The Terrible Bind of the Lawyer in the Modern World:
The Problem of Hope, the Question of Identity, and the Recovery of Meaning in the Practice of Law

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INTRODUCTION: TAKING LAWYER DISSATISFACTION SERIOUSLY

Lawyers today are bombarded with sobering descriptions of widespread malaise, dissatisfaction, and downright unhappiness in the practice of law. These assessments have come from both legal practitioners1 as well as legal scholars.2 They are writing about the

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2 See, e.g., MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994). Other law professors who have recently written on the crisis in the legal profession include: ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993), and JOSEPH G. ALLEGRETTI, J.D., M.Div., THE LAWYER’S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE (1996). Both Professor Kronman and Professor Allegretti describe the crisis as “spiritual” in character. KRONMAN, supra at 2; ALLEGRETTI, supra at 3. “Spiritual” has become a term to describe the contemporary malaise, ennui, and yearnings experienced by many in the midst of modern life. Many people describe themselves as “spiritual” but not “religious.” The problem is that “spiritual” as used today is a vague and often ill-defined term, which makes it difficult to know what people mean when they say they are, e.g., “working on their spirituality.” In referring to the crisis as “spiritual,” Kronman and Allegretti seem to reflect the current aversion to the term “religious” in favor of “spiritual.” Without denying the problems the term “religious” has for many people, it must be noted that the term “spiritual” raises its own set of problems. Consider, e.g., the different ways in which Kronman and Allegretti employ the term. Kronman says: “This crisis [in which the American legal profession is now caught] is, in essence, a crisis of morale. It is the product of growing doubts about the capacity of a lawyer’s life to offer fulfillment to the person who takes it up. Disguised by the material well-being of lawyers, it is a spiritual crisis that strikes at the heart of their professional pride.” KRONMAN, supra, at 2 (emphasis omitted).
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"crisis in the legal profession"—a profession in which "American lawyers, wealthier and more powerful than their counterparts anywhere else in the world, are in the grip of a great sadness,"^3 facing a "crisis

added). Note the absence of any "religious" characterization of this "spiritual crisis" and the apparent identification of it with an egoistic sense of satisfaction in the work of the lawyer for its own sake. Allegretti, by way of contrast, writes as one located within and determined by the Christian tradition when he says,

[m]ost discussions of the current state of the profession, however, take for granted the separation of law from the religious and spiritual side of life. Like my friends and acquaintances, critics of the profession treat it as a separate and autonomous sphere, without ties to the lawyer's deepest values and commitments. Yet by doing so they contribute to the rigid compartmentalization of life which, ironically, lies at the root of many of the problems they decry . . . . Let me be clear: At its core the legal profession faces not so much a crisis of ethics, or commercialization, or public relations, but a spiritual crisis. Lawyers and the profession have lost their way.

ALLEGRETTI, supra, at 3 (emphasis in original). While Allegretti goes on to say that Kronman is making a "similar point" to the one Allegretti has just made in the language quoted here, id., it is very clear that for Allegretti the ground of the values and commitments he speaks of as having been lost are religious in character, although he insists they need not be specifically Christian. ALLEGRETTI, supra, at 4-5. Kronman makes no such claim within his study. This all raises the question of whether the term "spiritual" can be the rubric under which the "crisis in the legal profession" is discussed by both those who hold a religiously grounded worldview and those who hold a worldview not so grounded. In simple terms: are all of the commentators really talking about the same thing, and can they talk with each other about what it is that troubles them about the practice of law at the end of the Twentieth Century?

^3 GLENDON, supra note 2, at 14. Everywhere and at all times, questions and harsh judgments have been hurled at lawyers. Contemporary critiques of the legal profession often include old questions about the way lawyers operate within the adversary system, especially within the criminal justice system, the way lawyers parse words in making arguments, the contingent fee structure in personal injury cases, and, for at least the last twenty-five years, questions about the practices of lawyers in the halls of government. While the Watergate scandal during the Nixon Administration was marked by the prominent role of many lawyers in the scandal, it cannot be blamed for all of the critical commentary on lawyers that has emerged over the past twenty-five years. Nevertheless, Watergate certainly stimulated much of the criticism as well as a major reassessment of the professional ethical standards for lawyers by the American Bar Association. Indeed, with respect to this latter phenomenon, the reverberations of Watergate continue to the present day. For a sampling of the critical commentary over the last 25 years, consider the following: Roger C. Cramton, The Ordinary Religion of the Law School Classroom, 29 J. LEGAL EDUC. 247 (1978); Peter D'Errico, "The Law is Terror Put Into Words: A Humanist's Analysis of the Increasing Separation Between Concerns of Law and Concerns of Justice, LEARNING AND THE LAW, Fall 1975, at 38; Jerold S. Auerbach, What Has the Teaching of Law to Do With Justice, 53 N.Y.U. L. REV. 457 (1978); Jerold S. Auerbach, A Plague of Lawyers, HARPER'S, October 1976, at 37; Sanford Levinson, The Secular Morality of the Law, HARPER'S, May 1977, at 35; Andrew Hacker, The Shame of Professional Schools, HARPER'S, October 1981, at 22, 26-28; For a popular, pre-Watergate critique of lawyers, see MURRAY TEIGH BLOOM, THE TROUBLE WITH LAWYERS (1968). For a well-regarded study of lawyers, see MARTIN MAYER, THE LAWYERS (1966).
of morale,"\(^4\) inhabiting a profession "betrayed" by the leaders of that profession.\(^5\) Many articles in bar association publications and law reviews now speak about such phenomena as the "tyranny of the billable hour," long work hours leading to loss of personal life, and declining loyalty between lawyers within firms that often split or downsize with severe dislocation to the members and associates of those firms. In the face of these dreary assessments of law practice, is it any wonder that studies have shown that the rates of depression,\(^6\) substance abuse,\(^7\) alienation,\(^8\) isolation\(^9\), and dissatisfaction in work\(^10\) run high among lawyers?\(^11\)

Many suggestions have been made to address these problems. Some of these are old, and some are new. Among the older approaches are well established programs that address problems of chemical dependency among lawyers. Thus, for example, in Minnesota, an organization of volunteer lawyers known as "Lawyers Concerned for Lawyers" has worked to assist and secure the well being of other lawyers caught in the grip of substance abuse and addiction for twenty-five years.\(^11\) Among the newer approaches there is a heavy emphasis on dealing with a host of issues related to stress in the practice of law. This can include work with the older approaches that address chemical dependency, but they also branch out into a wide range of career counseling issues such as alternative career paths both within as well as outside traditional legal practice. Thus, for example, the "Life and the Law" Committee of the Minnesota State Bar Association was formed in 1995 to address stress related issues in the practice of law. In addition to forums and workshops, the Life and the Law Committee has developed a web site with articles on stress management and links to other web based resources.\(^12\) Beyond these efforts, individual law firms strive to deal with the criticism that the

\(^{4}\) KRONMAN, supra note 2, at 2.

\(^{5}\) LINOWITZ, supra note 1.

\(^{6}\) See, e.g., studies cited in GLENDON, supra note 2, at 87-91; SELLS, supra note 1, at 99-100.

\(^{7}\) See, e.g., GLENDON, supra note 2, at 87-91; SELLS, supra note 1, at 99-100.

\(^{8}\) See, e.g., GLENDON, supra note 2, at 87-91; SELLS, supra note 1, at 99-100.

\(^{9}\) See, e.g., GLENDON, supra note 2, at 87-91; SELLS, supra note 1, at 99-100.

\(^{10}\) See, e.g., GLENDON, supra note 2, at 87-91; SELLS, supra note 1, at 99-100.


law firm culture is indifferent and inhospitable to the well being of their young associates, still lawyers in training. Such firms have sought out feedback from their associates, many of whom are striving under severe financial pressures brought on by the high cost of their college and law school education.\textsuperscript{13}

Management of stress in lawyers' lives, the newer modality, as well as helping lawyers face chemical dependency and depression, the older modality, are worthy initiatives within the bar to address elements of dissatisfaction among lawyers, but they are not enough. These initiatives need to be augmented by efforts to delve deeper into lawyers' lives to uncover and confront a deep problem of purpose and meaning often hidden beneath the discussions of the now widely reported phenomena of dissatisfaction. Beneath the surface of discontent and dissatisfaction, at its core, the crisis in the legal profession is a crisis of vocational identity that emerges when lawyers try to answer an increasingly difficult question: \textit{Who do you claim you are when you tell someone else that you are a lawyer?} Confronting this question seriously reveals that lawyers are in a "terrible bind" often experienced as a conflict of loyalties.\textsuperscript{14} This bind arises from four interlocking dilemmas that lawyers encounter in the study and practice of law. In this essay, I describe these dilemmas and the difficulties they pose for those lawyers who seek to practice law with a sense of purpose and meaning that can be the source of deep satisfaction. I then encourage exploration of the steps that might be taken to recover hope for securing such satisfaction in the practice of law. In Part I, I describe what it means to pose the problem of lawyer dissatisfaction as a problem of meaning. Part II, the main body of the essay, is devoted to a description of four interlocking dilemmas that together pose the problem of meaning for the lawyers in the midst of the lawyer's activity as lawyer. These dilemmas each threaten the lawyer with a particular form of tyranny that can trap the lawyer in a frame of reference that imprisons the lawyer in the practice of law. In Part III, I suggest two steps that might be taken in an effort to break out of the terrible bind that lawyers face in confronting these dilemmas.

\textsuperscript{13} One example is the effort by a leading Minneapolis law firm to survey the young associates in the firm in order to develop a mentoring program that would lead to a higher rate of retention than what has been experienced in recent years. Telephone interview with Byron Starns, partner, Leonard, Street & Dienard, Minneapolis, Minnesota (Oct. 31, 2001).

\textsuperscript{14} I am indebted to Douglas Sturm for this phrase. Douglas Sturm, \textit{Lawyering and the Need for a Public Philosophy}, CHRISTIAN LEG. SOCY. Q., Winter 1981, at 12.
I. BENEATH THE SURFACE MALAISE: THE QUESTION OF VOCATIONAL IDENTITY AND THE PROBLEM OF HOPE IN THE PRACTICE OF LAW—WHO DO YOU CLAIM YOU ARE WHEN YOU TELL SOMEONE ELSE THAT YOU ARE A LAWYER? WHY PRACTICE?

In its most simple form, the crisis in the legal profession comes down to this question: "Why practice?"\textsuperscript{15} In this brief form, the vocational identity question raises the issues of purpose and meaning on very personal terms for individuals engaged in the practice of law. Answers to this question capable of sustaining a commitment to the practice of law, other than as a means to a livelihood, have become increasingly elusive, and there is sadness everywhere. Most often the sadness of lawyers can be found on the margins of practice, in informal conversations around the water cooler in law offices and faculty lounges across the land, rather than in the midst of the professional activity of lawyers. Sometimes it breaks out in more explicit form when the pain becomes more than one can bear. When that happens, the loss of faith in one’s work is complete and often leads to an exit from the profession.\textsuperscript{16}

At a deep level, the “crisis” is accompanied by a sense of deep loss—loss of meaning about the significance of the lawyer’s work accompanied by loss of hope about the possibilities of law to secure the common good. Lawyers with a commitment to seek justice in service of the public good through their chosen vocation face great difficulties in being faithful to their commitment today. Many students enter law school with such a commitment but find that, on entering the “real world of law practice,” it is difficult to maintain a sense of purpose in their work that is congruent with their commitment to serve the public good. For those who once had a clear sense of purpose about their work, the inability to pursue it for a variety of reasons becomes an occasion of grief and disenchantment in the face of the enormous commitment of time, energy and spirit needed to study and pursue a career in legal practice.\textsuperscript{17}

The reasons for the perceived impossibility of living a congruent

\textsuperscript{15} The judge’s version of the question is “Why judge?” and the teacher’s is “Why teach?”

\textsuperscript{16} See, GLENDON, supra note 2, at 87-91 (describing the high rate of dissatisfaction among women and the significant dissatisfaction among young lawyers in general).

\textsuperscript{17} The idealism of students who choose to go to law school begins to fade relatively early in their law school studies. See, e.g., ROBERT V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL 12-35 (1989).
life in the practice of law are as many and varied as the practitioners who face the crisis in the legal profession. A few patterns, however, stand out. Many lawyers in successful firms contemplate the possibility of moving to another setting. Enough lawyers now contemplate this possibility that it has given rise to a profession of vocational counselors who work with seasoned lawyers searching for alternative settings in which to pursue their profession. Financially successful lawyers considering such a prospect, however, may well come to see that the possibility of moving to a different setting to pursue that purpose is compromised by the “golden handcuffs” acquired through several years of practice. The prospect of moving to a different setting, in which there is a substantial economic risk associated with such a move or in which the economic rewards are not as great, poses serious problems for those lawyers who have become habituated to a lifestyle and familial responsibilities that are supported by a large income.

Other lawyers, having become so habituated to serving client interest without a larger vision of the significance of their work, have lost sight of any sense of larger purpose than to serve the client. For them the answer to the vocational identity quest—Who do you claim you are when you tell someone you are a lawyer?—is answered by the reality that they are what they do—a servant doing the bidding of their clients. For such lawyers, the noble faithfulness of the lawyer to seek justice in the service of the public good has developed into an all consuming client loyalty devoid of any public significance. In their case they have simply lost sight of the value and purpose in law and its practice that they once had.

Lawyers in this situation are at the brink of losing any sense of worth in what they are so deeply engaged in doing day by day. In certain extreme cases, such lawyers may simply have become habituated to and adopted a “Rambo litigator” persona whose sole mission and purpose in life is as an expression of total unreflective embodiment of their client’s every wish. In such cases a lawyer’s sense of client loyalty has become so central that the lawyer is no more than an extension of the client. Such a lawyer has no grounded sense of self save for willing allegiance to the client as tyrant, and is unmoved by

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18 This is one of the continuing foci of activity by lawyers engaged in the activities of the Minnesota Life and the Law Committee. See Minnesota Life and the Law Committee, supra note 12.
19 Mary Ann Glendon describes the “Rambo litigator” as an extreme and aberrant version of the lawyer who is committed to client well-being, but in the case of “Rambo” has given up any sense of obligation to the larger community as an aspect of the lawyer’s role and responsibility. GLENDON, supra note 2, at 51, 74-78.
any sense of worth of practice that might be rooted in a larger sense of community well-being that includes the client as well as those with whom the client may be in conflict. With the emergence of the high visibility of the Rambo litigator in public settings as well as in popular commercial television programs and the cable television channel “Court TV,” devoted to bringing court proceedings into the home, it is no wonder that many lawyers have begun to explore moving into various forms of alternative dispute resolution (ADR) in an effort to address the problem of conflict resolution in non-litigious ways.20 Despite the enormous growth in the ADR phenomenon over the past twenty-five years, however, signs are beginning to appear suggesting that lawyers entering this field are unable to shake their litigious personas. For example, an enormous controversy has arisen about the ethics and appropriate role of mediators, including the question of whether lawyers are suited for such work.21

In short, for many lawyers, what once was seen as a vocation worthy of their commitment to serve the public good has become a demanding job without a sense of purpose. For many practitioners, the practice of law has become unmoored from any animating purpose that might serve justice and has been transformed into a set of instrumental practices that are for sale to the highest bidder.22

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20 For an introductory overview of this history, see, e.g., Carrie Menkel-Meadow, Symposium on Alternative Dispute Resolution: Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR, 44 UCLA L. REV. 1613 (1997). For a classic article calling for community-based approaches to criminal justice as a different approach to conflict resolution, see Richard Danzig, Toward the Creation of a Complementary, Decentralized System of Criminal Justice, 26 STAN. L. REV. 1 (1973). Danzig’s article was one of several critiques of the adversarial system raised in the 1970’s, which stimulated a variety of initiatives to develop alternative approaches to the handling of business, family and other sorts of civil disputes. A best selling book on principled negotiation, emphasizing the possibility of mutual gain in negotiation, ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991), added impetus to the emerging ADR movement. This book, written by two Harvard professors and first published in 1981, had, by the end of the twentieth century, sold over two million copies in eighteen languages. Menkel-Meadow, supra, at 1616 n.14. Over the past 30 years, ADR has become a significant feature of the curriculum of several law schools. It has also been warmly received by the courts in several states. In Minnesota, for example, parties to a civil lawsuit are required to attempt to resolve their dispute through ADR processes. Minn. Gen. Prac. Rule 114.01 (2000). This rule does not apply in cases of domestic abuse. Id.; Minn. Gen. Prac. Rule 210.01 (2000).


22 For an enduring discussion of how legal education plays into this problem, see
The situation in the legal academy poses its own peculiar difficulties for those lawyers who practice the profession of law by teaching the future members of the profession. For many in the academy, the day-to-day experience of being engaged in teaching future members of the profession poses a crisis of meaning. This crisis is a product, in large measure, of the "critical turn" in legal scholarship that emerged in the twentieth century. In the early years of the century the critical turn was expressed in the "rule skepticism" of the American Legal Realists. This raised serious questions about whether one could account for judicial decisions by a recourse to hard, objective rules. These questions and the anxiety they produced among lawyers and practitioners was identified with Benjamin Cardozo by Grant Gilmore. Cardozo acknowledged that, in his work as a judge, he was guided by more than the rules of the past in reaching decisions, and that this phenomenon was an enduring feature of the judicial role. Cardozo embraced judicial creativity within a commitment to precedent as an important dimension of the judicial decision-making task. The creativity and anxiety Gilmore saw in Cardozo is captured in a famous passage from Cardozo's 1921 Storrs Lectures:

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice


See GRANT GILMORE, THE AGES OF AMERICAN LAW (1977). The "critical turn" in legal scholarship, which began in earnest at the beginning of the twentieth century, was first expressed in the challenge to the "legal formalism" of the last half of the nineteenth century. Id. This ripened in the rule skepticism of the Realists of the 1920's and 1930's. Id. In the 1970's, the more radical strand of the Realist scholarship was deepened and extended by the work of the scholars associated with the Conference on Critical Legal Studies (CLS). Id. For a discussion of "The Age of Anxiety," see id. at 68-98. For an extension of this discussion down to the end of the twentieth century, focused especially on the work of CLS and related movements in legal scholarship, see GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1993).

GILMORE, supra note 23 at 76-77.


CARDOZO, supra note 25. For examples of Cardozo's use of precedent to reach what for many were surprising results ushering in changes in the common law of New York and instrumental in other jurisdictions, see Allegheny College v. National Chautauqua County Bank, 246 N.Y. 369 (1927), Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239 (1921), and MacPherson v Buick Motor Co., 217 N.Y. 382 (1916). GILMORE, supra note 23 at n.18.
that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.  

As time went along, for some scholars it became increasingly doubtful that rules bound judges, and many decisions came to be seen as the product of policy choices by those same judges—a task usually associated with the legislature. By the end of the century, the crisis over objectivity in law had intensified for those scholars associated with the Conference on Critical Legal Studies (CLS) who were influenced by the radical stream of the earlier critiques. Where Cardozo and others had come to acknowledge that judicial decision-making involved some measure of choice not constrained by rules, the core of the more radical critique of the CLS scholars, in its most fully developed form, claimed that judicial decision-making was almost entirely a matter of choice guided by the normative commitments of the judge. The rules were thus an expression of choice more than they were a constraint on choice by judges. The heart of this critique is its deconstructive approach to all theoretical syntheses of law. Here the persistent central claim that "law is politics" undermines the conventional view of law as the embodiment of objective, disinterested reason. In the face of this critique, many academic lawyers find that any attempt to construct a theory of law that might aid in recovering a sense of the lawyer's vocation as one pursued in service of the public good is doomed to fail because agreement about first principles for grounding such a theory can no longer be reached. In the current intellectual situation in the legal academy there is evidence of scholarly anguish that borders on despair.

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27 Cardozo, supra note 25 at 166-67 (emphasis added).
The foregoing observations have focused on individual practitioners in the profession, whether they are involved in ordinary practice or legal education. This might suggest that the crisis in the legal profession is a purely private crisis faced by individuals. The emphasis on the crisis as one of vocational identity can suggest as much. But that is far from the truth of the matter when one considers that vocation, and vocational identity, has little meaning outside of a social and cultural context. Once this is recognized, one can see that there is an important public, as well as private, dimension to the crisis of vocational identity. Because law, unlike soil, blood, or class, has played such a central role in maintaining the bonds of community in American society, the current crisis bears great importance for the prospects of securing justice in America’s third century. Where the citizens of the young republic once looked to law as an important activity in their search for a “more perfect union,” today the possibilities of law to play a meaningful role in that quest are increasingly called into question. Where once there were high hopes associated with law, today there are profound doubts. The high hopes were for securing justice under a “government of the people, by the people, for the people.” The profound doubts are about the fading possibilities of law as an enterprise capable of securing justice more widely shared in human communities. All of this points to the core of the crisis in the legal profession as a crisis of faith in the possibilities of law to secure the common good and a sense of satisfaction in the lives of lawyers engaged in the effort to secure the common good.

II. THE TERRIBLE BIND OF THE LAWYER: FOUR INTERLOCKING DILEMMAS FACING LAWYERS TODAY–THE EXPERIENCE OF LOYALTY CONFLICT IN THE LIFE OF LAWYERS

The question of vocational identity–Who do you claim you are when

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30 The centrality of law is best described by Alexis de Tocqueville, who wrote that, “[t]he law is that political question which arises in the United States that is not resolved, sooner or later, by a judicial question.” 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley ed., Alfred A. Knopf 1945).
31 U.S. CONST. pmb.
33 For a powerful set of nine stories about individuals’ experiences with law that raise serious questions about whether law can serve justice, see LAW STORIES (Gary Bellow & Martha Minow eds., 1996). For a set of stories about lawyers that describes how several lawyers have committed their work lives to the quest for justice, see MILNER S. BALL, THE WORD AND THE LAW 150-164 (1993).
you tell someone else that you are a lawyer?—has become increasingly difficult to answer at the end of the twentieth century. Lawyers addressing this question face four interlocking dilemmas in their education, practice and lives. Each of these dilemmas poses a loyalty conflict that contributes to the problem of vocational identity among lawyers. They may be briefly described as follows: (1) Lawyers are called upon to serve two masters at once: a public demand for justice and the personal desires of a private client; (2) Lawyers are called upon to practice a rigorous discipline devoted to securing meaning, while being willing to do without meaning; (3) Lawyers are called to learn how to think like a lawyer in a way that invites loss of self in the law school classroom; and, (4) Lawyers are called to live a life of public service in an age marked by deep dissensus about shared meanings and purpose in public life, which has been compounded by the impact of the deconstructive approaches to law and legal theory. These dilemmas begin to arise the moment law students enter law school to begin their studies and they continue on into their everyday lives as practitioners long after they have left law school. Together they place the lawyer in a “terrible bind” of difficult loyalty conflicts that can lead to the loss of a sense of purpose and meaning in the lawyer’s work. A critical tour of these dilemmas will make the “terrible bind of the lawyer” plain, and open up the possibilities for discussing the steps that might be taken in an effort to recover a sense of purpose and hope in the practice of law, a sense of the lawyer’s vocation worthy of the lawyer’s commitment.

A. The First Dilemma: Serving Clients or Serving Justice—The Tyranny of Client Loyalty

Lawyers face an irresolvable dilemma representing private clients that puts them in a position of great tension in everyday practice. It is the “terrible bind” that comes from being called upon to serve two masters at once: a public demand for justice and the personal desires of a private client. When these two interests are not the same, the dilemma is at its most serious.

The lawyer’s predicament has a public and a private side. On the public side, Douglas Sturm describes the predicament as resulting from the two-fold role that lawyers play in society. On the one hand, notes Sturm, lawyers are technical experts, trained in legal systems so that they may work on behalf of the interests of their clients. On the other hand, they are officers of the court and, as such, are

34 Sturm, supra note 14, at 12.
35 Id.
"ministers of justice and are to see that justice is done."\textsuperscript{36} The dilemma is that "[v]isions of justice and interests of clients . . . are not always the same."\textsuperscript{37} In cases of conflict, Sturm argues, the lawyer can not rely on some "invisible hand" behind the legal system to secure the larger vision of justice.\textsuperscript{38} Contrary to what some lawyers claim, it is not always clear that placing loyalty to one's client as a value above all else resolves such dilemmas. Indeed, the lawyer's decision to accept or reject a client may well be where the problem begins.

This bind of the lawyer is as old as the practice of law; but in our own time, Sturm notes, the bind has become especially terrible.\textsuperscript{39} We face deep crises of social, economic, and ecological character that raise the stakes.\textsuperscript{40} These crises, Sturm argues, are all "law-related."\textsuperscript{41} They exacerbate "the terrible bind of the lawyer,"\textsuperscript{42} and the law seems impotent to address them. Indeed, the law may serve to perpetuate them, by establishing a lawful tyranny rather than securing a measure of justice. In our work as lawyers, we seem unable to discern the content of justice. The justice we do serve is often merely procedural. In the face of this realization, lawyers must seriously consider admitting that we have lost our nerve to even attempt a definition of substantive justice beyond mere platitudes that call us to trust blindly that the existence of legal rules will provide it. The tyranny of client loyalty not only tempts the lawyer into abandoning the cause of justice, but also threatens the lawyer's personal sense of meaning, as the next dilemma makes clear.

Sorting out this old loyalty conflict between the public demand for justice and the personal desires of the private client has become especially difficult in the modern world as the discussion below of the remaining three dilemmas will illustrate. The increased difficulty comes from the fact that in the modern world meaning itself has become problematic. Thus, the old conflict between community and client is no longer simply a conflict between different conceptions of meaning. It has been compounded by the question of whether it is possible to speak "meaningfully" of meaning itself. This problem is encountered in the practice of legal analysis and argument, the second dilemma, and is first encountered by the student in law school, the third dilemma. As we shall see, all of these dilemmas are rooted

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\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} Sturm, \textit{supra} note 14, at 12.
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
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in and deeply influenced by the deep dilemma of life in the wilderness of the modern world, the fourth dilemma.

B. The Second Dilemma: Practicing the Art of Legal Analysis and Argument with “Scientific” Precision—The Tyranny of Practicing Rigor in the Name of Meaning without Meaning

The second dilemma lawyers face is intimately related to the other three, and in some respects is more personal to the lawyer than the others, even though it has its own public dimension. Lawyers are called upon to practice a rigorous discipline devoted to securing meaning within a set of facts, yet to do so without the hope that their discipline can finally secure the certainty of science, and to do so in a way that makes them personally willing to do without a sense of meaning in their work that goes beyond client loyalty.43 This is evident in the public dissensus in the modern world about serious issues of economic, social, and ecological character. When law addresses such public issues, the difficulty in securing consensus in the public square of political discussion is expressed as a large problem of securing consensus over legal resolution of such problems.

Lawyers are called upon to be “objective” in their advocacy, yet they are dedicated to a practice in which scientific objectivity is always out of reach. Here the bind is that lawyers committed to the hard work of rigorously performing interpretive argument for the purpose of claiming meaning for a legal text, such as a constitution, a statute, or common law precedent, are caught between a practice that sometimes looks and feels like a scientific practice but in fact is ultimately a rhetorical practice.44 This bind stems from the fact that law is more of an art than it is a science, yet lawyers, in their quest for rigor, are constantly striving to secure the impossible—trapped by a vision of law as an objective science.45 In the field of Constitutional Law, for example, the absence of a scholarly consensus concerning interpretive issues, such as “how to interpret the American Constitution?,” is evi-

43 See Part II, supra (client loyalty), and Part I, supra (problem of meaning and vocational identity).

44 The best writing on the rhetorical character of law is that by James Boyd White. See James Boyd White, HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985). The activity of legal argument, understood as rhetorical and constitutive, White says, has three characteristics that mark it as a cultural act for creating community. Id. at 33-35. First, it works empirically with the inherited language. Id. at 33-34. Second, it involves an argument about the terms of the language itself. Id. at 34. Third, it involves an argument about the character of the community in which the language is used. Id.

45 For a beautiful set of essays that portray law as an art, see Charles L. Black, Jr., The Humane Imagination (1986).
dence of the ambiguity that attends legal argument directed at claiming a particular authoritative meaning for a legal text. Today, constitutional scholars are locked in endless debate over "the key question of whether an interpreter can remain separate from an external text and ultimately submit to the reading demanded by the text." This raises profound doubts about the possibility of ever securing a consensus about the objective meaning of the constitutional text.

Beyond these troublesome public dimensions of the lawyer's bind, a deeply personal dimension to these interpretive difficulties needs to be taken into account. This dimension is sympathetically addressed in Joseph Vining's portrayal of the modern lawyer caught on the horns of a complex dilemma. He addresses the public side as one horn of the dilemma in the following words: "Lawyers know that theirs is a discipline not like those which have been at the center of twentieth century thought, but they have great difficulty in saying just what it is."

Thus, although the work of the lawyer is a precise rigorous discipline of analysis and advocacy employing precise categories, it has not succeeded in taking on a scientific caste adopted by many other fields of endeavor during the twentieth century. Rather, like the humanities, it relies on the use of creative imagination.

The second horn of the dilemma Vining describes is personal: "[T]he method central to a lawyer's training, which has much to do with setting them apart and defining who they are, is used to search for meaning; yet . . . lawyers profess to be willing to do without meaning." In commenting on this private aspect of the dilemma, Vining takes note of the personal cost to the lawyer:

Now doing without meaning is a form of despair and carries its own measure of pain. But when a man in despair is sentenced to purposeful action, there is worse pain than dull despair. That is the lawyer's pain. I think it can be alleviated, even if not wholly cured.

Thus, the public dimension of the lawyer's dilemma in attempting to purposefully strive, through legal argument, to secure public meaning for a legal text, brings with it a deeply personal pain of reaching for meaning but knowing that one cannot secure it. As a

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46 INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER xii (Sanford Levinson & Steven Mailloux eds., 1988) (emphasis added).
48 Id.
49 Id.
50 Id. at 3-4.
loyalty conflict, it is the bind of being caught between the drive to secure legal meaning for the client's cause, coupled with the temptation to give up any sense of meaning for one's work beyond that of the client's interest in doing so. Here, the lawyer is trapped by the tyranny of personal meaninglessness in service of securing meaning under law for one's client.

C. The Third Dilemma: Learning to Think Like a Lawyer without Losing Your Self—The Tyranny of the Law School Classroom

The lawyer's terrible bind described in the first two interlocking dilemmas begins at the moment law students undertake their studies. In law school, the quest for objective certainty that marks the spirit of the modern world, as discussed below,\(^{51}\) is the background against which law is taught. In law school, the modern quest for certainty is experienced as a quest for certainty in law through the student's immersion in rule-based study of legal doctrine largely severed from the social and historical context in which that doctrine emerges and to which it speaks. Policy analysis as practiced in such fields as products liability in torts, to be sure, could provide a basis for a more searching exploration of the social and historical context in which law is situated, but the curriculum and approach to teaching continues to focus largely on rule acquisition and manipulation on the part of the students. Very early students become habituated to seeking the law in the black letter rules without giving much attention to social and historical context. Such a narrow understanding of the quest for legal meaning is often based on the assumption that law is independent and objective—expressed in rules—and is not as messy as politics. This stance toward study soon converges with a quest for money, represented by the need to pay for the high cost of legal education, to create a medium well suited to socialize students into cultural isolation and client loyalty.

Thus, the predicament of the lawyer is already formed by the experience of the predicament of the law student. This is the third dilemma, but the first to be experienced by the law student. Law students often go to law school with high hopes of contributing to society,\(^{52}\) only to have them erode in law school.\(^{53}\) Several scholars have

\(^{51}\) See infra text accompanying notes 61-69.

\(^{52}\) See SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION, ABA, LAW SCHOOLS AND PROFESSIONAL EDUCATION: REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION OF THE AMERICAN BAR ASSOCIATION 32 (1980).

\(^{53}\) STOVER, supra note 17. See also the excellent bibliography on the socialization of law students found in LAWYERS: A CRITICAL READER 89 (Richard L. Abel ed., 1997).
addressed the law school setting and its tendency to socialize law students to an instrumentalist view of the law with the consequence of promoting a view of the lawyer as a modern day hired gun operating within a sharply adversarial setting. 54 Roberto Unger provides a particularly compelling description of the psychological terrain of the law school student culture. 55 The situation that the law student finds in law school:

reveals even more unequivocally and immediately than our own or that of our [faculty] colleagues the moral quality of the circumstance we all share. The conjunction of a biographical approach and an intellectual disappointment define for this purpose the predicament of the serious law student.

For him, coming to law school often means putting aside in the name of reality an adolescent fantasy of social reconstruction or intellectual creation. He does not want merely to have a job. He accepts the spiritual authority of that characteristically modern and even modernist ideal: you affirm your worth, in part, by attempting to change some aspect of the established structure of society and culture, and you create your identity by asserting in a tangible way your ability to stand apart from any particular station within that structure. Yet it also seems important to assume a concrete position within social life in order both to find a realistic version of the transformative commitment and to hedge against its failure. With each move forward, however, the opportunities for deviation seem narrower and the risks greater. In exchange for the equation of realism with surrender, the social order promises an endless series of rewards. Nothing seems to justify a refusal of these prizes: the realistic alternatives appear uninspiring, and the inspiring ones unrealistic. The individual who has undertaken this spiritual itinerary cannot easily regain the faith in a world in which justification comes from the good faith performance of well-defined roles, a world in which the system of roles is itself taken as the outward manifestation of an authoritative moral or even cosmic order. Without either that faith or its successful replacement by the idea of a transformative vocation, work appears as a mere practical necessity, robbed of higher significance or effect. Apart from the pleasures of technical intricacy and puzzle solving, it becomes solely a means to material comfort and an incident, if you are lucky, to domestic felicity or personal diversion.

54 Roger Cramton is especially good in describing this in his classic assessment of the “ordinary religion of the law school classroom.” Cramton, supra note 22.
In the law schools themselves, the students are told that they will be taught a forceful method of analysis. This method is meant to be applied to a body of law presented, to a limited but significant degree, as a repository of intelligible purposes, policies, and principles rather than as merely a collection of shaky settlements in a constant war for the favors of government. Yet the real message of the curriculum is the denial of all this—the message made explicit in our critique of formalism and objectivism. This implicit lesson differs from our explicit one by its cynical negativity. It teaches that a mixture of low-level skills and high-grade sophistic techniques of argumentative manipulation is all there is—all there is and can be—to legal analysis and, by implication, to the many methods by which professional expertise influences the exercise of state power.

The biographical approach and the intellectual insinuation have the same moral effect upon students and teachers alike. They flatter vanity the better to injure self-respect, and pump up their victims only to render them more pliable. Their shared lesson is that the order of thought and society is contingent and yet for all practical purposes untransformable. They preach an inward distance from a reality whose yoke, according to them, cannot be broken. They distract people by enticing them into the absurd attempt to arrange themselves into a hierarchy of smart alecks.\footnote{Id.}

The culture and the psychological impact on law students described by Unger is nurtured daily by the practice of analysis and argument modeled by law professors in their classrooms. Legal education, for the most part, is a rigorous and unreflective habitation of law students to reading legal texts in order to make something of them as authoritative precedent for adjudication of disputes in a present fact situation, which is different than the fact situations found in the authoritative texts relied on in making an argument. Thus, students very quickly focus their attention narrowly on rule acquisition and application out of context. They exhibit behavior which I call "mainlining on the lawyer's heroin"—doctrinal argument based on rules from past decisions. The method used to habituate students to this practice is often called "Socratic," but it is far from anything Socrates ever did in the Dialogues of Plato. It is not Socratic, for often the questioning presumes an answer or a range of answers. Neither is it science, although it was once thought to be such.\footnote{Id.} It is not even so-
cial science, although, again some have claimed it to be.\textsuperscript{58} Rather, it is more like an art which employs the craft of interpretive argument.\textsuperscript{59} It is close to, if not completely defined by, the phrase \textit{applied rhetoric}.

There is a basic tension in law expressed in an irreducible indeterminacy in both its nature and practice. The tension is seen when we look for the deepest presuppositions behind the study of law. These presuppositions are so deep, and so "foundational," that they are rarely if ever spoken of. Yet, the practice of discussion in the classroom roots them deeply into the consciousness of the law student from the very first day. Three bear mentioning. One is normative; the other two are descriptive but depend upon the normative assumption. The first is that "like cases are to be decided alike." Hence, the rise of precedent as the touchstone for authority. This is the core normative presupposition of the Anglo-American legal system. The second is that no two cases are identical. The third is that adjudication of disputes is understood as independent and objective within a tradition marked by instability and change. Thus, the law has a growing edge that flows out of rigorous practice marked by indeterminacy. As much as the precedent of the past may be called on to guide and determine the present, the rules are always in danger of being ruptured and replaced or reformed in response to the encounter with difference. Those who demand rigid stability see this as a threat, while those who yearn for something more from law than what it has given in the past, see this as an opportunity. The central question in this setting, and for this work, is this: What change is valid?

In the early days of law school, students may strive mightily to find the answer to this question in the various forms in which it is presented—as hypothetical after hypothetical taken up in the classroom. Eventually, when they have had enough trials of this sort, they are likely, when called upon to respond to a hypothetical, to begin their answer with the following all purpose response: "It depends?" This response reflects students' acceptance, in their practice of legal analysis and argument, of the assumption that more than one resolution of a legal issue may be offered and rationalized within the lan-
guage of the law. Thus, in the very practice of legal analysis and argument, the student’s response acknowledges the open texture involved in legal analysis and argument. This open texture is present in two choices that the student instinctively comes to understand. The first is the choice of one rule over others that might be used to analyze a problem and develop an argument. The second is the interpretive task associated with making an argument about the meaning of both the facts of the dispute and the rule which they have chosen to apply to the facts for resolution of the legal issue presented. Thus, when an opportunity is presented to develop a new direction for an existing rule, the question of what legal change is valid presents a choice which will be pursued through interpretive argument about the rule. The interpretive heart of legal argument in which the law student claims a particular meaning for a set of facts, within a claim for a particular meaning of the rule applied to those facts, is thus the source of the problem of discerning what change is valid. In the context of deriving a rule from a line of common law decisions, this gives rise to the debate of whether a particular decision by a particular judge, which embodies a change in the common law, is valid and faithful to precedent. It is this debate which rose to such prominence with the emergence of the “critical turn” in legal scholarship in the twentieth century.60

Thus, the seemingly guarded “it depends” response by a student, although perhaps offered to buy time for thought about the hypothetical posed, is also, and more deeply, an expression of the fact that the student has learned that legal analysis and argument has an open texture that permits a measure of creativity involving choice on the part of the practitioner of such argument. The guarded character of the student’s response is evidence of the student’s understanding that a hard objective answer to the legal issue posed by the hypothetical does not exist, coupled with the realization that solid supporting reasons for the student’s proposed legal resolution of the hypothetical will not be good enough to convince the teacher. The range of that creativity and choice may differ from hypothetical to hypothetical, but its presence is evidence of a dynamic dimension of law that places the quest for certainty in law always just out of reach.

When that occurs, the students are often well on the way to adopting the role of the lawyer as bound by no more than their future client’s desires. Having begun this move away from a purposeful understanding of law beyond that of the client’s desires, students may begin to find it more difficult to offer a constructive answer to the vo-

60 See discussion supra notes 23-28 and accompanying text, and infra Part II.D.
cational identity question than they did before arriving in law school. Before we consider how a constructive response to the vocational identity question might be attempted, we turn to a further consideration of the dilemma posed by the rise of the deconstructive impulse in contemporary scholarship. This will involve taking up the modern quest for certainty, which provides the background for the dilemma students encounter when they begin their studies.

D. The Fourth Dilemma: Finding a Way Without a Map in the Wilderness of Modern Life—The Tyranny of Cultural Dissensus

One of the most significant factors in the difficulties facing modern lawyers is that they are practicing in the modern world. Modernity, as Stephen Toulmin argues, has been marked at its core by a quest for certainty, yet the realization of that quest seems farther from reach than ever before, and has itself become the cause of controversy. Thus, the spirit of the age at the dawn of the twenty-first century is marked by deep dissensus about shared meanings and purpose in public life. Moreover, social meaning is viewed by many, in varying degrees, as a product of social construction. This is the central insight of the postmodern observation that no meaning is had without interpretation, and all interpretation is perspectival.

The expression of this insight in law is powerfully present in the deconstructive approaches to law and legal theory. These have revealed a deep divide within the legal academy over the possibility of saying anything constructive about law as an enterprise for the common good. This powerful critique challenging the traditional understand-

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61 For one of the many discussions of the origins and distinctive character of modernity, see Stephen Toulmin, Cosmopolis: The Hidden Agenda of Modernity (1990). The quest for objective certainty, which is a distinctive feature of modernity, can be expressed as an impulse that is directly questioned by “nonfoundationalism” as a philosophical critique. See, John E. Thiel, Nonfoundationalism 1-37 (1994). This critique is part of the “culture,” “sensibility,” and “thought” of “postmodernity.” See, Paul Lakeland, Postmodernity: Christian Identity in a Fragmented Age 1-38 (1997). For a description and analysis of origins and impact of the postmodern critique in law, which I have referred to as “the critical turn” in legal scholarship, supra notes 23-28 and accompanying text, see Minda, supra note 23.


64 For an excellent treatment of perspectivalism and its meaning for theories of hermeneutics, see Ronald L. Farmer, Beyond the Impasse: The Promise of a Process Hermeneutic (1997).
ing of the rule of law emerged in American legal scholarship during the twentieth century. The critical turn in legal theory has been around for much of the century, but its most recent expression, over the last twenty-five years, has intensified the problem of developing a constructive vision of law and legal practice. At its core, in its most fully developed form, the critique denies the existence of an independent objective foundation for legitimating law that can be discovered through the use of unaided reason. Many voices have participated in the rising chorus of criticism, but at the end of the twentieth century one stands out in particular: The Conference on Critical Legal Studies (CLS). This group of American legal scholars emerged in the mid-1970s as a movement devoted to a deep critique of the standard scholarly work and case law in virtually every field of legal doctrine. The critique took many forms, but shared one important feature, namely, the claim that received legal doctrine was a socially constructed body of rules that served the vested interests in society. The CLS critique undermines the claim of legitimacy for law and raises questions about its possibilities for securing the common good by striking directly at the root premises of conventional theories of law, namely, that law is independent and objective. By attacking these premises, the CLS critique ultimately calls into question all attempts to construct a comprehensive theoretical conception of law. For many lawyers, the work of CLS is deeply unsettling because it challenges the traditional understanding of law as the embodiment of reason capable of restraining the willful exercise of power by the stronger over the weaker. In its persistent and central claim that

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65 MINDA, supra note 23.
66 For extended studies of the origins and character of CLS, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987), and MINDA, supra note 23. For anthologies drawn from the enormous literature produced by CLS, see CRITICAL LEGAL STUDIES (James Boyle ed., 1992); CRITICAL LEGAL STUDIES (Peter Fitzpatrick & Alan Hunt eds., 1987); CRITICAL LEGAL STUDIES (Allan C. Hutchinson ed., 1989); and THE POLITICS OF LAW, supra note 28. For an extensive bibliography of work in CLS, see RICHARD W. BAUMAN, CRITICAL LEGAL STUDIES: A GUIDE TO THE LITERATURE (1996). For criticism of CLS, see ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990).
67 CLS mounts a powerful attack on any theoretical formulations of law that embody an overarching metaphysics. In this respect, the work of CLS is parallel to that of contemporary philosophers such as Richard Rorty, who rule out metaphysics. Mark Tushnet criticizes "Grand Theory" as no longer able to support liberal theories of constitutional law and goes on to offer "little theory" as a compromise. MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 179-87 (1988).
68 Socrates takes the view that justice is represented by the good, not by the will of the stronger, in the dialogue with Thrasymachus found in Book I of THE REPUBLIC OF PLATO para. 350e-354e (Alan Bloom trans., Basic Books 1968). There, Thrasymachus challenges Socrates's view that justice, and therefore law, consists in rendering
"law is politics," CLS asserts that law is simply a form of will, expressed by courts in adjudication, no different in kind than the will expressed by the legislature in legislation.

The unsettling challenge of CLS has provoked intense controversy in the academy. In one sense the intensity of the controversy is born of the "Cartesian Anxiety" described by Richard Bernstein. In giving it this name, Bernstein is pointing to the anxiety raised by the unsuccessful quest for objective certainty in developing the foundations of knowledge which is associated with the work of many philosophers since the time of Descartes. Those who have abandoned the quest, or at least become deeply doubtful about ever being successful, often display a deeply deconstructive theme in their work, and tend to give up on constructive theorizing. Others continue to engage in an effort to reconstruct theory so that it may be firmly grounded on an independent objective foundation. In the midst of their sparring with each other, both the deconstructionists and the reconstructionists display how enthralled they are by the modernist quest for objective certainty. Those who take a different tack, welcoming subjectivity alongside objectivity in their constructive theo-

what is due another. Id. at 7, para. 331e. Thrasy machus advocates the view that justice and law consist only in the declaration and imposition of the will of whoever had the power to make and declare law. Id. at 15, para. 338c. Bound up in this dialogue are many of the features of natural law and legal positivist theory that are also present in the background of contemporary jurisprudence.

Notwithstanding the ascendancy of legal positivism, the work of the scholars associated with CLS is anti-positivist in its insistence that law is politics, and that politics is deeply imbued with value choices. That does not, however, make it a form of natural law theory. Indeed most CLS scholars would take pains, as the Realists did, to separate themselves from, and to attack any claims to universal notions of justice and law.

See, e.g., Mark Tushnet, Critical Legal Studies: An Introduction to its Origins and Underpinnings, 36 J. LEGAL EDUC. 505-07 (1986); The Politics of Law, supra note 28.

Compare this view to that of Socrates and Thrasy machus in The Republic of Plato, supra note 68.


Bernstein coins this term in his discussion of the way in which modern philosophical scholarship is driven by the quest for objectivist foundational principles in the face of fear that radical relativism is what we face if the foundationalist quest fails. Bernstein, supra note 63, at 16-20.
retical efforts, satisfy neither the deconstructionists nor the reconstructionists, wedded as they both are to the quest for objective certainty. In the face of this situation, none of the responses provides a satisfying defense against the CLS critique. For some, the difficulty in securing an objectivist foundation has led them to turn away from the quest and turn toward descriptive understandings of the rhetorical character of legal argument.\(^\text{73}\) For others, anxiety has turned into something deeper about the possibilities of law to secure justice.\(^\text{74}\) The theoretical impotence of constructive efforts in the face of the CLS critique calls into question whether law can be defended as an instrument capable of producing justice. Like “all the King’s horses, and all the King’s men” who “couldn’t put Humpty Dumpty [together] again,”\(^\text{75}\) those who would reconstruct a theory of law on the old foundations are tragic figures, for although they seek justice, they have been rendered victims of the critique before they even begin their work.\(^\text{76}\)

In sum, the challenge of contemporary deconstructive legal scholarship to law is the assertion that law is neither independent nor objective. Rather, it is a form of politics incapable of restraining will. To say this is to say that law is not the embodiment of reason that legal modernism takes it to be.

One prominent feature of the critique is its emphasis on indeterminacy in legal interpretation as revealed in the practice of argument in the law school classroom described earlier.\(^\text{77}\) This raises a

\(^{73}\) See, e.g., INTERPRETING LAW AND LITERATURE, supra note 46 (describing the situation in constitutional interpretive scholarship).

\(^{74}\) Arthur Leff, quoted infra note 80, is a dramatic example of this theme. Another example is Mark Tushnet, the leading critical constitutional scholar, who ends his 318 page critical analysis of constitutional law with these words: “[c]ritique is all there is.” TUSHNET, supra note 67, at 318.

\(^{75}\) LEWIS CARROLL, ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS 291 (Grosset & Dunlap 1946).

\(^{76}\) For some the situation was characterized as one covered with a pathos that bordered on bathos. In the closing words of his influential essay in the emergence of CLS, Roberto Unger remarks that “[t]he legal academy that we entered dallied in one more variant of the perennial effort to restate power and preconception as right . . . . [T]hey were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars.” UNGER, supra note 55, at 119. This oft-quoted comment appears in a revised and expanded version of a talk given at the Sixth Annual Conference on Critical Legal Studies held at the Harvard Law School in 1982. Needless to say, Unger’s comments were taken as an offense by some. Recent evidence of this may be found in Mary Ann Glendon’s critical off-hand characterization of “late-twentieth-century American legal theory” embracing the deconstructive impulse as a “carnival” and her largely dismissive commentary on the scholarship of “The New Academy.” GLENDON, supra note 2, at 190, 199-229.

\(^{77}\) Supra text accompanying notes 60-61.
deep question of what "faithfulness" means in the practice of law. This question emerges especially in the context of critical evaluation of judicial behavior. In the face of the assumption that precedent in the common law, and text plus precedent in constitutional law, constrains judicial decision-making, the indeterminacy critique opens up precedent and constitutional text to creative argument and interpretation. Depending upon one's view of the exercise of creativity in decision-making that results, the behavior of a judge may be criticized as "faithful" or "faithless" to precedent and the text. The same analysis, of course, can apply to a critical evaluation of the argument of a lawyer who works creatively with precedent and legal text in argument before a court. This can be illustrated in constitutional law. Constitutional law both affirms and limits the power of government by the authority of the constitutional text. Therefore, judges are called to faithfulness to the text in marking out the limits of governmental power in the cases which come before the court. When the indeterminacy phenomenon emerges in the Constitutional Law classroom it poses the following problem for constitutional argument: How may majoritarian tyranny, expressed through governmental power, be checked by the rule of law, if the rule of law is not independent and objective in relation to the political context in which many constitutional issues arise? Answers to this question become problematic because the indeterminacy critique raises a deep question about the possibility of faithfulness in the practice of constitutional interpretation. In the face of the critique, such interpretation becomes deeply problematic and potentially idiosyncratic. It becomes expression of the will of the interpreter, rather than a restraint upon that will in response to the text. Faithfulness, if it is to be practiced, comes down to choice, but the choice is difficult to measure due to the openness of the text. In simple terms, the emergence of the indeterminacy critique, pursued relentlessly in the deconstructive scholarship, poses this question: What does faithfulness to the constitution mean, if anything, in the judicial task of adjudication?

This kind of critique is reflected in the popular political debate that periodically breaks out quite visibly in public about whether or not judges are being "faithful to the text of the constitution." These

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78 For a collection of articles that demonstrate this debate over judicial faithfulness in constitutional interpretation, see INTERPRETING LAW AND LITERATURE, supra note 46. For an excellent discussion of the problem of faithfulness in judicial behavior, see the study of the anti-slavery judges deciding slave cases in ROBERT M. COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS (1975). Cover poses the question of faithfulness starkly as a product of the moral-formal dilemma. Id. at 5-7.

79 This kind of public debate over judicial behavior is spawned when the Court
debates often center on whether or not a judge does, and/or should, take a "strict constructionist" approach to the constitution. Thus, the very choice of a particular interpretive approach to the task of constitutional adjudication poses a question of faithfulness, both to the text and to the community gathered around that text. Once the deeply perplexing questions about the relation of interpretive choice and faithfulness to law have been placed before students, the vocational identity question — *What are you claiming about yourself when you say to someone else that you are a lawyer?* — brings home in personal terms a challenge to students to confront the meaning of their work as lawyers. For those students who take the deconstructive critique of law seriously, answers to the vocational identity question now become difficult to come by. This deep anxiety is most poignantly expressed in some oft-quoted lines written by Arthur Leff, one of the early critical scholars:

I want to believe—and do you—in a complete, transcendent, and immanent set of propositions about right and wrong, *findable* rules that authoritatively and unambiguously direct us how to live righteously. I also want to believe—and so do you—in no such thing, but rather that we are wholly free, not only to choose for ourselves what we ought to do, but to decide for ourselves, individually and as a species, what we ought to be. What we want, Heaven help us, is simultaneously to be perfectly ruled and perfectly free, that is, at the same time to discover the right and the good and to create it.

I mention the matter here only because I think that the two contradictory impulses which together form that paradox do not exist only on some high abstract level of arcane *angst*. In fact, it is my central thesis that much that is mysterious about much that is written about law today is understandable only in the context of this tension between the ideas of found law and made law: a tension particularly evident in the growing, though desperately resisted, awareness that there may be, in fact, nothing to be found—

that whenever we set out to find "the law," we are able to locate nothing more attractive, or more final, than ourselves.

All I can say is this: it looks as if we are all we have. Given what we know about ourselves and each other, this is an extraordinarily unappetizing prospect; looking around the world, it appears that if all men are brothers, the ruling model is Cain and Abel. Neither reason, nor love, nor even terror, seems to have worked to make us "good," and worse than that, there is no reason why anything should. Only if ethics were something unspeakable by us, could law be unnatural, and therefore unchallengeable. As things now stand, everything is up for grabs.

Nevertheless:

Napalm babies is bad.

Starving the poor is wicked.

Buying and selling each other is depraved.

Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot—and General Custer too—have earned salvation.

Those who acquiesced deserve to be damned.

There is in the world such a thing as evil.

[All together now:] Sez who?

God help us.\(^80\)

But is that the last word?

III. THE NEXT STEP: RECOVERING MEANING IN THE PRACTICE OF LAW THROUGH A PURPOSEFUL RELATIONAL UNDERSTANDING OF LAW AND LEGAL PRACTICE

The four interlocking dilemmas discussed above demonstrate in detail the terrible bind that lawyers face in the modern world. The old dilemma, discussed above as the first dilemma, of being caught between the client's desires and the community need for justice has become much more complex in the modern world as the quest for certainty has broken down. This breakdown reveals the three new dilemmas as offspring of the modern quest and its breakdown in the twentieth century. Thus today, lawyers are caught in a set of loyalty conflicts, attempting to serve two masters, the public and their clients, in three different ways, and to do so in an age of popular and scholarly doubt about the possibility of choosing a way through the wilderness of modern life that can sustain law and legal practice as an

\(^{80}\) Leff, supra note 29, at 1229, 1249.
enterprise with a public purpose. Lawyers are asked to do justice and to faithfully serve a client's individual interest when it may conflict with justice. Lawyers are also asked to practice a precise discipline and to recognize that the precision of quantitative scientific enterprise is beyond reach. Finally, in both their study and practice, lawyers are asked to search for meaning in a legal text, in the service of both justice and the client, and to do so while being willing to do without meaning. So summarized, the lawyer's bind is a terrible one indeed—one in which the four dilemmas all converge in a complex conflict over the lawyer's loyalty. In the midst of this conflict, it is no wonder that many lawyers have lost touch with the sense of purpose and meaning that brought many of them to the very doors of the law schools filled with a commitment to serve justice.

In this difficult situation, lawyers all too often accept as their vocational identity a caricature of themselves as little more than chattel for hire, engaged in an arcane technique for sale to the highest bidder in service of private will. To avoid thinking of himself or herself as a mere hireling, a lawyer who takes justice seriously may be driven to a blind trust in the goodness of legal rules accompanied by a vague wish that perhaps somehow his or her work in the law will do justice, but with a fading hope that this wish will be realized. Underneath such wishful thinking is a deep blind trust—that the rule of law is a self-legitimating authoritative practice of governance and dispute resolution. This naive faith cannot endure for long in the modern world where the quest for certainty has broken down. Lawyers who once took justice seriously, and still endeavor to do so, are all too aware of the law's potential for doing injustice, leaving them on the edge of despair. If the truth be told, the modern lawyer who seeks to do justice is less like the scientific investigator in search of the secret to the origin of life and more like the spiritual seeker who has become exhausted in the search for the meaning of life. In this setting, lawyers are truly in a wilderness without either a map or a guide. In this setting, lawyers are likely to face a divided self and a diminished possibility of hope in the practice of law.

The lawyer in this modern world might well consider the possibility of abandoning the search for a way out of the wilderness and instead seek to live in the wilderness. To turn in that direction, back into the wilderness, leaving behind efforts to escape it, lawyers would do well to attend to the question of where they locate the "Center of Loyalty" in both their lives and their work as lawyers. To turn in this direction is to take the question of vocational identity seriously. To turn in this direction prepares for two steps which we can take in our
effort to break the terrible bind in which we lawyers now find ourselves.: The first step is to consider what it might mean to take reality as deeply relational and social, rather than radically individualist and material, and to live from that understanding. The second step is to turn back to the study and practice of law with a commitment to recover the social context as a way of recovering an understanding of the law as a set of possibilities for the realization of justice within the community.

A. The Relationality of Reality as Seen in the Principle of Internal Relations: A First Step

The first step has been suggested by many. It is both very old and very new. It is old since it may be found in the wisdom of many traditions, such as the African idea of *Ubuntu*, expressed eloquently by Archbishop Desmond Tutu when he said:

My humanity is caught up in your humanity. I am a human being only because you are a human being. There is no such thing as a solitary human being . . . . And for that reason, the highest value is accorded to harmony, communal harmony, and anger and revenge and bitterness are corrosive of this harmony. And in a sense, it is the best form of self-interest to forgive you, because if I do not, my anger against you, which goes towards dehumanizing you, dehumanizes me in the process. The minute you are diminished, whether I like it or not, I am diminished. And so if I can enhance your humanity, ipso facto, my humanity is enhanced . . . . And when we forgive, it is, in many instance [sic], for our own sakes.  

We can find in many places this vision of individual human experience as ultimately an expression of communal interdependency in which we, in our being, are part of one another, and need each other if we are to be whole selves. It rests on the intuitive knowledge

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we have through our experience. Taking this intuitive knowledge into reflection upon law can invite us to think again about the possibility of recovering a sense of purpose and meaning in our work as lawyers in the modern world.

The vision of Archbishop Tutu is shared by the American theologian Douglas Sturm, who stands out as one who for many years has called lawyers and legal scholars to think again before giving up on the practice of law as a vocation worthy of commitment in service of the common good. Sturm offers a view of “justice as solidarity” and calls for a “jurisprudence of solidarity” as part of his constructive work on the “politics of relationality.” At the heart of Sturm’s work is a deeply relational world view that animates all he has to say. It is a world view that sees relationality as the core of experience which reveals our possibilities for enriched experience. It is a world view that understands human identity as a phenomenon that is born out of our irreducible relatedness.

We might take Sturm’s work seriously as we seek to reconstruct a vision of law practice as a vocation worthy of the commitment of our lives in service of the common good. To begin such a conversation, I offer the following constructive proposition which may be tested through our experience and intuitive knowledge of reality: A relational world view, with “justice as solidarity” at its core, provides an important resource for reconstructing a vision of law and legal practice capable of recapturing the possibilities of law as a purposeful enterprise, worthy of commitment, and filled with hope.

A relational world view can lead us to a new understanding of law, in both its study and practice, as a vocation worthy of our commitment. Douglas Sturm develops an understanding of law and politics that embraces a relational world view expressed as proceeding from the principle of internal relations, which signals a need for a “deeper realism” than that usually associated with the American Legal Realists of the twentieth century, while taking a cue from them to be “realistic” in thinking about law and what lawyers do. In Sturm’s words:

In times such as these, if we are cognizant—and honest—about the circumstances that make up our common life, we must admit to

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83 Sturm, Solidarity and Suffering, supra note 82, at 16; Sturm, Community and Alienation, supra note 82, at 1-4.

84 Sturm, Community and Alienation, supra note 82, at 6, 187-209.
the thick interdependency of our lives. We cannot be what we are, we cannot do what we do, we cannot accomplish what we accomplish apart from one another. Perhaps more than we can ever fully discern, our lives are but expressions, albeit creative expressions, of a communal matrix that sustains us, inspires us, and constitutes the origin of our dreams and yearnings, our obligations and our rights. We are members of each other. We belong together. That is the source of our joy in life, although that is, as well, the source of the tragedies of life, the dark side of our history, which, on all too many occasions, makes us shudder and anxious about our destiny.\footnote{Sturm, Solidarity and Suffering, supra note 82, at 7 (emphasis added).}

Proceeding from this vision, Sturm argues that reality is constituted by a\emph{ principle of internal relations},\footnote{Id.; Sturm, Community and Alienation, supra note 82, at 1-4.} which departs from the\emph{ radically individualist} view of human experience that dominates notions of political society and legal theory in American life. In the individualist view, private life is elevated over public life and reality is understood as constituted by a set of\emph{ external} relations between self-contained atomistic individuals. In contrast to the radically individualist view of human experience and the principle of external relations, Sturm embraces the vision of experience in the community of life as constituted by a set of\emph{ internal} relations. This vision finds expression in the image of the\emph{ beloved community} and is: "

[The Johannine religious sentiment (to love one another, for love is of God)\footnote{"Beloved, let us love one another; for love is of God, and those who love are born of God and know God. Those who do not love do not know God; for God is love." Sturm, Solidarity and Suffering, supra note 82, at 16 (quoting 1 John 4:7).} is too often limited to close intimate relations but . . . . I would assert, is equally applicable to the political structures that sustain our lives . . . [It] is conveyed through the philosophical\emph{ principle of internal relations} (in the depth of our being, we belong to each other) and the political principle of justice as solidarity (as we belong to each other, so, while celebrating our differences, we are to work together for the sake of us all).\footnote{Id. (emphasis added).}"

On the basis of this vision, Sturm calls for a relational theory of law which he calls a "jurisprudence of solidarity"\footnote{Id.; Sturm, Solidarity and Suffering, supra note 82, at 10-11.} in contrast to a "jurisprudence of individuality."\footnote{Id. at 10.} Sturm points out that both of these views of law are concerned with promotion of basic norms. The "jurisprudence of individuality, is concentrated on the basic norm: pre-
serve autonomy!"91 The "jurisprudence of solidarity, is focused on an alternative basic norm: enhance community!"92 Both of these views of law are built on their own understanding of reality, and in their purest form "both run contrary to the prevailing practice of law."93 In other words, what Sturm claims is that these two views are two possibilities, among others, for us to consider in the current on-going "multivoiced and serious contention over the meaning and character of law."94

The principle of internal relations embraces a view of reality that departs from the radically individualist view of human experience, with its elevation of private life over public life, that dominates notions of political society and legal theory in American life. In the individualist view, reality is understood as constituted by a set of external relations between self-contained atomistic individuals. In American law, this is manifested in the central importance of private property with its notion of individual versus communal possession, title, and ownership of land. This view, coupled with the radically foundationalist objectivism that has dominated intellectual life for the last 400 years, denies the deeper reality of the principle of internal relations that understands human experience as deeply embedded in, and expressive of, the "creative passage of events,"95 which constitutes all of creation in cosmic community. In contrast, the deeper realism of internal relations understands that "[o]ur lives manifest a polarity between individuation and participation."96 . . . This means that "we as individuals must claim the community as integral to ourselves, necessary for ourselves."97

In sum, the history of American legal consciousness98 reveals the presence of dynamic creativity in judicial behavior coupled with a quest to legitimate such behavior on the foundational claim that law is both independent and objective. Thus, the dynamic creativity of law as an activity and the claim for legitimacy of law based on its alleged independent objectivity collide in irreconcilable tension with each trying to cancel out the other. "Deconstruction" is the extreme expression of purposeless dynamism. Static "formalism" is the extreme expression of a rule-bound acontextual approach to adjudica-

91 Id.
92 Id.
93 Id.
94 STURM, SOLIDARITY AND SUFFERING, supra note 82, at 10.
95 STURM, COMMUNITY AND ALIENATION, supra note 82, at 2.
96 Id. (emphasis added).
97 Id.
98 GILMORE, supra note 23; MINDA, supra note 23.
tion. The reality is that law both springs from and speaks to experience. Thus, it embraces elements of dynamic creativity as well as settled formal principles as poles on the continuum of law, rather than as contradictions between two views of law. If we accept the invitation to view law framed in a relational world view rooted in the principle of internal relations, as described by Douglas Sturm, we shall see law emerge as more than mere activity. Law becomes law-as-process—*with-a-purpose*. As Sturm writes, the deeper realism of internal relations, seen “through the eyes of faith” in the possibilities of law and life together, discloses “a context of meaning which, realistically, we ignore to our detriment.” 99 This is the implication, Sturm argues, of holding to “[Karl] Llewellyn’s thesis that there is a *telos* of law that constitutes the basic dynamic and meaning of law itself.” 100 That *telos* is suggested by Llewellyn’s assertion that “inherent in law is a drive toward social justice.” 101 Sturm draws on the Exodus story and the covenant to give meaning to this drive:

In the Exodus story, the Hebrew people were gathered under the leadership of Moses and brought into a new land. In the midst of these dramatic events, a bond of mutual loyalty and trust—of faithfulness—was effected between the Holy One and the people and among the people themselves. They were formed into a people through the covenantal interchange. The covenant was a creation, a calling into being of new life, the life of this people. They were pledged to be faithful to one another, that is, to sustain one another, to care for one another, to serve one another. They were held together by promise. Thus faithfulness is added to liberation as a quality of covenantal existence.

This new community was obliged to be a people of justice and peace. To do *justice* is to honor the rights and to fulfill the needs of all members of the community, especially the widow, the fatherless, the stranger within the gates. A restrictive covenant is a contradiction in terms. *Peace* is the quality of cooperation, coordination, harmonious action. Where justice attends to the needs of each individual member of the community, peace is the quality of belongingness that holds them together as a whole. In sum, a covenanted community consists of four qualities: liberation, faithfulness, justice, peace. 102

Thus, in Sturm’s hands, the “principle of internal relations”

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99 Sturm, Community and Alienation, supra note 82, at 199 (emphasis in original).
100 Id.
101 Id. at 198-99.
102 Id. at 202-03.
points to an understanding of law as an enterprise in service of the community. Simply put, Sturm's call for a "jurisprudence of solidarity" opens up a view of law-as-process-with-a-purpose to "drive toward the [aim] of social justice." In this view, the constitutional text is a set of words that provides a framework for pursuing this activity in a constitutional setting.

Embracing the enterprise of law within a relational world view brings us to a point where we might be reconciled to the indeterminacy of law. The conventional modernist claim for legitimacy in law based on dubious claims about the independent objectivity of law and legal reasoning breaks down repeatedly in the experience of lawyers. This insight is already available in law school as we have seen. The authority of precedent may well play a powerful role in shaping the present appropriation of the past in adjudication. Yet the present is always drawn, in part, out of the future, within the context of what the past has given, because analogical argument in law is always striving to include the novelty that emerges in experience within the categories which have come down from the past. The truth of the matter is that law has a growing edge marked by indeterminacy and contingency produced, in part, by the rigorous practice of analogical reasoning in legal argument within a specific social context. As much as the rules of the past may be called upon as authoritative precedent to guide or determine the present, the rules of law are always in danger of being ruptured and replaced or reformed in response to the encounter with difference. Those who demand stability see this as a threat, while those who yearn for something more from law than what it has given in the past see this as an opportunity. In the experience of the Anglo-American common law tradition, stability and change are both embraced as core features of the tradition. The fact that the growth of law involves change as well as stability demonstrates how the encounter of the past with the novelty that is emerging shapes the present as both an expression of the past, as well as something more than a replication of the past. Thus, precedent is more than merely a guide for present interpretation. Careful study of how courts use precedent reveals that creative use of precedent is the way in which legal interpretation may give evidence of and embrace the novelty which is emerging within the cosmos. This case is easily made by reference to the growth of the common law. But, it can also be made with reference to American constitutional law because the very text of the Constitution is deeply relational and open to dynamic growth in its meaning. Simply stated, the phenomena of experience present in

103 Supra text accompanying notes 55-61.
the culture of lawyers reveal law as relational and processive in its deepest aspect. To describe law as "processive" is to acknowledge the moving and dynamic *possibilities* of legal rules to participate in beneficial growth for the common good, rather than to claim that such beneficial growth necessarily is a product of the interpretive task that is at the heart of legal analysis and argument. Thus, a description of law as "processive"—a claim of possibility—is different from a description of law as "progressive"—a claim of inevitability—concerning the common good that law may encourage and support.

In short, the processive relational reality of law is always, irrepessibly, breaking through theoretical attempts to constrict it within an objectivist foundationalist world view that cannot contain it. Both the common law tradition and the constitutional tradition in American legal history provide examples of the relational cosmology embraced by a jurisprudence of solidarity breaking through the misplaced concreteness of law expressed in the claim that law is somehow independent and objective, and thus separate from the rest of experience.

B. *Taking the Social Context of Law Seriously: A Second Step*

Having taken the step to view reality in relational terms, and having come to see what that might mean for how we understand law as embedded within and expressive of relational reality, we may consider taking the next step on our journey to recover a sense of purpose and meaning in our work as lawyers. That second step is the recovery and close attention to social and historical context in both the study and practice of law. One way to take this step is to think of *lawyers as storytellers.* The heart of the lawyer's craft is storytelling.\(^{104}\) Lawyers listen to the stories brought to them by their clients and, in turn, retell them for the purpose of claiming a particular meaning for these stories within the language of law. To be sure, lawyers do many things. Lawyers counsel, advise, negotiate, mediate, draft papers, advocate, litigate and so on. But inside of all of these activities, lawyers begin with the stories their clients bring to them and work to claim a

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particular meaning for those stories within the language of the law and the particular task the lawyer performs on behalf of the client.

There is always a social dimension to this work, even when the lawyer is most intently focused on serving the needs and wants of an individual client. In the performance of that work, the lawyer is an officer of the court, and thus a representative of the legal system, as well as a representative of the client. Again this can be illustrated in the field of Constitutional Law. In constitutional argument, the values and commitments of the larger society are always present within particular constitutional disputes about the origin, nature, and function of governmental power and the human rights that serve as a limit on that power. Thus, constitutional cases are always, in a very direct way, cases about who we are as a people and how we have chosen to live together. Because the constitutional conversation is ongoing, it is most importantly a conversation about who we might yet become. Thus, to enter the study and practice of constitutional argument is to accept an invitation to enter a conversation about the creation of social and political meaning in the American Republic. This conversation has a history that emerges within a social context.

The stakes involved in this conversation, and our active participation in it, directly and deeply affect the character of our life together because the constitutional conversation is a constitutive conversation. The constitutional conversation is constitutive in three important ways: (1) It constitutes a culture of constitutional argument among lawyers engaged in the conversation that is marked by a vocabulary, grammar, and set of conventions in its practice, which shape that conversation and what it might become; (2) The practice of conversation within the particular culture of constitutional argument is a powerful force in constituting the meaning of justice and the character of our life together within the larger society through the embodiment of values in the rules of law that proceed from the conversation; and, (3) In our practice of constitutional argument, we necessarily take up a place in relation to that argument in both of the constitutive facets listed above. 105 In the process, we create and embrace a vocational identity for ourselves as constitutional lawyers. We answer the vocational identity question, “What does it mean to tell someone else that you are a lawyer?” The very work we do, the way in which we do it, and the reasons we give for doing it, together constitute the answer we give to the question of who we are and what the meaning of our lives is in our work as lawyers.

105 I am indebted to the work of James Boyd White for this view of constitutional conversation. See supra note 44.
By taking the steps suggested here, we can begin to break hold of the frame of reference that insists that law must be purely independent and purely objective for it to be legitimate and meaningful. Returning to our study and practice, borne along on a relational world view, we may contemplate the claim by Peter Gabel that law may serve the purpose of securing justice through “social healing.”

EPilogue: LAW AS ArtWORK

Law is artwork in pursuit of justice, performed by lawyers, in a social context, through the craft of counseling and advocacy. If it is to be practiced elegantly, it requires mastery and compassion. The heart of the lawyer’s craft is storytelling. Lawyers listen to the stories brought to them by their clients and, in turn, retell them for the purpose of claiming a particular meaning for these stories within the language of the law.

Study of the language of law is an activity for mariners, not miners. Lawyers perform their craft not by digging in search of bedrock, but rather by recognizing that they are learning how to sail and embarking on a journey. Like the sails we set before the wind, our task is always before us for the task of constitutional law is a journey, not a destination. Our journey may always take turns that secure less of the measure of justice than what we may reasonably hope for. But it may also bring us more than we might expect. One who undertakes this odyssey does so in the midst of history and with a recognition that it is a task among and on behalf of the neighbor/citizen who shares this journey with us. The “beloved community” we seek is not something totally distant in the future. It is, rather, a reality that may be experienced in our journey. As a nation, as a people, and as individuals, we are being in our becoming. Our legal discourse is important vehicle for the dialogue in which this takes place. The stance we take in this task is itself a vehicle for more fully realizing that vision. With this recognition, we take up the task of constitutional discourse with

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106 Peter Gabel, The Bank Teller and Other Essays on the Politics of Meaning (2000). For an overview of Gabel’s view, see id. at 1-15; 40-44. Gabel’ embraces the critical turn in legal scholarship at the same time that he challenges it to embrace a constructive view of law and the lawyer’s role, informed by an understanding rooted in the basic human need and desire for mutual recognition that is the fountainhead of action for social justice in both politics and law. Gabel’s work has spawned an embryonic discussion of how new forms of legal education and law practice might be nurtured, especially as expressed in the Restorative Justice movement of the last twenty-five years. Gabel strongly challenges the reliance on the adversary system in American law. For details of his views on the applicability of the “politics of meaning” to the study and practice of law see id. at 137-79, and see Peter Gabel, Imagine Law, Tikkun, November/December 2000, at 11.
humility, but not without hope—for if we have not hope, there is nothing that can move us to take up the task at all.

Mastery of the lawyer's performing art is gained, in part, through that legal education that is devoted to teaching critical thought within the categories of discourse employed by lawyers. These categories include legal rules as well as all of those resources that illuminate the social context in which lawyers perform their artwork. Concretely, this involves the teaching of critical reading and critical argument employed by the lawyer in the craft of counseling and advocacy. The focus of such education is on gaining proficiency in the task of critically developing, and convincingly defending, reasons offered for courses of action in performance of legal counseling and advocacy. As such, the activity of law and the purpose of legal education is devoted to a deep concern for reasons and reasoning in the social contexts addressed by law in a way that goes beyond the mere acquisition of information and skill in manipulating the rules of law.

Compassion in the practice of this performing art is gained, in part, through a sensitivity to the normative dimensions present in this art. This requires the development of the habit of undertaking both the study and practice of law with careful attention to the social context from which it springs and to which it speaks. In particular, it requires the development of the habit of careful attention to the values at stake in any given fact situation addressed by law in that context.

From this perspective, the rules of law are an important subject of study, but a focus on the reasons supporting the application of the rule in the pursuit of justice in a particular social context is even more important. Furthermore, from this perspective, every course in law school is a variation on the central task of legal education—the critical development and convincing defense of reasons for action, whether that be done in a counseling or advocacy setting. Courses in law school are thus all the same in one very important respect—they are all courses in public persuasion.

In the case of those "traditional" courses that address doctrine and practice, persuasion is taught in the context of a given portion of the "world of law." Constitutional law, for example, is but one version of this in its concern for persuasion in the context of issues related to the power of government and the limits placed on that power. Torts, for example, deals with the issues surrounding the definition and remedies available for civil wrongs. Litigation practice, for example, deals with the actual practice of persuasion in the framework of the courtroom. In each case, persuasion is taught in the context of the activity of some aspect of law and the lawyer's vocation.
In the case of "non-traditional" courses, which provide what are sometimes referred to as perspectives on law and its practice, persuasion is taught in the context of critical thought about "law in the world." For example, jurisprudence, legal history, and interdisciplinary courses take as their subject the development of a critically informed view of the place of law in the world at large. In each case, even though legal analysis and argument of the type found in the "traditional" courses is not being taught, persuasion, the foundation of legal analysis and argument, can be taught when emphasis is placed on critically developing and convincingly defending a particular view on the larger issues that provide the subject matter for such courses.

The upshot of all of this is that the classroom is not merely a place in which information transferal takes place. More significantly, it is a public place in which we all, student and teacher alike, gather around a common text and critically discuss the reasons that might be supplied to claim a particular meaning for that text in a particular fact situation within the larger social context from which law springs and to which it speaks. In this perspective, the study of law belongs to the liberal arts, not to the sciences, and the classroom is a theater for developing skill in the practice of the performing art of law. It is a place to practice doing law rather than merely receiving law. It is also a place to begin to address, a place to answer, the question of the lawyer's vocational identity: What does it mean to say to someone else, "I am a lawyer?"

A central task for legal education, understood as a form of liberal arts education, is to address the core ethical issue of the lawyer's vocational identity. In a traditional liberal arts setting, with a solid curriculum sensitive to the normative dimensions of all of the disciplines, the vocation of what it means to be human becomes the core issue around which all of the "practitioners" of the liberal arts gather for dialogue. The very heart and foundation of that dialogue is ethical in character. If this is true for liberal arts education, it is no less true for legal education. In the halls of the law school we teach skills that prepare legal advocates and counselors for performance in communities that seek justice. Thus, the very heart of the lawyer's vocation has a foundation that requires ethical reflection if the practice of law is to be a humane profession capable of addressing the needs of the community it serves.