

ENTREPRENEURSHIP AND LAW: ACCESSING THE POWER OF THE CREATIVE IMPULSE

STEVEN H. HOBBS

The process of change has shaped the perceptions and realities of how people interact in a world that has become a much smaller place.¹ We find ourselves in an era of global marketplaces that include mega-corporations not bound by national borders or allegiances, as well as the local, small villages where internet access makes it possible for even the smallest business to access the wide world of trade.² Entrepreneurship allows us to create new ways of providing innovative services and products to diverse markets and consumers.

Consequently, the creation of entrepreneurial ventures calls for imaginative methods of structuring laws and legal relationships that increase the chance of successfully bringing new services and products to the market. The legal advocate who assists entrepreneurs must become conversant in the theory and application of the entrepreneurial process. This is especially true for lawyers who represent the wide variety of stakeholders in economic, social, educational, and political enterprises, from family businesses, to venture capitalists, to social service providers in nonprofit organizations, to government entities engaged in economic and community development. The skill sets of lawyers must include strategic planning, leadership qualities, and creative problem solving.

¹ See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT 3.0: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (Picador 2007).

² Massachusetts Institute of Technology (“MIT”) Professor Nicholas Negroponte after witnessing the extreme poverty and lack of educational opportunities for two billion of the world’s poorest children, set out to build a rugged laptop computer and make it cheaply available to as many of these children as possible. See <http://laptop.org/vision/mission/> for a description of this program. This computer, known as the XO laptop and powered by a hand crank, is designed to make it possible to access the internet and open up the world of information. XO embodies the theories of constructionism first developed by MIT Media Lab Professor Seymour Papert in the 1960s, and later elaborated upon by Alan Kay, complemented by the principles articulated by Nicholas Negroponte in his book, *Being Digital*. Extensively field-tested and validated among some of the poorest and most remote populations on earth, constructionism emphasizes what Papert calls learning as the fundamental educational experience. A computer uniquely fosters learning by allowing children to think about thinking, in ways that are otherwise impossible. Using the XO as both their window on the world, as well as a highly programmable tool for exploring it, children in emerging nations will be opened to both illimitable knowledge and to their own creative and problem-solving potential. *Id.*

The Entrepreneurial Business Law Journal provides an excellent medium for legal scholars and practitioners to engage in conversation about the meaning of entrepreneurship and how the theoretical and practical applications of this emerging field shapes and changes the role lawyers play in the practice of entrepreneurial law. This essay is presented as an offering to the dialogue on the meaning of the study of law and entrepreneurship. This essay will consider how the creative impulse provides the juice for entrepreneurial thinking and endeavors. It is important for lawyers who work with entrepreneurs to understand this reality. Moreover, lawyers must be entrepreneurial in devising innovative legal practices to meet the rapidly changing needs of our profession. Hence, the legal field can not only assist entrepreneurs, but can also engage in the entrepreneurial process itself and develop a new area of law and practice. Accordingly, the publishing of the Entrepreneurial Business Law Journal is a timely vehicle for a broader discussion of the study of law and entrepreneurship.

I. ENTREPRENEURSHIP AS PROCESS

As an initial matter, one should consider the definition of entrepreneurship, especially as it relates to law. In previous work, I have explored the range of definitions used to describe entrepreneurship by asking a series of questions.³ Who is an entrepreneur? What is entrepreneurship? What is the entrepreneurial process, or how is entrepreneurship accomplished? And finally, can anyone learn the process of entrepreneurship?⁴ There are many ways to address these questions, depending upon the chosen point of reference. One can consider entrepreneurship as a function of economic theory,⁵ as

³ Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAPITAL U. L. REV. 241 (1997); Steven H. Hobbs, *Ethics in the Age of Entrepreneurship*, 39 S. TEXAS L. REV. 599 (1998); and Steven H. Hobbs & Fay Wilson Hobbs, *Family Businesses and the Business of Families: A Consideration of the Role of the Lawyer*, 4 TEX. WESLEYAN L. REV. 153 (1998).

⁴ Entrepreneurial education has grown exponentially in the past thirty years or so, especially in business schools. See, George T. Soloman, et al., *The State of Entrepreneurship Education in the United States: A Nationwide Survey and Analysis*, in KEYSTONE OF ENTREPRENEURSHIP KNOWLEDGE 282 (Rob van der Horst, et. al, eds. 2005) (also published in 1 INT'L J. ENTREPRENEURSHIP EDUCATION (2002)). See also, John S. Rosenberg, *Who Wants to Be an Entrepreneur?* 103/4 HARVARD MAGAZINE 35 (March-April 2001). Law schools have also begun offering courses and clinics in entrepreneurship, small business development, and transactional law.

⁵ For a discussion of the historical work on the relationship of entrepreneurship and economic theory, see generally Robert L. Formaini, *The Engine of Capitalist Process: Entrepreneurs in Economic Theory*, in ENTREPRENEURSHIP (5th ed. 2006); and MARK CASSON, THE ENTREPRENEUR: AN ECONOMIC THEORY (2d ed. 2003).

biographical inspiration,⁶ or as an analytical process grounded in theoretical assumptions and postulates.⁷ Scholars take a variety of definitional perspectives, including strategic management, psychological, and personal characteristics of the entrepreneur.⁸

However, the entrepreneurial process is fundamentally about dynamic change in the manner in which services and products are created and/or re-created.⁹ The entrepreneur recognizes possibilities for building a business or organization, seeks the resources necessary for bringing the enterprise into existence, and successfully develops plans for bringing the service or product to market.¹⁰ A broader definition, developed by Jeffrey A. Timmons and James Spinelli, posits a comprehensive method of conceptualizing the process:

Entrepreneurship is a way of thinking, reasoning, and acting that is opportunity obsessed, holistic in approach, and leadership balanced. Entrepreneurship results in the creation, enhancement, realization, and renewal of value, not just for owners, but for all participants and stakeholders. At the heart of the process is

⁶ One example of this genre is the biography, *On Her Own Ground: The Life and Times of Madam C. J. Walker*, by A'Lelia Bundles (Scribner 2002). The book tells the story of Madam C. J. Walker, who rose from poverty to start a successful company which manufactured and sold hair care products for black women, making her one of the first African-American millionaires. Her business acumen was the forerunner to such companies as Mary Kay and Avon, in that it help black women become financially independent:

As a pioneer of the modern cosmetics industry and the founder of the Madam C. J. Walker Manufacturing Company, Madam Walker created marketing schemes, training opportunities and distribution strategies as innovative as those of any entrepreneur of her time. As an early advocate of women's economic independence, she provided lucrative incomes for thousands of African American women who otherwise would have been consigned to jobs as farm laborers, washerwomen and maids.

Id. at 16.

⁷ For a comprehensive collection of writings on entrepreneurship, see THE FOUNDATIONS OF ENTREPRENEURSHIP, Vol. I & II (Scott Shane, ed. 2002).

⁸ See generally, KEYSTONES OF ENTREPRENEURSHIP KNOWLEDGE, *supra* note 4.

⁹ See *Toward a Theory of Entrepreneurship*, *supra* note 3 at 281. For a comprehensive presentation of a variety of entrepreneurial theories and perspectives, see also, THE DYNAMICS OF ENTREPRENEURSHIP: GROWTH AND STRATEGY (Tan Wee Liang, ed. 2002).

¹⁰ See Howard H. Stevenson & David E. Gumpert, *The Heart of Entrepreneurship*, HARVARD BUSINESS REVIEW 85 (March-April 1985).

the creation and/or recognition of opportunities, followed by the will to seize these opportunities. It requires a willingness to take risks -- both personal and financial -- but in a very calculated fashion in order to constantly shift the odds of success, balancing the risk with the potential reward. Typically, entrepreneurs devise ingenious strategies to marshal limited resources.¹¹

This definition takes a holistic approach to the process by entailing creativity, strategic planning, the varied participants, risk, and reward.¹² Understanding entrepreneurship as a multi-variant, dynamic process informs the advisors to entrepreneurs of how best to facilitate the enterprise's growth and development.¹³

From a lawyer's perspective, this requires new ways of adapting our legal system to facilitate the entrepreneurial process. For example, one tends to focus on how the entrepreneurial process is carried out in a start-up business or venture, although entrepreneurial functions can occur in an established firm.¹⁴ The form of the business—sole proprietorship, various partnership forms, various corporate forms, or joint ventures—must be tailored to the nature of the enterprise.¹⁵ Various stakeholders, including employees, managers, and

¹¹ JEFFREY A. TIMMONS & JAMES SPINELLI, *NEW VENTURE CREATION: ENTREPRENEURSHIP FOR THE 21ST CENTURY*, 47 (6th ed. 2004).

¹² See G. T. Lumpkin & Gregory G. Dess, *Clarifying the Entrepreneurial Orientation Construct and Linking It to Performance*, in *KEYSTONES OF ENTREPRENEURSHIP KNOWLEDGE*, *supra* note 4 at 83.

¹³ See *Towards a Theory of Entrepreneurship*, *supra* note 3, at 281-282.

¹⁴ For a consideration of how established business can become entrepreneurial, see Louis Jacques Filion, *From Employees to Entrepreneurs*, in *KEYSTONES OF ENTREPRENEURSHIP KNOWLEDGE*, *supra* note 4 at 158.

¹⁵ Businesses are increasingly forming new methods of partnering with other businesses in order to obtain a strategic advantage in the marketplace as suggested by the following:

The rapid pace of technology development and innovation, high costs of research and development, globalization of industries, rapidly changing trade constraints and barriers, and the rapid maturation of many industries have created a world in which cooperative behavior among small businesses may be becoming the rule rather than the exception. Strategic alliances, generally defined, as relatively enduring agreements establishing exchange relationships between cooperating businesses, have grown almost tenfold in the past 20 years. These new organizational forms, centered upon cooperation among businesses, are necessarily a redefinition of our concepts of business size and scope. Small businesses can now have the reach and impact of large businesses while large businesses can have the flexibility and innovation of small businesses.

investors, must be accommodated.¹⁶ Other legal issues may arise, demanding creative solutions. For example, the service or product may need protection through licensing and intellectual property law.¹⁷ Due diligence requires a legal analysis of the systems of law which must be accommodated in order for the enterprise to function lawfully.¹⁸ A host of regulatory and tax laws may need to be considered and analyzed from the point-of-view of the new service or product. Thought must also be given to new legal risks and liabilities that may not be readily apparent in the first observation and usage of the service or product.¹⁹

Necessarily, the Entrepreneurial Business Law Journal is itself a new service and product, offering a medium through which scholars and practitioners can explore the theoretical perspectives and parameters of entrepreneurial law. It also can collect and present creative ideas about how the law can evolve to better facilitate the entrepreneurial process. For example, much has been written about corporate governance under the Sarbanes-Oxley law and about corporate social responsibility when jobs are outsourced, leaving social dislocation.²⁰ Such changes, especially in a global marketplace, may determine how a business is structured and may have a

K. Mark Weaver & Pat Dickson, *Strategic Alliances*, 4/4 NFIB National Small Business Poll 1 (2004).

¹⁶ For an examination of how lawyers must consider the participants of the business, the economic and financial aspects of the business, and the legal schemes designed to facilitate the business, see WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES*, 9th ed. (2004). In the preface to this book the authors describe the interdisciplinary nature of the work:

The principal objective of this book is to explain, in simple terms but not simplistically, (a) the basic economic elements and legal principles, as well as language, of business organization and finance; (b) the interrelationship between and among economic elements and legal principles; and (c) the practical importance of a basic understanding of those elements, principles and interrelationships.

Id. at iii.

¹⁷ See Alan L. Durham, *Useful Arts' in the Information Age*, 1999 BRIGHAM YOUNG U. L. REV. 1419 (1999).

¹⁸ See generally GARY M. LAWRENCE, *DUE DILIGENCE IN BUSINESS TRANSACTIONS* (Law Journal Seminar Press 1994, with updates).

¹⁹ A good case study is provided by the collapse of the Enron Corporation which provides a cautionary tale for advisors to entrepreneurs leading a high growth enterprise. See, NANCY B. RAPOPORT & BALA G. DHARAN, *ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS* (Foundation Press 2004).

²⁰ See Steven Bainbridge, *The Complete Guide to Sarbanes-Oxley: Understanding how Sarbanes-Oxley Affects Your Business* (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028033 (last visited May 31, 2009).

financial impact on the profitability of the enterprise.²¹ Lawyers will have to quickly adapt to the rapidly changing global marketplace fueled by technological innovation.²²

II. THE CREATIVE IMPULSE

Entrepreneurship is fundamentally about the power of creativity. Creativity has emerged as a major field of scholarly endeavors.²³ While creativity is a central theme in this essay, it does not, by any means exhaust the possible coverage of this field. However, the intent is to present the ideal of creativity as a fruitful ground for further inquiry. The works of Daniel Pink and Ken Robinson are illustrative of the rising legitimacy of creativity studies, as they both examine how creativity is a force that comes from within us makes us human at many levels.²⁴ Pink explores the general ideas of creativity and stresses the importance of the creative capacity in a rapidly changing world.²⁵ He predicts that in the very near future, to thrive in a rapidly changing world environment, we will need to master a new set of thinking skills grounded in creativity that he describes as follows:

It is an age animated by a different form of thinking and a new approach to life -- one that prizes aptitudes that I call a high concept and a high touch. High concept involves the capacity to detect patterns and opportunities, to create artistic and emotional beauty, to craft a satisfying narrative, and to combine seemingly unrelated ideas into something new. High touch involves the ability to empathize with others, to understand the subtleties of human interaction, to find joy in one's self and to elicit it in others, and to stretch beyond the

²¹ See Weaver & Dickson, *supra* note 15, at 8.

²² See Laurel S. Terry, *Teaching Legal Ethics and Professional Responsibility Issue: A 'How-To' Guide for Incorporating Global and Comparative Perspectives into the Required Professional Responsibility Course*, 51 ST. LOUIS U. L.J. 1135 (2007).

²³ See Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97 (2001) (application of creativity theories to the practice of legal negotiation and problem-solving).

²⁴ See especially, DANIEL H. PINK, *A WHOLE NEW MIND: WHY RIGHT-BRAINERS WILL RULE THE FUTURE* (Riverhead Trade 2005), and KEN ROBINSON, *OUT OF OUR MINDS: LEARNING TO BE CREATIVE* (Capstone 2001).

²⁵ PINK, *supra* note 24, at 28-47.

quotidian in pursuit of purpose and meaning.²⁶

This is a theory that both reflects the artistic side of life and the ability to respond to human emotional needs. He posits that there are at least six creative aptitudes or senses that must be nurtured in the future: design, story, symphony, empathy, play, and meaning.²⁷ While we will not discuss these in detail here, we will allude to some of them in the discussion below.

Robinson also considers how creativity in general, and imagination in particular, provide critical skill sets for coping in a time of exponential growth in technology.²⁸ Robinson urges our educational systems to seriously consider the necessity of teaching imagination as a fundamental aspect of our curriculum.²⁹ He also reflects on how we promote and develop a culture where creativity works to enhance human potential.³⁰ Both Robinson and Pink conclude that societies that flourish in the new, technological world will be those that promote creativity, as well as the standard academic curriculum of language skills, mathematics, science, and history.³¹

Creativity starts within the brain and the recognition that our brain has two hemispheres. Simplistically, we can describe the general functions of each hemisphere. Creativity is the province of the right hemisphere of the brain. That is where we find thinking that is "...simultaneous, metaphorical, aesthetic, contextual, and synthetic."³² We place expressions that tend to be artistic, literary, musical, kinesthetic movement (i.e. dance), and other fine arts in the right hemisphere of the brain. Daniel Pink calls this "R-Directed Thinking."³³ The left hemisphere of the brain is said to involve thinking that is "...sequential, literal, functional, textual, and analytic."³⁴ Our ability to do complex mathematical operations, philosophical reasoning, and logical thinking occurs in the left hemisphere. Pink calls this "L-Directed Thinking."³⁵

Too often, we privilege the power of the left hemisphere's analytical thinking over the right hemisphere's creative thinking.³⁶ In reality, we

²⁶ *Id.* at 2-3.

²⁷ *Id.* at 65-67.

²⁸ ROBINSON, *supra* note 24, at 111.

²⁹ *Id.* at 194-195.

³⁰ *Id.* at 162-165.

³¹ See note 46 *infra.*, for a recent study on imagination and the curriculum.

³² PINK, *supra* note 24, at 26.

³³ *Id.*

³⁴ *Id.* See also DONALD F. KURATKO & RICHARD M. HODGETTS, ENTREPRENEURSHIP: A CONTEMPORARY APPROACH 130 (5th ed. 2001)

³⁵ PINK, *supra* note 24, at 26.

³⁶ See KURATKO & HODGETTS, *supra* note 34 at 131, who suggest "Our society and its educational institutions reward individuals who have been successful at developing their logical, analytical, and rational left-brain skills. Little emphasis,

function in the world by using the power of both sides. Hence, the creative process is dynamic and fluid as the mind conceives of new ideas and new methods of bringing those ideas to fruition.³⁷ Exactly how the brain functions is certainly beyond the subject matter of this essay,³⁸ but it is worth noting that a partial (and cursory) understanding of how the brain does function in the creative mode is an informative route to understanding entrepreneurship.³⁹

We often see creativity and the concepts of imagination and innovation entwined with each other.⁴⁰ We will consider both concepts. First, imagination is that powerful part of our brain that can perceive a reality that exists beyond the material world of the present.⁴¹ Storyteller Laura Simms describes how storytelling permits us, as listeners, to access that place within us where imagination takes flight.⁴² She describes it as follows:

As the characters in the fairy tale cross thresholds into other realms, we listeners are drawn inward past the boundaries of our logical mind into vast space and communal presence. The words beguile our minds with profuse details as our imaginations recreate

however, has been placed on practicing and using right-brain skills.” *See also* ROBINSON, *supra* note 24 at 80-82, and the press release announcing the results of a poll sponsored in part by the Arts Education Partnership focusing on imagination skills in public schools, “New Poll Reveals Stifling Imagination in Schools Underlies Innovation and Skills Deficit,” NAMM, the International Music Products Association (Jan. 24, 2008), *available at* <http://www.namm.org/news/press-releases/new-poll-reveals-stifling-imagination-schools-unde> (last visited May 31, 2009).

³⁷ *See*, ROBINSON, *supra* note 24, at 103-105.

³⁸ Both PINK, *supra* note 24, at 7-15, and ROBINSON, *supra* note 24, at 94-110, describe some of the work physicians and scientists are doing in brain studies.

³⁹ For a general discussion of how to develop one's creative powers, see KURATKO & HODGETT, *supra* note 34, at 119-144 and JULIA CAMERON, *THE ARTIST'S WAY: A SPIRITUAL PATH TO HIGHER CREATIVITY* (Putnam 2002)

⁴⁰ *See* KURATKO & HODGETT, *supra* note 34, at 87.

⁴¹ ROBINSON, *supra* note 24, at 100-101:

The founding perception of modern philosophy is the idea that we all have in two distinct worlds. There is the world that exists whether or not you exist. This is the world of objects, events, other people and material things. This world was in existence before you were, and will continue after you have gone. But there is another that exists only because you exist. This is the world of your private consciousness, sensations and feelings. This world came into being when you were born and will end when you die. We share the first world with each other: we share the second world with no one.

⁴² Laura Simms, *Crossing into the Invisible*, 25 PARABOLA MAGAZINE 1 (200), *available at* <http://www.laurasimms.com/CrossingIntoInvisble.html> (last visited on May 31, 2009).

the story. The habitual patterns of thinking that usually patrol the borders of this familiar world are engaged, and thus the door falls open inward -- we feel the ever-present timeless space of mind that has always existed beneath consciousness.⁴³

That place where we cross the threshold of our logical minds allows entry into endless possibilities.⁴⁴ This is where the light bulb goes off and we can think into existence new ideas and concepts that can eventually be transformed into new services and products.⁴⁵ Through imagination we can experience the past, whether it consists of actual, historical events, such as George Washington crossing the Delaware River to fight the Hessian troops in Trenton, New Jersey, or events in a world of our own creation, such as adventures in Middle Earth, Hogwarts, or in a long ago, distant galaxy.⁴⁶ Through imagination, we can envision a future world that does not yet exist, but we can perceive it in dreams, ideas, and visions. Such a world was imagined by President John F. Kennedy when he challenged the nation to send a manned flight to the moon before the end of the 1960's. It took the creative minds of tens of thousands to make that creative vision a reality. And finally, through imagination we change our perception of our present reality when we

⁴³ *Id.*

⁴⁴ See ROBINSON, *supra* note 24, at 115.

⁴⁵ We never know when creative ideas will come to us. They may come to us in a conversation, in doodles on a paper or in the middle of the night when we awake with a start fueled by subconscious thought. This is when we must follow the wisdom of the poet, Jelalludin Rumi who noted in the poem, "A Great Wagon": "The breeze at dawn has secrets to tell you. Don't go back to sleep." JELALLUDIN RUMI, *THE ESSENTIAL RUMI* 36 (Coleman Barks & John Moyne, trans., HarperOne 1995). See also TIMMONS & SPINELLI, *supra* note 11, at 87.

⁴⁶ Storytelling allows access to the imagination by letting the teller and the listener co-create a shared reality. As one storyteller describes, it can begin with the usual opening line of a story - once upon a time:

Once brings a sense of immediacy; *upon* lifts the storyscape up into the imagination; *a time* takes you and your listeners both forward and backward, until you arrive at a point of creative stillness from which the happenings of the story can creatively unfold. You have the power bring to birth a story that refreshes time, space, and your sense of life and who you are. As a storyteller, you are a cocreator with the thriving life of the universe.

NANCY MELLON, *STORYTELLING AND THE ART OF IMAGINATION* 16 (Yellow Moon Press, 3d ed. 2003).

listen to a story and experience anew the emotions and events as recounted by a storyteller.⁴⁷

Even more fantastic, with technology we can create a virtual world that is experienced in real time, but does not materially exist in the present moment. Video games take you into dungeons and onto racecourses or into sports arenas that only exist on the program of a computerized game system. One can also create the ultimate virtual reality by constructing a world of alter ego avatars who interact in real time with other created alter egos.⁴⁸

Innovation is fueled by imagination, but is often considered, in part, the applied process of the creative impulse.⁴⁹ After an idea is born in the mind's eye, one has to figure out how to bring it into existence.⁵⁰ Robinson describes this process as follows:

Creativity is not a single power that people simply have or do not have, but multidimensional. It involves many different mental functions, combinations of skills and personality attributes. They involve special purposes for familiar mental operations and more efficient use of our ordinary abilities, not something profoundly different. Creativity is not a separate faculty so much

⁴⁷ See MELLON, *supra* note 46.

⁴⁸ See, e.g., ROBBIE COOPER, ALTER EGO: AVATARS AND THEIR CREATORS (Chris Boot 2007).

⁴⁹ One study of innovation in the context of regional economic development connects knowledge creation and accumulation, in other words, ideas, to the innovative process. If the South is to fully function in a knowledge-intensive economy, it must understand how to create, accumulate and apply knowledge. Those knowledge skills are essential to the process of innovation. Innovation is an iterative process, one that almost always consists of many small steps and few large leaps. Innovation does not follow predictable paths. Sometimes the leap is directly from creation to application, sometimes from accumulation to creation to application. It is a chaotic process that relies on patience, diligence and the relentless pursuit of opportunity. Jim Clinton, et. al, *Innovation with a Southern Accent: 2006 Report on the Future of the South* 5-6 (2006), available at http://www.southern.org/pubs/pubs_pdfs/rfs2006.pdf.

⁵⁰ "There is a classical division of stages in creative thought: preparation, incubation, illumination, verification. This model is contested by different scholars, but it does suggest a common pattern of focus, withdrawal and then breakthrough. The key point is that creativity is a process rather than an event. The nature of this process is personal to the individual, but it often involves waking and sleeping moments or unconscious ruminations as we do other things. For everyone, creative activity involves a combination of control and freedom, conscious and unconscious thought, intuition and rational analysis." ROBINSON, *supra* note 24, at 135.

as an attitude: a willingness to reconsider what we take for granted.⁵¹

In the context of entrepreneurship, the innovative process must move towards bringing into reality an idea that will, as our entrepreneurship definition suggests, “result in the creation, enhancement, realization, and renewal of value, not just for the owners, but for all the stakeholders.”⁵² To take a ready example, engineers are hard at work designing the “green” car of the future that will respect our environment and utilize technologies to efficiently and economically transport people and parcels. While proceeding with that end in mind, there is a process that can be applied to the tasks at hand by purposefully and strategically tackling the theoretical, technical, aesthetic, and functional issues.⁵³ The challenge for those interested in the creative impulse of the entrepreneurial process is to understand that innovation is a complex dynamic process that can be accomplished if the environment or culture encourages innovation.⁵⁴ Hopefully there is much food for thought here for examining whether legal education and scholarship is promoting a culture of creativity needed for an era of exponential growth.

Imagination and innovation work together to generate new ideas and ways of thinking.⁵⁵ It allows us to recognize new patterns and relationships. Like the two hemispheres of our brain, they supplement and complement each other in what seems like a seamless web, and provide the impetus for the creative impulse in the entrepreneurial process. The creative process involves both logical and analytical thinking in the knowledge accumulation, evaluation, and implementation stages. In addition, it calls for imagination, intuition, analogy conceptualization, and synthesizing in the incubation and idea creation stages.⁵⁶ This is the essence of what Napoleon Hill meant in his remarkable book, *Think and Grow Rich*, where he examined the lives of extraordinary businesspersons to determine how they accomplished their phenomenal success.⁵⁷

Ideas about our world and life are generated by creative thinking. We look at our environment and think of ways to make it better, or to navigate

⁵¹ *Id.* at 137.

⁵² See accompanying text, TIMMONS & SPINELLI, *supra* note 11, at 47.

⁵³ “Successful innovators use both the right and left sides of their brains. They look at people. They analytically work out what the innovation has to be to satisfy the opportunity. Then they go out and look at potential product users to study their expectations, values, and needs. Most successful innovations are simple and focused. They are directed toward a specific, clear, and carefully designed application. In the process they create new customers and new markets.”

KURATKO & HODGETTS, *supra* note 34, at 133-134.

⁵⁴ See ROBINSON, *supra* note 24, at 181-182.

⁵⁵ *Id.* at 194-201.

⁵⁶ KURATKO & HODGETTS, *supra* note 34, at 130.

⁵⁷ See generally NAPOLEON HILL, *THINK AND GROW RICH* (Aventine Press 2004).

around, over, or through problems.⁵⁸ Hence, we invent new ways of travel, communication, medical practice, and wiser methods of using the earth's resources. We also use our creativity to make the world a more beautiful place and a place where humans can interact with each other through literature, music, dance, and art.⁵⁹ A prime benefit of artistic creation is the opportunity to express who we are as individuals. So we colorfully design our living spaces, fashion ways to entertain ourselves, and even clothe and paint our bodies to suit our unique tastes and styles.⁶⁰ Quite naturally, ideas and artistic expressions pave avenues for providing new services and products.

Creativity is thus the impulse that powers change in the way we perceive and understand the world.⁶¹ Creativity in the entrepreneurial context has been described as “the generation of ideas that result in the improved efficiency or effectiveness of a system.”⁶² The impulse can be a small spark that offers new insight into how a service or product can be enhanced, utilized, or improved for the benefit of the end user. For example, merely changing the color or

⁵⁸ See *Innovation with a Southern Accent*, *supra* note 49.

⁵⁹ Communities across the country are participating in a process to promote a more livable environment and are using the resources of a non-profit organization called Partners for Livable Communities (“PLC”). The creative arts and culture are an important component of this process. PLC emphasizes the economic value of promoting the arts and culture through the Culture Builds Communities project by providing programs that, “demonstrate how cultural resources can contribute to youth development, economic development and community design.” *Partners for Livable Communities*, http://www.livable.com/culture_builds/index.htm (last visited May 31, 2009).

⁶⁰ PINK, *supra* note 24, at 34. Pink describes our need for beauty as expressed in design, one of the attributes of R-Directed Thinking, as a function of the material abundance that we now enjoy but we are beyond just obtaining utility in the products we use. *Id.* He notices a common good during a recent shopping trip:

...a toilet brush designed by Michael Graves, a Princeton University architecture professor and one of the most renowned architects and product designers in the world. The cost: \$5.99. Only against a backdrop of abundance could so many people seek beautiful trash cans and toilet brushes—converting the mundane, utilitarian products into objects of desire.

Id.

⁶¹ “Human intelligence is creative in a profound sense. Thinking and feeling are not simply about seeing the world as it is, but of having ideas about it, of interpreting experiences to give it meaning. Different communities live differently according to the ideas they have and the meanings they see. In a literal sense, we create the worlds we live in. But we also recreate them. The great revolutions in human history have often been detonated by new ideas: by new ways of seeing that have shattered old certainties. This is the essential process of cultural change and it can be deeply unsettling. Creative insights often occur by making connections between ideas or experience that were previously unconnected.” ROBINSON, *supra* note 24, at 11.

⁶² KURATKO & HODGETT, *supra* note 34, at 121.

shape of the outside of the laptop computer, without changing its basic functions, permits individual expression through the designs of new beauty.⁶³

Or, creativity can provide the explosive paradigm shift which fundamentally changes our society and the manner in which we relate to each other.⁶⁴ For example, the internet opened new ways of accessing information and new communication modalities. Now, the pace of technological change is so rapid that the capacity and programs on our cell phones seem to improve daily.⁶⁵ They become technologically obsolete before they are worn out or broken.⁶⁶ Moreover, the creative impulse produces more creativity as end users utilize the service or product in ways not contemplated by the provider to the service or product. Who knew that text messaging would spawn a new language and at the same time new dangers, as for example when users text while driving a vehicle?⁶⁷

The impulse to create is about the ability to provide the world with a service or product that enhances the life quality of the service or product user—in other words, to be entrepreneurial in the purest sense of the concept.⁶⁸ Correspondingly, the producer of the service or product can achieve a particular set of goals or objectives, be they personal, professional, business, or financial. The service or product can be either a new invention, or a uniquely innovative method of presenting a common or established service or product. For example, miniaturization of computer technology, often called “nanotechnology,” makes it possible to create personal music and entertainment devices such as the iPOD and the MP3 player. Now we can download our music and movies from the internet, access podcasts of an infinite variety, and even create and disseminate our own personal expressions and ideas via Youtube, blogs, and personalized websites.

As another example, Ray Kroc, the founder of the McDonald's fast food enterprise, revolutionized the food service industry by offering a limited menu of food, served quickly and inexpensively. His idea became the blueprint for the fast food industry.⁶⁹ Interestingly, McDonald's was only possible because of the utilization of the then-rapidly emerging frozen food

⁶³ For a discussion of the aptitude for design, see PINK, *supra* note 24, at 68-89.

⁶⁴ See FRIEDMAN, *supra* note 1, at 36-37, for a discussion of how an individual can set up an internet journalism site and report ideas, news and issues around the world as fast as a click.

⁶⁵ See ROBINSON, *supra* note 24, at 29-30.

⁶⁶ Naturally, this just creates the need for a new service to recycle electronic devices and the materials with which they are made.

⁶⁷ *The Dangers of Text Messaging While Driving*, http://www.mynrma.com.au/cps/rde/xchg/myrnma/hs.xsl/dangers_of_texting.htm (last visited May 31, 2009).

⁶⁸ See text on the definition of entrepreneurship accompanying *supra* notes 3-13.

⁶⁹ See ROBINSON, *supra* note 24, at 30-33.

industry, especially the fresh, frozen, french fried potato.⁷⁰ Moreover, the spread of his restaurant empire across the country and the globe required the refinement and enhancement of franchise law, thus creating a lucrative service for lawyers to provide. Now we can go to nearly any city in the world and find a wealth of franchises of an almost infinite variety, including food services, personal care products, car care services, overnight package delivery combined with office services, and more. The world has changed because someone, moved by a creative impulse, offered a new or uniquely presented product or service.

III. THE CREATIVE IMPULSE FOR ENTREPRENEURIAL LAWYERS

I suggested earlier that the entrepreneurial lawyer will need skill sets that include strategic planning, leadership, and creative problem solving. At the heart of these skills will be a need to foster imagination and innovation in the manner in which we advise entrepreneurs and aid in shaping their enterprises. Just as small businesses are forming strategic alliances with larger businesses to achieve efficiency in bringing services and products to market, so too will lawyers have to conceive of new ways of doing business.⁷¹

First, an essential, innovative tool and skill for lawyers is to understand the development and use of business plans.⁷² They are designed to provide a roadmap for the enterprise, an assessment of the financial, legal and marketing issues, and a resource through which the entrepreneur can attract both human and financial capital. The business plan presents a description of the stakeholders, the needed resources, financial statements, plans for achieving the production of the service or product, and a projection of the business's estimated point of profitability.⁷³ The plan is designed to take a

⁷⁰ J. R. Simplot, a potato grower from Idaho, facilitated the first process for successfully freezing raw french fries and convinced Ray Kroc, the founder of the McDonald's franchise, to use them in his fast food restaurants. GEORGE GILDER, *THE SPIRIT OF ENTERPRISE* 36-39 (Simon & Schuster 1984).

⁷¹ See Weaver & Dickson, *supra* note 15, at 2.

⁷² KURATKO & HODGETT, *supra* note 34, at 289:

A **business plan** is the written document that details the proposed venture. It must describe current status, expected needs, and projected results of the new business. Every aspect of the venture needs to be covered: the project, marketing, research and development, manufacturing, management, critical risks, financing, and milestones or a timetable. A description of all of these facets of the proposed venture is necessary to demonstrate a clear picture of what the venture is, where it is projected to go, and how the entrepreneur proposes to get there. The business plan is the entrepreneur's roadmap for a successful enterprise.

Id.

⁷³ For an in-depth discussion of business plans, see *generally*, WILLIAM A. COHEN, *THE ENTREPRENEUR & SMALL BUSINESS PROBLEM SOLVER: AN ENCYCLOPEDIA*

creative business idea from conception to operational reality. It affords the advisors to the entrepreneur, such as lawyers, venture capitalists, and accountants, a chance to make suggestions and give input on how to maximize the chances of success.⁷⁴

A business plan also tells the story of the entrepreneurial client's enterprise. It offers insight into that client's hopes and dreams. This knowledge allows the entrepreneurial lawyer to tell the client's story to other stakeholders, including potential key employees, financial investors, and government officials who may need to grant regulatory approval. Storytelling, according to Pink, is one of the aptitudes that we will need in this world of rapid change.⁷⁵ An entrepreneurial lawyer is an advocate for a client in a crowded marketplace and when time is of the essence, the lawyer must be able to articulately state the client's case and get to the essence of the business proposal.⁷⁶ Of course, lawyers have always been known as great storytellers.⁷⁷

Second, the power of the creative impulse is multiplied exponentially when expressed in collaboration with others. Here is where leadership skills will become important when working with a team. Kuratko & Hodgett describe this phenomenon as follows:

If you wish to become innovative and
creative, you need to visualize yourself in

REFERENCE AND GUIDE 90-104 (3rd ed. 1990); and J.D. RYAN AND GAIL P. HIDUKE, *SMALL BUSINESS: AN ENTREPRENEUR'S BUSINESS PLAN* (6th ed. 2003).

⁷⁴ See Jeffrey A. Timmons, *A Business Plan is More Than a Financing Device*, HARV. BUS. REV. 34 (March-April 1980).

⁷⁵ See PINK, *supra* note 24, at 100-115. Pink recognizes that story is important in many aspects of our lives, including business:

The ability to encapsulate, contextualize, and emotionalize has become vastly more important in the Conceptual Age. When too much routine knowledge work can be reduced to rules and farmed out to fast computers and smart L-Directed thinkers abroad, the more elusive abilities embodied by Story become more valuable. Likewise, as more people lead lives of abundance, we'll have a greater opportunity to pursue lives of meaning. And stories—the ones we tell *about* ourselves, the ones we tell *to* ourselves—are often the vehicles we use in that pursuit.

Id. at 104 (emphasis in original).

⁷⁶ This is a skill that has come to be known as being able to give an elevator talk, or in other words, imagine conveying your story to a key, potential stakeholder during the time it takes to ride an elevator to the floor where the stakeholder gets off. One has to arrive at the heart of the story just when the doors open and the person will then want to hear more.

⁷⁷ See James W. McElhaney, *Just Tell the Story: Organize Your Case to Show There Is a Wrong to be Righted*, 85 A.B.A. J. 68 (Oct. 1999). See also, Steven H. Hobbs, *Ralph Ellison as Oral Storyteller*, 26 OKLA. CITY U. L. REV. 927 (2001) for a general discussion on the art of oral storytelling.

complementary relationships to the things and people of the world. You must learn to look at them in terms of how they complement you in your attempts to satisfy your own needs and to complete your projects. You must begin to look at people in nonconventional ways and from a different perspective.⁷⁸

Many minds acting together can solve a problem, improve the efficiency of a service or product, or make a service or product available to more people, cheaply, and with added value.⁷⁹ Here is where entrepreneurship, as an expression of the creative impulse, and the law, as a system that facilitates the functioning of enterprises, intersect. New creations and changing market conditions change business and commercial relationships and create heretofore unimaginable risks and dangers. New legal relationships create new legal responsibilities, which in turn create new risk of loss.⁸⁰ Here, risk of loss can either be financial (investments of venture capital) or tortious (such as when a new wonder drug later proves to cause unacceptable risks). The lawyer's task is to aid in the identification and structuring of the new relationships and in the minimization and spreading of the risk of loss.

In previous work, I have explored how teamwork can be useful in providing advice to a family business, especially one that is engaged in

⁷⁸ KURATKO & HODGETT *supra* note 34, at 128.

⁷⁹ See TIMMONS & SPINELLI *supra* note 11, at 87-88 stating:

Teams of people can generate creativity that may not exist in a single individual. The creativity of a team of people is impressive, and comparable or better creative solutions to problems evolving from the collective interaction of a small group of people have been observed. A good example of the creativity generated by using more than one head is that of a company founded by a Babson College graduate with little technical training. He teamed up with a talented inventor, and the entrepreneurial and business know-how of the founder complemented the creative and technical skills of the inventor. The result has been a rapidly growing multimillion-dollar venture in the field of video-based surgical equipment.

⁸⁰ See KLEIN & COFFEE, *supra* note 16, at 2, discussing the nature of risk and reward (or return) related to business enterprises and defining these concepts:

Risk of loss refers to the allocation among participants of losses from the investment in or operation of the business. If the business fails, who pays, or bears the burden of debts, who is entitled to what portion of any remaining assets, etc.

Return refers to salaries, interest, and other fixed claims, and to shares of the residual (the profit).

Id.

succession planning when the next generation of family members are getting set to take over leadership.⁸¹ Often family businesses reach for help at university-based family business centers, where they have access to the expertise of scholars and practitioners and can learn how to address succession issues in a holistic manner.⁸² The general idea is that in the university setting, working through succession planning with an actual family business, one can create an environment which provides a learning opportunity for the students (who may be members of that family business), a process for various advisors to collaborate in crafting solutions, and a fertile source of experiential research.⁸³ This process envisions a creative method for handling the dual challenge of family matters and businesses matters when the founding generation must give way to the succeeding generation in order for the business to continue and thrive.⁸⁴

To achieve the promises of this model, there needs to be someone who can provide the creative leadership necessary to pull all of these resources together. Daniel Pink identifies this skill set or aptitude as symphony:

Symphony, as I call this aptitude, is the ability to put together the pieces. It is the capacity to synthesize rather than to analyze; to see relationships between seemingly unrelated fields; to detect broad patterns

⁸¹ Steven H. Hobbs, *The Ethics and Professional Norms of Family Business Centers*, in THE FAMILY BUSINESS GATHERING 2000 - THE HOLISTIC MODEL: RETHINKING THE ROLE OF THE UNIVERSITY-BASED FAMILY BUSINESS CENTER 9 (Greg McCann & Nancy B. Upton, eds., 2000).

⁸² Greg McCann & Michelle DeMoss, *An Overview of the Holistic Model*, in THE FAMILY BUSINESS GATHERING 2000 - THE HOLISTIC MODEL: RETHINKING THE ROLE OF THE UNIVERSITY-BASED FAMILY BUSINESS CENTER 1, 1 (Greg McCann & Nancy B. Upton, eds., 2000).

⁸³ The Holistic Model utilized by the Stetson Family Business Center contemplates a process where stakeholders work together to enhance the business of a family by assisting the business and the family in going through the various stages of life. The process contemplates stakeholders (families, students, and academics and professional from various fields) working together in a process by which all learn from each other. All of the stakeholders contribute to the educational process through a methodology which encourages transformative learning. Hobbs, *The Ethics of Professional Norms of Family Business Centers supra* note 81, at 9.

⁸⁴ For a general consideration of the issues surrounding succession planning in family-held businesses, see change to: *see* CRAIG E. ARNOFF & JOHN L. WARD, ANOTHER KIND OF HERO: PREPARING SUCCESSORS FOR LEADERSHIP, (Business Owner Resources 1992); CRAIG E. ARONOFF & JOHN L. WARD, FAMILY BUSINESS SUCCESSION: THE FINAL TEST OF GREATNESS (Business Owner Resources 2003); and MARY F. WHITESIDES, WITH CRAIG E. ARONOFF & JOHN L. WARD, HOW FAMILIES WORK TOGETHER (Business Owner Resources 1993).

rather than to deliver specific answers; and to invent something new by combining elements nobody else thought to pair.⁸⁵

The entrepreneurial lawyer should always be on the lookout for unique and innovative connections in legal concepts, business concepts, and resources, including human, technological, and financial. The Entrepreneurial Business Law Journal provides a scholarly forum for such connections to be made.

And finally, the entrepreneurial lawyer must both be imaginative and innovative in crafting creative solutions to legal practice problems. Consider the current collaborative law movement as an expression of lawyers acting in an entrepreneurial process to solve the dilemma of making the divorce process more humane for the divorcing couple and the practitioner. The collaborative movement reflects the creative thinking of lawyers who believed that they could provide a dispute resolution service in an efficient and effective manner. The movement was founded by Stuart G. Webb in Minnesota when he became frustrated by the enormous emotional, psychological and financial toll the traditional divorce litigation model extracted from both clients and lawyers.⁸⁶ He describes what he did next:

So I began experimenting with different ways to approach family law practice. In late 1989, I was involved in one of the worst litigation cases of my career, a real showcase of everything that's wrong with litigation (lying, nasty tricks, hiding assets, endless court hearings, and so on). That case in and of itself could have been enough to get me to retire. But in the midst of one of those awful hearings, it occurred to me that there should be settlement-only specialists available for divorcing couples, specialists who work with the couple outside the court system, and who would turn the case over to trial lawyers if and only if the settlement process failed. That, in a nutshell, was the birth of Collaborative law. On January 1, 1990, I declared myself a Collaborative lawyer – the first, and only, one. I knew, though, that Collaborative law could never succeed if I were the only one doing it. So I mentioned

⁸⁵ PINK, *supra* note 24, at 130.

⁸⁶ See STUART G. WEBB & RONALD D. OUSKY, *THE COLLABORATIVE WAY TO DIVORCE: THE REVOLUTIONARY METHOD THAT RESULTS IN LESS STRESS, LOWER COSTS, AND HAPPIER KIDS – WITHOUT GOING TO COURT* xv-xvi (Plume 2006).

the concept to some other local divorce lawyers, and by the end of 1990 there were nine of us.⁸⁷

The idea is that the clients and their lawyers agree to sit down together to mediate their divorce with the goal of not resorting to the adversarial process unless it becomes absolutely necessary.⁸⁸ If the couple does go to court, their lawyers agree not to provide representation in that matter.⁸⁹ The clients and each of their lawyers meet together and may call in experts such as counselors or financial experts to handle any issues that may arise during the divorce.⁹⁰

The collaborative law movement has grown exponentially and has become global through the International Academy of Collaborative Professionals.⁹¹ The National Conference of Commissioners on Uniform State Laws is in the process of drafting a Model Collaborative Law Act.⁹² The American Bar Association and several states have issued ethical opinions approving the practice of collaborative law.⁹³ The collaborative law practice movement can be situated in a larger trend towards making the difficult family dissolution process more humane and less destructive to the participants, especially the children of divorce.⁹⁴

IV. CONCLUSION

Our challenge, as lawyers, is both to understand how the creative impulse animates our clients who engage in service or product enterprises, and to tap into the creative impulse in the design and provision of legal services. Lawyers should both assist and serve entrepreneurs animated by a creative impulse and, concurrently, become entrepreneurial in the manner and methods in which we practice law. Daniel Pink notes that information technology has

⁸⁷ *Id.*

⁸⁸ *Id.*, at 6-7.

⁸⁹ *Id.* at 7.

⁹⁰ *Id.*, at 87-96.

⁹¹ See <http://www.collaborativepractice.com>. The International Academy of Collaborative Professionals services is a resource center and works to promote ethical standards of practice.

⁹² For the latest draft of the proposed act visit the NCCUSL website at <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279>.

⁹³ See ABA Standing Comm. On Ethics and Professional Responsibility, Formal Op. 07-447, 8-9-07.

⁹⁴ See HOWARD H. IRVING & MICHAEL BENJAMIN, THERAPEUTIC FAMILY MEDIATION: HELPING FAMILIES RESOLVE CONFLICT (Sage Publications 2002); MARK CHINN, THE CONSTRUCTIVE DIVORCE GUIDEBOOK: EMPOWERING FAMILIES TO REACH LONG-TERM POSITIVE RESULTS (ABA 2006); and <http://www.uptoparents.org>.

forever changed the way people access legal services and products.⁹⁵ There are do-it-yourself websites and internet services where lawyers offer advice in a limited fashion.⁹⁶ Pink is certainly correct when observing that new ways of legal practice will be informed by those who can tackle far more complex problems and those who can provide something that databases and software cannot—counseling, mediation, courtroom storytelling, and other services that depend on “R-Directed Thinking.”⁹⁷ For the entrepreneurial lawyer, this will mean recognizing that being creative will give him or her an edge in the global marketplace for legal services. Furthermore, by paying attention to how we practice, we might just discover, as the lawyers who do collaborative work, that the practice of law can be personally satisfying and rewarding.⁹⁸

The Entrepreneurial Business Law Journal promises to serve as a facilitator of creative thinking in entrepreneurial law. The timeliness of this publication takes advantage of a scholarly current that is opening our imaginations and innovatively addressing how the law should respond in an era of rapid, global, and technological change. May the work of the Journal editors and contributors reflect the entrepreneurship definition of Timmons and Spinelli discussed earlier, by demonstrating that “[entrepreneurial Law] is a way of thinking, reasoning, and acting that is opportunity obsessed, holistic in approach, and leadership balanced.”⁹⁹

⁹⁵ For a general discussion of collaborative law in the divorce context, see Julie MacFarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RES. 179, 180 (2004); Elizabeth K. Strickland, Comment, *Putting ‘Counselor’ Back in Lawyers’ Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C.L. REV. 979 (2006); Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73 (2005); and Kimberly P. Fauss, et. al, *Collaborative Practice: Solving Family Disputes Outside of Court*, 55 VIRGINIA LAWYER 36 (Feb. 2007).

⁹⁶ PINK, *supra* note 24, at 46.

⁹⁷ *Id.*

⁹⁸ See MICHAEL F. MELCHER, *THE CREATIVE LAWYER: A PRACTICAL GUIDE TO AUTHENTIC PROFESSIONAL SATISFACTION* (ABA 2007).

⁹⁹ TIMMONS & SPINELLI *supra* note 11, at 47.

2009]

*Entrepreneurship and Law: Accessing the Power of the
Creative Impulse*

21