Finding Our Way Back to Socrates

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> Law school obviously is the place to raise the questions and to attempt answers about the ethical dimensions of lawyer. The questions should be honored as important not only during a student’s tenure in law school, they should be an ingrained part of the lawyering experience.
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> —Joseph P. Tomain, *False Idylls of Lawyering*[1]

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> You think perhaps of philosophy as dwelling in the clouds. I hope you may see that she is able to descend to earth. You think that in stopping to pay court to her, when you should be hastening forward on your journey, you are loitering in bypaths and wasting precious hours. I hope you may share my faith you are on the highway to the goal. Here you will find the key for the unlocking of bolts and combinations that shall never be pried open by clumsier or grosser tools. You think there is nothing practical in a theory that is concerned with ultimate conceptions. That is true perhaps while you are doing the journeyman’s work of your profession. You may find in the end . . . that instead of its being true that the study of the ultimate is profitless, there is little that is profitable in the study of anything else.
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> —Benjamin Cardoza, *The Growth of the Law*[2]

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[1] Joseph P. Tomain, *False Idylls of Lawyering*, 35 J. Legal Educ. 157, 160 (1985).

[2] Benjamin Cardoza, THE GROWTH OF THE LAW 23 (New Haven: Yale University Press, 1924).

We find Socrates in the *agora* at the foot of an imposing hill crowned with the Parthenon. The *agora* is lined with small merchant shops, and beyond the shops, lies the bustling city of ancient Athens. The *agora* is filled with the shouts of merchants and shop sellers, and in a place where men gather to talk, there is Socrates engaged in conversation with his colleagues.

It would, of course, help to imagine this scene, if you have walked in the *agora*, wandered through the *plaka* of Athens (the old town), visited the bay at Sounion to marvel at the cliff temple dedicated to Poseidon and stayed to see a blazing sun disappear into the sea with breath-taking finality at Sounion Bay. After the sunset, you walk the two kilometers down to a tiny café on the bay and ask the old Greek woman for a plate of fried calamari and a bottle of retinsa.

It is with Socrates in mind and the lingering taste of retinsa in mind that we pursue the quarrelsome dialogue of students asked to reflect on the moral dimension of the professional work they have set out to do. Socrates was not one to beat around the bush when he posed a question, and teachers of legal ethics know the sting of blunt questions. Randall, a student, put the point succinctly: "What good does all this ethics talk serve?" And then, with brutal honesty, "You don't expect us to make money with ethics, do you?"

Socrates would have a question of his own: "Would you not agree, my friend, that when all is said and done, in ethics we are talking about how to live a good life and how to be a good person?" Randall, anxious about his own good life and how to secure it, without embarrassment replies, "I have nothing to say about ethics," then adds, with an aggressive flourish, "ethics is just talk." Susan adds, "Don't you think it's awfully late, here in law school, to be talking ethics?"

Socrates, listening to this clammer of voices—cliché and conventional thinking—expressed with over-determined bravado responds, "Now tell me, what are you going to do when your work for

a client results in harm to others or harm to the community in which you live? Will you always be so eager to use your skills and knowledge to help others accomplish in the name of the law that which is so clearly contrary to the well-being of your community? Can it be good, for law or for you, to act as if the law exist independent of justice? What kind of person is a lawyer who ignores justice and does it for money, and speaks proudly of the fine living to be made doing it? How long do you think it would be before this lawyer's neighbors denounced him as a scoundrel?"

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

This notion, to Socrates, sounds peculiar. "This is all very strange. Do you claim that it is good to do what lawyers do solely because it's sanctioned by fellow lawyers grown accustomed to such practices? Are you oblivious to where this kind of 'many in our profession do it' thinking can lead? Have you given thought to what it might cost the community in which you live, indeed the effect on our sense of community more generally, to have lawyers and all their power aid someone to use the law to harm others, to use law in the aid of greed? When lawyers help those who harm others, can their participation in that harm be ignored? Can you and your fellow lawyers hold out in a world in which your fellow citizens, indeed, even your own colleagues, are scornful of your practices?" Socrates, with so many questions posed, pauses, and asks more directly, "Do you mean to say that it

can be good to harm the many for the pleasure of the one client?"

"I don't set about to intentionally hurt others," Susan explains, "I am simply serving my client. It is my job."

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

Realizing that she may have overstated her position, Susan retreats, but in a most guarded way. "Yes, I know I must be concerned about others, as well as my clients. But, when I practice law, I make a promise to help those who come to me and to disregard the claims and concerns of those who are not my clients. I have no desire to hurt others and do not actively choose to do anything of that sort. To help my client I must ignore what happens to others."

Socrates turns over this thought in his mind and poses another question, "Then you share with me a concern for others and the belief that it is better to live so that those who stand along our path are not harmed?"

"Yes, of course,"says Susan.

"Then, if it would be possible to find a way to help your client and avoid hurting others, you would agree that lawyers should do so?" Susan, who has been present for still other conversations between Socrates and his interlocutors, knows that he is about to set the trap. Susan fears she has revealed far more than she intended. Her fellow students realize that in her explanation of what lawyers do she has been speaking not just about the role of lawyers but about herself, recounting the clichés of the day that expresses her own limited sense of the professional life she seems all too ready

to adopt. Socrates has elicited a concession from Susan that calls into question the kind of adversarial advocacy she and her colleagues persist in trying to defend. Susan now wishes to retreat, not so much from the position she has advanced, but from the conversation itself. What she most wishes to be free of are the relentless questions Socrates poses. She says, "I am afraid that if I say much more, you are going to make me look uncharitable and uncaring. That's really not who I am."

Socrates, recognizing the changed direction of the conversation, says, "It is difficult to accept responsibility for our ideas and for the consequences of ideas we so readily proclaim. It is your own words that have taken us down this road. Perhaps it is not the deviousness of my questions, but your own cleverness by which you have tricked yourself into thinking one thing about yourself while becoming another."[3]

Socrates did not set present a philosophical map for us to follow. Socrates's philosophy is found in the way he speaks, the way he listens, and the trust he puts in conversation and argument.[4]

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[3] This conversation between Socrates and students of law is modeled on a conversation found in James Boyd White, *The Ethics of Argument: Plato's* Gorgias *and the Modern Lawyer*, 50 U. Chi. L. Rev. 849, 873-894 (1983)(A version of the essay appears in James Boyd White, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER AND COMMUNITY 93-113 (Chicago: University of Chicago Press, 1984)).

[4] *Id*. at 869.White argues that "Plato writes a text that seeks to involve the reader directly in the processes by which language and character are broken down and remade. His interest is in the possibilities of life we can give ourselves, in the possibilities of meaning we can give our language." James Boyd Whigte, WHEN WORDS LOSE THEIR MEANING 93 (Chicago: University of Chicago Press, ____).

James Boyd White says of Plato's *Gorgias*, that it teaches the reader, but not by way of a set of propositions or fixed principles, or comprehensive argument. *Gorgias* teaches us "how to remake a language" of our own. The reader of the *Gorgias* is asked "not to learn a particular set of questions and dialectical responses, to be repeated on other occasions, but . . . how to ask questions of one's own."

Tullio Maranhao describes Socrates's questioning that draws out the views of others as the distinguishing feature of Socratic conversation:

> The Socratic questioning stakes out the path of the conversation within the ideological framework of his interlocutors. . . . If opposition arises, Socrates tries to overcome it by recasting the conversation in terms acceptable to all. This, of course, is obtained by means of his unrelenting questions forcing every one to speak out, voice his opinions, and take a stand in relation to all statements.[5]

We engage our students in ethical inquiry, and we do it not by the knowledge that we pass along to them, but in a conversation about the knowledge they already have and the knowledge they seek. The Socratic-inspired teacher is "committed to the rigorous examination of the faith and morals of the time . . . . Reliance on consensus and prestigious paradigms are prime targets." If we take Socrates seriously, "it is a point of honor to swim against the stream."[6]

In *Protagoras*, Socrates calls us to re-examine learning, to judge whether what we seek to learn is worthwhile or merely popular, and whether what we seek to learn might not have the potential to poison the psyche as tainted food wrecks the body. What makes Socrates an enticing figure for legal educators is the way he makes reflection "a special feature of philosophy" and demands that we stand back "from ordinary practice and argument to define and criticize the attitudes involved in them."[7] When we take Socrates into the classroom, we resist "the slow descent of accepted thought

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[5] Tullio Maranhao, THERAPEUTIC DISCOURSE AND SOCRATIC DIALOGUE 177-178 (Madison: University of Wisconsin Press, 1986).

[6] Walter Kaufman, THE FUTURE OF THE HUMANITIES: TEACHING ART, RELIGION, PHILOSOPHY, LITERATURE AND HISTORY 22 (New Brunswick, New Jersey: Transaction Publ., 1995).

[7] Bernard Williams, ETHICS AND THE LIMITS OF PHILOSOPHY 2 (Cambridge, Massachusetts: Harvard University Press, 1985).

towards the inactive commonplace."[8] Socrates disorients and exposes habits of understanding reflected in our presuppositions, and in all the little ways we try to understand the world.

For Socrates, the work of philosophy is carried out in conversation. "Socrates taught by question and answer. He held that form of dialogue to be the original pattern of philosophic thought, and the only way for two people to reach an understanding on any subject."[9] The dialogue is rigorous. It requires

> that the people whose voices we hear be intimately connected with the positions they take. The first rule of Socratic *elenchus* [refutation] is that the respondent must say what he really thinks. When Protagoras attempts to break this rule by adopting a hypothetical view about the nature of virtue, Socrates stops him immediately . . . . In the *Gorgias*, when Callicles shows hesitation in answering Socrates, Socrates replies that unless Callicles has the courage to speak freely, the inquiry cannot proceed. Even when the respondent's compliance would make his job much easier, Socrates insists that the respondent not say anything short of what he truly believes.
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> It follows that *elenchus* is more than an exercise in philosophical analysis. In asking people to state and defend the moral intuitions which underlie their way of life, Socrates inevitably reveals something about their characters. *Elenchus*, then, has as much to do with honesty, reasonableness, and courage as it does with logical acumen: the honesty to say what one really thinks, the reasonableness to admit what one does not know, and the courage to continue the investigation. Most of Socrates' respondents are lacking in all three. Protagoras becomes angry, Polus resorts to cheap

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[8] Alfred North Whitehead, MODES OF THOUGHT 174 (New York: Free Press, 1968). "Philosophy begins when one learns to doubt—particularly to doubt one's cherished beliefs, one's dogmas and one's axioms. Who knows how these cherished beliefs become certainties with us, and whether some secret wish did not furtively beget them, clothing desire in the dress of thought? There is no real philosophy until the mind turns round and examines itself." Will Durant, THE STORY OF PHILOSOPHY 9 (New York: Time, 1962).

[9] Werner Jaeger, PAIDEIA: THE IDEALS OF GREEK CULTURE 19 (New York: Oxford University Press, 1986).(vol.2).

> rhetorical tricks, Callicles begins to sulk, Critias loses his self-control, Meno wants to quit. While their reactions leave much to be desired, Socrates' respondents do emerge from the pages of the dialogues as real people. Not only is there a clash of ideas but a clash of the personalities who have adopted them.[10]

Participation in a Socratic conversation requires searching questions, active listening, and a willingness to confront one's own ignorance. Socrates pronounces his own ignorance and confronts that of others.

The paradox in Socrates's approach to virtue is his claim that virtue cannot be taught, only to proceed to demonstrate that virtue is indeed taught.[11] Tom Eisele, using Plato's *Protagoras* as his text, explores Socrates's claim that virtue cannot be taught and points out that

> Socrates . . . enacts or performs excellence in his incessant questioning and questing. He may not be able to articulate fully what virtue is—but this only shows perhaps that virtue is not a matter of propositional knowledge. Socrates is able to embody it. And his example teaches us what virtue or excellence is. We learn virtue from his example.[12]

It is Socrates's enactment of virtue that captures our attention and captivates us. Socrates makes virtue, and our misunderstanding about it, the subject of conversation and argument.

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Three painters work in the hallway outside my office. I listen as they share stories aboutfellow painters, friends, weekend activities, approaching cold weather, and their plans for the last warm days

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[10] Kenneth Seeskin, DIALOGUE AND DISCOVERY: A STUDY IN METHOD 1-2, 3 (Albany: State University Press of New York, 1987).

[11] For an exploration of this paradoxical quality of Socrates teaching, see Thomas D. Eisele, *Must Virtue Be Taught?* 37 J. Legal Educ. 495 (1987).

[12] *Id*. at 497.

of fall. They talk about their work: calling in sick when “the wife” wants to take a long weekend, a co-worker who does “shoddy work” and blames others for his mistakes, “cooling out” supervisors who are arbitrary in their demands or put pressure on them to do shoddy work, how many paint brushes are wasted by an incompetent colleague during the course of a single week.

These painters would scoff at the idea that their conversation has anything to do with moral discourse, with philosophy or with Socrates, but as I listen to the painters, there is a unlying philosophical quality in their conversation. They talk about they try to do a “good job,” deal with “difficult” fellow workers, placate supervisors who are more concerning about pleasing the big boss than they are about looking after the needs of the painting crew. There is talk about sports, television, fishing, hunting, and neighbors, but it was the talk about “good work” that captures my attention.

The painters enhance a day of work by complaints, gossip, and stories. A painter who does nothing but complain finds himself with few friends; one who gossips too much is viewed with suspicion. One might see in the array of complaints and gossip in the painters’ conversations a clearing of the way for real stories. Painters tell stories because that’s what people do when they talk. Work is a source of stories and a place to tell them. Stories provide a way to raise questions about the work we do.

What I hear in the conversation of the painters is an ordinary man’s approach to philosophy, a practice of philosophy entwined in the meander of everyday conversations about work and how we do it and whether it has been done well.

The painters may lack formal study, but they know painting; they enjoy their work and they know how to converse and learn from each other. Painters know the obstacles to doing a good job and

they make these obstacles a part of the give and take of conversation with each other. For those who teach lawyer ethics, there is much to learn from painters. My proposition is rather simple: We can study lawyer ethics, not only as a body of ethical rules and law-like constraints but in the way painters engage in conversation about "good work." Painters talk to make their work tolerable and sociable, to give it a social meaning it would lack absent conversation. The study of lawyer ethics shares that goal.

Like the painters conversation, we might learn something about lawyer ethics from something quite simple: a sustained course of conversation about the work that lawyers do. Lawyer ethics talk follows a course that pursues matters—bothersome and difficult—that capture our attention. In conversation, painter friendly and law school studious, there is an opportunity to explore the oppositions by which we align ourselves: act and consequence, self and other, work and play, good and bad, ordinary and special, appearance and reality. In conversation, we create a social and qualitative ground for our professional work life.

One advantage we have over the painters is that our conversation is directed toward work that still lies ahead, to a life not yet fully shaped by daily routines and conventional practices. Ethics talk allows us to explore conventional, commonplace views about lawyers and to test these views against hopes and ideals, to test them against our fears of what lies ahead.

Ethics is learned by immersion in a conversation in which the student has a personal stake, a stake in a serious conversation about matters of real importance. Lawyer ethics is more deeply rooted in rhetoric than in rules; ethics is configured in conversation as well as by ethical command. Lawyer ethics grounded in conversation about legal work becomes a stage rehearsal, a theater with

actors working out the consequences and meanings of their proposed future roles as lawyers. Hanna Arendt observed that it is "[i]n acting and speaking, men [and women] show who they are, reveal actively their unique personal identities and thus make their appearance in the human world . . . ."[13] When we speak, the moral dimension of our character shows through. This moral dimension, lurking in our law school conversations, ever so fond of hiding, reveals itself in our conversations.

We learn ethics by talking about what we value; in talking about what we value we learn how our values and ideals are contaminated. We learn about our values when we find them disputed. A study of lawyer ethics limited to a study of law-like ethical rules is a poor substitute for ethics. Lawyer ethics taken up in conversation put ethics back where it belongs, in the talk we do about the work that reflects our ideals.

Moral discourse teaches as it pushes and pulls us to evaluate, defend, and reconfigure the character we find for ourselves in these conversations. We learn, in moral discourse, to distinguish between idle talk and talk that bespeaks a more compelling and estimable character. When talk implicates our character, we have a personal stake in the conversation.

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[13] Hannah Arendt, THE HUMAN CONDITION: A STUDY OF THE CENTRAL DILEMMAS FACING MODERN MAN 159 (Garden City, New York: Doubleday, 1959). Arendt observes that, "Action and speech are so closely related because the primordial and specifically human act must at the same time contain the answer to the question asked of every newcomer: 'Who are you?' This disclosure of who somebody is, is implicit in both his words and his deeds . . . ." *Id*. at 158.

A claim for the value of conversation in ethical inquiry is tempered by the recognition that some people are indeed "all talk and no action." We are taught, early and often, that "action speaks louder than words." We all have friends and colleagues who do not "live up to their word." Notwithstanding these reservations about the limits of talk, there is much to learn from the ethics we see at work when we direct conversation to the moral dimension of our professional lives. We can, in a course of conversation devoted to ethics, engage in rehearsed practice for what we will do.

In ethics talk, students learn that there is a voice and a part of themselves that begs to slow down, to pause, to think, to deliberate, to reflect, before rushing on to what lies ahead. Talking about ethics becomes a way of engaging the world that lies before us and within us.

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Thomas, quiet, self-confident, a sparkling smile, visits my office to talk about the ethics course that we have each in our own way, managed to survive. We talk of the twists and turns our conversation took, the dramatic encounters, and the frustration and anxiety that sometimes dogged us. Thomas speaks frankly of the persistent obstacles that sprang up to plague our conversations, obstacles that seemed at times to threaten our efforts at moral discourse.[14] We agreed that in our dialogue on lawyer ethics, we had engaged in a course of conversation that would be remembered.[15]

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[14] We resist our most profound questions, because of what we think we already know.

> The question [how one should live] is one about which everyone has an opinion. Indeed, virtually all men [and women], except the most thoughtful, assume that they *know* the answer, and that it is so obvious that they need not even give it thought. They may not formulate the answer in words, and of course if they do it will invariably turn out to be something silly, but most men [and women] seem nevertheless to assume that no one could possibly have anything to say to them about ethics. If they read on this subject it is less with a view to learning than to appraising what they read in terms of what they imagine they already know. Their "knowledge," however, more often than not turns out to consist of nothing more than certain superficial attitudes . . . .

Richard Taylor, GOOD AND EVIL: A NEW DIRECTION 3 (New York: The Macmillan Company, 1970).

[15] A course of ethical conversation can be engaging and rigorously demanding, but it can also be more. A course of conversation has a personality of its own: friendly and easy-going like an old friend, sometimes moody and temperamental, at times boring, at other times manic and wild, and on any given day just downright exasperating. When a course of ethical conversation takes on a life

In these ethics conversations with students, I have the hope they might be remembered as an act of friendship. With friends we set out to be wonderful, big-hearted, kind-spirited, thoughtful, warm and caring; in a course of ethics conversation, we put this ideal of friendship to the test. We make a true claim to friendship when we experience the wonder around us and evoke the mystery that lies cleverly hidden in the shadow of everyday language and everyday life.

A course of conversation can go off the deep-end, but when things go well, and we talk about law work and what that work means to us and how the work has the potential to deflect and deform our ideals with different-minded and better-minded colleagues, we can see the way to wisdom. There are real possibilities and real risks in such conversations, we could not expect otherwise. I've listened with reverence as students attempt to come to grip with matters that I, as their teacher, cannot fully explain or provide a formula for understanding. I have watched as conversations between guarded and weary students traffic in old worn-out clichés and stale conventional thinking. Knowing this, I still took up these conversations about lawyers work and ethics with great hope, knowing the rocky road we walk.[16]

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How should one live? Bernard Williams argues that it's this question—a question passed

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of its own, the student must establish a relationship with it: tolerate it, puzzle over it, complain about it, or learn from it. When lawyer ethics talk is real, it cannot be left unattended, ignored, or readily dismissed.

[16] This course of conversation about lawyer ethics is ever so much like a vulnerable child, protected, cared for, preached to, and prayed over, and then sent off to make its way in the world. Courses of study rooted in conversation, like these who have set out to become lawyers, must find their own way.

down to us from Socrates—that is the focal point of moral philosophy: "The aims of moral philosophy, and any hopes it may have of being worth serious attention, are bound up with the fate of Socrates' question, even if it is not true that philosophy, itself, can reasonably hope to answer it."[17] The Socratic question I want to raise with my students: How should one live as a lawyer? And there's a host of questions that follow: What work will you do? How will you do it? How much of you—what part of you, if not all of you?—will you invest in your work? Will your work serve others or simply be a means to sustain your worldly needs? How will you allow the culture, especially the legal culture in which you will work, to limit and deform you? What possibilities of freedom will you use your work to pursue? The posing of these questions is endless. Bernard Williams argues that

> [p]hilosophy starts from questions that, on any view of it, it can and should ask, about the chances we have of finding out how best to live; in the course of that, it comes to see how much it itself may help, with discursive methods of analysis and argument, critical discontent, and an imaginative comparison of possibilities, which are what it most characteristically tries to add to our ordinary resources of historical and personal knowledge.[18]

This question of philosophy—How am I to live?—makes us all, in one sense, philosophers. "There is no escape from philosophy," Karl Jaspers tells us. "The question is only whether a philosophy is conscious or not, whether it is good or bad, muddled or clear. Anyone who rejects philosophy is himself unconsciously practising a philosophy."[19]

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[17] Williams, *supra* note 14, at 1.

[18] *Id*. at 4.

[19] Karl Jaspers, WAY TO WISDOM: AN INTRODUCTION TO PHILOSOPHY 12 (New Haven: Yale University Press, 2nd ed., 2003).

Socrates presents us with a paradox: know thyself and know the self to be inadequate, know that the truth lies within and the truth is that we are enamored with our own inadequate thinking. The struggle at the heart of philosophy, animated by Socrates' teaching, is a desire and a fear; submit to these meaning questions and face the dark harbingers of trouble.