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Artists, Workers, and the Law of Work: Keynote Address

HOWARD LESNICK

I can best open what I want to say by beginning as I do in my course in Law and a Market Economy, with a story attributed to Picasso. In his Cubist period, he was painting a picture of a woman. One day when the work was almost finished, the woman's husband dropped by the studio to drive her home. Picasso showed him the picture and said, "Well, what do you think?" The husband said it was really very nice, but it didn't look anything like his wife. Whereupon Picasso said, "Well, what does your wife look like?" (His wife was sitting there all the time.) The husband reached into his wallet, took out a photograph, and handed it to Picasso, saying "That's what she looks like." Picasso examined the picture for a long time, then gave it back to the husband and said, "I didn't realize she was so small."

Now when I talk to law students, who are a notoriously unimaginative and literal-minded bunch, I go on to explain the story as only a notoriously unimaginative and literal-minded person would try to do; in the company of artists and their camp followers, I shrink from doing that. What I take the story to be saying is that our perceptions of reality are embedded in unspoken premises—such as, a photograph is not a lifesize representation

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but is otherwise lifelike. Of course, even that statement is not literally true either, when the photograph is not in color or the color is known to correspond only slightly to what our eyes see.

More broadly, our perception of reality is a social construct. It is not surprising that artists should be one profession, probably the first, to realize the truth of that concept; but it is important for you to realize, whether you are a lawyer or not, that such a perception is not only true of the arts, but is true of the law. And it is true of the world around us; the way we see the world is a social construct. It is the way we view reality; much of what we think of as simply a description of reality is also a social construct. That is not to say it's wrong, not to say it is an illusion or delusion. It's something more complex.

What I want to talk about is what I refer to as the notion of a consciousness of work. There has been in our society for the last couple of hundred years a consciousness of work—I call it the prevailing consciousness—which has had an enormous impact on the way we think about work and on the way the law of work has evolved. There is also an alternative consciousness of work, a different way of looking at it. It is interesting to think about this idea in the context of the arts. It is obvious that in many ways the artistic professions are the home of that alternative consciousness. I will say more about that in a moment, but I first want to spell out what I mean by a consciousness of work: an entire set of mutually reinforcing premises, priorities, and perceptions that answer the question, “What do people do when they work?” We have a set of answers to those questions that sometimes is largely implicit: they are not stated or are sometimes stated as if they are self-evident, as simply a description of reality. This room is rectangular; that is a picture of a beach; the lights are on. Those perceptions are not viewed as social constructs. They are viewed as simple descriptions of fact.

What is the prevailing consciousness of work? In two words, it is that work is an exchange relation. It's a contract. It is the giving up of leisure in exchange for something else. Economists say, of course, that leisure is a good thing: you give up leisure, you work, and you get something back. That is a short answer that has an awful lot riding with it. A number of things flow from that view. I don't want to dwell on all of them, but let me mention several. Most important, of course, is that such an analogy quickly unites the work relation to our traditional notions of contract and exchange, both in law and in our ideology generally. It is a voluntary, bilateral relation. There is no right to work. There is no right to a job; there's simply a right, if you will, to look for one. More salient, perhaps, is the idea that the utility of what a worker does is external to the worker. Utility is largely defined by the user, initially the employer—will somebody hire you?—and

ultimately society because the employer is typically hiring you in order to sell something that you helped make or do. So I can imagine myself a basso profundo, but nobody credits that unless somebody's willing to pay me to sing. The same thing goes for being a lawyer, a waiter, a cab driver, or anything else. The utility of what you do is external to you.

In this paradigm the value of what you do to yourself, the meaning of your work, is that it is a means to self-sufficiency. That is what you get back. You get back an income that (one hopes) can support life. You get back whatever status comes with the job. That again, I think, is a deceptively simple set of statements that has an enormous hold on our perceptions, and that legitimates and de-legitimates an awful lot of things we struggle about. So, for example, a corollary suggests that what you put into your job, what is your business and what is not, is defined by the notion of *role*. Certainly lawyers, who you might think of as professionals or in some sense as artists, are very much a part of that paradigm—as a lawyer I have a certain job, to be loyal to my client, to be skeptical. The idea is endemic; it is true of all jobs. The role that you have is not defined by you, except in the sense that you took the job. In the legal sense you took it voluntarily: you might have been delighted; it might be a wonderful job; you might feel you are being overpaid or overvalued; it might be a terrible job; you might feel you are being exploited; you might have had six choices; you might have been unemployed for a year. In some sense those factors all matter, but they do not change the fact that once you take the job, the role is defined for you by the job and initially by the employer.

There is a wonderful case that illustrates all of this. It is one of the decisions that has been coming along in the last ten years, attempting to limit the employer's power to discharge employees at will where there is no collective bargaining agreement. The case involved a salesman who sold steel products and who thought that a new product was unsafe. He told his boss, "You know, I don't think it's really a good product. You shouldn't sell it." The boss said, "Don't worry, the engineers have cleared it," which they had. Still the salesman was troubled. He didn't call Ralph Nader; he didn't go to the newspapers. He went to the vice president of the company, who happened to be his personal friend, and told him, "You know, you really ought to look into this. I think they made a mistake." So the company looked into it, and they found the statesmanlike personnel solution. They recalled the product and fired the salesman.

He brought a suit, which had no statutory basis, and he argued the obvious point—that there is a strong public policy in safety, in not letting employers fire people for pressing this kind of complaint. The court's answer was this:

Certainly the potential for abuse of an employer's power of dismissal is par-

ticularly serious when an employee must exercise independent expert judgment. But Geary does not hold himself out as this sort of employee. He was involved only in the sale of products. There is no suggestion that he possessed any expert qualifications or that his duties extended to making judgments in matters of product safety.

In other words, as everyone knows, if you're a salesman, you are supposed to say how great the product is, not how bad it is. He wasn't an engineer; he wasn't a safety person. If he cared about safety—whether because he cared about the company's reputation, his own reputation, or what happened to other people, or just because he cared—that was his own business. He could do whatever he wanted about that on his own time. He could write a book, or he could look for another job. But it was not part of his job. Why not? Because the job was not defined to include caring about safety.

The case is a good example of an endemic attribute of the prevailing notion about work. It illustrates for us that personal qualities, including your own values, your own priorities, in a very real sense yourself, are a frill. Those things are not a legitimate input to your job, your employability, or what you do in your job.

There are other contexts illustrating this point. An example is the so-called "lifestyle" case in which men with long hair or beards or women with pants are not hired unless they conform to a norm. The prevailing view of work says "If you want the job, cut your hair. If you don't want to cut your hair, that's okay, but you're not entitled to bring that part of you in. It is not part of the job." The same is true about personal values. Again, the prevailing view holds that if you don't want to take a job, you don't have to, but your personal values are not a legitimate part of the job.

One of the provocative things that Theodore Bikel said this morning was that society views actors as in some way disreputable; that acting is not acknowledged as proper work; and that actors are thought to lead lives of abandon, for which they have to pay more for insurance. One reason his observation is true, why actors are thought of as essentially self-indulgent people, is that they are working at something because they like it or think that it is important, not because somebody is willing to hire them. This is not to say that they don't care, because they obviously have to care about getting hired. But there is a sense in which it's a personal quality that leads you to want to act. And, in the dominant paradigm, that quality is not considered terribly relevant.

Any beginning actor confronts that attitude. Your parents tell you, "You'll grow up, forget this acting business, and sell insurance like the rest of us. Or are you going to be a kid all your life?" There is a moral duty to make yourself employable. If anything might keep you from getting a job—whether it's typing your resumé without blotting the paper when you sign

your name, not shaving, or whatever (all the Horatio Alger stuff)—you do it. More importantly, this attitude shapes your own goals in life and society. You want to be valued in the world, and it is basically a deal. I make widgets, people buy widgets, they pay me; everyone feels happy. It may be advantageous to you, it may be advantageous to society, or disadvantageous to both. But it is essentially a transaction.

I believe that these ideas are mutually reinforcing, that they flow from the basic view of work as an exchange relation, and that they have an enormous impact on what we think of as legitimate and illegitimate. And they are a social construct.

Now as I said, there is an alternative consciousness. I don't mean by that term to say that the traditional consciousness is not true. Obviously, there is an exchange element to work. But it is not the whole story. Again, there is no need to dwell on the idea before this group, because in many ways the whole notion of being an artist is that you are not "giving up" something by working, for which your pay compensates you. This morning, a dancer, speaking of her company, said "I had to give up dancing." An economist would say, "No, no, you were *able* to give up dancing. You became a boss, and you didn't have to dance." When she worked, she did so from an alternative consciousness of work. The central idea of that consciousness is that part of your being a person is bound up with wanting to work, with wanting to be useful, with wanting to express your energy, your creativity, your connection to other people. It never suffices to describe your work as giving up something to get something back. You are also expressing something that is important to you.

It follows that the utility of what you do is defined internally as well as externally. What that thought immediately conjures up is the bad musician hanging out in Washington Square Park, playing the saxophone, and answering his father's complaint, "Why don't you get a job?" with, "I'm a musician; people drop money in my box." That example sees the question in polar terms: either society defines utility, or its judgment is irrelevant. The real question, as I see it, is more complex: how can you follow your work, which has self-validated meaning and usefulness to you, in a situation where you have to get external validation too? The external validation is not unimportant and not irrelevant, but it is not the whole story because the utility of what you do is not defined by people's willingness to pay for it. People's willingness to pay for it may be a necessary requisite to your being able to continue to do it. Still, that self-validating aspect is regarded as legitimate.

This morning someone spoke about moving toward excellence, moving toward a commitment to excellence. In the traditional paradigm, how do you know who is excellent and who is not? Whether it is a painting or

steel rails, the answer is that what people buy, what people will pay for, is excellent, and what people won't pay for is junk. As artists you reject that, and there is an urge in all of us to reject that. You say that you have some sense that you can define excellence and hold on to it. It is slippery as everybody knows, but the notion involves a concept of intrinsic value not defined by the market. And you avert that you can act out of it that awareness. A worker's interest in his or her work is in part an extension of that person's identity. It goes beyond what people will pay for.

So when the panelists spoke about regional theatre and the notion of an ensemble, it was to suggest a value in working together. What is the basis of that value? When I was in college, certain schools played good basketball because the players grew up in the same neighborhood and played together for ten years so they could beat the hell out of everyone else. That suggests one reason why it is important to work together. But what I heard at this morning's panel was something that went beyond that. Wholly apart from the commodity value of ensembles is another value—acting communally and being involved with people you care about, having less dissonance between home life and work life. And all of that rests on the notion that your individuality is partly constituted by your relation to others; that is, the value society places on what you do is not expressed solely as a transaction, but as a relationship.

What strikes me is that, in many ways, the alternative consciousness is the consciousness of the artist. It is also the consciousness of the professional. If this were a conference of lawyers or teachers and there were lawyers and teachers in the room, I could make the same analysis. Traditionally, the professions are inner-directed, more tenuously connected to the market, and so forth. I would like to suggest a hypothesis: it is difficult and problematic, I think, to make much headway in achieving legitimacy in the world for that alternative consciousness for the arts if it is viewed as separate from the world of work generally. Galbraith, perhaps for rhetorical purposes, drew a very sharp distinction between certain types of work. I see it more as a continuum. I can describe it with three hypotheses. First, the traditional consciousness of work both shapes the law and is reinforced by the law. It's a mutually reinforcing set of ideas.

Second, we sense or we know, acutely in some cases, the incompleteness of the traditional consciousness. It fails to describe fully what we do as we work, and it produces results, human results, that are deeply problematic—unemployment, discrimination, low wages, occupational injury, and so on. At the same time, it seems inevitable; it seems that it is not a simple description of reality. Work *is* an exchange relation; this *is* a commodity world; we *do* relate to each other essentially as an endless series of negotiations. As a result we are trapped in this dissonance between dissatisfaction

and the inability to see any alternative as other than a romantic fantasy. And efforts to act out of an alternative consciousness tend to be captured over time by the traditional consciousness, whether those efforts take the form of new laws that quickly begin to lose their vitality, career aspirations, or transformational attempts in a job setting.

Finally, what I have called an alternative consciousness is not just for artists. It's not just for professionals, lawyers, and teachers. There was talk this morning about unemployed artists driving taxis. What about people who drive taxis all the time? They are not artists. But I have heard people who work as short-order cooks, for example, talk about what they do at 9:30 in the morning—slicing tomatoes—as in some way an expression of their involvement with the people who are going to eat those tomatoes. I suggest that the real task is to envision the ways that all of us, including those of us who are not artists, have within us this dissonance. We have within us a set of work norms that in some sense seems inevitable, but that in another sense is forced on us as part of the traditional consciousness.

Theodore Bikel's story about the Bureau of Labor statistics and the unemployment figures is true for thousands of people besides artists. There are literally thousands of people, whether they are cab drivers or teachers, working at something less than what they want to do. Of course, that fact does not end the matter. Sure, a lot of people would like to be president of the United States; they are not all unemployed simply because the position is not open, just as the fact that there is more to the utility of your work than the market does not mean that we all define the utility of our jobs. We don't; it is more complex than that. But there are many, many people caught in the situation of the unemployed artist driving a cab who is told that he is no longer an unemployed artist, he is an employed cab driver.

Whether we look at the aspect of the art world being discussed this morning or more broadly at the arts, as the world evolves the traditional consciousness tends to take over, even in those areas like the professions where it is the last place to be felt. Certainly, in law and in teaching, the bureaucratization and "proletarianization" of those professions are proceeding apace. I was interested to find this conference focused on an aspect of the arts where this phenomenon seems much less true. I am sure that there are other areas of the arts where it is true. Those of you who follow legal issues know that recently the Supreme Court of the United States, in the *Yeshiva University* case, told teachers they were not employees at all because they had discretion over their work that employees typically do not have. In other words, because they had some of the ingredients of self-direction that I have associated with the alternative consciousness, the Court said they were not employees, causing them to lose protection under the Labor Relations Act. The Court said that a professor has independent

judgment because it is the university's policy, in *its* self-interest, to hire people on that basis. In other words, as a teacher I have independence of judgment because the university wants me to have it. That was news to me, and it was not exactly reassuring. It is also interesting that in calling me an independent professional, the court was not raising my status but was taking away a legal right, one I may or may not have wanted, but which I otherwise would have had. It has doubtless been the increasing bureaucratization, the declining autonomy of professions like teaching that has led to such developments as unionization. The view that the professions are different is expressed to make people in those fields more vulnerable to technological and societal changes that are making the differences less real.

So the task that I see for us, penetrating the limitations of the traditional consciousness in attempting to construct legal principles that are responsive to something broader, is one that the field of the arts is central to, but that goes far beyond it.