THE COURTROOM MYSTIQUE AND LEGAL EDUCATION

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> 'I keep running into Harvard Law School graduates, people of all ages, who tell me that 'the court held no fear' for them. A lot of them are men who fought in World War II or Korea or Vietnam, and most say that even having had those experiences, they never felt as scared or oppressed as they did when they were law students at Harvard; and that afterwards, by comparison, their anxiety about going into a courtroom for the first time was nothing.'[1]
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> Contested litigation is much less significant to American lawyers than is popularly recognized. As a source of income and in the amount of time devoted to it, it is a minor activity for most lawyers in the United States. A sizable minority of the bar never participates in contested litigation, and comparatively few lawyers are regularly engaged in it.[2]

Many of the things that happen in legal education are justified by the assumption that they are necessary to prepare the student for life as a courtroom lawyer. This justification is often stated openly; but even if not explicitly articulated, it is nevertheless an unstated assumption. This would be no great problem were it not for the fact that many, and probably most, of the more objectionable features of legal education are justified by this reference to the courtroom paradigm.[3] The passage from *One L* with which this article opens is a statement by the fictional Nicky Morris, which continues:

> But it doesn't fill me with pride to be part of an institution that has provided so many people with the worst times of their lives. I don't

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1. S. TUROW, ONE L 169 (1977).

2. Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK; AN ANALYSIS OF THE LEGAL PROFESSION IN THE UNITED STATES AND ENGLAND 97-98 (1967).

3. It should be obvious that I do not claim this is their *sole* justification. See text section following note 38 *infra*.

> think that's an affirmative thing to say about this law school. I think there has to be something wrong with a place like that.[4]

Much is written about legal education, including *One L*, all of it noting that "something" has to be wrong with legal education. Yet all this literature, while recognizing that the courtroom paradigm justifies the "something", fails to consider the possibility that the "something" might be the paradigm itself. Johnstone and Hopson clearly imply a fundamental flaw in the courtroom paradigm as a justification.[5] But they merely note officially what has always been fairly obvious. Lawyers do not spend much time in court or even in courtroom-like circumstances.[6] Even those who claim to be "courtroom lawyers" are seldom in court. The skills necessary solely for the courtroom as well as many other things justified by the courtroom paradigm are a diversion. For all but clinicians, the courtroom paradigm is a fraud.[7]

The courtroom paradigm is often used to justify any aspect of legal education which seems morally repugnant or is personally objectionable.[8] Law students often observe certain formalities, use certain methods, adhere to certain traditions, and practice certain habits when those formalities, methods, traditions, and habits seem opposed to normal notions of the way human beings operate. Where law school departs from normal human expectations, the justification is likely to be that these departures are necessary for the student to prepare for life as a lawyer. And, most importantly, life as a lawyer is premised upon a belief that lawyer means trial lawyer and trial lawyers' lives are defined by the courtroom paradigm. This essay questions whether the paradigm has external validity—that is, first, whether it is right to use as a

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4. S. TUROW, *supra* note 1, at 169.

5. See text & note 2 *supra*.

6. See text & notes 40-43 *infra*.

7. As I hope to demonstrate, the courtroom paradigm is faulty due to three unarticulated myths of legal education: that many if not most law students are going to be practicing in court; that while there, they will be in "Perry Mason" kinds of combat situations; that non-clinicians are competent to teach the skills necessary for that mythic future. The myths, if I am right, are pedagogically faulty because of a misperception of practice both by our students and by ourselves. Since most students will spend little if any time in court, since most courtroom practice does not resemble our images, and since we do not specialize in courtroom skills, the paradigm is defective. None of this is true, of course, with respect to clinicians, who specifically study and often practice in the courtroom as part of their teaching duties. Their perceptions of the necessary skills are therefore more accurate, and their students—at least in trial practice components—are specifically interested in and oriented toward a possible courtroom career.

8. At this preliminary stage, I will rely on the Turow passage as provisional evidence of this phenomenon. I hope the point will be developed to the reader's satisfaction later in the text. This article uses both *Paper Chase*, J. OSBORN, THE PAPER CHASE (1971) and *One L*, note 1 *supra*, as support in places. Although both are works of fiction, there is good reason to justify their use here. Both works, which were indeed authored by law students, accurately reflect the points for which they are cited. Not only are they claimed to be accurate by the authors themselves, *see* J. OSBORNE, *supra*, Introduction; S. TUROW, *supra* note 1, at 10-11, but others have recognized their authenticity as well. *See* Herman, *Book Review*, 1972 WIS. L. REV. 634, 638-42 (1972); Shea, *Books for Lawyers*, 58 A.B.A.J. 505 (1972).

paradigm an area of practice so unrepresentative of most lawyers' lives; and second, whether it is actually even representative of those few lawyers' professional activities. Most of this essay will urge that a host of formally meaningless law school activities are justified by the courtroom paradigm and that not only do most lawyers spend little time in court, but the time they do spend there bears little relation to what law professors—who spend almost *no* time in court—teach. Finally, having suggested that the paradigm is more correctly characterized as a mystique, this essay will attempt to explain why law professors are so wedded to this mystique.

THE FORMALITIES

Many activities supported by the courtroom paradigm seem minor and petty not only in their effects on substantive education, but also as targets of criticism. But if they are so unimportant, one might logically wonder at their longevity; although apparently trivial, I suspect they have great psychological and ideological significance. It is only because they are so patently meaningless in terms of anything obviously substantive that I call them, "the empty formalities." These formalities include the use of seating charts in the classroom, the insistence on the terms Mr. or Ms. (and sometimes, significantly, Miss or Mrs.), and other rigid classroom techniques such as asking questions and choosing students to answer them in ritualistic patterns (alphabetically or otherwise). All these practices highlight an attachment to certainty in a profession which supposedly values a high tolerance for uncertainty.

These formalities are empty, of course, because they convey nothing of substance in educational terms. They don't teach "the law." They are also insubstantial in that almost all law professors would agree that these practices are silly and don't matter a whit. Nevertheless, they are perpetuated in one way or another, belying their greater importance.

Is there something important about professor and student calling each other "professor" and "Mr."?[9] One reason that might be ad-

9. [I]t is rare to be called anything but 'Mr.' or 'Ms.' by a professor and even rarer to address faculty members by their first names. Seldom do students and teachers pass more than a nod or a smile when they see each other out of the classroom. You are business acquaintances rather than friends. . . .

S. TUROW, *supra* note 1, at 137. The distance in law school is sometimes inhuman, although perhaps quite "lawyerly." It is this sort of distance, however, which seems almost pathological or, at least, severely neurotic. After a class year with Hart, his star student, and after selecting Hart to do some research for him, Professor Kingsfield failed to recognize Hart when the student tried to thank the teacher for a fruitful school year: " 'What was your name?' Kingsfield said, stepping past Hart. His voice sounded as if it came from a long way off. 'Hart, Mr. Hart,' Hart said. " 'Well, thank you, Mr. Hart,' Kingsfield said, and then he was gone." J. OSBORNE, *supra* note 8, at 216-17.

vanced is that all educational participants need the hierarchical structure offered by these empty formalities. But if this were the logic, there would be no need to treat the student with equal formality; it would accord far better with a hierarchical perspective to call the students by first name. I can only say that one colleague of mine,[10] when asked why he insisted on the Mr./Ms. routine, answered instinctively (too instinctively, I suspect) that those customs were necessary in court, so why not in the classroom. The idea that lawyers would use these empty formalities in court was his justification for their use in class.

What of seating charts? They are certainly convenient ways to identify students.[11] Of course, there are ways of identifying students other than their physical location in class. In a profession that prides itself on innovation and adaptation, it seems curious that we are so trapped by convention. But the seating chart does have its parallel in

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10. I resort to personal knowledge reluctantly and rarely in this article. If my arithmetic is correct, I have only done it seven times.

11. The rigidity of law classroom seating is well-known:

> [C]lass seats are assigned in advance. The allotment is random and there is a different seat for each course. Every student's seat number is recorded on a diagram. . . . Many professors cut students' picture out of the . . . handbook and place them on the chart as well. Students . . . are also prevented from sitting in the back of the class. . . .
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> Seat assignment is a requirement of the Socratic method. The seating chart allows professors to select students freely . . . rather than awaiting volunteers.

S. TUROW, *supra* note 1, at 42.

It should not take a law professor's creative and analytical mind to realize that the seating chart is unrelated to these purposes. Students can be called from the class roster and are thus instantly recognizable, without reference to names or pictures or seat. It is less the stated purpose of names, faces, and participation than that of fostering the courtroom mystique which motivates such classroom rigidity. In any event, it is more than a meaningless formality. Savoy puts great emphasis on the physical formalities of legal education, calling them the "architecture of education." Savoy, *Toward A New Politics of Legal Education*, 79 YALE L.J. 444, 491-94 (1970). The seating chart can achieve such formalistic significance that, just as the courtroom mystique, see text section beginning at note 69 *infra*, itself substitutes for the real courtroom, the chart functions as the students themselves. *Paper Chase*'s Hart once answered a question proposed by Professor Kingsfield to the teacher's total disbelief: " 'You don't have anything to say?' Kingsfield said, for an instant puzzled. He looked at the seating chart, as if to make certain it was Hart talking." J. OSBORN, *supra* note 8, at 173.

Sometimes the seating chart may be a not-so-rigid nor empty formality, but in that event it seems to lose all educational or even professional significance and assumes the role of a mere tool of torture. Witness how Kingsfield was able to "surround" Hart by asking questions of all of the students around him. Obviously, that could not be done by name alone because it requires some way of placing each student in a prescribed place. Used for that purpose, however, its legitimacy is questionable. *See* J. OSBORN, *supra* note 6, at 127-28.

Shaffer and Redmount say that to a significant extent it is the form, not the content, of legal education which is most important in what is taught: the secrets of professionalism. But just as the content of law is often hidden—answers are seldom given—the form is likewise kept a mystery. Law professors, by not being practitioners, disclaim the position of role model. Likewise, say Shaffer and Redmount, professors also insist that their academic positions should not be a model either. Thus, law professors avoid ever having to prove their credentials. "The immediate goal implicit among those who create this confusion in beginning law students is dependence." T. SHAFFER & B. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE 159 (1977). Given this dependence, and the refusal to accept a position as role model, the law professor is free to create her own universe. Thus, although an explicit reference to the courtroom paradigm is often useful as justification, a courtroom *mystique* is equally useful—after all, the professor never promised anything! To the extent that this mystique is kept, it helps keep order in the classroom and also protects the professor's ego.

court. Traditionally, the plaintiff and defendant sit on different sides and, in fact, the plaintiff has the position closer to the jury box. In addition, it is common to find that spectators and lawyers are often put in different places. A lawyer can walk into almost any courtroom in this country and immediately recognize most of these formally ordered positions.[12] The classroom seating chart, then, though perhaps an empty formality in itself, may be justified by the courtroom paradigm. Though the seating chart may also be dismissed by most legal educators as an empty formality, when push comes to shove and students resist the practice, it is not uncommon for a teacher to reply that students will have to get used to those formalities just like they will have to in . . . court!

It would be foolish to pretend that most law schools are now inhabited by students uniformly dressed like Wall Street lawyers. But it would be equally foolish to blind ourselves to the reality that formality, including fashion, is generally encouraged and that both faculty and students are received by their peers and superiors more approvingly when the official dress is sported. When such attitudes and practices are challenged, they are met with the same response that the other empty formalities provoke: such dress is customary in court and should become a habit in law school.[13]

THE METHOD

Enough has been written critical of the socratic method to eventually seal its doom; I will not repeat any of it here.[14] My concern is not with the educational validity of the method, which has been amply attacked, but rather with its other and perhaps ultimate professional justifications. The opening quotation from *One L* is evidence of this justification. The argument is that if students don't get used to the rough atmosphere of the classroom, they will be lost in the courtroom.[15] Thus, the rapid-fire, testing questions of the classroom are jus-

12. *See* P. BERGMAN, TRIAL ADVOCACY 334-36 (1979).

13. A much better justification, of course, is that future employers expect this type of attire. The fashions change at most law schools as predictably as the leaves of the famed southern dogwood: "Throughout October and November, blue-jeaned second and third-year students periodically disappear, to reappear with Brooks Brothers suits, suntans, and accounts of 'the best French restaurant in Beaumont, Texas.'" J. SELIGMAN, THE HIGH CITADEL 188 (1978). Note that this dress is justified not by a courtroom paradigm, but rather an employment paradigm—there is a certain standard, perhaps, that *clients* expect.

14. For a provisional definition of the socratic method, see note 35 *infra*. The literature about the socratic method seems almost endless. For a start, see references cited in note 11 *supra*, notes 30, 31, 33, 35, 70, 71, 77 *infra*.

15. An argument often raised in praise of the socratic method is that it 'toughens' students so that they are able to handle the rigors of the 'real world.' One who, as a professional psychiatrist, has observed law teaching closely, notes and approves of its goal, at least. Good students also develop the capacity to stand the pressure of the adversary

tified by the need to be quick on one's mental feet for fear of being tripped up one day in court. The essence of the justification is clearly the courtroom paradigm.

It is the atmosphere of the socratic method which I address. It may be, despite recurrent criticism, that the socratic method efficiently teaches legal doctrine. But implicit in the socratic method are meanness and brutality.[16] A student is put on the spot until she is either humiliated or reprieved.[17] After successfully fending off the teacher's attack, a student will frequently receive congratulations and handshakes, much as if she has just "won" a courtroom victory.[18]

The etiquette of the socratic method is implicitly, and sometimes explicitly, defended as a mirror of courtroom etiquette.[19] A teacher who is criticized for being too hard on her students will reply that such mental toughness is necessary to prepare the student for the cruel world

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situation, and I fully agree with those who see the classroom situation as a means for developing this necessary lawyer skill.

Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93, 126 (1968). He adds, that "My principle challenge to the system is that too many students fail to develop this capacity because of inappropriate programming for this stress." *Id.* at 126 n.67.

Watson falls into a common trap: he neither asks whether students should be taught this skill whether or not they are going to enter adversary situations *nor* whether, in fact, real adversary situations are the way law school professors imagine and portray them. Later in the article Watson discusses the different demands of various kinds of practice, but he never reconsiders his "principle challenge." *See id.* at 135-37.

16. For an instance, albeit quasi-fictional, of classroom cruelty engineered by the law teacher who "knew a good one when he saw one," *see* J. OSBORN, *supra* note 8, at 41-42, in which Professor Kingsfield lets Kevin, the student, hang until he is cut down by an "intruder," a fellow student who had the heart, and the nerve, to come to his rescue by violating the rules, speaking up "without the preparation of a hand. . . ." *Id.* at 42.

The socratic classroom is exactly as stressful as has been described. It varies, according to a knowledgeable psychiatrist, from "not getting out of bed in the morning" to "actual suicide." Watson, *supra* note 15, at 130. Therefore, even if the socratic method is educationally valid, it is questionable whether its adoption in the classroom can achieve the goal of producing lawyers ready for courtroom battle:

> [S]tudents must pass through the first year, and by then many have already had the stuffing kicked out of them. They have been treated as incompetents, terrorized daily, excluded from privilege, had their valued beliefs ridiculed, and in general felt their sense of self-worth thoroughly demeaned. If you get knocked down often enough, you learn not to stand up and after being a Harvard 1L, a silent crawl to the finish line looks to many students to be the better part of valor.

S. TUROW, *supra* note 1, at 273. The destruction, fortunately or unfortunately, is only one-way. The student rage toward law school and law professors which when repressed results in suicide could, if expressed, easily result in murder. Fortunately, this has only been an imagined event. *See* J. OSBORN, *supra* note 8, at 132.

17.. "Whatever its faults or virtues, the Socratic method depends upon a tacit license to violate a subtle rule of public behavior. . . . In using the Socratic method, professors are informing students that what would normally be a safe personal space is likely at any moment to be invaded." S. TUROW, *supra* note 1, at 42.

18. The courtroom imagery encouraged by both teachers and their classes is pervasive: "Bell had obviously lost touch with his surroundings. He wasn't in contracts class, but in a courtroom leading the defense. It was as though he'd been galvanized by the portraits of the old judges hung around the room and was arguing his case to them." J. OSBORN, *supra* note 8, at 106.

19. For a candid confession of the law teacher's goal that the classroom track as closely as possible the law professor's vision of the courtroom paradigm, *see* Oleck, *Adversary Method of Law Teaching, Summarized*, 27 J. LEGAL EDUC. 86 (1975).

of courtroom practice. It may be humiliating and pressured but, after all, that is the way cases are tried every day in court, goes the reply, and so why not get used to it now. This harsh mirror of perceived legal reality is repeated in other law school situations. Among these are moot court and examinations, to be considered below.

Characteristic of the socratic method is case analysis. Case analysis is often defended as a means of elaborating and illustrating legal doctrine.[20] Increasingly—although not originally—the case method is defended on very different grounds. It teaches a student to "think like a lawyer." Learning to state a case, to distinguish one from another, and to make perhaps artificial distinctions or syntheses of seemingly inconsistent cases is defended on the basis that it is a part of legal practice. Now, case analysis alone may in fact be a part of the "real" legal world. But in the socratic method, a student is forced to come up with these syntheses and distinctions in a split second.[21] Such pressured techniques are nevertheless defended by the argument that a lawyer will have to perform under such circumstances in court. Thus, to quickly analyze a case and come up with a distinction or synthesis—to "guess what I'm thinking"—while subject to aggressive questioning, is justified on the grounds that this is what court will be like some day.[22]

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20. It is ironic that Christopher Columbus Langdell, generally credited with originating the present structure of modern legal education as well as the case method and socratic style, "was not a very effective trial lawyer. . . . While the others appeared in court or met with clients, Langdell did the research and wrote the briefs." J. SELIGMAN, *supra* note 13, at 31.

The movement to replace or at least supplement the case method with a clinical curriculum is even more ironic in that the case method is, or at least was, a clinical curriculum. The case method was meant to replace the old academic lecture style with a technique better suited to the demands of actual law practice. *See generally* Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329 (1979). This very genesis explains both the current clinical trend and the courtroom mystique. The reason the clinicians want to abolish or preempt the case method is because it is ill-suited to actual practice. But the reason the case method was originally adopted and persists today in most classrooms is because it is based on the law professor's vision of courtroom practice.

21. See note 28 *infra*.

22. Surely, if the courtroom paradigm were accurate, it would matter not just how things were said, but what was said. But to some extent, the world of the law classroom is all show. It is the stratified world of legal macho. Hart, in *Paper Chase*, categorizes the people in the legal classroom into three groups: those who have surrendered to fear and maintain silence, those who live in fear and participate only when asked, and the elite third group who "thrust themselves forward into the fray." J. OSBORN, *supra* note 8, at 29.

> Sometimes he was amazed at what he was doing. Why didn't he just answer, put it on the line? He knew that the emulation of the third group came from the mere fact that they answered the question and had nothing to do with whether they answered the question right.

Id. at 29-30.

To the extent "snap judgments", see note 28 *infra*, breed *bad* habits, see notes 34, 45 *infra*, we certainly cannot rely on the courtroom mystique for support. Clearly the courtroom mystique supplies at least *some* of the underpinnings for classroom practices. Robert Hutchins, who at 28 was probably the youngest dean Yale or perhaps any law school ever had, said: "My course in Evidence, for example, was taught on the wholly mistaken theory that the student could go from my classroom to the courtroom, where he could at once begin to outmanipulate his opponent." Hutchins, *The University Law School*, in THE LAW SCHOOL OF TOMORROW (1968). Others have seen the folly, too. "By focusing on law cases rather than on the prevention of litigation through

THE TRADITIONS

Tradition, of course, is part of law school. But some traditions seem to have surprising and suspicious longevity. Two of these are the unvarying format of moot court and law examinations.

Moot court is explicitly defended on the basis of real world courtroom experience. Students often team up to write briefs and practice arguments to a panel of judges just like (they are told) they will do in practice.[23] The impression they are given is that real practice will be a team type of approach and therefore the student should become comfortable working with colleagues on briefs and argument.[24]

Appellate practice classes also face the perennial issue of whether the practice problem should be of the open or closed-universe type. Students may either be free to roam the library for any support they can find or may be restricted to specified authorities in order to save themselves, and frequently the teachers, from totally unbounded research.[25] This dispute is framed in terms of two opposing interests: economizing both student and faculty time and effort and approximating as closely as possible the kind of experiences that actually happen in court. Thus, the justification for the moot court experience is patently and explicitly the courtroom paradigm.

But moot court presents experiences that could be viewed as morally objectionable or personally unpalatable were they not otherwise justified by an external standard such as the courtroom paradigm. The student judges are encouraged to act as savagely as possible in their attack upon the litigants. The aim is to be as disruptive as possible to prepare the students for "real" court, where the litigants will suffer endless (and mindless) interruption in an aggressive, belligerent, and hostile atmosphere.[26] Student judges thus interrupt and frequently insult the litigants, seldom personally, but often in terms of the quality of the

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legal planning, most law school courses misrepresent what private practitioners, in fact, do." J. SELIGMAN, *supra* note 13, at 204. *See also*, Brown, *Teaching the Low Visible Decision Processes of the Lawyer*, 25 J. LEGAL EDUC. 386 (1973). Seligman has hit the nail on the head. It is not that law professors don't do what they claim they do—Seligman (and I) have no doubt they do, in fact, teach cases. What Seligman doubts is whether lawyers *do* cases, and all the things that go with cases—the formalities, the techniques, the methods, and the habits.

23. See note 25 *infra*.

24. *Id.*

25. Sometimes the beginning arguments are closed-universe while the "upper rounds" are open-universe. The competition is inevitably conducted in pairs or larger teams and, with open-universe problems, the scope of the task is truly immense. The scope is enormously increased when the universe is identified as every state rather than a single state. *See* S. TUROW, *supra* note 1, at 210-15, 246-50, for a description written from the student's perspective.

26. *See* S. TUROW, *supra* note 1, at 246-50. Although Turow's protagonist faced judges who "were a little more casual" than others, *id.* at 247, nevertheless the student judge attacked the argument, asking "why you argued this point." The actual judge on the three-member panel merely "appeared somewhat amused. He rocked in his chair, smirking now and then in my direction." *Id.* at 248.

argument. These judges are usually recruited from the ranks of upperclassmen, with the inducement that finally they will be able to do to underclassmen what was done to them in former years. Whatever is done, however, is done in the name of the courtroom paradigm.

Frequently these practice cases are expected to be completed within a semester. This high pressure is also justified in terms of how law practice will actually be. At many schools, a great wealth of faculty time is devoted to this activity because it is conceived to be excellent training for actual courtroom experience. Parenthetically, it is also perceived—although probably mistakenly—to be a good way to get a school on the map through national team competitions.[27]

Law school examinations are also designed in accordance with faculty perceptions of the demands of actual practice. It is more difficult to justify the examination in terms of the courtroom paradigm, however, because examinations are so obviously unlike anything that happens in a courtroom. But to a great extent examination practices can be harmonized with the courtroom paradigm.[28]

Why do students have only a few hours in which to demonstrate their performance? Why are the examples frequently framed in fictional terms of fantastic litigants, with the final question demanding the rights of the parties? If a student were to point out that in actual practice both a library and sufficient time for research would be available in which to absorb and consider the problem, the teacher's answer would frequently be that sometimes a lawyer has to think quickly and come to conclusions. The best refuge for this answer is a retreat to the

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27. Surprisingly, at Harvard, where much of the recent literature on aggressive legal education has been generated, the school has its own Ames competition instead of participating in the National Moot Court Competition (although it does participate in a number of other specialized national appellate programs). *See* S. TUROW, *supra* note 1, at 210-15.

28. And distinguished:

> The examination community which exercises first tyranny over law students (and this includes both academic examinations and bar examinations) is analytically irrelevant to either the learning community or the professional community. It is worse than that; it is an intrusion into each of them. The real context of law office practice is not a competitive context; it is a counseling context. Examinations are no preparation for it and are a poor way to evaluate one's promise for it.

T. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 3 (2d ed. 1979).

The failure of bluebook experiences to adequately assess the qualities of many students is well known:

> These students excel in long-term writing projects, courtroom arguments, or client counseling—skills that simply are not measured on first-year examinations. Indeed, all that is measured is an ability to describe the elements of a legal problem under time-pressure—an important ability, to be sure but only a small part of what law work actually requires.

J. SELIGMAN, *supra* note 13, at 179. While I agree with Seligman that the law exam tests only a small part of what legal work demands, I take issue with his inclusion of time-pressure as one of those demands. I have heard this again and again but have never seen anything as practical proof. Obviously, successful law practice is seriously time-demanding. But there is usually more than enough time to analyze the legal attributes of a problem, with a few exceptions such as public defenders who must defend a case minutes after meeting the client. Surely the latter is not the kind of practice for which we are ideally preparing law students.

courtroom paradigm. Of course, a lawyer can refer to books in the office or can spend the weekend pondering a particularly difficult problem. But when a lawyer faces her opponent across a tense courtroom, she may have to think on her feet to produce the best argument possible. And, considering all of the circumstances, this is probably the best —and only—justification for the present style of law school examinations. We should squarely face the fact that in any other circumstance, a lawyer would be guilty of malpractice if she were to do what is demanded of her in a law school examination (or, for that matter, a bar examination). There is no better example of *per se* malpractice than shooting from the hip, giving advice without reference to published materials and reaching conclusions in insufficient time.[29] Lawyers who follow these practices are usually either incompetent or have too many clients. Once again, the courtroom paradigm fails to conform to reality.

THE HABITS

Finally, there is the pervasive sense of adversity and hostility which infects much of law school.[30] The socratic method is frequently blamed, but other factors also share responsibility. First, there is a general sense of distance between faculty and students. Episodes of classroom friction sometimes even erupt into open hostility, but more often it exists as a submerged antagonism.[31] A teacher faced with a rebel-

29. *See* Smith v. Lewis, 13 Cal. 2d 349, 358-60, 530 P.2d 589, 595-96, 118 Cal. Rptr. 621, 627-28 (1975) ("[T]he record documents defendant's failure to conduct any reasonable research. . . . Instead he dogmatically asserted his theory. . . . [D]efendant's refusal to educate himself . . . constituted negligence. . . . [An attorney] . . . is expected . . . to discover . . . rules . . . which . . . may readily be found by standard research techniques. . . . "[E]ven with respect to an unsettled area of the law, we believe an attorney assumes an obligation . . . to undertake reasonable research . . . and to make an . . . intelligent assessment. . . . [H]e rendered erroneous advice . . . without . . . research of readily available authority."); Metzger v. Silverman, 62 Cal. App. 3d Supp. 30, 39, 133 Cal. Rptr. 355, 362 (1976) ("[A]n attorney assumes an obligation . . . to undertake reasonable research . . . and to make an informed decision . . . based on an intelligent assessment. . . .").

30. See notes 71, 75 *infra*. The reaction of some students may actually be physiological: "As Hart watched, Kevin's hands began to shake. Kevin put down the book and gripped the desk, holding onto the curving bench top like a sailor clinging to a spar." J. OSBORN, *supra* note 8, at 124. Other students are sturdier, although the strong ones are quite aware of their special strength and the vulnerability of others. One of the strong has said,

> They are playing a game, and I really enjoy it. There are some people who really feel the intimidation, and they will admit when they are not prepared. I wouldn't do that. If the prof asks me a case, even if I'm unprepared, I'll fake it. Let him catch me in a mistake. Let him tell me I'm not prepared, but I'm not going to tell him so.

Mohr & Rodgers, *Legal Education: Some Student Reflections*, 25 J. LEGAL EDUC. 403, 411 (1973).

31. Sometimes it isn't so submerged.

> Particularly in a law class, which may be regarded as, in some degree, a training ground for the polished urbanity of professional manners in the judicial forum, it becomes desirable to maintain the punctilio of courteous dealings. Just as it is distressing to see a judge lose his temper on the bench, so I think it is most unfortunate for a teacher to give vent to personal feelings from the platform, as I have known them to do, shouting with

lious class will frequently adopt an equally aggressive response. The entire class will be explicitly or subtly warned that the grades for that class will be curved downward.[32] Not, mind you, as any kind of retribution, but rather because the class has failed to act like lawyers. It is implied that lawyers should respond to ineffective communication—for that is usually all, assuming a knowledgable teacher, that a failed classroom represents—by toughening up, not by complaining.[33] Faced in court with a difficult time, a lawyer cannot complain about the situation. The lawyer must become more aggressive, answering sharp questions with equally sharp answers. She must never plead for gentleness, request explanation, or reduce tensions. The courtroom paradigm therefore dictates that law teachers avoid being too kind to their classes. Sanctions are the real stuff of the courtroom, and must be imposed when litigant-students are unsuccessful in resisting the inevitable pressures of the adversary system.[34]

It is the adverse nature of law schools that produces the atmosphere of hostility. Adversity probably breeds hostility.[35] This criticism

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rage at the student who arrives late, or leaves early, or is unprepared, or reads a newspaper in class.

Peairs, *Essay on the Teaching of Law*, 12 J. LEGAL EDUC. 323, 368-69 (1960).

Note what Peairs has done here: he has reached the same conclusion as do I, that classroom adversity is educationally unsound. Yet he reaches that conclusion by adhering to the courtroom paradigm, rather than abandoning it as I suggest. He has pinpointed, therefore, if both he and I are correct, the defect of the courtroom paradigm: it is a mystique. He achieves change by changing the paradigm; I do it by abandoning the paradigm. I don't think his approach is as satisfactory as mine because his approach is constantly endangered by the psychological and actual reality that professors will ultimately be responsible for fashioning their paradigms.

32. I don't know how often professors articulate these threats, but students nevertheless seem to understand them. "It was dangerous to feel hostile toward [Professors] Perini or Issac Fowler—they seemed capable of any retaliation." S. TUROW, *supra* note 1 at 277.

33. I am reminded of what Strother Martin said to Paul Newman, "What we have here is failure to communicate," in *Cool Hand Luke* (Warner Bros. 1967; screenplay by Donn Pearce and Frank Pierson; based on the novel by D. PEARCE). It seems far more than coincidence that this reminder of the failed law classroom is a statement made by a warden while brutalizing his prisoner.

34. Many law students have this inevitable sanctioning atmosphere so drilled into their heads that they don't realize that practice is much more flexible; the sanctions aren't necessarily inevitable. It is only if the student has been taught not to "make a fool" of herself that she may unwittingly trap herself into sanctions. I suspect that many practitioners have been served poorly by the law classroom's emphasis on quick thinking and the notion that sanctions are a constant threat. Hegland says the law student's preoccupation with not making a fool of himself is fatal to courtroom success. Faced with an objection the grounds of which are not apparent, he prescribes appropriate conduct:

> You have no idea what the hell they are talking about. Before admitting ignorance, try smoking them out. . . . If your opponent stonewalls it . . . you probably have no choice but to ask for a recess to go look up the law. Best for you to make a fool of yourself than let your client die.

K. HEGLAND, TRIAL ADVOCACY 128 (1979).

35. Since the socratic method is essentially adverse dialogue, *see* Dillon, *Paper Chase and the Socratic Method of Teaching Law*, 30 J. LEGAL EDUC. 529 (1980), it might be argued that the law classroom will necessarily be hostile. I think this is true but do not wish to be misunderstood as saying that this is either necessarily bad nor that it is uncontrollable, see text conclusion. I think the socratic classroom is necessarily hostile *to some degree*. *See* Kennedy, *How the Law School Fails*, 1 YALE REV. L. & SOC. ACT. 71, 72-74 (1970). Since adverse relationships are by nature

of the law school environment, however, has been rejected on the ground that if students cannot adapt to the adversity of law school, they will surely fail in the greater adversity of the courtroom. The courtroom paradigm dictates even greater hostility, not less.

Thus, a teacher who has had a hard time in class will not often accept the criticism that she has been too demanding. If her attitude toward the class is claimed to be too adverse, the teacher will usually respond that law students expect and deserve such adversity.[36] If students want explanations, for instance, the teacher will frequently respond instead with more questions. The notion of answering a question with another question, although acceptable practice in law schools, would be thought of anywhere else as discourteous, at the very least.[37] This practice, however, is frequently justified as the kind of intellectual challenge found in the courtroom.

This is what Nicky Morris meant when he said that even war veterans were terrified of the law classroom. Those students who appreci-

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hostile, I think the solution is not to deny the necessary relationship but to be conscious of it and attempt to control it within useful bounds. Obviously, some lawyers as well as law students and teachers are unable to control this hostility. See note 45 *infra*.

36. See note 38 *infra*.

37. Answering a question with another question, a common characteristic of a law classroom, is simply rude. In other contexts it would be characterized as obnoxious. Anyone who has been a parent knows the frustration and antagonism a child feels when his questions are met with more questions instead of answers. And anyone, I suspect, who has accompanied another as friend or spouse through the law school experience will recognize the interpersonally disruptive traits that law school encourages. *See* S. TUROW, *supra* note 1, at 92: ("At home, Annette told me that I had started to 'lawyer' her when we quarreled, badgering and cross-examining her much as the professors did students in class").

I do not insist that the forms of etiquette of polite society are necessarily congruent with good teaching methods. "A question is often a good opener. . . . But do not overdo the questions; there must be no hint of cross-examination." VOGUE'S BOOK OF ETIQUETTE AND GOOD MANNERS 16 (1969). On the other hand, I don't think teaching and conversation occupy two different universes. *Compare* note 61 *infra*. "A good conversationalist stimulates, inspires, and *teaches* us. He may also tease and flatter us. Underneath his wonderful 'gift of the gab' inevitably lie two ingredients: an honest desire to please *and* a sense of humor." L. BALDRIGE, THE AMY VANDERBILT COMPLETE BOOK OF ETIQUETTE 742 (1978) (emphasis added). As to the professor's perhaps repressed desire to please, see text section beginning at note 69 *infra*. As to his sense of humor, perhaps that is the quality which separates the aggressive professor from the wonderful conversationalist-teacher. The reader may note that I switch from "legal" to "non-legal" authorities at times. This is because a central thesis of this article is that to separate out lawyering from living is artificial . . . and more. *See* note 55 *infra*. It is unprofessional in the real sense of the word—it doesn't work. It is what this courtroom mystique—as a parallel to the courtroom paradigm—is all about. Explicitly practitioner-oriented literature tends to encourage lawyers to be more "natural"—that is, to abandon law school affectations and to adopt the lesson of what is learned from everyday activities.

> Herein the traditional advice you learned at your mother's knee. Be courteous to court personnel, respectful to the judge. Don't smoke or chew gum. Don't shout obscenities in the corridor. These are really very important and my decision not to discuss them at length is not meant to downplay them. It's just that you should be able to figure out how not to be obnoxious.

K. HEGLAND, *supra* note 34, at 85-86. If the explicitly practitioner-oriented literature refers to common experience as the source of many of the rules, there can be nothing wrong with referring to such things as common rules of etiquette in questioning the legitimacy of legal education generally.

ated adversity, hostility, and having their questions answered by questions said that this was what they would need someday in court. The courtroom paradigm, when believed by both teacher and student, is thus a defense against the most obvious hostility, aggression, and adversity in what is supposed to be an educational forum. It should be noted, however, that Turow's book is part fiction and part fact. Turow's imagined third-person statement that law class prepared the hardened veteran for court is an extraordinary example of the courtroom paradigm being conveyed from (Harvard) faculty to (Harvard) student. It was set into type as a fictional description of the justification for legal education in its present form. The courtroom paradigm became part of the classroom myth which Turow, like all law students who have not yet practiced, assumed was true. In order to work, I am saying, both professor *and* student must believe in the paradigm.[38] It is

38. It may be that the law school population which most often easily and completely falls victim to the courtroom mystique are the students. *See* S. TUROW, *supra* note 1, at 75. ("And we were all gladly training now for an intensely competitive profession in which there are winners and losers every time the jury returns, or the judge speaks"). It has been conjectured that "most Harvard alumni never get to court." Wiener, *Oral Advocacy*, 62 HARV. L. REV. 56, 56 (1948). Therefore, once the students swallow the mystique, I think the professor can breathe a sigh of relief. Had the students given thought to the possibility that they might not end up practicing courtroom law (after all, Turow himself became an author, not a trial lawyer), they might have resisted the paradigm. Once they accept it, however, they must also accept on faith the professor's portrayal of it.

That law students are intensely competitive is well-known. Whether that competition can be rationalized on the basis of the courtroom paradigm is the question addressed by my article. It is true that students love the competitive process and find it an acceptable way to work out what would otherwise be socially unacceptable behavior. *See* Kennedy, *supra* note 35, at 74. ("Most aggressive people, myself included, find themselves confronted with a difficult problem: how to channel their energy in basically constructive rather than destructive directions. . . . Teaching is an attractive solution"). But the question remains as to whether such a competitive atmosphere is educationally relevant. If the courtroom paradigm is false and the competition encouraged in the classroom is inappropriate in actual practice, then the only purpose served by the law classroom is training other law teachers. See note 70 *infra*. It is thus significant, I think, that both Kennedy and Osborn are now teaching law. The central point made here, though, is that both students and teachers accept on faith the mystique as a paradigm and the paradigm as relevant. For example, Osborn's faith that even war veterans would find the strict socratic teacher more frightening than combat has been shared by others. *See* Wiley, *A Tribute to Henry E. Springmeyer*, 42 S. CAL. L. REV. 2 (1969), where he stated that "[v]eterans who had faced the enemy under fire during two wars trembled before his outrage at fuzzy thinking." *Id.* at 2. I call this faith not only because neither Osborn nor Wiley appear to be war veterans themselves, *see* DIRECTORY OF LAW TEACHERS *1979-80*, 818 (1979), but also because, if comparing the classroom to the courtroom strains credibility, comparing it to the battlefield approaches perjury.

All of this faith, then, may mean that it is somewhat unpersuasive to argue that the positive responses of some students to the harsh regime of the socratic method undermines my criticism. This is because once the brutality of the method has been satisfactorily demonstrated, the argument that some students respond positively is less a validation of the method than of their inappropriate adjustment to social relationships generally and to the perverse relationships of the classroom in particular. Such students demonstrate an analogue of the battered-child syndrome. Kempe, Silverman, Steele, Droegemueller, & Silver, *The Battered Child Syndrome* J.A.M.A., 181:17 (1962). Battered children often rise to the defense of their tormenting parents. Among the characteristics of battered children is that "[t]he child takes over the role of parent and tries to be protective or otherwise take care of the parent's needs." V. FONTANA, THE MALTREATED CHILD 30 (4th ed. 1979). The parallels between battered children and the kind of student who responds favorably to classroom abuse are stark:

time now to examine whether the paradigm itself is as fictional as the many recent novels which have adopted its content.

INTERLUDE, CAVEAT, AND MEA CULPA

Having described the phenomenon of the courtroom mystique and discussed my disapproval of much of it, a strong *caveat* is essential to prevent misunderstanding. The *caveat* is that this article makes the most modest of claims. I do not claim that the phenomena sometimes justified by the courtroom mystique are justified by it alone. I thus certainly do not claim that those phenomena are unjustifiable at all. The claim I make is that, if they are to be justified, it must be for reasons other than the courtroom mystique because of the bankruptcy of that concept. The only reason for my claim is that I think debate on legal education should proceed in terms which are uncluttered by uninspected and possibly invalid concepts. One of those concepts is the courtroom mystique. If I am right, discussion of non-clinical legal education should proceed without it.

The modesty of my claim is, I hope, mirrored in my own position. I have avoided as much as possible any reference to personal knowledge. I recognize, however, that much of my argument is provocative. Therefore, I must emphasize that nothing I have said so far and in what follows is meant to imply that the courtroom mystique is only selectively seductive. I think we all fall prey to it. I know I do. Nothing is easier in class, when all else fails, than to tell a "war story."[39] When students bridle at difficult theoretical arguments, it is tempting to

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> [C]hildren who experience violence during their childhoods have the potential of becoming violent members of society in the future. . . . [S]ome abused children cope with the emotional stress of physical abuse through identification with the aggressors. . . . In contrast there are abused children who develop identities as 'victims.' . . . [S]ome children who are repeatedly battered learn to sense when it is time to leave or to be quiet. There are other children, however, who under similar circumstances perform the act or say the word that precipitates a beating. These children seem to have learned that love is equated with being hurt, and they establish a pattern of inviting assault and becoming victims.

J. WESTMAN, CHILD ADVOCACY 358-59 (1979). This has troubling ramifications. Clearly some law students respond to this courtroom mystique-inspired abuse in this battered way by becoming equally hostile in practice, although perhaps without success. *See* note 45 *infra*. Some students respond like the war veteran in the opening quotation of this essay with praise for professors who "beat" them. They perhaps invite assault in the classroom and learn to become victims or batterers. Others, perhaps most, unfortunately learn to withdraw because it is "the better part of valor." See note 16 *supra*. None of these responses would seem to be educationally or psychologically healthy. *See* Diamond, *Psychological Problems of Law Students*, in LOOKING AT LAW SCHOOL 19 (1977), for an identical conclusion by a medical professional.

39. While in the spirit of "war stories," the following facts may be relevant. I have been a student, a moot court judge, and writer of the moot court problem at Harvard; a student and student instructor at Hofstra; a moot court judge at Cardozo; and a teacher at Tennessee. The courtroom mystique is pervasive and I have observed it at all four of these institutions. I do not think it is unique to those schools. And, as far as I can tell, it is totally unrelated to any kind of rank-ordering of law schools one might come up with.

"prove" how useful the information is by reference to personal practical experience rather than to insist that the students recognize the essential validity of theory to law—that law is nothing more than theory. I have done this and more. So, unless I am totally schizoid, the claim of this article is not that professors who revert to the courtroom mystique are bad, but rather that a greater sensitivity to the mystique will make us aware of its existence and force us to examine whatever it is we are doing on more substantial bases.

THE PARADIGM

So far a number of fairly common and typical law school experiences have been examined in terms of how they are justified, at least in part, by the courtroom paradigm. The Johnstone and Hopson quotation at the opening of this essay neatly summarizes the point to be made here. It is simply this: that even if the paradigm were valid, it is of questionable educational legitimacy in view of the rarity of courtroom experience which most lawyers will ever have.

For all practical purposes, at least forty per cent and probably more than fifty per cent of all lawyers will *never* be in a courtroom, except perhaps for the day they are admitted to the bar.[40] While John-

40. The figures are, of course, elusive. One survey using a broad and seemingly representative sample asked lawyers whether they worked in various areas of the law including 25 areas ranging from administrative law, through trial and litigation, to legislative lobbying, plus "other." They were allowed to choose multiple areas so that, for instance, if a lawyer did municipal law as well as trial and litigation that lawyer would be able to indicate that she worked in both of those areas. Of the total, less than half, (47.4 per cent) indicated that they worked in trial and litigation. Of the 52.6 per cent who indicated that they did not work in trial and litigation, it would be erroneous to assume that perhaps they thought they had to devote a substantial time to the activity in order to answer honestly. This is because a second question was appended to the first which asked whether they considered any of the areas in which they worked "one of their *primary* areas of practice" (emphasis added). Thus it was clear that they were to include in their answer to the first question areas which they did not consider one of their primary areas if they nevertheless worked in the area. Of the less than half who indicated that they merely worked in the area, about sixty per cent indicated it was a primary area. That is, of the total sample, only 31.3 per cent indicated trial and litigation as *one* of their primary areas of practice! Baird, *A Survey of Legal Training: the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264, 270-71 (1978). Interestingly, the proportion who considered trial and litigation one of their areas of primary practice declined from a high of 37 per cent for recent graduates to 26 per cent for those who had been out of law school for two decades or so. *Id.* at 285.

In another study, about thirty-six per cent of those surveyed indicated they belonged in the lowest category of court *or agency* contact listed in the study, which was unfortunately described only as spending less than two hours per week. Of the remaining sixty-four per cent surveyed, only about half actually spend their court or agency time trying cases. J. CARLIN, LAWYER'S ETHICS 26 (1966). In another portion of that study, sixty-three per cent reported less than an hour per day in court or agency contact, with only about a third of that time devoted to "trying cases." Importantly, fifteen per cent indicated that they never had any court or agency contact! *Id.* at 16. In another portion of the study, thirty-three per cent of the lawyers responding indicate that they do work which is basically office work, another 14 per cent do real estate work, and one per cent do income tax work. Thus perhaps half of all lawyers do work which is fundamentally non-litigative. Of the remaining half, of course, it is never clear whether they actually do trial work or, if they do, how much of their time is actually devoted to that activity. *Id.* at 11-12.

Another survey covered 93 lawyers who listed themselves as solo practitioners, a category

stone and Hopson say a "sizeable minority" will never practice courtroom law, other writers indicate that the proportion is actually a majority.[41] For perhaps fifty per cent of all law students, therefore, the continued promotion of techniques, assumptions, and practices bottomed on the courtroom paradigm is a charade. But this is only the tip of the iceberg, since most law students who go into business or into other professions do not participate in the surveys. For all of those as well, the courtroom paradigm perpetuates an irrelevant body of habits, traditions, methods and formalities.

This means that if the courtroom paradigm is to legitimize any of its progeny, it must do so for well less than half of all law students. But of this remaining minority, as Johnstone and Hopson note, very few will spend any significant time in court. Thus, for all but a small portion of our law school student body, every one of our courtroom-paradigm-justified activities is perhaps an educational joke.

This, however, does not end the inquiry. As Johnstone and Hopson illustrate, "comparatively few" of those involved in the "minor" activity of litigation actually do it full time. We could therefore easily be down to a very few percent or less. In fact, according to a few statistics, less than one percent of legal practice involves trial work.[42] For that tiny fraction who actually do "regularly engage" in litigation, it is essential to realize how little of even their time is spent *in court*. I in-

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which would normally include a fair mix of different activities. Of those 93, though, 11 were in "business" and nine had never practiced law. If this ten per cent or so who never practice law is representative, many of the figures in the surveys are erroneous since they often tap only lawyers who still identify themselves as such. That ten per cent may legitimately be added to the approximately fifty per cent or so who clearly have little or no court contact. O. MARU, RESEARCH ON THE LEGAL PROFESSION 11-12, n.25 (1972). There is good reason to think that the ten per cent figure is representative. In a somewhat dated study (although there is no reason to suspect these particular findings suffer from age), it was found

> [i]n dealing with any large group of attorneys, from 10% to 20% of those listed in directories or in the admission rolls of the courts will be found, for one reason or another to be no longer in practice (if they ever were in practice) while around another 10% will be giving only part time to law, a considerable portion of this last group being primarily in other occupations.

A.B.A., THE ECONOMICS OF THE LEGAL PROFESSION 60 (1938).

In summary, it is not far off the mark to conclude that about half, and quite probably more than half of all lawyers will never, for all practical purposes, see a courtroom except for the day they are admitted to the bar. This figure is lower than it might otherwise be because none of the surveys I have cited (with the exception of the Baird study which, coincidentally or not, came up with the highest percentage of "non-litigating" lawyers) used a population composed of mere law graduates. The surveys instead used those who had already somehow self-selected themselves as lawyers by placing themselves in some kind of legal directory. One minimization factor is probably common to all the surveys. Since the response rate in all the studies was less than one hundred per cent (about fifty per cent in Baird), we might conclude that the non-responders included a higher proportion of non-practitioners than practitioners. People less involved in law would obviously have less interest in responding to a law-related questionnaire. This is pure speculation, of course, and I am quite satisfied with my approximately fifty per cent figure.

41. "[A]bout 10% of lawyers are in litigation. . . . [O]nly about 10% of cases go to trial." P. BERGMAN, *supra* note 12, at 8. *See also* note 40 *supra*.

42. See note 41 *supra*.

quired on an informal basis into the actual time spent by the most litigious of attorneys in a typical small urban area. Perhaps eight or ten hours of an average week is actually spent in court. The vast majority of that time is spent in waiting—an activity I was told is frequently more important than courtroom activity in terms of possibly outwaiting one's opponent. Only a tiny fraction of time is actually spend in trial activities similar to those envisioned by the courtroom paradigm.[43]

Thus, at the end of the only road to be travelled in examining the relevance of the courtroom paradigm, it appears as perhaps a tiny pebble in the path. It is not a discarded pebble, perhaps, because it does have relevance for some, although very few, participants; but it is one easily discarded without loss by the vast majority of travellers, a majority so numerous as to constitute for all practical purposes the entire population. The pebble is thus empty of much significance. Worse, however, is the possibility that it is not even there.

THE MYSTIQUE

The courtroom paradigm is probably an illusion. It is difficult to state with certainty the standard of practice that is most profitable to lawyers. But it seems probable, at least, that the courtroom paradigm, which guides legal education, is a standard that would be avoided by most courtroom lawyers and be quite undesirable to most of their clients.[44]

The courtroom is not at all the formal structure described by the paradigm. Neither is it the wholly hostile adverse atmosphere which the paradigm promotes. Nor is it as demanding, in terms of verbal and emotional conflict, or simplistic, as the paradigm claims.

This is not news, of course. Innovative legal educators have long recognized that skills such as negotiation and counselling form a major part of law practice.[45] What many of the proponents of those methods

43. One recent study of the Chicago bar concludes that, for the 699 practitioners surveyed, the median number of state court appearances was only three times per month. Since an appearance can constitute a wide variety of activities ranging from filing a paper to conducting a jury trial, and only the latter end of that range fits the courtroom paradigm, the conclusion is inescapable that a very small amount of all lawyers' time is spent in conditions resembling that paradigm. Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111, 1121 (1978).

44. "[L]itigation itself has declined in importance, and the overwhelming bulk of cases is disposed of either administratively, through the mechanism of default (as in consumer credit and landlord-tenant cases), or by manipulation of consent (as in divorce and criminal matters) . . . ." Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976). *See also* note 45 *infra*; note 28 *supra*.

45. The material generally available to students is unreal because it is about a litigious community (courts); in fact, the majority of it is about the most remote, most unlikely part of the litigious community (appellate courts). In most law courses . . . the real professional world is a pyramid; the appellate-court world is a tiny speck at the top of the pyramid. . . . [W]e [teachers] have produced material for law-office practice which is

have ignored, however, is that those skills are not alternatives to litigation skills, but rather are necessary within as well as without litigation.

Take, for instance, the formal structure of the courtroom. Are the formalities as pervasive as the courtroom paradigm pretends? In a large majority of courtrooms the action is too swift to allow for much seating, let alone formal ritualized seating.[46] At a trial, especially a jury trial, it is true that litigants take particular places. But, as we all know, trials, jury trials especially, are the exception.[47] Much courtroom activity is consumed in motions presented to a judge. Most trials are to the court. Many lower level trials are almost like motions, for example, quasi-administrative proceedings such as landlord-tenant disputes.[48] Litigants sit where they can and spectators mill around to such a degree that they sometimes endanger what little formality remains. While the court may refer to counsel as Mr., Mrs., or Ms., much of the activity involves conversations between counsel, in which it would be a mistake to insist on excessive formality if an amicable result is to be reached.[49]

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fashioned from law-office failure (litigation). . . . Good lawyers in this field regard litigation as failure.

T. SCHAFFER, *supra* note 28, at 4-5. How poorly the contentiousness of legal education actually prepares the student for actual courtroom activities is discussed by Hegland with respect to the nervous witness:

> And what accounts for the way an inexperienced lawyer deals with nervous witnesses? Although it is clear to everyone that the witness is about to pass out, the lawyer doggedly asks the next question. Why no reassuring words to the witness or a request for a recess? Because we know that we are on safe ground when we ask questions. . . . But, who ever heard of a lawyer stopping the testimony to tell the witness that everyone is nervous and that he should just answer the questions as best he can?
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> Insecurity is perhaps the inevitable product of a law school education. . . . And just sprinkle in a little of the benign contentiousness of the classroom encounter . . . . No wonder beginning lawyers are afraid to state anything without qualifications. . . .

K. HEGLAND, *supra* note 34, at 1-2. Sometimes, though, a lawyer can convince even his client of the efficacy of such methods just as the lawyer was converted during his law school years:

> Attorneys who are very pleasant out of court and during other phases of trial turn into overbearing snarlers on cross. This kind of attitude gives some clients the illusory satisfaction that 'my lawyer was really fighting for me.' The reality is that persuasive points get lost in heated exchanges between attorney and witness. The opposing side raises more objections, further diluting the impact of cross.

P. BERGMAN, *supra* note 12, at 244 (1979).

Dean Griswold once criticized the emphasis on clinical education for the same reason I criticize classroom teaching: they are both based upon a courtroom mystique:

> Much of the argument for this sort of training for law students is based on a model which, in my judgment is not a very accurate one. The trial lawyer plays a very important role in our profession, of course, but the great proportion of American lawyers are not trial lawyers, and a very large portion of the lawyer's function does not involve trial practice. The lawyer as counselor and planner and negotiator and draftsman, and advisor to corporations and charities is also an important aspect of our profession. Did Ralph Nader ever impanel a jury or try a case? I doubt it.

Griswold, *Teaching Alone is Not Enough*, 25 J. LEGAL EDUC. 251. 259-260 (1973). *See generally* Brown, note 22 *supra*.

46. *See generally* M. MAYER, THE LAWYERS 149-85, 451-87 (1967).

47. See note 41 *supra*.

48. See note 44 *supra*.

49. Even within the courtroom context, there are obviously varying degrees of formality.

In most courtrooms of America, it is seldom the case that the judge will quiz a lawyer on particular case law. Frequently, in fact, the law is the last thing the judge, or perhaps even the litigants, want to know about. Most proceedings are more cut-and-dried, focusing more on who can best produce facts to support their theory of the case.[50] Few attorneys at either the trial or appellate level are asked in so many words for the holding of a particular case. It is undeniably true, of course, that at the appellate level case law forms the foundation for some of the activity. But most of the questions posed even by appellate judges are aimed either at the facts or combined issues of fact and law.[51] Sometimes, it is true, opposing counsel will take up the gauntlet against one another and distinguishing and harmonizing cases will assume great importance. Certainly at the trial level, however, it is more often disruptive than anything else for counsel to seriously argue detailed case law to opposing counsel and the court.[52]

As the statistics show, most of the work of a courtroom lawyer is

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Some judges insist that counsel stand whenever speaking; others permit sitting. Some will permit flexibility even in standing; others will require counsel to speak from a lectern or other prescribed position. P. BERGMAN, *supra* note 10, at 334-35. I have refrained from "war stories" in this article partly because of form and partly because I find it generally obnoxious. I hope what follows is not unduly offending. I had the opportunity to clerk for two federal district judges—one, ironically, in a "clinical" course in law school, and one in the traditional post-law-school format. They were as different as night and day except that both were totally committed to their jobs. I think I could classify them as polar opposites: One was conservative and the other liberal, in the popular conception of those labels. Objectively, one was a former Democrat and the other a former Republican in their political pasts. The conservative always wore robes in court, insisted on relative formality and was recognized throughout the state as a crackerjack trial judge who knew how to run a trial. He and I did not agree politically but there was one strong bond we shared: a great interest in the people with whom we dealt. He never embarrassed a lawyer, litigant, or witness in the courtroom. If there were criticisms to be made they were either done in chambers or by calling counsel to the bench. My strict judge made it a point to recognize humanity as just that. The liberal seldom wore robes, except in jury or criminal matters. He frequently addressed counsel by their first name. He often chose to sit at counsel table instead of ascending the bench. He frequently called counsel to the bench and suggested alternatives in strategy, at least in criminal trials. He, too, took his job seriously enough to realize that all of the legal formalities were nothing compared to the humanity of one individual. These are two very different judges. They represent polar extremes. But in neither case does the courtroom mystique have any relevance to how either conducted proceedings. In neither of their courtrooms would a lawyer steeped solely in the adversarial formalities of the socratic classroom be well prepared.

50. "It is a safe assumption that the outcome of most trials depends, at least in large part, on the factfinder's determination of what the true facts are." P. BERGMAN, *supra* note 10, at 10.

51. Another mistake is to take the lofty approach, arguing only large abstractions; such tactics inevitably produce glazed expressions on the bench. The justices seem more interested when a lawyer sticks to homely, factual arguments. . . . Justice Jackson had a slightly different explanation for the Court's fascination with the facts at arguments. "The purpose of a hearing is that the Court may learn what it does not know," he said, "and it knows least about the facts. It may sound paradoxical, but most contentions of law are won or lost on the facts. They often incline a judge to one side or the other."

A. LEWIS, GIDEON'S TRUMPET 163-64 (1964), *quoting* Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801, 803 (1951).

52. "I can think of no more dismal and fruitless use of time than to recite case after case, with explanations why each is, or is not, applicable." Jackson, *supra* note 51, at 804 (referring to the Court's own precedents).

done outside court.[53] Preparation is the key, and negotiation is fundamental.[54] It would do little good to insist on formality in dealings with opposing counsel with whom an amicable settlement is desired. Thus, most courses on negotiation stress the need for less formal environments.[55] Even for those most heavily involved in the real courtroom paradigm, the truly productive activities are those divorced from the formality which the courtroom occasionally provides.

This same informality which is symptomatic of most law practice, even of courtroom practice, is indicative of another failure of the courtroom paradigm to approximate reality. The paradigm fails to recognize that adversity is seldom the atmosphere in which legal solutions are reached. Occasionally, when all else fails, adversity will take over. But in fact, the goal of the lawyer, including the courtroom lawyer, is to avoid adversity and work toward an amicable resolution.[56] Even for

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53. *See* notes 40, 41, 43 *supra*. "Harvard Law School had become the leader among American law schools because it had demonstrated to the big-city law firms that it best prepared students for their type of practice." J. SELIGMAN, *supra* note 13, at 63. The "big-city law firms" for the most part do not invest their time in courtroom practice. Yet Harvard Law School, the school that started the Langdellian method, seems very much the home of the courtroom mystique. The corporate law firm, however, is not the home of trial court advocacy:

> Corporate law firms were creatures of an age of organization. . . . [T]he resolution of disputes required the preventive techniques of the counselor who spoke to the future rather than the forensic skill of the advocate who litigated the mistakes of the past. . . . Corporate lawyers . . . earned their reputations for work done at their desks in conference rooms, not in court.

J. AUERBACH, UNEQUAL JUSTICE 22-23 (1976).

54. If the adversary system is, however, no longer capable of resolving disputes for the average citizen, does this require a model of professional conduct which does not seek to rely on the court for dispute resolution? Is the appropriate model for attorney conduct based on what best contributes to voluntary resolution of the dispute or best in the context of an adversary contest which assumes the ultimate capacity of courts to resolve the dispute?

> If it is correct to recognize that settlement without trial is the basic legal dispute resolution mechanism, then the lawyer's fundamental role is to achieve for his client the best acceptable settlement. The process and abilities required for achieving this may differ from that of trial, and the lawyer's responsibilities will accordingly change.

Leleiko, *The Opportunity to be Different and Equal*, 55 NOTRE DAME LAW. 485, 487 n.9 (1980).

55. Neirenberg says that "[t]he lawsuit is one of the negotiating tools of a lawyer." In his chapter on "Law, Lawsuits, and Effective Negotiation," he emphasizes the need for flexibility and the ability to shift mental contexts—for instance, from an exclusively legal assessment of possibilities to one considering business, public relations, and other aspects. G. NEIRENBERG, FUNDAMENTALS OF NEGOTIATION 230 (1973). One of the seminal articles on negotiation emphasizes the continuity between the formal processes of law and the informal processes of alternative dispute resolution. While the point of the article is to demonstrate that norms operate in the informal as well as the formal processes, what is important in the context of my article is that it is unrealistic to make a sharp distinction between legal and non-legal alternatives. Therefore it would be counterproductive to demand formality in one arena and not the other as a general rule of conduct. *See* Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976). Finally, experienced trial lawyers will never "gloat" over an advantage. Even facing victory, a good lawyer prefers settlement. See note 58 *infra*.

56. Lawyers at least since Lincoln have urged that settlement is the appropriate goal. Others have offered other explanations for apparently conflicting goals. *Compare* A. LINCOLN, *Notes for a Law Lecture*, II THE COLLECTED WORKS OF ABRAHAM LINCOLN 81 (1953). "Discourage litigation. Persuade your neighbors to compromise whenever you can. . . . As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough," *with* Marx, *Mathematical Wisdom*, in K. MARX & F. ENGELS, COLLECTED WORKS I, 545-46 (1975) ("If

courtroom lawyers, the most productive time is frequently spent in conversation with opponents peppered with a lot of ego-massage in an effort—an effort of which all participants are obviously conscious—to persuade the other that it is to her own advantage to reach an accommodation of interests.[57] Adversity, hostility, and aggression are the most unfruitful tactics of all, and generally should not be used unless and until all prospects of success have disappeared. It is seldom the case that one party leaves a legal dispute with a clap on the back while the other retreats like a dog with its tail between its legs. The objective for most lawyers is to reach a mutually satisfactory resolution in which each claps the other on the back in self-conscious regard for the future possibility of doing business again.[58] The same is true in the courtroom itself. It is seldom profitable to antagonize anyone in court. Although there are exceptional cases in which antagonism is necessary, even then a common rule is to avoid appearing so overbearing as to provoke sympathy for your adversary.[59] But one thing which is surely avoided is the kind of antagonism toward the judge which is promoted in the law classroom between teacher and student.

The paradigm justifying moot court is equally illusory. In fact, few appellate arguments are conducted by more than one attorney for each side. Most attorneys choose their colleagues through common interests of employment or specialty. Few lawyers, except for the lowest echelon in large firms, are actually assigned to work on cases with virtual strangers. Briefs are not divided nor universes closed, of course. But most importantly, appellate argument is not generally characterized by the hostility in which student and faculty judges seem to delight.[60] Most appellate argument is far more genteelly and intelligently

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feuds were settled by *a* and *b*, The Courts would be swindled out of their fee.") Others have recognized this same conflict but blame legal education squarely: "The source of the advocate's reluctance to settle is much the same as the gladiator's. Victory is distinguishable from compromise. The lawyer's training, moreover, concerns itself with judgments. A controversy results in litigation, which results in a judgment, whereby one party wins and one party loses." Wachtler, *Even if You Think Your Client Will Win, You May Have The Responsibility to Urge Settlement Anyway*, 6 HOFSTRA L. REV. 745, 746 (1978).

57. *See generally* Wachtler, *supra* note 56, at 746.

58. "If you do get your adversary at a disadvantage, do not gloat. Negotiate." P. BERGMAN, *supra* note 13, at 385.

59. "The system works too well when it makes an attorney look like she is taking unfair advantage of a witness." *Id.* at 181.

60. The artificiality of moot court is related to the fact that most actual cases litigated by real lawyers in genuine courtrooms are simply worlds apart from those used in moot court. Moot court inevitably involves cases of major doctrinal significance. "The total number of such cases in American appellate courts is perhaps small. . . . Nevertheless, in moot court competition the proportion of these cases is surprisingly high." BOARD OF STUDENT ADVISORS HARVARD LAW SCHOOL, INTRODUCTION TO ADVOCACY 125 (2d ed. 1976). Appellate judges are simply not the way some students and law professors seem to imagine them, for whatever reason:

> Courts of appeal are not filled by Demigods. Some members are learned, some less so. Some are keen and perspicacious, some have more plodding minds. In short they are men and lawyers much like the rest of us. That they are honest, impartial, ready and

conducted.[61] It is almost never the case that the court will interrupt counsel at the very start of her argument—a practice frequently encountered in moot court situations.[62] Moot court arguments are therefore no more justified by any real courtroom experience than was the Vietnam War by the Gulf of Tonkin incident. It is far more common to find a panel of judges half asleep than it is to find one aggressively hostile towards the attorney.[63] The most an attorney can usually hope for is that some attention will be paid to her during the fifteen or thirty minutes she usually has to present her case.

Additionally, it is rare for an appellate argument to be under such scheduling constraints that the litigants have insufficient time in which to prepare. Most appellate arguments are scheduled upon mutual agreement of counsel. Flexibility of a number of months is prevalent.[64] The pressure under which moot court arguments are conducted is thus not based on reality. The paradigm seems a fraud.

The same is true of the justification for law school examinations. In the courtroom, such quick thinking and shooting-from-the-hip is the exception rather than the rule. Good practice dictates that counsel be prepared not only in the pre-trial phases of courtroom practice but es-

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> eager to reach a correct conclusion must always be taken for granted. You may rightfully expect and you do expect nothing but fair treatment at their hands. . . . Do not get it into your head the idea that there is a deliberate design on the part of any judge to embarrass a counsel by questions. His mind is seeking help, that is all. . . .

Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 896, 898 (1940). With regard to team argument, note the following advice from Justice Jackson: "If my experiences at the bar and on the bench unite in dictating one imperative, it is: Never divide between two or more counsel the argument on behalf of a single interest." Jackson, *supra* note 51, at 801-02.

61. Tony Lewis' description of the arguments surrounding Gideon v. Wainwright, 372 U.S. 335 (1963), is telling. His quotation of Bruce Jacob, who argued the case for the state in his first Supreme Court argument only three years out of law school, is persuasive that the moot court training program is founded on a mystique which is educationally handicapped, to say the least:

> But then, when an argument begins, all the trappings and ceremony seem to fade, and the scene takes on an extraordinary intimacy. In the most informal way, altogether without pomp, Court and counsel converse. It is conversation—as direct, unpretentious and focused discussion as can be found anywhere in Washington.
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> "It was nothing like I expected," Bruce Jacob said later. "It was so informal—I just couldn't believe it. Usually judges are so sober-looking; they don't laugh. Not that they're unhuman, but they're nothing like Supreme Court justices. I just got the impression that these men had a real good time, talking to each other and asking questions."

A. LEWIS, *supra* note 51, at 167. I would suggest that there are few lawyers or law students in this country who could describe their moot court experiences in similar terms.

62. *Compare* S. TUROW, *supra* note 1, at 155 *with* A. LEWIS, *supra* note 51, at 167.

63. Two well-known articles have made this same point. Schaefer says a question from the bench should always be welcome: "On a minimal basis, as it has been said, at least it is fairly clear proof that the particular judge is not asleep." Schaefer, *The Appellate Court*, 3 U. CHI. L. SCH. REC. 1 (1954), *reprinted in* BOARD OF STUDENT ADVISORS HARVARD LAW SCHOOL, INTRODUCTION TO ADVOCACY 137, 141 (2d ed. 1976). Davis expressed the same sentiments: "And again I say unto you, rejoice! If the question does no more it gives you assurance that the court is not comatose and that you have awakened at least a vestigial interest." Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 897 (1940).

64. *See, e.g.*, N.Y. Super. Ct., App. Div., 2d Dept. R. §§ 670.19-670.24.

pecially at the trial phase.[65] It is at that point, assuming all other efforts at accommodation have failed, that it is essential that no surprises occur. It has long been the rule in litigation that counsel should be careful to avoid having to think on her feet during trial.[66] Good practice demands that everything be rehearsed, as well as discovered, and that questions be outlined, if not actually written out word-for-word, long before entering the courtroom.[67] Most failures in court, in fact, can be attributed to the attorney thinking on her feet instead of in the office.[68]

Enough has already been said about the unfortunate atmosphere predicated upon the courtroom paradigm. There should be no need by now to repeat that law practice, including courtroom practice, is not characterized by hostile, adverse relationships. On the contrary, most law practice consists of organized efforts to avoid such adversity and hostility. The hostile, adverse, lawyer is usually without clients and seldom favored by the court, and may be forced to seek a different occupation. In summary, the courtroom paradigm is a fraud. What has engendered so many artifacts of legal education is more accurately described as a courtroom mystique.

THE PARADOXICAL PARADIGM

What is interesting and paradoxical about the courtroom mystique is that it is hailed by the lawyer who, relatively speaking, is least able to assess it—the law teacher.[69] Why do law teachers insist that it is in the activity in which they least often engage that the measure of their legitimacy is to be found? It would seem more psychologically reassuring to

65. The only dispute seems to be over the actual mechanics of preparation. *See* P. BERGMAN, *supra* note 13, at 337-40.

66. It is also inappropriate at the appellate level: "There is no premium on speedy response, inasmuch as judges are persuaded by the content of responses and not by immediacy or glibness." U.C.L.A. MOOT COURT HONORS PROGRAM, HANDBOOK OF APPELLATE ADVOCACY 164 (rev. ed. 1980).

67. See note 65 *supra*.

68. See note 45 *supra*.

69. There must then be reasons other than fidelity to departed Dean Langdell why law schools do not teach their students how to "lawyer." One possibility is that many members of law faculties do not know themselves what it is that lawyers do, and how they do it. Professors are chosen in large part, on their academic credentials. One need not have practiced law in order to teach it. Indeed, when operating on Langdell's assumptions, experience in practice could be a liability to good teaching. Many young men who take the rostrum in the Fall were taking notes the previous Spring. The transition from student to teacher is made just that directly in many cases with no time in between to go downtown to get practice. Such teachers can hardly be expected to teach one how to "lawyer" if they have never done it themselves. There could be other possibilities. It could well be that some law professors know perfectly what is involved in the practice of law and find the whole business distasteful. . . . So a personality type emerges which disdains the everyday practice of law in action but relishes the intellectual rigor of law in abstraction. . . . [I]n some cases there are professors teaching because the idea of practicing is somehow frightening or distasteful to them.

Richardson, *Does Anyone Care for More Hemlock?* 25 J. LEGAL EDUC. 427, 429 (1973).

have as a paradigm something in which law teachers frequently engage and are thus competent than something which, for most of them, is a distant memory if not absolute fantasy.

Many if not most law teachers have engaged in law practice at one time or another. Many if not most of us are also very argumentative, intellectually erudite, and abstract thinkers. We are not necessarily people-people but idea-people.[70] Some have difficulty in relating to other individuals. Many were not satisfied in practice; it may even be true by definition that they were dissatisfied with practice.

These teachers often arrive in an environment believing that the world which they have left is the goal of their students. It is awkward to parade past glories to the class without seeming somewhat obnoxious. But it is also frequently difficult to explain why the teacher isn't still practicing without dampening student aspirations. Most law teachers question their own competence, as do all human beings, no matter how successful they actually were in practice. Most, I think, have doubts as to how good they actually were or could have been.[71]

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70. I think Richardson notes this, also, when he says of the failures of legal education: "Every one of the skill deficiencies is a 'people problem.'" Richardson, *supra* note 69, at 428. Indeed, the problem may be self-perpetuating: "Many of those schools are so staffed that they are best fitted, not to train lawyers, but to graduate men able to become book-law teachers—and so on ad infinitum, world without end." Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303, 1314 (1947). This problem seems not only self-perpetuating but also counterproductive because the courtroom mystique, almost by definition limited to classroom methods, has untoward effects upon clinical teaching as well. This is because of the same tenure pressures that produce a degraded quality of scholarly writing in law reviews. *See* Tushnet, *Truth Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1336 & n.135 (1979). Professor Leleiko says:

> The individual who has joined a faculty which adheres to orthodox values quickly learns the qualities looked for in the tenure process. Inclination toward exploring new teaching vehicles is effectively stymied. In some cases, the effect is to destroy the vitality and originality which new members of law faculty may have—whether their starting methodologies are orthodox or clinical.

Leleiko, *supra* note 54, at 498. This is particularly ironic in clinical teaching where the conscious objective is to depart from traditional forms. The classroom teacher orients his scholarly output—law reviews—towards the mystique for tenure purposes; the clinical teacher, hired to avoid that rigidity, orients his scholarly output—experiments in practice—similarly, and thus is rendered useless.

71. I am not alone in thinking that law professors live out their professional fantasy lives of courtroom invulnerability in the classroom:

> The law teacher is a teacher of problem-solving whose own problems are not solved. There are few frustrations so pointed as those resulting from failure to meet a self-imposed objective. It has been said that Blackstone was forced into teaching law by a strong distaste for active practice, and I suppose that distaste or disenchantment with modern practice may move men to the podium today.

Costello, *Another Visit to the Man Divided: A Justification for the Law Teacher's Schizophrenia*, 27 J. LEGAL EDUC. 390, 407 (1975). Professor Watson explains the moving force as follows: "In contrast with the adversary situation of a courtroom, the professor may carry on an essentially one-sided battle, always able to be the ultimate judge and decision-maker. I believe this to be highly important as a motivating factor to those who become law professors." Watson, *supra* note 15, at 114. Watson adds: "I anticipate challenge here." So do I. There is, of course, little opportunity to obtain hard evidence of the inner psychic workings of law teachers. I think, however, that all but the disengenuous will recognize that law teachers suffer all sorts of the kind of uncertanties that I describe. For the diehard traditionalist who insists that support be given for even

Being a more-than-average self-doubter, in fact, may be why many people become lawyers anyway. It therefore must be doubly difficult for a law professor to prove to himself, let alone to a class of a hundred students, that she could be as good in practice as she is in the classroom.

Thus the classroom can easily become the battlefield of the professor's psyche. The teacher who is hostile, apprehensive, or adverse may very well be asserting the competence which he either lacked or was uncertain about in practice, or which he doubts has survived his exile. It is tempting to choose as a target the neophyte rather than the experienced opponent, to assert competence in the classroom instead of the courtroom.[72] By adhering to the courtroom mystique, not in spite of, but, it can now be seen, *because* of its falsity, the teacher is able to assert victory in the face of an inner enemy which continually fails to keep its distance. By imagining certain things as signs of success in practice, which are actually not only unproductive in practice but may

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the most obvious, consider the following excerpt from an influential article by an author who admits not only to having these insecurities but also to the validity of the courtroom paradigm, if not mystique:

> An equally rich variety of symptoms are manifested by the Hessian-trainer side of the law teacher (by Hessian training I mean training for private practice at the Bar) . . . . He believes, to use the felicitous phrase invented by a former colleague of mine, that the proper way to train the beginning law student is "to put his feet to the fire of the cases." He imagines that he was, or surely would have been, a great trial lawyer. He actually reads the advance sheets sent to him by the West Publishing Company. When he fills out a form which requires him to state his business or profession, he inserts the word "lawyer."

Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 638 (1968). But much of this seems to be based on a false image (the courtroom mystique instead of the real paradigm).

> An argument often raised in praise of the socratic method is that it "toughens" students so that they are able to handle the rigors of the "real world." But there are very few role relationships in the real world which are analogous to the professor-student relationship in the law school. With the exception of an occasional scolding from a judge, (deserved or otherwise), lawyers do not have to take that kind of treatment in real life. If the real world were as tough as some professors seem to think it is there might be more excuse for sequestering themselves in Academe.

Richardson, *supra* note 69, at 444. Richardson concludes that the reasons professors adhere to the case method are threefold: it is easy and they are lazy; professors had to do it so students deserve the same punishment; it seems to work sometimes. Others have also noted this:

> Am I safe in assuming that lawyers ought to have a fairly good understanding of how to make a forceful presentation to a court, tribunal or jury? Of course I am. Is it not then, absolutely astounding that most law schools do not bother to teach their students how to make an argument? "Oh, but we do," answers one of my colleagues, "every time we call upon a student to discuss a case." Utter nonsense. Class recitations, even when a Seavey or a Schulman is directing them, train students for argument presentation about as well as a warm shower prepares one to swim the English Channel.

Bergin, *supra*, at 648. Here, Bergin notes that the courtroom paradigm motivates his colleagues. He then proceeds to unmask the paradigm as only a mystique. Except for his assumption that all lawyers, courtroom or otherwise, should be trained in oral argument, Bergin seems to have anticipated the present article.

72. "On the whole, I had the sense that Perini was using the classroom to live out some strange vision of himself and that struck me as a misappropriation of a teacher's power." S. TUROW, *supra* note 1, at 219.

be the reason that the professor found practice unsatisfactory,[73] the professor puts before the class an empty vision. He is then able to prove his superiority in the area where it really exists—the intellectual world peopled by imagined controversies and abstract issues, untouched by the mysterious dynamics of the real world.

Whatever professional insecurities a law teacher may have are somewhat soothed by this fixation to myth. The courtroom mystique secures an uncertain doubt to an illusory fantasy. But as long as it is promoted as truth to an audience unexperienced in the real paradigm (if there is one such paradigm), the security it offers is not pure fantasy. Success at the courtroom mystique—even with its defects—is more reassuring than the uncertainty of success in reality. The tail end of the paradox is, then, that the law teaching profession itself is built upon this bubble of illusion. Law teachers may have almost superhuman minds but their hearts and feelings are all too plainly human. They live in a world of insecurity just as we all do. It is paradoxical but also understandable that they seek what they need the most, and since it is not to be found in reality, they find it in their own minds. The courtroom mystique is their mental sustenance.

CONCLUSION

Because the process of law involves abstractions from reality, it is not surprising that lawyers, and especially law teachers, live their lives in the same way. We law teachers populate a universe of abstractions and ideas, and reality tends to be highly intellectualized. It is perhaps inevitable, then, that while we have the same human needs as everyone else for success and friendship, we tend to satisfy them in a more abstract and often illusory fashion. While much of this article has discussed how our need for success and approval falls prey to a mystique, the same phenomenon occurs with our need for friendship. While the fact that we play out our professional doubts on a stage before our students is hopefully more ludicrous than injurious, I think our efforts to gain friendships with our students are just sad.

In the same way that we manufacture imaginary courtroom success from classroom success, we develop false friendship in an illusory way with our students. We crave friendship with our students, despite our denials, just as all human beings so strongly desire it of those around them.[74] A failed law school class is very much like a loss of

73. See notes 70, 71 *supra*.

74. I think students sense the aching need that professors have for student approval, although professors themselves frequently deny it. After Kingsfield's last lecture of the year, the students gave him a standing ovation. "Then he was gone. They kept clapping for a long time, standing up behind their seats, facing forward toward the stage, clapping as if, like Tinker Bell, Kingsfield

friendship. A class without participation is perceived as one in which no one likes us. The problem is to produce the illusion of friendship just as we produce the illusion of success with the courtroom mystique. A failed friendship can only be regained by the out-reached hand, the offer to reconcile. A law teacher though herself a product of the courtroom mystique, cannot easily reconcile. She is antagonistic. While craving friendship, her tool is that of aggression. She threatens—low grades, humiliation, failure. Faced with the threat of the teacher's sanctions, the class once again responds and participates.[75] They go

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would die without them." J. OSBORN, *supra* note 8, at 210. The fact that we *want* this approval explains other phenomena as well, such as the preference for first-year classes: "One 1976-1977 Georgetown Law student rebutted her instructor with the startling exclamation, 'I pay good money to attend this law school. I'll raise my hand when I have something to say.' It's not for nothing that so many law professors prefer to teach first-year classes." J. SELIGMAN, *supra* note 13, at 159. I may be wrong in ascribing such self-delusion to law teacher's psyches. But it is certainly true that law teachers, at the very least, demonstrate a curious need for reinforcing contact with their students to a much higher degree than is usual in a university setting: "Where most graduate school professors aspire to be research moguls, or at any rate 'nonteachers,' under the rule that 'the higher a professor's standing the less he or she has to do with students,' law professors have reversed this 'flight from teaching' with an equally conspicuous 'flight to teach.' " *Id.* at 133.

"Dean Norman Redlich has said it is a mistake to try to become pals with the students. Our role is to be that of the exempler of the professional attorney." Williams, Legal Education in the Age of Accountability, President's Address to the House of Representatives at the Association's Annual Meeting, *Am. Ass'n of Law Schools* (Jan. 3, 1980). I don't know what Dean Redlich actually said but certainly President Williams wouldn't have used the quotation unless there was a sense that professors want to be "pals" with their students. As I say in the text, it would be surprising if professors did not want to be friends with students. Obviously, as Williams notes, the professional role is one defense to this need. It is thus not surprising that we adopt all sorts of mechanisms to protect ourselves. It is not at all strange that the class which Turow's protagonists found the most exciting, after the initial novelty of the socratic method wore off, was the class conducted in the least rigid way. "Each time I walked into Morris's classroom all that rapturous discovery of the first six weeks returned. And I knew I would leave after each meeting with that same crazy feeling, half heat, half thirst—the sensation of being nearly sucked dry by excitement." S. TUROW, *supra* note 1, at 22. The reason professors prefer the rigidity and formality of the socratic method is that it offers protection. It turns out that Professor Morris, because of his accessibilitiy—unprotected by the trappings of the mystical socratic-courtroom fantasy—was also the most vulnerable: "[O]nly toward Nicky [Morris], the least fearsome of our teachers, did many people dare express their anger over some of the most consistently offensive aspects of law school life. . . . Nicky, on the other hand, was committed to liberal tolerance. . . ." *Id.* at 277.

Sometimes our reactions to explicit bids for friendship are both funny and sad. It is only when the rigidity fails that the teacher may suspect the great and powerful function performed by that rigidity as well as his terrible need for it. Witness what happened when Hart's class gave an impromptu birthday party for the German professor Temby: " 'What is ziss . . .' the German stammered. 'Iz somezing wrong? Do you want somezing?' He was terrified having them up at the lectern. They'd broken some kind of magic, mental dividing line." J. OSBORN, *supra* note 8, at 137.

Many acts by teachers can only be explained as a bid for friendship, it seems to me, especially acts which are otherwise bizarre, unexplainable, or simply illogical:

> Sometimes things happen in class that you don't expect and are hard to explain. Once one of my professors said to the class: "I want to see *Planet of the Apes*, but no one will go with me." Everyone talked about it afterward. You see, he just blurted it out while giving a very technical lecture on the parol evidence rule.

Id. at 130.

75. Law professors undeniably use what can only be called psychological torture to obtain participation:

> "I hope you are *very* well prepared on Monday, Mr. Mooney." Again that voice and look, brewing hatred. What would he do to Mooney on Monday? Something unpleas-

through the motions of friendship. And we, amazingly, are satisfied. We are friends once again. Having created a false friendship using the tools of aggression, we are grateful for the resulting appearance and are happy to live the illusion we have created. We live this illusion, and thus it is not surprising that we teach it to others.[76]

Law teaching is a curious business populated by curious people. Being insecure about success outside the classroom, law teachers create a fictional reality—so constructed that we are assured of succeeding in it—and pretend it is real.[77] When we demonstrate that we can succeed within the confines of the law school, we feel more secure about our competence outside the law school. We feel secure because of the fictional reality we create. As long as we convince ourselves of its reality, to us the mystique is real. The lesson should be that we could all profit by facing reality. A real friendship is better than a construct of one. Simply being good law teachers must, likewise, be more rewarding than making believe.[78]

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ant. Something terrible. Right now Perini looked mad enough for murder. And Mooney would have to carry that worry for the next five days.

That class sat stunned, absolutely still. Perini leaned over the seating chart and made a furious mark on it; then he called on the man who sat on Mooney's left. Calling on the person beside an unprepared student is a familiar device, used by law professors to increase the pressure on those who fail to respond. . . . It was the Socratic classroom's answer to the thumbscrew.

S. TUROW, *supra* note 1, at 151. Participation—that is, conversation—is not usually gained in this way in polite society. Imagine how small talk is usually started at a cocktail party, for instance. It would be considered rude to threaten a guest with torture for not engaging in conversation; and one can not even imagine the loss of a drink or hors d'ouvre as the penalty for a lapse of silence.

76. We can do better *without* these illusions, according to Professor Savoy: "The only time that anything really happens in my class is when I start being the person I really am—with feelings, doubts, expectations, fears—and not the incarnation of some professional or academic role." Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 456 (1970). Professor Watson notes, in the same vein: "It is only as these fantasies are cleared away that effective interdisciplinary teaching can take place." Watson, *The Current Status of Lawyer Professionals: Some Implications for Legal Education*, 24 LAW QUADRANGEL NOTES 16, 19 (1980). Though Watson is referring to the fantasies lawyers harbor toward each other even when they try to team-teach, the proposition probably has broader application. We must rid ourselves of all our fantasies about what we are doing before it can be done fruitfully.

77. Savoy, in what was perceived as a radical and revolutionary article in the 70's, advised massive reforms in legal education, and bottomed at least some of them on the courtroom paradigm. Instead of, like Peairs, see note 31 *supra*, reconstructing the paradigm to be more reflective of reality, or like me, abandoning the paradigm because of its actual and psychological distractions, he adopts a paradigm which is unlike reality but desirable nonetheless. He adopts a paradigm of reform intended to change the way practice is conducted. I think my approach is perhaps better than Peairs' because it at least requires that the professor consciously assess the substance of the paradigm she chooses. Savoy, *supra* note 76, at 472-73.

78. The world we teach about is a world built upon *rights and duties*; in the real professional world the lawyer is a *manipulator* who knows how to get what clients want with subtle, unpublic, unjudicial intrusions into the power structure. The professional ideal in the world we teach about is *mastery*, but the professional ideal in the real world is *competence*; the difference between the two ideas is the difference between knowing something and being able to do it. The world we teach about is, finally, a world in which standards of decision relate more or less to *fairness*; the real professional world, in property-settlement practice especially, is a world in which the standards of decision relate to *love and hate*.

T. SHAFFER, *supra* note 28, at 5.