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## THE PARADOX OF A LIFE IN LAW

*James R. Elkins\**

### I. THE PARADOX

What does it mean to say that a life in law is a paradox? A paradox is a seemingly contradictory statement which is nonetheless true despite the contradiction. A person or situation is deemed paradoxical when it has contradictory aspects. The premise of this essay is that a life in law involves major contradictions which make living such a life paradoxical.<sup>1</sup>

This essay is based on the view that there are two seemingly contradictory ways to orient our life in law. The challenge is to

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1. The theme of this essay—that a life in law is a paradox—parallels Justice Cardozo's view of law itself. For Cardozo law was the "child of antinomies." B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 4 (1928).

Behind the facade of law in modern society Cardozo found:

the ancient mysteries crying out for understanding—rest and motion, the one and the many, the self and the not-self, freedom and necessity, reality and appearance, the absolute and the relative . . . . Deep beneath the surface of the legal system, hidden in the structure of the constituent atoms, are these attractions and repulsions, uniting and disservicing as in one unending paradox.

*Id.* at 4-5,7. Indeed the great problems in law involve "[t]he reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites. . . ." *Id.* at 4.

understand these prototypical world-views and how one's own life style and work patterns move one to strongly adopt a unidimensional view of the world, and finally to decide whether there is a means of moving from one orientation to the other as individual and social needs dictate.

This essay will consider the contradictory elements of a life in law; locate the paradox in the life of the law student, law teacher, and lawyer; explore some of the ramifications of a paradoxical life; and finally suggest a way of viewing such a life.

While the paradoxical nature of our existence as lawyers can be traced to a number of contradictory aspects in legal education and lawyering, the paradox at the very core of our lives as students, law teachers, and lawyers is the reconciliation of the "real" and the "ideal." Students confront the dichotomy of the real and ideal as they chart a difficult course in learning law and as they determine whether a life in law offers opportunity for expression of deeply held values. Law school is often experienced as a place that limits imagination and creativity and stifles ideals. Law teachers are frustrated by students who have "given in" to learning for grades, and yet teachers often reinforce the belief that personal values and social ideals are obstacles to learning the law and becoming a skilled lawyer. Students, in turn, see little utility in innovation or in creative efforts to improve learning. Both law students and law teachers seem to be part of a system in which each acts to destroy the efforts of the other toward achieving his ideal. Students emerge from such a learning environment only to find themselves in a similar position in the legal system. The practicing lawyer struggles with real clients and real legal problems while often seeking an expression of self that being a legal technician does not allow.

I have chosen the real and the ideal as the polar elements of the paradox for one who chooses law as a career. The reader will undoubtedly find that these terms suggest a variety of possible meanings. The terms beg for a definition: what does the author mean by "real," by "ideal"? I have chosen not to begin the essay by defining these terms, but to allow the essay itself to suggest the nature of the real and the ideal. The precise meaning of that which is real and that which is ideal can only be given by a reader as he comes to understand the underlying purpose of the essay and his own life in law.

This essay explores the paradox of the real and ideal by moving freely from the descriptive to the biographical. For too long we have denied the intimate personal connection in the substance of what

we choose for academic scholarly work. Consequently, this essay is a description of the paradox; at the same time it seeks to develop a speculative theoretical framework and to make a personal statement. While the reader will find footnotes which resort to citation of so-called authorities, the essay is not intended to be viewed as traditional legal research.

Lest the reader despair that this essay is merely a revelation of one teacher's neurosis,<sup>2</sup> analysis of the way we dichotomize the world into the real and the ideal has serious possibilities for interdisciplinary legal research. For example, one could begin by determining whether a significant number of law students, law teachers, and lawyers experience the contradiction of the real and the ideal. What are the effects of this dichotomization on the way we experience the world? To what extent is our professional identity as lawyers formed by the real, the practical, in our everyday life? Do our ideals contribute to the self-image that becomes a part of both personal and professional identity? In essence, what is the relationship of identity to the paradox of the real and ideal? What role does legal education play in creating and resolving the paradox? What particular aspects of law promote reliance on what we believe to be real or ideal? Where can we find adequate models for a life in law which seeks to integrate the real and ideal?

The real and the ideal can be seen in particular world-views which are actually and actively adopted and used by individuals in law. I have chosen to view the "real" as reflected in an ideal type-practical man, while the "ideal" is related to the artist.

#### A. *Practical Man*

The essence of a practical man's world-view can be simply stated: an emphasis on simplicity, experience and the traditional values expressed in work.<sup>3</sup>

A practical man takes the world for granted. He feels little need to question that which appears to be and even less need to inquire into that which makes no appearance at all. The practical man is perfectly content to leave the unknown unexplored. A practical man finds little reason to question what he does or the way he views the world. While the practical man has a philosophy, he has no desire to figure out what it is.

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2. See, e.g., C. REICH, *THE SORCERER OF BOLIAN'S REEF* (1976).

3. For a historical perspective on the practical man, see E. HOFFER, *THE ORDEAL OF CHANGE* 58-77 (1963).

The practical man's view of the world is based on experience. Consequently, the view is highly subjective.<sup>4</sup> Only as the practical man experiences the world is it known and real to him. Husserl asks: "Is not the life-world as such what we know best, what is always taken for granted in all human life, always familiar to us in its typology through experience?"<sup>5</sup>

A practical attitude involves one in activity, supported by what is already known or can be readily learned. A practical life is possible only when we *know* certain materials and tools and can discover so much of that which is unknown as will allow continued productive activity.

The knowing of practical man lies in the doing. Action becomes a mode for knowing. Since the practical man knows only that which he does, his self-image is closely tied to his work. The close relationship of our orientation toward work and our life-world is suggested by those who contend that "major 'habits of mind,' approaches to the world, or in phenomenological terms, attitudes towards every-

4. The life-world of the practical man is a subjective view of the world as a result of his devotion to knowing by way of experience. The experience of practical man is undermined by science—scientists tell us that we "see" only a limited part of the world and that which we do see and experience is often illusory. The simplified world-view of practical man is destroyed by the scientific ethic which shows practical man that things in the world are not as they seem. Science has taught us to distrust our senses. Our senses portray a fictive, nonexistent world.

The practical men of science have by their studied efforts in pragmatism undermined what was once a practical view of the world. When the practical man accepts the wonders of modern science and technology, his practical view of the world is threatened.

Yet the practical man is a man willing to accept science, to give up traditional values for the practical benefits of technology. This presents a paradox in understanding the practical man as a scientist and a scientist as a practical man, for it is science which has been the prime mover in suggesting that our experience of the world is so superficial and incomplete as to preclude our forming a true picture of the world.

The paradox for practical man is one that he shares with science. Abraham Kaplan tells us that, "[t]he scientific habit of mind is one dominated by the reality principle, by the determination to live in the world as it is and not as we might fantasy it." A. KAPLAN, *THE CONCEPT OF INQUIRY* 380 (1974). Yet through science the practical man is urged to imagine and then accept as reality that which his senses cannot confirm. For example, he must come to believe that something is moving in the electrical wiring that brings light and that "images" travel through space to our TV screens. Is it not science that prompts the substitution of a fantasy for what we can actually experience in our everyday life? Can our future in a scientific world be anything more than a collective fantasy served up by science? It is indeed questionable whether Kaplan does not mislead us in his assertion that scientists would have us live in the world "as it is." The world "as it is" is a world defined by science. Science now dominates the human mind. H. SMITH, *THE FORGOTTEN TRUTH: THE PRIMORDIAL TRADITION* (1976).

5. Husserl, *The Life-world and Theoretical Praxis* in *EXISTENTIAL PHENOMENOLOGY AND POLITICAL THEORY: A READER* 3, 6 (H. Jury ed. 1972).

day life, and specialized attitudes, are extensions of habits of thought that emerge and are developed in the practice of an occupation, profession, or craft."<sup>6</sup>

The practical man seeks to live in the world as it is. He accepts the existing norms and group practices as necessary conditions of his life. In the absence of questioning, thinking or reflection, existing social and cultural practices become absolute constraints on the choices open to the practical man. Yet obviously, the practical man thinks about his world and reflects on his own experiences and those of others he may know. The thought is limited and is incapable of transforming existing approved forms of action. Practical man is simply a being in the world. Lacking self-knowledge of the world, he is unable to gain sufficient distance from his own subjective experience to use his action for the achievement of ultimate values.<sup>7</sup>

### B. *The Artist*

The artist, both in life style and consciousness, is far removed from the practical man. The artist does not accept the world as it is, either the way it appears to us or the way we are to live in the world. The artist seeks to impose a new consciousness on the existing order, to change things. The emphasis is on a sensual experience of the world which will satisfy aesthetic sensibilities. The artist is a creative being. Abraham Maslow defines a creative or self-actualizing person as one who is "attracted to mystery, to novelty, change, flux, and finds all of these easy to live with, as a matter of fact these are

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6. J. BENSMAN & R. LILIENFELD, CRAFT AND CONSCIOUSNESS: OCCUPATIONAL TECHNIQUE AND THE DEVELOPMENT OF WORLD IMAGES 1 (1973).

7. The danger in an extreme practical, unreflective orientation in the world is clearly shown in the following comment of Paulo Freire:

Unlike men, animals are simply in the world, incapable of objectifying either themselves or the world. They live a life without time, properly speaking, submerged in life with no possibility of emerging from it, adjusted and adhering to reality. Men, on the contrary, who can sever this adherence and transcend mere being in the world, add to the life which they have the existence which they make. To exist is thus a mode of life which is proper to the being who is capable of transforming, of producing, of deciding, of creating, and of communicating himself.

Whereas the being which merely lives is not capable of reflecting upon itself and knowing itself living in the world, the existent subject reflects upon his life within the very domain of existence, and questions his relationship with the world. His domain of existence, is the domain of work, of history, of culture, of values—the domain in which men experience the dialectic between determinism and freedom.

P. FREIRE, CULTURAL ACTION FOR FREEDOM 51-52 (1972).

what make life interesting."<sup>8</sup> Instead of avoiding the dynamic flux of modern social life, the creative individual maintains an openness to the world<sup>9</sup> and to the inner life.<sup>10</sup>

In the artist we often find an integration of "work" and "living." The artist avoids the compartmentalization of public (professional) and private life so often found in the legal world.<sup>11</sup> When one's work is linked to a professional life that divorces itself from "living," the skills dimension of life is split off from the value dimension.<sup>12</sup> Abraham Maslow has found that self-actualizing, crea-

8. A. MASLOW, *EUPSYCHIAN MANAGEMENT: A JOURNAL* 192-93 (1965).

Clark Moustakas has suggested that "[a]s long as habit and routine dictate the pattern of living new dimensions of the self will not emerge; new interests will not develop." C. MOUSTAKAS, *LONELINESS AND LOVE* 39 (1972).

MacKinnon suggests: "[C]reative persons are especially disposed to admit complexity and even disorder into their preceptions without being made anxious by the resulting chaos. . . . [T]hey prefer the richness of the disordered to the stark barrenness of the simple." MacKinnon, *The Study of Creative Persons: A Method and Some Results*, in *CREATIVITY AND LEARNING* 20, 30 (J. Kagan ed. 1967).

Gerard Egan has noted that:

The qualities of the creative person—*fluency*, or the ability to put out a large number of responses to a situation rather than focusing on just one; *flexibility* or the ability to change one's thinking and to change the meaning; *interpretation*, or use of something; and originality, or a flair for the unusual, the novel, the farfetched, the remote, the clever. . . .

G. EGAN, *ENCOUNTER: GROUP PROCESSES FOR INTERPERSONAL GROWTH* 98 (1970).

9. The openness of the creative individual requires courage. Rollo May has recently completed a new book on creativity entitled *THE COURAGE TO CREATE* (1976). Maslow explains that the courage for creativity:

is simultaneously a kind of justified trust in one's self and a justified trust in the goodness of the environment and of the future, to be able to face an unexpected, an unknown, unstructured situation without any guards or defenses, and with an innocent faith that one can improvise in the situation.

MASLOW, *supra* note 8, at 189.

Creativity involves a playful attitude toward reality and a tolerance for ambiguity. On the ambiguities in the role of the judge, see Freund, *An Analysis of Judicial Reasoning in LAW AND PHILOSOPHY* 282, 282-83 (S. Hook ed. 1974). The reality of the law student's world demands both "playfulness" and a working relationship with ambiguity.

See also M. PECKHAM, *MAN'S RAGE FOR CHAOS* (1965).

10. The creative person is more likely to have "perceptual openness to experience of the inner life as well as of the outer environment and culture." MacKinnon, *supra* note 8, at 28.

Creativity "flows from an internal negotiation between what seems to him intuitively correct and what the constraining forces of technique, of material, of tradition, of criticism and of the marketplace require." Goleman, *The Fertile Tension Between Discipline and Impulse*, *PSYCH. TODAY* 53, 53 (Oct. 1976).

11. On the split in the private and professional self, see Stone, *Legal Education on the Couch*, 85 *HARV. L. REV.* 392, 422 (1971).

12. Both work and consumption are increasingly a part of an institutionalized bureaucracy. Our work is institutionalized and now standardized. As Ivan Illich has so aptly stated, the consumer has become "addicted" to standardized goods. I. ILLICH, *TOWARD A HISTORY OF NEEDS* 6 (1978). Even education has become a consumer good. Wendell Berry, the Kentucky

tive individuals "assimilate their work into the identity, into the self, *i.e.*, work actually becomes part of the self, part of the individual's definition of himself."<sup>13</sup>

One characteristic of the artist is that he lives his art: art is life, and life is art. In the life which expresses itself through craft, there is a fusion of private life and professional values. The legal artisan is a participant in life and the law.<sup>14</sup> The lawyer becomes an artist when he becomes one with law and life.

Robert Lifton, a Yale psychiatrist, has recently directed attention to a theme common to all major social institutions: "the quest for significant work experience, both in immediate involvement and in a sense of the work's contribution to the continuing human enterprise."<sup>15</sup> Law students and young lawyers share with others the contemporary quest for self-realization through humanistic work. By "self-realization," I mean the sense of freeing oneself from the meaningless automated work of an industrial bureaucratic society and engaging in work which is socially responsible and personally fulfilling.<sup>16</sup> The focus is on the reinstallation of personal values<sup>17</sup> in work and achieving a sense of commitment in a world increasingly

poet, novelist, essayist and environmentalist argues that "a practical education has the nature of a commodity to be exchanged for position, status, wealth . . ." W. BERRY, *THE UNSETTLING OF AMERICA: CULTURE AND AGRICULTURE* 157 (1977).

13. MASLOW, *supra* note 8, at 1.

14. Fortas, *Thurman Arnold and the Theatre of the Law*, 79 *YALE L. J.* 988 (1970).

15. R. LIFTON, *THE LIFE OF THE SELF* 142 (1972).

16. See generally C. REICH, *THE GREENING OF AMERICA* (1970). The personal fulfillment from work is related to the psychological needs of the individual and the ability of a profession or job to satisfy those needs. See Teete, Francia & Strawser, *A Look at Lawyers' Need Satisfaction*, 57 *A.B.A.J.* 1193 (1971); T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 194-200 (1976).

Paul Freund has succinctly described the role of the law in our lives:

[T]he processes of law — the procedures and ways of thought of lawyers and judges — may contribute . . . generally to our thinking [and] may help us to live with uncertainty and ambiguity, may teach us to cope with the great antinomies of our aspirations; liberty and order; privacy and knowledge; stability and change; security and responsibility.

P. FREUND, *ON LAW AND JUSTICE* at v (1968).

On psychological need theories, see *THE COURSE OF HUMAN LIFE* 92-101 (C. Buhler & F. Massarik ed. 1968); A. MASLOW, *MOTIVATION AND PERSONALITY* 63-154 (1954); M. ROKEACH, *THE OPEN AND CLOSED MIND* (1960); W. C. SCHUTZ, *FIROA: THREE DIMENSIONAL THEORY OF INTERPERSONAL BEHAVIOR* 13-56 (1958).

17. Values come from a deeper and more organic level of experience than the rational. They are rooted in irrational experience as well as rational; they are both on unconscious as well as conscious levels. . . . Values are feeling-charged guides around which the person's devotion crystallizes. Thus, they have their source in the organic being of the individual and in his interpersonal relationships in his community.

May, *Values, Myths, and Symbols*, 132 *AM. J. PSYCHIATRY* 703 (1975).



devoid of both.<sup>18</sup>

Finally, the artist is a person of ideals—"the first art of every artist is to choose *the right ideals*."<sup>19</sup> The lawyer as artist can be envisioned as a seeker after the ideal of justice, much like the artist's concern for beauty.<sup>20</sup> Karl Llewellyn has argued that law, in addition to the abstract ideal of justice, has a kind of functional beauty. For example, legal cases are said by Llewellyn to be beautiful when "they drive to a point; they drive to technical accuracy, to justice in the case at hand, to right guidance for the future."<sup>21</sup> Legal artistry is concerned with coupling the passion of our ideals and the functional beauty of law to human problems.

## II. THE STUDENT

The ascension to the priesthood of law has a way of engendering idealism.<sup>22</sup> To many, law is merely a vehicle to achieve a higher

18. "Lawyers regard themselves as socially responsible pursuers of universal verities, concerned with value-laden concepts. The myth is often expressed in the proposition that they are 'generalists' in an age of 'specialists.'" Tapp, *Psychology and the Law: The Dilemma*, PSYCH. TODAY 16, 20 (Feb. 1969).

Stuart Scheingold has labeled this notion as the "myth of the lawyer-generalist." He notes that it is a "conceit which converts the accidental fact that the lawyer is an available social handyman, ready to take on a wide variety of complex assignments, into a basis for supposing he has a competence to deal with ever more complex phenomena." S. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 161 (1974) (quoting Goldstein, *The Unfilled Promise of Legal Education* in LAW IN A CHANGING AMERICA 161-63 (G. Hazzard, Jr., ed. 1968)).

"[T]he basic challenge to legal education is to effect an accommodation between generalized and specialized training while maintaining an awareness of and ability to respond to actual and projected changes in the social structure and in the roles of the attorney." Speidel, *A Matter of Mission*, 54 VA. L. REV. 606, 611 (1968).

19. D. MASON, ARTISTIC IDEALS 2 (1927).

20. See A. EHRENZWEIG, PSYCHOANALYTIC JURISPRUDENCE 169 (1971).

21. Llewellyn, *On the Good, The True, The Beautiful in Law*, 9 U. CHI. L. REV. 224, 229-30 (1942).

22. Harry Kalven has noted that "aspirations to service, skill, loyalty, fiduciary trust, and courage and independence in defense of the unpopular are traditional aspects of lawyering which elevate the practice of law to profession status." Kalven, *Tradition in Law*, in THE GREAT IDEAS TODAY 23, 26 (1974).

A somewhat different description of the "ideal" in law has been provided by Roscoe Pound.

Ideal gets its name from a Greek word meaning picture. An ideal of a thing is a picture of it to which we fit our conception of it as we think it is or ought to be. The ideals of the social order, however, which become authoritative guides to determination of controversies and ordering of conduct, are not photographs or photographically retouched drawings of the social order of the time and place. They are largely pictures of a social order of the past, drawn to it at its best, undergoing retouching as to details in order to fit exigencies of the present. Ideals of law and ideals of principles and rules of law, are pictures made to conform to an ethical-philosophical juristic picture of the legal

social status and financial well-being. But more importantly, consider how law provides the opportunity to achieve a distinct position in life; how the idealism in law creates the image of the lawyer as fighter, problem-solver, helper. These images become part of the student's process of defining self, of distinguishing himself from the herd. The student is aided in this definitional process by gaining access to an esoteric body of knowledge inaccessible to the layman and by acquiring a special technical language.<sup>23</sup>

As a student, I first experienced disquietude over the excessive emphasis on the practical aspects of lawyering and the absence of concern for the ideals which I sought to express through a life in law. Student veneration of the rules, with encouragement from a respectable number of law teachers, kept our focus on the "real world" of lawyering. Many of my teachers taught as if the rules of cases reflected something called law and that by knowing, finding, and applying rules, one could be happy in the practice of law.<sup>24</sup> Some of my teachers failed to move beyond the "given" rule (if a rule can ever be said to be given) to ask the "why" and the "how" of the rule. Could they have been afraid to ask whether the rule was functional or served to further human values in society? Here again, there were teachers to influence our lives, to encourage an escape from the realism of rules as "given." The conflict of the real and the ideal became a part of our lives.<sup>25</sup>

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order, intended to guide judges and legislators and administrative agencies toward making the means afforded by the legal order achieve its postulated ends.

R. POUND, *LAW FINDING THROUGH EXPERIENCE AND REASON* 7 (1960).

A more somber view is taken by jurisprudential scholar Morris Cohen who suggests that: [i]dealists are those who are so impressed with the ideal order, which visible things only partly embody, that they are charged with neglecting the poor brute facts. The realists are so impressed with the hard actual facts, especially the unpleasant ones, that they are charged with neglecting the possibilities of change or improvement inherent in things.

M. COHEN, *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY* 248 (1967).

23. The definitional process outlined here follows closely the sociological view of the concept of profession. See Elkins, Book Review, 30 *VAND. L. REV.* 923, 926-27 (1977).

24. I have often thought the phrase "practice law" to be imbued with more meaning than one who uses it intends. Why is it that we say that one "practices" law (or medicine, although of less frequent usage) and do not say that a minister or priest "practices" religion?

25. The conflict is both internal to the particular student and external in the deep gulf created between student and teacher. Andrew Watson explains the psychological aspects of the conflict:

[T]he faculty's psychological bias, both conscious and unconscious tends to create immediately a split in the student's orientation. If he is to become a top-notch student and identify himself with the professor, he will tend automatically to avoid the mundane problems of law practice. He will deal with law primarily as a series of intellectual abstractions that permit him to avoid unpleasant emotions and result in a barrier

My colleagues and I expended an inordinate amount of time and energy in the effort to get at the paradox of the real and the ideal. By "get at," I mean resolve the paradox in the short run, as in deciding which courses we would take and whether we should spend scarce free time in following the tangents which seemed so enticing and yet were so peripheral to the "real" thing which we were about.

The paradox seemed sometimes distant and at other times of immediate concern: What should I be getting out of law school to be a "good" student? What is a "good" lawyer? Is being a "good" student directly related to being a "good" lawyer? If so, does that mean that half of the class will be "good" lawyers and the other half not so "good"? How can I enter the professional world of the lawyer and maintain a sense of who I am as a person? Is it possible or desirable to keep the law school world and the world outside of law school compartmentalized?

What do these people we call law professors have to do with this paradox in my life? Can we listen to them, believe them, model our lives after theirs? Why are they teaching instead of "practicing law"? If we are preparing for entry into the real world, shouldn't we be taught by "real" lawyers? How can one choose between those teachers who talk like "real" lawyers and those who make an effort not to? What about those who warn that an unquestioning acceptance of the dictates of the "real" world destroys the imagination and blunts our creativity?

Students often become bored, passive, cynical, and leave law school with the belief that legal education has failed to prepare them for the real world of lawyering. As a result, many law school graduates "go into legal practice with their ideals buried, their principles forgotten and their inspiration stifled."<sup>26</sup> Further inquiry

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between himself and all truly professional operations. On the other hand, if a student retains concern with the "people" part of law practice (which is the area where all professional questions lie), then he must resist identification with the professor. He will need to depreciate the importance of the intellectual tasks placed before him and will often develop serious goal conflicts as he studies law. I have encountered innumerable examples of this in talks with students and lawyers in groups and individually during recent years. This schism can be so severe as to force students to drop out of law school, and those who leave are not necessarily of poor intellectual or psychological caliber. They merely lack the psychological capacity to resolve the serious conflicts that are created or supported by the process of legal education.

Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1, 12 (1963).

26. 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, 539 (1978).

must be made into this state of affairs.

First year law students face the unsettling prospect of three years of legal study and a saturated employment market. Many students have struggled to gain admission and once enrolled are faced with financial pressures which are forcing larger numbers of students to work and those students already working to increase their work load. It is not surprising, then, to find students today concerned not with the "ultimate," but frustrated and fighting for survival. To survive is to obtain a law degree and pass a bar examination, mere stops along the way. Law school is simply a place to put in time, and there are some who avoid even that minimal requirement. Many law students today have little time for subjects or instructors who are not attuned to the student's work world.<sup>27</sup>

Today's pragmatism and concern for "relevance" should be distinguished from the relevance in legal education demanded by the activist student in the late 1960's and early 1970's.<sup>28</sup> Relevance then expressed concern for social responsibility of law and lawyer and the role of legal education in promoting a new ethic. Today relevance means little more than an illusory relationship between teaching material, course coverage, and the work the student expects to perform after graduation. The fear of today's law student is that he will join a law firm and be asked to research a client problem involving a "secured interest," not having had a course in the subject in law school.

Therefore, there is renewed student concern for practical skills. Students are increasingly pragmatically oriented and expect to learn "how to do it" as opposed to learning the theoretical structure and philosophy underlying legal rules.<sup>29</sup> A rejection of theory and a

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27. See Kelso, *In the Shadow of the Bar Examiner, Can True Lawyering Be Taught?*, 2 *LEARNING AND THE LAW* 38 (Winter 1976). The pragmatist bent of today's law student has been related to anti-intellectualism in legal education. See Allen, *The Prospects of University Law Teaching*, 63 *A.B.A.J.* 346 (1977).

28. Compare Stevens, *Aging Mistress: The Law School in America*, 2 *CHANGE* 32 (1970) and F. MARKS, K. LESWING & B. FORTINSKY, *THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY* (1972).

29. One of the most scathing attacks on the how-to-do-it approach to legal education was delivered by Robert Hutchins. See Hutchins, *The University Law School*, in *THE LAW SCHOOL OF TOMORROW* 5 (1968). Hutchins declares that "[t]he best practical education is a theoretical one" and declares "war" on the how-to-do-it law school. *Id.* at 15. Hutchins regards the law as a "great intellectual discipline." He argues that:

[t]o have the university and the law school dedicated to training technicians is so far from the potentialities of either as to be a scandal, and too flagrant to continue.

The responsibilities and opportunities of the university and the law school are now greater than ever. Society needs centers of independent thought and criticism as never before. The law faces new problems that must be solved if civilization is to survive.

lack of concern for the subtle nuances of the style, art, and craft of lawyering alienate the students from both law and law teachers.

Students are ever willing to see theory and practice as polar opposites, dismissing the possibility of each subsuming the other. How often do we hear the question: "Will what you are teaching help me survive the bar examination and the critical scrutiny of recruiting law firms?" There is an obsession with pragmatic skills which produce a "street-wise" (court-wise) lawyer following graduation. "Players in this game have little time for rhapsodies about the beauty of learning; their interest is in getting the ticket punched in the shortest time possible and moving on."<sup>30</sup>

Getting a career ticket punched is the work of a practical man. With an eye to the real world of lawyering one can guard against illusions of grand possibilities in the world. The practical man suffers from an illusion that he engages the world only through practice and that theory and ideals are of little value. With the denouncement of theory comes the masking of ideals. Listen to the voice of the practical man in law school: "I want courses which tell me what the law is so that I can use it when I get out into legal practice. Courses should be more practical. Teachers should spend less time talking about theory and more time showing students how to draft documents, file papers, and deal with the real problems which I will face in legal practice. I like courses which help me become a competent lawyer."

Robert Pirsig in *Zen and the Art of Motorcycle Maintenance*

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The university is the place where wisdom can be generated. The law needs that wisdom and must contribute to it. Other civilizations have fallen because of the barbarians without. That may happen to us. But it seems more likely that we may fall prey to the barbarians within, from which the university and the law might save us.

*Id.* at 17.

Robert Redmount, a longtime student of legal education, adds:

Legal education does not serve the lawyer who is consulted on a variety of personal, social, and institutional problems nearly as well as it serves the lawyer who is appointed to operate the traditional mechanism of authority of law. The need is for excellence in delving into and ordering the properties of experience, as well as excellence in defining and advocating some of the properties of authority that guide end results.

Redmount, *Humanistic Law through Legal Education*, 1 *CONN. L. REV.* 201, 215 (1968).

Many in legal education will welcome the new pragmatism, the concerns of which permit legal educators and students to get on with being lawyers as opposed to social critics. Thus, we will undoubtedly see a strong coalition of survival-oriented law students and a faculty component which has never given up rule-structured legalism as its *raison d'être*.

30. Costello, *Another Visit to the Man Divided: A Justification for the Law Teacher's Schizophrenia*, 27 *J. LEGAL EDUC.* 390, 401 (1975). Costello notes that this factor may explain the "sea of apathy" in the classroom. *Id.* For a somewhat different view of the law student in 1965, see Reich, *Toward the Humanistic Study of Law*, 74 *YALE L. J.* 1402 (1965).

has described this as a classical view of the world.<sup>31</sup> It is a view which is concerned with how to fix things, how to solve practical problems. Again listen to the voice of the student: "Look here. Clients will be coming into my office with all kinds of problems. They want answers, not theories. You don't get paid by a client for the theories you know. My clients will want to believe that I know the law and can suggest an answer to their problem. I've got to have the legal tools which will allow me to serve my clients."

A phenomenologist<sup>32</sup> would ask: Who is the "practical realist" student? When does this student adopt this orientation? Does this student bring this attitude to law school, or develop it as a reaction to law school? What are the other features of this student's world-view? Is the student's practical orientation at the "center" of the world-view? What are the psychic and social bases for the pragmatist view? How does a student with this orientation experience law school? What effect does this orientation have on the law school learning environment? In essence, who are these practically-oriented students, and how does their pragmatism affect their world and mind?

Legal educators forget that we present to students the possibility that they will fail to meet required standards, and many of them accept the real possibility of failure. Before he can direct any effort toward the ideals that he hopes to express in a life in law, the student must become convinced of his ability to survive. Abraham Maslow has argued persuasively that our basic needs must be met before higher ideals can be pursued.<sup>33</sup>

I have been looking at the ideal as if it were something that the student was moving toward, an attainment which could be envisioned through "reality work." What, we ask, is real about our ideals? My first reaction is to say that most of us have them; others would say that we all do. There is a sense that the ideal is real because it belongs to us; that is, we possess it. Even if we deny the ideal an active role in our life, it is still there. It doesn't go away

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31. R. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* (1974). See also Bodenheimer, *Classicism and Romanticism in the Law*, 15 *UCLA L. REV.* 915 (1968); Shklar, *Decisionism*, in *NOMUS VII: RATIONAL DECISION* 3, 7 (C. Friedrich ed. 1964) ("Lawyers are not romantic as a rule.")

32. A phenomenologist is a philosopher who would turn away from the abstraction of theory and hypothesis and "turn toward their concrete referents in experience, i.e., to the uncensored phenomena." H. SPEIGELBERG, *DOING PHENOMENOLOGY: ESSAYS ON AND IN PHENOMENOLOGY* 58 (1975).

33. See A. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* (2d ed. 1968); A. MASLOW, *MOTIVATION AND PERSONALITY* (2d ed. 1968).

simply because it isn't acted on or acted out. It is not uncommon to find the ideal submerged, perhaps distorted or even denied at the conscious level. Yet with a little archaeological work the ideal can be exhumed. Ideals are astonishingly resistant.

We can also experience directly the ideal in the real. There are those who feel "lucky" and "fortunate" in the lives they live. They view their life as a dream. They experience a realization of their ideal—being a thoughtful disciplined student.

Whatever the ideals that accompany the student to law school, the initial task is simply to learn how to learn law. Law teaching is substantially different from most undergraduate teaching. It requires a major effort for students to learn how to do basic things, such as briefing cases and taking final examinations. Admittedly learning how to learn is a preeminent concern only of first year law students; yet even second and third year students must deal with the anxiety that comes from dealing with unknown teachers and a new approach to yet another complex area of law.

Finally, the "reality work" of the law student entails the mastery of numerous fields of substantive law, the ability to do legal research, draft legal documents, and attain skills in trial and appellate advocacy. We indeed ask a great deal of law students. The law student is deeply enmeshed in the "reality work" of becoming a lawyer.

To be a lawyer is to be able to perform the role of lawyer by pursuing legal strategies for solving a particular type of human problem. As Karl Llewellyn has observed, "any man who proposes to *practice* a liberal art [like law] must be *technically competent*."<sup>34</sup> Clearly one must learn the method of law, the major outlines of the substance of law, and the traditional concerns and values of those who live a life in law. The value of this "reality work" is unquestioned. The problem lies in the way that the reality work of the student comes to obscure the ideals that he had on entering law school.

Rather than exacerbating student anxieties about employment and bar examination results, legal educators should face the problem. Given an awareness of the problem on the part of law school administrators, faculty and students, we can proceed to structure a legal and academic environment which produces competent and skilled lawyers and reduces the anxieties of the student. This goal

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34. K. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 380 (1962) (emphasis in original).

should not, however, obscure the tragedy of a legal education which successfully indoctrinates students into "thinking like a lawyer" but stifles idealism, social consciousness and creativity.

Benjamin Cardozo once commented in a lecture to Yale law students:

You think perhaps of philosophy as dwelling in the clouds. I hope you may see that she is able to descend to earth. You think that in stopping to pay court to her, when you should be hastening forward on your journey, you are loitering in bypaths and wasting precious hours. I hope you may share my faith that you are on the highway to the goal. Here you will find the key for the unlocking of bolts and combinations that shall never be pried open by clumsier or grosser tools. You think there is nothing practical in a theory that is concerned with ultimate conceptions. That is true perhaps while you are doing the journeyman's work of your profession. You may find in the end . . . that instead of its being true that the study of the ultimate is profitless, there is little that is profitable in the study of anything else.<sup>35</sup>

One ultimate concern for the law student lies in the "identity work"<sup>36</sup> which law school permits and requires.<sup>37</sup> The work of forging a coherent identity is not limited to the period of adolescence,<sup>38</sup> but continues as one seeks an image of self which "provide[s] a coherence of ideas and ideals."<sup>39</sup> My observation of and discussions with law students convince me that this search is nowhere more evident than in law school.<sup>40</sup> In the search for identity, the student, with

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35. B. CARDOZO, *THE GROWTH OF THE LAW* 23 (1924).

"[T]he most important element of professional education is theory, the ability to relate specific data to a larger universe of thought; the art of seeing the general in the particular." Freund, *Dedication Address: The Mission of the Law School*, 9 *UTAH L. REV.* 45, 46 (1964).

36. The concepts of "identity work" and "reality work" are adopted from S. COHEN & L. TAYLOR, *ESCAPE ATTEMPTS* 20 (Pelican Books 1978).

37. The relationship of this "identity work" to the artist's need to create cannot be fully developed in this essay. Erich Neuman, a follower of Carl Jung, suggests that

The creative man . . . is stigmatized by his failure to abandon the self's directive toward wholeness in order to adapt himself to the reality of the environment and its dominant values. The creative man, like the hero of myth, stands in conflict with the world of the fathers, i.e., the dominant values, because in him the archetypal world and the self that directs it are such overpowering, living, direct experiences that they cannot be repressed. The normal individual is released from his heroic mission by his institutional education toward identification with the father archetype, and so becomes a well-adjusted member of his patriarchally directed group. In the creative man, however, with his predominant mother archetype, the uncertain, wavering ego must itself take the exemplary, archetypal way of the hero; must slay the father, dethrone the conventional world of the traditional canon, and seek an unknown directing authority, namely, the self that is so hard to experience, the unknown Heavenly Father.

E. NEUMAN, *ART AND THE CREATIVE UNCONSCIOUS* 185 (1959).

38. See Stone, *Legal Education on the Couch*, 85 *HARV. L. REV.* 392, 400 (1971).

39. E. ERIKSON, *TOYS AND REASONS* 107 (1977).

40. This observation is not to suggest that the search may not continue throughout one's



guidance, sees that an identity is rooted in one's values.

Student identity and valued ideals are a part of a larger matrix. The law student enters law school with expectations, goals and images in addition to defined intellectual capabilities and work patterns. These are the *prima materia* which will be subjected to the operations necessary to produce a professional lawyer. One way to understand what happens during legal education is by analogy to the work of the alchemist. Historically, the alchemist was viewed as a prescientific forerunner of the modern day chemist. Today we know that the alchemist sought not only a change in the base metals but was concerned with the transformation of his own consciousness as he undertook the work. Law schools are devoted to law not only as a body of knowledge and skills, but also as a way of viewing the world. Law teachers openly avow to teach their students to "think like lawyers" and in so doing become alchemists of the soul. Law teachers are contemporary alchemists: the success of their work lies in their artistry, for the only true claimant to modern alchemy is the artist.<sup>41</sup>

While it is agreed that law students change during the course of legal education, the question concerns the extent of that change and whether it rises to the level of a change in consciousness. I would argue that the transformation is a potentially deep one. The depth and breadth of change has not been fully explored. The methods for analyzing these changes are at present largely unknown. One possibility would be to look at the changing concept of self and the relationship of parts of the self. In particular, there is a need to examine the emergence of an identity as a professional; that is, when and to what extent does a professional self begin to emerge?<sup>42</sup>

The law student's developmental change during his socialization into the legal profession could be viewed from the perspective of ego-development, attainment of ego-ideals, levels of self-

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life. It has been suggested that

seeking is a lifetime quest. That is, as long as one exists one must be concerned with the problem of what it means to be, and in concerning one's self with what it means to be in the fullest and most significant manner, one eventually gets probed to one's ultimate values, one's world-view.

J. ROYCE, *THE ENCAPSULATED MAN* 124 (1964). As Clark Moustakas has so aptly stated: "The awareness of one's true place in life cannot be hurried or forced." MOUSTAKAS, *supra* note 8 at 4.

41. This insight comes from Professor John Batt at the College of Law, University of Kentucky.

42. See generally Elkins, *The Legal Persona: An Essay on the Professional Mask*, 64 VA. L. REV. 735 (1978).

awareness and self-actualization, the need for expression of creativity, and finally as a search for meaning.

Another way to approach the change in the law student is to view it as a resolution of the conflict in vocational and idealistic demands. I have referred to this conflict as the paradox of the real and the ideal. The polarity expressed in this paradox can be expressed in a number of meaningful ways, all of which are clearly evident in legal education:

practice	theory
objective	subjective
the present	the future
doing	learning
knowing how	knowing about
work	play
student	teacher

Finally, the law student's development can be viewed in the context of the student's basic orientation to learning and the way the student's view of learning is worked out in the learning environment. Here the student's expectations of how law will be taught become as important as his image of what law is. Expectations as to teaching methods and the images that the student has of the "good" teacher are primary student inputs into the student-teacher relationship.

Can the law student aspire to anything other than "reality work," the work which has as its purpose the training for professional competence? Is it possible to attain identity as a lawyer and still satisfy creative needs?

Legal education certainly meets one of the fundamental needs of the creative person, that is, the development of a reservoir of fundamental knowledge and concepts. Perhaps some fantasize and live with the hope that a leap of faith will take us beyond the drudgery of "basics." We should, however, be careful to note that "[t]ransformations of old notions require a rich set of concepts and experiences to be transformed. A rich idea can hardly be born if there is no rich medium in which it can grow."<sup>43</sup>

There are, however, institutional impediments to recognition of creativity as a legitimate concern within legal education. Creativity is not a factor in selecting law students; the selection process re-

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43. Kagan, Introduction, *Creativity and Learning* vii, viii (J. Kagan ed. 1968).

wards an intellectual cognitive style that emphasizes analytical and language faculties. A cursory review of the literature on creativity shows that it is largely independent of intelligence and analytical abilities. The present criteria for law school admission undoubtedly insure that students who foster creative potentials have less likelihood of being accepted into law school.

The personality of individuals attracted to law school may also impede teaching approaches which emphasize creativity. Law students display an unusually high need for order and security in their lives, which is reflected in their demands and expectations of the educational process.<sup>44</sup> Order and security emanate from socially sanctioned traditional values. The very essence of tradition is its static nature. Tradition permits one to *know* the world through an unchallenged consensus-reality and to play a well-defined role. Adherence to custom and a fear of the unknown are major obstacles to creativity.<sup>45</sup>

Law schools do not claim to produce lawyer-artists, nor should any school be expected to do so. The artist cannot be mass-produced by an educational system; rather legal instruction should be viewed as developing a program of professionally monitored self-education.<sup>46</sup>

While a program for mass-produced lawyer-artists is not possible, this should not cause us to overlook the fact that we are all artists in that we use fantasy and daydreams to help navigate the real world. The fantasies and daydreams range from erotic inter-

44. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93, 101 (1968).

45. See SHAFFER, *supra* note 16, at 279-93 (1976).

It takes courage to be a creative artist lawyer.

It is the courage to be oneself in the fullest sense, to grow in great measure into the person one is capable of becoming, developing one's abilities and actualizing one's self . . . [T]he creative person is not preoccupied with the impression he makes on others, and is not overly concerned with their opinion of him, he is freer than most to be himself.

MacKinnon, *supra* note 8, at 27.

[C]asting loose the ties of security requires courage and understanding. It requires some courage to move alone often counter to popular prepossessions, and toward uncertainties. And to move free of the established requires the understanding that the established is not absolute, but is only the instrumentality of life.

THE CREATIVE PROCESS (B. Ghiselin ed.) 19 (1952).

46. See Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL EDUC. 109, 200 (1948) arguing that the task of the law school is to start the student "on a program of self-education and to give him the fundamental insights and ways of thought that will enable him to draw the maximum profit from his later education in the school of experience."

ludes with neighbors to dreams of ambitious careers, to attainment of significant positions or power and a happy secure life. Neither science nor psychology has offered adequate theories about the channeling of everyday fantasies into a work of art—or an artful life.

The law student is not being urged to take flight from the reality of legal education and the legal profession but to ground himself in that reality, to bury roots in that reality, so that imagination can spring from fertile soil.

### III. THE TEACHER

The tension in the paradox of the real and the ideal is carried from the student to the law teacher. Student and teacher deal with the same paradox from different perspectives. Student and teacher maintain a symbiotic relationship, each struggling with the shared paradox from his separate world. In this section we will observe the rhythmic ballet of student and teacher.

The teacher-student relationship is one of the prominent features of a legal education which tempers the ideals of the entering student, hints at the real world of lawyering and fashions the visions that law students take with them into the legal world. It seems appropriate to inquire into the work of law professors and the images which they have of this work, and of their life, both in and out of the classroom. The ultimate question is whether the law professor is a true craftsman and artist or merely a peddler of a stagnant body of legal rules and a purveyor of information on how to use those rules.

There are a host of questions which present themselves as candidates for attention in our effort to explore the paradox of the real and the ideal in the life of the law teacher. What kind of world does the law teacher live in? How does the teacher see the world? How does this view of the world affect what goes on in the law school classroom? What kind of educational philosophy does the teacher have?<sup>47</sup> To what extent is this educational philosophy based upon a belief that law teaching is different from teaching in other liberal arts? To what extent are the teacher's educational philosophy and special views about law teaching actually implemented in the classroom? To what extent does the teacher profess to have *no* educational philosophy, and how does this view affect teaching?

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47. Every teacher has a philosophy of education. It may be highly articulated. More often, it will be largely unconscious or unexamined. McDowell, *The Dilemma of a (Law) Teacher*, 52 B. U. L. REV. 247 (1972).

What does it mean to be a law teacher? What are the motivations for a law graduate to enter teaching? How have the experiences of the law teacher, prior to teaching, affected his view of teaching and the meaning which is ascribed to it? What is deemed to be the appropriate role (roles) for the law teacher?

Law teachers have been characterized as "prima donnas"<sup>48</sup> and as teachers of problem-solving who have not solved their own problems.<sup>49</sup> Professor Bergin, ten years ago, described the law teacher as a man divided against himself.<sup>50</sup> In the view of some, the law teacher's schizophrenia is an occupational hazard without hope of cure.<sup>51</sup>

The schizophrenia of the law teacher is rooted in the paradox of the real and the ideal. This schizophrenia has been succinctly described as a philosophy of education which exists on two levels. There is

a perception of what the reality of education *is*, and a set of ideals or values of what it *ought* to be. Like the ideal, the perception of reality is also an abstraction or a concept, since the human mind never completely mirrors the real world. It is easy to confuse the two conceptual levels. Not only will a person's ideals color his view of reality, but his notions of what *is* will obviously flavor his ideals of what *ought* to be. The more unexamined an educational philosophy is, the more the two levels tend to merge. The danger then is that the teacher will accept his perception of reality as the ideal of education, or vice versa, and lose the capacity to examine his system critically.<sup>52</sup>

The law teacher's emphasis on the real or the ideal raises a question which goes to the essence of a life as teacher: does his work have any significance? The question is somewhat ambiguous as it does not suggest *for whom* teaching should be significant. One aspect of teaching is that the teacher's work has meaning not only for himself as a teacher, but also for the student who seeks to learn from his work. The work of the teacher is unique in that it is carried out in a "shared" environment. Students share the teacher's work and in doing so permit its existence.

To ask the question "what does it mean to teach?" we must consider what it means to be a student. Again, teaching and learning — teacher and student — are part of a symbiotic relationship,

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48. T. SHAFFER & R. REDMOUNT, *LAWYERS, LAW STUDENTS, AND PEOPLE* 37 (1977).

49. Costello, *supra* note 30, at 407.

50. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968).

51. Costello, *supra* note 30, at 391.

52. McDowell, *supra* note 47, at 247 (emphasis in original).

a relationship honored more often in ignorance than enlightenment.

The first perception of reality for the law teacher, a recognition of what *is*, must begin with the law student. Law students constitute the real world of the law teacher. It is impossible to consider the life of the teacher apart from the demands that law students make on the law school, its curriculum and teachers. Student images and attitudes operate as a kind of external constraint on the teaching enterprise.

The claims made on a teacher are found in the expectations of students. Students create an image of law teachers patterned on other teachers and other authority figures. The student's image, reinforced by bureaucratic dogma, creates a role for the teacher to perform. It is this image which the teacher so often encounters and to which he falls prey.

Students are concerned with practice-oriented courses and those which they feel are "required" for the well-rounded lawyer. Thomas Shaffer and Robert Redmount, in a study of three midwestern law schools, conclude that "[t]he student seeks bar-related and bar-significant courses. He cannot afford to pursue legal education as an adventure in learning, and an opportunity for self-learning, because there appears to him to be no tangible reward or secure professional preparation in these choices."<sup>53</sup>

In attempting to educate students to be responsible lawyers, the law teacher is caught in the dilemma of teaching students both pragmatic "practice" skills and a sophisticated theoretical understanding of law, its application and evolution. Professional competence requires ample knowledge of basic rules in addition to intellectual skills of synthesis, conceptual analysis, comprehension, and criticism.<sup>54</sup>

The law teacher must deal with the tension between the demands of a practice-oriented student body and the intellectual component of legal education. The polarity in these demands creates a frustrating situation for the teacher. How is it possible for a teacher to deal with the fact that some graduates write wills and contracts, others become prosecutors, serve as legal aid attorneys or work for the federal government? The diversity in lawyer roles requires lawyers with a broad range of skills and knowledge. A lawyer must be acquainted with the traditional body of knowledge and have the

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53. SHAFER & REDMOUNT, *supra* note 48, at 20.

54. Christenson, *Studying Law as the Possibility of Principled Action*, 50 DEN. L. J. 413, 430 (1974).

ability to apply it. He must also develop a healthy skepticism about the role of law in society and an intellectual curiosity to prompt philosophical reflections. The measure of each component will vary depending on the lawyer's role.<sup>55</sup>

The creative impulses of the law teacher are easily dissipated by the energy directed to dealing with student demands for real, practical lawyering skills and knowledge of substantive law. The demands for real experience, for real practical knowledge reduce the teacher to a perfunctory role of providing information and a supportive role in showing students how to do law. The effect of such student demands is present both for the young teacher without the security of tenure who may feel the pressure of student demands and for the established teacher who seeks to avoid student dissatisfaction so that he can get on with other things that concern him.

There is little encouragement from administrators or colleagues to pursue innovative and creative teaching methods. Even with encouragement, the lack of staff and financial support make innovation difficult. The effect is to discourage innovation and change in law teaching. In essence, there is "little room for success in experiments with new means of professionalizing lawyers . . . ."<sup>56</sup> Given such an environment, it should come as little surprise that only the exceptional law professor confronts the apathy of "status

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55. An emphasis on only the first of these roles results in legal education which is primarily professional in orientation, although it should also be preparing students for lives of public service and scholarship. This confusion of goals is tacitly recognized, and an appearance of unity is maintained by the theory that all three are accomplished by the law schools' special way of training the mind. But the 'unity rings false, and the schools do not accomplish all that they undertake.

Reich, *supra* note 30, at 1402. See also Allen, *supra* note 27, at 349:

Nor should it be assumed that concern with practical professional skills is necessarily at odds with a legal education intellectually based and humanistically motivated. Attention to practice problems can contribute interest and realism to the study of law and thus contribute to the realization of the multitudinous objectives of legal education, including the enhancement of professional competency. The increased emphasis on practical skills becomes a threat to university training only when it ignores the broad range of values and social interests that legal education is called on to cultivate.

A more skeptical assessment is provided in Borosage, *Can the Law School Succeed? A Proposal*, 1 YALE REV. L. AND SOC. ACT. 92, 93 (1970):

As an academic institution, the law school might have deemphasized the role of a trade school and adopted that of a graduate center for the study of law. It could have devoted itself both to empirical study of the actual functioning of our legal system and to normative inquiry into the role and nature of law. Instead, the law school has abandoned the basic responsibilities of an academic institution, and accepted its poor part as the training ground for skillful technicians for the corporate elite.

56. SHAFER & REDMOUNT, *supra* note 48, at 20.

quo-ism" to attempt innovative teaching ideas.<sup>57</sup>

There is at present no consensus on the role of creativity in law teaching and legal education.<sup>58</sup> The "traditionalist" teacher is content with teaching from collected appellate decisions either by lecturing on the legal rules reflected in the opinions or by forcing students to painfully discover for themselves the legal structure by the so-called Socratic method.<sup>59</sup> The goal is professionalism. Law schools have historically viewed their primary mission as training lawyers in technical competence, although this mission is both praised and widely condemned. In at least one respect, the supporters and critics of legal education have found common ground in the absence of concern for the role of creativity in legal education. With a few exceptions, creativity has been largely ignored by commentators on legal education.<sup>60</sup>

The truly creative teacher/scholar must indeed embrace a body of knowledge and reflect his intimate concern with the subject in the classroom. The "good teacher" who can double as a creative scholar needs an inquiring mind, the power of analysis, intuition and self-discipline, and a tendency toward introspection.<sup>61</sup> This still tells us very little about the classroom teacher.

The truly good teacher is a paradox in that his skill lies in doing less rather than more. The emphasis in law schools on teaching a substantive body of legal rules has obscured the student's responsibility in the learning environment. The failure to take appropriate account of the student was recognized by Charles Reich before his departure from the ranks of law teaching:

Law schools do little to encourage students to use initiative in educating themselves. Students are not really treated as adults. They are made to feel that they are beginning their education all over again, and the classes put very little emphasis upon individual work and thinking. The students get

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57. *Id.* at 21.

58. Compare Savoy, *Toward a New Politics of Legal Education*, 79 YALE L. J. 444 (1970), and Stone, *supra* note 11, at 392.

59. There is now some question as to the extent to which the widely discussed Socratic method is actually used in the classroom. The author's experience in teaching in three law schools would confirm that the Socratic method has been largely abandoned or severely modified in actual use.

60. The exceptions include Macleod, *Creative Problem-Solving—For Lawyers?!*, 16 J. LEGAL EDUC. 198 (1963); and Yeamans, *Creativity and Legal Education*, 23 J. LEGAL EDUC. 381 (1971).

61. See Brown, *The Development of Creative Teacher-Scholars*, in CREATIVITY AND LEARNING 164-80 (J. Kagan ed. 1967).



caught up in examinations, grades, and class ranking. In many ways the LL.B. program is undergraduate, not graduate education.<sup>62</sup>

Carl Rogers argues that significant facilitation of learning is due to the personal relationship of teacher and student.<sup>63</sup> To stress this aspect of learning Rogers refers to the teacher as a "facilitator." The emphasis is on facilitation of learning as contrasted to a focus on teaching.<sup>64</sup> Rogers finds genuineness<sup>65</sup> and empathy to be two important qualities of the teacher-facilitator.

The idea of empathy is based on an awareness of another person and the fact of their difference. James White in *The Legal Imagination* suggests a relationship between empathy and active imagination. He finds that imagination begins "when you first face a client or a judge and ask yourself 'who is this person?' in a way that recognizes that he may be different from you. . . . 'Who is this person and how shall I address him?' is a constant question in the life of the lawyer. . . ."<sup>66</sup>

For the teacher, the question is, how shall I address this person who has come to this place to learn? Who is this person and what can we make of our relationship? An empathic teacher sees the world through the eyes of the student and shares the student's world with him. Empathy is, in effect, a special way of seeing.

To see, means to stand somewhere in a certain way. Vision is not confined to the eyes, but involves other parts of the body. Seeing is a posture, an

62. Reich, *supra* note 30, at 1403.

63. See Rogers, *The Interpersonal Relationship in the Facilitation of Learning*, in *NEW DIRECTIONS IN CLIENT-CENTERED THERAPY* 468, 471 (1970).

64. *Id.* at 481-82.

65. When the facilitator is a real person, being what he is, entering into a relationship with the learner without presenting a front or a facade, he is much more likely to be effective. This means that the feelings which he is experiencing are available to him, available to his awareness, that he is able to live these feelings, be them, and able to communicate them if appropriate. It means that he comes into a direct personal encounter with the learner, meeting him on a person-to-person basis. It means that he is being himself, not denying himself.

Seen from this point of view it is suggested that the teacher can be a real person in his relationship with his students. He can be enthusiastic, he can be bored, he can be interested in students, he can be angry, he can be sensitive and sympathetic. Because he accepts these feelings as his own he has no need to impose them on his students. He can like or dislike a student product without implying that it is objectively good or bad or that the student is good or bad. He is simply expressing a feeling for the product, a feeling which exists within himself. Thus, he is a person to his students, not a faceless embodiment of a curricular requirement nor a sterile tube through which knowledge is passed from one generation to the next.

Rogers, *supra* note 63, at 471.

66. J. WHITE, *THE LEGAL IMAGINATION* 758 (1973).

attitude. Hence to see through the other's eyes means to stand in another way which means to move. One must move to the other's place to see in another way. To see through the eyes of another is seeing psychologically.<sup>67</sup>

Abraham Maslow, one of the founders of humanistic psychology, finds an analogy in the teacher and the farmer.

The good farmer simply throws out seeds, sets up good growing conditions, and then gets out of the way of the growing seeds most of the time, helping them only where they really need help. He doesn't pull up the sprouting seed to see if it's doing all right; he doesn't twist it, or train it or shove it around or put it back in the soil, or whatever. He just leaves it alone, giving it the minimum necessary help.<sup>68</sup>

We can be assured that the discussion of the "good teacher" will not be resolved. I am reminded of Loren Eisely's suggestion that society is never totally sure of what it wants of its educators.<sup>69</sup> If society, the legal profession, and professional academics cannot agree on what the "good teacher" does and how he should relate to students, then we may find it necessary to recognize "the pluralism in teaching, the many styles of influence, the many modes of connection that bind student and teacher to each other."<sup>70</sup> Finding a "good teacher" is complex.

Finally, the task of the creative teacher is to provide students not only with theories of and about law but also with new images of the lawyer and his work. Even this essay has at times, by its emphasis on the real and the ideal, suggested two polar images<sup>71</sup> — the practical lawyer and the artist. Other images of the lawyer which

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67. Lecture presented by Robert Romansyhn at the 1st Summer Institute in Archetypal Psychology, University of Notre Dame (June, 1978).

68. MASLOW, *supra* note 8, at 178.

69. L. EISELEY, *THE NIGHT COUNTRY* 210 (1971).

70. Adelson, *The Teacher as a Model*, in *INTERPERSONAL DYNAMICS* 335, 335 (3d ed. 1973). Cf. Brown, *supra* note 61, at 176-77:

In the evaluation of the qualities of a creative teacher-scholar as a teacher, it is necessary to keep clearly in mind the role in which he can contribute most. There are teachers of enthusiasm and effectiveness who make the art of teaching at a more elementary level a life-long subject of study. A number of such scholars of teaching are a valuable supporting cast in any university. Their facility in attracting student interest in what is already known should not be permitted to upstage the teacher-scholar who in his drive toward discovery of new approaches and ideas in his discipline may at times leave his students breathless and confused. The ideal, of course, is the perfect blend of the dynamic scholar and the ever-lucid, ever-patient teacher; but in the absence of any large reservoir of such persons, most universities must be satisfied with the compensating attributes of a balanced team. It is the task of the university, however, to establish the assumption that the precious norm is the balanced teacher-scholar, and that oneness is a shortcoming rather than a source of distinction.

71. These polar images have been described elsewhere as *Pericles and the Plumber*. See Twining, *Pericles and the Plumber*, 83 L. Q. Rev. 396 (1967).

may point to an integration of the practical and the artistic (as in the artisan or craftsman) are the lawyer as literary critic,<sup>72</sup> architect,<sup>73</sup> historian,<sup>74</sup> futurologist, and performer.<sup>75</sup> Such images of the lawyer envisioned by the teacher expand our awareness of what it means to be a lawyer. These images of law are the work of the teacher as artist in making that which was invisible "visible," and thereby possible. The teacher cannot teach a law student how to become a lawyer-artist. A law school "can only provide a place for the student to learn the limits of law and the love of human beings which give the artist his form and his power."<sup>76</sup>

#### IV. THE LAWYER

Each of us has been given a life which we devote primarily to work. Our lives as lawyers are busy and crowded. We are most unlike those who lead a contemplative life, and a life of meditation and reflection.<sup>77</sup> Consequently, we live in a world of activity comprised

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72. Lawyers "deal in an everyday way with the very stuff of literary art and criticism: close readings of texts, precedent, form and structure, and language itself . . . [T]hey face moments of complex psychological significance and high human drama." Weisberg, *Comparative Law in Comparative Literature: The Figure of the "Examining Magistrate" in Dostoevski and Camus*, 29 RUTGERS L. REV. 237 (1976).

This image of the lawyer suggests that the law teacher ask himself whether he communicates to students the value of careful and lucid writing, awareness of rhetoric devices, and close reading of text.

73. Paul Freund has argued that law and architecture have much in common: "Each must employ tested materials to bring into being a vision of order; each is linked to the past and its masters while seeking emancipation through new forms and new creations. Each owes its special fascination and challenge to its being both an art and a science." Freund, *Dedication Address: The Mission of the Law School*, 9 UTAH L. REV. 45 (1965).

74. See J. FRANK, *COURTS ON TRIAL: MYTHS AND REALITY IN AMERICAN JUSTICE* 37-40 (Atheneum ed. 1970).

75. In what sense do students, teachers, and lawyers perform? What does it mean to perform, to realize that what one does can be viewed as a performance? What is the relationship between performing and identity? Compare BENSMAN & LILIENTHAL, *supra* note 6, at 51-58 and E. GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959). BENSMAN & LILIENTHAL, at 58, suggest: "If the performer is able to retain and then to transcend theory and technique, he reaches the point of becoming an artist."

76. Christenson, *In Pursuit of the Art of Law*, 21 AMER. U. L. REV. 629, 632 (1972). On the limits to creativity of the lawyer, see T. SHAFFER, *supra* note 16, at 279-93.

77. Contemporary man . . . fears inner silence and avoids places that induce inner silence, be they deserts or mountains or empty stretches of ocean. In case their inner noisemaker ever fails them and by some accident falls silent, they carry with them portable radios, drowning any awareness they might happen to develop in a wash of senseless sound. Should this recourse fail, they hasten to some party where, in an atmosphere poisoned by the fumes of alcohol or tobacco, they exchange at the tops of their voices a stream of inanities concerning their own or other people's lives.

R. DEROPP, *THE MASTER GAME* 74-75 (1968).

primarily of *work* which we periodically and temporarily punctuate with *leisure*.

Thomas Merton, the Trappist monk who lived much of his later life in solitude, characterized our present situation as one in which our very soul is projected into our work activity. Merton sees in this work the sad spectacle of "a madman who sleeps on the sidewalk in front of his house instead of living inside where it is quiet and warm."<sup>78</sup> Lawyers in particular often find it difficult to get inside where it is quiet and warm.<sup>79</sup>

The lawyer often chooses the path of routinization of everyday experience, whereby he becomes a bureaucratic legal technician who ascertains rules and applies them to concrete factual situations. Routinization of rule finding and application reduces the lawyer to a legal plumber. The simple questions are whether the law can "fix" the problem or "tell me what to do." As a last resort, he will ask a court to determine the legal rights of the parties and finally resolve the dispute.

The constant repetition in solving narrow legal problems can convince the "realist" lawyer that lawyering is a very practical sort of profession which requires very practical skills. To this end, the profession is blessed with a legal periodical called *The Practical Lawyer*. So it is indeed possible that one's life in law can be experienced as nothing more or less than providing a practical service for a fee.<sup>80</sup>

I would suggest that a relatively small percentage of the lawyers in this country want or would offer such a bleak description of their lives as lawyers. Members of the profession have historically enjoyed

78. T. MERTON, *NO MAN IS AN ISLAND* 98 (Image Books ed. 1967).

79. In some way, one must at times silence the familiar and welcome the strange. S. KEEN, *TO A DANCING GOD* 28 (1970). Each of us has a tendency to let "present needs, past experience, or expectations for the future" determine what we see. *Id.*

Sam Keen has informed us that to appreciate the uniqueness of a particular time, place, or person, one must be sufficiently aware of "preconceived ideas and characteristic emotional distortions to bracket them long enough to welcome strangeness and novelty" into one's perceptual world. *Id.* "This discipline of bracketing, compensating, or silencing requires sophisticated self-knowledge and courageous honesty. Yet, without this discipline each present moment is only the repetition of something already seen or experienced." *Id.*

80. There is some support for such an experience in the mode of financing for the delivery of legal services, the primary means still being the private fee for services. It is not clear, however, that a different financing scheme would produce a different experience for the lawyer. A not uncommon experience for legal aid attorneys who are publicly financed is a "burnout" on the glut of "run-of-the-mill" legal problems. The mode of financing is obviously not a causal factor in the way one experiences the paradox of the real and the ideal in lawyering.

a social status and financial and political success which belie the argument that they are mere service technicians.

Absent a "psychic numbing" to the social and personal problems presented through the personal interaction with clients and other lawyers, a lawyer will surely find himself in a world as "unreal" as it is "real." It is hard to fathom how one can deal with clients, ranging from the confident, rational, knowledgeable business owner to the emotionally distraught divorce client, without realizing that law relates to people and is therefore as unpredictable and imponderable as only people can be.

Lawyers deal with a variety of people: the "guilty" criminal who manipulates his lawyer and commits perjury on the witness stand; the corporate client who presses hard to suppress company information which the lawyer feels may be required by law to be disclosed to the public; the political or social activist who feels more strongly about the cause than about himself. In these situations, the "feeling" aspect of the attorney-client relationship and the ethical dimension are joined. A quick study of the problems of "professional responsibility" will convince even the most skeptical that lawyers often work in an "ethical vacuum" which only heightens the paradoxical dilemma posed by the real and the ideal.

Not only does the lawyer confront an immense array of people problems, he faces an uncertain existence on a variety of fronts. Finally there is the paradox of the law itself. Cardozo viewed the paradox as an antithesis between rest and motion, stability and progress.<sup>81</sup> He recognized that the very prospect of change places inherent limitations on the complacency and conservatism of law and on the lawyer as well.

We live in a world of change. If a body of law were in existence adequate for the civilization of today, it could not meet the demands of the civilization of tomorrow. Society is inconstant. So long as it is inconstant, and to the extent of such inconstancy, there can be no constancy in law.<sup>82</sup>

In a world of change, *stare decisis* is not the central feature of the legal system but a polar position which emphasizes uniformity and symmetry which in turn must ultimately be balanced by considerations of equity and justice.<sup>83</sup> Cardozo argued that a "wise eclecticism" from both poles should shape the judicial process.<sup>84</sup> Such

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81. B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 7 (1928).

82. *Id.* at 10-11.

83. *Id.* at 8.

84. *Id.* at 8-9.

concerns are not, however, limited to the judge.

Lawyers also must judge. Each of us must be held responsible for the life he chooses. That choice is all too often buried in the obligations of profession, family, geography, and personal-biological imperative. Even an unconscious choice is a response. In fact, our legal system itself is based on the assumption that each citizen has the ability to make an informed, rational, free choice about his own behavior.<sup>85</sup>

It is tempting to choose to see the world in simple, pragmatic, non-paradoxical terms. Man's basic insecurity pushes in that direction as he seeks certainty. To pursue certainty in a world and a discipline like law in which little can be known definitively undermines the reality of law.<sup>86</sup> That choice is simply an intellectual rationalization of our blindness; it is simply a way of not facing the paradox within which we live. The power of choice "can scarcely exist at all until he [the lawyer, law professor, or law student] has analyzed the forces which impinge upon him, until he has discovered what kind of intellectual climate it is he lives in."<sup>87</sup> Commonly, we work toward a position, a status, a role, where we will no longer be required to make difficult choices.

The lawyer who honestly confronts the ethical dilemmas in legal practice, the emotional feeling of the client,<sup>88</sup> the complicity and injustice in judging,<sup>89</sup> and the uncertainty of law in a changing world must do so without forewarning from legal educators and

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85. The assumption, if we take our lessons from Freud, is unfounded. A growing body of legal literature suggests that the legal system could benefit from a psychoanalytically-oriented jurisprudence.

86. The certainty and order attributed to law are largely mythical. See J. FRANK, *supra* note 74. It is the work of the lawyer artist to understand the myth-like structure of law.

Myth has been used in a variety of contexts to explore the nature of social phenomena. See E. CASSIRER, *THE MYTH OF THE STATE* (1946) (the state as myth); J. CAMPBELL, *MYTHS TO LIVE BY* (Bantam ed. 1973) (the role of myths in our everyday life); M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* (Illini Books ed. 1972) (politics as myth); S. FREUD, *THE FUTURE OF AN ILLUSION* (E. Jones ed. 1928) (religion as myth); J. PEARCE, *THE CRACK IN THE COSMIC EGG* (reality as myth); G. ROHEIM, *THE ORIGIN AND FUNCTION OF CULTURE* (1943) (culture as myth); BERGAN & ROSENBERG, *THE NEW NON-FREUDIANS: PSYCHOANALYTIC DIMENSIONS OF SOCIAL CHANGE* 34 *Psychiatry* 19, 23 (Feb. 1971) (culture as myth); S. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974) (legal rights as myths).

87. L. FULLER, *THE LAW IN QUEST OF ITSELF* 16 (1940).

88. On dealing with clients and ourselves on the "feeling" level, see Elkins, *A Counseling Model for Lawyering in Divorce Cases*, 53 *NOTRE DAME LAW.* 229 (1977). See also A. WATSON, *PSYCHIATRY FOR LAWYERS* (rev. ed. 1978).

89. See R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); Bollinger, *The Homer of the Pacific: Melville's Art and the Ambiguities of Judging Evil*, 75 *MICH. L. REV.* 823 (1977).

often without an adequate map of the terrain which must be traversed.

The undesirable nature of the present state of affairs is obvious. Its corrosive effect extends from the law student to lawyer to legal profession. But most importantly, it is regrettable for those individuals who will make their lives in law. The alienation, dehumanization, and cynicism of law school and legal practice can be averted only when we begin the search "for ways to express and share more fully our humanness in our educational and professional lives."<sup>90</sup> Only then can we restore the possibility of finding in law "a life that is richly creative."<sup>91</sup> The initial task is to rekindle the spirit of adventure which should accompany learning and lawyering.

Each of us seeks "guidance for our activity as we decide, choose, commit ourselves, and otherwise bear the burden of our necessary human freedom."<sup>92</sup> The goal that should guide the law student, teacher and lawyer is the potentiality for imagination and creativity in lawyering.

James White has correctly reminded us that the professional life of the lawyer "constitute[s] an enterprise of the imagination, an enterprise whose central performance is the claim of meaning against the odds: [t]he translation of the imagination into reality . . . ."<sup>93</sup> Imagination and creativity ultimately require a new image

90. Himmelstein, *supra* note 26, at 516.

91. Reich, *supra* note 30, at 1408.

92. H. RICHARD NIEBUHR, *THE RESPONSIBLE SELF* 48 (1963).

93. J. WHITE, *THE LEGAL IMAGINATION* 758 (1973). A similar theme has been pressed in areas far removed from the legal profession, for example, in politics, history, and science. "[T]he study of politics must neither neglect the fact that man is an imagining and myth-making animal, nor fail to make explicit allowances for the necessary entry of imagination and myth-making into the study itself." O'Brien, *Imagination and Politics*, in *POWER AND CONSCIOUSNESS* 203, 211 (1969). "Exercising the imagination is an important part of historical thinking, and it does consist in trying, so far as we can, to put ourselves in the places of those whose actions we are studying." Walsh, *Can History Be Objective?*, in *THE PHILOSOPHY OF HISTORY IN OUR TIME* 216, 221-22 (H. Meyerhoff ed. 1959).

Imagination plays a similar role in science:

All advances of scientific understanding, at every level, begin with a speculative adventure, and imaginative preconception of what might be true — a preconception which always, and necessarily, goes a little way (sometimes a long way) beyond anything which we have logical or factual authority to believe in. It is the invention of a possible world, or of a tiny fraction of that world. The conjecture is then exposed to criticism to find out whether or not that imagined world is anything like the real one. Scientific reasoning is therefore at all levels an interaction between two episodes of thought — a dialogue between two voices, the one imaginative and the other critical; a dialogue, if you like, between the possible and the actual, between proposal and disposal, conjecture and criticism, between what might be true and what is in fact the case.

of man—the image of the person as a creator of meaning for his own experience<sup>94</sup>—the image of the artist.<sup>95</sup>

### V. THE LAWYER AS ARTIST

There are no easy answers for questions raised by pragmatist friends or for the pragmatist within you. The paradox for the law student/teacher/lawyer is that the legal world is at the same time a pragmatic world of technical skills and craftlike precision and a world of theories and ideals of legal justice, fairness, and equality. In such a paradoxical world, the lawyer-artist is our guide.

Our common image of the lawyer is not as an artist. We commonly consider a painter, poet, or sculptor to be an artist. Perhaps even an architect,<sup>96</sup> a potter, or a novelist is an artist, although to extend the term even to the latter group may be unacceptable to some. The question of *who* can properly be called an artist deserves additional consideration.

The need to differentiate the painter from the architect presents us with one aspect of the work of the artist: that “art in all its forms is bounded on one side by the practically useful . . .”<sup>97</sup> and on the other by the notion of art for the sake of art. Thus, we speak of the artist as one who creates a work of art, especially the painter and sculptor, and the artisan as one skilled in making something, a craftsman. The lawyer is both craftsman and artist.

P. B. MEDAWAR, *Science and Literature*, in *THE HOPE OF PROGRESS* 18, 22 (1972). Cf. SARTRE, *The Psychology of Imagination*, in *EXISTENTIAL ENCOUNTERS FOR TEACHERS* 145-47 (M. Greene ed. 1967).

94. See E. BECKER, *THE STRUCTURE OF EVIL* 170-71 (1968).

95. The attempt to recover a sense of how a life in law can be creative and the lawyer experience himself as an artist parallels a similar attempt in other disciplines. On the historian as artist, see BENS MAN & LILIENFELD, *supra* note 6, at 115-34 (“In the sense that there are options and choices in the selection of imagery with which one refers to a period, history is an art and not a science.” *Id.* at 116 (footnote omitted)). Cf. Robertson, *Clio in the New World*, in *THE HISTORIAN’S WORKSHOP* 103, 117-19 (L. Curtis ed. 1970).

On the engineer as artist, see S. FLORMAN, *THE EXISTENTIAL PLEASURES OF ENGINEERING* 99-126 (1976). In psychotherapy see Landau, *The Creative Approach to Psychotherapy*, 27 *AM. J. PSYCHOTHERAPY* 4 (1973). In sociology, see R. NISBET, *SOCIOLOGY AS AN ART FORM* (1976).

On the teacher as an artist, see J. AXELROD, *THE UNIVERSITY TEACHER AS ARTIST* (1973); EISELEY, *supra* note 69, at 200-02, 219 (1971). See also G. HIGHET, *THE ART OF TEACHING* (1950). Even farming has been described as an art. See BERRY, *supra* note 12, at 87. (“There is an inescapable kinship between farming and art, for farming depends as much on character, devotion, imagination, and the sense of structure, as on knowledge. It is a practical art.”)

96. One wonders as did Tolstoy whether in architecture there are not some “simple buildings which are not objects of art, and buildings with artistic pretensions which are unsuccessful and ugly and therefore not to be considered works of art?” Tolstoy, *What Is Art?*, in *ART AND PHILOSOPHY* 7, 7 (W. Kennick ed. 1964).

97. *Id.*



A view of the lawyer as an artist and a craftsman is an integration in recognition of an earlier era when *homo faber* (man the maker-worker) and *homo poeta* (man the creator of meaning) were one and the same. We should not forget that "art does not begin with freedom and beauty for beauty's sake. It begins with making instruments for human life, canoes, vases, arrows, necklaces, or wall paintings destined to subject, through magical or nonmagical signs, the human environment to the mastery of man . . . ."98 The Latin derivative of artist is "ars," which means a way of being or of acting, hence a skill or talent.<sup>99</sup> The artistry of lawyering involves an attempt to integrate the required craftsmanlike skills and the creative function in law.

The artistry of the law and lawyering can be seen when we view lawyering as a craft. The word "craft" today, although associated with a skill or ability, is usually limited in usage to hand-produced items indigenous to a particular person, group or geographical region. Craft is also the root of "crafty," the skill of evasion or deception. Perhaps we should seek to find what it is in the way that lawyers do their work which leads to a recognition of its craft-likeness.

Michael Maccoby, in a recent work on the social psychology of corporate managers, sees the craftsman as one who "has a sense of self-worth based on knowledge, skill, discipline, and self-reliance."<sup>100</sup> Maccoby found that the corporate craftsman, although interested in success and money, "is motivated even more by the problem to be solved, the challenge of the work itself and his satisfaction in creating something of quality."<sup>101</sup> Even the corporate craftsman's dreams were frequently of solving problems.

The lawyer-artist requires technical competence.<sup>102</sup> Throughout his diverse writings, Karl Llewellyn argued forcibly for technical competence.<sup>103</sup> The creative lawyer and lawyer artisan must attain a high level of technical competence in order to perform as a legal craftsman. Alan Stone, a psychoanalyst on the Harvard Law School faculty, puts it this way: "If creativity is to occur, the student must first master the mass of cognitive information necessary to inform his creative efforts—one must first become an artisan before he can

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98. See J. MARITAIN, *CREATIVE INTUITION IN ART AND POETRY* 45 (1953).

99. E. PARTRIDGE, *ORIGINS* 27 (1958).

100. M. MACCOBY, *THE GAMESMAN: THE NEW CORPORATE LEADERS* 43 (Bantam ed. 1978).

101. *Id.* at 45.

102. See LLEWELLYN, *supra* note 34, at 380-81.

103. *Id.* at 380. See text accompanying note 34 *supra*.

become an artist."<sup>104</sup>

What does it mean to be technically competent? In essence, "a craft means skills,"<sup>105</sup> and technical competence lies in the skilled way in which we engage ourselves in the legal system.<sup>106</sup>

104. Stone, *supra* note 11, at 420-21. Stone expresses ambivalence about the movement from artisan to artist:

Most of professional training, by its very nature, demands the acquisition of large amounts of new cognitive data. This learning task is essential to professional competence and does not allow for instant creativity. Were the student to approach his professional education *ab initio* with the expectation that he would find great opportunities in which to be immediately creative, he would most certainly be bitterly confused and disappointed. Mastering a series of legal cases can be an exciting intellectual challenge, as can be learning all of the branches of the carotid artery, but these sorts of learning cannot be a discovery of something unknown to others nor, except by the most strained interpretation, can there be instantly creative experiences in this process. The realities of a generalist professional education are for most people incompatible with being creative; to suggest otherwise is a cruel hoax.

*Id.* at 421.

It is commonly recognized that some kind of transformation is taking place in law school. Interestingly enough, creativity involves a transformation of the old into the new, the mundane into the surprising. Is it possible to view the very process of legal education as an evolving act of creativity — the changing of one view of the world into another? Legal education in this sense is viewed as a creative act which "alter[s] the viewer's conventional way of perceiving or thinking about the world. . . . A transforming object invites the viewer to move out, intellectually, in new directions — it stimulates him to consider its consequences." Jackson & Messick, *The Person, the Product, and the Response: Conceptual Problems in the Assessment of Creativity*, in *CREATIVITY AND LEARNING* 1, 9-10 (J. Kagan ed. 1968).

105. LLEWELLYN, *supra* note 34, at 365; Fortas, *The Training of the Practitioner*, in *THE LAW SCHOOL OF TOMORROW* 179, 184 (1968).

106. Llewellyn noted that

the essence of our craftsmanship lies in skills, and in wisdoms; in practical, effective, persuasive, inventive skills for getting things done, any kind of thing in any field; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, any kind of man, in any field; and then in skills for regularizing the results, for building into controlled large-scale action such doing of things and such moving of men.

Llewellyn, *supra* note 34, at 318.

The skills of the legal profession are most often associated with problem solving. Lawyers are problem solvers, because they "reach and implement decisions." Kelso, *In Quest of a Theory for Lawyering* 29 U. MIAMI L. REV. 159, 161 (1975). *Cf.* T. SHAFFER, *supra* note 16.

Lawyers engage in problem-solving behavior to reach decisions in and for situations involving the possible application of power, usually governmental power. The law is almost always involved. Of course, the decisive considerations are rarely limited to how the law probably will apply to given facts. Also important are the values sought to be advanced or protected by the lawyer's advice and action, and the probable consequences of law application. Kelso, *supra*, at 161. Legal problem solving involves specific skills and techniques which require mastery by the true craftsman. *Id.* at 163.

Critics of legal education have pointed that the law school's emphasis on law as opposed to lawyering has left unemphasized certain features of the problem-solving role of lawyers. For example, little instruction is provided on:

The lawyer-artisan has an inquiring mind with the power to analyze a specific problem.<sup>107</sup> Law schools place heavy emphasis on the acquisition of analytical skills. Analytical skills require the ability to work through a problem, beginning with problem definition, fact analysis, search for applicable legal and nonlegal solutions, determining solution ranges or outcomes acceptable and/or desirable to the client, and a value judgment as to appropriate means and ends. Finally, a creative lawyer must temper his analytical

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1) How to generate relevant facts in addition to those reported by a client or included in an appellate opinion,

2) The human and value aspects of legal problems, and

3) Lawyering techniques and procedures (e.g., trial advocacy, negotiating and drafting), the efficacy of which enter into decisions on basic strategy for dealing with a problem. *Id.* at 162.

On problem-solving strategies, see R. THOMPSON, *THE PSYCHOLOGY OF THINKING* (Penguin Books ed. 1959), and J. BRUNER, J. GOODNOW & G. AUSTIN, *A STUDY OF THINKING* (1956).

107. In some instances, the power to analyze a specific problem must be supplemented by "the technique of inventing policy alternatives." Lawyers in the role of executive, legislative, and judicial policy makers are often confronted by polycentric problems which on first analysis defy solution. The solutionless problem demands a more sophisticated model for analysis than the one presented here. See generally Lasswell, *Current Studies of the Decision Process: Automation versus Creativity*, 8 W. POL. Q. 381 (1955).

The characterization of any problem as solutionless may involve an overstatement. A better description may be that of Ralf Dahrendorf, who notes:

We are living in a period in which our potential for realizing human life-changes has outgrown the ways in which these life-changes are organized in our societies. We can survive, and we can have more justice, and we can have both in liberty, but our habits and institutions make it difficult for us to do what we could do. And when I speak of what we "could" do, I do not mean an imagined world, utopia, but the potential of solutions, technical, economic, social, even psychological, which is already there. If we pass through a critical period, it is a crisis of the ways in which we have organized our affairs, not of the capacity which we have developed to cope with our problems.

R. DAHRENDORF, *THE NEW LIBERTY: SURVIVAL AND JUSTICE IN A CHANGING WORLD* 23 (1975).

Sociologist Daniel Bell argues that present social purposes and assumptions are not adequate. See D. BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 251 (1976): "The consumer-oriented, free-enterprise society no longer morally satisfies the citizenry, as it once did. And a new public philosophy will have to be created in order that something we recognize as a liberal society may survive."

The question which should be raised is what role the legal profession will play in devising a "new public philosophy." Arguably, that role should be de minimus unless the fullest range of imagination and creativity is available to the lawyers who seek to play such a role. It was Robert Hutchins, the lawyer-trained academician, who warned:

The responsibilities and opportunities of the university and the law school are now greater than ever. Society needs centers of independent thought and criticism as never before. The law faces new problems that must be solved if civilization is to survive. The university is the place where wisdom can be generated. The law needs that wisdom and must contribute to it. Other civilizations have fallen because of the barbarians without. That may happen to us. But it seems more likely that we may fall prey to the barbarians within, from which the university and the law might save us.

Hutchins, *supra* note 29, at 17.

reasoning with a critical perspective.<sup>108</sup>

We have identified analytical and critical skills necessary for the lawyer-artisan and must finally add "creative skills" to the repertoire. It is difficult to describe the potential artistry of the lawyer with our limited language. It cannot be known in the sense that one gives a written or verbal description of it.<sup>109</sup> It involves a kind of tacit knowledge.<sup>110</sup> Creative skills involve synthesis, the construction of alternative modes of handling problems, and ingenuity in inventing legal structures to advance the public good.<sup>111</sup> Creativity requires "the nurturing of those inner resources of ingenuity and the use of all relevant knowledge and discipline in the solution of

108. Critical skills require the appraisal or the evaluation of a legal decision or process in relation to criteria which each person identifies and clarifies explicitly. This intellectual skill is particularly necessary in avoiding the dangers of blind comitment to action as a participant — for example, as an advocate or decision-maker. At some point it is essential to appraise an appellate decision, a piece of legislation, a government action, or a position in defense of a client according to external criteria. Is the decision logically necessary? Is it sound? Is the legislation designed to meet demonstrated need but no more? Is the defense believable as well as logical? Does the action have intellectual integrity? Does it hide emotion in verbalism either wittingly or unwittingly? Is the reasoning internally consistent? Is the process comprehensive? This judgmental skill is among the most difficult to learn and among the most valuable for principled action.

Christenson, *Studying Law as the Possibility of Principled Action*, 50 DEN. L. J. 413, 430-31 (1974).

109. There is no body of rules expressing the art of the lawyer any more than that of the sculptor or painter. You are as free as they, and as responsible for what you do. It is true that one of the mediums of the lawyer's art is rules, and the lawyer must know rules, and the other materials of the law, as the sculptor must know clay and the painter paint and canvas. . . . But what you must ultimately learn is what to do with rules and judicial opinions and all the other forms of expression that are the working stuff of a lawyer's life, just as the sculptor must learn what to do with clay and marble.

J. White, *supra* note 66, at xxv.

110. Gregory Bateson has made a similar observation about skills: "The sensations and qualities of skill can never be put in words, and yet the fact of skill is conscious." G. BATESON, *STEPS TO AN ECOLOGY OF MIND: COLLECTED ESSAYS IN ANTHROPOLOGY, PSYCHIATRY, EVOLUTION AND EPISTEMOLOGY* 138 (1972). "The problem here lies in the fact that the performance of a skill is in part unconscious to the performer." *Id.* at 137.

"The thought of skilled craftsmen and performers of all kinds, and also of game players, is often particularly inaccessible to their own reflection; reflection is precisely the kind of thought, or topic of thought, in which their skill does not reside, unless they are also teachers." Hampshire, *The Explanation of Thought*, in *THOUGHT, CONSCIOUSNESS, AND REALITY* 3, 6 (J. Smith ed. 1977).

A recent and largely successful effort to express the *feeling* of the skilled craftsman/artist can be found in R. PIRSIG, *supra* note 31. For a review of the work and its relation to the setting of legal education, see Parker, *Review of ZEN AND THE ART OF MOTORCYCLE MAINTENANCE With Some Remarks on the Teaching of Law*, 29 RUTGERS L. REV. 318 (1976).

111. Christenson, *supra* note 108, at 431.

important legal problems."<sup>112</sup>

Karl Llewellyn has observed that "[i]t is the craftsman who mediates between the people and the structured rules and forms of law."<sup>113</sup> It requires knowledge of the law, an understanding of human behavior, an ability to communicate (which includes the art of listening and presentation), and finally an ability to mold all of these factors into a solution to a human problem. It is in this process that Llewellyn finds "legal esthetics" to be "in the first essence functional esthetics."<sup>114</sup>

In this sense, the lawyer is not only an advocate, one who argues for a cause or a person, but an intermediary, a bridge between persons (individual or corporation), and between persons and the state, the formal representation of social order. In this business of representing individuals seeking to resolve personal and social conflict, the lawyer's work can be viewed much like the work of the poet. Archibald MacLeish, an eminent American poet and graduate of Harvard Law School has suggested that

The business of the law is to make sense of the confusion of what we call human life—to reduce it to order but at the same time to give it possibility, scope, even dignity.

But what, then, is the business of poetry? Precisely to make sense of the chaos of our lives. To create the understanding of our lives. To compose an order which the bewildered, angry heart can recognize. To imagine man.

Invent the age, invent the metaphor. Without a credible structure of law a society is inconceivable. Without a workable poetry no society can conceive a man.<sup>115</sup>

Llewellyn provides the compass for our discussion in his observation that style expresses the relationship of a craftsman to his work and his society.<sup>116</sup> To explore the artistry of the legal craftsman will require consideration of the aesthetics of craftsmanship, that is, the style<sup>117</sup> which emerges from the functional aspects of lawyer-

112. *Id.*

113. Llewellyn, *supra* note 21, at 233.

114. *Id.* at 229.

115. MacLeish, *Apologia*, 85 HARV. L. REV. 1505 (1972). Although MacLeish willingly admits of significant differences between the means of poetry and the means of law, he argues that the actual gulf between poetry and law is not a wide one.

"Art can be defined as the imposing of a measure of order on the disorder of experience, while respecting and not suppressing the underlying diversity, spontaneity, and disarray. Is not this likewise the meaning and function of law?" Freund, *supra* note 73, at 45.

116. Llewellyn, *supra* note 21, at 224.

117. Llewellyn defines style as "a set of pressures channeling technique and imagination, a set of pressures which have come (rarely by design) to interlock into a sensible whole." *Id.* at 237. See also PECKHAM, *supra* note 9, at 22-24.

ing.<sup>118</sup>

There exists in American society a tension between "work" and "living" (or "leisure") which is unknown to the craftsman.<sup>119</sup> Today's widely held view that work is "something necessary so that something else — living — is possible" is alien to the concept of the lawyer as craftsman.<sup>120</sup>

The struggle and conflict between professional and private life has in part been responsible for the emergence of a new mode of lawyering which reflects a new life-style: the public interest lawyer. The quest for self-realization and the demand for "personally fulfilling work" led lawyers into public interest work in order to "integrate their personal values and their professional world."<sup>121</sup>

The public interest lawyer has sought to attain technical competence while assuming personal responsibility for the work and the effect of that work.<sup>122</sup> Public interest lawyering involves to some extent an "abandonment of the traditional concept of professional neutrality, a concept in which the lawyer does not identify himself with the goals of the client or with the outcome of a matter or its social consequences."<sup>123</sup>

The lawyer-artist needs a sense of identity. "A sense of identity means a sense of being at one with oneself as one grows and develops; and it means at the same time a sense of affinity with a community's sense of being at one with its future as well as its history—or mythology."<sup>124</sup>

118. The lawyer technician is much like the functional dresser — one who wears clothes to be protected from the rays of the sun and the cold of winter. The dress is undoubtedly simple, functional, and worn in such a way that it does not call attention to the wearer. A substantial part of the population wears clothes in this manner, and I think it is safe to assume that the dress of the lawyer technician is attractive to many.

Contrast the dress of the functionalist with one who is very conscious of clothes and wears them with full awareness that clothes are a part of the image that one projects. The clothes-conscious person is concerned not only with the functional aspect of clothing but with clothes fashion.

It is the blend between functionalism, fashion, and an awareness of image that leads to style in dressing. The same can be said of the lawyer. In a broader context, style in law reflects the basic premise that law is not only a tool for problem solving but is autonomous to the point of meriting study as a culture. As a culture, law is possessed of its own language, symbols, and myths, which embody a professional legal ethos or "world view." See S. SCHEINGOLD, *supra* note 16; J. SHLLAR, *LEGALISM* (1964).

119. See F. MARKS, K. LESWING & B. FORTINSKY, *supra* note 28, at 210.

120. *Id.*

121. Comment, *The New Public Interest Lawyers*, 79 *YALE L. J.* 1069, 1146 (1970) [hereinafter cited as *The New Public Interest Lawyers*].

122. Compare *id.* at 1139.

123. F. MARKS, K. LESWING & B. FORTINSKY, *supra* note 28, at 201.

124. E. ERIKSON, *DIMENSIONS OF A NEW IDENTITY* 27-28 (1974). For a more extensive

Public interest lawyers have attempted to "strike a satisfying balance between the demands of the craft, social concerns, and personal needs"<sup>125</sup> and in so doing have moved the profession to "question the basic assumptions and forms of the profession. Behind the questioning will be the vision of a new kind of law, more humane for the people whose lives it orders and for its practitioners as well."<sup>126</sup> The career role of the public interest lawyer "represents a tentative compromise between personal values and societal concerns, risk and security, reality and dreams."<sup>127</sup> In sum, the public interest lawyer has fused personal and social consciousness in a new mode of lawyering and a new style of life in law.<sup>128</sup>

## VI. CONCLUSION

The paradox of the pragmatic world of lawyering (a world of technical skills and precision) and the world of theories and ideals of legal justice, fairness, and equality can be navigated only by the lawyer-

discussion of the legal identity, *see* Elkins, *supra* note 42.

125. *The New Public Interest Lawyers*, *supra* note 121, at 1137-38.

126. *Id.* at 1145.

127. *Id.* at 1072. The compromise between personal values and social concerns is analogous to a problem presented by Ralf Dahrendorf: that of a leader immersing himself in an organization. Dahrendorf uses the metaphor of atmospheric re-entry from space travel:

It is the problem of the exact angle at which they dive into the thicker atmosphere of the organization while remaining intact and alive themselves. If the angle is too steep, the leader burns up in the organization, becomes a part of it, adopts its mores and fails to have an impact; the bureaucratization of leadership. If, on the other hand, the angle is too flat, the space capsule may be thrown back into space, the leader never actually penetrates the organization but remains an isolated figure head again without impact, brilliant perhaps, ineffectual certainly; leadership without relevance.

R. DAHRENDORF, *supra* note 107 at 40.

128. The cultivation of emotional and moral sensitivities, along with intellectual development, is the mark of thorough professional preparation for the lawyer. Without the cultivation of self-consciousness, and people-consciousness, as well as law consciousness, preparation for the practice of law becomes sterile and, inevitable, the practice itself tends to become sterile. Lawyers are often insensitive to the society they purport to serve. (Could it be, even that personal injustice is *perpetrated* by law and lawyers where these sensing mechanisms are not developed? Maybe lawyers do not appreciate as well as they should where personal injustice exists and how best to deal with it.)

Redmount & Shaffer, *Learning the Law — Thoughts Toward a Human Perspective*, 51 *NOTRE DAME LAW.* 956, 959 (1976).

The work of the artist is not unrelated to that of the public interest lawyer. The artist operates on that which emerges from indirect consciousness to express a larger social reality. Gary Snyder, the poet and essayist, has defined poetry, for example, as "the skilled and inspired use of the voice and language to embody rare and powerful states of mind that are in immediate origin personal to the singer, but at deep levels common to all who listen." G. SNYDER, *EARTH HOUSE HOLD* 117 (1969).

artisan.<sup>129</sup> Karl Llewellyn warned that “[n]o discipline is healthy in which the practical-arts side is not in steady interplay with the theoretical: providing problems, providing experience and insight, testing, and retesting theory.”<sup>130</sup> Llewellyn was quick to point out that “technical competence without ideals is a menace and ideals without technique a mess.”<sup>131</sup>

“[T]o show what is not a mess, but a salvation, one needs to put technique to work upon ideals, and with vision.”<sup>132</sup> It is only an artist who can couple the passion of idealism within the context of the problem-solving world of the lawyer.<sup>133</sup> The failure to adopt a more visionary stance may result in the “obsolescence of lawyers.”<sup>134</sup>

129. Paul Freund has noted that “the basic dilemmas of art and law are, in the end, not dissimilar, and in their resolution — the resolution of passion and pattern, of frenzy and form, of convention and revolt, of order and spontaneity — lies the due to creativity that will endure.” P. FREUND, *supra* note 16, at 23. “[T]he good work, the most effective work of the lawyer in practice roots in and depends on vision, range, depth, balance, and rich humanity . . . .” LLEWELLYN, *supra* note 34, at 376.

130. *Id.* at 367-68.

131. *Id.* at 320-21.

132. LLEWELLYN, *supra* note 34, at 321.

133. How can one accept the problematic nature of life and law, the real and the ideal, without being defeated by it or withdrawing and isolating oneself from the chaos of the paradox? One way to approach the paradoxical is to maintain a sense of wonder and open oneself to the serendipitous nature of the legal experience. Serendipity is the faculty of making fortunate and unexpected discoveries by accident. The paradoxical can be approached only through a “child-like sense of wonder.” “Wonder” here is used to connote the impending sense of the unknown (the unknown substance of the law and our future role as lawyers), or playfulness. See S. KEEN, *supra* note 79.

134. See Miller, *Public Law and the Obsolescence of the Lawyer*, 19 U. FLA. L. REV. 574 (1966-67).

Judge Learned Hand has warned us of the perils of becoming administrative bureaucrats. “The lawyer must either learn to live more capaciously or be content to find himself continuously less trusted, more circumscribed, till he becomes hardly more important than a minor administrator, confined to a monotonous sound of record and routine, without dignity, inspiration, or respect.” THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 19 (I. Dilliard ed. 1952).

Miller, *supra* at 515-19, suggests that:

[T]he hypothesis is tentatively advanced that the legal profession as a whole has not kept pace with a rapidly altering society and, hence, must learn new skills and new ways of thinking or stand in danger of being bypassed. The American people will not long tolerate any institution or any profession which does not fulfill its deepest aspirations and desires. It is by no means clear that Americans today are receiving what they should from lawyers. To the extent that they are not, a real tragedy and possible danger exists, for law is too important — much too important — not to be seen as central in a nation such as the United States. But the law that is studied in the law schools and much of what appears in the writings of lawyers bears little relevance to the “real” world.

. . . .  
 . . . [T]he lawyer — whether professional or mere technician — may well plum-



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met in social importance unless he adapts himself to changing reality and to the demands and deepest aspirations of the American people. There is little evidence that such an adaption is taking place. While this does not mean that lawyers will disappear or even become obsolete, it does mean that they may well become less relevant to the world at large and thus obsolescent. No doubt they will still be around, perhaps in large numbers, but merely as practitioners "in a rather esoteric craft of limited social value." Many years ago the prescient Holmes could call the lawyer of the future, not the black-letter man, but the expert in economics and statistics. The Holmesian future is here, but the black-letter men still predominate. In an age when public law is all pervasive, they still are private-law oriented; in the era of the "administrative state," they still think courts are central; in a Darwinian and Einsteinian age, they still adhere to Ptolemy and Newton; in a time when Freud and successors have revolutionized the conception of the human mind, they still cling tightly to the ideas of the Age of Enlightenment. Law may be "conservative" — it is of necessity a conserving influence — but there is no requirement that it be blind.