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Speaking Truth to Powerlessness

Howard Lesnick*

I have offers from three New York firms, and wonder if you can tell me which one is the most prestigious.

A third-year student seeking my advice a year or two ago

The most striking aspect of Patrick Schiltz's essay is that it directly addresses *students*. In word (the salutation) and deed (what follows), he speaks, not to the folks who help rule the world (judges, legislators, officials, weighty practitioners, and those rulers-once-or-twice-removed, professors), but to those who are hoping—dare they?—to ascend to some future vacancy in those positions.

Schiltz's message is in two parts: First, he tells students several important empirical truths (as he thinks they are): the sources of the extraordinary malaise that seems to be tightening its grip on our profession in recent years (Parts I-III); the realities of large-firm life (Parts IV, VI); the priorities that are driving so many lawyers to live and work in so self-defeating a manner (Part V). He then (Part VII) offers students some advice, "little picture" and "big picture." The former is full of important detail, not "little" at all, but it is the two sentences of "big picture" advice that I want to note here:

[R]ight now, while you are still in law school, make the commitment—not just in your head, but in your heart—that, although you are willing to work hard and you would like to make a comfortable living, you are not going to let money dominate your life to the exclusion of all else. . . . Make the decision

* Jefferson B. Fordham Professor of Law, University of Pennsylvania. The title is a play on a famous Quaker admonition, that we are called to "Speak Truth to Power." See, for example, THE AMERICAN FRIENDS SERVICE COMMITTEE, SPEAK TRUTH TO POWER: A QUAKER SEARCH FOR AN ALTERNATIVE TO VIOLENCE iv (1955), attributing the thought to "a charge given to Eighteenth Century Friends." Those seeing themselves as wholly *lacking* in power may be no more open to the voice of truth than are the powerful, for it may call on them to *act* inconsistently with that vision of themselves.

now that *you* will be the one who defines success for you—not your classmates, not big law firms, not clients of big law firms, not the *National Law Journal*.¹

There is much to ponder respecting the accuracy of both Schiltz's diagnosis and his prescriptions, "big" and "little." I would like, however, to focus this brief comment, not on the merits of those thoughts, but on the question of how students (or young lawyers) are to *get* from here to there—how one who *does* find some significant power in the diagnosis, and some ingrained resonance with the remedy, might find himself or herself able to cross the existential abyss that stands in the way of taking the challenge of the advice seriously.

Tacky though it surely is to begin by quoting oneself, I will recall here the opening lines of the coursebook in professional responsibility that I published some half-dozen years ago:

As I was about to become a teacher, a wise friend said to me that, although most teachers use people to teach things, teaching is using things to teach people. I have set out in this book *not* to treat Professional Responsibility as the thing that I am teaching, that is, as a body of knowledge or ideas that I am transmitting or imparting to students. My intention is rather to use Professional Responsibility, both doctrinal development and theoretical critiques, to evoke in students their own responses to some fundamental questions about themselves as emergent lawyers, to teach students to ask themselves: Who am I? In my work as a lawyer, what will I be doing in the world? What do I want to be doing in the world?²

Acknowledging that they are "far from easy to address," I called these questions ones of *identity*. While a large part of the power of Schiltz's essay is its ability dramatically to motivate attention, I fear that attention will falter in the face of what I have termed the "existential abyss," which works, I believe, to prompt disengagement from the essay's unsettling prescriptions. The "big picture" advice that I have quoted places the reader squarely before that abyss—one cannot *think* about advice to judge success by one's own criteria without facing the questions of identity—and I would like to venture a word or two to remind us that, in deciding whether to turn away or risk the jump, we need not jump entirely in the dark, but also to suggest that some of the "dark" is the product of legal education and the prevailing norms of legal professionalism.

1. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 924 (1999).

2. HOWARD LESNICK, *BEING A LAWYER: INDIVIDUAL CHOICE AND RESPONSIBILITY IN THE PRACTICE OF LAW* 1 (1992).

The problem is this: For people who have “made it” in the professional world to suggest to people who have not that they should not care too much about money is a chimerical effort at best. It is assuredly far better to suggest, as Schiltz goes on to do, that they look to their own criteria of success to find the place that money, prestige, and similar goods should have in their life. Yet three mutually reinforcing processes interact to render such a self-examination problematic.

First is the enduring human tendency to look outside oneself for authoritative guidance. Nearly 350 years ago, George Fox, a fervently believing Christian (the founder of the Religious Society of Friends), challenged his hearers: “You will say, Christ saith this, and the apostles say this; but what canst thou say?”³ Our contemporary consumer culture ratchets up that tendency powerfully, raising our children to think it self-evident that “the market” is our surest guide to desirability, that what sells—and not some inherent criterion of value—tells us what is worthwhile. So, the student whose inquiry serves as the epigraph of this comment asked, not which firm did the highest-quality work, would teach him best, treat him (or others) fairest, or even ultimately make him the most money, but which was highest in the opinions of others, irrespective of the grounds of their judgment (“prestige”).

Closer to home, the implicit and explicit messages of legal education inhibit the experience of choice, and discourage students from inquiring into unspoken premises, whether about the legal system, the larger social order, or the role of lawyers. The result is to reinforce the factors that lead a neophyte lawyer to conceive of his or her task as to fit in, to view the world wholly as found, not made.⁴

Yet countervailing resources are there to be tapped:

You look at where you're going and where you are and it never makes sense, but then you look back at where you've been and a pattern seems to emerge. And if you project forward from that pattern, then sometimes you can come up with something.⁵

3. The Testimony of Margaret Fox, in 1 THE WORKS OF GEORGE FOX 50 (M.T.C. Gould 1975) (1931) (Testimony preceding Gould's 1975 reprint of the 1831 edition).

4. For discussion, see Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 UCLA L. REV. 1157, 1160-82 (1990), and my coursebook, LESNICK, *supra* note 2, at 219-28. (The two sentences preceding the notecall in the text are taken from these works, pages 1182 and 226, respectively).

5. ROBERT M. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* 168 (1974).

In Sandy Levinson's felicitous terms, professional norms, inculcated by legal education, seek to work a "bleaching out" of such "merely contingent aspects of the self" as one's race, gender, religion, or ethnic background, in the cause of creating "almost purely fungible members" of the profession.⁶ To "look back at where you've been" can enable one to begin to struggle against that "bleaching out," and recover an identity that can provide a source of real engagement with Schiltz's "big picture" advice.

For those who live, or at one time lived, within a religious tradition, it can be a salient source of such an identity. Although at times it answers too quickly, too glibly, religion most centrally reminds us to ask the questions: Who am I? What do I want to be doing in the world? It can supply a deeply rooted "personal" code, by which the code of our profession may be judged; in that act of judgment, the reflexive acceptance of the norms of the profession, and the wider culture, can be offset. For what Robert Cover said of Judaism is true, I believe, across the spectrum of religions: "The basic word of Judaism is obligation"⁷ As has often been observed, the words "religion" and "obligation" have a common root, *ligare*, "to bind." Moreover, the obligation does not pertain only to the sectarian observances of one's particular faith, but is salient throughout one's daily life, most especially the world of work.⁸

These characteristics of a religious consciousness—obligation and integration—are greatly strengthened by a third, what I have termed "transcendence," the experience of awe, "of time as tinged with eternity, finitude with infinity, the mundane as embodying the transcendent."⁹ That experience generates an imperative, a "call" or "leading," a feeling of being impelled, not merely persuaded.¹⁰

A recollection (a "re-collection") of the call of one's religious tradition can ground a complete reorientation of one's approach to the practice of law. In law teacher Joseph Allegretti's words (speaking of his own tradition):

6. Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578-79 (1993).

7. Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 66 (1987).

8. For brief expressions of this idea, drawn from the Muslim, Buddhist, Jewish and Christian traditions, see Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 FORDHAM L. REV. 1469, 1483-87 (1998).

9. *Id.* at 1488.

10. For a fuller description of the process as I understand it, see HOWARD LESNICK, LISTENING FOR GOD: RELIGION AND MORAL DISCERNMENT 78-84 (1998).

[I]f I begin to bring my religious values with me into the workplace, a curious thing happens. My work is placed in a wider, deeper frame of meaning. No longer am I a lawyer who happens to be a Christian on Sunday, but a follower of Christ who is trying to live out my Christian calling within my role as a lawyer. It is a small shift, just a rearrangement of a few words, to move from *a lawyer who is a Christian* to *a Christian who is a lawyer*, but in that small shift a whole new way of looking at work emerges . . .¹¹

Understand that I am not pressing a return to religion, or an initial embrace of it, on anyone who resonates decisively to any of the multiple reasons for repudiating it. Religion is assuredly “an unlikely savior.”¹² Indeed, for many, religion was in their lives an inauthentic identity, imposed by one’s community of origin, often in literally terrifying ways, and far more pernicious than the siren song of prestige and success.

Beyond that, many are firmly rooted in a secular interaction with the world. Although I have come to appreciate the special ways in which religious language and practices can guide and fuel the moral sense,¹³ I do not claim rational entailment for such a perception. Athens may speak to you in ways that Jerusalem does not.

George Fox’s question persists, however: “What canst thou say?” Consider this admonition of contemporary philosopher Robert Nozick:

I do not say with Socrates that the unexamined life is not worth living—that is unnecessarily harsh. However, when we guide our lives by our own pondered thoughts, it then is *our* life we are living, not someone else’s. In this sense, the unexamined life is not lived as fully.¹⁴

For one’s thoughts to *be* “our own,” however, they must be something other than a simple parroting of introjected norms, whether of society at large or of our profession. Consider, for example, what it means to “represent” someone, to act for a client. We all know what the professional codes say about that—an impoverished,

11. JOSEPH G. ALLEGRETTI, *THE LAWYER’S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* 126 (1996).

12. This is the subtitle of Chapter 1 of DANIEL C. MAGUIRE, *THE MORAL CORE OF JUDAISM AND CHRISTIANITY: RECLAIMING THE REVOLUTION* 3 (1993). Christianity, to Maguire, “seems lost in its doctrinal and ecclesial constructs and trapped in tangential moral concerns,” while “an overly segregated Judaism has largely defaulted on the universalist dream of Isaiah.” *Id.* at 4. For my own bill of indictment, see LESNICK, *supra* note 10, at 43-45.

13. See LESNICK, *supra* note 10, at 48-51.

14. ROBERT NOZICK, *THE EXAMINED LIFE: PHILISOPHICAL MEDITATIONS* 15 (1989).

highly polarized, badly skewed stance.¹⁵ But more fundamental than those shortcomings is the implicit assumption that an attorney must envisage the act of representation as leaving untouched the client's stance toward the world. Lawyer-classicist James Boyd White (purporting to speak for Socrates) condemns that assumption in these terms: "You say you are your client's friend, but . . . in truth you are not his friend, but his flatterer, which is to be his enemy. For your concern is not with his real interests, but with assisting him to attain whatever it is he may desire."¹⁶

Whatever the limitations of such a mindset as it affects the quality of the representation of the client,¹⁷ my major focus here is on the lack of an awareness of choice, and responsibility for choice, in the life of the *lawyer*. To perceive how constricted our vision in this regard normally is, consider (as if addressed to us as lawyers) Socrates' challenge to Callicles, Plato's quintessential "practical" man of affairs:

You have lately embarked on a public career and are urging me to do the same . . . Surely then this is the moment for mutual examination. *Has any citizen hitherto become a better man through the influence of Callicles?* Is there anyone, foreign or native, slave or free, who owes to Callicles his conversion to virtue from a previous wicked career of wrong-doing and debauchery and folly? What will you say if you are asked this question, Callicles? What example will you give of a man who has been improved by associating with you?¹⁸

15. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980). Despite their paying lip service to the idea of a lawyer as a "wise counselor," *id.* at n.18 (quoting *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162 (1958)), our professional norms cannot "envision a relationship between lawyers and clients in which one or the other is not in charge of and dominant over the other." ALLEGRETTI, *supra* note 11, at 41 (emphasis omitted). In my view, the culture of law practice and law schools, "in particular their obsessive focus on rights, obligations and hierarchy of decisional authority," is the source of much of this failing. Lesnick, *supra* note 8, at 1499 n.132.

16. James Boyd White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 875 (1983).

Recent scholarship has begun to explore the content of a concept of moral counseling that takes seriously, but is not immobilized by, its theoretical and practical difficulties. See, e.g., Robert F. Cochran Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327, 378-97 (1998); Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9, 9-28 (1995). More broadly, see Professor White's superb essay, James Boyd White, *Meaning in the Life of a Lawyer*, 26 CUMB. L. REV. 763 (1996).

17. Consider, for example, the critique of philosopher Alan Goldman: "The client may in fact lose his own sense of moral responsibility when he sees his most partisan interests warmly embraced and given institutional respectability by his lawyer. . . . To be morally autonomous is to assume moral responsibility for one's own actions. . . ." ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 126 (1980).

18. PLATO, *GORGIAS* *515a-b, in PLATO, *GORGIAS* 128 (Walter Hamilton trans., Penguin Books 1960) (n.d.) (emphasis added).

What *will* you (or I) say, indeed? If you answer, quickly and righteously, that Plato's language is simply too, well, Victorian to deserve serious engagement, and that anyway it is not a lawyer's job to make a client a "better person," will there be nothing more that nags at you?

If your honest answer is no, so be it. If you find it a bit more troubling, if that feeling might have its source in a fleeting glimpse of unexpected and hitherto unexplored possibilities, then I encourage you to allow yourself to be troubled. It suggests that you might find opportunity, and not only discomfort, in Pat Schiltz's invitation to essay the abyss: "Make the decision now that *you* will be the one who defines success for you."¹⁹

19. Schiltz, *supra* note 1, at 924.

