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The Lawyer as an Artist

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Abstract

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I. Introduction

The lawyer as an artist. It must seem an oxymoron. A lawyer searches for predictability, certainty, logical analysis, and clarity in thought and words. The artist seeks feeling, essence, grace, style and line. They have little in common. Even research on brain specialization suggests different parts of the brain are responsible for skills associated with legal thought and artistic expression.¹ Yet lawyers who are creative and imaginative may steer the law through uncharted waters. These lawyer-as-artists drive the law forward.

In this essay I will attempt to describe in broad strokes the training and work habits of lawyers and artists. Of course, the topic requires chapters, not paragraphs, but the outlines are instructive. I then describe those few lawyers who use artistic talents, some as practitioners to protect and promote their client interests, other as judges to reshape the way we think about legal issues, and still others as legal scholars to rethink the bases of our principled legal system. Those lawyers-as-artists are the creative generators of new doctrine, new voices, and, perhaps, legal redemption.

My colleague, Professor Michael Richmond, has written eloquently of how practicing lawyers can use the lessons of literature², and there is a growing body of writing on the topic of educating lawyers through study of the work of expressive artists.³ I find it difficult to

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1. The left hemisphere "specializes in logic" and language meaning; the right hemisphere "specializes in processing emotions" and "in perceiving the orientation of objects in space." Raymond, *Creative Works by Neurologically Impaired Artists Provide Scientists With a Window on the Brain*, 35 *Chronicle of Higher Education*, June 21, 1989, at A6.

2. Richmond, *Can Shakespeare Make You a Partner?*, 20 *ST. MARY'S L.J.* (1989); Richmond, *In Defense of Poesie* 57 *FORDHAM L. REV.* 901 (1989).

3. See, e.g., J.B. WHITE, *HERACLES' BOW* (1985); J. B. WHITE, *THE LEGAL IMAGINATION; STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973); Weisberg, *Coming of Age Some More: 'Law and Literature' Beyond the Cradle*, 13 *NOVA L. REV.* 107 (1988). See generally, Anshaw, *The Rebirth of the Renaissance*

argue with this approach.⁴ Lawyers can use literature, as well as economics, social science and even common sense in carrying out their important societal functions. As I shall try to explain below, however, the lawyer-as-artist moves one step beyond the important work of the legal craftsperson.

II. The Lawyer

The law is a system of shared principles used to regulate human interaction. It is sustained by the ideal of certainty. Lawyers make the legal system operate because they have learned to predict how those shared principles will apply in given circumstances.⁵ Lawyers take the chaos of the facts of life and order it within boundaries to create boxes of facts with understood meanings. Thus, one box of facts is a deed, another a binding contract, and a third a violation of the Constitution. New combinations of facts must fit within preestablished categories. Lawyers share a complex system of symbols and "the scattered prophecies of the past."⁶ The law abhors surprises, and lawyers long for certainty in method and outcome.⁷

Lawyer, 18 STUDENT LAWYER, Sept. 1989, at 16.

4. *But cf.* R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988). Garrett Epps perceptively describes the current variegated state of law school intellectualism in *Bar Wars*, 21 WASH. MONTHLY, May 1989, at 50.

5. It has been suggested:

When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is such much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). K. LLEWELLYN, *What officials do about disputes is . . . the law itself*, in THE BRAMBLE BUSH 9 (2d ed. 1951). *See generally*, H.L.A. HART, THE CONCEPT OF LAW (1961); L. FULLER, THE MORALITY OF LAW (2d ed. 1969).

6. Holmes, *supra* note 5, at 457.

7. Obviously, lawyers may disagree as to the "box" within which a set of facts fits. They agree on the potential set of boxes, however. A system of adjudica-

It is not unexpected then that law schools train attorneys—the priests of the legal system—in the image of that system. To think “like a lawyer” is to think along paths already trod by others. Lawyers are taught how to order disorganized facts into patterns, then compare these patterns with established ones and give them meaning and effect.⁸

A lawyer can draft a will in a way that will protect the testator’s intent. He or she knows what meaning courts have given to certain phrases, what formalities are required to assure authenticity, and what traps of ambiguity to avoid. The lawyer can advise a client whether there is a cause of action in simple negligence. Has there been an actionable failure of care, in other words, conduct actually and proximately causing injury to the plaintiff that fell below the standard of ordinary prudence? The overriding need is for certainty and uniformity of treatment.⁹ Subjectivity is too uncertain a measure.¹⁰

The lesson of this simplified description is that lawyers and the legal system they administer could not operate in an environment where rights and obligations shift like the direction of the wind. No good lawyer promises his or her client that a strategy will always work. But unless the lawyer’s craft involves far more than random chance, it is not a legal system—it is a lottery or palm reading.

Traditional legal education equips lawyers to play their crucial role as ministers of justice. To this end, the essential task of a law school is to train initiates to sort facts and predict outcomes. Absent the common framework of ordered thinking, a legal system composed of lawyers acting as free and creative spirits could not exist. A bar of poets will not do.

tion—courts, administrative tribunal, arbitration, for example—will then set the correct designation.

8. As J.B. White explains: Lawyers must “bring to bear the materials of the past upon a present question, remaking those materials as they do so, with the idea of creating a new set of relations in the present and the future.” J.B. WHITE, *HERACLES’ BOW* xiii (1985).

9. Of course, there is a role for discretion in legal analysis, but only within limited bounds. “[A]ll rules have a penumbra of uncertainty where the judge must chose between alternatives.” H.L.A. HART, *supra* note 5, at 12. A court can “oil” the system to account for compelling circumstances, but not in a way that risks the system itself.

10. Adherents of legal realism remind us of the human element in the legal process. It is naive to ignore the fact that humans must operate the system, but they attempt to do so in a way that seeks objectivity and predictability. It is no surprise that sometimes they fall short.

III. The Artist

The artist translates feeling, emotion and perception into a medium others can perceive, a process very different from the lawyer's job of fact analysis, pattern comparison and prediction. The artist and the lawyer work at different ends of the thought spectrum, and their training reflects these essential differences.¹¹ Visual artists are trained in a systematic fashion to interpret what they see through "forms, lines, shades and colors."¹²

Artists see life with their senses and emotions. Van Gogh's main concern was his "freedom to express his emotions"¹³ and his painting was only a "vessel for personal emotions."¹⁴ Cezanne disregarded "the logic of external appearance for the sake of the inner logic of the design," his purpose being to "uncover the permanent qualities beneath the accidents of appearance."¹⁵ Of course, at any given time in history there are artistic protocols, but these bounds prove elastic as creativity presses beyond established limits.¹⁶ Modern visual artists, such as Jackson Pollock, have demonstrated the "continuity and expansiveness of the creative process."¹⁷ "[P]rivate fantasy" and "the leap of the imagination," not reason and logic, control.¹⁸ "Disparate moments of inspira-

11. Of course, it is presumptuous for a lawyer to attempt to describe the training and work habits of an artist. Rather, it is best to rely on the thoughts of artists themselves and others who are expert in the field, in particular, E.H. Gombrich and H.W. Janson. Much of this analysis draws upon their classic works, E.H. GOMBRICH, *ART AND ILLUSION* (1956) and H.W. JANSON, *THE HISTORY OF ART* (1974).

12. JANSON, *supra* note 11, at 12.

13. *Id.* at 506.

14. *Id.* at 507.

15. *Id.* at 504-05.

16. The strict rules established by art academies of the Nineteenth Century, for example, did not deter Impressionists, Cubists and Expressionists from sharing their vision through art. See, e.g., W. Kennick, *Does Traditional Aesthetics Rest on a Mistake?* in *PROBLEMS IN CRITICISMS OF THE ARTS* (H.G. Duffield ed. 1968). "The assumption that . . . all works of art must possess some common nature, some distinctive set of characteristics which serves to separate Art from everything else . . . constitutes what I consider to be the first mistake on which traditional aesthetics rests." *Id.* at 193.

17. JANSON, *supra* note 11, at 546.

18. *Id.* at 525. Accord Pei, *The Nature of Urban Space*, in *MODERN CULTURE AND THE ARTS* (J.B. Hall & B. Ulanov eds. 1968). "[F]actors . . . relevant to the aesthetics of urban spaces . . . are hard to rationalize and harder yet to measure, for urban space is a medium that still remains illusive, immeasurable, and often more successfully approached by intuition than by logic and mathematics." *Id.* at 510.

tion determine what becomes the artist."¹⁹

H.W. Janson draws a very useful distinction, in his introduction to *History of Art*, between the work of an artist and that of a crafts-person.²⁰ The artist displays talent; the craftsperson shows only aptitude. The artist is unpredictable; the craftsperson is measurable, constant and specific. "Originality . . . distinguishes art from craft."²¹ That same line can be used to distinguish the artist from the lawyer.²²

A good lawyer can write an excellent brief to the court using all the skills of his or her craft. Well-chosen arguments, clear and concise prose, apt metaphors and even literary allusions will make the brief a fine piece of work—a work showing craft but not art.²³ For the lawyer to move from craft to art requires more, as we shall see, and it may be something law schools cannot teach at all.²⁴

Training an artist first requires the development of skills and an appreciation of the past. The artist builds on a tradition, "the firm platform from which the artist makes his leap of the imagination."²⁵ Janson explains how an artist moves from craft to art:

Every budding artist starts out on the level of craft, by imitating

19. Danto, *What Becomes An Artist Most*, ARTNEWS, Nov. 1987, at 149.

20. JANSON, *supra* note 11, at 12.

21. *Id.*

22. JAMES B. WHITE, in the Introduction to *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* xxxiv-xxxv (1973), says that "law is not a science . . . but an art. And this course is directed to you as an artist." He posits that a lawyer is as free as an artist to imagine and discover. The legal system could not operate if every attorney functioned as White envisioned. Moreover, while the wonderful material covered in the growing number of law-and-literature courses enriches the work ways of the attorney, it does not, and should not, remove the practitioner from the mainstream of legal practice.

John Nivala recognized this distinction in his important and creative article, *From Bauhaus to Courthouse: An Essay on Educating for Practice of the Craft*, 19 U.N.M. L. REV. 237 (1989), comparing the work of Walter Gropius and Karl Llewellyn. Nivala begins, "The practice of law is, at its heart, a craft. In the hands of a gifted few, it may on occasion rise to artistry. But underlying the artistry is a mastery of the craft." *Id.* at 237.

23. It is here, for example, where the law-and-literature school can have the greatest impact, in the way traditional lawyers go about their tasks, with flair and erudition.

24. Sculptor Louise Nevelson thinks some artists are "born ready-made. It's not a matter of decision." Danto, *What Becomes An Artist Most*, ARTNEWS, Nov. 1987, at 149, 150. Perhaps it is the same with the lawyer-as-artist.

25. JANSON, *supra* note 11, at 15.

other works of art. In this way, he gradually absorbs the artistic tradition of his time and place until he has gained a firm footing in it. But only the truly gifted ever leave that stage of traditional competence and become creators in their own right. No one, after all, can be taught how to create; he can only be taught how to go through the motions of creating. If he has talent, he will eventually achieve the real thing.²⁶

The artist creates what he or she perceives using various media. Michelangelo carved his stone "liberating the figure from the marble that imprisons it," and he was not always successful.²⁷ Others use canvas and paint, metal and fabric, but always imagination.²⁸ Through choosing from among levels of abstraction and fields of perception, artists offer their personal insights into life and the world.²⁹ Thus, the artistic process is one of selectivity in the re-creation of reality.³⁰

The artist experiments because art is a process of creation.³¹ Uncertainty is "the essence of the artist's work,"³² and success is not always assured:

In the creative process, we are constantly faced with our own limitations. The impulses within us are forced through a tortured labyrinth, with opportunities for failure at every corner It do not think any real creativity can take place without acknowledging our limitations It is from the *actual* failure that one grows.³³

26. *Id.* at 16.

27. JANSON, *supra* note 11, at 10.

28. "[T]he more imaginative the work, the more profoundly it allows us to share the artist's experience of the visible." J. BERGER, *WAYS OF SEEING* 10 (1972).

29. Cezanne said: "A minute in the world's life passes! To paint it in its reality, and forget everything for that! To become that minute, to be the sensitive plate . . . give the image of what we see, forgetting everything that has appeared before our time." *Id.* at 31.

30. A. RAND, *THE ROMANTIC MANIFESTO* 45 (1969).

31. In the words of Swiss artist Paul Klee:

I have tried pure drawing; I have tried pure chiaroscuro painting; and I have tried all sorts of experiments with color as these arose out of my meditations on the color wheel. . . . Sometimes I dream of a work of vast expanse which would encompass the whole realm of elements, objects, content and styles. Doubtless that will remain a dream, but it is good occasionally to imagine this possibility. . . .

Klee, *The Shaping Forces of the Artist*, in *MODERN CULTURE AND THE ARTS* 13 (J.B. Hall & B. Ulanov eds. 1968).

32. JANSON, *supra* note 11, at 11.

33. Croghan, *The Psychology of Art*, *AMERICAN ARTIST*, Aug. 1988, at 18, 82.

But art is successful in telling us "which aspects of . . . existence are to be regarded as essential, significant, important."³⁴ The artist teaches us how to look at our existence.³⁵

IV. The Lawyer As Artist

In each generation, a few lawyers move beyond craft into art. They do so not to consciously break the bonds of prior protocols of practice, but to further the interests of the clients they represent. They might not even appreciate that they possess these rare talents. The lawyer-as-artist perceives reality, interprets it, and then uses all tools available—be they traditional or newly invented—to pursue his or her goals. The lawyer-as-artist sees the endless possibilities of creative lawyering, drawing feelings from the emotional and creative side of life.³⁶ It can be said that the lawyer-as-artist paints on a blank canvas with a palette of many colors.

How then does this lawyer-as-artist function? If the concept of lawyer-as-artist is to have meaning, candidates must know the job description. Much like the artist trained first as a craftsperson, the lawyer-as-artist is schooled in the ways of established law and practice. The lawyer-as-artist must know what precedent commands and how good lawyers carry on their craft.³⁷ As an artist, however, he or she can

34. A. RAND, *supra* note 30, at 45.

35. This description of the artist is as oversimplified as that of the lawyer, and it may rely too heavily on outmoded idealism. Many current artists have a much less grand conception of their work. Sculptor Richard Serra, for example, "adamantly denies his sculptures possess psychological content," let alone feeling, emotion and perception. When asked whether his works "address traditional themes like nature and death and transcendence," Serra responds: "That's a lot of literary claptrap!" Solomon, *Richard Serra, Our Most Notorious Sculptor*, N.Y. Times, Oct. 8, 1989, § 6 (Magazine), at 39, 74. See also Serra, *'Tilted Arc' Destroyed*, 14 NOVA L. REV. 385 (1990). Musicologists reflect this view as well.

Composing (in the early 20th Century) was, after all, just another manufacturing process aimed at satisfying external demands. So the composer should give up all the 'highfalutin' claims to self expression—why should the listener have any interest in the composer's 'inner-psyche state'?—and view himself once again as an honest craftsman

A. JANIK AND S. TOULMIN, *W. H. GENSTEIN'S VIENNA* 251 (1973).

36. For example, Justice Brennan notes that lawyers must view their profession as a socially creative skill and not as a science. Brennan, *What's Ahead for the New Lawyer?* 47 U. PITT. L. REV. 705 (1986).

37. A critical weakness in legal writing, for example, is not that attorneys lack an artistic prose style, but instead, "[the] problem is that lawyers cannot write clearly

rethink unbounded. Where might we insert ordinary feelings of everyday people, discard old ways and substitute new ones more in tune with human values? Where might inventive use of nontraditional means of advocacy effect change? The lawyer-as-artist acts as a bridge between two distinct cultures—the lawyering culture that is and the lawyering culture that could be.

Does the lawyer-as-artist write contracts? Certainly, but those papers might not sound like familiar documents. They might contain plain English words that ordinary people could understand. That might not seem to be a great breakthrough now, but the first lawyers who tore away at legalisms to enhance understanding were artists of the first rank.

Does the lawyer-as-artist litigate? He or she does in interesting ways, using untraditional methods. A few examples will suffice. Louis Brandeis was a great lawyer-artist. His famous brief in *Muller v. Oregon*³⁸ drew upon sociological data, an astounding break from lawyering precedent.³⁹ Lawyers who filed an amicus brief in behalf of non-English speaking Chinese children in *Lau v. Nichols*⁴⁰ wanted to explain to the Supreme Court the importance of bilingual education. How could they demonstrate to the Justices what it would be like for a student to attempt to learn in a class taught in a foreign language he did not understand? Attorney J. Harold Flannery, now a Massachusetts state trial judge, creatively proposed writing a footnote in the brief in Chinese, certainly a dramatic example of artistic lawyering.

Other lawyers-as-artists have moved the law along as legal com-

unless they can think clearly, unless they can recognize and construct a convincing legal argument—unless, in other words, they understand the structure of law.” Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599, 621 (1986).

38. 208 U.S. 412 (1908).

39. Similarly, Thurgood Marshall’s brief in *Brown v. Board of Education*, 347 U.S. 483 (1954) used psychological data to attack segregation and the amicus brief filed by a pro-choice group in the recent abortion case, *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), related stories of women who had had abortions in order to support its position that women should retain control over their own bodies.

Not all lawyer-artists are well known. See, Salerno, *The Toxic World of Allan Kanner*, 75 A.B.A. J. 58 (July 1989). The late Judge Robert Vance of the Eleventh Circuit described his former law clerk: “Kanner’s sort of like a shooting star. . . . He flashes in every direction, but he has a brilliant mind. He capable of original thought. Now hear what I’m saying: He is capable of absolutely original thought. There’s not one person in a thousand you can say that about.” *Id.*

40. 414 U.S. 563 (1974).

mentators. All academics have their favorite ground-breaking article.⁴¹ Even law students have participated. Ms. Naomi Sheiner as a student at Fordham Law School⁴² drafted a law review note proposing a revolutionary method for allocating loss in the toxic tort case.⁴³ Justice Mosk and a majority of the California Supreme Court found her market share liability theory meritorious⁴⁴ and many other courts followed suit.⁴⁵ She changed the direction of the law.

Judges too, can be artists—Cardozo, Traynor, Douglas⁴⁶, to name a few. Their thoughtful writing challenged their generation of lawyers. Lawyers-as-artists working as practitioners, scholars and judges may not always find the right answers, but they search for them in new and creative ways. They reach out beyond traditional notions of law and policy to move the law to better serve society.

As suggested above, it may not be possible—or even wise—for law schools to train lawyers-as-artists. Dean Soia Mentschikoff thought otherwise. In her Robert S. Marx Lecture delivered at the University of Cincinnati College of Law in 1981, Dean Mentschikoff called on law schools to train artists of the law. “There are three necessary ingredients to the study of law as a liberal art: technical competency; intellectual integrity . . . ; and the spiritual aspect, or the quest of the art for service and beauty.”⁴⁷ She recognized that it would not be simple for law schools to achieve this goal; “Neither rainbows nor the pot of gold

41. My personal choice is a paper written by Dean Harry Shulman of Yale Law School, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955), which explained for the first time the proper function of labor arbitration, my field of interest. Again Louis Brandeis must be ranked high based on his article co-authored work with Dean Samuel D. Warren that first described a right of privacy protected against tortious invasion: *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

42. Ms. Sheiner is now an Assistant United States Attorney in New York City.

43. Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978).

44. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

45. See generally Rabin, *Environmental Liability and the Tort System*, 24 HOUS. L. REV. 27 (1987).

46. My selection of judge-artists reveal personal preferences. I would add Judge Frank M. Coffin of the First Circuit, for whom I clerked. Judge Coffin is an artist both in his opinions and in his workshop. His creative spirit has energized a generation of clerks. Some might also argue with justification that Judge Richard Posner and other judicial adherents to the law-and-economic school should be added to the list. Their greatest impact on the development of the law lies ahead.

47. Mentschikoff & Stotsky, *Law—The Last of the Universal Disciplines*, 54 U. CIN. L. REV. 695, 742 (1986).

can be obtained, nor would be worth the having if it were. But the search is good."⁴⁸ Hers was a glorious vision.⁴⁹

V. Conclusion

Lawyers and artists are different kinds of people, but a lawyer with an artist's vision may succeed in driving the legal system forward when a good craftsperson lawyer would not. Legal education trains traditional practitioners to pursue the calling, and it must continue to do so. Without the cadre of competent, dependable professionals, the legal system would fail to serve its important structural functions. But we must also maintain an educational environment where some few lawyers can become artists of the law. The lawyer-as-artist serves an essential function within our profession, to rethink those principles we have come to see as fixed and immutable and to reshape the ways of the practice.

Art is human creativity and the law serves as its protector, as this fine Symposium demonstrates. Without law, art cannot perform its purpose to help us rejoice in the human spirit and expand the boundaries of our perceptions. The best lawyer-craftspersons allow the law to serve as an effective guidepost for peaceful human interaction, and, in turn, allow the artist to humanize us all.

48. *Id.* at 744-45.

49. Recently, there has been a corresponding call from Professor Carol Becker of the School of the Art Institute of Chicago to improve art students' analytic skills. Becker, *Art Students Require a Truly Rigorous Core Curriculum, to Help them Develop Intellectually as Well as Artistically*, 35 CHRON. HIGH. EDUC., June 21, 1989, at B1.