AN ARGUMENT AGAINST RETICENCE IN THE TEACHING OF VIRTUE

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Both Tom Eisele and I are drawn to this question—can virtue be taught? We know the question has a long history in philosophy and is still worth posing. The question is of particular salience to legal educators who, like Eisele and I, have attempted to teach legal ethics and do so in a way that stretches the idea of legal ethics beyond the narrow, legalistic, and rule-oriented approach to teaching lawyer ethics that we would both view as a misguided and misplaced use of the term "ethics." When Tom Eisele describes a "traditional" legal ethics course, it is clear that he has something in mind other than teaching students that we lawyers are bound by a set of ethical rules and a "law of lawyering." Eisele shows little interest in such a positivist, legal, rules-oriented approach to teaching lawyer ethics.

In "From 'Moral Stupidity' to Professional Responsibility,"[1] Eisele provides yet another thoughtful and passionate response to a question and a concern that still plagues us in legal education: can virtue be taught in the law school classroom? The genius in Eisele's essay is that he does with Seymour Wishman (that is, he demonstrates) exactly what I assume we do when we teach virtue in the legal ethics course. First, we take seriously the difficulty in what we have set out to do. We pay attention to the deep skepticism that our students and fellow colleagues have about this matter of ethics. We monitor the sense of failure we personally experience as we set out to make virtue the subject of teaching and learning. (Eisele makes clear that he is addressing a personal sense of failure which he then explains as having relevance to other teachers of lawyer ethics.)

The great irony in Eisele's superb reading and work with Seymour Wishman's story is that he concludes that we cannot create the kind of reality in the classroom that makes ethics teaching and learning possible. Yet, Eisele has done exactly what he claims we cannot do. (Actually, Eisele hedges his argument by admitting that we might teach lawyer ethics if we resort to clinical teaching.) Eisele demonstrates the teaching of virtue in a number of different ways. First, in his careful and deliberate phrasing of the issue; secondly, in the use of a rigorous

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[1] Thomas D. Eisele, *From "Moral Stupidity" to Professional Responsibility*, 21 Legal Stud. F. 193 (1997).

philosophical analytics drawing crucial distinctions; thirdly, in the humility with which he approaches the central question he explores and the way he honors the "difficulty" in teaching virtue; and fourthly, the respect he extends Wishman in telling his "tale" of "moral progress." I would argue that Eisele, in the careful and thoughtful working through of the issue, and the virtue he demonstrates in his reading of Wishman, raises substantial doubts about the pessimistic conclusions he draws. Eisele has, perhaps, been overly influenced by Plato's accounts of Socrates on the teaching of virtue, since Socrates too can be seen as doing in his conversations what he claims to have no ability to do—teach virtue.

I want to examine Eisele's "From 'Moral Stupidity' to Professional Responsibility," more closely, pointing out areas of agreement and areas of concern. First, I know of no one who would take exception to Eisele's observation that a legal ethics course taught well (that is, a "traditional" legal ethics defined as Eisele's describes it), is indeed difficult to teach.[2] But it cannot simply be a matter of saying the teaching of legal ethics is difficult, this difficulty must be described, its contours mapped, its roots examined.[3]

Eisele, commenting on his own teaching of legal ethics observes, that lawyer ethics teaching (if it is to carry that exalted name ethics) calls for teaching "in a way that I do not otherwise teach in law school." Indeed,

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[2] I might note that Eisele is more than generous in his reading of what goes on in "traditional" legal ethics. My survey of legal ethics teachers conducted by way of personal interviews in the early 1980s found a far more rule-oriented approach to the course than your generous characterization of the traditional course would suggest. It is possible that the intervening years have resulted in a change in the "tradition" along the lines you suggest but I suspect the course is bleaker and far more rule-oriented than you have described.

[3] I have tried to present something of a map of the particulars of the "difficulty" beginning with, *Moral Discourse and Legalism in Legal Education*, 32 J. Legal Educ. 11 (1982); picking up the problem again in, *The Pedagogy of Ethics*, 10 J. Legal Prof. 37 (1985); addressing it in, *A Conversation Called Ethics*, 10 Legal Stud. F. 265 (1986); examining the institutional features of the difficulty in, *Resistance to Legal Ethics*, 12 J. Legal Prof. 29 (1987)(co-authored with Elizabeth Gee); and finally, trying to lay out the nature of the "difficulty" in the most explicit way possible in, *Symptoms Exposed When Legalists Engage in Moral Discourse: Reflections on the Difficulties of Talking Ethics*, 17 Vt. L. Rev. 353 (1993) and in *The Moral Labyrinth of Zealous Advocacy*, 20 Cap. L. Rev. 735 (1993). A similar trail could be charted in the work of Tom Eisele. See e.g., Thomas D. Eisele, *Must Virtue Be Taught?*, 37 J. Legal Educ. 495 (1987); *Bitter Knowledge: Socrates and Teaching by Disillusionment*, 45 Mercer L. Rev. 587 (1994); *Wittgenstein's Instructive narratives: Leaving the Lessons Latent*, 40 J. Legal Educ. 77 (1990); *The Activity of Being a Lawyer*, 54 Tenn. L. Rev. 345 (1987); *The Legal Imagination and Language*, 47 U. Colo. L. Rev. 363 (1976).

it is this sense that ethics pedagogy requires a different kind of teaching (if not a different kind of teacher) that is, paradoxically, accurate even as it allows us to undermine the notion that it is ethics we want to teach. I suspect that we draw back from ethics teaching (teaching lawyer ethics as ethics, as moral discourse) either because we have no belief that teaching ethics matters, or if it does matter, it must surely entail some heroic effort that the mere mortal cannot muster. The puzzling point of this observation is that I associate neither of these stands—teaching ethics doesn't matter or if it is to matter it must be done by super-heroic effort—with Tom Eisele. A cursory reading of Eisele's thoughtful inquiry into matters of professionalism (and its teaching) suggest that he cannot be pointing to any such conclusions. To the contrary, Eisele seems to argue that ethics matters and matters in the most significant of ways. And there is certainly no one, based on personal observation and exploration of his work, more qualified to engage in moral discourse with law students than Tom Eisele.[4]

So, I'm left, finally, with a bit of mystery: how can one who knows (and I mean know in the strongest possible sense) and understands the teaching of virtue as clearly and with the most impressive of qualifications as Tom Eisele not be willing and eager to set about "to teach, *against* how or what we teach in most other courses in law school?"

To understand the "difficulty" in teaching legal ethics and the reticence Eisele confesses when faced with it, one must get at the root of the problem and Eisele does exactly that. He describes a "systematic tension in the teaching of a traditional Legal Ethics course" which sets up a dynamic and a structural fault-line that makes the "difficulty" real. The failure to recognize this fundamental tension and honor its power to cripple our teaching efforts would be sheer folly. Like Eisele, I too have struggled with the tension, coming initially to view it as a conflict between legal discourse and moral discourse.[5] Simply put, legal discourse (and its ethic and ethos) puts one at odds with moral discourse. Some students of law (and teachers of legal ethics) want to know more about how this happens and what can be done about it (if

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[4] Eisele's thoughtful reading, observations and immersion in the work of Wittgenstein, Socrates (by way of Plato), and James Boyd White, would more than qualify him, indeed, would make him an exemplary teacher of lawyer ethics.

[5] See Elkins, *Moral Discourse and Legalism in Legal Education, supra* note 3.

anything), others see the conflict as either inevitable or of little pedagogical significance.[6]

Eisele provides a brief but accurate description of what goes on in traditional law courses that gives rise to law as a distinctive discourse, world-view, ethos and ethic. In Eisele's terms, we

> teach our students how to analyze and argue cases, using the rules and the legal materials as they find them, whichever side they may find themselves on. This means that law students must learn to understand and apply legal rules without qualms about any pre-existing commitment they may have in favor of one side or another of a legal issue. Or, perhaps it is better to say, law students are asked to commit themselves *only* to the argument itself, to forging the best argument (logically, rationally, persuasively) they can manage to forge out of the materials at hand.... Law students are expected, and are trained, to commit themselves to the side they are fortuitously assigned in class, just as they will find themselves in practice committing themselves to their client, whoever he or she may be, when the client walks into their law offices and presents them with a legal problem, a case.

Eisele describes, in this passage, a "tradition" we associate with the adversarial ethic and its accompanying ethics. Our ethic creates an ethos, a community of like-minded practitioners. But as in our most enduring traditions and ethic(s), there is much to be applauded (virtue abounds) even as our traditions are rife with conflict and vices that would undermine them. (No virtue exist, in all its particulars, as pure principle.) If our adversarial ethic were pure we lawyers would be saints (and when our ethic works in the limited way we moralists would have it work—as in the case of Atticus Finch and any number of real world lawyers—lawyers are saint-like). But the adversarial ethic has its limits[7] and to the extend that we recognize and honor these limits we must question the pedagogical traditions Eisele describes. We must, if we

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[6] I might add that I don't see the articulation and argument of this tension between legal and moral discourse as a necessary element of what we do *in* the classroom so much as what we learn from what takes place in the classroom. I realize that much of our legal discourse is moral in nature and that moral discourse is increasingly legalistic. Once we get the "categories" (legal and moral) this fundamental, they tend to get unwieldy, although I continue to find them helpful, if only for the fleeing moment in which they are used to understand a felt-experience.

[7] It was a course in lawyer ethics in which the limits of the adversarial ethic are made the subject of study that I attempted to describe in Elkins, *The Moral Labyrinth of Zealous Advocacy, supra* note 3.

(teachers and students working together) find the adversarial ethic limited as a source of virtue, make these moral limits a part of the teaching and learning in both traditional law school courses as well as in legal ethics courses.

Put most simply, the moral limits of the adversarial ethic are found deeply embedded in the very tradition we claim as honorable and virtuous. We can see how the "limits" get built-in, if we look more closely at Eisele's description of the tradition.

(1) Eisele finds that we teach our students to "analyze and argue cases, using the rules and the legal materials as they find them" but we know there is more to "finding" law than walking along a pathway picking up stones. We *make* the law even as we set about to *find* it. Judges *make* the law even as they pronounce they have *found* it. Law does not, in my view, exist "out there" to be found in quite the way Eisele implies in this statement. I assume that only the most legalistic among us view law as there to be found rather than made.

(2) Eisele says we teach our students to use the law "whichever side they may find themselves on." We do indeed try to put law students in as many different "value" and "role" positions as possible (and this may be a good thing when done in a thoughtful, reflective fashion). But outside the most artificial of law school exercises, we do not, I think, "find" ourselves in situations in quite the way Eisele suggests. Yes, it's true we often "find" ourselves in surprising places and situations (visited by moral dilemmas which we have not anticipated) but we also find, I think, that we have brought much of ourselves, even placed ourselves, if not intentionally then unconsciously, in the situations that seem initially to take us by surprise. (We do much to create our own moral dilemmas and, yes, they do visit us as if by some fateful intervention of a devilish, playful god.) Paradoxically, our "assignments" in life (outside the classroom) may often be fortuitous (fateful) but it is what we bring with us to the task and the fates that befall us that gives moral texture to our lives and our professional work. While I would preserve this element of "fortuity" in thinking about lawyer ethics, I think Eisele focus too little on the element of *choice* and *what we bring with us* to the legal ethics classroom. In Eisele's description of traditional law school courses, legal argument, and lawyering, there is little mention of choice and the role it plays, in the decision to take up a study of law, in framing a legal argument, and finally, in the choice of clients to whom we devote our lives.

(3) While we may commit ourselves to zealous and partisan advocacy in the name of the adversarial ethic, this does not mean, as Eisele claims, "that law students must learn to understand and apply legal

rules without qualms about any pre-existing commitment they may have in favor of one side or another of a legal issue." I assume that ethics (and the moral discourse in which ethics is given meaning in the classroom) draws on and encourages recognition and honoring the "qualms" now being squelched in traditional law school teaching. Without qualms, the lawyer is a robot, a technician (or as William Twining posited, a "plumber" in contrast to a Pericles[8]), a sophist and a menace. The lawyer without qualms is the prototypical legalist, a person without feelings (or acting as if they have no feelings), a person so vested in the lawyer role and the job at hand that qualms have no place. I suspect that our qualms are just a set of feelings that coalesce around the doubts we have about what we do and how we are do it. Our qualms are one part of the psyche attempting to get attention (any attention it can) from another part of the psyche, the ego, which has been placed in charge and dominates our psychic affairs.

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Let me pause here to note that Eisele, might well agree with these observations. I do not mean to suggest that Eisele does not fully understand all of these matters. Eisele's map of what "we" do in the classroom and his description of a pedagogy of lawyer ethics that would look behind the scenes of the virtuous lawyer image is extremely helpful. Eisele is exactly right about a lawyer ethics course taught as ethics when he claims that in such a course,

> we turn around and ask our students to pierce the veil...so that they can consider the ethical dimension of their own actions.... In effect, we are challenging our students to assess themselves (their behavior, their actions as lawyers for their clients) on the basis of their own cares and commitments, their own interests. And yet they still are being taught this lesson *within* the larger context of their being taught to emulate and enact the role of the uncommitted advocate, the advocate for hire.

I don't see how the central importance of lawyer ethics (and its teaching) could be made any more directly or explicitly than Eisele makes it here: There is a fundamental conflict between our adversarial ethic (represent the client and do whatever the law permits and do it in the most aggressive fashion possible so far as the "rules" of legal ethics permits) and the "cares and commitments" we carry with us as lawyers. The conflict is, according to Eisele, "*the* fundamental antinomy of the legal profession, in so far as that profession is built upon an adversarial

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[8] William Twining, *Pericles and the Plumber*, 83 Law Q. Rev. 396 (1967).

ethic, or an ethics of advocacy." I agree that this conflict is real, fundamental, pervasive, operational, and as determinative of the kind of lawyers we turn out to be as anything else that goes on in legal education. Consequently, what choice do we have but teach the conflict? If we can theocratically describe the conflict, experience it first-hand (having had personal experience with it), see it in our students and observe their efforts to avoid and confront the conflict, then what choice do we have but teach what we know? Lawyer ethics requires an understanding and appreciation of the conflict, regardless of the difficulties we might experience in trying to ultimately resolve it?

Eisele maps out the ethical tension in our adversarial ethic and the way we teach it; it is an experiential reality. Eisele suggest that we have little choice: we can either treat lawyering (argument, advocacy, analysis) "as something impersonal to you" or "as something personal to you, something for which you take not only professional responsibility but also personal responsibility, something for which you are answerable (as any person is)." He makes quite clear that lawyering involves, for each of us, in varying ways, a struggle to work out the relation of the personal and impersonal in our law work. Seymour Wishman argues with himself and the reader about this very thing when he tries to justify the brutal cross-examination of Mrs. Lewis with the claim that it was not "personal."[9] Mrs. Lewis, the subject of Wishman's aggressive cross-examination, makes clear that it was "personal" and she makes it personal for Wishman as well. Wishman seems willing *now* to confess that it was, in a real sense, personal for him as well. Stripping away all the expectations, pressures, and encouragements associated with his aggressive lawyering, Wishman seems to be telling the reader—the brutal cross-examination of Mrs. Lewis was personal and in recognition of this he has, in Eisele's terms, moved from "moral stupidity" to "professional responsibility." It is Wishman's recognition (his reflections) and his action (that is, his articulation of his moral stance and the ability to admit that we may not have gotten things exactly right) that we expect of ourselves and our students. There is no guarantee that Wishman has gotten this matter exactly right (in either the way he talks about his moral concerns or his response to them) or that we can get it exactly right as we try to reflect on Wishman's situation, his lawyering, and his response to what he has learned.

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[9] Interestingly enough, Wishman published a novel prior to the publication of *Confessions of a Criminal Lawyer* entitled *Nothing Personal*. Seymour Wishman, NOTHING PERSONAL (New York: Delacorte Press, 1978).

Eisele demonstrates, in my view quite clearly, that we can learn from Wishman, as we give Wishman credit for being a learner and having made "moral progress" in his development as a reflective human being and lawyer. I assume that lawyers need to learn exactly this about themselves and the struggle to define the personal/impersonal elements of their work (our work). I don't see how we can spare ourselves the struggle by any safe and expedient psychological means. We can, short of resolution, admit the existence of conflict, study its contours, and pay close attention to the many ways it deforms our thinking about lawyering. We can, with some effort, learn from each other how to navigate the peaks and valleys of this sometimes perilous struggle with professional conflict. Can we not, and should we not, in our teaching say: *Be of the world and watch out for the world. Be zealous and know the limits of zealousness. Serve your client and pay attention to yourself. (A man divorced from self-knowledge is a threat to himself and those he serves.) Know that in this Janus-like, dualistic way of being you will face conflict, that resolutions in the personal / impersonal abound, and none fully suffice. It is possible, that in any great profession, there is an element of tragedy.*[10]

Eisele asks, in the most forthright way, "how can we expect our students to embrace such a fundamentally dissonant activity?" For Eisele, the conflict is so fundamental that it must by its nature be unresolvable, at least when it is taken up in legal education circles. If we cannot ask our students to address and resolve the conflict, then Eisele seems to suggest that we must forgo teaching it. The implication is that we can teach only those conflicts we can resolve. We might, alternatively, teach only those conflicts we know to be real, including whatever real possibilities (if any) we find for resolution.

I remain open on the question of resolution of the conflict, agreeing that it is certainly difficult to resolve. And I would not, as a matter of course, make the resolution of fundamental conflicts a goal of a lawyer ethics course. Basically, resolution (or even the issue of resolution) should not drive our pedagogy. There are all matter of things, of real and lasting importance, that we cannot fully and finally "resolve" but which we undertake with great enthusiasm knowing full well that we may fail. Marriage and the raising of children come to mind, as does wistful thoughts of becoming a great lawyer or teacher. We set out to do such things knowing they are difficult, knowing we may fail, knowing that the conflicts confronted along the way may be unresolvable—yet,

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[10] Stanley Hauerwas has written about medicine as a "tragic" profession and I assume the characterization might be extended to the legal profession.

we go on. I don't see how, or why, the life of the adversarial advocate could be spared such fundamental questions?

Basically, I don't think the resolution issue (itself unresolvable) should determine whether we attempt to teach virtue so much as how we teach it. The resolution issue calls, I think, for more humility than we find in most law teachers. In Eisele's case, humility seems to have fostered an estrangement from the legal ethics classroom, a classroom where I think Eisele belongs. Humility demands caution, thoughtful appraisal, and openness to the view that we may know less about what we are doing than we claim. I would not let the kind of pedagogical reticence that has taken hold of Eisele, be an excuse to leave the teaching of legal ethics to those who eschew knowledge of the *agon* at the heart of a thinking lawyer's professional life.[11]

Reading "From 'Moral Stupidity' to Professional Responsibility," I conclude that Eisele and I proceed along the same path and finally take issue with one another on a most narrow pedagogical question: Can the fundamental tension of a lawyer's professional life be taught in the law school classroom? Eisele seems firmly convinced that there are real and fundamental structural differences between teaching (effectively) law and teaching the conflict in professional life. While I understand his conviction and the argument that there is something basically so different in teaching law and teaching a fundamental ethical conflict that one kind of teaching feels real and the other unreal, I am not convinced that the conclusions Eisele draws from this experience are appropriate. It is certainly true, as Ron Pipkin pointed out some years ago,[12] that students play a central role in creating a sense that ethics is unreal (soft, subjective, discretionary, personal). They seem not to find enough "reality" in the teaching of ethics to make it worthwhile, and consequently hold legal ethics teaching in disdain. I think it possible to accept the reality of student disdain (and the student perception that no good can come of ethics teaching) and not accede to the more radical conclusion that there is no way to create and pose in the classroom a real ethical conflict which can then be taught as we would other kinds of knowledge. We know, or at least I think we know, that many of our students are not highly motivated to pursue "literature" or "philosophy"

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[11] Or worse, we leave the teaching of legal ethics to those who take the expedient route and translate a study of lawyer ethics into the law of lawyering. A 1995 symposium exploring state of the art legal ethics teaching suggest that the law of lawyering is no longer the central focus of legal ethics teaching in the elite law schools. See, *Teaching Legal Ethics*, 58 L. & Contemp. Probs. 1-389 (Summer/Autumn, 1995).

[12] Ronald Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 Am. B. Found. Res. J. 247 .

(or indeed any of the "liberal arts") and yet, we continue to believe in the reality of literature and philosophy and that they can and must be taught. I would make a similar claim for legal ethics (and the fundamental tensions ethics exposes): ethics is real and is as real in the classroom as virtually anything we teach.

Eisele's conviction that there is something "real" to teach when we engage in legal discourse seems as overstated as he understates the real possibilities for teaching real (acknowledged and experienced) ethical conflict in the legal ethics course. Eisele sees in traditional law teaching a reality based on a sense that we can assuredly assess whether a student's legal argument "either work[s] or fail[s]" and that we can make this assessment in the classroom. We do, of course, make such judgments and we make them to encourage our students to make them. But, I'm not sure these assessments and evaluations are quite so sure-footed and conclusive as Eisele suggest. Isn't the lesson we teach (and students learn) on the *working* and *failure* of legal argument more subtle? Don't we, in essence, say to students, "well, yes, I understand your argument, but did you consider...? And would you alter your position if you knew that the court had ruled..? How would your argument be affected if the client...?" Don't we leave our students wondering, even when they have made a "good" argument, how good it actually is, by subjecting them to the Socratic hot-seat, pushing them beyond the limits of their knowledge, leaving them with a dialogue in which they feel roughed up if not abused?[13] (If we asked our students whether they knew the "basics" of "good" legal argument, is there any hope we would get a satisfactory answer?) Don't we teach our students that however "good" an argument, they are subject to a kind of scrutiny that leaves them with a sense of *failure*. (This may be why so many students take solace in grades, there being so little of it in the classroom.) And isn't it the case, that even when we teach by way of "bitter knowledge" (Eisele's term for Socratic teaching) we reject the sadistic Kingsfield approach to teaching by suggesting that we learn by way of failure and that failure is something different than it appears. So we say to the student who makes a failed argument, "well, yes, I understand your argument, but have you considered...? And would it be possible to read this opinion of the court to require...?" In essence, don't we encourage our students to believe that it is they (as students) rather

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[13] On the abuse of students in the name of Socratic teaching, see Toni Pickard, *Experience as Teacher: Discovering the Politics of Law Teaching*, 33 U. Toronto L. J. 279 (1983). For a scholarly exploration of authentic Socratic teaching, see Eisele, *Bitter Knowledge: Socrates and Teaching by Disillusionment*, *supra* note 3.

than we (as teachers) who have come to a right understanding of the situation, even when they begin in ignorance? While we may, as Eisele argues "assess each student's fulfillment of his or her personal responsibility for the rightness, the aptness, the cogency, of the argument," I suspect that we are far less than forthright about our assessments and how they work. Indeed, I assume that we are downright mysterious when it comes to fulfilling the premise of Eisele's contention that, "The student's responsibility for what he or she has fashioned can be studied and assessed in the classroom." The classroom is a place where assessment takes place but I don't think we are nearly so straight-forward and explicit about our acts of judgment as Eisele suggests.

If, indeed, we are mysterious and mystifying in our practice of assessment (in the classroom and in grading) then how real can these "acts" of judgment be? I assume that students find our assessments every bit as baffling as we find them throughly rooted in the objectives of pedagogy. Yet, students, as I listen to them, come to a love/hate relationship with our assessments of their work *in* the classroom and bitterly complain of the arbitrary and capricious nature of course grade assessments. It wouldn't take much of an argument to convince students that our evaluations of them are "subjective" (perhaps ever bit as subjective as we assume ethics is subjective)(suggesting that in our evaluations of students we are operating in the realm of ethics and its processes of evaluation, distinction, discernment, and judgment). On the reality of what we do in the classroom, I am suggesting that Eisele overestimates the reality of our evaluative practices (as traditional legalists without the benefit of Critical Legal Studies and other "schools" of contemporary jurisprudence overvalue the "objectivity" of law).

Overstating one reality (the possibilities of assessment), Eisele understates another, the claim that in the absence of a client, lawsuit, and court "there is no way we have of trying to estimate or assess how a student might treat the client, how he or she might actually resolve a conflict that arises...." I think we can assess, based on what a student says and does, and how she speaks and with what care and concern she goes about her work as a student, how she will deal with a client. We can *see* and *hear* and *know* how a student will respond to a client just the way we can see, hear, and know (or think we can) how they will frame and present and write a legal argument. Our prediction about how a future lawyer will deal with clients is based on the evidence before us, on the student's ability to *read* (texts, situations, people); the way she *articulates* concerns about what she reads; her *arguments*, noting that we argue in daily life and about moral concerns before we

make arguments about and with law; her *reflective skills,* those philosophical concerns raised about the situation she finds herself in and the condition of the world in which her lawyering will take place; and finally, her *avowals*, or promises, implicit and explicit, she makes about the life she will lead.

We know every bit as well whether our student will be good in the moral sense as we do whether they will be good in the legal sense. In both instances, our predictions of what lies ahead are fraught with the limits attendant to predictions about the future, particularly in matters of greatness and goodness.

By bringing Seymour Wishman's account of moral progress (and other possible accounts of moral success and failure available by way of novels, films, journalistic accounts of lawyering, and personal accounts provided by students) into the classroom, we have, I think, not a simulation of reality, but something quite real in itself. With Seymour Wishman's account of his brutal, humiliating, cross-examination of Mrs. Lewis, we have a very real person and question before us: What are we to do? What are we to say? How are we to respond? What arguments can be made when confronted with Wishman's account of his practices and his life as a lawyer? What concerns and arguments does Wishman make? How are we to respond to Wishman, his arguments, his concerns, his reflections, and his "tale" of "moral progress"? And finally, how are we to deal with the various, sometimes thoughtful, sometimes careless ways, we see others respond to Wishman?

There is nothing unreal or abstract about these questions. They don't call upon a degree in philosophy to respond to them. Indeed, a response is forthcoming, even from those who say there is nothing of real ethics that can or should be taught in the classroom. It is the great irony of ethics (and moral discourse) that the most passionate participants in the dialogue are often those who contend that ethics cannot be taught and if it can, it would be pernicious to do so.

I know that Eisele tries to hedge his argument, to avoid exactly the kind of critique I present here, but I don't think the hedge works. He argues that without the real client (*"the reality of the other"*), "the potential conflict between the student's personal responsibility and his or her vicarious responsibility, is not really posed in class, and it cannot be. (I do not say that such a conflict cannot be imagined or described in class: I only say that it cannot be created or posed.)" He goes on to say, again, "[c]reating or duplicating such a conflict is not a pedagogical possibility," and still again, that the conflicts are "generally impossible to duplicate in the classroom...." I don't understand the attempted distinction between imagining and describing the fundamental conflict

(a possibility Eisele accepts) and creating and posing conflict (a possibility Eisele rejects). If we take Wishman to be real (as we both do), then I would argue that we can do with Wishman in the classroom what Eisele does with him in his thoughtful essay, that is, allow the reading/story/vignette and the discussion that follows from it, to pose questions, raise concerns, generate arguments, allow us a glimpse at how we might reconcile ourselves with past actions, and survey what avowals we might want to make about our understanding and ways of *seeing* that provide insight into our fundamental moral conflicts. With these matters posed in the context of a real life/story (i.e, Wishman's life and then our own), I fail to see why we haven't created a reality as present and full and rich as any statute or lawsuit or client ever presented in the traditional law school classroom (almost always by way of judicial opinion).

If Eisele is right in his central point—that the conflicts we expose in legal ethics courses are not real—then his pessimism about teaching the fundamental conflict in lawyer ethics is well-founded. If the conflict we bring to the classroom (or have evolve in the classroom from the conflicts that students bring with them) isn't real, then a legal ethics course as Eisele and I imagine it must fail of its own terms.

I contend that students know the conflict they are talking about is real and they experience it as real and personal. It becomes real as students take engaged, committed stances—they think they know, already, whether it is a good thing or a bad thing to brutally humiliate a truthful witnesses on cross-examination. Some students are eager to pronounce the rightness or wrongness of Wishman's kind of cross-examination and even their own willingness to do it. Still other students don't know what they would do in this situation and are stunned by their colleagues deep convictions and assumptions that the matter is so *already* and *fully* settled. When you have a situation in which some students know exactly what they will do, others are uncertain, some believe that the conversation is important and others view it as senseless, I think we have a "real" conflict and a "real" possibility for learning.

Just as we create conflict in the traditional law school course by our questions (Did you think about this? What if this happens?) and ask students to work through the uncertainty (learning to think on their feet, learning when we do not provide answers), we work in legal ethics with conflict in much the same way. We try to see how the real conflict in our lives re-presents itself as conflict *in* the legal ethics classroom. In both law course and ethics course, the student must *act* on arguments and strategies being presented, that is, the student must take a stance.

(We assume law students to be active participants in the course, a feature we adopt from Socrates and his teaching.) Can we understand and talk about Wishman or not? Is the situation that Wishman describes real enough to engage us or not? Can we learn something from Wishman or not? In both law and ethics courses, students take up stances, practice arguments, deploy different kinds of rhetoric strategies and rehearse the future. Students argue, in both law and ethics, in ways that are personal (subjective) and detached (objective), mechanically and passionately. They struggle (as do their teachers) in both kinds of classrooms to work out the fundamental tension between the personal and impersonal, the real and the unreal.

Eisele has it exactly right in describing Wishman's story as one of "professional development," a story in which we see "a kind of movement from innocence to experience, or sinfulness to salvation."[14] While I agree that "innocence to experience" is a helpful characterization of professional development, I wouldn't use the characterization as a central goal in the teaching of legal ethics. While we are most certainly, in teaching legal ethics, in the business of creating opportunities and possibilities for experience, I don't go into the classroom assuming that my students are "innocent" (allowing for the possibility that there are the innocent among us). Basically, it is experience in the reality of moral discourse and moral reflection by which we stake our claim as teachers of lawyer ethics.

Many readers of Wishman's story, including myself, agree that Eisele has the story and its moral lessons exactly right. It illustrates "a growth in professional responsibility" and "a movement of the self toward increased understanding and assessment...." Eisele goes on to note that "Wishman's story tells how he was shocked out of his complacency by someone's reaction to his behavior as a lawyer; and how, years earlier, he himself had been shocked by his own callousness, his own wilful indifference or blindness to the quite real possibility that he had helped to convict an innocent man." I think Wishman's "confrontations with himself and with his behavior as a lawyer...." can be brought into the classroom and used with students to do exactly what Wishman does—"ponder what kind of a lawyer—and what kind of a person—he was becoming." There will be some (sometimes too many)

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[14] It may be the phrase "sinfulness to salvation" that concerns Paul Hayden. See Paul Hayden, *Sinners in the Hands of an Angry Law Professor: Some Cautionary Thoughts on Teaching Moral Lessons in the Professional Responsibility Class,* 21 Legal Stud. F. 257 (1997). I do not, however, take the phase and its theological implications as crucial to Eisele's argument.

who will, when offered the chance to "ponder" over these matters find reason not to do so. For some, this kind of pondering has a bad name, isn't something they associate with law school, and will not be sought out as important in their professional education and training. This predisposition to hold pondering in a bad light is not overcome easily and presents real difficulties for the teacher of legal ethics. I don't, however, find the predisposition determinative but rather itself a subject for investigation. My impulse is to honor the resistance that students present to moral discourse (that is, pondering about matters of moral significance) even as I challenge it. Don't we honor the student's failed legal interpretation even as we challenge it? I honor the resistance not to assume a false modesty or avoid charges of moral indoctrination, rather, as a way to acknowledge that the resistance is real, pervasive, and significant in any inquiry that might lead to self-knowledge. Wishman's resistance to self-knowledge is seen in his effort to explain and justify his cross-examination of Mrs. Lewis. The effort to excuse himself is followed by the observation that he has unthinkingly become a kind of person he didn't want to be.[15]

If we accept the reality of Wishman's story, a reality Eisele describes as a "tale of moral progress, a kind of pilgrim's progress if you will...[a] case of professional development," then we might make the story real for students with our (and their) understanding that Wishman's story is not just a "personal" one but "a morality tale for all legal professionals...." Wishman, of course, has similar hopes for his story: "I sensed that my distress was not just a personal matter but revealed some of the painful moral and ethical dilemmas of my profession."[16]

Eisele, in the varied and helpful ways he talks about Wishman's story, seems to say in the most direct possible way that Wishman's story is as real as we are likely to get. The moral concerns that Wishman explores are real for each of us, even if by real we mean avoidance and denial, in which case the response to Wishman's reality is simply another, a reality provoked by it. It is the reality of Wishman's moral concerns that impress the reader and especially law student readers of the story. There is no getting away from Wishman, no escaping the

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[15] It was in honor of the resistance to ethics and the will to stifle our "pondering" about moral concerns that lead me to look at this resistance as "symptoms" that afflict moral discourse. See Elkins, *Symptoms Exposed When Legalists Engage in Moral Discourse*, *supra* note 3. It was, I assume, the symptoms found in the law school classroom that brought Eisele around to a notion of teaching as an offering of "bitter knowledge." See Eisele, *Bitter Knowledge: Socrates and Teaching by Disillusionment*, *supra* note 3.

[16] Seymour Wishman, CONFESSIONS OF A CRIMINAL LAWYER 18 (New York: Penguin Books, 1982)(1981).

moral lessons he teaches unless we have concluded there are no moral lessons we are willing to learn.

Yes, it's possible to distance oneself (as a reader) from what Wishman teaches, but I don't think many of us would be impressed or comforted by the effort. For example, a student might say, "I don't really know Wishman at all. How can I be sure he isn't just saying these things?" Or as one of my students remarked, "maybe Wishman just wrote this book and told this story to make money." Or a student might conclude that one could say the kind of things Wishman says and not be a changed person at all, that he might be something of a hypocrite, or less pejoratively, he may tell a gripping story that isn't fully reflected in the way he lives and practices law. If so, then maybe, we need not pay so much attention to the story. And how can we know, as one student put it, "what happened to Wishman after he write this book?" Or, finally, "I'm just not going to put myself in the kind of situation that Wishman created for himself?"

And the strategies of resistance might be expanded, and we might see in each and every strategy to distance ourselves from Wishman, yet another subject of conversation, another piece in the moral puzzle (and its teaching). I don't think it's an adequate response to these various ways of distancing ourselves from Wishman, to say, "some students are just not going to pay any attention to Seymour Wishman and his concerns and consequently his story isn't going to have much impact." (Eisele does not make this argument, but others do.) Some students don't pay enough attention when we talk about theories of constitutional interpretation or exhaustion of administrative remedies or exceptions to the hearsay rule. We have surrounded *failure* in the traditional law course with all manner of pedagogical explanation. Likewise, the failure of students to perceive the opportunities and possibilities in exploring the realm of personal/professional conflict should not halt our efforts. If Wishman's story is of sufficient weight and bearing to be anything more than an "abstract idea" indeed, of "sufficient force to make us stop and think", why doesn't the *us* include our students? Eisele observes that "with the help of self-reflection, or critical thinking, perhaps we can change our ways." With this observation, Eisele's view of the Wishman story, as one from which "we may learn something more about moral development" does not square with the conclusion that it is insufficiently real for purposes of classroom lawyer ethics. I'm not arguing that Wishman must be accepted *as is* or that his story offers a prototypical path to moral redemption. Eisele, as in so many other places in his essay, puts it exactly right, when he says that "Wishman's discoveries about himself exemplify one course that moral development or growth

can take." I would emphasize that Wishman's is *one* story and that no *one* story will ever do (or as we narrativists contend, 'one good story deserves another').

Basically, I disagree with the conclusion that students are "unlikely" to make the kind of "discoveries about themselves" that we associate with moral progress of the kind reflected in Wishman's *Confessions of a Criminal Lawyer*. But if moral progress is possible, for Wishman, and in a reading like Tom Eisele accords Wishman's accomplishments, then we must look to teachers like Wishman (and Eisele and Nancy Cook[17]) for the stories, situations, analysis, and reflections, that might make the possibilities of moral progress real *in* the legal ethics classroom. I don't see how the failure to provide our students with ultimate answers or proven strategies for resolution of their professional conflicts should present a obstacle to our continued teaching of Wishman's story and the conflicts he presents.[18]

My claim is a simple one: moral discovery is every bit as possible as is intellectual discovery. The only difference being that we take one (intellectual discovery) as our goal and the other (moral discovery) as a great mystery. I would treat both as goal and as mystery. We know less about the one and more about the other than we sometimes assume. I would impress upon those who argue against moral pedagogy in the law school classroom that even with failure ever present there remains much to teach. Getting to virtue (and teaching about it) may be one of life's mysteries, but one need not be an ethics gurn to see that there is much of ethics all around us, (present and real) in everyday talk and argument, and in the everyday expression and resolution of concern, doubt, confusion, regret, and hope that gives our lives texture. Even if one concludes that students should not (indeed, cannot) be pushed or pulled toward moral progress, wouldn't that fact alone be worth knowing? We might want to learn more about the cost of our delusions concerning moral progress, that is, our continued efforts to be better and get it right when we so consistently fail. If we are deluded about what

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[17] Nancy Cook, *Response-Ability: Merging the Personal and the Professional Through Action and Reflection*, 21 Legal Stud. F. 239 (1997).

[18] Law teachers take pride in refusing to provide their students with answers. Either our reticence about "legal answers" in the traditional law course is a devious ploy or a worthwhile pedagogical strategy. (Maybe there is more to this matter of having "answers" and "questions" in both law and ethics classrooms than we have fully realized. One might, putting the matter bluntly, see students as either answer or question oriented ("I want answers" vs. "I have some questions"). I see something of this division in students as they deal with moral discourse.

is possible, and it is delusion we suffer, then so be it, this too, must be learned.

While there may be substantial resistance and perplexing difficulties in the teaching of lawyer ethics, in contrast to Eisele, I argue that we have all "the tools and materials for coming to learn something about ourselves...." we are ever going to have. We have as many Wishman stories and variations on it as we can consume in a lifetime, stories that prod and provoke, stories that encourage and promote moral discourse *and* moral progress (and, yes, we have stories that show with great particularly, how moral failure too is a real possibility).[19] Ethics demands, not just that we be good, but that we be concerned about the good, not that our moral teaching succeed, but that we not let our failures blind us to our hopes. There is, indeed, much missing in the traditional Legal Ethics class that makes learning and moral progress problematic. But the "missing" is, to use some jargon, present by its absence. Our studied efforts to keep the moral dimension out of legal education, teaching as if the adversarial ethic was not full of moral imperatives, and our efforts to incorporate lawyer ethics as the law of lawyering, speak loudly and clearly of our failed efforts at moral pedagogy.

We can, and should, expect students to aim for self-knowledge, of the self they enact as a lawyer, the self they take with them into the law firm and the courtroom and the self that exists beyond Law. Contrary to Eisele, I think we have all the "tools and materials" we need; we have all the "tools and materials" bequeathed us as talents, endowments, skills, and imaginations. The clever and devious ways that so many of our "tools and materials" have been put to use is itself of course a reality and must be explored in all its particulars in the reality and fictions of lawyer work. The moral resources we have been given and make unconscious use in daily life and law firm and lawyering life have been so amplified and analyzed and plotted (in lawyer fiction and social science research, in newspaper accounts, TV dramas and Hollywood films) that we have a wealth of materials on which to draw. If there is anything lacking in the law school classroom, the classroom where either law or ethics is taught, it is imagination.

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[19] On teaching from and about moral failure, see Lewis LaRue, *Teaching Legal Ethics by Negative Example: John Dean's Blind Ambition*, 10 Legal Stud. F. 315 (1986); James R. Elkins, *Ethics: Professionalism, Craft, and Failure*, 73 Ky. L. J. 937 (1984-85).