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FROM "MORAL STUPIDITY" TO PROFESSIONAL RESPONSIBILITY

THOMAS D. EISELE*

"We are all of us born in moral stupidity, taking the world as an udder to feed our supreme selves: Dorothea had early begun to emerge from that stupidity, but yet it had been easier to her to imagine how she would devote herself to Mr Casaubon, and become wise and strong in his strength and wisdom, than to conceive with that distinctness which is no longer reflection but feeling—an idea wrought back to the directness of sense, like the solidity of objects—that he had an equivalent centre of self, whence the lights and shadows must always fall with a certain difference."

George Eliot, *Middlemarch*¹

Within the context—even, the challenge—presented by the first chapter of Seymour Wishman's book, *Confessions of a Criminal Lawyer*,² we symposiasts have been invited to say something about the teaching of courses which in law school go under the titles, "Legal Ethics," "Professional Ethics," or "Professional Responsibility." This last is the title of a two-credit course that I teach, in what I take to be a fairly traditional form, over the span of a semester at the University of Cincinnati. In this essay, I want to talk about the teaching of such a course; not about how I manage to teach it, however, but rather *why* I find it so difficult to teach.

For I do find the traditional Legal Ethics course difficult to teach—difficult and demanding and frustrating. And it is difficult in a way that I believe is not common to the difficulties and demands faced in teaching other traditional courses in law school (e.g., Property, Estates & Trusts, Jurisprudence). By way of warning, I should note that in making my comments I claim no expertise in this field. I have taught Legal Ethics only three times in the past seven years. What I have to

* Judge Joseph P. Kinneary Professor of Law, University of Cincinnati. I appreciate the critical comments on an earlier version of this paper that I received from Jim Elkins, Tom Shaffer, and Jim White. They helped me to say better what I wished to say, without endorsing it.

I dedicate this essay to Tom Shaffer, as a way of honoring his work in this field. No one of whom I know has made a more personal or professional contribution to the teaching of Legal Ethics. Tom Shaffer cares; and he is committed to the ensuing work entailed by such caring.

¹ George Eliot, *MIDDLEMARCH* 243 (Baltimore: Penguin Books, W. J. Harvey ed., 1965)(first published 1871-1872).

² Seymour Wishman, *CONFESSIONS OF A CRIMINAL LAWYER* (New York: Penguin Books, 1982)(1981).

say, then, others before me may have noticed—and they may have noted it better, or at least differently, than I shall mark and enter it here for discussion. All I wish for my comments is that they help to identify what seems to be a systematic tension in the teaching of a traditional Legal Ethics course, and that they do so within the context of considering Seymour Wishman's balanced and considered recounting of his own struggles (as he was turning himself into an experienced criminal lawyer) with the ethics of his actions.

I. THE DIFFICULTY OF TEACHING A TRADITIONAL COURSE IN LEGAL ETHICS

Let me start by saying that Legal Ethics is my least favorite course among the five courses that I teach with any regularity. This is not a promising beginning. Nevertheless, it seems the right place to start, because such an admission impels me to seek some sort of an explanation for this lack of enthusiasm. After all, as a law teacher of some 10-15 years of experience, I am admitting that I take responsibility for teaching a course that I don't much enjoy. Short of masochism, why would anyone (anyone with tenure) undertake such an apparently self-viscerating project? Also, I recognize that my attitude toward the traditional Legal Ethics course is incongruous in another respect. Over the years, I have on the whole enjoyed teaching in law school and have found it rewarding. So why is *this* course so difficult? What might explain my antipathy toward teaching Legal Ethics?

The most readily available candidate for an explanation—the fact that the materials of such a course are themselves difficult and unwieldy—can, I think, be put aside. It is notorious that, in dealing with issues of professional ethics, the applicable materials are various and complicated. They include not only a variety of federal and state cases, but also two general codes from the American Bar Association³ (adopted in several variations by the 50 states), as well as a vast array of state and federal statutes. (In using the phrase, “traditional Legal Ethics course,” I am assuming in part that such a course comprises this collection of variegated source materials. A differently constituted course would not be “traditional” in my use of that term.) Then, too, this plethora of materials is further complicated by the fact that cases posing legal ethics issues arise within (and implicate other issues of law in) every area of substantive and procedural law. These facts mean,

³ The 1969 Model Code of Professional Responsibility and the 1983 Model Rules of Professional Conduct.

however, only that a course in Legal Ethics is difficult to master. But such difficulty is not in itself a reason for finding a Legal Ethics course unrewarding. As many teachers would testify, the challenge of mastering a difficult course can be a spur to a teacher's creativity, goading one on to greater effort. Mastery brings with it an increased sense of accomplishment. (For example, in my struggles to master the notorious Rule against Perpetuities, which I teach in both my Property and my Estates & Trusts courses, the difficulty of mastering the Rule has not meant that I have found teaching either course unrewarding; just the opposite is true.)

If, then, it is not simply the struggle of comprehending such various materials, and of communicating them cogently to one's students, what makes the traditional Legal Ethics course difficult to teach? And why might one find the teaching of these materials to be unrewarding? In thinking about these questions, I have come to the conclusion that teaching the traditional Legal Ethics course is difficult (and I find it unrewarding) because it engages me in teaching in a way that I do not otherwise teach in law school. One way of stating my sense of the pervasive difficulty of teaching a traditional course in Legal Ethics is to say that, in such a course, law teachers are asked (or required—by the materials) to teach *against* how or what we teach in most other courses in law school.

The dilemma is this. In law school, we teach our students how to analyze and argue cases, using the rules and the legal materials as they find them, whichever side they may find themselves on.⁴ This means that law students must learn to understand and apply legal rules without qualms about any pre-existing commitment they may have in favor of one side or another of a legal issue. Or, perhaps it is better to say, law students are asked to commit themselves *only* to the argument itself, to forging the best argument (logically, rationally, persuasively) they can manage to forge out of the materials at hand. In this respect, they are rhetoricians. And this is not a bad thing; "rhetoric" is not an epithet in law school.⁵ Law students are expected, and are trained, to

⁴ Elsewhere, I have tried to describe in more detail the process of disillusionment and reaffirmation through which law teachers take their students (on my account of a modified Socratic method of teaching). A part of this lesson is learning that the applicable rules, cases, and other legal materials always have two (or more) sides. Interested readers might wish to look at my essay: Thomas D. Eisele, *Bitter Knowledge: Socrates and Teaching by Disillusionment*, 45 Mercer L. Rev. 587 (1994).

⁵ More than anyone else, James Boyd White has made accessible—while he also has resuscitated—the rhetorical dimension of lawyering. His work rescues rhetoric from its pejorative fate in the ancient tradition of Socrates and Plato (by using the very resources

commit themselves to the side they are fortuitously assigned in class, just as they will find themselves in practice committing themselves to their client, whoever he or she may be, when the client walks into their law offices and presents them with a legal problem, a case.

This way of teaching instructs law students that they are agents for their clients, fiduciaries who must take seriously the responsibility of representing their client's interests as best they can. By and large, law students learn this lesson well. In my experience, they take seriously their vicarious responsibility for the positions they assert and defend (as they also take seriously their personal responsibility for the quality of the work they do in law school). And this development continues in law practice, where it is pretty much the normal course of events for lawyers to adopt the positions of their clients. By advocating clients' positions or interests, we advocates identify with them—those positions or interests and, indirectly, with those clients. (In a sense, we turn ourselves into them.) I suspect that most of us most of time become captured by the positions and interests of our clients, of our principals. "You are what you speak." We become co-opted by, or captive of, the side we represent. We come to believe in the justice of the case we are presenting (in court or in negotiations).

But this way of teaching changes in traditional Legal Ethics courses, or the dynamics of the teaching change. In the traditional Legal Ethics course, we typically try to prevent (or, at least, to resist) this transformation. In such courses, we turn around and ask our students to pierce the veil of their vicarious (substitute) responsibility, their representation of their client's interests, so that they can consider the ethical dimension of their own actions on behalf of their principal. In effect, we are challenging our students to assess themselves (their behavior, their actions as lawyers for their clients) on the basis of their own cares and commitments, their own interests. And yet they still are being taught this lesson *within* the larger context of their being taught to emulate and enact the role of the uncommitted advocate, the advocate for hire.

In traditional Legal Ethics courses, then, we teachers seem to be telling our students (asking them, rather) to conform their lawyering activities to the following two conflicting maxims:

of that tradition to reconstitute itself). In particular, I recommend White's third book as an instructive way of coming to appreciate the rhetorical dimension of the law. See James Boyd White, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (Madison: University of Wisconsin Press, 1985)(especially Chapter 2).

(1) Treat this activity of lawyering—of argument, of advocacy, even of analysis—as something impersonal to you: it is a task, a professional challenge or chore, but something that exists only on the level of your representation of another, your vicarious (substitute) responsibility for the interests and rights of another person; and

(2) Treat this same activity of lawyering as something personal to you, something for which you take not only professional responsibility but also personal responsibility, something for which you are answerable (as any person is).

We seem to be telling our students two fundamentally opposed things: (1) Be impersonal and professional; *and* (2) Be yourself (be the person you were or are outside of your role as lawyer). And, if this is what we are saying, then how can we expect our students to embrace such a fundamentally dissonant activity? Can we expect them, or even hope for them, to resolve it? (Where "it" refers to perhaps *the* fundamental antinomy of the legal profession, in so far as that profession is built upon an adversarial ethic, or an ethics of advocacy.) I am not sure that we can expect them to achieve on their own a resolution of this conflict. Yet, I also am not sure that in class I can help them to resolve this conflict. For a teacher, it is an unrewarding fix in which to find oneself.

II. PERSONAL RESPONSIBILITY V. VICARIOUS RESPONSIBILITY

I am not the first person to have noticed this dichotomy in the dynamics of teaching a Legal Ethics course. For example, I hear this perception of dissonance being expressed in the "Introduction" of the book that I like best in this area, Thomas L. Shaffer's wonderfully rich and challenging casebook, *American Legal Ethics*.⁶

Shaffer introduces his casebook by noting the extent to which a Legal Ethics course can be built around two related conflicts of values. He says (1) that, on his view, the field of Legal Ethics "insists on being both *personal* and *cultural*";⁷ and (2) that its questions "are broad [moral] questions; but ... they are also vicarious."⁸ He brings together these two possible foci of a Legal Ethics course in the following passage:

⁶ Thomas L. Shaffer, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* (New York: Matthew Bender, 1985).

⁷ *Id.* at xxi (emphases in original).

⁸ *Id.* at xxiii.

This vicarious focus gives our subject two kinds of tension: (1) between a lawyer's morals and the morals of his client, and (2) between a lawyer's morals and his sense of public and professional duty. Those tensions are topical in legal-ethics classrooms; we who work together there are aware of the tensions; we *feel* them.⁹

Some teachers may feel or experience these tensions. But do we know what to make of them? I am not sure that we—or that I—do.

Shaffer's identification of these tensions, these dynamic pressures and conflicts, is rich beyond count, and his work suggests any number of dimensions along which we might measure the course of a person's ethical conflicts. I cannot profitably work out the variety of dimensions here, but instead must limit myself simply to mentioning two.

First, Shaffer's "personal/cultural" distinction cuts in a couple of directions. At a minimum, it describes (i) the tension between an individual lawyer's sense of himself or herself as a person, as an individual; and that individual lawyer's sense of himself or herself as a member of a community—be the community legal or non-legal (religious, political, ethnic, whatever). And the "personal/cultural" distinction also describes (ii) the tension between an individual lawyer's sense of himself or herself as a lawyer, an individual craftsperson; and that individual lawyer's sense of himself or herself as a member of the profession, the legal community.¹⁰

Second, Shaffer's "moral/vicarious" distinction also cuts in a couple of directions. At a minimum, it portends (i) the tension between a lawyer's commitment to his or her own personal moral code; and that same lawyer's commitment to a professional moral code. The "moral/vicarious" distinction also describes (ii) the tension between a lawyer's commitment to any moral code (be it personal or professional); and that same lawyer's commitment to represent the interests of his or her client (the person for whom he or she is vicariously responsible).

Here, I am drawing selectively from Shaffer's dichotomies to examine, on the one hand, a lawyer's *personal* responsibility for what he or she does; and, on the other, his or her *vicarious* responsibility for the same. Let me try to develop this distinction on what seems to be an intuitive level. At a minimum, lawyers are personally responsible for

⁹ Id. at xxiv (emphasis in original).

¹⁰ It seems to me to be possible that an individual lawyer might also be divided between his or her sense of himself or herself as an individual craftsperson; and his or her belonging to a non-legal community (be it religious, political, ethnic, or whatever). But this further development only emphasizes my earlier statement that these dichotomies are capable of additional elaboration, and I do not here wish to proceed further along this line.

what they make out of the legal materials at their disposal. If they fashion a poor argument or craft a lousy brief, this is something for which they are personally responsible. This poor argument, this lousy brief, is something they themselves did, and it reflects directly upon their person (even in its guise as a lawyer). *That* a lawyer has to make an argument on behalf of his or her client is not something the lawyer has chosen; it is a necessity of the role of being a lawyer, a necessity of the activity of lawyering. This much every lawyer must accept—or else stop being a lawyer. But *which* argument a lawyer makes on behalf of his or her client—and *how* the selected argument is made—are very much a function of choices made by that lawyer.

Summarizing, I would say that a lawyer is *vicariously responsible* for the necessity of making an argument, because that is something he or she must do once the lawyer has accepted the assignment of representing a particular client. The lawyer is vicariously responsible for making an argument because this is something done on behalf of the client; it is done as proxy for the client (because the client otherwise would have to make an argument for himself or herself, if no one were willing to represent him or her). But *what* argument the lawyer subsequently makes and *how well or poorly* he or she makes it are both actions for which the lawyer is *personally responsible*. The particular argument made is an artifact that the lawyer has fashioned and entered into the legal arena, and every artist or craftsman is personally responsible for his or her work.

This is, for me, the most intuitive level on which the "personal" versus "vicarious" distinction works. But this distinction also seems applicable to the activity of lawyering on a slightly different level, perhaps a more general or abstract one. Here we are talking not about the specific distinction between types of responsibility solely at the level of legal argument, but rather about differing types of responsibility that a lawyer has *qua* lawyer (whatever activity of lawyering the lawyer may be engaged in, be it making an argument or something else). What we might call our "vicarious responsibility *as lawyers*" locates our responsibility for the protection and advancement (if legally possible) of our clients' best interests. We substitute for (stand in the shoes of) our clients in the sense that we try to achieve their goals or effect their wishes (all, of course, within the bounds of the law). On the other hand, our "personal responsibility *as individuals who happen to be lawyers*" locates, instead, our responsibility for the consequences of our actions *in our role as lawyers*, including their effects upon people not our clients.

Vicarious responsibility narrows or focuses our responsibility by limiting it (*not* removing it). Our vicarious responsibility is concentrated

in our role as advocate for and protector of the interests of our client. In terms of vicarious responsibility, we lawyers are (solely? wholly?) committed to our client's well-being.¹¹

Personal responsibility, on the other hand, dilutes our responsibility (again, without removing it). It spreads wider the net or web of our moral commitments by including in this wider system the interests and well-being of others: parties for the other side, "neutral" parties (e.g., witnesses or experts at a trial), the court itself (at least in the person of the judge), lawyers for the other side, and so on. Our personal responsibility includes our actions as lawyers in so far as we are persons or individuals (who happen to be lawyers). In this respect, then, the role of lawyering does not define or delimit our personal responsibility. This professional role may, in fact, involve us in more—and in more complicated—ethical relationships than we otherwise would find ourselves involved in. On the personal level, the role of lawyering does not contract our moral responsibility—instead, that role expands our moral responsibility. Whereas, on the vicarious level, the role of lawyering contracts (rather than expands) our moral responsibility. This dissonance in moral effect, then, seems to be the source of many ensuing ethical conflicts.

If I am correct in my brief sketch of this complex of relationships between vicarious responsibility and personal responsibility, then I hope that it can serve as a rough guide for thinking about some of the

¹¹ I hesitate here (putting in parentheses my queries, "solely? wholly?") because I am mindful that lawyers have professional responsibilities toward people or institutions other than their clients (e.g., toward a court in which they are appearing or the judge before whom they are appearing). It seems to me at least initially plausible to characterize such responsibilities as being in part vicarious and in part personal, and it would require a great deal of time and space to develop or show the plausibility in such a claim.

On the other hand, there seem to be professional responsibilities that are neither vicarious nor personal. For example, we sometimes speak of a lawyer's responsibility "for the (current state or condition of the) law," or "for the legal system (as a whole)." Sometimes, we even speak of lawyers' being responsible for "our criminal justice system" or the "workings of the judicial process." How are we conceiving such responsibilities? They hardly seem equivalent to the vicarious responsibility a lawyer has for the interests of his or her client, for they are not episodic in the same way and do not seem to be related to a specific task accepted—or a particular agency relationship assumed—by a lawyer (as is the case, I believe, with a lawyer's vicarious responsibility toward a client). On the other hand, I do not know that I would be willing to call these "personal responsibilities," because such objects as "the law" or "the state of the criminal justice system" do not strike me as the sorts of things for which a person can take personal responsibility.

Accordingly, I am aware that the dichotomy I explore (between vicarious and personal responsibility) neither explains nor clarifies everything we may want to know about a lawyer's responsibilities for his or her actions.

conflicting ethical demands made upon lawyers' behavior. Now, I want to move on to ask: Can we expect or hope that our students in a traditional Legal Ethics course will be able to resolve this complex tension of ethical commitments or responsibilities?

I doubt that they can. The problem, as I see it, is this. In teaching law, as I stated above, we traditionally require our students to make arguments (or to perform case analyses) in class. And the rules (or the cases) are *there*, in the classroom, to be used in argument (or to be analyzed). Since they are there, we—all who participate in the class—can witness and assess how well or poorly, how aptly or inappropriately, how cogently or incoherently, the student does performing the assignment. This means that we all can see and judge how the assigned student relates himself or herself to the task at hand: how well they argue, how poorly they analyze, how cogently they marshal the facts, how incoherently they recount the parties' stories, etc. The arguments, the cases, the facts, the claims—all of them are a part of the reality of the classroom; they are something we actually create as well as use (along with the aid and assistance of our students) before our very eyes. They exist in the classroom as a product of people arguing, debating, analyzing, hypothesizing, explaining, describing, etc., then and there.

It may or may not be the case that the argument a student makes in class would or would not "work" in the "real world"; that is a matter for speculation and, possibly, informed debate. But it is *necessarily* the case that the argument made in the classroom *does* either work or fail there, as it is made.¹² And so we can assess each student's fulfillment of his or her personal responsibility for the rightness, the aptness, the cogency, of the argument. The student's responsibility for what he or she has fashioned can be studied and assessed in the classroom.

The same cannot be said for the student's ability either to represent a client, or to relate to a client (or, for that matter, a student's ability to relate to other, non-client parties who might hypothetically be made a part of the argumentative context). Except for special situations—such as clinical settings or empirical simulations—we cannot say that there

¹² When we make an argument in law school, that is exactly what we do: we *make* an argument. It may not be exactly the same argument one would make in court (or in front of a particular judge), but it remains as truly and actually an argument as any might or can be. And the student's responsibility for the argument he or she fashions remains the same as it would be in the so-called "real world." In other words, the student's responsibility for the quality of the argument he or she makes, does not change depending upon the forum in which the student makes the argument.

is a client for a student to represent, or to whom to relate.¹³ No actual client exists; no actual lawsuit exists; and no actual court exists. And, because of this, there is no way we have of trying to estimate or assess how a student might treat the client, how he or she might actually resolve a conflict that arises (say) between the student's sense of vicarious responsibility for the client's interests and the student's sense of personal responsibility (toward himself or herself or toward others).

We can, of course, try to simulate these things, and sometimes we succeed. But the value of simulation as a teaching technique only proves my point, because what we are trying to simulate in the classroom is the thing we feel missing: *the reality of the other*, the reality of the client and of others involved in an actual lawsuit (or legal transaction). We resort to simulation when we feel the need for a larger dose of reality, when we feel the need for more realism. But what we are thereby trying to make real, to simulate, is the reality of the ethical conflict between a lawyer's personal and vicarious responsibilities. Perhaps, on occasion, legal clinics and class simulations fill this need;¹⁴ but, without them, the classroom experience of a Legal Ethics course does not and cannot reproduce or duplicate the reality of the ethical conflict we expect (or hope) our students will learn to resolve in such courses. And, without such replication, how can we expect them to achieve such a resolution? How are they supposed to resolve a conflict that we are unable to reproduce in the classroom?

I am trying to convey my sense that arguments in law school (as well as analyses, hypotheses, theories, claims, facts, etc.) are factors in relation to which a law student's behavior can be assessed (ethically, or otherwise). But a law student's behavior cannot be assessed with respect to how well (or poorly) the student relates to his or her client (or to the client's lawsuit, or to the court, or to the judge, or to the other parties,

¹³ I am reminded that my remarks are limited to what I am calling the "traditional Legal Ethics course" when I read the collection of materials in a recent symposium issue: *Teaching Legal Ethics*, 58 Law & Contemp. Probs. 1 (1995). These materials suggest that alternative courses exist. For example, Robert Burns describes a one-semester course at Northwestern University that integrates Trial Advocacy, Evidence, and Legal Ethics taught through simulation, which integrated course receives 10-credits. See Robert Burns, *Teaching the Basic Ethics Class Through Simulation*, 58 Law & Contemp. Probs. 37, 43 n. 19 (1995). Still, for law schools lacking either the curricular flexibility or the institutional resources described in this set of papers, I suspect that the traditional Legal Ethics course will remain the norm. (Perhaps it should not; but I suspect it will.)

¹⁴ On teaching legal ethics in a clinical setting, see Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, 71 Notre Dame L. Rev. 605 (1996); and Christine Mary Venter, *Encouraging Personal Responsibility—An Alternative Approach to Teaching Legal Ethics*, 58 Law & Contemp. Probs. 287 (1995).

etc.) because no such client (or lawsuit, or court, ...) exists in law school. So, the potential conflict between the student's personal responsibility and his or her vicarious responsibility, is not really posed in class, and it cannot be. (I do not say that such a conflict cannot be imagined or described in class; I only say that it cannot be created or posed.) In the law school setting (except, again, in the circumstances of live-client clinics and some empirical simulations), creating or duplicating such a conflict is not a pedagogical possibility. And, if such a conflict cannot be posed, then whatever learning we hope to be generated or gained by a student's struggling to resolve such a possible conflict, cannot occur—because the conflict is not there for the student to resolve.

III. WISHMAN'S STORY

It is at this juncture that I find Wishman's autobiographical passage to be useful. It shows us how and when and where ethical conflicts can arise in the life of a lawyer. In this respect, Wishman's account is a useful supplement to the law school classroom, because Wishman's story demonstrates that these potential conflicts (about which we may have been talking in the classroom, but which are, I am claiming, generally impossible to duplicate in the classroom) are real. They can and do happen to lawyers in the course of their professional lives. So Wishman shows us, for example, that a lawyer's vicarious responsibility for his client may well conflict with that lawyer's personal responsibility toward himself, or toward others (who may include—but who are not limited to—his client), or toward all of these people, and perhaps even others. Such conflicts are often lived out in the developing life of any lawyer.

The story in Wishman's first chapter tells of the development of his moral sensibility as a young lawyer, and for this purpose Wishman focuses on two very distressing, disconcerting, experiences. One relates to a nurse, a Mrs. Lewis, who was the victim of an alleged rape and, thus, was the main witness at the trial regarding the crime. Wishman was counsel for the defendant. How Wishman treated Mrs. Lewis on the witness stand, and how he later came to view his treatment of her, are the two main threads of his first recounting.

The other person Wishman tells us about in his first chapter is an unnamed defendant in a criminal case prosecuted by Wishman roughly 8-10 years prior to the incident with Mrs. Lewis. This earlier case dealt with a robbery and an associated assault and battery (with Mace) of the robbery victim. Here again, Wishman's story hinges on how he initially perceived his actions during trial (which led to the defendant's conviction), and how he later came to think that perhaps he had acted

inappropriately, and what Wishman did to correct the impropriety (as he then saw it) of his earlier actions.

In the first case, regarding Mrs. Lewis, Wishman recounts how one night he was entering the lobby of a hospital's emergency room, escorting the sister of an injured client who was at the hospital. In crossing the lobby, Wishman was assailed by a nurse—Mrs. Lewis, it turns out, but at the time she was unknown to Wishman by name or sight. This nurse, infuriated by the mere sight of Wishman, shouted obscenities and tried to get Wishman thrown out of the hospital.

When things calmed down, Wishman realized that this nurse had been the complainant and main witness in a rape case where Wishman had defended the alleged attacker. During his cross-examination of the nurse, Wishman had suggested that she had had consensual intercourse with the defendant and had filed a false rape charge when the defendant failed to pay for the sex. But now, in retrospect, after suffering this assault upon his own sensibilities, Wishman is somewhat shocked and abashed to realize, in recalling his treatment of the witness, that he had humiliated her. His cross-examination of Mrs. Lewis had exposed her to a second humiliation, heaped upon that of the first (her rape):

Weighing on me more heavily than the possibility that I had helped a guilty man escape punishment was the undeniable fact that I had humiliated the victim—alleged victim—in my cross-examination of her. But, as all criminal lawyers know, to be effective in court I had to act forcefully, even brutally, at times. I had been trained in law school to regard the 'cross' as an art form. In the course of my career I had frequently discredited witnesses. My defense of myself had always been that there was nothing personal in what I was doing. This woman [Mrs. Lewis, the witness-victim] was obviously unwilling to dismiss my behavior as merely an aspect of my professional responsibility....¹⁵

Wishman's initial view had been that brutality was a part of cross-examination; perhaps not inevitably or necessarily a part of it, but the possibility of being brutal on cross-examination is always *there* in the trial process. Any aspiring lawyer learns, he says, that the "art" of cross-examination might turn into a brutal exercise. To Wishman's mind, this possibility has to be accepted as a part of the price we pay for our adversarial system of justice. Its possible (or likely) effect on the witness is somehow justified by its being "merely" a part or aspect of a lawyer's "professional responsibility."

In the second case, Wishman tells how it dawned on him, only after

¹⁵ Wishman, *supra* note 2, at 6-7.

trial, that he had helped to convict a defendant who possibly was innocent. The defendant had visited an employment agency shortly before it was robbed, and the agency manager had been sprayed with Mace during the robbery. The agency manager had subsequently identified the defendant as the perpetrator, whereas the defendant proclaimed his innocence. The defense was based upon the defendant's claim to have visited the agency shortly before the attack, at which time the defendant had filled out some employment forms in his own handwriting. The defendant suggested that the manager was confusing the defendant with the assailant; the defendant's face "seemed" familiar to the victim (so the defense argument went) only because the defendant had visited the employment office earlier in the day. But the defense failed to offer any corroborating evidence of the defendant's earlier visit—for instance, the defendant might have offered (but did not) evidence of the earlier visit based upon an analysis of the job application forms filled out that day, using handwriting analysis from a specialist (whose fee would have been borne by the state). Apparently, such evidence might have shown that the defendant truly did visit the agency before the robbery (rather than a "shill" who, I suppose, might have visited it as an excuse for casing the place, and who might have written the defendant's name on the forms). Therefore, because the defendant failed to offer any such evidence, and because it could have been obtained fairly easily and at the expense of the state, Wishman as prosecutor dismissed the defendant's explanation of how the agency manager might have come to have confused the defendant's face with the face of the actual criminal. "There were only two ways I could interpret the absence of a handwriting expert: either the defense counsel had been negligent or he knew an expert's testimony would have confirmed the guilt of his client."¹⁶

The jury convicted the defendant, somewhat to the surprise of prosecutor Wishman and, initially, in the glow of victory, he was "elated." But his elation wore off as he yielded to a nagging doubt. "[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 hadn't occurred to me that I might have been responsible for the conviction of an innocent man."¹⁷ So, with some anxiety, Wishman decided to send handwriting samples from the job application forms to an expert. The ensuing report seemed to confirm the defendant's explanation. After much effort and exertion (eight months after trial,

¹⁶ Id. at 11.

¹⁷ Id. at 11-12.

while the defendant sat in prison), Wishman got the original conviction set aside.

Since I hadn't had a 'substantial belief' in the defendant's innocence, but believed only in the *possibility* of his innocence, [a judge whom Wishman respected] would have maintained that legal ethics required me to continue the prosecution of the case, leaving it to the jury to make the final decision about guilt. But I had not been able to let the case rest because I had found the possibility of having convicted an innocent man too upsetting from a personal standpoint. The prospect of fighting for the acquittal of guilty men, as I later would do as a defense lawyer, didn't disturb me—denying society the conviction to which it was entitled was a different matter, because 'society' was too abstract an idea for me. But Mrs. Lewis, the nurse I humiliated years later, would be a casualty of my skill as a defense lawyer in winning an acquittal, and Mrs. Lewis was not an abstract idea, even if it had taken her screams to bring that fact home to me.¹⁸

Wishman's initial assessment of his own actions—his unthinking assumption about them—is that he is merely doing his chosen professional task well, both in terms of his vicarious responsibility for his client (i.e., protecting and advancing the client's interests through legal means) and in terms of his personal responsibility for doing his job well (i.e., undertaking and fulfilling the task of cross-examination, or the task of prosecuting an accused criminal). Wishman knew how to present a case to a jury, he knew how to cross-examine a hostile witness; and that is the end of his responsibility for his actions or their consequences. On this view of the matter, then, each legal task or action involved Wishman only as a professional, only in his professional capacity; it did not implicate him as a person, or in any personal way. In the nurse's case, Mrs. Lewis simply did not understand that "as all criminal lawyers know, to be effective in court I had to act forcefully, even brutally, at times. I had been trained in law school to regard the 'cross' as an art form. In the course of my career I had frequently discredited witnesses. My defense of myself had always been that there was nothing personal in what I was doing."¹⁹ And this conception of professional responsibility is not idiosyncratic to Wishman; it is widely shared throughout the legal profession by lawyers and judges.

For example, in the (wrongly?) accused defendant's case, Wishman remembers that when he tried to inform the original trial judge of the

¹⁸ *Id.* at 13-14 (emphasis in original).

¹⁹ *Id.* at 6.

possible wrongful conviction, the judge rejected Wishman's attempt to intervene, or to correct what he now saw as a mistake. "The judge said I had had no business meddling with the conviction; our adversary system had separate roles: a prosecutor should prosecute and a defense lawyer should defend, and if I had had doubts about the handwriting, they should have been resolved before the conviction."²⁰ Wishman did not, however, end up accepting this judge's view of his responsibility for the result of that trial. Similarly, almost a decade later, Wishman was shocked by Mrs. Lewis' attack, and he began to realize that he had humiliated her in cross-examination.

So Wishman comes to see himself and his actions differently; he comes to see an aspect of himself and his actions that he had previously missed. For whatever reason, Wishman's experiences get him thinking, forcing him to think about who he is *as a lawyer* and what kind of a lawyer—and a person—he is turning himself into as he continues through his admittedly successful legal career.

The very last paragraph in Wishman's chapter closes with an expression of fear: "[O]ne thing was clear: that nurse's anger, her palpable hatred of me, frightened me. Not that I expected her to harm me physically, but I was frightened by the person she saw ... frightened that I could be seen that way...frightened that I might *be* that person."²¹ The fear expressed here is as palpable as Mrs. Lewis' hatred for Wishman, and it is complex. In part, of course, Wishman fears the force of Mrs. Lewis' assault; but another aspect is Wishman's recognition that he fears what—if he explores further his actions and his thoughts about them—he may learn about himself. Self-knowledge is not easy, and it is not pretty, and it is not fun, however much it may benefit us. A medicine may help us, but its bitterness still repels, and the taste may linger. "[This] is why the path of self-knowledge is so ugly, hence so rarely taken, whatever its reputed beauties. The knowledge of the self as it is always takes place in the betrayal of the self as it was."²² How many of us truly want to know who we are and what we have done? Wishman's willingness to confront himself and his actions is unusual, and unusually candid.

²⁰ *Id.* at 12.

²¹ *Id.* at 18 (emphasis in original). This honest portrayal of the anxiety in two people confronting one another, is one of the best things about Wishman's account. It seems to capture the anxiety we can feel when we truly inquire into who we are and what we have done (or what we are in the process of doing).

²² Stanley Cavell, *THE WORLD VIEWED: REFLECTIONS ON THE ONTOLOGY OF FILM* 160 (New York: Viking Press, 1971).

IV. PROFESSIONAL RESPONSIBILITY IS PERSONAL

Without having done justice to the rhythm of Wishman's story, which develops naturally and powerfully to its climax in the frightening recognition scene I have just quoted, and without having done justice to its moral complexity (because it is not simply *obvious* that Wishman's initial actions were morally wrong), I want to consider briefly one aspect of Wishman's dawning awareness that perhaps he had done wrong (morally). What I think Wishman begins to see or to realize is that he and his behavior could be viewed the way they were seen by Mrs. Lewis—because *he* begins to see himself and his actions this way. This leads me to ask two questions: First, how is it that Wishman could be blind, initially, to this possible way of seeing himself and his actions? Second, what allows or enables him to become aware of this possibility? What lets him see himself in this way (i.e., in the way that Mrs. Lewis saw him)?

Wishman had not known or understood—had not been aware of (until Mrs. Lewis screamed at him)—how he had acted toward her when he, Wishman, had questioned her during the rape trial. Similarly, as Wishman admits, he had not been aware of what he might be doing in the robbery-Mace assault case (“it hadn't occurred to me that I might have been responsible for the conviction of an innocent man”²³). What seems to make this blindness possible is Wishman's acceptance of the common ideology of lawyering. Wishman believes, that is, that while he is engaged in the activities that constitute being a lawyer, he is responsible only for representing the best interests of his client (and, thus, his moral responsibility is reduced or narrowed to coincide with the limits of his vicarious responsibility to his client). Whoever gets in the way of the protection of his client's interests is fair game: any such person can be treated with impunity by Wishman, apparently, so long as Wishman's actions toward this other person protect the legitimate interests of Wishman's client.

This is, I believe, the common internal vision of the legal profession, its understanding of its responsibilities. So, ascribing such a view to Wishman may not be controversial. Still, evidence supporting the ascription of this view to Wishman can be found throughout his story. Consider a sampling of passages in which Wishman describes his motivations and satisfactions:

²³ Wishman, *supra* note 2, at 11.

(1) About Injustice

I had applied to law school with a deeply held belief that I could satisfy some high, even noble, expectations as a lawyer. Although I had never articulated what those expectations were, I knew I cared about the poor and the underdog; although I may have had only a hazy idea of what justice was, I did have an acute, albeit intuitive, sense of injustice.²⁴

* * * *

[A]s for any moral component to my work, I knew that it had less to do with right and wrong than with an obscure identification with the underdog, even a despicable underdog, against authority.²⁵

(2) About The Judge for Whom He Clerked

I clerked for a criminal trial judge, Charles S. Barrett, Jr., of the Superior Court of New Jersey, a gentleman of humor and intelligence and decency. Every day in the course of his trials Judge Barrett made specific decisions based on his sense of justice. Of course, he was guided by statutes and opinions of higher courts, but the details of a case often required interpretations that could be made only by relying on his personal convictions. I greatly admired the judge for those personal convictions; I sensed he had struggled with the more profound human questions and answered them with a consistency that seemed well-considered intellectually and satisfying emotionally. There was nothing I wanted more than one day to be a man of such integrity and conviction.²⁶

(3) About Learning The Lawyer's Craft

I had to admit that I was getting more out of what I was doing as a criminal lawyer than money or the intellectual satisfaction of supporting the legal system. I would confess, over the years, to ego gratification and the joy of good craftsmanship: plotting out an intricate strategy, carrying off a good cross-examination, soaring through a moving summation—and the sound of the jury saying 'not guilty'—are all thrilling.²⁷

* * * *

²⁴ Id. at 7.

²⁵ Id. at 17.

²⁶ Id. at 7.

²⁷ Id. at 16-17.

I tried, as an act of will, to limit my vision to what I actually did in the courtroom—the trial was a fascinating process, a game, and I was good at it and getting better all the time. I didn't believe I was making the world safer from criminals; I was learning a trade that I enjoyed, and, like most prosecutors, I was getting the experience and credentials I needed to go out on my own in private practice.²⁸

* * * *

So I began trying one case after another, and I learned my trade and loved what I learned.²⁹

These remarks express Wishman's cares and commitments, his values, and they number three: (1) he says that he cared deeply about injustice, especially as it related to poor people; (2) he expresses his admiration and affection for the judge for whom he clerked; and (3) he tells of his satisfaction in learning the craft of criminal litigation, the skills of lawyering. These three areas of value and concern are the three areas to which Wishman has committed himself in his formation as a lawyer; they are the things about which Wishman most cares. (Only in the law? Or in his life? Or can the two not be separated?)

I do not think that Wishman's cares and commitments are idiosyncratic. They seem, on the contrary, to be quite ordinary concerns for any person aspiring to be a lawyer in America in the late twentieth century. For example, Wishman's expectations in law school and his own sense of justice (or of injustice) remain inarticulate, "hazy" and "obscure." (Well, who among us has managed to articulate his expectations, or her sense of injustice? In law school, or in practice?) Wishman allows that he wants to emulate Judge Barrett, and yet he finds that he has neither the judge's faith in God nor the judge's belief in our penal system.³⁰ (Who among us can say otherwise? Who among us

²⁸ Id. at 15.

²⁹ Id. at 10.

³⁰ Wishman gives this account of the distance he perceives between himself and Judge Barrett:

Now as I thought back about my judge, almost twenty years later, fresh from my disquieting encounter with Mrs. Lewis, I admired more than ever, and envied, his ability to prevent difficult and, at times, harsh decisions from disturbing other parts of his life. Although I firmly believed that society required criminal laws to protect itself, I could not put aside my belief that the acts of a criminal, horrendous as they often were, were usually caused by factors or events beyond the control of the 'criminal.' And the thought of an inhumane penal system raised in my mind, and more so in my heart, the gravest doubts about the whole system of justice. Lastly, if it had been religious belief that gave my judge the strength to do the harsh things his job required, I, unfortunately, didn't have such belief.

Id. at 8-9.

does not have a hero or heroine to whom we do not measure up?) Finally, Wishman enjoys the sense of mastering his craft, but his gratification stems from "the joy of good craftsmanship," nothing more. (In our profession, isn't this common enough?)

If Wishman's history is unexceptional, then I would guess that his sense of impersonality and anonymity (with respect to people and events who appear during the course of his life yet who seem to be essentially unconnected with his life) also matches a large number of life-stories for lawyers. For most of us lawyers, we *are* "hired guns" or mouthpieces, doing the legal work *for others*, and happy about it to the extent that we are relatively well-paid for our services. If our work is vicarious, then so too are our pleasures or gratifications.

We can assess the morality of Wishman's actions in this regard by developing George Fletcher's insight that "the normal commitments of our lives—expressed as 'loyalties'—provide a sounder basis for the moral life than [does] an Enlightenment ideal that is...incapable of realization."³¹ The opposite of loyalty is betrayal, and I have earlier quoted Stanley Cavell to the effect that we come to learn the self only in our betrayals of it. The term "betrayal" is usefully ambiguous here, because it connotes both expression and treachery (or disloyalty). I understand Cavell's point to be two-fold. First, his remark means that we come to learn about the self to the extent that we "betray" it by expressing or revealing it. So our knowledge of a self (be it our own or another person's) consists in, or depends upon, its being revealed. Self-knowledge turns upon the extent to which, and the ways in which, we reveal ourselves in and by our actions (which consist in our words as well as our deeds). But, second, Cavell's conception of self-knowledge also means that self-knowledge retains the bitter taste of betrayal, because to bear witness to (or to recognize) the self is necessarily to move beyond (or outside) it—to view it from the outside, as though it were an object. And this objectification of the self is, in a sense, a betrayal of it, a disloyalty to it (as the self stood—even if this "betrayal" is done on behalf of the self as it now stands).

³¹ George Fletcher, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* x (New York: Oxford University Press, 1993).

The idea that our ordinary cares and commitments are fundamental to our moral standing and status, is central to Part Three of Stanley Cavell's monumental work, *The Claim of Reason*. See Stanley Cavell, *THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, Morality, and TRAGEDY* 245-326 (New York: Oxford University Press, 1979). A similar idea is a motivating force in Harry Frankfurt's collection of philosophical papers. See Harry G. Frankfurt, *THE IMPORTANCE OF WHAT WE CARE ABOUT* (Cambridge: Cambridge University Press, 1988)(especially Chapters 7-8).

I would put the broader moral of both Fletcher's and Cavell's remarks this way: Morality is as much or more a matter of trying to understand and assess human (personal) relationships, as it is one of trying to understand and assess human actions according to impersonal rules or principles or laws or maxims. Because of this, if we are to understand and appreciate our moral responsibility, then we must understand and appreciate our relationships with and to the people, places, and things that constitute our lives. This is a very abstract or general way of saying that morality is in part a matter of *relating* ourselves to others, and to our selves. So, for example, Cavell says:

In...morality, one human being confronts another in terms of that person's position, and in a mode which acknowledges the relation he is taking towards it. And in...[morality], 'in terms of that person's position' means, in terms of what he is doing and must do and ought to do. In...morality this means, in terms of his cares and commitments.... The *problems* of morality then become which values we are to honor and create, and which responsibilities we must accept, and which we have, in our conduct, and by our position, incurred.³²

In attending to some of Wishman's commitments and in compiling, a moment ago in my text, a list of his loyalties, I was trying to use Fletcher's and Cavell's insights (on the nature of morality, and on the nature of self-knowledge) as a way of coming to learn who Wishman was when he acted the way he did toward Mrs. Lewis and the unnamed accused defendant. I was trying, in other words, to gain some knowledge of his self (as it then stood in relation to those people and events).

This method of self-knowledge (which proceeds by attending to a person's cares and commitments and personal relations) is also a method of moral analysis. It is a way of judging the morality of Wishman's actions, because it affords us a way of coming to learn what he was doing when he acted in those ways toward those people. It allows us to observe how Wishman thought and spoke about his own actions and about those other people. In particular, this method affords us a way to collect and assess the reasons that Wishman gave, or the excuses he entered, in explaining his behavior. These reasons or excuses or explanations are what Cavell calls "elaboratives," and they are (on Cavell's view of morality) important moral data:

[K]nowing what you are doing and what you are going to do and what you have not done, cannot fully be told by looking at what in fact, in

³² Cavell, *supra* note 31, at 325 (emphasis in original).

the world, you do. To know what you are doing is to be able to elaborate the action: say why you are doing it, if that is competently asked; or excuse or justify it if that becomes necessary. What you do and fail to do are permanent facts of history, and the root of responsibility. But the trunk and branch of responsibility are what you are *answerable* for. And where your conduct raises a question, your answers will again be elaboratives. I have described moral arguments as ones whose direct point it is to determine the positions we are assuming or are able or willing to assume responsibility for; and discussion is *necessary* because our responsibilities, the extensions of our cares and commitments, and the implications of our conduct, are not obvious; because the self is not obvious to the self.³³

If our responsibilities are "the extensions of our cares and commitments," and if "the implications of our conduct ... are not obvious," then it seems true that what the self has done—our actions, these extensions of our selves—need not be clear or obvious to us. Or, at least, their meaning, their consequences, their morality, need not be clear or obvious. And, in cases where their meaning or moral implications are not clear or obvious, in order to discover or to discern their moral meaning or implications, we shall have to analyze and argue and, generally, discuss these matters. In this sense, then, "the self is not obvious to the self." What a particular self is, and what it has done, and what it is doing, and what it is capable of doing, are not obvious to us. They require elaboration—as, for example, I am trying to elaborate the moral aspects of Wishman's actions as they relate to issues and concepts of professional responsibility.

V. THE NECESSITY OF ACCEPTING RESPONSIBILITY

From my perspective, professional responsibility is—and must be—personal. It is the recognition that lawyers are people doing things to (and for) other people (as well as doing things to and for themselves). And, whatever else professional responsibility is or may be, it is a matter

³³ *Id.* at 311-312 (emphases in original). Continuing his thought, Cavell says:

To the extent that that responsibility is the subject of moral argument, what makes moral argument rational is not the assumption that there is in every situation one thing which ought to be done and that this may be known, nor the assumption that we can always come to agreement about what ought to be done on the basis of rational methods. Its rationality lies in following the methods which lead to a knowledge of our own position, of where we stand; in short, to a knowledge and definition of ourselves.

Id. at 312.

of our coming to learn to understand and assess the ways in which people behave in the roles and through the forms that the law makes available to them (as lawyers, as clients, as parties to legal actions, etc.). So, for example, I read Wishman's story as illustrating a growth in professional responsibility because it illustrates a movement of the self toward increased understanding and assessment (as my motto from George Eliot would term it, this movement proceeds from "moral stupidity" toward professional responsibility).

I understand Wishman's growth or professional development—the increase in his moral sensitivity and sensibility—to be based, in particular, upon his *having taken personal responsibility* for what was happening, or for what had happened. On my view, Wishman took personally—and saw his own personal stake in—the actions or events that he recounts in the first chapter of his book. Wishman saw how he was implicated in what happened to Mrs. Lewis, what was done to her (by him through the means and tools he had mastered from the medium of our legal system [e.g., cross-examination as an "art"]). Wishman saw or realized that he, a person, did *that* to Mrs. Lewis, another person, on behalf of yet a third person (Wishman's client). Now, the question arises: How could Wishman have done that to her?

In studying Wishman's account of how he related to Mrs. Lewis and to the possibly falsely accused defendant he prosecuted, and paying some attention to Wishman's remarks about his relations with other people, I notice that, time and again, Wishman explains or excuses his behavior by saying, in effect, "Nothing personal."³⁴ (For example, the adversarial attack on Mrs. Lewis had not been meant or intended by him to be taken personally.) Wishman distances himself, that is, from any activity going on or from its effect, by claiming for it an impersonal status (in terms of its intent or animus). Or he excuses himself for doing what he does as a lawyer by claiming that it is meant only to achieve a certain legal effect (the suggestion being that its effect on the person of any party involved in the legal process is, thus, irrelevant).

The suggestion seems to be, then, that you (the object of my attack) should not take my attack (my action) personally—even though you are a person and I am a person, and this *is* how I treated you. But what sense does this suggestion make, when the context is one in which this *is* the relationship we have—because this *is* the way that *I* have acted

³⁴ Wishman, *supra* note 2, at 6. See also *id.* at 7, 8 (twice), 9, 13, 16, 17, and 18, for other contexts in which Wishman invokes the term "personal" in characterizing a relationship that he either did or did not have with someone who in some way mattered to his life (in terms of his development as a lawyer).

toward you? Somehow, it seems, I (the actor) expect you (the sufferer of my action) to ignore the relation I have already established between us (by means of the way I have acted). How is this to be done—can it be erased magically? Or else, you (the sufferer of my action) are supposed to absolve me of my moral responsibility for having treated you this way. Why? Because I have the role I have in our legal system or because I play the part of a lawyer in our society? None of these possible responses or explanations makes sense to me morally; they seem to ignore the fact that the morality of a person's actions is based, in large part, upon the nature of the relationships such actions establish (or define or destroy or modify) with the people affected by those actions.

How we might recognize this basic fact of moral responsibility and act upon it (rather than ignoring it), is suggested in the way that Wishman subsequently acted toward Mrs. Lewis and the allegedly falsely accused defendant. In the case of the accused defendant, Wishman tells us that he himself "was relieved by the thought that [he] had done all [he] could to undo a possible miscarriage of justice for which [he] had, in part, been responsible."³⁵ Wishman admits, further, that he "had not been able to let the case rest because [he] had found the possibility of having convicted an innocent man too upsetting from a personal standpoint."³⁶ Wishman took the situation—the plight of the convicted man—seriously because he took it personally, felt his personal involvement in the case; and because he accepted his share of the responsibility for this perhaps innocent man having been convicted. (Perhaps these two characterizations—taking something personally, and accepting one's responsibility—are simply two ways of saying the same thing.)

As to Mrs. Lewis, Wishman came to treat her as a person, not an abstraction. "Mrs. Lewis was not an abstract idea, even if it had taken her screams to bring that fact home to me."³⁷ So, unlike the abstraction, "society," Wishman came to feel some connection with Mrs. Lewis, some solidarity with her, which meant that he no longer could cavalierly dismiss the way he treated her. "I could no longer deflect the realization—this chilling glimpse of myself—that I had used all my skill and energy on behalf of a collection of criminals. Not all of them, but many, had been monsters—nothing less—who had done monstrous things."³⁸ Again, this perception led Wishman to take responsibility for

³⁵ *Id.* at 12.

³⁶ *Id.* at 13.

³⁷ *Id.* at 14.

³⁸ *Id.* at 16.

his actions, for what he had done. To the accusatory question, asked of Wishman time and again—"Don't you take responsibility for what a criminal you get off may do next?" Wishman's once flippant answer was no longer self-availing. "I could no longer give that answer. I didn't want to be flippant with Mrs. Lewis, nor could I dismiss her with lofty, jurisprudential arguments. The ferocity of my courtroom performances, and those of other criminal lawyers, had terrible consequences on individual lives."³⁹ Here, I think, we witness Wishman taking responsibility for his actions and even for the way the legal system treats the accusers of criminals—which can be, terribly. Wishman humiliated Mrs. Lewis on cross-examination; and the subsequent realization—that *he* did *this* to *her*—enables him, or compels him, to accept his responsibility (—for having done that to her on behalf of—vicariously for—his client).

I have said that Wishman's story is a tale of moral progress, a kind of pilgrim's progress if you will, and my title suggests one way of characterizing the trajectory of this case of professional development. But Wishman's story illustrates more than merely his own reformation, or transformation; it is a morality tale for all legal professionals (and, perhaps, for all professionals; so, too, then, perhaps for all people).

On the question of self-transformation, or the reformation of the self, I know of no better book than Herbert Fingarette's *The Self in Transformation*.⁴⁰ There Fingarette argues that "the essence of therapeutic and moral progress is ... to accept responsibility, i.e., to accept as *ours* the task of doing something about [the problems confronting us]."⁴¹ In psycho-therapy this means that "[a]pparently the patient *must* accept responsibility for traits and actions of his which are the inevitable results of events over which he had no control and of actions which he did not consciously will."⁴² Despite the fact that we cannot control all of the events in which we are implicated, or all of the results of our actions, Fingarette argues that it remains fair to hold us responsible for these things. "[P]aradoxical as it may *seem*, this is precisely the case."⁴³

This may seem a harsh view of life, an arbitrary and inhumane one. In fact it *is* harsh to a degree, but it is *not* arbitrary or inhumane.

³⁹ *Id.* at 17.

⁴⁰ Herbert Fingarette, *THE SELF IN TRANSFORMATION: PSYCHOANALYSIS, PHILOSOPHY, AND THE LIFE OF THE SPIRIT* (New York: Basic Books, 1963).

⁴¹ *Id.* at 163 (emphasis in original).

⁴² *Id.* (emphasis in original).

⁴³ *Id.* (emphasis in original).

It is the brute fact which mature human beings and immature ones with moral insight have long recognized in their practice and at times in their theory.

It is not arbitrary, for there *is* a reason for accepting responsibility.... [T]his [seems] an unjustifiable burden. And it will always appear unjustifiable so long as one looks to the past for the reason. It is to the *future*, however, that we must look for the justification of this profound moral demand. It is not that we *were* children and thus nonresponsible but rather that we are *aiming to become* mature persons. This *ideal*, and not the past, is the ground for the harsh demand that we accept responsibility for what we are, even though we are in many ways morally evil and even though we could not help ourselves.

Guilt is retrospective, but responsibility is prospective. Responsibility is based upon a willingness to face the world as it *now* and to proceed to do what we can to make it the world as we would like it to be. To accept responsibility is to be responsible for what shall be done.⁴⁴

Earlier in his book, Fingarette says that self-transformation can be thought of or characterized as "the movement from immaturity to maturity, from ignorance to insight, from bondage to liberation, from sin to salvation, or in any of a number of other ways...."⁴⁵ In choosing the figure of "moral stupidity" from Eliot's vast novel, *Middlemarch*, I have betrayed my own proclivity for wishing to think of professional development as a kind of movement from innocence to experience, or sinfulness to salvation.⁴⁶

I conclude this section, and this stretch of thinking, by quoting Fingarette once again:

To face the world and oneself as they truly are and to accept responsibility for what in each of these one can control are the necessary conditions of maturity. It is not a penance for the past but the price of the future. Humility is of the essence.

⁴⁴ Id. at 164 (emphases in original).

⁴⁵ Id. at 10.

⁴⁶ There is another point of similarity between Fingarette's thought and Eliot's image. Fingarette makes the following comment:

Responsibility comes relatively late in life; guilt appears very early in life. Thus we can be guilty where we are not responsible.... In this sense, at least, we are born into sin. For we are involved with evil and guilt before we are able to assume that responsibility for our self which might, at least ideally, keep us from having the wishes which constitute morally the fact of the spirit's corruption.

Id. at 168.

Honest humility reveals that to accept responsibility, considering what we start with, is a heavy burden. To say, as criticism, that this is not 'fair' or 'just' is to suppose that the world is fair and just. This is precisely what the world is not. It has no design leading to some inevitable, built-in moral future. It is we human beings who can reach humanity only by accepting the challenge to *make* the world just.⁴⁷

VI. WHAT HOPE OF SELF-KNOWLEDGE IN A TRADITIONAL LEGAL ETHICS CLASS?

Wishman's story tells how he was shocked out of his complacency by someone's reaction to his behavior as a lawyer; and how, years earlier, he himself had been shocked by his own callousness, his own wilful indifference or blindness to the quite real possibility that he had helped to convict an innocent man. These two confrontations with himself and with his behavior as a lawyer, these two self-revelations, led Wishman to ponder what kind of a lawyer—and what kind of a person—he was becoming. These two incidents shook Wishman out of his self-absorption into an appreciation of what George Eliot, in my motto, calls the "equivalent centre of self," of solidity and worth, that any other human being possesses. These experiences also, simultaneously, enabled Wishman to see his own relationship to these "equivalent" selves, for whose fate Wishman at least took partial responsibility on a personal basis.

Wishman's discoveries about himself exemplify one course that moral development or growth can take. It is not that moral change must happen this way, but only that it can occur in this way. Wishman's autobiography portrays, then, one way in which a person can become aware of the moral dimension or aspect of his actions. This dawning awareness is not an abstract idea; rather, it is what Eliot calls a conception "with that distinctness which is no longer reflection but feeling—an idea wrought back to the directness of sense."⁴⁸ Such a feeling has sufficient force to make us stop and think; and then, with the help of self-reflection, or critical thinking, perhaps we can change our ways. In this respect, then, by scrutinizing Wishman's story, we may learn something more about moral development.

Having said this, however, I am not sanguine about the possibility (much less, the likelihood) of such learning taking place in a traditional class on Legal Ethics. Wishman made the discoveries he made—about

⁴⁷ Id. at 166 (emphasis in original).

⁴⁸ See text, *supra*, at note 1.

himself, about the law, about lawyering, about what he had done to Mrs. Lewis and others—because he was able to refer to his actions in the contexts in which they truly occurred. As I have tried to make clear in Sections I and II of this paper, teachers of a traditional Legal Ethics class are not able to reproduce or duplicate actual lawsuits, parties, or clients. Because of this, I know of no way in which students in such classes can work on relating themselves to such entities. And, without testing and assessing the ability or inability of students to do these things, I think it unlikely that students in traditional Legal Ethics classes can make similar discoveries about themselves (i.e., discoveries similar to the ones Wishman made about himself). With respect to a law school course designed along what I have been calling "traditional" lines, then, self-knowledge is not vouchsafed the students.

We claim that Socratic teaching is a form of self-knowledge, or that it is based upon a method designed to lead to self-knowledge; certainly, I have said such things in print, and I believe them.⁴⁹ But this claim can be made for that method of teaching only because the tools and materials for coming to learn something about ourselves are all there, in the typical law school classroom. In a traditional Legal Ethics class, I claim they are not. We lack something, we are missing something—if, that is, our aim is to achieve self-knowledge about the morality of our actions and our ability to resolve ethical conflicts (as opposed, for example, to learning or memorizing the provisions of our professional codes).

Try as I may, I do not have much hope that anything I do pedagogically in such a classroom can redress or supply what is lacking. And this is why I said at the beginning of this paper, I find such teaching unrewarding. —Still, I accept responsibility for it, and for what I do in the classroom in response to this lack.

⁴⁹ See my essay cited *supra*, note 4.

