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**Book Review of Jean Stefancic & Richard Delgado, How Lawyers Lose Their Way: A Profession Fails Its Creative Minds (2005)**

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## Book Review

Jean Stefancic and Richard Delgado, *How Lawyers Lose Their Way: A Profession Fails Its Creative Minds*. Durham and London: Duke University Press, 2005. Pp. xiv + 138.

Reviewed by Milton C. Regan, Jr.

### Introduction

Jean Stefancic and Richard Delgado's new book describes several surveys and studies that suggest that a disturbing percentage of practicing lawyers are unhappy. The authors note a "high rate of burnout, job dissatisfaction, divorce, depression, suicide, and drug and alcohol addiction" among lawyers (51). Many in practice face "unrealistic demands for billable hours, narrow specialization, inadequate opportunities for creativity, and intense competition for jobs, clients, and partnerships" (51). As a result, "[m]any lawyers regret having entered law at all and contemplate leaving for another field. Each year, about forty thousand actually do" (10).

One plausible explanation for this state of affairs is that lawyers simply work too much. Billing 2,000 or more hours a year translates into an even larger number of hours at the office and in airplanes, trains, and taxis. Add to this long commutes to work, instant availability via e-mail and cell phones, and demands for ever more rapid responses to drafts of documents. The result is that lawyers in the United States are a prime example of what Juliet Schor calls the "overworked American."<sup>1</sup> Stefancic and Delgado themselves note that "[l]awyers have little leisure time to think about their cases, much less for family and recreational pursuits" (46).

*How Lawyers Lose Their Way* claims, however, that *lawyers'* unease stems from a distinctive source: their excessive use of and exposure to "formalism" in their work. I think that they are on to something, but the analysis in this book is too underdeveloped to provide much insight into what it is. The authors' use of the term "formalism" risks being so inclusive that it loses explanatory power. In addition, their claim that overreliance on formalism is the chief culprit in

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Citations to *How Lawyers Lose Their Way* appear as parentheticals in the text.

1. Juliet B. Schor, *The Overworked American: The Unexpected Decline of Leisure* (New York, 1993).

lawyers' unhappiness is vulnerable to the charge that lawyers are suffering the effect of trends in the workplace affecting a wide range of occupations.

Finally, Stefancic and Delgado fail to explore in any depth the material conditions of law practice, and how the evolution of those conditions might relate to the formalism they decry. Their treatment of formalism is, well, formalistic. Formalism seems to be an independent force that rises, falls, and now has reemerged, on its own. This makes it difficult to identify any steps that might help reshape law practice beyond the personal responses of individual lawyers. The result is that the authors leave us with no sense of any collective efforts holding out any promise. The book ends with an associate at a law firm whose consciousness has been raised about the tyranny of formalism. What does she do? She adds a few items to her list of things she dislikes about her job, and then resolves, "Tomorrow, I'm going to find time to check out that new bookstore I've been wanting to see" (85).

One can't help but be disappointed at this conclusion. In what follows, I lay out the authors' arguments, and suggest how its limitations lead to this result. I then offer some thoughts on how what I think of as hyperabstraction may well pose particular hazards for lawyers, which could have broader social ramifications as well.

### **The Reign of Formalism**

Stefancic and Delgado begin by arguing that the underlying source of many lawyers' unhappiness is that they are captives of formalism. Formalism, they maintain, abstracts from daily life, substituting reliance on impersonal conceptual categories for appreciation of the richness and complexity of experience. The lawyer engaged in formalism spends her time in the exercise of a "narrow, technocratic facility at manipulating doctrine, cleverly and endlessly" (80). According to the authors, immersion in this task cuts lawyers off from creative fulfillment. By subjecting all before it to the "narrative-killing, subdividing, compartmentalizing impulse" (84), formalism effectively turns lawyers into machines who are at least one step removed from real engagement with life.

This occurs, the authors argue, because:

legal formalism hammers reality—in the form, for example of a client who swindled two hundred widows by selling them worthless stock—into existing doctrines and precedents. It asks whether the case calls up this precedent or that, whether regulation is permissible under this governmental power or the other. Deeming most of the facts of the case irrelevant—including many that would be considered relevant by most citizens—it pronounces this case like some previous one, and not some other. Even when correct within its narrow system, this is always a kind of world-killing exercise—in less polite language, a lie (82).

The authors' complaint is not that formalism has no place in legal thought, but that it has come to dominate the lawyer's work. This produces an imbalance that accounts for the "high-paid misery" (77) that so many lawyers seem to experience. We need, they argue, a "balance of rigor and imagination" in the practice and interpretation of law (78). Lawyers need to move closer to this balance, so they can be treated as "autonomous professionals capable of imagination, discovery, original thought, and dissent" (78).

The authors maintain that the stories of the poet Ezra Pound and the lawyer and poet Archibald MacLeish illuminate these themes. The paths of the two crossed intermittently in the early decades of the twentieth century, with MacLeish admiring Pound's work but Pound rarely returning the favor. Pound "became the acknowledged architect of modern poetry, dismantling the ornate language of the Victorian tradition and replacing it with sharp images, precise words, and metrical variation" (7). In other words, Pound challenged the prevailing formalist paradigm of poetry, and attempted to create a style that more directly elicited the texture of experience. In this respect, Pound serves for Stefancic and Delgado as an example of the impulse toward the particular.

Unfortunately, Pound also drifted toward fascism and anti-Semitism, and recorded more than one hundred radio broadcasts from Italy praising Benito Mussolini and excoriating Franklin Roosevelt and the United States. He eventually was indicted for treason and transferred to United States military authorities at the end of the Second World War. Pound ultimately was committed to St. Elizabeth's Hospital for the Criminally Insane on the basis of testimony that his eccentric views and personal habits reflected an unsound mind.

MacLeish grew up as a member of the United States social elite and served in various high public positions during his career. He was both a lawyer and a poet who sought to reconcile these two dimensions of his personality and experience—with only limited success, according to Stefancic and Delgado. MacLeish rejected a legal career because he saw it as too stifling—a "mockery of human ambitions" (15). He longed instead for what he saw as the more spiritually rewarding path of poetry. Stefancic and Delgado suggest, however, that MacLeish was never fully able to shake the influence of formalist traditions in both law and literature, which prevented him from achieving a sense of balance and satisfaction in his life.

MacLeish admired Pound's ability to break free of formalist conventions, and sought advice from him about his own work. Pound was dismissive because he felt that MacLeish's work "was derivative and that he would never amount to anything until he learned to write simply and without affectation" (17). Although MacLeish won the Pulitzer Prize for his poem "Conquistador," he never gained acceptance into inner literary circles. MacLeish periodically provided financial assistance to Pound, and eventually used his legal skills to free Pound from St. Elizabeth's in 1958. The poet moved to Italy, where he lived until his death in 1972. "By saving Pound," the authors argue,

“MacLeish could achieve vicariously that which he himself had allowed to drift away” (27).

Stefancic and Delgado assert that the stories of Pound and MacLeish illustrate the importance of a balance between rigor and imagination. They suggest that Pound represents the dangers of imagination without discipline. “The raging, out-of-control Pound, whose mind raced from one crackpot theory to another,” lacked the rigor that MacLeish had gained in law school (78). They see MacLeish as emblematic of the difficulty of achieving such a balance for someone raised on legal and literary formalism. His life, they suggest, demonstrates how “[f]ormalism...imposes unbearable pressures on creative, high-spirited human beings” (30). His experience “is a metaphor for what is starting to go wrong with the world of work” (84).

What can we do to address this malady? The authors argue that lawyers must use “anti-formalism and critical analysis” (84). Law students need to “develop[] their own critique of social institutions and the role of law” in order to “stave off professional disappointment” (50). This may help young lawyers understand the source of the pressures they face, so that they can either make peace with them or learn how to counter them.

### Limitations of the Thesis

The first difficulty with this book is that Stefancic and Delgado use formalism to encompass a wide variety of phenomena, which seem united mainly by the fact that the authors regard them as undesirable. Using the term so capaciously makes it difficult to be clear about what precisely is the source of so many lawyers’ unhappiness.

One meaning included in the term is legal formalism. They define this as “a conception of legal reasoning that emphasizes internal rather than external factors in generating legal decisions” (34). It focuses on regularity and predictability, limiting decision makers to the consideration of a relatively small number of factors. Decisions therefore turn on “categorical questions” rather than assessment of social consequences (34). This creates a problem: “Formalism is a rule of exclusion. Life, however, is diverse and unruly” (35).

Legal formalism, the authors argue, influences legal education by promoting reliance on the Socratic method and the analysis of doctrine. “The professor asks what the rule of the case is and how it squares with that of a previous one. He or she asks how the case would come out if one of the facts were different, say, if the defendant were a child. (The student is supposed to remember that a different rule comes in)” (35). This fosters the view that the law is an autonomous discipline that need not consult other sources of knowledge for insight.

Stefancic and Delgado contend that formalism also is reflected in Supreme Court decisions that are hostile to progressive social thought or interdisciplinary analysis. Formalism means reliance on doctrines such as federalism, original intent, and extreme textualism, for instance, to strike down affirmative

action programs and to reject the claim of discriminatory administration of the death penalty.

Moreover, the authors argue, legal formalism is but one version of a phenomenon that extends to other disciplines. It is reflected in literature in the desire to restrict study to the traditional Western canon; in literary interpretation in a focus on the text of a work rather than the broader circumstances in which it was produced; and in history in the desire to limit study to wars and the careers of famous men. In the realm of politics, formalism gives rise to opposition to immigrants and to “the desire to keep the nation demographically pure” (xi).

At this point, the term has begun to lose its value as an explanation for the unease that many lawyers feel. Exactly what is it that unites Socratic pedagogy, the traditional Western canon, anti-immigration policies, a focus on wars and great men, reliance on doctrine and precedent, *Lochner v. New York*, and the general practice of using conceptual categories to impose order on experience? Socrates’ insistent interrogation, for instance, did not seek to inculcate admiration for convention and the status quo nor a life devoted to the memorization and manipulation of rules. How then is the method that uses his name formalist?

Furthermore, *Bush v. Gore*<sup>2</sup> and the Bush administration lawyers’ memos on torture<sup>3</sup> likely would rank high on a list of legal analyses with which Stefancic and Delgado disagree. Yet the problem in each instance arguably is that the analysts were too acutely sensitive to the particular parties and specific circumstances of the situations they faced. Greater adherence to precedent and to the conceptual integrity of federalism, as well as to the text of the Geneva Convention, probably would have produced outcomes more satisfactory to progressives. Yet such an approach would be more formalistic in that it would abstract from the particularities of the cases at hand in order to seek consistency with past decisions.

Finally, a focus on wars or notable individuals in history can be more attentive to specific detail, and to the caprice and unruliness of human experience, than, for instance, Marxist historical analysis that focuses on events as reflections of the underlying contradictions of capitalism or the proletariat’s role in history. Similarly, the historical study of women and minorities can be formalist in some hands when it is put in the service of sweeping claims of patriarchy and oppression, or can provide rich details of everyday life that defy easy categorization. Each approach can operate at different levels of abstraction and provide different kinds of insights.

The authors’ elastic notion of formalism therefore makes it difficult to discern the features of the culprit that they hold responsible for the deadening of many modern lawyers’ lives. Even their conception of the more limited idea

2. 531 U.S. 98 (2000).

3. See Mark Danner, *Torture and Truth: American, Abu Ghraib, and the War on Terror* (New York, 2004).

of legal formalism goes beyond the historical significance of this approach to legal analysis. Stefancic and Delgado seem to suggest that *any* attempt to reconcile current with past decisions, to achieve consistent outcomes across different cases, or to abstract from the multiplicity of details presented by a given situation, represents the hand of formalism. The reader must struggle to clarify the meaning of the key concept of the book.

What seems to be the most coherent definition of formalism is the use of abstraction from experience to attempt to impose order and predictability on a world that is disorderly and unpredictable—but also vital and generative. This is consistent with Stefancic and Delgado's portrait of Pound as imprisoned by a radical particularism that left him defenseless against the onslaughts of prejudice and emotion. Had he been better able to regard events against a broader cognitive background that utilized more general conceptual categories, perhaps he would have had the means to reflect more critically on his impulses and ideas. At the same time, the source of his poetic power may have resided in this very limitation.

The authors' discussion of Pound underscores that they acknowledge the need for some degree of abstraction to make sense of the world. Most of us have a powerful need to move beyond the experience of a succession of stimuli to a sense of coherence and meaning. The use of general categories to encompass a variety of ostensibly similar particular phenomena is a crucial tool in this process.<sup>4</sup>

Stefancic and Delgado thus suggest that the problem for lawyers is not the use of formalism *per se*, but an imbalance between formalism and more direct modes of apprehending life. They argue that this imbalance risks producing lawyers who are deadened to existence because they see experience only as various instances of more general phenomena—and hence operate at a step removed from the vitality of human life. Their diagnosis of modern lawyers' unhappiness is that many are engaged in work devoted mostly to manipulating abstract categories, which estranges them from the emotional and imaginative dimensions of experience.

This formulation of the problem raises at least two questions. First, Stefancic and Delgado posit a dichotomy between abstraction and order on the one hand and particularism and creativity on the other. Computer engineers, analytic philosophers, and mathematicians spend a large proportion of their working lives engaged in the manipulation of abstractions. Yet many of them feel that they are engaged in an exhilarating creative endeavor. On the other hand, social workers, child care providers, and department store clerks spend most of their time dealing directly with the specific needs of particular individuals. Yet many feel burned out by their work. Abstraction, it seems, is not necessarily the enemy, nor particularism the friend, of creativity.

4. See Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise on the Sociology of Knowledge* (Garden City, N.Y., 1967).

Elsewhere, Stefancic and Delgado describe the problem of disenchantment in somewhat different terms. They suggest that “routinization and specialization” are the enemies of creativity, along with intense productivity demands (51). Thus, a young lawyer may spend months or even years researching narrow points of law, or reviewing hundreds of thousands of documents, all while being pressured to bill 2,000 or more hours a year. Perhaps, then, the problem is being required to engage constantly in routine and narrowly defined tasks.

This diagnosis may seem sounder than one that focuses simply on the degree of abstraction in someone’s work day. Yet it immediately elicits the observation that the problem is not limited to lawyers. Many workers in a variety of fields feel the same pressure and pinched circumstances. As Richard Posner suggests, lawyers are simply late arrivals to an experience that other workers have had for some time: the “industrialization” of work.<sup>5</sup> For a long time, lawyers had guild-like control over the production of legal services, which insulated them from the full brunt of market forces that shaped other sectors of the economy. That control now has eroded, swept away by developments such as the invalidation of restrictions on advertising and legal fees, the rise of more influential in-house corporate legal departments, and increases in the scope and specialization of legal services in response to the demands of transnational corporations.

Lawyers now are more directly exposed to the chilly winds of competition than perhaps ever before, which increases demands for the efficient delivery of legal services. Is that, however, necessarily a problem? As Posner notes of current law practice, “Naturally it is less fun. Competitive markets are no fun at all for most sellers; the effect of competition is to transform most producer surplus into consumer surplus, and in more or less time to drive the less efficient producers out of business.”<sup>6</sup>

Seen from this perspective, lawyers’ lament seems like whining and special pleading. Why should the rest of us care that lawyers have lost their oligopoly power and now must compete in the marketplace like everyone else? What makes them more an object of interest or concern than any other group of workers who must labor under the current conditions of a global capitalist economy?

Stefancic and Delgado concede that lawyers are not the only unhappy workers. The regimentation of thought and reasoning, they maintain, has occurred in the professions more broadly. This “tak[es] the life out of work and the professions, depriving them of juice, richness, concreteness, and anything else that might render them of human interest” (xi). They devote a chapter to the discontent of doctors and, in passing, to university professors. Expanding the circle of concern to include such people, however, leaves them open to the charge of class bias. Why pay special attention to those who traditionally have regarded themselves as “professionals”? Why is numbing routine and pressure

5. Richard Posner, *Overcoming Law* 63 (Cambridge, Mass., 1995).

6. *Id.* at 92.



for performance recognized as a problem only when it infiltrates the working conditions of those who previously regarded themselves as above such things?

The authors acknowledge that we need to provide “room to experiment, grow, and breathe” for “*everyone*—not just high-paid professionals” (81). Factory workers, they suggest, might be permitted to change jobs periodically, take breaks for exercise, and learn how their work relates to the product that the company sells. Such steps could enhance their potential to be creative, rather than leaving them simply to function as cogs in a well-oiled machine.

Acknowledging the plight of workers in general responds to the charge of special pleading on behalf of lawyers. The price, of course, is that it robs concern about lawyers of any distinctiveness. From this perspective, Stefancic and Delgado’s account of the legal profession is interesting as an example of a broader phenomenon—the stultification of creativity in the twenty-first century workplace. One might argue, however, that there is no reason to be concerned about this in law practice any more than in other occupations that have become industrialized—say, publishing or asset management.

In sum, “formalism” seems hardly necessary to explain lawyers’ unhappiness. Most workers nowadays have too few opportunities to nurture imaginative capacities, engage in recreation, and reflect upon dimensions of life that are not tied to work demands. As is everyone else, lawyers are caught up in what David Harvey calls “space-time compression.”<sup>7</sup> The skeptic might argue that Stefancic and Delgado’s book offers an interesting account of how a particular set of workers experiences this imbalance, but that lawyers’ disenchantment is not unique, nor does it have any distinctive social implications. The level of generality at which Stefancic and Delgado conduct their diagnosis and prescription unfortunately leave them ill-equipped to respond to such arguments.

### Lawyers and Abstraction

Perhaps Stefancic and Delgado *don’t* think that the dissatisfaction they see in the law practice is of any particular concern compared to other occupations. Maybe they are writing about lawyers simply because they teach future ones. Still, lawyers tend to exhibit levels of substance abuse and other ills at a rate higher than the rest of the population. What is it in their working lives that accounts for this?

My view is that the authors’ instincts are right, but we need to probe more deeply to discover what is going on. While the book doesn’t make a persuasive argument that excessive abstraction is of particular concern in the work lives of lawyers, a good case can be made that it is. Furthermore, the consequences of lawyers’ unease may have larger ramifications for society as a whole.

Making this case requires that we recognize the unique role of law in human society as an effort to achieve both order and justice in human affairs. Law seeks

7. David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Cambridge, Mass., 1989).

to impose some degree of order and predictability upon the inherent volatility of daily life. It attempts to achieve regularity by abstracting from the particularity of events to deal with them on a plane of more general similarity and difference. This permits us to identify common patterns in otherwise unique occurrences.

Thus, for instance, different individuals or organizations may fall within the category of lessor or lessee, debtor or creditor, and tortfeasor or victim. When confronted with messy emotions such as hope, anguish, trust, betrayal, fear, shame, or greed, law purports to tame their potentially terrifying intensity by translating them into dispassionate legal terms. In this way, we aim to make them amenable to rational discourse and reasoned analysis.

This suggests that the act of abstraction may have a different significance for lawyers than for other occupations. Computer engineers, for instance, also deal in abstractions at work. That process generally does not require them, however, to suppress the vivid particularity of human relationships in order to translate it into more neutral technical terms. The distinctive danger of the lawyer's task of abstraction is that she may come to approach existence in general with the same detachment that she displays at work. She may proceed based on the belief that human affairs and relationships can and should be subject to control and approached dispassionately and rationally. When we deal with the world in this way, emotion becomes the unwelcome disruptive force whose influence must be suppressed.

Benjamin Sells, a psychotherapist and lawyer, has elaborated on this danger in some detail.<sup>8</sup> Sells suggests that perhaps the most primeval sense of law is as an alternative to anarchy. On this view, law is akin to an outside occupying force responsible for imposing and maintaining order on a restive population.<sup>9</sup> Crucial to law's ability to perform this function is a stance of objectivity. "Objectivity," says Sells, "translates visceral human experiences into schemata so they might be more easily compared" to other sets of facts with ostensibly similar doctrinal significance.<sup>10</sup>

Think, for example, of the common experience of first-year law students who begin to try out their new conceptual scheme on everyday life. Is a contract formed in the process of selecting food in the cafeteria? If so, when? Might you be vulnerable to tort liability if you leave a sharpened pencil protruding from your backpack? Do I have any kind of property right in a parking space I've selected? For awhile, it seems as if all of life can be reduced to instances of rights and obligations organized according to various legal doctrines.

Ideally, most lawyers come to strike a balance between this abstract perspective and an appreciation for the quirky and unique texture of daily experi-

8. Benjamin Sells, *The Soul of the Law: Understanding Lawyers and the Law* (Rockport, Mass., 1994).

9. *Id.* at 29.

10. *Id.* at 41.

ence. Abstraction can be seductive, however, because it holds out the promise of order and control. Lawyers are not alone in being drawn to this promise. Modernity more generally emphasizes “belief in objective rationality as the supreme source of knowledge and understanding.”<sup>11</sup> Sells argues, however, that this belief “exists in concentrated and powerful form in the lawyer.”<sup>12</sup> The image of justice as blindfolded expresses faith in judgment abstracted from particularity. This aspiration has its virtues, as I discuss below. Those however, come with a cost: “Justice can no longer look out upon the world, can no longer appreciate its subtle variations and delicate distinctions.”<sup>13</sup>

Excessive identification with abstract rationality may anesthetize the lawyer to experience. “[A]s rationality is exalted, other forms of psychological existence are oppressed, relegated to lower stations, and stripped of power and influence.”<sup>14</sup> Lawyers lose their “imaginal diversity” and find it difficult to become emotionally involved in the world. They see personal relationships as threats to the detachment that appears to furnish a sense of power and control.

We thus may have particular reason to be concerned about the impact of excessive abstraction on lawyers. Constant translation of visceral and emotionally charged experience into the more detached categories of legal doctrine may take a severe toll on the capacity for an appropriately wide range of emotional responses. For this reason, law’s aspiration to order may provide insight into the cost of undue reliance in law practice on what Stefancic and Delgado call formalism.

Law aspires not only to order but to justice. This also has implications for the balance of abstraction and particularity in lawyers’ work lives. We can see this by appreciating two dimensions of justice. The first is justice as appropriate moral responses to particular circumstances and predicaments. In dispute resolution, for instance, it requires determining who was wronged and who is to blame. In transactional work, it involves understanding what a party wants to accomplish and asking if it is consistent with standards such as good faith and fairness. In providing advice on regulatory compliance, it leads one to ask whether, for instance, the activity is the type that the tax code wants to encourage, or is the sort that environmental law seeks to restrict. Thus, to have faith that law can do justice, we need to believe that it is sensitive to the richness and complexity of human behavior and the visceral moral responses that it evokes.

At the same time, justice reflects the idea that law is impersonal—that it treats persons in accordance with general principles that apply across various situations. This, of course, is expressed in the image that I mentioned earlier: law as blindfolded. From this perspective, law must abstract from particularity to express our basic equality as legal subjects. This process seeks to isolate

11. *Id.* at 102.

12. *Id.* at 102.

13. *Id.* at 43.

14. *Id.* at 103.

general characteristics that serve as the criteria for legal treatment, so that legal interpretation does not depend on the unique identity of the parties or the decisionmaker involved.

Any legal system must balance these two dimensions of justice to preserve the belief that law represents a genuine effort to invest existence with moral meaning. Excessive attention to the dimension of particularity can erode this belief by fostering a sense that decisionmakers are free to engage in favoritism or indulge their own preferences without any constraints on their power. An excessive focus on abstraction can erode it by creating the impression that the law is a sterile system of rules that are unconnected to any fundamental human concerns.

We tend to think of achieving this balance as something that is primarily the province of judges. Practicing lawyers, however, confront it every day. They must consider it in the arguments they make before tribunals, the advice they give their clients, and the legal analyses in which they engage. These activities all send a message about the nature of the law. A lawyer who persistently focuses on manipulating the letter of the law while ignoring its spirit eventually communicates that law primarily is a set of abstract rules available for creative exploitation. A lawyer who attends only to a sense of the felt exigencies in a given situation regardless of legal rules communicates that we are a society governed by individuals rather than laws.

Seen against this backdrop, we can appreciate why what Stefancic and Delgado describe as an excess of abstraction in lawyers' work lives can be problematic in distinctive ways. On a personal level, lawyers confront human stories that evoke visceral moral responses; on a professional level, they are consistently denied recourse to those responses when they do their work. Instead, many believe that they must devote themselves to manipulating the rules as effectively as possible to achieve what their clients want as long as it's arguably legal. It's easy to see that this can be a recipe for cynicism and despair, because it undermines the very notion that human beings can achieve some degree of moral order by establishing a legal system. It's thus not surprising that William Simon would say, "No social role encourages such ambitious moral aspirations as the lawyer's, and no social role so consistently disappoints the aspirations that it encourages."<sup>15</sup>

On a social level, this kind of disillusionment for lawyers may produce a similarly corrosive effect. If those who devote their lives to the law lose confidence in its moral potential, why should anyone else believe in it? Loss of faith in the ability of law to achieve justice incites anger, opportunism, and nihilism: "Justice? You get justice in the next world, in this world you have the law."<sup>16</sup>

In these ways, the dominance of what Stefancic and Delgado characterize as formalism can have profound consequences for both lawyers and society as

15. William H. Simon, *The Practice of Justice* 1 (Cambridge, Mass., 1998).

16. William Gaddis, *A Frolic of His Own* 13 (New York, 1995).

a whole. If this is the case, how do we right the balance? Unfortunately, the authors offer little guidance on how to do so beyond the example of the lawyer who plans to make time to visit a new bookstore. Lawyers certainly need to make time for activities that nurture their imagination beyond the law. It would be helpful, however, to have some sense of the bigger structural forces that shape current practice and how we might try to influence them.

### The Broader Context

We need a richer sense of both history and the dynamics of modern law practice than this book provides. Stefancic and Delgado generally draw on experience in private practice, especially law firms, in making their points. An increasing number of lawyers practice in firms, and the firms themselves are growing dramatically through mergers and acquisitions. In addition, corporate legal departments have grown in both size and stature in recent decades.

In light of these developments, we need to acknowledge more explicitly what we often seem to ignore or even repress: many, perhaps most, lawyers represent business corporations. Recognizing this fact of life does not mean that a large percentage of lawyers are indifferent to considerations of justice or social welfare, or that we must radically revise our professional aspirations downward. It does mean, however, that we need a clear-eyed awareness of the distinctive features of corporate representation if we are to have any hope of promoting justice and social welfare, or realizing traditional professional ideals, in a large segment of law practice.

It's important to recognize that corporate responses to changes in market conditions have powerfully shaped large law firms. The integrated law firm first arose in the late nineteenth and early twentieth century to meet the expanding legal needs of corporations of unprecedented scope and scale in the decades after the Civil War. Solo practitioners or small law offices simply were inadequate to deal with the legal work generated by enterprises such as transcontinental railroads, oil production and refining companies, and steel manufacturing entities. By the early twentieth century, Paul Cravath had institutionalized the corporate law firm in a form whose influence is still felt today.<sup>17</sup>

Significantly, for many years corporations preferred to contract for most of their legal services from independent law firms, rather than meet their needs by hiring lawyers as company employees. Regulation was relatively minimal, so executives may not have seen legal costs as a constant and significant cost of doing business. In addition, legal analysis was less amenable to standard production techniques than other corporate services, which made it more difficult to integrate it into the corporate bureaucracy. Furthermore, corporate enterprise presented fundamental challenges to conventional legal doctrine, and companies may have wanted to rely on the experience of lawyers with

17. See generally Robert T. Swaine, *The Cravath Firm and Its Predecessors 1819-1948* (New York, 1948).

wide contacts in the political and business community. Lawyers who served more than one client could offer this benefit.<sup>18</sup>

Finally, while there was variation among companies and industries, many corporations enjoyed a relatively substantial degree of market power until the last few decades of the twentieth century. This was of course especially true immediately after World War II. The result may have been less pressure for cost containment and strict efficiency in the use of legal services.

For much of the twentieth century, the large law firm enjoyed a significant degree of market power, with minimal competition for both clients and lawyers. Relationships with clients were long-term, partners came almost solely from the ranks of associates, and firms were able to give some weight to economic and non-economic considerations in how they organized their practices. It was not that law firm practice was a profession, rather than a business. It was decidedly a business, but one that operated under oligopolistic market conditions.<sup>19</sup>

Some claim that such market power gave lawyers the opportunity to offer advice to corporate clients that took a long-term perspective, and which considered to some degree non-financial social and moral concerns.<sup>20</sup> That is, they had some latitude to speak with clients about not only the letter but the spirit of the law. In Stefancic and Delgado's terms, they were able to offer advice that treated the law not simply formally, but as a practice that affirmed the norms immanent in particular situations and circumstances. They were able to say "no" to their clients because the clients trusted them, and because they had the intricate knowledge of the client's operations that created the opportunity to fashion alternatives that could accomplish the client's goals without running afoul of social boundaries.

It's impossible to evaluate these claims with any degree of certainty. To some extent, they may be simply self-serving assertions by an older generation of lawyers who resent being shoved aside by younger, more entrepreneurial colleagues.<sup>21</sup> In addition, lest we accept too quickly this characterization of a bygone golden age, we must recognize that firms openly discriminated against women, racial minorities, and individuals of certain ethnic backgrounds. Finally, the close relationship between law firm and client may have led to sins of blindness rather than willfulness. That is, even if lawyers may have been likely

18. See generally Wayne K. Hobson, *The American Legal Profession and the Organizational Society 1890-1930* (New York, 1986); Thomas Paul Pinansky, *The Emergence of Law Firms in the American Legal Profession*, 9 U. Ark. Little Rock L. Rev. 593 (1986-87).

19. See generally Paul Hoffman, *Lions in the Street* (New York, 1973); Erwin Smigel, *The Wall Street Lawyer: Professional Organization Man?* (New York, 1964).

20. Anthony Kronman, for instance, maintains that "[f]or a hundred years the large corporate firm has been the principal standard-bearer of the lawyer-statesman ideal in the sphere of private practice." Anthony Kronman, *The Lost Lawyer* 273 (Cambridge, Mass., 1993).

21. See Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 Dick. L. Rev. 549 (1996).

to counsel their clients not to ignore the adverse impact of their actions, they may have internalized the client's perspective so completely that they were oblivious to many occasions on which there was such impact.

Despite these caveats, there is some plausibility to the claim that market power created at least some space for more wide-ranging, and less formalistic, legal advice. Milbank Tweed, for instance, consistently gave conservative advice to Chase Manhattan Bank about activities that might run afoul of restrictions on interstate banking.<sup>22</sup> Similarly, Lord Day & Lord advised the *New York Times* that concern for the public interest should lead the paper to grant the Attorney General's request not to publish the Pentagon Papers.<sup>23</sup> In addition, it is striking how many large firm partners participated in legal and political reform movements and engaged in public service, from the very first years that the large law firm first strode onto stage.<sup>24</sup>

The shift toward the "industrialization" of legal services that Posner describes reflects the intensification of competition for many corporations and industries in recent decades.<sup>25</sup> Accelerated technological developments and global competition have created considerable instability and unpredictability for business corporations. This has created greater pressure to obtain cost-effective services. In addition, the proliferation of regulation has made legal services a more significant component of corporate budgets. In response, most major corporations have sought greater control over the provision of these services by significantly increasing both the size and responsibilities of their in-house legal departments.

As a result, law firms no longer can count on steady business from particular clients, but must earn the right to represent them on specific matters. Corporations use the competition among law firms to gain concessions on price, controls over staffing, and a major voice in decisions. In addition, firms now face fierce competition for lawyers, with profitable partners periodically moving to more lucrative opportunities, sometimes bringing entire practice groups with them to other firms. Law firms have responded to this heightened exposure to market forces by adopting more explicit business strategies and measures to make their delivery of services more efficient and profitable.<sup>26</sup> Greater special-

22. See Ellen Joan Pollock, *Turks and Brahmins: Upheaval at Milbank, Tweed: Wall Street's Gentlemen Take Off Their Gloves* 96-97, 99 (New York, 1990).

23. See Hoffman, *supra* note 19, at 100-01.

24. See Robert W. Gordon, "The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910, in *The New High Priests: Lawyers in Post-Civil War America* 61, ed. Gerard W. Gawalt (Westport, Conn., 1984); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 *Md. L. Rev.* 255, 267-75 (1990).

25. Richard A. D'Aveni and Lacy Glenn Thomas, *The Rise of Hypercompetition From 1950 to 2002: Evidence of Increasing Structural Destabilization and Temporary Competitive Advantage* (October 11, 2004). Tuck School of Business Working Paper No. 2004-11, available at <<http://ssrn.com/abstract=611823>> (last visited on July 3, 2005).

26. See generally Marc Galanter and Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (Chicago, 1991).

ization, merger with or acquisition of other firms, and compensation according to productivity rather than seniority are all reflections of this trend.

The reduction of law firm market power vis-a-vis corporate clients has implications for what Stefancic and Delgado characterize as the balance between formalist and non-formalist approaches to law practice. Confronted with relentless competitive pressures, many corporate clients tend to be preoccupied with financial performance on a quarterly basis. When missing earnings estimates by a penny a share can result in a drop of 12 percent in share price, there seems little room to consider anything beyond the bottom line.<sup>27</sup>

In this world, corporations want to know how lawyers can “add value” to the business enterprise.<sup>28</sup> This may involve pushing the envelope with legal advice, and letting the client decide how much of a risk it wants to take of violating the law. At their crassest, corporations treat law purely instrumentally, as an obstacle to be creatively surmounted, rather than as a set of pronouncements with any intrinsic normative force.<sup>29</sup> Treating law formally, and focusing solely on gaming the system by manipulating doctrinal rules, is the hallmark of such an approach to law practice.

The imbalance that Stefancic and Delgado describe has its roots in the changing market conditions of corporate capitalism. In the face of increasing competitive pressures, many clients may not be especially interested in obtaining legal advice that takes account of broad social or moral considerations. They have no desire to be instructed by what Anthony Kronman has called the “lawyer-statesman.”<sup>30</sup> As with other professionals, lawyers are “no longer experts offering professional and autonomous advice on how best to steer the economy. They [have become] employees subject to the market forces they believed they controlled.”<sup>31</sup>

This may seem to offer a bleak prognosis for modern law firm practice. Yet it also suggests a potential vehicle for changing the conditions of that practice: placing political pressure on corporations to respect and accommodate important social values. The broader the range of concerns for which corporations are held accountable, the more considerations the lawyer can take into account in advising the corporate client on what is in its best interest. Some contend that the range of those concerns is widening, and that the corpora-

27. See Gary Rivlin, *Ebay Misses Forecast by a Bit, and Shares Fall*, N.Y. Times, Jan. 20, 2005, at C1.

28. See Robert Eli Rosen, *We're All Consultants Now: How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 *Ariz. L. Rev.* 637, 681 (2002).

29. For a description and critique of this approach, see Cynthia Williams, *Corporate Compliance With the Law in the Era of Efficiency*, 76 *N.C. L. Rev.* 1265 (1998).

30. Kronman, *supra* note 20, at 11.

31. Mark Tushnet, *A Public Philosophy for the Professional-Managerial Class*, in *Debating Democracy's Discontent: Essays on American Politics, Law, and Public Philosophy* 92, 92, Anita Allen and Milton Regan, eds. (New York, 1998).



tions that thrive will be those that meet the challenge of addressing them.<sup>32</sup> If so, such a development provides the opportunity—indeed, the responsibility—for lawyers to go beyond formal analysis of legal doctrine in the discussions that they have with their clients.<sup>33</sup> This expansion of the lawyer's role could help restore some of the satisfaction that seems to have gone out of practice for so many lawyers.

Placing the dominance of what Stefancic and Delgado call formalism in historical and economic context thus suggests that changes in law firm practice likely will require more fundamental changes in corporate America. Pressing for such changes may well be done most effectively from outside the corporation and the large law firms that represent it. Lawyers, in other words, need outsiders—interest groups, legislators, and litigants, for example—to provide them opportunities to draw on social considerations in counseling their clients.

This may be some cause for hope, but it also leads to two sobering observations. First, and most obvious, the challenges of inducing socially responsible behavior by corporations can be enormously daunting. Multinational companies can engage in regulatory arbitrage, and informal pressures may result in public relations responses that do little to address underlying problems. Collective action problems abound, and corporations have vast resources that they are willing to devote to avoiding limitations on their freedom of action.

Second, even a lawyer advising a corporation that it must take account of non-economic concerns typically will have to counsel her client in the language of economic self-interest. “Think how this would look on the front page of the *Wall Street Journal*,” or “We’re going to risk losing a major group of customers if we’re seen as exploiting child labor in the Third World,” are arguments likely to be taken especially seriously by corporate clients. Even in a world of more expansive corporate social responsibility, the lawyer may have to sacrifice the ability to speak in explicit moral terms in order to be effective. This is not to suggest that corporate managers are indifferent to moral concerns. Rather, it is a realistic acknowledgment of the constraints under which many of them operate, and the considerations that they seek to balance. The lawyer can feel gratified that the client takes her advice that ethics is good for business. This may not, however, fully satisfy the desire in law practice to refer more directly to the underlying values that law seeks to promote.

This suggests that exploring the working lives of lawyers in private law practice and corporate legal departments requires appreciation of the trade-offs those practice settings involve. The more powerful the client, the larger

32. See, e.g., Lynn Sharp Paine, *Value Shift: Why Companies Must Merge Social and Financial Imperatives to Achieve Superior Performance* (New York, 2003).

33. See, e.g., American Bar Association, *Model Rules of Professional Conduct*, Model Rule 2.1, Comment 2 (2005) (purely technical legal advice may be inadequate; lawyer may need to refer to broader considerations); Rule 2.1 (lawyer may “refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client’s situation”).

the lawyer's compensation, and the more she is subject to the risks and rewards of market pressures—but also, the greater the potential impact of legal advice that reflects an expansive view of the client's responsibility. The number of opportunities to provide such advice, however, and the client's willingness to heed it, may depend on forces outside the lawyer's control. Even when such opportunities arise, the lawyer in many cases will have to use an instrumental vocabulary rather than one that directly refers to justice or other moral values. High compensation and professional prestige thus may carry with it certain types of costs.

By contrast, lawyers who practice outside these settings may have a greater sense of the integration of personal and professional life because of their ability to speak in a less constrained language. They may, however, enjoy less financial compensation, and fewer opportunities on a daily basis to help move powerful clients directly toward socially responsible behavior. They also may receive less professional prestige by conventional standards. A sense of integrated personal and work commitments, in other words, may come at a price.

Lawyers in these two broad practice categories are likely to confront different sources of contentment and disenchantment. This framework is one example of how we might try to begin mapping in more systematic fashion the details of lawyers' work lives. We will need to move well beyond this level of generality, however, to understand the texture and dynamics of modern law practice. We need to examine the experiences of specific lawyers in particular practice organizations. To what extent does a practice organization recognize the tensions and influences with which its lawyers must contend? What kinds of policies and structures does it adopt in response to them? How feasible is it to create and sustain a distinct organizational culture that tries to balance multiple values? Detailed case studies and rich narratives, not sweeping generalizations, will be most valuable in this effort.

I suspect that such research will indicate that it is extremely difficult for lawyers to fashion work lives in which they are able harmoniously to integrate all the personal and professional values that they consider important. In this respect they may be no different from anyone else—but it will be useful to identify the trade-offs that *lawyers* must make in general, as well as in particular kinds of practices. Among other things, such a step would be useful in giving students a clearer understanding of the landscape that they must traverse as they enter the profession.

### Conclusion

The main limitation of *How Lawyers Lose Their Way* is, ironically enough, that it employs general abstractions, rather than the fine-grained observation that it prescribes. The chapter on MacLeish is the most nuanced discussion in the book. Even it, however, tends to proclaim, rather than demonstrate, MacLeish's struggle to balance different sensibilities. In addition, that struggle is presented as the project of a single individual, isolated from the broader context of law practice in his time and unconnected to our own. Stefancic and

Delgado are right to suggest that what they describe as formalism plays a role in lawyers' dissatisfactions. For this suggestion to yield any insight, however, we need much more than this book provides: a more sharply focused account of formalism, a more subtle examination of its consequences for practicing lawyers, and a deeper appreciation of how varying practice conditions can contribute to—or allay—the imbalance that many lawyers apparently feel. We need, in other words, less formalism about formalism.