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ESSAY

THE PRACTICE OF LAW AS PLAY

Barbara Stark*

*Lessons of patience are learned slow.*¹

Lawyers work long hours. Some put in these hours because their firms expect them to, some have bills to pay, and some are simply workaholics. This Essay is not about them. It is about those lawyers who put in long hours because they love what they do—because practicing law gives them the kind of profound satisfaction they once knew as children deeply immersed in play.² They like winning cases and making money, of course, but for them practice itself is rewarding—not always, but enough of the time for them to feel lucky in their choice of work.

By “practice of law,” I refer to a lifelong, ongoing process of learning about the law and how to use it. This process begins long

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¹ K.D. LANG, *Still Thrives This Love*, on *INGÉNU* (Warner Bros. Records, Inc. 1992).

² Cf. ABRAHAM H. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* (1968) (providing 1960s study of “people who worked hard not in order to get conventional rewards, but because the work itself was rewarding”), cited in Mihaly Csikszentmihalyi, *Introduction to OPTIMAL EXPERIENCE: PSYCHOLOGICAL STUDIES OF FLOW IN CONSCIOUSNESS 5* (Mihaly Csikszentmihalyi & Isabella S. Csikszentmihalyi eds., 1988) [hereinafter *OPTIMAL EXPERIENCE*].

before a lawyer sees her name on the bar pass list. Rather, the process begins when a law student opens her first law book or attends her first class in law school.³ By "play," I refer to the process described in psychoanalytic theory through which adults, as well as children, negotiate the terrain between inner and outer reality.

This Essay first draws on the work of British psychoanalyst D.W. Winnicott to define "play" and to describe its function in psychological development. It then explains the intense need for play during law school and the virtual impossibility of satisfying that need. Finally, it describes the happier prospects for play after law school, at least for some. The Essay concludes that, while the practice of law at its best *is* play, learning what you need to begin practice is not. "Play" rooted in "not-play" is one of the first paradoxes of practice, however, and paradox is what makes practice play.

I. PLAY IN PSYCHOANALYTIC THEORY

In his groundbreaking work in the 1950s, D.W. Winnicott suggested that play is best understood as "the beginning of the developmental line of the ability to maintain paradox"⁴—that is, the ability to tolerate an apparent contradiction, including the

³ It does not begin when she picks up her first John Grisham novel. While the process may well involve *pretending* to be a lawyer, as in moot court and role-playing, see *infra* notes 42-45 and accompanying text (discussing these forms of law school "play"), the focus here is on the actual acquisition of lawyering skills, not on the *idea*, or fantasy, of lawyering that may inspire that acquisition.

⁴ SIMON GROLNICK, *THE WORK AND PLAY OF WINNICOTT* 34 (1990). Winnicott's influential works include D.W. WINNICOTT, *PLAYING AND REALITY* (1971); D.W. WINNICOTT, *THE FAMILY AND INDIVIDUAL DEVELOPMENT* (1968); D.W. WINNICOTT, *THROUGH PAEDIATRICS TO PSYCHO-ANALYSIS* (1975). For a lively and accessible introduction, see MADELEINE DAVIS & DAVID WALLBRIDGE, *BOUNDARY AND SPACE: AN INTRODUCTION TO THE WORK OF D.W. WINNICOTT* (1990). See generally ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* (1963) (describing psychoanalysis as the study of the ego's roots in social organization). Psychologists who are not as psychoanalytically-oriented approach play from a different perspective and with different objectives. They focus more on social contexts, such as the family and the school, rather than the intrapsychic constructs established in infancy. Psychoanalysts are more likely to focus on the ways in which these intrapsychic constructs are replicated or sought in later social contexts. See, e.g., JEAN PIAGET, *PLAY, DREAMS AND IMITATION IN CHILDHOOD* (C. Gattegno & F.M. Hodgson trans., 1951).

illusion that what we create at play really exists.⁵ Play becomes possible, according to Winnicott, when an infant's needs are anticipated by an attentive parent.⁶ The infant comes to connect her *wish* for milk, warmth, and cuddling with the appearance of the bottle, breast, and parent. The belief that her wish "creates" the breast is the source of the sense of magic and power that makes play so delicious,⁷ and it is also the source of the child's make-believe and the adult's creativity.⁸ The belief alone, however, is not *play*.

Play is the process through which the infant, and later the child and the adult, integrates her inner reality—what she wants from the world—and the outer reality—what is actually obtainable. Play takes myriad forms. As Winnicott notes,

[T]he content does not matter. What matters is the near-withdrawal state, akin to the *concentration* of older children and adults. The playing child inhabits an area that cannot be easily left, nor can it easily admit intrusions. This area of playing is not inner psychic reality. It is outside the individual, but it is not the external world. Into this play area the child gathers objects or phenomenon from external reality

⁵ Winnicott referred to play as "our first illusion." *PLAYING AND REALITY*, *supra* note 4, at 14.

⁶ *PLAYING AND REALITY*, *supra* note 4, at 12. Winnicott consistently refers to "mother" rather than "parent," which has earned him the disapproval of many feminists. See, e.g., JANICE DOANE & DEVON HODGES, *FROM KLEIN TO KRISTEVA* 7-33 (1992). But cf. NANCY J. CHODOROW, *FEMINISM AND PSYCHOANALYTIC THEORY* 152-53 (drawing on Winnicott to "begin to imagine not only liberated individuals, but individuals mutually engaged in a society built on liberated forms of social life"). The extent to which the concept of play, as well as its endless forms, may be gendered is beyond the limited purposes of this Essay, which is to introduce the psychoanalytic concept of play and apply it in the context of the practice of law.

⁷ "The mother's adaptation to the infant's needs, when good enough, gives the infant the *illusion* that there is an external reality that corresponds to the infant's own capacity to create." *PLAYING AND REALITY*, *supra* note 4, at 12; accord GROLNICK, *supra* note 4, at 35 (citing Judith Kestenberg (1971)).

⁸ "[This] constitutes the greater part of the infant's experience, and throughout life is retained in the intense experiencing that belongs to the arts and to religion and to imaginative living, and to creative scientific work." *PLAYING AND REALITY*, *supra* note 4, at 14.

and uses these in the service of some sample derived from inner or personal reality.⁹

As examples of play, Winnicott describes a baby playing with a tongue depressor, mouthing it and throwing it on the floor;¹⁰ an older child using a string first to tie objects together, later as a tether, and finally as nesting material;¹¹ and a middle-aged woman creating a verbal game using bits of poetry.¹² It is not the form of the play that matters, but the player's *creation* of it.

Play begins in what Winnicott describes as the "transitional" space between a parent and an infant. This is an intimate, safe space, which the infant experiences as both an extension of herself and as fascinatingly "other"—as "me" and "not me." This is the infant's first experience of the "intermediate mental space of the imagination and of the symbolic world that so epitomizes the human animal."¹³ Transitional space also has a temporal aspect; it is an interval, a period of time during which the infant can explore this interesting new realm.

Throughout this process, and crucial to its effectiveness, the infant must be able to control the pace and even to opt out—that is, to drop into the "steady backdrop of a holding environment."¹⁴ This has been described as the "sense that one is held; that there is a safety net present rather than the hard concrete of the circus floor; that one won't be dropped, physically or metaphorically; that one can experience one's self and *be* one's self."¹⁵

⁹ *Id.* at 51. "The thing about playing is always the precariousness of the interplay of personal psychic reality and the experience of control of actual objects. This is the precariousness of magic itself . . ." *Id.* at 47.

¹⁰ *Id.* at 48-49.

¹¹ *Id.* at 42-43.

¹² *Id.* at 62-64; see also *infra* note 41 (citing examples of play in legal scholarship).

¹³ GROLNICK, *supra* note 4, at 34. For a classic exploration of symbolic, childhood play, see PIAGET, *supra* note 4. See generally DAVID COHEN, *THE DEVELOPMENT OF PLAY* (2d ed. 1993) (discussing development of play and arguing for more rounded view).

This transitional state, like the other elements of "play," recurs throughout life. It assumes various forms, not all of which are particularly pleasant. "The brief but intense boredom of childhood are reactive to no great loss, but are merely an interruption—after something and before something else. Like all genuine transitional states, their destination is unclear." ADAM PHILLIPS, *On Being Bored*, in *ON KISSING, TICKLING, AND BEING BORED: PSYCHOANALYTIC ESSAYS ON THE UNEXAMINED LIFE* 68, 72 (1993).

¹⁴ GROLNICK, *supra* note 4, at 37. For a concise summary of play, see *PLAYING AND REALITY*, *supra* note 4, at 51-52.

¹⁵ GROLNICK, *supra* note 4, at 30.

According to Winnicott, play serves several distinct but related functions, each contributing to psychological and intellectual development. First, play provides an outlet for tension as well as a constructive channel for it. Second, play structures social interaction and "helps [to] define and redefine the boundaries between ourselves and others. . . ."¹⁶ Third, play provides an opportunity to practice skills and work through problems. Fourth, play enriches experience, in that it "helps give us a fuller sense of our own personal and bodily being . . . and . . . enhances drive satisfaction."¹⁷ Finally, Winnicott recognizes the importance of play for its own sake.¹⁸

Winnicott assumes the ongoing relevance of play, not only throughout childhood, but throughout adult life as well.¹⁹ Play continues as the process through which we integrate inner reality

¹⁶ *Id.* at 35.

¹⁷ *Id.* Winnicott is careful to distinguish play from a *drive*, such as hunger or sex, however. Indeed, when play becomes too "drive-infested," it loses its "creative growth-building capability." *Id.*

¹⁸ Accord Csikszentmihalyi, *supra* note 2, at 5. Csikszentmihalyi uses the term "flow" to refer to the intense focus and deep pleasure experienced during intellectual or other creative activity. "Flow" may be understood as a particular form of play:

Flow is made up of a limited number of essential elements. For flow to occur outcomes must be significant and determined by individual volitional actions; the act must be intrinsically rewarding, occasioned by a merging of action and awareness, an absence of self-consciousness; and action must take place in a limited stimulus field.

Richard G. Mitchell, Jr., *Sociological Implications of the Flow Experience*, in *OPTIMAL EXPERIENCE*, *supra* note 2, at 36, 53-54. For the argument that flow may serve as a "dynamic force in evolution," see *id.* at 30.

¹⁹ It is assumed here that the task of reality-acceptance is never completed, that no human being is free from the strain of relating inner and outer reality, and that relief from this strain is provided by an intermediate area of experience . . . in direct continuity with the play area of the small child who is "lost" in play.

PLAYING AND REALITY, *supra* note 4, at 13. "To live creatively the individual has to go on being able to find his own inner reality—that part of the self from which the dream emanates—through a personal way of experiencing external reality." DAVIS & WALLBRIDGE, *supra* note 4, at 63.

A crucial part of Winnicott's therapy with adult patients was to remind them how to play. He did so through his famous "squiggle" game, in which he would draw an arbitrary line, the patient would next take a turn drawing an additional line, and so on, both describing what was being created. GROLNICK, *supra* note 4, at 36. Cf. COHEN, *supra* note 13, at 7 (noting that Piaget and Freud considered play basically preserve of children). Winnicott never fully developed his theory of play in the context of adult experience. He died while going over the proofs for *Playing and Reality*.

and outer reality.²⁰ Adult's play, like child's play, requires a safe space, time, and something or someone to play with.²¹ Like the child, the adult at play must be able to set her own pace and to drop into a "holding environment" when necessary.²²

Play enables adults to maintain paradox—to tolerate and accept apparent contradictions—just as play enables the infant to maintain the paradox of "me" and "not me." The ability to maintain paradox is central to the practice of law.²³ It enables lawyers to entertain inconsistent theories, to tolerate uncertainty, to see the ambiguity in an open-and-shut case, and to transform a stark win-lose dichotomy into a dazzling array of options.

II. PLAY AND THE LAW SCHOOL EXPERIENCE

Students in law school need play more than they did in college, and they get less. Students need play more because law school demands massive integration—of doctrine and its application within each class; of different analytical frameworks and processes among classes;²⁴ and, ultimately, of the student's inner reality and the outer reality of law school and the legal world beyond. It is through this multilevel, multistage process of integration that the student who enters law school transforms herself into the lawyer who emerges.²⁵

²⁰ "[P]laying is an experience, always a creative experience, and it is an experience in the space-time continuum, a basic form of living." *PLAYING AND REALITY*, *supra* note 4, at 50.

²¹ Christopher Bollas describes a "transformational object"; that is, "an object that is experientially identified by the infant with the process of the alteration of self-experience . . . in adult life, the quest is not to possess the object; it is sought in order to surrender to it as a process that alters the self." *PHILLIPS*, *supra* note 13, at 76-77 (attributing views to Bollas).

²² See *supra* notes 14-15 and accompanying text (discussing holding environment).

²³ "[T]he 'serious' institutions that constitute society—science, the law, the arts, religion, and even the armed forces—all started out as games, as contexts in which people could play and experience the enjoyment of goal-directed action." Mihaly Csikszentmihalyi, *The Flow Experience and Its Significance for Human Psychology*, in *OPTIMAL EXPERIENCE*, *supra* note 2, at 15, 34 (citing Huizinga).

²⁴ The mere quantum of information which students are required to assimilate does not in itself demand play. Indeed, many students come to law school because of the relative ease with which they can absorb new information and the pleasure they take in the "game" of learning.

²⁵ This resonates with Winnicott's description of "play" as part of self-creation. *PLAYING AND REALITY*, *supra* note 4, at 64. Because the integration of doctrine and process during law school effectively precludes the "play" necessary to integrate inner and outer realities, the new lawyer rarely feels that the transformation is complete.

The integration of material within a single class, while probably the simplest integration required in law school, suggests the magnitude of the task.²⁶ In common law legal analysis, for example, students learn that to analogize the facts of the problem to the facts of the precedent, they must be able to describe those facts in varying degrees of generality and specificity. A teacher in a first-year class may hold up a watch and invite students to describe it, starting generally ("an object") and ending specifically ("a small white Timex with arabic numerals and a brown leather band belonging to the teacher").²⁷ Students learn that seemingly straightforward facts can be expressed in an indefinite number of ways.

This is rich territory for play. Forget your previous notions of "truth" or objective reality, students are told, "it is all relative; it can all be manipulated." Some students want to play with the idea—to explore its personal implications. They wonder, "Isn't one description less *true* than another? Is it *dishonest* to argue in favor of the less true description? How far is too far?" Teachers are rewarded for answering these questions so as to further the pedagogical purpose of the exercise.²⁸ A teacher might reply, for example, "It depends on the *legal issue*. If the issue is whether the plaintiff should have known the time, a watch and a clock are analogous. If the issue is whether a watch is included in a bequest of 'household furnishings,' they are not." By answering the question in this way, the teacher frustrates the student's attempt to play. She also introduces one of the most common games in law school—turning another person's question to your own purposes. But this is not "play."²⁹

Even the students who are comfortable manipulating abstractions, and are not distracted by actual human experience, are likely to be frustrated. In civil procedure, for example, students learn the

²⁶ For a fresh introduction to the law, which suggests that the task may be easier than students and teachers think, see Jeremy Paul, *A Bedtime Story*, 74 VA. L. REV. 915 (1988).

²⁷ This exercise is suggested by RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY AND STYLE* 22-26 (1990).

²⁸ These rewards include the knowing smiles of the students who "get" it, student evaluations, and peer review.

²⁹ Games are more formal than play. One of Freud's "favorite metaphors for the analytic situation was that of the chess game, with its prescribed rules." GROLNICK, *supra* note 4, at 36 (citing André Green (1978)); see also *infra* note 39 (noting use of games as method to forestall frightening aspects of play).

elements necessary for a court to assert jurisdiction. Then they read *Kulko*, in which these elements are technically satisfied.³⁰ A technical application of these elements to the facts in *Kulko*, however, would have punished a cooperative father in New York for allowing his children to visit his ex-wife, their mother in California, by subjecting him to the jurisdiction of the California court.³¹ Students who have simply applied the technical rules, thinking they have caught on to the game, find that the rules have abruptly changed. The manipulation of abstraction, however proficient, is not enough.

Rather, the problem is broken down into a series of judgment calls. How strong is the precedent? How similar are the facts? What are the policy arguments, if any, demanding a different result? Teachers tell students that it is the law's openness, its indeterminacy, that assures their future livelihood and makes it possible to effectuate change within the system. But to many students, the initial experience of that indeterminacy feels like swinging high above the "hard concrete of the circus floor"³² without a net. Being asked a question in a first-year class is like being asked to leap into the void.³³

Simply going from one class to the next may also require a leap, although both teachers insist that they are talking about the same body of law. The correct answer to a question in torts class is never, "File in another state where the law is more favorable," although the civil procedure teacher has just explained the options for doing so.³⁴ Because it distracts from the torts teacher's story of the doctrinal development of torts, the student's effort to integrate torts and civil procedure is likely to be cut off as a "tangent."³⁵

³⁰ *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84 (1978). I am indebted to John Sobieski for this application of this case.

³¹ *Id.*

³² See *supra* note 15 and accompanying text (quoting Grolnick's description of a holding environment).

³³ Relatively well settled doctrine begins to look like a safety net, but the hard work of teaching is to expose the indeterminacy even there. For a rich exploration, focusing on purportedly race-neutral doctrine, see Frances L. Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511 (1991).

³⁴ In practice, this may well be the preferred approach.

³⁵ Indeed, other students are usually less tolerant of tangents than are teachers. If the cutting-off is done amiably, the student may seek the teacher out later and discuss the overlap, as well as the lacunae, between doctrinal subjects and the debate within the

A student's attempt to integrate her inner reality and the outer reality of law school³⁶ is likely to lead to even greater frustration.³⁷ In criminal law, for example, students learn to distinguish between proving the elements of a crime—that is, establishing legal guilt—and merely “knowing” that one person killed another. The student who balks at these distinctions, the student deeply troubled by what she sees as the moral ambiguity of criminal law, may be veering toward a rich jurisprudential vein. The teacher cannot encourage such veering during class, however, without abandoning all hope of covering the material.³⁸

I do not mean to suggest that play is impossible in law school. There are always some opportunities and students seize them eagerly. These are tremendously expensive in terms of time, however, and considerably more structured than the “play” Winnicott describes.³⁹ Law review, for example, links students to the “outer reality” of the legal academy.⁴⁰ It also provides an opportunity for a few students to write, to integrate materials creatively.⁴¹ Moot court similarly offers an integrative writing

academy about discourse boundaries. She may even ask for, and be given, cites to law review articles on the subject. Even if this occurs, and it does not occur as often as it should, the point here is that this is *not* part of the classroom experience.

³⁶ For a thoughtful essay on the difficulties of trying to help students do so, see Katharine T. Bartlett, *Teaching Values: A Dilemma*, 37 J. LEGAL EDUC. 519, 520-21 (1987). For a succinct description of the “ordinary” assumptions of this outer reality, see Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 248 (1978).

³⁷ The student will be told to “be objective,” that is, to forget, or ignore, her subjective reactions and even her own personal experience. Her awkward questions—and they are bound to be awkward because they are framed in a made-up language—are at best likely to be dismissed with, “Interesting question, but I am not going to spend class time on it.”

³⁸ If she does not cover the material, some of her students will not pass the exam, and some may lose a few points on the bar exam.

³⁹ “Games and their organization must be looked at as part of an attempt to forestall the frightening aspect of playing.” PLAYING AND REALITY, *supra* note 4, at 50.

⁴⁰ The legal academy's links to “reality” are regularly questioned, of course. See, e.g., John T. Noonan, Jr., *Law Reviews*, 47 STAN. L. REV. 1117, 1119 (1995) (“Academic isolation from the larger world may explain at least in part the reviews' relative indifference to judicial integrity and to the much greater problems presented by . . . corruption . . .”).

⁴¹ Examples of “play” in legal scholarship include J.M. Balkin, *The Footnote*, 83 NW. U.L. REV. 275 (1988) and Gretchen C. Rubin & Jamie G. Heller, *The Restatement of Love (Tentative Draft)*, 104 YALE L.J. 707 (1995). The first example draws the reader into a clever exploration, and a deeper understanding, of the relationship between text and subtext. Professor Balkin ends by inviting the law review editors to place the entire article in the

experience. It adds another dimension by allowing students to play lawyer *over time*, returning again and again to the same role, each return adding new depth to the student's understanding.⁴²

There are even opportunities for play in class. Some teachers, for example, deliberately incorporate play in the classroom through role-playing and experiential learning.⁴³ Law school clinics probably offer the experience closest to "play." First, clinics allow students to "play lawyer," often in a personally meaningful context.⁴⁴ Second, they allow students to integrate skills and doctrine learned in different law school classes and to refine this integration with the help of thoughtful feedback from clinical teachers.⁴⁵ Third, clinics link students to the "outer reality" of a real community and real clients.

All of these activities, however, are generally regarded as luxuries within the law school culture, in terms of money as well as time. Accordingly, they are available to few students and

final footnote. *The Restatement of Love* translates the undefinable, inexplicable, and overwrought process of falling in love into impeccable legalese, an ironic comment on both the experience and the law.

⁴² See Barbara B. Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life*, 91 MICH. L. REV. 1977, 1986 (1993) (describing value of moot courts and role-playing in the classroom: "Short of actual client representation, nothing focuses a student's attention like the eye of the camera, a well-prepared opposing counsel, and the scrutiny of a 'judge.'") See generally Paul Bergman et al., *Learning From Experience: Nonlegally-Specific Role Plays*, 37 J. LEGAL EDUC. 535 (1987) (describing value of non-legally specific role plays).

⁴³ See, e.g., William S. McAninch, *Experiential Learning in a Traditional Classroom*, 36 J. LEGAL EDUC. 420 (1986) (demonstrating that experimental learning can be effectively and economically employed as adjunct to traditional methodologies); Woodhouse, *supra* note 42 (describing value of moot court and role-playing in the classroom). For an exploration of the relationship between experiential learning and moral development, see Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505 (1995); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147 (1988). Cf. PLAYING AND REALITY, *supra* note 4, at 57 ("My reward for withholding interpretations comes when the patient makes the interpretations herself, perhaps an hour or two later.").

⁴⁴ I am thinking here specifically of clinical programs like those offered at the University of Tennessee, Rutgers University, and American University, which allow students to choose among subject matters and client groups. Cf. Mitchell, *supra* note 20, at 52 ("What is missing from rationalized society is not action but purpose, a sense of belonging to a unified, animated, spiritually encompassing world.").

⁴⁵ For descriptions of some of the tasks faced by such teachers, see, for example, Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731 (1993).

affordable for even fewer. More importantly, while these activities may feel more *like* play than the other activities of law school, they lack two of the crucial elements of *true* play. First, the student-player is not in control of the play. Instead, its pace, parameters, and goals are all set by an external authority. The student is always aware that her ability to keep pace, to play within the set parameters, and to reach the predetermined goal is being judged and graded. Second, there is no holding environment. Twelve to sixteen class hours a semester allow no respite. The time pressures of law school virtually preclude play.

The curtailment of play in law school puts one of the most important lawyering skills—that is, the ability to maintain paradox—beyond the reach of most students, at least temporarily. This ability is not quickly or easily acquired. As Winnicott notes: “To control what is outside one has to *do* things, not simply to think or to wish, and *doing things takes time*. Playing is doing.”⁴⁶ Play requires repeated frustration, followed by repeated retreats to a holding environment, followed by yet another round of creative forays, of playful experiment.

Some may argue that the ability to maintain paradox, even if it is a vital lawyering skill, should be acquired before the student comes to law school, preferably before puberty. In fact, most law students have acquired that ability, but are stymied when they attempt to draw on it in a law school context, which impedes even as it demands play. This is rooted in the unique psychological and intellectual demands of the paradox which is the law.

The law is stately and ancient; indeed, some of it is quite literally written in stone. At the same time the law is fluid, always open to new interpretations. The law must be orderly, predictable, and certain. It draws on deeply rooted values and shared norms of justice, but at the same time, each case exposes more uncertainty, more ambiguity. Each lawyer argues that resolution of that ambiguity in *her* client's favor is required by the same deeply rooted values and shared norms of justice relied on by the other

⁴⁶ PLAYING AND REALITY, *supra* note 4, at 41; cf. PHILLIPS, *supra* note 13, at 69 (“It is one of the most oppressive demands of adults that the child should be interested, rather than take time to find what interests him. Boredom is integral to the process of taking one's time.”).

lawyer to support the opposite conclusion. Law is like those mad, meticulous M.C. Escher drawings, in which a formal stone courtyard is shown in impossibly careening perspective⁴⁷ or the artist's own hands grasp the pens with which they draw themselves. The lawyer unable to maintain paradox is unable to traverse that courtyard or to truly grasp the law.



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M.C. Escher, *Drawing Hands* (1948)⁴⁸

III. PLAY AND PRACTICE AFTER LAW SCHOOL

The time pressures of practice make law school seem, in hindsight, like a leisurely summer afternoon for some lawyers.⁴⁹ The

⁴⁷ This drawing, entitled *Relativity*, is reprinted at the end of this Essay.

⁴⁸ Reprinted in F.H. BOOL ET AL., *M.C. ESCHER: HIS LIFE AND COMPLETE GRAPHIC WORK* 294 (J.L. Locher ed., 1982).

⁴⁹ See Amy Stevens, *Why Lawyers Are Depressed, Anxious, Bored Insomniacs*, *WALL ST. J.*, June 12, 1995, at B1, B7 ("The psychological agony of junior lawyers arises when partners are omnipotent, and associates are infantilized . . .").

scope of doctrine, unmanageable during law school, expands exponentially to preclude any possibility of mastery. The mere absence of a holding environment in law school seems positively benign in a world where unseen forces press you constantly toward the edge and even your own colleagues threaten to push you over.⁵⁰

Eventually, however, many lawyers find—or carve out—a niche in practice which allows them some control over the pace of their work and provides an acceptable holding environment. Creating such a niche, unlike law school, is an open-ended process and may well take years.⁵¹ Once this niche is found, however, lawyers discover that practice offers wonderful possibilities for play.⁵² Indeed, the practice of law not only allows play, it demands it. Two commonplace examples of lawyer play, role-playing and storytelling, illustrate the point.

First, lawyers play by role-playing. While role-play may take many forms,⁵³ I focus here on the most mundane: the lawyer's

⁵⁰ *Id.* (citing 1990 Johns Hopkins University study showing that "severe depression is more likely to occur among lawyers than members of 103 other occupations").

⁵¹ Those rare students who thrive in law school are generally those who have been able to approximate this process. See *infra* note 58 (describing ability of some lawyers and successful students to create needed down time).

⁵² But see Stevens, *supra* note 49, at B1 (citing Freud for proposition that "human beings need to feel that they control their environment—and have an impact on it," an experience denied many young lawyers at big firms). Compare PHILLIPS, *supra* note 13, at 74:

For the child to be allowed to have what Winnicott calls "the full course of the experience" the child needs the use of an environment that will suggest things without imposing them; not preempt the actuality of the child's desire by force-feeding, not distract the child by forcing the spatula into his mouth. It is a process, Winnicott is saying, that is easily violated

It is an open question how "meaningful" the practice context needs to be for the beginning lawyer; that is, how compatible with her own values and goals. While an environment hostile to the new lawyer's values and goals may preclude any kind of satisfying play, some new lawyers need play to discover or develop these values. See *supra* note 43 (describing effectiveness of role-playing in learning).

⁵³ For many lawyers, such as the district attorney who joins a criminal defense firm, this includes career changes. It may also include the sometimes-hourly transformations of the sole practitioner, who may counsel a divorce client in the morning and close a commercial real estate deal in the afternoon, and the multiple roles a lawyer is called upon to assume within the context of a single case (e.g., interviewer, counselor, drafter, and representative).

necessary ability to imagine himself in other people's shoes.⁵⁴ The lawyer not only has to understand the legal issue, he has to understand the motivations, interests, and perspectives of his client as well as the other parties, their lawyers, and the court. To negotiate the terrain between these multiple realities, the lawyer role-plays. Unlike the role-playing assignments of law school, this does not require diligent preparation and a careful script. It is instead an internal, intermittent exploration, over the course of the case, of these other realities. Like a child at play, the lawyer conjures up other selves. Surrounded by his law books, framed diplomas, and bar admissions, the staid, suited lawyer plays "dress-up." Freed by the demands of the profession, he imagines himself as an embezzling bank president or even a battered wife. The lawyer adept at this kind of play is the lawyer whose deep, sometimes startling, insights often provide the key to intractable disputes.⁵⁵

Second, lawyers play by telling stories.⁵⁶ A litigator, for example, must shape the facts into a coherent and compelling story. She must transform mountains of documents—or, conversely, a bare record—into a story that rings true, that accounts for the facts, and that is amply supported by them. This story must be flexible

⁵⁴ At an innovative clinic at Columbia Law School, students learn how to do so in the context of representing community groups. Mary M. Zulack, *Rediscovering Client Decision Making: The Impact of Role-Playing*, 1 CLINICAL L. REV. 593, 602-603 (1995). For a description of simulation exercises used to encourage students to place less stock in "lawyerly constructions," see Charles Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2244-47 (1992).

⁵⁵ I recall, for example, an adversary's explanation to the judge, who had instructed our divorcing clients to divide their personal property "equally." The judge could not understand how this had led to six hours of bickering, with resolution nowhere in sight. "My client is still in love with his wife," my adversary explained. "He'll say anything just to keep her in the same room with him." The judge quickly drew a line down the middle of the property list we had submitted, allowing the wife to choose which half she wanted.

Many lawyers find it especially useful to imagine themselves in the court's shoes. See generally Pierre Schlag, *Anti-Intellectualism*, 16 CARDOZO L. REV. 1111 (1995) (criticizing tendency of American legal thinkers to identify with judges).

⁵⁶ Many commentators have noted the centrality of storytelling to lawyering. See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (examining emergence of feminist narrative scholarship as distinctive form of critical legal discourse); Alfieri, *supra* note 45 (discussing notion of poverty law advocacy as medium of storytelling). See generally Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (exploring the importance of narrative in legal practice and scholarship).

enough to accommodate new facts as the case unfolds, but firm enough to resist an adversary's attempt to turn it against her client. The litigator tells the story to her client, and she tells variations to her adversary and to the court, drawing on all of them in settlement negotiations. Each story is based on the same facts, but each is given a different emphasis, a different "spin." Like role-play in practice, and unlike most work in law school, storytelling is rarely condensed into a frantic weekend of preparation. Rather, the stories emerge as the case evolves, shifting and changing as new facts are discovered and new theories considered.

Whether role-playing, storytelling, or playing in a different way, the lawyer needs the steady backdrop of a holding environment if her work is to feel like play. She must be able to opt out, to drop into "the sense that one is held . . . that one will not be dropped . . . that one can experience oneself and *be* oneself."⁵⁷ Holding environments are as diverse as the lawyers who arrange them. For some it is primarily a time, an hour during which nothing else will be scheduled. During this time, they savor the "sense that there is a safety net present, rather than the hard concrete of the circus floor."⁵⁸ For others, it is primarily a place, perhaps the book-lined walls and dark wood of their own offices, especially in the quiet hours after six.⁵⁹ Some lawyers find a holding environment in an activity—swimming, running, and even, it has been claimed, playing golf—which can be taken up almost anywhere at anytime

⁵⁷ See *supra* notes 14-15 and accompanying text (describing need for holding environment).

⁵⁸ *Id.* Lawyers, like everyone else, spend this time in a wide range of activities. They drink coffee and skim newspapers, go for walks, go to museums, play with their dogs, and listen to music. Because their work days are typically so long, however, lawyers have to be diligent and resourceful in building in efficient down time. I have noticed that this is a skill shared by some of our most successful students. Unlike their classmates, who have "too much to do to run" or who may spend hours in desultory activities that do not refresh them, these students have found a way to "experience oneself and *be* oneself," while meeting the demands of law school.

Trying to work through a problem while engaged in such activities, unfortunately, may deprive us of their benefits. At the same time, problems that we do not try to work through often seem to resolve themselves.

⁵⁹ Other places where lawyers may be found include libraries (especially law libraries) and courthouse coffee houses. Again, however, the lawyer must feel free of expectations for a place to function as a holding environment. As a law student, I was unable to free myself from the demands of my classes in the law library, although the undergraduate library worked well.

as the need is felt and professional demands allow. Many lawyers will swear that such activities make work possible. By serving the function of a holding environment, they also make *play* possible.

Role-playing and storytelling are not *like* play; they *are* play.⁶⁰ They provide an outlet for tension as well as a constructive channel for it. They facilitate social interaction and "help[] define and redefine the boundaries between ourselves and others."⁶¹ They provide an opportunity to practice skills and work through problems, and they enrich experience.⁶² Role-playing and storytelling are not the only forms of lawyer play, nor do all lawyers play. But *very good* lawyers engage in some form of play because that is how they sustain and hone the "ability to maintain paradox" that makes them very good.

For these lawyers, their work is their play. This is why so many lawyers are reluctant to retire, why emeritus professors still come to their offices, and why mandatory retirement for judges is such a bad idea. Lawyers accept, of course, that play is often cut off by the practical demands of practice, just as play is cut off by the practical demands of law school. But lawyers know that as long as they practice law they will be able to resume their play in a later case, in an article, or in a conversation with a colleague or even a former law teacher.⁶³

Law teachers understand the importance of play. This is why we bring our manuscripts on vacation, why we coach moot court teams, and why we construct simulation exercises for our classes. Many of us regret that law students do not have more time for play, even

⁶⁰ "[I]n playing, and perhaps only in playing, the child or adult is free to be creative. . . . [This] takes into account the difficult part of the theory of the transitional object, which is that a paradox is involved which needs to be accepted, tolerated, and not resolved." WINNICOTT, *PLAYING AND REALITY*, *supra* note 4, at 53.

As Mihaly Csikszentmihalyi notes:

The universal precondition for flow is that a person should perceive that there is something for him or her to do, and that he or she is capable of doing it. In other words, optimal experience requires a balance between the challenges perceived in a given situation and the skills a person brings to it.

Csikszentmihalyi, *supra* note 2, at 30.

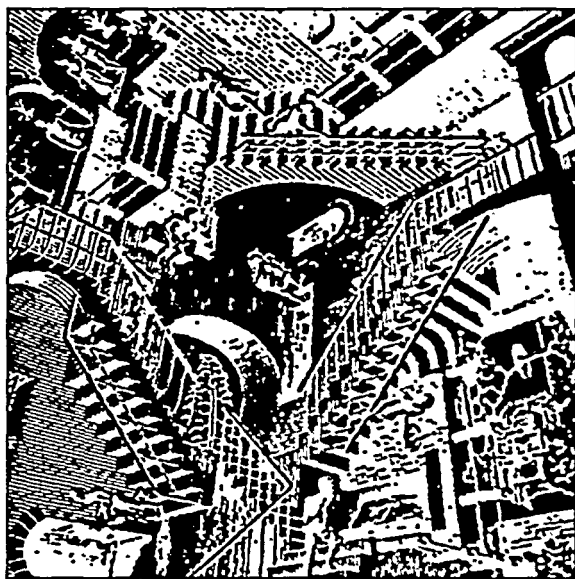
⁶¹ GROLNICK, *supra* note 4, at 35.

⁶² See *supra* notes 16-17 and accompanying text (describing these benefits of play).

⁶³ Practitioners and former students often call with knotty legal problems. They say that they want "advice," but most simply want to play—to explore the ambiguities of the law.

as we continue to assign reading and papers that barely leave students time to eat and sleep. We are hoping to expedite the mastery of doctrine necessary for play, or at least to expose the student to the provocative case that will inspire it.

The mastery of doctrine necessary for the practice of law is like the mastery of draftsmanship necessary for an Escher drawing. This mastery is in inevitable tension with the moment of imaginative flight, of creative play, which reveals the law as fluid and opens it to new interpretations. The practice of law requires this mastery, but play brings the law to life. Like any other form of play, the practice of law as play can only be facilitated; it cannot be taught.⁶⁴ This is a paradox and it is rooted in the deeper paradox of the law itself.



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M.C. Escher, *Relativity* (1953)⁶⁵

⁶⁴ Cf. *supra* note 19 (describing how Winnicott facilitated play with the "squiggle" game).

⁶⁵ Reprinted in BOOL ET AL., *supra* note 48, at 306.

