Symptoms Exposed When Legalists Engage in Moral Discourse: Reflections on the Difficulties of Taking Ethics

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SYMPTOMS EXPOSED WHEN LEGALISTS ENGAGE IN MORAL DISCOURSE: REFLECTIONS ON THE DIFFICULTIES OF TALKING ETHICS

James R. Elkins

I. THE SYMPTOMS OF ETHICS TALK

This essay begins with a truism, or what might be called a symptom of lawyer ethics: we have difficulty talking about our ethics as lawyers, a difficulty that drives us toward a disdain for ethics. We also have serious difficulties talking about and interpreting the Constitution, but these interpretive difficulties don't push us in the same direction as they do when it comes to ethics. Indeed, we know there is going to be trouble when we interpret the Constitution and we come away from those difficulties with an increased appreciation for the complexity of the interpretive task. One of the most striking features of efforts to talk lawyer ethics and interpret the social text called “professional responsibility” is that we come to such moral discourse as skeptics and leave it with a hint of failure in the air.

We begin the moral discourse of lawyer ethics with skeptics among us, expecting ethics talk to ring with hollow rhetoric in contrast to the solid law talk encouraged in law school. But it is not just moral skeptics who find ethics conversations problematic. When we talk lawyer ethics we entangle, puzzle, confuse, intrigue, and frighten each other. If you happen upon law students or lawyers talking ethics, you will hear things that dishearten you. Continue to listen and you may find that you are angered by what you hear. Stay with the conversation and you may find your anger turn to puzzlement. Probe the puzzlement and you will want to know more about the difficulties of ethics talk.

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Physicians and their patients, confronted with illness, pay close attention to symptoms. They assume that the symptoms tell them something important they need to know. Psychotherapists take a similar stance with those seeking counseling: the middle-aged corporate executive grown silent in his marriage, the young woman obsessed about the food she eats, and the bright high school student who no longer prepares class assignments and receives failing grades. The physician and therapist honor the symptoms by confronting them and taking them seriously. If we are to understand the disordering symptoms we find in ethics talk, we must approach the symptoms as a good physician would.

The interesting thing about ethics talk is that difficulties arise over relatively simple things: how we will regard the truth, whether we will avoid harm to others when we take up the adversarial ethic, and whether our zealoussness has any moral limits other than those specifically provided by law and ethical rules. We might note that lawyer ethics, treated as the law of lawyering, produces some low-level symptoms, but they don't amount to much, perhaps a mild headache, or a slight gnawing in the stomach, or perpetual boredom. Or no symptom at all. The symptoms of dis-ease and dis-order that I report here are most likely to appear when we take lawyer ethics seriously as ethics. If you inquire into lawyer ethics as a study of the body of ethical rules prescribed for ethical wrongdoing, you are unlikely to see or experience the symptomatic difficulties of ethics talk. The paradox of ethics talk is that it makes the symptoms of our underlying ethical disorders visible only when we talk seriously about who we are as lawyers, how we have gotten to be this way, and how our notions of lawyering lead us astray. To realize the hope and possibility in ethics talk, to get at what we want from


2. The kind of serious talk I have in mind is best exemplified by Socrates in the dialogues given to us by Plato, particularly the early dialogues. See, e.g., PLATO, GORGIAS (Walter Hamilton trans., 1960) [hereinafter PLATO, GORGIAS]; PLATO, PROTAGORAS: A SOCRATIC COMMENTARY (B.A.F. Hubbard & E.S. Kornofsky trans., Univ. of Chicago Press 1982) [hereinafter PLATO, PROTAGORAS].
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...and to make ethics real, we have to take the symptoms of ethics talk seriously.

The work with symptoms of ethical dis-ease is, in some ways, like that of a physician or psychotherapist, and reflects the philosophical stance described in Robert Pirsig's *Zen and the Art of Motorcycle Maintenance*. Pirsig's popular narrative—part autobiography, part novel, part philosophical treatise, part travelogue—is educative in many ways. Most relevant here is his poignant, sensible, grounded, philosophical account of how we get into difficulty over relatively simple things; for example, how we maintain the motorcycles we ride. For Pirsig, talking about motorcycles is a lateral and metaphoric way of talking about self and culture, and about philosophy. The "motorcycle" I work on in this essay is the self we use in becoming lawyers. Like all motorcycles, it runs hot and cold, it breaks down, it needs repair. To get us where we are going, the self that finds expression in ethics talk needs maintenance. Ethics is a kind of repair work we do when we talk about how lawyers are to care for their character as they care for their clients' concerns and their clients' ethics.

The narrator of *Zen and the Art of Motorcycle Maintenance* is a motorcycle aficionado, a love that he shares with his friends Sylvia and John. They ride and talk motorcycles together. They are drawn to motorcycles and to each other the way lawyers, pilots, ham radio operators, and coin collectors get together and talk. The narrator/protagonist runs into a problem with John and Sylvia. They don’t really know anything about motorcycles, except how to ride them. They don’t pay attention to how the machine runs; they don’t know what to do or what it means when it runs hot or cold, and they don’t understand enough about the

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5. I speak here of the narrator of *Zen and the Art of Motorcycle Maintenance* not from any desire to be a sophisticated literary critic, but to avoid a misreading of Pirsig and the story he tells. Stylistically, it would be easier to refer to the narrator as if he were speaking for the author, Robert Pirsig. The narrator of the story, however, does not identify himself as the author, and the reader may need to account for this fact.
machine not to create problems for themselves and anyone who rides with them. The narrator, on the other hand, not only rides the motorcycle, but sees the need to care for the machine, to understand how it works, and how the failures of the machine can be understood and carefully corrected.

The narrator characterizes the problem that he has with John and Sylvia over motorcycle maintenance as a "minor difference."\textsuperscript{6} It could, with some effort, be overlooked. We all have occasion to overlook, look around, or beyond, a difference like this. It's how we learn to get along, be accepted, and belong.\textsuperscript{7} The narrator of this philosophical tale of motorcycle maintenance can't seem to do this. Yes, he tries, but he finds the problem with John and Sylvia gnawing at him. The problem just won't go away. He says, "it's like discovering a tooth with a missing filling. You can never leave it alone. You have to probe it, work around it, push on it, think about it, not because it's enjoyable but because it's on your mind and it won't get off your mind."\textsuperscript{8}

Instead of seeking technologically compatible, machine-savvy friends to ride motorcycles with, the narrator uses his friends' limited understanding of their motorcycles as an opening, an invitation to spin a philosophical tale about the big differences we experience with each other (and within ourselves) in our culture. Pirsig's tale is exemplary not only as a story of friendship and what we can learn with the help of our friends and their symptoms, but also for demonstrating how it is possible to do philosophy by staying with rather than moving away from annoying and puzzling minor differences. Pirsig has his narrator work on just such a difference by pushing at it, staying with it, turning it over and over, and linking it up with other things he sees in John's and Sylvia's lives and in his own.

Pirsig does philosophy in a way suggestive of what lawyers who take their ethics seriously might do;\textsuperscript{9} he hangs on to what

\begin{itemize}
\item \textsuperscript{6} PIRSIG, \textit{supra} note 3, at 9.
\item \textsuperscript{7} See \textit{infra} note 108 and accompanying text.
\item \textsuperscript{8} PIRSIG, \textit{supra} note 3, at 10.
\item \textsuperscript{9} Do your routines and everyday activities link to "a view with sufficient generality and clarity to guide you and to place the immediate context of your action in a broader setting"? ROBERTO M. UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK 77 (1987).
\end{itemize}
could be ignored, trying to align various observations about John and Sylvia so that he can put a name to their attitude, to the vision of reality that makes it possible for them and others of their generation to eschew any understanding of technology. John and Sylvia are with technology the way some law students are with ethics: They don’t claim to know anything about it and don’t want to learn any more than they must. They don’t see any need to learn anything about what they don’t know. Their aptitude for understanding the problem is turned against understanding. When they try to learn, they get blocked.

Even when we do know something—about motorcycles, about ethics—we can still act like we don’t care. Pirsig tells several stories of the narrator’s experience with motorcycle mechanics. These are the people with expertise in motorcycle maintenance. The mechanics that work on Pirsig’s motorcycle are:

Good-natured, friendly, easy-going—and uninvolved. They were like spectators. You had the feeling they had just wandered in there [to the shop] themselves and somebody had handed them a wrench. There was no identification with the job. No saying, “I am a mechanic.” At 5 P.M. or whenever their eight hours were in, you knew they would cut it off and not have another thought about their work. They were already trying not to have any thoughts about their work on the job. In their own way they were . . . living with technology without really having anything to do with it. Or rather, they had something to do with it, but their own selves were outside of it, detached, removed. They were involved in it but not in such a way as to care.10

These motorcycle mechanics regard the motorcycles they repair the way some students regard ethics: it’s just a job, something that must be done, tolerated, and endured, knowing always that life is elsewhere.

10. PIRSIG, supra note 3, at 24.
During the long motorcycle trip that makes up the travelogue of *Zen and the Art of Motorcycle Maintenance*, Pirsig describes another encounter, this one of a different tone. The chain guard on the motorcycle has broken, and the narrator tries without success to find a replacement. He decides to repair the old one. He finds a welder's shop: “Cleanest welding place I've ever seen. Great high trees and deep grass line an open space in back, giving a kind of village-smithy appearance. All the tools are hung up with care, everything tidy, but no one is home.”

When he returns later to find the welder, he turns out to be:

[A]n old man in his sixties or seventies . . . . I explain about the chain guard and after a while he says, “I'm not taking it off for you. You'll have to take it off.”

I do this and show it to him, and he says, “It's full of grease.”

I find a stick out in back under the spreading chestnut tree and scrape all the grease into a trash barrel. From a distance he says, “There's some solvent in that pan over there.” I see the flat pan and get out the remaining grease with some leaves and the solvent.

When I show it to him he nods and slowly goes over and sets the regulators for his gas torch. Then he looks at the tip and selects another one. Absolutely no hurry. He picks up a steel filler rod and I wonder if he's actually going to try to weld that thin metal. Sheet metal I don't weld. I braze it with a brass rod. When I try to weld it I punch holes in it and then have to patch them up with huge blobs of filler rod. “Aren't you going to braze it?” I ask.

“No,” he says. Talkative fellow.

He sparks the torch, and sets a tiny little blue flame and then, it's hard to describe, actually dances the torch and the rod in separate little rhythms over the thin sheet metal, the whole spot a uniform luminous orange-yellow, dropping the torch and filler rod down at the exact right moment and then removing them. No holes. You can hardly see the weld. “That's beautiful,” I say.

“One dollar,” he says, without smiling. Then I catch a funny quizzical look within his glance. Does he wonder if he's overcharged? No, something else . . . lonely, same as the

11. *Id.* at 319.
waitress. Probably he thinks I'm bullshitting him. Who appreciates work like this anymore? 

One of the educative powers of reading comes when we hook up the problem in the story, the problem of the story, to the problem or story that has taken up an annoying presence in the life we are trying to live. Something of this sort happens to me—thinking about the difficulties I encounter with students and lawyers who try to engage each other in ethics talk—when I re-read *Zen and the Art of Motorcycle Maintenance*. Maybe this problem of how we are to care and maintain motorcycles is a good working metaphor for lawyer ethics.

Some lawyers and law teachers, and some law students, know the stuff of ethics firsthand. They take pleasure in what they know, and how they live with this knowledge. Others seem to get on, and get along, in life, riding along if you will, without much explicit knowledge of how ethics works, even the ethics in their own lives. Like John and Sylvia, they don’t seem to realize the cost of their lack of knowledge. They get by all right. After all, you don’t have to know anything about ethics to be a success, or to become a lawyer, or to practice law. Ethical concern, ethical sensibilities, and ethical awareness are, in reality, not prerequisites to becoming or being a lawyer. Students of legal ethics know this even if they do not publicly proclaim it. Sometimes they fear it and rage about it, but there it is for all to see, to know, and to talk about, if one has the courage.

It would be possible to pass over and get around the difficulties we have with each other about ethics. Some troubles you can avoid by just walking away from them. The narrator in Pirsig’s tale could have found new friends. Yet he found his minor differences with John and Sylvia bearing on his mind, something to puzzle over. Curiosity, if nothing else, sometimes prevents us

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12. Id. at 320-21.

13. I had no idea when I began teaching legal ethics in 1977 as a young law teacher that it was a course one taught only at the insistence of the dean, or that the course would be particularly difficult to teach. There was no forewarning that teaching legal ethics would put me on a collision course with students (and more than one dean) who thought legal ethics should be taught as if it were the law of lawyering, and entangle me in pedagogical confusion that would eventually teach me some hard lessons about how ethics works.
from walking away from a problem like this. You don't have to be a philosopher to experience the need to understand (and solve) one of these everyday life problems.

There are many ways, some more honest than others, to insure that our minor ethical differences don't escalate into anything serious. One way to do this is to focus on legal ethics as the study of a body of ethical rules. By examining a set of ethical dilemmas that lawyers face (or think they face) and examining how the ethical rules of the profession are applied in the resolution of these dilemmas, you have a typical law school course on legal ethics. This legalistic, quandary-driven approach to legal ethics keeps both teacher and student on relatively safe ground. A teacher of legal ethics can walk away from the skepticism and disdain that students have for ethics talk by simply translating lawyer ethics talk into law talk.

If you move in the other direction and take up the talk of lawyer ethics as ethics and moral discourse, you find yourself in a paradoxical world where black and white compete always with gray, gray, gray. There is no end of gray, in many shades and colorations, in ethics talk. There are so many ways to talk about the gray areas of ethics that I am reminded of the Eskimos and their many words for snow.

In lawyer ethics talk there is much to engage us, but also much to infuriate us. Some participants in conversations about lawyer ethics celebrate ethics because it makes us more attentive and reflective about our professional lives. Others, fearful of where all this ethical talk might lead, practice silence: a silence of doubt and frustration, and, at times, a silence of anger and rage. How are these competing visions of ethics talk in legal

14. This world of moral gray, and the ethical discourse that explores this world, is rooted in a world of love and hate, and right and wrong, and it gives rise to feelings of possibility—caring, working together, figuring things out, pulling together pieces of a personal puzzle—shadowed by a sense of futility and impending failure.

15. Traveling this route, you are soon reminded that talking ethics is futile. You can't, we are told, change anyone's mind about moral matters, and it's a wasted effort to try. Besides, there are dark overtones to all this talk about ethics: whose ethics? The problem in the background in all ethics talk is dogma and indoctrination: "Be like me." "Believe like me." With these concerns about ethics talk in mind, we keep our own counsel about ethics; we let others do the arguing. When confronted with ethics talk, the temptation is to slip off. We set off on our own way. But then, if we don't talk ethics, matters just get...
education to be interpreted? What do they teach us about lawyer ethics? Others are pulled incrementally, one way and then the other. Yes, the way we talk about ethics matters;\textsuperscript{16} no, I'm afraid it doesn't. One resolution is to anchor ourselves and just not sail at all!

\textit{Zen and the Art of Motorcycle Maintenance} draws attention to the way we encounter differences and difficulties—whether owning, riding, and maintaining a motorcycle, or in a professional life—when we confront the symptoms that reveal our cultural disorders. One wonders whether it would be possible to do for ethics what Pirsig did for motorcycle maintenance. Can we take the differences and difficulties that arise in lawyer ethics talk (in and out of the classroom) and treat them as symptoms of deeper problems of the culture of lawyering? Pirsig worries about the culture, even as he diagnoses its ills. Can those who are curious about lawyer ethics do something of this sort? Is it not concern and curiosity about culture, in our case the culture of lawyering, that draws us to ethics? We are not drawn to ethics because of its glamour, or the glory bestowed upon those who take ethics seriously. We take up lawyer ethics because we have an unarticulated sense that something is wrong, that we are drifting, and being pulled by strong currents into dangerous waters.

In this essay, I do not present a program for how we might fix the culture of lawyering or offer a comprehensive account of the moral drift that is the subject of concern in the profession.\textsuperscript{17} My purpose here is a modest one: to examine the difficulties that arise when students of law are confronted with lawyer ethics talk that is not reduced to a discussion of the rules of ethics. Taking up the symptoms of lawyer moral discourse one cannot escape the failures and dead-ends that are its subject. I offer up what I can

\textsuperscript{16.} There is a sense, at times, that we really do need to talk about ethics. We do seem to need an antidote to the moral drift that we observe and experience in the legal profession. To arrest the drift, we must talk about where we are going and what happens when we become lawyers.

\textsuperscript{17.} \textit{Zen and the Art of Motorcycle Maintenance} does not provide us with a cookbook for fixing the failures of the legal profession or even the failures of motorcycle maintenance. It does, however, provide a manual of sorts, a manual on how we deal with symptoms of cultural disorder and how we get conned into seeing the world the way we do and the traps that keep us from seeing better, seeing more, seeing wisely.
and pull it together as I do, not to offer any kind of ultimate description, or proven antidote, but to see what an attitude of resistance to ethics talk looks like under close scrutiny in the law school classroom. Instead of turning away from the minor differences we encounter when we talk lawyer ethics, I amplify them, and treat them as if they were symptoms rather than semantical misunderstandings.

The obstacles to moral discourse provide the best opening we have to understanding what is really ailing us. In the study of ethics talk, we are like the physician who confronts an array of symptoms. The symptoms can be interpreted differently: they may point to nothing of serious concern and pass in due time, or the symptoms may point to a matter of grave concern to the future health of the patient. The wise physician is always discarding symptoms: “No, this is not of concern now, don’t worry about it, everything will be all right.” The failure to know when to discard a symptom embroils us needlessly in a cure for problems that are not serious. The physician’s other move is equally and vitally important: “We will keep an eye on this symptom, it may point to something seriously wrong and we will need to address it medically to avert serious problems.”

In this essay, I report some of the symptoms I detect in law school versions of lawyer ethics talk. I will spare the reader descriptions of those symptoms that turned out, after watchful days, to point to nothing serious, for example, the kind of minor differences we can bear with equanimity. I present those features of moral discourse that seem most likely to indicate deeper cultural pathologies, symptoms that a physician of ethics would want to talk to a patient about, symptoms it would be wiser to address than walk away from.

II. GETTING A FEEL FOR ETHICS TALK

The symptoms of moral disarray are most pronounced, most visible, and most accessible when we engage each other in what
I call ethics talk. The symptoms and difficulties of serious lawyer ethics talk are muted when ethical dilemmas are subjected to a problem-solving analysis using the *Model Rules of Professional Conduct* and the *Code of Professional Responsibility*. We can use our problem-solving abilities to deal with ethical problems, but we need to be careful lest we assume that a lawyer's ethics can be solved by finding the right rule.

What, then, is ethics talk? What does the conversation of ethics sound like? I begin with the assumption that ethics talk,

18. In this essay, I use the idea of ethics talk, the conversation ethics, and moral discourse, without trying to distinguish, categorize, or define them. This may violate an unwritten law of respectable scholarship and signal an ignorance of analytical approaches to moral philosophy. Later in this essay I identify the effort to define ethics as one of the symptoms of ethics talk. See infra part VII.

I turn away from definitions because I find that they stunt ethics talk. Those who demand definitions most are most likely to use the definitions to derail ethics talk. Definitions may help us talk about ethics and, at the same time, keep the talk always at arm's length from what we want the talk to do.

One might distinguish ethics talk, the conversation ethics, and moral discourse by charting out the origins of these terms and showing how the terms take on meaning through the context of their extended use by identified participants or users of the terms. Using this scheme, ethics talk would be traced to the renewed interest in rhetoric and how our talk (even talk so informal as gossip) is used to persuade others about notions of moral goodness. The conversation ethics can be traced to those who seek to re-vision a more decentralized, participatory, dialectical approach to matters as disparate as philosophy and politics, literature and law. Moral discourse, then, might be viewed as a more formal, structured inquiry with an eye to the philosophical practices of Foucault and Habermas.

Let me confess here to having made no such distinctions as those suggested previously. (Some readers will be distracted by my failure to do so.) I use the term "ethics talk" because this is where I see ethics most visibly in action. If ethics is a way of talking, and our talk is where we see ethics at work, being rehearsed, experimented with, and performed, then ethics talk might be a serious but accessible way into a subject—a set of concerns, a way of living—that is not so easy to get at by more refined, academic means.

Or, start in the other direction with the more academic-sounding notion of moral discourse. Once you get around the discourse gurus—Foucault and Habermas, and the style of European philosophy they practice—discourse turns out, by way of dictionary definition, to include the ideas of argument, conversation, and talk. Consequently, I use talk, conversation, and discourse as interchangeable terms, terms that can be defined best by performance in contexts created by those who set out to inquire into ethics and how ethics finds its way into the practice of law.


20. There may be symptoms of one sort or another when we attempt to solve ethical problems using legal skills, but these symptoms point to problems with legal reasoning, rather than a problem with ethics. When we read judicial opinions and use the law we extract from these opinions to solve a case with different facts, we confront problems of legal interpretation that generate their own recognizable symptoms. It is not the symptoms of law talk, but ethics talk that concerns me here.
ethics language, and ethics rhetoric are all around us. It's hard to imagine anyone not hearing it and not responding to it. We don't have to know exactly what it is, or call it "ethics," to be engaged in ethics talk. Whether we call it ethics or not, we are more or less conscious of this dimension of our everyday lives. The only way to be free of ethics, its talk, its language, and its rhetoric, is to be a hermit. Morals and ethics are constant fare in daily newspapers, television evening news, and conversations with friends. Ethics talk is indeed all around us. We are knee-deep in it, doing it, using it in our thinking, or struggling to live, so we don't think about it.

We are in the web of ethics talk because our lives have direction and they go astray; we see how some directions in life take more character and yield more Quality than others. Our lives inevitably have a qualitative dimension—they are better or worse lives depending on how we engage each other, how we engage our work, and how we engage ourselves. This qualitative dimension of life is not easily translated into a subject for an ethics course or a set of lectures on professionalism; it is not easily described or explained. Yet, it moves in and out of our daily talk like the weather, gossip, and politics.

Getting a sense of ethics from the talk going on around us requires a good ear, curiosity, a novelist's eye for the use and misuse of language, the courage of an anthropologist doing field work in Sumatra, and appreciation for puzzle, paradox, and mystery. Most of us don't have ready access to all these qualities and skills, and so we don't know how to get from the ethics talk around us to ethics talk that would be educative in a moral sense. After all, talk is cheap, and action speaks louder than words. We bump up against this old adage; we mistrust words when it comes to ethics. Rightfully so. We are all, if we have an eye for reality, suspicious about ethics talk. This means it is going to be difficult

21. JEFFREY STOUT, ETHICS AFTER BABEL: THE LANGUAGES OF MORALS AND THEIR DISCONTENTS 71 (1988) ("the moral language we use in daily life has much to do with what life is like, with what we are like").

22. I use "Quality" here in the sense that Robert Pirsig uses it in his philosophical narrative. See generally PIRSIG, supra note 3.
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to get any respect for ethics talk. We begin ethics talk with a low-grade fever if not more pronounced symptoms.23

We may be suspicious of ethics talk but we continue to do it: we parade our moral sensibilities out into public view, and we pick up more of our morals and ethics from what we hear around us than we would like to admit. Indeed, one way we get our ethics is listening to others,24 watching what they do and how they talk about what they do, and watching and listening to the relation of talk and action. Ethics talk is a kind of self-review or self-rehearsal, using the scripts provided by others and those we have written ourselves. We talk one way and then another, listening to how our speaking sounds, watching and attending to the reactions it receives out in the world, calculating our rhetorical successes and failures. We talk to justify the way we live.

If this assessment of ethics talk and our relation to it, with it, and against it is accurate, then one might see ethics talk itself as one way, among others, that we can use to learn ethics actively. We might even find that the ethics in our everyday talk, conversations, and dialogues—the ethics in classroom, hallway, and lounge talk, the talk we do with our friends, colleagues, neighbors, and teachers—can itself be taught. It can be self-taught (self-learned), and it can be taught to us by others. Socrates was a teacher of this kind of ethics, the ethics we already have and are always rehearsing in the everyday scripts of our life dramas.25

23. We suspect ethics talk is a facade. We have learned not to trust what we hear. We are by ethics the way some parents are by their children, the way some employees are by their employers, and the way some students are by their teachers; they keep their eye on the action and distrust the word.

24. THOMAS NAGEL, MORTAL QUESTIONS xiii (Canto ed. 1991) (1979) ("People have to be ready to listen, and that is not determined by argument.").

25. One of the oddities of teaching law students professional responsibility and lawyer ethics is that the kind of teaching Socrates inspired—remember that Socrates is the patron saint of legal education—is so noticeably absent. Law students begin their study of lawyer ethics not with Protagoras or Gorgias, Plato's Socratic dialogues pointedly relevant to those who set out to become lawyers, but with a set of professionally derived rules of ethical conduct. The failure of these rules to arrest the moral drift of the legal profession, or to satisfy the fantasy that positivist problem-solving (on the model of legal problem-solving) can be used to solve moral dilemmas, has still not brought law school legal ethics teachers back around to Socrates. But see Thomas D. Eisele, Must Virtue Be Taught?, 37 J. LEGAL EDUC. 495 (1987); John O. Cole, The Socratic Method in Legal Education: Moral Discourse and Accommodation, 35 MERCER L. REV. 867 (1984); James B. White, The Ethics of Argument: Plato's Gorgias and the Modern Lawyer, 50 U. CHI. L. REV. 849 (1983); Anthony
One of the ways we learn ethics, and indeed one of the ways we know ethics, is in the talk we do with each other, talk that sometimes takes a qualitative, philosophical turn, talk that sometimes appears as no more than collegial banter. Steven Tipton observes that "[t]he moral sense we make of our lives, and of one another, takes the form of discourse about what is good, which acts are right, and who is virtuous." Our moral sensibilities are engaged by the talkative scrutiny of acts we feel (or learn to feel) are not right and of lives that take non-virtuous paths. We argue about what is right, how we ought to feel, and what outcome is morally desirable; when we do so with the idea of educating ourselves and others, we engage in what might be called moral discourse.

Robert Pirsig in Zen and the Art of Motorcycle Maintenance engages the reader in moral discourse. Pirsig argues that we have different visions of reality and that we learn how these visions work and what they mean when we take minor differences seriously—trying to get to the bottom of the symptoms we find in our relations with friends and with ourselves. Lawyers, too, have differences, and our differences about ethics remain minor only when we subject them to the numbing un-reality that equates ethics to a set of ethical rules read and interpreted like legal rules. The symptom/pathology/shadow side of legal ethics and the ethics talk that breaks out when we put aside the notion that lawyer ethics equals a set of ethical rules of conduct, are vividly portrayed in Seymour Wishman's Confessions of a Criminal Lawyer. Wishman begins his Confessions with a story of a screaming woman who confronts him in a Newark hospital lobby. Wishman later realizes that the woman was a victim in a rape case in which he had acted as defense counsel for the
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accused. It was Wishman's humiliation during cross-examination of the woman, Mrs. Lewis, who now confronts him, that suggests in a dramatic way that something has gone wrong.

Wishman tells the story about Mrs. Lewis in a way that asks us, as readers, lawyers, and empathic human beings, to take account of how he (and we) can justify the humiliation of a woman like Mrs. Lewis, a witness whom Wishman believed was telling the truth when she testified that she had not willingly engaged in sex with Wishman's client. Can lawyers, in good conscience and with justification provided by their professional ethics, humiliate a witness whom they believe is telling the truth? Wishman sets out to explain the humiliation of Mrs. Lewis during his cross-examination, but his explanation does not resolve his distress when he reflects on the harm it caused. In harming Mrs. Lewis, Wishman begins to see that he has harmed himself. He finds that he can no longer simply justify what he has done with what he calls "flippant" philosophical excuses. Wishman uses the encounter with Mrs. Lewis to begin to honor the symptoms of his moral situation.

29. Wishman, supra note 27, at 17. Wayne Booth has observed that:

[In a world that talks of the threat of alienation and the loss of community, we have found a community that everyman [and every woman] can assent to: as old as Adam and as new as the morning's newscast, it is the community of those who want to discover good reasons together.

Wayne C. Booth, Modern Dogma and the Rhetoric of Assent 203 (1974); see also Philippa Foot, Virtues and Vices and Other Essays in Moral Philosophy 96 (1978) ("The fact that moral judgments need defense seems to distinguish the impact of one man's [or one woman's] moral views upon others from mere persuasion or coercion, and the judgments themselves from mere expressions of likes and dislikes."); Jürgen Habermas, Moral Consciousness and Communicative Action 19 (Christian Lenhardt & Shierry W. Nicholsen trans., 1990) ("Everyday communication makes possible a kind of understanding that is based on claims to validity and thus furnishes the only real alternative to exerting influence on one another in more or less coercive ways.").

30. Wishman, supra note 27; see also John Dewey, Reconstruction in Philosophy 163-64 (Beacon Press 1957) (1920).

A moral situation is one in which judgment and choice are required antecedently to overt action. The practical meaning of the situation—that is to say the action needed to satisfy it—is not self-evident. It has to be searched for. There are conflicting desires and alternative apparent goods. What is needed is to find the right course of action, the right good. Hence, inquiry is exacted: observation of the detailed makeup of the situation; analysis into its diverse factors; clarification of what is obscure; discounting of the more insistent and vivid traits; tracing the consequences of the various modes of actions that suggest themselves; regarding the decision reached as hypothetical and tentative until the anticipated or supposed consequences which led to its
We cannot understand Wishman's humiliation of Mrs. Lewis, or whether Wishman was right to do what he did, until we find out how we are going to talk about Wishman, his character, and his explanation of what he has done. Before we can know what kind of moral universe we have made for ourselves with the roles we imagine lawyers to play, we must find out what we will do and say about Wishman's moral character and the moral problem we face when we take zealfulness to the lengths that Wishman portrays in his Confessions. 31

In moral discourse with Wishman (about Wishman, zealfulness, humiliation, and the role of the lawyer) we question ourselves, 32 our world, our ethics: How does the legal mind-set we bring to our talk about lawyer ethics work? How do we, as insiders, understand and attempt to justify an adversarial ethic that immunizes lawyers (at least in our own view) from the moral consequences of adversarialism? And how are we, as lawyers, to understand the character of our work or our character as lawyers, if we reject the facile explanations of the moral rhetoric used to justify questionable professional practices? It is with moral discourse that we begin to see how we both routinely and unconsciously portray a moral universe in the language we use to account for what we do as lawyers. Indeed, we begin to see that we are powerless to rid our language and thoughts about law of moral implication and consequence.

Seymour Wishman's Confessions of a Criminal Lawyer is an autobiographical account of lawyering that pushes us to re-examine the explanations that lawyers use to justify the hard-ball tactics that accompany an unreflective reverence for the adversarial ethic. (Tactics defended, ironically, in the name of legal ethics.) It is in our struggle to understand Wishman's behavior, and our own practices as lawyers, that we bring together law

adoption have been squared with actual consequences.  

Id.

31. One way to describe Wishman's conduct is that he has been ruthless. We must examine how such ruthless conduct is to play out in our public lives as lawyers. See NAGEL, supra note 24, at 75-90 (describing ruthlessness in public life).

32. Peter Elbow observes that "[l]anguage is the principal medium that allows you to interact with yourself. . . . A principle value of language, therefore, is that it permits you to distance yourself from your own perceptions, feelings, and thoughts." PETER ELBOW, WRITING WITHOUT TEACHERS 55 (1973).
school course conversations, lawyer ethics talk propelled by an eye on ethical rules, and what sophisticates like to call "moral discourse." Moral discourse presents not only a philosophical issue but a practical one: how does ethics work and how can we use ethics talk to help us see what kind of lawyer we have set out to be? An education in ethics talk moves toward an understanding of how these questions work and how our working with them can change our moral identities and professional lives. When we learn to engage each other in moral dialogue and observe the obstacles to moral discourse we will have set about a re-imagining of lawyer ethics.

Ethics, then, is less a course of study or a body of knowledge, and more a course of conversation that implicates each of us in a life we are already living and a future we must imagine. With Socrates as our guide, a study of ethics would focus on what happens when we talk about ourselves as lawyers, our legalistic modes of thinking about the world, how being a lawyer affects our moral sensibilities and imaginations, and how our ethics as lawyers gets played out in the communities where we practice.

When we take ethics talk seriously, it becomes a pragmatic matter of learning to talk about professional life so that we can figure out how to live. I talk about ethics to say what I see, to see how I am blind to my own faults and deceptions, and to

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33. The ways that we imagine the world of ethics talk shape the world of lawyering practices. There is always an image of the lawyer at work and at play in legal ethics and ethics talk. The images and ethical talk we create in turn create us.

34. We talk with each other about ethics when we seek, in our own way and in ways common to our education and culture, to have the world take us seriously:

[W]e all have an obligation to ourselves and to each other to try to make sense of our lives in deciding to what ends we will use our legal skills. In becoming a professional, we do not stop being human. As humans we have some responsibility to work toward objectives that seem to us useful.


35. Stanley Hauerwas has observed that:

Contrary to our dominant presumptions, we are seldom conscious of what we are doing or who we are. We choose to stay ignorant of certain engagements with the world, for to put them all together often asks too much of us, and sometimes threatens the more enjoyable engagements. We profess sincerity and normally try to abide by that profession, yet we neglect to acquire the very skills which will test that profession of sincerity against our current performance. On the contrary, we deliberately allow certain engagements to go unexamined, quite aware that areas left unaccountable tend to cater to self-
imagine more concretely what I must see if I want to get from where I am now to where I should be going. I must learn to talk about the ethics around me and the ethics I embrace.

When we talk ethics in this serious way we find out to what and to whom we have become blind: to the harms of a humiliating cross-examination of a truthful witness like Mrs. Lewis and the harms to ourselves of professing mis-practices in the name of ethics. If the aim of ethics is moral sensibility in the practice of law, then ethical inquiry must take as its subject who we are, how we live, and how we address ourselves in justifying the practices and lives that we claim to be morally (socially, politically, and spiritually) worthwhile. Without the education of ethics talk, we lose sight of who we are and what we are becoming.

III. A PHILOSOPHY OF MORAL DISCOURSE

We begin moral discourse by being attentive to the way we already talk. We start with what we already know, imagine, dream, and fear. Hanna Pitkin describes the path we follow:

Instead of studying moral rules or principles or traditional systems of morality, the teachings of religious leaders or philosophers, . . . [we 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 interest. As a result of that inertial policy, the condition of self-deception becomes the rule rather than the exception in our lives, and often in the measure that we are trying to be honest and sincere.

STANLEY HAUERWAS, TRUTHFULNESS AND TRAGEDY 82 (1977).

36. The philosophical approach reflected in this essay is similar to that of Thomas Nagel in his introduction to philosophy. Nagel argues that "[t]he center of philosophy lies in certain questions which the reflective human mind finds naturally puzzling, and the best way to begin the study of philosophy is to think about them directly." THOMAS NAGEL, WHAT DOES IT ALL MEAN?: A VERY SHORT INTRODUCTION TO PHILOSOPHY 4 (1987). "It is," Maurice Natanson reminds us, "the character of engagement [in and with the world] rather than a theory" of the "purpose or importance" of engagement that concerns a phenomenological and existentialistic approach to philosophy and moral discourse. MAURICE NATANSON, THE JOURNEYING SELF: A STUDY IN PHILOSOPHY AND SOCIAL ROLE 3 (1970). "The procedures [in philosophy] we are concerned with, then, presuppose a discovery, an un-covering of the meaningful history of the individual's world." Id. at 5; see also JOHN SABINI & MAURY SILVER, MORALITIES OF EVERYDAY LIFE (1982) (for a phenomenological philosophical perspective applied to the moral philosophy of everyday life).
ordinary use that our concepts of morality and action are learned and shaped . . . 37

Pitkin makes clear that while this is not the only way to think or talk about ethics, “it is a powerful and instructive way.”38 There are different routes, different ways to think, talk, and imagine ethics.39

Moral discourse begins when we say what is on our minds, but it does not end there. Much of what we think is so bound up with the conventions of the day that our handy opinions, casual banter, and collegial argument disguise rather than reveal our ethical stances. If we are to make ethics talk transformative rather than debilitating, then we must find out how moral discourse works and how we can use it to sharpen and broaden

37. HANNA F. PITKIN, WITTGENSTEIN AND JUSTICE: ON THE SIGNIFICANCE OF LUDWIG WITTGENSTEIN FOR SOCIAL AND POLITICAL THOUGHT 149 (1972). Steven Tipton applies Pitkin’s observation to those who do not consider themselves philosophers:

To hold moral discourse central to the study of social life is not to imagine ordinary persons as moral philosophers-writ-small, but rather to recognize that they, like us, ask themselves “What should I do now? Why?” And that their answers matter just as much to them as do ours to us.

TIPTON, supra note 26, at xiv.

We must educate ourselves with the moral sensibilities necessary for a public life and do so by confronting the temptation to mislocate lawyer ethics as the law of lawyering on the one hand and a matter of personal choice and individual conscience on the other. It was John Dewey who reminded us that:

Morals is not a catalogue of acts nor a set of rules to be applied like drugstore prescriptions or cook-book recipes. The need in morals is for specific methods of inquiry and of contrivance: Methods of inquiry to locate difficulties and evils; methods of contrivance to form plans to be used as working hypotheses in dealing with them.

DEWEY, supra note 30, at 169-70. We have shamelessly reduced ethics talk in legal education to a set of rules to be applied like “drugstore prescriptions” and “cook-book recipes.” Id. The problem is not a lack of recipes but that we have forgotten how to cook.

38. PITKIN, supra note 37, at 149.

39. There are many ways to proceed, many ways to think about ethics, many ways to talk and work together on the moral malaise we find in the legal profession. There is, as Thomas Nagel recommends for philosophy, an admonition to be aware that “methods are always themselves in question.” NAGEL, supra note 24, at xi.

40. We must first say where we stand, what we think and believe, and what we propose we will do (when we follow our own dictates).

41. What happens when we engage in debilitating moral discourse? In transformative moral discourse? Consider the following:

(i) We simply pass the time (idle talk and talk of cynicism);
(ii) We tender our personal opinions to each other (adopting the stance of relativism);
the moral sensibilities we have as lawyers. The language and moral rhetoric that we now routinely accept as uncontroversial are subject to re-evaluation and re-qualification.

The power and instructive quality of moral discourse lies in its realness, in the way it draws us to consider and re-consider the moral judgments that we make without being aware that we make them. 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 between an actor and someone affected adversely by what he did. Moral discourse is personal, though not merely

(iii) We diagnose the known failure of other approaches to lawyer ethics—more definitive ethical rules, more moral exhortation about professionalism (preaching);
(iv) We converse to engage in friendship;
(v) We converse to transform character;
(vi) We converse to keep the long-standing conversation on ethical matters alive in our own time and in our own lives.

42. See Thomas L. Shaffer, The Practice of Law as Moral Discourse, 55 NOTRE DAME LAW. 231 (1979) (arguing that "[t]he beginning and end of a lawyer's professional life is talking with a client about what is to be done"; that this discussion constitutes "moral conversation"; and that in moral conversation we find ethical orientations that reflect the moral stances lawyers take with their clients).

Iris Murdoch, in an all too short essay, has referred to a feature of realness she identifies as a philosophical impulse "against dryness." See Iris Murdoch, Against Dryness: A Polemical Sketch, in REVISIONS: CHANGING PERSPECTIVES IN MORAL PHILOSOPHY 43 (Stanley Hauerwas & Alasdair MacIntyre eds., 1983); see also HANNAH ARENDT, THE HUMAN CONDITION: A STUDY OF THE CENTRAL DILEMMAS FACING MODERN MAN 158 (Anchor Books 1959) (1958) ("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.").

43. It is our choice and our ability and our willingness to speak about the character that brought us to these choices that takes us, sometimes willingly, sometimes resisting, into the realm of moral discourse.

44. Alfred North Whitehead reminds us that "philosophic truth is to be sought in the presuppositions of language rather than in its express statements." ALFRED N. WHITEHEAD, MODES OF THOUGHT vii (Free Press paperback ed. 1968) (1938). Thomas Nagel points out that "[t]he main concern of philosophy is to question and understand very common ideas that all of us use every day without thinking about them." NAGEL, supra note 36, at 5.
It is *conversation* between speakers who believe that the outcome of their contested uses of words and ways of speaking matter that becomes moral discourse.\(^46\)

Moral discourse is not values clarification, although there is much in our values that needs to be explicated and clarified. What we want from moral discourse is broader than a clarification of values. What we seek to know is where we stand and how that affects those who inhabit the world with us. The rhetorical stance we offer, in contrast to the opinions we are willing to articulate publicly, defines our character. Ethics talk is too easily mistaken as a forum for polemic and opinion.

We are free to make whatever claims we want and voice whatever opinions we will, but our claims and opinions inevitably give shape to our character. Whenever we hold moral discussions, Hanna Pitkin notes, "[y]ou can take any position you want, but at the same time there are standards, and your position defines you just as surely as your action itself."\(^47\) When we speak, we weave *persona* and character, surface and depth, into a textured pattern, a self.\(^48\) In speaking we display the surface of character, reflect how we imagine self and world. If we cannot speak in morally instructive ways, then human interaction in the world, our human experience of the world, is affected significantly.

In the image of weaving there is an implication of wholeness. Moral discourse is related to the idea or fantasy of being a whole person. One philosopher notes that "[t]he

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45. PITKIN, *supra* note 37, at 150; see also ARENDT, *supra* note 42, at 159 ("In acting and speaking, men [and women] show who they are, reveal actively their unique personal identities and thus make their appearance in the human world . . . ").


47. PITKIN, *supra* note 37, at 154.

48. The way we talk to each other, the way we speak our lives and tell our stories, reflects how we imagine self and world. If we cannot speak in morally instructive ways, then human interaction in the world, our human experience of the world, is affected significantly.

In the image of weaving there is an implication of wholeness. Moral discourse is related to the idea or fantasy of being a whole person. One philosopher notes that "[t]he
assuming always that there is substance behind the scenes and the styles of talk.49

As a matter of fundamental epistemology, "[o]ur understanding of reality is constituted by the language we use to express it."50 As Steven Tipton has observed, "[u]nderstood in ethical terms, the ideas we hold give us a model of and for social reality. They tell us what is so, and what we ought to do about it."51 We create character when we speak. Stanley Hauerwas argues that "our moral language does not just describe what is; it describes how we ought to see and intend the world."52 It is with ethics talk that we imaginatively connect who we are and what we do.

less integrated and holistic is one's sense of himself, either due to ignorance or out of ambivalence and a sense of personal fragmentation, the less chance there is of validity in his judgments." STEPHEN D. ROSS, THE NATURE OF MORAL RESPONSIBILITY 118 (1973).

Moral discourse makes demands on a speaker. Moral speech is demanding because it calls the fragmented self into question, it forces the self to act as if it were whole. Moral discourse is rich and full because it expresses the ideal of speaking as a whole person. The alternative—that we can never speak as whole persons—implies that we can never get all our selves back together. For a pluralist, fragmented image of self that argues against the existence of whole persons as the basis of morality, see XAVIER R. DE VENTÓS, SELF-DEFEATED MAN: PERSONAL IDENTITY AND BEYOND (Christine Denmead trans., Harper Colophon paperback ed. 1975).

49. William F. May, in a suggestive passage on style, contends:

Style is a much deeper issue than how one packages what one has to say. Style is a matter of metaphysical perception, a sense for what the Stoics called the fitting, a discretion that is deeper than tact, more sensitive than rule, a feeling for what is congruent with reality....

With good reasons moralists have been suspicious of professional guilds that concentrate on questions of style and decorum. Style meant the eighteenth-century doctor with his gold-knobbed cane, the journalist with his note pad, the lawyer with his bulging briefcase, the engineer and the scientist with their laconic control of hard data. Style can be corrupted to mask incompetence, to present a false front to the world and cover one's cynical withdrawal from a client. But, in its uncorrupted state, style is the elegance of technical competence, a fitness of bearing, and a personal attentiveness to all dimensions of a case.


51. TIPTON, supra note 26, at xiv.

52. STANLEY HAUERWAS, VISION AND VIRTUE: ESSAYS IN CHRISTIAN ETHICAL REFLECTION 73 (Univ. of Notre Dame Press 1981) (1974); see also Steven M. Tipton, The Church as a School for Virtue, 117 DAEDALUS 163 (1988) (describing church morality as "learning and teaching about the whole of social life").
Moral discourse reflects the value dimension of our lives as we search for words (and ways) that embody an ideal self and an image of a socially just world. Moral discourse is both an ideal and a reflection of reality. Sometimes the ideal and reality seem to be taking us in different directions. The conflict between the ideals expressed as moral sentiments and the reality of lawyering lies at the heart of a troubled sense of professional responsibility. Ethics must help us bridge the ideal, our quest for a better world using law, and the real, the world we now inhabit as lawyers. Ethics does not exhort us to become saints and martyrs, nor does ethics cut us off from the world in which lawyers practice their craft.

In the use of language to express our understanding of reality and to shape and define our moral character, we should take more care with our speaking, listening as we speak, listening as others speak to us. Is it not when we lose the ability to hear ourselves speak, to see ourselves in our speaking, that we have lost sight of who we are and what we are becoming? We are, as Hanna Pitkin noted and Seymour Wishman discovered, strained and damaged in our action with words and with our ways of speaking. When lawyers and students of law talk with each other about Seymour Wishman's humiliation of Mrs. Lewis, they, too, experience the strain and witness the damage. When we speak to each other as lawyers, we find that something goes wrong. Our relations with each other become strained. Something is damaged


Our capacity to use moral language, to be guided by moral reasoning, to define our transactions with others in moral terms is so central to our view of ourselves that even to envisage the possibility of our radical incapacity in these respects is to ask for a shift in our view of what we are and do which is going to be difficult to achieve.

54. I do not mean that we should strive to say what others want to hear or make only those claims to which others will assent. The kind of listening I have in mind acts as an antidote to conversations in which speakers treat their opinions and ideas as possessions to be defended. ERICH FROMM, TO HAVE OR TO BE? 33-34 (1976).
by the voice of false reasoning.\textsuperscript{55} It is in moral discourse that we take notice of blind speech and learn the repair of relations "strained or damaged by the unforeseen results of some action."\textsuperscript{56} Moral discourse helps us respond to "action[s] gone wrong."\textsuperscript{57} Moral discourse is an inquiry into the symptoms of lawyer ethics talk.

If lawyer ethics talk is to be educative and count as something worth taking seriously—afflicting the way we imagine and live as lawyers—we are going to need to confront the symptoms that plague us when we engage each other in moral discourse. How do we go about disguising our suspicion and disdain for moral discourse? By what rhetorical and cognitive stances do we set ourselves against ethics? How does our ethics talk get stunted?\textsuperscript{58} If lawyers and students of law are to participate in this most ancient of conversations, this conversation called ethics,

\begin{itemize}
\item \textsuperscript{55} PITKIN, supra note 37, at 154 ("Some ways of elaborating our conduct only make things worse . . . ."). Legal ethics must free itself from the standard rhetoric of professionalism. There is little impetus to do that so long as the rhetoric of professionalism is taken seriously as a substitute for moral discourse. With a self-justifying adversarial ethic sacrosanct, as it is today, we will have difficulty imagining that our ethics as lawyers is as significant as our knowledge of law.

The ideology of professionalism would have us improve and reform present practices, weed out the bad apples, and clean up our public image. Lawyers associate ethics with moderate, acceptable, incremental reform. Professional reformists tend not to venture far afield when they think about ethics. When lawyers embrace ethics, they have in mind a limited, vulgarized version of ethics, an ethics of regulation to damp the deviant. It is not the ethics of philosophers and theologians, an ethic of caring, or even an ethic of justice, but an ethic formed from the normative conventions and practices of lawyers that we lawyers want to call legal ethics.

Ethics, deformed by the prevailing ideology of conventional professionalism, is so routinized, secularized, and rule-oriented that it reinforces a narrow, simplified, and amoral view of professional life. When we make our legal ethics an ethics of rules, we give over the heart of professionalism to legalism. A legalistic world-view translates the ethics of professional life into a belief that ethics can be a matter of rule-following.

\item \textsuperscript{56} Id. at 149.
\item \textsuperscript{57} Id.

\item \textsuperscript{58} Consider the following obstacles that might stunt moral discourse: unfulfilled expectations about ethics, uncertainty about right and wrong, an unwillingness to disclose moral stances, an education that suggests the futility of moral discourse, a sense of self that holds talk in disdain, a sense of public space that precludes moral discourse, a distrust of those who speak about ethics, a belief that talking about ethics doesn't affect behavior out in the real world, an unwillingness to reflect on the issues raised in moral discourse, and a fear that ethics will get in the way of success.
and do so in a meaningful way, we must recognize the obstacles to what we have set out to do.\textsuperscript{59}

When we inquire into our fate as lawyers, how we might live as lawyers, and the paths we have chosen (or taken without notice), we confront ourselves and the powerful conflicting voices of our culture. We must educate ourselves in the language of these voices and the ethics they represent: the voice that says that ethics does not matter; the voice that says that if ethics matters it cannot be a matter of public discourse; the voice that claims that ethics, including lawyer ethics, is a private matter, a matter of personal choice and individual conscience; the voice of caring that admits that ethics matters, but that however much one may care, others care too little; and the voice that tells us only fools care.\textsuperscript{60}

It is difficult to talk about these voices and the moral quality they give our work as lawyers. Talk to lawyers and law students about ethics (or the lay public, for that matter), and you find minor differences that reflect deep suspicions about ethics.\textsuperscript{61} In this essay, I take these suspicions about lawyers and their ethics seriously and examine their appearance in ethics talk as symptoms to be observed and addressed with a physician's care. In the sections that follow, I identify some of the symptoms we find in

\textsuperscript{59} If we are to engage in moral discourse, whether it be in a legal ethics course in the law school or elsewhere, we must confront the barriers that impede our efforts. When legal ethics is approached as ethics, as a conversation about the possibilities and failures of ethics, about good judgment and the character it takes to have good judgment, there is going to be resistance. This means that the hopes and fears about the practice of law can be confronted in a legitimate and authentic way only if we (teachers) recognize that there are obstacles to moral discourse. In exploring these obstacles, we are actually learning how to be good lawyers and still retain our self-respect and integrity as human beings. In the conversation ethics, I propose that we re-introduce ourselves to the questions that we already carry around with us about our future as lawyers and what it means to be a good person who is a good lawyer and a successful one.

\textsuperscript{60} It is hard to talk about ethics with people who don't care. If ethics turns out to be more a matter of attention and caring (attentive care) than it is following rules, ethical skepticism is going to interfere with our ability to care. Disdain for ethics is one way we demonstrate that we have lost the ability to care. See TARThANG TULku, Skillful Means 10-14 (1978) (discussing the importance of caring about the work we do).

\textsuperscript{61} Ethics calls into question assumptions we make about the goodness we attribute to ourselves by way of our claims to professionalism. The assumption we make about our own goodness must be examined in light of the contradictions reflected in the deep suspicions we have about lawyer ethics.
ethics talk and explore how they act as obstacles to moral discourse.

IV. THE BAGGAGE WE BRING WITH US; OR, IT’S TOO LATE TO LEARN ETHICS

In contracts, torts, administrative law, and constitutional law, there is an assumption that the study of these subjects will start at the beginning. What you know about contracts or the Constitution when you walk into the class doesn’t mean a hoot to the teacher of those subjects. That you know what one colleague calls the “bar stool law” of torts is not going to be accepted as the basis for your knowledge of the law of torts as a lawyer. What you know about contracts when you walk into contracts class may get you into trouble as much as it will give you a head-start on learning what the contracts teacher wants you to know. Law teachers are more or less dogmatic about the notion that what you bring with you to a law school course is irrelevant. The fantasy of traditional law teachers is that your pre-existing knowledge gets in the way when you try to learn law as lawyers need to know it.

The situation is reversed in moral discourse on lawyer ethics. We begin ethics talk with the assumption that we already have whatever ethics we will need as lawyers and that lawyer ethics can be confined to a study of the special and peculiar ethical roles and problems of lawyers. So we already have ethics when we come to study law. Although this assumption about the ethics we’ve got and how we are to study lawyer ethics turns out to be problematic—it can undermine moral discourse—it contains a kernel of solid truth. We come to the conversation about lawyer ethics already morally educated. We do not begin a study of lawyer ethics with a clean slate. We have ideas, notions, concerns, attitudes, values, impulses, fears, and beliefs that provide direction to the worth and meaning we attribute to our professional lives.

62. This assumption can, and should, be deconstructed. It can be examined alongside the equally problematic assumption that the topic of ethics does not, and cannot, have clear-cut beginnings and endings that students of law expect of legal subjects. Without the boundaries of beginning and ending, ethics breaks down, and our roles as students, teachers, and lawyers are called into question.
Legal education is far too late in the scheme of things to be teaching and learning ethics, at least this is the common refrain. The cows are already out of the barn. We are who we are. There is not much incentive to think and talk ethics if you assume that you are already ethical, that you are as ethical now as you are ever going to be. James Pike found "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." This "I've already got my ethics" assumption is analogous to what Karl Jaspers found in philosophy: "In philosophical matters almost everyone believes himself capable of judgment. . . . Our own humanity, our own destiny, our own experience strike us as a sufficient basis for philosophical opinions." Perhaps it is this notion, that we are already as ethical and philosophical as we need to be, that sets the conversation ethics apart from legal discourse. When we

63. It is too late, not just because we have reached the end of the line in terms of formal education or reached the beginning of the line in terms of professional work, but because of a sense that all moral discourse has fallen into disarray:

Granted that there are many moral languages in use around us, each with its own assumptions about reality and complicit in a distinct way of life, and granted that our condition is often one of discord and misunderstanding, do we have good reason to regret coming on the scene belatedly—after an age of coherent discourse and community?

STOUT, supra note 21, at 2; see also MACINTYRE, supra note 53, at 1 (beginning his argument for a virtue-oriented ethics with a parable about the condition of modern-day moral discourse in which the world as we once knew it has been lost).

Skeptics, relativists, modernists, and the weak of heart, each with a different rhetoric, assume that it is too late to engage in moral discourse. The relativist may concede that ethics matters but concludes that it matters to each of us in an idiosyncratic fashion. There is no means or mechanism, the relativist tells us, to determine what is good in any collective sense. In matters of morals and ethics everything must be determined on an ad hoc basis. The possibilities of moral conversation with relativists are limited. Modernists, too, have forsaken ethics talk as an impossible quest for truth, a truth for which there can be no foundation. But see Drucilla Cornell, Toward a Modern/Postmodern Reconstruction of Ethics, 133 U. PA. L. REV 291 (1985); Drucilla Cornell, "Convention" and Critique, 7 CARDOZO L. REV. 679 (1986) (providing a rare modernist account of contemporary ethics in legal scholarship). The weak of heart, well, they always find reason to pass when it comes to ethics talk. "It is often said that the hottest places in Hell are reserved for those who in times of moral crisis remain neutral." Anthony E. Cook, Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr., 103 HARV. L. REV. 985, 1044 (1990).


65. KARL JASPERS, WAY TO WISDOM: AN INTRODUCTION TO PHILOSOPHY 8-9 (Ralph Manheim trans., Yale Univ. Press 1954) (1951).
participate in legal discourse, we assume we have something to learn.

There is enough truth in the "virtue can't be taught" argument, as in most scraps of conventional wisdom, to make it a tenacious platitude. Platitudes, like the old refrain about the inability of old dogs to learn new tricks and the admonition that "it is too late" to learn ethics, dramatically de-moralize ethics talk. To ignore the plea that "it is too late to learn ethics" would require us to overlook an active obstacle to moral discourse. To ignore the plea is to ignore what happens when we try to talk about our moral lives, our values and ideals, and the conflict we experience as we seek insight into the moral sensibilities necessary for a professional life.

There is no sin in being realistic about the difficulties of moral education. But the notion that "it is too late" to teach ethics may turn out to be more skepticism than realism. The skeptic, with her ambivalence about ethics, must underplay the influence of moral matters, and in doing so miscalculates the effects of moral discourse.

66. See PLATO, PROTAGORAS, supra note 2 (on Socrates' skepticism about the possibility of teaching virtue); GILBERT C. MEILAENDER, THE THEORY AND PRACTICE OF VIRTUE 45-74 (1984). The irony of Socrates' teaching is that he continues to act and to live as if virtue could be comprehended and taught in the dialectic of dialogical conversation. Socrates reminds us, in every conversation he conducts, that the first and last question of philosophy is how one should live a virtuous life. See BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 1-21 (1985). But cf. Eisele, supra, note 25 (for a contemporary response to Socrates and the questions he raises about the teaching of virtue).

67. Skepticism is a low-level form of psychic numbing. It is skepticism and psychic numbing that make it possible to talk the way law students and lawyers do. Ethics talk, however, can be used to fight psychic numbing:

We must dream of a better world from within the confines of what has been given to us in language, and in the stories and fables of the past. However, stories as patchworks can always be re-assembled. Memory is creative, precisely because she bears within herself the promise of the future.


We need to identify the intricate ways in which skepticism cuts us off from meaning on the one hand, and helps us maintain a critical view of ourselves and our world on the other. Skepticism is a double-edged sword.

Skepticism leads to the conclusion that there is nothing to be done about those who take moral shortcuts. It really is, the skeptic tells us, a dog-eat-dog world and to survive you must fight fire with fire. Only the strong survive. The rich get richer and the rest get what the rich don't take (in a trickle-down theory of moral economy). To be concerned about ethics in the legal profession, in government, or in business means only that you are a fool. For skeptics, ethics cannot be allowed to matter; it is as simple and profound as
If, as so many believe, it is too late in law school for adult students to learn ethics, then the first stage of moral discourse is to learn something about the ethics that we already have. It is one thing to say, "It is too late to learn ethics," but another to say, "I don't want to talk about the ethics I've already got." In ethics talk, we re-learn what we assume we already know. The way we think and talk ethics points to the lives we live, the lives we see others living, and the lives we imagine it possible to live. When we turn away from the voice of ongoing moral concerns, we let the symptoms of ethics talk go untreated.

The ethics we already have, and the assumptions we derive from ethics already in place, become problematic and symptomatic when we realize that most of us, most of the time, are on ethical "automatic pilot." We don't think or worry about ethics. We let whatever ethics that is "built-in," the ethics we got growing up, be our ethics. We live our morals and ethics without thinking about them. The problem with thinking about ethics is, as Hannah Arendt observes, that it "roused you from sleep." We think we know what to do, how to live, and who to be. We think, at times, especially those times when we are asked to talk ethics, that we know who we are. Knowing who we are, we know what to do. As one student explained, "The reason we don't see an ethical problem in so many of the situations we talk about is that we have already made up our minds." We assume away the ethical nature of the problems that come our way. In fact, we

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68. This discussion assumes that one claims already to be an ethical person. I take no account here of the "amoralist" who makes no such claim. See Bernard Williams, Morality: An Introduction to Ethics 1-12 (1972).
69. If our ethics isn't constantly being learned, how do we attain wisdom? Wisdom is the province of those who weave their ethics out of experience and evaluation, judgment and character, knowledge and mystery, pain and perplexity.
70. We do not, in this view, play a conscious, active role in setting the shape of our own ethics. We are simply what we have grown to be.
72. Whenever we encounter resistance to the idea that a "legal problem" has an ethical dimension we may find that: (i) we can't recognize ethical dilemmas or don't know what we mean when we say that a problem poses an ethical dilemma; (ii) we don't want to recognize ethical dilemmas because they make life more complicated and more difficult; and (iii) we are sufficiently socialized into the professional "hired gun" role that we believe that whatever lawyers do, in fact, constitutes ethical behavior.
further assume that ethical problems are undesirable. We want a trouble-free, symptom-less life, a life that runs like a Toyota that never needs maintenance. We end up walking through life not seeing and not knowing that we are immersed in ethics. Our ethical problems are painful reminders of what we work so hard to forget.

In the conversation ethics, we are confronted with an ethics already in place, an ethics flowing from the past; we locate ourselves with a repertoire of rhetorical moves that silence moral doubts and concerns. Obviously, this silencing doesn't work, wish as we may that it did. If it worked, we would not be plagued with lawyer jokes and TV soap opera dramas that so prominently feature lawyers and their moral dilemmas. Paradoxically, it is this ethics we already have in place, secure or disjointed as the ethics may be, that provides a reservoir of impulses, sentiments, memories, and beliefs that constitutes our moral character, a character that it would take a massive effort at indoctrination (brainwashing is the more vivid term) to redirect. The ethics, and associated baggage, ethical and otherwise, we bring to the conversation ethics is valuable and yet problematic in our efforts to understand how ethics works. Learning to value the morals you bring with you to the law is the point of ethics talk. Be forewarned, however, that what we bring with us can be the where we stand. One obstacle to moral discourse is the dubious distinction between morals as a kind of subjective valuing and ethics as socially derived objective standards of value. It is common to hear students of lawyer ethics distinguish between the morals of individual conscience and the ethics of professional duties. They believe morals to be aspirational while ethics establish minimal prescribed duties. They are more willing to talk about rule-based duties than about moral aspirations.

In the approach to the study of lawyer ethics emphasized in this essay, conversation mediates what Bernard Williams calls the "inside" and the "outside" stance toward ethics. WILLIAMS, supra note 66, at 30-53. The "inside" point of view relates to the excellence of character we associate with virtue. Virtues are, in Williams’ explanation, "internalized dispositions of action, desire, and feeling." Id. at 35-36. The "outside" point of view takes account of our civic self with its concerns for "[o]ther people’s welfare" and the "requirements of justice" (among other things of value). Id. at 51.

73. The need to see ourselves as "good people" is sufficiently compelling that we create powerful illusions to promote our positive self-images. We tell ourselves that we are doing the right thing, making the right choices, and moving in the right direction. We seek affirmation that what we say to others about ourselves is true. The view that we have of ourselves as "good" (regardless of the truthfulness of the notion) is a powerful determinant in how we live. See SHELLEY E. TAYLOR, POSITIVE ILLUSIONS: CREATIVE SELF-DECEPTION AND THE HEALTHY MIND (1989) (a psychological account of the illusions we use in everyday life).
source of self-deception. Law school and lawyering perform a dual alchemy, gold into lead, and lead into gold.

The purpose of lawyer ethics talk is not to promote a cult of moral elitists, but to provide clarity on the kind of expectations and assumptions, and identifications and sensibilities that find their way into the rhetoric of our moral stances and how this rhetoric and fervent talk impoverish our character as lawyers. What I seek in ethical conversation is an inquiry into lawyer ethics that focuses on the rhetoric stances that we take in the name of ethics: rhetorical stances that empower us, and rhetorical stances that marginalize the ideals associated with law.

The conversation ethics calls forth the character we already have, the character we bring with us to legal education and the practice of law. The problem (otherwise we should have no need for an explicit course of conversation in lawyer ethics) is that some of our ideas are the basis for a moral life in the practice of law, others are the basis for hypocrisy and self-deception. It is possible to deceive ourselves about the kind of persons we are and about the kind of persons that we must be to do what lawyers do. We make assumptions about ourselves and about lawyers, and many of them turn out to be ill-founded. Seymour Wishman’s Confessions is a vivid example.

When we look at how our assumptions about ethics work, that is, our ethics baggage, we begin to see self-deception as a symptom of more deep-seated problems. Ethics talk reminds us that we may need to change our minds about who we want to be

74. See Mike W. Martin, Self-Deception and Morality (1986) (philosophical accounts of self-deception); Stephen D. Ross, Moral Decision: An Introduction to Ethics 285-89 (1972). The most accessible account of self-deception that I have found for pedagogical use is Stanley Hauerwas’ essay on Albert Speer, the Nazi war criminal. See HAUERWAS, supra note 35, at 82-98.

75. Our understanding of ethics and moral discourse may turn, on examination, to be no better than our understanding of alchemy. We tend to be righteously dismissive about alchemy as bad chemistry. We know little to nothing of the true quest of the alchemists to transform themselves as they worked to transform the materia of their outer world.


77. Wishman, supra note 27.
and how we want to think about ourselves as lawyers.\textsuperscript{78} It pushes us to take fuller account of the assumptions that we hold uncritically and unreflectively. In ethics talk, there is the possibility of re-working and re-educating the assumptions that we use to construct a morally constricted universe that make it possible to do harm and speak of the harm as a necessary, inevitable, and functional part of a role that we cannot help but enact.

Moral discourse, when it works, and it does not always work,\textsuperscript{79} helps us see what kind of ethics we already have, and how we embody our ethics in a story that justifies and makes coherent the character we bring to the choices we make when we practice law. We need to know what kind of ethic we adopt when we train our minds for legal discourse.\textsuperscript{80} We need to know how our moral sensibilities get muted, dulled, stunted, and compromised.

We each have moral baggage that we carry around with us and carry into ethics talk, although it is true that some travel lighter than others. One of the reasons we fear ethics talk (and disguise ethics talk the way we do) is the fear that the baggage we carry with us is inadequate and may not be so praiseworthy as we assume. There are symptoms of moral disorder in our

\textsuperscript{78} How should we work and talk together to try to change each other’s minds about the things that matter to us? When should we change our minds? What kind of discourse will make needed changes of mind possible? How are we to think carefully and to think straight about this matter of changing our own minds, and talking with others about matters in which we can only hope they will see it possible to change theirs?

\textsuperscript{79} What is frequently assumed to be the futility and failure of moral discourse is associated with the problem of never being able to get to the beginning of ethics. We know, intuitively, that we don’t get our ethics in law school. This means that law school ethics talk is like walking in on a movie that has already started. You take caution to leave the house at the right time so that you get downtown for the 7 p.m. movie and then find that you have arrived late. There is, for most of us, something annoying about getting to a movie late. In the case of ethics there is something annoying about a conversation that assumes so much, that takes us not to a beginning or end, but plops us in the middle. There is, I am afraid, simply no way to initiate a conversation about ethics that starts at the beginning; we are always getting to ethics late.

\textsuperscript{80} Legal discourse provides a new web of meaning, personal and cultural, that acts as an overlay on the map of ordinary reality, common-sense, and moral sensibility. As lawyers, we view the world in a way that both narrows our vision and makes it possible to speak in an authoritative voice. The risk is that we come to believe that our legal language, and the voice in which it presents itself, reflects a truthful view of the world.
ethics talk, symptoms that infect the moral sensibilities we import into our lives as lawyers.

In moral discourse, when it works, we begin to recover a sense of an existing self, a sense of the person we desire to be, and an image of ourselves as lawyers that includes our moral sensibilities. We find again and anew how the moral implications of our legal and professional character are prefigured in the ways we have already learned to imagine and talk about our lives as lawyers. With moral discourse we see how our rationalizations and justifications, aspirations and moral ideals, give character to our work as lawyers.

V. LETTING OUR ETHICS GO UNDERGROUND; OR, GETTING ABSORBED AS INSIDERS

When it comes to ethics, we can put ourselves on "automatic pilot" and ignore ethics talk. Living this way lets ethics fade into context like a quiet person at a noisy party. Ethics is subtextual; it quietly influences and informs what we do and say, the characters we adopt, the scripts we enact in the personal dramas of day-to-day life. We are prompted by this subtext without necessarily being aware of it: we exist in a moral story, unconscious of how our lives are guided, shaped and molded, and pulled and pushed by the influence of the story we are in. As we are in stories, we are also in one myth or another, or moving from one myth to another. Our ethics is part of the myth we are already living.81 Because we are characters in the story we live (but not always, as it turns out, the principal characters), we forget how we live, and how our own ethics work.82

With the warm blanket of professionalism, we quiet plaguing doubts about our ethics as lawyers. We become so enamored with and embedded in the felt logic and perceived necessity of the

81. See MICHAEL NOVAK, THE EXPERIENCE OF NOTHINGNESS 23-29 (Harper Torchbook 1978) (1971) (providing a brief account of the shift from an ethics that "concentrate[s] upon logic and language" to one that concentrates upon "the drive to understand and upon myths and symbols").

82. When we are unconscious of how ethics is played out in our personal and collective myths, we give over the world to those who imagine that they can speak for us.
adversarial ethic that an ideal is converted into pathology. The legal mind-set drives ethics underground because ethics talk alerts us to the limits of an adversarial ethic and calls the games we play as lawyers into question. We want to be good lawyers and we want to play the game well. We become insiders and participate in an adversarial ethos. When the rhetoric of ethics and professionalism would have us express our doubts and make moral distinctions, our position as insiders allows us to push these considerations aside.

Taking on the ethos of lawyering and adopting an ethic of adversarialism is not in and of itself a bad thing. Being an insider gives us access to the power of skills, what Stanley Hauerwas and Thomas Shaffer describe in the life of Sir Thomas More as “hope as skill.” The lawyer’s adversarial ethic can form the basis for authentic pride, or support an ethic embodied in a voice and a persona that makes possible the lawyer stereotypes of L.A. Law. Our adversarial ethic is a reality—a


84. One example of an image of lawyer work that has moral consequences is the notion that the practice of law is a game. Thinking of what we do as a “game” may allow us to distance ourselves from the morally queasy practices that we both abhor and seem all too willing to use. Games are bound by rules and lawyers work with rules every day. Lawyers know how to understand and manipulate rules. Rules define the basic moves of any game and are used as reference points to resolve conflict over contested moves. The outer limits of legitimate play are also determined by explicit or “hard” rules. There is, however, an ethic of the game, a sensibility about how a quality game is played, that is always, of necessity, beyond the rules. See ROBERT S. DE ROPP, THE MASTER GAME: PATHWAYS TO HIGHER CONSCIOUSNESS BEYOND THE DRUG EXPERIENCE (New Delta ed. 1989); HERMANN HESSE, MAGISTER LUDI (Mervyn Savill trans., Frederick Ungar 1949) (1943); JAMES P. CARSE, FinitE AND INFINITe GAmES (Ballantine ed. 1987) (1986); MICHAEL MACCOBY, THE GAMESMAN: THE NEW CORPORATE LEADERS (Bantam ed. 1978) (1976) (providing accounts of the game metaphor that do not turn on a set of rules of play).

85. What would prompt anyone to examine his or her work as a lawyer through a moral lens if it were possible to get by and get along without doing so? If we are not experienced or educated (or even asked) to make the moral dimension of our thinking explicit, and if we have been adjudged successful even as we resist moral discourse, then how can moral discourse ever find a place, much less a secure footing, in our lives?


realism that gets us into trouble. Michael Novak has observed that “[r]ealism effectively makes one a participant in the ongoing system. It stifles the revolutionary, utopian, visionary impulse. It teaches one compromise, patience, and acquiescence.”

Imagine the confusion for law students moving in the liminal space from legal outsiders to insiders—in transition, betwixt and between, neither here nor there, in twilight. Ethics talk takes us into liminality because moral discourse reverses roles. Traditionally, the insider-teacher initiates the outsider-student. The uninitiated student (outsider) stands before the law and seeks admission to law’s mysteries and powers. The law teacher stands watch as gatekeeper to the inner sanctum and guardian protector of the deep mysteries of law.

In law school ethics talk, this tradition of roles is reversed. The teacher of moral discourse remains a gatekeeper, but one who seeks to demystify and deconstruct adversarialism while cautioning moderation in the pursuit of the secret pleasures of legal

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89. NOVAK, supra note 81, at 22. We talk about reality in the everyday language of Necessity. Necessity is everywhere. The felt sense of Necessity with all its routines constitutes the ore from which we extract the central motifs of our storied lives. Our storied lives are revealed as moral enactments and made visible in Necessity, in what we are ever assuming must be said and done. There is too little time, too much to do, too much to know, too many skills to learn and improve, and too many techniques to master, we tell ourselves, to be chasing after an always elusive ethics, even the ethics embedded in our own stories.

The Necessity of everyday life and the Reality of lawyering pervade our choices, sometimes usurping and dominating other perspectives and other realities. The prosaic and mundane, ever present, in lawyering and in life, become a thick, crusty, impenetrable shield that cuts us off from moral sensibilities.

90. In the moral discourse of outsiders and insiders, we vacillate between gaining ground (understanding) and losing it (despair). In liminal space/time there is no sense of progress, and we experience dismay and suffering. In the liminality of role reversal, the student of ethics complains that ethical talk is an obstacle to becoming an acknowledged insider.

91. Students of law have made their way to the threshold and are beginning to see what law is and how it works and how it is practiced by lawyers. It is against this reality that ethics must find a place.

zealousness.\textsuperscript{93} The student, her ethics assured, "we all already have our ethics," adopts the posture of an insider, ethics already in place, eager to embrace the adversarial ethic, ready to accept a narrowly defined professional role; adopts a legal \textit{persona};\textsuperscript{94} and speaks in the disembodied voice of the law.\textsuperscript{95}

With their eyes set firmly on the prize, students see moral discourse as a threat to a fragile, hard-won, insider status and the security of a professional identity. The hostility to moral discourse is that of an insider who has taken up residence in a new moral fortress. Ethics talk raises the fear of outsiders attacking, stealing, and dishonoring the hard-won gains of newly initiated

\begin{itemize}
\item 93. The teaching space of moral discourse is liminal for the law teacher because ethics confronts law, reintroduces the legal persona to its shadow, and deconstructs legal discourse. When lawyer ethics is translated as the law of lawyering, liminality is avoided.
\item 94. See Elkins, \textit{supra} note 83.
\item 95. Mark Yudof observes that:
A major purpose of legal education—and certainly the primary task of law and lawyers operating within the framework of a legal system—is to recognize some order in the disparate human voices in any legal controversy. That recognition is necessary if disputes are to be settled in accordance with principles that transcend individual cases. It enables society to treat people equally, to treat like cases alike, and to avoid rampant favoritism—in short, to achieve formal justice.


Although "human voice," in Yudof's view, may be critical to the "dynamic of justification" of the legal system, it must remain an external rather than internal critique of law. \textit{Id.} at 591. Human voice "does not suggest an internal critique that would permit individualized exceptions to static legal rules." \textit{Id.} Why is Yudof worried about an "internal" critique? "By challenging the efficacy of all general statements of legal norms, the internal critique is tantamount to an attack on the legitimacy of the enterprise of law itself—it denies the viability of law as a context for knowing." \textit{Id.} The bottom line for Yudof is that "human voice," if allowed to compete fully with "professional voice" would undermine "the very idea of formal justice for all." \textit{Id.} at 591, 595. Yudof draws a rather nebulous and worrisome distinction between formal justice and substantive justice. Human voice may, argues Yudof:

[L]ure us away from formal justice, equal treatment of persons, and legal principles that transcend individual cases. Use of the human voice in this way would, I believe, favor a form of substantive rationality, justice without principles or rules, justice in response to the life stories of each individual. In such a world, the processes of law would be illegitimate, for "doing" law would consist of imposing ordered justice on disordered and disconnected human events.

\textit{Id.} at 595.
Moral discourse is symptomatic of a topsy-turvy world where an ethic can be overvalued, vices claimed as virtues, and outsiders who talk ethics can be kept in their place. Ethics talk makes painfully obvious what successful insiders do in the name of professionalism. The slavish devotion to the adversarial ethic gives rise to strong talk in quest of moral justification. We resent ethics talk because ethics pathologizes and indicts the world in which we live, implicating us in the pathologies of the law-world ethos.

VI. KEEPING ETHICS IN ITS PLACE; OR, NOT HERE, NOT NOW

It is a legacy of modern education and a feature of contemporary culture that morals and ethics have a limited place in public discourse. We simply do not see or think or talk about the

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96. Our status, prestige, and autonomy as professionals promote and sustain the disdain of outsider criticism. We shield ourselves from the truth. Although it may not be possible to rid oneself of all self-deception, which itself will justify many from making the effort, it is possible to be more aware of the operative ethics in the paths we follow. The way we do our work, the way we are in the world with others, the way we are in relation with all else is reflected in the ethic and ethics of professionalism, and in turn reflected in ethics talk.

97. See LEO TOLSTOY, The Death of Ivan Ilych, in GREAT SHORT WORKS OF LEO TOLSTOY 245-302 (Louise Maude & Aylmer Maude trans., Perennial Library 1967) (1886). The law-trained Ivan Ilych was not, according to Tolstoy, a "toady," but "by nature attracted to people of high station as a fly is drawn to the light, assimilating their ways and views of life and establishing friendly relations with them." Id. at 256. We have each learned (have we not?), as did Ivan Ilych, to do:

[T]hings which had formerly seemed to him very horrid and made him feel disgusted with himself when he did them; but when later on he saw that such actions were done by people of good position and that they did not regard them as wrong, he was able not exactly to regard them as right, but to forget about them entirely or not be at all troubled at remembering them. Id. Ronald Sampson says of Ilych that he had the capacity "for comfortable adjustment and elasticity of conscience, with antennae so delicately and quickly attuned to sensing the currents of dominant opinion" and, therefore, "was admirably equipped to rise in the world and advance his career." RONALD V. SAMPSON, THE PSYCHOLOGY OF POWER 127 (Vintage Books 1968) (1966).

98. Ethics speaks to the ways we choose to be in the world with others and, consequently, cannot be divorced from politics and social ideology. That ethics cannot be divorced from politics and society does not mean that we have not tried. In contrast to a mindset that consciously works to limit the place of ethics, ethics as critical moral inquiry offers an opening into the social, political, and culturally induced features of our ethics.

See STOUT, supra note 21, at 161 (providing a succinct statement of the philosophical history of efforts to limit moral discourse). My previous efforts to escape the bounds of law school versions of moral discourse are described in James R. Elkins, A Conversation Called
bulk of what we do as lawyers and students of law with the understanding that we are knee-deep in ethics every step of the way. When you ask lawyers or law students whether the decision to represent a particular client, whose interest and proposed course of action will result in significant harm to other persons or to a community or to their own character, constitutes a moral problem, they are as likely to say that it does not as that it does.99 When you ask law students whether the humiliation of a truth-telling witness during cross-examination is a moral or ethical problem, they are likely to say it is not. We continue to chase the fantasy expressed by Oliver Wendell Holmes when he mused:

For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. . . . [B]ut by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.100

99. We keep ethics off center-stage, hidden, and out of awareness so that we can give free play to adversarial ethics. We want ethics to be implicit, offstage, and the background scenery for enactment of a prosperous life.

100. Oliver W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 464 (1898).

The study of ethics continues to play a marginal role in both legal education and the continuing education of practicing lawyers. When we relegate legal ethics to the periphery of legal education, we can expect ethical concerns to be of peripheral concern in the practice of law. If ethics is to matter in the lives of lawyers (and their clients), moral discourse must be made central rather than peripheral to the education and training of lawyers. Ethics will be peripheral in the education and practice of lawyers, until we learn to talk about ethics in a serious way—in a way that makes our ethical bearing central to our everyday lives as lawyers.
And how does this attitude about keeping moral discourse in its place work? Consider the following vignette from a law faculty lounge: A small group of law teachers sits around a large oval table. The conversation turns to teaching effectiveness and the pedagogical innovations that motivate students to learn. As the conversation progresses, the talk drifts into a discussion of competence in classroom teaching. The colleagues agree that one of their number (not present at the table) is incompetent. At this point, Roger remarks, "We may agree that Paul is incompetent, but the real problem is that we refuse to do anything about it. Students complain. We complain. But nothing happens. I don't think we are ethical, as teachers, when we sit by and do nothing. We would be outraged if our colleagues at the medical school followed our example. We let Paul continue teaching. Students certainly don't feel like they are in a position to do anything. We turn our backs on the problem and nothing is done. It is a disgrace that we let this happen."

Some years ago, I undertook a study of legal ethics teaching and had an opportunity to talk with law school ethics teachers and to observe their classes. When they weren't searching in the Code of Professional Responsibility for answers to ethical problems, they tended, as Thomas Shaffer has noted, "to equate one's morals with one's taste in beer." THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS xxviii (1985). They indeed made "a fetish of tolerance" while trying to promote discussion and avoid the dilemma of suggesting to students that they, the teachers, might have a sense of right and wrong. Id. When moral arguments arose, both the arguments and the students making them tended to remain unchallenged and unanalyzed. As Shaffer puts it: "We do not evaluate the moral arguments we make to one another." Id. Both teacher and student seem manifestly uncomfortable trying to articulate their ethical stances, and unwilling to discuss the obstacles they confronted in making an effort to do so. Consequently, the legal ethics class I observed sounded soft, ephemeral, and lacked intellectual rigor.

Many of us share Shaffer's sentiments about our legal ethics courses, knowing at some level, that more is possible, that although the teaching of ethics, the talking about ethics, is difficult, it is not beyond our means to make legal ethics an interesting, even commanding subject.

The study of legal ethics is not simply an effort to teach law students moral philosophy and ethical theory—an approach that characterizes the early efforts to teach medical ethics as ethics. We can imagine legal ethics as ethics and still avoid the temptation to make legal ethics the study of moral philosophy applied to problems of the legal profession. Ethics can be derived not only from philosophy, but from a study of literature, psychology, sociology, history, and theology. The problem is that legal ethics is packaged and presented to students as a study of the rules that constrain the practice of law. If the aim of ethics is to locate and examine the roots of moral sensibility in the practice of a professional craft, then ethics must reach out to disciplines and perspectives that suggest ways of seeing and experiencing the world that help a professional know what to do, and more importantly, know how to live. As Thomas Shaffer put it, "we will do well not to let it [the course in legal ethics] get narrow on us." Id. at xxiii.
Fred, another colleague, joins the conversation, “Roger, I agree with you about Paul’s competence, but don’t you think calling us unethical goes a little too far? You are going to have to define what you mean by unethical.”

Roger responds, “I am puzzled by your reaction. I’m not single-handedly making a personal assessment of Paul’s teaching. We agree that he’s incompetent. We don’t need a definition of ethics to talk about a colleague’s incompetence. Talking about how we should define ethics is a ploy to avoid talking about our complicity in Paul’s incompetence. That we do nothing says something about us, about our ethics as teachers. It’s really that simple.”

“Well, it’s difficult to talk about a colleague’s competence,” Fred replies, “but more difficult still when you put it as a matter of ethics.”

Roger is willing to make a minor concession, but persists in pressing his colleagues to see the moral dimension of the situation, “Fred, sadly enough, you are right. Talking about ethics doesn’t seem to get us anywhere, but talking about Paul’s incompetence and our complicity in ethical terms does force us to take account of what we are doing, to defend ourselves. Talking about ethics is a way of being honest. We preach professional responsibility to our students—demand it of them—and then deny responsibility when it comes to ourselves. We are simply hypocrites.”

Fred replies, “Roger, this moralistic stance of yours makes me uncomfortable. We all have different views about teaching and what it means to be competent in the classroom. I don’t see how Paul’s teaching is a matter of ethics. You say it is unethical for us to do nothing. I don’t see it that way. There is no way to resolve a difference when presented as a matter of ethics. You undoubtedly have a view of ethics that is different from mine.”

101. We confront here a working, practical, philosophy that holds it to be unhelpful, and perhaps even wrong, to view our everyday concerns and conflicts through a moral prism. The problem is not that we do not identify and accept a particular moral/ethical conclusion that is an obstacle to moral discourse, but that we make, in our conversations
Phillip, another colleague, agreeing with Fred, says, "I think Fred is right, there are as many views of ethics as there are people at this table. You're not going to get agreement about anything if you talk about ethics. Talking about competence as an ethical matter confuses the issue." 102

Roger, Fred, and Phillip leave the lounge to teach their morning classes where the symptoms of moral discourse will, as in this conversation, go unrecognized.

and in our lives, a serious, sustained effort to push moral discourse to the periphery of consciousness and translate moral sensibilities with a crude language of instrumentalism. See Charles Taylor, Sources of the Self: The Making of the Modern Identity 499-502 (1989) (providing a chilling description of instrumentalism). It is not the one path that we seek in moral discourse, but how being on the path we follow makes a particular life possible, and how it might impoverish the life we seek to live. We attempt to inhabit a world with others and yet follow different paths with different conceptions of the good. We value diversity and tolerance. But not every path, as any hiker will tell you, is as good as another!

102. Kenneth Burke devised the following 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 feeding 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: An Anatomy of Purpose 55-56 (1965). Burke offers this story to illustrate the situation we are in today, characterized by an "attempt to erect a communicative medium that will lie across many diverse disciplines, distinct ways of living, different psychoses." Id. at 56.
VII. DEFINE YOUR TERMS; OR, IT'S ALL A MATTER OF SEMANTICS

One rhetorical ploy in the faculty lounge conversation was the call for a definition of ethics. Someone inevitably asks: “How do you define ethics?” “How do you define justice? Good? Public interest?” “Define your terms,” she demands. Definitions have a place when they push a conversation forward or permit a stalled or ineffectual dialogue to proceed, but in the faculty lounge conversation the request to define ethics stifles the conversation; it is a symptom of a way of talking that leads us astray. The plea for definitions in ethics talk is not, as it might appear, a desire for rigor and clarity in thinking; it is a misplaced, unconscious desire to block moral discourse. In a conversation about how a good lawyer comes to be considered good, or how a good person can choose to be a lawyer and do what lawyers do, a demand for definition pulls the conversation off course. This definitional talk encourages the fantasy that we can do in legal discourse—say exactly what we mean and mean exactly what we say—what we cannot do in moral discourse.

A definition of ethics is like a definition of physics. The question in physics and ethics is: How does it work? How do ethics and physics help us understand the world in which we live? A dictionary definition of ethics, even a good dictionary definition, gives no more understanding of how ethics works than a manual on bicycle riding makes it possible to ride a bicycle. We give words like ethics meaning as we embody them in conversational action. Our stories, lives, and ethics are more complex than any definition we might devise for the words we use to describe who we are and what we find worth knowing about ethics.

103. Jeffrey Stout locates the cognitive problem this way: “Once we know the subtle details of actual usage [of moral terms], a theoretical definition . . . is likely to cause more problems than it solves and unlikely to be both uninformative and nonreductive. It would be better to have none [no definition] at all.” STOUT, supra note 21, at 28.

104. See Elkins, The Pedagogy of Ethics, supra note 98, at 73-74 (criticizing the impulse to seek definitions as an obstacle to moral discourse).
VIII. DISAGREEMENT; OR, THE FUTILITY OF IT ALL

We expect disagreement when we engage each other in moral discourse. Anticipating moral disagreement, we temper our moral conversations and steer away from ethics talk. We ignore the common ground we share. The avoidance of moral conflict dampens our moral imagination, and erodes the courage and the truthful speaking that ethics demands. Fear of disagreement can be translated and symptomized into a stance antagonistic to moral discourse.

It does not take an education in moral philosophy to realize that a conversation about lawyer ethics, and the moral judgment of lawyers, can involve us in disagreement and conflict. As lawyers we must each employ, consciously or unconsciously, a strategy for dealing with the complexity of moral disagreements. It is disagreement that ethics would have us confront. There are disagreements—some quite devilishly contrived since the Devil always seems to have an advocate—about how to

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105. To engage in moral discourse requires that we give attention to how and whether it is possible to stand together, how we share basic aspirations and fundamental beliefs about the matters we call ethics. We share enough to call ourselves a law firm, a law school class, a profession, just as we share enough to call ourselves a country. We could share more, but we often assume that we share far less than we do.

In moral discourse we take as a starting point that we share a language and a world in which moral language and moral sentiments will be shared as well as disputed. It is important to keep in mind that we share a language and in doing so share more than we are likely to admit.

106. See Stout, supra note 21, at 13-32 (providing an accessible, philosophical account of moral disagreement).

107. Pitkin, supra note 37, at 153-54:

The point of moral argument is not agreement on a conclusion, but successful clarification of two people’s positions vis-à-vis each other. Its function is to make the positions of the various protagonists clear— to themselves and to the others. Moral discourse is about what was done, how it is to be understood and assessed, what position each is taking toward it and thereby toward the other, and hence what each is like and what their future relations will be like. The hope, of course, is for reconciliation, but the test of validity in moral discourse will not be reconciliation but truthful revelation of self. “The direct point” of moral discourse . . . is “to determine the positions we are assuming or are able or willing to assume responsibility for.” Consequently, again, “what makes moral argument rational is not the assumption that we can always come to agreement about what ought to be done on the basis of rational methods. Its rationality lies in following the methods which lead to a knowledge of our position, of where we stand.”

Id.
cultivate ethical sensibilities. We live in a pluralist, fragmented universe. Talk of ethics and values moves us off the safe terrain we create with the casual banalities of everyday life.

Our relationship with the disagreements of ethics is like our relationship with language: there are times when the disagreement is simply part of the reality we accept, and times when the disagreement suggests the possibility of a reality we must resist. We hold differing views, and adopt and adapt differing moral stances, and there will be times when only the most arduous search will locate the symptoms that block our coming together on common ground.  

108. Consider the following story related by Joseph Singer:

When I was in college, I became close friends with someone whose political beliefs were different from mine. We are still good friends. We disagreed about certain matters that we considered important. We talked about these issues a lot, partly because we found them interesting and partly because we could not understand why we disagreed. Most important, however, we were close friends, and we each cared a great deal about what the other thought. After four years of these discussions, I became frustrated because I could not convince my friend that he was wrong about certain things. He believed things that I considered, and still consider, morally wrong. I had assumed all along that if we talked long enough, and that if we were both people of good faith trying to reach the right answer, we would eventually agree. But we did not agree.

I found that I had to give up one of the underlying assumptions on which I had based our long conversations. I could give up the idea that my friend was intelligent. In that case our disagreement could be explained by his stupidity. Or I could give up the idea that I was intelligent and explain our disagreement by my inadequate mental capacity. Alternatively, I could give up the idea that we were both acting in good faith, that we were both trying to reach the right answers and were not just playing games with each other. But I believed that we were intelligent people of good will. I could also conclude that one or both of us were mistaken about what was right. But this did not make sense to me. We held our different positions because of values that were important to us, and I did not see how we could be mistaken about what was important to us. The only alternative was to give up the final assumption: the belief that if we talked long enough we would eventually agree. And that is what I did.

We can treat each other as if we inhabit moral islands and that moral dis-ease will not reach the island we inhabit. There is something of this moral island imagery in the demand that each of us, in moral matters, be treated as individuals. Or we can reduce moral differences to the status of peccadillos, things we learn to live with, overlook, or disregard. In this view, moral differences are symptoms that need to be overlooked, not treated. Steven Tipton warns, however, that “we need to revive an educative ideal of politics based on truthful argument.”

109. I have stolen (or thieved, guided by Hermes) the idea of moral islands and isolation imagery from Thomas Shaffer. See Shaffer, supra note 42, at 231 (presenting moral isolation as one of three ethical orientations governing lawyer-client conversations). It would be best to confess here that I am deeply indebted to Thomas Shaffer for going first in legal scholarship with so many of the ideas I have translated into my own.

110. Tipton, supra note 52, at 173. Tipton, a sociologist, argues that “moral pluralism is not the cause of the problems we face in making sense of how we should conduct our lives and our public affairs. And moral absolutism is not the cure for our problems.” Id. at 168. And what is the problem? Tipton describes it this way: “The core of the problems lies . . . in the cultural overgeneralization of individualism to represent a sort of moral Esperanto.” Id. Individualism creates a “moral imbalance” that “garble[s] and cut[s] off a cultural conversation that embraces other modes of moral discourse.” Id.

Tipton believes that every moral tradition, including individualism, has a “universalizing nature”:

The biblical tradition, for example, enables us to envision how to love and obey God, not just in worship but in business, politics, and family life as well, so that these activities too become worship in their fundamental meaning. The classical republican tradition enables us to extend a principled concern for the common good and reasoned dialogue regarding it to the whole of life seen as a forum, not just the academy and the town hall. In contrast, the utilitarian tradition extends its bottom line from the market to every interpersonal exchange revealed as a matter of wants and uses with calculable costs and payoffs. We see ourselves producing and consuming political and cultural goods, accumulating and investing social and symbolic capital. The romantic, meanwhile, urges us to “give our all for love,” and the aesthete or dandy stylishly shows us how to live the whole of life as a work of art.

Id. at 169.

When the moral tradition of individualism exerts its “universalizing nature,” it takes on a life of its own and becomes, in Freudian terms, overdetermined. Thus, although there are many payoffs in the individualist moral tradition, we learn its cost when we come to moral discourse:

By overexpanding a vision of public life as a marketplace for competing interests and an administrative center for distributing utilities, and by overnarrowing it as a covenantal community and a forum for debating our common needs, virtues, and ends, we are failing to do justice to one another and to care for one another as we should.

Id. at 170. Compare Derek Bok: “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 C. Bok, A Flawed System of Law Practice and Training, 33 J. LEGAL EDUC. 570, 575
With argument-based inquiry and scrutiny, we are going to face conflict in ethics talk.

Ethics is a constant reminder of the conflicts embedded in our work and the way we have chosen to live. Ethics talk threatens us, as legal discourse does not, because it exposes the tension between law and justice, belief and knowledge, and regard for others and regard for self. The disparity between our ideals (and the many ways of speaking the truth of these ideals) and the reality of how we practice our craft as lawyers is a moral fault-line that underlies our struggle to talk about lawyer ethics. If moral discourse is not threatening and unnerving, pointing to one serious symptom after another, then you might rightly conclude that you have not been talking ethics at all.111

Knowing what we do about morals and ethics, we must expect disagreement and argument. However, if moral argument is just quarreling, then we can dispense with ethics talk as skeptics implore us to do. Skeptics seek to avoid ethics because it calls attention to conflicting visions of what it means to be a good lawyer. They fear that if ethics talk opens the door, we will be awash in conflicting subjectivities, that moral reasoning is nothing but a facade for emotion112 and personal preference. Skeptics fear the symptomatic subjectivity of ethics.113

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111. The Socratic dialogues suggest that questions posed by Socrates seriously threatened some participants in his probing conversations. See, e.g., PLATO, GORGIAS, supra note 2; PLATO, PROTAGORAS, supra note 2.

112. Paul Tillich makes the similar observation that religion, “banished to the realm of mere feeling, has ceased to be dangerous for any rational and practical human enterprise.” TILLICH, supra note 98, at 7.

113. To deal with this fear we need to expand, dramatically, our understanding of subjectivity and its non-pejorative possibilities.
Subjectivity leads first to healthy skepticism, then becomes pathological cynicism when moral discourse evokes the kind of fear of conflict that turns us away from ethics talk. In contrast to ethics, we put our faith in reason and law with the hope that arguments can proceed, conflict can be resolved, and that we can be spared the sickly feelings of inadequacy and futility when confronted with moral differences. The faith in law as a fantasy final cure for subjectivity lies in the belief that matters of difference can be settled, that conflict can be resolved; law displaces ethics.

All of us, all of the time, cannot share a common sense of the value of moral discourse. We are not all equally prepared to engage in moral discourse. We are not all equally healthy, in the Socratic sense, in mind and soul. In the absence of an authoritative view of what it means to be a good lawyer, we are left with our symptoms.114 But to say that no single comprehensive ideal

114. I do not have, and cannot offer, a prescriptive, fully defined set of morals that you will want to live by. There is no unitary conception of the good lawyer that would allow us all to be both good lawyers and good persons. The situation should not overly disturb us:

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. JASPERS, supra note 65, at 29.

We say we are a pluralist society and we say it with pride. Tolerance is a value; "live and let live" is more than a libertarian motto. But when we point to the plural nature of our society, we also are using it as a defense: what I disdain, another prizes; therefore, my tolerance precludes me from moral judgment. It is this notion of tolerance that leads to the conclusion that "it is beyond the capacity of us Americans to engage in productive moral discourse with one another." PERRY, supra note 110, at 4. Perry finds this proposition "sobering, even frightening—it presents a bleak, dispiriting vision of human relations—and ought not to be accepted uncritically." Id.

Perry begins his analysis by asking whether there can be moral knowledge. Id. at 9. Do moral claims have any truth value? The skeptic says no. The relativist says no. 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.
of the good lawyer is conceivable or that we have no ready-made
guide for moral discourse to form one, does not mean that the
conversation ethics is destined to fail, although it must inevitably
be haunted by the specter of failure. Even the nastiest of
symptoms serves to guide us back to health.

The certainty we seek in avoidance of conflict makes us
disdainful of moral discourse. Few are willing to forego
comfort and security for the frustration and conflict that ethics
holds out to us. Who among us has appreciation for discomfort,
anxiety, confusion—exactly those conditions and symptoms that
speak to our moral state of affairs? But just as the symptoms of
psychological and physical disorder have a positive function, so do
the symptoms of discomfort when we find ourselves in moral
disagreement.

IX. PROTECTING OURSELVES AGAINST THE VIEWS OF OTHERS;
OR, HOW CAN YOU QUESTION MY OPINION?

One concern as we begin to talk with each other about
ethics—yours, and mine, and the ethics of lawyers more general-
ly—is whether our conversation is a ruse to promote a particular
moral creed about how we are to live as lawyers. The answer is

115. I have attempted to articulate some preliminary thoughts on the role of failure
in moral discourse in a previous essay. See Elkins, Ethics: Professionalism, Craft, and
Failure, supra note 98.

116. We have a need for certainty, for reassurance that we will get to where we have
set out to go. The subjective, ephemeral, open-ended quality of ethics makes us anxious.
We are afraid to question our purposes and whether the life we choose to live is worth the
cost.
yes and no. No, ethics talk does not mandate a particular moral creed. But then, as a lawyer, a professional, a public actor, and a citizen, you are not free to adopt any creed that suits your fancy. It would be a contradiction in terms, for instance, for you to espouse what is immoral (e.g., harming those who seek to tell the truth) and still claim to be a good person. It is a basic proposition of moral life that ethical awareness calls for us to consider harm to others, and if truthfulness requires, admit to our complicity in the suffering caused by our actions.117

We should have no illusions about being able to induce or indoctrinate anyone to accept particular ethical notions and ideas. We have no power, ultimately, to prevent each other from becoming the moral persons we have set out to be. Each of us has the strength and the will to shield ourselves against the onslaught of peculiar, idiosyncratic, and destructive ideas.118 Even so, we can work together to be on guard when our talk becomes intolerant and we endanger ethics talk with dogmatism.119

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A fundamental premise underlying moral discourse is that some people live better lives than others. Some of us make better choices than others. Some have more character. Consequently, not every notion about lawyering ethics is equally deserving of acclaim. Some opinions and assumptions about lawyering are

117. Ethics helps us experience and evaluate the harm that follows from choices, decisions, and actions. Ethics links persons and actions to consequences. We can, with an education in moral discourse, see that the words and ways of expression that we now routinely accept as uncontroversial are subject to re-valuation and re-qualification.

118. I assume this intellectual and psychological characteristic to be present, knowing that, for some, it must be absent. I hold this assumption the way a therapist assumes that every patient has the capacity to learn to live a better life, the way a parent assumes his or her child is a good kid, even when empirical evidence points the other way.

119. Dogmatism takes different forms. In one sense, all teaching can be said to traffic in dogmatism, the dogma of reason and knowledge, set against the dogma of experience and belief. Teaching requires choice; it requires inclusion and exclusion. If teaching has any substantive content and the substance is backed by commitment, there will be talk of dogmatism.

For expressions of a teaching sensibility that engages us about our life projects, while being dogmatic only about engagement as engagement, see Howard Lesnick, Being a Teacher, of Lawyers: Discerning the Theory of My Practice, 43 HASTINGS L.J. 1095, 1099 (1992) ("Our teaching should be informed by our own ongoing engagement with the questions: 'Who am I? What am I doing here? What should I do with my life?'").
better than others. The object of moral discourse is to engage in moral inquiry about the possibilities, constraints, and character of our moral notions about the good of lawyering.

It is not easy given the world in which we live—it has never been easy—to determine what constitutes the good. The difficulty of the task does not mean that we can simply treat every impulse as if it were a good moral one. We do not because to do so would be a violation of the moral notion that some morals are better than others. Thieves have morals, but we don’t respect thieves, and we don’t want them teaching our children the morals associated with their work and their way of life. In moral discourse we are given an opportunity to re-examine lawyer ethics, seeing, in a new light, the better and the worst of what we do as lawyers.

Every person is, as we are all too frequently told, entitled to his or her opinion. No one who prizes personal and political freedom would have it otherwise. A thief is entitled to his opinion about morality even though from a moral perspective it is a mistaken one. If we are not to become tyrants to opinions, and by tyrant here I mean one who has no compulsion to listen to others, then we must find a way to listen to others (and they to listen to us) and see if we cannot by reason and passion, rhetoric\textsuperscript{120} and story, get beyond our settled opinions. If moral discourse is not to consist of the public airing of opinions, and if some opinions impoverish our character, what are we to do?

\textsuperscript{120} DAVID M. RICCI, THE TRAGEDY OF POLITICAL SCIENCE: POLITICS, SCHOLARSHIP, AND DEMOCRACY 301 (1984) ("a great conversation relies very heavily on time-worn and emotional terms, many suffering from imprecise character but still carrying enough moral authority, by precedent, habit, experience, and spiritual commitment, to be capable of moving many people in the right direction much of the time").

\textsuperscript{121} There are times when our language is inappropriate, lax, lazy, insubordinate. Words, as Paul Ricoeur points out: "[M]ay also be used so as to say nothing, to gossip, to lie, to deceive and, lastly, to lead to delirium. Consequently, work may easily put to shame the word which, it seems, does not make anything. Hamlet speaks of the vanity of speech: \textit{words! words! words!}" Paul Ricoeur, WORK AND THE WORD, in EXISTENTIAL PHENOMENOLOGY AND POLITICAL THEORY: A READER 36-65, 52 (Hwa Yol Jung ed., 1972).
First, a moral person will acknowledge that ethics is not subjective in the sense that you have your ethics and I have mine, nor is ethics objective in the sense that there is some definition, prescription, code, set of principles or rules, that fully describes ethics. Ethics, like the two-faced Roman god Janus, faces us, at one and the same time, toward subjective and objective aspects of the good life.

To say that ethics is subjective does not mean that every moral opinion, idea, and thought constitutes a moral good. We don't accord the opinions of racists and sexists the same qualitative place that we do those who seek equality. To assume that every belief is equally valuable would value true and false, functional and dysfunctional, empowering and disempowering beliefs equally. A person could not live and function in a civil society without making moral discernments. As a practical and political matter we know that every person is entitled to an opinion, but having the political and legal right to express an opinion does not mean that we should value bad opinions or take impoverished notions of the world to heart, adopting them as our own. If there is, as Socrates argued, a demonstrable difference between true and false beliefs, then a true belief is more valuable than a false one. A good opinion is more valuable and useful than a bad one. If there were no discernible differences in moral judgment we would have no use for ethics talk.

X. RELATIVISM; OR, MORALS ARE AN INDIVIDUAL MATTER

If each of us has her own approach to ethics and the approach is personal and idiosyncratic, then all opinions and beliefs—regardless of the harm they tolerate—are immune to criticism and judgment, persuasion and re-evaluation, and

122. The argument that we make up our own ethics, framed by the subjectivity of an idiosyncratic perspective is, at its extreme, a form of philosophical skepticism known as solipsism. See Nagel, supra note 36, at 11 (solipsism is the conclusion that “your mind is the only thing that exists”).

Without the capacity to consider, evaluate, measure, and reflect on what you identify as your own moral stance, and the harmful consequences of actions taken pursuant to this stance, then it will be difficult to persuade others that it is indeed a moral stance that you are taking.

123. See id. at 59-75 (providing a straightforward, philosophical account of how the discernment of right and wrong is fundamental to philosophy).
immune to the knowledge that might be gained from listening and thinking, learning and teaching.

If the moral worthiness of professional practices is not to be determined by explicit principles or a body of ethical rules (e.g., a professional code of minimal moral conduct), how can we know what is right? If we cast off from the mooring provided by ethical rules, how can we ever determine what is ethical for a lawyer to do? What values and ideals will guide our relationships with clients, other lawyers, and with ourselves? Is every opinion offered in the name of ethics equally valid? Is every ethical stance as good as any other? Most simply put, how will we know what to value, what to cherish?

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The students in the seminar I taught were asked to read the story of Richard Rodriguez, a Mexican-American and self-acclaimed “scholarship boy” who mastered academic life at Stanford.124 Rodriguez's story describes the transformation he underwent from the familial world of his Mexican-American childhood to an English-speaking world of middle-class American manhood. The students have been asked to consider how, and in what ways, Rodriguez's memory of his transformation evokes memories of their own gains and losses as they undergo the rites of passage that lead to initiation into the priesthood of lawyers.125

During the discussion of the Rodriguez story, Karen, a student in the seminar, rejects Rodriguez's narrative because of what she describes as his bitterness toward his parents and


A political scientist has presented similar accounts. See James C. Foster, Antigones in the Bar: Women Lawyers as Reluctant Adversaries, 10 LEGAL STUD. F. 287 (1986); James C. Foster, Legal Education and the Production of Lawyers to (Re)Produce Liberal Capitalism, 9 LEGAL STUD. F. 179 (1985); James C. Foster, The "Cooling Out" of Law Students, 3 LAW & POL'Y Q. 243 (1981).
teachers. She argues that Rodriguez should have been thankful for the education they made possible. Other students, and the teacher, are surprised at Karen's reading of Rodriguez. The story they hear is that, as Rodriguez learned English, he began to model his life on that of his English-speaking teachers. He confesses that as an adolescent he was at times ashamed of his parents' poor English. In remembering his education, Rodriguez sees that it was his identification with the public world of his English-speaking teacher and his desire to be a "public man"\textsuperscript{126} that provided the context for his childhood attitudes toward his Spanish-speaking parents. Richard Rodriguez's education as a "scholarship boy" and his assimilation into middle-class white culture is costly, but it is not clear that his honest evaluation constitutes bitterness.

Karen becomes increasingly defensive about her interpretation. "It is," she claims, "just a story and I am entitled to read it any way I want." What is one to say in response to Karen and her claim about Rodriguez, whether or not it is misguided? More problematic, how is her claim about her reading and interpretive ethic to be regarded by others struggling to understand Rodriguez? Is Karen right that stories can be read any way we want? Her adamant claim that when she reads a story she, with justification, can read it any way she chooses, is at once a wild, undisciplined assertion of freedom and a statement of a relativist interpretive stance.\textsuperscript{127}

One response, the power move (the prototypical law school move), is to prove that Karen's reading is misguided\textsuperscript{128} and try to demonstrate better readings of the story. I have made the power move, and it has left me with the troubled realization that I would have been a better teacher if I had listened more deeply, probed more fully, and proved less. To listen carefully to the relativism embodied in Karen's response, I must see a value or quality in her stance. I must try to hear Karen speaking in a way

\textsuperscript{126} Rodriguez, supra note 124, at 7.
\textsuperscript{127} I should point out that Karen's relativism cannot be assessed on the basis of a single interpretive move. Relativists reveal themselves as they engage us in sustained moral discourse over time. Karen's relativistic stance was confirmed in her reading of other texts and other classroom interpretive moves.
\textsuperscript{128} Ironically, such misreadings of a story push us to see how our subjectivity as readers and interpreters of texts works.
that reflects not only her belief, but as the expression of a culture she brings to her reading. Yet, by attentive listening, I do not want to confirm silently a narcissistic indulgence of interpretive relativism that muddles public discourse.

To work with Karen’s relativism, therefore, I must know what I am hearing. To do that I must ensure that I am listening. And to do that I must know something of Karen and how she comes to this relativistic interpretive ethic that closes her off to argument and persuasion. Karen, troubled about the condition of the world, just as I am, clings to her isolating relativism. Is her relativism an attempt, perhaps a misguided one, to take a moral stance in what she fears to be a hopelessly amoral world? If relativism is a stance of hopeful tolerance in a world of dogmatism, then I must learn to listen to the rhetoric of relativism with more care than it often seems to deserve. Relativists may turn out to be pragmatists whose realism shields them from the trouble-ridden world that they seek to enter as professionals.

Karen is taken by surprise when her reading leads to talk about relativism. Karen, like other relativists, assumes that her argument is intuitively sound and beyond refutation. She assumes she is telling us something we already know and accept. Karen’s relativism is not a worked out theory, or an explicit, articulated philosophy, but an embedded, unreflective way of

129. Thomas Nagel suggests something along this line in his observation that “[a]s a last resort, those who are uncomfortable without convictions but who also cannot manage to figure out what is true may escape by deciding that there is no right or wrong in the area of dispute, so that we need not decide what to believe.” Nagel, supra note 24, at xi.

130. Milton Mayeroff has written:

To care for another person, I must be able to understand him and his world as if I were inside it. I must be able to see, as it were, with his eyes what his world is like to him and how he sees himself. Instead of merely looking at him in a detached way from outside, as if he were a specimen, I must be able to be with him in his world, “going” into his world in order to sense from “inside” what life is like for him, what he is striving to be, and what he requires to grow.


131. Perplexed by the cultural drift toward moral confusion in public life, I consider education, and my teaching, to be in service of the idea that we must understand Karen and her rhetorical and moral stance, or we will forever be confused about moral discourse. The opposition to moral relativism that I envision is not dogmatic opposition; it takes account of relativism as an experienced truth, a real world ethical dilemma, an ethical theory, a partial truth that finds its way into moral discourse.
seeing the world. Karen herself makes clear that she is being what she calls "argumentative" and is not articulating a philosophy. She argues that she is simply voicing an opinion—one woman's opinion is as good as another's. The problem is that her opinion, this day and others, is not just a personal opinion, but a rhetorical stance with serious moral implications. What begins with an old adage—one person's opinion is just as good as another's—becomes for the relativist a way to insulate a stance against personal and political challenge.

Exposing anything personal to public cynicism, in particular the cynicism that accompanies the law school version of the Socratic method, poses an imagined, if not real, danger. Another way to protect what is important—love, family, ethics—is to withdraw it from the public realm of scrutiny into a private realm of silence. It is by silence that we make ethics personal and private. It is true that we may also choose not to talk about ethics for the reasons we do not talk about justice, civility, love, friendship because we doubt the sufficiency of language to express what we feel; or we may doubt our skill at using what language we have to express our feelings; or we may believe that even skilled use of language will result in a tangle of misunderstanding. It is difficult to talk about things that matter deeply, to articulate our concerns about the world and our place in it. Relativism disguises difficulties we are unwilling to confront.

132. In various encounters with relativists I have found that they take pleasure in argument and are comfortable in the spotlight. Adept at gaining attention, they are still wholly unprepared for critical scrutiny of their relativist views. The argument that ensues when relativism is questioned sounds like verbal ping-pong. The relativist sees it as a semantic game.

133. To oppose relativism raises the specter of psychological and political dogmatism. The politics of equality make the equality of opinions a fundamentally unassailable idea in the eyes of the relativist. The confrontation of the relativist with the counter-understanding that some opinions are indeed better than others—that some values are more significant than others and that some ideals and beliefs lead to a better world than others—leads the relativist to conclude that claims about the relative value of opinions is elitist, undemocratic, and totalitarian.

As the relativist becomes more adamant in her claims, the conversation proceeds to gridlock. Whatever appeal to reason or experience, whatever form the rhetorical response to Karen takes, she clings ever more tightly to her position. At this juncture the conversation falters.
XI. FALSE NECESSITY; OR,
I DON'T SEE HOW IT WILL EVER CHANGE

We are, in whatever we do as moral actors, either critics or conformists. A critic tries to see through the world. Conformists accept the world as it is. We live our professional lives on one side or the other of the critical/conformity divide. There may indeed be forays across the divide, alone or in the secure company of others, and we may fantasize a healthy mixture of both—"Sometimes I'm critical and sometimes I'm not"—but it can be no more than a fantasy built atop the moral, political, and cultural fault-line of the dialectic of criticism and conformity.

We are all, in one sense, conformists. Our embeddedness in the world of everyday reality pulls us into ethical stances that we adopt without reflection.134 There is always someone standing by to define me, to put and keep me in a box, suggesting that I take the already marked path. Necessity abounds. The day is filled with demands labeled as necessity. Our lives are caught up in the structures, routines, conventions, and traditions we accept as real and unavoidable.135 We answer to the system within

134. One phenomenological sociologist described our conformity this way:

The human actor, as a socialized member of society, operates within a life-world that is pregiven and already organized... The language he learns, the culture he acquires, and the social structures within which he lives provide him with a stockpile of typifications, of recipes for interpreting and acting, and with a stock of knowledge that forms the basis for even his imaginative exploration of courses of action other than those he already knows.

The life-world (Lebenswelt) is not only prestructured but the meanings of the elements contained within it are also pregiven. The stock of knowledge provides the actor with rules for interpreting interactions, social relationships, organizations, and institutions. And when the unexpected happens or new situations occur and the taken-for-granted is thrown into question, only then is he forced to consider alternative schemes of interpretation.

Thus, within the standpoint of the natural attitude, the individual is not motivated to question the meaningful structures of his life-world. His interest is a practical one and his task is to live in rather than to make a study of the life-world.


135. While there is much foolish romanticizing of the primitive, I have no doubt that at some early time in our evolution as cultural beings the ability to experience the present moment was more easily sustained, and evoked in sacred ritual, than it is today. Or perhaps that is one of the fantasies that I project onto the past and imagine as a quality of the primal mind. That some part, if not much of life, is devoted to the sustained effort to survive in the face of necessity, and its facelessness, is a fate we share with our
which we work and, in doing so, we become conformists. The
danger is that we do not admit that we are conformists.

We are surrounded with conventions and traditions that cover
us like the blankets we pull around us on a cold night. You may,
of course, reject homely conventions and try to forge a self that is
modern, contemporary, mobile, elastic, protean, secular—in short,
a self that finds little need to talk about ethics. Or, uncomfortable
with life, fearful of what you see happening around you, you
may retreat and seek a sense of self rooted in established ways.

Some of us immerse ourselves in everyday life and live with
what we are given, living decent lives in doing so. Others want
to change the world, make it safer, more peaceful, and more
aesthetically pleasing. Still others, confused or afraid, resist
change and pledge their lives to unacknowledged conventions.136

Can we see the world clearly enough to know what kind of
world we are in and how it might change? Is there something
wrong with the world?137 Your stance on this question will find
its way into your ethics talk. You must believe in some funda-
mental way that the world works in the way that it should, or
that it does not.138 We believe in the world and accept it as it
is, or we register our disdain for the way the world works. A
critic resists conformity in the belief that something has gone
wrong with the world. Optimists are of two sorts, those who find
too little wrong with the world or their place in it to seek critical

ancestors.

136. Between these polar stereotypes we find the skeptic who finds the world a mess,
but sees little possibility of repairing the mess and, thus, little patience for talking about
the situation. “I do not,” the skeptic says, “have the power to change the world, or a single
person in it. I am powerless. I am weary. I am too disgusted and angry to be of any
help.” See PERRY, supra note 110, at 9-10 (explanation of the stances of other skeptics).

137. NICHOLAS RESCHER, ETHICAL IDEALISM: AN INQUIRY INTO THE NATURE AND
FUNCTION OF IDEALS 85, 87 (1987) (“The quarrel between an optimistic and a pessimistic
appraisal of the world’s course is an ancient one. . . . Optimism in all its forms is
indissolubly linked to the dimension of value. All the various modes of optimism are
evaluative positions that contemplate some manner of goodness . . . ”).

138. It is a stand that tells us something of your philosophy and the place that you
give critical reflection in your ethics. See Max H. Fisch, The Critic of Institutions, in THE
OWL OF MINERVA: PHILOSOPHERS ON PHILOSOPHY 135-51 (Charles J. Bontempo & S. Jack
Odell eds., 1975) (arguing that philosophy should be viewed as a critique of institutions).
change, and those who seek critical change to justify morally their optimism.

What, if anything, has gone wrong? If something has gone wrong, what are the symptoms of our malady? Consider the following philosophical and rhetorical scenarios we find in ethics talk:

(i) There is nothing wrong with the way things are now. "I have a good position, and am in a good situation. I do not want to undermine what I have achieved." Mark Tushnet responded to this sentiment with the observation that: "Particular people in particular societies have interests in maintaining things as they are. You can talk to them until you're blue in the face about how they would lead more satisfying lives if they abandoned their positions of privilege, yet you're not likely to get very far."

The other philosophical strand of—"there's no reason to change"—comes from a semi-explicit social theory: there is nothing wrong with the way things are now because it is natural that things exist as they do and, even if we turned things upside down, they would return to the same hierarchial order of their own accord.

(ii) There is something wrong with the way things are now, but we must live our lives with what we are given:

The great majority of people in most human societies is conservative. The reasons for this are not at all mysterious. Most people are conservative in the sense that they take the basic structures of their society for granted and try to work out the problems of their own lives within these structures. . . .


140. In an elegant essay, Robert Grudin observes that:

[M]ost of us go through life assuming that the world, give or take a tree here or a building there, was meant to be more or less what it is. We tend to accept the status quo, in general terms, as the limit of possibility. The essence of inventiveness lies in trashing this assumption.

Difficulties of Talking Ethics

This conservatism is typically unreflected, not given to theorizing, self-assured rather than defensive in tone.\(^{141}\)

We can change what is wrong only when we know how to fix it. Until we know how to fix what we know is wrong, there is nothing to do. There is simply no program, ideal, or vision that adequately explains how to fix things and make a better world. Until a reform program is spelled out and given a high probability of success, we should not attempt to change things—even if something is wrong. And, whatever may be wrong, things are getting better.\(^{142}\)

(iii) There may or may not be something wrong with the present situation. We don’t have to decide finally whether something is wrong because those who seek change cannot be trusted. “The problem is that I don’t trust those who diagnose the problem and want to change things. The people who want to change the world are just as bad as those who want to keep it the way it is now. When you turn the world over to those who seek radical change, they put themselves in power and then go about business as usual.”

Others, uncertain about the present situation and the need for change, have a psychological aversion to change. “I just don’t like constant change. Stability, certainty, and predictability are important to me and even if our situation is not perfect (is it all that bad?) it is better to continue as we are than to try to change things.”

(iv) There is something wrong, but to change it only creates problems. “We have to think about the consequences of change. We may not like things as they now exist but there are others who do, and they have power. If we make the changes necessary to make the world work the way we want it to work, we will incur the wrath of the powerful and they will interfere/impede/block our changes.” Or a bleaker scenario: “Those who have power will take notice of the changes we seek and punish us in unimaginable

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142. We might label this kind of optimism as *meliorism*. See RESCHER, supra note 137, at 87, 92-98.
ways. To change what we now know to be bad will retard the slow progress we have been making."\textsuperscript{143}

A variation of this view accepts that things need to be changed, but fears that change has the potential to turn against us and make matters worse. Stability and certainty, even with a bad situation, reduce the risk that things might become worse. We vary widely in our ability to cope with uncertainty and to take risk. On this point, Roberto Unger notes that:

\begin{quote}
We ordinarily admit into our thoughts only that measure of seemingly disordered reality to which we can give an active response. To limit the perception of reality is the natural strategy of intellectual survival: the mind fears being overwhelmed by more than it can imaginatively order. But unless we occasionally move at the edge of our imaginative capabilities we cannot hope to extend our vision of reality and to refine our conception of how things may be ordered.\textsuperscript{144}
\end{quote}

(v) There is something wrong, but there is neither time, energy, nor resources to change it. This view builds on the idea that there is both good and bad in what we do. Although the bad may predominate, and need changing, we also do much that is good, and in doing the good we expend our energy and exhaust ourselves. "Do the best you can with the good and suffer the bad," they tell us. In doing so we participate fully in the inevitable compromises of modern social institutions. "Yes, things are in bad

\textsuperscript{143} We are reminded by Frank Michelman that:

The result of confrontation is unpredictable: it might be incomprehension, denial, or repudiation. Or it might be progress. If you ask me, the odds on progress are not favorable. That, however, is not a reason for not trying if there is nothing much to lose. And what is there to lose?

Frank I. Michelman, \textit{Conceptions of Democracy in American Constitutional Argument: Voting Rights}, 41 FLA. L. REV. 443, 490 (1989). Michelman, drawing on his revisionist civic republicanism, posits a "dialogic conception" of the self in which "a person's identity is partially constituted by that person's social situation, and personal freedom accordingly depends on a capacity for self-critical reconsideration of the socially embedded ends and commitments that partly make one who one is." \textit{Id.} at 450; \textit{see id.} at 443-52 (providing a dialogic, self-constitutive theory of politics); C. Edwin Baker, \textit{Republican Liberalism: Liberal Rights and Republican Politics}, 41 FLA. L. REV. 491, 514-15 (1990) (observing that "[c]ommunicative action is central to our identities, as well as to deliberative politics" and that the "conception of a person as a being who engages in communicative action, therefore, both leads to liberal supra-political rights and implies the necessity of an everyday politics that is, at least in part, deliberative and constitutive").

\textsuperscript{144} \textit{Unger, supra} note 9, at 87.
shape, but we have to be realists. We must do what we can and make the best of it. Life is not a bed of roses.” Here we see a pragmatic assessment of the possibility of change that combines a sense of realism (what is possible) and futility (we can’t change it).

(vi) There is something wrong, and it must be changed slowly through negotiation with those who oppose change. There are those who see clearly how a situation works and can articulate the nature and basis of needed change, and yet ally themselves with those who oppose change. The reformer believes that things must change, but that all change must take place within the terms and conditions established by those who resist it. Change is compromised because it proceeds only upon agreement with those in power and is implemented in a way so that no one in power is threatened.

Thomas Shaffer and Stanley Hauerwas, in a beautifully crafted essay on Sir Thomas More, observed how power is an incentive to delusion about change. Compromise is the sweet name we give our giving in to power. Lawyers are asked to compromise, Shaffer and Hauerwas observe, because power seems to offer a way to improve society:

Lawyers are always being asked to bend a little, so that power can work, and things can be made better; lawyers are always being told—always telling one another—that the essence of their profession . . . lies in working within the system. They are always being told that someone has to do the job, that if they don’t do the job, someone worse will do the job. Things have to be done in office that cannot be done with moral comfort in private life, but that is the way office (including the license to practice law) is.

. . . It is important, first, to notice that we are talking about a compromise with truthfulness, a compromise demanded of public persons, which comes about because the person who makes the compromise is optimistic. It is important, second, to notice what we mean by compromise. It is not compromise, in this sense, for the public person to adjust his views to the views of others when there seems to be no clear right or best

145. Hauerwas & Shaffer, supra note 86.
thing to do—when, in other words, he needs their views as much as they need his, when all of those most immediately involved are seeking truth. It is not compromise . . . to commit oneself to the discovery of the truth through a willingness to share the variety of ways people discover when they set out to lead good lives. What we mean by compromise is an agreement to bracket one’s basic convictions in order to achieve certain limited ends. Compromise . . . assumes that the good society is based on power. Compromise is . . . to be distinguished from respect and civility, and even the concessions people make when they work together on the assumption that the good society is based on truth . . . . Compromise asks the loss of self; it also destroys the possibility of good societies.

Compromise is destructive because it becomes institutionalized and accepted as a proper way of life. When that happens, the distinctions between the public and the private . . . become a sign of despair. The distinctions come to say that the social world cannot be held together by truth. A society afflicted by the syndrome of the two kingdoms [the effort to erect compartmentalized worlds of public and private morality] raises up leaders who have trained themselves to believe that their public roles are their selves, who define themselves by roles (e.g., the role “lawyer”). They are compromised before they enter the fray. When this happens, as it may well have happened to us Americans, it is no longer honest to distinguish between the public and the private person . . . . There is no private person left. Power, as requiring the surrender of the private person, is what . . . [we are] struggling with. Power threaten[s] the private, adamantine sense of self . . . .

Here, virtue is a tangled trail through a dark forest. The practical man or woman of affairs tends to believe that it is egocentric not to make such a compromise. Refusal seems to betray hope (optimism), for to be unwilling to compromise is to cease to be effective, and it is important to be effective. (The way power corrupts is by gradually convincing those who have power that the most important thing is to be effective.)

How does truth affect change and bring about transformation if it succumbs to power or is defeated by it? Why bother with truth? Or ethics? No one sets out to be a loser. There is, as the

146. Id. at 581-82 (footnote omitted).
late Robert Cover suggested, a very real danger "that the gulf between the redeemed world [reality] and the unredeemed [the yet unrealized vision of a future world] will [not] be bridged . . . by our committed practical behavior."

(vii) There is something wrong and we tried to change it and failed. "We must now live with what we've got. Radical change has, as always, failed. We must live with the situation as it is." The "change failed" scenario, or resigned realism, lies in a sense of tragic resignation that preconditions us to accept the inevitability of failure.

(viii) There is something wrong, but it doesn't matter one way or the other whether we try to change it. "I really don't care whether we do anything or not. It's all the same one way or another." In cynicism, denial masks the ignorance of indifference.

(ix) There is something wrong, but this is not the time or the place to fix it. "Let's wait. We can start tomorrow. Now is not the best time. When the time is right we will change things." "Why do today what will wait until tomorrow? It will eventually get done." Procrastination is elevated to a virtue.

(x) There is something wrong, but we don't have the courage to fix it. Clarence Kelly, the former director of the FBI, relates how FBI agents' fear of J. Edgar Hoover thwarted change.\textsuperscript{148} Robert Sherrill summarized the situation:

Nobody ever told Hoover the truth, says Mr. Kelley, because to do so might upset him; besides, if you showed too much savvy, Hoover might see you as a rival and get rid of you. Apparently Mr. Kelley was as intimidated as the rest of the crew. He admits that, "on many occasions I saw the opportunity to initiate changes that would have produced better investigations by the Bureau" but "my experience with headquarters' officialdom cautioned me against any departure from FBI


norms. Essentially, I did what others had done before, and rocked no boats.”

The danger of not acting on the impulse to change the world and ourselves is cynicism and decay.

(xi) There is something wrong, and when we change ourselves we will change the world. Erich Fromm argued that we can change human character if we suffer and are aware that we do; recognize the origin of our ill-being; recognize that there is a way of overcoming our ill-being; and accept that to overcome our ill-being we must follow certain norms for living and change our present practice of life.

XII. EPILOGUE: A TROUBLED JOURNEY

When we engage in ethics talk in conversations about the world in which we actually live as lawyers, we begin to see how paradoxical, difficult, obstacle-strewn, and symptom-laden moral discourse turns out to be.

You can sort out, when confronted with moral discourse, what you hear and your feelings about ethics, and, using old mental maps, judge ethics talk to be impractical and worthless. Or you can use ethics talk to trace the magnetic outlines of the moral terrain that push and pull lawyers to and fro in their work. The old maps you use to judge ethics talk may turn out to be invaluable, but you cannot know that until you explore the terrain.

149. Id.
150. The danger of the impulse to change others and the world is dogmatism.
151. FROMM, supra note 54, at 155.
152. What I have in mind here as an antidote to conventional magnetic moral forces is described by Anthony Cook in his survey of the critical moral elements of the world-view of Martin Luther King, Jr.:

[We] must meet and talk together, appreciating our respective histories and experiences of alienation and oppression. We must talk specifically about the kind of community we would fashion and how the rules, laws, and rituals defining the roles we adopt can be mutually empowering and facilitative of a community of equals. We must talk specifically about how we should organize, protest, agitate, and struggle to achieve our objectives, realizing that we are perennially engaged in a dialectic in which the program shapes our practices, which in turn refine and redefine our program.

Cook, supra note 63, at 1044.
and evaluate your map(s) against the life you and other lawyers live. One might, from a stance of suspicion or faith, pursue moral inquiry to see what it might teach about the maps we have made of the moral universes we inhabit.

We want reassurance that ethics is a good map for the real world. Although there are maps—ways of life, moral principles, and religious beliefs—that provide abundantly clear directions to moral pathways we might follow, many of us take up ethics with the idea that we must draw the map for ourselves.\textsuperscript{153} To live the lives we want to live we attempt to re-draw the moral maps we have inherited. We assume the freedom to re-forge old ethical sensibilities because we mistrust those who would impose their ethics on us.

There is no readily available map that charts the moral terrain of contemporary professional life. Sound judgment, concern for others, sincerity, and authenticity are essential elements of professional character, but law school bookstores don’t sell reference books on how to develop these virtues or deal with those who lack them. There is no authoritative map or guide to show us how ethics can be made central to the practice of law and how we are to form agreements about a good life (or live a good life in the absence of moral agreement as to its nature). Moral discourse cannot, then, help us discover a true map or establish a set of final prescriptions for how to be a good lawyer, or negatively, how to avoid being considered an unethical lawyer. But there are many who hold adamantly to the necessity of just such a discovery.\textsuperscript{154} Otherwise, they wonder, why talk? Moral discourse, like any conversation, is not predestined to lead us one

\textsuperscript{153} We play loose and free with this imagined freedom to configure a new ethics of the day. The problem is that our ongoing, everyday, flexible, self-made ethics becomes, not just situational, but solipsistic and relativistic.

\textsuperscript{154} Bernard Williams points out that “[o]ne reason why conservatives and traditionalists attack reflection [the reflection encouraged by moral discourse] is that they fear the uncertainty that seems to follow from it.” WILLIAMS, supra note 66, at 168.
In moral discourse we find out where we are going as we get to where we should be.\textsuperscript{155}

Regardless of the map we use, it is hard to do ethics, to talk ethics, to take ethics seriously. In response to the invitation of moral discourse, some are silent. Some are silent because they assume ethics talk is futile. Others because they fear that expressions of moral concern in some way will be used against them. There is a fear of disapproval, of revealing an inner weakness. Finally, there are those who have social and political agendas that are best promoted by the secrets of silence.

Some seek, with their silence, to protect vulnerable ideals, beliefs, and values. There are times when we do not have a voice to speak of things that matter most to us. Personal faith and beliefs are vulnerable to the rough treatment of public exposure.

Silence has many faces.\textsuperscript{157}

\textsuperscript{155} The uncertainty will be unacceptable to some. They posit goals for themselves because they cannot imagine being without a predetermined destination. Lloyd Weinreb, speaking of his effort to provide a new explanation of natural law said, "I have tried to provide something of a map and frequent road signs; but the destination can only be announced and is not fully in view until journey’s end." Lloyd L. Weinreb, Natural Law and Justice viii (1987). So it can be said of moral discourse and the conversation ethics. As in all philosophy, "[t]he answer has to be discovered, or established, as the result of a process, personal and social, which essentially cannot formulate the answer in advance, except in an unspecific way." Williams, supra note 66, at 200 (arguing that we answer the most serious philosophical questions through reflective living).

\textsuperscript{156} There are no guarantees that moral discourse actually will make us into good persons, or that it will get us where we want to go. The conversation ethics exposes the fear that we do not actually know where we are going and that where we want to go may turn out to be less than desirable. For example, life on the lawyer fast track may turn out to be costly—witness the high levels of dissatisfaction with the legal profession now being voiced by young lawyers.

\textsuperscript{157} Paul Goodman observed that:

There is the dumb silence of slumber or apathy; the sober silence that goes with a solemn animal face; the fertile silence of awareness, pasturing the soul, whence emerge new thoughts; the alive silence of alert perception, ready to say, "This . . . this . . ."; the musical silence that accompanies absorbed activity; the silence of listening to another speak, catching the drift and helping him be clear; the noisy silence of resentment and self-recrimination, loud with subvocal speech but sullen to say it; baffled silence; the silence of peaceful accord with other persons or communion with the cosmos.

Goodman, supra note 46, at 15.
Difficulties of Talking Ethics

Some are subtle in their opposition to moral discourse. Ridicule is a common response. Others become dismayed, confused, and angry, and resist the inquiry into lawyer ethics. They do not want to hear that we must all suffer ethics talk.\(^\text{158}\) We must suffer because the conversation ethics uncovers the neurotic baggage we bring to ethics talk and the moral trouble—confusion, anger, perplexity—that underlies the drift of our culture.\(^\text{159}\)

Ethics, in one fashion or another, inevitably makes its appearance in our lives and conversations, sometimes disguised, and when ethics arrives, unannounced, it makes trouble.\(^\text{160}\) We experience ethics as difficulty. Ethics and ethics talk, depending on how we live, make life unpleasant because we do not welcome difficulty. We do not know how to see or to use the difficulty of ethics, with its myriad symptoms, as telling us something about our lives as lawyers, indeed, something about our world and our culture. We blame the futility of ethics talk for our confusion and sense of impotence to change, to focus more directly on the good.

A journey into ethics talk will be deeply troubling if you bring to it the kind of law-trained mind and psyche that shuts down whenever you hear the word “ethics.” If you follow the bent of your law-trained mind and assume that the only way to study lawyer ethics is to study a body of ethical rules and the law of

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\(^{158}\) Maurice Natanson refers to this suffering as a kind of anguish: “[A]nguish may be understood as the threat of placing in fundamental question everything which assures our placement in the world. The force against philosophy can be measured by two components: first, the protection of common sense against “outside” invasion; second, the insulation of common sense against “inside” erosion.” Natanson, \textsuperscript{supra} note 36, at 15.

\(^{159}\) The moral perspectives we adopt are perspectives offered and pressed upon us by the world in which we live. See Joel Kovel, \textit{The Age of Desire: Reflections of a Radical Psychoanalyst} (1981) (exploring the socially shaped dynamic of our neurotic baggage).

\(^{160}\) With the turn to ethics talk, we are asked to re-evaluate and re-think what we have assumed to be beyond question. We lose a friend or a spouse. We experience some big or little failure. A colleague betrays us. Someone we trust breaks a promise. Or, we fail ourselves in some way that cannot be denied. There are times, then, when we become painfully aware of what we have taken for granted, times when we are forced to recognize what we have become and we see the toll our choices have taken in our own lives and in the lives of others. See, e.g., Tolstoy, \textit{supra} note 97. When the noisy party ends we are left with the truth and with ourselves. Our own ethics—accepted, operating on automatic pilot, half-hidden and forgotten, embedded and mythic—keep wandering into our lives, claiming their due, demanding attention, making their way onto center stage and into our scripts, and stories, and becoming a part of our professional lives.
lawyering, then you may feel lost and angry when the conversation centers on moral discourse. If you are threatened by the possibility that the practice of law poses a set of moral problems as well as moral possibilities, then you may find yourself hostile to an inquiry into lawyer ethics using moral discourse. If you measure what you hear about lawyer ethics by the folk wisdom of adversarial zeal, you can expect trouble. If you are threatened when your ethics are challenged, you may find it difficult to participate in moral discourse. If you are angered, threatened, or outraged by the critique of professional practices and the adversarial ethic that emerges from moral discourse, you may become defensive of both the legal profession and the choices you feel compelled to make in the name of what you now call “ethics.”

Ethics threatens our unreflective lives. The threat is especially pronounced for those who assume that the adversarial ethic and its excesses are morally excused by our professional role. Ethics makes the lawyer role and the ways of thinking attributed to the adversarial mindset, the subject of talk and critique, claim and argument, lament and condemnation. Ethics turns out to be the burr under the adversarial saddle we lawyers ride, sometimes in self-assured comfort, sometimes (secretly) knowing that we should be walking rather than riding. Ethics constitutes an obstacle in our headlong rush to adopt uncritically a legal persona, legal mindset, and legal voice. Ethics is a potent enemy to those who wear the lawyer mask uncritically and who hope to ignore the harm that lawyers do in the name of zealousness and professionalism, all the while calling themselves “ethical.”

Ethical inquiry and moral discourse will, unless we find a way to circumvent moral concerns, stop us in our tracks, block well-worn paths, interrupt ongoing assumptions and unexamined

161. Lawyer ethics is found in the language of condemnation and exhortation, as well as justification. We use ethics to condemn those who have gone astray; we extol professionalism to bolster the misshapen public image of the profession. We defend against the public rhetoric of condemnation and its assault on lawyer practices with a rhetoric of moral justification to soothe our moral concerns about the adversarial ethic. We turn to ethics for solace (the rhetoric of justification), spiritual absolution (the condemnation of those who stray from the moral path and the elevation of those who “make it” to the status of heroes), and image boosting (speeches bolstering the value of law and lawyering).
practices. Ethics interrupts the certainty and security we desire for our taken-for-granted lives. Ethics challenges those who would practice law as an unreflective and unexamined life.

Moral discourse demands that we confront ourselves about the ethical worlds we now inhabit. We confront ourselves in moral discourse because ethical talk exposes the parade of conflicts in the roles and lives held out to us as exemplary, as well as those in our own lives. Moral discourse is a dramatic work of revelatory conversation about how to be a good person and a good lawyer.162

Some fear that a lawyer who wants to succeed cannot afford to worry about virtue and character, about ethics. Some find the idea of ethics quaint, others conclude that ethics is absolute nonsense. There are some who find ethics not only alien, but subversive and dangerous because ethics questions established conventions about the role of lawyers and their adversarial ethic.

162. The characterization of conversation as a dramatic work follows Alasdair MacIntyre's observation that our conversations "belong to genres in just the way that plays and novels do" and have "beginnings, middles and endings just as do literary works. They embody reversals and recognitions; they move towards and away from climaxes. There may within a longer conversation be digressions and subplots, indeed digressions within digressions and subplots within subplots." MACINTYRE, supra note 53, at 196; see MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 378-94 (1986) (explaining Aristotle's use of drama, especially tragedy, in moral education). Kenneth Burke notes that "[in great eras of drama, the audiences know why characters act as they do. The characters themselves may be in a quandary, but the audience has merely to see them act and hear them talk, and the motives are taken for granted." BURKE, supra note 102, at 32. Burke argues that tragedy is at the roots of the ethical life:

Tragedy is a complex kind of trial by jury in which the author symbolically charges himself or his characters with transgressions not necessarily considered transgressions in law, and metes out condemnation and penance by tests far deeper than any that could be codified in law. Since tragedy is essentially concerned with the processes of guilt and justification, every full religious expression touches upon tragedy . . . . Tragedy reveals most clearly the workings of the criminal and expiatory processes implicit in human relationships. And it particularly concerns the complexities of ethics and psychology because of the close connection between tragedy and purpose. We might almost lay it down as a rule of thumb: Where someone is straining to do something, look for evidence of the tragic mechanism.

Id. at 195.

For Aristotle, the defining features of tragedy were pity (eleos) and fear (phobos). See WALTER KAUFMANN, TRAGEDY AND PHILOSOPHY 50-56 (Anchor Books 1969) (1968). "The most distinctive and universal feature of Greek tragedy was that immense and overwhelming suffering was presented to the audience." Id. at 373.
In the conversation ethics, it is possible to hear the unexpected and be asked to confront matters we do not fully comprehend. For some, the conversation ethics will be familiar and friendly. For some, it will seem alien and bizarre. For many, the conversation will result in confusion, discontent, and anger. Ethics talk can at times sound strange; it can be frightening to learn what those who purport to be good people will do. Some moral choices articulated in the guise of being an effective lawyer—choices articulated in the law school classroom, choices we see being lived out around us—are reprehensible. It is not always clear where the conversation ethics will take us.

We cannot talk ethics without a struggle. Yet, some see no purpose in the struggle of ethics talk. Others do not believe their ideals and beliefs as lawyers should be puzzled over in public conversation. There is the fear of self-exposure and that minor deceits, personal failings, and unconscious self-deception will be exposed. When we talk ethics, we expose ourselves and the fundamental notions we have formed about the world and our strategies for dealing with the world.

I know of no way to do ethics, to engage each other in ethics talk, that does not leave us, at times, dismayed, baffled, and perplexed. In searching for what is morally worthwhile, we face uneasy hesitations, silences, confusion, anxiety, disavowals, and denials. The conversation ethics is often a muddle and a mess.

The conversation about the moral and ethical dimensions of a life in law will take us on a rather long and arduous journey.

163. Or hear what was not said, or hear so little of what was said that an effort at elaboration results in distortion.

Moral discourse is sometimes like the parlor game where a group sits in a circle and one person whispers a message to the person next to him in the circle. The game proceeds by each person in turn repeating what he heard to the next person in the circle. The payoff in the game is the shock when the last person repeats what he has heard after it has traveled its way around the circle of speakers and listeners. When we speak to each other in our capacity as lawyers, the effect is only slightly less dramatic than in the game. Unable to confine our conversations, dialogues, and communications to simple, direct, unequivocal directives—"This is the law; this is what the law requires"—we learn and relearn the now familiar adage that the message sent is not necessarily the message received.

164. NATANSON, supra note 36, at 10 ("Self-consciousness . . . is rather strange precisely because the flow of our action is stopped and the scene of our involvement itself becomes explicit to reflection.").
On this journey, all of your symptoms, including those that upset you most (and especially these), are part of the drama and learning that make the journey memorable. As we talk and learn ethics, we see the limits of our adopted character, our moral reasoning, and our professional voice. We cannot participate in moral discourse and hide from each other our vulnerabilities, mistakes, and failures. A sense of disquietude, frustration, confusion, and anger can be instructive and can deepen understanding of what it means to be a moral lawyer. If, as seems inevitable, we become confused and go astray, we at least can be forewarned of our fate.\textsuperscript{165}

\textsuperscript{165} Even if we cannot say where our ethics talk about moral matters will take us and what we will ultimately do with what we say and hear, we can value those moments of clarity when we see the interconnectedness of our lives and work and the moral muddles that befall us. It is clarity that clients want from lawyers and are willing to pay to get. Clarity is not only a matter of legal training and an intellectual virtue, but a moral virtue honed in moral discourse.