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# All My Friends Are Becoming Strangers: The Psychological Perspective in Legal Education

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# **“ALL MY FRIENDS ARE BECOMING STRANGERS”: THE PSYCHOLOGICAL PERSPECTIVE IN LEGAL EDUCATION†**

JAMES R. ELKINS\*

## PREFACE

That I adopted as part of the title for this article “All My Friends Are Becoming Strangers”<sup>1</sup> suggests the need for explanation—what humanistic sociologists call a reflexive statement. More simply put, this article needs a preface. The psychiatrist, Robert Coles, has suggested that a preface permits an author

to tell where he stands, and unquestionably in so doing he runs the risk of self-centeredness if not self-display . . . We owe it to ourselves and our readers to show something of our lives and our purposes, to indicate, as it were, the context out of which a particular book has emerged.<sup>2</sup>

This article began as an angry and polemical response to an article by William Simon calling into question what he called The Psychological Vision in legal education.<sup>3</sup> Upon first reading the Simon article I was dismayed that anyone could be so bold and presumptuous as to attack the psychological perspective and its role in legal education. While I have no formal training in psychology, the work of Andrew Watson,<sup>4</sup> Robert Red-

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<sup>1</sup> The title is derived from a novel by Larry McMurtry. L. McMURTRY, *ALL MY FRIENDS ARE GOING TO BE STRANGERS* (1972).

<sup>2</sup> R. COLES, *Erik H. Erikson—The Growth of His Work* xi (1970).

<sup>3</sup> See Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 *STAN. L. REV.* 487 (1980) [hereinafter cited as *Homo Psychologicus*].

<sup>4</sup> Watson, *Know Thyself, Know Thy Client: A Psychiatrist Teaches the Behavioral Dynamics of Law Practice*, 1 *LEARNING AND THE LAW* 45 (Spring, 1974); *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 *U. MICH. J. L. REF.* 248 (1975); *Legal Education Plays Some Strange Psychological Tricks on you*, 3 *STUDENT LAWYER* 23 (Sept., 1974); *Professionalizing the Lawyer's Role as Counselor: Risk-Taking for Rewards*, 1969 *ARIZ. ST. L.J.* 17 [hereinafter cited as *Professionalizing the Lawyer's Role*]; *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 *CIN. L. REV.* 93 (1968) [hereinafter cited as *The Quest for Professional Competence*]; *The Watergate Lawyer Syndrome: An Educational Deficiency Disease*, 26 *J. LEGAL EDUC.* 441 (1974).

mount,<sup>5</sup> Gary Goodpaster,<sup>6</sup> Thomas Shaffer,<sup>7</sup> and Paul Savoy,<sup>8</sup> a group that Simon refers to as Homo Psychologicus or "legal psychologists" for those less enamored with Latin, have played a significant role in my development as a law teacher and my thinking about legal education.<sup>9</sup>

My concern was that Simon had painted a rather narrow and ghastly picture of the psychological perspective, and was in some instances unfair to those he set out to criticize.<sup>10</sup> My first

<sup>5</sup> Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972 (1961); *A Clinical View of Law Teaching*, 48 S. CAL. L. REV. 705 (1975); *A Conceptual View of the Legal Education Process*, 24 J. LEGAL EDUC. 129 (1972); *Marriage Problems, Intervention and the Legal Professional*, 50 CONN. B.J. 11 (1976); *Perception and Strategy in Divorce Counseling*, 34 CONN. B.J. 249 (1960); *The Transactional Emphasis in Legal Education*, 26 J. LEGAL EDUC. 253 (1974).

<sup>6</sup> Goodpaster, *Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5 (1972).

<sup>7</sup> T. SHAFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1976); T. SHAFER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* (1972); Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721 (1975).

<sup>8</sup> Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444 (1970).

<sup>9</sup> The psychological perspective has been a "friend" over the years and has served as the basis for much of my work (thanks to the influence of John Batt at the University of Kentucky). See Elkins, *A Counseling Model for Lawyering in Divorce Cases*, 53 NOTRE DAME LAW 229 (1977); *The Legal Persona: An Essay on the Professional Mask*, 64 VA. L. REV. 735 (1978); *The Paradox of a Life in Law*, 40 U. PITT. L. REV. 129 (1979); Book Review, 30 VAND. L. REV. 923 (1977) (T. SHAFER, *LEGAL INTERVIEWING IN A NUTSHELL*).

<sup>10</sup> Simon's critique of Thomas Shaffer for example seems to be particularly unfair. The bias in Simon's critique arises from his focus on "a synthesis of themes." He examines the work of legal psychologists without looking at that work within the context of the writer's body of work. See *Homo Psychologicus*, *supra* note 3, at 489.

In the case of Shaffer, one cannot read his works without seeing the profound influence of the theological, religious perspective. See Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW 211 (1979); Hauerwes and Shaffer, *Hope in the Life of Thomas More*, 54 NOTRE DAME LAW 569 (1979); *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721 (1975). For an excellent account of theology as a personal and social perspective, see M. NOVAK, *ASCENT OF THE MOUNTAIN, FLIGHT OF THE DOVE* (Rev. ed. 1978).

Moreover, Shaffer makes no effort to maintain a rigid separation between his psychological and theological perspectives. That Shaffer's psychological perspective has not obscured his social awareness is amply demonstrated by his recent work on the moral and ethical dimension of the practice of law and trial advocacy. In both *The Practice of Law as Moral Discourse*, *supra* note 10, and *Advocacy as Moral Discourse*, 57 N.C. L. REV. 647 (1979), Shaffer moves away from

urge was to respond to Simon's polemic with one of my own, so I set out to write a defense of the psychological perspective in legal education. I wanted to show that Simon's arguments were flawed and that his critique was unsound. I could not trust a work which made "no attempt to do justice to the distinctive features"<sup>11</sup> of the various individual legal psychologists and which set out to "emphasize the defects of their work rather than their virtues."<sup>12</sup>

As I began to reflect on Simon's work I found that not only was I unwilling to trust his critique of the psychological perspective, but I was increasingly troubled by my own response. Colleagues who read this article in an early draft<sup>13</sup> suggested that my reading of Simon was overly narrow and niggardly. As one colleague put it "Overall your attack on Simon suffers from the same defects as his attack on the psychologists. It is too narrow, Simon makes many valid points that you don't respond to, and it is too general. . . ." Criticism such as this suggests that Simon had hit a sensitive nerve and that my own involvement in the psychological perspective made an objective scholarly response difficult, if not impossible.<sup>14</sup>

In reassessing Simon's critique and rereading the works of various legal psychologists it became clear that my response to Simon was a defensive reaction to the excesses of the legal psychologists. I began to see that Simon and I shared a common ground—each of us sought to bring a critical perspective to a

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the psychological toward a moral/ethical/religious perspective. In sum, Shaffer utilizes a psychological perspective which *in some instances* provides the predominant frame of reference. However, to view Shaffer merely as a "legal psychologist" or to suggest that he follows a Psychological Vision fails to give proper attention to the theological, the moral and the ethical perspectives in his work. Note here that the theological and the moral/ethical are not the same perspective. They may converge, as in *Advocacy as Moral Discourse*, or the moral/ethical perspective may stand without strong support from the theological, as in *The Practice of Law as Moral Discourse*.

<sup>11</sup> *Homo Psychologicus*, *supra* note 3, at 489.

<sup>12</sup> *Id.*

<sup>13</sup> Liz Dvorkin at the University of Hawaii and Paul Brest at Stanford were instrumental in helping me place this work in a broader perspective. I am confident that both would find much with which to disagree in the work that has emerged. Neither should be held accountable for the views expressed here.

<sup>14</sup> Of course, whether objective, value-free scholarship is the goal is a separate and significant question.

newly emerging vision of professional relations and professional education. There were indeed questions to be raised about the Psychological Vision, and working through my angry response to Simon led me to see that I share many of his questions about the psychological perspective.

### I. PSYCHOLOGY AND LEGAL EDUCATION

The explanation of the subjective factors in the decision to write this article suggests my own ambivalence about the role of psychology in legal education—an ambivalence which I have decided not to mask by writing a more definitive, academic, scholarly account. My personal ambivalence involves the use of psychology by law teachers to help law students cope with the stress of Socratic teaching and to help students adapt to existing professional roles. More significantly, psychology can serve to fortify the existing jurisprudential philosophical paradigm which underpins the lawyer's role in contemporary society. It is now clear, for example, that Andrew Watson's version of psychology in the classroom is instrumental in maintaining the teacher's "control" and ignores the critical view of professionals in contemporary society. While Watson's work provides us with a much needed introduction to psychoanalytic theory<sup>15</sup> and is rich with observations that can be used in law teaching, it is inadequate as a psychology for legal education.

It is difficult to assess Watson's actual impact on pedagogical practices in legal education. Since few law teachers are trained in psychoanalytic theory, the teaching techniques that

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<sup>15</sup> While often attacked, psychoanalytic theory, apart from free association and psycholanalysis as a therapeutic treatment, has not been successfully replaced as a useful theory to explain the relationship between man's behavior and his motives. Although behaviorism has captured the majority of American psychology departments, it fails to deal with the very aspect of human behavior which is at the core of psychoanalytic theory—motive. In fact, psychoanalytic theory offers the only thorough explanation of motives. See F. CREWS, *OUT OF MY SYSTEM: PSYCHOANALYSIS, IDEOLOGY, AND CRITICAL METHOD* 4 (1975).

Crews argues that, "Whatever its therapeutic or even its conceptual disadvantages, only psychoanalysis has registered the psychic costs involved in man's prolonged dependency and his improvising of culture out of thwarted desire." *Id.* at 76. Freud must be given credit, not for discovering the unconscious, but for creating a systematic theory which views both the conscious and unconscious as operative in understanding behavior and the nature of man.

Watson recommends, such as observing individual and group behavior in the classroom which reflects underlying unconscious motivations, needs, and conflicts, are probably not in wide use.

More recently, a group of legal educators at Columbia, following the work of Jack Himmelstein,<sup>16</sup> have begun to utilize humanistic psychology<sup>17</sup> rather than psychoanalytic psychology as the basis for teacher training. Himmelstein dismisses the

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<sup>16</sup> See E. DVORKIN, J. HIMMELSTEIN, & H. LESNICK, *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* (1981) [hereinafter cited as *BECOMING A LAWYER*]; Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514 (1978) [hereinafter cited as *Reassessing Law Schooling*].

I have benefited greatly from my association with Himmelstein and others who have participated in the summer workshops sponsored by the Project for the Study and Application of Humanistic Education in Law.

<sup>17</sup> Humanistic psychology is sufficiently broad, diverse and eclectic that it is no longer subject to a simple definition or description. For a summary statement describing humanistic psychology, the reader can begin with the statement of the Association for Humanistic Psychology (AHP) which publishes one of the leading journals in humanistic psychology. The *Journal of Humanistic Psychology* explains to its readers that humanistic psychology:

Centers on the experiencing person and thus on experience as primary to understanding people;

Affirms the fundamental uniqueness and importance of human life;

Tries to develop methods to enlarge and expand human experience;

Believes that intentionality and values are crucial to human choice;

Emphasizes topics given little attention in most systems—self-realization, spontaneity, loving, choosing, creativity, valuing, responsibility, authenticity, transcending and courage;

Seeks for means to integrate the whole person—emotions and intellect, body and soul;

Is concerned with the individual, the exceptional and the unpredictable rather than only the regular, the universal and the conforming;

Encourages research based on the significance of the phenomena studied;

Explores synergistic relationships within groups, communities and institutions;

Has a fundamental commitment to psychology as an art and a science, rejecting only those assumptions which restrict inquiry and interfere with a total view of human experience.

Humanistic psychology focuses on how we experience the world; the personal values which influence our experience and life choices; the responsibility we assume for the choices we make—in essence, the unique self that exists, changes, and grows as a being in existence.

"narrow definitions of man" found in the Freudian and behaviorist orientations to psychology and adopts humanistic psychology, which he praises for its view "of the person as a whole, and an appreciation and understanding of responsibility, love, joy, courage, will, the role of values, and the personal search for meaning in life. . . ."<sup>18</sup> The general themes of Himmelstein's version of humanistic legal education are derived almost exclusively from humanistic psychology, focusing on personal awareness and responsibility, self-actualization, interpersonal relationships, and the role of values in personal and professional development.

The humanistic psychological perspective in legal education has recently received "establishment" approval with the publication by West Publishing Company of *Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism*.<sup>19</sup> The book is the collaborative product of a group of humanistic "legal psychologists" who have been involved with the Project for the Study and Application of Humanistic Education in Law based at Columbia Law School and supported by a grant from the National Institute of Mental Health.<sup>20</sup> Under the leadership of Himmelstein, this group has conducted humanistic legal education workshops during the summers and weekend introductory workshops throughout the past three years.<sup>21</sup> As a result, approximately fifty law teachers, including several law school deans, have received training in the humanistic psychological perspective on teaching in legal education.<sup>22</sup>

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<sup>18</sup> *Reassessing Law Schooling*, *supra* note 16, at 544.

<sup>19</sup> *Id.*

<sup>20</sup> The work of the Project has not been fully described in the legal literature. The original grant proposal to The National Institute of Mental Health [hereinafter referred to as NIMH] was rewritten and appears in a 1978 *Symposium on Legal Education* published by the *New York University Law Review*. See *Reassessing Law Schooling*, *supra* note 16.

<sup>21</sup> For a description of one of the first weekend workshops conducted under Project auspices, see *Reassessing Law Schooling: The Sterling Forest Group*, 63 N.Y.U. L. REV. 561 (1978).

<sup>22</sup> One of the earliest efforts reported in the legal literature to teach law student human relations skills in sensitivity training groups, sometimes called T-groups, was that of Howard Sacks. Sacks, *Human Relations Training for Law Students and Lawyers*, 11 J. LEGAL EDUC. 316 (1959). Sacks used a variety of conventional and non-traditional approaches in the course. While some substantive information was conveyed to students by lecture and assigned reading material, students were actively involved in the course through role-playing exercises and participation in unstructured small groups. (On the use of lectures and discussion

in the teaching of social interaction skills see M. ARGYLE, *SOCIAL INTERACTION* 416-418 (1967)). Sacks describes in detail the purpose, goals, and agenda of T-groups and explores their relevance to learning human relations skills in legal education. Sacks, *supra* at 328-36. Sacks' experimentation with human relations training in the course led him to suggest that this kind of training could be incorporated into other courses. *Id.* at 343.

Building on the work of Sacks and others, Thomas Shaffer began to use small group training techniques. See Grismer & Shaffer, *Experienced-Based Teaching Methods In Legal Counseling* 19 CLEV. ST. L. REV. 448 (1970). Shaffer and Grismer sought to employ teaching techniques which would take account of student "developmental needs." Shaffer and Grismer predate Himmelstein in the suggestion that the student's "human growth" be a part of formal legal education. *Id.* at 449. Both Sacks and Shaffer sought new teaching techniques not for the purpose of directing and promoting individual growth but rather to train law students in legal counseling.

The subject for study in the small group or T-group is the behavior of the participants, their experience of each other, and the experience of what is called "group process." The T-group is not a therapy group and is not designed to provide individual therapy for participants. Generally, personal and interpersonal problems are dealt with insofar as they inhibit communication within the group and stand in the way of the group's achieving its goals. Emotional issues are not ignored but are dealt with to the extent called for by the goals of the group.

The leader/teacher acts as a resource for the group. Her primary purpose is to reveal to the group its own dynamics as it moves through various stages of development as a group, i.e., "What is happening in the group here and now." Gerard Egan notes that "[t]he leader-member is in the group because he is interested in interpersonal growth, his own included. . . . Because of his experience, he may be more aware of his own interpersonal strengths and his areas of deficit, and it is this awareness that enables him to make contact with others." G. EGAN, *ENCOUNTER: GROUP PROCESSES FOR INTERPERSONAL GROWTH* 125 (1970).

How is small group process applicable to legal education and lawyering? First, a law school class of 15-20 people constitutes a small group with the full range of individual and group behavior which occurs when human interaction takes place. The law school classroom as a small group can be used to deal with competition, winning-losing, peer approval, self-esteem, and conflict, e.g., between teacher and student, between student and student.

The small group can be used to experience the *source* of rules, suggesting the juncture of the social and psychological matrix from which rules emerge. Various rules which govern the class can be explored to determine whether all rules are of equal import and are of the same nature. Hence there is a suggestion of the hierarchical nature of rules. Some rules reflect fundamental principles, while others are derivative. This exercise offers an opportunity to explore Hart's concept of "primary" and "secondary" rules. See H. HART, *THE CONCEPT OF LAW* (1961). This exercise can also be used to explore the relationship between stated, formal, written law and "living law." See, e.g., Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS, 1 (1969). See also E. SMIGEL, *THE WALL STREET LAWYER, PROFESSIONAL ORGANIZATION MAN?* (1969) (the living law in law firms); Richard, *Faculty Regulations of American Law Schools*, 13 CLEV.-MAR. L. REV. 581 (1964) (the living law of law faculties).

During the course of legal education students are introduced to a variety of



From my participation in Himmelstein's first summer workshop<sup>23</sup> and my experience leading small groups I recognize the value in greater self-awareness and the emphasis on the subjective and personal dimensions of professional socialization and the learning experience. The danger in this psychologicalization of the professional educational experience is that it has a tendency to further mystify the role of the teacher.

The humanistic psychological paradigm which Himmelstein follows is grounded in his work with a "selected" group of legal educators. Himmelstein is thus able to work with a group of teachers who have chosen to engage each other in psychological discourse. The selection process permits Himmelstein to screen out those who are not open to experientially focused learning. But more important than their initial openness<sup>24</sup> to this form of teaching is the fact that the group is fundamentally disaffected

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legal concepts such as jurisdiction, conflicts of law, procedure, due process, notice, presumption and punishment. These can be viewed as principles operative in the class as a small group. See Weyranch, *The "Basic Law" or "Constitution" of a Small Group*, 27 J. SOC. ISSUES 2:49, 50 (1971).

Second, lawyers are members of small groups in both private and professional spheres of life. In the private sphere one may be a member of a church congregation, the PTA, Lions Club, a neighborhood group formed to secure better law enforcement, or a Wednesday poker group. In their professional work lawyers attend meetings of the firm's partners, serve on boards of directors, as counsel to administrative boards, as city counsels, and represent corporate clients where they may be a part of an inner elite who run the company. Lawyers may negotiate the settlement of a case in which negotiations take place in a small group setting. Lawyers may represent clients whose "interest" evolves from a group process, e.g., a corporate client or an administrative board.

Lawyers deal with juries which are small groups. See, e.g., Strodbeck & Hook, *The Social Dimensions of a Twelve-Man Jury Table*, 24 SOCIOLOGY 397 (1961); Stodtbeck & Mann, *Sex Role Differentiation in Jury Deliberations*, 19 SOCIOLOGY 3 (1956). Lawyers deal with courts which, in the case of some appellate courts, also operate as a small group. See, e.g., R. WOODWARD & S. ARMSTRONG, *THE BRETHERN* (1979); Snyder, *The Supreme Court as a Small Group*, 36 SOCIAL FORCES 232 (1958).

<sup>23</sup> The author attended the first two-week summer program in 1978 held at Devil's Thumb Ranch, a guest ranch near the Continental Divide in Colorado. The meetings were held in a single room cabin, carpeted, and filled with overstuffed pillows. The room contained no furniture. The participants were physically isolated and there were few opportunities to stray from the ranch.

<sup>24</sup> I say "initial openness" because there are some striking examples of resistance to a constant diet of experiential exercises and the transformation of experience into subjective awareness.

with the traditional Langdellian paradigm in law teaching. It is a group that takes seriously the criticism of legal education and the impoverishment that it brings to their own lives. With this kind of critical awareness of legal education, Himmelstein's talk of a richer, fuller life as a teacher and professional becomes appealing.

What are we to make of the principles of humanistic pedagogy in a classroom filled with students we did not select and in an environment which is not tailor-made for the sharing of personal values and aspirations? What we find is that, indeed, some of our students have no desire to participate in a classroom which is "experientially based," a few are so threatened by the prospects of being "open" and "sharing", the keystones to humanistic teaching, that they totally withdraw and become further alienated. We should not be surprised to find that some of our students are unreceptive.<sup>25</sup> First year students often do not share nor do they readily understand the disaffection of their teachers with the legalistic paradigm. Rather, they see law, and all its traditional trappings, as being the vehicle for personal and material success. When students adopt a more critical perspective, which many do before their departure from law school to the world of practice, I suspect that they are critical for radically different reasons than are their teachers.

The point of Himmelstein's work is not to simply present new techniques and strategies for educating and training lawyers. A reading of *Becoming A Lawyer* and informal communication with Himmelstein and his colleagues suggest that there is something more at stake than professional pedagogy. Himmelstein is trying to envision a process of education and a life in law which is radically different from professionalism as we know it today. To the extent that Himmelstein can utilize humanistic and transpersonal psychology<sup>26</sup> to help us lead more meaningful lives in and through our professional work, his work should be supported.

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<sup>25</sup> As one of my students told me several years ago, "Professor, you're just going to have to see that your way of thinking is an obstacle to my getting out of this place with the least amount of involvement possible."

<sup>26</sup> See Boucouvales, *Transpersonal Psychology: A Working Outline of the Field*, 12 J. TRANSPERSONAL PSYCH. 37 (1980).

William Simon's critique of the legal perspective pushes us to reexamine the work of legal psychologists like Watson and Himmelstein and ask whether psychology can serve as the basis for a new paradigm in legal education, permitting us to put Langdell's ghost to rest. Or is a psychological perspective in legal education simply another manifestation of what Christopher Lasch calls a "culture of narcissism."<sup>27</sup>

Lasch argues that the present emphasis on self-awareness and individual feelings has produced a "culture of narcissism" in which we live for the moment. He suggests that "[w]e are fast losing the sense of historical continuity, the sense of belonging to a succession of generations originating in the past and stretching into the future. It is the waning of the sense of historical time—in particular, the erosion of any strong concern for posterity. . . ."<sup>28</sup> With the waning of a sense of historical time we forget our collective past and simultaneously develop a belief that there is no future in society. We no longer believe that any sort of common social existence is possible. Society is no longer perceived as serving the individual, but as an obstacle to individual development.<sup>29</sup> The danger in this disdain for society is that "the therapeutic outlook threatens to displace politics as well, the last refuge of ideology."<sup>30</sup>

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<sup>27</sup> C. LASCH, *THE CULTURE OF NARCISSISM* (1978).

In a sense we have begun, as a culture, to view the world, and ourselves in the world, from the inside out, that is, we are increasingly willing to perceive the world from a subjective standpoint. The world is no longer a concrete reality, which must be accepted as a *given*. In this new age of consciousness, the external world is a world that *I* construct and a world for which *I* am responsible. It is now commonplace to see reality as a personal construction. If the major orientation to self in the past was religious, political, economic, or social, today it can be seen as psychological.

It should come as no surprise that when individuals in a culture begin to see their world from inside out they pay more attention to self and *how* the world is being viewed. So the age of consciousness is closely tied to psychology, especially that part of psychology which pays attention to individual feelings and emotions and one's awareness of what might be called inner states of being. And so, contemporary American culture has emerged as the first post-modern industrial country in which a culture has begun to attune itself to the psychological, the subjective inner world of the individual—feelings, emotions, images and dreams.

<sup>28</sup> *Id.* at 30.

<sup>29</sup> *Id.* at 39.

<sup>30</sup> *Id.* at 43.

As with any cultural transformation,<sup>31</sup> we see both functional and dysfunctional aspects of the psychological perspective in modern society. Few criticize the increasingly sophisticated and diverse forms of counseling and treatment which are now available for individuals with personal and psychological problems. Public acceptance of individual counseling and therapy, better recognition of the role of mental illness in modern society, and less social stigma attached to those who suffer from mental disturbances have been positive features of a "democratized" psychology.

And yet, even psychology as treatment has not escaped criticism. Psychology teamed with science has given us psychotropic, mind-altering drugs which proponents argue are responsible for the massive outflow of patients from mental institutions, while others contend that such drugs cover up symptoms of a "sick society." Others have directed criticism to the excesses of new psychological therapies like nude encounter, primal scream and regression therapy which appear to be more in the nature of counter-culture antics than psychologically based modes of help and healing.

The acknowledged excesses of charlatans and the fools who follow them in this age of therapeutic man can be criticized on a number of grounds. Edwin Shur, in his book *The Awareness Trap*, argues that modern efforts to understand self through psychology are not a reflection of a major cultural transforma-

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<sup>31</sup> The danger is that a profession's traditional forms and rituals of education and practice will obscure the underlying change. On the surface, the existing paradigms for legal education and legal practice are deceptive in that nothing appears to have changed.

Thomas Kuhn, writing of the history and philosophy of science, has suggested that scientific truth is determined by a community of professionals. Kuhn's work is outlined in Bonsignore, *Law as a Hard Science: On the Madness in Method*, 2 ALSA FORUM 47 (December 1977). Scientific knowledge, or what we know as true, depends upon the "paradigm" to which the community of scientists claim allegiance. Revolutions in scientific approaches occur when the old paradigm is unable to "hold" disparate facts and theories. The existing paradigm gives way and a new scientific world-view comes into existence.

From a Kuhnian perspective, one might argue that the old paradigm in legal education and the traditional role of the lawyer have been seriously threatened by continual criticism over the past decade. Our old theories of legal education may, after a century of the Landellian paradigm, be giving ground to new theories and models.

tion but are the preoccupation of an indulgent middle class.<sup>32</sup> Shur notes that the poor simply do not have the financial resources to partake of the new array of psychological services and therapies and would be no better off as a class if they did. In a society that emphasizes self-awareness, the poor are implicitly encouraged to ignore their social condition, thereby undermining the likelihood of social change.

The reader may be asking whether these social concerns about the role of psychology in contemporary culture have anything to do with law and legal education. The most obvious response is that the study and practice of law reflect the broader culture of which they are a part; and professional education does not exist in isolation from the culture in which it occurs. Movements in legal education parallel changes which are taking place in the broader world of education. We forget that legal education *is education* as well as professional training and indoctrination. Lawyers educated within a culture which places emphasis on self-awareness, feelings and emotions, and personal relationships will sooner or later be exposed to teaching that embraces the psychological perspective.

It should come as no surprise that today psychology plays a significant role in education. In a recent survey, the works of two psychologists were shown as having an influential role in education.<sup>33</sup> *Motivation and Personality* written by Abraham Maslow, a founder of what is known today as humanistic psychology, was listed by educators as one of the four most influential works on curriculum and teaching published in this century.<sup>34</sup> Seventy-five percent of the educators surveyed cited *Counseling and Psychotherapy* by Carl Rogers as having had a significant influence on education.<sup>35</sup>

A survey of the legal literature reveals that legal education, too, has been significantly affected by the psychological perspective. Psychology is an integral part of the substantive aspects of

<sup>32</sup> E. SHUR, *THE AWARENESS TRAP: SELF ABSORPTION INSTEAD OF SOCIAL CHANGE* (1976).

<sup>33</sup> Shane, *Significant Writings that Have Influenced the Curriculum: 1906-81*, 62 *PHI DELTA KAPPAN* 311 (Jan. 1981).

<sup>34</sup> A. MASLOW, *MOTIVATION AND PERSONALITY* (2d ed. 1970).

<sup>35</sup> C. ROGERS, *COUNSELING AND PSYCHOTHERAPY: NEW CONCEPTS IN PRACTICE*; (1942).

criminal and family law, and there is voluminous legal literature on the need for a better understanding of the psychodynamics of the attorney-client relationship. The psychological perspective has also served as a frame of reference for a thorough-going critique of legal education. Andrew Watson, Alan Stone, Robert Redmount, Thomas Shaffer and others have been writing for over a decade about the psychodynamics of legal education.

For several decades, law schools have been criticized for their failure to teach legal interviewing, counseling and negotiation, areas in which psychology is an integral part of the teaching." While recognizing that lawyering was "people-oriented," we failed to emphasize and teach the interpersonal skills of lawyering and the personal development necessary to attain those skills. In response to the critics, law schools began to teach courses in interviewing and counseling, negotiations, and law and psychiatry.

The psychological perspective has had an effect not only on what we teach, but, perhaps more significantly, it has served as the basis for a critique of *how* we teach and *how* we look at legal education. As we examine psychology in legal education, we will find it useful to distinguish psychology as a tool, a perspective, and a vision.

Psychology is a tool, or instrument, when we use it to pursue other ends. The legal literature is replete with suggestions that psychology helps us understand the psychodynamics of the attorney-client relationships; which understanding leads to more effective, competent, and professional lawyering.<sup>36</sup> When we use psychological knowledge and understanding to improve lawyering skills then psychology is instrumental, it serves as a tool. It is also a tool when viewed as a *subject* to be taught in the law school curriculum. Whether we teach psychology and psychiatry because of the role of psychiatrist as expert in the legal system,<sup>37</sup> or teach it because it provides a theory for understanding

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<sup>36</sup> See, e.g., A. WATSON, *PSYCHIATRY FOR LAWYERS* (rev. ed. 1978) [hereinafter cited as *PSYCHIATRY FOR LAWYERS*]; Elkins, *A Counseling Model for Lawyering in Divorce Cases*, *supra* note 9; Watson, *Professionalizing the Lawyer's Role*, *supra* note 4.

<sup>37</sup> See, e.g., Elkins, *Legal Representation of the Mentally Ill*, 82 W. VA. L. REV. 157 (1979).

the dynamics of professional relationships, we see the instrumental nature of psychology.

It may seem a dramatic overstatement to suggest that we not only use tools but are used by them. Yet, tools, like psychology, seem to develop lives of their own. Our cultural tools affect us in subtle and powerful ways. Although automobiles and television are different in significant ways from psychology, they are excellent examples of how inanimate tools can transform the way we live and affect a culture in ways far beyond their instrumental use value.<sup>38</sup>

This phenomenon is not limited to inanimate object-tools but applies to social institutions like professions and academic disciplines like psychology. When we look at psychology as a discipline we find that, like other "strong" disciplines, it is not only a body of knowledge about the world, but suggests a distinctive mode of discourse and the means for approaching and addressing issues of personal and social existence. Most simply put, psychology can become a particular way of seeing the world. Like any discipline, it obscures at the same time that it reveals. It does not provide a "total," or shall we say, holistic, way of viewing. Whenever we view the world from the perspective of a discipline we miss "something."

To understand psychology as a perspective, we can view it in the broader context of the need to understand individual behavior and a co-equal need to understand the social context of and for individual action. Psychology and sociology have evolved, for the most part, as separate fields of study reflecting our concern for individual and social processes. The study of the individual and of society historically have proceeded as separate academic disciplines.<sup>39</sup>

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<sup>38</sup> The point as to automobiles has been argued by Ivan Illich in *TOOLS FOR CONVIVIALITY* (1973). For a discussion of the effect of television on one aspect of contemporary culture—education, see N. POSTMAN, *TEACHING AS A CONSERVING ACTIVITY* (1979).

<sup>39</sup> An example of how psychology, Freudian in this case, and sociology divide up the world is given by Robert Merton in *SOCIOLOGICAL AMBIVALENCE* (1976). He points out that, generally, the concept of ambivalence has been viewed primarily from a psychological perspective which focuses on "the inner experience and the psychic mechanisms released by efforts to cope with conflicting emotions, thoughts, or actions." *Id.* at 4. Although the Freudian account of ambivalence takes into account, at least in its consideration of the Oedipus complex, the status

Both the disciplines of psychology and sociology are modes of "seeing."<sup>40</sup> As in the literal act of seeing, some objects will be in sharper focus than others. Everything in our perceptual field cannot be maintained with equal clarity *at the same time*. Conse-

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of the male "as husband-and-father when it treats the son's mixed feelings of love and hate about his father," *id.*, the structure of social relations is not made central to the analysis. Merton notes that social relations in psychoanalytic theory are taken as facts of historical circumstance rather than examined in terms of the dynamics of social structure to see how and to what extent ambivalence comes to be built into the very structure of social relation.

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Unlike the psychological orientation, the sociological one focuses on the ways in which ambivalence comes to be built into the structure of social statuses and roles. It directs us to examine the processes in the social structure that affect the probability of ambivalence turning up in particular kinds of role-relations. And finally, it directs us to the social consequences of ambivalence for the workings of social structures.

*Id.* at 4-5.

Merton believes that the sociological perspective "complements" the psychological.

By centering on the special case of the structural sources of ambivalence in the relations between professionals and clients, we may be able to raise some of the principle problems requiring investigation and still keep our account from becoming so diffuse as to blur these problems.

....

[W]hatever the psychological theory takes as the sources of ambivalence, it centers on how this or that type of personality develops a particular ambivalence and copes with it?

*Id.* at 6.

Sociological ambivalence, on the other hand, refers to incompatible normative expectations of attitudes, beliefs, and behavior assigned to a status, *i.e.*, a social position, or to a set of statuses in a society. "[T]he ambivalence is located in the social definition of roles and statuses, not in the feeling-state of one or another type of personality." *Id.* at 7.

<sup>40</sup> Another way to picture psychology and sociology is as personal and impersonal modes of "seeing." We might even generalize the personal and impersonal perspectives as basic polarities of existence. Thus, when we pair psychology and sociology, private and public, subjective and objective, we find that the first term of each pair is related to the personal, the second term to the impersonal.

We have several alternatives for viewing such polarities: the dominance of one over the other; a coequal emphasis on both, with the resulting possibility of obfuscation of one, or more likely both; placement on a linear continuum where one perspective moves toward and at some point becomes the other; a paradoxical or complementary existence, in which the polar opposites express truths about the same phenomena which are in contradiction to each other.



quently, the psychological perspective *places* the individual in the foreground and society in the background.<sup>41</sup> This makes it possible to focus, "to see" if you will, that which is closer. The individual is foreground, society becomes background. A psychological perspective then is simply a perspective, and does not provide a means to "see" everything at once.

Finally, psychology can become an individual or social worldview, and thereby take on the aura of vision.<sup>42</sup> As vision, psychology extends beyond its instrumental value as a tool, a methodology for use in understanding individual and social problems, or a body of knowledge, or a mode of discourse. Psychology is transformed from a view to a vision which suggests wholeness, completeness, totality. William Simon has recently suggested that psychology is now a vision in legal education.<sup>43</sup> Psychology, in Simon's view, has become a jurisprudence—an effort to understand in a fundamentally different way the nature and purpose of lawyering and the legal system and has changed "the intellectual history of American law."<sup>44</sup>

The issues I want to raise in this article call into question some of the implicit values in humanistic psychology and the psychological perspective. I raise these questions not because I have answers but because the questions are troublesome, and, as any good set of questions, need to be asked again and again before we will attain any clarity as to their true significance. This article will look at the work of several legal psychologists and reexamine the critique of William Simon to see what additional light can be shed on the following questions. How has the contemporary cultural emphasis on self and self-awareness affected legal education? Is learning about self a legitimate goal of professional education and training? How does learning more about self and who we are as persons affect the role of lawyering? If we decide to make *self* a part of legal education, do we

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<sup>41</sup> The common wisdom is that the power of psychology as an explanative tool and a means for understanding diminishes as we move from the individual, to the small group, to community, to society. The reverse is true of sociology which focuses on the collective, *e.g.*, society or community. If we view psychology as a *discipline* it comes as little surprise that society gives way, *in the discipline*, to the individual.

<sup>42</sup> See *Homo Psychologicus*, *supra* note 3.

<sup>43</sup> *Id.* at 488.

<sup>44</sup> *Id.*

encourage lawyers trained in this "therapeutic" milieu to turn away from the world and to eschew social and political action which is designed to improve society?

A. *Andrew Watson: Freudian Psychology and Legal Education*

Andrew Watson is a psychoanalyst and a long time student of legal education. As a member of the law faculty at the University of Michigan, he has turned his clinical attention to the dynamics of legal education and become a prominent proponent of psychology in legal education.<sup>45</sup> He has also written extensively on the psychodynamics of the attorney-client relationship and on the need for law schools to provide necessary professional training in the psychological skills.

Much of Andrew Watson's work presents psychology as a tool, a tool to which law students should be exposed during their legal education. Watson's books, *Psychiatry for Lawyers*<sup>46</sup> and *The Lawyer in the Interviewing and Counseling Process*,<sup>47</sup> lay out the fundamental tenets of psychoanalytic oriented psychiatry and show how it is applicable to lawyers. We need a psychiatric theory of human behavior, in Watson's view, to understand the "working relationship" we have with clients. In the opening paragraphs of *Psychiatry for Lawyers*, Watson states: "It seems appropriate to initiate our exploration of contemporary psychiatry theory in the context of the lawyer-client relationship."<sup>48</sup> *Psychiatry for Lawyers* presents psychology as an appropriate tool for understanding ourselves and those with whom we interact in our professional lives.

Watson and others have argued for several decades that law students should be taught counseling skills. They contend that the lawyering role involves interpersonal relations and that we need interpersonal, *i.e.*, psychological, skills in order to effectively perform the lawyer role. Counseling skills are best taught through individual, supervised sessions and by the method of case presentations used in medical schools and counselor training. These methods which can be used in legal education, par-

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<sup>45</sup> *The Quest for Professional Competence*, *supra* note 4.

<sup>46</sup> *PSYCHIATRY FOR LAWYERS*, *supra* note 36.

<sup>47</sup> A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976).

<sup>48</sup> *Supra* note 36, at 2.

ticularly in clinical programs, simply do not reach the vast majority of law students. Watson has sought to devise teaching methods to introduce counseling skills to students who do not participate in clinical programs. Watson contends that every law school classroom provides an opportunity for developing counseling skills. "Students in a classroom, buffeted about by the stresses generated by the Socratic technique, provide ample data for use in counseling training."<sup>49</sup> To make use of the law school classroom a teacher must be "willing to see and deal with the group's emotional reactions" and to utilize "the group-transactional process of the Socratic classroom situation."<sup>50</sup>

Watson makes an additional theoretical assumption to support the argument that the law school classroom provides an appropriate setting to learn about counseling skills. He contends, "that students go through the same kinds of emotional reactions in the classroom that clients do in the counseling situation. Direct analogies may be made between these affective transactional responses and the interviewing situation."<sup>51</sup> Working with feelings is a "technical necessity" of the lawyer's work, so students "must learn how to objectify these subjective aspects of their work."<sup>52</sup>

Finally, the teacher and his affective "presence" is analogous to the lawyer in the interview and counseling setting. For Watson, the teacher-student relationship is, at least for teaching purposes, the emotional analogue of the lawyer-client relationship. Whatever emotions and feelings are present in the patent law class, an example used by Watson, affect learning and are similar to the feelings that arise in the attorney-client relationship.

At this juncture, it is unclear if psychology, which in Watson's view is psychoanalytic psychiatry, is simply a handy tool which lawyers should know about and learn how to use. Or does psychology play a more significant role in legal education?

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<sup>49</sup> *Professionalizing the Lawyer's Role*, *supra* note 4, at 29.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 30. The purpose of psychologically oriented pedagogy is "to involve the students in emotional processes which are analogous to those experienced in actual practice.

<sup>52</sup> *The Quest for Professional Competence*, *supra* note 4, at 150.

In *The Quest for Professional Competence: Psychological Aspects of Legal Education*, Watson's seminal work on the psychodynamics of legal education, it becomes clear that psychology is not simply a tool, but a perspective from which we can understand and explain the true reality of legal education. An examination of *The Quest for Professional Competence* reveals that psychology is being used, not only to teach counseling skills, but to explain why students come to law school, the forces which affect a student's performance, the nature of the lawyer's professional role and the relationship of the law school curriculum to the lawyer's role.

Watson first contends that there are underlying psychological needs, drives, forces and images which affect us as students and teachers. We can, thus, be "better" students and teachers if we are aware of this psychological dimension. Students enter law school with a "whole set of ingrained, family-fostered, psychological images which will be crucial to their healthy and successful development as lawyers-to-be. These images are the models from which the student derives much of his motivation and measures his success."<sup>53</sup> Watson argues that these images of self and others are directly related to one's development as a lawyer. Watson implies that images affect the way a student learns, the kind of lawyer one becomes and the self-image that we carry with us in the process.

Watson's second contention is that the present structure of legal education produces substantial stress which the psychological perspective can help us understand and deal with.<sup>54</sup> Third, some aspects of legal education promote the inculcation of values which are not conducive to effective lawyering, e.g., the over-emphasis of analytical skills.<sup>55</sup>

Fourth, by making use of psychology and psychological knowledge, Watson suggests we rethink the sequence of courses, their substantive content and the way we teach. Watson argues that we should pay more attention to courses which focus on professionalism and skill training because they more nearly reflect what lawyers do and because they aid in forming a profes-

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<sup>53</sup> *Id.* at 94.

<sup>54</sup> *Id.* at 145-47.

<sup>55</sup> *Id.* at 127-32.

sional identity.<sup>56</sup> Finally, the lawyers we train are too narrow. We need to reevaluate admissions procedures and the education process in order to produce lawyers "to fit all of the kinds of roles which are needed."<sup>57</sup>

We have thus far traced Watson's conception of psychology as a tool for teaching counseling skills to its central role in the law school classroom, and now we begin to see how it is a perspective to *explain* legal education. Psychology begins to serve a different function when Watson attempts, through the use of psychoanalytic concepts of unconscious motivation, need and conflict, to tell us why students select law as a profession. In Watson's view those who attend law school have psychological character structures marked by a strong need for mastery, control and aggressiveness, or its counterpart, passivity, which is a defense, or what the psychoanalysts call a reaction formation, to aggressiveness.<sup>58</sup> These needs are expressed as we try to forge a professional identity, "the detailed and complex internal image which each person must develop of himself"; the model on which we pattern our lives.<sup>59</sup> Law school is the time in which we begin the work on a professional identity and integrate this new identity into our personal structure.

The professional image which ultimately evolves is linked to what we bring with us to law school and how we manage our ideals, images and expectations in the face of professional demands and expectations.<sup>60</sup> For Watson, professional competence, the way we act out our professional lives, depends on the resolution of the "psychological conflicts"<sup>61</sup> which are present in identity formation.

To simplify Watson's view, a life in law, *i.e.*, being a professional, entails fundamental conflicts:

- (1) duty to secure justice (truth and social justice) with duty to a particular client (zealous representation);
- (2) interest of the client (competence and professional skills) with self-interest (status, prestige, financial well being);

<sup>56</sup> *Id.* at 140. See also *id.* at 117-18.

<sup>57</sup> *Id.* at 143-44.

<sup>58</sup> *Id.* at 101-03, 95.

<sup>59</sup> *Id.*

<sup>60</sup> See generally Elkins, *The Paradox of a Life in Law*, note 9, *supra*.

<sup>61</sup> Watson, *Lawyers and Professionalism*, *supra* note 4.

- (3) analytical skills with emotions and feelings (aggression, need for order, predictability, idealism, altruism (which flow from conscious and unconscious wants, needs, drives, motivations));
- (4) public image with inner self;
- (5) competence with vulnerability;
- (6) aggression with cooperation;
- (7) lawyer control with client control
- (8) certainty with uncertainty; and
- (9) winning with losing.

To be professionally competent, Watson argues that we "must handle" these conflicts. "It is only through the development of a psychological capacity to deal with those conflicts openly and cognitively that a person can elect to behave with professional propriety."<sup>62</sup> The role of the law teacher is

to help the student understand what he is doing, to permit him to learn why it happened, and then to assist him in developing the capacity to control such professionally inappropriate behavior in the future. This must lead the student to confront questions which bring him to recognize the appropriate behavioral responses.<sup>63</sup>

To function in this role the law teacher must turn to the psychologist/psychiatrist, the expert, if he is to gain competence in professional lawyering skills. Only the psychologist can help "mobilize these emotional conflicts in order that they might be experienced, apprehended, and then handled with a proper perspective."<sup>64</sup> Watson confirms the essential role of the psychologist in legal education. "[A]t least for the present, most law schools will need outside, nonlawyer assistance to carry out this technique with skill and effectiveness."<sup>65</sup>

Psychologically-oriented teaching is not simply a matter of recognizing psychological conflict, which nonpsychologically trained individuals can do just as effectively as "professionals," nor is it just a matter of technique. One must learn the "causes" of the conflicts, which requires "experts" such as psychody-

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<sup>62</sup> *Id.* at 251.

<sup>63</sup> *Id.* at 265.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 270. *See also id.* at 284.

namically trained psychiatrists, clinical psychologists and psychiatric social workers.<sup>66</sup>

In the final analysis, it is "professional propriety" to which psychology is to be devoted,<sup>67</sup> and it is here that we find Watson's psychological perspective emerging as a psychological vision. Psychology is no longer simply a tool for understanding the attorney-client relationship nor a means to improve law teaching, psychology becomes the corrective for the moral defects in the legal profession. In addressing a graduating class of law students about the conflicts in lawyering, Watson argued that we avoid "falling prey" to the "vulnerability of being seduced by self-interest" by self-awareness, "by high sensitivity of self joined with great sophistication about the technical obligations and procedures of the legal profession. . . ."<sup>68</sup> The corrective for the moral waywardness associated with Watergate is to couple self-insight with technical skills. The only moral deficiency in law and legal education is the lack of "sensitivity to self," which we recover through psychology.

Watson, some six years after his psychological analysis of legal education, extolled the virtues of law school training.

Law schools have convincingly demonstrated their capacity to hone the minds of their students so that when they graduate, they possess excellent intellectual skill to carry out the complex analytical tasks which lawyers perform in our society. For this accomplishment I have only the highest praise, and nowhere in the University is this task done better: this means that truth-seeking by lawyers will be done with consummate intellectual skills.<sup>69</sup>

How is this praise to be qualified in the light of Watergate? What explains the public failings of a profession purportedly committed to public service and "professional responsibility"? Watson argues that we need only "to understand better the complicated emotional reactions which join as well as interfere

<sup>66</sup> *Id.* at 270.

<sup>67</sup> In *Lawyers and Professionalism* Watson sets out to "delineate methods for dealing with stresses of a lawyer's professional life, suggesting ways in which the attorney may satisfy his goals as well as those of his client." *Id.* at 248 (emphasis added).

<sup>68</sup> Watson, *The Watergate Lawyer Syndrome: An Educational Deficiency Disease*, *supra* note 4, at 441.

<sup>69</sup> *Id.* at 441-42.

with intellect when one is searching for elusive Truth.”<sup>70</sup> Law schools are to be criticized only because they ignore the emotional side of learning and professionalism.

Criticism of Watson’s psychological perspective centers on three aspects:

- (1) the instrumental nature in which he uses psychology to help students adapt to the professional role;
- (2) the failure to examine more carefully the social context of professional role behavior; and
- (3) the “glossing over” of the consequences of psychologically-oriented teaching for students who object to it and the lack of critical awareness of the latent effects of such teaching.

When we focus on the student’s early experiences of law school we conclude with Watson that it is indeed a psychological experience and that professional education would benefit from an effort to focus more clearly on the images, needs and expectations which bring the student to law school and on the “identity work” which is the hidden agenda of law school. Although one can argue with Watson’s general assessment of identity formation, the more pressing problem is that he simply tells us too little. We can be assured that identity work is a part of legal education and can agree with Watson that these images and the identity work in law school are closely tied to patterns which ultimately emerge in professional practice. The question remains—how does the student’s personal identity affect classroom teaching and the student’s acquisition of legal knowledge and skills?

Most troubling is Watson’s use of the psychoanalytic perspective to “fit” law students to the professional role. The implicit assumption is that the professional role is an appropriate one, if expanded to include interpersonal and counseling skills, skills not based on analytical reasoning. Watson does not inquire into how professional roles affect the individual student/lawyer, nor does he determine whether the professional role generally serves socially desired ends. Watson seems to be oblivious to the possibility that psychological intervention for the purpose of helping students “cope” with their initiation into profes-

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<sup>70</sup> *Id.* at 442.



sionalism and adoption of professional roles raises social and ethical questions.

There is real fear, which Watson does little to dispel, that the underlying reason for "handling" psychological factors is to make it easier to adapt to contemporary role demands and to alleviate the suffering which comes from realizing that, as professionals, we do too little to secure social justice and a more humane world. Watson recognizes the social problem but "reduces" it to a personal one—a psychological conflict. For example, an individual who recognizes that the poor have unequal and inadequate access to legal services must develop the "emotional capacity to cope" with the feeling of concern by understanding the "impossibility" of insuring that these social needs are met.<sup>71</sup> If the student is unable to do this he is doomed to a kind of frustration and disappointment which may convert altruism to cynicism. Students and young lawyers can, in Watson's view, be helped to face these conflicting emotions in order to learn a means for coping.<sup>72</sup>

Watson translates the social problem of legal services to the psychological conflict it produces and then teaches us how to "cope" with it by seeing our concern for social justice as irrational.

A lawyer must ultimately face the fact that he does not have the capacity to solve all problems. Then and only then may he comfortably put forth his best effort and feel comfortably satisfied that he has done all that a human being can do. Successful resolution of such problems would make it possible to avoid the pretense that the attorney does not care about the problems which remain unsolved.<sup>73</sup>

Psychological awareness thus provides a justification for giving up on the impossible task of altruism.

Watson's use of psychology in legal education can also be criticized on pedagogical grounds. Arguably, psychoanalytically inspired teaching mystifies the process of learning and kindles the magic of the law teacher/psychologist as the master of a new and powerful form of knowledge. It derives its power from the

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<sup>71</sup> *Id.* at 443.

<sup>72</sup> Watson, *supra* note 61, at 268.

<sup>73</sup> *Id.* at 281.

teacher/psychologist's ability to "see through us" and subject our every act to interpretation. The most obscure aspects of our being are now part of the learning process. When confronted with a person who has gained psychological knowledge, we, the students and clients, feel "helpless" because the teacher/lawyer/therapist understands the dynamics of the relation which we take for granted. Fear, anxiety, dread, guilt—all of the feelings and emotional states which we seek to avoid—are gist for discussion and use in teaching and in lawyering. The psychoanalytic legal psychologist sees through us and gains his power through the knowledge that the "class hour is filled with manifestations of unconscious attitudes and feelings, in slips of the tongue, bizarre grammatical formations, and a multitude of facial expressions and body movements which reflect spillovers of unconscious and uncontrolled attitudes or feelings into the classroom situation."<sup>74</sup> For Freud, these incidents in everyday life were to be taken as evidence of the unconscious, but one can question whether he would have agreed that they should be subject, without the consent of the student, to analysis in law school classrooms.

Watson evidently receives some negative feedback on his psychological interventions but glosses over its significance.

There will usually be one or two individuals in a large class who for personal reasons, will react strongly to the emotional threat, real or imagined, of this kind of exploration. However, I have yet to encounter a situation which the class and I cannot resolve for the benefit of both the individual and the entire class. The class learns that the person disturbed is reacting in a way which is only slightly stronger than other members of the class.<sup>75</sup>

Who are these individuals who react strongly? How do they experience the threat of psychological intervention? How do they express the threat? What kind of "personal reasons" might one have for being cautious of in-class psychological interpretations? And finally, how are these situations resolved so as to both "benefit" the individual and the class? Is there perhaps a conflict in the student's interest in not proceeding and the

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<sup>74</sup> *The Quest for Professional Competence*, *supra* note 4, at 151.

<sup>75</sup> *Id.* at 156.

classes' interest in the student's personal objections? How can the psychologically-oriented teacher resolve the conflict to benefit the class without sacrificing the individual's concern to be left alone?

We can agree with Watson's assessment of the significance of emotion and feeling in lawyering and still question his approach. Can we deal with the experience of having our feelings and psychological conflicts exposed by saying that it is all for a good cause—to understand our clients? Is it possible that we encourage defensive withdrawal and the masking of emotions and feelings by calling attention to the unconscious and giving everything a psychological interpretation? And if we do not limit ourselves to superficial interpretations, how are we to deal with flushes and restless stirrings which reflect not so much a problem of competence but are tied to feelings of impotence and rage about childhood, education, society? Are we really prepared to work through these issues in the classroom? Or do we admit at some point that there is a depth to the psyche below which psychological interventions and interruptions cannot reach.<sup>76</sup> Even if there is no thought of doing psychotherapy in the classroom, drawing the line between teaching and therapy is a real issue. How are we to define the respective role of student and teacher in a psychologicalized classroom?

#### B. *Jack Himmelstein: Humanistic Psychology and Legal Education*

There are striking parallels between Himmelstein's and Watson's psychological perspective. Both are troubled by the narrow definition of the lawyer's role and the effect of legal education on present role conceptions. Himmelstein, like Watson, focuses his attention on various aspects of legal education and suggests that a "humanistic educational psychology" can enhance lawyering. Himmelstein's critique of the lawyering role is much more explicit than Watson's. Like Watson, Himmelstein views legal education as a formative influence on the professional role.<sup>77</sup>

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<sup>76</sup> See generally J. HILLMAN, *REVISIONING PSYCHOLOGY* (1975).

<sup>77</sup> See *BECOMING A LAWYER*, *supra* note 16; *Reassessing Law Schooling*, *supra* note 16.

Himmelstein cites the work of the earlier psychologically-oriented critics of legal education—Watson, Alan Stone and Paul Savoy—but makes clear that he does not follow “traditional” schools of psychology, in particular Freud’s view of “man as a creature of instincts, influenced largely by unconscious forces.”<sup>78</sup> Himmelstein implies that Watson’s psychoanalytic perspective on legal education rests on too narrow a definition of man and on an inadequate conception of human growth.<sup>79</sup> He dismisses the “narrow definitions of man” found in the Freudian and behaviorist orientations to psychology and praises humanistic psychology for its view “of the person as a whole, and an appreciation and understanding of responsibility, love, joy,

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<sup>78</sup> *Reassessing Law Schooling*, *supra* note 16, at 543.

<sup>79</sup> Himmelstein’s bias against the Freudian perspective is mirrored in the following excerpt from Sidney Jourard, a prominent figure in the early days of humanistic psychology. Jourard, however, makes a distinction between the effectiveness of Freud’s therapy and the humanistic nature of his accomplishment.

Freud mastered some forces which could have prevented him from becoming the man who invented psychoanalysis. He suffered “Portnoy’s complaint,” as millions of people in the west have—a seductive, doting mother and a father who was both strong and weak, loved and feared. The result of struggling with such conflicting parental demands has been neurosis and diminished growth for many. Freud’s courage lay in facing his recollections and fantasies, his sexuality, his anger, and discovering that one’s past need not preclude fuller functioning, whether it was genital, intellectual, or physical functioning, in adult years. I believe he was most effective as a therapist with persons whose suffering grew out of antigrowth forces comparable to those which he himself had tamed. The therapeutic technique he taught others has not been notorious for its effectiveness. Freud showed in his very person that it’s possible to marry, make love, raise children, and defy all kinds of social pressures in one’s time and place in spite of having been raised as a middle class, minority group member with parents whose demands and expectations were not always compatible with the free flowering of individuality. I suspect he might have helped his patients more swiftly—he sometimes kept patients seven years or more—if he were not so shy and so reluctant to share his experience with his patients. It’s interesting that Freud apparently was never so effective with older people as Jung was, people who had already struggled through their childhood hangups but were finding life meaningless in their forties and fifties, not because of unresolved Oedipal problems but because life, as an adult, had reached the end of its tether. It was time to let go of those forms in order to go forward.

Jourard, *Changing Personal Worlds: A Humanistic Perspective*, in HUMANISM AND BEHAVIORISM: DIALOGUE AND GROWTH 35, 40 (A. Wandersman, P. Poppen & D. Ricks eds. 1976) (footnote omitted).

courage, will, the role of values, and the personal search for meaning in life. . . ."<sup>80</sup>

Himmelstein has taken the central themes of humanistic psychology and applied them to legal education. He summarizes his goals:

- (1) development of modes of experiential learning;
- (2) increasing awareness about oneself, others and the professional role;
- (3) development of personal responsibility in the learner and professional;
- (4) facilitating collaboration as distinguished from competition in learning and practice;
- (5) understanding the use and abuse of authority in teaching and lawyering;
- (6) complementing cognitive and affective understanding and expression in learning and lawyering;
- (7) enhancing the ability to identify with the reality of others (including nonprofessional subcultures);
- (8) understanding the relation of subjective experience and objective reality;
- (9) honoring the relation between personal and professional development, particularly with respect to the search for purpose and meaning in life; and
- (10) adhering to one's sense of personal integrity and value in education and professionalism within the reality of the rewards, demands and pressures of the profession and society.<sup>81</sup>

The general themes of Himmelstein's version of humanistic legal education are derived exclusively from humanistic psychology and its concern for awareness and responsibility, self-awareness and self-actualization, interpersonal relationships, the expression of individual and professional values and our acceptance of greater responsibility for ourselves, and our actions.

Whereas Watson was concerned with the psychodynamics of legal education and how the psychoanalytical perspective in the classroom could be used to promote lawyering skills, Himmelstein's primary focus is on the lawyer as a person. Both Himmelstein and Watson take up the problem of identity, Himmelstein

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<sup>80</sup> *Reassessing Law Schooling*, *supra* note 16, at 544.

<sup>81</sup> *Id.* at 549-50.

giving more attention to personal identity, Watson to professional identity. In the final analysis, Himmelstein and Watson both opt for applying their psychological insights to the law school classroom.

Himmelstein's conception of the role of the psychologically oriented legal educator goes beyond the psychoanalytic interpretations of Watson. The humanistic approach to psychology in education is described as an

effort by legal educators to respond to those aspects of legal education that leave the professionalization process narrowly role-defined, limiting the ability to perceive and appreciate the human concerns and values that underlie law and lawyering. We are seeking new approaches that would better reflect these dimensions and be more responsive to the individuals in the learning process, especially to their deeper aspirations in choosing a career in law.<sup>82</sup>

These comments suggest that there is something fundamentally wrong with the professional role of the lawyer in contemporary society. So we find the psychological humanists, like Watson, turning to psychology because of a profound uneasiness with law teaching and the present conception of lawyering.<sup>83</sup>

What are the humanistic-oriented legal psychologists *critical* of? The general thrust of the criticism seems to be that both legal education and the lawyer's role are too narrowly defined. Reflecting the views of William Twining in a celebrated article of some ten years previous, Himmelstein contends that "the role

<sup>82</sup> BECOMING A LAWYER, *supra* note 16, at 1.

<sup>83</sup> The humanistic perspective, in law and in other disciplines, seems to emerge from a sense of need or disquietude. We realize the failure of a traditional academic discipline to serve our personal need for understanding; the impoverishment of existing educational theories and pedagogies; the need for a more comprehensive sense of our world or perhaps our own relation to the world of which we are a part; and the humanistic perspective emerges.

The humanistic perspective, then, emerges and builds on the failure of traditional modes and conceptions of thought. Consequently, the humanistic perspective is often closely associated with a critical awareness of existing social structure and processes, modes of thought, and ways of being.

A critical perspective is closely associated with humanistic thought. Paul Kurtz notes in an introduction to a book on humanism that the humanistic orientation "provides a critique of alienating and depersonalizing tendencies . . ." THE HUMANIST ALTERNATIVE: SOME DEFINITIONS OF HUMANISM 6 (P. Kurtz ed. 1973).

of the lawyer in modern society has largely become that of talented technician, skillful in the application of a certain technical framework to secure certain 'legal' goals."<sup>84</sup> The reader may remember that Twining, in an article aptly titled *Pericles and the Plumber*,<sup>85</sup> presented two starkly different images of the lawyer, the first as a technician, the other as a statesman:

The image of the lawyer as a plumber is a simple one. 'The lawyer' is essentially someone who is master of certain specialized knowledge, 'the law,' and certain technical skills. What he needs is a no-nonsense specialized training to make him a competent technician.

. . . .

At the other extreme is the image of the lawyer as Pericles—the law-giver, the enlightened policy-maker, the wise judge. [The attributes of the Periclean lawyer are] intellectual discipline, detachment, breadth of perspective, an interest in human nature and a capacity for independent and critical thought.<sup>86</sup>

What consequences flow from this image of the lawyer as plumber?

[I]ncreased specialization and bureaucratization of the large, private firms and legal services to the poor; . . . the unnecessary competitiveness in the resolution of legal problems; lack of awareness and sensitivity to the human reality of clients and others who participate in the legal system; . . . lack of development of integrity and ideals in the practicing professional; the loss of personal values or the subordination of those values to other goals or pressures. . . .<sup>87</sup>

A narrow conceptualization of the professional role "makes being a lawyer less than the full and rich human experience it can be for the practicing professional."<sup>88</sup>

Himmelstein's critique of lawyering operates at separate but interrelated levels. At the personal level Himmelstein suggests that something has gone wrong. We are simply not living a rich and full life if we give up or lose our personal values,

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<sup>84</sup> *Reassessing Law Schooling*, *supra* note 16, at 516.

<sup>85</sup> Twining, *Pericles and the Plumber*, 83 L.Q. REV 396 (1967).

<sup>86</sup> *Id.* at 397-98.

<sup>87</sup> *Reassessing Law Schooling*, *supra* note 16, at 516.

<sup>88</sup> *Id.* at 519.

assuming our personal values are worth pursuing, in becoming a lawyer. Himmelstein contends, rather dramatically, that lawyers have become cut off from their "sense of humanity, aspirations and values, and from their responsibility towards self and others."<sup>89</sup> Himmelstein, as a humanistic psychologist, suggests that we give up our soul when we join the legal priesthood.

The humanistic critique of lawyering extends to the role of the lawyer in society. The soul-less lawyer projects his neurosis onto society in the way he deals with clients and tries to resolve social disputes. In the neglect of fundamental human values, the lawyer as plumber adversely affects the legal system and society in general.<sup>90</sup>

Although Himmelstein is more explicit about the inadequacy of contemporary professional roles, his critique is still rather limited. Himmelstein's chief focus is on the fact that our roles are too narrow to achieve our personal sense of worth. He argues that students "seek a professional identity that allows for the expression of those human principles and values they most cherish rather than a role that becomes increasingly divorced from who they are as people."<sup>91</sup> Himmelstein also hints that the narrow role conception interferes with the realization of significant social values. "[T]he law embodies among its highest goals the utmost respect for personal autonomy, freedom, self-determination, self-expression, and the human regard for others. . . ."<sup>92</sup> That Himmelstein is less concerned about society than lawyers as individuals can be seen in the nature of the values ascribed to law—with the exception of human regard for others, the values are centered on the fascination in humanistic psychology with self-realization and the traditional liberal ideology rooted in individualism.

Himmelstein recognizes that legal education is not "solely responsible" for fostering a limited lawyering role. Lawyers, like other professionals, are under strong social, economic and personal pressures in their practice that influence greatly the nature of their role.<sup>93</sup> While Himmelstein seems to be aware of

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<sup>89</sup> BECOMING A LAWYER, *supra* note 16, at 2.

<sup>90</sup> *Reassessing Law Schooling*, *supra* note 16, at 519.

<sup>91</sup> *Id.* at 521.

<sup>92</sup> *Id.* at 521-22.

<sup>93</sup> *Id.* at 531-32. See BECOMING A LAWYER, *supra* note 16, at 2.



the broader social and economic context of professional roles, he abandons any effort to develop the nature of these contextual influences and returns to focus exclusively, as does Watson, on legal education.

The problem in Himmelstein's critique lies in the failure to properly analyze the relationship of legal education to the legal profession and to place legal education in the context of education more generally. The question is whether we can learn about "professionalism in the larger context of the development of humankind. . . [and its] personal, social, and political implications"<sup>94</sup> by focusing on education.

It is not clear from the empirical studies whether Himmelstein is right in the assumption that students have high ideals and concerns for justice and fairness which they bring with them to law school<sup>95</sup> and that traditional modes of law teaching "destroy the appreciation of human dimensions with which students enter."<sup>96</sup> In the humanist critique of legal education, it is argued that the emphasis on analytic, cognitive and pragmatic skills in a competitive setting stifles the concern for "principle, ideals, and inspiration."<sup>97</sup> Many students "start to forget or to put aside their personal identification with justice, fairness, and responsibility to one's fellow man."<sup>98</sup>

I believe the "felt sense" that teachers have that law schools destroy the ideals of students is derived from a projection onto students of the teacher's failed idealism. Many law teachers enter legal education to "save" their own ideals from assault within the world of legal practice. Unable to achieve the ideal of justice within the practice of law, we retreat to law schools where we now see the failure of ideals in others rather than

<sup>94</sup> See BECOMING A LAWYER, *supra* note 16, at 3.

<sup>95</sup> *Reassessing Law Schooling*, *supra* note 16, at 533, 538-39.

<sup>96</sup> *Id.* at 533. See Hedegard, *The Impact of Legal Education: An In-Depth Examination of Career-relevant Interests, Attitudes, and Personality Traits Among First-Year Law Students*, 1979 AM. B. FOUND. RES. J. 791; Rathjen, *The Impact of Legal Education on the Beliefs, Attitudes and Values of Law Students*, 44 TENN. L. REV. 85 (1976); ABA, LAW SCHOOLS AND PROFESSIONAL EDUCATION, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION OF THE ABA (1980).

<sup>97</sup> *Reassessing Law Schooling*, *supra* note 16, at 520.

<sup>98</sup> *Id.*

ourselves. It is easier to see in our students that which we cannot see in ourselves.

While the observation that law schools pay little attention to student ideals, personal values, principles and identities is accurate, it is more difficult to assess the impact of legal education on our "being." To argue that students enter law schools with personal and social ideals is to imply that such ideals were fostered by previous educational experiences or were derived outside the world of education and have remained impervious to its influence. If, with Himmelstein, we agree that educational experiences affect ideals then we must concern ourselves with the role of personal values and ideals in education prior to law school. We should be cautious in viewing legal education in isolation from the larger educational world of which it is a part.

Finally, the humanistic perspective, as outlined by Himmelstein, fails to directly confront the fact that the adversary system of justice and the roles that lawyers play in the context of the adversary system, as a social structure, are highly determinative of the role of human values in legal education and the practice of law. The "social ethos" associated with legalism is ingrained in the ideology of advocacy and the adversary system. How we become lawyers, what we think as lawyers and how we imagine ourselves in the lawyering role are all products of existing educational and social structures. How can we become more humanistic lawyers when the pursuit of individual goods which undermine the "public interest" and the social order are "ethically" by general consensus sanctioned?

## II. A CRITICAL AND SOCIAL PERSPECTIVE

William Simon's *Homo Psychologicus: Notes on a New Formalism*<sup>99</sup> is one of the first major critiques of psychology in legal education. Simon contends that the psychological perspective in legal education leads to a conception of the attorney-client relationship and a form of jurisprudential thinking which produces a culture of professional narcissists.<sup>100</sup> Simon contends that the

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<sup>99</sup> Note 3 *supra*.

<sup>100</sup> *Id.* Simon's critique can be read as a useful criticism of some forms of psychology or more broadly as a polemical attack on psychology in general. My first reading of Simon led to the conclusion that he had set out not just to raise

psychological perspective in legal education focuses on practical tasks of lawyering, especially the attorney-client relationship, rather than legal analysis, or "professional discourse,"<sup>101</sup> which results in a "new style of discourse" and hence "a significant event in the intellectual history of American law."<sup>102</sup> Psychology in legal education is significant in Simon's view because of the effects it has on lawyers and law teachers: When we carry on a psychologically inspired discourse we give up trying to change the world. Simply put, Simon believes that efforts at self-understanding and focusing on the interpersonal dynamics of the attorney-client relationships makes us forget the need to create a more just society.

This "new style of discourse" is not just a vision, a starry-eyed dream of educational malcontents, but significantly affects both what and how we teach. Simon sees its influence "in the recent proliferation of courses on law and 'human relations,' negotiation and counseling, advocacy, professional responsibility, and particularly, the clinical versions of these subjects."<sup>103</sup> From Simon's list of courses one might gather that the psychological perspective is essentially concerned with the techniques of lawyering and professional practice. No, Homo Psychologicus has broader ambitions; the Psychological Vision is jurisprudential in scope. Simon seeks to expose the Psychological Vision as a false "jurisprudence" which "obscures rather than illuminates the crucial issues of lawyering and legality . . . [is] hostile to—critical thought and theory in general . . . [and] tends toward an unreflective and complacent acceptance of prevailing professional institutions and practices."<sup>104</sup>

Simon argues at great length that the basis of the Psychological Vision is a "therapeutic pedagogy."<sup>105</sup> This psychologically influenced mode of teaching focuses on changing the person instead of teaching a body of doctrine, an approach "which encour-

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the issue about psychology in legal education, but was determined to put those who have a psychological perspective, who he called, I think perjoratively, Homo Psychologicus, to an early rest. His mission seemed to be to kill and bury this hairy beast of Homo Psychologicus that stalks the halls of legal academe.

<sup>101</sup> *Id.* at 488.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 489.

<sup>105</sup> *Id.* at 527-39.

ages or requires the disclosure and engagement of relatively intimate personal feeling.”<sup>106</sup> Simon contends that a “therapeutic pedagogy” is conservative and conformist and serves to inculcate “prevailing norms of legal professionalism.”<sup>107</sup> While “therapeutic pedagogy” embraces the “rhetoric of self-actualization” it engages in manipulation and encourages conformity.<sup>108</sup> Psychologically oriented teaching is conformist because legal psychologists emphasize the professional role and preach professional responsibility. In the hands of the legal psychologist Simon believes that the lawyer’s social role becomes “a shelter for sentiment” rather than a force for social change.<sup>109</sup>

A “therapeutic pedagogy” is conformist because it is premised on the work of Carl Rogers and “client-centered” psychotherapy, a model which encourages adjustment to the expectations of others and “exalts cooperative and acquiescent behavior” and “deprecates criticism and resistance.”<sup>110</sup> By following the lead of clients, especially in situations where they have “sharply divergent values,” we end up becoming “non-political.”<sup>111</sup> Simon goes on to suggest that a psychology which emphasizes feelings is most inappropriate in situations in which authority is impersonal and the legitimacy of the authority is derived “from principles independent of the feelings of those who exercise it or are subject to it.”<sup>112</sup>

One of the most problematic elements of Simon’s critique, because it lies at the core of his analysis, is the view of Psycho-

<sup>106</sup> *Id.* at 527.

<sup>107</sup> *Id.*

Simon charges that legal psychologists tend to diagnose dissent and non-conformity as pathological. *Id.* at 529-31. While the criticism is correct as to Andrew Watson, Simon ignores Thomas Shaffer’s work on Thomas More who could certainly not be viewed as a conformist. More’s non-conformity was sufficiently explicit that it led to his death. See Hauerwas and Shaffer, *Hope in the Life of Thomas More*, *supra* note 10.

Simon makes references to conformity to the professional role encouraged by the psychological perspective but never explains what he finds objectional to the professional role. In fact, in an earlier part of the essay he speaks favorably of “professional discourse.” The exact nature of either “professional discourse” or “professional role” are not spelled out.

<sup>108</sup> *Homo Psychologicus*, *supra* note 3, at 527.

<sup>109</sup> *Id.* at 528.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 533.

<sup>112</sup> *Id.*

logical Man. Who is Psychological Man? How does he view himself in the world? How does Psychological Man experience the world? What is the Psychological Vision held by such a person? How is the Psychological Vision a way to see the world, a way to experience the world? Any serious critique of the Psychological Vision would address these questions in some fashion, questions which Simon conveniently sidesteps. By circumventing these threshold questions we find the broader critique grounded on questionable premises.

The first problem in Simon's analysis is the inability to shift from the view of Psychological Man as an ideal-type constructed *in theory* to Psychological Man in lived reality. The ultimate question, and one which Simon's analysis does not resolve, is whether a psychological perspective helps one view the world differently. What kind of behavior and social outlook accompany the Psychological Vision? How can we know anything about behavior and outlook until we know something about how such a person experiences the world? What I am trying to suggest here is that Simon's Psychological Man is a caricature, which ignores experience. It is a theoretical construct which has nothing to do with lived reality. Simon's is a criticism, divorced from reality.

When we look at the description of Psychological Man on which Simon's critique is constructed we begin to understand that Psychological Man is a straw man, built to be destroyed not understood. Simon describes Psychological Man as an "egotist," less "rational" and "materialistic" than his predecessors, Sociological and Economic Man.

He is defensive rather than aggressive. He does not seek to impose his will on the material world, but rather to achieve a largely internal satisfaction, a 'sense of well-being.' Psychological Man acquiesces in the claims of social relations and norms, but this acquiescence takes a heavy toll in anxiety and frustration. Social relations and norms tend to compromise the fulfillment of his desire and feelings. He seeks to strike a realistic balance between acquiescence and indulgence.<sup>113</sup>

Our first suspicion of this definition is that it is totally negative. Psychological Man is egotistical, defensive, acquiescent, anxious, frustrated, indulgent. For Simon, Psychological

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<sup>113</sup> *Id.* at 491-92 (footnote omitted).

Man turns out to be a narcissistic, neurotic brat. Yet, if we read the literature on Psychological Man we find an emphasis on caring, relating, reflecting, creativity, self-actualization, *i.e.*, change and growth. If we step back from Simon's description, Psychological Man becomes Janus, the two-faced God. There are indeed two sides to Psychological Man, and Simon painfully expresses only the negative or "shadow" side. This is not to belie the significance of the shadow constructed by Simon. The question is how these negative attributes come into being. How are they associated with the psychological perspective? Can the anxiety and frustration of Psychological Man be a result of caring and valuing human ideals rather than submission to social norms?

An adequate understanding of the Psychological Vision cannot be premised on the contentious view that Psychological Man is "defensive rather than aggressive"; that he "acquiesces in the claims of social relations and norms"; is anxious and frustrated and that he compromises his desires and feelings; and "seeks to strike a realistic balance between acquiescence and indulgence." Some of these claims about Psychological Man are nonsensical, others simply fail to adequately describe Psychological Man. What does Simon mean when he says that Psychological Man is "defensive rather than aggressive" or that he "seeks to strike a realistic balance between acquiescence and indulgence"? Abraham Maslow has argued that there are fundamental human needs associated with survival. A certain amount of aggressive behavior may be associated with the fulfillment of these needs. Moreover, social existence requires aggressiveness. Simon offers no hint as to how Psychological Man has managed to allay his aggressive drives. To say that he is "defensive rather than aggressive" is a claim that needs support, support which Simon does not provide.<sup>114</sup>

We have presented Simon's critique in rather broad outline and can now examine more closely his central thesis:

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<sup>114</sup> Simon's description is one-sided in part because of his exclusive reliance upon the work of Phillip Rieff, particularly *THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD* (1966). Since Rieff is not generally associated with the contemporary movement toward a Psychological Vision, the use of his work as the basis for establishing a view of Psychological Man is questionable. Why do Rieff's views hold such an important position?

- (1) a psychologically oriented legal education presents the attorney-client interaction as a "personal" relationship;<sup>115</sup>
- (2) the personalization of the attorney-client relationship is a response to psychologically-oriented teaching; and
- (3) "psychologizing" the attorney-client relationship obscures the social and political context of law and lawyering.

Simon's arguments on the first two points are problematic and deserve a specific and detailed response.

The main point in the argument is that lawyers who express preeminent concern for client feelings have "personalized" the attorney-client relationship. Simon counters that the attorney-client relation is fundamentally impersonal and that "trust and personal care do not flourish in the lawyer-client relation any more than they do in explicitly commercial relations."<sup>116</sup> Simon's choice of "commercial relations" as the metaphor for lawyer-client relationships is instructive. If our relations are commercial then we must view ourselves as businessmen and entrepreneurs. We can recall Holmes' suggestion in the 19th century that we see law as a business and have "a business-like understanding" of the law.<sup>117</sup> Law viewed as a business helps us see the professional relationship as transactional and commercial rather than interactional and personal.

Simon contends that the work of lawyers concerns matters especially *outside* the professional relation because clients are worried less about themselves than with others. Simon's attempt to distance the client as a person from his legal problem is itself a formalistic conception of a complex relation in which who one is as a person is closely tied to a particular legal problem. Any attempt to isolate what goes on in the legal system from the relationship of attorney and client or to conceive the client as a person separate and apart from his legal problem is bound to fail. The attorney-client relationship is an interactive process which involves lawyers, clients and others whose interests con-

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<sup>115</sup> This is certainly true of my own work. See Elkins, *The Legal Persona: An Essay on the Professional Mask*, *supra* note 9; Elkins, *A Counseling Model for Lawyering in Divorce Cases*, *supra* note 9. It is also true of Himmelstein, who describes the attorney-client relationship as an "intense human interaction" and views the relationship from a psychological rather than instrumental perspective. *Reassessing Law Schooling*, *supra* note 16, at 524.

<sup>116</sup> *Homo Psychologicus*, *supra* note 3, at 501.

<sup>117</sup> Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458-59 (1897).

flict or interfere with the client's interest. To suggest that the resolution of legal problems has no bearing or significant impact *within* the attorney-client relationship is a sterile view of lawyering which can be rejected out of hand.

In the next step of the argument Simon contends that personalizing the attorney-client relationship is a result of the Psychological Vision. The question is rather simple: What role does the psychological perspective play in legal education and eventually the legal profession's view of the attorney-client relationship? Whether the Psychological Vision pushes the attorney to view the relationship in human or psychological terms is questionable.<sup>118</sup> The idealization of the attorney-client relationship, if it exists, has historical roots which predate the appearance of psychologically oriented legal educators.

But the real thrust of Simon's argument is not, ultimately, dependent upon a characterization of the attorney-client relationship as personal or impersonal, or even upon the role of psychology in bringing about a particular conception of the relationship. The real question is whether an emphasis on personal aspects of professional relationships obscures the social and political context in which such relationships take place. Here is Simon's contention: "By celebrating the [attorney-client] relation as an end in itself, the Psychological Vision subverts consideration of the comparatively impersonal legal, social, and ethical considerations in terms of which consequences might be identified and the actions which produced them justified or condemned."<sup>119</sup> The assertion raises interesting questions. How can it be shown that it is the psychological orientation which clouds our social perspective? In what sense can legal, social and ethical considerations ever be "comparatively impersonal"? Compared to what? What kind of compromise is being called for

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<sup>118</sup> The argument is hardly advanced by Simon's reliance on Charles Curtis' writings from the early 1950's. Curtis' defense of amoral professional practices, *The Ethics of Advocacy*, appeared in the *Stanford Law Review* in 1951. 4 STAN. L. REV. 4 (1951). A later book incorporating the article was published in 1954. C. CURTIS, *IT'S YOUR LAW* (1954). Curtis' work is not psychological in perspective and has not previously been linked to contemporary efforts to bring psychology to the law school classroom. There is nothing in Curtis' work to identify him with the Psychological Vision; in fact, there is little to suggest that his views are anything other than a traditional defense of the adversary system.

<sup>119</sup> *Homo Psychologicus*, *supra* note 3, at 502.



when one asks that legal, social and ethical views be "impersonal" in character?

While we have seen that both Watson and Himmelstein have little conception of the social context for the psychological perspective, this criticism stops short of Simon's assertion that the psychological perspective blocks or obscures political and ideological concerns. Simon's efforts to show that psychology interferes with political and social awareness fails to take account of the fact that other factors in the legal culture have historically pushed law in the same direction as psychology does today. Stuart Scheingold, in *The Politics of Rights*, has suggested that the socializing influences of the legal world-view pull lawyers away from the idea of social change.<sup>120</sup> Scheingold argues that it is the distinctive way that lawyers view problems and think about social issues that makes the legal world a conservative one. By its very nature, "law school imparts habits of mind which tend to narrow the lawyer's political vision. . . ."<sup>121</sup> The political implications of legal education lie in the ideological substructure of the profession,<sup>122</sup> not the psychological orientation.

Before we place the burden on legal education for the conservative bias of lawyers, we would do well to recognize that the profession, through the organized bar, has historically discouraged lawyers' involvement in social change.<sup>123</sup> So it cannot be argued that it is solely the psychological perspective which turns us away from social and political action. A more careful analysis suggests that it is the social institutions and structures

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<sup>120</sup> See S. SCHEINGOLD, *THE POLITICS OF RIGHTS* (1974).

<sup>121</sup> *Id.* at 162.

<sup>122</sup> The problem of social action and social change is one endemic to the profession. We see this most clearly by looking at other professions; for example, it is increasingly being suggested that physicians, like lawyers, attend to individual concerns while ignoring social action. "Physicians as a class have shown little interest in political activities unless political and social situations directly affected them." Jonsen & Jameton, *Social and Political Responsibilities of Physicians*, 2 J. MED. & PHIL. 376, 377 (1977). I do not mean to suggest that the social organization of law and medicine as professions do not entail significant difference. See Hein & Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111, 1138-39 (1978).

It might be well to remember that the social sciences, with their scientific methodology, are also conservative in nature. See C. HAMPDEN-TURNER, *RADICAL MAN* (1971).

<sup>123</sup> See J. AUERBACH, *UNEQUAL JUSTICE* (1976).

supported by political and power elites that have contributed to the disregard for social values and social change. A strong argument can be made that social institutions in modern society no longer exist to improve society but have an autonomous existence, creating the needs they seek to fill.<sup>124</sup>

De Tocqueville noted over a century ago, that "[w]hatever profession men may embrace" in America they constantly strive to improve their position, which "absorbs for the time all his thoughts and inclines him to defer political agitations to some other season. This not only prevents men from making revolution, but deters men from desiring them."<sup>125</sup> Lawyers, as prominent members of the middle class,<sup>126</sup> are concerned about status, prestige and financial well-being, in a word they are "ambitious"—a condition anathema to broad social concerns, although not to politics in the restricted sense of serving in public office. Finally, we should recognize the tendency of lawyers to think of themselves as young entrepreneurs and "their services as a product which is sold rather than as a vital public necessity. Attention is focused on those services that pay rather than on the societal job to be done. . . . The preoccupation with fees reinforces the strong ties between the legal profession and business and monied interests."<sup>127</sup>

### III. PSYCHOLOGY, THE SOCIAL WORLD AND A POLITICAL VISION

How are we to understand the argument by Simon and others that psychology, or at least some brands of it, obscures social and political realities?<sup>128</sup> The crucial problem for Psychological Man, Simon suggests, is that he is a creature who lives in

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<sup>124</sup> See I. ILLICH, *CELEBRATION OF AWARENESS* (1976); *TOOLS FOR CONVIVIALITY*, *supra* note 38; *DISABLING PROFESSIONS* (1977).

<sup>125</sup> A. DE TOCQUEVILLE, 2 *DEMOCRACY IN AMERICA* 245, *quoted in* B. BLEDSSTEIN, *THE CULTURE OF PROFESSIONALISM* 25 n. 45 (1976).

<sup>126</sup> On professionals as constituting a new middle class see B. BLEDSSTEIN, *THE CULTURE OF PROFESSIONALISM*, *supra* note 125, at 1-45.

<sup>127</sup> I. ILLICH, *DISABLING PROFESSIONS*, *supra* note 124, at 167-68.

<sup>128</sup> One begins to suspect that Simon has some concept of the social order and a political philosophy which influences his criticism of the Psychological Vision, yet it is never made clear. It is only in the final pages of his article that Simon's concepts of man in society, and the lawyer in society, begin to emerge. I say begin to emerge because Simon's social and political views are as "obscured" in the critique as are the social and political concerns of the legal psychologists.

a private rather than a social world. Instead of embracing the social world he "acquiesces in the claims of social relations and norms."<sup>129</sup> This purported rejection of society and social relations makes Psychological Man "defensive, antinomian, self-absorbed."<sup>130</sup>

It becomes clear in Simon's critique that psychology becomes problematic through its effect on the relationship of our private and public worlds. For Simon, the private and public worlds are separate worlds.<sup>131</sup> One effect of the Psychological Vision, in his view is to conflate the public and private worlds. It does so by "reduc[ing] all human experience to intimate feeling and . . . treat[ing] all social demands as equally intrusive and repressive. . . . Most notably, it obscures people's capacity and need for fulfillment through rational and relatively impersonal social commitments. . . ."<sup>132</sup>

Simon's alternative to the Psychological Vision is a political perspective which focuses on the social order as an impersonal "public world"; a world in which we act as "political men" and seek to transform our world by social action which requires solidarity with others and commitment to and pursuit of "norms."<sup>133</sup>

<sup>129</sup> *Homo Psychologicus*, *supra* note 3, at 492.

<sup>130</sup> *Id.* at 493.

Abraham Maslow, one of the founders of contemporary humanistic psychology has warned of the possibility that we can get trapped by the experiential and turn away from the world. "In a word, instead of being temporarily self-absorbed and inwardly searching, he may become simply a selfish person, seeking his own personal salvation. . . ." A. MASLOW, *THE FARTHER REACHES OF HUMAN NATURE* 344 (1971).

<sup>131</sup> The compartmentalization of our private and public worlds can be seen throughout Marx's work, a point for which I am indebted to Charles Ellison, a sociologist at the University of Cincinnati. See C. ELLISON, *MARX AND THE MODERN CITY: PUBLIC LIFE AND THE PROBLEM OF PERSONALITY* (unpublished manuscript 1981). The relationship of public and private man is a central theme in the work of Richard Sennett. See, e.g., *THE FALL OF PUBLIC MAN* (1977); *AUTHORITY* (1980) [hereinafter cited as *AUTHORITY*].

<sup>132</sup> *Homo Psychologicus*, *supra* note 3, at 493-94.

<sup>133</sup> *Id.* at 557.

I am somewhat baffled by what Simon means by Political Man's "normative commitments" and the orientation of "conduct toward norms." Talk of norms is often a conservative appeal which favors the status quo and opposes social change. Simon tries to assure us that this is not the case.

[N]orms would not always produce integration and solidarity; they might appear to contradict established practices and provide a basis for

This Political Vision raises a number of questions. To what extent is there a "public world" in which an individual leaves behind "the private realm of intimacy"?<sup>134</sup> Can one engage in "impersonal action" in the world? What are the dangers and dysfunctional aspects of segregating our personal and public worlds?<sup>135</sup> What does it mean to view the purpose of life as social action and the transformation of an existing social order? For what *kind* of social action is Simon calling? Action towards what ends?<sup>135</sup>

One immediate reaction to Simon is to point out that the era of Political Man has passed. His existence depends upon a cohesive social order of shared values and centralized decision-making—a society other than our own. We have witnessed the twilight of Political Man and a political view of the social order. The erosion of politics "is rooted in some degree in the recrudescence of ethnicity, religion, locality and kinship."<sup>137</sup>

The Political Vision posits a return to old forms of thinking about power and authority in society—forms of thinking which depend on nonexistent reality. Simon holds an image of man framed in terms of a social paradigm and a set of political theories which are inadequate for the New Age. To revision the

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opposing them. Moreover, the prevailing social norms would not exhaust the possibilities of rational and fulfilling normative commitments.

One might appeal beyond prevailing norms to more fundamental principles and values.

*Id.* at 557-58. This reference to social norms is more intriguing than elucidating. How do we distinguish between "norms" and "established practices"? How do we justify deviation from the norms supported by social consensus in favor of more fundamental principles and values?

<sup>134</sup> *Id.* at 558.

<sup>135</sup> The dysfunctional aspect of relegating morality to the private rather than public world has been explored by the philosopher Stuart Hampshire. Hampshire, *Public and Private Morality*, in PUBLIC AND PRIVATE MORALITY 23-53 (S. Hampshire ed. 1978).

<sup>136</sup> One who sees the goal of man as transformative social action has a vision of the social order rooted in a critical sense of existing social relations and social structure. Alternative visions of social theorists and critics, like social movements, are less persuasive when the view of the post-transformative society is poorly articulated. Simon, like other social critics, and one can point to Ivan Illich, the legal realists, and the New Left, has failed to articulate a coherent vision of the future.

<sup>137</sup> Nisbet, *The Decline of Academic Nationalism*, 6 CHANGE 29 (1975), quoted in J. OGILVY, MANY DIMENSIONAL MAN 40 (1977) [hereinafter cited as OGILVY].

existing social order we must recognize the impotence of political power<sup>138</sup> and a culture without a center.

Simon's Political Vision fails not only because it is premised on an inaccurate view of society, but more importantly because it fails to recognize how social structure and social forms of relations are internalized. Simon's is a Vision which takes no account of the relation of psyche and society—or more simply put, how personality, or person, is in a very real sense a social construct.<sup>139</sup> A Political Vision which does not link power and authority in society with the psychological structure and consciousness of man must fail. "The point is to gain some insights into the patterns of reinforcement between social structure and psychic structure . . . ."<sup>140</sup>

The relationship between social structure and individual psychology has been demonstrated in a recent work by Richard Sennett,<sup>141</sup> who offers a striking counterpoint to Simon, especially in his conceptualization of authority. Sennett's work on authority refutes Simon's arguments on every count. For Simon, authority is a social phenomenon which, if subjected to the psychological perspective, leads to conformity and diminished social awareness. Yet, when we turn to Sennett we find that to study authority one must inquire "into how people now feel authority, fraternity, solitude, and ritual"<sup>142</sup> if we are to connect a social-psychological analysis and a political vision. Sennett, rather than turning away from psychology, looks to "felt experiences" of authority and how these experiences are shared in society.<sup>143</sup> Sennett

<sup>138</sup> OGILVY, *supra* note 137, at 13-41.

<sup>139</sup> The concept of self has recently become a central focus in social psychology. See, e.g., *THE SELF IN SOCIAL PSYCHOLOGY* (D. Wegner and R. Vallacher eds. 1980).

<sup>140</sup> OGILVY, *supra* note 137, at 58. Harold Lassell's *Psychopathology and Politics* (1931) is a classic example of the use of psychoanalytic techniques and theory to show the relationship of personality structure and political role.

<sup>141</sup> *AUTHORITY*, note 131 *supra*.

<sup>142</sup> *Id.* at 10.

<sup>143</sup> We should point out here that it is humanistic psychology that has pointed the way to concrete lived human experience, a grounding which explains the ties of humanistic psychology to existentialism and phenomenology. See generally Colaizzi, *Learning and Existence* in *EXISTENTIAL-PHENOMENOLOGICAL ALTERNATIVES FOR PSYCHOLOGY* 119-35 (R. Valle & King eds. 1978); J. Dagenais, *MODELS OF MAN: A PHENOMENOLOGICAL CRITIQUE OF SOME PARADIGMS IN THE HUMAN SCIENCES* (1974); Gendlin, *Existentialism and Experiential*

hopes to "illuminate what a general social theory about the fear of authority means in concrete human terms. . .";<sup>144</sup> a task which would be impossible without a psychology of feeling and experience.

Sennett's work shows how complex the "acceptance" and "rejection" of authority is in reality and how our relationship with authority emerges from "acceptance" and "rejection," producing a rhythmic ballet of dissonance; a dissonance which is neither exclusively social nor personal. Rather, "[c]rises of authority are constructed around the modulations in recognizing freedom and slavery in oneself,<sup>145</sup> recognizing them in other human beings, and recognizing oneself in other human beings."<sup>146</sup> For Sennett, authority is both an external reality and a matter of personal consciousness.

To deal with *social* authority we must recognize and deal

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*Psychotherapy*, in NEW DIRECTIONS IN CLIENT-CENTERED THERAPY 70-94 (J. Hart and T. Tomlinson eds. 1970); E. GENDLIN, EXPERIENCING AND THE CREATION OF MEANING; A PHILOSOPHICAL AND PSYCHOLOGICAL APPROACH TO THE SUBJECTIVE (1962); A. GIORGI, PSYCHOLOGY AS A HUMAN SCIENCE, A PHENOMENOLOGICALLY BASED APPROACH (1970); R. JOHNSON, IN QUEST OF A NEW PSYCHOLOGY: TOWARD A REDEFINITION OF HUMANISM (1974); J. SHORR, PSYCHO-IMAGINATION THERAPY: THE INTEGRATION OF PHENOMENOLOGY AND IMAGINATION (1972); H. SPIEGELBERG, PHENOMENOLOGY IN PSYCHOLOGY & PSYCHIATRY: A HISTORICAL INTRODUCTION (1972); S. STRASSER, THE IDEA OF DIALOGIC PHENOMENOLOGY AND IMAGINATION (1972).

The emphasis on experience has now received recognition outside of psychology.

In philosophy, literary criticism, psychology, linguistics, and the social sciences, there is an emerging concern with the world *as lived and perceived* rather than as objectively explained. Linked to this is an interest in the symbolic constructs people use to make sense of their experience. Too, there is a preoccupation with 'common sense reality' and the structures of meaning that are shared in particular cultures.

Green, Book Review, 44 HARV. EDUC. REV. 331, 332 (1974) (quoting A. SCHUTZ, THE PROBLEM OF SOCIAL REALITY 55 (1967)) (footnote omitted) (emphasis in original).

<sup>144</sup> AUTHORITY, *supra* note 131, at 12.

<sup>145</sup> Erich Fromm is in close accord with Sennett:

The authoritarian conscience is essentially the readiness to follow the orders of the authorities to which one submits; it is glorified obedience.

The humanistic conscience is the readiness to listen to the voice of one's own humanity and is independent of orders given by anyone else.

E. FROMM, THE REVOLUTION OF HOPE 81-82 (1970).

<sup>146</sup> AUTHORITY, *supra* note 131, at 129.

with internalized representations of authority. Sennett is quite explicit in how we can learn about authority. We begin first with detachment, not commitment or social action, as suggested by Simon.<sup>147</sup> Following detachment from authority we reflect on the experience of authority: "[W]hat was I like under that authority's influence?"<sup>148</sup> The legitimacy of authority is derived in part from the process of detachment and reflexive inquiry, a process of personalizing the influence of authority rather than its acceptance or rejection in the context of social action. Sennett concludes that

only when we have learned to remove ourselves from the sphere of authority can we re-enter it, with a sense of its limits and a knowledge of how commands and obedience might be changed so that our real needs for protection and reassurance might be served.

. . . .

[T]o think about the legitimacy of an authority figure without having first disengaged from that figure and explored oneself is likely to mean one would think nothing very new; the unexplored, inner voices of one's own needs and injuries would remain in control.<sup>149</sup>

Authority, as Sennett makes clear in his concluding remarks, is a matter of experience and human imagination, "[n]ot a practical reflection of the public world. . . ."<sup>150</sup> To understand authority we must understand our self and our relations with others; for it is in the experience of power, both leading and following, and the images of these activities that our beliefs, attitudes and ultimately our willingness to place our hope and faith in the power of others is finally based.

Sennett's work on authority is an excellent example of a proper regard for the interaction and interrelation of private and social worlds and a sharp contrast to Simon who sees a rather clear demarcation of private and social worlds. In Simon's view, professional relationships are by their nature impersonal and occur in the social world. Feelings are personal and have little to do with a professional relationship and are relegated to the

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<sup>147</sup> *Id.* at 132, 134-42.

<sup>148</sup> *Id.* at 132-33.

<sup>149</sup> *Id.* at 133.

<sup>150</sup> *Id.* at 197.

private world. Feelings are not facts. We must choose between following our feelings or social norms. In Simon's conflict model individual and society are always at odds, at least to the extent we pay attention to our feelings. When we attempt to recognize our feelings in the context of professional relationships we turn our back on the social world.

Simon's conflict model posits law as "a struggle for scarce resources and the conflict of opposed ends;"<sup>151</sup> a struggle in which lawyering is "a relatively impersonal process of conflict and coercion. . . . in which the pursuit of clients' goals compromises and restricts the ability of others to pursue their goals, in which loyalty to clients requires the betrayal or coercion of others."<sup>152</sup> Law is indeed involved with the social distribution of scarce resources.

The role of law in determining who gets what, when and how was made amply clear by Harold Lasswell and Myres McDougal several decades ago. The social, economic and political context of law, lawyering and legal education was the central focus of Lasswell's and McDougal's work. It is of no little significance that Lasswell's and McDougal's "public policy approach" did not disparage the psychological perspective as a sacrificial lamb for Political Man. Rather, Lasswell and McDougal formulate a jurisprudence which recognizes the need to clarify one's role as an individual and professional in the social order. Lasswell and McDougal called for a clear exposition of the observational standpoint of one acting within the legal system.<sup>153</sup> We expect those who seek and exercise power and who make important value choices for society to pay close attention to the subjective aspects of their decision-making. The psychological perspective is one means of access to the biases, prejudices and preconceptions which we bring to the decision-making process as

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<sup>151</sup> *Homo Psychologicus*, *supra* note 3, at 558.

<sup>152</sup> *Id.* at 558-59.

<sup>153</sup> Lasswell, *Person, Personality, Group, Culture*, 2 PSYCHIATRY 533 (1939); McDougal, *Jurisprudence for a Free Society*, 1 GA. L. REV. 1 (1966).

The disclosure of observational standpoint is one of the first tasks recommended by Lasswell and McDougal in their outline of a "policy-oriented jurisprudence." Observational standpoint is nothing more than the explicit recognition not only of one's methodology or perspective of study or approach to decision-making, but requires the statement of underlying assumptions which had led to the selection and use of the particular methodology or frame of reference.



lawyers and judges. Reflecting on observational standpoint serves to sharpen the focus of the observer and allows others to scrutinize the premises and assumptions which influence significant value choices of the observer/decision-maker.

Lasswell, in particular has been responsible for infusing "policy-oriented jurisprudence" with a psychological perspective. Lasswell must be given credit for bringing to jurisprudence and the quest for rational public-policy decision-making the concept of man as a *non-rational* creature, a side of man's nature which Simon criticizes the legal psychologist for recognizing.<sup>154</sup> It is the task of the lawyer, the jurisprudential scholar *and* the social critic to assess the impact of personal and subjective elements which become embedded in legal thinking and jurisprudence.

There seems to be no disagreement between Simon and the legal psychologists on the need for "a more reflective approach" to lawyering and on the "value of self-awareness."<sup>155</sup> Simon "acknowledges the value of self-awareness"<sup>156</sup> without indication as to how self-awareness can be undertaken without a psychology of the "feeling self." By focusing on our awareness, the psychological perspective moves us, not away from social concerns, but toward a position where we can *experience* our politics, *i.e.*, self in society. It is by experiential awareness, by knowing through experience, that lawyering as a "process of conflict and coercion" can be experienced as well as explained. The psychological perspective is not inherently opposed to laying bare the underlying social conflict which pervades the lawyer's work.

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<sup>154</sup> It is unclear what Simon means when he argues that Psychological Man is less rational than Sociological or Economic Man. It is clear that Simon does not take into account how the rationality of any given decision may depend upon insight into unconscious factors. "If we obtain insight into the factors which dispose us to accept, or to reject, a certain pattern of thought of non-rational grounds, we may be better prepared to accept or reject the pattern on rational (technical) grounds." H. LASSWELL, *THE ANALYSIS OF POLITICAL BEHAVIOR* 211 (1947). Elsewhere Lasswell notes that "[i]f the observer-analysis prefers, the maximization postulate may be exclusively applied to conscious perspectives. Unconscious factors are then classified as conditions affecting the 'capability' of the individual to think and act." H. LASSWELL & A. ROGOW, *POWER, CORRUPTION, AND RECTITUDE* 73 (1963). "Insight, not prediction, is the principle contribution of social and behavioral science to judgment." *Id.* at 88.

<sup>155</sup> On self-awareness in lawyering see Elkins, *The Legal Persona: An Essay on the Professional Mask*, *supra* note 9; Book Review, *supra* note 9.

<sup>156</sup> *Homo Psychologicus*, *supra* note 3, at 558.

Social action and participation in the "public world" are dependent upon both a psychology of awareness *and* upon the social context for social and political action. We move from an individual to a social world, from personal to political action, taking our personal frame of reference, our world-view, with us. The failure to so move makes man dependent on external authority and makes powerful leaders "omnipotent, omniscient, sacred."<sup>157</sup>

The purpose of awareness is not, as Simon suggests, to mask one's own motivations and purposes, or to "control" one's own behavior and penetrate the facade presented by others.<sup>158</sup> An awareness of feelings and a psychology of self serve social values, including reason.<sup>159</sup> Simon complains that psychology undermines rational discourse.<sup>160</sup> To the contrary, a psychology of

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<sup>157</sup> E. FROMM, *THE REVOLUTION OF HOPE*, *supra* note 145, at 63.

<sup>158</sup> Simon contends that "[t]he psychologists seek to assist lawyers in perfecting themselves as instruments. They strive for a precise and pervasive control of the presented self which makes possible control of others." *Homo Psychologicus*, *supra* note 3, at 539. Simon argues that to focus on psychology, especially a psychology of feeling, leads to manipulation of others because we learn "to use" feelings to control the behavior of self and others. *Id.* at 539-40. Simon suggest that keeping up one's guard and not revealing feelings can be seen as efforts to both manipulate and defend against manipulation. What Simon sees as self-manipulation flowing from a psychology of feeling appears to be directly contrary to the value of openness and cooperation, which Simon also identifies with a feeling-oriented psychology. To the extent that legal psychologists encourage the behavior described by Simon they are obviously undermining values of openness and cooperation. People cannot subscribe to openness and at the same time believe that "[t]hey can never safely let down their guard. . . ." *Id.* at 540.

The manipulative behavior described by Simon is a form of aggressive behavior which cuts against Simon's contention that *Homo Psychologicus* is defensive rather than aggressive. Simon even uses the metaphor of "psychic war" to describe what occurs in a relationship where one has adopted an instrumental view of self. It is becoming apparent that the so-called instrumental self is not reflective of the values of humanistic psychology, at least as described by Simon.

<sup>159</sup> If we look to Freudian psychology we find Freud saying in his famous dictum "were id is, ego shall be", meaning that ego, reason, should replace id, the instinctual, during the course of successful psychoanalytic therapy. *See generally* P. RIEFF, *FREUD: THE MIND OF THE MORALIST* (1961).

<sup>160</sup> Simon contends that a Psychological Vision premised on a psychology of feeling "is an assault on the ideal and practice of rational discourse." *Homo Psychologicus*, *supra* note 3, at 540. Rational discourse is undermined by the Psychological Vision because it finds the latent as well as the manifest content of communication significant.

The psychologists teach lawyers to view the statements of others as symptoms of an underlying affective reality. They direct attention

awareness suggests the possibility of rational discourse. Harold Lasswell has stated that the purpose of self-scrutiny is the clarification, formulation, adaptation and employment of "procedures whose principle role is to prepare the thinker to endure or obtain a higher level of rationality."<sup>161</sup>

Erich Fromm argues that man's evolution toward truth and reality is based on awareness.<sup>162</sup> "The process of increasing awareness is nothing but the process of awakening, of opening one's eyes and seeing what is in front of one. Awareness means doing away with illusions and, to the degree that this is accomplished, it is a process of liberation."<sup>163</sup> Fromm makes clear that awareness refers to both man himself and the phenomenal universe in which he exists. Consequently, a psychology of awareness is one in which individual and social realities external to man are in a dialectical relationship.<sup>164</sup> In such a dialectical

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away from the explicit content of statements to the 'hidden agenda' beneath the surface. The statements of others are neither to be accepted on their own terms nor evaluated in terms of impersonal criteria of truth; they are to be diagnose in an attempt to determine hidden emotional vulnerabilities.

*Id.* (footnote omitted). Simon is simply not willing to accept the possibility that interpersonal communications have "an underlying affective reality," a view widely held in modern psychiatry and communications therapy. The error here is the assumption that a psychological perspective leads one to look beneath the surface of *all* statements that others make and that *all* manifest statements are ignored in *all* situations.

<sup>161</sup> See, e.g., Lasswell, *Clarifying Value Judgment: Principles of Content and Procedure*, 1 *INQUIRY* 87 (1958). Although Lasswell argued forcefully for "the use of appropriate procedures by means of which the thinker obtains access to pertinent facts about the Self", *id.* at 92, he does not ignore the role of environment "in shaping the perspectives and operational activities of those who are exposed to [it]." *Id.* at 92, 93. Lasswell comments that we may have overplayed the significance of the individual as a unit of study. He cites case studies involving sensory deprivation and "brainwashing" as suggestive that human affairs may be facilitated by societal networks or "interaction sets" which involve "interplay among participants in the social process." *Id.* at 93. Lasswell concludes that "[t]he clarification of value judgment appears, in this perspective, as an 'interactive' rather than a 'privatized' activity." *Id.* at 93. See also P. SLATER, *EARTHWALK* 16-17 (1974).

<sup>162</sup> E. FROMM, *THE REVOLUTION OF HOPE*, *supra* note 145, at 63-65.

<sup>163</sup> *Id.* at 64.

<sup>164</sup> Although awareness and self-scrutiny have a distinctive psychological frame of reference with regard to the "internal" processes of man, there is an "external" dimension of self-scrutiny which is decidedly sociological in orientation. A contextual analysis of individual self-scrutiny reveals that the process is not an

relationship, "[a]wareness of existing reality and of alternatives for its improvement helps to change reality, and every improvement in reality helps the clarification of thought."<sup>165</sup>

Fromm contends that if we are to humanize our technological society we "must be aware of the role of man as part of the whole system . . . [M]an as a system builder and analyzer must make himself the object of the system he analyzes."<sup>166</sup> We become the object of the social system only with a proper concern for man's "inner world" as social reality. In modern society, it has been psychology which has promoted recognition of our inner world.

Even some sociologists recognize this basic connection between self and society, society and self.<sup>167</sup>

Seldom aware of the intricate connection between the patterns of their own lives and the course of world history, ordinary men do not usually know what this connection means for the kinds of

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act isolated from the social environment in which it takes place. The concern for individual "internal" process should not obscure the relationship between self and others, self and external reality which effect the lawyer as decision-maker.

<sup>165</sup> *Id.* at 65.

<sup>166</sup> *Id.* at 96-97.

<sup>167</sup> C. Wright Mills contended that men need not only information and skills of reason but also "a quality of mind that will help them to use information and to develop reason in order to achieve lucid summations of what is going on in the world and of what may be happening within themselves." C. WRIGHT MILLS, *THE SOCIOLOGICAL IMAGINATION* 5 (1959) [hereinafter cited as MILLS].

Mills refers to this quality as the sociological imagination. Such an imagination

enables its possessor to understand the larger historical scene in terms of its meaning for the inner life and the external career of a variety of individuals. It enables him to take into account how individuals, in the welter of their daily experience, often become falsely conscious of their social positions.

. . . .

The sociological imagination enables us to grasp history and biography and the relations between the two within society.

. . . .

[I]t is by means of the sociological imagination that men now hope to grasp what is going on in the world, and to understand what is happening in themselves as minute points of the intersections of biography and history within society.

*Id.* at 5-7.

men they are becoming and for the kinds of history-making in which they might take part. They do not possess the quality of mind essential to grasp the interplay of man and society, of biography and history, of self and world. They cannot cope with their personal troubles in such ways as to control the structural transformations that usually lie behind them.<sup>168</sup>

Simon's anti-psychological bias and depersonalized view of social action are unlikely to serve the goal of social transformation and the emergence of a new social order. Erich Fromm tells us that

a new society is possible *only if*, in the process of developing it, a new human being also develops, or in more modest terms, if a fundamental change occurs in contemporary Man's character structure.

. . . .

[A] new society can be brought about only if a profound change occurs in the human heart. . . .<sup>169</sup>

#### IV. THE RADICAL CRITIQUE AND THE PSYCHOLOGICALIZATION OF EXPERIENCE

We turn now to look more closely at the ideological aspects of legal education in order to provide a broader framework for understanding the role of psychology in legal education. The radical critique of legal education can be stated rather simply. Law schools exist to produce professionals who utilize their legal expertise to support the dominant ruling class in society.<sup>170</sup> A corollary to this premise is the identification of the ruling class with corporate and business interests. David Rockwell, in presenting this view, argues that the nature of the legal profession and its professional roles are "defined by those interests which pay the highest price for the services of the profession. One of the primary functions of the legal profession is to support and defend the power and control of corporations and business interests."<sup>171</sup>

<sup>168</sup> *Id.* at 3-4.

<sup>169</sup> E. FROMM, *TO HAVE OR TO BE?* 9, 133 (1976) (emphasis in original).

<sup>170</sup> See Kinoy, *The Role of the Radical Lawyer and Teacher of Law*, in *id.* at 276-99 [hereinafter cited as Kinoy]; Rockwell, *The Education of the Capitalist Lawyer; The Law School*, in *LAW AGAINST THE PEOPLE* 90-104 (R. Lefcourt ed. 1971) [hereinafter cited as Rockwell].

<sup>171</sup> Rockwell, *supra* note 170, at 91.

Wythe Holt has put it rather plainly:

The problem, then, with American legal education is that its curriculum, structure, and methodology uncritically reflect and form a part of the dominant power structure of the system. . . .

. . . .

Present-day American legal education has been and is a useful tool for equipping fledgling lawyers with the techniques and language necessary to maintain the dominance of elites and serves as a vital acculturation process to ensure the devotion of lawyers to the system, and the continuation of legal institutions to mask and legitimize elite control.<sup>172</sup>

Arthur Kinoy, also a law teacher, suggests that

[u]nder the system of bourgeois democracy the lawyer more than often plays out the role of guaranteeing the existence of the facade which masks the oppression lurking beneath the super-structure of 'rights and liberties.' The lawyer becomes identified with these 'frills,' these 'rights,' these 'liberties,' the term depending upon the analysis of function in the system. The lawyer's particular role in the system is to make look good, to provide at least the appearance of justice . . . .<sup>173</sup>

A careful examination of the radical critiques of law and legal education, beyond the scope of this work, would involve an understanding of the relationship of professional socialization and work in capitalist society and, more generally, the relationship of education to existing social structures.<sup>174</sup> And finally, how do dominant elites maintain existing social structures, including the professions, in a way that both mask their control and continue the illusion of a classless society?

The source of the radical critique is rather diverse and is framed in the general terms of a concern for social justice, equal protection of the laws, or in a theoretical and historical critique of society. Kinoy gives his radical view a more immediate focus on conditions "as they exist *today*, in *this* country, at *this* moment in our history. . . ."<sup>175</sup>

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<sup>172</sup> Holt, *A Radical Law School*, 2 ALSA FORUM 25, 27-28 (August 1977).

<sup>173</sup> Kinoy, *supra* note 170, at 287.

<sup>174</sup> See generally S. BOWLES & H. GINITIS, *SCHOOLING IN CAPITALIST AMERICA* (1976); I. ILLICH, *DESCHOOLING SOCIETY* (1971); M. KATZ, *THE IRONY OF EARLY SCHOOL REFORM* (1968); J. SPRIN, *EDUCATION AND THE RISE OF THE CORPORATE STATE* (1972).

<sup>175</sup> Kinoy, *supra* note 170, at 278 (emphasis in original).

Kinoy points out the *contradiction* in his role as radical and law teacher, a contradiction rooted in his concern for the "class nature of the system of justice" and for teaching law students who help perpetrate that very same system of justice. For Kinoy, the contradiction defines the life of a radical law teacher. The response to the contradiction is not to adopt one or the other side of the polarity between law teacher and radical but "to study in depth and in precision the *particularity* of the contradictions" and then use this study to make justice less oppressive.<sup>176</sup> The study is necessary because it is the particularities of the contradictions which "shape our role and our responsibilities."<sup>177</sup> Beyond the study and immersion in the particularities of the contradictions, "the radical lawyer must assist in the increasing and exploding radicalization of masses of people learning from their own political experience."<sup>178</sup>

Secondly, the radical lawyer, because of his role in the system, has the

opportunity to expose, within the framework of the judicial arena itself, the extraordinary fact that the rulers and their servants in the judicial system, be they prosecutors or judges, are turning upon their *own* system, are abandoning their *own* stated rules, designed once in a bygone day to embody the then revolutionary principles of fairness, equality, justice, and liberty.<sup>179</sup>

As the ruling class abandons and ignores people's liberties—lawyers who support the facade of rights and liberties are in a position to defend, protect and legitimate human rights. Kinoy sees in this "system maintenance" an opportunity for further radicalization, as "we learn how the ruling classes abandon liberty to protect their own interest."<sup>180</sup>

Conflict is a common theme in the work of Watson, Himmelstein, Kinoy, and in Simon's critique. For Watson, it is the conflict between instinctual needs and drives and the demands of professionalism. Himmelstein, like Watson, frames the conflict in terms of personal and professional identity, but is careful

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<sup>176</sup> *Id.* at 277 (emphasis in original).

<sup>177</sup> *Id.* at 281.

<sup>178</sup> *Id.* at 286.

<sup>179</sup> *Id.* at 287 (emphasis in original).

<sup>180</sup> *Id.* at 289.

to redefine personal identity in broader humanistic terms, *i.e.*, self-awareness and self-realization of human potential, and takes a more critical view of the lawyer's professional role. Kinoy sees the conflict in social, political and ideological terms. The conflict for Kinoy lies in the dilemma of a professional role which often serves ruling class justice.

We can look at the conflict in experiential terms. In the case of Watson and Himmelstein, the conflict arises from the questions "Who Am I?" "What Can I Become?" "What Will I Be?" The emphasis is on coming to terms with the conflict. For Watson coming to terms means being a better lawyer, for Himmelstein it means being a better person. In comparison to Kinoy, both Watson and Himmelstein, but especially Watson, ignore the social context of the conflict. For Kinoy, the conflict is viewed in a social context, and the question becomes, "What can I do now?" Progress for Watson and Himmelstein lies in self-awareness and honoring our "inner world." Kinoy sees the struggle out in the world, where progress can be seen as a step "forward in the history of humanity: the taking over of the control of the political, economic, and cultural institutions of the country by the people. . . ."<sup>181</sup>

The difficulty in reconciling Watson and Himmelstein with Kinoy is the way they tend to dichotomize the world. Watson and Himmelstein focus on the inner world, which, admittedly, they conceive somewhat differently; Kinoy and Simon view the lawyer as an actor in a social world—an actor whose very life is a contradiction, a contradiction played out in the social world. It is Fidel Castro, the lawyer acting in defense of human liberties when charged with an attack on a military barracks after the Batista *coup d'état*, that Kinoy uses as the model for working with conflict. This example stands in sharp contrast to Watson's psycholocial interventions to deal with student's conflict. It is equally distinct from Himmelstein's effort to show how we become separated from our deeper aspirations as students and lawyers by having us imagine a time when our involvement with law "made deep personal sense. . . when it was connected with the feeling that . . . [our] work in law was deeply important to . . . [us], to the direction of . . . [our] own life."<sup>182</sup>

<sup>181</sup> *Id.* at 296.

<sup>182</sup> *Reassessing Law Schooling*, *supra* note 16, at 551.



The contrast between Himmelstein's effort to demonstrate the conflict and Kinoy's example of Fidel Castro's defense of liberty and the right to use revolution to defend those liberties springs from their radically different concepts of experience. Experience for Himmelstein is narrowly conceived as the awareness of feelings in the here and now. Himmelstein makes clear that clinical work and trial practice courses do not entail experience as he uses the term. Himmelstein, following the Gestalt school of psychotherapy, uses experience to mean subjective awareness. Experience is the equivalent of feelings. Himmelstein makes this point clear:

One might associate experiential learning in law school with clinical work or trial practice courses. Those contexts usually do include experiential learning, although it is easy in both settings to become cognitively focused in ways that are kept quite separate from the experience. A clinical class in which the participants discuss their outside work is once removed from the experience, when compared to a class meeting that also draws upon what is going on in that meeting itself as part of the learning.<sup>183</sup>

Thus, Himmelstein, unlike Watson, is not an instrumentalist. It is not the clinical experience—what we learn how to do and the skills attained—that is important, but the way we feel, in the classroom, about the learning that becomes the focal point. Traditional concepts of learning, knowing and doing and the social dimensions of these concepts are viewed as less important than that which is locked away within each individual learner. We do not know from Himmelstein's published work whether the psychological focus results from a loss of faith in community and the social world, personal disillusionment with social and political action, or simply reflects a personal vision of Himmelstein himself.

The point I am making here is shown most clearly in the exercise that Himmelstein suggests to become more attuned to ourselves as teachers. To make sense out of teaching we look within, not outside to those who are recognized by others as good teachers, or to the social context of teaching, but to our own reflection on teaching. This way of looking at teaching is problematic, Himmelstein notes, because it "feels difficult to in-

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<sup>183</sup> *Id.* at 550-51.

vite others to reflect on or communicate about personal issues."<sup>184</sup> Even so, we are invited to view teaching in terms of our own experience; not social experience, but a reflective, subjective experience.

The philosopher, John J. McDermott, in his book of erudite essays, *The Culture of Experience*, notes that "each generation is faced with using the method of experience to develop a language that is consonant with the events and potentialities of its own situation."<sup>185</sup> McDermott's concern for the transformations of the meaning of experience in philosophy is suggestive for our understanding of the psychologicalization of experience. Perhaps it is in the transformation of experience, philosophical and psychological, that we begin to understand the diverse worlds of Jack Himmelstein and Arthur Kinoy. At the heart of these differing conceptions of experience lie divergent views of social and political consciousness and the relationship of praxis and personal reflection and introspection.

If we follow McDermott and turn to John Dewey, we find a concept of experience which seems to pull Himmelstein and Kinoy closer together. Dewey reminds us that "experience includes what men do and suffer, what they strive for, love, believe and endure, and also how men act and are acted upon, the ways in which they do and suffer, desire and enjoy, see, believe, imagine—in short, processes of experiencing. . . ."<sup>186</sup> There is a warning, implicit in Dewey's view of experience, "against the intellectualizing of our situation to the extent that we cut ourselves off from the richer and unfettered immediacies of living."<sup>187</sup> The appeal of the Gestalt approach to experience reflected in Himmelstein's work is that it pays close attention to the "richer and unfettered immediacies of living." The problem with the Gestalt perspective is that it has a tendency to be anti-intellectual. If our experience is *nothing but* immediate awareness of feelings then we erect an illusion—a new sense of a timeless now.

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<sup>184</sup> *Id.* at 554.

<sup>185</sup> J. McDERMOTT, *THE CULTURE OF EXPERIENCE* 5 (1976) [hereinafter cited as *THE CULTURE OF EXPERIENCE*.]

<sup>186</sup> J. DEWEY, *EXPERIENCE AND NATURE* 10 (2d ed. 1929), *quoted in THE CULTURE OF EXPERIENCE*, *supra* note 185, at 8.

<sup>187</sup> *Id.* at 9.

Dewey, in the tradition of William James, was a proponent of philosophy based on "concrete experience." It might be of some help here to try to distinguish Dewey and Himmelstein's notion of experience. Both Dewey and Himmelstein agree, at least superficially, on the power of experience in learning and try to use experience as the basis for a philosophy of life. The problem is that they mean something radically different when they refer to experience. For Dewey, experience has to do with the ordinary life world—concreteness, the reality we attach to the work and the daily flow of life. Whereas for Himmelstein, experience is linked to subjective awareness of the affective dimension—"How do I feel now?" This is the diametric opposite of Dewey's notion of experience with its connection to the future.<sup>188</sup>

In some forms of contemporary psychology, including those favored by Himmelstein, experience comes to be viewed as an organic form of existence, defined by the rush of present events and the subjective awareness of the *now*. We see this most clearly when we listen to the Gestalt therapist at work: "Margaret, you look very upset, what are you *experiencing*?" That is, what are you now feeling, what is your subjective awareness of this moment? Experience, in the Gestalt view, pays little concern to our cognitive maps and styles, because experience is not what we know or how we see the world but how we feel about it. Reality and experience in this view, have no history and no future, for it is always in the state of "being experienced."

At the heart of Himmelstein's humanistic psychological paradigm is a radical transformation of the nature of experience. Experience will no longer be equated with the "rush of events" and the "immediacies of life" but the opening of the deepest recesses of the self<sup>189</sup> and the formation of communities in which the sharing of "deep" aspirations and human values can be accomplished. As Himmelstein puts it, "the hope [is] that we, as legal educators, students, and lawyers, can together search

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<sup>188</sup> *Id.* at 12.

<sup>189</sup> Himmelstein expressed difficulty in writing about experience, see *Reassessing Law Schooling*, *supra* note 16, at 550, and a general reluctance to make his work public, *id.* at 514, because the experience most meaningful, is the personal, private, subjective awareness that we have of ourself and our world. The sharing of this inner experience "is not what we normally do in a public meeting, a classroom, or any typical social interaction. Usually, what we hold deeply in ourselves we keep there, private, personal, sheltered." *Id.* at 553.

creatively in legal education and the profession for ways to express and share more fully our own humanness . . . ."<sup>190</sup>

#### CONCLUSION

This article suggests the need for a conceptualization of experience which welds subjective awareness to social action. Himmelstein's concept of psychological experience as awareness of feelings pays too little attention to ordinary experience and the way our experience of the world is mediated by social structures. Taken with Simon's warning that the psychologicalization of experience effects our notions of social and political action, it can be seen that we need a psychology which reflects what C. Wright Mills called a "sociological imagination."<sup>191</sup>

The most cursory sociological and historical glance suggests that, in the last several decades, professionalism has been under extraordinary attack as social critics begin to expose the myth of expertise. We learn that experts know less than they have led us to believe; that they actively harm us during the course of their interventions, with iatrogenic disease in medicine and ineffective assistance of counsel in law. The fundamental premises of professionalism are now questioned. Professional autonomy is undermined as consumers seek an active role in the regulation of professions. The rhetoric of a legal profession dedicated to service is exposed as the Supreme Court overturns associational restrictions on professional advertising and the price of routine legal services fall. Finally, the moral authority of the practicing professional is called into question. Law schools rush to add legal ethics and professional responsibility courses to the curriculum and require students to become familiar with the professional code of conduct. Finally, the professional code itself is subjected to criticism for servicing professional rather than public interests.

How can a professional maintain "masterful command" under these circumstances? The magic circle of esoteric professional knowledge is first broadened to include the social sciences. As the hope of an interdisciplinary "grand synthesis" of law and the social sciences failed to materialize, however, we have turned

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<sup>190</sup> *Id.* at 516.

<sup>191</sup> MILLS, *supra* note 167.

to psychology, initially to traditional psychoanalytic theory and now to humanistic psychology, to buttress the moral foundations of the profession.

One way to look at the psychologicalization of experience in the psychoanalytical interventions of a teacher like Watson and the new humanistic visions of Himmelstein is that it provides new ways for teachers to remain in control. I do not mean by control the notion of authoritarian styles of teaching associated with a "controlling teacher." Both humanistic psychological and psychoanalytic oriented perspectives effectively call the authoritarian style into question. My sense is that we are now deriving a much more subtle and omnipotent form of control because we attempt to include *everything* within our grasp: the verbal and non-verbal; the conscious and unconscious; the intellect and feelings.<sup>192</sup> As traditional forms of control in the classroom and in professional relations have eroded, more subtle forms of control appear. As students and clients overcome their sense of awe and reverence for professionalism, which was historically defined in terms of an esoteric body of knowledge and language, the elaborate premises and underpinnings supporting professionalism are threatened.

To avoid the dysfunctional aspects of the psychological perspective we must pay closer attention to the social theorists and to those sociologists who provide a social perspective on subjective awareness. Without a sociological imagination we look at subjective awareness *as if*, standing alone, it could transform the world.<sup>193</sup> Contemporary legal psychologists

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<sup>192</sup> Nothing is to escape the attention of the psychologists or the psychologically oriented humanists. For the psychologists, behavior is to be considered in its entirety, which means that non-verbal behavior, *i.e.*, body language and the use of the body in space, personal space maintained in communication, seating, is subject to scrutiny and understanding and in turn becomes a subject of professional discourse.

The humanists are less concerned about non-verbal behavior and behavioral indices of the unconscious, but are still concerned about the "whole" person. The psychological humanist shifts attention to feeling and emotions and other aspects of the individual's subjective awareness, *e.g.*, images, phantasies, daydreams, general fears, concerns, expectations, which are out of awareness. They argue that these affective elements, experienced in the "here and now," provide the basis for an "experiential based" education which looks at the feeling side of learning.

<sup>193</sup> See, *e.g.*, W. ANDERSON, POLITICS AND THE NEW HUMANISM, note 17, *supra*.

believe that when we get our personal act together, the world will become a better place to live. This belief confuses what Mills called "troubles," with "issues".<sup>194</sup>

*Troubles* occur within the character of the individual and within the range of his immediate relations with others; they have to do with his self and with those limited areas of social life of which he is directly and personally aware. Accordingly, the statement and the resolution of troubles properly lie within the individual as a biographical entity and within the scope of his immediate milieu—the social setting that is directly open to his personal experience and to some extent his willful activity. A trouble is a private matter; values cherished by an individual are felt by him to be threatened.<sup>195</sup>

Issues, on the other hand,

have to do with matters that transcend these local environments of the individual and the range of his inner life. They have to do with the organization of many such milieux into the institutions of an historical society as a whole, with the ways in which various milieux overlap and interpenetrate to form the larger structure of social and historical life. An issue is a public matter: some value cherished by publics is felt to be threatened.<sup>196</sup>

Mills' "sociological imagination" warns us of the hazards of seeing experience as subjective awareness. As Robert Merton, the sociologist, puts it, "[t]otal subjectivism leads us astray by failing to provide a theoretical place for *systematic* concern with objective constraints upon human action."<sup>197</sup> Moreover, "[t]o ignore those constraints [social demographic, economic, technological, ecological] is mistakenly to imply that they do not significantly affect both the choices people make and the personal and social consequences of those choices. It is to pave the road to Utopianism with bad assumptions."<sup>198</sup>

Any understanding of social life, Merton argues, must account for how people perceive and define situations, "But socio-

<sup>194</sup> MILLS, *supra* note 167, at 8.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> R. MERTON, *SOCIOLOGICAL AMBIVALENCE AND OTHER ESSAYS*, *supra* note 39, at 175 (emphasis in original).

<sup>198</sup> *Id.* at 176.

logical theory can provide an adequate place for such perceptions without falling into the fallacy of total subjectivism. . . . Subjective definitions of the situation . . . can matter greatly. But they do not alone matter.”<sup>199</sup> So we will need to find social sciences,<sup>200</sup> philosophies, and teaching strategies which recognize the dialectical embracing of individual subjective awareness, *i.e.*, the “inner world”, and of the social world, where experience is linked to life itself, to the past and to the future. What most contemporary legal psychologists lack is that quality of mind which sees the relationship of self and world and the dynamic interplay of the inner world of experience and experience in the world.

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<sup>199</sup> *Id.* at 177.

<sup>200</sup> To understand the distance between Himmelstein and Kinoy, between the view of experience as awareness and experience as social action, we have looked briefly at McDermott’s contention that experience as a concept is transformed by philosophy, a point even more apparent when we look at the disciplines of psychology and sociology.

It may indeed be an overstatement to suggest that what we know of the world, and our experience of self in the world, is a reflection of the structure of academic disciplines, but I would hold that this is precisely the case for those of us who argue about such things as the nature of experience and paradigms in education. The disciplines matter because we pose our arguments and justify our views by relying on knowledge from the disciplines. We read, or refuse to read, Watson precisely because he maintains a psychoanalytic view. Himmelstein obtains federal funds to pursue his work because he relies on humanistic psychology and convinces grant sources that humanistic psychology belongs in professional schools.

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