THE MORAL LABYRINTH OF ZEALOUS ADVOCACY

JAMES R. ELKINS*

INTRODUCTION

There is no hiding the problem with lawyer ethics. It is a problem we see in law offices, courtrooms, law school classrooms, daily newspapers and magazines,[1] and on network television. The problem, put simply, is this: Lawyers sometimes act as if they are not bound or limited by the most basic tenets of ordinary morality. The issue has also been raised in medical ethics, by moral philosophers concerned with professional ethics, and by commentators on ethics in public life.[2] It is a problem many lawyers worry about, and talk about; a problem we sometimes try earnestly to fix.[3] Even so, we have

---

* Professor of Law, West Virginia University. B.A. 1967, J.D. 1971, Kentucky; LL.M. 1975, Yale.

1. *See, e.g.*, David A. Kaplan with Ginny Carrol, *How's Your Lawyer's Left Jab? A New Crackdown on Slimeball Litigation Tactics,* NEWSWEEK, Feb. 26, 1990, at 70 (discussing the debate over new "courtesy" codes for lawyers).

2. It is this notion that ordinary and professional morality can take different paths that has become a central focus of the academic literature on professional ethics. *See, e.g.*, David Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 462-70 (1981). Robert M. Veatch, *Medical Ethics: Professional or Universal*, 65 HARV. THEOLOGICAL REV. 531 (1972); Benjamin Freedman, *A Meta-Ethics for Professional Morality*, 89 ETHICS 1 (1978); Mike W. Martin, *Rights and the Meta-Ethics of Professional Morality*, 91 ETHICS 619 (1978); ALAN GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS (1980); *Public and Private Morality*, *in* PUBLIC AND PRIVATE MORALITY, 23-53 (Stuart Hampshire ed., 1978).

3. One way to deal with the problem is simply to accept it. Or we can try to explain it away. The argument goes like this: There have always been incompetent and unethical lawyers and the only reason we appear to have more today is that there are more lawyers. Another effort goes like this: There are no more unethical and uncaring lawyers than there are physicians or journalists. Arguments such as these are used to convince ourselves that the problem is not as bad as it seems. Another way to deal with the problem is to try to understand it. Consider the following, recent effort:

> Lawyers who take justice seriously as the object of their work are in a "terrible bind"–a predicament connected to larger problems of life in an age of deconstruction. . . . [D]espite the temptation to despair, we continue to dream dreams of justice and yearn for new, more enduring constructs of law. Contemporary experience tells us that consensus about constructs of law is unlikely to emerge. We must seriously

(*continued*)

trouble understanding what the problem of lawyer ethics is and what efforts might be responsive to the ills we hear diagnosed.

You do not have to be a philosopher, sociologist, or psychologist to know that being a lawyer in these troubled times is difficult. If you read newspapers, watch television, or talk to your neighbors, you are faced with the public's ambivalence toward lawyers, an ambivalence that finds lawyers and their ethics the subject of jokes and cartoons while at the same time we are also viewed as cultural heroes. If you do not already know this about lawyers, you may find yourself drinking coffee one day and read in your local morning newspaper the results of yet another poll that puts in graphic form the low regard that the general public has for lawyers and their ethics. It is disconcerting to learn that lawyers are held in the same regard as used car salesmen and politicians.

Edmund D. Pellegrino, a physician, finds that

> [t]he professions today are afflicted with a species of moral malaise that may prove fatal to their moral identities and perilous to our whole society. This malaise is manifest in a growing conviction even among conscientious doctors, lawyers and ministers that it is no longer possible to practice their professions within traditional ethical constraints.[4]

Students of law are introduced to an effect of this malaise when they are warned, by someone in their family, church, or town, that going to law school is a test of a person's moral character.[5] Others experience the malaise first-hand during law school when they realize the moral drift of their legal education and that they are not going to receive guidance in their struggle to understand the relation of law and justice. Many students puzzle over how to retain their

---

> consider how to live as a people in the midst of widespread political dissensus. The heart of the matter is that in law, as in life, we are left with dreams of justice and without a hard rock of foundation for acting on our dreams.

Howard J. Vogel, *In the Cause of Justice: Reflections on Robert Cover's Turn Toward Narrative*, 7 J. L. AND RELIGION 173, 177 (1989).

4. Edmund D. Pellegrino, *Character, Virtue and Self-Interest in the Ethics of the Professions*, 5 J. CONTEMP. HEALTH L. & POL'Y 53 (1989).

5. Many law students are warned by someone they know against coming to law school, and advised, in no uncertain terms, not to become a lawyer. And yet, we make the decision to become lawyers and assume that we can do so and still be good persons.

ordinary moral sensibilities as they make their way into the legal profession.[6]

One way to ignore the moral problem of lawyers and their ethics is to engage in the kind of discourse that makes us, as insiders, reject what the public, as outsiders, already knows: the ethics of lawyers may not deserve the name ethics. Our professional ethic and ethos, in particular the adversarial ethic and ethos it has spawned, has gotten us into something of a mess. We need, I think, to understand the mess we are in before we can begin to respond to what Pellegrino diagnoses as "moral malaise". We cannot afford, morally or psychologically, to ignore the "problem" of professionalism.

Lawyers sometimes assume that the practice of law is per se an embodiment of a moral life. Many lawyers and law students take it for granted that the adversarial ethic can provide the foundation for their moral lives.[7] Adversarialism is accepted as an uncontestable "good", a pragmatic means to justice. It is this same adversarial ethic that fuels an illusion, professionally supported, that so long as lawyers represent the "legal" interests of their clients they should be free from moral scrutiny. Lawyers are quick to turn a deaf ear to criticisms and critiques of adversarialism. We assume those who critique and criticize fail to understand the legal profession and how it serves a "system" of justice. We are quick to reject criticism, including, ironically the criticism embodied in ethics itself.

---

6. Law students also confront professional "moral malaise" first hand in their work with lawyers before they graduate. The depth of this moral malaise has now been documented. *See* Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization,* 4 GEO. J. LEGAL ETHICS 537 (1991).

7. This is the way one judge put it:

> The Rules of Professional Conduct purport to govern the minimal level at which lawyers must operate within the system. They provide a lowest common denominator approach to good practice. They assume as a first principle that the lawyer is a champion on behalf of his client–that is the essence of advocacy. The lawyer is to advance the interest of his client zealously within the bounds of the law.

Frederick J. Martone, *Adversary Adjudication on Trial*, 21 ARIZ. ST. L. J. 227, 228 (1989) (The author was, at the time this statement was published, associate chief presiding judge, Superior Court of Arizona in Maricopa County, Phoenix, Arizona). Judge Martone goes on to point out that lawyers have responsibilities, under existing ethical rules, that extend beyond the client. Even so, "many lawyers have a one-dimensional view of the adversary system. They think their role is limited to advancing their clients' interests in a zealous way. Their role as an officer of the court has become a metaphor with little substance." *Id.* at 233.

Within the legal profession we assume that lawyers are actively engaged in productive work; we fantasize that our work as lawyers makes the world a better place to live. We believe, as lawyers, that we are "progressive" and "moral" (in the social and political sense that these terms imply). These implicit notions, notions we take for granted, shield us from the troubling moral implications of the adversarial ethic.

Our claims of "goodness" as lawyers cannot be taken seriously if they double as rationalizations for hardball litigation tactics (by which we make life miserable for our colleagues in hopes of improving the odds of "winning" the case),[8] leveraging a client's interest by resort to false claims and perverted readings of legal texts, seeking unwarranted delay to pressure opposing parties, and the willful abandonment of civility and civic responsibility. When it becomes a guise for amorality, relativism, and self-deception the adversarial ethic, played to its limits, can prove to be an unreliable foundation for a virtuous life. The adversarial ethic at the heart of the lawyer's partisan role becomes a source of pathologies of character that deform the legal *persona*.[9] The lawyer who adopts the ethic of

---

8. Zealous advocacy that tests the moral limits of the zeal as a professional virtue we call zealousness now has its own label—"hardball". *See* Charles W. Joiner, *Our System of Justice and the Trial Advocate*, 24 U.S.F.L. REV. 1, 15-19 (1989) (The author is Senior United States District Judge, Eastern District of Michigan.). Judge Joiner describes advocacy as hardball when it is "used to subvert the process of finding facts expeditiously and inexpensively [and] to divert the search for truth." *Id.* at 15. Judge Joiner presents the following examples of hardball advocacy: abuse of the discovery process, harassment of truthful witnesses, damaging an opponent's case by delaying trial, using evidence that will confuse the jury. Judge Joiner argues that these well-known tactics should be condemned. *Id.* at 17. Judge Joiner argues for condemnation of hardball tactics on grounds of fairness and defense of the "system". "Hardballers, by their actions in the name of advocacy, if not reigned in, would destroy the adversary system created by society to do justice through advocacy." *Id.* at 19.

9. Thomas Huff, *The Temptations of Creon: Philosophical Reflections on the Ethics of the Lawyer's Professional Role*, 46 MONT. L. REV. 47 (1985) Huff argues that lawyers are subject to a variety of temptations:

> There are, of course, the usual temptations of private gain manifest in laziness, dishonesty, or thievery. . . . More often, however, if there are moral errors which tempt you, they are errors of professional role rather than errors of private gain. They show up as failures of ethical insight and moral sensitivity. It is the kind of moral error which comes from too great an identification with role. . . .

(*continued*)

zealousness as a single, paramount, ultimate virtue is the subject of this essay.

Is it possible to be a good person and a good lawyer if your ultimate moral principle is permeated with an adversarial ethic limited only by the outer limits of the law? If we are to understand the proudest and saddest moments in our lives as lawyers—and the disdain the public has for lawyers and we have for each other as lawyers—then we must confront and reflect on the moral notions, role images, rhetorics, metaphors, and alluring stories that make hardball tactics a common part of lawyering. Zealousness goes to the heart of what lawyers are about—it is, as all of us know, and as students of law argue so fervently, the *job* of lawyers to be zealous. (Having a job and doing a job still means something in America!) Zealousness is a trait we associate with the good lawyers. Being zealous is something that many lawyers learn without reflection. It seems a little absurd to imagine a lawyer asking, "How zealous do I want to be in this case?" When lawyers earn their money, live up to the ideals of the profession, and gain the admiration of other lawyers, they act as zealous advocates. When lawyers are less than zealous in their advocacy, there is, from the perspective of both insider and outsider, a sense of failure.

Lawyers take pride in zealous advocacy. It is not something we lawyers do simply because it is demanded of us. It is something we demand of ourselves. We demand it of ourselves in a way that is as much internal (and psychological) as it is external (and sociological). It is part of the ritual of lawyering, grounded in the ethos and ethic of lawyering. We internalize the notion of zealous advocacy, it becomes a habit and a way of life. Our best virtues are those we enact as a matter of habit. The habit of zealousness is internalized as a way of knowing[10] and embedded in our sense of professionalism.

When zealousness becomes part of our ritual life as lawyers, it takes on a double-edged meaning. First, we do it without thinking (zealousness is who we are) and we become the best that we can be as lawyers. Second, we do it and we become the kind of lawyer the public has learned to hold in disdain. We become active participants in the "moral malaise" of the profession.

In this essay, I explore the moral conundrum posed by zealousness and how habituated responses to zealousness mask an impoverished, pathological strain of the adversarial ethic. We may find that our

---

Id. at 47.

10. PARKER J. PALMER, TO KNOW AS WE ARE KNOWN 21 (1983) ("The shape of our knowledge becomes the shape of our living. . . .").

faith in zealousness has blinded us to its moral costs. If so, we might listen as lawyers and those who have set out to be lawyers verbally rehearse the scripts used to embrace a morally impoverished ethic. We can, if we look steadily, see how our rhetorical responses to the moral tests posed for us by zealousness became symptoms of character gone astray. It is this confrontation and stance toward the power and pathology of the adversarial ethic that implicates our judgment and character as lawyers.

I.

Atticus Finch, the Maycomb, Alabama lawyer in Harper Lee's novel *To Kill a Mockingbird*, provides a wonderful literary example of the internalization of zealousness and its ritual re-appearance in a virtuous act of courage.[11] Appointed by Judge Taylor to represent Tom Robinson, a black man charged with the rape of a white woman in the 1930s, Atticus does not "decide" how zealous to be in his representation of Robinson. From what we learn about Atticus, it is not a decision to be made.[12] Atticus represents Tom Robinson zealously because his character, as person and lawyer, makes it impossible for him not to do for Tom Robinson what he would do for any client or neighbor who sought his services. It is this kind of zeal and this kind of devotion to advocacy that makes a good lawyer someone to revere even as we laugh at the lawyers made the butt of common jokes.

---

11. HARPER LEE, TO KILL A MOCKINGBIRD (1960).

12. While the representation of Tom Robinson may have been the most difficult case of his legal career, Harper Lee does not present Atticus to us as a man who struggled over the decision to do what he did. The implication (at least in its literary portrayal) is that Atticus knew what to do, knew what must be done, and did it. He did not weigh the possibilities and dangers of accepting the appointment. We might imagine what Atticus did as "rational", but not rational in the sense of weighing possibilities, considering feasible alternatives, projecting costs, and evaluating outcomes. Atticus was rational but not a decisionist. He did not see the Tom Robinson case as the kind of quandary we use to teach legal ethics in law school. Near the end of the novel Atticus faces a more traditional law school version of an ethical quandary when he learns that Boo Radley, instead of Jem, his son, has killed Bob Ewell. The dilemma is whether to protect the reclusive Boo Radley or let the "truth" be known about Bob Ewell's death. Harper Lee has told the story of Atticus as a lawyer known by his virtue and character rather than his problem-solving and decision-making. On the moral philosophical grounds of this shift in focus from ethical problem-solving to virtue and character, *see* EDMUND L. PINCOFFS, QUANDARIES AND VIRTUES: AGAINST REDUCTIVISM IN ETHICS (1986); STANLEY HAUERWAS, VISION AND VIRTUE: ESSAYS IN CHRISTIAN ETHICAL REFLECTION (1981); THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS (1987).

In the account of Tom Robinson's trial the following conversation takes place among regulars of the Maycomb courthouse "club" on the day the trial begins:

> ". . . thinks he knows what he's doing," one said. "Oh-h now, I would not say that," said another. "Atticus Finch's a deep reader, a mighty deep reader."
>
> "He reads all right, that's all he does." The club snickered.
>
> "Lemme tell you somethin' now, Billy," a third said, "you know the court appointed him to defend this nigger."
>
> "Yeah, but Atticus aims to defend him. That's what I do not like about it."[13]

Atticus, from what we are told and what we know about his character (not just what we read but what we *know*) will represent Tom Robinson zealously notwithstanding the virulent racism of the courthouse regulars. We do not need anyone to tell us that Atticus did the right thing and that it would have been wrong to succumb to the cynicism, hypocrisy, and bigotry necessary to have done less. (I say "we" can share in this conclusion while I suspect that there are those, for reasons all too common, who resist even this minimal attempt at moral consensus.)

Atticus' zealousness on behalf of Tom Robinson is a matter of habit and character, found in a story of a lawyer whose character cannot be bought by either the fear of what his neighbors will think or by the fact that his children may suffer ridicule. Atticus lives in a racist community, a community that makes it hard to be a good neighbor. Some Maycomb residents (we do not know how many) think that Atticus, rather than racism, is the problem. This means that Atticus cannot represent Tom Robinson without danger to himself and his family.

If Atticus' story has bearing for us today, and I contend that it does,[14] we might speculate that there will be times when it takes raw courage (and times when courage must be refined and crafted) to be a zealous lawyer, to stand up to a community hell-bent on doing the wrong thing. Atticus' habit of zealousness requires courage. It takes the courage of character to stand up to a community, to do what Atticus did and what lawyers are so often asked to do.

---

13. LEE, *supra* note 11, at 165-66.

14. On the concerns of those who do not see the relevance of Atticus Finch to today's lawyers, *see* section XIII *infra*.

Zealous advocacy for Atticus Finch is a matter of telling the truth. The truth is that Tom Robinson did not rape Mayella Ewell. Even truth will not be enough to save Tom Robinson from the savage indifference to human decency and moral blindness that racial bigotry has produced in Maycomb, Alabama.[15]

Atticus is a hero because he stood by Tom Robinson and did so in a way that allowed Tom to show his character and his courage, a moral stance that turned out to be far more costly for Tom than for Atticus (as the truth is always more costly for those who are marginalized by a dominant culture).

Today, in communities around the country, there are lawyers who have the courage and the character to do what Atticus did for Tom

---

15. Tom Shaffer argues that Atticus Finch is a hero because he is able to tell the truth to Maycomb about the prejudices of his community.

See Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181 (1981). And how do we know that Atticus was telling the truth? How do we know that racism is morally wrong? I argue that racism is wrong today and was wrong in Maycomb. It was as morally wrong in Harper Lee's fictional Maycomb, Alabama, over a half century ago as it is Brooklyn or Forsythe, Georgia today. We know racism was wrong in Alabama because Atticus, Miss Maudie, Sheriff Tate, and Judge Taylor are there to tell Maycomb (and us) about racism and what it cost a community. We do not have to be moral absolutists to believe that something we know is wrong today was equally wrong fifty years ago when we have those like Atticus to show us the errors in our misguided ways. Even so, no discussion of Atticus Finch's moral character is complete until we are reminded (by some innocent moral relativist) that we can never say that a community like Maycomb, existing in a different historical period, was wrong to believe as it did. One wonders about the possibilities of moral discourse, on something as subtle as the limits of zealousness, when we cannot agree that racism is insidious and pernicious, if not down-right evil. How can we talk about zealousness and think about the character we take on when we internalize the zeal of advocacy when relativism is our guiding frame of reference? How is Atticus Finch's character to have any meaning to a reader who thinks that our moral situation today has so improved that we are now outside the circle of meaning encoded in Atticus's story? One student, when confronted with Atticus, contended that Atticus would not know what to do if he faced the kind of problems that lawyers face today!

And what would any talk about the moral limits of zealousness mean to a reader of *To Kill a Mockingbird* who thinks that it is nonsense to hold Atticus Finch as a hero? What would it mean to a reader of *To Kill a Mockingbird* who concludes that Atticus is indeed a moral hero, but only because he is "fictional", he is of "literary interest" is of no practical significance to those who do their lawyering in the "real world"? Or what would Atticus mean to a reader who looks at the "progress" in race relations since the 1930s in Maycomb, Alabama, and argues that we have less need today for the kind of courage than a 1930's era Southern lawyer needed?

Robinson. When we think about Atticus doing what he did, and what he had the character to do, we think best of ourselves as lawyers, and when we think this way of ourselves we are entitled to the moral acclaim that one is due as a zealous advocate.

Because Atticus internalized the ethic of zealousness and reconciled it with the person he was, he was able, without anguishing over it, to tell the truth and withstand the pressure exerted on him as he stood against the racists (including neighbors and family members) in his community. One reason we educate lawyers to internalize the zeal for advocacy is so they can be zealous about truth when it is costly to do so. When advocacy becomes part of our character, as it was for Atticus, we are more likely to know what the truth is and how to tell it when the time comes. As Tom Shaffer and his colleague, the theologian Stanley Hauerwas, said of Sir Thomas More (drawing on Thomas Bolt's story of More in *A Man for All Seasons)*[16] we need the skills to speak truth to power.[17]

The problem, of course, is that this same zeal, twisted and perverted, becomes not a source of deserved pride, but a sword turned against colleague and community, a shield against moral criticism.

II.

A real estate developer seeks to use a badly drafted historical preservation law to destroy a city block of old historical homes.[18] Can

---

16. ROBERT BOLT, A MAN FOR ALL SEASONS (1962).

17. Stanley Hauerwas and Thomas L. Shaffer, *Hope in the Life of Thomas More*, 54 NOTRE DAME LAW., 569 (1979).

18. I present the dilemma here in bare form. One response to the problem is that we need more information before we can make a decision as to the moral consequences of representing the real estate developer. Another response is that additional factors are unimportant, so long as what the real estate developer proposes is within the law, or an interpretation of the law that a lawyer can convince a court to adopt. Our moral choices are often made in more richly textured context than the stark portrayal of the problem presented here, but there is reason to believe we are sometimes asked to act and exercise judgement on the barest of facts. Basically, we want to know what the real estate developer is going to do with the property. Is he going to build low-income housing? Is it possible that the historical homes cannot be economically rehabilitated? We want to know more about the developer. What kind of projects has he been associated with in the past? What kind of reputation does he have? Others, imbued with the spirit of legalism and the interpretative crafts of lawyering will inquire into the language of the badly drafted statute. Some will want to know whether the lawyer asked to take the case is a "starving" young lawyer or an established pillar of the community.

(*continued*)

a lawyer represent the developer and claim to be acting in the moral tradition of Atticus Finch?[19]

We can, knowing the contextual, particularized, situational nature of moral decisionmaking, fantasize the possibility that once we know all the facts we will know what it is right to do. The other possibility is that for every fact that might "tilt" the decision one way, the next fact we learn has the potential to move the decision in the opposite direction. At some point, we may conclude that it is not the "facts" but our character that will ultimately determine what we will do.

19. If the politics of this ethical question bothers you (and there are politics in every ethical question) consider other cases in which politics cut in another direction: Should an American lawyer have represented the Nicaraguan government in an action against the United States before the International World Court and claim to be acting in the moral tradition of Atticus Finch when our government was financing an armed rebellion against the Nicaraguan Sandinista government? Jeane J. Kirkpatrick, in an opinion piece in the *Washington Post*, implied that Abram Chayes, the American lawyer who represented Nicaragua, was cooperating with a foreign government to undermine United States policy and that it was wrong for him to use his advocacy skills on behalf of Nicaragua. Jeane J. Kirkpatrick, *Nicaragua's U.S. Lawyers*, WASH. POST, Sept. 30, 1985, at A15. Kirkpatrick's concern was voiced when Nicaragua was in the hands of the Sandinista government, a government so vehemently opposed by the Reagan administration that Lt. Col. Oliver North was allowed to use the National Security Council as a front for the illegal diversion of funds to Contras fighting the Sandinista.

Abram Chayes, in his response, noted that Kirkpatrick's concern about United States foreign policy ignores the "bedrock proposition" that even our government is "subject to and accountable before the law." Abram Chayes, *What Kirkpatrick Ignores*, WASH. POST, Oct. 4, 1985, at A23.

One issue between Kirkpatrick and Chayes was whether the representation of Nicaragua before the World Court was a political or legal matter. The issue could be reframed as a moral one. Chayes may have taken on the representation of Nicaragua because he found United States foreign policy, not only illegitimate and a violation of international law, but immoral as well. Roger Wilkins, a Washington, D.C. lawyer commenting on Kirkpatrick's blast at Chayes, pointed out that

> [t]he attempt by one sovereign state [the United States] to instigate the overthrow of another [Nicaragua] by means, among others, of murder, rape and theft would seem to me to present quintessential questions of international law, even though the decision to follow such a course may have been a political one. It is clear that illegal acts may flow from political decisions.

Roger Wilkins, *Letter to the editor*, WASH. POST, Oct. 6, 1985, at D6.

Lloyd N. Cutler, one of the most widely known lawyers in Washington, argued that so long as Mr. Chayes "believes there are reasonable jurisdictional and substantive arguments to be made in Nicaragua's behalf, he has every

(*continued*)

Some students and commentators on legal ethics claim the answer is yes. Confusion develops because the real estate developer's proposal, with the help of an astute lawyer, may turn out to be legal. If you want to be a lawyer, and you do not want to be confronted with concerns about the ethics of zealousness, then you can assume that lawyers have a well-compensated, at times unpleasant, *job* of doing what clients want done.[20] Consider the propositions implied in such an assumption: (1) lawyering is a job (in contrast to the inflated self-promoting rhetoric that accompanies professional insiders); (2) the propriety of what the client wants is measured by whether it is legally permitted in contrast to what is morally accountable; and, (3) lawyers

---

ethical right to present its case to the court." Lloyd N. Cutler, *Letter to the editor*, WASH. POST, Oct. 6, 1985, at D6.

Another commentator observed that "what Mrs. Kirkpatrick should remember is that patriotism sometimes requires taking a hard look at our own actions, in the tradition of a John Adams." Pierre M. Hartman, *Letter to the editor*, WASH. POST, Oct. 10, 1985, at A26.

George C. Smith, associate general counsel to the conservative Washington Legal Foundation, argued that the problem was not that Nicaragua had a United States lawyer, but that Chayes had been legal advisor to the State Department during the Kennedy administration and in that capacity was privy to sensitive and confidential information. Smith charged Chayes with a violation of confidence gained as a government lawyer. Smith contends that the Washington legal establishment, including Lloyd Cutler, does not condemn Chayes' movement through the "revolving door" (representing first the government and then using the knowledge gained in government service to represent non-government interest) because the "American bar establishment is so completely dominated by a combination of mercenary and liberal-internationalist mentalities" that no one sees the harm in Chayes "peculiar version of the 'revolving door.'" George C. Smith, *Nicaragua's Lawyer is Not Just Any Lawyer*, WASH. POST, Oct. 26, 1985, at A19.

On October 7, 1985, the Reagan administration, fearful of an adverse decision by the International Court of Justice on claims by Nicaragua that the United States had violated international law, ended a thirty-nine year policy under which the United States had agreed to abide by the International Court's decisions. John M. Goshko, *U.S. Limits Recognition of World Court Rulings*, WASH. POST, October 8, 1985 at A1. For a defense of the United States decision, *see Editorial, Opting Out of the Court,* RICHMOND TIMES-DISPATCH, Oct 11, 1985, at A2.

20. This view supports what Richard Wasserstrom once described as a profession induced simplified amoral universe. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975). It is, in this simplified world, morally acceptable to represent the real estate developer so long as what he seeks to do is legal. Lawyers do not confront a moral problem so long as they represent clients who act within the law. The problem, from the amoralist view, turns out not to be a problem at all.

can take any client that walks through the door without moral qualms (because this is what lawyers do and rightfully do without fear of moral condemnation because the work of lawyering can be compartmentalized so the morals of the client do not taint the morals of the lawyer).

When we try to unpack these operative assumptions of conventional lawyer ethics (rigidified into unexamined conventions) and consider how they find their way into our character as lawyers, we encounter resistance. There is resistance to the suggestion that a lawyer who sets out to represent the real estate developer may have a moral dilemma. There is resistance on the practical grounds that lawyers in the "Real World" do not pick and choose their clients and cannot be expected to morally influence the ends that their clients seek. This appeal to Real World necessity contains just enough truth to make it appealing.[21] This assertion about the Real World distorts reality because lawyers, for practical, financial, *and* ethical reasons, do not represent every potential client who seeks their services. For example, lawyers refuse clients they do not feel competent to represent, or clients that require attention that would significantly detract from the representation of valued clients. Many lawyers learn not to take clients they do not trust. Some established lawyers do not take clients they actively dislike.[22]

---

21. Legal ethics, we are warned, "cannot be effective if addressed to a world of ideals and angels. It must address our very real world of imperfect justice, hard-headed and hard working attorneys, and difficult moral choices." Edward J. Eberle, *Toward Moral Responsibility in Lawyering: Further Thoughts on the Deontological Model of Legal Ethics*, 64 St. JOHN'S L. REV. 1, 5 (1989). The problem, however, is that some conventional Real World claims about lawyer ethics turn out to be rather appalling.

22. The traditional rhetoric of professional ethics would have us keep our distance from the client while at the same time giving them "zealous" representation. The model is objectivity and detachment, the lawyer works from arms-length distance, "Free of compromising influences and loyalties." MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-1 (1983). The folklore surrounding this ideal of professional relations is that lawyers who get too close to their clients, get too involved, or overly identify, misserve their clients and make trouble for themselves. For example, Seymour Wishman, in *Confessions of a Criminal Lawyer,* relates how other lawyers had cautioned him "about getting too close" to clients, suggesting that it interfered with good judgment. SEYMOUR WISHMAN, CONFESSIONS OF A CRIMINAL LAWYER 117 (1981).

Yet, even the ethical rules of the profession recognize that "liking" and "disliking" the client cannot be dismissed so readily. One Ethical Consideration of the *Code of Professional Responsibility* makes clear that lawyers should not decline to represent clients solely on the basis of their being disliked in the community. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-27

(*continued*)

(1983). Also, we are not to decline representation simply because we, as lawyers, will be disliked as a result of the representation. *See* EC 2-28. Liking and disliking the client is a reality that the *Code of Professional Responsibility* is forced to confront. Ethical Consideration 2-30 warns that "a lawyer should decline employment, if the intensity of his [her] personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client." But we are not required to like our clients and are given every encouragement by traditional ethical standards to avoid the kind of involvement that might be called friendship. The negative proposition, the only one affirmatively stated in the Code, is that when we find we so thoroughly dislike a person that our feelings would interfere with our lawyering then representation should be declined. This formal ethical consideration is a far cry from the reality of the statement made to Seymour Wishman by Vinnie, a homicide detective, who also happened to be his friend: "A likable client should be considered an unnecessary luxury in this business." WISHMAN, *supra* at 115.

There are a number of reasons why Wishman found it possible to like his clients. First, he realized that he identified with the criminals he represented. Some clients "had their own sense of integrity and decency, although of a different kind from that shared by most law-abiding members of society." *Id.* at 90. Criminals symbolize opposition to authority and Wishman identifies with this opposition. *Id.* at 17, 99. Later Wishman reveals that he found it "thrilling" to learn about the lives of his clients and their crimes. *Id.* at 32. It is through his clients that Wishman "become[s] familiar with a world that would otherwise have remained hidden from me–a fascinating world, an intriguing, inviting, seductive demiworld." *Id.* at 99.

> With little prompting, my clients would describe their lives in lurid detail–passionate, desperate lives filled with violence, drugs, and sex. I must confess I sometimes felt a vicarious excitement on hearing the exploits of these people so unfettered by the normal restraints. They were living and running on the razor's edge.

Id. at 100. "I wasn't the only one," Wishman says, who was "titillated by the stories. Judges, prosecutors, detectives, jurors–virtually all those connected with the administration of criminal justice–experienced at one time or another this sense of voyeurism." *Id.* But at other times Wishman realizes that he is not sure what his motivations for working with these clients really are. *Id.* at 45.

But there are other reasons, more social and less psychoanalytic, to explain Wishman's identification with his clients. His clients were black, Hispanic, and poor. *Id.* at 90, 117. They were uneducated and schooled in violence. They came "from families in which violence was as much a part of the household as a screaming younger brother or sister." *Id.* at 117. Wishman was born in South Bronx and grew up in Newark. *Id.* at 56. He knew something about the world of his clients firsthand. "My father," Wishman says, "worked as a meatcutter for thirty-seven years in this factory–sixty tedious and exhausting hours a week for modest wages . . . ." *Id.* at 51.

(*continued*)

The notion that it is a lawyer's *job* to represent clients and make no moral judgment on what the client wants to do (ignoring consequences, social harm, and personal repugnance) is a popular moral view in legal education and professional circles.[23] The idea that it is a lawyer's job to represent all clients, regardless of the nature (moral, political, social, or psychological) of the claim or cause, is elevated into a moral stance.[24] It becomes a matter of professional pride (in some circles) that lawyers can represent any client, anywhere, anytime, with whatever legally sanctioned ill-consequences might follow, and willfully ignore public complaints about the "dirty work" we do for clients and the havoc we wreak in our communities. This claim, that lawyers must always represent all clients without regard to their morals, causes, or effects, is presented to us as a matter of necessity writ large—Necessity. If it is the lawyer's job to do nasty work, then we should get on with the task at hand. Necessity brooks no argument.[25]

> [S]ome criminal lawyers had grown up on the street, living and playing with many of the people we were later to become their clients. Their attitudes toward lives and property were little different from those of their clients. They even dressed and talked like their clients. Somewhere along the line they had managed to get an education and membership to the bar; now they represented the people they knew and understood well.

Id. at 99.

23. The notion may be popular but it remains, as a moral matter, "simple-minded." *See, e.g.*, Huff, *supra* note 9, at 53. "[Y]ou should be warned against the simple-minded identification of moral responsibility with role responsibility." One reason we can talk about our "jobs" as lawyers in the way we do is because "traditions of the profession do provide rationalizations for those who would abandon their own judgment" to that of the firm or some imagined profession. Edwin H. Greenebaum, *Attorney's Problems in Making Ethical Decisions*, 52 IND. L.J. 627, 630 (1977). Greenebaum goes on to point out that "[w]hatever rationalizations lawyers accept . . . there will remain that portion of their personalities which holds to notions of goodness which were learned as children growing up in a family and in the general community." *Id.* If Greenebaum is right and I assume he is, then the claim "I was only doing my job" must mean that doing my job affirms that portion of personality that tells me what is good.

24. *See, e.g.*, Geoffrey C. Hazard Jr., *My Station as a Lawyer*, 6 GA. ST. U. L. REV. 1 (1989).

25. There is a tendency on the part of many lawyers and students of law to barricade themselves against moral concerns in a psychic fortress they call Necessity. Some cling to unreflective ideas about the adversarial ethic even more tenaciously after seeing how the stance misrepresents what lawyers

(*continued*)

If we are not careful we can let conventional notions about lawyers, their *job*, and Necessity, make us think we are being realistic[26] when we are actually embedded in unexamined conventions that are morally questionable.[27] When we confront the moral choices made in the name of Necessity, we learn that some lawyers do not experience Necessity as a moral justification for what they do. Juxtaposed to the reality of a hardball adversarial ethic is the reality of lawyers who resist the troubled practices of a *job* that leads to moral malaise—and ultimately, a morally compromised life. There is no Necessity that demands that we give up character to be lawyers. The appeal to Necessity is simply a rhetoric move that justifies a sense of self, profession, and world that cannot admit that we profit by the convenience, self-interest, and failures of imagination and character that accompany an unreflective adversarial ethic. It is the rhetoric of lawyer *job* talk and the appeal to Necessity that drives the zealousness ethic to extremes. It is we, not the *job*, who transform zealousness into zealotry. We become zealots, the same way Atticus became a lawyer hero, without thinking about it, by participating in an ethos that constitutes a closed loop that wards off the complications of criticism and contrasting ethical possibilities.

It is a simple matter to claim, but more difficult to demonstrate, how an activated sense of ordinary morality and the ethical sensibilities we bring with us to law can be used to curb our zeal for adversarialism. The difficulty is compounded by the fact that one sense of ordinary morality (the habit of zealousness) is set against

---

actually do in the world of practice. Ironically, law students who proclaim the demands of Necessity know little about any real, or for that matter, fictional lawyers, apart from the lawyers they see represented on television. Talk about the Real World is often an uninformed, decidedly partial, portrayal of reality.

26. An appeal to the real world "logic" of an adversarial ethic bounded only by legal constraints carries the name of realism but is actually a kind of romantic individualism that takes solace in the image of the tough "kick ass" lawyer who can not only look after himself but anyone else who can pay the price.

27. Do we really want to be what we turn out to be when our moral imaginations are captured by prosaic conventions of legal practice? Some of us, apparently, do. One can imagine a young woman or young man saying,

> I have come a long way to get here, to what I assumed would be an exalted position. I want to be a lawyer not a social worker. I did not come to law to labor under the double burden of being a skilled, tough, winning lawyer, and be held to task for the morals of the clients I serve. No lawyer should be held to such an ethical burden. There is no reason to believe that lawyers have, or should be expected to have, more character than anyone else in our society.

another sense of ordinary morality (the knowledge that zealousness has its limits). The desire to take zealousness to the limits is a feature of everyday life, but no more so than the ordinary moral notion that zealousness has its limits. It is our inquiry into lawyer ethics that puts us to work re-imagining the images of an adversarial ethic that transforms zealousness into zealotry.

III.

A well-established Washington, D.C. law firm, Covington & Burling, represents South African Airways and must decide whether it will continue its representation.[28] South African Airways is a government-owned, money-making subsidiary of the South African government, a government that maintains, by law (now being dismantled), a brutal, repressive regime of racial segregation called apartheid.

When students of law consider the Covington & Burling decision, some argue that representing South African Airways is no more an ethical problem than representing the real estate developer who seeks to destroy historical homes. There are, in the world of high-priced legal talent (and in the world of those who seek admission to this world), arguments for the continued representation of South African Airways.[29] In the world of law there are, we are not surprised to find, those who will argue both sides of this issue.

---

28. I learned of this ethical problem from a news account. David E. Sanger, *Law Firm Drops South Africa Client*, N. Y. TIMES, Oct. 4, 1985, at D1. Mark Green reported on the problem some ten years before the decision of Covington & Burling to terminate its representation. *See* MARK GREEN, THE OTHER GOVERNMENT: THE UNSEEN POWERS OF WASHINGTON LAWYERS 196-99 (1975).

News accounts of Covington & Burling's decision resulted in a spate of opinion editorials and letters to the editor in the *New York Times* and the *Washington Post*. *See* Ronald L. Goldfarb, *Lawyers–or Hired Guns?*, WASH. POST, Oct. 17, 1985, at A23; *When a Law Firm Feels Obliged to 'Fire' a Client*, N. Y. TIMES, Oct. 20, 1985, at 20E; *Lawyers–or Hired Guns?* WASH. POST, *Letter to the Editor* Oct. 24, 1985, at A22.

For other commentary on the firm's decision, *see* Mark Shuford, *Elkins Speaks on Firm's South Africa Decision*, WASH. & LEE NEWS, Dec. 5, 1985, at 7; Steve Nelson, *Covington's Decision May Spur Pressure on South Africa Issue*, 8 LEGAL TIMES, Oct. 7, 1985, at 1; *Boycott Leaders Buoyed by D.C. Firm's Decision*, LEGAL TIMES, Oct. 7, 1985, at 6.

29. Consider for example, Judge Irving Kaufman's observation about the "costs" in refusing to continue to represent a client willing to pursue immoral practices: "[T]he lawyer will then be unable to influence the client's conduct favorably." Irving R. Kaufman, *Law: "No Longer Can the Lawyer Avoid*

(*continued*)

How can we do what we do or know what to do (what is best; what is good) when we hear arguments so readily advanced to justify the extremes of adversarialism? How is a law firm to decide what to do about its representation of an agency of a foreign government that supports by law a reprehensible social policy like apartheid?[30]

The lawyers of Covington & Burling will, at some point in their deliberations, turn to the *Rules of Professional Conduct* (or the *Code of Professional Responsibility*) to determine whether there are "ethical rules" that might guide (or dictate) the decision to withdraw from representation of South African Airways. The firm will find, when it turns to the *Rules of Professional Conduct*, Rule 1.16, which speaks directly to the decision of a lawyer (or law firm) to withdraw from representation. But the rule says only that it will not be an ethical violation for the firm to withdraw if they have "good cause" to do so. One "good cause" reason for withdrawal recognized by Rule 1.16 is the firm's belief that the objectives of the client are "repugnant". The rule leaves to the discretion of the lawyer whether to act when a "good cause" is present. The rule does not solve the practical problem or the ethical problem (if the two could ever be more than provisionally separated) because the rule does not say what an ethical lawyer will do in these situations; the rule does not command a particular outcome.[31]

Consider for a moment the possibility that the lawyers at Covington and Burling, trying to decide what to do about their continued representation of South African Airways, do not adequately understand apartheid. Is it possible that lawyers who inform themselves about the actual workings of apartheid will find it a modern day manifestation of evil sufficient to subdue their arguments for continued representation of South African Airways? Lawyers do not come easily to the notion that they actively participate

---

Impropriety by Adherence to Principles of Fairness in the Conduct of Litigation," SATURDAY REV., Nov. 1, 1975, at 15; ROBERT ARONSON & DONALD WEICKSTEIN, PROFESSIONAL RESPONSIBILITY 11 (1980) ("A lawyer who represents a developer may be in a very good position to influence the client's actions so that they make environmental as well as business sense." There are, of course, costs for the lawyer who remains with the client solely to insure that the client will do more good than he or she would do in the absence of the lawyer. An element of this cost will be moral in nature.).

30. One wonders where Jeanne Kirkpatrick, who hinted at treason in Abraham Chayes' representation of Nicaragua, would come out on Covington and Burling's decision to withdraw its representation of South African Airways. *See supra* note 19.

31. Huff, *supra* note 9, at 52 ("[C]odes do not offer a developed account of how you are to express your own more general moral principles in meeting your professional responsibilities.").

in the continued existence of injustice. The image of lawyers engaged in advocacy divorced from the moral quality of the client's cause or case assumes a freedom that promotes justice. This assumption is not dislodged even when an evil like apartheid lurks in our midst. The disposition to ignore the consequences of the legal representation of South African Airways is not overcome, at least by some lawyers and students of law, even when they are confronted with a panoply of facts about overcoming apartheid, the role that South African Airways plays in government apartheid policies, and that withdrawal from representation might actually be an "effective" way to bring change to South Africa, and even if it is not effective in the most immediate sense it may be a worthwhile symbolical protest of apartheid. Adversarialsim, seems to linger in our heads and ultimately in our hearts, whatever the facts may turn out to be.

When we come this far in the ethics conversation we look at each other, quizzically, and with a small measure of loathing. Who are we? What have we become? What do we stand for as lawyers? What do we stand against? Are there limits—call them ethical, call them by another name—on what lawyers will do in the name of an adversarial ethic? Is it too much to expect lawyers and law firms like Covington & Burling to take a stance against something as insidious as apartheid? Is it possible that to continue representation of a client like South African Airways means that we are more interested in money than in upholding the principal of client autonomy? These questions about the adversarial ethic suggest that we must enter the lawyer's heart of darkness before we will know what it means to be a good lawyer.[32]

If you assume Covington & Burling does not confront a moral problem in its continued representation of South African Airways then you will be prepared for yet another argument: "I would argue for the firm to continue representation of South African Airways because if the firm withdraws someone else will represent them. This means that we will accomplish nothing by withdrawing our representation because South African Airways will simply find a new firm to represent it. If we do not do it, someone else will." Before we see how loose and morally troubling this argument is, we must hear it argued and supported. Whatever our concerns about South Africa's people of color, there is a voice that reassures us that

32. The paradox of ethics is that for each philosophical argument, political theory, sociological description of the real world, and ethical rule there is a contrary (or complementary) philosophy, theory, description, or rule that pulls in another direction. There is, at the heart of our moral stances, a series of contradictions that can be resolved only by a leap of faith.

"everyone has a right to a lawyer, even the government of South Africa." It sounds right, we have heard it before, and we know that this argument stands, in some convoluted way, for something worthwhile in our profession. We have heard the argument often enough to convince ourselves it must be a good argument. It is an argument that says something about the "system", expresses an ideal, and one version of a conventional understanding of the lawyer role. Adversarialists argue that lawyers cannot and should not be saddled with their clients' social, political, and moral views. It would be a saving grace if argument could make it so, make it stick, and give it moral weight. These claims of adversarialists are just true enough to make them viable. They also reflect how difficult it is to sort-out the ideal of zealousness from the self-interest and the arrogance of willed self-deception about how the adversarial system works.[33] It points to our inability to distinguish between ethics and the excuses we rehearse in the name of ethics.

In our talk of what we would do and would not do, what we should do, and what Necessity (as a law firm partner) demands of us, one begins to get the sense that something has gone wrong.[34] As we talk

---

33. Some students of legal ethics argue that if Covington & Burling does not continue its representation of South African Airways the "system of justice" will be adversely affected. Here we get the stock Law Day speech about the virtues of the adversary system of justice: even with all its faults no one has found a better system. But how strange it is to make use of the word "justice" when it is apartheid that is central to the "system" of South African politics and jurisprudence. To make these arguments and this kind of talk about lawyer ethics work, we must deny that it is we (the lawyers) who work the "system" and make the "system" work the way it does. When we talk so aggressively about representing a client like South African Airways (and indirectly the South African government) to preserve a "system of justice" we are confronted with the kind of loose talk that makes lawyers the victim of their own rhetoric.

34. One thing that has gone wrong is that we focus on the moral and ethical problem that confronts the lawyers at Covington & Burling and get the cart before the horse. Instead of being preoccupied with moral decisions appropriate we may do better to shift our attention from the moral dilemmas themselves to the people acting in them.

William May explores the mistake we make when moral problems rather than character become our primary focus:

> Moralists make a mistake when they concentrate solely on the quandaries that practitioners face, or on the defects of the structures in which they operate. Inquiry into these matters already assumes specific dispositions of character, which themselves need to be clarified and criticized. The quandary-oriented professional tends to assume and prize the virtue of conscientiousness. The critic of structures often

(*continued*)

ethics we bring ourselves and others to doubt the moral sensibilities we most desperately need.

In fact, there seems to be something seriously wrong.[35] If you know anything about apartheid,[36] know anything about how apartheid is practiced, you will be troubled by the fact that many lawyers are not only willing to represent the South African government and its money-making subsidiaries but, more troubling, cannot see that it is a reflection on their ethics when they choose to do so.[37] Lawyers do

---

> brings to the inquiry a specifically aroused moral indignation. Important to professional ethics is the moral disposition the professional brings to the structure in which he operates, and that shapes his or her approach to problems. The practitioner's perception of role, character, virtues and style can affect the problems he sees, the level at which he tackles them, the personal presence and bearing he brings to them, and the resources with which he survives moral crises to function another day. At the same time, his moral commitments, or lack of them, the general ethos in which he and his colleagues function, can frustrate the most well-intentioned structural reforms.

William May, *Professional Ethics: Setting, Terrain & Teacher*, *in* ETHICS TEACHING IN HIGHER EDUCATION 205, 230 (Daniel Callahan & Sissela Bok, eds., 1980). For one account of the human loss for the kind of lawyering done at Covington & Burling, *see* CHARLES REICH, THE SORCERER OF BOLINAS REEF 19-83 (1976).

35. Walker Percy, one of our more engaging philosophical novelists observed, "I am perfectly willing to believe Flannery O'Conner when she said, and she wasn't kidding, that the modern world is a territory largely occupied by the devil. No one doubts the malevolence abroad in the world." WALKER PERCY, SIGN-POSTS IN A STRANGE LAND 380 (1991). Percy was less interested in the malevolence of the world and more in what he calls "looniness". "The looniness, that is to say, of the 'normal' denizen of the Western world who, I think it is fair to say, doesn't know who he is, what he believes, or what he is doing." *Id.* at 380-81.

36. *See, e.g.*, Courtland Milloy, *Opening Eyes,* WASH. POST, Nov. 26, 1985, at C3; Christopher S. Wren, *Apartheid Frays at the Edges, But Its Core is Unchanged*, N.Y. TIMES, Mar. 12, 1989, at E2; Anthony Lewis, *Luxury of Apartheid*, N.Y. TIMES, May 14, 1989, at E23; Christopher S. Wren, *Mandela, Freed, Urges Rise in Pressure on White Rule*, N.Y. TIMES, February 12, 1990, at 1; David B. Ottaway, *Afrikaners Feel Betrayed by de Kelerk: Descendants of Dutch Settlers Believe God Ordained Them to Form White Nation*, WASH. POST, Feb. 24, 1990, at A26.

37. Defenders of the lawyer as amoral technician are not going to concede (and some will never see) the moral limits of their stance. There are many reasons, psychological and sociological in nature, that "program" our inability to "see" the limits of our moral stances. On the prerationalist, rationalist, modernist, and post-modernist cognitive stances that find their way into our

(*continued*)

what they do for money (South African Airways pays its bills so the lawyers can pay theirs), for status, for promotion in the firm, and to complicate matters, they do it in the language of principles, craft,[38] and ethics.[39]

IV.

We learn our ethics as lawyers, we are not born with them. One source of learning, about lawyers and the world, is stories.[40] The stories that provide powerful moral lessons are sometimes about lawyers and sometimes about others who provoke our moral imaginations. For example, Bowen McCoy, an American businessman, tells a story about his efforts to scale an 18,000-foot peak in the Himalayas.[41] McCoy is a Wall Street realty executive, not a lawyer, but when he talks about ethics he talks a language lawyers can understand.[42]

In *The Parable of the Sadhu*, McCoy describes efforts of he and his companion, Stephen, an anthropologist, accompanied by a group of climbers, to traverse an 18,000-foot peak in order to reach the village of Muklinath, an ancient holy place. The peak was the highest mountain pass they had attempted in a sixty-day Nepal hike. Six

---

world views, *see* Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195 (1989).

38. There are craft skills involved in finding a legal way to do what the most devious and immoral client wants done. First, there are, if the old adage holds, always arguments to be made on both sides of an issue. Second, weak arguments need strong advocates. Third, the government does get sloppy in its heavy-handed ways, and it is possible to identify with the client, even the client with the immoral cause, made a victim of a "system" that makes individual immorality 100 percent small by comparison.

39. Rule 1.2(b) of the *Rules of Professional Conduct* states: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." MODEL RULES OF PROFESSIONAL CONDUCT (1983).

40. One of the most eloquent defenders of this proposition is Thomas Shaffer. *See, e.g.*, SHAFFER, *supra* note 12 (arguing that our morals begin in stories and that our search for a way out of our moral malaise as lawyers will take us back to stories).

41. Bowen H. McCoy, *The Parable of the Sadhu*, 61 HARV. BUS. REV. 103 (1983).

42. I have often wondered whether as students of lawyer ethics we might not be better advised to study the ethics of those outside the legal profession as well as the moral practices of lawyers. If ordinary morality is going to have any bite in this mythical real world we are all trying to live in (and live against) and in our lives as lawyers, then we are going to need ideas about ethics from whatever source we can tap.

years earlier McCoy had attempted a similar climb and had been forced back by altitude sickness. The weather, on the day of the attempted traverse, was unfavorable and McCoy feared that they would not be able to make it over the pass.

> At 15,500 feet, it looked to me as if Stephen [who had accompanied McCoy on the trip and the climb] was shuffling and staggering a bit, which are symptoms of altitude sickness. . . . I felt strong, my adrenaline was flowing, but I was very concerned about my ultimate ability to get across. A couple of our porters were suffering from the height, and Pasang, our Sherpa sirdar (leader), was worried.
>
> Just after daybreak, while we rested at 15,500 feet, one of the New Zealanders, who had gone ahead, came staggering down toward us with a body slung across his shoulders. He dumped the almost naked, barefoot body of an Indian holy man—a sadhu—at my feet. He had found the pilgrim lying on the ice, shivering and suffering from hypothermia. I cradled the sadhu's head and laid him on the rocks. The New Zealander was angry. He wanted to get across the pass before the bright sun melted the snow. He said, "Look, I've done what I can. You have porters and sherpa guides. You care for him. We're going on!" He turned and went back up the mountain to join his friends.
>
> I took a carotid pulse and found that the sadhu was still alive. We figured he had probably visited the holy shrines at Muklinath and was on his way home. It was fruitless to question why he had chosen this desperately high route instead of the safe, heavily traveled caravan route through the Kali Gandaki gorge. Or why he was almost naked and with no shoes, or how long he had been lying in the pass. The answers were not going to solve our problem.
>
> Stephen and the four Swiss began stripping off outer clothing and opening their packs. The sadhu was soon clothed from head to foot. He was not able to walk, but he was very much alive. I looked down the mountain and spotted below the Japanese climbers marching up with a horse.
>
> Without a great deal of thought, I told Stephen and Pasang that I was concerned about withstanding the heights to come and wanted to get over the pass. I took off after several of our porters who had gone ahead.
>
> On the steep part of the ascent where, if the ice steps had given way, I would have slid down about 3000 feet, I felt vertigo. I stopped for a breather, allowing the Swiss to catch up with me. I inquired about the sadhu and Stephen. They said

that the sadhu was fine and that Stephen was just behind. I set off again for the summit.

Stephen arrived at the summit an hour after I did. Still exhilarated by victory, I ran down the snow slope to congratulate him. He was suffering from altitude sickness, walking 15 steps, then stopping, walking 15 steps, then stopping. Pasang accompanied him all the way up. When I reached them, Stephen glared at me and said: "How do you feel about contributing to the death of a fellow man?"

I did not fully comprehend what he meant. "Is the sadhu dead?" I inquired.

"No," replied Stephen, "but he surely will be!" After I had gone, and the Swiss had departed not long after, Stephen had remained with the sadhu. When the Japanese had arrived, Stephen had asked to use their horse to transport the sadhu down to the hut. They had refused. He had then asked Pasang to have a group of our porters carry the sadhu. Pasang had resisted the idea, saying that the porters would have to exert all their energy to get themselves over the pass. He had thought they could not carry a man down 1000 feet to the hut, reclimb the slope, and get across safely before the snow melted. Pasang had pressed Stephen not to delay any longer. The Sherpas had carried the sadhu down to a rock in the sun at about 15,000 feet and had pointed out the hut another 500 feet below. The Japanese had given him food and drink. When they had last seen him he was listlessly throwing rocks at the Japanese party's dog, which had frightened him.

We do not know if the sadhu lived or died.[43]

The encounter with the sadhu produced, what McCoy calls, a classic moral dilemma. McCoy, deeply troubled by his decision to leave the sadhu behind after providing minimal care, concludes that the mountain ascent was not as important as he assumed while he was on the mountain. He puzzles over his failure to provide more care for the sadhu, a puzzlement he refers to as a parable.[44] McCoy tries, along

---

43. McCoy, *supra* note 41, at 104.

44. McCoy calls his story a parable. McCoy, *supra* note 41, at 103. Parables have often been used by powerful teachers. Robert Burt observes that,

> parables are not intended to be readily accessible to any listener. They are designed to raise questions more than to answer them, to confound rather than to confirm prior understanding, and particularly to accomplish this in order to raise doubts among their listeners about

(*continued*)

> whether they are among the elect or remain outside among those who "hear and hear, but understand nothing."

Robert Burt, *Constitutional Law and the Teaching of Parables*, 93 YALE L.J. 455, 469 (1984).

Burt uses the stories that Jesus tells in the Biblical Gospels as examples of teaching parables. Consider for example the parable of the prodigal son,

> A father divides his wealth between his two sons; the younger son takes his share away from the family home and squanders it, then returns impoverished and feeling disgraced. But the father welcomes him joyously, arranges a homecoming feast and proclaims to everyone, "[L]et us eat and make merry; for this my son was dead, and is alive again; he was lost, and is found."
>
> Now [the] elder son was in the field; and as he came and drew near to the house, he heard music and dancing. And he called one of the servants and asked what this meant. And [the servant] said to him "Your brother has come, and your father has killed the fatted calf, because he has received him safe and sound." But [the elder son] was angry and refused to go in. His father came out and entreated him, but he answered his father, "Lo, these many years I have served you, and I never disobeyed your command; yet you never gave me a kid, that I might make merry with my friends. But when this son of yours came, who has devoured your living with harlots, you killed for him the fatted calf!" And [his father] said to him, "Son, you are always with me, and all that is mine is yours. Its fitting to make merry and be glad, for this your brother was dead, and is alive; he was lost and is found."

Id. at 467-68 (citing *Luke* 15:23-24, 25-32 (Revised Standard)).

The open texture and unresolved questions are, explains Burt, crucial to the parable genre.

> [W]e are not told whether the elder brother was persuaded by his father's injunction to join in the rejoicing. . . . Why should the elder brother rejoice? Is it because the father has *ordered* him to rejoice, has invoked his superior authority? And is the further implicit message that Jesus in telling the parable has invoked his extraordinary authority, his divine authority, to establish the correctness of the father's command that we should all rejoice.

Id. at 468. Burt concludes that the parable "[h]olds open the possibility for continued dispute between Jesus and his listeners as well as between the father and his elder son." *Id.*

The parable means one thing to an insider, another to an outsider. Or as we might say, there are different ways to interpret the meaning of the parable,

(*continued*)

with the reader, to figure out what the message of the parable is and how it can be understood and how it can be given practical meaning.

---

different lessons that might be learned from it. Or, we might say the parable means something different to everyone who reads it. Or, we might say that there is no authoritative reading of a story such as this.

Why would one use parables, stories that obscure their meaning, when they are being told to convey meaning? Burt points out that when asked by his own disciplines about the use of parables in teaching, Jesus replied,

> To you the secret of the kingdom of God has been given; but to those who are outside everything comes by way of parables, so that (as Scripture says) they may look and look, but see nothing; they may hear and hear, but understand nothing; otherwise they might turn to God and be forgiven.

Id. at 468-69 (citing *Mark* 4:11-12 (New English)).

To those outside the learning and teaching, the parable is obscure, a mystery. For those inside the meaning is clear, it is "given". It is only for outsiders that explanation is necessary. *Id.* at 469. But even for the insider the story can be confounding. One purpose of the prodigal son parable is "to unsettle those who are confident of their rectitude." *Id.* "The strategy in all this is not simply to confound or to raise self-doubts for their own sake; the strategy is to heighten the listeners' sense of their own vulnerability." *Id.* "[N]o one can take for granted that he is safely in some protected flock, that he is found." *Id.* at 471.

> The underlying goal–and the basic methodology of. . . parables–is to lead the listeners to acknowledge a question, not an answer: a question about the true extent of their own safety. The premise of this methodology is that when the listeners acknowledge their vulnerability, they will see the appeal of the answer that Christ represents. The [New Gospel] parables in effect only teach the proper question so that, once taught this, the true initiates teach themselves the proper answer.
>
> ....
>
> What is the lesson in all of this for judicial conduct in our secular society? Again, the first part of the lesson is methodological. Judicial invocation of the Constitution recurrently uses the same methods as these parables: converting all into needy outsiders by confounding insider and outsider and then offering hope for ultimate protection by mapping a path back inside for everyone.

Id. at 471.

On the pedagogy of parables, *see* John J. Bonsignore, *In Parables: Teaching Through Parables*, 12 LEG. STUD. F. 191 (1988).

McCoy's parable teaches, not only because it offers what McCoy calls a classic moral dilemma, but is told as a compelling story. McCoy offers, in his reflections on the dilemma, some instructive clues about how ethics work and how ethics fail. It is a story that illustrates how our purposes, morally neutral in one context—McCoy did not set out on his journey to harm a holy pilgrim—blind us to the needs of others, and paradoxically, to our own needs as well.

McCoy's parable raises the question of whether we have a duty to look after those who are in need that we encounter along the way. Should I follow through on the long-standing goal of getting over the mountain pass or give up the goal to help another human being? And if we have some duty to care for others, how is it that we so easily walk past them?[45] Is the sadhu story a parable for lawyers?

If we feel, as McCoy implies, that he had a duty to provide more adequate care for the sadhu, then how can we excuse ourselves as lawyers for not caring for the rights, concerns, and welfare of others on the expedient grounds that it is not our *job* (role) to do so? McCoy confesses to worrying about the decision that he made to abandon the sadhu, yet, when we talk through McCoy's story and his efforts to "see" the nature of the encounter more clearly (now that he is off the mountain), McCoy, the businessman, turns out to be more sensitive to the situation than many law student readers of the parable.

McCoy fears that his ethics failed him up on the mountain in his encounter with the sadhu. Even more puzzling (at least to McCoy) is that his friend, Stephen, a "committed Quaker with deep moral vision" who did comprehend the moral situation was equally

---

45. Huff, *supra* note 9, at 50.

> Suppose a client arrives at your office seeking help to achieve ends which are unjust or immoral. . . . A bitter husband seeks custody of his children in a divorce battle simply to hurt his wife, or a debtor wants to escape an honest debt by invoking a legal technicality against the debtor. How should you respond? First it should be noted that you must *recognize* that there is a moral conflict in the situation presented by the client. This may not occur if you are sufficiently isolated from moral claims outside your professional role. You, as a lawyer, are particularly vulnerable to this way of missing moral issues because you are constantly called upon in your professional life to act as the agent of your clients—to speak or make arguments on their behalf whether you agree with those arguments or not.

Id.

unresponsive to the needs of the sadhu.[46] It was, says McCoy, Stephen's moral vision that helped him know, in ways that he did not, that they had a duty to care for the sadhu, and that whatever reason they might have for continuing the Nepal climb was morally insufficient to abandon the sadhu.

McCoy suggests that it is the mistakes we make about purposes and goals that block our moral vision. In previous trips to Nepal, McCoy observes that his most interesting experiences were those in which he "lived in a Sherpa home in the Khumbu for five days recovering from altitude sickness" and that the high point of a previous trip for Stephen had been "an invitation to participate in a family funeral ceremony in Manang. Neither experience had [anything] to do with climbing high passes of the Himalayas."[47] McCoy reflects on the nature of these unexpected experiences that were not contemplated as part of his and Stephen's avowed reasons for being in Nepal and asks why they were so adamant about getting over the mountain when it was the experiences outside those they had planned that had been most meaningful to them. A good question for lawyers!

V.

Wayne Brazil, a law teacher at Hastings, provides another story about how we fail to care for others. Brazil describes the incident this way:

> I was walking one morning from the commuter train station to school. I encountered one of those dirty, hapless, vaguely threatening people whose presence gives the Tenderloin section of San Francisco its special charm. To make my story easier to tell I'll call him Archie.
>
> My first reaction to Archie was fear, but that's not particularly remarkable, because my first reaction to almost everything is fear. My second reaction was more noteworthy. It was a crisp sense of indignation.
>
> I was moralistic, condemning him (silently, of course) for being in the state he was in, for not working, for not seizing control over his life and earning the money to pay his own way.

---

46. McCoy, *supra* note 41, at 104. Stephen argued that they had failed to adequately care for the sadhu and attributed the failure to an unwillingness to assume personal responsibility and the fact that the sadhu was so unlike themselves in appearance. *Id.* at 104-06.

47. *Id.* at 108.

Then, before these feelings had played themselves out, I became self-conscious about the way I was reacting. I began to think about the distance that seemed to separate me and Archie. It occurred to me that I really had no understanding at all of him or his situation. I had no idea what forces had been at work in his life, what limitations God or history had imposed on him. I had no idea whether he had the capacity to be anything other than what he was—whether he had that morning, or ever had, any meaningful control over his fate.

As I became more self-conscious about my ignorance I also became more embarrassed by my initial moralistic and condescending reaction.

I realized that my reaction had been born in the gulf that separated me and Archie—and that that reaction was graphic evidence about how wide that gulf had become.

I began to think about the many different ways the distance between me and the Archies of the world has grown in the last several years.

As I have worked hard to succeed and to contribute, I have become more specialized, and more sophisticated in my specialty. And I have spent almost all of my time with comparably specialized and sophisticated people.

The hard work that has brought me material comfort and professional achievement has made me tired, and tired of being tired. So I have become much less patient with people who do not seem to be trying as hard, or who appear to rely on others to meet even their most basic needs.

In short, I have become preoccupied with my struggle to do better and with what that struggle has cost me. And in the preoccupation I have permitted self-serving, moralistic assumptions to displace the more open-minded concern about people like Archie that I once felt.

This train of thought led to the perception that troubled me the most; just as the situational distance between me and Archie has grown largest, my empathy—my impulse to try to understand him—has been evaporating.

Pretty heavy stuff to be pondering on a summer morning. There was one more thing. As an erstwhile historian it occurred to me that I probably was not the only person who had drifted in these emotional directions during the last decade. It was the spectre of many people who occupy positions like mine

> moving in emotional directions like this that inspired [this reflection on] . . . deterioration in our sense of community.[48]

Brazil explains his disdain for Archie, the street person he encounters on his way to the law school where he teaches, by the fact that he had become a success in his work and spent so much time with other successful people like himself. His work and the success it made possible brought Brazil "material comfort and professional achievement" but it had also brought him weariness. Brazil confesses to being "preoccupied" with his own struggle, a preoccupation that resulted in "self-serving, moralistic assumptions" about the homeless Archie. Like McCoy, Brazil's work has sanctioned, if it has not prompted, an erosion of empathy, an impoverishment of what Maxine Greene has called moral imagination.[49] Brazil suggests that his, and by implication McCoy's, story reflect the "emotional direction" that we have been traveling during the last decade.[50]

---

48. Wayne Brazil, *Reflections on Community, Responsibility, and Legal Education,* 9 J. LEGAL PROF. 93 (1984).

49. Greene's theory of "moral imagination", found throughout her exemplary work, is explored in two essays, Maxine Greene *The New Freedom and the Moral Life* and *Wide-Awakeness and the Moral Life, in* LANDSCAPES OF LEARNING 147-57, 42-52 (1978).

50. Moral malaise, when we give it the attention it deserves, does indeed have an "emotional direction". Whether law teachers, like Wayne Brazil and the author of this essay, have any credibility as commentators on our moral drift and as moral teachers, is an open question. One commentator notes that

> [i]t has been enormously popular to say that there are no moral experts. But this is said thoughtlessly. Even those who say it seek advice about hard cases; and even they regard some people as typically foolish and others as not foolish. These critics notice there are a few people who have a certain knack for finding their way through very difficult moral situations without doing the sorts of wrongs which the rest of us find so easy to do. Indeed, the critics of the supposed established wisdoms are themselves typically uttering the wisdom or findings of other persons, whom they implicitly regard as their gurus. The reality is that each of us has probably known at least one wise person—perhaps a parent, relative, pastor, priest, rabbi, teacher, or neighbor. Such people strike us as knowing what they are doing when the rest of us do not. They impress us not simply as lucky, but as having unusual insight into moral situations and unusual ability to put their insight into practice. They are good people. They have something enviable. We might call it judgment. Aristotle called it practical wisdom. And he thought this trait so important that he mentioned it in his famous account of what virtue

(*continued*)

There are many stories like McCoy's and Brazil's, stories about the driving, zealous energy we bring to our pursuits, an energy, drive, and purposefulness that can, barring caution and reflection, blind us to the care we owe others. If we were more truthful about our own stories than we tend to be—self-deception is a serious undertow in professional life—we could each tell a story about choices we have made, like McCoy's and like Brazil's, in which we try ever more desperately to justify how we live.

McCoy's and Brazil's stories, however you read them, are compounded by the existence of our own stories, and the stories we tell when we talk about McCoy and Brazil. Stories add up.

Our stories matter. Stories matter and have power not because we talk about them as we do or because we extract moral lessons from them, but by the more infinitely subtle process of their shaping our imagination and anchoring us against the undertow of an unbounded adversarial zeal that teaches that we need not care for others.

VII.

We turn, after our encounter with the sadhu and the homeless Archie, to another story, this one closer to home, the story of a lawyer, Seymour Wishman.[51] Wishman begins *Confessions of a Criminal Lawyer* with the story of his confrontation with a woman named Mrs. Lewis, who he had humiliated during cross-examination in a rape trial. Wishman did not believe his client's story but still conducted a brutal cross-examination for the purpose of helping his client avoid conviction.[52] Wishman initially tries, as do many lawyers and

---

> is. He remarked that virtue is "a settled disposition of the mind determining choice, and it consists in observing the mean relative to us, a mean which is determined by reason, as a person of practical wisdom would determine it.

Jon Moline, *Classical Ideas About Moral Education*, 2 CHARACTER 1 (1981).

51. WISHMAN, *supra* note 22, at 4-5.

52. Philip Corboy, the well-known Chicago litigator, divides cross-examination into two categories: "(1) that intended to impeach the witness or to expose some fallacy within his or her testimony; and (2) that which has no purpose other than degradation and humiliation of the witness." Philip H. Corboy, *Cross-examination: Walking the Line Between Proper Prejudice and Unethical Conduct*, 10 AMER. J. TRIAL ADVOC. 1, 2 (1986). Corboy argues that lawyers "must draw a line between legitimate impeachment and frank humiliation. Sometimes impeachment must encompass witness humiliation, but the initial decision to embark upon a degrading cross-examination requires careful scrutiny of the target." *Id.* On the "classic question" of the "propriety of

(*continued*)

students of law, to justify his humiliation of Mrs. Lewis. It is difficult to admit to yourself that you humiliated another human being who deserved better.[53] Even more shocking, we learn that the reasons we give ourselves for the humiliation are bogus.

Wishman offers an array of reasons for the humiliation, none, by his own confession, adequate, ultimately, to justify the humiliation of Mrs. Lewis.[54] Wishman explains what he has done with the following reasons:

—I did it to be effective. It was my job. "I had done what a criminal lawyer was supposed to do."[55]

—I was trained in law school to do it.

—I did not think about it. There was no time to think. I got caught up in the trial as a contest.

—It was part of an elaborate game, a contest.

—I associated tough cross-examination with good craftsmanship. It takes skill to "break" a witness.[56]

—I made an effort to narrow my vision so I would not be overly concerned about situations like this. "I tried," Wishman says, "as an act of will, to limit my vision to what I actually did in the courtroom. . . ."[57]

—There was nothing personal in it. (The practice of law had become a *trade*, a *game*, a *contest*, a *battle*.)

---

discrediting the adverse witness [in a rape trial] counsel *knows* is telling the truth", Corboy admits it is not an easy question and the "result" casting doubt on truthful testimony seems "harsh." *Id.* at 11. Corboy does not, however, adequately use the two categories he has presented to frame his inquiry into the moral concerns involved. He concludes rather lamely that "it is undesirable that defense counsel should sit silently whenever he believes a searching cross-examination may be harmful to a prosecution witness." *Id.* at 12.

53. WISHMAN, *supra* note 22, at 4-5. Greenebaum, *supra* note 23, at 631-32 ("The emotional pressures to view oneself as honest and honorable cause practitioners to rationalize what they are compelled to do as ethical conduct, or they are likely to find a new context in which to earn a livelihood.").

54. One Federal District Judge argues that "[c]ross-examination based on factually unsupported innuendo, irrelevance, or dissembling and hiding facts are all hallmarks of the hardball advocate. . . ." Joiner, *supra* note 8, at 16 (remarks addressed to cross-examination in the context of civil advocacy).

55. WISHMAN, *supra* note 22, at 18.

56. Wishman takes pride in becoming good at what he is doing. He lashes out at the incompetence of other lawyers, and even his own lawyering when he loses control. Wishman is consumed with the idea of being a good lawyer.

57. *Id.*

—There were personal, psychological reasons for doing it: ego gratification, the need for power and control, the effort to secure respect and admiration from those who observed my work.[58]

—I was getting *something* more out of practicing law than I had been willing to admit to myself. "Why," I finally ask, "did I find it *so* thrilling?"[59]

—I had failed to fully articulate the "high, even noble expectations" that took me to law school. I had kept my thoughts about justice quiet.[60]

—I followed the model of Judge Barrett, the judge that I had clerked for after graduating from law school. Judge Barrett had compartmentalized his life so that he could assume a role within the system and ignore his deepest personal convictions. Judge Barrett imposed the death penalty but had strong personal feelings about the sanctity of human life. He gave harsh prison sentences, but believed that the penal system was inhumane. Judge Barrett's personal convictions and personal integrity, even his religious beliefs, are walled off from his belief in the adversary system of justice.[61]

When we talk about Seymour Wishman's humiliation of Mrs. Lewis with students of law, we find that some crave the opportunity to badger, humiliate, and "destroy" witnesses on cross-examination. Others are repulsed at the thought of doing what Wishman has done. Wishman elicits both admiration and condemnation. Much of the admiration for Wishman turns not on his searching moral inquiry but on the fact the he plays hardball and tells a good war story. Others disdain Wishman—not just his humiliation of Mrs. Lewis, but Wishman himself—because they assume they, unlike Wishman, will never succumb to the dark side of the adversarial ethic.

I take the self-assured arguments that Wishman makes about doing his *job* to be a story that lawyers tell, a story that deserves close

---

58. *Id.* at 17.

59. *Id.*

60. *Id.* at 7.

61. Judges, even as they witness first hand the abuses of the adversary system, call for devotion to the system. *See, e.g.*, Joiner, *supra* note 8. ("An advocate must be more than just a hired gun for his or her client; rather, the advocate must serve the system and the client at the same time."*Id.* at 7. "That the duty to the administration of justice supersedes any claim of the client is a professional obligation of the civil advocate."*Id.* at 9.); Martone, *supra* note 7, at 233 ("*The Rules of Professional Conduct* need to be amended to clarify that a lawyer's duties to the system are equal to or greater than his or her duties to the client."); Clement Haynsworth, *Professionalism in Lawyering*, 27 S.C.L. REV. 627, 628 (1976) (The lawyer "owes [a] duty of loyalty to his client, but he has a higher duty as an officer of the court.").

attention. There is, Wishman learns, something wrong with the moral vision reflected in his various "reasons" for humiliating Ms. Lewis. (Remember it was Bowen McCoy's observation about his Quaker anthropologist friend's committed "moral vision" that made it possible for him to understand what was happening in their encounter with the sadhu.) We need to inquire into how the lawyer ethic makes it possible to humiliate a witness who tells the truth and then claim that we are morally justified in doing so. Can we be ethical and so cavalier about the truth?[62]

While Bowen McCoy is not a lawyer, and does not cross-examine witnesses in a legal trial, his story is yet another kind of cross-examination, the kind we do with our friends and of ourselves. It is possible to make a credible argument, based on the best of philosophical sources, Socrates among them, that the kind of cross-examination that McCoy demonstrates is ultimately as important as any we will ever do in the courtroom.

When we talk about the ethics of cross-examination, and the ethics of the cross-examiner, we begin to see how lawyers get entangled in an ethic that pushes them beyond moral limits. When we watch lawyers at work we discern a difference between the ethics of a lawyer like Atticus Finch and the ethics so many of us pursue without understanding how a virtue like zealousness can become a working pathology.

Wishman's reflections on his life as a lawyer provide a number of clues to suggest how ethics work:

---

62. Those who puzzle over these practices of humiliation might juxtapose Harper Lee's account in *To Kill a Mockingbird* of the cross-examinations conducted by Atticus Finch and Mr. Gilmer, the prosecutor, in the Tom Robinson rape case. LEE, *supra* note 11, at 177-81, 183-91, 198-201. Consider also Atticus' humiliation of the Ewells to get at the truth in the Tom Robinson rape trial and Wishman's humiliating cross-examination of Mrs. Lewis in cavalier disregard of the truth. These juxtapositions bring the conversation ethics around to talk about this elusive notion of truth and whether it has any place in our lawyer *jobs*.

It is, of course, more than a matter of truth. Scout, Atticus' daughter, recounting the events of the Tom Robinson trial, and Atticus' cross-examination of Mayella Ewell, who has falsely accused Tom Robinson, says of the cross-examination: "Somehow, Atticus had hit her hard in a way that was not clear to me, but it gave him no pleasure. He sat with his head down. . . ." *Id.* at 191. Even Mr. Gilmer, the prosecutor, who takes full advantage of Maycomb's racism (suggesting that he too may be part of Maycomb's "usual disease") "seemed to be prosecuting almost reluctantly" a reluctance that does not diminish the brutality of his cross-examination of Tom Robinson. *Id.* In these elusive references we find a personal, subjective dimension of zeal that is seldom the subject of inquiry or analysis.

Ethics pulls us into moral discourse by way of the "reasons" we give for leaving the sadhu behind, or as in Wishman's case, humiliating a witness we believe to be telling the truth.

Ethics calls us to be reflective, to engage in self-examination.

Ethics slows us down and interrupts the routine, habituated patterns of everyday life.

Ethics helps us "see" how the system fails and helps us develop a critical perspective.

Ethics helps us account for the moral choices we make.

Ethics helps us move beyond the subjectivity of personal opinion and the claims of objectivity associated with conventional moral rhetoric.

A. *Giving Reasons*

We do ethics and see ethics at work when we give "reasons" for what we do. In giving reasons we account for the harm that others (and we) attribute to our actions. Wishman finds it necessary to give reasons for his humiliation of Mrs. Lewis.[63] Bowen McCoy found it necessary to give reasons for leaving the sadhu and not staying behind to care for him. Wayne Brazil reasons with himself (and the reader) to understand how his life makes it possible to walk past Archie, the homeless man, without better ministering to him. Wishman, McCoy, and Brazil, upon reflection, come to understand, and explain, and seek the reader's understanding of the reasons they have used to explain the moral situations they find themselves in. The reasons given, on reflection, fail. McCoy continues to feel guilty. Wishman makes public his confession. Brazil laments the moral drift that has resulted in his indifference toward Archie. Their reasons may help explain what has happened, and how it happened, but the reasons do not add up to a moral justification. Wishman begins to see that his reasons are excuses and that what he has been telling himself about what he does as a lawyer is part of what might be called a *cover story*. Wishman, like so many of us, has become blind to the everyday reality of the legal practices he has adopted. (Wishman assumes that what he does in the courtroom is not "personal".) Wishman's competitive drive and intense desire to win[64] have fueled his adversarial zeal. The obsession with winning, allied with the idea that winning demonstrates competence, has resulted in the displacement of other ideals and values that might

---

63. WISHMAN, *supra* note 22, at 3-18.

64. *See generally*, *The Zealous Lawyer: Is Winning the Only Thing?* 4 REP. CENTER FOR PHIL. & PUB. POL'Y. 1 (1984).

have pulled Wishman in a different direction. Wishman has made Mrs. Lewis into an object of an elaborate game, his "ferocity" becomes a calculated courtroom performance, a game with "terrible consequences on individual lives."[65]

Wishman describes one case in which he became convinced that he had prosecuted and helped convict an innocent man, the horror for any prosecutor with an ounce of moral sensibility. Using his best skills, he had obtained a conviction in a doubtful case, a conviction that had "elated—at first" but then troubled him.[66]

> [A]fter the initial excitement of winning, I looked at what I had done. I had been so caught up in the contest, the adversarial battle of the trial, that it had not occurred to me that I might have been responsible for the conviction of an innocent man. . . . On reflection, after the verdict, it seemed to me that the defendant might have been telling the truth.[67]

Wishman acknowledges that something has gone wrong[68] and that he must address "these new grievances" about himself.[69] What

---

65. WISHMAN, *supra* note 22, at 17.

66. *Id.* at 11.

67. *Id.* at 11-12.

68. Wishman suggests a number of ways that things have gone wrong in his life as a lawyer:

—He has lost sight of his own responsibility. *Id.* at 11, 17.

—He forgets the faces of those he prosecutes and represents. *Id.* at 14, 15. One day in a hallway outside a courtroom Wishman runs into a defendant who has been found innocent in a case that he has prosecuted. The man introduces himself but Wishman has forgotten not only the man's name but his face. "When I failed to recognize him [the innocent defendant] in the corridor by the elevator, I told myself I had simply prosecuted too many cases–prosecuted too many defendants who looked alike and committed the same crimes. I had forgotten him . . . ." *Id.* at 14. And there are other incidents, the kind that remind us that it requires a massive loss of memory to live on the lawyer fast-track.

> It was around the time I met in the corridor the defendant whom I had perhaps wrongly convicted that I decided to leave the prosecutor's office. I'd been there for two years and had been thinking about moving on for some time. One afternoon I found myself in the middle of a summation in another case–calling for the conviction of yet another scourge of society–when I realized I had forgotten the defendant's name and the charge against him.

Id. at 15.

(*continued*)

motivations have made it possible for him to humiliate a truthful witness like Mrs. Lewis and become so enamored with gaining convictions that he loses sight of the possible innocence of a defendant? Wishman begins to see that he has used his power and skill in a harmful way and then covered up the harm with "flippantly" presented "lofty jurisprudential arguments" to justify what he has done.[70]

B. *Self-Examination.*

When the reasons no longer work, when Wishman sees that the reasons are rationalizations used to disguise harm, and that he has taken on a character he does not want, he finds it necessary to confess, to figure out who he is and what he has become. *Confessions of a Criminal Lawyer* is a story of one lawyer's moral self-examination.

—He cuts himself off from his ideals and his feelings. The more Wishman plays the game and learns the skills necessary to win, first as a prosecutor and later as a criminal defense lawyer, the more he becomes cut off from the ideals (admittedly vague ones) that had taken him into law. "I . . . coped with my feelings by putting them aside, out of the way of my professional judgments." *Id.* at 42. He distances himself from the fact that he feels responsible for the punishment of a criminal when he obtains a conviction. "Although they were guilty–often of atrocities–I was even more disturbed than I expected to be by the thought of anyone going to jail because of my skill. Unlike other prosecutors, I wouldn't appear on sentencing day. . . ." *Id.* at 14. Wishman tries to shield himself from his concern about punishment and prisons so that he can concentrate on getting convictions. But putting aside such feelings, necessary it might seem to be to do the job, is part of a pattern that leads us astray.
—He develops stock answers for those who question what he is doing. *Id.* at 14.
—He finds that he has no intimate relations with other people.

> What had once been a shield of self-protection separating me from a psychologically threatening criminal world had assumed the pretension of a personal philosophy. The chances for intimacy with new friends or new ideas had diminished slowly over the years without my noticing it. With lower expectations of people and ideas, I could no longer be disappointed easily. Aside from the self-defeating limits this attitude imposed on my relationships, it was a depressing world view to be alone with.

Id. at 240-41.

69. *Id.* at 239.

70. *Id.* at 17. Wishman later refers to the rhetoric that he has used to justify humiliating Mrs. Lewis as "posturing". *Id.* at 69.

"[F]or the first time in my life, my habit of examining myself was shifting from external details to the moral level."[71]

Ethics, if we can ever get beyond the notion that the study of legal ethics is a study of profession prescribed ethical rules, is going to require self-examination. We see ethics at work when we look carefully at ourselves; we see how our prized claims about ethics are a shield for self-protection and rationalized practices that advance our own interest and ignore those of others. The only way to know ourselves is to examine what we are and who we are. Wishman says,

> I had to examine in a disciplined way the sources of my anger, the anger that was peculiar to me rather than to criminal lawyers generally. I decided that one way to begin this examination would be to write about it.
>
> I had vague memories, hidden, it seemed, behind many thin, finely spun curtains. I knew I would have to try to draw the curtains back.[72]

Wishman's confessions are an attempt to exhume the vague purposes and ideals are guiding and shaping his sense of what he is doing in the practice of law. He acknowledges that the purposes that would redirect him and provide a more coherent ethical basis for his life as a lawyer are vague and ill-defined. But vague as they may be, they still represent, Wishman believes, a higher ideal than that exemplified in his humiliation of Mrs. Lewis.

C. *Slowing Down and Taking Account.*

Ethics slows us down and disrupts the placid self-assurance that all is well. I would have to screen my cases from now on. I had never turned down a case because the crime or the criminal were despicable—but now that would change. I could no longer cope with the ugliness and brutality that had for so long, too long, been a part of my life.

I also knew that I could not deal with the same volume of cases. I could not 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.[73] Old explanations

---

71. *Id.* at 56. For a commentary on this process, *see* James R. Elkins, *The Examined Life: A Mind in Search of Heart,* 30 AM. J. JURIS. 155 (1985).

72. WISHMAN, *supra* note 22, at 241.

73. *Id.* at 241.

are reexamined when they no longer work. Wishman finally concludes that he must try fewer cases, that he must slow down, think about what he is doing and take responsibility for what he does as an advocate. In slowing down we refocus on purposes (and identities) that get pushed aside in the rush to be successful lawyers.

D. *Becoming More Critical*

Ethics helps us develop a critical perspective. We begin to see who we are in the "system" and how the "system" has found its way into our character.[74] Wishman uses his skill to secure the conviction of a man that he later decides is innocent. When Wishman confirms the innocent defendant's story, a story he discredited at the man's trial, he sets out to rectify the wrongful conviction. But the system seems less interested in righting the wrong than it does covering it up. A wrongful conviction is an embarrassment to the system, as Wishman painfully learns.

---

74. The story that Wishman tells about Judge Barrett, the judge he revered, is instructive on how lawyers become operatives for the system. On Judge Barrett, *see, id.* at 7-9, 13. *See also*, Stanley Hauerwas & Thomas Shaffer, *Hope in the Life of Thomas More*, 54 NOTRE DAME LAW. 569 (1979) (An account of a lawyer who was an "insider" and retained his integrity.).

In puzzling over lawyer ethics we raise this question about being insiders and holding on to our ethics. Can our ethics ever be anything other than the operating standards of the groups in which we live out our working lives? Michael Maccoby, in a suggestive observation, points out that

> [t]he corporation is of course not fully responsible for the character development of those who work there. Character is formed first in family and school, and the type of person who chooses to work in a corporation has some idea of what to expect. He or she enters with character traits common to young Americans who pass all the exams and get high grades at colleges and universities. The corporate individual must be competitive and highly intelligent in terms of intellectual problem-solving. But most young people are a mixture of still-malleable attitudes. Upon entering the corporation, they still have the chance to become more idealistic and just or they could become disillusioned and self-serving. The traits stimulated in the corporation will in many cases have a decisive effect on the kind of people they become, not only as managers, but as citizens, husbands, wives, fathers, and mothers.

MICHAEL MACCOBY, THE GAMESMAN: THE NEW CORPORATE LEADERS 157 (1976).

> With my hands sweating as they clutched the papers, I ran down the courthouse corridor to the judge who had presided over the trial. I had expected him to be as upset as I was. The judge said I had had no business meddling with the conviction; our adversary system had separated roles: a prosecutor should prosecute and a defense lawyer should defend, and if I had doubts . . . they should have been resolved before the conviction.[75]

The trial judge reluctantly agrees to reopen the case but the matter is not resolved. The public defender who represented the defendant does not pursue the issue and leaves the matter for his successor when he resigns his position to enter private practice.

Six months passes before Wishman learns that the conviction has not been set aside. He contacts the new public defender assigned to the defendant and urges him to move for a new trial. Eight months after the trial the conviction is set aside.

When we work to keep the "system" going we assume we are thinking of the "big picture". With a more reflective critical perspective, Wishman finds that protecting the system may be a worthy goal, but it became for him "too narrow and abstract a concept" to provide him "with any comfort". "I had ignored the larger moral and emotional implications of my actions."[76] The "system" allowed to trump one's own moral sensibilities is a "system" that will devour us.

E. *Making Choices.*

It is hard to imagine a life as a lawyer without choices and it is in the choices we make that we see ethics at work. Wishman sees that he is constantly in the process of making choices when he tries a case before a jury and that in these choices he is saying something about the kind of lawyer and the kind of person he is. "There is no end," says Wishman, "to the possibilities for self-consciousness. Should I smile? Should I get angry? Should I treat the D.A. with respect or contempt? Should I demand that the jury acquit or should I beg them?"[77]

---

75. WISHMAN, *supra* note 22, at 12.
76. *Id.* at 69.
77. *Id.* at 70.

F. *Getting Beyond the Subjectivity of Ethics.*

It is ethics that links the personal to the social, political and spiritual. Seymour Wishman's distress, induced by his overdetermined attitude toward adversarial zeal, is personal but not idiosyncratic. Wishman suggests that his concerns are related to the moral concerns of the legal profession as a whole. "I sense that my distress was not just a personal matter but revealed some of the painful moral and emotional dilemmas of my profession."[78]

We must try to relate what is going on in the personal way we practice law to the ethics we have as lawyers because we are lawyers. Our miscues, mistakes, and failures are openings into heightened moral concern and evaluation of the pathologies of lives lived "in" a profession.

VII.

A law firm is asked to seek delays in all cases involving a client insurance company.[79] The applicable ethical rules make clear (well, relatively clear) that such delays are an infringement of justice; whether they are a violation of the rules is another question.[80] In the

---

78. *Id.* at 18.

79. The problem goes something like this: the law firm represents All-Nation Insurance, a wholly owned subsidiary of Good-Health Drug Company. A five person law firm management committee makes policy decisions for the fifteen member firm. The firm has two partners that spend 80-85 % of their billable hours representing All-Nation in the settlement and trial of insurance claims against the company. The two partners who handle the insurance defense work are not members of the management committee.

The partners who handle litigation for All-Nation have asked the management committee to consider the following: the General Counsel in the Cleveland home office of All-Nation has forwarded the litigation partners a memorandum informing them that Good-Health has become the target of a recent effort in a leveraged buy-out and is drawing heavily on All-Nation financial reserves to put together a strategy to block the buy-out. As a result All-Nation has requested that local counsel (your law firm) seek delays in *all* pending cases to avoid the possibility of adverse publicity and adverse cash flow that would result from unfavorable jury awards. The General Counsel also notes that the policy has been initiated as a result of substantial adverse cash flow created by increased claims and a rash of million dollar plus plaintiffs' victories.

The partners who represent All-Nation ask for advice of the management committee?

80. The ethical rule on delay is a model of obfuscation. The rule turns out not to be much of a rule: "A lawyer shall make reasonable efforts to expedite

(*continued*)

law school conversation and argument that takes place about the requested delay, we hear the many rhetorics of moral discourse at work and get a glimpse at the Real World talk of lawyers:

> Andy: First, let's define the problem.
>
> Sue: Does it matter what the delays are for?
>
> Andy: That's not the question. For me the question is whether it is an ethical question or just a matter of policy.
>
> Sue: It's an ethical problem.
>
> Elizabeth: I think it's terrible that people have to wait for their money because of what we are going to do. But then what happens if we do not ask for the delay?
>
> Roger: The company is lost, people lose their jobs, no one gets paid.
>
> Andy: It's not a matter of seeking illegitimate delays. Delays work to the advantage of both sides.
>
> Elizabeth: But even if the delays are legal it does not make them right.

---

litigation consistent with the interests of the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1983). This is certainly no rule meant to hold water against the analysis of a law-trained mind: what constitutes reasonable efforts? Is what is reasonable to be read, in all cases, "consistent with the interest of the client"?

The rule does not bother to concern itself with the simple fact that expediting litigation is often not in the client's interest. The problem is addressed not in the rule, but the comment to the rule. The comment provides that

> [d]ilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

The sentiments of the rule and the comment seem to move in different directions. If the aim of the *Rules of Professional Conduct* are clarity and bright-line rules for lawyers, guidance on the ethics of the tactics of delay during litigation fails dramatically. Yet, this is what the client wants, and if it is what the client wants, we are pushed, as lawyers, to consider how it can be done. When a law firm comprised of law students confronts this issue and begins their deliberations we see how hard it is (even within what many students take to be an unreal world of classroom moral discourse) to say *no* to a client.

Andy: If it's legal, we can do it.

Roger: What is the benefit to anyone in speedily getting into court?

Elizabeth: [Gives example of injured parties who need the money.]

Roger: We're not talking about settling claims.

Sue: When one pays insurance premiums, they expect to get paid when they file a legitimate claim. Can you not see the harm that this will cause those who have filed claims that are now being contested?

Andy: People may expect, with insurance, that they have taken care of the problem, but in reality you are dealing with a company.

Sue: If you pay flood insurance and lose your house in a flood you are going to be outraged if you have paid all those premiums for 20 years and then do not get paid.

Phillip: My perception is that they are not wanting us to delay settlements in "legitimate" cases. It's a different issue if we are talking about delay in cases where the plaintiffs have legitimate claims.

Andy: If the company does not survive this cash flow problem, they'll fold.

Elizabeth: How can we help the most people? When people sue they are trying to get more than they would when they settle.

Phillip: No, that's not right. When you settle you get less than you would if you litigated.

[An argument ensues about whether the firm will lose the client if the firm does not do what the client as requested.]

Phillip: Is it up to the firm to decide about delays? Do not judges make these kind of decisions?[81]

As the conversation continues, Phillip, influenced by Andy's adamant stance that there is nothing wrong in seeking the delays, reminds the others, that it may, whether they like it or not, be Necessary to do what the client has asked. (Necessary in these conversations is always spoken with a capital N.) "We have to do what the insurance company wants. It's our job. We'll lose the client if we do not do it." When presented in this stark fashion, some participants in the conversation pull back from a strong claim of

81. The conversation presented here is a condensed, edited version of an actual conversation that took place in one of my legal ethics classes.

Necessity, the demands of Role, and the amoral stance they are struggling to understand and enact.

Sue focuses on the harm caused by the requested delays, and tries to find a rhetoric that will personalize the harm so that her colleagues can understand it as she does. Getting the delays the client "wants" is basically, she observes at one point, "sleazy business". Andy works assiduously to stay in the dark, as best he can, about the purpose of the delay, the interests it serves, and the harm caused by such a course of action. Even when informed by his colleagues what the delay means, he is slow to take account of the consequences of doing what the client wants.

There is, during the course of the conversational struggle, an effort to find a practical compromise. The compromise is that they will not go as far as the client (and Andy) wants, but then they will not say no (as Sue urges), at least not outright. It is difficult to say no. Some of us clearly do not have the character to say it when we must.

There is surprise and dismay when we hear what our colleagues will do, the compromises that can be made, in the name of ethics. There is also wonder at the courage of those who know their ethics, think through a problem, and stay with what they know is right. It is easy enough when we talk ethics to become confused and perplexed. If you set out to explore the moral limits to lawyer zealousness, you will be humbled by the obstacles you confront along the way.

VIII.

We turn our attention now to a client who is trying to figure out what to do about a proposed Federal Food Administration (FFA)(a hypothetical new Federal agency) regulation that would ban the use of certain cancer-producing chemical preservatives in wine shipped in interstate commerce.[82] The vineyard owner has already treated half of the present season's wines with a chemical that the FFA alleges to be cancer-producing and is concerned that he will have to close down the vineyard if he is unable to sell the treated wines before the proposed regulation bans their shipment.

There is talk about saving jobs, of the possibility that the scientific evidence used by the FFA to support the ban will later be shown to be mistaken, and the always popular and logic defying notion that the presence of so many "natural" cancer-causing agents makes it

82. I have adapted this problem from THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 136-40 (2d ed. 1981).

foolish to worry about carcinogenic additives to the food and liquids we consume.

If it is possible to use the legal system to get a sufficient delay in the promulgation of the proposed ban on the sale of chemically treated wines, the vineyard can sell the wine. Many students of legal ethics assume (and then argue) that this is exactly what the client "wants" and that the lawyer must of Necessity do what the client seeks so long as it is legal. Others finally willing to draw the line express concern about cancer-causing chemicals in our food: "This is simply going too far and I will not do it. I will not represent a client and help him actively harm other people—knowingly harm others. This carries the idea of zealousness too far."

In response, proponents of the "I'll do whatever is legal for my client" stance reply: "Everyone is entitled to their own opinion about ethical matters. You decide not to represent the client. That is your ethics. I will represent the vineyard owner. I do not see how my doing so says anything about my ethics. My client's morals are not necessarily mine. And I do not think representing the vineyard owner and doing what he wants to do says anything about my character. What I do in representing clients has nothing to do with my politics or my character."[83]

---

83. Lawyers, whatever their moral rhetoric, worry at times about their character. Some lawyers worry that they will acquire traits of character which they do not admire.

> [W]hen one is schooled in the ways of thinking and modes of comportment of a particular profession, one does not merely appropriate a special skill. Rather, one's entire outlook including one's senses of self, others, and the world, is radically enlarged, if not fundamentally reshaped. . . . [T]he typically intense, often anxiety-laden, education and training, to which lawyers . . . are exposed, characteristically induces in them a fundamental change in world-view, a change in how they experience the meanings and significances of human situations, as well as a change in the ways in which they relate to them.

William F. Fischer, *Lawyering as a Way of Life*, 28 DUQ. L. REV. 671, 672 (1990). On the moral nature of lawyer character, *see, e.g.*, Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987); Anthony T. Kronman, *The Good Lawyer: Judgment and Character in Law Practice*, YALE L. RPT., Spring, 1989 at 2.

To say that being a lawyer entails a kind of character may mean something like—Japanese character is different from American character. Lawyers may, as it turns out, develop during the course of their education, training, and work, a kind of character (and they might not). Lawyers may, as a result of their

(*continued*)

We have all heard this speech or a variation of it. "I do not think I have right to impose my moral views on you, my client, or anyone else. The limits of zealousness are a personal matter that every lawyer must decide for herself. And when a lawyer decides one way or another that resolves the matter. You cannot condemn a person for living an ethic you do not like, any more than you can condemn someone for having a different religion."

There is just enough truth in this speech to keep us marred in an ethical muddle without ever inquiring into the nature of the muddle or how it may be clarified.[84]

---

training, their work, and their motivation in becoming lawyers, develop a particular kind of "social character", a character that we present to the world as a "legal persona" or mask. *See* James R. Elkins, *The Legal Persona: An Essay on the Professional Mask*, 64 VA. L. REV. 735 (1978); JOHN T. NOONAN, PERSONS AND MASKS OF THE LAW (1976). There is, I contend, a psychological dimension to lawyer character, to the kind of personality that one develops in a profession like law. (There is presently no academic field that concerns itself with a psychology of professionalism.) On the moral psychology of character and the lawyer role, *see* DAVID LUBAN, THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 259-314 (1983).

84. On the nature of conversational muddles, *see* GREGORY BATESON, STEPS TO AN ECOLOGY OF MIND 14-20 (1972).

This is the way, William Frankena, a philosopher, responds to the muddle presented in the argument outlined in the text:

> It seems clear that morality is a guide to life of a peculiar sort in that it allows the individual to be, indeed insists on his being, self-governed in the sense, not only of determining what he is going to do, but of determining what it is that he should do.
>
> ....
>
> But to say that a developed moral agent must make up his own mind what is right, and not simply accept the dictates of an external authority, is not to say that he can make a course of action right by deciding on it, or that whatever life he chooses or prefers to live can be claimed by him to be *ipso facto* morally right or good; any more than to say that a developed rational man must make up his own mind what is true, and not merely accept the declarations of another, is to say that he can make a statement true by believing it, or that whatever system he chooses or prefers to believe can be claimed by him to be *ipso facto* intellectually justified. Being autonomous does not mean being responsible to no transpersonal standard in morality any more than in science. In both cases one is involved in an interpersonal enterprise of human guidance (in morality of action, in science of belief) in which one is self-governing but in which one makes judgments ("This is right,"

(*continued*)

It is hard to know what move to make make in the face of so much well-intentioned resistance.[85]

IX.

We cannot think best of ourselves unless we know how to be advocates and we cannot be advocates until we test the limits of our skills. As lawyers, students, and teachers, we want to have the "right stuff". Many of us want, as Tom Wolfe said of the first test-pilot astronauts, to "test the edge of the envelope". There is something, for some of us, in becoming lawyers that suggests the possibility of testing ourselves, of using law and our skills as lawyers as a test of our moral imagination. Is it not the daring skill deployed in matters of significance that draws us to law? Is there not something in law that suggests not only Reality (that we mislabel as Necessity) but Myth?

The stakes are high. We are no longer talking about the kind of game where it is a sports coach's hype that makes winning and losing significant. When you get to know lawyers, read about them, and watch them at work on television, you begin to get the idea that winning and losing matter, and it matters not just because lawyers have big egos, but because of what the lawyer represents and how winning for some causes and principles calls us back to our ideals. Our orientation to winning and losing is so fundamental a part of lawyer culture that many of us go glassy-eyed at the implications that winning is not the sole criteria of success.

"That is true") which one is claiming to be warranted by a review of the facts from the impersonal standpoint represented by that enterprise and shared by all who take part in it–a claim which is not merely an assertion of what one chooses or prefers, and may turn out to be mistaken.

William K. Frankena, *Toward a Philosophy of Moral Education*, *in* MODERN PHILOSOPHIES OF EDUCATION 316, 325-26 (John Strain ed., 1971).

85. Some of my colleagues have responded to the argument with thoughtful essays and we might begin by reading them with each other and with our students. *See, e.g.*, Warren Lehman, *The Pursuit of a Clients Interest*, 77 MICH. L. REV. 1078 (1979); Duncan Kennedy, *The Responsibility of Lawyers for the Justice of Their Causes*, 18 TEX. TECH. L. REV. 1157 (1987).

When we talk about lawyer zealousness we hear refrains of denial and ignorance ("what has ethics got to do with this?"); moral narcissists ("my ethics are just as good as yours"); and liberals ("we have evolved a system to adjudicate disputes and the injection of morality doesn't help us preserve the pluralism we have struggled so hard to preserve"). Each offers a different perspective on the matter of resistance.

It is the desire to win that gets Seymour Wishman into trouble. It is winning, being a winner and living the life of the achiever, that gets many of us into trouble. When you are winning, making-it, and being acclaimed, awarded, venerated, there is little reason to be reflective.[86] Good fortune is not a prod to self-examination.

How is one to learn the real price for ignoring the moral limits of zealousness? First, it is clear that everyone is going to make up their own mind about the cost of doing what lawyers do in the name of the adversarial ethic. There is at present no inoculation against moral malaise and misguided moral sensibilities. We are all free to make fools of ourselves by becoming zealots with reputations as "hired-guns" and "shysters", so zealous and so guarded of our false consciousness that we can not see the forest for the trees. (Some of us will become outright "crooks" along the way.) Yes, we can police the profession and weed-out (some) incompetents and punish lawyer thieves who steal from their clients. We can banish the most unethical among us from the profession. There are some bad apples among us and we can seek them out and sanction them. But look at who gets drummed out of the profession and one wonders whether the few who get caught stealing clients' money and those who demonstrate in the most explicit way their incompetence and negligence constitute the real danger. We can sanction and disbar the most egregious of the crooks and incompetents and still have enough ethical misfits to plague the profession and give credence to our reputation as charlatans and hired-guns.

We can mount media campaigns and teach the public to better understand the legal profession and the adversary system. By more effective use of the news media we can spruce up our image as a profession. I do not know how gullible the American people are, and whether they are susceptible to being told, by lawyers, that lawyers are in reality fine public servants looking after the affairs of the republic. The American public may already know something about lawyers that lawyers have been unwilling to admit to themselves.

One wonders whether the legal profession, as a community, is not becoming the kind of community that Atticus Finch's Maycomb had become, divided and self-delusional, a community that does not know the truth about itself, and when it hears the truth must deny it or

86. Tolstoy's Ivan Ilych is a good example of a lawyer, albeit a fictional one, that makes a comfortable place for himself and then finds that his life is a mess, that his comfortable life has come at an exorbitant cost. Ilych has followed the well-worn path trod by others and learns that he must pay the price. LEO TOLSTOY, THE DEATH OF IVAN ILYCH AND OTHER STORIES 95-156 (New American Library 1960). Self-deception is a costly ego-defense mechanism and lawyers are common victims.

dismiss it. The legal profession needs to listen to its Atticus Finches. The legal profession needs to know that our critics are telling the truth about us when they say that we are, in our efforts to take zealousness to its adversarial limits—while promoting the adversarial system as a system of justice—a problem to ourselves and the communities in which we live. We need to be able to face up to the shadow side of lawyering. The way to do it is to admit that there is occasion for shame[87] in our profession.

It may be overly dramatic to say that it is shame that is driving lawyers from the profession, but something is. Paul Ciotti, a staff writer for the *Los Angeles Times*, reported on a 1988 American Bar Association poll that showed forty-one percent of a representative sample of lawyers would choose another profession if they had to make the choice again.[88] Mr. Ciotti found lawyers frustrated with paper work, ungracious colleagues, greedy clients, a slow and adversarial legal system, boredom, overwork, public disdain for the profession, and their own unrealistic expectations about the practice of law. Basically, Ciotti notes that "[m]ore than ever before, many lawyers say they are working harder, getting richer and enjoying it less."[89] Lawyers are flocking in astonishing numbers to career-change seminars.

In recent years some corporations have conducted "ethical audits" and we would be well advised to do something of this sort in our law firms and law schools. Why are lawyers leaving the legal profession? We might conclude that there is something wrong with the work, something wrong with legal education, something wrong with the limited ideals we now hold for ourselves as professionals.

It is not the money that is bothering lawyers,[90] but something about the work, about the profession, about the practice of law. Ciotti

---

87. On the re-discovery of shame in the world of psychology and psychotherapy, *see* Robert Karen, *Shame*, 269 THE ATLANTIC 40 (1992).

88. Paul Ciotti, *in Unhappy Lawyers*, 1 ETHICS: EASIER SAID THAN DONE 54 (1989).

89. *Id.*

90. There is good reason to believe that lawyers are not dissatisfied with the profession and seek to leave it because they are underpaid. While there has been speculation that federal judges have left the bench because of miserly pay, one might venture that this hype (actually, a kind of rhetoric) about inadequate judicial salaries is the voice of the establishment looking after its own. There are as many qualified lawyers willing to assume the bench at existing salaries as there are federal judges willing to give up a life-time appointment and the power and prestige attached to the office of a federal judgeship. Hundreds of American law teachers, many who have continued limited law practices during

(*continued*)

concludes that the general level of dissatisfaction in the legal profession is high, perhaps an all time high.[91]

One gets a glimmer of one strain of moral pathology in the legal profession when we listen-in on what is being said in law school classrooms (which is what I have been doing in this essay).

During the several weeks that I talk with law students in a legal ethics course about the adversarial ethic and whether there are limits to what we can do in the name of zeal, I present students with a problem about the negotiation of a lease agreement for a client when the opposing lawyer is trying desperately to complete the negotiation because he plans to take his family to Europe on vacation (he has super-saver tickets that make it costly to renege on the vacation). The question, as it gets framed during the course of discussion, is whether they will bargain for a "fair" settlement for their client or take advantage of the other lawyer's plans. As one student put it, the issue is either doing what is fair for both sides, or taking the other lawyer and his client "to the cleaners" (using the language of adversarial zero-sum game lawyering). There is little moral outrage expressed when the argument is made that every lawyer, for every client, must get all that can be gotten for the client. ("I mean really now, you imply that we must not only look out for others, but we must look out for the lawyer on the other side! This is absurd.")[92]

It becomes apparent in these discussions about zealousness and from the way we imagine the role of zeal that zeal adopted as a solitary virtue makes life hellish for lawyers. We make life hellish, not by adopting the kind of zealousness that Atticus Finch had, but the kind of zealousness that Seymour Wishman demonstrated in his humiliation of Mrs. Lewis. It is the callous zealousness that we enact that makes it possible to humiliate a witness like Mrs. Lewis and see "nothing personal" in it. And it is the kind of dispirited zealousness ("just doing his job") that Atticus Finch's daughter, Scout, describes when she explains Mr. Gilmer's racist comments in his cross-

---

the course of their tenure as teachers, would be fully qualified to sit on the federal bench, and willing to do so at existing salaries.

91. Ciotti points out that alcoholism among lawyers is almost twice as high as for the general population. Ciotti, *supra* note 88. *See* Ted Rohrlich, *Bar Group Finds Lawyers' Alcohol Consumption Rising*, PADUCAH SUN, Dec. 6, 1990, at 6A.

92. We have now progressed from laments about the "ethics" of lawyers reflected in our treatment of others, to a concern—within the profession—of how we treat each other. *See, e.g.*, *How's Your Lawyer's Left Jab? A New Crackdown on Slimeball Litigation Tactics*, NEWSWEEK, Feb. 26, 1990, at 70; Milo Geyelin, *Lawyer's Object to Colleagues' Rudeness*, WALL ST. J., June 24, 1991, at B1.

examination of Tom Robinson in *To Kill a Mockingbird*. Or it can be the kind of zealousness that comes from having a purpose, as did Bowen McCoy, that will get us over a Nepalese mountain pass and leave behind a sadhu suffering from hypothermia. We make life hellish for each other as lawyers because of an ethic that privileges zealousness as the ultimate virtue. We burn-out as lawyers[93] when the ethic of zealous adversarialism wipes out the other virtues we need to maintain a sane world and a decent profession.

X.

The decision about what we are to do and to be in our zealousness is one we cannot escape. Students of law and ethics set out on an escape route when they use relativism to defend a notion of partisan advocacy that ignores all interests but that of the client. When confronted, law students claim that the decision is a personal one, slipping to embrace the relativist claim that we each have our own ethics. It is a perversion of the tacit moral knowledge we share to say of ethics: "You have yours and I have mine." This school of thinking makes moral discourse an exercise in futility: When you say what your ethics of advocacy are and hear my notion of mine, we have said all we can say to each other. The inquiry ends. We are, if we follow this logic of moral isolationism, indeed in a deep muddle.

The problem with moral relativism is not that it is wholly false, but true enough to be appealing, true enough to crowd out the kind of critical thinking we need to understand how ethics works in the life of Seymour Wishman and in our lives. After all, if I do not have my ethics and you do not have yours, where would that leave us? Who, if not I, or God, will decide what is going to be ethical? Without some version of moral relativism we seem to be thrown back to moral absolutes, absolutes we assumed we had escaped in these "modern" and "post-modern" times. And with absolutes we can, can we not, expect dictators telling us what will be right and what will be wrong? Are we not bound, in a democracy, and as devotees of individual freedom, to the idea of everybody having their own ethics? Ethics begins to look like an inflated way of talking about individual preferences. ("I have my opinions and you have yours.")

Relativism, common and pervasive, cannot be ignored if we are going to talk about lawyer ethics. And yet, some students are amazed that anyone could question relativism as a moral stance. To do so

---

93. Martone, *supra* note 7, at 230 ("The lawyer loses faith in his own system because everything he undertakes is problem avoidance rather than problem resolution. This leads to great lawyer burnout.").

they say is a form of dogmatism. Allan Bloom observes that when moral relativism is challenged its character is "revealed" by "a combination of disbelief and indignation: 'Are you an absolutist?,' the only alternative they know, uttered in the same tone as 'Are you a monarchist?' or 'Do you really believe in witches?'"[94] Anyone unwilling to accept relativism, warts and all, must be a dogmatist intent on imposing their own ethics on others.[95] The challenge to relativism is met by a claim of dogmatism and authoritarianism. In this view, if you are not a relativist then you are intolerant of other people's views. The only way to be tolerant and fair is to accept every ethical view (conflated or disguised as they may be in opinions, preferences, interests, attitudes, and predispositions) as representative of a worthwhile moral stance. Relativists believe, Bloom argues, that "[r]elativism is necessary to openness" and that tolerance of other views is the only virtue that separates us from dogmatism.

"Openness—and the relativism that makes it the only plausible stance in the face of various claims to truth and various ways of life and kinds of human beings—is the great insight of our times."[96] The challenge to relativism is viewed, by those challenged, to be illegitimate and a danger to the compromises of liberal tolerance.

XI.

Lawyers (and students, even before they have any realistic sense about what lawyers do in the much vaunted Real World) claim that it is the *job* of lawyers to represent unpopular clients (clients who have engaged in reprehensible conduct or clients who are disfavored in a particular community because of notorious moral views unacceptable to the community).[97] We want lawyers to exercise independent

---

94. ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY'S STUDENTS 25 (1987). I cite Bloom's point about relativism without adopting the more reactionary claims he makes about the academy.

95. By challenging their relativism my students assume that I am an old-fashioned absolutist, concealing my moral agenda in the guise of moral discourse.

96. Bloom, *supra* note 94, at 26.

97. The prototypical case is an American Jewish lawyer who defends Nazis. *See* ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM 2 (1979) ("I supported free speech for Nazis when they wanted to march in Skokie in order to defeat Nazis. Defending my enemy is the only way to protect a free society against the enemies of freedom.") (*continued*)

judgment and have the strength of character to represent clients that a community might prefer go unrepresented or represented in a pro forma way. The amoral zealous advocate takes the idea of independence and freedom of lawyers to represent whomever they want and the pride we take in those lawyers who represent unpopular clients and *assumes* that this means that lawyers *should* represent all clients, whatever their cause, and without regard to the client's moral purpose.[98]

The Model Rules of Professional Conduct promote the moral legitimacy of this stance by noting that "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social, or moral views or activities."[99] The comment to Rule 1.2 notes that

---

Id. at 1-2.) Neier recognizes that his position seems to present a paradox, which he sets out to untangle in his book.

David Goldberger, an ACLU lawyer, who is Jewish, said of his successful efforts to defend the right of a small group of Nazis to march in a heavily Jewish Chicago suburb, "I don't think I'll ever look back on it without remembering the pain it caused. . . . The hardest thing was being at odds with people for whom you had strong feelings of empathy." *Lawyer Who Aided Illinois Nazis Recalls a 'Very Difficult Odyssey'*, N. Y. TIMES, April 29, 1979, at 56. Goldberger reported that throughout the court fight "he was vilified, threatened with physical harm and forced several times to move his wife and children from their house." *Id.* Goldberger found the beliefs of Nazi leader, Frank Collin, "absolutely disgusting" but could not find another lawyer to take the case. Goldberger agreed to represent Collin because "the case raised classic questions about the constitutional guarantees of free speech and assembly." *Id.*

For a law school dean's explanation to his students of why he has undertaken the representation of Dr. Bernard Bergman, who had been widely vilified in the news media, *see* MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS App., A to A-12 (1990) (In his accounting to law students, Freedman does not rely on the argument that every person is entitled to a lawyer. Freedman rejects the notion that "a lawyer is bound to represent everybody who walks in the door. That is not true and never has been true." *Id.* at A-1).

98. It is an ethic that teaches us to mistrust everyone (excluding ourselves) and assume that all purposes, so long as they are sanctioned by law, are equally meritorious in their claim for scarce cultural and psychic resources. If law is to be the measure of moral concern, then every lawyer's ethics must be treated as good as any others so long as it is legal/constitutional. For an intermediate position, see ARONSON & WEICKSTEIN, *supra* note 29, at 11 ("While a lawyer is under no obligation to act on behalf of every person who seeks his services, the professional obligation to make legal services fully available to all who may need them requires that there be at least one lawyer willing to represent every potential client.").

99. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b) (1983).

> legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.[100]

The commentary seems to be saying two things at once: It is good (that is, something we should do) when we represent unpopular clients. I take this to mean that it was morally good for lawyers to represent the targets of Senator Joseph McCarthy's communist smear attacks during the early years of the Cold War with the (former) Soviet Union. It was morally good for lawyers to represent the cause of civil rights workers and African Americans living in the South during the years of the desegregation effort. It was morally good for lawyers to represent conscientious objectors during the early years of the Vietnam War before the tide of public opinion had turned in support of the anti-war effort.

But what does it mean to say, as the commentary to Rule 1.2 does, that it is "[b]y the same token" (of our resistance to popular pressure in the community) that we represent those who reflect the most debased moral views of the community? My students, the most amoral among them, realize that lawyers (whether of Necessity or Choice) become identified in one way or another with their clients. Yet, we also know that lawyers represent all kinds of people, for all kinds of purpose, without taking up the clients' purposes as their own. A lawyer who represents a defendant charged with killing a policeman (a decidedly unpopular client) does not advocate violence against policemen, or murder in general. Some lawyers are clearly more moral than their clients, while the client's morality can become the measure of the lawyer's ethics. (Some clients are more moral than their lawyers, and are introduced to schemes and ploys of dubious moral value by their lawyers.) The point is not that it is clients that lead lawyers from the path of righteousness (as they sometimes do) or that lawyers must become moral judges of their clients causes (although they sometimes are). The point is that moral inquiry into zealousness requires that we know that zealous advocacy, like any virtue, can be transmuted into a vice.

The primary culprit (and accompanying ethical muddle) is seen in the compartmentalization that makes possible the notion that the ethics we have as lawyers do not count as the ethics we have as

---

100. *Id.* at Rule 1.2 cmt.

persons.[101] We find convenient the idea that we can set aside our personal morals and take up the professional amorality of the adversarial ethic. We assume this is necessary to live with the cognitive dissonance created by the image of ourselves as good lawyers (when good means no more than successful and successful means a lawyer who will play whatever games lawyers play to get ahead) and good persons (a person who can claim with pride to be a lawyer and to be doing the the work that lawyers do).

Atticus Finch escaped the trap by living the same ethics at home, with his children Jem and Scout, as he did in town, as a lawyer. Scout, Atticus' six-year-old daughter, when informed that things happen behind closed doors that are secrets, tells Miss Maudie, a neighbor: "Atticus don't ever do anything to Jem [her older brother by some five years] and me in the house that he don't do in the yard."[102] Later at the rape trial of Tom Robinson, Scout is trying to explain to Dill, one of her friends (the kids have, without Atticus' permission sneaked into the courthouse to see Atticus try the Robinson case), why Atticus and Mr. Gilmer, the prosecutor, treat their witnesses differently on cross-examination. Mr. Gilmer refers to Tom Robinson as "boy" and attempts to humiliate Tom Robinson in the eyes of an all-white jury by insinuating that a black man's word cannot be believed when it is refuted by a white woman.[103] Atticus on the other hand "humiliates" Mayella Ewell, the prosecutrix in the rape case, and her father, Bob Ewell, in showing the jury (and the reader) that Mayella and her father are lying. It is difficult to conduct a successful cross-examination of lying witnesses without humiliating them. When Scout tries to explain to Dill, why he is sick to his stomach at the way Mr. Gilmer treats Tom Robinson and not bothered by Atticus' cross-examination, the best answer she can give is that Atticus is "the same in the courtroom as he is on the public streets."[104] Atticus does not have one set of ethics at home and another at the courthouse just as he did not have a set of ethics for dealing with Scout and Jem when the neighbors were looking on and another set when he was dealing with them at home behind closed doors.

Atticus, for all we know and assume, did not compartmentalize his life. Atticus took his sense of himself as lawyer home and used

---

101. There are "moral risks" to this assumption. The problem is that we then lose the ethics we have as persons that would keep us straight as lawyers. *See* Huff, *supra* note 9, at 50-51 (pointing out how compartmentalization leads to the sort of "blindless" where we do not perceive that we are doing wrong and fail to recognize the moral issues present in our professional lives).

102. LEE, *supra* note 11, at 50.

103. *Id.* at 200.

104. *Id.* at 202.

his lawyer's sensibility to raise his children. And it can be argued (neither Atticus nor Harper Lee do so explicitly) that Atticus treats Mayella and Bob Ewell the way he does, getting at the painful truth in the Tom Robinson case, because he takes the patience and gentleness that he has at home with Scout and Jem to the courtroom (and to the law office) with him.

Atticus would, if I read his character right, scoff at the idea that there is something called professional morality that can (or must) be compartmentalized that makes it possible to act like two persons rather than one, one person at the office and in the courtroom and another at home with his children. The idea of ordinary morality (the morality of common folk) and professional morality (the morality of special folk like lawyers) is something that we have cooked up to explain modern day notions of lawyering and lawyer ethics. The idea that we can make sense of lawyers and their ethics by devising two disconnected worlds, one for ordinary moral concerns and another for professional morality, is more reactive than reflective, more excuse than justification. What we imagine to be ethics of two worlds (or "two kingdoms" as Thomas Shaffer called them)[105] becomes, as it always must, one ethic, an ethic for a schizoid world.[106] The expedient splitting of professional and private life, giving to each its *own* form of morality makes us schizoid.

The intellectual compartmentalization of morals reflects a deeper psychological splitting that helps us keep the *shadow* side of professionalism at arms length.[107] In law, as in life, we take the *persona* to be real, and the *shadow* something found only in the "bad apples" of the profession. As one law student put it, "Every profession has unethical practitioners but this does not mean that there is anything wrong with the profession." The student was trying to ward

---

105. Thomas L. Shaffer, *The Legal Ethics of the Two Kingdoms,* 17 VAL. U. L. REV. 3 (1983).

106. Thomas Shaffer, *Christian Lawyer Stories and American Legal Ethics,* 33 MERCER L. REV. 877, 885 (1982) ("We practice our profession with a disabling discontinuity between who we are and what we are doing. Too many lawyers try to do that, and they end up in misery, or alcoholism, or repentance.").

107. The *shadow* is a term that psychologist C.G. Jung used to denote those elements of our conscious lives, both negative and positive, that have been repressed, denied, ignored, and (tentatively) forgotten. The shadow is masked by a *persona*, that is both consciously and unconsciously selected and presented to others as the "self" we want the world to see. For Jung's explanation of the *shadow*, *see* AION- RESEARCHES INTO THE PHENOMENOLOGY OF THE SELF (Herhard Adler et al. eds., R.F.Hull trans., 2d ed. 1968); ROBERT H. HOPCHE, A GUIDED TOUR OF THE COLLECTED WORKS OF C.G. JUNG 81-85 (1989). *See also* ROBERT BLY, A LITTLE BOOK ON THE HUMAN SHADOW (1988).

off the disturbing idea that when lawyers are unethical it is a reflection on her and her profession. A bad lawyer (whether bad in the sense of competence or bad in the sense of morals, or bad in the sense of both) is just one bad lawyer. You cannot, this student argues, make arguments about the goodness of the legal profession based on the lawyers who have gone astray. You can not let the bad lawyer influence your view of the good that lawyers do. Psychologically, the student was protecting her cognitive choice to be a lawyer and do what lawyers do, even doing what lawyers do when they are most frowned on by the public by using ego defense mechanisms: denial (the legal profession is not in trouble), rationalization (the argument that bad lawyers do not signify a bad profession), and compartmentalization (bad lawyers/good lawyers). The student confirms her *persona*, the legal *persona* necessary for deployment of the adversarial ethic, and denies the presence of the *shadow*, the moral impulse that tells us to respect and care for others regardless of what name we give the work we pursue, what we call our job, or who is paying the fare.

But covering the tracks that we make during the process of splitting ourself (into *persona* and *shadow*) and our lives (into lawyers and the person we are at home) is more difficult than it appears when it verbally is pronounced. Few of us can maintain a consistent and deliberate *persona* that successfully manipulates others into seeing us as we wish to be seen. It is one thing to learn to keep a straight face playing poker, yet another to keep the *persona* in place, shielding us from our own *shadow* and from the *shadow* of the profession. One may with practice, perform a straight poker face; it is more difficult to live a *persona*.[108]

We want to think that the right hand can act in a way that does not reflect on the left hand, that the left hand need never be implicated in what the right hand does. The right hand of Necessity may feed the

---

108. The *shadow*, regardless of how careful and deliberate we try to keep it in its place. The *shadow* has a life of its own. The more the *shadow* is disowned the more energy it has in our life. The more effort we put into maintaining the *persona* the bigger the wall necessary to keep the *shadow* in its place. The greater the fear that we will be found to be something more or less than we claim to be, the less we become at the *shadow's* behest. The *shadow*, having its own existence, takes up, seemingly on its own initiative, an other-worldly, denied, subterranean existence. And most importantly, having a life of its own, the *shadow* acts on its own initiative, separate and apart from the ego's desire to be in control, and proves to the world that we are what we have told the world we are. We become the split person. We become compartmentalized into professionals and private persons (the functional side of compartmentalization). We become compartmentalized into *persona* and *shadow* (the psychological and pathological side of compartmentalization).

left hand of private moral existence, but what the right hand feeds us cannot be digested without consequences for the character we become in the process. Right and left hand are assumed to function on different bodies, that is, we embody the one ethic (of a so-called professional morality, amoral and purposeless, or purposeful in the direction of extreme zealousness) with the one hand and the ethic of caring and concern,[109] respect and integrity, a hand that exists on the same body. The lawyer then wonders why she feels torn, split, fragmented; why she does not feel whole and complete; why each day seems to move her toward burn-out and emptiness, each day defined by the struggle to resist giving-up and giving-in.

XII.

What we are talking about is zealousness, no longer empowering, a zealousness that forgets itself, frozen into a rationalized philosophy of cruelty. Absent the character of Atticus Finch, zealousness practiced unreflectively requires increasingly more energy to justify. But first denial seems sufficient. We are simply unwilling to see the choices we make as having anything to do with, or deserving of moral inquiry. "I simply do not see this as an ethical problem," we say when confronted with the most obvious moral dilemmas. If we do not see the problem we do not worry about ethics. We do not worry about our zealousness as lawyers because we find it more convenient (and conventional) to proceed on ethical "automatic pilot". If we do not know what we are doing in the name of zealousness and use our zealousness unconsciously (willfully and arrogantly) then our adversarial ethic will take us astray. Knowing that some of us will engage in professional malevolence and get away with it sets us to

---

109. As a result of the work of Carol Gilligan the ethic of care is both widely known and debated in legal education circles. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). For further elaboration of the ethic of care *see*, NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION (1984). Gilligan's work, and the ethic of care, have received widespread attention in feminist moral theory. *See, e.g.*, WOMEN AND MORAL THEORY (Eva F. Kittay and Diana T. Meyers eds. 1987). Feminism and feminist moral theory have recently been presented as a critique of lawyering and lawyer ethics. *See, e.g.*, NAOMI R. CAHN, *A Preliminary Feminist Critique of Legal Ethics*, 4 GEO. J. LEG. ETHICS 23 (1990); Carrie Menkel-Meadow, *Portia in a Different Voice: Some Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

wondering.[110] What some of us will do in the name of zealousness makes a mockery of ethics.

Whether you would or would not take zealousness to its limits depends on who you are and where you are, on your character, common-sense, and self-image. A lawyer who is a trout fisherman might be unwilling, on what he takes to be personal moral grounds, to represent a company dumping pollutants into a trout stream. People who love old homes and lament the sorry spectacle of living in suburbs of blandness will not readily represent a real estate developer who wants to level historical homes and build an apartment complex. There will always be lawyers who counsel the vineyard owner against the use of the legal system to help him sell chemical-treated wines suspected as cancer-producing agents. And there is always, if we are lucky, someone who will see how doing what the client asks us to do is morally wrong, regardless of the fact that it can be done and he will get away with it and make money doing it. Some lawyers will refuse to seek a delay when the corporate client wants one simply to put pressure on a party to settle; some lawyers will even think it Necessary to do it and then find a way not to do it.[111]

Each of us much choose.[112] One of the choices we make is how we are going to adopt and adapt this ethic of zealousness to make it fit our character. The judgment that character makes possible, and the character of that judgment, are central to good lawyering and any

---

110. We do not know—I do not know—what to do about someone who sets out to do wrong in the name of right, evil in the name of good, when no law has been broken. There is much to despise and condemn that falls outside the realm of the prohibited and the criminalized. To create a perfect fit between law and morality would be to create a perfect hell.

> The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

GRANT GILMORE, AGES OF AMERICAN LAW 110-11 (1977) ("Law reflects but in no sense determines the moral worth of a society. " (paraphrasing HOLMES, THE COMMON LAW 36 (Howe ed., 1963))).

111. For an interesting commentary on why business men and women remain honest, even when the market-place seems to support dishonesty, *see* Amar Bhide & Howard H. Stevenson, *Why Be Honest If Honesty Doesn't Pay*, 68 HARV. BUS. REV. 121 (1990).

112. Some students of lawyer ethics argue that when you decide to be a lawyer you have already decided your ethics and little more need be said.

advocacy that claims moral worth. Without the kind of judgment we first learn (and continue to practice) as judgment of character we would be not only morally awash but professionally inept.

XIII.

There are those who claim that while the image and life of Atticus Finch is an exemplary one, his story is not relevant to the lives of today's lawyers. There is resistance to the kind of common-sense moral notions Atticus exemplifies. It is possible to defend against the simple moral lessons (ah, you say, "there is nothing simple in matter of morals and ethics") that Atticus teaches. First, many of us are not interested in moral lessons; we do not think we need them, and we are not likely to identify the moral teaching of the lessons that come our way. If we are not looking to examine the moral fabric of lawyering when it is pointed out to us, we probably will not take kindly to instruction as to the texture of the moral weave of lawyer work. We see best what we are looking for, what we already see well.

Even if we are open to moral teaching, to the lessons, demonstrations, and exemplars of good character (and are able to admit that there can be teachers of morals), these lessons must come at the right time, and in the right way. Then, and only then, are we willing to take account of the morals and ethics we are constantly in the process of learning and using, learning and failing to use, using without knowing how we have learned them.

Even in ideal circumstances there are obstacles to accepting the truth of Atticus' life that we can fashion a moral life without compartmentalization, Seymour Wishman's confession is presented to show that compartmentalization is false and the better it works the more pernicious it may turn out to be. Some readers of *To Kill a Mockingbird* complain that the picture of Atticus we get is from the eyes of a child and consequently must be taken with a grain of salt. After all, as one student put it (in assertive law school fashion) "we do not know what Atticus would do in a different situation other than the ones we are shown in the novel." For this student, Atticus' willingness to endanger his children's and his own well-being to defend Tom Robinson is an incidental matter. We can never know what Atticus would do if he were placed in the situation we are in today, says this student.

We know a good deal more about Atticus Finch than the student is willing to admit. We may know as much about Atticus as we know about any actual living lawyer. (Many law students enter law schools without any acquaintance with lawyers, real or fictional, except the ones they know from television.) We know more about Atticus than we know about the lawyers we accept invitations to

practice with, and perhaps more than we know about ourselves. We know where Atticus came from and who his people were. We know he was "Maycomb County born and bred"[113] and that he knew the people of Maycomb and that they knew Atticus. The Maycomb, Alabama, of the early 1930s is the kind of place where the cliche—everybody knows everybody else—is more than a cliche. We know Atticus' neighbors and we know Calpurnia, who takes care of Scout and Jem while Atticus is in town being a lawyer. We know something about the Black community in Maycomb, and something about how the Black community is organized around the Black church that Calpurnia attends. We know something about the church because Calpurnia takes Scout and Jem to church and we learn how that turned out.[114] Basically we know Maycomb, as a community and a troubled one, a community deformed by racism. We know what Atticus thinks about Maycomb and how, his regard for this place of his people must be reconciled with its racism.

It is with and in all this that we know Atticus and know something is wrong with the student's argument that we do not know what Atticus would do if presented with the kind of "real" problem that lawyers who take the adversarial ethic seriously face. It is what we know of Atticus that allows us to say that he has character, a character stalwart enough to make his adversarial ethic only a part of his character. What the student cannot admit and is unwilling to concede is that we do indeed know Atticus and what we know is that he has character beyond his legal *persona* and that his character helps us speculate about what he and we would and would not do in the name of an adversarial ethic. Atticus has the kind of character that all of us would like to have (or so many of us that it seems fair to say all of us). Even those who do not aspire to be like Atticus are not eager to admit to the implications of the impulses that would have us put Atticus and his character aside in our study of lawyer ethics.

The student goes on to point out that Atticus is a "fictional" character and that it is not realistic to try to live up to the moral standards of a fictional lawyer hero portrayed through the eyes of a child. This argument, like the amoral stance on the issue of zealousness, is another example of compartmentalization: there are Real people and there are characters in fiction; a Real World and a world of fiction. The characters in fiction are not real and therefore can have no real claims on us; characters of fiction can have no moral weight in our efforts to figure out how to live our own lives.

---

113. LEE, *supra* note 11, at 9.
114. *Id.* at 119-29.

Once we learn to psychologically compartmentalize our lives we find it handy for all sorts of purposes. Compartmentalization appears to offer protection of the moral character we have already adopted. It is convenient that Atticus, and his character, are fictional and can so easily be set apart from our Real World concerns. Your problem, the student tells me during our discussion of Atticus, is that you take Atticus too seriously. You act as if Atticus were real, you forget that he is not.[115]

This brief, but intense, classroom dialogue raises interesting pedagogical, ethical and epistemological issues. What is a teacher to do when a student asserts that they cannot be expected to have character as a lawyer? What are we to do when young initiates of the legal profession assume that the adversarial ethic is the only one they will need to be a good lawyer? And is that not what we hear and see in the legal profession? In response, I hold to the reality of Atticus Finch and his character. We know that Atticus has character because we know him, his neighbors, and how his neighbors respect him: they send him off to the legislature in Montgomery even though Atticus is different, reads all the time, is a bit detached, walks when everyone

---

115. There are diverse intellectual strategies available to those who seek to avoid learning what Atticus has to teach. The argument, a composite of those I have heard over the years, goes something like this:

> Why should I believe that any person can have the kind of character that Atticus does? And if such character is possible, what reason is there to believe that anyone today would be interested in trying to be like Atticus? And even if someone among us could imagine herself being like Atticus, it is not me.
>
> There are many ways to be good. We don't all have to be good like Atticus. It is good that we are not all like Atticus and it is good that I do not particularly want to be like him. I can be good in my own way. It is in the many ways that we are different in our moral perspectives and the many ways that we are good that makes for a lively world. We should not set up Atticus as the moral beacon for all lawyers. Who knows what kind of problems and dilemmas we are going to face? And is it not harmful to create unrealistic expectations about the kind of character one might have as a lawyer? What is going to happen to your self-image when you hold up Atticus Finch as the image of the good lawyer and find that you cannot live like Atticus? Atticus is a fictional creation.
>
> No real person who has the character that Atticus Finch has. The way I see ethics cannot be held up against a fictional portrayal of character, or for that matter held up against anyone's determination of what it would mean to be a good lawyer. There are no heroes (moral saints) to tell us what our ethics should be.

else has given up walking for riding around in automobiles, and disturbs the community profoundly in the zeal he devotes to presenting a truthful defense of Tom Robinson, confronting the community with its racism. We know Atticus and we know that Atticus knows his own mind. Atticus has, as Thomas Bolt said of Sir Thomas More, an "adamantine sense of his own self."[116]

The defense against learning ethics from Atticus may be one of those situations where what we know about another person is simply too threatening to the choices we are making to accept. To accept Atticus, to understand his character, and to accept the possibility that we need a character like Atticus' to be an ethical lawyer is going to come hard to those who think it possible to learn lawyer ethics from a rule book, to be zealous without regard to the costs.

---

116. BOLT, *supra* note 16, at xi.