Notre Dame Journal of Law, Ethics & Public Policy
2000

Symposium on Ethics

Article

*117 LAWYER ETHICS: A PEDAGOGICAL MOSAIC

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PreludeAfter several unsuccessful attempts to weld my results [of "philosophical investigations"] together into . . . a whole, I realized that I should never succeed. The best that I could write would never be more than philosophical remarks; my thoughts were soon crippled if I tried to force them on in any single direction against their natural inclination. And this was, of course, connected with the very nature of the investigation. For this compels us to travel over a wide field of thought criss-crossed in every direction. The philosophical remarks in this book are, as it were, a number of sketches of landscapes which were made in the course of these long and involved journeyings. [FN1]

-- Ludwig Wittgenstein [T]hose who are willing to engage in a genuinely critical conversation can learn from one another. At least that is the hope. [FN2]

-- Wayne C. Booth

I. Finding Our Way Back to Socrates

Looking to the early history of philosophy, we find Plato's portrayal of Socrates engaged in moral discourse. Imagine Socrates in the agora (market place), a space about the size of one of today's large shopping-mall parking lots, at the foot of an imposing hill crowned with the Parthenon. The perimeter of the agora is lined with small merchant shops, and beyond the shops, the bustling city life of ancient Athens. In the agora we hear the shouts of merchants and shop sellers and it is here too we find Socrates talking about matters in a way we still today find instructive.

***118** It would, of course, help to imagine all of this if you have been to Greece, stood in the agora, walked through the plaka of Athens (the old town), visited the bay at Sounion to see the temple dedicated to Poseidon and watched the blazing sun disappear into the sea at Sounion Bay with breathtaking finality. After the sunset, perhaps you walk down to a tiny cafe on the far side of the bay and ask the old Greek woman for a plate of fried calamari. Yes, it would help to have been there, but experiences of this sort can be imagined and appreciated from afar.

It is with Socrates in mind that we might begin to think about the teaching of lawyer ethics and the way we

engage students in ethical inquiry. If we set out to learn ethics by way of moral discourse, we find in the conversations Plato attributes to Socrates in old Athens, [FN3] a way to proceed. Socrates was not one to beat around the bush when he posed a question and teachers of ethics know the feel of a blunt question themselves. A student, for example, puts the point immediately: "What good does all this ethics talk serve?" Or more bluntly still, "You don't expect us to make money with ethics, do you?"

Socrates might respond with a question of his own: "Would you not agree, my friend, that when all is said and done, in talking ethics we are talking about how to live a good life and how to be a good person?" [FN4] The student, with immediate matters pressing upon him and the good life a fantasy of what lies ahead, without the slightest embarrassment replies, "I have nothing to say about ethics" and adds, with an aggressive flourish, "ethics is just talk." Another student, taking courage from the first, joins the conversation, "I look forward to being a lawyer because lawyers are involved in action, in solving problems, in getting things done. We get things done for our clients." And another adds, "Lawyers should represent anyone who has a legal claim regardless of what we lawyers might think about what the client seeks to ***119** do in the name of the law. Don't you think it's awfully late, here in law school, to be talking ethics."

Socrates, hearing all the conventions of his day expressed in the confidence and arrogance of these remarks, responds: "Now tell me, what are you going to do, when your work for a client results in harm to others or harm to the community in which you live? Will you always be so eager to use your skills and knowledge to help others accomplish in the name of the law that which is so clearly contrary to the well-being of your community? Would it be a good thing to act as if the law could exist without regard to justice? What kind of person would that make you, if you, as a lawyer tried to ignore justice and did it for money, and spoke proudly of the fine living you make by doing it? How long do you think it would be before your neighbors denounced you as a scoundrel?"

Some of the students have grown silent, but one, still eager to press his views and question Socrates' notion of goodness, ventures forth. "Well, of course, I can represent any client so long as he does not seek to do that which the law prohibits. Real estate developers and corporate polluters need lawyers like everyone else. And I can discredit witnesses and lead jurors to believe my client's version of the story so long as I do not violate explicit ethical rules. In our zealous representation of a client, the lawyer's conception of goodness is governed by the rules of our profession, not by our conscious."

But this notion, to Socrates, sounds peculiar. "This is all very strange. Do you claim that it is good to do what lawyers do solely because it is sanctioned by fellow lawyers grown accustomed to such practices? That your profession does not do more to eradicate its questionable practices brings no honor. Are you oblivious to where this kind of 'many in our profession do it' thinking can lead? Have you given thought to what it might cost the community in which you live, indeed the sense of community more generally, to have lawyers and all their power aid someone to use the law to harm others, to use law to aid their greed? When lawyers help those who harm others, can their participation in that harm be ignored? Can you and your fellow lawyers hold out in a world in which your fellow citizens, indeed, even your own colleagues, are scornful of your practices?" Socrates, with so many questions before them, pauses, and asks more directly, "Do you mean to say that it can be good to harm the many for the pleasure of the one client?"

"Oh no, it is not good to harm others," the student explains, "I do not set about to intentionally hurt others. I am simply serving my client. It is my job."

***120** Socrates appears unconvinced. “Helping those who seek help is to be commended. But surely you would not mean to say that you can advance the interests of your friends and those who pay you to be their ‘professional friend’ regardless of the consequences to those who stand outside this closed circle of friendship.”

Realizing that he may have overstated his position, the student retreats, but in the most guarded way. “Yes, I know I must be concerned about others, as well as my clients. But when I practice law, I make a promise to help those who come to me and to disregard the claims and concerns of those who are not my clients. It is only in helping my client that others are hurt. I have no desire to see that happen and do not actively choose to hurt others. To help my client I must ignore what happens to others.”

Socrates, turning over this thought and a small smooth pebble in his hand, poses another question: “Then you share with me a concern for others and the belief that it is better to live so that those who stand along our path are not harmed?”

“Yes, of course.”

“Then, if it would be possible to find a way to help your client and avoid hurting others, you would agree that lawyers should do so?” Socrates, for those listening to the conversation, seems here to have turned the conversation, to have issued an invitation to move from the conventions of the day to some better way of thinking about how ethics works. But it is also at this moment that one of the eager students realizes, as do some of his fellow students, that in his explanation of what lawyers do, he has been speaking about himself, recounting not just the clichés of the day but his own limited sense of the professional life he will take up. Indeed, he fears he has revealed far more than he intended. He, too, sees that the conversation has taken a turn, and that Socrates has elicited a concession that calls into question the kind of adversarial advocacy he and his friends have been proclaiming with great vigor. The student now wishes to retreat, not so much from the position he has advanced, but from the conversation itself. What he most wishes to be free of is the questions Socrates has been posing, and so he says, “I am afraid that if I say much more, you are going to make me look uncharitable and uncaring. That's really not who I am.”

Socrates, standing at the opening framed by this uneasy moment, says, “It is difficult to accept responsibility for our ideas and for the consequences of the words we so readily speak. It is your own words that have taken us down this road. Perhaps it is ***121** not the deviousness of my questions, but your own cleverness by which you have tricked yourself into thinking one thing about yourself while becoming another.” [FN5]

Socrates, in conversations such as this one, was a threat to those who proclaimed the conventional thinking of the day--indeed, to all who might lead an unexamined life. Socrates used questions to provoke serious conversation, spur thinking, and engage his interlocutors in moral inquiry; he sought to expose, with searching questions, the unexamined premises, forgotten purposes, ill-defined commitments, and assumed identities we carry with us into everyday life. [FN6] He demanded that we rethink the assumptions that underlie our conventional views and the way we have set out to lead what we trust to be a good life. Socrates is the patron saint of all those who venture into serious talk about lawyer ethics. [FN7]

***122** II. Starting Close to Home

Three painters work in the hallway outside my office. I listen as they share stories about co-workers, friends, weekend activities, approaching cold weather, and their plans for the last warm days of the fall sea-

son. They talk about their work: calling in sick when "the wife" wants to take a long weekend (the painters are men), a co-worker who does "shoddy work" and blames others for his mistakes, "cooling out" supervisors who are arbitrary in their demands or put pressure on them to do "shoddy" work, and how many paint brushes a "careful painter" uses on a week-long job. These painters might scoff at the idea of moral discourse presented as academics would describe it, and they most definitely would not view themselves as philosophers. The painters would likely say to the academic, "We were just talking." Or, "It's just what we do. A man's got to get through the day." But talk, even that of painters trying to get through a day of painting, turns inevitably to more weighty matters. (Even talk itself is subject to scrutiny when the men discuss a colleague who "does more talking than painting." [FN8])

As I listen to the painters, one of the philosophical threads in their conversation is quality--how to do a "good job," dealing with "difficult" fellow workers, supervisors who please the "boss" and ignore the needs of their crew. Yes, there was talk about sports, television, fishing and hunting, and neighbors, but it was the talk about "good work" that captured my attention.

We might see in the conversation of these painters, the ordinary, everyday practice of philosophy, the kind of philosophy we find entwined in the meander of daily conversations about work and our lives. Consequently, my proposition is a rather simple one. Let us take up the study of lawyer ethics, not as a body of ethical rules (and legal constraints), or a set of disciplinary principles, but as the kind of conversation painters engage in about ***123** "good work." [FN9] If we study lawyer ethics with the painters in mind, we might find ethics more congenial, more inviting, than the ethical teaching conceived by academics and legalists. Painters talk to make their work tolerable and sociable, to give it the meaning it would lack absent their conversations. The study of legal ethics could use this kind of sociability and needs all the meaning we can lay claim to.

There is still another reason we might turn to painters conversation as a model of the kind of lawyer ethics talk that students might find instructive. Much of our work as lawyers is based on incessant talk, listening (in which we are often far less skilled), and argument. When lawyers talk and listen, they are engaging in an element of lawyering, and they need to learn to do it well, whether presenting a client's case or articulating views about lawyer ethics.

And what are we to talk about in this lawyer ethics conversation? We might begin with our work, with what it means to do law work, to make a life talking about law and doing the work that lawyers do. We might try to talk about our love for the work, about the abilities, talents, and skills of those around us from whom we learn and whom we seek to emulate. We might also talk about the community in which lawyering work is done. In this talk about lawyer work, it will be difficult to avoid basic proto-philosophical questions: Do we, as lawyers, have special obligations to the community? Can we do the work our clients want done and let the community take care of itself?

The painters enhance the course of their day by complaints, gossip, and stories. A painter who does nothing but complain will find himself with few friends; one who gossips too much will be viewed with suspicion. But one might see in their entertainment of complaints and gossip, not only some therapeutic value, but a making-way for real stories. In legal ethics devoted to talk about lawyer work, we turn to stories because that's what happens when people talk. We seek for conversation those who can tell stories. We tell and elicit stories from colleagues. Work is a source of stories and a place to tell them. Stories provide a way to raise questions and points of view that might be viewed less ***124** favorably if approached more directly. And we know that work needs to be questioned; questions come with us to work and are forced upon us by the work we find ourselves

doing. We may have no answers to the questions that plague us (and we may not even know what the questions are). But we do have stories to share. To tell stories and ask questions about work makes it possible to get through the day; work acquires sociability. As social creatures we are drawn to the stories and questions around us. We want to hear others talk about work and listen as they respond with stories, listening for answers to unasked questions. Listening to stories, there may be occasion to raise objections, to question whether it really happened, or whether the teller of the story knew all the facts, or whether the story might not be told differently by someone with a different perspective (less involvement, more involvement, more education, less education). We might even find occasion to argue, to attempt to change a colleague's mind about some story about how the world works or how people work (and why they do the things they do). We may (or may not) want to put our stories and arguments on the line and see how others might react to them, how they might be heard, what kind of response they might evoke. It is not only in the law work we do, but the stories we tell and the questions we pose about this work, that we make ourselves known to ourselves and to others.

In conversation (talking and listening), we stumble into agreement and find those with whom we share an outlook on the world; we disagree and find ways to deal with our differences. Like painters, lawyer ethics talk must follow a course of conversation that pursues matters of real interest, matters that trouble us, concerns that capture our attention, conditions found in legal work that make it bothersome and difficult and questionable. In conversation, painter friendly and law school studious, there is an opportunity to explore act and consequence, self and other, work and play, good and bad, ordinary and special, appearance and reality. We create, in conversation, a social and qualitative ground for our professional work life. [FN10] We might, I am arguing here, learn something about lawyer ethics from something quite simple-- a sustained course of conversation.

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***125** In legal education, we have an opportunity to do what painters do and to be reflective about it. We can engage each other in ethics talk, focus our attention on how moral and ethical thinking about the practice of law works and on how legal thinking breaks down when carried into the realm of ethics. In lawyer ethics talk we have an advantage over the painters since our conversation is directed to work that still lies ahead, to a life not yet fully shaped by daily routines and conventional professional practices. Law students are in a position, if they could only realize it (and their teachers make it more obvious), to be more self-reflective and make these reflections part of their learning. [FN11] Ethics talk allows us to explore conventional and commonplace views about lawyers, and to test these views against collective hopes and ideals, to test them against our imaginings and fears of what lies ahead.

In the painters way of lawyer ethics, there need be no study of prominent legal ethicists or famous moral philosophers, no effort to learn the various “schools” of moral philosophy. When we think about ethics as a way of talking, as conversation, rather than a formal subject of study, we avoid academic lines of inquiry which have left the study of ethics badly misshapen. The painters may lack formal study and a working knowledge of moral philosophy, but they know painting; they enjoy their work and they know how to converse and learn from each other. Painters know well the obstacles to doing a “good job” and that these obstacles are to be understood by way of the give and take of conversation with fellow painters. For those who teach lawyer ethics, there is much to learn from painters. [FN12]

***126** III. A Course of Conversation

In legal education, we adhere to notions about lawyer ethics that stifle the conversation we should be having. Consider the following rather conventional notions about the study of lawyer ethics: (i) law students already have their ethics (that is, their "real" ethics and their moral character) when they arrive at law school; and (ii) the law school study of lawyer ethics is first and foremost the application of a body of ethical rules. [FN13] The conventional law school version of ethics translates ethics into law-like rules, [FN14] a convenient strategy for those who seek to convince the outside world that we have an interest in ethics even as we have already concluded there is nothing to be done about the moral character of those who set out to become lawyers. We want the world to believe we have an interest in ethics when truthfully we don't want to be bothered with ethics at all.

Everyday painter conversation about lawyer ethics is discouraged when we assume that a student's ethics are already in place when they take up the study of ethics. The assumption would have us believe that it is futile to address, confront, or question lawyer ethics. Moreover, the assumption allows us to ignore the moral presuppositions our students bring with them to the classroom, [FN15] and the moral qualms and confusions they have about law work. Consequently, moral discourse (in contrast to the endless talk about ethics rules) requires that we confront this pervasive (and conventional) skepticism about ethics--the belief that ethics talk is futile. [FN16]

***127** Lawyers and law students know that there are ethical rules governing the attorney-client relationship and that they must know these rules and observe them. But in knowing these rules, can they not also learn how a persistent and exclusive focus on ethics rules becomes an all too convenient way to let the "study" of legal ethics be a substitute for meaningful ethical inquiry, an inquiry in which we might actually learn something about the moral dimension of lawyering?

My proposition, going back to the painters, is a simple one: study lawyer ethics by engaging in moral discourse. Ethics is learned by doing ethics, by immersion in a conversation in which ethics is not a "subject" but an engagement in which one has a personal "stake," [FN17] a stake in a serious conversation about matters of real importance. An inquiry into lawyer ethics is rooted in rhetoric not rules. Lawyer ethics grounded in conversation (literally, a course of conversation) about law work becomes a stage on which we rehearse, a theater in which we see actors working out the consequences and meanings of their proposed actions. Hanna Arendt observed that it is "[i]n acting and speaking, men [and women] show who they are, reveal actively their unique personal identities and thus make their appearance in the human ***128** world . . . ." [FN18] When we act by speaking, the moral dimension of our character "shows through." This moral dimension, always present, lurking in our law school conversations [FN19] is particularly fond of hiding and thus reveals itself in metaphors and images, [FN20] the primary ingredients of lawyer ethics talk.

We learn ethics by talking about what we value (and learning how our valued notions might have been contaminated along the way) and about how matters of value are shared and disputed in the world we inhabit with others. A study of lawyer ethics limited to a study of law-like ethical rules is a poor, even pernicious, substitute for ethics. Lawyer ethics taken up in conversation puts ethics back where it belongs--in the spoken, everyday world of connective, communal, constitutive talk.

Moral discourse--lawyer ethics taken up in conversation--teaches as it pushes and pulls us to evaluate, defend, and (sometimes) reconfigure the character we find ourselves holding forth in these conversations. We learn, in the best practices of moral discourse, to distinguish between idle talk (and the conventions and clichés in which it thrives) and talk that bespeaks a more compelling and esteemable character. When talk implicates our ***129** character, as it must, and as it does most particularly in making claims about the moral limits of lawyer

practices and the arguments in which we have a personal stake, moral discourse is not just a rehearsal of action, but moral character in action.

In serious ethics talk, students learn that there is a voice (and a part of themselves) that begs to slow down, to pause, to think, to deliberate, to reflect, before rushing on to the next case, next course, and the life that lies ahead. Talking becomes a way of pausing to see, a way of practicing how to see and value the work and the world that lies before us (and within us).

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It is not, I think, whimsical to contemplate that in Socrates and in the painters, we have found forms of conversation that make ethical inquiry possible and inviting (even if, at times, painfully difficult). It is not, I know from personal experience, beyond hope that a law school course of lawyer ethics conversation can (with good fortune, concerned students, and a teacher willing to take the risk) take on a life of its own. Indeed, a course of ethical conversation can be as engaging and rigorously demanding as any classroom work found in a law school. But, it can also be more; a course of conversation can be revitalizing by its realness, with the shape and personality it acquires. A course of conversation has a personality of its own: friendly and easy-going like an old friend, sometimes moody and temperamental, at times boring, at other times manic and wild, or just exasperating. When a course of ethical conversation takes on a life of its own, the student must establish a relationship with it--tolerate it, puzzle over it, complain about it, or learn from it. [FN21] When lawyer ethics talk is real, it can not be left unattended, ignored, or dismissed.

Courses of conversation, like persons, get lost, depressed, alienated, disenchanted. They sometimes go off the deep end, commit suicide. But when things go well, a course of studied conversation makes it possible to talk about law work and what it means to us. It allows us to practice engagements with like-minded and better-minded colleagues, colleagues who can sometimes show us the way to wisdom. There are real possibilities and real risks in such conversations and the pedagogies that encourage them; we could not expect otherwise.

***130** I confess to attempts to teach by way of the kind of conversations I describe here. I have watched as conversations between guarded and law school weary students develop a life of their own, talked into realness. I've listened with reverence and fear as students attempt to come to grip with matters that I, as their teacher, cannot fully explain or provide a formula for understanding. I engage in such courses of conversation with no pleasure, knowing that they must inevitably result in confusion and pain and lurch toward an uncertain future. [FN22] Knowing this, experiencing it first-hand, I still begin each course of conversation with students about lawyer ethics with great hope, knowing that there are real possibilities along the path we follow as we learn about the fantasies and fear that attend lawyers and their work. It is this combination of possibility and failure that makes lawyers and our talk about their ethics, real, alive and threatening.

A course of ethical conversation does not, of course, begin when I step into the classroom (as I must continually remind myself). Yet there is a sense in which we each begin anew, starting from the beginning (knowing this is impossible), acting as if this conversation had not already taken place. For me then, the classroom continues to be a space of vast energy and hope in which we can form and shape ourselves. [FN23] Conversations in which we seek the limits of possibility are sometimes deep, sometimes shallow. At times, they take your breath, make you gasp. Before we begin our work on lawyers ethics talk together, I sometimes feel isolated and alone, waiting for the discovery of how it will take place--this new conversation with all its fits and starts, twists and turns, moments of exhilaration and feelings of futility. This course of conversation I imagine, is

ever so much like a vulnerable child, protected, cared for, preached to, and prayed over, and then sent off to make its way in the world. Courses of ***131** study rooted in conversation, like the passage from childhood to adulthood, must find their own way.

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A student, quiet, self-confident with a sparkling smile, visits my office to talk about an ethics course now completed. We talk of the twists and turns our classroom conversation took, the sometimes dramatic encounters (those made a part of our conversation and those we did not pursue), the frequent frustration and boredom ("what are we accomplishing here?"), and the anxiety that sometimes caught up with us. The student speaks openly of what he found troubling; he was disturbed by the persistent obstacles that sprang up and continually plagued our conversations, obstacles that seemed at times to undermine the promise that we might actually learn something about lawyers and their ethics. [FN24] He went on to recall a remark I had made at an orientation program about how law school has the potential to change the way we see the world. [FN25] We agreed, this student and I, that in the wild energy of our dialogue on lawyer ethics, we had indeed engaged in a course of conversation that would be remembered.

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For many students, a fair number of law school courses leave little to remember. As for my ethics conversations with students, I hope they might be remembered (if nothing more). Ideally, I hope they might be seen as a kind of friendship. With friends we set out to be wonderful, big-hearted, kind-spirited, thoughtful, warm, and caring; in a course of ethics conversation, we find ideals of friendship, a friendship which flounders when we exploit it or treat it as something it is not. To seek to experience the wonder around us and to evoke the mystery that follows us ever so closely, cleverly hidden in the shadow of everyday language and everyday life, we make a true claim to friendship. Expect no more of ethics talk than you do of your friends!

***132** IV. Finding a Metaphor

We use metaphors in everyday speech, especially when we have difficulty saying exactly what we mean. We need to know more about the metaphors we use, how we use them, and how common metaphors shape our thinking. Along the way we might find new metaphors to replace the old ones that have worn thin and become ragged with use. Metaphors appear in conversation, never more prominently than when we talk about our work and our lives (they are also found prominently in our talk about social relations and social institutions). In law, metaphors are always close at hand: we think of the law as a tool, as a means of dispute resolution, a form of protection, or a set of rules. We think of ourselves as technicians, hired-guns, counselors, friends, or as warriors for litigants engaged in battle. These images and metaphors have moral implications, [FN26] some serve as continuing support for conventional practices while others serve as reparative or defenses as we combat out-grown images and debilitating, dysfunctional metaphors. [FN27]

Lawyering is a complex activity and lawyers go about their professional work in diverse ways. Facing complexity and diversity, we make still more use of metaphors. Seymour Wishman, in Confessions of a Criminal Lawyer, during the course of an instructive narrative, talks about his experience of lawyering as a game, contest, battle, fight, brawl, ritualized aggression, art form, trade, job, craft, drama, performance, and power-brokering.

[FN28] We know law and the practice of law through metaphors of this kind (and still others). We also know our lives through metaphor. Life, law, and ethics are games, contests, journeys, stories, dreams, nightmares, tragedies.

***133** These metaphors evoke images and images have power. They channel and shape our thinking. For example, the images that accompany the metaphor of conversation that has evolved in my teaching of lawyer ethics has changed the nature of my teaching and, one might assume, the experience of students who undertake a course of study with me. Images have power because they are not random and isolated, not picked up off the image counter at a shop at the mall, but are a part of the literal stories we live out as lawyers. Our images of ourselves, and ourselves as lawyers, are linked up through the threaded plot of narrative. An image is an encoded story, a hologram of a discrete way of life, a path with a destination. We end up as characters in the plots we devise, plots that link up the various images to which we have become attached.

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With metaphor, we speak the connective images that establish meaning. [FN29] We use metaphors in lawyer ethics talk that reveal our ethical stances and the ethics we carry with us (as tacit knowledge) into our work. [FN30] The need to become more conscious of these metaphors arises when our everyday talk about ethics falls short, that is when we have difficulty translating the ethics we assume we already have into practices that secure the approval of others. By learning (and living) new metaphors we give ethics real meaning.

One can imagine a variety of metaphors for ethics: tool, [FN31] strategy, problem, dilemma, puzzle, a hurdle to overcome, rules ***134** or principles to be obeyed, a special language comprised of words that require definition, [FN32] or as the light we shine on the dark places our lives place us.

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***135** I have used conversation as a pedagogical metaphor for the inquiry into lawyer ethics. It is time to ask if the metaphor is a good one? Wayne Booth, a literary critic and rhetorician, offers the following criteria for evaluative judgement of metaphors:

Good metaphors are active, lending the energy of more animated things to whatever is less energetic or personal, or more abstract and passive.

. . . .

Good . . . metaphors are concise, economical.

. . . .

Good metaphors are appropriate, not just as tested by some general standard of decorum . . . but as appropriately grand or trivial, precise or general, active or pacifying: appropriate to the task at hand. If the point is to heighten sublimity, then trivial metaphors must be avoided. But if depreciation is desired, the more trivial the better.

. . . .

Good metaphors accommodate the audience.

. . . .

Good metaphors are novel, original, striking. Nothing can destroy an effect more completely than an obvious effort to say something clever when the result is commonplace. . . . [FN33]

If good metaphors are concise and economical, then ethics as conversation is a model of simplicity; we already know what conversation is and how it works. There is nothing esoteric in the idea of conversation (even though, we may find, like Walker Percy's Allison in the novel, The Second Coming, that we sometimes speak in "code"). Conversation works better as a metaphor for ethics than does philosophy (too abstract), principle (too condensed), rules (too rigid), or professionalism (too grand and amorphous on the one hand and a shield for self-deception on the other).

The fit of the conversation metaphor and its audience is harder to determine. [FN34] A conversation devoted to ethics cannot, standing alone, command the attention and respect of all those who would presently hold ethics talk in disdain. While some students***136** find ethics talk long overdue, others resist it. There is, between those who believe in ethics talk and those who do not, a continual struggle over the matter of futility ("why talk?"), relativism ("every view about ethics is as good as any other"), and cynicism ("You can talk but I won't listen").

Finally, Booth observes that our best metaphors are striking, novel, and original. I cannot claim originality for the conversation metaphor; it has, of late, been discovered by philosophers, [FN35] political scientists, literary critics, [FN36] and even legal scholars. Conversation has found use in new theories of reading (the conversation of reader and author), political theory (the conversation promoted by constitutionalism), psychology (the conversation of patient and therapist), and feminism (the conversation of women's consciousness-raising). Just because conversation as a metaphor for ethics is unoriginal does not mean it is not strikingly vivid: striking toward the heart of some matter of significance, pushing through fog and confusion, aggressively confronting the forgetting and denial that would have us turn away from moral discourse as futile.

Using conversation (and indeed ethics) as metaphor is a way of imagining a participatory ethics, something we do together, something common in our everyday interactions and routines, in contrast to something academic, external, and imposed on us. What we do together, conversationally, is figure out how ethics works, how we use and confuse our speaking about moral matters, how the metaphors and images smuggled into ethics talk reflect the shape and limits of our moral sensibilities. The conversation metaphor works--for me-- because conversation is what it takes to get me started on the journey. Journey, of course, is itself a metaphor; I don't know how to talk about ethics without using metaphors!

V. Journeys and Backroads

We take a path, pursue a purpose, [FN37] and strive toward an end. We take pride in the fact that we are constantly on the go, that we are so active and relentless in our pursuit of the good ***137** life. [FN38] Yet, there are times when conditions along the path make travel rough. But we proceed, slowing down as we must, or seeking a new route, and when all else fails, we are forced to turn back. There are times, regardless of the path we follow, that we must stop and take account of where we are and where the path is taking us. [FN39] Indeed, some journeys are not planned at all, and on some, the destination (and purpose) may be unknown. Getting ready for and taking and accounting for a journey makes for a good story.

When we get bored or beaten down (or begin to doubt the story we are living), we take a trip to Florida, drive out to California, check out Montana, drive into town for a long weekend. Trips shake loose old memories and create the possibility for new ones. [FN40] A traveler knows that home takes on the most distinctive ***138** meaning only after venturing forth beyond home, beyond provincial thinking and the local ways of doing things. We journey because we are in search of something we cannot find at home--experiences, people, memories--a story we can live only when we see ourselves as other than one who has never left home. [FN41]

Journeys help us re-imagine our histories and refashion a sense of self that takes account of ideals and dreams. Journeys relocate and help us re-size the necessity that pervades the roles we have adopted. (When we listen, away from the thunder of the courtroom and the din of the law office, we hear voices that don't get heard in the busyness of everyday life.) We travel to respond to a vague unarticulated need, to see something new and different, to be somewhere that allows us to re-imagine what it means to be home.

Those who know about journeys (and life) know that we do not always reach our destinations. The journey gets interrupted; we abandon the path, take a detour, or get lost. We sometimes turn back, return home, or stay close to home and travel vicariously. Even those who travel to get to where they thought they were going, find the place (the work, the time, the experience, the people) disappointing. What we find is that we have ended up, not in the special place we imagined, but in another version of the place we left behind. We get to China and find it built over with the worst of Western architecture. It is not easy to find places that live up to their billing in our imagination; in particular, it is hard to find places that still have some sacred quality to them. [FN42]

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***139** In my work with lawyer ethics, I find solace in the reflective journey work of Robert Pirsig's Zen and the Art of Motorcycle Maintenance. [FN43] The unnamed narrator of the story says of the Central Plains, as he leaves Minneapolis for the Dakotas on a motorcycle: “This highway is an old concrete two-laner that hasn't had much traffic since a four-laner went in parallel to it several years ago.” [FN44] When we talk about ethics, and try to make ethics a central concern in our lives, we head out on an “old concrete two-laner.” The road one follows in moral discourse is old, narrow, poorly-maintained. You don't find any of those fancy sodium lamps that illuminate urban expressways. Consequently, ethics talk can be slow going, with all the twists and turns and slow travel we associate with two-lane back roads.

Pirsig reminds us, however, that there are compensations for taking back roads. Some are lined with trees and there is much to see; being on the road is a pleasure. There are open fields, farmhouses and a sense that there are still people who live in these places along these roads, people who work and conduct their lives without pretense.

“I'm happy,” says the narrator of Pirsig's famous philosophical travelogue, “to be riding back into this country. It is a kind of nowhere, famous for nothing at all and has an appeal because of just that.” [FN45] I say just this sort of thing about a conversation devoted to lawyer ethics. As one who travels these back roads of ethical conversation, I know to expect interesting sights and a world of intriguing people (who will say almost anything). And, like Pirsig's central plains of Minnesota, a conversation about lawyer ethics can be “a kind of nowhere, famous for nothing.” Ethics is certainly not a major student attraction, nowhere and not famous at all in legal education. [FN46] Yet, I engage in these conversations***140** about ethics, happy as is Pirsig's narrator “to be riding back into this country.”

The narrator, with his son Chris riding behind him on the motorcycle, has time to take note of things he sees along the way. When he sees a red-winged blackbird he whacks Chris's knee and points to it, hollering out to his son, “Blackbird.” Chris hollers back, “I've seen lots of those, Dad!” The narrator notes that, “[a]t age eleven you don't get very impressed with red-winged blackbirds.” [FN47] Long past Chris's age, many law students don't find many occasions to be impressed with ethical blackbirds. We study law and head out on a professional life that takes us onto fast four-lane highways; we move from one task to another so quickly it's hard to look out for red-winged blackbirds or ethics. We grow up, and like the youthful Chris, assume we know all the ethics we need to know. However, it's not just red-winged blackbirds we fail to see, but also the growing tensions among lawyers, and how the new “hardball” tactics of zealous advocacy put the profession to shame. We don't know all that well how the changes in the legal profession have taken place and we certainly don't try to figure out how these institutional changes in the profession [FN48] (and the culture) might have a direct bearing on our own personal ethics as a lawyer. Our assumptions, about ourselves, about ethics, and the things its possible to see along the way, make ethics talk difficult.

Seeing a red-winged blackbird in a way that Chris cannot is “all mixed with memories that he [Chris] doesn't have.” [FN49]

The pungent smell then was from muck stirred up by hip boots while we were getting in position for the sun to come up and the duck season to open. Or winters when the sloughs were frozen over and dead and I could walk across the ice and snow between the dead cattails and see nothing but grey skies and dead things and cold. The blackbirds were gone then. But now in July they're back ***141** and everything is at its alivest and every foot of these sloughs is humming and cricking and buzzing and chirping, a whole community of millions of living things living out their lives in a kind of benign continuum. [FN50]

Chris may be too young to appreciate red-winged blackbirds the way his father does. And so, too, students of law may be too young in the profession, lacking experience and memory that makes ethical reflection memorable. We need memory to be ethical. [FN51]

Pirsig invites the reader to listen in as his narrator remembers his life. These rememberings are an intellectual autobiography that take the form of Chautauquas, the talks made famous by 19th century traveling tent shows. For Pirsig, the Chautauquas are an “inquiry into values” (the subtitle of Zen and the Art of Motorcycle Maintenance), a “series of popular talks intended to edify and entertain, improve the mind and bring culture and enlightenment to the ears and thoughts of the hearer.” [FN52] These Chautauquas are of particular interest to lawyers because they take up as their central theme a search for the meaning of Quality--in teaching, in the care of motorcycles, and in the way we think about ourselves and the world. Pirsig's story, actually a number of stories, nestled one inside another, telescopes a personal narrative and a philosophical exploration of Quality, as the reader journeys with the narrator into the “high country of the mind.” [FN53]

Pirsig says of the philosophical tale he wants to tell in the Chautauquas: [FN54]

The Chautauquas were pushed aside by faster-paced radio, movies and TV, and it seems to me the change was not entirely an improvement. Perhaps because of these changes the stream of national consciousness moves faster now, and is broader, but it seems to run less deep. The old ***142** channels cannot contain it and in its search for new ones there seems to be growing havoc and destruction along its banks. In this Chautauqua I would like not to cut any new channels of consciousness but simply dig deeper into old ones that have become silted in with the debris of thoughts grown stale and platitudes too often repeated. “What's new?” is an interest-

ing and broadening eternal question, but one which, if pursued exclusively, results only in an endless parade of trivia and fashion, the silt of tomorrow. I would like, instead, to be concerned with the question "What is best?," a question which cuts deeply rather than broadly, a question whose answers tend to move the silt downstream. There are eras of human history in which the channels of thought have been too deeply cut and no change was possible, and nothing new ever happened, and "best" was a matter of dogma, but that is not the situation now. Now the stream of our common consciousness seems to be obliterating its own banks, losing its central direction and purpose, flooding the lowlands, disconnecting and isolating the highlands and to no particular purpose other than the wasteful fulfillment of its own internal momentum. Some channel deepening seems called for. [FN55]

Listening to Pirsig talk about the need to "edify and entertain, improve the mind and bring culture and enlightenment to the ears and thoughts of the hearer" and do some "channel deepening" sounds like a worthwhile agenda for those of us interested in lawyer ethics.

VI. A Journey and a Parable

My approach to ethics, like Pirsig's efforts to talk about Quality by way of motorcycle maintenance, may at times be indirect; it's not always possible to get at ethics directly, head-on. There are times when the desire for straight talk and definitions and assurances that all will turn out well undermines moral discourse. Ethics can be an elusive fox. Consequently, we must sometimes look beyond our profession's work and conventional practices for ethical guidance.

Bowen McCoy, a Wall Street businessman, relates for readers of the Harvard Business Review (and for himself) an experience which occurred while hiking in Nepal. [FN56] McCoy and a companion,***143** Stephen, an anthropologist, were in a small party of climbers, approaching the highest pass in a sixty day Himalayan trek, an 18,000 feet pass which had to be traversed to reach the village of Muklinath, an ancient holy place. Six years earlier McCoy had attempted the climb and was forced back by altitude sickness. The weather on the day of the attempted traverse with Stephen was not good and McCoy feared that his party would be forced to turn back.

At 15,500 feet, it looked to me as if Stephen were 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 weren't 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 ***144** 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 3,000 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 1,000 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. [FN57]

McCoy's story raises, in the most dramatic, poignant, and immediate way, ethical questions of a sort that might confront a lawyer: What duty do I have to care for others? What are the social, political, psychological, and spiritual constraints that limit my ability to care for those I encounter along the way? [FN58] McCoy's ***145** parable invites conversation and offers, as McCoy reflects on his experience, an array of instructive clues about how ethics works. We cannot talk about Bowen McCoy and what happened on the mountain or McCoy's response to his encounter with the sadhu without engaging each other in moral discourse. When we talk about the McCoy story, we learn something about ethics and take a step closer to understanding how our ethics as lawyers might work.

A.Blindness

Ethical dilemmas are hard to see; we walk right past them. [FN59] We don't recognize the ethical nature of the problems that confront us. [FN60] McCoy, reflecting on his encounter with the sadhu, realizes that he "had literally walked through a classic moral dilemma without fully thinking through the consequences." [FN61] When we talk with each other about ethics we see the recognition problem first hand and up close; we are often blind to the moral dimension of our habits and practices, our conventions and concerns.***146** Some seem even to take pride in their blindness. (Self-deception knows no bounds.) To get beyond blindness we need curiosity

and an openness to inquiry, but many of us are more closed than we suspect or are willing to admit. The antidotes for blindness are curiosity, courage, and imagination. It takes courage to talk ethics, to puzzle through our personal, moral-shaped metaphors and images of professionalism. It takes skill to listen for trace elements of ethics in our talk. It takes imagination to see how ethics works in our everyday professional lives.

B.Disagreement

Engaged in ethical inquiry, we often disagree about what ethics requires us to do. McCoy, upon his return from Nepal, argues with Stephen about the duty they owed the sadhu. McCoy took the position that appropriate care had been given the sadhu; Stephen argued they did not do enough. How are we to evaluate McCoy's and Stephen's contrasting (competing) views? What kind of rhetoric(s) do we have available when we try to persuade each other that one ethical view (or resolution) is better than another? How deep are their differences and what commonality can be located in their different perspectives? Can we identify, without falsely reifying, the differences in their views? [FN62] Can we disagree, reach no resolution, produce no "answer," and continue the conversation and ethical inquiry? In talking about lawyer ethics we sometimes disagree even on such fundamental questions as whether ethics talk serves a worthwhile purpose.

There will be times when our differences are pronounced, argument escalates, and the gap between views seems too wide. [FN63] But caution dictates we not magnify our differences. "[O]ur efforts at justification need not break down helplessly at the first mention of bitter, prolonged disagreement. Disagreement itself is not the beginning. We want to explore why people disagree, ***147** what reasons they offer to defend their views, how compelling their reasons are." [FN64] Ethics is a study of contested truths. [FN65]

What we need is the kind of "edifying talk" described by Joan Williams:

***148** A pragmatic approach abandons the search for a single viewpoint because it abandons the search for a certainty that compels agreement. In its place, pragmatism substitutes an "edifying conversation" that views societal differences as food for thought. The pragmatist's search for a workable society is a search not for universal principles but for strategies through which a population, inevitably divided by differences over a very broad range of their affairs, can seek a series of necessarily transient and provisional understandings. [FN66]

C.Conversation

The disagreements we have about ethics emerge in conversations and arguments with our friends, teachers, colleagues, family and neighbors. [FN67] For McCoy, the "parable of the sadhu" emerges from conversation and argument with his friend Stephen, a conversation that began on the mountain when they encountered the sadhu and continued in McCoy's commentary in the article. [FN68]

D.Slowing Down

We are most directly confronted by ethics when, the Other "suddenly intrude [[[s]" in our lives. [FN69] Ethics throws a monkey wrench into the perpetual motion machine of routine habit; ethics disrupts an unexamined life. Ethics requires us to slow down and attend matters taken for granted. Ethics frustrates expectations, calls the accepted into question, creates obstacles to easy marches along well-worn paths. When we talk ethics we interrupt unreflective moral stances and taken-for-granted attitudes and call their accepted utility and wisdom into

question.

***149** E.Teaching

Our ethical encounters teach us about life. McCoy tells the parable of the sadhu because the encounter "had a powerful impact" on his thinking about his "corporate ethics." [FN70] The sadhu story has instructive meaning for McCoy and he assumes that it might speak to his business colleagues as well. McCoy says, "How the group [of climbers] responded I think holds a lesson for all organizations no matter how defined." [FN71] The sadhu, Stephen, and the encounter became teachers for McCoy, he offers the story to us as moral instruction.

F.Stories

We see ethics at work in the particularity of McCoy's story. We learn ethics in the particulars of a story because stories pull us into contextual, intentional worlds that can be evaluated by reference to our own experience. McCoy finds that it is "[t]he stories people tell . . . [that] transmit . . . conceptions of what is proper behavior." [FN72] Stephen Gillers argues, that "[i]n the end, every ethical rule must be tested against real stories." [FN73] "I can only answer the question 'What am I to do?' if I can answer the prior question, 'Of what story or stories do I find myself a part?" ' [FN74]

If we are to understand our ethics as lawyers we must turn to stories. [FN75] It is in stories, and the conversations these stories make ***150** possible, that the character of our virtues and vices as lawyers can be witnessed, questioned, and tested. The problem is that our lived stories too often disavow reflection, contemplation, introspection, critical self-examination. [FN76]

We forget that we have a philosophy, that our lives reflect choices that serve as plots in the lawyer story we are living. Philosophy/choice/plot/story shape the professional ethic we adopt (and adapt) in the work we do. Ethics, rooted in narrative, story, [FN77] conversation and dialogue, is close to the lives we live, attentive to the images we adopt as lawyers.

G.Defensive Moves

When we talk ethics, we sometimes find ourselves on unfamiliar ground. We lack assurance that we know our ethics well enough to hold out our views to question and scrutiny. And when questioned about our ethics, Bowen McCoy says, "we dig into a defensive position from which it is very difficult to emerge." [FN78] We are made uncomfortable by what an inquiry into ethics might reveal.

Ethics confronts us with all that we have promised, compromised, ignored, forgotten, failed, and lost in living the professional lives we do. The possibility that the life I live can be found ***151** lacking is frightening. Ethics threatens to derail a life speeding along the fast-track; ethics questions the morals of a lawyer bent on "success" at any cost.

H.Intrigue and Puzzlement

As resistant as we sometimes are to the idea of ethics, we are drawn into conversations about ethics because there is a deep human need (unless we have completely given in to the impulses of the banal and prosaic, to van-

ity and greed) to explore the puzzles and struggles that shape and texture our lives. Ethics reflects a substrata in the lives we have covered over with professionalism and assumptions about roles, necessity, and the Real World. Ethics entices us, even as it perplexes and confounds, with its choices, puzzles, mazes, and labyrinths. McCoy, his curiosity awakened, is drawn into (and becomes entangled in) the effort to understand his encounter with the sadhu.

I.Reasons and the Need to Explain

Moral and ethical concerns raised by others require that we explain ourselves. McCoy argues with his friend Stephen and tries to defend his care of the sadhu. Stephen questions McCoy. McCoy, in turn, questions himself about the encounter, the moment of choice, the decision to proceed and leave the ailing sadhu behind.

We take action, make a choice, do nothing. McCoy provides minimal care to an "almost naked, barefoot body of an Indian holy man . . . shivering and suffering from hypothermia" and sets off to climb his mountain. [FN79] Later McCoy asks: How could this have happened? Why? What happened? Who am I? We try to give, to ourselves and others, reasons that explain the action (or the failure to act) and how the choices we have made are consistent with the character we claim for ourselves.

Some of the "reasons" McCoy uses to justify abandoning the sadhu turn out to be rationalizations. Moral rationalizations are a first line of defense. "It's the lawyer's job." "We must represent our clients zealously." "We must take aggressive action to secure the goals of our clients." Our rationalizations, however, become clichés, if not cryptic ways of talking ethics while denying it is ethics we are talking about.

McCoy, speaking of his decision to climb the mountain and leave the holy man behind, perhaps to die, attributes the decision to a "high adrenaline flow, a super-ordinate goal, and a ***152** once-in-a-lifetime opportunity . . . ." [FN80] McCoy now questions these reasons. "On the mountain, none of us but Stephen realized the true dimensions of the situation we were facing." [FN81] McCoy did, however, provide some help to the sadhu, and he describes the situation as "ambiguous." [FN82] The "stress" of the situation and their purpose in attempting the climb were also reasons to leave the sadhu. But Stephen and McCoy find that the reasons, as he now tries to articulate them, simply do not work.

If you have an extra-marital affair, it is unlikely that a plea "I didn't initiate the relationship" would be a good reason for breaching a commitment you made to your spouse. If you perform badly in law school, a potential employer is unlikely to be impressed with the statement: "I didn't know it was going to be as hard as it turned out." Or, "I had better things to do." In McCoy's case, his reasons don't measure up by his own standards. "Despite my arguments, I felt, and continue to feel guilt about the sadhu." [FN83] Reasons, it turns out, are one way we defend ourselves against guilt. And it is our reasons that tell us so much about who we have become; it is our reasons that get us into trouble. [FN84]

J.Learning from Others

Ethics is something we do with others, something we do for others, something we do because we are in the world with ***153** others. [FN85] McCoy points out that "[f]or many of the following days and evenings [after the encounter with the sadhu] Stephen and I discussed and debated our behavior toward the sadhu." [FN86] McCoy and Stephen were engaged in a conversation about ethics, the kind of moral discourse I advocate for students of

lawyer ethics. McCoy's subsequent writing about the experience and the publication of the "parable" constitutes a continuing moral dialogue about the care we owe others whom we encounter along the way.

K.Failure

McCoy talks of a failure of "moral imagination and vision" [FN87] in their treatment of the sadhu. Stephen too fails, so McCoy argues, because he did not get the support of the other climbers, and McCoy, to give the sadhu appropriate care. [FN88] McCoy concludes that Stephen's failure was less than his own and explains Stephen's being more attuned to what was happening as related to his being a "committed Quaker" with a "deep moral vision." [FN89] It is McCoy, corporate executive and ordained ruling elder of the United Presbyterian Church, whose moral vision shaped by corporate life so thoroughly fails on the mountain. [FN90]

VII. A Lawyer Turns Reflective

In becoming lawyers we can expect to encounter a few sadhus along the way, clients and cases and situations and other lawyers that provide the impetus for action and for moral choice. There will be times, as the McCoy parable instructs, when the rationalizations we deploy to defend our professional lives fail. What happens when we learn that we have taken up practices and a work life that leave us less than we imagine ourselves to be?

Seymour Wishman recounts just such a story in Confessions of a Criminal Lawyer. [FN91] The book begins with Wishman's account of ***154** his confrontation with a screaming woman in a hospital lobby, a woman he later realizes was the prosecutrix in a rape case in which he had acted as defense counsel. Ms. Lewis expresses, in the most graphic street language, her disdain for Wishman and how he had treated her at the trial of her assailant. Wishman's cross-examination of Ms. Lewis had been, in his words, "brutal." Wishman concedes he "humiliated" Ms. Lewis and he wants to believe (as some lawyers and students of law today believe), that he was required to do what he did. He acted zealously, even ruthlessly, on behalf of a client. In this pugilistic version of the adversarial ethic, Seymour Wishman acted according to a fighter's code.

Following this strand of adversarialism, there is no ethical duty to, or personal concern for, Ms. Lewis and her welfare, no moral duty or obligation for Wishman, as an advocate, to concern himself with the truth of Ms. Lewis's claims. (Of course, even a lawyer enacting this "scorched-earth" version of an adversarial ethic would have some interest in the truth. He cannot knowingly present perjured testimony and must view truth as it figures in his strategy for winning the case and securing a favorable verdict for his client.) In this schema, Wishman is expected to focus on the defendant's interest and suspend or forget about ordinary notions of truth, and about Ms. Lewis. As one of my students put it, "lawyers have their own way of dealing with truth."

But there is a problem. Ms. Lewis confronts Wishman in the most direct, accusatory way, and refuses to allow him the refuge of his professional role (and the sanction of officialdom). To Ms. Lewis, his actions were reprehensible. Wishman, reflecting on his humiliation of Ms. Lewis, ponders the possibility that he has crossed an ethical line in his cross-examination. [FN92] For a thoughtful man, humiliating a person who seeks only to tell the truth (and secure justice) is not easy to explain away. Wishman begins to see his treatment of Ms. Lewis and a host of other incidents as symptoms he must now address. Could it be possible that he has let his adversarial zeal, and the legal-mind used to justify it, embrace an adversarial ethic that has distorted his character and undermined his ideals?

Wishman's story about the cross-examination of Ms. Lewis poses a question that plagues thoughtful lawyers: can a lawyer, in good conscience, and with the full approval of his professional ***155** colleagues, humiliate a witness who he believes is telling the truth? Wishman, as a good lawyer, knows that his treatment of Ms. Lewis can be explained, yet his efforts to do so, he now finds "flippant," "philosophical" excuses of which he is dubious. His explanation and reasons seem far less persuasive when Wishman momentarily sees himself through the eyes of Ms. Lewis, a woman whose moral sensibilities have not been trained to disregard the truth with impunity. [FN93]

How are we, readers of what Wishman calls a "confession," we teachers and students of law, to put Wishman's soul-searching to use? [FN94] What choices do we have? Are we, future lawyers, willing to accept the kind of adversarial ethic Wishman practices on Ms. Lewis, to adopt such an ethic as our own? How do we, in the public forum of the classroom, articulate, defend, and criticize Wishman's humiliation of Ms. Lewis and his new found reflectiveness about what he did? How do we take account of the confusion in the classroom created by the disagreement between those who accept Wishman's methods of cross-examination and those who disavow such methods?

Wishman's story presents students of law a moral dilemma that cannot be resolved by resort to the profession's ethical rules. The student must find a way of dealing with Wishman's treatment of Ms. Lewis and his moral evaluation of his own conduct that goes beyond rules, beyond clichés about legal ethics. Some students will attempt to circumvent the moral discourse Wishman's story invites: "I don't expect to practice criminal law." "If you can't stand the sight of blood, you might not want to be a doctor." "I really don't think we need to worry so much about Ms. Lewis; she was an adult and should know that when you seek to take away someone's liberty there is going to be some serious questions asked." Law students reading Seymour ***156** Wishman's account of his humiliation of Ms. Lewis are as likely to defend a practice Wishman seeks to question as they are to pause and reflect on the limits of the adversarial ethic they are adopting. Even when confronted with an insider's warning about the dangers of unbounded adversarial zeal, they are ever so reluctant to question the character formed around the clichés and conventions of the work that they will soon do. [FN95]

Whatever reluctance there may be in working through Wishman's story, the effects the story might have on us cannot be known until we probe the incident, ask how it happened, explore Wishman's explanation, and morally evaluate the "reasons" he presents for assuming his actions were ethical and professional in nature. We cannot understand Wishman's humiliation of Ms. Lewis and whether it can be justified (whether it might, under some circumstances, be the right thing to do) [FN96] unless we talk through the problem, engage each other in conversation, confront the obstacles to understanding we experience as we explore the moral dimensions of the story. We must examine the story, see how it works, and how we are going to work with it.

***157** If stories and texts make demands on us, as surely they do, [FN97] then Wishman's story makes substantial demands on the lawyer reader. Is Wishman claiming that lawyers must seek the truth above all else? There is little in Wishman's story to suggest such a simplistic reading. Is he claiming that clients with a reason to lie and a propensity to do so, don't deserve representation? Hardly. Wishman isn't, it seems, so much trying to tell us how to think about lawyers and truth-telling or trying to devise an authoritative statement on the moral nuances of cross-examination, as he is simply describing how his work as a lawyer set him at odds with himself and how the incident with Ms. Lewis gave him pause to reflect on who and what he was becoming. Wishman demands that we come to grips on our own with this matter of truth-telling.

One way of reading Wishman is to see that he does indeed leave the reader with a moral injunction: You

must reflect on your embodiment and enactments of the adversarial ethic; you must decide whether the accommodations you have made as a lawyer fit with the kind of character you envision for yourself. If you ignore matters of truth-telling, it will, Wishman warns, come back to haunt you. The demand Wishman makes on the reader is a dialogical one: you must enter this conversation, consider my notions about lawyering, and in doing so, you must reflect on what you are becoming. You can successfully escape the moral concerns associated with your work as a lawyer only if you are willing to become the kind of character that is oblivious to the harms in which you are implicated, blind to the sadhus you meet along the way.

Wishman's interior conversation about these matters, and his efforts to justify to the world (and Ms. Lewis) his version of the adversarial ethic, offer those of us curious about lawyer ethics something to talk about. Listening to Wishman's story, we must respond. What are we to do about the professional virtue we know as zealousness? Are we willing to let it undermine other ***158** aspects of our character? By talking about Wishman, we pursue not just a moral dilemma--can a moral person who happens to be a lawyer attempt to make the truth look like a lie?--but a course of conversation in which the nature and purpose of our moral commitments must be spelled out. We, like Wishman, must determine what it is possible to say, feel, and do about this lawyer ethic of adversarial zeal, an ethic powerful enough to set itself above the truth and to shape the character of those who embrace it.

Wishman, by way of his story, becomes a teacher of lawyer ethics, a teacher who demands that we think carefully about the legal persona and a legal mindset pushing zealousness to its limits (and beyond). Wishman's confession demands that we reflect on the moral character we create as we serve this adversarial ethic. [FN98] How do we try to justify what Wishman did? What excuses do we give each other in our effort to minimize the impact of Wishman's confession? Can we justify (to each other) an unreflective, unarticulated stance toward an adversarial ethic that results in harm to others? If not, how do we know when to exercise caution, when to question the ethic that lies so perilously close to the actionable heart of our moral life? Taking on ***159** these questions we accede to the demands of Wishman's confession and put our selves, our professional ideals, and our ethics to the test.

Wishman raises a host of questions: At what cost do we embrace, without reflection, an adversarial ethic? How does a legal mindset help us rationalize the humiliation of truthful witnesses? [FN99] How does a legal mind tune out moral concerns?Is***160** a legal mind the only kind of mind one needs to be a lawyer? [FN100]

When we talk about Wishman, we inevitably talk about ourselves. When we talk about ourselves, we are not always going to be pleased with what we hear and what we learn. When we talk about what lawyers do and what we will do as lawyers, we find the talk “tightens” and “constrains” and seems clearly not to be an elixir. [FN101] We can expect some strained conversations as we witness the tattered moral maps we carry into law school conversations about ethics. We begin to see and feel, in our talk about Wishman, how vulnerable we are [FN102] and how easy it is, talking about moral matters, to succumb to a sense of futility. It turns out to be no simple thing at all, this matter of talking about Wishman, talking about ethics, talking about our work as lawyers. We are rather quickly and dramatically pushed beyond the conversational***161** world of painters, beyond their easy banter about and casual reflections on the work that gets them through the day.

There is no formula we can follow to talk about ethics, as there is no formula to become a good lawyer or good person.

* * *

Law students, still new to the idea of the practice of law, speak convincingly as if they were already lawyers, already ethically composed (and compromised) by the necessities of a Real World and the conventional roles held out to them when they take their place in this world. We listen, as students convinced about the necessities of the adversarial ethic push it beyond limits justified by common sense and ordinary morality. We listen, and witness the painful moments as those most certain about themselves and their role mimic the talk of hard-ball lawyering. We listen, as these students, ever eager to be Real Lawyers and leave their student days behind them, argue with passion that Seymour Wishman did nothing wrong in his cross-examination of Ms. Lewis. They do not see in their defense of Wishman, made all the more bold by their newly emerging law-shaped speech, an ethic and a character with the potential to undermine their ideals. Law students try to imagine themselves in a story [FN103] that puts them outside (or above) everyday moral concerns. They defensively attempt to justify the harmful effects of unbounded adversarial zeal when asked: Is there a more thoughtful, caring, judicious, and truthful way to imagine ourselves as lawyers than our education as lawyers now holds out for us?

VIII. Maps We Bring With Us

Testing our ethics in a course of conversation, as students do when they confront the Seymour Wishman story, is a form of educational adventure travel. [FN104] Some set off, in ethical conversation and in life, with little thought to where they are going. Others make elaborate preparations before setting out and plan every possible detail. I traveled once with a man from my hometown in Western Kentucky who had planned a trip "out West" for over a decade. In his seventies when the trip began, he had been planning the trip from the day his ten year old grandson***162** was born. He planned the trip so long he had become an old man, old enough to need help to make the trip.

Some of us travel using maps, others seek destinations for which no map seems needed.

When we listen to law students talking ethics, it's important to keep in mind that they too draw on maps. Our ethics talk (and even our silence about ethics) leave markers of paths we follow to get from one place to another. In moral discourse those maps are put to use. The maps we use in moral discourse (or to hold it in disdain, placing it off the map) locate where we are and the routes we follow.

When we talk ethics we travel where others have traveled before. Since no one comes to ethics talk with a blank ethical slate, our conversation about lawyer ethics is going to draw on maps most readily available to us. [FN105] Some of our maps may be no better than the crude hand-drawn ones used by treasure hunters. Others carry official maps. Still others resort to the kind of maps you find at the chamber of commerce that show local points of interest. [FN106] Simply put, we have a frame of reference [FN107] that we bring with us to ethics and to our moral education and training as lawyers. This frame of reference, or map, ***163** figures prominently in the kind of character we take on as lawyers.

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***164** Many of us use a map that we might call "common-sense." This is the map we use to initiate a conversation ("How are you today?"), seek directions ("How can I get to the Sears Building?"), establish the nature of the work we are being asked to do ("What do you want me to do now?" "How should we proceed?"). What are we doing? Where do we go from here? What next? Without this common-sense map of everyday reality, we would be lost. The common-sense map is the map the painters use in their workday conversations.

The common-sense map is functional but one-dimensional. When overused, and taken erroneously to be a map of more territory than it actually represents, the common-sense map leaves its user a subscriber of practicalism, a philosophical frame-of-reference with decidedly undesirable features. A prosaic mentality--the kind of mind who overuses the common-sense map [FN108]--is pernicious when pushed beyond its limits.

***165** How is this common-sense map related to our ethics as lawyers? First, the map assumes a great deal of power because it purports to represent reality. Static social conventions and scripted roles are accepted as given, natural, inevitable. These patterns become part of a taken-for-granted reality that encode and disguise our assumptions about the moral dimensions of professional life. We expect, as the natural order of a well functioning life, that our ethics will be enfolded in our actions and choices; we assume ethics to be an internalized set of principles that need no articulation. [FN109]

For the everyday life of lawyer ethics, we need simply watch lawyers in their offices talking to clients, and talking with each other about clients. There is, of course, ethics reflected in the law talk we do in trials and with judges, and in the narratives that judges create in judicial decisions, but it is the everyday talk of lawyer with client, [FN110] and lawyers with other lawyers, and law students and their teachers, that we find revealed the common-sense maps that make moral notions a part of the reality of legal practice. Letting our practices become habit, we follow the map and the restricted routes it lays out for us. [FN111] Like fish immersed in water, we are immersed in the ordinary practices of law. [FN112]

* * *

***166** Walker Percy, in his novel The Second Coming, [FN113] introduces a young woman named Allison who has difficulty doing the most ordinary everyday sorts of things. She is dysfunctional because she has no map of ordinary reality. Allison's difficulties are set against the story of Will Barrett, a man in his mid-forties, retired from a New York law practice after the death of his rich Carolina wife Barrett has made effective use of the map of ordinary reality (along with other maps) to become a "successful lawyer." When you use the map of ordinary reality and are good at it, you can get along quite well in life.

One difference, among others, between Barrett and Allison, is that Barrett has used the map of ordinary reality to convince others and himself that he knows what to do and how to do it, where he is going and how to get there. He has certainly proven he knows how to get ahead in life. And, as we might expect of a lawyer, Barrett knows how to talk; he knows what to say and how to say it.

Allison is a failure in all that Barrett has succeeded. Allison recognizes that there is a map used by others that she doesn't have--she calls it the "code"--which permits others to know this ordinary reality [FN114] and to interpret it. "[S]he reflected that people asked questions and answered them differently from her. She took words seriously to mean more or less what they said, but other people seemed to use words as signals in another code they had agreed upon." [FN115] Allison uses words literally; she finds that others mean something different than her literal translation of their words. To be real with those with whom she must interact, to be more functional, Allison seeks access to this "code" which will allow her to get to the secret meaning behind words. [FN116] Allison feels that with access to the code she can better deal with the fact that the people she encounters don't "talk in complete sentences. People didn't seem to need more than a word or two to make their own sense of what you said." She discovered "she could talk as long as she asked questions. Making statements was risky." [FN117]

***167** Allison's discoveries follow an encounter with a young man in a Michigan State T-shirt sitting on a public bench:

He looked good-natured and dumb. She decided to practice [talking] on him.

"Michigan State," she said. It came out not quite as a question and not quite as a statement. "You--?"

This sounded more like a question.

"Oh no. Linwood High. I play for the Wolves."

"The Wolves. Oh yes." She noticed the banner. "Yes, but is that permitted?"

"Is what permitted?"

"The Michigan State T-shirt."

That was a slight blunder. For a moment she had imagined that there might be regulations preventing unauthorized persons from wearing university T-shirts, perhaps a semi-official regulatory agency. In the next instant she saw that this was nonsense.

But the youth did not see anything unusual. "You can get them for three and a half from Good's Variety."

"Are the Wolves--?" She paused. . . .

"If we win this one, we'll be state champs, single A," he said.

"That's --" she said and stopped. But he didn't notice. He must have been waiting for somebody, for suddenly he was up and on his way.

"Have a nice --" he said, but he turned his face away.

"What?" she asked in a very clear question. "Have a nice what?" But he was gone. [FN118]

Even Will Barrett, while he has full access to the "code" that Allison struggles to rediscover, finds that some of his conversations sound a bit strange. Barrett, playing golf with old Carolina friends and a brother-in-law, Jimmy Rogers, reports the following conversation:

His brother-in-law was lining up a putt, crouched over his putter with its gimmicky semicircular head, elbows sticking out, right foot drawn back daintily. . . . After the putt Jimmy Rogers took his arm and drew close and said Hail Caesar and he said Hail Caesar? and Jimmy Rogers said You really did it, didn't you? and he said Did what? And Jimmy said You picked up all the marbles, that's all. You married one of them and beat them at their own game in their own ball ***168** park. Them? Who's them? Yankees? What game? Practicing law? Making money?

But then Jimmy drew close and looked solemn.

"I'm so sorry, old buddy."

"Sorry about what?"

“Your wife's passing.”

“Oh. Thank you.”

“What a wonderful person she must have been.”

“Yes, she was.”

Jimmy Rogers began to tell him a joke about a Jew and a German and a black on an airplane with a single parachute. . . . Am I going crazy? he wondered curiously. [FN119]

Will Barrett, having made effective use of the “code,” is now witness to a world where words have dubious meanings.

Yet, Barrett, when he looks back on his life as a young lawyer practicing law in New York, sees that it was not all quite what he assumed it to be. [FN120] Barrett is an example of how a man can, as his bother-in-law put it, “pick up all the marbles,” and still not avoid those times in life when it all turns strange. Barrett starts firing a gun close to his face, remembering a woman he knew in high school; he contemplates suicide. Barrett, like the lawyer Ivan Ilych in The Death of Ivan Ilych, [FN121] finds his routine world coming apart at the seams. He begins to fall during his golf games and experience what appears to be seizures. (The complex relationship of physical and psychological “causes” for Will Barrett's complex of “symptoms” is an underlying theme in the novel.) Barrett has lived according to a common-sense map that uses ordinary reality to forge a “successful” life. But he now needs another map, a philosophical/existential map that corrects the gross distortions of the map of ordinary reality he's grown so accustomed. [FN122]

***169** When we follow the well-worn path, live an unreflective life, go after success with reckless abandon, we set ourselves up for a “fall.” Witness the archetypal failure of lawyers like Ilych, [FN123] and Jean Baptiste-Clamence, in Albert Camus' The Fall. [FN124] Or consider examples closer to home, those you know in your own family, town, or church, and the stories you read about lawyers in the daily newspaper and see fictionalized on television.

Consider, from some years back, a rather well-known Republican political operative named Lee Atwater, a tenacious “hard-ball” political manager, and engineer of George Bush's presidential campaign in 1988. Atwater died in 1990 of a brain tumor. [FN125] Atwater's illness brought him around to reconsider his reputation for political hardball:

Lee Atwater, who used to revel in making his political enemies squirm, who used to jog with the President and spar with the press, now says the moment when he feels most in control is when he goes to the hospital for the daily treatment to fight the tumor in his brain.

“He has said radiation is the one time of the day he's on the offensive,” said Leslie Goodman, Mr. Atwater's press secretary at the Republican national headquarters, “because he's doing something that actively contributes to his wellness.”

Being on the offensive is what most of Mr. Atwater's life has been all about. He brought a relentless, win-at-all-cost aggressiveness to national politics that thrilled his Republican followers and infuriated his Democratic opponents.

But for the first time in his adult life, Mr. Atwater's central preoccupation is no longer politics. His enemy is not some Democrat he can slash away at, but a small cluster of errant cells, about a quarter of an inch in diameter, in the right forward part of his brain.

***170** There is something about Mr. Atwater's situation that is almost like a novel. At the age of 39 he had become the dark prince of politics, admired and perhaps feared by Republican colleagues; disliked and feared by many Democrats. He is one of the youngest Republican national chairmen in the party's history and a confidant of the President of the United States, a President he helped elect.

Then, by his own description, Mr. Atwater came suddenly "this close to your Maker" when the tumor announced its presence 25 days ago by causing a seizure as he was delivering a fund-raising speech.

Everything has changed.

. . . .

"I fooled myself into thinking I was indestructible," he told his hometown newspaper. . . .

[One person who visited Atwater reports in summary fashion that he said], "The normal pettiness that accompanies politics isn't, under normal circumstances, worthy of very much. In this case it's pretty clearly blown off the radar." [FN126]

An earlier article reported that Mr. Atwater's "discovery of a benign tumor in his brain has caused him to tone down his pit-bull style of politics":

"I can't imagine me getting back in a fighting mood," Mr. Atwater said. . . . "I don't see how I'm ever going to be mean."

Mr. Atwater first rose to prominence in South Carolina politics with his aggressive, and negative, style of politics. He achieved nationwide fame with negative tactics that he successfully used in George Bush's Presidential campaign in 1987.

"It's going to be hard for me to be as tough on people," he said . . . in the interview over his automobile telephone. Mr. Atwater talked on his way to the hospital for his daily radiation treatment, which is intended to shrink the olive-size tumor.

"What I'm going to do is take a new approach to how I proceed, because politics is people. I've always loved people. But I have a better sense of humanity, a better sense of fellowship with people than I've ever had before.

***171** "Forget money and power," Mr. Atwater said. "I had no idea how wonderful people are. I wish I had known this before. What a way to find out."

. . . .

"Seventy percent of the things I was frantically pursuing didn't matter anyhow," Mr. Atwater said.

When it was suggested that he sounded like an entirely different person, Mr. Atwater replied: "I'm the same guy. You're seeing a guy who just stared right into the abyss. Things I didn't think about too much are now important, and that's human relationships and the love of a lot of people, and how valuable they are."

"This whole experience has taught me something new about love and mankind in general," Mr. Atwater said. [FN127]

* * *

When we stay on well-worn paths, follow established, conventional maps, we expect to end up at destinations we have chosen. We assume that being practical and realistic and responding to the demands of the Real World is all we need to succeed. Those who adapt to this Real World not only accede to Necessity but do so with pride; those who call themselves Realists assume that their compromises and middle-way, [FN128] avoids extremes and lends authority to their moderation. They speak in authoritative tones about "being realistic." They assume, sometimes rather righteously, that their map of ordinary reality is Reality. And so it is that we forget that even well-worn paths can lead us astray. Charles Reich, in The Sorcerer of Bolinas Reef, says, "I was amazingly wrong in the assumption I made. I took pride in being as realistic as possible, but to a large extent I ended up misdirecting my energy, being concerned with the wrong things, spending years attempting to master the wrong curriculum." [FN129] If the well-worn path led to gold, everyone would be rich. The one feature on the common-sense map of reality most likely to be obscured is the warning sign: Success has its costs. Hardball players like Lee Atwater learn, but late and the hard way, that the route they follow, leads to no paradise.

***172** IX. Myths That Locate Moral Discourse

We readily assume that we are ethical, assured that we know the source of our ethics. We say of ethics--it is a matter of childhood and growing up, lessons learned from parents, following time-honored principles, knowing right from wrong. We claim ethics to be the seamless and inevitable translation of experience into character.

Ethics does indeed have much to do with how (and where) we were reared as children, how we were loved and cared for, neglected or abandoned, and how the trust we learned to place in ourselves and others has been reciprocated. We see ourselves as moral persons because we have a history, a story-shaped, parented past.

Others contend that, yes, while we certainly got our ethics as children, ethics has a still more distant origin. Ethics emerges from conventions and traditions of a community of people. Ethics is what we get from being embedded in an already existing tradition and culture. [FN130] We take on and adopt ethical roles in dramas that are socially and culturally scripted, dramas already ongoing. We inhabit, in this view of the source of ethics, a moral world that predates personal experience. [FN131]

* * *

When we think about lawyer ethics and whether our efforts to talk about ethics has any bearing on the way we live, we are ***173** likely to confront what might be called an ethics origin myth. [FN132] One origin myth for ethics envisions a distant past (of some greater or fewer years), a time of great simplicity when we found right and wrong sharply delineated, when there was greater certainty about how one was to pursue a worthwhile life. In this time now past, people had a more definitive sense of who they were, what they were meant to do, how meaningful work was to proceed, and how their lives were to unfold. Life had purpose and meaning, restricted and confined, labored and painful, as it may have been. This was a time when "tacit knowledge" [FN133] and practical affairs were conjoined, when moral knowledge served the practical affairs of everyday life and knowledge was directly linked to survival. What we did not know (and there was a greater sense then that there was

much we did not and perhaps could not know) we left to the province of religion and fate, which themselves gave rise to bodies of practical knowledge.

Those who accept this myth as an origin for ethics see our movement over time as a decline. The myth leaves us longing for the once good world, buying into an all-consuming busyness even as we seek escape (and redemption) from our headlong rush toward the future, as we try to sort through the muddles and confusions of modern life. The task of ethics in this myth is that of recovery, a battle to reclaim the sensibilities of a lost world in which moral sentiments and stature provided safe haven.

A second, sharply contrasting mythic account of the origin of ethics sees our movement over historical time as marked by progress. The nostalgia for a lost paradise (and the yearning for it) is viewed as folly, a kind of backward look that impedes our confident embrace of the future. The past, rather than a time of desirable moral certainty was, according to the myth of moral progress, a time of great turmoil and savage indifference to human suffering, a time when the first law was the law of the jungle. The most dominant ethic in this vision of the past was the will to survive. Necessities of survival left most human beings indifferent to the nuances of ethics. In the far reaches of this past, waking life was spent protecting ourselves from enemies and dealing with the forces of nature. We feared the wrath of distant gods and experienced everyday existence as brute destiny. Human energies and imagination were summoned as allies ***174** against myriad fates that threatened to engulf and destroy as often as they provided solace and comfort.

The moral bottom line in the myth of progress: we are less brutish today because moral reckoning has slowly replaced the law of the jungle. Ethics (and the social institutions and psychological changes that make ethics possible) has, ever so slowly, transformed an ethic of survival into an ethic of human and moral progress. Ethics celebrates the growing development of human civilization.

* * *

Moral discourse is shadowed by contrasting myths of decline and progress. These myths, one or the other (or still another), appear as substrata in our conversations about who we are today, and how the moral conditions of our own time, and our sense of hope or futility about the evolution of a moral universe, plays out in the practice of law. We rely upon myth to rationalize the moral skepticism found in law school classrooms; myth is required of those who set themselves against the practices of extreme adversarial zeal. We lawyers are, for good and ill, stranded in a world refracted through the prism of mythic stories of moral progress and moral decline.

Whether the ethics we claim for ourselves emerges from a nostalgic or barbarous past, we seem to have settled for a muddled, modern, middle-ground, a myth of ethical mythlessness. “It is too late to learn ethics.” “Ethics can't be taught.” “Moral discourse is futile. No one changes their mind when we talk ethics.” “Ethics gives me a headache.” We find no reason to talk ethics, reflect on our moral fate, and see no future in making ethics a central concern of professional life. We locate ethics in the realm of individual privacy, or we sanitize ethics in a technology of bureaucratized quasi-ethical rules. We demand that lawyer ethics be reduced to law. The rationality of legalism seeks to displace the mystery of ethics, even as our ethics become more perplexing.

X. Curiosity and Courage

To confront the conventional disdain for ethics and the myth of mythlessness requires courage and curios-

ity. It takes courage to face ourselves and others squarely, honestly, and truthfully. It takes courage to confront not only the powerful in society but also the powerful ways we deceive ourselves. It takes courage to confront and undo self-deception. And courage, like any virtue, cannot stand alone. Courage requires curiosity (and humility, and empathy, and . . .). Curiosity is a spur to courage, a ***175** magnetic pull into the ethical labyrinth of law work. Curiosity fuels the desire to know how ethics works.

Curiosity has two archaic meanings that provide insight into ethical inquiry. With its etymological roots in the Middle French curios, Latin curiosus and cura, curiosity suggests both care as well as "undue nicety or fastidiousness, inquisitiveness" and "a blamable desire to seek knowledge (as of sacred matters)." [FN134] The archaic meanings of curiosity stand in contrast to its more modern definition: the desire to investigate and learn, inquisitiveness about others' concerns. Curiosity, with its definitional matrix of archaic and contemporary, virtue (inquisitiveness, care) and vice (unwarranted prying, fastidiousness), compels ethical inquiry.

To be curious implies an eagerness to learn. Curiosity, manifested as the desire to know, is associated with those who seek excellence (or Quality), and excellence is always laced with a substrata of moral understanding. To know any subject well, and one's relation to it, there must be an inquisitiveness about the ideals, virtues, and moral features that make the subject compelling, that have given it a shape and a history. Curiosity is accompanied by the ever-present danger of "objectionable intrusiveness or officiousness." For the ethically curious there is always that "habitual impertinent curiosity . . . about things secret or unrevealed . . . ." Our curiosity is always shadowed by an association with prying and an "officious or busy meddling esp[ecially] in personal affairs." [FN135] We shy away from ethical matters because we don't want people (even the most well intentioned) prying into our lives. (We all know what it means to have prying, meddlesome neighbors, parents, friends, or colleagues.)

Courage and curiosity play themselves out in rather interesting ways in legal education. Those who successfully undertake the arduous work of legal education are acclaimed "good students." Yet, some of us find the acclaimed to be thoroughly deceived by their success. Richard Rodriguez, in The Hunger of Memory, describes a student--himself--he calls a "scholarship boy." [FN136] This student learns to mimic his teachers and receive praise for the work he produces. [FN137] The "scholarship boy" is, however, not a good student at all. "He relies on his teacher, depends on all that he hears in the classroom and reads in his ***176** books. He becomes in every obvious way the worst student, a dummy mouthing the opinions of others." [FN138]

The narrator in Robert Pirsig's Zen and the Art of Motorcycle Maintenance, a teacher, comments on a different kind of student, one who has lost his curiosity and certainly has no desire to be like his teacher. "At first he thought it was laziness but later it became apparent that it wasn't. They just couldn't think of anything to say." [FN139] Pirsig describes the teacher's "sinking feeling" when a student, assigned to write a five-hundred word essay, took as a topic, the United States. The student was encouraged to narrow her topic to Bozeman, Montana, where the university was located:

When the paper came due she didn't have it and was quite upset. She had tried and tried but she just couldn't think of anything to say.

He had already discussed her with her previous instructors and they'd confirmed his impressions of her. She was very serious, disciplined and hardworking, but extremely dull. Not a spark of creativity in her anywhere. Her eyes, behind the thick-lensed glasses, were the eyes of a drudge. She wasn't bluffing him, she really couldn't think of anything to say, and was upset by her inability to do as she was told.

It just stumped him. Now he couldn't think of anything to say. A silence occurred, and then a peculiar answer: "Narrow it down to the main street of Bozeman." It was a stroke of insight.

She nodded dutifully and went out. But just before her next class she came back in real distress, tears this time, distress that had obviously been there for a long time. She still couldn't think of anything to say, and couldn't understand why, if she couldn't think of anything about all of Bozeman, she should be able to think of something about just one street.

He was furious. "You're not looking!" he said. . . . For every fact there is an infinity of hypotheses. The more you look the more you see. She really wasn't looking and yet somehow didn't understand this.

He told her angrily, "Narrow it down to the front of one building on the main street of Bozeman. The Opera House. Start with the upper left-hand brick." [FN140]

***177** The student, as she was about to complete the essay, said of her experience: "I sat in the hamburger stand across the street . . . and started writing about the first brick, and the second brick, and then by the third brick it all started to come and I couldn't stop." [FN141] The student rediscovered her curiosity, but she needed an impetus and a method to do it.

It will take curiosity and courage (and some curious teachers) to talk about lawyers and their ethics in law schools as they are presently constituted. Is it not courage one needs to participate in a conversation that comes all too quickly back around to the ethics not of lawyers in general, but to the ethics each of us brings to the profession? [FN142] Is there not some curiosity demanded of those who must square an adversarial ethic with the ordinary ethics we have in place when we take up the study of law? It takes both courage and curiosity to explore the gap and the dissonance of actions and images, our pronouncements about adversarial zeal and the moral characters we purport to have.

To figure out how the ethics we have already got works and how the ethics we take on as lawyers can be reconciled with who we already are (and seek to be) is a heady task. We will need curiosity about ideals and ethics and how they are to be lived in a hostile world. We need curiosity about ourselves, about our hopes and fears, curiosity about how ethical life works and how it fails. We must have the courage to listen.

XI. Educating Failure

A profession like law draws the reflective and the unreflective, those willing to examine the moral fabric of their lives and those who see such examination as nonsense and folly. It draws both those capable of doing good and those who don't intend to let the search for the good by others slow them down in getting what they want out of life. In such a world, moral discourse proceeds with difficulty, looming always at the edge of failure.

Ethics reintroduces us to the experience of failure in professional life; it calls us to do an honest accounting of what we are not. [FN143] Seymour Wishman tells a story of failure and the atrophy ***178** of his moral sensibilities. Bowen McCoy experienced failure in both his own personal response and that of his climbing group when confronted with a fragile sadhu. We can learn from such failures and the pathologies (or what Jung would call the shadow) [FN144] they represent, or we can deny they have ethical significance.

When we take up ethics, we can expect failure, and the failure is experienced firsthand when we try to reimagine an adversarial ethic lived as a virtuous life. [FN145] A sense of failure follows our talk of ethics, a his-

tory of failure that begins with Socrates (a failure that resulted in Socrates' death). But we must attempt, with Wishman and McCoy, and other teachers, to confront and learn from failure, but to do so, we must be willing to see failure as a problem of professional life. [FN146]

Ethics talk does not, in and of itself, magically produce resolute moral sensibilities or rid the world of amoral lawyers. Such an admission turns ethics talk somber and lends support to those who insist that ethics talk (if not all of ethics) is a futile endeavor. Suspicions about ethics talk are confirmed when moral discourse, with its twists and turns, discomforts and anxieties, confusions and perplexities, leads us in circles and produces no ready answers.

The folk wisdom about moral failure is democratic and simple: we all suffer them. [FN147] Some of us run from them, hide and cover them up, and sometimes lie about them. [FN148] We know mistakes***179** are hard to admit, so hard that how we deal with them becomes an integral part of our character. We try to care for others, avoid harm, and do good work. But then, there is a mistake. We ignore one for whom we have responsibility to care. Someone under our care is harmed. It is difficult to admit something has gone wrong. We abhor the thought of personal failure. When ethics introduces the reality of failure, we cannot always expect the messenger to be treated well. It takes real courage to look, without despair, at the pathologies we develop as lawyers. [FN149] Honesty hurts, but without honesty about failure we become deluded about the quality and meaning of our work. Work uneducated in failure is dishonest. [FN150]

Failure and the dark days of confusion and despair that accompany it bring honesty to craft and truth to professionalism. The truth of failure takes us back to the beginning, endowing the high rhetoric of professionalism with the grounded humility appropriate to a craft. With failure we are reintroduced to a new way of seeing our work, a new truth about work. James Hillman, writing about failure (calling it pathology), suggests that “it's there all the time! The pathology [failure] is the place that keeps the person in the soul, the torment, that twist that you can't simply be naive, you can't simply go along in a natural way, that there's something broken, twisted, hurting, that forces constant reflection--and work . . . .” [FN151]

When we stay close to the pathologies and failures of our work, we see the soul of work, what makes it human, the heart of it, and its dark shadow side. Without a sense of failure we are unprepared for the tragic dimension of professional life. [FN152] The ***180** failure of professionals, and of professionalism itself, is no secret, so an education in failure honestly accounts for what we know about professionalism. [FN153]

An education in professional failure teaches caution about the rhetoric of success and how it provides a convenient “cover story” for our work. [FN154] Success blinds us to an ethic of work that encourages deception and silence. Without the perspective of failure, attending to work from the dark side up, we are in danger of misreading the text of our own life and the life of the work we do. By turning the world of success on its head, seeking an education from stories of mistakes and failure, wrong turns, poor attitudes, confusion, anger, and disappointments, we make our work lives more honest and truthful. [FN155] There is something of value buried in the rubbish of our mistakes and failures--a record and a truthfulness about who we are and what we do. If the present legal culture did not lead us astray, if legal thinking did not impede our memory and encourage self-deception, we would have less need for ethics than we do. Ethics confronts us with the promised but unlived and we cannot know this truth without suffering. “We come to the truth only through suffering and anguish, so that in order to recognize the truth we must be drawn from our comfortable and self-contained worlds of illusion.” [FN156]

***181** But who among us has an appreciation for discomfort, anxiety, confusion, failure? Taught to treat

symptoms out of existence, we assume moral well-being to be the absence of symptoms. But just as the symptoms of psychological and physical disorder have a positive function, so too do the symptoms of discomfort when we engage in moral discourse. Adrienne Rich observes:

In every life there are experiences, painful and at first disorienting, which by their very intensity throw a sudden floodlight on the ways we have been living, the forces that control our lives, the hypocrisies that have allowed us to collaborate with those forces, the harsh but liberating facts we have been enjoined from recognizing. Some people allow such illuminations only the brevity of a flash of sheet-lighting, that throws a whole landscape into sharp relief, after which the darkness of denial closes in again. For others, these clarifications provide a motive and impulse toward a more enduring lucidity, a search for greater honesty, and for the recognition of larger issues of which our personal suffering is a symptom, a specific example. [FN157]

Moral discourse, when it intrudes into the domain of legal discourse, is just the experience Rich describes, "painful and at first disorienting" because it "throw[s] a sudden floodlight on the ways we have been living, the forces that control our lives, the hypocrisies that have allowed us to collaborate with those forces, the harsh but liberating facts we have been enjoined from recognizing." These lines say much about our lives as lawyers. There is, as best I know, no way to take up ethics and no ethical life that allows us to escape the perplexity of moral discourse, the cul-de-sacs, box-canyons, and washed-out trails we find evidenced in our efforts to talk about our ethics as lawyers.

* * *

Law, legal education, and the legal profession, are permeated with stories of success and failure. [FN158] How could it be otherwise? Failure and success are linked archetypal themes at the ***182** heart of any heroic quest. Consider, for example, Cinderella and her education in winning and losing as she experiences failure upon failure and then a stunning "success." The lasting impression we have of Cinderella is her unqualified success. Our memory of Cinderella, her purported rescue by a prince, and our desire to believe that good has prevailed, a remembering of the story that obliterates the pain of Cinderella's suffering and the fact that we know nothing of Cinderella's future life with the prince.

In Greek mythology we find the story of Icarus, another story of archetypal failure. Daedalus, Icarus's father, had befriended the king, but out of favor had been held prisoner, with his son Icarus, in a tower.

Daedalus contrived to make his escape from his prison, but could not leave the island by sea, as the king kept strict watch on all the vessels, and permitted none to sail without being carefully searched. "Minos may control the land and sea," said Daedalus, "but not the regions of the air. I will try that way." So he set to work to fabricate wings for himself and his young son Icarus. He wrought feathers together, beginning with the smallest and adding larger, so as to form an increasing surface. The larger ones he secured with thread and the smaller ones with wax, and he gave the whole a gentle curvature like the wings of a bird.

Daedalus equipped both himself and his son with a pair of these bird-like wings and taught his son how to use them to fly. When all was prepared for flight, he said, "Icarus, my son, I charge you to keep at a moderate height, for if you fly too low, the damp will clog your wings, and if too high, the heat will melt them. Keep near me and you will be safe." While he gave him these instructions and fitted the wings to his shoulders, the face of the father was wet with tears, and his hands trembled. He kissed the boy, not knowing that it was the last time. Then rising on his wings, he flew off, encouraging him to follow, and looked back from his own flight to see

how his son managed his wings . . . . They passed Samos and Delos on the left and Lebynthos on the right, when the boy, exulting in his career, began to leave the guidance of his companion and soar upward as if to reach heaven. The nearness of the blazing sun softened the wax which held the feathers ***183** together, and they came off. He fluttered with his arms, but no feathers remained to hold the air. While his mouth uttered cries to his father it was submerged in the blue waters of the sea, which thenceforth was called by his name. [FN159]

Our problem, as for Icarus, is that our ideals, often enough untried and untested, are, as law teachers take pride in demonstrating, little more than pretense and facade. An ideal claimed, but not lived, is pretense. (The ideals that law students assert in the classroom--the ethic they defend--are naive only because they have not been lived.) High exalted hopes and longing for greatness are shadowed by the looming (but denied) danger of a "fall," an Icarus descent into a world that defeats us. [FN160]

XII. Appearance and Reality

The tension between appearance and reality, fundamental to our efforts to understand success and failure, can be traced to the classical Greek philosophers who were concerned with "real and false philosophers, statesmen and tyrants, unjust men who seem just." [FN161] The appearance/reality, success/failure problem ***184** stalks our lawyer ethics talk. If the purpose of ethics talk is to shore up the public image of lawyers, to hold ourselves out to the world to be something we are not, to deny the moral fault lines that appear in our work, then ethics talk is little more than an organized effort to shore up an appearance. [FN162] Albert Camus' The Fall explores this terrain. [FN163] The protagonist of the novel, Jean-Baptiste Clamence, a Parisian lawyer, passes his time in an Amsterdam bar recounting a life in which he assumed himself to be one kind of person, while the life he was actually living produced a strikingly different person. Clamence describes, in lavish detail, an imagined life as a virtuous lawyer. Then, in a chilling self-dissection of that appearance, Clamence makes clear that his virtue was a facade. [FN164] Clamence's righteous allegiance to virtue convinced him he was a superior man, above and beyond judgment. Clamence says of himself, "I have never felt comfortable except in lofty places. Even in the details of daily life, I need to feel above." [FN165] To feel superior, Clamence practices virtue as a style, and disguise. He later confesses that "style, like sheer silk, too often hides eczema." [FN166] Clamence is, simply put, a hypocrite. A hypocrite (Greek hypocrite, actor) holds forth as having virtues or qualities she does not have; a hypocrite is a dissembler, a fake. [FN167]

***185** The hypocrite in "[e]very age, every form of literature, and every public stage has [been] held . . . up for contempt and ridicule." [FN168]

> [The moral hypocrite] pretends that his motives and intentions and character are irreproachable when he knows that they are blameworthy. Then there are complacency and self-satisfaction, the hypocrisies of the wealthy and powerful who are so well able "to bear the misery of others without a murmur." Whatever is in their interest somehow is always also for the public good, in this best of all possible social worlds. There is, finally, a cluster of attitudes which taken together we call insincerity and inauthenticity. These need not express themselves in conduct that injures others directly, but they are said to deform one's personality. Any attempt to hide one's feelings, every social formality, role, or ritual, even failures to recognize one's character and possibilities are called acts of hypocrisy or self-betrayal. Here the very act of playing a part at all is utterly condemned. [FN169]

We have, one fears, come to accept, in both ourselves and others, the hypocrisy Shklar describes. Even though hypocrisy, modeled ever so blatantly in public life, undermines our aspiration for honesty in private life,

Shklar finds political hypocrisy less pernicious than one might assume. More frankness and public sincerity would not, she speculates, be conducive to democracy.

Would any egalitarian prefer more public frankness? Should our public conduct really mirror our private, inner selves? Often our public manners are better than our personal laxities. That "sugary grin" is, in any case, not a serious issue. On the contrary, it is a very necessary pretense, a witness to our moral efforts no less than to our failures.

Indeed, one might well argue that liberal democracy cannot afford public sincerity. Honesties that humiliate and a stiff-necked refusal to compromise would ruin democratic civility in a political society in which people have many serious differences of belief and interest. Our sense of public ends is so wavering and elusive because we often do not even see the same social scene before us. We do not agree on the facts or figures of social life, and we heartily dislike one another's religious, sexual, intellectual, and ***186** political commitments--not to mention one another's ethnic, racial, and class character. [FN170]

Shklar concludes that in a liberal society hypocrisy is not viewed as the ultimate vice for to do so would "entangle us finally in too much moral cruelty, expose[ ] us too easily to misanthropy, and unbalance[ ] our politics." [FN171]

Shklar's observations about hypocrisy present a dilemma for lawyer ethics: Can we have an ethics, of lawyering or of public life, that does not condemn practices we hold to be vices? If we differ in our visions of reality and in our visions of moral rectitude, what kind of professional character can we celebrate? What character can we condemn? Does moral condemnation place us in danger of forgetting the folk admonition against the throwing of stones by those who live in glass houses? If we are all dwellers in glass houses, how can any one of us condemn the acts of another? What qualities and abilities of forgiveness do we need to complement our efforts at witnessing moral failure? If our "public ends" are, as Shklar contends, "wavering and elusive," and we cannot agree as to the "social scene before us," then how can ethics talk ever come to any good?

When we talk ethics we need to keep in mind Shklar's caution about hypocrisy as political vice. We may have ethical sensibilities we are simply not willing to articulate in public. This reserve about ethics is not only a matter of humility, but an effort to practice moral tolerance and maintain civility in a world in which even ethics is contested. We are, as lawyers, political creatures--political actors in a liberal society which holds that there is not one path, but many paths of rectitude. Ethics teaches how we sometimes walk the path together, and how we sometimes walk it alone.

XIII. When We Sound Like Lawyers

In becoming lawyers we imagine a world of value and meaning. [FN172] In the struggle to express ideals, beliefs, hopes, fears, and ***187** dreams--all the human dimensions of the world of work we take up--we use language that values, qualifies, and moralizes. In speaking, we inevitably disclose something about our place in a world strongly shaped by a lawyering ethos, ethic, and ethics. For a lawyer, speaking is fundamental; we are advocates paid to speak for others. Interpreting and manipulating language is play of the highest kind in a lawyer's "language game." [FN173] To play this lawyer's language game you must wear a special mask and take on a new persona. Basically, law students learn, sometimes slowly and painfully, sometimes as if born to the task, a linguistic style and grab-bag of verbal skills associated with legal discourse. In mastery of these verbal skills and legal voice the legal persona emerges. [FN174]

Lawyers learn, sometimes haphazardly, sometimes methodically, to speak in a voice that identifies them as lawyers, in ways that can both disfigure and distinguish us. Listen to lawyers and judges and law students and you hear Law speak. When lawyers speak, the sound is funneled through the mask; a persona is always a shaping of sound and words. In wearing a mask and speaking through it, a lawyer discovers and makes habitual his cleverness and his power and his limits. But with any powerfully clever way of speaking, the lawyer's way of speaking is endangered by the constant undertow of subverting forces. A still greater danger is that the deep resonance of the legal voice becomes so alluring and powerful that it dominates and then seeks to eradicate other voices and other sensibilities of those who master the voice and then become its servant. [FN175] In Seymour ***188** Wishman's story about his "brutal" cross-examination of Ms. Lewis, we have an account of how that happened and how it was so subtle, expected, and sanctioned, it could be explained away, boastfully admitted, and laid to claims of professional responsibility.

In wearing lawyer masks we do not listen to ourselves and do not hear the "thick" sound of law in our voices. [FN176] Speaking ***189** through a mask, used instrumentally and for dramatic effect, we train the ear not to hear the "hollow" sound in our boisterous talk. (Moral talk too can reach for a high ground that empties it of meaning while making it look and sound suspicious.) When lawyers speak in a distancing, hollow way, they claim it to be an integral part of law work, inevitable because lawyers speak not for themselves but for their clients. To compensate for the cold, thin, remote sound of Law, lawyers sometimes make great effort to make their speech more human, to make it appear authentic and real, as if it emanated from some great collective, authoritative source. Lawyers quote Shakespeare and the Bible and the Constitution, they mouth clichés and conventions in common usage, they tell familiar stories, and they do so to translate law talk into talk we will accept, into words familiar and comforting, necessary and binding.

Yet, much of the speech of lawyers is scripted and bought, forced into existence by the quest for profit, by mimicry, by the desire to win (lawyers often see their work as a game involving highly skilled players who keep score by their winnings), and by expediency (saying whatever it takes to get desired results). Of course, law talk is not always and inevitably impoverished; if it were, it would threaten its own existence. And yes, there are lawyers who mean the words they speak, and when they cannot tell the truth, remain silent. For some, it is apparent when they speak, they do not have their heart in it. Such a lawyer may admit to herself that legal versions of truth are sometimes not good enough and that truth deserves more. A lawyer concerned about truth pays a price for the disconnect between words and meaning, self and language. (The truth does not always arrive postage-paid. There is no free lunch when it comes to truth.)

To remember how we speak and how we sound to others, we must hear again the sound of our own voice. We must welcome ***190** the disquietude [FN177] we experience when we hear ourselves given over to the instrumental voice of the legal mask, a mask we so eagerly, proudly, and sometimes vainly, wear. [FN178]

The lawyer's limited way of speaking (staying in a role, following the script) is at once understandable and often functional. It can also be an expression of power and a rhetorical stance that muddle one's moral sensibilities. Law, in its objectifying voice, makes it possible to treat others and ourselves as objects instead of persons, [FN179] a voice that can be used to obliterate awareness of the consequences of actions. Seymour Wishman's humiliation of Ms. Lewis and the "reasons" he advances for his willful disregard of the truth and Ms. Lewis' dignity, attest to the real possibility of an obliteration of moral consciousness. Wishman, in his representation of the rape defendant, gave no consideration to the possibility that Ms. Lewis might be entitled to dignity and respect and failed to consider that he, as a lawyer, might have a moral or personal duty to treat her with respect (a duty that could be reconciled with his professional duty as a diligent, zealous lawyer for his client.) Instead, Wishman

rationalized the humiliation of Ms. Lewis with the notion that it was not "personal" and indeed, was something he was trained and professionally mandated to do.

With rationalizations of the sort attempted by Wishman we begin to believe flat speech is round, that our legal version of truth is the truth. "It is my job." "This is what lawyers do." "Everyone is entitled to a lawyer to help them do what they want to do so long as it is within the law." [FN180] These are the claims of lawyers ***191** and students of law. Empowered with a legal voice, these justifications are spoken with authoritative (and dismissive) clarity. This sound of authority, indiscriminately made available to clients who pursue morally questionable ends, can be used to justify (legally) what is unworthy, unfair, and destructive. Lawyers learn to use their legal voice to defend clients; they learn just enough of the rhetoric of ethics to defend themselves.

One way to hear our own voice is to become conscious of those times when the legal voice fails, when legal speech is used to ignore pain, suffering, and violence. Learn what emperors give up to be emperors; learn what persons give up to be lawyers. [FN181] It is convenient to deny and painful to remember. Even more frightening, we deny the loss, and when it cannot be denied we simply revalue how the loss might have mattered to us. We dress the legal emperor in clothes that only other lawyers can see. [FN182] Watch the nude emperor and listen to the many ways he has learned to disguise his legal voice.

There are times, are there not, when the language of legal discourse is inadequate to express who we are and the realities that must be reconciled? At times, the law speaks in a shrill, remote, abstract voice; at other times it is a voice that purports to speak for history, for logic, for reality. But listen closely and there is often a disembodied ring to the voice in which the language of law is spoken. Law teachers promote this disembodied voice when they offer a role, a new identity, and an ethic that segregates ordinary notions of morality and language and feeling from the many human skills, non-legal knowledge, psychological strategies, and human sentiments we need as lawyers. We learn by authority of teachers to accept and trust the virtuous necessity ***192** of a legal voice. [FN183] There is a danger that we let this legal voice sound in all our relations, in inappropriate places and questionable ways, and ultimately let it reshape the images we have of ourselves and others. We need ethics talk and moral discourse to direct attention to other voices, to those silenced and drowned out by the overpowering voice of the Law. We lose sight of who we are when we adopt a sonorous, morally bankrupt voice that speaks law without recognition of ordinary moral sensibilities. [FN184]

To be aware of this lawyer voice (and its wondrous possibilities and known pitfalls), we must put some hard questions to ourselves, to our education as lawyers, and to an ethic rooted in adversarialism. What is the relationship of the language and morals we bring to law school to the language and morals we enact as lawyers? What kind of character do we enact when we talk like lawyers? What happens to our ordinary sense of morality when we adopt a legal persona and speak the voice of law? How is my voice as neighbor, parent, spouse, or citizen to be reconciled with my voice as a lawyer? [FN185] How will I know when to use ***193** the language of law and when to resist it? And how will I learn to move from one language to another, from one voice to another, as I move from context to context, client to client, and from office to home, and home to office?

These questions, personal experience, and a new genre of personal narratives and critical humanistic writings in contemporary jurisprudence suggest that we speak with more than one voice, [FN186] voices that law forgets, ignores, discounts, devalues, or demeans. [FN187] At times, the voice speaking from an ethical stance and the voice speaking law seem irreconcilable. We fear that a voice trained in law cannot also be a voice that reflects workable, ordinary, moral sensibilities. The struggle to shape, control, and integrate these voices, and to

see how these voices constitute and impoverish the roles we imagine for ourselves as lawyers, is central to moral discourse. [FN188] The struggle with and against moral discourse is a struggle to overcome the incoherence of a world of law (practice) split off from a world of ethics (moral sensibility), a splitting constantly underway but never fully realized. In moral discourse we experience a pull in different moral directions as we take up the varied practices of our craft and respond to the different "voices" and morality tales enacted in the practice of law.

Wittgenstein suggested that the limits of language set the limits of one's world. [FN189] Our world, as lawyers, is bound by the ***194** language we use [FN190] and the voice we give to our speaking as lawyers.***195** We are pulled by the power of our lawyer voice into a web of meaning that can both empower [FN191] and impoverish us. [FN192] It is with ethical thought and moral action (and the talk in which they are rehearsed) that we weave the world as it is with the world as we imagine it, in the voice we speak as lawyers.

XIV. An Old Pedagogy and Foundations for a New One

A.Notes on the Traditions of Legal Ethics Teaching

There is one course in the law school curriculum that lies neither at the core nor at the periphery--a course that seems to belong nowhere and everywhere. The course is legal ethics, a course in which students are asked to consider the nature of professional responsibility. [FN193]

***196** We have mandated the teaching of legal ethics and made it another subject in the law school curriculum. But in doing so, we still do not adequately explore what ethics means to lawyers, how ethics works in the day-to-day life of particular lawyers, or what obstacles we confront in our efforts to make ethics a central concern in legal education. The unexamined premise, now widely accepted, is that legal ethics is a subject to be taught and learned by those who set out to be lawyers. We hold, at the same time, quite stubbornly, the intuitive notion that students have already acquired their moral and ethical sensibilities before they arrive at the law school. Consequently, we teach ethics, denying that ethics can be taught. I believe that ethics can be taught and learned (as we learn anything truly worthwhile) and consequently, find myself at creative odds with those who see conversations about lawyers and their ethics as futile.

We are, in legal education, quite earnest when we say we teach ethics. We assume that the ethics we teach must be shaped by the profession, by the fact that we are lawyers, not journalists--advocates, not therapists. We expect, without question, that legal ethics will be distinct to law as a profession.

We claim that legal ethics stands apart, not only as it is shaped by the ethics and ethos of lawyers, but also by its demands for acting in ways difficult to explain in terms of ordinary morality. Lawyers take up a morality that stands apart from ordinary morality, or so one of the conventions of professional ethics would have it. This assumption, that legal ethics exempts us from the claims of ordinary morality, sets up a tension between law and ethics, between the way we talk as lawyers and the way we engage in everyday moral conversation. We see the tension most clearly when we try to engage in moral conversation in the law school classroom about the conventions and practices of lawyers.

One way we put our assumptions about lawyer ethics into practice is to treat legal ethics as far as possible like other courses in the law school curriculum. Law teachers have so "legalized" ethics that law school versions of ethics look more like law than they do ethics. In this way, lawyers have the best of all possible worlds-

-the claim to ethics without learning ethics, ethics without moral discourse. At best, the pedagogy of ethical legalism conflates ethics with the law of lawyering. At worst, it tells those who come to law school with high ideals that anything goes in the name of adversarial justice.

***197** The pedagogy of ethical legalism emphasizes ethical rules (the Model Rules of Professional Conduct) that govern lawyers in some (but not all) aspects of their work. Ethics, in this view, is a matter of rule-following. Learning ethics is an exercise in applying rules. Legal ethics is the law of lawyering.

The trend toward legalization of legal ethics is reflected in L. Ray Patterson's Legal Ethics: The Law of Professional Responsibility. [FN194] Patterson argues that the professional responsibility course "is directed primarily to the rules of conduct for lawyers and rules relating to the practice of law generally." A professional responsibility course, in Patterson's view, is "a law course involving rules of law and legal problems." Patterson explicitly and emphatically rejects the notion that professional responsibility is rooted in ethics, or an understanding of ethics and moral philosophy. A course in legal ethics is a law course. The body of ethical rules governing legal practice is viewed by Patterson, and others, as the law of lawyering.

Patterson is right to suggest that ethical decisions are made within a legal context. Some professional practices, like the misappropriation of client funds, are not only ethically wrong, but also criminal in nature. Other instances, such as the failure to file lawsuits within prescribed statutory periods or the neglect of a client's case, involve malpractice for which the attorney may be civilly liable for damages. Given this "law" of professional responsibility, some ethical problems can be resolved by finding and applying appropriate rules.

Patterson is also right in suggesting that the growing body of law and standards of professional responsibility deserve serious study as a body of emerging legal principles. There is no harm and much gain from a study of the law of lawyering. It would be quarrelsome to quibble over whether such a course should be called "Professional Responsibility" or "The Law of Professional Conduct." It is somewhat more problematic, however, when Professor Patterson appropriates "legal ethics" as the title of his book and then summarily declares that legal ethics is a matter of law, not ethics.

Law teachers make ethics look like law and disguise ethical thinking as legal thinking so ethics will be more palatable to the law-trained mind. It is law teachers who make ethics compatible with existing notions and expectations of the character, talent, and skills that will be successful in a law world defined by an adversarial ethic. When law students come to ethics, their law ***198** trained minds rebel. And if we think carefully about legal education we will see there is no mystery in the rebellion:

[The law] seeks to assimilate everything that happens to that which has happened. It seeks to relate any new phenomenon to what has already been categorized and dealt with. Thus, the lawyers' virtually instinctive intellectual response when he is confronted with a situation is to look for the respects in which that situation is like something that is familiar and that has a place within the realm of understood legal doctrine.

. . . .

. . . [P]ersons who are genuinely concerned with far-reaching and radical . . . solutions to social ills ought to be on guard against and ought to mistrust this powerful tendency on the part of the lawyer to transmogrify what is new into what has gone before or to reject as unworkable or unintelligible what cannot be so modified. . . . [FN195]

The taste for legalism precedes entrance into the hallowed halls of the law school. But it is law teachers that are the paid gatekeepers to the world of law. And it is the law teacher gatekeeper who teaches legal ethics and professional responsibility as an ahistorical, asocial, and apolitical regulatory scheme, a body of rules. The student is asked, often explicitly, to assume that the relationships of attorneys and clients, lawyers to each other, lawyers to law, and lawyers to the broader world are devoid of significant moral content, that lawyers who do the bidding of their clients, must do so without regard for the ramifications of their actions. The effort to separate and isolate the lawyer and her ethical worldview from the broader social world in which legal skills are witnessed is sanctioned by a rule-oriented legalistic conception of ethics, a brand of ethics especially devised, and legalized, for the benefit of law students.

William Twining presented us with two powerful images of lawyering: Pericles and the plumber. The legalist views the lawyer as a kind of plumber. Plumbers have only the most limited need for ethics, and consequently, if we imagine lawyers as legal plumbers we can get all the ethics we need from a set of rules. But the legalist flounders when he tries to imagine an ethics of lawyering fit for Pericles--for lawyers as leaders, teachers, planners, statesmen and stateswomen. For Pericles, the "simplified amoral universe" of the lawyer as technician/plumber ethic will not suffice. When the ethics of lawyering is reduced to zealous ***199** representation of skilled warriors governed by an adversarial ethic limited only by constraints of law, then we have simplified our ethics, turned ourselves into ethical plumbers, and act as agents in an amoral universe. Those who subscribe to legalism as a predominant and defining feature of their moral universe do not take kindly to ethical challenges to legal discourse and the adversarial ethic.

Simply put, the teaching of lawyer ethics as a branch of law, still prevalent in American law schools, is a facade and a fraud. When we get beyond the law of lawyering, and ethics imagined as ethical legalism, the fraud in legal ethics lies fully exposed.

Teaching lawyer ethics as the law of lawyering or as introduction to moral discourse still requires that we deal with this phrase, ethics. The question-- what is ethics?--is largely ignored by teachers of legal ethics. As the pedagogy of legal ethics comes of age, and a new generation of teaching materials appear, the question--what is ethics?--still haunts us. The time has come to take account of our ghosts.

There is now a general consensus that legal ethics is best taught by using problems and dilemmas that arise in legal practice. The problems are usually those that neatly fall into (or agonizingly between) existing provisions of our ethical rules. For example, whether the lawyer can jointly represent two criminal defendants of varying degrees of involvement and with different criminal records who have been charged with a single crime. The problem is clearly a question of conflict of interest, and as a possible complication, confidentiality as well. What we do not find in law school ethics courses is how the representation of a client's interest may substantially undermine rather than promote the common good. In legal ethics we do not attempt to deal with the systematic practices of police, judges, and other lawyers who undermine social justice. In the law school teaching of ethics, it is the client that commits perjury, not policemen or prosecutors. One might ponder the meaning of an ethical problem that forces the student to elect to either defend a lying client or abandon the client. Is it only our clients that present a problem of truth-telling? One begins to wonder about the ideological underpinnings in the selection and teaching of "practical" ethical problems.

Students and teachers of lawyer ethics are a pragmatic, rational lot, an orientation that predisposes us to see ethics, like law, as simply a matter of solving complex problems. Thomas Shaffer argues that the quandary method is probably unavoidable, but of limited value. Lawyers are good enough at "defining" problems, devel-

oping alternatives, exploring consequences, and ***200** deciding on an appropriate resolution, so good they want to use the same method in ethics. There is a strong tendency to take what we do well, problem-solving, and use it as a way of thinking about ethical problems. When legal ethics is subjected to the pragmatic talents of the problem-solver it becomes just another set of problems, no more or less difficult than those found in administrative law or corporations. Legal ethics is made relevant and appealing to law students by grounding the study of ethics in practical (law-like) problems, in a pedagogy of practicalism. An ethics of problem-solving suggests that professional life is an unending series of ethical dilemmas in which one "can't win for losing," that every choice is a painful one. When we present ethical choice as a choice between competing goods, the implicit message is that ethics is for losers. The practical problem-solving approach to ethics can obscure the fact that it is what we bring to an ethical dilemma, as much as any rule or principle that we might apply to the problem, which defines our moral judgment. The pedagogy of practicalism leads to a disembodied ethical self, a conception of ethics as a game, as part of the strategy and techniques integral to the courtroom warrior and gamesman.

In a pedagogy of practicalism (a parade of ethical quandaries and a set of rules to apply to facts to get an ethical answer), rules undermine the students' perception of lawyer ethics as ethics. Law students "know" that lawyers do not spend an inordinate amount of their busy day worrying about ethics and the body of ethical rules that govern their practice. Even so, there is a sense of security that comes from an ethics premised on rules. Rules suggest answers. Law students, as lawyers in general, tend to be pragmatists who want to solve problems, not wallow in them. (One of the attributes of law is that it resolves disputes and answers our questions.) Lawyers traffic in answers. This does not mean that the answers are easy to produce, that they appear by some form of magic, or that they will always be conclusive. The thinking lawyers bring to bear on a problem is designed to respond to a problem so that everyone feels that an answer has been produced, even though the answer makes neither client or lawyer happy. The lawyer begins with an event, a situation, a question, and works toward an answer. Both lawyers and clients want answers to their questions. With so much focus on answers and problem-solving, uncertainty poses a threat to lawyers. In times of uncertainty, we demand that ethics be a source of answers rather than an impetus for questions. We expect ethics to rationalize and reconcile the many cross-currents and contradictions that lie at the heart of professional life.

***201** A pedagogy of ethical practicalism fails to address the fundamental ideals and beliefs, hopes and dreams, that accompany the entry into professional life. Focusing on rules and quandaries, a pedagogy of ethical practicalism steers the student away from what she needs the most--moral discourse. Consequently, there is little focus in law school ethics courses on virtue, on the character reflected in our choices, and on the person who is the lawyer. We focus instead on problem, situation, and role. A study of lawyer ethics as ethics would shift attention to how and by what means may a lawyer live a good life (in the Platonic and Socratic sense of good), be a good person, and do work that is socially worthwhile and personally fulfilling.

The problem in the pedagogy of legal ethics is that we know less about ethics, at least in legal education, than we assume. And what legal educators do in the name of ethics may, upon closer inspection, turn out to be a most peculiar kind of ethics. If we do not know what we are doing, and its effects are unknown or unintended, then the teaching of what we call legal ethics will always be superfluous, if not worse.

When we give a course a name like legal ethics, or professional responsibility, we expose strands of the profession's history. There is some significance in what we call our work, or the name we give a law school course. Names lend authority, words bind us to meanings. We cannot make names and words mean anything we want. A law school course is constructed around a name. Contract teachers believe they have an obligation to teach something called contracts. But what are we to make of this peculiar case we name by the juxtaposition

of terms like legal and ethics? Do we face an anomaly similar to that in the longstanding joke suggested by the idea of military music? Does the idea of legal ethics suggest a coherent body of thought, [FN196] a methodology, a perspective or a way of seeing the world, a mode ***202** of understanding? And if this phrase legal ethics means nothing so lofty as a body of knowledge or coherent mode of knowing, does it point to some practical or pragmatic knowledge of how we are to act as lawyers?

B.Foundations for a New Pedagogy

1. A Set of Ethical Rules Cannot Fully Capture the Moral Character of Lawyers

We have traditionally focused the teaching of lawyer ethics on the ethical regulation of lawyering. When we teach lawyer ethics as legal regulation, we forget that ethics (for lawyers or anyone else) can never be captured, once and for all, in a set of prescribed rules that if followed, result in a life of respectability. No worthwhile human activity can be completely defined by a set of prescribed rules (roles or scripts). Our ethical rules may help us address ethical behavior, but they also mask the complexity of the moral dimension of lawyering practices; they cannot instill the commitment necessary for a morally sensible life.

The law of lawyering may be important as a regulatory and sanctioning system for lawyer discipline, but it cannot and should not be equated with lawyer ethics. [FN197] Legalistic thinking, driven ***203** to the point of legalism, transmutes moral inquiry and moral discourse into a legal version and vision of ethics--legal ethics without ethics. [FN198] Law school renditions of ethics (and continuing legal education programs on the ethical rules) are ethics of the most narrow, limited sort. [FN199] Ethics is not a fox to be caught in a net of rules (however well the rules are constructed and applied), and the fox will not be lured to some ethical high ground by repeated, ritualized exhortations about professionalism. Ethics is too ordinary, crafty, and elusive to be caught so handily by regulation and rhetoric.

We must finally admit that the moral rhetoric of rules and the law of lawyering is an impoverished, offhanded way of talking about lawyer ethics. [FN200] Legal ethics, when imported into the law school curriculum, and taught in the manner of other law courses, is not ethics but its mutation, the law of lawyering. [FN201] When lawyer ethics is translated into disciplinary concerns and ethical rules, our professional rhetoric of ethics will increasingly be seen as a set of empty promises, or worse, a disguise that masks the extremes of an adversarial ethic blindly worshiped as an effective exemption to ordinary moral restraints. If we are not willing to judge our ethical sensibilities as lawyers by ethics recognized***204** by those outside the profession then legal ethics does not deserve its name.

While no one actually claims that the presence, study, or even the persistent application of a set of ethical rules will make anyone a good lawyer, we continue to teach legal ethics as if the rules would do what we know they cannot. (In some circles, this is called magical thinking.) We spin our wheels, endlessly analyzing ethical problems from a legal frame of reference. And, more seriously, we ignore ethics in the process. Law students know this, law teachers know this, and yet, teachers and students turn their back on what they know--that any ethics that makes a difference is not an ethics of authoritative rules. [FN202]

When ethics talk is confined to ethical rules, it fails to reflect the power and responsibility that lawyers have in modern society, the way others perceive our use of this power and responsibility, and the dysfunctional and immoral aspects of professional practices tied to adversarial zealotry. If our aim in the study of legal ethics is

simply to alert lawyers to practices for which they are subject to punishment (or trouble with state bar ethics committees), then a study of the ethical rules is sufficient. If, however, the role of the lawyer is too narrowly and technically defined, then we must reexamine the fundamental goals and assumptions that prevent us from realizing (or even recognizing as valid) more worthwhile ethical aims in the practice of law. [FN203]

2. Legal Education Shapes Lawyer Ethics

We rearrange the moral fabric of everyday life when we educate ourselves to be lawyers. Law students often complain that ***205** keeping their ethical bearing in the study of law is problematic. Legal education teaches and promotes an adversarial ethic from the first day the student enters the portals of a law school until the day she leaves. But we also know that law schools do not initiate this zest for adversarialism. We seem to be culturally programmed for the kind of teaching and training that law school versions of adversarialism promote. [FN204] Actually, we know little of how this adversarial ethic is translated (by way of education), into a working sense of professionalism that drives competing ethical sensibilities underground. [FN205] The study of law shapes and bends and sometimes deforms the character we bring with us to the study of law. The character transformation takes place when we submit our ordinary notions of law and justice and morality (and the character these notions entail) to the sometimes subtle (sometimes not) influences of legal discourse. [FN206]

Law school is a rite of passage; for some, it is a night-sea journey of the soul. [FN207] Law school may be remembered affectionately as hard fought because there is some hardness necessary to learning to be a lawyer and do what lawyers do. Law school is not just learning to know what lawyers know, but a trip over stormy seas, for some a time of profound uncertainty, for others a time of transformation.

It is during these legal rites of passage that we develop a legal persona and determine, in preliminary fashion, how we will wear the legal mask and live with its fit and feel. [FN208] Those who acquire a new legal identity and character sometimes express concern about what they gain and lose by way of their education ***206** and initiation into the legal profession. We need to listen to them and ourselves as we explore the effects of an initiation into law. [FN209]

3. How to Confront the Moral Dimension of Our Professional Lives

There is no common agreement on what constitutes the “public interest,” ethical lawyering, or professional responsibility. We are reluctant to talk about our own ethics (“morals are private”), and reticent to honestly confront the limits of the adversarial ethic that underlies our professional work. We have only a vague, unarticulated sense of the qualitative, value-laden, moral-charged nature of legal knowledge, lawyering skills, and professional ethos. We know (or fear) (or ignore) the troubled “ethics” of the profession, and we are unsure what, if anything, can be done to change the course of our profession. Basically, we are unclear about how to proceed, knowing as we do that “[a]ny effort to give voice to our deepest feelings and thoughts is liable to be unavoidably vague at times. Truth is greater than both our ***207** thoughts and our language.” [FN210] We find, at times, that both language and skill in expressing ethical sensibilities are wanting. We do not have a ready, determinative language by which we can resolve moral issues and allay moral concerns. As Richard Rorty has pointed out, “[w]e have not got a language which will serve as a permanent neutral matrix for formulating all good explanatory hypotheses, and we have not the foggiest notion of how to get one.” [FN211] Much of the time, we don't know how to characterize and describe the nature and extent of the moral dimensions of the problems that confront us.

* * *

One might assume that law students and lawyers would be the first to see the need for ethics, and that making ethics central to our professional work would enhance our lives. Many do not see ethics this way at all. Lawyers and law students are, at best, ambivalent about ethics. Our ambivalence may reflect the cautious way we make up our minds about matters of importance. [FN212] Another reading of our ambivalence is that we find ourselves in a culture in which not thinking about important matters is expedient and serves our instrumental goals.

We generate, for the public and for ourselves, a rhetoric of professionalism that makes it appear that lawyers are deeply concerned about ethics. But professionalism is often a rhetoric of justification (business-as-usual). The most controversial actions of lawyers--wearing down the opposing party with delay, dirty tricks, hard-ball practices, contrived emotional performances for the benefit of jurors, stretching and distorting and ignoring the truth, exorbitant fees, are all defined as ethical. (Our professional ethics is the ethics of the professional services market place.) These strategies and practices (and the market for them), embraced by some, are vigorously contested by lawyers unwilling to use the guise of professional morality to justify uncivil, [FN213] contemptible behavior that perverts not only professionalism, but also justice.

The question for lawyers is whether we can, or whether we are even willing to try, to draw moral distinctions between zealousness***208** and zealotry. Is it morally acceptable for lawyers to identify so completely with the adversarial ethic that zealousness is transmuted into zealotry? Is lawyer ethics (and the professional morality we claim for it) a way of justifying the loss of our ordinary moral sensibilities? [FN214]

The ethics of lawyers must be measured with and against an adversarial ethic that many lawyers (and students of law) consider sacrosanct. The adversarial ethic is for many lawyers an ethical benchmark. It is an ethic used by lawyers to excuse themselves from moral scrutiny. Lawyers want their ethics to be defined by law, code, rules. The counterpoint to the proposition that the law is the only limit to zealousness poses an ethical question: Can a good person be the kind of lawyer that takes zealousness to its legal limits without regard to moral consequences?

An inquiry into lawyer zealousness and its limits is, ultimately, a question about goodness, about the goodness of our adversarial ethic and the goodness of the character we take on as advocates of the ethic. When we explore the good we attribute to the ethic, we inquire into the preconditions (frameworks, worldviews, cognitive styles, rhetorical stances, philosophies, stories, myths) that find their way into our justification of what lawyers do. And as we converse about lawyer work and lawyer ethics (an inquiry that sometimes takes the shape of a story, a journey, a philosophical quest), we begin to see what it means to live a life of character, in pursuit of Quality, [FN215] a life with a sense of public purpose, serving others, a life embedded in community.

Moral discourse can help energize and cultivate the impulses, beliefs, and stories that undermine the sense that our roles, stances, and ethic are fixed, frozen, sanctioned, unyielding (Necessary and Real), that we must submit to a reality that leads to a morally impoverished view of lawyering. The disparity between the ideals that linger in moral discourse and the reality of modern day lawyering, the conflict between what we know and what we do (how we talk and how we live), lies at the heart of our ***209** concern about professional responsibility and our participation in lawyer ethics talk.

4. A Conception of Practice

When we try to figure out what these practices mean in the lives we live, how we live in our practices and how we resist them, we find ourselves telling a story. For Alasdair MacIntyre, it is in the story of our practices that we find the most "compelling account" of who we are and what we do. [FN216] By the practices we take up, we locate ourselves in a "narrative order." [FN217] Practice, as MacIntyre uses the term, is another way of delineating the points of moral interest on the compass we rely on in our professional lives.

In MacIntyre's view, a philosophical account of practice must include some notion of virtue. MacIntyre seems to have in mind something of what Atticus Finch demonstrated in To Kill a Mockingbird, when he took on the case of Tom Robinson, the young black man falsely charged by Mayella Ewell, a white woman, of raping her. It is Maycomb, Alabama, in the 1930's and it is unlikely that an all white male jury will acquit Tom Robinson even if innocent. Atticus takes Robinson's case, which causes some folks in Maycomb to talk derisively about him in front of his children, Scout and Jem. The racist element of Maycomb society is bothered by the possibility that Atticus intends to defend Tom Robinson zealously. Atticus knows he is not going to "win" a jury acquittal, but he also knows that anything less than a spirited defense of Tom Robinson is unconscionable. It is Atticus' character and how it is lived out in the practice of a Southern lawyer in the Old South that makes him an admirable hero. Atticus immerses himself in the practice of law, but he doesn't separate who he is in the office from who he is with Jem and Scout at home.

But before we get to anything like the moral sophistication of Atticus Finch there are more basic matters to explore. MacIntyre distinguishes football and chess, which are examples of practices, from tic-tac-toe and throwing a football, which are not. "Bricklaying is not a practice; architecture is. Planting turnips is not a practice; farming is." [FN218] MacIntyre points to arts, sciences, games, politics ("in the Aristotelian sense"), family life, painting, music, physics, chemistry, biology and the work of historians as human endeavors that constitute practices and thus ***210** give rise to virtue. Lawyering, viewed as a set of rules without regard to "excellence" and appropriate "conceptions of the ends and goods involved," does not, I would argue, amount to a practice as MacIntyre outlines it. For example, MacIntyre uses the example of a child who learns to play chess because of the desire for candy that he can purchase with the money made available by a parent who pays the child money to play chess:

Thus motivated the child plays and plays to win. Notice however that, so long as it is the candy alone which provides the child with a good reason for playing chess, the child has no reason not to cheat and every reason to cheat, provided he or she can do so successfully. But, so we may hope, there will come a time when the child will find in those goods specific to chess, in the achievement of a certain highly particular kind of analytical skill, strategic imagination and competitive intensity, a new set of reasons, reasons now not just for winning on a particular occasion, but for trying to excel in whatever way the game of chess demands. Now if the child cheats, he or she will be defeating not me [the parent who pays the child to learn chess], but himself or herself. [FN219]

Like the child learning to play chess, some of our reasons for taking up law are good ones and some not so good. We don't have, and would be leery of, any "motivational tests" to screen those who seek to enter law school on the basis of good and bad motives. We take students of law as we find them, so long as they demonstrate an ability to follow the Map of Ordinary Reality (high grades and an ability to master standardized tests). (There is concern that this Map of Ordinary Reality favors, in morally questionable ways, members of the dominant culture and marginalizes--punishes--cultural minorities.) But we expect the student of law, as she learns and begins to talk law, to take up legal discourse as a practice that "involves standards of excellence." We become more than we might have expected when we take up a "practice" because it asks us to accept the "authority" of standards that allow us to judge the "adequacy" of those who attempt to engage in the practice.

This business of judging ourselves is paradoxical. A practice requires that we judge ourselves by standards of performance derived from the history of the practice. [FN220] In a practice, I "subject my own attitudes, choices, preferences and tastes to the standards***211** which currently and partially define the practice." [FN221] The virtues of a practice are realized in the work of the practice, but only when the work reflects the historical standards of the practice. Yet, these standards are never complete and whole, never totally determined, and never totally binding on me. And they are not, as MacIntyre observes, "immune from criticism." [FN222] Even so, says MacIntyre, "[i]f on starting to play baseball, I do not accept that others know better than I when to throw a fast ball and when not, I will never learn to appreciate good pitching let alone to pitch." [FN223]

Whether we have set out to play baseball, practice law, or talk ethics we find that some folks are better at it than others. We don't want, as novices and new initiates, to get "hung-up" on the fact that some seem to do so well what we have yet to master. To get "hung-up" would simply incapacitate us, make us so anxious about the journey to be taken, we might never get underway. It is the excellence others demonstrate and the virtue and practice of a discipline by which a neophyte sets her course. It is hard to imagine thinking about lawyers without thinking that some, like Atticus Finch, are better men by being better lawyers.

There are problems with MacIntyre's notion of practice. First, practices, with their history and standards, can push us to accept questionable conventions of practice, as well as toward excellence. Worse still, a practice can become pernicious. Historical longevity does not impart virtue, as slavery and human cruelty make clear. The persistent historical practice of genocide does not make human extermination a moral art. Child abuse practiced over time does not become a virtuous practice by way of longevity. Women, for example, take no solace in a practice of law, with patriarchal roots reaching back to ancient history, that treats women unfairly.

Next, practice perpetuates itself, increasingly taking itself for granted, forgetting its own checkered history, narrowing its focus and purposes, and discounting and devaluing those at the margin of the discourse that sustains the practice. A practice excludes deviant ways of thinking. It divides the world into insiders and outsiders, discounting the evaluation of insider practices by outsiders. A practice, drawing too exclusively on its own standards and history of excellence, becomes hostile to criticism. Professions confer upon themselves moral authority. The assumption (rooted in professional arrogance) is that those ***212** outside the practice who lack relevant experience in the practice are not competent to judge what is good and what is not. Doctors, for example, sometimes hold law (and lawyers) in disdain, because they think we lawyers are out of our league when we inquire into their negligent practices and demand they be held accountable.

Next, a practice may embody false consciousness, or a sense of false necessity. We see this vividly when we talk about lawyer ethics. Some of us use the idea of ethics to mean that we can do anything short of the unlawful and still claim to be ethical. You will find lawyers who claim that playing "hardball" is necessary, "dirty tricks" are just part of the game. The lawyering game turns out to be a rough one. And, we are told, anyone who gets in the game should expect "fouls" because they are an integral (assumed, expected) part of the action.

When we say, or hope, or dream, that being a lawyer is more than just a "job," we are alluding to law as a practice, with an ethic that transforms the work. It is hard to imagine practicing law without developing a lawyer's sensibilities, a sense or ethic that makes the work feel worth doing.

5. Ethics Cannot Exist Without a Critical Perspective

To be an ethical lawyer and live a worthy professional life, one must measure herself against an ethic that

both recognizes and calls into question the lawyer's professional ethic and ethos. A study of lawyer ethics limited to ethical rules and conventions of lawyer practice makes a mockery of this evaluation. In the best of worlds, lawyer ethics would be an introduction to a way of thinking and talking, a way of imagining the practice of law that allows one to reflect on and question the ethic(s) we embrace. Legal ethics, because it is ethics (as well as a form of behavioral regulation dependent on rules and sanctions) must take seriously the premise that we, as lawyers, live in both the best and worst of worlds. In a professional world given over to moral malaise, we resign ourselves to compromised lives, inhabiting worlds in which we shield ourselves from accountability and our own impoverished ethical imaginations.

While there is a need to view ethical problems in the context of normative conventions of like-minded practitioners of the art, there is a danger that this sociological conception of professional ethics undermines the very notion of ethics. [FN224] Advocates of "descriptive ethics" grounded in a sociology of normative conventions ***213** fail to see that the conflation of professional ethos and ethics leads to moral failure.

What does it mean to be critical? And how are our critical impulses related to the ethical stances we take as lawyers? [FN225] Critics try to express reasoned judgments by evaluating the value, truth, rightness, or full appreciation of a matter. A critic considers merits and evaluates; they stress faults and in doing so blame, censure, condemn, and denounce. A critic expresses opinions that are reasoned. We admire critics for thinking more carefully about a matter than we ourselves have done. Ethics too is about reason, having good reasons for what we do and the action we take, good enough reasons to justify the consequences of our actions. The critic not only has an opinion, but expresses it; a critic speaks out, professes, holds forth. However, opinions do not make us critics; the judgment reflected in our opinions does. Opinions are more or less valuable, depending on the judgment that goes into them. Opinions are interpretations, "readings" of events, persons, situations. But there is a dark shadow that follows the critic. Critics stress faults and are given to harsh and captious judgments. Critics become carpers, negativists, nay-sayers. We grow tired of critics and view them in a negative light because they ignore the basic childhood teaching--"If you can't say something good, don't say anything at all."

My colleague, Wythe Holt, once argued that we all are already critics. We are indeed critics in that we make judgments about the value and truth of matters that affect our lives. We make judgments concerning the merits of alternative ways of thinking and acting. We denounce others for poor judgment (or silently scoff) and blame ourselves, openly or secretly, for our poor judgments. We are then, in this sense, all critics. Even so, some of us turn out to be better critics than others. And it also seems obvious that our critical impulses can be covered up and buried.

6. Ethics Is a Complaint about the World and How It Works

Our complaints about modern life--the way we and our neighbors live, the way we think and act, the kind of friends, lovers, and spouses we turn out to be-- are confused, and sometimes ***214** shrill, pained cries--songs of lament for the way we now live. [FN226] Ethics is not a quiet lullaby, but a keen "lamentation for the dead uttered in a loud wailing voice," a "wordless cry." [FN227] Now is the time to pay attention to what ails us, to recount and remember, to recover what has been lost, time to remember the forgotten. [FN228]

XV. A Teacher's Assumptions About Lawyer Ethics Talk

When we engage in moral discourse about a profession and the life it makes possible, we explore, question,

and test old assumptions. Moral discourse searches out what we take for granted and tests what we say about ourselves and about how being a lawyer shapes our hopes and ideals. Ethics depends upon assumptions--about each other, the world, and ourselves. Most of these assumptions are implicit, offering moral instruction from just off center stage. We rely upon these assumptions without giving much thought to them and do not, for the most part, ever attempt to articulate them. It would, of course, be impossible to make all our operative moral assumptions explicit. And yet these assumptions affect us so directly, and at times adversely, that it becomes the province of ethics to encourage attention to these assumptions-- to learn what they are and how they are enacted as a moral stance.

In Plato's Protagoras, the dialogue begins with Socrates questioning an impetuous young Hippocrates, who has roused Socrates from an early morning sleep to secure an introduction to Protagoras, a popular teacher who claims to teach his students sophos or wisdom. Socrates' questions make clear that Hippocrates has not thought carefully about the course of instruction he intends to pursue. [FN229] (Of course, there are times when teachers too are unreflective about what they have set out to do.)

Charles Taylor, in a brilliant philosophical analysis of moral self-identity, observes that we "draw on" these assumptions "in any claim to rightness," and that "we are forced to 'spell out' the nature of our assumptions (as best we can) when we defend our actions;" "[t]his articulation can be very difficult and controversial." ***215** [FN230] To learn how ethics works, we must articulate the unexamined assumptions that so bear heavily on what we do and how we proceed.

Since the assumptions the student brings with her to lawyer ethics talk are to be made part of the study of lawyer ethics conducted as moral discourse, it seems appropriate for a teacher to articulate his pedagogical assumptions. These assumptions should be scrutinized carefully by students and challenged when they are wrong-headed and lead ethics talk astray.

A.Our Curiosity and Questions about Ethics

We must all be curious (even if disdainful) about ethics. Would it be possible, one might wonder, to have no questions about the moral and ethical dimensions of the legal and professional world you have elected to enter? One might see in this curiosity about the moral dimensions of professional life a parallel to a quality of mind necessary for other, more practical lawyering skills. Jennifer Jaff, a law teacher colleague, makes the connection this way:

There is a value to asking questions. We all learn from asking questions either of ourselves or of others. And the answers lead to the next question, on and on. Thus, if the teacher can take the student from question to question, thereby demonstrating the progression of the teacher's own thought (or a judge's thought or a court's thought, or a litigant's thought), the student can begin to visualize what forms the progression of his or her own thought might take. The ability to formulate the question that will best advance the inquiry is the skill that students need to develop to be able to think and learn on their own. Accordingly, the student must be able to see us, their teachers, in the act of formulating the best next question. Where we have figured some things out and reached certain conclusions, the student needs to see what guided our figuring out, how we got from point A to point B. By showing our students the questions that we formulated along the way, we demonstrate how they can reach conclusions of, and on, their own. [FN231]

***216** B.Skepticism and Hope in the Study of Ethics

In lawyer ethics talk, we confront in a dramatic way the contradiction between skepticism and hope, both as the contradiction is embodied within a particular individual and as it is expressed by those who speak as skeptics and those who speak their hope.

C.Ethics Matters

I concede that we do not always know best where the serious might lie and that the perils that may befall us are not always adequately or fully perceived. For some, ethics will matter only because they want to know enough about ethics to avoid trouble. Their study of lawyer ethics is driven by what my colleague, Thomas Shaffer, calls the bad-man theory of lawyering, which assumes everyone operates as close to the minimal limits of acceptable moral and ethical standards as possible as a matter of self-interest.

D.We Believe We Are Already Moral and Ethical

It is hard to find anyone that will openly express a desire to be unethical. James Pike said this of this moral ambition: "The fact is . . . that virtually every lawyer wants to feel that he is not only a good lawyer (in the sense of technical proficiency) but that he is a lawyer of impeccable integrity. He not only wishes this to be his public image, he wishes to think this of himself." [FN232] The assumption that we already have all the ethics we need leads some to the firm conviction that ethics talk is futile. "If I am already ethical why talk about ethics at all?" "If I am already ethical then ethics cannot be taught, at least, to me, now." The assumption that we are already ethical and have no need for ethical study confronts us with a paradox: "[t]he mind has its ways of keeping us from truths, as well as leading us to them." [FN233]

***217** E.The Shared Experience Necessary to Converse about Good Lawyers

We may find that what we share is sometimes less than what we need, but more often, we may rush to stake out disagreements before we try to learn and act on what we have in common. The integrity of an ethical inquiry requires that we keep in view what we have in common, what we share, and where we stand together. "[E]thical quarrels always take place against a backdrop of agreement." [FN234] We must find a way to stand together because we know there will be times we cannot.

F.Differing Visions of the Real World in which Lawyers Practice

People see the world in different ways, which bears on the conversation that takes place about lawyer ethics. There are real differences in how we exercise judgment, evaluate character, and take on the duties and responsibilities of professional life. Lawyers devote their lives to different purposes and projects. Every worthwhile journey does not lead to the same destination.

A lawyer cannot escape conflict. "A lawyer's moral life, even a quiet lawyer's life, is full of conflict and the emotional turmoil that goes with it." [FN235] Ethical inquiry will, I assume, subject us to disagreements and conflicts that befall caring persons. Some will be deeply troubled by the conflict and the absence of an authoritative way to resolve differences. In the absence of hard answers, some will conclude that lawyer ethics talk is

futile; even optimists will at times find it troubling. One moral philosopher describes our condition as one where "moral premises are like so many incommensurable fragments of lost languages. The moral concepts we use, deprived of the contexts in which they formerly make sense, have become mere means of expressing our feelings and manipulating others." [FN236] We must work with the fragments we have available.

***218** G.The Study of Lawyer Ethics Requires Ethical Reflection and Introspection

We must talk and write about ethics so we can see more clearly what moral philosophies we enact. We must learn more about the moral philosophers we have already taken up. If, as I suspect, our assumptions about lawyer ethics are encoded in the short-hand expressions, conventions, and images we use for talking and writing about ethics and moral concerns, then ethical reflection begins with close attention to the ways we talk ethics.

H.Agendas Affect Our Ability and Willingness to Engage in Moral Discourse and Our Character as Lawyers

We come to this conversation about lawyer ethics with "baggage." Some resist the exposure of their assumptions and their agendas; others find the exploration and charting of this realm of the implicit quite exhilarating. Some agendas promote open inquiry and public scrutiny. Others do not. Some agendas are cryptic and difficult to decode. Sometimes, we can readily identify an agenda and give it a name; at other times, we cannot. Identifying and working with these agendas can be controversial.

I.Exemplars and Scoundrels

The legal profession has both exemplary lawyers and a fair number with morally questionable character. A study of lawyer ethics can rightfully ignore neither.

J.We Must Attempt To Teach and Learn Ethics

I would go still further: It is never too late to develop ethical discernment and moral sensibilities. The task may not be easy; it may sometimes (indeed, often) fail. Ethical learning and teaching may not take place when planned or commanded. Yet, an extended conversation about ethics is a journey it would be remiss not to undertake.

I assume that ethics can be learned (and taught). This is what might be called a weight-bearing assumption. I cannot, however, as a bearer of this assumption, be certain beyond all doubt that I am right. I can only hold to the assumption, see how it works, and watch to see how it is challenged. I stand open to argument and refutation. In ethical conversation and argument, it is possible to learn that I am wrong, even when I think I am most right. Assumptions founded on the best of motivations can lead us astray.

***219** K.A World of Caring People

It is difficult to imagine a world without caring people, a world without ethics. Colin Turnbull, an anthropologist, describes a tribe called the Ik who made cruelty (and other vices) commonplace in their social relations. [FN237] In the film, The Road Warrior, survival in a post-apocalyptic world is the dominant ethic; only the powerful (and those the powerful protect) have any chance to survive. In both real and fictional worlds, we

learn that it is possible for a moral universe to implode. We must try, in some fashion, in everyday life to believe in ethics, to believe that each of us has the capacity to be bound to the other by a standard of care that makes mutual security and well-being possible. Knowing that the web of relations that holds us together (and protects us from each other) is fragile, we continue to depend on each other.

L.Moral Person Will Be Concerned about Justice

Law is an instrument of justice, and the practice of law cannot (that is, morally and ethically) be divorced from justice. There will be, as one might expect, areas of both agreement and disagreement about what constitutes justice, the nature of our duty to alleviate suffering, and what we are required to do and be as ethical lawyers. It is the discussion, debate, argument, challenge, examination, reflection, and musing upon our agreements and disagreements about what lawyers do when they act justly that gives moral substance to our conversations about lawyer ethics.

Lawyers who seek to be nothing more than legal technicians and sophistic word-plumbers may disavow any special obligation to concern themselves with justice. But most of us do not take up law to be sophists and technicians. It may happen to us along the way, but we don't set out with that as a plan. We come to law with stories that reflect diverse motives and purposes in becoming lawyers, but I know of no one who comes to law that does not imagine law as an honorable calling and a form of socially significant work. Yet, this high regard for law as a profession may not ***220** take into account the possibility that a lawyer's ultimate status is associated with his sense of justice and his practice of law as a means to virtue.

We should note that lawyers have long had a special role in American society. It is this prominence in American social and political life that gives rise to popular fascination with lawyers and makes lawyers of interest to sociologists, moral philosophers, cultural critics, novelists, and movie-makers.

Lawyers need to see themselves as doing work with intrinsic value, work that is socially significant, contributing in some way, small or large, to the public good. This claim to “goodness,” more assumed than questioned, is under close scrutiny by critics and outside observers of the legal profession. The moral dimension of our professional practices requires study and conversation because our claims of “goodness” as lawyers, and consequently as persons, sometimes doubles as rationalizations of amorality.

M.Moral Discourse, Communities, and Moral Traditions

Notwithstanding our communal allegiance to law, we continue to think about ethics (including lawyer ethics) as something that belongs to an individual, an individual's history, struggles, and moral sensibilities. Consequently, we take up moral discourse within the limited strictures placed on it by a culture of individualism. Individualism, embedded as the deep structure of modern life, tells us that each of us stands alone, each person her own moral island.

Paradoxically, law, in its traditional forms--contracts, torts, property, and criminal law--runs counter to the moral individualism we assume in the study of lawyer ethics. The law provides a language to describe, interpret, and give meaning to a web of connectedness between person and public. Ethical discourse, like law, is another way of articulating the relational web of personal and public, individual and community. Ethics is the moral web created by human beings as they produce a sustainable ecology of everyday life. Ethics, like law,

links persons and actions to social consequences and helps us evaluate the harm that follows from choices, decisions, and actions made with too little regard for others.

A hermit living in the mountains would, one might speculate, have fewer moral concerns than those of us who make our lives serving others. The hermit can be nasty and brutish. His neighbors, miles away, do not suffer unduly from the hermit's foibles. The hermit's need for ethics is no greater than his need ***221** for a fancy sanitation system. (Hermits worry little about pollution.) When hermits make a mess of their cabins and clutter up the woods around their houses there is little public outrage. Ethics, like aesthetics and sanitation, have radically different meanings depending on our social settings. When the hermit moves next door, his aesthetics and ethics will mean something more to me than when he lives a solitary existence. Lawyers, unlike hermits, always live next door.

The reconstructive element of moral discourse is work we do alone (as we entertain moral doubts) and together (as we mutually question the moral stances that lawyers take). Ethics talk is work both personal and public. It is individual in the reconstruction of a vulnerable and fragmented self, social in the rebuilding of habitable, desirable communities. The project draws on psychological, political, and spiritual sensibilities. The outcome of the project will affect the way we experience and locate ourselves in the world. [FN238]

Epilogue

We end ethical inquiry as we began, with unanswered questions. William James, the philosopher, is reported to have concluded near the end of a long, productive life, that when all is said and done there is no advice to be given. The web of relations that binds us as a professional community in the name of professionalism is a fragile and sometimes illusory one, too often unresponsive to moral concerns. If there is, ultimately, no advice to be given on ethical matters, we will still have talked, listened, fashioned our questions, explored concerns about how professional skills are melded into a lawyer identity and how the various identities we create shape our character. By speaking out and professing moral concerns, by listening, questioning, talking, we mark ourselves as one kind of lawyer as opposed to another.

A conversation about lawyer ethics is a conversation about our moral lives, about the assumptions we make about what we do as lawyers when we leave ethics on “automatic pilot” and stray into the adversarial world of lawyering. It is in moral discourse that we take account of our profession, its troubled adversarial ethics, and the afflictions of character of those overly-identified with the ethic. [FN239]

***222** If you are troubled by what you know and hear about the ethics of lawyers, you will find much to ponder as you engage in moral discourse. Ethics looks squarely to the mess we have made, and continue to make, of our world and attunes us to new moral possibilities by way of the metaphors, images, and stories that reside in our everyday conversations. In ethics talk we explore the conditions that shape a lawyer's work, the stories we tell about this work and ourselves as we engage in it and are engaged by it, the need for new directional paths, ways of thinking, and transformative theories that rekindle hope, belief, and faith.

We know, even if in a vague and ephemeral way, what we want: a good world and a good life, a world that is fair and just, a world that we help make fair and just by our work as lawyers. We can still believe in ethics, believe that each of us is bound to the other by a standard of care that can be judged for its adequacy. We have not, as lawyers and citizens, even in our contemporary, postmodern, technological, bureaucratic, masculinist, nuclear culture, obliterated ethics, try as we have. When we imagine a thoroughly brutish world, a world of

"winners" without moral compass, we begin to see how much we depend on law colleagues, clients, and judges to live ethical lives.

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[FN1]. Ludwig Wittgenstein, Philosophical Investigations ix (G.E.M. Anscombe trans., 3d ed. 1968).

[FN2]. Wayne C. Booth, The Company We Keep: An Ethics of Fiction 347 (1988).

[FN3]. For those unfamiliar with Socrates and the way he engaged his compatriots in conversation, B.A.F. Hubbard & E.S. Karnofsky, Plato's Protagoras (1982), provides a wonderful introduction. The genius of the Hubbard and Karnofsky edition of Protagoras is a set of commentary questions that engages a reader/student/teacher in conversation not unlike the one between Socrates and his interlocutors. For my claims for Socratic pedagogy, see James R. Elkins, Socrates and the Pedagogy of Critique, 14 Legal Stud. F. 231 (1990). On both the practical and philosophical implications of a Socratic inspired lawyer ethics dialogue, see James Boyd White, When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character and Community 93-113 (1983).

[FN4]. Socrates' question is as viable today as when he posed it and some philosophers still see it as a central question for philosophy. See, e.g., Bernard Williams, Ethics and the Limits of Philosophy 1-21 (1985).

[FN5]. Plato, in the early Socratic dialogues, was the first to demonstrate the therapeutic use of language. Socrates tries to make others aware of their misunderstandings of pivotal words and concepts, misunderstandings that resulted inevitably in a "misrepresentation of reality":

> Moreover, thinking they knew what in fact they did not, they were not conscious of the dislocation of values inherent in their misunderstanding. Socrates therefore sought to unravel, by dialectic, the components of the misunderstanding, to expose the linguistic flaw that was the foundation of the false construction of reality.
>
> This was the first step toward a more adequate construction, and it was on this step that Socrates remained, never permitting himself to rush ahead to the work of construction until the dismantling of false conceptions of reality had been completed. By so doing, Socrates demonstrated the potential of language to discover and analyze misrepresentations of reality. Language is primarily therapeutic or remedial.

Margaret R. Miles, Image as Insight: Visual Understanding in Western Christianity and Secular Culture 139 (1985).

[FN6]. Moral discourse requires reflection on the questions put to us and questions we put to ourselves. Questions lie at the heart of moral discourse. But there is no way to insure that a particular Socratic question will be the right one, or that a particular question will spark one's moral imagination. In the quest for questions worth asking, we encounter various pitfalls and traps. For example, some questions posed to us should be rejected. The problem is that we often reject questions which make worthwhile demands of us. The trek into an unexplored ethical world following questions put to us by others is often threatening. For some, the perplexity that emerges will be exciting and empowering. For others it is frightening to have a secure world of legal discourse (with its conventions, persona, and resonant "professional" voice) turned on its head, exposed for all the world to see. On the strategies used to turn away from moral discourse, see James R. Elkins, Symptoms Exposed When Legalists Engage in Moral Discourse: Reflections on the Difficulties of Talking Ethics, 17 Vt. L. Rev. 353 (1993).

[FN7]. On Socrates as a teacher whose exemplary critical discourse has instructive possibilities for teachers of

legal and moral discourse, see Thomas D. Eisele, Bitter Knowledge: Socrates and Teaching by Disillusionment, 45 Mercer L. Rev. 587 (1994); Thomas D. Eisele, Must Virtue Be Taught?, 37 J. Legal Educ. 495 (1987); Elkins, supra note 3; Anthony T. Kronman, Foreword: Legal Scholarship and Moral Education, 90 Yale L.J. 955, 959-67 (1981); Richard K. Neumann, A Preliminary Inquiry into the Art of Critique, 40 Hastings L.J. 725 (1989); James Boyd White, The Ethics of Argument: Plato's Gorgias and the Modern Lawyer, 50 U. Chi. L. Rev. 849 (1983).

[FN8]. Painters who talk too much and are work "shy" are made the subject of gossip. Law students know the reality of this kind of situation first hand. In the law school world, fellow students who seem always and forever talking in class are often the subject of disparaging lounge conversation.

[FN9]. There are many ways to think and talk and teach legal ethics. We can be no more certain and definitive about the correct way to talk about ethics than we can devise ways to secure definitive (determinative) results in law. Both ethics and law, when put to the test, are shadowed by indeterminancy. We may talk as if ethics and law were settled--secure, certain, known--but when pushed, or caught in a candid moment, we are forced to admit that in law, as in ethics, certainty and determined outcomes are as much the exception as the rule.

[FN10]. The exploration and probing we do in serious, law school classroom conversations is not, of course, the only place in which such conversations take place. Indeed, we might also want to acknowledge the conversations we have with ourselves in the form of interior monologues, ruminations, daydreaming, and moments of deep reflection.

[FN11]. Some law students, like their counterparts in the world of painters, are undoubtedly just trying to get through the day. We will find some students far more interested in getting law school behind them than they are in introspective ethics talk.

[FN12]. Hanna Pitkin describes a philosophical approach she attributes to ordinary language philosophers that captures the approach to lawyer ethics I have in mind:

> Instead of studying moral rules or principles or traditional systems of morality, the teachings of religious leaders or philosophers, they [ordinary language philosophers] are interested in the way moral discourse functions in everyday life, how we ordinarily talk about moral matters. For it is in ordinary use that our concepts of morality and action are learned and shaped.

Hanna Fenichel Pitkin, Wittgenstein and Justice 149 (1972). Pitkin makes clear that while this is not the only way to think or talk about ethics, "it is a powerful and instructive way ...." Id. See also Sally Engle Merry, The Discourses of Mediation and the Power of Naming, 2 Yale J.L. & Human. 1 (1990) (Exploring "forms of talk" used by participants in lower courts and mediation programs; distinguishing between moral, legal, and therapeutic discourse).

[FN13]. There are now indications that legal educators have finally begun to abandon the rule-oriented approach to lawyer ethics pedagogy. See Symposium, Teaching Legal Ethics, 58 Law & Contemp. Probs. 1-389 (1995).

[FN14]. I return, time and again, to this translation of ethics into law and the pedagogical confusion it creates.

[FN15]. Alfred North Whitehead noted that "philosophical truth is to be sought in the presuppositions of language rather than in its express statements." Alfred North Whitehead, Modes of Thought vii (1938).

[FN16]. Skepticism about ethics has been with us for a long time. It was explored in Plato's Socratic dialogues when Socrates and the Sophists argued about whether virtue could be taught. Contemporary students of lawyer

ethics claim, when confronted with moral discourse and ethical introspection, that they already have their ethics when they come to law school and that there is little for them now, as adults, to learn about morals and ethics in a law school course. Listen to law students talk about ethics and their skepticism about ethics is rendered in particulars:

"I don't know what you mean when you talk ethics. In fact, I am a little suspicious of those who have a strong need to talk about such things."

"It is 1998 and no time to be thinking in transcendent value terms. We are each free to do whatever we must. We are no longer chained to the provincial, dogmatic, patriarchal religious views of the past."

"I have no desire to be a saint and consequently don't have much time for ethics."

"I am afraid that modern forms of moralism (call it ethics, call it whatever you will) will result in less freedom. I am afraid we will have less tolerance and a more dangerous world if we try to see things from a moral perspective. The world is filled with mad men and garden variety terrorists who wage war against the innocent. The new moralism is just terrorism of a different sort."

"If we aren't careful, we will destroy the hard won objectivity that gives us the ability to demand justification of actions. Reason provides a good middle-ground, a buffer-zone where we can live together without violence. To fairly, equitably and justly resolve our problems we need more reason, less morality."

[FN17]. It is our involvement in moral discourse that leads Hanna Pitkin to claim:

[T]he characteristic setting for moral discourse is one of dialogue among persons who are actually involved in what has happened .... No doubt we can contemplate moral principles in the abstract or hold public discourse about them, but the center of gravity of moral discourse falls in personal conversation.

Pitkin, supra note 12, at 150. I assume that moral inquiry into lawyer ethics is worthwhile because morals and ethics matter in the shape and outcome of our professional lives.

[FN18]. Hannah Arendt, The Human Condition: A Study of the Central Dilemmas Facing Modern Man 159 (1959). "Action and speech are so closely related because the primordial and specifically human act must at the same time contain the answer to the question asked of every newcomer: 'Who are you?' This disclosure of who somebody is, is implicit in both his words and his deeds...." Id. at 158.

Certainly there is more to ethics than what we say about it. A claim for the value of conversation in ethical inquiry is tempered by the recognition that some people are indeed "all talk and no action." We are taught, early and often, that "action speaks louder than words." We all have friends and colleagues who do not "live up to their word."

There is, in ethics, danger that as we talk about ethics, we demean philosophy by being mindless about doing it, talk about ethics while ethics goes undone. Notwithstanding such reservations about the limits of talk, there is much to learn from the ethics we see at work (and play) when we direct conversation to the moral dimension of our professional lives. We can, in a course of conversation devoted to ethics, engage in talk as practice for doing, if not doing itself.

[FN19]. My little, worn-out dictionary defines conversation as informal spoken exchange; familiar talk. Ethics, like conversation, is informal, spoken, and exchanged, something we do together. And there are, of course, times when we carry on conversations with ourselves. The conversations we have with ourselves are often about ethical matters.

[FN20]. For an accessible account of the prominent place of metaphor in our everyday lives, see George Lakoff & Mark Johnson, Metaphors We Live By (1980). Lakoff's more recent work on metaphor focuses on morality and politics. See George Lakoff, Moral Politics: What Conservatives Know That Liberals Don't (1996). See also generally Eric Mount, Jr., Professional Ethics in Context: Institutions, Images and Empathy (1990).

[FN21]. We have strong feelings about courses of study as we do our friends, talking about them incessantly, even obsessing about them. “I loved it,” one student says of his study of legal ethics. And another, “It was terrible. I couldn't stand it.”

[FN22]. When I prepare for an ethical encounter with my students, I imagine their presence as I go about imagining the course our conversation might follow. There is no face, no name, but they are real nevertheless. Yet, they are always real in a different way than my fantasy would have them be, when our foray into lawyer ethics gets underway. I confess to anxiety as I contemplate these encounters. Who there, in that throng of faces, will take ethics seriously? Who will speak their disdain of ethics--a disdain that their education, culture, and profession encourage? Who will show us the way to wisdom?

[FN23]. I have spoken of what lies ahead as a fantasy. In my fantasy, when we talk ethics, we take ethics seriously, and make ethics real. When we talk ethics we set the stage for making ethics a part of our social and political lives as lawyers. When we are most real to each, when the plot deepens, and our conversation becomes perplexing and troubled, we will need to draw on such fantasies.

[FN24]. The obstacles to moral discourse are serious and deserve far more scholarly attention than they have received. For two contrasting views of the “difficulty” in teaching legal ethics as moral discourse, see Thomas D. Eisele, From “Moral Stupidity” to Professional Responsibility, 21 Legal Stud. F. 193 (1997), and Elkins, supra note 6.

[FN25]. This change in one's view of the world and the effort required to understand and to turn the change to productive and morally worthwhile ends has been the primary focus of the work of James Boyd White. See, e.g., James Boyd White, The Legal Imagination: Studies in the Nature of Legal Thought and Expression (1973).

[FN26]. See generally Mount, supra note 20, at 73-103. William Twining, in a celebrated article of some years past, presented two starkly differing images of the lawyer--the lawyer as technician/plumber and as Pericles, the famous Greek orator. See William Twining, Pericles and the Plumber, 83 Law Q. Rev. 396 (1967). There is, it seems, always some image of the lawyer at work (and play) in the practices and ethic(s) we adopt. On the role of professional images and their relation to professionalism, see William F. May, The Physician's Covenant: Images of the Healer in Medical Ethics (1983), and Aroskar, The Fractured Image: The Public Stereotype of Nursing and the Nurse, in Nursing: Images & Ideals (Stuart F. Spicker & Sally Gadow eds., 1980).

[FN27]. Susanne K. Langer, the philosopher, reminds us that, “the mind of man is always fertile, ever creating and discarding, like the earth.” Susanne K. Langer, Philosophy in a New Key: A Study in the Symbolism of Reason, Rites, and Art 17 (3d ed. 1980).

[FN28]. See Seymour Wishman, Confessions of a Criminal Lawyer 6, 10, 11, 15, 17, 116, 142, 151, 182, 200-02, 223-24, 231-32, 242 (1982).

[FN29]. William Gass, the literary critic, says that metaphor is “a manner of inferring; a manner of setting down as directly and briefly and simply as possible whatever is necessary” for a desired inference. William H. Gass, Fiction & Figures of Life 63-64 (1971). A metaphor, Gass argues, is a way of showing, or presenting. “Showing argues and showing produces acquaintance. It presents to the mind one thing in order that the mind may seem to have possession of another.” Id.

[FN30]. A study of metaphor teaches:

The concepts that govern our thought are not just matters of the intellect. They also govern our everyday functioning, down to the most mundane details. Our concepts structure what we perceive, how we get around in the world, and how we relate to other people. Our conceptual system thus plays a central role in defining our everyday realities. If we are right in suggesting that our conceptual system is largely metaphorical, then the way we think, what we experience, and what we do every day is very much a matter of metaphor.
Lakoff & Johnson, supra note 20, at 3.
[FN31]. Tool suggests an instrument, an object used as a means to some end. We own tools and make use of them because they are instrumental to ends--a hammer for pounding nails, a knife for cutting wood, a shovel for digging holes. The idea of tool is to get something done, to make something happen, to produce another object or arrangement of value. Generally, one doesn't own a tool for the sake of possessing the tool. We use tools to make something, or undo something already constructed.

[FN32]. Instead of trying to define ethics, I find it more instructive to talk about ethics, to explore the undefined ethics we've already got, and to wrestle with a present but undefined ethics that defines our character. Ethics talk is turned to definition by those most confused and perplexed by the effort to take ethics talk seriously.

We treat definitions as the building blocks of objective thought. Definitional work is a foundation of modern academic discourse and knowledge: "We are inclined to begin a subject by asking how crucial terms can be explained or defined, and that approach in turn leads to a separation of understanding and doing, between comprehension and motivation. What we need is a better way to begin." Elizabeth H. Wolgast, The Grammar of Justice 201 (1987).

Kenneth Burke has given us the following instructive allegory:

Suppose that a flock of birds, while consorting together, had developed a great variety in their ways of living. They now sought different foods in different places, so that the kinds and degree of danger which they incurred varied considerably. Also, their ways of food-gathering had altered their aptitude for escape: Some could get away more quickly than others, etc. Those fleeing in trees met dangers which did not concern those on the ground or in the water.

Yet suppose that they still considered themselves a homogeneous flock, and still clung discordantly together, attempting to act by the same orientation as they had when living in a homogeneous culture. How would this cultural mongrelism affect them? Their responses would be thrown into a muddle. The startled cry of one member would lose its absolute value as a sign. The placidity of the group in a tree might not any longer be an adequate safety sign for those in the water. A cry of danger among those feeding on the shore might no longer indicate similar danger for those in the water or in the trees.

Suppose them at this point endowed with speech. Would they not immediately begin insisting upon definitions, in order that they might get this muddle cleared away? Words for danger, safety, food, etc., would not be enough. A scrupulously critical vocabulary would have to be introduced: danger under what conditions, food for which members of the flock, etc. Their old poetic methods of flapping their wings and crying out would lose prestige among the flock. Only the demagogues or the imbeciles would still resort to such procedures. The most intelligent birds would insist upon the perfection of a strict and unambiguous nomenclature.
Kenneth Burke, Permanence and Change 55-56 (1965). Ethics, when viewed from the Olympian standpoint of definitional rationality, is simply "not the kind of entity to which the conception of rationality is applicable." Berlin, Rationality of Value Judgments, in Rational Decisions 221 (Carl J. Friedrich ed., 1964). We get closer to ethics by talking and reading stories than we do when we argue about definitions of ethics and ethical terms.

[FN33]. Booth, supra note 2, at 312-16. See also Philip Wheelwright, Metaphor and Reality 71 (1968) ("What

really matters in a metaphor is the psychic depth at which the things of the world, whether actual or fancied, are transmuted by the cool heat of the imagination.").

[FN34]. See Michael Polanyi & Harry Prosch, Meaning 70 (1975) ("It is commonly known that metaphors, like jokes, lose their effectiveness if they are explained in detail.").

[FN35]. See, e.g., The Interpretation of Dialogue (Tullio Maranhao ed., 1990).

[FN36]. See, e.g., Booth, supra note 2.

[FN37]. Some contend it is better to have no purpose, moral or otherwise. Be loose, spontaneous, free. Let the purpose emerge from whatever it is we are doing. It is our purposes that get us into trouble. To be modern, contemporary ("with it," "cool") is to have no purpose, live day-to-day, be as formless as possible in a world that demands order. See generally James Oglivy, Living Without a Goal: Finding the Freedom to Live a Creative and Innovative Life (1995); Jedediah Purdy, For Common Things: Irony, Trust, and Commitment in America Today (1999).

[FN38]. Having a sense of purpose, being purposeful, is a matter of drive, dream, fate, personality, will. Its manifestation (and its justification), at least in Freudian terms, derives from the total self: ego (will), id (drive), and superego (ego ideals and conscience). Put simply, purpose is a matter of knowing what we want, taking responsibility, and getting where we want to go.

Lawyers often have a strong sense of purpose. "My purpose," says one kind of committed lawyer, "is to the legal system. I am devoted to the adversarial ethic, to the presentation of claims and disputes to a neutral arbitrator (a judge). I am devoted to being a good lawyer in the sense of having a reputation for being tough-minded and zealous, a lawyer who can take the difficult case (even the impossible case) and win it. I want to be known as the most zealous lawyer in town. Zealousness in pursuit of my client's interest is my purpose."

We can have purposes, admit to having them, at least to ourselves, without ever clearly identifying exactly what those purposes are and how they embody images that we enact as lawyers (or as teachers, students, or judges). There is something of this sort going on in Wishman, supra note 28 and in Albert Camus, The Fall (Justin O'Brien trans., 1956).

We can be foggy about our purposes and end up with our purposes leading us into the fog. See, e.g., Pete Dexter, Paris Trout (1989) (depicting Harry Seagraves, a lawyer protagonist whose muddled purposes lead to a tragic end). Moral inquiry takes us into the fog of purposes, purposes that come and go, purposes that we have but deny, purposes that we have but fear, purposes that we have but fail even with sustained effort to realize, purposes that seem always to elude us. Moral inquiry confronts us with purposes we have not named, illuminates the nature of purposes we have already "spelled out" in our lives, and prompts us to imagine purposes left unattended and unclaimed.

[FN39]. John S. Dunne, in one of his meditations, asks, "What kind of story are we in? Is it the story of an adventure, a journey, a voyage of discovery?" John S. Dunne, Time and Myth 1 (1975).

[FN40]. Duncan Kennedy, in an article every law student should read in the early days of his or her legal education, points out that law is a "trip":

All members of the [legal] community know that one's initial impression that a particular rule governs and that when applied to the facts it yields X result is often wrong. That's what makes law such a trip. What at first looked open and shut is ajar, and what looked vague and altogether indeterminate abruptly reveals itself to be quite firmly settled under the circumstances.

Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. Legal Educ. 518, 522 (1986).

[FN41]. During the journey, we rediscover selves ignored or abandoned. “We are no longer simple beings in the image of a single God,” says James Hillman, “but are always constituted of multiple parts: impish child, hero or heroine, supervising authority, asocial psychopath, and so on.... [W]e have come to realize that each of us is normally a flux of figures ....” James Hillman, Re-Visioning Psychology 24 (1975). For further exploration of Hillman's thesis of the multiple self, see Robert Jay Lifton, The Protean Self: Human Resilience in an Age of Fragmentation (1993); David L. Miller, The New Polytheism: Rebirth of the Gods and Goddesses (1974); James Ogilvy, Many Dimensional Man: Decentralizing Self, Society and the Sacred (1977).

[FN42]. One has to marvel that some sacred places never lose energy. People still go to Stonehenge and to the Acropolis long after the religions that built them have disappeared. The mysterious energy of sacred places attracts pilgrims as surely as rubbed amber attracts particles. Century after century, people just go, drawn by the place and impelled there from within themselves.

Eugene Victor Walker, Placeways: A Theory of the Human Environment 74 (1988).

[FN43]. Robert Pirsig, Zen and the Art of Motorcycle Maintenance: An Inquiry into Values 190 (1974).

[FN44]. Id. at 11.

[FN45]. Id.

[FN46]. If asked to name significant courses in the law school curriculum students might choose constitutional law, evidence, civil procedure, or perhaps environmental law. It is difficult to imagine a student who would claim legal ethics as an important and significant course in their legal education. For speculation as to how ethics gets located in this nowhere space of the “famous for nothing,” see Ronald M. Pipkin, Law School Instruction in Professional Responsibility: A Curricular Paradox, 1979 Am. B. Found. Res. J. 247.

[FN47]. Pirsig, supra note 43, at 11-12.

[FN48]. In both news media accounts and academic commentaries we find confirmation that there is trouble afoot. The numbers of lawyers grow. Fewer lawyers practice in individual and small firm practices and increasingly join the practices of mega-firms. The character of law practice is increasingly shaped by a mega-firm mentality that carries its own moral worldview. For accounts of the Wall Street practice of law, one fictional, the others journalistic, see Louis Auchincloss, The Great World and Timothy Colt (1987); Cameron Stracher, Double: A Young Lawyer's Tale of Greed, Sex, Lies, and the Pursuit of a Swivel Chair (1998); Ellen Joan Pollock, Turks and Brahmins: Upheaval at Milbank, Tweed (1990).

[FN49]. Pirsig, supra note 43, at 12.

[FN50]. Id.

[FN51]. On the use of memory to recover a more authentic sense of self, see Camus, supra note 38; Alice Koller, An Unknown Woman: A Journey to Self-Discovery (1983). Alice Koller's journey of discovery is further documented in Alice Koller, The Stations of Solitude (1990).

[FN52]. Pirsig, supra note 43, at 15.

[FN53]. Id. at 127. After an interlude of eighteen years following the publication of Zen and the Art of Motor-

cycle Maintenance, the journey was updated. See Robert M. Pirsig, Lila: An Inquiry Into Morals (1991).

[FN54]. We are beginning to admit that it is the lot of every discipline to be embodied in “tales.” See, e.g., Howard Brody, Stories of Sickness (1987); Jonathan Reé, Philosophical Tales (1987); John Van Maanen, Tales of the Field: On Writing Ethnography (1988).

[FN55]. Pirsig, supra note 43, at 15-16.

[FN56]. Bowen H. McCoy, The Parable of the Sadhu, 61 Harv. Bus. Rev. 103 (1983) [hereinafter McCoy, Parable]. On the use of McCoy's parable as an evocative teaching text on the limits of zealous advocacy, see James R. Elkins, The Moral Labyrinth of Zealous Advocacy, 21 Cap. U.L. Rev. 735, 755-61 (1992). For McCoy's later reflections on teaching his parable, see Bowen H. McCoy, When Do We Take a Stand?, 75 Harv. Bus. Rev. 60 (1997).

[FN57]. McCoy, Parable, supra note 56, at 104.

[FN58]. For instructive accounts of caring, see Carol Gilligan, A Different Voice: Psychological Theory and Women's Development (1982) (on the ethics of caring as a fundamental orientation in the moral perspective of women); Pirsig, supra note 43, at 3-25 (particularly his description of the lackadaisical motorcycle mechanics, see id. at 23-43, and the old-time welder, see id. at 355).

[FN59]. See Stanley Hauerwas, Truthfulness & Tragedy: Further Investigations in Christian Ethics 54 (1977):

> Our obligations are correlative to the world we see, but our seeing is inherently perverted by our inveterate tendency to self-deception. To be “rational” requires the humility to see the world truthfully, since the world always comes as a challenge to our prideful assumption that we wish to know the “facts.” The significance of virtue is clear once we understand that the moral life involves not just what we ought to do, but how we see the world at all.

[FN60]. Recognizing the presence of an ethical dimension is simple when there is clearly harmful or negligent conduct involved. The nature of the ethical problem is less clear-cut when a potential client contacts you about putting together a real estate deal which will involve the demolition of historical homes; a client asks you to set up an appointment to review his will so that he can disinherit his only daughter because she has moved to California and no longer corresponds with him; a client suggests the possibility of “pulling strings” with the prosecutor to dismiss a drunken driving charge; a client wants to consider a malpractice suit against a thoughtful and competent physician because a loved one has died under his care. The moral problems we “see” in these situations are a matter of judgment and character.

One way to deal with the question--“What is a moral dilemma?”--is to conclude that morals and ethics pervade all the work we do, however careful we do it. If you can't get away from ethics then all problems have a moral dimension. All true enough, but I suspect that most of us think about the world and about ethics somewhat differently. We go about the business of deciding what is and what is not of moral and ethical concern as if we could actually distinguish between those situations in which we confront moral decisions and those which involve no significant moral questions.

[FN61]. McCoy, Parable, supra note 56, at 106.

[FN62]. Oddly enough, commonality and difference are juxtaposed on the surface and at each level of descent (or ascent) into moral discourse. See, e.g., Pirsig, supra note 43, at 73-80 (describing Pirsig's descent to the level

of bedrock difference in the recognition of different visions of reality--he called classic and romantic--reflected in his experience riding and working on motorcycles with his friends, John and Sylvia.) Consider the differences we associate with the cultural designations masculine and feminine, male and female. See Gilligan, supra note 58.

[FN63]. In ethics talk we are reminded of the cost of individualism and the shortfalls of a culture of freedom. We stand at the foot of the tower of Babel. On the tower of Babel as "a symbol of our moral condition," see Jeffrey Stout, Ethics After Babel: The Languages of Morals and Their Discontents 1 (1988).

[FN64]. Don Herzog, Without Foundations: Justifications in Political Theory 235 (1985) (commenting on disagreement in politics).

[FN65]. See Karl Jaspers, Way to Wisdom: An Introduction to Philosophy 29 (Ralph Manheim trans., 1951):

> Through thousands of years the warring schools [of philosophy] have been unable to demonstrate the truth of any one of them. In each view some truth is manifested, namely an attitude and a method of inquiry which teach men to see something in the world. But each one becomes false when it lays claim to exclusiveness and strives to explain all existence.

The contested nature of ethical life reflects the politics of pluralism. We say we are a pluralist society and we say it with pride. The pride of pluralism makes tolerance a value. "Live and let live" is more than a libertarian motto. When we point to the plural nature of society, we sometimes do so as a defense of tolerance and a way to justify our expressed disdain for ethics. Tolerance, misread, can impede the active exercise of judgment in moral deliberation. We begin to live and assume that it is beyond our capacity "to engage in productive moral discourse with one another." Michael Perry, Morality, Politics, and Law 4 (1988). Such a proposition is "sobering, even frightening--it presents a bleak dispiriting vision of human relations-- and ought not to be accepted uncritically." Id.

Perry asks if "moral claims" have "truth value." Id. at 9. The skeptic is doubtful. The relativist says it all depends. Perry points out that moral skepticism has little currency among contemporary philosophers but is still found in American law schools "where some provincial lawyer-academics continue to subscribe to the outdated morally skeptical views of an earlier generation of legal philosophers." Id. at 10.

What, then, constitutes moral knowledge?

> [M]oral knowledge is knowledge of how to live so as to flourish, to achieve well-being. More precisely, it is knowledge about how particular human beings--the particular human being(s) I am, or we are, or you are, or she (or he) is, or they are--must live if they are to live the most deeply satisfying lives of which they are capable, or at least lives as deeply satisfying as any of which they are capable.

Id. at 11. How ought I to eat to flourish? How ought I to live as a moral person to flourish? Connect the two. We do not abandon the former question because we have different taste and combine our foods into different diets. But whatever your diet, nutrition matters in how well you live and flourish. Cannot the same be said for our moral sensibilities? [M]oral knowledge is primarily about what sort of person a particular human being ought to be--what projects she ought to pursue, what commitments she ought to make. What traits of character she ought to cultivate if she is to live the most deeply satisfying life of which she is capable.

Id. Perry notes that there are different "competing conceptions of flourishing: egoistic, altruistic, materialistic, spiritual, etc." Id. at 15.

[FN66]. Joan Chalmers Williams, Culture and Certainty: Legal History and the Reconstructive Project, 76 Va. L. Rev. 713, 735 (1990). For an extended exploration and argument of how this kind of talk might proceed, see Wayne C. Booth, Critical Understanding: The Powers and Limits of Pluralism (1979).

[FN67]. We have, in a similar fashion, moral disagreements with books we read, with ourselves, and even with God (as did Job).

[FN68]. See McCoy, Parable, supra note 56, at 104 ("For many of the following days and evenings Stephen and I discussed and debated our behavior toward the sadhu.").

[FN69]. Id. at 103. Paradoxically, while ethical dilemmas happen to us uninvited (they happen to good people who live good lives), we seem to place ourselves in situations in which the fate that seeks us finds us. We set ourselves up for the fate that befalls us. And when we don't, we are in the presence of tragedy.

[FN70]. Id.

[FN71]. Id. See also Wayne D. Brazil, Reflections on Community, Responsibility, and Legal Education, 9 J. Legal Prof. 93 (1984). Brazil tells a story about Archie, a street person, that he sees on his way to the law school, and how Archie became a moral lesson for him. In his retelling, Archie becomes a moral warning for the reader.

[FN72]. McCoy, Parable, supra note 56, at 107.

[FN73]. Stephen Gillers, Taking L.A. Law More Seriously, 98 Yale L.J. 1607, 1617 (1989). See also Fred R. Dallmayr, Critical Encounters: Between Philosophy and Politics 193 (1987) ("In comparison with abstract theoretical speculation, ethics ... is a domain peculiarly and constitutively linked with particularity, a domain in which general maxims are pointless unless instantiated and exemplified in concrete actions or behavior patterns."). On the particularity found in literature, see Perry, supra note 65, at 48-49; John Denvir, Comic Relief, 63 Tul. L. Rev. 1423, 1429 (1989).

[FN74]. Alasdair MacIntyre, After Virtue: A Study in Moral Theory 201 (1981).

[FN75]. The legal scholar most responsible for reminding us of this point is Thomas Shaffer. See, e.g., Thomas L. Shaffer, Faith and the Professions (1987). Some moral philosophers agree with Shaffer. See, e.g., Jerome Schneewind, The Use of Autonomy in Ethical Theory, in Reconstructing Individualism: Autonomy, Individuality, and the Self in Western Thought 64 (Thomas C. Heller et al. eds., 1986):

> The basic features of morality do not change much over the centuries, any more than do the basic features of the natural world in which we live. There are far more changes in the stories we tell ourselves about morality, the stories by which we make it intelligible to ourselves in the light of whatever else we take to be known about the world. Those stories provide the vocabularies we use to express and criticize our moral feelings and convictions.

The problem is that we tend to look askance at stories as a form of intelligence. In the words of Toni Morrison, "[p]eople give a lot of credence to the intelligence, the concentration, the imagination necessary for listening to music, but never for listening to stories." Gail Caldwell, Toni Morrison, Boston Globe, Oct. 6, 1987, at 67. For instructive efforts to revision story-telling and narrative as valued intelligence, see Jerome Bruner, Acts of Meaning (1990); Jerome Bruner, Actual Minds, Possible Worlds (1986); Jerome Bruner, The Culture of Education 130-49 (1996); Roger C. Schank, Tell Me a Story: A New Look at Real and Artificial Memory (1990).

[FN76]. We see this problem of perspective and critical reflection worked out most poignantly in literature. See, e.g., Leo Tolstoy, The Death of Ivan Ilych 95-156 (1966). On the psychological basis of our unreflective approaches to work, see Abraham Zaleznik & Manfred F.R. Kets de Vries, Power and the Corporate Mind (1975).

[FN77]. For a philosophical rationale for grounding ethics in narrative, see Stanley Hauerwas, From System to Story: An Alternative Pattern for Rationality in Ethics, in Hauerwas, supra note 59, at 15-39.

[FN78]. McCoy, Parable, supra note 56, at 106. This defensive posture is evident in the early Socratic dialogues, in particular the Gorgias.

[FN79]. Id. at 104.

[FN80]. Id. at 106.

[FN81]. Id. at 106-107. McCoy now sees that he walked through the situation with the sadhu without truly understanding it as a moral dilemma. He was, McCoy concludes, blind to what was happening.

[FN82]. Id. at 106.

[FN83]. Id.

[FN84]. McCoy's list of intermediate reasons (in addition to the stress of the situation) for abandoning the sadhu include:

-- We all cared. (There was no moral failure.)

-- I did my part. (I'm not personally responsible for what happened.)

-- What more could we (or I) have done? (We could not expect to be saints. We were human beings.)

-- The situation justified what we did. (There is a way to explain what would otherwise look like a moral failure.)

-- The sadhu had no right to disrupt our lives. (The one in need is responsible for his harm, not those of us who could have rendered aid.)

-- I had my own well-being to worry about. (Self-interest too has moral weight.)

-- No one else was willing to help. (If there was any failing it was that of the group. All of us were to blame, therefore I alone should not be condemned.)

See id.

[FN85]. The ethical emphasis on what we do together is worked into an account of moral character and moral life in Laurence Thomas, Living Morally: A Psychology of Moral Character (1989).

[FN86]. McCoy, Parable, supra note 56, at 104.

[FN87]. Id.

[FN88]. See id. at 108.

[FN89]. Id. at 104.

[FN90]. McCoy's speculations about the role of groups (and corporate cultures) in ethical thinking is muddled in comparison to his more revealing speculations about the duty to care for the sadhu. See id. at 107-108.

[FN91]. Wishman, supra note 28. I draw here on an extended examination of Wishman's “confession” and its pedagogical value. See James R. Elkins, Teaching a Lawyer's Confessions, 21 Legal Stud. F. 151 (1997).

[FN92]. One focus of moral inquiry should be “the assessment and repair of human relationships when these

have been strained or damaged by the unforeseen results of some action." Pitkin, supra note 12, at 149.

[FN93]. The truth is, most assuredly, a complicating factor in the life of a lawyer. When the student informs me that lawyers have their own version of truth, he may be offering a thinly disguised relativism and a preemptive justification for his future life as a lawyer-for-hire whatever the cause. The view that there is legal truth that need not be reconciled with ordinary notions of truth is a psychological defense mechanism, a rhetorical and professional facade for the passive-aggressive, lawyer bully.

[FN94]. Other colleagues are more skeptical about the kind of teaching of the story I prescribe. See Eisele, supra note 24; Paul T. Hayden, Sinners in the Hands of an Angry Law Professor: Some Cautionary Thoughts on Teaching Moral Lessons in the Professional Responsibility Course, 21 Legal Stud. F. 221 (1997). Still other colleagues see pedagogical value in the Wishman story. See Nancy Cook, Response-Ability: Merging the Personal and the Professional Through Action and Reflection, 21 Legal Stud. F. 239 (1997); Reed Elizabeth Loder, Professional Grieving, 21 Legal Stud. F. 267 (1997).

[FN95]. Michael Perry's observations on the assumption that our beliefs are "fixed" are worth noting here:

> One's beliefs are not fixed for all time. Why does a person revise or at least question her beliefs? What are the occasions of revision? Perhaps she was unaware that she held inconsistent beliefs but is now aware; or perhaps she was aware that she held inconsistent beliefs but now finds herself in a situation in which she can no longer tolerate the inconsistency and must resolve it. Perhaps due to some new experience, whether her own or that of some trusted other on whom she relies, she has acquired a new belief inconsistent with one or more beliefs previously held; or perhaps the new belief is not inconsistent with any previously held belief but nonetheless renders her system or "web" of beliefs less balanced or integrated or coherent and more ad hoc. Perhaps she simply finds herself in a situation in which one or more of her beliefs is subjected to a challenge that, as an existential or at least practical matter, she cannot ignore. Revision of one or more of the beliefs that constitute a person's web of beliefs may require revision of one or more further beliefs, and so on, given the extent to which a person's beliefs are interdependent.

Perry, supra note 65, at 27.

[FN96]. Philip H. Corboy, a prominent Chicago trial lawyer, recognizes that cross-examination is a "fertile area for trickiness" and that the "tricks, ruses, and artifices" that lawyers use, "range from the trivial to the unconscionable." Philip H. Corboy, Cross-Examination: Walking the Line Between Proper Prejudice and Unethical Conduct, 10 Am. J. Advoc. 1, 4 (1986). Corboy raises concern about these practices and concludes that lawyers should not let "unswerving loyalty to client or to victory to cloud their moral or ethical judgment." Id. at 13. Monroe Freedman, in contrast, argues that lawyers have an ethical duty, once they have chosen to represent a client, to "discredit" truthful witnesses on cross-examination. See Monroe Freedman, Understanding Lawyers' Ethics 161-71 (1990).

[FN97]. The texts, stories, events, and incidents which crowd our lives define who we are and how our life's work will be vested with meaning. Consider, for example, a law student who reads the Constitution (or National Labor Relations Act or Americans with Disabilities Act) during their legal education and spends a lifetime as a constitutional lawyer. Our lives are often tied to texts: a constitution; a statute; a book, perhaps Freud's Interpretation of Dreams, Kate Millet's Sexual Politics, Scott Peck's The Road Less Traveled, or Richard Bach's Jonathan Livingston Seagull, perhaps a biography of Madame Curie or Theodore Roosevelt, a Nancy Drew book; or a fairy tale. Texts help crystallize and energize some part of the self or selves that demand expression. In stories like that told by Seymour Wishman we have occasion to direct attention to the adversarial ethic and those features of the legal-mind that threaten our downfall, even as we claim the glory of the ethic we have adopted.

[FN98]. The adversarial ethic lies at the heart of the partisan role lawyers play on behalf of their clients, and consequently, at the heart of the character pathologies associated with a legal persona devoted to an over-determined ethic. If we are to understand the proudest and saddest moments in the life of our careers as lawyers (and the disdain the public has for lawyers) we must confront conventional views of lawyering that make "hard-ball tactics" a professionally sanctioned part of lawyering.

Lawyers cannot sustain their moral lives on zealousness alone. There is nothing inherently wrong with zealousness; it is a virtue in which we take great pride as lawyers. But zealousness is not enough; it can never be the ultimate virtue by which all other virtues of professional character are measured and adjudged. We must learn, concretely, as painful as it may be, that an adversarial ethic is not an adequate foundation for professional life. See Elkins, supra note 56.

Wishman is a lawyer story-teller whose confessional narrative introduces the "shadow" side of the adversarial ethic. Wishman helps us see how zealous advocacy can have a serious, detrimental impact on the character of the advocate, the cost of becoming an amoral zealot. On the philosophical and psychological relation of adversarial professional role and character, see Benjamin Sells, The Soul of the Law (1994); Andreas Estate, Does a Lawyer's Character Matter?, in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics 259-69 (David Luban ed., 1983); Gerald J. Postema, Self-Image, Integrity, and Professional Responsibility, in The Good Lawyer, supra, at 70-85; Bernard Williams, Professional Morality and Its Dispositions, in The Good Lawyer, supra, at 286-314.

Wishman's observation takes on added weight and his reflection more difficult to dismiss because they come from a lawyer-insider, a lawyer who deeply respects the adversarial system.

[FN99]. For a description of what I am calling the "legal mind-set," see Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change 151-69 (1974) (arguing that the legal mind-set is a "narrowing" political vision that accompanies traditional methods of legal education); James R. Elkins, The Legal Persona: An Essay on the Professional Mask, 64 Va. L. Rev. 735 (1978) (examining the psychological features of the legal mind-set); Leonard Riskin, Mediation and Lawyers, 43 Ohio St. L.J. 29, 43-49 (1982) (presenting the legal mind-set as a "headwind" in opposition to the mind-set and worldview reflected in the practice of mediation).

Jerold Auerbach argues, that it is the lawyer's "dislike of vague generalities, the preference for case-by-case treatment of all social issues, the structuring of all possible human relations into the form of claims and counterclaims under established rules, and the belief that the rules are 'there" ' that constitute a legalistic world-view. Jerold Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 10 (1976). Stuart Scheingold notes:

When we accuse someone of being legalistic, we suggest an excessive zeal for purely formal details which becloud rather than clarify the real issue. The legalist is someone who is lost among the trees and cannot or will not consider the overall shape of the forest. So it is a sense of willful closure together with an obsession for procedure and minutiae that we associate with the law game.

Scheingold, supra, at 156. Judith Shklar argues that legalism has a moral/ethical dimension. Legalism is "the ethical attitude that holds moral conduct to be a matter of rule following and moral relationships to consist of duties and rights determined by rules." Judith N. Shklar, Legalism 1 (1964). Legalism can be seen as "a way of thinking about social life, a mode of consciousness" which structures our social experience. Roberto Mangabeira Unger, Knowledge and Politics 75 (1975). The legalism described by Shklar, Scheingold, Auerbach, and Unger is expressed in social institutions, political ideologies, philosophical thought, and personal behavior. It is a pattern of individual conduct and a social ethos. But it is in the legal profession and with lawyers that legalism finds its home. "Legalism is, above all, the operative outlook of the legal profession, both

bench and bar." Shklar, supra, at 8. For an account of how legalism effects the lawyers' relations with clients, see Richard Wasserstrom, Lawyers as Professionals: Some Moral Considerations, 5 Hum. Rts. 1 (1975) [hereinafter Wasserstrom, Lawyers as Professionals].

Jerold Auerbach has, somewhat extravagantly, described legalism as the "omnipotent deity ... worshiped by a cult of monotheistic professional zealots." Auerbach, supra, at 303. Auerbach further indicts the legal profession for its failure to promote social justice, contending that the failure is due, in part, to a legal mind "hemmed in by the ingrained professional preference for process and order, moderation and compromise." Id. at 266. For an argument that compromise undermines ethical behavior, see Stanley Hauerwas & Thomas Shaffer, Hope in the Life of Thomas More, 54 Notre Dame L. Rev. 569, 581-82 (1979).

An ideological worldview premised on legalism "is as much an obscuring veil as a clarifying lens for approaching social problems. Law and legal thinking are as frequently the cause of social trouble as the means of resolving it." Peter d'Errico, The Law is Terror Put into Words, 2 Learning & L. 39, 40 (1975). Legalism has increasingly come under criticism for "its role in maintaining oppressive social conditions and for the exceeding narrowness ... as a world view." Id. Richard Wasserstrom points out:

[T]he law is conservative in the same way in which language is conservative. It seems to assimilate everything that happens to that which has happened. It seeks to relate any new phenomenon to what has already been categorized and dealt with. Thus, the lawyers' virtually instinctive intellectual response when he is confronted with a situation is to look for the respects in which that situation is like something that is familiar and that has a place within the realm of understood legal doctrine.

....

I think that persons who are genuinely concerned with far-reaching and radical--the generic sense of the term--solutions to social ills ought to be on guard against and ought to mistrust this powerful tendency on the part of the lawyer to transmogrify that which is new into what has gone before or to reject as unworkable or unintelligible that cannot be so modified....

Richard Wasserstrom, Postscript: Lawyers and Revolution, 30 U. Pitt. L. Rev. 125, 129 (1968) [hereinafter Wasserstrom, Lawyers and Revolution].

[FN100]. See James R. Elkins, Thinking Like a Lawyer: Second Thoughts, 47 Mercer L. Rev. 511 (1996).

[FN101]. Will moral discourse work? Michael Perry makes the point that "moral discourse" is not "invariably a solvent of moral conflict" but that given the alternatives it ought to be tried. Perry, supra note 65, at 52. "There is surely nothing to be gained in underestimating the possibility of productive moral discourse." Id. at 53.

[FN102]. See Pitkin, supra note 12, at 154 (we find in moral discourse that "[s]ome ways of elaborating our conduct only make things worse").

[FN103]. Legal education constitutes a world of stories. See Pedagogy of Narrative: A Symposium, 40 J. Legal Educ. 1-250 (1990).

[FN104]. On the importance of other adventures and travel in education, see David H. Lempert, Escape From the Ivory Tower: Student Adventures in Democratic Experiential Education (1996).

[FN105]. What hypotheses about ethics and about our own moral lives do we carry with us into ethical inquiry? Are these hypotheses adequate for the life we are trying to live? How do these hypotheses illuminate and shadow our lives?

One problem in working with ethics is distinguishing what we know from what we do not, what we know and cannot articulate from what we know and can instructively articulate for others. We may know less

than we think we know (at least about some things, and some people). We may know, in some instances, more than we want to talk about. The problem is a normative one: how much of what I know about ethics must I be able to articulate in order to insure that I know what I think I know?

[FN106]. We bring something to ethics both more significant and more troubling than we might assume, something we already know and something we struggle to disown.

[FN107]. There are many ways to talk about the maps we use when we engage each other in ethics talk. Pierre Schlag describes two cognitive stances, rationalism and modernism, that are of particular interest to those who want to understand ethics talk. See Pierre Schlag, Missing Pieces: A Cognitive Approach to Law, 67 Tex. L. Rev. 1195 (1989). Schlag argues that rationalism is the "dominant cognitive mode" found in the community of legal practitioners. Id. at 1222.

> The hallmark of rationalist consciousness is the privileging of ego-centered reason.... [E]go-centered reason affirms the validity of the rule of reason as determined by the individual rationalist self. This consciousness posits a strongly idealist conception of reason in which the rationalist self knows few (if any) limits on its ability to understand and rationalize the world. Ego-centered reason understands that all claims or arguments about the nature of law or the world are addressed to the rational ego itself. The rationalist self is radically free--it need not (and should not) accept any claim that would de-center itself or its reason in adjudicating the nature of reality.
>
> Rationalist consciousness insists first and foremost on the justification of claims according to established rules of logic, or, more broadly, good reasoning. Claims are redeemable for rationalist consciousness if one can demonstrate that they follow correctly from accepted premises. Because, in principle, the rationalist self knows few (if any) limits on its capacity to understand or explain the world, any limits (or other vexations) it does encounter must result from intellectual sloth, outright error, or intentional distortion by other conversants.
>
> Because rationalist consciousness views all other selves as capable of the same intellection, at least in theory, the rationalist assumes that reasoned deliberation must govern all interpersonal enterprises. If all parties conduct this deliberation in good faith, the better argument will necessarily win the day. If the better argument does not prevail, it can only be because some of the parties have chosen to be disingenuous, dishonest, or fraudulent, or because they still do not understand the rules of the game.

Id. at 1210-11. Critical legal studies scholarship has brought another cognitive stance to our attention, a stance that confronts and calls into question our reliance upon rationalist consciousness. Modernism "pushes the critical edge" and "puts reason on trial." Id. at 1208. Modernism strives, says Schlag, "to articulate in polite, theoretical terms the unpresentable underside of reason." Id. Schlag associates modernism with Hegel, Marx, and Freud, and to a lesser extent, Nietzsche. See id. at 1208 n.62.

> Modernism troubles the rationalist picture. For modernists, theory, reason, and discourse are not only autonomous forms of thought but also activities or practices whose status is underwritten by some non-rational underside.... For modernists, reason itself must be scrutinized before its products can be admitted into the intellectual arena....
>
> Modernism thus demands a de-centering of ego-centered reason .... What is required is nothing less than a change in the very form in which categories are used to think--a change not just in what is thought, but in the way it is thought. This is a slippery and systematically repressed distinction, but it is extremely important. To understand the distinction, one must abandon the characteristic focus on substance in favor of form. As modernists see it-- rationalists do not--the difference between modernism and rationalism is not just a difference in theory, but a difference in the practice of theory.

....

...[M]odernism seeks to deepen Enlightment projects by acquainting them with the dark side of reason.... The modernist ... understands the present as a period of anguish, estrangement, and alienation.

Id. at 1213-14, 1218.

[FN108]. On the prosaic mentality, see George W. Morgan, The Human Predicament: Dissolution and Wholeness 81-93 (1968). Morgan describes the prosaic mentality:

[A person] interested in ... clear-cut boundaries. He wishes to have things sharply defined. He wants to know exactly what is meant, exactly what the facts are, exactly what constitutes his rights and duties, and exactly how to proceed. He hates what he calls blurred boundaries and sees them as a source of misunderstanding, confusion, inefficiency, and conflict. He is determined to find out where to "draw the line."

The prosaic man stresses literalness. Whatever is to be understood and communicated he wants to see spelled out in explicit statements. He thinks that stark, literal prose is the only instrument of expression and communication, and sees deviation from such bare, denotative prose as leading to error, miscommunication, and emotionalism.

The prosaic man praises objectivity, regarding it as the essence of reliability and truthfulness.... [T]o be objective means to withhold the feelings and to be detached and impersonal.

....

...[T]he prosaic person is forever incapable of considering issues in depth. He stays at the surface; he remains with things that permit specifiable action. He entertains no questions with respect to life, man, or society that do not obviously lead to specific things to do.

Id. at 83, 89. The practicalist assumes that the world can be mastered through the use of skills (routinized and habituated). The practicalist seeks skills and values them but is unwilling to question the purposes to which skills are devoted, and more troubling, whose purposes they ultimately serve. The practicalist has a philosophy, a powerful one, but she has no desire to know how it works.

We develop a prosaic mentality and accept conventional non-critical views of what we see going on around us and become obedient because we are unwilling to take risk. The need for security is so strong that we are unwilling to take the risk in being critical. See Edward E. Sampson, On Risk-Taking and Security, in Ego at the Threshold 46-48 (1975).

[FN109]. We are suspicious, and rightly so, about wordy (self-serving) pronouncements of ethical principles. To start a conversation with principles is to start where we want to end up. It's like watching the end of the movie first. Principles matter, and they matter in significant ways. But they matter in ways different than we assume. Principles are distillates of a life being lived, of life in process. We find out what principles we have got by living them.

[FN110]. See Thomas L. Shaffer, The Practice of Law as Moral Discourse, 55 Notre Dame L. Rev. 231 (1979). I find lawyer protagonists in fiction an instructive source (often by negative example) of moral discourse with clients. See, e.g., Stephen Greenleaf, The Ditto List (1986); George V. Higgins, Kennedy for the Defense (1980); George V. Higgins, Penance for Jerry Kennedy (1985).

[FN111]. As Edward Stevens puts it:

[The choice] is not between operating or not operating according to a given ... philosophy and morality. The question is rather whether you go about your moral life with eyes open and well aware of your operative philosophy or with eyes shut, unconscious of the assumptions and moral consequences of your decisions. The fact that you never give morality a second thought doesn't mean ... that your decisions have no moral import; it simply means that you are unaware of the moral dimension. The fact that a person cannot spell

or even pronounce the word “philosophy” doesn't mean that he has no operative philosophy in his life; it simply remains unconscious.
Edward Stevens, Business Ethics 8 (1979).
[FN112]. See infra notes 218-25 and accompanying text.

[FN113]. Walker Percy, The Second Coming (1980).

[FN114]. On language as “code” and how this code affects speaking, see Paul Goodman, Speaking and Language: Defence of Poetry 33-55 (1971).

[FN115]. Percy, supra note 113, at 33-34.

[FN116]. On the use of transactional analysis to decode conversation, see Eric Berne, Games People Play (1964); Eric Berne, Scripts People Live (1975); Eric Berne, What Do You Say After You Say Hello?: The Psychology of Human Destiny (1972).

[FN117]. Percy, supra note 113, at 24-25.

[FN118]. Id. at 24-25.

[FN119]. Id. at 46-47.

[FN120]. A danger in using the map of ordinary reality is that we begin to treat it as if it were the only map available, the only map a rational person would ever need. You do things automatically, or you live day-to-day, or you make careful plans so you can achieve your goals, but all are designed to get you where you are going according to a well-marked map. (Some of us move along such well-marked maps that it feels as if there is no different routes possible, indeed, that there is no map.) Along the way you talk so people understand you, you fit in, you “go along” (as they say), and things work out like they should (or so you think).

[FN121]. Tolstoy, supra note 76.

[FN122]. Walker Percy's fiction is often characterized as philosophical in tone. For an introduction to the philosophical and psychological foundations of Percy's fiction, see Robert Coles, Walker Percy: An American Search (1978). The literary themes of Percy's fiction are surveyed in John Edward Hardy, The Fiction of Walker Percy (1987).

Walker Percy died at his home in Covington, Louisiana, on May 10, 1990. His unpublished nonfiction essays have been collected in Walker Percy, Signposts in a Strange Land (Patrick Samway ed., 1991).

[FN123]. See Paul Gewirtz, A Lawyer's Death, 100 Harv. L. Rev. 205 (1987) (reflecting on The Death of Ivan Ilych and the compartmentalization of our lives).

[FN124]. See Camus, supra note 38; Dawson Martin, The Lawyer as Friend, 32 Rutgers L. Rev. 695 (1979) (drawing on The Fall in essay on the amoral stance of lawyers).

[FN125]. See generally John Joseph Brady, Bad Boy: The Life and Politics of Lee Atwater (1997).

[FN126]. Michael Oreskes, For Atwater of the G.O.P., Illness Is Now the Enemy, N.Y. Times, Mar. 31, 1990, at A7.

[FN127]. Tumor Seems to Mellow G.O.P. Chief, N.Y. Times, Mar. 17, 1990, at A8.

[FN128]. Realists fit everything, including good and bad, and extremes of every dualistic sort, on a continuum, avoiding polarities like reason and passion, masculine and feminine, objective and subjective, self and other, science and religion.

[FN129]. Charles Reich, The Sorcerer of Bolinas Reef 20 (1977).

[FN130]. Michael J. Perry makes the point this way:

> One of the most important sources of one's moral beliefs is certain other person's experience--trusted others on whom one does and must rely, in particular the moral community and tradition in which one participates. By moral community I mean, in this context, a group of persons who are the present bearers of, and participants in, a moral tradition. By moral tradition I mean a particular history or narrative in which the central motif is an aspiration to a particular form of life, to certain ideals and goals, and the central discourse is an argument--in Alasdair MacIntyre's terms, “an historically extended, socially embodied argument”--about how that form of life is to be cultivated and revised.... Basic moral beliefs--deeply satisfying--are less the property of individuals than of communities.

Perry, supra note 65, at 29. It is, I think, this desire to see the lawyer as a part of tradition and community that underlies so much of the work of Thomas Shaffer. See, e.g., Thomas L. Shaffer, American Lawyers & Their Communities: Ethics in the Legal Profession (1991).

[FN131]. My own view is that ethics can no more lie in the remoteness of childhood than in the immediacy of an ahistorical, unstoried present. The historically formed character and the character of the moment are contingent, each on the other.

[FN132]. “There is some profound link, it seems between the story of a man's life and the story of his world. The story of his world is his myth, the story in which he lives, the greater story that encompasses the story of his life.” Dunne, supra note 39, at 50.

[FN133]. On tacit knowledge, see Michael Polanyi, The Tacit Dimension (1967).

[FN134]. All quoted phrases are from Webster's Seventh New Collegiate Dictionary 204 (1967) [hereinafter Webster's].

[FN135]. Id.

[FN136]. Richard Rodriguez, The Hunger of Memory 46-73 (1983).

[FN137]. I suspect that legal educators recognize as good students those who are good in a rather limited sense.

[FN138]. Rodriguez, supra note 136, at 67.

[FN139]. Pirsig, supra note 43, at 190.

[FN140]. Id. at 190-91.

[FN141]. Id. at 191.

[FN142]. When we take up ethics, reflect on the character of ethics lived around us, we must inevitably say

something about ourselves and our own character. We must, it seems, also say something about our curiosity about ethics and the ideals and pathologies we see associated with the adversarial ethic.

[FN143]. For an earlier effort to reflect on the role of failure in professional life, see James R. Elkins, Ethics: Professionalism, Craft, and Failure, 73 Ky. L.J. 937 (1984-85).

[FN144]. See Robert Bly, A Little Book on the Human Shadow (William Booth ed., 1988); The Shadow in America: Reclaiming the Soul of a Nation (Jeremiah Abrams ed., 1994); James R. Elkins, Pathologizing Professional Life: Psycho-Literary Case Stories, 18 Ver. L. Rev. 581 (1994).

[FN145]. There are serious obstacles to an inquiry into the moral character that lawyers take on in their zealous pursuit of client interests, obstacles which must be addressed in the conversation ethics. Obstacles to moral discourse can be found in the classroom (the legal ethics course is a curricula stepchild, unwanted, unloved), in legal education (there is disagreement about the role of morals and ethics in the practice of law), and in culture (moral relativism when allowed to run rampant can make moral discourse difficult). More basically, it is legal discourse, and the legal persona, and our love affair with an unbounded adversarial ethic that perverts and derails our conversation about lawyer ethics.

[FN146]. See, e.g., Robert Coles, Legal Ethics: The Question of Principalities and Powers, 21 Bos. Col. L. Rev. 1017 (1980).

[FN147]. “In all lives there are serious moral failures; we fail to recognize this because many such failures are unspectacular and hence are not noticed widely, and perhaps are not noticed even by those committing them.” Glenn Tinder, Against Fate: An Essay on Personal Dignity 138 (1981).

[FN148]. On the various forms and shapes of these lies, see Sissela Bok, Lying: Moral Choice in Public and Private Life (1978).

[FN149]. See Benjamin Sells, The Soul of the Law (1994).

[FN150]. Carla Needleman says of craft, that it becomes an education in failure, an education that helps us see failure in what we do and how our attitude toward failure affects what we make and the lives we live. See Carla Needleman, The Work of Craft: An Inquiry into the Nature of Crafts and Craftsmanship 15 (1979).

[FN151]. James Hillman, Inter Views 23 (1982).

[FN152]. Consider the following comments about the worm in the lawyer's apple:

But the lawyer is always in a hurry; there is the water of clepsydra driving him on.... He is a servant, and is continually disputing about a fellow-servant before his master, who is seated, and has the cause in his hands; the trial is never about some indifferent matter, but always concerns himself; and often the race is for his life. The consequence has been, that he has become keen and shrewd; he has learned how to flatter his master in word and indulge him in deed; but his soul is small and unrighteous ... from the first he has practiced deception and retaliation, and has become stunted and warped. And so he has passed out of youth into manhood, having no soundness in him; and is now, as he thinks, a master in wisdom. Such is the lawyer, Theodorus....

Martin Mayer, The Lawyers 4 (1967) (quoting Plato) (alteration in original). The [lawyer] role itself requires certain dispositions to guile, aggression, and instrumental behavior. The problem is that such dispositions eventually become settled traits of character and thus change the person who performs the role.

David Luban, Introduction to The Good Lawyer, supra note 98, at 18.

[FN153]. Wendell Berry, a Kentucky farmer, novelist, essayist, and poet reminds us that "no ideal is invalidated by anyone's or everyone's failure to live fully up to it." Wendell Berry, Standing By Words 100 (1983).

[FN154]. "At bottom, ours is a society built on individualism, competition, and success. These values bring great personal freedom and mobilize powerful energies. At the same time, they arouse great temptations to shoulder aside one's competitors, to cut corners, to ignore the interests of others in the struggle to succeed." Derek Bok, A Flawed System of Law Practice and Training, 33 J. Legal Educ. 570, 575 (1983).

[FN155]. We soon realize the success we seek, but, in reaching the destination, we have lost something along the way. We get what we most want and find it empty. The result is burnout, depression and numbness.

[FN156]. Stanley Hauerwas, Vision and Virtue: Essays in Christian Ethical Reflection 47 (1981). Jules Henry observes:

> For most of us, our abilities, our good looks and our social techniques--our pleasant, public-relations hellos, our ability to laugh at anybody's jokes, our capacity to hold conventional opinions and to never value or fight for any position in an argument too much--never seem quite adequate to ward off all the charges of failure.

Jules Henry, On Sham, Vulnerability and Other Forms of Self-Destruction 90 (1973).

[FN157]. Adrienne Rich, On Lies, Secrets, and Silence: Selected Prose 1966-1978 215 (1979).

[FN158]. See Jaspers, supra note 65, at 23:

> Crucial for man is his attitude toward failure; whether it remains hidden from him and overwhelms him only objectively at the end or whether he perceives it unobscured as the constant limit of his existence; whether he snatches at fantastic solutions and consolations or faces it honestly in silence before the unfathomable. The way in which man approaches his failure determines what he will become.

[FN159]. Thomas Bulfinch, The Outline of Mythology 156-57 (1913).

[FN160]. Paul Diel observes that "[e]very man who is comparable to Icarus by his elevation" and "vainly exalted spiritual effort" [read professionalism] "finds not the satisfaction he had imagined, but disappointment...." Paul Diel, Symbolism in Greek Mythology: Human Desire and its Transformations 35 (1980).

[FN161]. Warren Lehman, Finding Our Way Back, 29 Am. J. Juris. 229 (1984) (review essay). Richard Mitchell points out that Socrates talked about "the difference between being good and seeming good." Richard Mitchell, The Gift of Fire 96 (1987). Mitchell suggests, "[i]t is obviously possible that the outward appearance of goodness is a sign of inward goodness, but it is just as possible that it is not. As to which is which, experience is a remarkably poor teacher." Id. Jacob Needleman argues:

> [It is the "power" of Socratic conversation] to penetrate, again and again, behind the world of appearances; the world of emotional appearances as well as the world of perceptual appearances--that is, the world as I like it or dislike it, the world to which I am attached in my emotions, the world of my emotions. To penetrate beyond the world of appearances means to destroy my beliefs, my opinions, my certainties not only about objects, but about myself.

Jacob Needleman, The Heart of Philosophy 24 (1982). We get beyond appearances by a process of "uncovering" presumptions that lurk in our thinking:

> [B]y analyzing conceded judgments we go back to their presuppositions. We operate regressively from the consequences to the reason. In this regression we eliminate the accidental facts to which the particular judgment relates and by this separation bring into relief the originally obscure assumption that lies at the bottom of

the judgment on the concrete instance. The regressive method of abstraction, which serves to disclose philosophical principles, produces no new knowledge either of facts or of laws. It merely utilizes reflection to transform into clear concepts what reposed in our reason as an original possession and made itself obscurely heard in every individual judgment.
Leonard Nelson, Socratic Method and Critical Philosophy 10 (Thomas K. Brown trans., 1965).
[FN162]. See Huanchu Daoren, Back to Beginnings: Reflections on the Tao 64 (Thomas Cleary trans., 1990):

> Diligence means to be keen in matters of virtue and justice, but worldly people use diligence to solve their economic difficulties. Frugality means to have little desire for material goods, but worldly people use frugality as a cover for stinginess. Thus do watchwords of enlightened life turn into tools for the private business of small people. What a pity!

[FN163]. See Camus, supra note 38.

[FN164]. On the use of Jean-Baptiste Clamence as a reflective mirror for our own character, see Martin, supra note 124.

[FN165]. Camus, supra note 38, at 23.

[FN166]. Id. at 6.

[FN167]. Hypocrisy takes its meaning from the Greek word hypokrisis, an act taken on by playing a part on the stage. See Webster's, supra note 134, at 410.

[FN168]. Judith N. Shklar, Ordinary Vices 45 (1984).

[FN169]. Id. at 47.

[FN170]. Id. at 78.

[FN171]. Id. at 86.

[FN172]. See Wittgenstein, supra note 1, at § 19 (“And to imagine a language means to imagine a form of life.”). Paul Ricoeur has noted that words have a “militant existence” and that the word “makes something within the world.” Paul Ricoeur, Work and the Word, in Existential Phenomenology and Political Theory: A Reader 40 (Hwa Yol Jung ed., 1972). “[T]he spoken word is, in a sense and an authentic sense, an annex of the enterprises of transforming the human milieu by the human agent.” Id. at 40-41. It is with words that we sing the lament called ethics, that we rehearse alternatives to stale conventions and static practices that lull us into moral sleep.

[FN173]. On language games, see Wittgenstein, supra note 1, at § 7. When lawyers talk “law talk,” lay witnesses call it “legalese.” When we hear professionals speak in the language idiom of their discipline we call it “jargon.” For an exploration of “law talk,” see Mary Jane Morrison, Excursions into the Nature of Legal Language, 37 Clev. St. L. Rev. 271 (1989). The jargon of legalese symbolizes the impoverished (and fragmentary) ethical scripts we enact with clients and with each other, scripts that implicate both our character and the character of law. On the political and ideological character of our attorney-client interactional scripts, see Austin Sarat & William Felstiner, Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process (1995) (working with verbatim scripts of lawyer/client conversations). Learning and mastering the subtleties of legal language is an integral part of the transformation of self that takes place in legal education.

[FN174]. Moral discourse sometimes reveals the remaking of character to fit a legal persona, a fit that sometimes feels "natural," for others, quite forced.

[FN175]. Richard Wasserstrom observes:

> [To become a lawyer] is to incorporate within oneself ways of behaving and ways of thinking that shape the whole person. It is especially hard, if not impossible, because of the nature of the professions, for one's professional way of thinking not to dominate one's entire adult life.... The nature of the professions--the lengthy educational preparation, the prestige and economic rewards, and the concomitant enhanced sense of self--makes the role of professional a difficult one to shed even in those obvious situations in which that role is neither required nor appropriate. In important respects, one's professional role becomes and is one's dominant role, so that for many persons at least they become their professional being.

Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, in Problems in Professional Responsibility 2, 14 (Andrew Kaufman ed., 3d ed. 1989). William O. Douglas may have captured the existential dimension of the problem in his decision not to emulate his elders. "I looked around at the older men in my profession and I knew I didn't want to be like any of them. They couldn't climb a mountain, couldn't tie a dry fly; they knew nothing about the world closest to me, the real world, the natural world." William O. Douglas, Go East Young Man 156 (1974). There are, of course, lawyers who can tie dry flies. See, e.g., Anatomy of a Murder (Columbia Pictures, 1959) (depicting Paul Biegler, a trout-fishing lawyer).

[FN176]. In the rites of passage from lay person to lawyer we first become inattentive, and then unconscious of, what is painfully obvious to others. Julius Getman argues that the "most prevalent mode of expression in legal education is 'professional voice,' the essence of which is addressing questions of justice through the analysis of legal rules." Julius Getman, Colloquy: Human Voice in Legal Discourse, 66 Tex. L. Rev. 577 (1988). Getman goes on to point out that the rhetorical style of this "professional voice" is "formal, erudite, and old-fashioned." Id. at 578.

> Its passages often are interspersed with terms of art and Latin phrases, as through its user were removed from and slightly above the general concerns of humanity. Indeed, the focus on general rules, which is one of the contributions of professional voice, ensures the use of language that removes some of the feeling and empathy that are part of ordinary human discourse.

Id. And what do we do with this professional voice we have so painfully learned to speak? How is it used (and abused)? Voice is one of the trappings of professionalism. Together with dress, manner, and support personnel--secretaries, research assistants, people to answer phones and to screen the lawyer's time--it serves symbolically to remove the lawyer and the law professor from the concerns of ordinary people. For this reason, too exclusive a focus on professional voice is dangerous to the lawyer's psyche.... Professional voice overemphasizes the importance of sonorous phrasing and suggests that a lawyer's professional responsibility necessitates responding to complex emotional situations in terms of abstract rules.

Id. The danger of "professional voice" was suggested earlier by Richard Wasserstrom when he observed that "the professions tend to have and to develop their own special languages" and use these professional languages to depersonalize the client by the exercise of linguistic "power": Because the ability to communicate is one of the things that distinguishes persons from objects, the inability of the client to communicate with the lawyer in the lawyer's own tongue surely helps to make the client less than a person in the lawyer's eyes--and perhaps even in the eyes of the client.

Wasserstrom, Lawyers as Professionals, supra note 99, at 21. On "voice," see Mari Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323, 324 (1987); Carrie Menkel-Meadow, Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law, 42 U. Miami

L. Rev. 29 (1987); Frank Michelman, Traces of Self-Government, 100 Harv. L. Rev. 4 (1986); Martha Minow, Many Silent Worlds, 9 W. New Eng. L. Rev. 197 (1987) (book review).

[FN177]. Socrates gained a reputation for the disquietude he induced in those he engaged in conversation. When our conversations turn to ethics and we use moral discourse to critique legal discourse, we can expect a fair amount of disquietude. Taught to turn away from trouble, to ignore the symptoms of disease, ethics demands a contrary impulse, an affection for the symptoms exposed in ethical inquiry and reflection.

It was the nature of the questions posed by Socrates, as it is the questions we pose for ourselves, that jostle us out of complacency. On the "new" questions of philosophical concern posed by Socrates, see Langer, supra note 27, at 7-10 (arguing the fundamental importance of our questions in contrast to more widely revered answers). Socrates' "questions centered on what values things had-- whether they were good or evil, in themselves or in relations to other things, for all men or for few...." Id. at 8. It was the perceived "new quality of his questions" about value that made them so "disconcerting." Id. at 9.

[FN178]. Ethical discourse does not lend itself to the "cool," dispassionate, problem-solving language we prize so highly in law.

[FN179]. See John T. Noonan, Persons and Masks of the Law: Cardozo, Holmes, Jefferson and Wythe as Makers of the Mask (1976).

[FN180]. In the public conversation about lawyer ethics an astounding pantheon of lawyer stereotypes is exposed. We need to take these lawyer stereotypes seriously and be attentive to how they are "voiced." The "voices" that appear in moral discourse are real; they have a life of their own. We must understand them or they will consume us.

Stereotypical explanations and justifications for the adversarial ethic are "voiced" because they are inexorably linked to the various scripted roles we accept as lawyers. The law school course in legal ethics is a good place to examine the clichés used to justify and perpetuate these "voices." Some of us are comfortable speaking conventional verities; others are not. Some students of ethics learn by actively participating in class, some persist within the bell jar of silence. Those who speak reveal in their "voice" a distinct persona.

[FN181]. There are differences in emperors, as in lawyers. One feature common to both is the struggle with power and authority. For different approaches to the psychological dynamic of authority and power relevant to moral discourse, see Richard Sennett, Authority (1981); Zaleznik & Kets de Vries, supra note 76.

[FN182]. One way we defend against critics of the legal profession is with the self-assured belief that outsiders do not see and understand how our ethics as lawyers work.

[FN183]. Legal discourse provides a new web of meaning (personal and cultural) that acts as an overlay on the map of ordinary reality, commonsense, and moral sensibility. The problem is that lawyers do not speak in a single voice or with a "prescribed" vocabulary. "[T]he apparently single vocabulary which constitutes what we call legal language is actually several vocabularies." Walter Probert & Louis Brown, Theories and Practices in the Legal Profession, 19 U. Fla. L. Rev. 447, 470 (1966-67). As lawyers we shift from one language to another, from one sense of meaning to another. This shifting feature of legal language allows us, as lawyers, "to move through several perspectives without being aware of the shift and without being observed, except perhaps by the skeptic's eye." Id.

[FN184]. We lose, in an overzealous adoption of the legal voice, the ability to hear our own voice. We lose the

ability to see the look of dismay of those who witness and experience the sting of our adversarial ethic. Yet, we must rely, far more than we are willing to admit, on those who can hear our voice, on listeners to whom we portray, with arrogance, our single-minded, disembodied ethic. Without their disapproval, we are lost.

[FN185]. In a seminar of law teachers a participant remarked: "One can never speak as a whole person. When we speak, it is always part of us that does so." This observation, from the day it was spoken, has plagued me. It says something about who we are in the world, how we convey human sentiments, and who we have become as moral persons.

My colleague's observation calls for reflection. What could one mean by the statement "One can never speak as a whole person" ?

-- Speech is a cognitive function which can proceed without reflecting underlying emotions and feelings.

-- When we speak we are never "fully committed" to what we say (all speech is a form of deception and manipulation).

-- When we speak, we do so in performance of a role--lawyer, friend, student, father--a role is not synonymous with person, nor is speech.

-- There is no whole person as there is no one self to constitute a whole.

Can one speak as a whole person? Is it possible to be a whole person, to even temporarily experience one self as whole? How does the absence of wholeness play itself out in our speech as lawyers?

[FN186]. See Getman, supra note 176, at 577:

Legal education like the law itself uses a variety of distinct voices. Regardless of specific content, these voices convey characteristic messages. Not only do they embody different rhetorical styles, but they manifest different values, respond to different psychological needs, convey different archetypical visions, perform different functions, and pose different problems.

[FN187]. The most extensive effort to work out the implications of the limited nature of legal discourse using literature and the humanities as a constant reminder of what legal discourse forgets, ignores, discounts, devalues, and demeans, can be found in White, supra note 25. See also James Boyd White, What Can a Lawyer Learn from Literature?, 102 Harv. L. Rev. 2014 (1989) (book review).

[FN188]. This integration of voices and ways of being has been central in the work of James Boyd White beginning with the magisterial The Legal Imagination. See White, supra note 25.

[FN189]. See Ludwig Wittgenstein, Tractaus Logico-Philosophicus § 5.6 (1961). Roberto Unger concludes Knowledge and Politics with an appeal to God: "But our days pass, and still we do not know you fully. Why then do you remain silent? Speak, God." Unger, supra note 99, at 295.

Susanne Langer observes that "our primary world of reality is a verbal one. Without words our imagination cannot retain distinct objects and their relations, but out of sight is out of mind." Langer, supra note 27, at 126. The anthropologist, Malinowski, extends Langer's point and uses law as an example:

The mastery over reality, both technical and social, grows side by side with the knowledge of how to use words. Whether you watch apprenticeship in some craft within a primitive community or in our own society, you always see that familiarity with the name of a thing is the direct outcome of familiarity with how to use this thing. The right word for an action, for a trick of trade, for an ability, acquires meaning in the measure in which the individual becomes capable to carry out this action.

....

Take, for instance, the problem of law in its verbal and pragmatic aspects. Here the value of the word,

the binding force of a formula, is at the very foundation of order and reliability in human relations. Whether the marriage vows are treated as a sacrament or as a mere legal contract--and in most human societies they have this twofold character--the power of words in establishing a permanent human relation, the sacredness of words and their socially sanctioned inviolability, are absolutely necessary to the existence of social order. If legal phrases, if promises and contracts were not regarded as something more than flatus vocis, social order would cease to exist in a complex civilization as well as in a primitive tribe.

Bronislaw Malinowski, The Language of Magic and Gardening, in 2 Coral Gardens and their Magic 232-35 (1935), reprinted in William R. Bishin & Christopher D. Stone, Law, Language, and Ethics 407, 408 (1972).

[FN190]. C.W. Mills observed that "[w]e may 'locate' a thinker among political and social coordinates by ascertaining what words his functioning vocabulary contains and what nuances of meaning and value they embody." C. Wright Mills, Language, Logic and Culture, in Power, Politics and People: the Collective Essays of C. Wright Mills 423, 434 (Irving Louis Horowitz ed., 1963). The simple truth, as Mills, one of the great humanistic sociologists, observes:

> [L]anguage provides not only words but the meaning of words. No thinker can assign arbitrary meanings to his terms and be understood. Meaning is antecedently given; it is a collective "creation." In manipulating a set of socially given symbols, thought is itself manipulated. Symbols are impersonal and imperative determinants of thought because they manifest collective purposes and evaluations. New nuances of meaning which a thinker may give to words are, of course, socially significant in themselves; but such "new" meanings must in their definition draw upon the meanings and organization of collectively established words in order that they may be understood, and they are conditioned thereby; and so is the acceptance and/or rejection of them by others. Here again, the thinker is "circumscribed" by his audience because in order to communicate, to be understood, he must "give" symbols such meanings that they call out the same responses in his audience as they do in himself. The process of "externalizing" his thought in language is thus, by virtue of the common essential to meaning, under the control of audience.

Id. at 434-35.

[FN191]. For an elegant defense of "thinking like a lawyer," see Peter R. Teachout, Uneasy Burden: What It Really Means to Learn to Think Like a Lawyer, 47 Mercer L. Rev. 543 (1996).

[FN192]. Peter Goodrich has explored the impoverishment of legal language, legal thinking, and legal consciousness in the representation of rights of an indigenous people. Goodrich describes a confrontation of the Haida Indians of the Queen Charlotte Islands and their efforts to use the courts to protest a logging license granted an American lumber company. See Peter Goodrich, Moralities of Annunciation: An Introduction to Courtroom Speech, in 2 Law & Semiotics 143 (Roberta Kevelson ed., 1988). Goodrich relates:

> [H]ow the chiefs of the Haida appeared before the court in full ceremonial dress accompanied by eighteen elders of the Haida nations but without lawyers.... Chief Lightbrown and others retold at length the mythological history of the Haida arrival in the islands.... A series of further anecdotal narratives, mythologies and traditional poems were presented to the court as evidence of the ancestral claim of the Haida to the islands.
>
> Several Haida artists explained at length the character and symbolism of their art forms, of their totems, masks and carvings all of which also spoke to the integral relationship of the Haida to the lands of their love of it and respect for it.... [O]ne of the women elders sang traditional songs to the court for a full afternoon. The songs repeated ancestral legends and evidenced again that in Haida custom and art, inhabitant and nature were one....

Id. at 144-45. Goodrich reports that an injunction was granted the next day to prohibit Haida interference with the logging operation. The court found that the "evidence presented as to the Haida title to and relationship with the islands was not legally relevant to the case being heard which simply concerned interference

with a valid logging license." Id. at 145. The legal web of meaning did not comprehend the Haida way of life and the language of the Haida people.

[FN193]. I have been writing about the legal ethics course for some years now and the arguments I present here are drawn from previous efforts to describe the nature, dynamics, and possibilities for a pedagogy of lawyer ethics that escapes its present confines. See James R. Elkins, Moral Discourse and Legalism in Legal Education, 32 J. Legal Educ. 11 (1982); Elkins, supra note 143; James R. Elkins, The Pedagogy of Ethics, 10 J. Legal Prof. 37 (1985).

[FN194]. L. Ray Patterson, Legal Ethics: The Law of Professional Responsibility (2d ed. 1984).

[FN195]. Wasserstrom, Lawyers and Revolution, supra note 99, at 128-29.

[FN196]. The notion that ethics is a special field of study, a discipline, with its own language, body of knowledge, and methodology is now commonplace. The Hastings Center found that when ethics is taught outside philosophy departments and theology schools, teachers tend to have no formal training in moral philosophy or ethics. See The Hastings Center, The Teaching of Ethics in Higher Education (1980). The report expresses concern about the proliferation of courses in applied ethics taught by those "with no special professional qualifications...." Id. at 62. The Report argued that "[t]hose who have not made a strong effort to become familiar with the field of ethics cannot be expected to teach rigorous and well-grounded courses, whether theoretical, applied, or professional." Id. at 65. The Report concludes that all ethics teachers need "special" training to teach ethics. "Whatever the shortcomings of a training in philosophical or theological ethics, it normally provides some well-established criteria for assessing and justifying moral arguments and some body of developed theory.... There are, in short, disciplinary standards of rigor and quality." Id. at 63.

While the Report finds advanced degrees in both philosophy and the field in which ethics is taught desirable, they are deemed impractical. The Report concludes that the only way an "applied ethics" teacher can be "adequately grounded" is to have formal training in ethics. How much training is necessary? The Report proposes that at least one year is necessary to ground the teacher in the discipline of ethics. Ethics is, in the view of the Hastings Center Report, a discipline with its own "internal dynamics" which one can understand only with professional training.

It can be argued, notwithstanding the Hastings Center Report recommendations, that it is not some discipline called ethics that law teachers need to be trained, but the simple, everyday skills of moral discourse. Lawyer ethics is difficult to teach, and often taught poorly, but it is not due to an absence of formal "training" in philosophy but embracing a legal mind-set in a setting in which that mind-set is to be questioned that undermines the teaching of lawyer ethics.

[FN197]. Thomas Shaffer must be given credit for efforts extending over many years to make this point. Shaffer has shown how we impoverish the idea of ethics by envisioning lawyer ethics through the positivist prism of a legalistic world view. See generally Thomas L. Shaffer, American Legal Ethics: Text, Readings, and Discussion Topics (1985). Yet, lawyer ethics is routinely reduced to law. Listen, as L. Ray Patterson, talking about his law school course in legal ethics, makes the reductive move: "A course in legal ethics is, and should be, a law course involving rules of law and legal problems. That the subject of the rules is ethical conduct and that the problems may be characterized as ethical in nature does not make them any the less legal." Patterson, supra note 194, at ix.

[FN198]. We have codified lawyer ethics into what looks and reads like rules. We have moved from an ethics of

"canons," and later a "code," to an ethics of "rules." In the name of progress, we have attempted to legalize ethics, to reduce ethics to rule-following.

[FN199]. If we could keep ethics simple and straight-forward, if we could just do ethics the way we follow a recipe in a cookbook, or establish ethical rules and follow them (and punish those who do not) we would indeed find ethics to be simple. Ethics, oddly enough, is somewhat analogous to the criminal law, where we make laws that proscribe behavior, and punish those who violate the social consensus on wrongdoing, but crime keeps happening. We have plenty of criminal laws, and invest heavily in the efforts to catch criminals and prosecute them, and are now placing hundreds of thousands of them in overcrowded prisons without "solving" the crime problem. You can promulgate law-like ethical rules for lawyers, put more resources into investigations of client complaints about lawyers, and punish more lawyers for violations of profession imposed ethical rules, and still not "solve" the problem of lawyer ethics.

[FN200]. The instrumental transmutation of legal ethics into the law of lawyering impoverishes the pedagogy of lawyer ethics, and is another way legal educators pander to those who possess the efficient and economical virtues of a "legal mind." Some go further, and suggest the use of regulatory ethics to bolster the "public image" of the profession. With the rhetoric of "ethics," students learn to justify an adversarial ethic limited only by prescriptions of law.

[FN201]. The problem is even more pronounced now that "legal ethics" is tested as part of the Multistate Bar Examination. Many law teachers have turned their legal ethics courses into a preview of the ethical (law-like) rules that are tested on the Multistate Professional Responsibility Examination.

[FN202]. Some years ago, I set out to travel around the country talking with legal ethics teachers and moral philosophers interested in lawyer ethics. The result of my interviews with ethics teacher colleagues can be summarized as follows: Teachers of legal ethics believed the teaching of lawyer ethics to be of importance and were saddened by the unwillingness of students to take ethics more seriously. Even so, many of the teachers I interviewed had resigned themselves to teaching legal ethics as a survey of the ethical rules and the application of these rules to resolve lawyers' ethical dilemmas. The result then (a result that would, I believe, be confirmed if conducted today) was that law teachers teach legal ethics and professional responsibility courses as if they were law courses. Interestingly enough, both students and teachers know that lawyer ethics cannot be reduced to the law of lawyering, but neither teachers nor students knew how to extricate themselves from a form of instruction that ignores ethics in the name of ethics.

[FN203]. One aim of ethics might be to help us confront the evil that takes place in the name of law and lawyering. See Stephan A. Landsman, Satanic Cases: A Means of Confronting the Law's Immorality, 66 Notre Dame L. Rev. 785 (1991).

[FN204]. On the depth of adversarialism in American culture, see William F. May, Adversarialism in America and the Professions, in Community in America: The Challenge of Habits of the Heart 185-201 (Charles H. Reynolds & Ralph V. Norman eds., 1988).

[FN205]. Law teachers, when they adopt the rhetoric of instrumentalism and legalism, ask their students to put aside their personal morality. Other legal educators object. See Bryant G. Garth, Legal Education and Large Law Firms: Delivering Legality or Solving Problems, 64 Ind. L.J. 433, 442-45 (1989) (arguing that we should let "personal morality" "play a role in all legal advice" and that legal education is the place we learn to integrate personal morality with professional practice).

[FN206]. I have attempted to explore this change in previous essays. See, e.g., James R. Elkins, Becoming a Lawyer: The Transformation of Self During Legal Education, 66 Soundings 450 (1983); Elkins, supra note 100.

[FN207]. See James R. Elkins, Rites of Passage: Law Students “Telling Their Lives”, 35 J. Legal Educ. 27 (1985); James R. Elkins, The Quest for Meaning: Narrative Accounts of Legal Education, 38 J. Legal Educ. 577 (1988).

[FN208]. Law teachers demand that their students learn to talk and “think like lawyers.” We cannot be ethical lawyers unless we confront the legal persona we have acquired during the course of our schooling in legal discourse.

[FN209]. We bring with us to ethics, predispositions, attitudes, values, ideals, beliefs, and dreams that are channeled into the stream of everyday life and an antinomian stream that flows beneath and out of view of everyday life. C.G. Jung called the self we present in our everyday world persona and the self hidden to the world shadow. It is a daimon, a life dream or fantasy about who we are, what we are to do and to be in this world, that shuttles between persona and shadow. Learning ethics, and being ethical, depends ultimately on this daimon and how we deal with it, with our images, dreams and fears. The moral and ethical views expressed in the justification of choices gives the daimon life, reflected as character. For an interesting treatment of the daimon and its centrality and determinative influence on character, see James Hillman, The Soul's Code: In Search of Character and Calling (1996).

The daimon is another name for the inner voice. The inner voice is often strong, clear and unmistakable, so persistent that it develops its own personality. A strong inner voice of this kind, what the Greeks called daimon, can be a relentless vision, guiding, pulling, pushing one along. For some the daimon is a long-standing dream or vision that occurs so persistently that consciously or unconsciously we live to fulfill its design. For others, the inner voice is sporadic, inaudible, or mute. And for still others, the sound is that of many voices, voices that set one off in many different directions, chasing conflicting purposes and ideals.

My own inner voice emerges and subsides; sometimes loud, now dim as fading light. At times I listen, at others I go about the day ignoring it. This inner voice, my daimon, is associated with some deep (and cutoff) part of my self. The daimon expresses a different view on the world, and on me, from its protected place in the interior. It is my inner voice that gives me an interior sense of how things work, a sense of what is good that comes from within (what has gone on before) watching what goes on from without (what is happening now).

[FN210]. Daniel Maguire, The Moral Choice 37, 39 (1978).

[FN211]. Richard Rorty, Philosophy and the Mirror of Nature 348-49 (1979).

[FN212]. See Gillers, supra note 73, at 1617-18 (“We are frequently ambivalent about how lawyers should behave in a particular circumstance. One reason for this may be that we are still making up our minds about a matter.”).

[FN213]. A major source of reported job dissatisfaction of lawyers is the increasing lack of civility between lawyers. See Milo Geyelin, Lawyers Object to Colleagues' Rudeness, Wall St. J., June 24, 1991, at B1.

[FN214]. The question of how our sense of professionalism is to be embodied in a “professional morality” and how this morality of professional life is related to ordinary morality is a frequent theme in legal ethics writings on professionalism. See, e.g., Robert H. Aronson & Donald Weickstein, Professional Responsibility 9-16 (1980); Alan Goldman, The Moral Foundations of Professional Ethics 1-33 (1980); David Luban, Lawyers and

Justice: An Ethical Study 104-47 (1988); The Good Lawyer, supra note 98; Stuart Hampshire, Public and Private Morality, in Public and Private Morality 23-53 (1978); David Luban, Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics, 40 Md. L. Rev. 451, 462-70 (1981); Richard A. Matasar, The Pain of Moral Lawyering, 75 Iowa L. Rev. 975 (1990).

[FN215]. On the pursuit of Quality, see Pirsig, supra note 43.

[FN216]. See MacIntyre, supra note 74, at 174.

[FN217]. Id.

[FN218]. Id.

[FN219]. Id. at 175.

[FN220]. This kind of evaluation is brilliantly demonstrated in Kennedy, supra note 40.

[FN221]. MacIntyre, supra note 74, at 175.

[FN222]. Id. at 177.

[FN223]. Id.

[FN224]. Tradition, as we learn virtually everyday, can be profoundly immoral. Doing what others do may avoid moral failure. And so we struggle with the stories, strategies, and ethic(s) that give us an identity and root us in communities that make and undermine the possibility of a moral professional life.

[FN225]. What kind of image do you have of yourself as a critic? How has your idea of “being critical” taken on positive and negative associations in your life? How have your critical impulses (and the obstacles to those critical impulses) been factored into the story that you tell about your decision to become a lawyer?

[FN226]. Drucilla Cornell argues that the self is in crisis, a crisis linked to modernity, to the times in which we live. See Drucilla Cornell, Toward a Modern/Postmodern Reconstruction of Ethics, 133 U. Pa. L. Rev. 291 (1985).

[FN227]. Webster's, supra note 134, at 46.

[FN228]. See Stanley Cohen & Laurie Taylor, Escape Attempts: The Theory and Practice of Resistance to Everyday Life 206 (1978) (“It is almost as if our true self has been stolen from us and we are left with only traces, echoes, memories.”).

[FN229]. See Hubbard & Karnofsky, supra note 3.

[FN230]. Charles Taylor, Sources of the Self: The Making of Modern Identity 8-9 (1989).

[FN231]. Jennifer Jaff, Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning, 35 J. Legal Educ. 249, 262 (1986). The use of questions in legal education is often associated with the Socratic method. Many commentators have observed that the law school version of questioning has little to do with the historical Socrates and his philosophical practices. Ironically, Jennifer Jaff criticizes not only the law

school version of Socratic questioning, but also Socrates himself. See id. at 259, 262.

[FN232]. James Pike, Beyond the Law: The Religious and Ethical Meaning of the Lawyer's Vocation 91 (1963).

[FN233]. Coles, supra note 146, at 1019. The assumption that we now know ethics as well as we are ever going to know ethics sets the stage for the ethical trickster. Anthropologists and folklorists remind us that the trickster is a universal folk hero who brings change by trickery through his ability to escape harm. Tricksters are "survivors par excellence." Susan Niditch, Underdogs and Tricksters: A Prelude to Biblical Folklore xi (1987) ("Trickster narratives help us to cope with the insurmountable and uncontrollable forces in our own lives personifying and in a sense controlling the chaos that always threatens.").

[FN234]. Booth, supra note 2, at 422.

[FN235]. Michael Meltsner, Healing the Breach: Harmonizing Legal Practice and Education, 11 Vt. L. Rev. 377, 377 (1986). Any ethics worth pursuing is difficult and demanding. In applying ethics we get ourselves into that space where our ideals come into conflict and choice is necessary. Ethical choice calls our character into question, and this "calling into question" moves, stirs, perplexes and angers.

[FN236]. Jeffrey Stout, Liberal Society and the Languages of Morals, in Community in America, supra note 204, at 127.

[FN237]. The Ik are described in Colin Turnbull, The Mountain People (1972). The modern American prison, described in Jack Henry Abbott, The Belly of the Beast: Letters from Prison (1981), is another example of a nightmarish world, where the prevailing ethic is a violent milieu of caged men at war with their keeper-guards and with themselves. For a similar, less dramatic, account of prison life, see Jean Harris, Stranger in Two Worlds (1987) (describing the story of her incarceration for the killing of Dr. Herman Tarnower, a Scarsdale, New York diet doctor).

[FN238]. We undertake this project in the knowledge that others, elsewhere, are engaged in similar tasks, sharing our frustrations and fears.

[FN239]. For some readers, the claims I make for moral discourse will be inadequate to describe moral discourse. Consequently, I might say that in a conversation about lawyer ethics we: (i) discuss the difficult choices that lawyers (and law students) confront; (ii) recognize and confront the conflict between the persons we are and the professional identity we assume as lawyers, and reflect on the relationship of who we are at home and who we are as lawyers at the office; (iii) explore the strategies and ploys that link who we are as persons and the world we help create as lawyers; (iv) examine the conflict created when we look out for the interests of paying clients and ignore social and community interests that either the client or we find reason to ignore; (v) observe how difficult it is to talk about these conflicts and recognize how the choices we make in resolving conflicts often impoverish the ideals and dreams that brought us, originally, to study and practice law; (vi) discover that part of who we are as professionals exists as a deaf-mute companion, so that we live day-to-day by acting on implicit rather than explicit choices about our character and ethics, cultivating one voice and one way of being in the world, and stifling other voices and ways of being.

I adhere to the notion that learning lawyer ethics is in reality a way of talking about how to be a good person. Some students are puzzled by this notion that lawyers must be good persons before they can hope to be good lawyers. Some students find that this idea carries too much baggage. I claim otherwise. Working out this disagreement, we engage in moral discourse and attempt, against the odds, to re-imagine lawyer ethics as ethics.

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