's past.⁹ When the woman at the hospital begins screaming at Wishman and must be restrained, Wishman is baffled and does not recognize her. And then he realizes that the screaming woman was the victim in a rape and sodomy case in which he had represented the defendant. When Wishman realizes who the woman was—Mrs. Lewis, the complaining witness against a former client, Larry Horton—he realizes why she might be screaming. In recalling the details of the Horton trial, Wishman recalls how he had, during his cross-examination of Mrs. Lewis, brutally humiliated her.¹⁰

Wishman uses the word "humiliated" and we lawyers and watchers of TV lawyer dramas and films know exactly what he means. Lawyers are expected to know how to discredit a witness and Wishman points out that during the course of his career he had had occasion to do it frequently. But note the subtle shift in meaning when we talk about "discrediting" a witness and "humiliating" a witness. Put in the more neutral, professional language, we get a sense of an activity to which no one would pose moral objections. We know, of course, that being a lawyer and using the tools that lawyers have at their disposal assumes that they will be used with care. So when lawyers talk about discrediting a witness, the most basic point is simple: there are many witnesses who deserve to be discredited and only with their discrediting can justice be done. We discredit witnesses for a reason; the witness is unable or unwilling to tell the truth. It is lawyers and their tough cross-examinations that helps us determine whether our belief in a witness is justified. Yet, it is the power of lawyers to use this extraordinary tool, one fundamental to our way of proceeding in legal matters, that creates problems.

We might, of course, imagine a case in which a lawyer attempts to discredit a witness simply because the witness is crucial to the opposing side and "something" must be done on behalf of the client. Students will sometimes say, "This is what lawyers do, it is their job, and I don't know that much more need be said." Obviously, Wishman found this blunt

⁹ In the movie, *Cape Fear*, the lawyer is revisited and terrorized by a former client. Hollywood lawyer films often play on both this theme of "terror" and the inability of lawyers to stay free of their client's obsessions.

¹⁰ In a course I am now teaching, a student, reading Wishman's account of the encounter with Mrs. Lewis remarks, and not in a cynical way, "I didn't find Wishman's treatment of Mrs. Lewis all that bad. What did she think was going to happen in a rape case?" I didn't hear the student to mean that there was nothing wrong with Wishman's conduct, but to suggest that the prosecution had poorly prepared Mrs. Lewis as a witness.

assertion (and its accompanying sense of Necessity) insufficient, as might a teacher of lawyer ethics. We may well be pressed into doing things that are distasteful, but we might expect on the part of one who is confronted with Necessity, to at least acknowledge how even Necessity has its limits.

A still more basic question is whether a lawyer can discredit a truthful witness and contend that to do so has no moral consequences. A lawyer or student of law, offers evidence of insensitivity to moral morals when she argues: "I'm just not that interested in the truth, as I am presenting the best possible case for my client and letting the chips fall where they may. No one appointed me as an arbiter of truth. It's not my job." Actually, we might not want to label such sentiments without knowing more about their source, but they most certainly raise some questions. In this sense, the teacher of Wiseman proceeds, with the help of Socrates,¹¹ to pose some questions: Of course, you don't mean to say that you don't care about the truth? Shouldn't everyone, your client, you, the client and the lawyer on the opposing side, as well as the judge, be interested, at least in some limited way, in the truth? Do you really think it possible to have a system of justice in which clients lie, or the police lie, or an expert witness knowing produces conclusions she knows to be unsupported by her findings? Wouldn't it be more accurate (better?)(wise?) to say that we are all, in our own way, responsible for truth? One might, as a reader of Plato's Socratic dialogues, realize that the participants in such a conversation may not be all that happy to have such questions posed (and posed in public for all to see and observe and judge one's response).

We might move from this middle-ground (I discredit witnesses as part of my job) to the more disturbing situation where the lawyer or student says, "Yes, I would discredit a truthful witness and do anything else so long as it were legal. I want to win every case I try and I'll use whatever tactics that are available for that purpose." Here, we have moved from the case of a student who has not thought carefully about their position (and learns by way of questioning that they indeed have a higher regard for truth than they make have initially recognized), to a student, seemingly willing to proceed in reckless disregard of the truth. At this point, one might be disturbed about the general tenor and tone and passion with which the brutal cross-examination is contemplated and the corresponding unwillingness to see that the position presents any sort of moral or ethical problem. Again, we don't

¹¹ See James R. Elkins, *Socrates and the Pedagogy of Critique*, 14 *Legal Stud. F.* 231 (1990).

have to decide where, exactly, we come out on the difficult question—did Wishman go too far, ethically, in his cross-examination of Mrs. Lewis—to realize that the mindless use of this powerful tool might create moral problems (for the user of the tool as well as one who has it used indiscriminately against them). A teacher of lawyer ethics might conclude that one who engages in such risky business needs to know how risky it can be.

I read Seymour Wishman to say that whether you want to think about the truth or not (and many law students do not), if you discredit witnesses willy-nilly and do it without thinking about it, you may end up being a different person than you have set out to be.

Actually, a law student might need to think carefully, not only about the moral rip-tides in litigation hard-ball tactics, but about their strategic value as well. Humiliating truthful witnesses is a perilous business, both in a strategic sense (most of us aren't all that enamored with a person who sets out to obfuscate the truth)(discrediting a truthful witness might undermine a lawyer's case in the eyes of jurors) and in a personal sense (playing loose and free with the truth might not be all that good for the psyche).

Working with Wishman's encounter with Mrs. Lewis, we might get around to talking about the moral significance (which some students will take great effort to deny) of the difference in a lawyer's discrediting a witness who deserves to be discredited and discrediting a witness the lawyer believes to be telling the truth. The difference, and the moral weight of what the lawyer has done, especially when the witness is humiliated, might just happen to turn on whether the witness was telling something that resembled the truth *and* whether the lawyer knows or cares to know that the truth is at stake.

In Harper Lee's *To Kill a Mockingbird*,¹² Atticus Finch humiliates Bob Ewell, a witness against Atticus's client, Tom Robinson. Robinson has been charged with the rape of Mayella Ewell. Atticus uses his cross-examination to discredit Bob Ewell, Mayella's father, and a purported witness to the rape; so thoroughly is Bob Ewell humiliated and his lying exposed for all to see, that he later spits in Atticus's face and attempts to kill his children. Mayella Ewell's account of the rape is also discredited when Atticus uses his cross-examination of her to suggest that it was most likely her father who had beaten and abused her rather than the defendant, Tom Robinson. Finishing the cross-examination, "Mayella's face was a mixture of terror and fury."¹³ She makes one last

¹² Harper Lee, *TO KILL A MOCKINGBIRD* (New York: Popular Library, 1960).

¹³ *Id.* at 190.

emotional statement that Tom Robinson raped her and then “burst into real tears. Her shoulders’s shook with angry sobs.”¹⁴ We know, as much as we can ever know these things, that Mayella Ewell is lying, and that Atticus, being the gentleman in the courtroom he is,¹⁵ has discredited Mayella Ewell with the best of motives—his client, Tom Robinson did not rape Mayella Ewell. Liars who have sworn to tell the truth need to be exposed and must be exposed if there is to be any justice for the Tom Robinsons of this world.

The problem, of course, is that discrediting witnesses in the name of adversarial zeal can get out of hand. Witness what happens in the Tom Robinson trial in *To Kill a Mockingbird*. When Mr. Gilmer, the prosecutor, cross-examines Tom Robinson (whose “manners,” according to Scout Finch, who has sneaked into the courtroom to watch the trial, “were as good as Atticus’s”)¹⁶ he refers to him as “boy”¹⁷ and mocks Tom Robinson who claims to have been trying to help Mayella with her chores rather than sexually assaulting her. When Tom Robinson, who is black, indicates that his motive for helping Mayella, who is white, was that he felt “right sorry for her,” Gilmer asks, “You felt sorry for *her*, you felt sorry for her?”¹⁸ Mr. Gilmer is, as was said of Johnnie Cochran in the O.J. Simpson trial, playing the “race card.” Tom Robinson is no fool; he “realized his mistake and shifted uncomfortably in the chair. But the damage was done. Below us [the whites attending the audience were seated on the first floor, blacks in the balcony], nobody liked Tom Robinson’s answer.”¹⁹ Now, Mr. Gilmer, doing his job, trying to make the rape case against Tom Robinson, has set about to discredit Tom Robinson’s testimony and does so by evoking in the white jury a sense of outrage that a black man might feel “sorry” for a white woman. Tom Robinson seems to have violated a “code” (of race relations) for which he must be punished, regardless of the truth of the alleged rape. It begins

¹⁴ Id.

¹⁵ The judge tells Mayella, “Mr. Finch is always courteous to everybody. He’s not trying to mock you, he’s trying to be polite. That’s just his way.” Id. at 184. The judge might, if he had not been bound by notions of judicial propriety and fairness, also told Mayella Ewell that Atticus was a man of some honor, what at one time we would have called a gentleman, concerned in his cross-examination in trying to get to the truth. It was, I assume the powerful image of Atticus Finch as gentleman lawyer that led Thomas Shaffer to pursue the possibility that the gentleman ethic might still be of interest in the legal profession. See Thomas Shaffer, *The Gentleman in Professional Ethics*, 10 Queen’s L. Rev. 1 (1984); Thomas Shaffer, *The Moral Theology of Atticus Finch*, 42 U. Pitt. L. Rev. 181 (1981).

¹⁶ *To Kill a Mockingbird*, *supra* note 12, at 197.

¹⁷ Id. at 199.

¹⁸ Id. at 200.

¹⁹ Id.

to look like that Mr. Gilmer is less interested in getting at the truth, or even presenting a strong case against Tom Robinson, than he is preserving the status of whites and to keep blacks in their place (segregated, never to question a white, or cast doubt on a white man or white woman's word).²⁰

A childhood friend of Scout's who has snuck into the courthouse with Scout and her brother Jem, is so upset at Mr. Gilmer's brutal cross-examination of Tom Robinson that he has to leave the courtroom. Scout, mystified by Dill's sobbing, takes him from the courtroom and tries to find out what is wrong.

"Ain't you feeling good?" I asked, when we reached the bottom of the stairs.

"Dill tried to pull himself together as we ran down the south steps. Mr. Link Deas was a lonely figure on the top step. "Anything happenin', Scout?" he asked as we went by. "No sir," I answered over my shoulder. "Dill here, he's sick."

"Come on out under the trees," I said. "Heat got you, I expect." We chose the fattest live oak and we sat under it."

"It was just him I couldn't stand," Dill said.

"Who, Tom [Robinson]?"

"That old Mr. Gilmer doin' him thataway, talking so hateful to him—"

"Dill, that's his job. Why, if we didn't have prosecutors—well we couldn't have defense attorneys, I reckon."

Dill exhaled patiently. "I know all that, Scout. It was the way he said it made me sick, plain sick."

"He's supposed to act that way, Dill, he was cross—"

"He didn't act that way when—"

"Dill, those were his own witnesses."

"Well, Mr. Finch didn't act that way to Mayella and old man Ewell when he cross-examined them. The way that man called him 'boy' all the time and sneered at him, an' looked around at the jury every time he answered—"

"Well, Dill, after all he's just a Negro."

"I don't care one speck. It ain't right, somehow it ain't right to do'em that way. Hasn't anybody got any business talkin' like that—it just makes me sick."

"That's just Mr. Gilmer's way, Dill, he does 'em all that way. You've never seen him get good'n down on one yet. Why, when—well, today Mr. Gilmer seemed to me like he wasn't half trying. They do 'em all

²⁰ For still another lawyer's fateful representation of a client who represents a "racial code" rooted in prejudice and bigotry, see Pete Dexter, *PARIS TROUT* (New York: Penguin Books, 1989)(1988).

that way, most lawyers, I mean.

"Mr. Finch doesn't."

"He's not an example, Dill, he's—" I was trying to grope in my memory for a sharp phrase of Miss Maudie Atkinson's. I had it: "He's the same in the courtroom as he is on the public streets."

"That's not what I mean," said Dill.

"I know what you mean, boy," said a voice behind us. We thought it came from the tree-trunk, but it belonged to Mr. Dolphus Raymond. He peered around the trunk at us. "You aren't thin-hided, it just makes you sick, doesn't it."²¹

In this poignant and powerful passage, Scout (the insider, daughter of a lawyer, versed in legalese from an early age) tries to educate an outsider, Dill, in the seemingly hateful ways of lawyers. Scout's first impulse is to excuse Mr. Gilmer's behavior before she concedes that there is indeed something basically different between Mr. Gilmer and her father, Atticus. When Dill points out that Mr. Finch doesn't act the way Mr. Gilmer does, Scout explains that he's "not an example" of the typical lawyer because "[h]e's the same in the courtroom as he is on the public streets."²² Scout has learned, even at her early age, that lawyers play games; they act a role and much of what they do is to be discounted. (It's a bit odd that we expect lay persons to discredit much of what lawyers say *because* they are simply being zealous advocates and doing their job, or, if not discredit what we say, then be able to ferret out our acting from our commitments to the truth.) Scout is an experienced enough observer to know how bad things can be. She detects in Mr. Gilmer something less than whole-hearted enthusiasm in trying this case against Tom Robinson. Earlier, Jem, Scout's brother, had observed that Mr. Gilmer "seemed to be prosecuting almost reluctantly...."²³ Scout tells Dill, that Mr. Gilmer seemed to her like "he wasn't half trying."²⁴ Some of the jurors, familiar with the lawyers, may see and sense something of what Scout and Jem have seen. Perhaps Mr. Gilmer has qualms about prosecuting the Tom Robinson case (having tried Tom Robinson for the same reasons the juror convicts him, because the racial code demanded it). But then, Mr. Gilmer may simply know that he doesn't have to put his heart and soul into prosecuting a case in which he has the weight of prejudice on his side. Ultimately, in doing their job, both Mr. Gilmer and the jury, will convict Tom Robinson of a rape which

²¹ Lee, *To Kill a Mockingbird*, *supra* note 12, at 201-202.

²² *Id.* at 202.

²³ *Id.* at 191.

²⁴ *Id.* at 202.

Atticus has shown to most reasonable observers did not take place. When doing your job leads to injustice, there is, one suspects, the real possibility that there is something wrong with the job.

I have related these scenes and incidents from *To Kill a Mockingbird* to make a point about discrediting witness. It makes all the difference whether the witness the lawyer attempts to discredit is telling the truth.²⁵ And, from what we know about Atticus Finch, the character

²⁵ "Is it proper to cross-examine for the purpose of discrediting the reliability or the credibility of a witness whom you know to be telling the truth?" Monroe Freedman has identified this question as one of the three hardest questions of legal ethics. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1470 (1966). What makes the question so difficult? To illustrate the moral dilemma posed by the question, Freedman presents the following scenario:

Your client has been falsely accused of a robbery committed at 16th and P Streets at 11:00 p.m. He tells you at first that at no time on the evening of the crime was he within six blocks of that location. However, you are able to persuade him that he must tell you the truth and that doing so will in no way prejudice him. He then reveals to you that he was at 15th and P Streets at 10:55 that evening, but that he was walking east, away from the scene of the crime, and that, by 11:00 p.m., he was six blocks away. At the trial there are two prosecution witnesses. The first mistakenly, but with some degree of persuasion, identifies your client as the criminal. At that point, the prosecution's case depends on this single witness, who might or might not be believed. Since your client has a prior record, you do not want to put him on the stand, but you feel that there is at least a chance for acquittal. The second prosecution witness is an elderly woman who is somewhat nervous and who wears glasses. She testifies truthfully and accurately that she saw your client at 15th and P Streets at 10:55 p.m. She has corroborated the erroneous testimony of the first witness and made conviction virtually certain. However, if you destroy her reliability through cross-examination designed to show that she is easily confused and has poor eyesight, you may not only eliminate the corroboration, but also cast doubt in the jury's mind on the prosecution's entire case. On the other hand, if you should refuse to cross-examine her because she is telling the truth, your client may well feel betrayed, since you knew of the witness's veracity only because your client confided in you, under your assurance that his truthfulness would not prejudice him.

For those who teach legal ethics by way of dilemma, one dilemma after another, the student can be placed on the spot and asked directly: How would you respond to this situation?

Monroe Freedman has gained a reputation for his adamant defense of the adversarial ethic and his argument that the lawyer is not in the business of discerning the truth but putting on the case his client wants advanced, even when there is perjury in the offering. For a response to Freedman's vision of litigation ethics, see Mark L. Alderman, *Essay: Three Discussions of Legal Ethics*, 126 U. Penn. L. Rev. 452, 458-463 (1977) (calling into question Freedman's "model" of "moral deliberation" as a "single-source deductive approach.") Alderman argues that Freedman's vision of lawyering is grounded in an "abstraction." "The relevant moral agent is not an abstraction known as a "lawyer" but rather a flesh-and-blood person who happens to work in the law--an *important*, but not *controlling* fact. The question thus becomes what considerations, other than an abstract notion of what the system expects of lawyers, are important?" *Id.* at 460. The commentator

of a lawyer and how much of a "role" he acts out in the courtroom is also involved in how we go about discrediting witnesses. Atticus's treatment of Mayella Ewell can be distinguished from Mr. Gilmer's treatment of Tom Robinson, according to the trial judge and his daughter Scout, on the basis of Atticus's character, the way he deports himself in and out of the courtroom. For Scout, the main point seems to be that Atticus is "the same in the courtroom as he is on the public streets."²⁶ Atticus the lawyer is still Atticus.²⁷ Atticus doesn't treat the law as a game where he assigns himself a role that requires him to "play" a part in some drama that features an abstraction, in which Atticus the lawyer is not the Atticus we know outside the courtroom. Atticus doesn't *act* in the courtroom.²⁸ Atticus the lawyer is still Atticus the man on the public streets, the father of Scout and Jem, the man he is behind closed doors.

Atticus, literary example though he may be, presents the particulars (and the power) of a lawyer who seems not to struggle with the kind of fundamental conflict that so afflicts today's lawyers, pulled and torn between professional and personal life. We have gotten to the point in legal ethics where we fully expect our "professional morality" to be at odds with the "ordinary morality" we take with us into the world of law. We try, in as many ways as the rhetoric of professionalism will support, to defend the notion that reckless disregard for truth is a lawyer's virtue. We try not to think about how such disregard for the truth might destroy innocent lives, lead to injustice, and undermine the "system" to which we pay allegiance.

Scout has just enough experience with lawyers to have become jaded, a bit blind to the outrage that an innocent Dill experiences in seeing Mr. Gilmer humiliate Tom Robinson. It's not a pretty sight and Dill can't accept what he sees. Scout tries to excuse Mr. Gilmer, while Dill, the innocent, would hold him responsible for his moral callousness. The woman screaming at Seymour Wishman in the Newark hospital

suggests that "objections" can be posed "to the use of deception to prove the truth" but "they are all essentially grounded in the value judgment articulated in the maxim 'the end does not justify the means.'" *Id.* at 463-64.

²⁶ Lee, *To Kill a Mockingbird*, *supra* note 12, at 202.

²⁷ Scout, concerned about matters that may or may not go on in the mysterious Radley house next door, is told by Miss Maudie, that things can go on behind closed doors that we never know. Scout takes objection based on her experience with Atticus: "Atticus don't ever do anything to Jem and me in the house that he don't do in the yard." Miss Maudie, surprised by Scout's observation, says she was wasn't talking about Atticus but the Radleys, but that it's true: "Atticus Finch is the same in his house as he is on the public streets." *Id.* at 50.

²⁸ Wishman and other trial lawyers frequently comment on the theatrical elements of the trial, the trial as drama, with actors who speak scripted parts.

makes it clear that she hasn't accepted (and will never accept) what happened at the rape trial of her assailant, Larry Horton. She holds Wishman responsible for his treatment of her. If Mrs. Lewis was telling the truth, as Wishman suspects (assumes) she was, then perhaps she has good reason to be upset. The only question is: will we readers and students of law be upset? Or have we, like Scout, gotten beyond the point where seeing what lawyers do has the capacity to make us sick?

It is no small matter to be humiliated simply because a lawyer wants to win a case (imagine a teacher who humiliates a student for the simple reason that she hasn't prepared for class). Does the adversarial ethic, an ethic that requires partisan zeal on behalf of the most guilty of clients, require that lawyers become oblivious to the truth, to notions of civility, fairness, and respect for those who have sought no more than to appear in court and tell, as best they can, what happened? Should the victim of rape be forewarned by a prosecutor that she (or he) can be expected, as a matter of course, to be subjected to the most humiliating possible ordeal? It may be possible for lawyers to conduct "slash and burn" cross-examinations, but when the truth gets battered about unmercifully and truthful witnesses are routinely humiliated, then we may have let our ethic get out of control. Or have we? There will be students to say it has not gotten out of control at all, that Wishman has overreacted and that all is fair in love and war and that litigation is war. When this stance is articulated and defended and passions aroused, don't we have a real opportunity for teaching and learning?

Catching Oneself Up Short

Seymour Wishman, violently confronted by a witness he has humiliated, does what we might expect a lawyer to do: he defends himself. He tries to justify his actions and to put forth reasons for his treatment of Mrs. Lewis, and argue, to himself and the reader, that what he did can be explained. We might see in Wishman's efforts a glimpse of the working of ethics. We make a choice, take a stance, follow a path, and then we are called to task, called to explain and justify (if we can) what has happened. There is, in ethics as in law, this matter of being called to give reasons, the best possible reasons we can devise for some incident, or accident, or happening, or choice. Lawyers learn to do this on behalf of their clients. We get paid good money to make whatever reasons the client can produce look as good as they can possibility look. We help clients clarify and enhance the viability of their reasons so that the client can get a fair hearing, and if possible, a favorable resolution of their case.

Wishman deals with the Lewis encounter in good lawyerly fashion. He examines all the reasons (just as if they were evidence) he might use to justify his cross-examination of Mrs. Lewis, but he finds they don't add up. For another lawyer, under different circumstances, they might add up and the result might be something akin to a clean bill of moral health: "I did it; I didn't have any choice or reasonably thought I didn't, and now I must get on with it." One might imagine a different Seymour Wishman saying, "I have to put this incident, this 'screaming woman' behind me. I can't let her get to me." And while Wishman tries to persuade himself that all is well, he knows as well as he knows his own name, that Mrs. Lewis is telling him something he cannot deny. The result, a "chilling glimpse" of himself. Here, as so often in his story, Wishman offers instruction for those who want to know how ethics works. We get our ethics (or know about ethics) from exactly this kind of moment in which something breaks through the outer crust, gets behind the legal *persona*, and demands attention. The ego does what it can to contain the damage (and all the fussing around, the confusion, and the muddle which such moments can bring with them), but these ethical breakthroughs suggest that the ego too must be educated (to see its limits, its constant overreaching, its will to dominate, its overreliance on reason).

Wishman, like any one of us, might have assumed that he had no special responsibility or obligation to look after Mrs. Lewis (having his hands full with his obligations to his client, Larry Horton). So, Wishman does what any one of us might do, but then there is a surprising turn. He comes to see his treatment of Mrs. Lewis as a symptom for the more troubling aspects of his work and his life. For reasons which Wishman does not attempt to explain, the matter with Mrs. Lewis calls for a more searching self-examination than one would expect of a successful lawyer. (We are more likely to be reflective in failure than in success.) When the many reasons and explanations don't work, Wishman turns to reflection and introspection, worthwhile skills that legal education tends to ignore.²⁹

Instead of pushing aside Mrs. Lewis's emotional outburst, it seems to have stung Wishman. It provokes him to take a closer look at himself.³⁰ Wishman, shaken by the confrontation with Mrs. Lewis,

²⁹ See Appendix A, On Reflection as a Skill.

³⁰ Tom Eisele, in his contribution to this symposium, *From 'Moral Stupidity' to Professional Responsibility*, 21 Legal Stud. F. 139 (1997), argues that it is just such self-knowledge and the need for it that makes Wishman's encounter with Mrs. Lewis an instructive story for those interested in a sense of "professional development" that includes

begins to reflect on the incident and the way it leads to troubling conclusions. As Wishman (and readers like the contributors to this Symposium) work through his reflections, we have, I think, created the grounds for a real conversation about lawyer ethics, a conversation in which ethical self-reflection becomes an object of legal education.

If lawyers are expected and trained and ethically sanctioned to discredit witnesses, what moral objections can possibly be posed? First, we need to look at Wishman's justifications, not as abstract philosophical arguments, but in the particulars of Wishman's language, his way of putting the case, based on his experience, his language, and his way of seeing the world. It is in the particulars, the actual language, and the way Wishman expresses his concerns that we see a demonstration of ethical self-reflection and where it might lead. We don't, of course, see Wishman arguing for a particular way to resolve the conflict he has identified in his life, or pose anything like moral injunctions: e.g., "don't discredit truthful witnesses and your life as a lawyer will be in good moral condition." Wishman teaches by identifying the conflict, seeing how it is located in his life, traces its origin, and relates how he personally experiences the conflict. We might see in what Wishman has done, a model for ethical instruction, a model of particular interest in that Wishman does not seek out a teacher or guidebook, but learns something about himself from himself. It's not prescriptive moral lessons that Wishman conveys but his willingness to engage in self reflection and introspection that makes *Confessions of a Criminal Lawyer* an exemplary teaching text.

Teaching Wishman

There is much of interest in Wishman's story and it becomes an excellent teaching story (that is, a story we *should* teach) because he touches, with sensitivity and sensibility, so many matters with which lawyers and students of law must struggle. Consider, just in the space of the fifteen pages of his first chapter, the concerns Wishman raises

an understanding of the fundamental conflicts we confront as lawyers. While Eisele reads Wishman in much the same way I do, he is rather more pessimistic about the possibility of actually teaching Wishman and the conflict his story represents, than am I.

about: truth,³¹ skills,³² training,³³ personal psychology,³⁴ role models,³⁵ winning,³⁶ and injustice.³⁷ A lawyer ethics course built around these topics alone would, in my view of lawyer ethics, be a perfectly good and worthwhile course of ethical instruction.

Getting Behind the Reasons

I will not here try to show how each theme and area of moral concern raised in Wishman's *Confessions* might be put to use in a legal ethics course, but will focus on Wishman's explanation for his treatment of Mrs. Lewis and the reasons he advances which makes it possible for lawyers to justify this kind of behavior. I think these reasons need airing, and whether in a single hour, or weeks of careful exploration, the reasons give students of legal ethics much to talk about and much to ponder. They can be the source of argument and insight. So, I turn to the reasons.

³¹ Can a lawyer, ethically, discredit a witness he fully believes is telling the truth? Do lawyers, all lawyers, have some moral obligation, to preserve and defend the truth, even in that difficult situation, where the client has no or too little regard for the truth?

³² Do we let our fascination with lawyer skills and their use blind us to the fact that skills can be used to secure unjustifiable ends? Or is there something, in the belief that we hire-out our skills to willing buyers, that we have no responsibility for ends?

³³ Does law school train students to be ruthless advocates, with no regard for truth, with no sense that they are implicates in the ends of their clients? If so, how does this training take place? What, for the concerned among us, might be suggested as an alternative, or antidote?

³⁴ How much of our zealousness (or lack thereof) is driven, or fueled, by personal psychology, by unexamined needs (in contrast to being prompted by ethical rules and conventional understandings of the role)?

³⁵ Do we adequate role models as law students and young lawyers? Who teaches and what do they have in mind for us? For a laudable and much needed effort to use the elders of the legal profession as teachers of lawyer ethics, see Walter H. Bennett, Jr., *The University of North Carolina Intergenerational Legal Ethics Project: Expanding the Contexts for Teaching Professional Ethics and Values*, 58 L. & Contemp. Probs. 173 (Summer/Autumn, 1995).

³⁶ Does the intense, personal desire to win, distort our moral judgment? Can winning become a purpose, so dominant and ever present, that it creates a destructive, neurotic element in lawyering?

³⁷ How does a lawyer deal with the knowledge and awareness of injustice? No one of us can be so naive that we could get to be a lawyer without knowing that injustice is possible, but what, if anything, are we prepared to do about it?

(1) *I did it*, Wishman says, “to be effective in court,” to be “an effective counsel.”

A lawyer must at times, argues Wishman, “act forcefully, even brutally....” Wishman says of his earlier work as a prosecutor, “I was good at it and getting better all the time.” My question to students is a simple one: Is Wishman right? Must you humiliate Mrs. Lewis to be effective? And if you are willing to humiliate her, should you be bothered by what you have found it necessary to do? Are there not moral concerns that need to be addressed when a person who wants to be a good lawyer finds they are called upon to discredit a truthful witness?

Wishman puts the practice of discrediting witness in a more expansive light in a later passage in *Confessions*. He says,

If a witness’s testimony hurts his client’s case, the lawyer, whose primary objective is to win, considers it his duty to discredit the witness’s testimony, even when it may be truthful. He may try to confuse an overly cautious witness or intimidate a timid one, bait an irritable witness into appearing obnoxious, or tempt an arrogant one into exaggerating himself into an indefensible position. By the content of a question, or merely by the way the question is asked, a witness can be shamed, embarrassed, harassed, or angered into saying something that is or sounds untruthful. (174-175).

There are, Wishman recognizes, times when the lawyer who wants to be effective will choose not to discredit a witness. “For although it may be possible to shake a witness’s credibility, even a truthful witness’s credibility, it is a difficult and risky endeavor. There is always a strong chance of failure and of alienating the jury in the process.” (175). Wishman points out that “[r]ather than attacking the truthfulness of a witness, particularly a police officer, head-on, a good lawyer would prefer to find an explanation of the testimony that is consistent with his client’s innocence.” (133).

While there are strategic concerns in the discrediting of witness, there are also serious moral issues and it is the moral issues that students seek to avoid if possible. The possibilities and temptations for the lawyer to ignore the truth are endless.

It is not unusual for a truthful witness to appear to be lying. When a witness testifies on direct examination, he is questioned by a friendly lawyer who wants his story believed by the jury. He has spoken to the lawyer in advance and has been told what questions will be asked. So it is not surprising that the witness should sound sincere and likable, answering the questions promptly and candidly. On cross-examination his attitude might seem entirely different. He might react nervously,

creating the impression he is evading or lying. He might suspect—with good reason—that traps are being laid for him by this professional manipulator who knows all the rules. The witness may begin to take time to think about the questions, even simple questions, before answering. He may appear to be stalling for time to think about the questions, even simple questions, before answering. He may appear to be stalling for time by asking that a question be repeated, or complain that the lawyer is being unfair or the question cannot be answered with a simple yes or no. He may ask the judge for help and the judge may threaten him with contempt for not answering the lawyer. He may not look the lawyer in the eye, but stare at the jury, fearing they will not believe him. He may make a feeble joke. No one will laugh. He may ask the lawyer a question and be told abruptly to just address himself to the lawyer's questions. The lawyer can yell at him, shoot rapid-fire questions, be sarcastic, or accuse him of being a liar. And the jury will see a witness who could very well be evading, or withholding evidence, or lying. (173-174).

The point about being “effective” is that it is an assertion and a claim that needs examination. It requires exploration because it may not be such a good strategy and because it raises, hidden in the word effective and the desire to be effective, a moral dimension which must be described and mapped (as best we can).

(2) *“I had been trained in law school” to do it.*

When Wishman's statement is used in the legal ethics classroom it produces two starkly different views. Some students see Wishman's point, and credit law school with promoting the kind of adversarial zeal that results in discrediting truthful witness, doing whatever it takes to zealously represent the client regardless of who might be hurt or what harms might happen as a result. Still other students contend that it is not law schools that teach “hard-ball” tactics, but what a particular individual decides (chooses) to do with the adversarial ethic that determines a lawyer's character. Whether law schools teach in an active and affirmative way that lawyers need not worry about the truth, or educate in a more neutral agnostic way on the issue, is an open question.

(3) *“[T]here was nothing personal in what I was doing.”*

Wishman notes that Judge Barrett, the judge he had clerked for, would probably have been less “personally disturbed” by the encounter with Mrs. Lewis than he had been. And Wishman observes that when he tries to impeach the credibility or embarrass policemen who lie on the witness stand, “even when I yell at them, they don't take it personally either.” (133).

Wishman wants to believe that the treatment of Mrs. Lewis was not personal, but he knows it to be otherwise. He tells us he found the conviction of an innocent man “upsetting from a personal standpoint” and goes on to contrast his own concern with a callous trial judge who told him he “had no business meddling with the conviction [of the innocent man]” because the “adversary system had separate roles: a prosecutor should prosecute and a defense lawyer should defend” and that Wishman should have resolved his doubts before the trial. In Wishman’s view the conviction of an innocent man is a “miscarriage of justice” and something to get personally upset about, something he decides to act on, in contrast to the trial judge whose understanding of the system makes it possible for him to accept whatever result the “system” produces. The trial judge has created a peculiar kind of moral universe in which the conviction of an innocent man isn’t allowed to disturb him; injustice becomes impersonal.

Ultimately, Wishman concedes that there was indeed something personal in his humiliation of Mrs. Lewis³⁸—he had a “need for power and control, respect and admiration.”

I had to admit that I was getting more out of what I was doing as a criminal lawyer than money or the intellectual satisfaction of supporting the legal system. I would confess, over the years, to ego gratification and the joy of good craftsmanship: plotting out an intricate strategy, carrying off a good cross-examination, soaring through a moving summation—and the sound of a jury saying ‘not guilty’—are all thrilling. But why did I find it so thrilling. I knew, but only vaguely, that on a personal basis my courtroom performances also had something to do with a need for power and control, respect and admiration. (17).

* * * *

My involvement with the process of a trial could make me feel wonderful. Sometimes I experienced a sense of power and control over events and people that is often lacking in everyday life. I could decide to make heroes and villains of people, and then go ahead and do it. I could decide to make people fear me or like me or respect me, and go ahead and do it. I could want to move a jury to tears, and go ahead and do it. (200).

* * * *

³⁸ Wishman does not comment on the obvious contradiction in his effort to rationalize the humiliation of Mrs. Lewis by asserting on the one hand that there was nothing personal in it and then admitting that he had a deep psychological need to do what he did.

A good cross-examination was the hardest part of the trial, and when I was doing it well, it was thrilling—I was dominating the witness, the audience, the moment. Whatever self-doubt I might have as to whether I was really controlling the proceedings as I had thought, would be eliminated by the acquittal, if there was an acquittal. Where else could I find a place to be so decisive and powerful.

The fact that the lawyer's performance was in front of an audience added an important dimension to the enjoyment of the experience. All eyes were focused on me. The jury was composed of twelve critics to be persuaded; they watched me every moment. Spectators filled the courtroom to cheer their favorite players.... I could feel very important and special. A friend of mine once told me, "When I'm trying a case, standing there in front of a jury, it's the only time I feel totally alive." (200-201).³⁹

One way that Wishman (and we) insure that the "dirty" work we do as lawyers is not "personal" is to compartmentalize the personal and the professional, so that we don't let our work, and what we do in the name of that work get to us. For example, Wishman says:

If a crime or a criminal had been particularly offensive, I had always coped with my feelings by putting them aside, out of the way of my professional judgments. My method of dealing with these kinds of cases had seemed emotionally necessary and ethically appropriate. (42).

* * * *

I'd had no difficulty separating myself from my clients, and even from aspects of my own behavior that I found distasteful. But although I had been unaware of the extent of my detachment, and, at times, had even taken pride in my ability to keep so many things from touching me, I had been paying a heavy price. (238).

And yet, there was something in the encounter with Mrs. Lewis that "had changed things" for him.

A bell had been rung for me. Her outrage and pain after the trial had made a joke out of my posturing and my claims that there was nothing personal in what I had done. There damn well *was* something personal. If she had been telling the truth, I had stripped her of what little dignity she had left after my client had finished with her. (69).

³⁹ See also, pp. 38-39, 135-136, 142-143, 147, 162, 188 (successful criminal lawyers are "egomaniacs"), 207, 220, 221, 227-228 231, 232-233.

We see the problem of compartmentalization again, when Wishman talks about Judge Barrett, for whom he had clerked, a man of many admirable qualities but one who doesn't connect his ideals with his actions as a judge.

(4) The way I went about cross-examining Mrs. Lewis was a "reflex," says Wishman.

[A] good trial lawyer has to act almost by reflex at times. When an adversary is asking something improper or when a witness is starting to say something he should not be allowed to say, a lawyer may have only a fraction of a second to make his objection before the jury hears the damaging testimony. The rules and the procedure have to become so much a part of the lawyer that he has to be on his feet objecting, cutting the speaker off, sometimes even before formulating the precise basis for the objection.⁴⁰

Wishman later says that he acted reflexively to protect a client named Williams, a child killer, who he came to dislike intensely, a man he found disgusting. (166).

One point in this talk about acting as a reflex, is whether and to what extent we are expected to be conscious of anything more than the needs of our client. Some students will content that if you start thinking too much about law school and the work that lawyers do, you'll fall into a state of depression and that the only healthy way to get through life is to think less rather than more. I think one might see this as an important observation about what it takes to survive and still not argue it as a recommended course of action. As in most matters of expediency (and survival) it doesn't result in a sustainable psychological or moral practice.

(5) The humiliation of Mrs. Lewis on cross-examination was "merely an aspect of my professional responsibility...."

"I had done what a criminal lawyer was supposed to do." (18). This point was confirmed by the trial judge who commended Wishman for his "brilliant" cross-examination of Mrs. Lewis. Later, Wishman takes up the point again and remarks: "Maybe I hadn't done anything unethical—legally unethical. In fact, I might have been doing what I, as

⁴⁰ Wishman, *Confessions*, at 9. Wishman claims to have "formed the habit of automatically sizing up character and trustworthiness" of others and has "developed a reflex of recalling all inconsistent statements, no matter how trivial...." *Id.* at 239. At one point, Wishman talks about being "swept up as a partisan...." *Id.* at 50).

a lawyer, was required to do.” (69). But after the encounter with Mrs. Lewis, Wishman finds no “comfort” in what he now considers an “abstract” concept of responsibility. Yet, there is still a part of him that pulls in the other direction. “[P]art of me,” says Wishman, “shared, or wanted to share, my judge’s conviction [Judge Barrett, who Wishman had served as a clerk] that justice was served by a lawyer’s skills, ethically employed....”

If a legal ethics course doesn’t provide an opportunity to consider (argue, explore) what we mean when we use this nebulous but important phrase, professional responsibility, one wonders where and when such an exploration might take place. If law school and the practicing bar promote a conception of “professional responsibility” with such little regard for the truth as Wishman’s statement implies, then that ought to be explored. Some students may want to take objection and point out law school doesn’t advance any particular conception (or model) of professional responsibility. What we may find, however, is that law schools may help students form conceptions and images of lawyers that embody a particular kind of professional responsibility.⁴¹ And yes, we may find that these images and conceptions are sometimes in conflict, between students, and even within a particular student. If what we have is competing versions of professionalism, then it must be the case that the student is being asked to choose. For the teacher of legal ethics concerned about “preaching,” it isn’t a particular choice that a teacher dictates, but that our visions and images of the lawyer are contested and that some choice is being made.

(6) “[T]he trial was a fascinating process, a game....”

Wishman talks about the practice of law as a game. “And above and beyond the pleasures of the game, the trial was a contest for high stakes. The lawyer was literally playing for someone’s life.” (202). Charles Reich, in *The Sorcerer of Bolinas Reef*, relates how his colleagues at the Washington law firm where he worked viewed winning and losing cases as a game.⁴² The irony, Reich observed, is “they did not play it as if it were a game.”

⁴¹ On the use of images in professional ethics, see Eric Mount, Jr., *PROFESSIONAL ETHICS IN CONTEXT: INSTITUTIONS, IMAGES, AND EMPATHY* (Louisville: Westminster/John Knox Press, 1990).

⁴² Charles Reich, *THE SORCERER OF BOLINAS REEF* 27 (New York: Bantam, 1977).

When Wishman calls his work a game he has deployed a powerful metaphor, and one that needs examination.⁴³ There is nothing inherently wrong (morally or otherwise) with seeing the law as a game, but the metaphor can hide a multitude of sins. We might, drawing on the metaphor, put some questions to our students: Is law a game? If so, what kind? Is it possible that law consist of more than one kind of game? If so, what kind of different games do lawyers play? What moral significance, if any, lies in the use of the game metaphor to describe what one does as a lawyer?⁴⁴

(7) *I had, says Wishman, never connected the ideals that took me into law and my "feelings of justice" with "the anger of a humiliated witness."*

I had applied to law school with a deeply held belief that I could satisfy some high, even noble, expectations as a lawyer. Although I had never articulated what those expectations were, I knew I cared about the poor and the underdog; although I may have had only a hazy idea of what justice was, I did have an acute, albeit intuitive, sense of injustice. I didn't talk out loud about such things, because I didn't want to sound self-righteous or naive, but the truth was that beyond vague, grandiose feelings, I had never really thought it through, even for myself. (7).

Wishman relates how his friends had suggested to him when he became a prosecutor, that he "was on the verge of joining the enemy and violating some larger commitment to helping the poor and downtrodden" when he become a prosecutor. (10).

D. T. Jones, the lawyer in Stephen Greenleaf's novel, *The Ditto List*, says of Jerome Fitzgerald, a fellow lawyer:

Jerome Fitzgerald had been one of the students he most despised in law school, one of those who had always known they wanted to be lawyers and had always known why--money and power and deductible

⁴³ It would be difficult to talk about a complex activity like lawyering without making use of metaphors. Wishman uses various engaging metaphors to characterize his experience of lawyering: game (15, 202), contest (11, 202), battle (11, 201, 223), fight (224), brawl (224), ritualized aggression (223, 231), art form (6), trade (10, 15, 116), job (151), craft (17), drama (201), performance (182, 200-201, 232), and power-brokering (242), among others.

⁴⁴ If we are to do any meaningful work with the game metaphor, we will need good "texts" to help us understand how the metaphor works. I recommend James Carse, *FINITE AND INFINITE GAMES: A VISION OF LIFE AS PLAY AND POSSIBILITY* (New York: Ballantine Books, 1987)(1986).

vacations. No cause, no principle, no reformist zeal, just a respectably lucrative job. Less pressure than medicine, more fashionable than real estate or insurance, less risky than wildcatting or drug dealing. D. T. had once overheard a girl ask Jerome to name his favorite novel and movie and symphony. The novel was *The Robe*; the movie *Spartacus*; the symphony *The Grand Canyon Suite*.⁴⁵

We might expect someone with Fitzgerald's notions about life to act toward others in insensitive ways. But many students, with ideals more laudatory than Fitzgerald's, still find reasons to justify lawyer conduct that is an affront to ordinary morality.

(8) *There is, says Wishman, something I learned from the judge I clerked for that helps explain my treatment of Mrs. Lewis.*

But the connection between what has happened with Mrs. Lewis and the clerkship with Judge Barrett, "a gentleman of humor and intelligence and decency" is not altogether obvious, either to Wishman or to the reader. Wishman finds in Judge Barrett a "sense of justice" and a person he holds in high esteem. Wishman admires Judge Barrett because he is a man of convictions. "Of course, he was guided by statutes and opinions of higher courts, but the details of a case often required interpretations that could be made only by relying on his personal convictions." Wishman watches the Judge struggle "with the more profound human questions" which he answers "with a consistency that seemed well-considered intellectually and satisfying emotionally." Wishman finds Judge Barrett to be a man of "integrity and conviction" and wishes to be just such a man.⁴⁶

Judge Barrett, Wishman tells us, is intelligent and decent, emotionally stable, possessed with a sense of humor, strong personal convictions and integrity. He is a religious man and he believes in the legal system. He is a gentleman. Wishman admires Judge Barrett for "his ability to prevent difficult and, at times, harsh decisions from disturbing other parts of his life." (8).

Wishman fantasizes that if he were more like Judge Barrett his confrontation with Mrs. Lewis would have bothered him less than it did—" [h]e might have discussed her 'in the context of the larger issues involved and the obligations of vigorous advocacy in our adversary system.'" (9). Judge Barrett's view of law leads to a "dispassionate

⁴⁵ Stephen Greenleaf, *THE DITTO LIST 12* (New York: Ballantine Books, 1986).

⁴⁶ All quoted passages, at 7.

perception of the adversary system as an inherently worthwhile, if at times flawed, institution....” (9).

One might pause, with students, and ask whether Judge Barrett’s character is as virtuous as he seems. Wishman tells us that Judge Barrett

believed our penal system was inhumanely harsh, yet he sentenced defendants to long periods of incarceration. He held no higher value than the sanctity of human life; yet I watched him impose a death sentence without any apparent emotional conflict. And because a police officer had failed to knock on a door, I saw the judge, without hesitation, dismiss the case against a brutal rapist. (7-8).

We know that compartmentalization can be functional, and most of us have had first-hand experience in making use of it. With Judge Barrett, we see a demonstration of how compartmentalization works: “Judge Barrett believed in our system of justice, in its principles and its process, to such a degree that his commitment to that system required and allowed him to put aside any other personal feelings about a particular case.” (8). But there remains a question: At what cost do we compartmentalize and proceed as if we can ignore or disregard feelings?⁴⁷

(9) *“I tried, as an act of will, to limit my vision to what I actually did in the courtroom....”*

On limiting his vision, Wishman observes:

One of the more satisfying aspects of trying cases had been the escapist nature of the involvement. Totally losing myself, I would focus all my

⁴⁷ See Wishman’s account of how he deals with “personal” feelings, at 42, 148, 151-152, 153, 167, 207, 210-211, 215, 218, 225-246.

One can imagine an argument in support of Judge Barrett. The constitutional requirement of a search warrant violated by police officers in their zeal to arrest a rapist may require that evidence obtained incidental to the arrest be suppressed. Outraged as we may be by the possibility that any criminal may go free because of a mistake by the police, our outrage could equally be directed at the police for making a senseless mistake. It is not Judge Barrett’s willingness to extend the protection of constitutional guarantees to the rapist that disturbs us so much as his ability to compartmentalize his intellectual and emotional life, but more importantly his ability and willingness to abandon his highest ideals when he acts as a judge.

For an account of a judge (albeit an imagined one), who attempts to realize his ethical ideals as a judge, and explain how he can do so and still be a judge, see Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Legal Educ. 518 (1986).

attention and energy on the events as they were unfolding before me. Although that kind of concentration was necessary throughout much of a trial, it closed off any opportunity for me to reflect on my own behavior, apart from the way it directly bore on my effectiveness as an advocate. I had to start paying closer, but wider, attention. (69-70).

(10) *He humiliates Mrs. Lewis because he wants to "win."*

Wishman's *Confessions of a Criminal Lawyer* might be seen as an insider's account of what it means to win and lose; how one person has come to understand the competitive urges that drive him.⁴⁸ In a world where the objective is to win, get ahead, and be successful, most of us realize that ethical concerns often take a back seat. Those who are cynical about ethics tell us: "I will be crippled--shackled--disadvantaged if I try to be too moral when others are not. It's a cut-throat world. The only ethics that I can afford is an ethics of self-protection." We know there is enough reality in this perspective to make it impossible to dismiss. Indeed, as Alasdair MacIntyre has said of virtues like justice, courage and truthfulness:

[T]he cultivation of truthfulness, justice and courage will often, the world being what it contingently is, bar us from being rich or famous or powerful. Thus although we may hope that we cannot only achieve the standards of excellence and the internal goods of certain practices by possessing the virtues *and* become rich, famous and powerful, the virtues are always a potential stumbling block to this comfortable ambition.⁴⁹

In Wishman's *Confessions* there is an interesting tension between competing ideals—justice and winning.⁵⁰ Winning requires superior performance, competence, and skills, the very things which might also

⁴⁸ See generally, *The Zealous Lawyer: Is Winning the Only Thing?*, 4(1) Rpt. Ctr. for Phil. & Pub. Pol. 1 (1984).

⁴⁹ Alasdair MacIntyre, *AFTER VIRTUE* 183 (Notre Dame, Indiana: University of Notre Dame Press, 1981).

⁵⁰ Charles Reich portrays the tension in a vivid psychological vignette:

I remember a grey November day in Washington, D.C., in 1956. Our law firm had just won a famous victory. A corrupt official, who had brazenly stolen public funds and had been convicted, was freed on a technicality which I found in the statutes. The other lawyers who had worked on the case were going to have a victory dinner at the client's expense at Chez Mazime, an exclusive French restaurant. I politely declined. I drove home through the miles of bleak apartment houses feeling no appetite and a hollow emptiness inside. At home I feasted two hotdogs in solitary splendor and misery.

Charles Reich, *THE SORCERER OF BOLINAS REEF* 19 (New York: Bantam, 1977).

be put to use in securing justice. Wishman's account of his efforts to "win" makes it possible to assess winning as an ideal and to explore the ways in which it undermines other worthwhile ideals.⁵¹ Unlike many who become lawyers, Wishman is good in the courtroom. While a prosecutor, Wishman says, "I began trying one case after another, and I learned my trade and loved what I learned." (10). Wishman takes pleasure in winning and so his winning becomes part of the myth he is living; his winning is both mythic and tragic.⁵²

If we understand competition and winning as an ideal, then we must see them as elements of character. Competition is not something that just happens, nor is it inevitable.⁵³ Competition is learned. The student learns to be competitive before she comes to law school; legal education is graduate work in competition. Competition and the idea of winning are so commonplace in our culture that we sometimes lose sight of other goals and ideals. We forget the moral cost of living to win. If winning is central to our work, then we must help our students unravel the complex history of their competitiveness (and the system that promotes

⁵¹ The intensity of the desire to win may be a surface manifestation of an unexamined, deeper, psychological need, a point which Wishman makes in regard to his own life.

All the lawyer's emotions and skills are deployed for one purpose--winning. During a cross-examination, all energy is spent on beating the witness. With a tough witness, the duel can be thrilling. Few lawyers would admit that anything other than the pleasure of craftsmanship had been involved in subduing a witness. And yet I have seen lawyers work a witness over, control him, dominate and beat him--and then continue to torment him. Deriving enjoyment from inflicting that unnecessary measure of pain might be rare, but not that rare. If the witness is a woman, there might even be sexual overtones to the encounter.

Seymour Wishman, "A Lawyer's Guilty Secrets," *Newsweek*, November 1981, p. 25.

⁵² Wishman is a professional and professionals know how to distance themselves from the pain and suffering of others. It was, Wishman tells us, "nothing personal." (6). It is this distancing that makes the use of humiliation a professional skill. Is it this distancing that makes it possible for a lawyer to plough ahead with zeal regardless of the harm that follows in the way of the deployment of his skills? Is it this distancing that makes Seymour Wishman a winner? A distance that allows Wishman to so readily forget the face of those he prosecutes and those harmed by his skill? (3-5, 14, 15). What do we forget to win?

⁵³ The desire to be winners may make winning as an ideal seem inevitable. Winning is so much of our culture that it is hard to imagine anyone wanting to be anything but a winner. We certainly assume we will not become losers. We like to win wars, win fights, win arguments, win friends, win the lottery. Winning is fun and profitable. Winning is not, in itself, a bad thing. But we must surely see the danger and know the danger (or *should* know the danger even if we claim to have no such knowledge) in a pursuit of winning. "Winning at all costs" is the expression we use when we cast doubts on those who win without thinking about the consequences. Winning has consequences.

it).⁵⁴ We might ask our students: What virtues and vices do you see in how *you* compete? How do you deal with the morality of winning and losing? How does legal education weigh-in on these questions?

Winning, of course, is not a moral justification for anything absence the question—what is the purpose of your winning? Winning is a description of an outcome, a resolution of a zero-sum game. We take up the idea of winning and losing from games and sports, and then adopt the game as a metaphor for life. But for some matters, the game metaphor does not seem to fit.

I think we can see (argue) that talk of winning and losing must be done more carefully than we sometimes do it. We forget that our winning has consequences. First, someone loses when I win. Secondly, I must, over a life-time of winning, discover that I sometimes win when I *should* have lost. (And of course, I am deeply troubled by those times when I should have won and didn't.) Thirdly, I may discover, as did Wishman, that there are different ways of winning. If you prefer the battle metaphor (and war imagery generally) then you might conclude that there are better and worse ways to win a war.⁵⁵

* * *

In this survey of Wishman's reasons for humiliating Mrs. Lewis, we might be admonished to remember a point made by the literary critic, Wayne Booth:

A satisfactory account of good reasons in any one domain of life would necessarily require a sizable book. The repertoire of good reasons could

⁵⁴ Derek Bok, a former Dean of the Harvard Law School and President of Harvard, observes that:

At bottom, ours is a society built on individualism, competition, and success. These values bring great personal freedom and mobilize powerful energies. At the same time, they arouse great temptations to shoulder aside one's competitors, to cut corners, to ignore, the interests of others in the struggle to succeed.

Derek Bok, *A Flawed System of Law Practice and Training*, 33 *J. Legal Educ.* 570, 575 (1983).

⁵⁵ Calling what we do in the courtroom a battle or recognizing how trials are like wars may be an attempt to avoid the moral implications of our actions, but war does not preempt ethics. Morals and ethics apply to wartime and battlefields and soldiers the same way they do to everything else. The situation and the roles of combatants may present particular moral problems (killing another human being, destruction of property, harm to innocent bystanders, fear that one may lose their life) but the recognition that the particulars and the dynamics of war create a setting for moral problems that do not typically arise in civilian life is not to say that soldiers don't need morals and ethics. Indeed, we might argue, conversely, they need ethics in the worst possible way.

never be constructed by any one person, since it would include all good discourse about the grounds of valid discourse in any subject.....⁵⁶

The basic question for the student of lawyer ethics, as for Wishman himself, is whether in this cornucopia of reasons, any of them will suffice.⁵⁷ Or, do some or all of the reasons turn out, as Wishman comes to see them, as akin to the flippant excuses and “lofty jurisprudential arguments” he presents to friends when asked whether he bears any responsibility for the harm his clients commit when he gets them acquitted.⁵⁸ Todd Andrews, the lawyer protagonist in John Barth’s novel, *The Floating Opera*, says: “I am not a philosopher, except after the fact; but I am a mean rationalizer, and once the world has forced me into a position, I can philosophize (or rationalize) like two Kants, like seven

⁵⁶ Wayne Booth, *MODERN DOGMA AND THE RHETORIC OF ASSENT* 144-145 (Chicago: University of Chicago Press, 1974).

⁵⁷ When does an explanation for the harm of another serve as a good reason for the harm? For example, in an extra-martial affair, it is unlikely that a plea--“I didn’t initiate the relationship”--would be a good reason for the betrayal. If you get low grades in law school, a potential employer is unlikely to be impressed with the statement: “I didn’t know it was going to be as hard as it turned out to be.” Or, “I had better things to do.” Some reasons we use to *defend* ourselves are found, by others, or with a change in circumstances or perhaps new self-knowledge, not good reasons at all. Indeed, we call reasons that don’t stand up to moral scrutiny, excuses (excuse used in the lay rather than legal sense of the term).

We might see Wishman’s *Confessions of a Criminal Lawyer* as an elaborated account of an effort to justify what happened in the courtroom in his cross-examination of Mrs. Lewis. The treatment of Mrs. Lewis and his later efforts to understand his responsibility for *doing what lawyers do* is a central theme of the book. Throughout the book one finds references to Wishman’s understanding of what it means to practice law that serve as still additional justification for his actions. E.g.,

(i) “It is not unusual for a truthful witness to appear to be lying.” (173-174).

(ii) It is the duty of the prosecutor, not defense counsel, to protect a truthful Mrs. Lewis from humiliation. (173).

(iii) If a trial “tactic” is unethical it is the duty of the trial judge to proscribe and punish its use. (8). The trial judge, in the Lewis rape case, after the trial, told Wishman that he “had dealt with this woman [Mrs. Lewis] ‘brilliantly.’” (18).

⁵⁸ *Id.* at 17. When asked: “Don’t you take responsibility for what a criminal you get off may do next?” Wishman replies: “Very little. About as much as a doctor who repairs the broken trigger finger of a killer.” It is this kind of response that he identifies as “flippant.” *Id.* at 17. To be fair to Wishman, he does not characterize all the reasons he has presented as justification for his treatment of Mrs. Lewis as “flippant.” When we listen as students discuss Wishman’s account and the attempt to justify what Wishman now concludes is no longer defensible, we hear not so much “flippant” arguments but the standard fare: it’s out job to be zealous on behalf of clients; we have an adversarial system of justice; if things get out of line, there is a judge to monitor the parties; it’s not my responsibility to look after Mrs. Lewis.

Philadelphia lawyers. Beginning with my new conclusions, I can work out first-rate premises."⁵⁹

When Wishman examines the "reasons" he has given, he finds them wanting. When students in a legal ethics course take up the matter they seem to have a vested interest in defending a course of action and its justification in a manner that Wishman no longer accepts. It is at this point that Wishman's *Confessions* and his *reasons* become a valuable teaching text. If Wishman's reasons are indefensible—Wishman wishes no defense—then a student's defense of Wishman's reasons must be her own. Wishman has, in a most subtle and powerful way, implicated the reader/law student in the most direct/personal/real way in moral inquiry and reflection. Wishman intends, we suspect, exactly this result. Bringing the first chapter and the story of his encounter with Mrs. Lewis to a close (at least a momentary respite), he suggest that his sense of "distress" that followed the encounter "was not just a personal matter but revealed some of the painful moral and emotional dilemmas of my profession."⁶⁰

Students Responding to Wishman's "Reasons"

The reasons Seymour Wishman presents for his treatment of Mrs. Lewis are as straight-forward and accessible as an account of one's action can ever be expected to be. Wishman speaks of his life as a lawyer with deep affection and from the standpoint of who has, from all we can see, mastered his craft. He knows the adversarial ethic as both virtue and vice. Wishman's justification for his humiliation of Mrs. Lewis goes to the heart of our adversarial ethic. In his serious, thoughtful, reflective observations he provides us with something to talk about in legal ethics. The point of our conversation need not be the most obvious one: Is it moral and ethical to humiliate a truthful witness in the representation of a client? Perhaps the more interesting question is whether we can do what Wishman did and justify it in the name of ethics? And there is still more room for ethics talk in trying to come to grips with Wishman's new realization that an unthinking pursuit of the adversarial ethic has resulted in his becoming a person he didn't want to become. Wishman seems to suggest that you can celebrate lawyering and still question traditional views of "professional responsibility." It is my contention that Wishman (and the contributors to this Symposium), in reading Wishman

⁵⁹ John Barth, *THE FLOATING OPERA* 167 (New York: Bantam, 1972).

⁶⁰ *Id.* at 18. There is a linkage of the personal feelings that lawyers bring to their work and public concern about the ethics of lawyers.

and working with his text, demonstrate how we might think about doing legal ethics with our students.⁶¹

While I have never attempted an entire course on lawyer ethics constructed around a single text, if urged to do so, I would be tempted to focus the course on the fifteen pages found in Wishman's chapter exploring the encounter with Mrs. Lewis and the way it brought him to think differently about lawyer ethics. I have, of course, used Wishman's story in conjunction with other texts over the years and can provide some examples of what happens when students consider the story.

Wishman claims that he humiliated Mrs. Lewis on the witness stand because he wanted to be an *effective* lawyer. I ask students whether Wishman was right. Wishman himself points out any number of strategic (rather than moral) reasons for avoiding heavy-handed tactics on cross-examination. I am curious as to whether students who want to defend such heavy-handed tactics (despite anything Wishman might have to say on the subject) might not want to moderate their view in light of a discussion about how the power to discredit witnesses might be a double-edged sword, one to be used with the utmost care.

Must Wishman humiliate Mrs. Lewis to be an *effective* lawyer? The question posed, Lawrence (a student) holds up his hand. "Humiliation," says Lawrence, "if you want to call it humiliation, is not the problem. Wishman is simply a lawyer and all he is doing is defending his client." The most interesting part of Lawrence's response was the way he said, "if you want to call it humiliation." "Well, Lawrence," I ask, "what do you want to call what Wishman did?" Lawrence contends it's really "just a matter of definition." "It all depends," he says, "on how you want to define humiliation." In Lawrence's world, using the analytical mind he has developed in law school, the way to approach this situation is to redefine the terms, to recast the situation in a different light by using different language. With new terms (and a redescribed situation) Lawrence tries to avoid the moral implications of Wishman's account of his encounter with Mrs. Lewis. (Lawyers are wordsmiths and their use of words must be watched closely.) In the briefest of comments, Lawrence attempts to so change the situation Wishman describes so that he is not faced with arguing for a view of lawyering that seems so thoroughly problematic. To see the problem would produce a cognitive dissonance (or what Tom Eisele points to as a fundamental conflict) that Lawrence seems unwilling to address.

⁶¹ For still a different approach to reading Wishman, see Appendix B, Reading Wishman.

What Wishman did, says Lawrence, was “embarrass” Mrs. Lewis rather than humiliate her. The peculiar thing about what Lawrence does—besides demonstrate that he is a good lawyer by being analytical and savvy about semantics—is to both “define” the situation and Mrs. Lewis’s experience (she was, remember, outraged by Wishman’s treatment) and do so in a way that completely ignores Wishman’s insight (that such practices come at a cost). The observations, experiences, and reflections of the only parties to the event must be discounted by Lawrence in order to defend his own view of the lawyer role. Lawrence has deftly substituted his view of the world for that of Mrs. Lewis, ignoring completely Wishman’s observations on the matter, and done so without realizing it or giving it a moment’s thought. Lawrence is completely unconscious of the fact that his argument (doing what he thinks a law student should do) places his own moral perspective in the spot-light and subjects it to question. If questioned on the matter he would claim to be doing nothing more than what he has learned to do—defend the adversarial ethic.

We talk in class about Lawrence’s attempt to redefine what both Wishman and Mrs. Lewis seem to agree was more than an embarrassment. Lawrence retreated, but only slightly. He was willing to concede that even embarrassment of a witness might be strategically problematic, but declined when asked by a fellow student to say more about what he meant by embarrassment. Basically, Lawrence steps into the spotlight and tries, some of us think, unsuccessfully, to avoid the moral implications of his own observations.

Unwilling to pursue the humiliation/embarrassment distinction, Lawrence now proceeds with another strategy: avoid the moral problem by suggesting that Wishman did not actually know during the cross-examination that Mrs. Lewis was telling the truth. He contends that “Wishman’s confession and all the reasons he gives, are all after the fact.” “The reason,” says Lawrence, “that we can’t be expected to learn much from Wishman’s situation, is that he didn’t really know Mrs. Lewis was telling the truth when he conducted the cross-examination.” If this reading of Wishman is accepted, then the moral implications of the problem can be averted or disappeared. But this strategy of avoidance is no more successful than the first. To read the moral concerns out of Wishman’s account, Lawrence must misread Wishman. When we go back to Wishman’s account we find a direct response to Lawrence’s proposal that Wishman didn’t know Mrs. Lewis was telling the truth: “And still worse, at some level I must have recognized this disturbing possibility [that my humiliation of Mrs. Lewis was] *unjustified*...even while I attacked her in that crowded courtroom.” (17).

Of course, there is no way for Lawrence to deal with Wishman's admission, for to do so would totally undermine his argument. Wishman goes on to suggest (in a part of the book students were not assigned) that even in the most stressful and reflexive moments, the lawyer is always making choices, indeed, choices in exactly this kind of situation.

There is still another response to Lawrence's argument that Wishman did not know the witness was telling the truth. Lawyers (no less than parents or friends) use the expression: "you knew or should have known." Claims of ignorance, in many situations, are simply unpersuasive. We punish (by way of penal sanctions) based on the kind of inferences Lawrence would not be willing to make in Wishman's case (ironically, even when Wishman confirms that he did "know"). Even if, as Lawrence contends, Wishman did not know Mrs. Lewis was telling the truth, we may respond: "Yes, you did know, and even if you did not, you should have known. A reasonable person under similar circumstances would have known." Here, Lawrence might learn something about moral reasoning by way of lessons learned from criminal law. In both moral and legal accountability, we subject claims of lack of knowledge to tests of credibility and believability. And we might add: "Any thinking, caring, thoughtful person would have known, even if Wishman did not. And if you did not know we are going to treat you, for all practical, moral, and legal purposes as if you knew. (Whether you actually knew at the moment you proceeded is not the test.)"

A second student, Sharon, suggests that there is another question that we must answer before we can decide whether Wishman's humiliation of Mrs. Lewis is justified.⁶² She argues that it depends on your view of the adversary system. If you believe in the adversary system you come out one way, if you mistrust the adversary system, you come out another. It's possible that Sharon picked up something from Wishman's discussion of Judge Barrett and the trial judge in the case in which he prosecuted an innocent man, and I should have pursued this possibility with her. I'm afraid I got in the way of what could have been

⁶² Sharon may have picked up something from Wishman's description of his mentor Judge Barrett. Wishman speculates that Judge Barrett "might have discussed her [Mrs. Lewis] 'in the context of the larger issues involved and the obligations of vigorous advocacy in our adversary system.'" (9).

a valuable discussion by moving too quickly to comment on Sharon's observations and didn't permit her to develop her ideas.⁶³

There does indeed seem to be a relationship between our view of the adversary system and how we deal with Wishman's story and the underlying moral problem. But the relationship is certainly not so simple and straightforward as I initially posited. One could indeed believe strongly in the adversary system of justice and still conclude that Wishman had been overly zealous. I didn't explore this possibility with Sharon, but a student did point out that how one views the adversary system question would depend on whether you thought the adversary system existed to determine the truth or whether the lawyer was just out to win a case. A good point and the opening for an interesting discussion. If you view the adversary system as requiring a quest for truth then it wouldn't, this student says, make much sense to humiliate a witness you have reason to believe is telling the truth. If you are just out to win, then humiliation of the witness might be just another strategy to achieve that purpose.

Don, another student, points out that we wouldn't have to discuss any moral issues (or indeed any of the issues raised by Lawrence and Sharon) if we return to the question originally presented: do you have to humiliate witnesses on cross-examination to be effective as a lawyer? If you answer that question no, Don argues, you don't reach the issue about the adversary system of justice. I concurred and pointed out that one might indeed try to decide the question about Wishman's tactics on what appear to be non-moral grounds. It is risky business, especially with juries, to humiliate witnesses the jury assumes is telling the truth. If the lawyer's disregard for the truth is obvious to the jury, it is hard to imagine a jury having much confidence in the lawyer unless the jurors too are expected to disregard the truth (Mr. Gilmer's cross-examination of Tom Robinson in *To Kill a Mockingbird* being an example).⁶⁴

⁶³ I assumed, and remarked accordingly, that this view would mean that strong advocates of the adversary system would be likely to find Wishman's humiliation of Mrs. Lewis morally defensible, while those who had serious doubts about the adversary system would be more likely to question what Wishman did. This obvious "interpretation" would have been better left to discussion than my pedagogical commentary.

⁶⁴ Or consider the jury in the Oliver North case who may have determined that North was misrepresenting the truth (that he had indeed lied to Federal officials, his superiors, and now to the jury) but still deserved respect because his lies were based on the patriots belief in their necessity. The prosecutors in the North case would undoubtedly want to discredit North as being a man willing to lie, but if the jury believes in North, believes in

Wishman's story raises concerns about truth, and how lawyers are to deal with the truth in an adversary system of justice. We may find, as in the discussion of Seymour Wishman with Lawrence, Don, and Sharon, that moral discourse and ethical reflection seem always to be circling around this matter of truth.

The Structure of Moral Reflection

Watching Wishman work through his reflections following the encounter with Mrs. Lewis, we begin to see a structure:

- *We simply go about our work.* A person goes about their work (well compensated, enjoyable, challenging work) and does so without crippling moral concerns. We are more or less unreflective as we engage in the everyday affairs of a law practice.⁶⁵ We would not, for the most part, consider this situation abnormal or problematic. Wishman, as most of us, lives day-to-day.
- Then, there is an *incident*, a confrontation, an encounter, some intimation that we have in some way failed. We get knocked off course, diverted from the well-worn path, find that old habits don't suffice. For Wishman, it was "the screaming woman in white" (5). The incident with the "screaming woman" presents a break in the routine, the on-going, unreflective path demanded of us by everyday life.
- The break in the seamless surface of everydayness requires *explanation*. When Wishman tries to explain the "screaming woman" (read "screaming" client, senior partner, spouse, friend), he finds that his way of life (and its practices) demands *reasons*.⁶⁶ Unreflective practices become subject to reflection.

his character, believes in his cause, believes that he is a patriot and that patriot sometimes lie to protect their country, then a lawyer would want to be careful in their efforts to discredit North. The prosecutors might argue that North had violated his oath of office, mislead his superiors, lied to Congress, and in doing so taken on a power that no individual should assume, even if he has come to believe that it is in defense of the country.

⁶⁵ For an examination of this unreflective quality of professional life and an effort to respond to it, see James R. Elkins, *The Examined Life: A Mind in Search of Heart*, 30 Am. J. Juris. 155 (1985).

⁶⁶ It is Wishman's *reasons* for what happened with Mrs. Lewis and student responses that serve as a focal point for my use of Wishman's story as a teaching text.

- But before there are reasons, there is *immediate reaction*: When Wishman becomes the focus of attention through the efforts of Mrs. Lewis's screaming, Wishman finds everyone at the hospital was "staring at me." "I was frightened but tried not to show it." (5). We might, with our students, inquire into *immediate reactions* and see how they shape the reasons that follow.
- In reacting and giving reasons, there must be a *question*. Did I go too far, and cross the line, in my cross-examination of Mrs. Lewis? "[A]s I thought about my career while riding home from the hospital after my confrontation with Mrs. Lewis, I asked myself why I should spend my life with these criminals?" (16). Without questions we are lost in the on-going, immediate, necessities of everyday life.
- Small questions, for those who are destined to become reflective, transmute into a kind of *existential dilemma*, questions about the major direction one's life has taken. "By the time I arrived home from the Newark City Hospital that night, one thing was clear: that nurse's anger, her palpable hatred of me, frightened me. Not that I expected her to harm me physically, but I was frightened by the person she saw...frightened that I could be seen that way...frightened that I might *be* that person." (18). By existential dilemma, I mean something like the situation in which a lawyer might pose questions like those asked by lawyer Will Barrett in Walker Percy's novel, *The Second Coming*:⁶⁷ "Is it possible for people to miss their lives in the same way one misses a plane?" "How can it happen that one day you are young, you marry, and then another day you come to yourself and your life has passed like a dream?"

These existential questions are foreshadowed by those posed to us in everyday life; we are surrounded by questions which we answer in the most off-handed way. For Wishman, it was a question with which we are all too familiar: "The most disturbing question people often put to me--a question asked accusingly, over and over, but without touching me until now--was: 'Don't you take responsibility for what a criminal you get off may do next?'" (17). "For years non-lawyers had been asking me how I could defend such people. For years I had answered, like a trained lawyer, like a lawyer who would have made Judge Barrett proud, that everyone

⁶⁷ Walker Percy, *THE SECOND COMING* 124 (New York: Farrar, Straus, Giroux, 1980).

was entitled to the best defense in order to make our system of justice work.” (16).

- The questions and the existential dilemma present a *turning point*. A lawyer can defend herself using all her best rhetorical skills and strategies, and convince herself that all goes well. Or, she can let her questions and qualms, provide an impetus to learn how her life has progressed, how she has changed, how she might be become something different than the person she had assumed she would be. It was, one assumes, Wishman’s questions and his efforts to work through them that resulted in *Confessions of a Criminal Lawyer*.
- Before greater insight and self-knowledge can be achieved, there must be *recognition* that our actions have consequences. For Wishman, it was the “undeniable fact that I had humiliated the victim [Mrs. Lewis].” (6). There is still another kind of recognition that takes place, recognition that we have doubts about what we do. “I felt shaken. I could understand the severity of my reaction only by assuming that it had come at a time when I had accumulated, without realizing it, a number of reservations about my work.” (18).
- Our work and our strategies have *consequences*. Following the encounter with Mrs. Lewis, Wishman admits, that “[t]he ferocity of my courtroom performances, and those of other criminal lawyers, had terrible consequences on individual lives.” (17).
- With recognition and a sense of consequences, we are able to accept *responsibility*. Wishman concludes, that “[m]aybe Mrs. Lewis was one of many witnesses I had humiliated who were not nearly as despicable as I had made them out to be.... [S]he might indeed have been raped and sodomized, which made me responsible for her *unjustified* disgrace.” (17).
- We are faced with the question put to the Sydney corporate tax lawyer in Peter Weir’s film, *The Last Wave*, when the lawyer seeks the help of an Aborigine elder in the defense of Aborigine young men charged for murder in a ritual killing: “Who are you?” And when the elder repeats the question, again, and again, it becomes a kind of chant; we know the elder asks a question the lawyer cannot answer. Wishman says, “By the time I arrived home from the Newark City Hospital that night, one thing was clear: that nurse’s anger, her palpable hatred of me, frightened me. Not that I expected her to

harm me physically, but I was frightened by the person she saw...frightened that I could be seen that way...frightened that I might *be* that person." (18).

- And coming full circle, we find that ethics (and the kind of self-knowledge it requires) *slows us down*, returns us to everyday life with a different sense of self. In slowing down we bring more of an explicit sense of purpose to what we are doing. We make ethics work, by slowing doing, and seeing ourselves in our choices, seeing that we have choices to make. Wishman concludes that he must slow down and think more about what he is doing.⁶⁸

⁶⁸ Wishman decides to "screen" his cases and find new ways to "cope with the ugliness and brutality that had for so long, too long, been a part of my life." He knows that he can't "deal with the same volume of cases," "constantly be in court, on my feet, arguing, fighting, struggling to win. I needed to find a way to step back from the aggression of the courtroom battles and the violence that was usually the subject over which those battles were fought." (241).

APPENDIX A

On Reflection as a Skill

We teach all manner of skills in legal education (close reading of important texts, excavation of legal rules, plotting the historical evolution of legal doctrine, strategies for legal argument, formulaic legal writing, speaking and taking on the role of the lawyer) but in none of these skills (and they are the most important of skills and simply *must* be learned and mastered) there is little to be heard about the skills of *reflection* and *introspection*, skills necessary to a thoughtful, caring, critical, humanistic lawyer. It is, in my view, reflection and introspection (and the move toward greater self-knowledge that comes from these skills) that lies at the heart of wise judgment. We expect plumbers to have plumbing skills (of the mechanical and technical sort) and in this lawyers are like plumbers, for much of what we do is a kind of legal plumbing. But the problem with lawyers, in contrast to plumbers, is that we don't limit ourselves to plumbing. Indeed, we end up doing a dizzying array of things in addition to legal plumbing. The practice of law is at once a "technical" activity and one that calls for good judgment and more often than we might suspect, wisdom.

I confess to having no assessment tools (and no evaluative methodology) that would allow me to determine, in some quantitative way, whether a student's reading and class discussions of a text like Seymour Wishman's *Confessions of a Criminal Lawyer* might lead them to exercise better judgment and put them on the road to wisdom. What I desire for the student (and myself) are exactly the kind of things we cannot measure (a fact that keeps most teachers with both feet firmly planted in the traditionalist camp). If I cannot measure good judgment (which perhaps my colleagues in the clinic might have a better chance to observe and evaluate) and have even less hope of evaluating a student's progress toward wisdom, what can I do?

I have determined that it is possible to evaluate (even in a somewhat crude way) what might be called demonstrations in the art of reflective and introspective writings. Introspective writing is based on the proposition that the only real learning is the learning we do for ourselves (and we tend, I think, to learn in dramatically different ways). Legal education puts far more responsibility on the learner (with far more uncertainty and anxiety) than what most undergraduates are accustomed. The shift in responsibility to the student in legal education includes a focus on questions rather than answers; on active student class participation; student articulation of the "rules" of cases in contrast

to having them simply presented; the single test administered at the end of the semester; and a focus on the process of thinking in contrast to the content of what is being sought.)

Reflective and introspective writing focuses on the subjective element of learning and one's role as a lawyer. Law, in contrast, holds itself out to the student (and presented so by many teachers) as a largely objective matter. We tend to think of law as "hard" while something like social work is "soft." It is the presence of rules and their highly "defined" and "bounded" qualities that give the illusion that in law we deal with an objective phenomena. The objectivity of law is defended even as we find that it is sometimes (often?) highly subjective. Interestingly enough, lawyers think of law as objective, while clients (and lay observers) see it as quite subjective. Whether law's objectivity is an illusion or is reality based, the point here is that we proceed as if these objective/subjective distinctions were real. Reflective writing permits the student/author to determine, what, and how, and when subjectivity finds its way into the study of law and one's possible future as a lawyer.

Basically, we tend to think that morals and ethics are subjective, awash in the nuance and subtlety of situation and person, in contrast to law which is more determinative, less personal, more objective. Again, law is hard (real, immediate, necessary, objective) and ethics is soft (abstract, ephemeral, discretionary, personal, subjective). By turning to introspective writing we try to make the mode of writing "fit" what we are writing about. (I think we get much of this hard/soft, objective/subjective distinction and compartmentalization wrong, and use it wrongly even when we get it right, but my thinking on this matter doesn't change the world of perceptions in which others take these distinctions to be both real and operative.)

One way to think about reflective/introspective writing is that it offers the student an opportunity to write the course as it is being taught. Why, I have always wondered, must what we do for evaluation be separate and apart from what we do, day to day in learning? Isn't it this distinction between course and test that leads some students to believe that all is going well (attending class, taking notes, reading the cases, making an outline) and then the test comes along and they do badly. ("I studied so hard. How could this have happened?") In law school we let this sort of thing happen by compartmentalizing teaching and learning, course and test, teacher's perception of evaluation and student's perception of what it means to be graded.

APPENDIX B

Reading Wishman

Wayne Booth, in *The Company We Keep: An Ethics of Fiction* (Berkeley: University of California Press, 1988) has presented a number of provocative ideas about the “ethics of fiction” that might help us read Seymour Wishman’s autobiographical confessions.

(i) Booth argues that our intentions catch us up in a world of value. (97). How is that true for Wishman?

(ii) Booth, as a teacher of rhetoric and English literature, observes how readers are crippled in their reading. (See also, Wayne Booth, *A Rhetoric of Irony* 222-227 (1974)). How are we (how are you) crippled or limited in the way you have set out to read Wishman’s confessions?

(iii) Booth observes that “many acts of evaluation are indeed little better than reports on private feelings—as data, they are not to be sneezed at, but neither are they full critical acts.” (101). Iris Murdoch, the philosopher and novelist, observes that it is “frequently difficult in philosophy to tell whether one is saying something reasonably public and objective, or whether one is merely erecting a barrier, special to one’s own temperament, against one’s own fears. (It is always a significant question to ask about any philosopher: what is he afraid of?)” Murdoch argues that “[t]o do philosophy is to explore one’s own temperament, and yet at the same time to attempt to discover the truth?” Iris Murdoch, *The Sovereignty of Good* 72, 46 (London: Routledge & Kegan Paul, 1970). Is Seymour Wishman doing philosophy in his *Confessions*?

When we talk about our reading of Wishman’s confessions and what that might mean for us as lawyers, how are we to distinguish between temperament and truth, between an act of evaluation that reports on private feelings and an act of evaluation that is “critical” in the sense that Booth means?

Does Booth offer any help on responding to this question in his observation that: “The goal is not to pack into our traveling bag only the best that has been thought and said but to find forms of critical talk that will improve the range or depth or precision of our appreciations.” (113).

What could Booth mean by “critical talk”? Do our discussions of lawyer ethics amount to “critical talk”? Booth finds that “those who are willing to engage in a genuinely critical conversation can learn from one another. At least that is the hope....” (347).

What obstacles do you see in engaging in this kind of talk?

(iv) Booth asks us to put the following question to ourselves when we read: "If I am to give myself generously, must I not also accept the responsibility to enter into serious dialogue with the author about how his or her values join or conflict with mine?" Booth concludes that the failure to do so, to, as he puts it, "decline the gambit," is "to remain passive in the face of the author's strongest passions and deepest convictions", and to do so, is "condescending, insulting, and finally irresponsible. (135).

What kind of relationship have you created with Wishman's story? When you read, you establish a relationship with the story, with the characters of the story, with the author (or at least what might be called the "implied" author), and with yourself as a reader. What kind of relationship does Wishman's confessions ask you to have with yourself and your reading?

During our discussions of Wishman take note of how we are condescending, insulting, irresponsible, toward Wishman and his confession and to each other.

(v) Booth asks us to consider, as we read narratives like that of Wishman: What is "the quality of the author's gift to us"? (113).

Ask yourself, as you read Wishman's confession: How am I being asked to see the world? What kind of assumptions am I being asked to make? What kind of person would this account of the world and this author have me be?

What kind of inquiry does the story invite? What kind of encounter, of reader and author (or implied reader and implied author) is made possible by the story?

What kind of achievement is this "text"? How does the story invite ethical thought and questioning? (91). "Has something been achieved here that is *in its own terms* admirable? Has some gift or skill been exhibited here that *those who see and accept its implicit standards* will admire?" (111).

What qualities in the author could account for the various qualities you find in the story? (112). Booth argues that "One cannot experience a fiction without inferring (perhaps not consciously) certain qualities in the character of its maker...." (113).

(vi) What are we to do, as readers, as participants in the conversation about legal ethics, when we encounter in a story, our conversation, or in each other, "a locus of many seemingly rival values"? (115). What are we to do in the face of the plurality of moral concerns and their pronounced differences as they led us toward what appears to be inescapable conflict?

Booth suggests that “ethical quarrels take place against a backdrop of agreement.” (422). What kind of agreements have been articulated on the occasion of this reading of Wishman’s *Confessions*?

Booth says of one of Yeat’s less distinguished poems, “[h]e wins my friendship, as my real friends do, by offering a distinctive, engaging way of being together, one of many possible ways of addressing a world of conflicting values.” (216). How can friendship continue when our values conflict?

(vii) How can we exercise good judgment about each other’s ethics without being judgmental in the pejorative sense? What qualities of character, of conversation, of listening and speaking, of attention to each other, make good judgment possible while avoiding debilitating judgmental stances?

Booth observes that “[N]o mode of criticism [by which we can take him to mean judgment] can escape controversy for long, and all modes are vulnerable to insensitive, unintelligent, or dogmatic practice. We should no more give up ethical criticism because it can be practiced badly than we should give up going to doctors when we learn--as a recent announcement has it--that 15 percent of all doctors are ‘incompetent.’” (137-138). Frank Michelman, a Harvard law professor, observes that: “The result of confrontation is unpredictable: it might be incomprehension, denial, or repudiation. Or it might be progress. If you ask me, the odds on progress are not favorable. That, however, is not a reason for not trying if there is nothing much to lose. And what is there to lose?” [Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 Florida L. Rev. 443, 490 (1989)].

What are we to do during the course of ethical conversation when we are confronted with what Booth calls a lack of “intelligence”? Or with insensitivity? Dogmatism?

Booth recognizes that “[t]oo much ‘moral’ talk springs from motives that have little to do with a hope for anyone’s possible betterment: revenge, greed, political power, self-praise and exculpation. It is easier to find examples of ‘moral discourse’ designed to put others down than of genuine inquiry about the good and bad of behavior.” (484, n.1).

Booth argues that “If we are to avoid not only undue confusion but positive injustice in our appraisals [talking here about narrative fiction, but he could as well be talking about any ethical judgment], we must know who is being held responsible--and for what.” (126).

How do we hold each other responsible when we read Seymour Wishman’s *Confessions*? When we make and reflect on ethical judgments that others make?