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## The Growing Disjunction Between Legal Education and the Legal Profession

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# THE GROWING DISJUNCTION BETWEEN LEGAL EDUCATION AND THE LEGAL PROFESSION

*Harry T. Edwards\**

## INTRODUCTION

*In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.*

— Felix Frankfurter<sup>1</sup>

For some time now, I have been deeply concerned about the growing disjunction between legal education and the legal profession. I fear that our law schools and law firms are moving in opposite directions. The schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use. The firms should be ensuring that associates and partners practice law in an ethical manner. But many law schools — especially the so-called “elite” ones — have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy. Many law firms have also abandoned *their* place, by pursuing profit above all else. While the schools are moving toward pure theory, the firms are moving toward pure commerce, and the middle ground — ethical practice — has been deserted by both. This disjunction calls into question our status as an honorable profession.<sup>2</sup>

Over the past two decades, law and economics, law and literature, law and sociology, and various other “law and” movements have come to the fore in legal education. We also have seen a growth in critical

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1. Letter from Felix Frankfurter, Professor, Harvard Law School, to Mr. Rosenwald 3 (May 13, 1927) (Felix Frankfurter papers, Harvard Law School library), *quoted in* RAND JACK & DANA C. JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* 156 (1989).

2. For a similar view of the disjunction between legal education and the legal profession, see Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991).

legal studies (CLS), critical race studies, and feminist legal studies movements. In my view, all of these movements, albeit measurably different in content and purpose, have the potential to serve important educational functions and, therefore, should have a permanent home in the law schools. However, because many of the adherents of these movements have a low regard for the practice of law, their emergence in legal education has produced profound and untoward side effects. This was highlighted for me in a recent survey of my former law clerks, where one respondent reported:

Several discussions I've had the past year with friends who went on the teaching market generally confirm your thesis concerning the gap between the teaching and practice of law. One told me that at a recruitment dinner, faculty members . . . explained that they considered themselves academics first and lawyers only by the sheerest of happenstance. My friend's impression at virtually every school she interviewed with was that most faculty members (and certainly most of the youngest and most ambitious) were generally disdainful of the practice of law.<sup>3</sup>

I have heard comments like this on countless occasions in the past few years. They reflect a reality that many "elite" law faculties in the United States now have significant contingents of "impractical" scholars, who are "disdainful of the practice of law." The "impractical" scholar — that is the term I will use — produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner. As a consequence, it is my impression that judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy.

I should make clear at the outset that I do not doubt for a moment the importance of theory in legal scholarship. "Practical" scholarship, as I envision it, is not wholly doctrinal. Rather, in my view, a good "practical" scholar gives due weight to cases, statutes and other authoritative texts, but also employs theory to criticize doctrine, to resolve problems that doctrine leaves open, and to propose changes in the law or in systems of justice. Ideally, the "practical" scholar always integrates theory with doctrine. Moreover, I am not opposed to "impractical" legal scholarship, as long as *law* professors are well suited to produce it (I see no reason why law professors should write mediocre economics, or philosophy, or literary criticism, when arts and sciences professors could be doing a better job), and as long as *other* law profes-

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3. Practitioner #12 at 1. For a description of my survey of former law clerks, see *infra* note 15 and accompanying text.

sors continue to do “practical” work. In the ideal law faculty, there is a healthy *balance* of theory and doctrine.

I fear that my idealized view of legal education is a fading reality. Our law reviews are now full of mediocre interdisciplinary articles. Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it. Quite recently, a well-known law professor at a prominent law school described his work to me as follows:

I suppose that we both agree that there is an ever-increasing split between the academy and practicing judges (not to mention practicing lawyers). . . . I presume that a good illustration of the split would be [an article of mine]. . . . Although a couple of cases are mentioned, it is in no serious sense meant to be a contribution to the discussion of any of the contemporary doctrinal issues of undoubted importance to our society.

. . . Though I am always delighted to discover that a judge has [read] anything I have written . . . I can't honestly say that I expect many judicial readers nor am I willing to redirect my writing in ways likely to increase the number.

. . . I view my task as a legal academic as similar more to the member of a university department of religion, somewhat detached from the practices he/she is studying . . . . One need not be a devotee of a particular religion in order to find its practices or doctrines fascinating . . . .<sup>4</sup>

I am still astonished by the professor's frank admission that he is “unwilling to redirect” his writing in useful ways, since he prefers to study whatever “fascinates” him. The law schools *should* have interdisciplinary scholars, but not scholars whose work serves no social purpose at all. We do not give tenure to stamp collectors, or to light readers.

Moreover, I sense from academic writings and from ceaseless comments that I hear from colleagues in the profession that, at least at a number of the so-called “elite” law schools, there is no longer a healthy balance between “impractical” and “practical” scholars. Because too few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners, too many important social issues are resolved without the needed input from academic lawyers. The problem is not simply the *number* of “practical” scholars, but their waning *prestige* within the academy.

The proponents of the various “law and” movements generally disdain doctrinal analysis. In a 1981 article, then-Professor Richard Posner, a pioneer of “law and” scholarship, aptly described this attitude:

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4. Letter from professor to Harry T. Edwards, Judge, U.S. Court of Appeals for the D.C. Circuit 1-2 (Sept. 11, 1991) (on file with author).

[One] reason for the malaise of doctrinal analysis is that some of the practitioners of the newer fields of legal scholarship do not respect doctrinal analysis. . . .

. . . The academic lawyer who makes it his business to be learned in the law and expert in parsing cases and statutes is made . . . to seem a paltry fellow, a Philistine who has shirked the more ambitious and challenging task of mastering political and moral philosophy, economics, history, and other social sciences and humanities so that he can discourse on large questions of policy and justice.<sup>5</sup>

Judge Posner decried this development, concluding:

[T]he belittlement of conventional legal scholarship, especially by deans at leading law schools, should cease. Those of us, for example, who believe that economics holds the key to understanding and reforming the antitrust laws should remind ourselves from time to time that Phillip Areeda of the Harvard Law School has carved out for himself a leading position among academic antitrust lawyers more by mastery of legal doctrine than by application of economic concepts.

[L]eading law schools should seek to foster social scientific research on the legal system, to the extent compatible with retaining their basic focus on the training of practicing lawyers.<sup>6</sup>

The point should be obvious. The scholar who attends to legal doctrine will have difficulty completing fine, influential, important work if he or she is disdained by haughty peers. The situation is even worse now than when Judge Posner assessed it, because now we see "law professors" hired from graduate schools, wholly lacking in legal experience or training, who use the law school as a bully pulpit from which to pour scorn upon the legal profession.

The "impractical" scholars, too, often scorn each other, with the adherents of the various interdisciplinary approaches taking the view that all other approaches are deluded. This view, combined with ideological bias, makes for aggressive intolerance, occasionally turning classrooms and common rooms into battlefields. As shown by the recent fiasco at Harvard Law School,<sup>7</sup> the legal academy sometimes has become uncongenial to thoughtful, dialogic, unbiased scholarship, of

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5. Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1117-19 (1981).

6. *Id.* at 1129. In a 1987 article, Judge Posner rearticulated his view that "[d]isinterested legal-doctrinal analysis of the traditional kind remains the indispensable core of legal thought." Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 777 (1987). More recently, Judge Posner has shifted his emphasis, and criticized legal scholarship as being too narrowly doctrinal. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 468-69 (1990). I, too, think that "practical" legal scholars must examine more than doctrine.

7. See, e.g., Fox Butterfield, *Parody Puts Harvard Law Faculty in Sexism Battle*, N.Y. TIMES, Apr. 27, 1992, at A10; David Margolick, *In Attacking the Work of a Slain Professor, Harvard's Elite Themselves Become a Target*, N.Y. TIMES, Apr. 17, 1992, at B16; Abigail Thernstrom, *The Vile Circus at Harvard Law*, WALL ST. J., May 1, 1992, at A14.

any kind. The overheated atmosphere at Harvard and some other "elite" schools is profoundly inhospitable for the scholar who wishes to provide helpful guidance on pressing social problems, and not to fight ivory-tower conflicts that are irrelevant to the outside world.

The atmosphere is also profoundly inhospitable for *law students*. As one of my former law clerks reports:

Many professors [at law school] had an "attitude" that teaching was the be all and end all, that practitioners were sell outs, endured intolerable drudgery and were not the bright lights in the profession and that engaging in academic discourse (discussions of theory), especially those infused with philosophy, was a better use of a good mind than the practice of law.<sup>8</sup>

The law student who merely takes a variety of pure theory courses, and learns that "practitioners [a]re sell outs," will be woefully unprepared for legal practice. That student will lack the basic doctrinal skills: the capacity to analyze, interpret and apply cases, statutes, and other legal texts. More generally, the student will not understand how to practice *as a professional*. He or she will have gained the impression that law practice is necessarily grubby, materialistic, and self-interested and will not understand, in a concrete way, what professional practice means.

Law students need concrete ethical training. They need to know why *pro bono* work is so important. They need to understand their duties as "officers of the court." They need to learn that cases and statutes are normative texts, appropriately interpreted from a public-regarding point of view, and not mere missiles to be hurled at opposing counsel. They need to have great ethical teachers, and to have *every* teacher address ethical problems where such problems arise.

The schools' failure to enhance the teaching of ethics is occurring at a time when that training has become all the more important. In the past, new lawyers might have learned law "on the job." But as law firms have become increasingly materialistic — as *pro bono* work has been displaced by profit-maximization, and the "officers of the court" by the "hired guns" — we can no longer count on the law firms to be "law schools." New lawyers need to know, before they enter full-time employment, what ethical practice means. Otherwise, their only model of the practicing lawyer may well be crudely materialistic.

As I see it, academicians and practitioners have a joint obligation to serve the system of justice. Law schools fulfill that obligation by producing "practical" scholarship, which addresses concrete problems, and by training their students to practice law in a competent

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8. Government Lawyer #1 at 5.

and ethical manner. Law firms fulfill that obligation by giving due weight to the public interest, both in choosing and in representing clients. This is the "professional" ideal.<sup>9</sup> Instead, what we are now beginning to see is a sham of professionalism. Some law schools grant "J.D.s" but allow professors to ignore or disparage legal doctrine, on the assumption that bar review courses will prepare students to pass the bar and that students will then learn whatever they need to know from their employers. Many law firms and other employers of young legal talent accept or even encourage this ruse, because the unformed novices can be shaped to the employers' needs. New associates will "learn" to misconstrue cases and statutes, to write obfuscatory briefs, to overpaper a case, and this "education" will be all the smoother if they studied only pure theory in law school.

I emphasize, again, that a great professional school never can be antitheoretical. It is undoubtedly valuable for law students to learn economics or moral theory, whether they do so in "pure theory" classes or as part of the more traditional curriculum. It is also crucial for law students to understand and apply theoretical frameworks and philosophical concepts so that they will have a capacity to think beyond the mundane in assessing the work of the legal profession. But law students must also receive a doctrinal education. They must acquire a fluency with legal texts and concepts. This fluency is an integral skill for the practicing lawyer, just as a knowledge of anatomy, physiology, or pharmacology is integral for the practicing physician. A course in the philosophy of human nature may make the medical student wiser and more compassionate, but that course is hardly sufficient preparation for the practice of medicine.

Nor will theory be useful if the law student does not know doctrine first. In commenting on the situation that he faced at Harvard Law School, one of my former law clerks wrote:

I was fortunate to get mainly Traditionalists my 1L year, and after that I avoided the Crits at all costs. That is why I feel that my legal education made sense. Other 1Ls were not so lucky. They got stuck with Crits, and ended up at best wasting a year, and at worst becoming alienated from law school and the law. Of course, some students — mainly those who were in law school not because they were genuinely interested in the profession but because they couldn't think of anything

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9. Of course, whether the law schools and firms ever have completely fulfilled this ideal is a separate question. See, e.g., Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L.J. 741 (1992) (describing historical failure of law schools to fulfill original, public mission). See generally ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983) (providing skeptical history of legal education). However, I believe that the professional ideal is less fully realized today than ever before.

else to do with themselves — actually chose to go to the Crit HLS [Harvard Law School], and in my experience those students were almost completely ignorant of the basic rudiments of law as it is practiced.<sup>10</sup>

A CLS critique of formalism, or a law-and-economics critique of contracts law, is meaningless to the first-year law student. As a clerk applicant once told me: “It makes no sense to me that, in the first year of law school, I was expected to *deconstruct* a body of law before I understood it!”

Thus, I wholly reject the “graduate school” model of legal education that Professor George Priest has propounded and that all too many law professors now favor. Priest argues:

The Enlightenment is coming. Its source seems to be the increasing specialization of legal scholarship. If these intellectual trends continue — as I believe they will — the structure of the law school will change. The law school will of necessity become itself a university. The law school will be comprised of a set of miniature graduate departments in the various disciplines. Introductory courses may be retained (if not shunted to colleges). Even then, a wedge deeper than the one we see today will be driven between those faculty members with pretensions of scholarship and those without. The ambitious scholars on law-school faculties will insist on teaching subjects of increasingly narrow scope. The law-school curriculum will come to consist of graduate courses in applied economics, social theory, and political science. Specialization by students, which is to say, intensified study, follows necessarily.<sup>11</sup>

Priest apparently assumes that legal doctrine is “easy”: that law students can acquire doctrinal skills on their own, and similarly that governmental decisionmakers do not need scholars to advise them about the relevant doctrine. However, this assumption is quite wrong: it reflects the arrogant, antidoctrinal bias of interdisciplinarians who too much admire their graduate school counterparts and view anything but theory as “unworthy.”

Moreover, even if Priest’s assumption *were* correct, his educational model would remain misguided. As then-Professor Posner noted, the “basic focus” of legal education must be “the training of practicing lawyers.”<sup>12</sup> For if lawyers are no different from economists or political scientists, then why do they need J.D.s rather than M.A.s or Ph.D.s? And why should law professors be writing books and articles that, *ex hypothesi*, could be better written by economists or political scientists? On Priest’s assumption, the law school becomes a haven for

10. Practitioner #1 at 1. This comment overstates my concern, however, because I see nothing wrong with a law student’s having meaningful exposure to critical legal studies and “law and” courses once he or she has a solid grounding in doctrine, practice, and ethics.

11. George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 441 (1983).

12. Posner, *supra* note 5, at 1129; *see supra* text accompanying note 6.

would-be theorists too mediocre to earn tenure in the graduate schools. As Professor Francis Allen has argued:

I believe that however widely diagnoses of the present situation may differ, most interested observers sense that this is a period of large opportunities and of considerable peril in the intellectual life of American law schools.

The opportunities stem principally from the fact that as legal education approaches the mainstream of university thought, new paths and methods are opened to legal scholarship. Participating in the intellectual life of the university and contributing to the achievement of the university's general purposes, however, do not mean that we must or should simply duplicate the methods and activities of other disciplines. It does not mean that the law school is to be converted into a kind of colonial outpost of the university graduate school, an outpost in which the faculty inmates do only those things, though often less well, that are being done on other parts of the campus. A sense of uniqueness of purpose and tradition should not be squandered. This, I believe, is not a plea for narrowing legal scholarship or a wholesale return to "traditional" legal writing (whatever that term may be thought to mean.) Indeed, in some respects the new tendencies in legal scholarship are more restrictive than liberating. They are reductionist, not only in the logic and techniques often employed, but also in the attitudes they apparently spawn toward other kinds of useful and important work.<sup>13</sup>

This article is my response to Professor Priest and all other legal academicians who disdain law teaching as an endeavor in pursuit of *professional* education. My view is that if law schools continue to stray from their principal mission of *professional* scholarship and training, the disjunction between legal education and the legal profession will grow and society will be the worse for it. My arguments are quite straightforward, and probably not wholly original.<sup>14</sup> Nevertheless, they surely merit repetition.

In pursuing my thesis, I will share the results of a survey that I

13. Francis A. Allen, *The Dolphin and the Peasant: Ill-Tempered, but Brief, Comments on Legal Scholarship*, in PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 183, 195 (Peter Hay & Michael H. Hoeflich eds., 1988).

14. There is a large literature on legal scholarship. Recent symposia include *Legal Scholarship*, 39 J. LEGAL EDUC. 313 (1989); *Colloquium on Legal Scholarship*, 13 NOVA L. REV. 1 (1988); *Law Professors, Lawyers, and Legal Scholarship*, 35 J. LEGAL EDUC. 311 (1985); *American Legal Scholarship: Directions and Dilemmas*, 33 J. LEGAL EDUC. 403 (1983); and *Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981). Cf. Symposium, *Legal Scholarship in the Common Law World*, 50 MOD. L. REV. 673 (1987). Other recent works include Allen, *supra* note 13; David Barnhizer, *The University Ideal and the American Law School*, 42 RUTGERS L. REV. 109 (1989); Carrington, *supra* note 9; Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191 (1991); Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1 (1986); Johnson, *supra* note 2; Philip C. Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251 (1986); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988); and Marin R. Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367 (1990).

recently circulated to my former law clerks, in which I asked them to reflect on the connection between their own education and practice.<sup>15</sup> The survey did not purport to draw statistically reliable data; however, the survey responses clearly serve to highlight certain assumptions underlying my thesis. To be sure, my former law clerks are not perfectly representative of the legal profession. But this "bias" in the survey actually strengthens my argument. The survey respondents have an unusual exposure to doctrine, practice, ethics, and pure theory. They are among the most talented and successful people in the legal profession, each with a proven capacity to integrate the "academic" with the "practical." They are not antitheoretical as a group; indeed, their survey comments indicate just the opposite. They are, almost without exception, unusually creative and open-minded. And they are, on the average, young enough not to be wedded to traditionalist thinking merely by virtue of age. Thus, I found their comments immensely useful in assessing the growing disjunction between legal education and the legal profession.

In what follows, I trace three aspects of this disjunction. Parts I and II address the academy's growing disinterest in legal doctrine as manifest in scholarship and pedagogy, respectively. Part III examines the decline in professional ethics among the private bar.

## I. LEGAL SCHOLARSHIP

The growing disjunction between legal education and legal practice is most salient with respect to scholarship. There has been a clear decline in the volume of "practical" scholarship published by law professors. "Practical" legal scholarship, in the broadest sense, has several defining features. It is *prescriptive*: it analyzes the law and the legal system with an aim to instruct attorneys in their consideration of

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15. Thirty former law clerks (who served with me during the 1980-1981 through the 1990-1991 court terms) responded, in some detail. They are a varied group, having graduated from ten different law schools: Berkeley, Boston University, Buffalo, Duke, Georgetown, Harvard, Michigan, NYU, Stanford, and Yale. Nearly every one finished law school at or near the top of his or her class; 16 were Supreme Court clerks; six were law review editors-in-chief; and many have received offers to enter (or serious invitations to consider) law teaching. At the time of the survey, 20 of the respondents were private practitioners; seven were law school professors (at Berkeley, Chicago-Kent, Cornell, Florida State, Harvard, Michigan, and Ohio State), one of whom was on leave of absence working as a private practitioner (and is counted as one of the 20 private practitioners); and four were government lawyers. A good number have worked previously in other branches of the legal profession. Five of the professors previously practiced with firms or public defender services; three of the government lawyers previously practiced with firms; and four of the private practitioners previously taught, or practiced with the government or public defender services.

For the sake of convenience, and to preserve the anonymity of the respondents, I have identified my former law clerks as either "Practitioner #—," "Government Lawyer #—," or "Law Teacher #—." Copies of the survey responses are on file in my chambers.

legal problems; to guide judges and other decisionmakers in their resolution of legal disputes; and to advise legislators and other policymakers on law reform.<sup>16</sup> It is also *doctrinal*: it attends to the various sources of law (precedents, statutes, constitutions) that constrain or otherwise guide the practitioner, decisionmaker, and policymaker.

The paradigm of "practical" legal scholarship is the treatise. Areeda's *Antitrust Law*,<sup>17</sup> Davis's *Administrative Law*,<sup>18</sup> LaFave's *Search and Seizure*,<sup>19</sup> Prosser's *Torts*,<sup>20</sup> Tribe's *American Constitutional Law*,<sup>21</sup> White and Summers's *Uniform Commercial Code*,<sup>22</sup> and Wright and Miller's *Federal Practice and Procedure*<sup>23</sup> are classic examples. These works create an interpretive framework; categorize the mass of legal authorities in terms of this framework; interpret closely the various authoritative texts within each category; and thereby demonstrate for judges or practitioners what "the law" requires.

As evidenced by *American Constitutional Law*, a work of "practical" legal scholarship need not rely solely on the interpretation of authoritative texts.<sup>24</sup> It also may include "theoretical," i.e.,

16. Rubin, *supra* note 14, at 1847-53, discusses this aspect of what he calls "standard legal scholarship."

When viewed as an academic discourse, the most distinctive feature of standard legal scholarship is its prescriptive voice, its consciously declared desire to improve the performance of legal decisionmakers. . . . [T]he point of an article about a judicial decision is usually to remonstrate with the judge for the conclusion reached and for the rationale adopted. The point of an article about a statutory provision or a regulation is to expose the errors made in drafting it, and to indicate what should have been done instead.

*Id.* at 1847-48; see also Learned Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law?*, 24 MICH. L. REV. 466 (1926) (arguing that judges are audience for legal scholars).

17. PHILLIP E. AREEDA ET AL., *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* (1978 *et seq.*).

18. KENNETH C. DAVIS, *ADMINISTRATIVE LAW TREATISE* (2d ed. 1978-1984).

19. WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (2d ed. 1987).

20. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* (5th ed. 1984).

21. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988).

22. JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* (3d ed. student ed. 1988).

23. CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* (2d ed. 1982 *et seq.*).

24. Professor Tribe states his theory in his preface to the first edition of the treatise:

I believe that another extended outline . . . would not serve the real needs even of beginning students, let alone of scholars, practitioners, and officials sworn to uphold the Constitution. My conclusion, after a number of years of teaching and talking about constitutional law with all these groups, is that their needs are more shared than divergent, and that only a systematic treatment, rooted in but not confined to the cases, sensitive to but not centered on social and political theory, can offer a clear perspective on how the doctrines and themes of our constitutional law have been shaped, what they mean, how they interconnect, and where they are moving. I also think only such a treatment can provide a coherent foundation for an active, continuing, and openly avowed effort to construct a more just constitutional order.

noninterpretive, argument, as long as theory is given an appropriate place. The “practical” scholar adduces a theoretical argument only where that argument could be persuasive to the scholar’s audience — to the judge, administrator, or legislator. In other words, “practical” scholarship does not advance theoretical arguments in the teeth of legal doctrine. The judge is not advised to ignore applicable statutes or binding precedents; the legislator is not advised to ignore the Constitution.

In my recent article, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*,<sup>25</sup> I discussed the distinction between “easy” cases and “hard” or “very hard” cases. An easy case is one where pertinent legal rules are readily identified and applied to the facts at hand: in other words, the applicable legal authorities are decisive. By contrast, a “hard” case is not clearly decided by applicable authorities, and a “very hard case” remains in equipoise. This distinction illustrates the place of theory in “practical” legal scholarship. The “practical” scholar freely uses theoretical argument for “hard” or “very hard” issues, but not for “easy” ones. For example, the “practical” scholar who is addressing a judge does not advance theoretical reasons for some outcome that the plain language of a relevant statute prohibits.

I reject the Langdellian or “formalist” idea that every case is ultimately “easy”: that the body of authoritative texts provides an answer to every legal problem.<sup>26</sup> Although legal scholars have too often followed Langdell and written *only* about doctrine, such pure doctrinalism is not what I mean by “practical” legal scholarship. Rather the “practical” scholar should seek to integrate theory with doctrine, because both are relevant to the practitioner and governmental decisionmaker.

Typically, the “practical” law review article has more theory than a treatise — or a student Note. Typically, the author specifically chooses a “hard” or “very hard” topic, while the treatise-writer selects a much wider field, of varying “hardness,” and the Note writer focuses

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Tribe, *supra* note 21, at vii (reprinting preface to first edition).

25. Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 856-63; see also Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 389-402 (1983-84).

26. See Christopher C. Langdell, *Harvard Celebration Speeches*, 3 LAW Q. REV. 118, 123-24 (1887) (“I have tried to do my part towards making the teaching and study of law in that school worthy of a university . . . . To accomplish these objects, so far as they depended upon the law school, it was indispensable to establish at least two things — that law is a science, and that all the available materials of that science are contained in printed books.”); see also KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 38-39 (1960).

on case law or other authoritative texts. As then-Associate Judge Stanley Fuld of the New York Court of Appeals explained, forty years ago:

[The law review can] render a real service to lawyers — lawyers on the bench and in the legislature, as well as those in private practice.

Of course, the review should be more than a receptacle for the compilation of cases. There must be analysis of debated doctrines and the evaluation of possible trends. Frequently, the emerging mass of social science research can be profitably explored, for the review must seek to relate the law to the problems of the community at large. Technical problems, problems of practice, of course, cannot be ignored. But neither should the place of the law in the social process. . . . [I]f that be your approach, you will, I believe, be performing a real service for lawyer and lawmaker alike.

. . . .

Such work . . . has earned the real respect of the bench. We admire the law review for its scholarship, its accuracy, and, above all, for its excruciating fairness. We are well aware that the review takes very seriously its role as judge of judges — and to that, we say, more power to you. By your criticisms, your views, your appraising cases, your tracing the trends, you render the making of “new” law a little easier. In a real sense, you thus help to keep our system of law an “open” one, ever ready to keep pace with changing social patterns.<sup>27</sup>

In Judge Fuld’s view, as in mine, the ideal law review article has a good dose of theory. But like the legal treatise, or the student Note, the law review article also gives due weight to doctrine. The article writer should serve as a “judge of judges,” or of other governmental decisionmakers; he or she should assume the same attitude toward authoritative texts that the decisionmaker rightly would. Only if the writer does so will the article have practical import.

There has been some dispute about the utility of law review articles. For example, a recent study found that law reviews are seldom cited by the federal courts of appeals.<sup>28</sup> But citation studies invariably underestimate utility; I often use treatises and law review articles that are not ultimately cited in my opinions. Moreover, citation studies do not distinguish high quality, “practical” articles from the kind of “impractical” scholarship I will shortly discuss, or from mediocre work more generally.<sup>29</sup> Many law review articles and Notes, doctrinal or

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27. Stanley H. Fuld, *A Judge Looks at the Law Review*, 28 N.Y.U. L. REV. 915, 917-18 (1953).

28. Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051 (1991).

29. There is a further problem with any historical survey, such as a citation study. The fact that law professors have not always used the scholarly power they have to shape the system of justice does not mean that they lack this power, or ought not exercise it. Compare Carrington, *supra* note 9, at 795-805 (expressing generally skeptical attitude about historical influence of legal

not, are no doubt poorly researched and written.<sup>30</sup> But I also have no doubt that a high quality, "practical" article or Note is immensely useful to the judge, no less than a high quality treatise.<sup>31</sup>

If "practical" scholarship is useful to judges, it should also be useful to practitioners. I asked my former clerks, "How much do you benefit from the academic literature?" This response was typical:

I look for articles and treatises containing solid doctrinal analysis of a legal question; comprehensive summaries of an area of law; and well-argued and -supported positions on specific legal issues. Theory wholly divorced from cases has been of no use to me in practice.<sup>32</sup>

Unfortunately, too much of the law review literature is "theory wholly divorced from cases." Such "impractical" scholarship falls into two categories. The first kind is not directly prescriptive: it does not address a problem that some practitioner or governmental decisionmaker must resolve. The second kind of "impractical" scholarship is directly prescriptive, but wholly theoretical: it prescribes a decision, but ignores the applicable sources of law.<sup>33</sup>

scholarship on legal system) and Fred S. McChesney, *Intellectual Attitudes and Regulatory Change: An Empirical Investigation of Legal Scholarship in the Depression*, 38 J. LEGAL EDUC. 211 (1988) (arguing that legal academics played little role in New Deal regulatory changes) with P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* 384-407 (1987) (asserting that American law schools, and specifically legal scholarship, have had significant impact on legal system; by contrast, English law schools have had only marginal influence) and WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* (1982) (contending that legal scholarship had critical, albeit misguided, influence on American conception of administrative law).

30. The literature criticizing law review mediocrity, like the law review literature itself, is large. For a recent example, see Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990). The classic piece is Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

31. See Charles E. Hughes, *Foreword*, 50 YALE L.J. 737, 737 (1941) ("It is not too much to say that, in confronting any serious problem, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analyzed, in a good law periodical."); see also Benjamin N. Cardozo, *Introduction to SELECTED READINGS ON THE LAW OF CONTRACTS FROM AMERICAN AND ENGLISH LEGAL PERIODICALS* at vii (Association of American Law Sch. ed., 1931) (noting utility of law reviews to courts); William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 227 (1965) ("I have a special affection for law reviews, . . . and I have drawn heavily from them for ideas and guidance as practitioner, as teacher, and as judge."); Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 315-18 (1989) (describing how judges first came to accept law review literature, in early twentieth century); James Leonard, *Seein' the Cities: A Guided Tour of Citation Patterns in Recent American Law Review Articles*, 34 ST. LOUIS U. L.J. 181, 183 n.2 (1990) (citing further sources for proposition that law reviews influence courts); Frank K. Richardson, *Law Reviews and the Courts*, 5 WHITTIER L. REV. 385 (1983) (same); Roger J. Traynor, *To the Right Honorable Law Reviews*, 10 UCLA L. REV. 3 (1962) (arguing that law reviews are very useful to judges in developing the law).

32. Practitioner #11 at 2. Another former law clerk reports: "Now I use books and treatises that summarize the evolution and current state of the law (again — setting forth doctrine, rather than theory) more than academic literature. I have often looked for articles dealing with questions that arise in practice." Government Lawyer #1 at 4-5.

33. As one former law clerk observed: "[T]he literature is occasionally useful as an introduc-

Critical legal studies exemplifies the first kind of "impractical" scholarship. The CLS scholar does not demonstrate how authoritative texts constrain and guide a governmental decision. Rather, quite typically, the CLS scholar purports to "show" the opposite: that the texts are "indeterminate."<sup>34</sup> This exercise is "impractical" because it seeks to show that the existing legal system is fundamentally flawed. At its best, CLS usefully questions and challenges the political premises that serve as the foundation of our system of justice; at its worst, CLS is hopelessly destructive because it aims to disrupt the accepted practice of judges, administrators, and legislators with no prescriptions for reform. CLS has in turn spawned vigorous efforts by legal scholars to demonstrate that legal texts *are* meaningful — for example, Ronald Dworkin's work on objectivity and interpretation.<sup>35</sup> Dworkin and others are waging a heroic battle against legal nihilists (some of whom are CLS scholars),<sup>36</sup> a battle that must perhaps be fought; but Dworkinian scholarship, like legal nihilism, has little direct utility for practitioners, judges, administrators, or legislators.

Law and economics exemplifies the second kind of "impractical" scholarship — the kind that is directly prescriptive but wholly theoretical.<sup>37</sup> Although law-and-economics scholars are often concerned with practical problems, they also typically ignore the relevant law. One typical kind of law-and-economics article seeks to demonstrate that a particular legal outcome is efficient.<sup>38</sup> However, a judge or administrator cannot choose an efficient outcome that violates an appli-

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tion to a new topic, although many articles are too busy advancing a 'creative approach' to be worth wading through." Practitioner #14 at 2.

34. This is surely not the only kind of CLS scholarship, but it is one important kind. For general works on CLS, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 *YALE L.J.* 1515 (1991).

35. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986).

36. See Paul D. Carrington, *Of Law and the River*, 34 *J. LEGAL EDUC.* 222, 227 (1984) ("What [legal professionalism] cannot abide is the embrace of nihilism and its lesson that who decides is everything, and principle nothing but cosmetic. Persons espousing [this] view, however honestly held, have a substantial ethical problem as teachers of professional law students."); Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739, 762-63 (1982) (criticizing two kinds of nihilism: the belief that legal texts can mean anything at all and the belief that they mean nothing); see also "*Of Law and the River*," and *of Nihilism and Academic Freedom*, 35 *J. LEGAL EDUC.* 1 (1985) (exchange of correspondence concerning Carrington's article).

37. The dual examples of CLS and law and economics demonstrate that the split between "impractical" and "practical" scholars is *not* a left-right split. As one former law clerk notes: "There was (and is) a significant split at Harvard between teachers on the 'left' and teachers on the 'right.' But both have their share of theoreticians (e.g., Duncan Kennedy; Steve Shavell) and doctrinalists (e.g., Randall Kennedy; Phil Areeda)." *Law Teacher* #3 at 2. Similarly, another former law clerk notes that both Professor Catharine MacKinnon and Judge Richard Posner are prominent theorists. *Law Teacher* #2 at 3-4.

38. Again, this is not the only kind. See generally Symposium, *The Place of Economics in Legal Education*, 33 *J. LEGAL EDUC.* 183 (1983).

cable statute, precedent, or regulation. Thus, such an article will have much less utility for the judge or administrator than a "practical" article, which *first* considers whether the legality of an efficient outcome is "easy" or "hard," and then advances the efficiency argument only if the efficient outcome is not clearly illegal.<sup>39</sup> As one of my former law clerks reports: "I am personally interested in law and economics and have done some reading in that area. While it may be useful in a policy or academic context, I have not encountered a situation in which it would be useful in my practice."<sup>40</sup>

"Impractical" legal scholarship is nothing new. Certain traditional kinds of legal scholarship, such as jurisprudence or legal history, are not directly prescriptive and are thus "impractical" in the first sense. And wholly theoretical, directly prescriptive scholarship dates back, at least, to the realist movement of the early twentieth century. It is produced by law professors who, in the manner of the realists, apply "academic" theories to legal problems.<sup>41</sup>

However, only in the past several decades, with the rise of the various "law and" and critical studies movements, have such "academic" approaches found a comfortable home in the law school.<sup>42</sup> Only recently have so many law professors so completely imitated the professors of arts and sciences, by copying their methodologies, goals, and even objects of study. One of my former law clerks, now a professor, evinced this imitative habit with the following observation:

It is . . . not surprising that law schools have moved more toward a graduate school model. The study of "law" is, in fact, the study of applied social science. To understand what the law is, where it has been, and where it is heading, we must view law within an appropriate social and historical context. This means that we should have more interdisciplinary courses, not less.<sup>43</sup>

This sentiment was not shared by any of my other former law clerks,

39. See Jeffrey L. Harrison, *Trends and Traces: A Preliminary Evaluation of Economic Analysis in Contract Law*, 1988 ANN. SURV. AM. L. 73 (empirical study, finding modest impact of law-and-economics scholarship on contracts case law).

40. Government Lawyer #1 at 4. Another former law clerk mused: "Law & economics is to some degree helpful in practice, especially if you're arguing in the 7th Circuit. Otherwise I don't see much direct benefit to practice." Practitioner #7 at 2.

41. On the realists, see STEVENS, *supra* note 9, at 131-71. Indeed, the academic trend predated the realists. For example, Christopher Columbus Langdell also insisted that doctrinal research was a "science." See *supra* note 26. And the leading law schools have long aspired to be "academic" in the institutional sense, for example, to make law teaching itself a "profession." On the "academicization" of U.S. law schools, see STEVENS, *supra* note 9, at 35-72; Barnhizer, *supra* note 14, at 144-53; Carrington, *supra* note 9, at 786-92; John H. Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311 (1985).

42. See Posner, *supra* note 6 (describing rise of "law and" and critical studies movements).

43. Law Teacher #1 at 2.

but it is a view now endorsed by a number of persons in legal education. The law-and-economics scholar, just like the economist, uses economic analysis to assess "efficiency." The law-and-literature scholar, like the professor of literature or English, simply describes certain texts. The nihilist scholar, just like the deconstructionist professor of literature or English, "describes" the vacuity of those texts. It is clear to me, as well as to other commentators, that the volume of such scholarship has dramatically increased over the past several decades.<sup>44</sup> Indeed, there are now journals expressly dedicated to interdisciplinary research, such as *The Journal of Law & Economics*.<sup>45</sup>

It is difficult to dispute, I think, that these various nontraditional movements have the potential to be valuable additions to the law school. CLS scholars have provided a critical, anti-establishment view that, in the past, was largely absent from the law schools. Law-and-economics scholars have aimed to improve lawyers' understanding of efficiency, an important goal of many legal regimes. Law-and-literature scholars have helped us read texts more closely and subtly. The same is true of other interdisciplinary approaches, such as feminist

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44. See, e.g., Collier, *supra* note 14, at 192-206 (noting recent increase in interdisciplinary scholarship); Johnson, *supra* note 2, at 1234-40 (same); Kissam, *supra* note 14, at 296-300 (same); see also Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 26-35 (1989) (describing evidence showing that law-and-economics scholarship significantly expanded in the 1960s and has now reached steady state); Michael J. Saks, Law Journals: Their Shapes and Contents, 1960 and 1985, at 5-7 (Jan. 6, 1989) (unpublished preliminary report, on file with author) (finding that 1985 law review articles were more likely than 1960 articles to be authored by legal scholars rather than judges or practitioners; also finding that 1985 articles were more theoretical and less useful to practitioners but more useful to judges and legislators; "utility" was rated by group of law professors); cf. Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 924-29 (1986) (showing how constitutional law scholars increasingly attempt to produce "brilliant," paradigm-shifting scholarship). But see Stephen B. Burbank, *Introduction: "Plus Ça Change . . . ?"*, 21 U. MICH. J.L. REF. 509, 509-10 (1988) (doubting that legal scholarship has become more theoretical).

I am less sure whether the "law and" movements have produced a significant further shift away from treatise writing. Since the "realist" period, prominent law professors have generally ceased to write treatises. See A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 668-79 (1981). At the very least, the "law and" movements have not ameliorated this unfortunate phenomenon.

There is some evidence, perhaps related to the rise of "impractical" scholarship, that courts are now using legal scholarship with diminishing frequency. See Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 134 (1986) (finding decrease in Supreme Court's citation of law reviews from 1971-73 to 1981-83). But see Wes Daniels, *"Far Beyond the Law Reports": Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940 and 1978*, 76 LAW LIBR. J. 1 (1983) (finding increasing use of legal scholarship and specifically law reviews); John H. Merriam, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381, 405-15 (1977) (finding declining use of legal scholarship in general, but increasing use of law reviews).

45. Paul Carrington reports the recent founding of *Law &*, "a scholarly publication that will publish papers on any topic as long as the paper is not limited to law." Carrington, *supra* note 9, at 790.

legal studies, critical race studies, and moral theory, which usefully inquire whether the existing legal system is fundamentally unfair in its construct.

However, I am concerned that there are too many "law and" scholars. A scholarly law school, ideally, should have a balance of "practical" and "impractical" professors. Then-Professor Richard Posner observed a decade ago that "doctrinal analysis, which is and should remain the core of legal scholarship, is currently endangered at leading law schools."<sup>46</sup> Posner's observation is all the more true today, so I doubt that any contemporary judge would now concur in the sentiments expressed in 1931 by then-Judge Cardozo in praise of legal scholarship:

Judges and advocates may not relish the admission, but the sobering truth is that leadership in the march of legal thought has been passing in our day from the benches of the courts to the chairs of universities.

In the engulfing flood of precedents the courts are turning more and more to the great scholars of the law schools to canalize the stream and redeem the inundated fields. . . . Partly because of the growing complexity of life [and] the overwhelming demands that modern litigation makes upon the powers of the judges, . . . the vanguard of the column which in our common law system was once led by the judges, is led by them no longer . . . . [T]he outstanding fact is here that academic scholarship is charting the line of development and progress in the untrodden regions of the law.<sup>47</sup>

There are too few books, treatises, and law review articles now that usefully "chart the line of development and progress" for judges and other governmental decisionmakers.

Where does the problem lie? For one thing, the law schools must hire more "practical" scholars.<sup>48</sup> My impression is that the number of law professors who now engage in *serious* doctrinal analysis is diminishing. One former clerk, currently a professor at a leading school, notes that "doctrine is not in vogue in the University" and elaborates:

The basic difficulty, at a major research institution . . . , is the tension

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46. Posner, *supra* note 5, at 1113; see also Ellickson, *supra* note 44, at 28, 32-33 (finding that law-and-economics articles comprised 24% of articles in Harvard, Stanford, University of Chicago, and Yale law reviews in 1985-86, and 33% in 1980-81; also finding that overwhelming percentage of articles written in leading law-and-economics journals are by law professors with economics Ph.D.s or persons who are not law professors). But see Saks, *supra* note 44, at 5 (finding that fewer law review articles in 1985 were written by nonlaw authors than in 1960).

47. Cardozo, *supra* note 31, at ix.

48. Cf. Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REF. 191, 212-26 (1991). The authors noted that "[o]nly one-quarter of all professors sampled had more than five years of practice experience. Thus, although more and more professors have had some exposure to the practice of law, the fact remains that the vast majority of professors teaching law have had very little experience in practicing law." *Id.* at 219.

between academics and professional training. The tension exists in all professional schools (e.g., business, medicine) but has become especially intense in law schools as younger teachers (1) arrive with Ph.Ds, (2) do more inter-disciplinary work, and (3) correspondingly are less interested in doctrine . . . .<sup>49</sup>

And the "elite" schools, of course, have a disproportionate impact on the profession: they produce much of the influential scholarship<sup>50</sup> and train most of the future professors.<sup>51</sup>

The problem goes further. The proper balance of "practical" and "impractical" scholarship is not simply achieved by hiring *X* doctrinal analysts and *Y* pure theoreticians, and then doing no more. The law school must make itself a congenial place for concrete, "practical" analysis — a place where scholars of different approaches and ideologies accord each other the mutual respect they deserve.<sup>52</sup> Otherwise, "practical" scholars will be discouraged in their work, and prospective scholars deterred from entering the academy. The ivory-tower elitism all too common among many "law and" proponents, and their con-

49. Law Teacher #4 at 1-2. Another professor in the survey group notes that "[t]he faculty . . . divides — largely along age lines — into 'Elitists/Theorists' and traditionalists." Law Teacher #6 at 1.

50. A small group of law reviews accounts for a disproportionate share of law review citations by judicial opinions and by law review articles. See Daniels, *supra* note 44, at 14-16, 30-32 (citations by judicial opinions); Sirico & Drew, *supra* note 28 (same); Sirico & Margulies, *supra* note 44 (same); Scott Finet, *The Most Frequently Cited Law Reviews and Legal Periodicals*, 9 LEGAL REFERENCE SERVICES Q. 227 (Nos. 3/4 1989) (citations by judicial opinions and law review articles); Richard A. Mann, *The Use of Legal Periodicals by Courts and Journals*, 26 JURIMETRICS J. 400 (1986) (same); Leonard, *supra* note 31 (citations by law review articles); Olavi Maru, *Measuring the Impact of Legal Periodicals*, 1976 AM. B. FOUND. RES. J. 227 (same). These studies do not necessarily agree on which law reviews are the most influential. However, the studies all identify some relatively small group of influential reviews, and this group is always partially if not wholly comprised of reviews from some of the "elite" schools.

In turn, professors at the "elite" law schools account for a disproportionate share of the articles in the influential law reviews. See *Chicago-Kent Law Review Faculty Scholarship Survey*, 65 CHI.-KENT L. REV. 195 (1989); Ira M. Ellman, *A Comparison of Law Faculty Production in Leading Law Reviews*, 33 J. LEGAL EDUC. 681 (1983) (also discussing fact that schools' reviews are likely to publish their own professors); Leonard, *supra* note 31, at 201-04, 230-31.

In short, "[s]o long as we recognize citation frequency as being synonymous with scholarly value, it appears that influential scholarship is the preserve of a handful of law reviews and is generated by a small body of scholars distinguished by legal education and faculty position." Leonard, *supra* note 31, at 216.

51. See Borthwick & Schau, *supra* note 48, at 226-36.

52. Then-Professor Posner, again, made the same point: "The challenge is to make the law school a comfortable habitat for a diverse group of disciplines. A first requirement in meeting this challenge is mutual respect among the practitioners of the different disciplines." Posner, *supra* note 5, at 1130.

I asked my former clerks: "Was there a split in the law faculty [at your law school] between 'doctrinalists' and 'theoreticians'?" Many answered in the affirmative; one went so far as to say that his alma mater was "really two schools," with one "made up of the 'Hart & Wechsler' or 'Hart & Sacks' 'Traditionalists,'" and the other "made up of 'Crits' and other fancy (fanciful) theorists . . . ." Practitioner #1 at 1.

comitant disdain for law practice, are deplorable. Again, Professor George Priest's view is paradigmatic:

The demands of scientific theory create extraordinary internal conflict for the lawyer who develops an interest in social science. The lawyer-economist, -sociologist, -political scientist, -social theorist finds himself a modern-day Henry Adams, whose education teaches him that his training is obsolete and that the more he develops his scientific interest, the more obsolete his basic training — legal training — will become. The legal scholar may have been certain as he selected his career that the law and the legal system were subjects of central intellectual importance, but now theory tells him that he was wrong. Those with true intellectual courage would abandon the law and become full-time social scientists — but I know of none who have done so. Many convince themselves that extensive knowledge of the intricacies of legal doctrine and legal argument and legal tradition will perhaps make possible some deep theoretical discovery. This is a false hope. It is equivalent to the belief that Einstein would finally have discovered a unified force theory if only he had stayed a few more years in the patent office.<sup>53</sup>

“Law and” scholars with true intellectual confidence would acknowledge the legitimacy of alternative, and complementary, approaches.<sup>54</sup>

I want, specifically, to rebut the view that was articulated by a former law clerk of mine, who claimed that “[t]he reason why the ranks of doctrinal scholars are thinning is because the task is now seen as ministerial.”<sup>55</sup> Professor Edward Rubin, in his article *The Practice and Discourse of Legal Scholarship*, takes a similar position:

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53. Priest, *supra* note 11, at 439. Professor Charles Collier's article provides a more recent (and considerably more arrogant) example of this view. According to Collier, “[t]he true realm and *métier* of legal scholarship, like that of all scholarship, is the world of ideas. It bears approximately the same relationship to adjudication that poetry bears to nursery rhymes.” Collier, *supra* note 14, at 271.

54. One of my former law clerks suggested that many such professors teach with a false sense of superiority.

Many of the professors appeared to work at setting themselves apart from the world by their attempt to convey an air of superiority, both intellectual and moral. That attempt was largely unsuccessful with me and my fellow students. What was actually conveyed was the fact that so many of the professors were *out of touch* with the effects of the legal system on the majority of the people. Not only were they out of touch, they knew they were and really didn't want to grapple with the difficult issues facing people unlike themselves. They appeared, at worst, lost in a maze of esoterica or, at best, exclusively involved in issues facing the more financially or politically powerful. Those professors who chose to write about topics which might be of concern to a more general population risked censure from their colleagues or accusations that the topics were not “scholarly.” In fact, many of the professors were playing to such a small audience that some . . . students were a bit amused as well as outraged.

Practitioner #17 at 3-4.

55. Law Teacher #1 at 4. A different argument against “practical” scholarship is adduced by nihilist scholars: if legal doctrine, and interpretive reasoning more generally, are vacuous, then the “practical” scholar who purports to interpret authoritative texts is deluded. See, e.g., Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981). Of course, I think that the nihilist is wrong in this view. We judges *necessarily* believe that cases and statutes are constraining. Moreover, so far as I can tell, most law professors *also* reject this nihilist argument, at least in its most extreme version.

If standard legal scholarship seems ill-adapted to addressing legislatures and administrative rule-makers in a persuasive manner, one would imagine that it would be ideal for addressing judges. It is with judges, after all, that legal scholars share their discourse, and it is to them that the large majority of scholarly efforts are explicitly directed. The difficulty is that the fit is all too good. Do judges really need to be told how to interpret prior cases, or how to construct a legal argument? That is the very essence of their job, after all, and most people tend to believe that they can do their job reasonably well on their own. Of course, scholars can acquire a reputation that allows them to speak as authorities, or articulate an argument that possesses a persuasive power of its own. And judges are quite willing to cite scholarly articles in support of positions they have already decided to adopt. But since the general discourse of scholarship is so similar to the judge's, the general impression will be that there is nothing particularly distinctive about the scholar's contribution.

There are areas where judges clearly need assistance, but they do not involve doctrinal reasoning. . . . [T]he doctrine itself is familiar to judges.

. . .<sup>56</sup>

But Rubin is profoundly mistaken in his view that "the doctrine itself is familiar to judges." To be sure, the judge needs no help in performing the simplest doctrinal tasks — in finding the precedents that are binding and squarely on point, or in reading the plain language of a statute. But it consumes considerably more time and skill to sort through seemingly conflicting case law, to find applicable cases from other jurisdictions or to compile a comprehensive legislative history. And placing a problem in its legal context — identifying all the cases and statutes that are not directly relevant, but rather cover related issues — is yet more difficult. Imagine that a judge needs to resolve a complex procedural problem — What is the appropriate appellate standard for reviewing a trial court's finding of a jurisdictional fact? — and that the problem is of first impression. In such a case, the absence of authoritative texts squarely on point does not mean that doctrinal analysis is over. Rather, the judge needs to know more about appellate standards of review; about trial court factfinding; about dismissals for want of jurisdiction. In other words, the judge needs to understand various provisions in the Rules of Civil Procedure, as construed by a mass of prior decisions. Typically, all this doctrine is not intimately familiar to the judge. The judge may learn the doctrine from a brief, but this simply shifts the issue — for where then does the briefwriter learn the doctrine? One typical place is the legal treatise; another is a law review article or Note.

The apologist for "impractical" scholarship might respond at this

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56. Rubin, *supra* note 14, at 1889.

point that prominent law professors need not waste their efforts on “practical” scholarship, because the current crop of treatises, together with student Notes, do a perfectly adequate job. However, this response entails a naive view of interpretation. It assumes that the interpretation of a large body of complicated texts is a mechanistic task, no better accomplished by Laurence Tribe or Charles Wright than anyone else. It wholly overlooks the fact that interpretation, like theorizing, may involve considerable efforts and talent.

Moreover, the apologist’s notion that law professors should write wholly theoretical scholarship, while judges (or the authors of treatises and Notes) should do the doctrinal analysis, ignores the problem of fitting theory into doctrine. The judge may well find theory superfluous or inapposite if the theorist does not know the doctrinal map. Theory is superfluous if doctrine already prescribes an outcome; it is inapposite if doctrine allows several outcomes but the theorist recommends yet another.

To avoid superfluous or inapposite results, the theorist who addresses a judge must attend to doctrine. In short, that theorist should write “practical” legal scholarship. My former clerks agreed, with virtual unanimity, that they rarely used wholly theoretical books or articles as practicing lawyers:

As a practitioner, I benefit very little from academic literature. This is perhaps the greatest disparity between “what goes on” at most law schools . . . and the actual practice of law. The greatest problem is that most of the academic literature does not address the problems that arise in my practice. I am not sure that most law professors have much of a sense of (or care) what those legal issues are.<sup>57</sup>

Much of the literature is simply not oriented to the practitioner or even to the person with more than a casual interest in legal doctrine. I sometimes wonder if *anyone* reads some of the articles I come across. Clearly multi-disciplinary work is in vogue . . . . It may make for more interesting conversation in the faculty lounge, but I’m hard pressed to see that the profession is benefitting.<sup>58</sup>

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57. Practitioner #6 at 6. Some other comments: “I rarely use the academic literature in daily practice. . . . I would say that probably at least 50% of the academic literature I have read was either duplicative of something that someone else had written, or did not add any particular insight to the area written about.” Practitioner #3 at 6.

[T]he genuinely insightful, memorable law review article is plainly the exception.

The same is true of interdisciplinary literature. Although I did draw upon some of the law-and-economics literature in trying to think through some of the FERC cases that came before the D.C. Circuit during my year in chambers, I have not found interdisciplinary approaches to be of much help generally in practice.

Practitioner #4 at 2. “When I write a Supreme Court amicus brief, I often consult the literature, especially if I am writing something that has a historical component. Every once in a great while, you even find something worth reading.” Practitioner #9 at 2.

58. Practitioner #10 at 3.

My own experience indicates that neither judges nor practicing lawyers regularly rely on "impractical" scholarship. The survey results are consistent with this view.

My argument, here, assumes a particular audience for legal scholarship — a practitioner seeking to solve a legal problem or a judge preparing to resolve a legal dispute, each of whom is constrained by a complicated mass of authoritative texts. As Professor Rubin has suggested,<sup>59</sup> legislators, agency rulemakers, and other decisionmakers who are relatively unconstrained by doctrine will find wholly theoretical, prescriptive scholarship more useful. I do not disagree with this point,<sup>60</sup> but I do insist that "practical" scholarship is also useful to legislators and the like. The "practical" scholar attends to the authoritative texts that constrain or guide a governmental decisionmaker, and existing law does guide the legislator, even though it is not constraining. The legislator does not generally work *ex nihilo*, but rather makes incremental changes to a complex, existing legal regime — an existing mass of authoritative texts. Thus, the legislator needs to understand that regime before the changes are made. Indeed, Professor Rubin recognizes as much. "Legislative and administrative decisionmakers need to know how to express their policies in legal terms, and to integrate them into the remaining legal context that they have no desire to disrupt."<sup>61</sup>

Imagine a classic legislative decision: whether to amend some provision in a statute. The legislator is constrained neither by the existing provision, nor by other provisions in the statute, nor by other statutes. But this mass of statutory law, and the mass of case law construing it, are hardly irrelevant. Rather, the legislator needs to know what the existing provision does, and how it has failed in the past. The legislator also needs to know how the provision fits into the larger statutory regime. These are doctrinal questions, which the "practical" scholar addresses. To be sure, the legislator has the option of revamping the entire statute. This is where "theoretical" advice may be useful. But such advice is not *all* that the legislator needs.<sup>62</sup>

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59. See Rubin, *supra* note 14, at 1886-87.

60. Nor do I insist that "impractical" scholarship is wholly useless to practitioners and judges. A judge, for example, could find a wholly theoretical article illuminating in a "hard" or "very hard" case. See *supra* note 25 and accompanying text.

61. Rubin, *supra* note 14, at 1900.

62. Then-Associate Justice Roger Traynor of the California Supreme Court made this point quite eloquently, some 30 years ago:

If ever we needed the law reviews, it is in this area [i.e., proposing legislation]. It is an area that most of them have sadly neglected. They could if they would take the lead on many timely problems with well-drafted proposals for legislative consideration. They could do a job, and what a job it would be, of analyzing statutes and administrative rulings as painstakingly as they do the law reviews.

In short, I believe that "practical" scholars serve our whole legal system: judges, legislators, and administrators, as well as practitioners, both private and public. The "practical" scholar shows, *inter alia*, how the legal regime works. That is useful information to a governmental decisionmaker, whether the decisionmaker is operating "inside" the regime, or rather reforming it. It is also useful information to practicing lawyers, who seek to persuade the decisionmaker.

Again, I do not deny that "impractical" scholarship *also* can serve our legal system. This can be true of prescriptive, wholly theoretical scholarship, e.g., the law-and-economics article that shows the legislator why a particular regime is efficient. It also can be true, indirectly, of nonprescriptive scholarship, e.g., the law-and-literature article that helps "practical" scholars understand how to read legal texts. Nor do I even insist that "impractical" scholarship must always, ultimately, be useful. For example, it is perfectly appropriate for legal historians to study the Middle Ages, or Rome; historical knowledge is an end in itself, and need not be justified in terms of some further social goal.

However, I think it is sensible to ask whether a particular kind of "impractical" scholarship should be done by law professors, or, rather, by professors of arts and sciences. The law school is the place for legal history, because law professors are best suited to interpret historical cases and statutes, but it is not the place for, say, art history. "Law and" scholars should have some comparative advantage at their work, relative to pure academics. The entire array of graduate schools must not be duplicated, in microcosm, in the law school, simply because interdisciplinary work has become fashionable.<sup>63</sup> Moreover, the legal scholar's work must be valuable. "Personal fascination" is not a sufficient justification for scholarship, of any kind. Insouciant "pastiche," which no self-respecting academic journal would publish, have no place in the law reviews.

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ingly as they now analyze opinions. It would be a job such as could absorb the talents of every student in every law school.

Time is with the law reviews. An age that churns up problems more rapidly than we can solve them needs such fiercely independent problem-solvers preoccupied with long-range solutions. . . . I salute them for their already large contributions to law revision in the public interest. Particularly I salute them as the best critics a judge could have.

Traynor, *supra* note 31, at 9-10.

63. Professor Thomas Bergin made this point quite trenchantly:

Why do we incompetents teach these bizarre [interdisciplinary] courses for which we have no training? Because we imagine that we are, in some essential and undiscovered way, authentic academics. Even where we have fooled ourselves and our students time and time again, we try once more — darting like butterflies from academic flower to academic flower, hoping to find one which finally and eternally suits our taste. Yet the small voice keeps whispering that we will never find it.

Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 647-48 (1968).

Finally — and this is my main point — pure theory should not wholly displace the production of treatises or articles that, *inter alia*, focus on legal doctrine. Unfortunately, this displacement is now beginning to occur and therewith a grave disjunction between legal scholarship and the legal profession. “Practical” scholarship constitutes a vital link from the law schools to our system of justice — to the legislators, administrators, judges, and practitioners who need thorough, thoughtful, concrete legal advice.

## II. LEGAL PEDAGOGY

Legal practice is not only increasingly disjoined from legal scholarship, but from legal *pedagogy* as well. This second disjunction is caused by the first. “Impractical” scholars often are inept at teaching doctrine, for either lack of any practical experience or lack of interest in the subject matter, or both. Obviously, law students will not receive a full and rich doctrinal education from such teachers.

By *doctrinal education*, I mean this: the law student should acquire a capacity to use cases, statutes, and other legal texts. The person who has this capacity knows the full range of legal concepts: the concepts of property law, and procedural law, and constitutional law, and so on. This person is also skilled at interpretation: the reading of a case or statute, or a mass of case law, or a complex regulatory scheme. Finally, this person can communicate the interpretive understanding, both orally and in writing.

Doctrinal education, thus defined, is not the delivery of substantive information. Law schools should not seek to provide students a comprehensive knowledge of legal doctrine, for it simply cannot be done.

We still attempt to provide in three years a “complete” legal education, which provides both basic principles and legal methodology, on the one hand, and at least an introduction to the many substantive practice areas that exist, on the other. As a result, I believe that many law students come away from law school with little more than a “smattering” of everything. . . .

. . . .

. . . [W]e should stop attempting to teach so much substance in the basic law school program. We should not attempt to prepare someone to *practice* labor law, environmental law, commercial transactions and the many other subjects that we teach. The substance of these specialized areas either should be left for “apprenticeships” and actual practice (where, practically speaking, it either is learned or “re-learned” anyway), or we should face the fact that the scope of law today is much too broad for a three-year curriculum and initiate the counterpart to medical “resi-

gency” programs where lawyers would learn specialized practice areas.<sup>64</sup>

I do not suggest that law schools cancel their first-year classes in property, civil procedure, and criminal law. Indeed these classes, and others, such as constitutional law, evidence and ethics, should be required.<sup>65</sup> My point is simply that the function of the first-year classes, rightly understood, is to create in students the *capacity* to understand and use the full range of legal doctrine.

Traditionally, the best law schools *did* provide their students this capacity. Although students did not really learn to “think like lawyers” — because the complete lawyer “thinks” about doctrine, *and* about trial strategy, *and* about negotiation, *and* counseling — they at least learned to “think like the authors of fine appellate briefs.”<sup>66</sup> Now, however, law students receive a rudimentary doctrinal education, but, in my view, often do not receive the full and rich doctrinal education they deserve. This failure constitutes part of the growing disjunction between legal education and the legal profession.

Students still learn the rudiments of legal doctrine, because there are still “practical” legal scholars; indeed, there are a number of truly brilliant “practical” scholars. Thus, because a law student takes multiple courses, he or she will acquire *some* doctrinal skills if *some* of the student’s teachers respect legal texts. Moreover, even a wholly “impractical” law faculty could not abstain entirely from teaching doctrine, because law teaching is subject to economic and institutional pressures that do not constrain law scholarship. A “law” school that only taught theory would lose students and, possibly, its accreditation.<sup>67</sup> A relatively recent study of ABA-approved law schools shows that, although more “nontraditional” courses are now being offered, many courses still bear “traditional” labels, and students are still universally required to take contracts, torts, property, criminal law, and civil procedure.<sup>68</sup> There is good reason to doubt, however, whether

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64. Practitioner #6 at 1-3.

65. I also believe that law schools should offer second- and third-year electives that *do* provide in-depth coverage of particular doctrinal areas, for students who wish to specialize in those areas.

66. This claim is perhaps too broad. There is some reason to suppose that the traditional case method did not in fact provide students a full and rich doctrinal education. See Paul F. Teich, *Research on American Law Teaching: Is There a Case Against the Case System?*, 36 J. LEGAL EDUC. 167, 169-73 (1986) (describing controversy over case method). However, I think it is clear that a scholar who ignores or disdains legal doctrine is a poorer teacher of doctrine than a “practical” scholar who uses the case method. Thus, whatever the virtues of the case method, the rise of “impractical” scholarship has caused a growing disjunction between legal pedagogy and practice.

67. Cf. STEVENS, *supra* note 9, at 238-40 (describing pressure by bar and courts on law schools, during 1970s and 1980s, to increase practical competence of graduates).

68. See WILLIAM B. POWERS, AMERICAN BAR ASSN., A STUDY OF CONTEMPORARY LAW

there is any coherent design or consistency in legal education any longer. With the influx of “impractical” scholars, it is also doubtful whether it is even possible for law students to receive a full and rich doctrinal education.

Such an education is crucial to the lawyer’s professional development. First, it is a crucial part of the lawyer’s technical development: a lawyer is by definition skilled in the law, just as a doctor is skilled with the human body. Any hack can misread cases, statutes, and other legal texts; it is much harder to read them well. Second, a doctrinal education is a crucial part of the lawyer’s ethical development. The ethical lawyer should only advance reasonable interpretations of the authoritative texts — interpretations that are plausible from a public-regarding point of view. The ethical lawyer’s brief should be reasonably true to those texts, and to the public values they embody. This is what law school must teach, for it appears that the law firms no longer can. The doctrinal capacity — the capacity to develop and communicate a true understanding of some legal regime — is a necessary condition for ethical practice.<sup>69</sup>

A full and rich doctrinal education, as I see it, needs a structured curriculum. It needs an integrated series of courses, covering, at least, statutory law, constitutional law, and the common law, where law students learn the full range of legal concepts and progressively deepen their ability to interpret authoritative texts. Very roughly, it needs the traditional first year of law school (although one year is probably too short for the program I envision). If all or even some of the law professors teaching the doctrinal curriculum are “impractical” scholars, then the curriculum will not fully succeed. The nihilist scholar, who believes that texts are infinitely plastic and subjective, can only teach students to destroy legal texts, not to construct them. Similarly, the law-and-economics scholar, who accepts that doctrine does constrain but is preoccupied with theory, will not give sustained and sub-

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SCHOOL CURRICULA 69-72 (1987) (summarizing findings); *id.* at 26-65, 83-174 (analyzing and listing elective courses).

69. One of my former law clerks raised a legitimate point in querying me on the breadth of “practical” pedagogy:

When students complain to me about professors who teach too much theory and too little that is “practical” I always ask what they mean. Their answers too often indicate their belief that a “practical” approach to legal education means teaching them how to argue persuasively to a judge or jury, how to “bury” the opponent in discovery, and how to get on a judge’s “good side.” Their learning goals, in other words, range from the clinical (which is fine, but shouldn’t occupy six semesters) to the appalling. I’m afraid that such students will hear your criticism of legal education as an endorsement of these demands.

Law Teacher #5 at 1. But this is surely not what I mean by “practical” pedagogy.

tle attention to cases, statutes and the like.<sup>70</sup>

As my former law clerks reported, it is a nightmare for a law student to be stuck in a class purporting to cover doctrine being taught by an "impractical" scholar:

I know that [one "impractical" scholar's] first-year civil procedure class was particularly irrelevant. I'm not sure exactly what types of things [the professor] *did* teach [the] students, but I know [the professor] didn't have "time" for such matters as personal jurisdiction and *res judicata*. Because of the importance of civil procedure as a foundation for understanding the law as a system, I can't imagine a more damaging experience for law students than to be stuck in [that professor's] class.<sup>71</sup>

Citing a different twist on the problem, another former law clerk, who is now a law professor, wrote:

[T]heorists generally don't like exams or grading. . . . The solution is multiple choice exams. Such exams are easy to construct and can be graded by computer. Unfortunately, it is difficult to test anything but black letter law with a multiple choice exam. But this is a small price to pay for the reduced effort required. Students quickly realize that the theorist professor, who likes to talk in class about philosophy and political theory, is ultimately going to test them solely on doctrine. So they ignore all of the professor's "policy" discussions and perk up only when doctrine is discussed.<sup>72</sup>

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70. Professor John Weistart has made essentially the same point, although more optimistically:

Commentators occasionally decry the fact that law schools by and large continue to offer a first-year curriculum that has changed little in the last fifty years. In fact, leaving aside occasional experiments by venturesome schools, the labels in the first year do appear to be the same: torts, contracts, property, procedure, and criminal law. But a closer look at first-year instruction reveals a much different picture. The basic courses have revealed a capacity to admit of considerable flexibility, not only in substance, but also in methodology.

John C. Weistart, *The Law School Curriculum: The Process of Reform*, 1987 DUKE L.J. 317, 320-21 (footnote omitted). Professor Weistart's point, and mine, is that "traditional" courses are malleable. An "impractical" scholar may use a contracts casebook, in a course entitled "Contracts," to teach law students about economic or literary theory instead of contracts law.

71. Practitioner #1 at 3. I received a number of similar comments:

I didn't really learn the federal court system during law school . . . or *truly* understand the *process* of administrative law that is so critical to clerking. I took several administrative law type subjects (food and drug, environment [etc.]) but they were taught from a theoretical perspective. Thus, I didn't hone in on issues like standard of review.

Practitioner #13 at 1-2. "You already know about my strong feelings for my property professor, who did his best to convince us that it would be a waste of time to learn boring old property law in class . . . ." Practitioner #2 at 4.

[One of the] greatest shortcomings in my legal education [was the] . . . impractical and uncomprehensive treatment of civil procedure. We learned nothing about the normal course of a suit through the courts — what must be in a complaint, what must be in an answer, what is waived if not raised, what is a motion for summary judgment, standards of review, etc.

Government Lawyer #1 at 2.

I can think of little that I learned in law school that has been of use, other than the little bit of black-letter law that I happened to learn. My problem may be a reaction to Harvard and CLS — it was all so nasty in that period that I chose not to absorb it.

Practitioner #5 at 1-2.

72. Law Teacher #6 at 1-2.

What a depressing vision of doctrinal pedagogy!

Indeed, the problem goes further. It is not simply that "impractical" professors ignore legal doctrine and thereby produce "gaps" in the doctrinal curriculum. The "elite" law schools' failure to create a congenial scholarly habitat, where "impractical" and "practical" scholars accord each other mutual respect, is also a pedagogic failure. All too often, "impractical" scholars who disdain doctrine communicate this attitude to other scholars and to their students.

My former clerks generally agreed that

law school focused much more on the intellectual . . . to the exclusion, indeed the disdain, of the practical . . . . The teaching was that if a problem admitted of an answer, it was almost not worth thinking about!

. . . .

. . . There was a prevailing ethos . . . that graduates who went into practice were those who couldn't get teaching jobs.<sup>73</sup>

And, as Professor Sanford Levinson has noted, the problem is compounded because many law professors now have a special contempt for the federal judiciary:

[O]ne of the realities of contemporary intellectual life within the legal academy is the remarkable disdain expressed for the federal judiciary by many leading academics. . . . It is one thing to find a number of "young radicals" identified, in one way or another, with Critical Legal Studies making [contemptuous] remarks. But consider, then, the significance of Yale Law School Dean Guido Calabresi's comment, at the very beginning of a *New York Times* op-ed piece supporting Clarence Thomas's nomination to the Supreme Court, "I despise the current Supreme Court and find its aggressive, willful, statist behavior disgusting."<sup>74</sup>

Disdainful teachers surely engender the same attitude in some students. The best evidence is the law professorate itself — a fair percentage of "impractical" professors must have developed their views during law school.

Fortunately, the law schools have not yet followed Professor Priest's advice and entirely abandoned the doctrinal curriculum in favor of pure theory; unfortunately, however, it cannot be said that the purposes of that curriculum are now being fully realized. Rather, the learning of legal language and interpretation is subverted by "impractical" professors who disdain or ignore authoritative texts. Law

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73. Practitioner #15 at 1-3. Other comments: "[Y]ou often got the impression from professors that no real intellectual would enjoy practicing law." Practitioner #9 at 2. "I do recall my Property professor using a phrase such as 'ridiculous' to describe his course." Practitioner #8 at 3. "At some point, . . . I became aware of [one professor's] apparent disdain for practice. . . . [Another professor] is openly contemptuous of practice on intellectual grounds." Practitioner #11 at 3.

74. Sanford Levinson, *The Audience for Constitutional Meta-Theory (Or, Why, and to Whom, Do I Write the Things I Do?)*, 63 U. COLO. L. REV. 389, 404 (1992) (footnote omitted).

schools, increasingly, are failing to fulfill a role they once performed: the schooling of skilled doctrinalists.

This assertion may seem like a dissent from the majority view on legal education. A standard theme in the *Journal of Legal Education* and other such literature is that law students take too many doctrinal courses. Commentators regularly propose more clinical courses or theoretical courses.<sup>75</sup> And the case method, traditionally used to teach doctrine, is also widely criticized.<sup>76</sup>

However, I do not mean to dissent from this general view. Unlike most commentators on legal education, my focus is not the law school's curriculum, or its teaching methods, but, rather, the faculty. My principal cure for the "elite" law schools' pedagogy is the same as my cure for their scholarship. The schools must seek a balance of "practical" and "impractical" scholars: by hiring more of the former; by creating a congenial environment for their work; and by assigning *them* to teach the doctrinal curriculum.<sup>77</sup>

In other words, I insist merely that doctrine should be taught well, where it is taught; it need not be taught in every class, or by the case method. Thus, I agree that law schools are insufficiently clinical.

The Law student should learn, while in school, the art of legal practice. And to that end, the law schools should boldly, not slyly and evasively, repudiate the false dogmas of Langdell. They must decide not to exclude, as did Langdell — but to include — the methods of learning law by work in the lawyer's office and attendance at the proceedings of courts of justice. . . . They must repudiate the absurd notion that the heart of a law school is its library.<sup>78</sup>

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75. See, e.g., *Curriculum Developments: A Symposium*, 39 J. LEGAL EDUC. 469 (1989); Symposium, *The Law Curriculum in the 1980s*, 32 J. LEGAL EDUC. 315 (1982). See generally Kristine Strachan, *Curricular Reform in the Second and Third Years: Structure, Progression, and Integration*, 39 J. LEGAL EDUC. 523, 523 n.1 (1989) (citing literature on law school curriculum); Weistart, *supra* note 70, at 318-29.

76. See *supra* note 66 and accompanying text.

77. Some have challenged the view that law teacher and law scholar are complementary roles. See, e.g., John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343 (1989); Scordato, *supra* note 14. By contrast, I believe that law teaching and scholarship are complementary if the scholarship is "practical" — if the professor *qua* scholar seeks to communicate with practicing lawyers, as teacher. The scholarly and pedagogic roles appear to be inconsistent, at present, because so many professors insist on pursuing pure theory. See Elson, *supra*, at 343 n.3 (citing commentators who believe that roles are complementary).

78. Jerome Frank, *What Constitutes a Good Legal Education?* (1933) (unpublished speech), quoted in STEVENS, *supra* note 9, at 156-57. My former law clerks generally favor more clinical education:

Students need to learn other things [besides doctrine]. It would be useful, I think, if wanna-be lawyers knew something about negotiating, trying cases, and working with clients. These are the things that law schools do poorly: partly they don't want to spend the money (clinicals are expensive); partly the current law school faculty don't have these skills; and partly it is hard to know how to integrate clinical teachers (who often don't publish) with the standard academic hiring and promotion process.

The complete lawyer has many other skills besides a facility with doctrine.<sup>79</sup> Nor does doctrinal education require three years of law school. Absent specialist training, it probably requires only the first year and part of the second; the remaining time can and should be used for clinical courses, as well as for doctrinal and theoretical electives.<sup>80</sup>

I also concur in the general criticism of the case method, especially in advanced courses in the second and third years, where professors pretend to use a Socratic approach to dissect a massive (and often unmanageable) body of law. This method is a specific mode of doctrinal education, probably best suited for the first year of law school; but it is neither the only mode, nor necessarily the best. For example, some non-Socratic approach (for example, role-playing or the "problem method") might be used to teach case interpretation. The interpretive texts might be statutes and regulations rather than cases. Classes might be smaller. Such alterations in the case method, in appropriate doses, would surely improve doctrinal education.

Another matter of serious concern in legal education is the lack of good training in legal writing. A surprising number of former law clerks faulted their education in legal writing, and, I would add, with good cause. The general view was that "law school exams and seminar papers simply are not good training for the writing expected of a practicing lawyer."<sup>81</sup> This cannot be doubted, but I fear that far too

Law Teacher #4 at 2-3.

The distorted view that you get of legal practice through law school is that lawyers spend most of their time formulating theories about their case, or otherwise engaging in what I would call "high legal reasoning." . . . Rather, much of the lawyer's job involves things that are never even spoken of in law school, such as communications with the client, communications with opposing counsel, interviews of potential witnesses, etc.

Practitioner #3 at 4. "I know that my friends who did clinical work knew how to perform basic litigation tasks . . . when they graduated. . . . It's this kind of craftsmanship, as opposed to substantive knowledge in any particular area of the law, that turns out to be essential for young litigation associates." Practitioner #2 at 2.

79. See generally Anthony G. Amsterdam, *Clinical Legal Education — A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984).

80. One law clerk goes even further:

Law school certainly gives the student the skills not only to become comfortable with [a] new type of problem-solving, but even to become adept at it. The only problem is that this principal skill taught at law school is mastered by most law students by the end of their first semester, leaving the question, why does law school continue for two and a half additional years?

Practitioner #3 at 1-2. This clerk suggests "eliminat[ing] [the] third year" and "increas[ing] the concentration on practical training." *Id.* at 12.

81. Practitioner #9 at 1. Some other comments:

Perhaps law school does teach us how to "spot issues." It does not provide much training, however, on two other skills that, in many respects, seem even more fundamental to the practice of law: arguing (often orally) and writing. Virtually no "argumentative" legal writing is done in law school. . . . Similarly, virtually the only time law students speak . . . is in response to questions propounded by professors using the Socratic method.

few law professors recognize the gravity of the problem.

In my twelve years on the bench, I have seen much written work by lawyers that is quite appalling. Many lawyers appear not to understand even the most elementary matters pertaining to style of presentation in legal writing, i.e., things that serve to facilitate communications between lawyers and clients, lawyers and opposing counsel, and lawyers and governmental decisionmakers or policymakers. For example, my checklist for a first-rate brief would be as follows:

Above all, it is selective. It resists making every possible argument and sticks to the ones that the court reasonably can be expected to consider. The brief skips long quotes, and it does not unfairly crop the occasional quotes that are used to highlight key points. It avoids excessive underscoring, too many footnotes, and overuse of words like "clearly," "plainly," and "obviously." It does not attempt to pour text into footnotes, as a way to avoid page limitations. It uses citations to fortify the argument, not to certify the lawyer's diligence, and it does not cite cases without offering the reader a clue why they are there; instead, it furnishes parenthetical explanations to show the relevance of the citation.

A good brief does not shy away from citing law review commentaries or other scholarly analyses of authorities that may aid the court as much as they did the brief writer to get an overview of the area. The brief is carefully proofread so the judge isn't led to the wrong volume or page when she checks a reference. (If a brief is sloppy in this regard, the judge may suspect its reliability in other respects as well.) Finally, and most importantly, a good brief is fully *honest* in the argument that it presents: it does not mis-cite cases; it does not distort lines of authority; it does not shade the facts; and it acknowledges and seeks to distinguish unfavorable precedent.

As a footnote, [I would add that a] top quality brief scratches "put downs" and indignant remarks about one's adversary, the trial judge or the agency. These are sometimes irresistible in first drafts, but attacks on the competency or integrity of a trial court, agency, or adversary, if left in the finished product, will more likely annoy than make points with the bench.<sup>82</sup>

It is amazing how many lawyers are unfamiliar with these simple points, or are unable to execute them.

The more serious problem in legal writing, however, is what I would call a lack of depth and precision in legal analysis. For exam-

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Practitioner #6 at 3. "From my discussions with other students, I gather that many of the [legal writing course] teachers did not take the course seriously, did not exact much from the students and did not apply high standards or careful thought to their comments on student work." Government Lawyer #1 at 1-2. "I did not do nearly enough writing while in law school. I take some of the blame for this. . . . [G]iven the overall time constraints of law school, it always seemed somewhat easier when selecting courses to pick an exam course over a course with a lengthy paper." Government Lawyer #2 at 1.

82. Harry T. Edwards, *Appellate Advocacy — Good and Bad in the Court of Appeals*, CAL. LAB. & EMPLOYMENT L.Q., Winter 1991, at 1, 2.

ple, too many lawyers demonstrate a lack of familiarity with or understanding of controlling or analogous precedent. Too many advocates are unable to focus an argument, so as to highlight and concentrate on the principal issue(s); and too many attorneys fail to assess how an action in a particular case may affect future cases or future developments in the law. These failings, I think, are attributable in no small measure to failings in "doctrinal education."

In an effort to address this issue, one of my former law clerks, now a professor, has taken the following approach:

I think that . . . students should write a series of papers (10-15 page memoranda) addressing realistic legal problems. In first-year Property, I have dropped all final exams and replaced them with five ten-page papers. I tell students that they can talk with each other about the problems, but that they cannot read, edit or write each other's work. In Environmental Law I have four slightly longer papers (with the same ground rules). One paper requires students to amend a regulation and write a supporting memorandum justifying the changes. One is a client letter . . . Having done this for the past three years, I can say unequivocally that these students are the best prepared in class of any students I have ever had; the classes (both large and small) are enthusiastic. By the end of the course, the students have substantially improved their legal skills (just looking at any given student's papers during the course will reveal the sharp learning curve). The only downside — and it is substantial — is the enormous time it takes to grade the papers.<sup>83</sup>

I know from my many years of law teaching that there is a real burden associated with grading student papers. However, I also know from my years on the bench — after having read more briefs and motions than I care to recall — that there is enormous room for improvement in the writing skills of lawyers.

Finally, I repeat that, in advancing my claim for "doctrinal education," I do not propose that law schools eliminate theory from their curricula. Law students should learn theory, but not at the expense of doctrine. The ideal "doctrinal" class is like the ideal work of "practical" scholarship: it seeks to integrate theory with doctrine, to show how theory resolves normative problems left open by the authoritative legal texts.<sup>84</sup> I have no question that some law teachers are doing this, just as some scholars are.

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83. Law Teacher #4 at 2; see also Mary K. Kearney & Mary B. Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 TEMP. L. REV. 885 (1991) (arguing for "Socratic," i.e., dialogic methodology in legal writing class, so as to teach both writing and legal analysis).

84. Law schools should also offer pure theory courses, so as to teach theories that students will later integrate with doctrine. However, pure theory courses should not displace the core doctrinal curriculum. Nor should the "impractical" scholar teach whatever pure theory class he or she finds interesting, regardless of its relevance to practical problems.

Among the many comments that I received from my former law clerks, there was a split in the views on this point. One typical response was as follows:

I really have no complaint about the way legal theory was used in my education. In those courses in which legal theory played a prominent role, I generally found that my teachers did a good job of using theory to illuminate and resolve questions of doctrine or practice. Moreover, I have found that these courses were of real value and that I have often drawn upon the theories discussed in class in my subsequent practice. Indeed, I now realize that the courses that integrated theoretical and doctrinal instruction were of more lasting practical value than the sort of "code"-oriented classes . . . in which doctrinal rules were explored without much consideration of their theoretical underpinnings.<sup>85</sup>

The following response typifies the other end of the spectrum:

In my view, there is a very important need for teachers who are *both* very intellectual and bright, and who have significant experience in the practice of law. The best legal theory will often be based on an understanding of what that theory means in actual practice (not simply in the abstract). Very few of my professors . . . were able to combine good legal theory with a practical understanding of the practice of law.<sup>86</sup>

Almost all of my former law clerks agreed, however, that the best teachers they had were the ones who could comfortably integrate theory with doctrine.

My principal fear is that some law professors *cum* theorists have forgotten the obvious. The lawyer's theory is generally interstitial. It begins its work where interpretation ends, and not before. The practicing lawyer needs the capacity to write fine legal documents, *not* the capacity to write pure theory, and law students should not develop this second capacity at the expense of the first.

### III. ETHICAL PRACTICE

*Doctrine* is not the only point of interconnection between legal education and legal practice. The function of a good law school is not merely to create skilled doctrinalists, or to produce scholarship that doctrinalists can use. A person who deploys his or her doctrinal skill without concern for the public interest is merely a good legal technician — not a good lawyer. Good lawyers are "professional," which means, among other things, that they are "ethical": that they must sometimes ignore their own self-interest, or the self-interest of their clients.<sup>87</sup> The function of a good law school is, in part, to produce

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85. Practitioner #4 at 2.

86. Practitioner #16 at 3.

87. See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 11-30 (1988).

ethical lawyers.

"Ethics" may bear upon the practice of law in two different ways. First, it bears upon the choice of clients. The good lawyer should not simply serve the richest clients, who will pay the fattest fees. Rather, the lawyer has an ethical obligation to practice public interest law — to represent some poor clients; to advance some causes that he or she believes to be just; to deploy his or her talents pro bono rather than pro se, at least in part. Second, ethics bear upon the lawyer's representation of a particular client. This is the domain of professional responsibility: the ethical lawyer cannot always advance the client's narrow self-interest, because the lawyer is an officer of the court as well as an advocate.<sup>88</sup>

In my essay, *A Lawyer's Duty to Serve the Public Good*,<sup>89</sup> I argued at some length against the "total commitment" concept of the lawyer as "hired gun," who *only* pursues the client's aims. Specifically, I contended that lawyers should counsel clients to conform to the public interest, and should represent pro bono those persons who would not otherwise have access to legal services. I will not repeat my arguments here. I will, however, note this: one can concur in the general concept of an "ethical lawyer" without sharing my specific conception. It remains a difficult and contestable question how to balance the lawyer's duties as "officer of the court" and "advocate," and how to balance pro bono representation with profit-seeking. However, there can be no doubt that some balancing is required.

Few of my former law clerks are sanguine that practicing lawyers have reached the right balance. Almost every respondent to my survey deplored the ethical failings of the practicing bar. There was a general consensus that practicing lawyers are overly concerned with profit: "they care about money, money, money."<sup>90</sup> One clerk suggested that private firm lawyers must "Bill or Be Banished."<sup>91</sup> In short, the survey confirms the picture I painted in *A Lawyer's Duty to*

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88. William Simon suggests a similar dichotomy.

Lawyers should have ethical discretion to refuse to assist in the pursuit of legally permissible courses of action and in the assertion of potentially enforceable legal claims. This discretion involves not a personal privilege of arbitrary decision, but a professional duty of reflective judgment. *One* dimension of this judgment is an assessment of the relative merits of the client's goals and claims and those of other people who might benefit from the lawyer's services. *Another* is an attempt to reconcile the conflicting considerations that bear on the internal merits of the client's goals and claims.

William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083 (1988) (emphasis added).

89. Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148 (1990).

90. Practitioner #1 at 4.

91. Practitioner #14 at 3.

*Serve the Public Good:* many, many law firms have transformed themselves into “money machines,” where partners and associates finance their huge salaries and luxurious surroundings by billing a tremendous number of hours.<sup>92</sup>

Materialistic goals can overcome ethical considerations in private practice. First, lawyers tend not to find time to fulfill their pro bono obligations. The following comment was typical:

I have found that many lawyers in my firm are genuinely concerned with issues of social justice, and many of them make a concerted effort to undertake pro bono projects directed to those issues. At the same time, there is no mistaking that it requires a concerted effort to integrate pro bono efforts into the normal routine of legal work done for paying clients, and that there is no real ethic that encourages lawyers to undertake such work.<sup>93</sup>

Second, some lawyers cross the line of ethical behavior in overly zealous representation of their clients. One former law clerk has described to me an astounding case, where a lawyer’s private investigator had interviewed a prospective defendant, claiming to be a reporter; the lawyer refused to admit to the court that this episode was unethical or even deceptive.<sup>94</sup> Another former law clerk states:

My time in practice has been brief. But I have already seen enough posturing and bad-faith game playing in the discovery process to be thor-

92. See Edwards, *supra* note 89, at 1151-53 (discussing growth of large, materialistic law firms); see also RICHARD L. ABEL, *AMERICAN LAWYERS 182-202* (1989) (same); MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991) (same).

93. Practitioner #4 at 4. Another former law clerk states: “On the broader question — social justice — the doyens, and only the doyens of the profession commit themselves to serve social justice . . . . Most attorneys don’t see that far or can’t afford to, or are concerned about the public effects of social justice ministrations.” Practitioner #13 at 8-9. There were many other comments along the same lines:

Personally, I’m resigned to the idea that working in a law firm and doing satisfying work in the public interest are incompatible. I recognize, though, that this represents a massive failure of the imagination. I’m sure that there *are* ways to reconcile the two — in fact, my understanding is that until relatively recently, a lot of lawyers in private practice felt that they were serving the public interest at the same time that they served their clients. But I don’t know what happened, and I don’t know what the answer is.

Practitioner #2 at 7. “I do not think that private practitioners, on average, care much about issues of social justice or serving the public interest. The causes will vary from individual [to individual], but the heavy time demands of private practice seem to me to be one important factor.” Practitioner #11 at 4. “The business pressures on private practitioners, and the competition for business, are so great that there is little concern for anything — public service, social justice, training associates — that does not *directly* enhance the lawyer’s marketplace advantage or financial bottom line.” Practitioner #15 at 4-5.

I have concerns about the continuing commitment to pro bono work of most law firms. The deemphasis of such work seems a natural result of increasing concerns about billable hours and other bottom line matters (indeed, a general view of the profession as a business and nothing more). In this respect, I think associates have paid a high price for their escalating salaries — longer hours, less room for pro bono work, etc.

Practitioner #16 at 6.

94. Practitioner #5 at 1.

oughly disgusted by it. I've been to third-party document productions that the other side tried to stop after I drove an hour in a snow storm to get there, I've had to bring motions to compel to get discovery, I've had wholly inadequate responses to discovery requests, I've seen opposing counsel lie to a judge about my behavior in discovery, etc.<sup>95</sup>

Yet another former law clerk reports:

Over the last year or two, I have noticed, with disturbing frequency, the number of attorneys who would miscite or grossly exaggerate case law, or give false or misleading descriptions of facts and even of prior events and rulings in the case. . . . [It has] happened with surprising frequency by attorneys from well-respected firms.<sup>96</sup>

More generally, the materialistic lawyer is likely to view his or her legal knowledge as a skill, not as a set of norms. Most survey respondents reported that "there is . . . a powerful tendency of practitioners to be dismissive and contemptuous of scholars and especially of theory,"<sup>97</sup> that "some senior practitioners pay too little attention to legal theory."<sup>98</sup> This disdain for theory may reflect an appropriate skepti-

95. Practitioner #11 at 3. Other similar comments:

I have seen former employees of defendants who had given declarations to plaintiffs meet with defense counsel just prior to a deposition, agree to be represented by such counsel, and then suffer an amazing loss of memory as to everything contained in their declaration. I have seen defense counsel interrupt a deposition when unfavorable testimony was being given, and warn the witness of the penalties for perjury.

Practitioner #3 at 10.

The single most prevalent kind of unethical conduct I see in practice is the mis-citation of legal authority or misstatement of the facts. I think that the cause of this behavior is a "win-at-all-cost" mentality of a great many legal practitioners. I have found to a disturbing degree that many lawyers will simply say anything (true or untrue) to advance their case.

Practitioner #8 at 4.

The most prevalent unethical conduct I have seen is the willingness of witnesses to distort the truth, or engage in outright falsehoods. I am convinced that this is extremely common, and lawyers must be vigilant to prevent this. I have also seen many lawyers go beyond advocacy, and make significant misrepresentations in court. Finally, I think that there is a great deal of abuse of the legal system — deliberate efforts to delay, increase expenses, etc.

Practitioner #16 at 5. "What troubled me [in private practice] was the way clients are billed. First, as you know, routine matters are often over-lawyered and over-papered, thereby driving up legal bills. Second, many law firms have turned services for word processing, copying, faxing, etc., into mini-profit centers." Government Lawyer #2 at 3-4.

The worst — and most prevalent — [abuse] is overpapering a case to attempt to raise the costs of litigation so a less well heeled opponent will give up. I also see a lot of lawyers who ill serve their clients by failing to look into the merits of a suit before filing.

Practitioner #9 at 3.

[B]ig law firms pull the wool over clients' eyes and often agree to take on something they know nothing about but which has come their way because of their panache. I have so often seen situations where practicing lawyers don't know what they are doing. New associates will then be set a task with totally ignorant and uninformed supervision where a lot is at stake for the client.

Practitioner #13 at 6-7; see also Sharon Walsh, *Lawyers' Clients Get a Little Cross Examining Bills: Overcharges, Questionable Fees Come Under Increased Scrutiny*, WASH. POST, June 8, 1992, Washington Business, at 1.

96. Practitioner #18 at 6.

97. Law Teacher #2 at 4.

98. Practitioner #11 at 3.

cism about “impractical” scholarship, but it also may reflect a contempt for the normative stance that the theoretician takes. It may reflect the incorrect view that, if courts and enforcement agencies will permit a particular action (because doctrine permits it), then there is no good reason not to pursue it.

Senior practitioners tend to be very result-oriented, but they usually want to see a well-reasoned theoretical justification for the position they have reached. They tend to regard legal theory as a tool to be used to justify the outcome they favor, rather than as a guide to reaching a decision.<sup>99</sup>

Does unethical practice represent a “growing disjunction” between legal education and legal practice? If law schools are teaching students to be unethical, and these students become unethical practitioners, then there is no real “disjunction” at all. Likewise if law students are fundamentally unethical upon entering law school and remain so upon entering practice (despite the best efforts of the law schools to inculcate a different ethic). To quote one survey respondent:

I personally feel that all lawyers have an obligation to do work on behalf of underrepresented people. Our students, if you surveyed them, would say the same. In reality, few do anything. The reason is not lack of curricular opportunities; there are far more courses in these areas than students to fill them. I think that (1) there are not many public interest jobs, (2) most students want to make lots of money, (3) they want to focus on becoming successful (I mean this in a positive sense) and think that there is always time later for the public interest stuff. I also think that law students go through great angst over this issue. They come to law school, on the surface, wanting to save the world. Law school doesn't deflect them from this goal (although they blame school). Rather, they discover that they have a venal side. This deep contradiction leads to a lot of breast beating, but cynics know what the final answer will be — go make money and obtain job security.<sup>100</sup>

If this picture is really accurate, then the problem of unethical practice is quite different in kind from the problem of “impractical” scholarship and pedagogy.

However, I do not believe that the picture is accurate. Individual “greed” partially explains why lawyers behave unethically,<sup>101</sup> but it is

99. Practitioner #10 at 4. Other former law clerks reported the same thing: “I don't think that partners or other senior practitioners have the luxury to pay much attention to legal theory; time is short and clients won't pay for it.” Practitioner #8 at 4. “I . . . find that, in practice, some senior practitioners start with a desired result, and then seek legal argument to support it, rather than first finding out if the position that they wish to advance is truly justified under the law.” Practitioner #3 at 8.

100. Law Teacher #4 at 3-4.

101. Some of my former law clerks emphasized the role of “greed”: “[A]mong those who choose private practice as a long-term career, [public interest work] appears to be the exception, and many private practitioners are not concerned with much more than their own success and material comfort.” Practitioner #3 at 12. “The primary cause of [unethical] behavior is greed

not the whole answer. At the typical materialistic law firm, altruistic individuals face institutional pressures to behave in a materialistic fashion.

I know that the impetus for, and the vast bulk of time devoted to, pro bono activities comes predominantly from associates, not partners who came of age during the 60s and 70s. This pro bono work, moreover, is done despite the fact that the minimum billable hours requirement for this firm (as for all others) has increased dramatically over the past 10 to 15 years, and particularly the past five years . . . . My own view is that it is the economic pressure to bill 2,000 or more hours a year, not any lack of altruism among younger lawyers, that suppresses the amount of pro bono work done today.<sup>102</sup>

Thus, as far as I can tell, many graduating law students are not greedy materialists, fully prepared to engage in unethical practice. Rather — assuming that my survey is representative — there is a significant percentage of “ethical graduates,” who find it difficult or impossible to realize their ethical ideals in private practice.<sup>103</sup> Law school may well

— of the client and of the lawyer.” Practitioner #9 at 3. “I have also seen, many time[s], clients’ interests seconded to personal ambition or the bottom line. I perceive greed to be at the bottom of a lot of this.” Practitioner #13 at 7.

102. Practitioner #12 at 2. Other former law clerks describe the situation despairingly:

I do think that private practitioners, at least the ones I practice with, care about issues of social justice. In fact, I would go so far as to say that a lot of my coworkers care deeply about issues of social justice. And as a result, they feel deeply guilty that they aren’t doing more, or anything at all, to advance their visions of social good. I think that a lack of opportunity to serve the public interest ends up being a chief cause of job dissatisfaction among the young associates I know.

Practitioner #2 at 5-6.

I would lower the salaries [at law firms] and cut back on the tremendous pressure and horrendous hours. I think that would weed out some of the “bad actors” whose motivation is solely monetary. It might leave the rest enough time and energy to develop as balanced individuals who could bring a broader perspective to the practice of law.

Practitioner #14 at 3.

Practically speaking, as a partner in a large and successful law firm, the greatest problem with the practice of law is the paralyzing effect of the legal salary structure. Partners and associates in law firms make a significant amount of money. The cost is that . . . it is essential to work many hours. . . .

I would be willing (and I suspect others would be too) to forego a portion of my income in order to reclaim more of my time . . . . The problem is that it is difficult for a firm to do that (even if it wanted) and remain at the “top” of legal circles.

Practitioner #6 at 6-7.

103. Indeed, many of these graduates feel constrained by student debt to enter private practice in the first place.

We all can talk in lofty idealistic language about the need for quality legal services to low income folks, and how law schools should do more to encourage their students to forego the big bucks. But until something is done to accommodate the monthly debt of those who go into public interest law, no real change will happen.

I am a typical case in point. As you know, I had to move back in with my parents (at the age of 30, with my [spouse] and [child]) in order to leave the private sector and take a government job . . . .

The problem is that my student loan debt (most of it from law school) totals over \$35,000; or, translated, means I pay \$500 per month. This is roughly equivalent to rent for a two-bedroom apartment in a nice suburb in this city.

Government Lawyer #3 at 1.

have nurtured these ideals.

[My law school] offered programs in, and gave serious attention to, the problems of under-represented and unrepresented individuals. I personally participated in a program to assist battered wom[en] obtain TROs and other legal redress against those abusing them. In addition, I participated in [the law school's] externship program . . . . Both of these programs helped instill in me a desire to work in the public sector.<sup>104</sup>

At the very least, it appears that law school does not extinguish the “ethical graduate’s” ethical ideals.

Thus, unethical practice *does* seem to represent an important disjunction between legal education and legal practice. If ethical graduates are unable to find a place for themselves in private law firms — if they are forced by institutional pressures to behave unethically, and are ultimately made greedy themselves — then private firms are “failing” the academy.<sup>105</sup> Moreover, this failure is growing. As I have already suggested, large law firms are increasingly materialistic.<sup>106</sup> In my view, the recent past has seen a radical transformation in the nature of legal practice. The tremendous pressure to create revenues, which so many of my former clerks describe, is a wholly novel phenomenon. When I practiced law at a large firm, some twenty years ago, I felt no such pressure, nor did my colleagues. We enjoyed our work, because we felt the work was valuable: valuable to society, and to ourselves. The billing of clients was not the single, overriding goal

104. Government Lawyer #2 at 5. Other similar comments: “[Law school had] a comprehensive legal justice and clinical program. . . . In law school, I saw social justice as a tool for helping people live lives that were less fettered by injustice and legal obstacles and I still see it that way.” Practitioner #13 at 7-8; “Appropriate parts of my legal education focussed on how to help unrepresented or underrepresented persons in our society. . . . The student-funded fellowship and clinical courses provided practical training to students who wished to help underrepresented persons.” Practitioner #11 at 3-4.

My legal education didn’t focus in any specific way on how to help unrepresented or underrepresented persons, though the importance of doing so was stressed in a general way fairly routinely by many of my professors. But I know that other people learned a good deal, in a very concrete way, about helping unrepresented people through their work in clinical programs. That I didn’t have the same learning experience is my own fault, and not the product of any lack of opportunity.

Practitioner #2 at 5.

105. Of course, to the extent that staggering student debt forces graduates to overvalue salary when choosing between the public and private sectors, or among private employers, *see supra* note 103, the academy is in a sense “failing” itself.

106. *See* sources cited *supra* note 92 (discussing growth of large, materialistic law firms); *see also* Gordon, *supra* note 87, at 51:

[T]he rhetoric of decline has captured something real. Analysis of changes in the social conditions arguably facilitating political independence can lend fairly strong support to the view that, at the level of elite private practice, such conditions have indeed eroded in this century, and perhaps eroded most rapidly during the revolution in the organization of large firm practice that has occurred in the last ten years.

*Id.* at 51.

that it has now become — a compulsion that drains pleasure and honor from the practice of law.

My point here is that law firms are significantly responsible for the growing disjunction between legal education and practice. All too often, practitioners or judges criticize the academy, without recognizing that law firms and schools have a joint responsibility to serve the system of justice. While law schools must produce “practical” legal scholarship, and prepare law students to practice as professionals, law firms must likewise ensure that young graduates do not become materialistic, unprofessional practitioners. Law firms have no right to complain that law graduates are “unskilled,” where those skills are simply used to maximize profit.

If law firms continue on their current course, law schools must work all the harder to create “ethical graduates.” Such graduates will at least attempt to resist the institutional pressures and practice law in a manner that serves the public interest. The J.D. who has no interest in pro bono work, and knows nothing of professional responsibility, will succumb all the more readily to the pervasive materialism of the law firms. The law schools should perhaps not be blamed for unethical practice, but they have considerable power to correct it. “Because of the pressures in the profession to cut corners — and the prevalence of this — I think it is extremely important that future lawyers be given a strong foundation in ethics as part of their education . . . .”<sup>107</sup> But legal scholars must have some real understanding of practice before they can usefully address the ethical problems of the profession. A scholar who disdains practice is ill-equipped to consider such issues.

Unfortunately, as my survey shows, a “strong foundation in ethics” is not being built in legal education.<sup>108</sup> Our law schools must place much more emphasis on serving underrepresented persons.<sup>109</sup> The professional responsibility class must not be “a joke.”<sup>110</sup> More

107. Practitioner #16 at 2.

108. On the teaching of legal ethics, see, for example, *Teaching Legal Ethics: A Symposium*, 41 J. LEGAL EDUC. 1 (1991); Symposium, *Ethics in Academia: Power and Responsibility in Legal Education*, 34 J. LEGAL EDUC. 155 (1984).

109. “[M]y legal education included very little emphasis upon the importance of serving unrepresented or underrepresented persons. The issue was raised both inside and outside of class, to be sure, but it was generally presented as a dilemma that students would have to confront on their own after law school.” Practitioner #4 at 4.

[My law school] is pretty weak in this area. My own training left me with a reasonably good idea of the areas I would like to work in if I set out to represent the underrepresented, but virtually no idea of how actually to initiate such a project. If I ever put my shoulder to that particular wheel, I’m afraid I’ll have to learn the nuts and bolts on the job. Law Teacher #3 at 2. See generally Edwards, *supra* note 89 (discussing need for pro bono work, and for law schools to foster commitment to such work).

110. The one course that was irrelevant and disdainful was Professional Responsibility. As taught, it was a joke. Although we read and became quite familiar with the code and

generally, ethics can and should be taught pervasively, in almost every law school course.<sup>111</sup> As one former law clerk notes: “[T]here is very little emphasis on the role of the attorney in society, the boundaries of good advocacy, or the responsibility of the attorney to other parties and courts in law school.”<sup>112</sup> The “role of the attorney” can be addressed whenever law teachers discuss practical legal problems — be they problems of contracts law, or antitrust law, or labor law. Here, again, is the link between scholarship and pedagogy: “practical” scholars, who attend to concrete legal problems in their scholarship, and ideally have practiced law themselves, are much better suited to teach law students what ethical practice means. Conversely, “[a] teacher who is seen by students to be disengaged from political reality and the humdrum affairs of professional life may be disadvantaged” — indeed, *will* be disadvantaged — “in the effort to inculcate moral standards applicable to professional thinking and conduct in public roles.”<sup>113</sup>

### CONCLUSION

One of my former law clerks (with about ten years of experience) opined that, although he strongly agreed that there has been a growing disjunction between the teaching and practice of law, there were “broader problems”<sup>114</sup> in the profession as a whole:

Lawyers no longer really view themselves as part of a coherent profession, and as officers of the court. I am not so much referring here to the

model rules, there were no materials on case law relating to ethics. We gained no familiarity with the different procedures for enforcing the rules. And there was no sense that we might actually be presented with difficult problems that would require action.

Government Lawyer #1 at 5. Many other comments reflected the same sentiment: “For reasons that are a mystery to me, ethics in most law schools is a despised course. Perhaps the reason is that it is one of the only upper class mandatory classes . . . , or perhaps the problem is that the school sends signals that the course is unimportant.” Law Teacher #4 at 3.

It seems to me that a chief problem with ethical instruction today is the dominant focus on “rules.” . . . [T]oo many students come out of law school with a passable knowledge of what minimum standards of conduct are required by the Rules of Professional Responsibility, but too little thought to what responsibility they may have to set aspirational standards for themselves that surpass those set in the Model Rules.

Practitioner #4 at 4.

The subject of legal ethics is extremely important and very much underemphasized in law school. The three most common ethics shortcomings that I see involve honesty, loyalty to client, and confidentiality. It may be difficult in law school to instill the importance of honesty in pleadings and representations to the court. Nevertheless, we should try.

Practitioner #6 at 5.

111. See David T. Link, *The Pervasive Method of Teaching Ethics*, 39 J. LEGAL EDUC. 485, 485 (1989) (describing Notre Dame’s curriculum, where “every professor in every course [is expected] to discuss ethics along with substantive, theoretical, and procedural law”).

112. Practitioner #10 at 5.

113. Carrington, *supra* note 9, at 791.

114. Government Lawyer #4 at 4.

“hired gun” mentality, but instead to the lack of identity and commonality between parts of our profession. Private practitioners, law professors, government lawyers, and public interest lawyers increasingly view themselves as having little in common. Not only is the advocacy of each group driven by its own clients and constituencies, but each group’s identity is largely disconnected [from] the profession as a whole.

Much attention has been focused on the development of a bottom-line, business mentality among law firms and their failure to focus on the broader needs of the profession and the public interest. The other groups in our profession, however, have also gone down the path toward isolation.

As private lawyers grew rich in the 1980’s, many public interest lawyers developed a deep sense of martyrdom and moral superiority over the rest of the profession. For some, this excused them from having to think hard about difficult public interest issues in which they were involved — since they were the public interest lawyers, whatever position they take must be correct.

In an era of dwindling resources, government lawyers, at least at the state level, often take on a siege mentality, reflexively, protecting the state from attacks from both private practitioners and public interest lawyers. . . .

[And] too many law professors see themselves as intellectually superior, and more importantly, disconnected from the rest of the profession. It sometimes seems that the issues most fiercely debated in the academic community are the ones least relevant and accessible to the rest of the legal community.<sup>115</sup>

The force of these sentiments cannot be doubted, but I still return to the idea expressed by then-Professor Felix Frankfurter, that “[i]n the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.”<sup>116</sup> I earnestly believe that much of the growing disarray that we now see in the profession is directly related to the growing incoherence in law teaching and scholarship.

I recognize that there are people like Professor George Priest who not only acknowledge the growing disjunction between legal education and the legal profession, but seek to encourage it. Recently, Priest argued that,

[o]ver the next twenty-five years, these trends will accelerate. The dis-

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115. *Id.* at 3-4. Another former law clerk (also with about ten years of experience) made the same point:

I fear that law schools and legal practice have more and more become separated and distinct. Indeed, I sometimes wonder how much law professors care about the actual practice of law in our society — other than, perhaps, as a subject of study and criticism — and I similarly wonder how much practitioners care about law schools — other than as a source of associates and their billable hours.

Practitioner #18 at 9.

116. *See supra* text accompanying note 1.

tance between the bar and the law school will become greater. The obsolescence of the law faculty will increase. Divisions within the law schools and battles over faculty appointments will escalate. Some may view these trends, as many do today, as signaling the disintegration of the academy. Far from disintegration, they are a sign of intellectual progress and advance.<sup>117</sup>

According to Priest, “[l]egal education” should focus on “the application of the social sciences and social theory to criticize legal analysis and the legal system.”<sup>118</sup> Legal scholars, he says, should not be “burdened by the mastery of the legal system’s details,” but, rather, should ponder “ideas relevant to the law.”<sup>119</sup>

These arguments are, in my view, utterly specious. For one thing, I do not understand how a *legal scholar* can seriously and fruitfully consider “ideas relevant to the law” without some “mastery of the legal system’s details.” For another thing, even Priest understands that the practice of law is and will remain a “professional” undertaking in our society, and, thus, there always will be law schools to serve as the training ground for lawyers. Law schools cannot cease to offer doctrinal education and “practical” scholarship any more than medical schools can discontinue core courses like anatomy.<sup>120</sup> What we may see, however, is the obsolescence of certain “major law schools,”<sup>121</sup> as Priest calls them, if these schools persist in ignoring the needs of the profession.

There remains the practical question: What is to be done? What will remedy the growing disjunction between legal education and legal practice? Is that remedy within the power of individual lawyers, or individual law schools and firms? Or does it rather require some kind of coordinated effort by the profession?

As I have tried to argue, the problem at hand is a problem of the lawyer’s role. Among other things, the law professor’s role is to produce what I have called “practical” scholarship — scholarship that attends to legal doctrine — and to provide law students a doctrinal education.<sup>122</sup> Similarly, the role of the practicing lawyer is an ethical

117. George L. Priest, *The Increasing Division Between Legal Practice and Legal Education*, 37 BUFF. L. REV. 681, 683 (1988/1989).

118. *Id.* at 681.

119. *Id.* at 682.

120. I have no doubt that it would be intellectually stimulating, even useful, for Priest-like scholars in the medical profession to focus on “the social sciences and social theory to criticize” medical analysis and the medical system. But this would not moot the requirement of, for example, the practical training that a prospective surgeon needs in order to be able to perform surgery.

121. Priest, *supra* note 117, at 683.

122. Again, this is not the professor’s *sole* role; law schools should also engage in pure theory. See, e.g. *supra* note 84.

role. A practitioner should at times sacrifice self-interest for the public interest, in choosing and in representing clients. Perhaps other social actors properly assume a self-interested, profit-maximizing stance (although I tend to doubt it), but professionals should not.

To say that lawyers have mistaken their proper roles, however, is not to say, necessarily, that individual law professors or practitioners have the power to correct this mistake. Some do: for example, I see no reason why a tenured professor cannot simply choose to engage in "practical" scholarship and pedagogy. After all, academic freedom is the point of tenure. On the other hand, the professor without tenure may not be so free. At a law school dominated by "impractical" scholars, a junior professor might risk his or her career by eschewing high theory. Similarly, at a law firm where "billable hours" is the main criterion for partnership decisions, associates may find it difficult to work pro bono or even to keep an ethical distance from their clients.

Fortunately, I do not think that institutional constraints have obliterated the professional power of junior law professors, or of associates, let alone of senior professors or partners. The "law and" movements have not yet overrun the law schools. Thus junior professors can still, I hope, expect that fine doctrinal work will suffice for tenure, although that work will probably need to have theory integrated with doctrine, and to take the form of law review articles rather than treatises. Similarly, large-firm associates can surely still uphold the norms of professional responsibility. They also still have the capacity, albeit too limited, to serve unprofitable clients.

In short, I believe that individual lawyers retain some power, and thus some responsibility, to assume their appropriate roles. The arguments I have formulated in this article — the arguments for ethical practice, and "practical" scholarship and pedagogy — are not simply addressed to law firms and law schools.

However, it is clear that ethical practice or "practical" scholarship and pedagogy are vastly facilitated by congenial institutions. To some extent, this is a matter of removing the constraints on individual choice: reducing the billable hours requirement, or assuring junior faculty that tenure does not require high theory. But the "practical" law school or the ethical firm does more than simply permit lawyers to assume their appropriate roles. It actively encourages them to do so. It nourishes an institutional culture where pro bono work, or treatise-writing, is seen as valuable; where lawyers who are not altruistic, or who deprecate doctrinal work, realize the merits of a different approach.

An institutional culture is nourished by the leaders of institutions — by the executive committees that set “production” standards for large-firm lawyers; by the law school deans who design and staff the core curriculum; by the faculty members who hire and tenure professors. It is also nourished by the individual members of the institution, who can exercise the professional power accorded them to advance rather than thwart the institution’s norms.

I have no doubt that, if individual lawyers and legal institutions took professionalism to heart, the growing disjunction between legal education and practice would be reversed. I wholly reject the argument that these institutions are gripped by larger social forces, that preclude their free action. To be sure, the rise of economics and other social sciences explains why the “law and” movements have become popular, and the ascendancy of materialism may explain why law firms maximize profits, but these phenomena do not constrain law schools to ignore doctrine, or firms to abandon ethics. A single law school can decide to reemphasize legal texts, even if other law schools do not, while a single law firm can reorient its activities toward the public interest. At the very least, this is true of the most prominent schools and firms, which are just the institutions where the growing disjunction between practice and education is most salient. I am not arguing against some kind of coordinated action by the profession. But individuals and institutions should not wait for such action. They have no excuse for waiting, and the profession cannot afford their lack of leadership.