

STRATEGY  
**Carpet-Bombing**  
THE **Witness**

By Joseph W. Varela



FOR EXAMPLE, TAKE THE CENTER OF A LARGE CITY AND IMAGINE WHAT WOULD HAPPEN AMONG THE CIVILIAN POPULATION DURING A SINGLE ATTACK BY A SINGLE BOMBING UNIT. FOR MY PART, I HAVE NO DOUBT THAT ITS IMPACT UPON THE PEOPLE WOULD BE TERRIBLE . . . WHAT COULD HAPPEN TO A SINGLE CITY IN A SINGLE DAY COULD ALSO HAPPEN TO TEN, TWENTY, FIFTY CITIES . . . IN SHORT, NORMAL LIFE WOULD BE IMPOSSIBLE IN THIS CONSTANT NIGHTMARE OF IMMINENT DEATH AND DESTRUCTION.

Giulio Douhet, *The Command of the Air* (1921)

**HOW FAR CAN A CIVILIZED INDIVIDUAL  
— OR NATION — GO WHEN ENGAGING IN  
SERIOUS CONFLICT?**

Newark defense lawyer Seymour Wishman was visiting in a hospital one evening. A nurse tried to attack him, screaming “That’s the lawyer, that’s the motherf---ing lawyer!” He had represented her alleged rapist in a trial a few months before, in which his client was acquitted. Wishman reproduces his cross--examination in his book:<sup>1</sup>

Wishman: Isn’t it a fact that after you met the defendant at a bar, you asked him if he wanted to have a good time?

**COMPLAINANT: NO! THAT’S A LIE!**

Q: Isn’t it true that you took him and his three friends back to your apartment and had that good time?

A: No!



**Q:** And, after you had that good time, didn't you ask for money?

**A:** No such way!

**Q:** Isn't it a fact that the only reason you made a complaint was because you were furious for not getting paid?

**A:** No! No! That's a lie!

**Q:** You claim to have been raped and sodomized. As a nurse, you surely have an idea of the effect of such an assault on a woman's body. Are you aware . . . that the police doctor found no evidence of force or trauma?

**A:** I don't know what the doctors found.

**Q:** Isn't it a fact . . . that you got what you bargained for?

**A:** No.

**Q:** Then isn't that why you made the complaint to the police—you were angry that my client hadn't paid you, that you hadn't gotten what you bargained for?

Reflecting on the events, Wishman broods:

Maybe I hadn't done anything unethical—legally unethical. In fact, I might have been doing what I, as a lawyer, was required to do...I had ignored the larger moral and emotional implications of my actions.<sup>2</sup>

The question of emotional and moral responsibility for my actions was beginning to dominate my thoughts. I was concerned about the moral legitimacy of my own behavior in ways I had never seen before, and it was disturbing . . .<sup>3</sup>

Are there moral limits to conflict?

It is well known that during World War II, the Allies bombed cities in Germany. Air Marshal Arthur Harris, chief of British Bomber Command, was a follower of interwar theories of combat that stressed the war-ending capability of destruction of enemy cities by air.<sup>4</sup> The Royal

Air Force flew almost exclusively at night, and practiced what they called "area bombing," which amounted to bringing large numbers of heavy bombers over densely populated cities and letting go.<sup>5</sup> No attempt was made to restrict targets to those of military importance; the bombing was designed to break the German citizens' morale.<sup>6</sup>



*R.A.F. Avro Lancaster heavy bomber*

The air war over Germany is still the subject of controversy six decades after the fact. Two recent books consider the moral dimension. British historian Robin Neillands examines the evidence and concludes that the British carpet-bombing was militarily justifiable.<sup>7</sup> World War II was a conflict of the highest stakes, one in which Britain's existence and the survival of its subjects were in doubt. Germany had declared total war, and its practices included siege warfare,<sup>8</sup> carpet-bombing of cities, and industrial mass murder. Neillands argues that once Germany started total war, any method that could be justified in military terms was admissible, the more the better, to end the war quickly. The bombing of Germany's heartland arguably hindered its military capability. That it killed 600,000 civilians<sup>9</sup> was incident to the war.

Examining the same evidence, British historian and philosopher A.C. Grayling concludes that the R.A.F. night-bombing was a war crime.<sup>10</sup> Grayling holds that any force in any conflict, to be moral, must be both *necessary* and *proportional*. Grayling condemns the British night area bombing as neither. He finds that its contribution to the war effort was minimal, and that the suffering it imposed on civilians was disproportional to the danger to Britain.<sup>11</sup>

This is not the place to decide among the claims concerning the conduct of the war. Rather, the discourse informs criminal lawyers of the moral considerations when contemplating the destruction of a witness. Grayling would ask: Is the intended treatment of the witness both necessary and proportional? Only if both questions can be answered "yes" should we proceed. Neillands would have us look at the intended action without benefit of hindsight, and determine whether it would help the defense; if so, it must be done.<sup>12</sup>

Criminal trials frequently involve high stakes, particularly for defendants. A loss can mean years in prison or even death. A defense lawyer, at least as much as any other kind, owes a high duty to his client to advocate his client's interests.<sup>13</sup>

**The rules of professional conduct provide:**

... a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf.<sup>14</sup>

As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.<sup>15</sup>

Reading these rules, it would seem that carpet-bombing a witness, Wishman-style, is always justified if it is in the interest of the defendant. This is essentially Neillands's view of British bombing.



*Hamburg, summer 1943*

Is there room for the defense lawyer to ask Grayling's questions of necessity and proportionality? Consider these provisions of the disciplinary rules:

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society.<sup>16</sup>

A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others.<sup>17</sup>

Can the lawyer balance his duty to his client against the damage to another that might be caused by such cross? Does the lawyer owe some obligation to the society at large? Does carpet-bombing lower the criminal justice system in the eyes of the public? If it does, should lawyers be concerned?

Wishman, mulling over these issues, concludes that "Preserving our criminal-justice system," worthy as that goal might be, was becoming far too narrow and abstract a concept to provide me any comfort.<sup>18</sup> Not long after publishing his introspections, he retired from the law and became president of First Run Features, a distributor of independently produced films.<sup>19</sup>

1 Seymour Wishman, *Confessions of a Criminal Lawyer* (1981), chapter 1.

2 *Id.* chapter IV.

3 *Id.*, chapter VIII.

4 The hypothesis that concentrated urban bombardment could end wars almost instantly was advanced in Giulio Douhet, *Il dominio dell'aria* (1921), trans. by Dino Ferrari as *The Command of the Air* (1942). Douhet argued that an air force should consist entirely of heavy bombers aimed at civilians. A pioneering American theorist advocated a more balanced force directed against military and industrial targets. See William Mitchell, *Winged Defense: The Development and Possibilities of Modern Air Power, Economic and Military* (1925).

5 Also called, perhaps more accurately, "carpet bombing" or "saturation bombing."

6 The U.S. Army Air Force in Europe practiced "daylight precision bombing." It was anything but precise, and civilian collateral casualties were high, but the targets were military, transportation and industry and it made a vital contribution to ending the war.

7 Robin Neillands, *The Bomber War: The Allied Air Offensive Against Nazi Germany* (2001).

8 The siege of Leningrad caused over a million civilian deaths by starvation and disease. See Harrison Salisbury, *The 900 Days: The Siege of Leningrad* (1969).

9 Neillands, *op. cit.*, chapter 17.

10 A.C. Grayling, *Among the Dead Cities: The History and Moral Legacy of the WWII Bombing of Civilians in Germany and Japan* (2006).

11 Grayling, *op. cit.*, chapters 7 and 9. Grayling acquits American daylight bombing, but he also indicts American area bombing in Japan. In a nine-month campaign, including Hiroshima and Nagasaki, 900,000 civilians were killed, Neillands, *op. cit.* chapter 17.

12 As Col. Paul Tibbets, who flew the Enola Gay to Hiroshima, put it, "You've got to take stock and assess the situation at that time. We were at war. . . You use anything at your disposal." Julie Carr Smyth, "Pilot of Plane that Dropped A-Bomb Dies," *Houston Chronicle*, November 2, 2007.

13 Prosecutors have a different obligation: "It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done." **Tex. Code Crim. Pro. Art. 2.01.**

14 **Tex. Disciplinary R. Prof. Conduct Rule 1.01** Competent and Diligent Representation, Comment 6.

15 **Tex. Disciplinary R. Prof. Conduct Preamble: A Lawyer's Responsibilities 2.** *Accord*, **Monreal v. State**, 923 S.W.2d 61 (Tex. App. - San Antonio 1996) (Hardberger, J., dissenting): "But a defense counsel has one overriding responsibility: to provide the most effective assistance to her or his client that they are capable of giving."

16 **Tex. Disciplinary R. Prof. Conduct Preamble: A Lawyer's Responsibilities 1.**

17 **Tex. Disciplinary R. Prof. Conduct Preamble: A Lawyer's Responsibilities 4.**

18 Wishman, *op. cit.* chapter IV.

19 Peter M. Nichols, "Finding a Place for Small Movies in the Big Picture," *New York Times*, June 14, 1998.

