

# THE GROWING DISJUNCTION BETWEEN LEGAL EDUCATION AND THE LEGAL PROFESSION

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## 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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The author wishes to acknowledge and express his appreciation for the research assistance of Matthew D. Adler, J.D. 1991, Yale University, in the preparation of this article.

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 in any 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 fight 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 inmaterialistic — 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 inmaterialistic.

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

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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.

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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.

## 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. . . .

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. . . [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

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 "élite" 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>

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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.