Can Law Survive Legal Education?

*Ernest J. Weinrib**

I. THREE ACTIVITIES 401
II. DISJUNCTION: THE ROLE OF INSTRUMENTALIST ANALYSIS 406
 A. *The Example of Economic Analysis* 406
 B. *The Dynamic of Instrumentalism* 410
III. OVERCOMING THE DISJUNCTION 415
 A. *The Character of Private Law* 415
 B. *The Stages of Elucidation* 417
 C. *Legal Education* 425
IV. THE INTERDISCIPLINARY TURN 428
V. CONCLUSION 437

I. THREE ACTIVITIES

Legal education exists at the confluence of three activities: the practice of law, the enterprise of understanding that practice, and the study of law's possible understandings within the context of a university. The first of these, the practice of law, consists of the activities consciously governed by law, including, for example, lawyers giving legal advice, citizens contemplating the legality of prospective actions, legislators creating law within the limits of their jurisdiction, and judges determining the rights and duties of litigants. It thus comprehends the entire field of legal institutions, legal doctrine, and legal interaction. The second activity, the enterprise of understanding law, refers to the elucidation of the character of this practice. This enterprise seeks to determine the extent to which the practice's various characteristics can be grasped as exhibiting, through the coherence of their interrelationships, some generically determinate character. The third activity, university study, requires that the student's reflections about law be appropriate to an institution devoted to caring for the intellectual inheritance—the stock of ideas,

HeinOnline -- 60 Vand. L. Rev. 401 2007

images, beliefs, skills and modes of thinking—that compose the world's civilization.[1]

These three activities exercise a reciprocal effect on one another. On the one hand, the practice of law supplies the materials that are to be understood through university study. On the other hand, that practice is transformed by the very enterprise of articulating understandings of it. Scholars are not merely the passive recipients of the law's materials. Rather, their understandings influence the practice by making practitioners conscious of the possibilities that are implicit in it.[2] When these understandings originate in the universities and are thus invested with the authority of prestigious institutions of learning, the practice of law itself can become either (at best) more aware of law's distinct voice in the conversation of civilized humanity or (worse) more prone to succumb to prevailing academic orthodoxies.

The central challenge that has faced legal education since it was wrested from the legal profession and lodged in the universities[3] has been how to integrate the three activities. The relation between the practice and the university study of law has proved particularly problematic. One influential critique of legal education laments the growing disjunction between them:

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* University Professor and Cecil A. Wright Professor of Law, University of Toronto. I am grateful to Ariel Porat for his comments on an earlier draft.

1. MICHAEL OAKESHOTT, *The Study of 'Politics' in a University: An Essay in Appropriateness*, *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 184, 187-94 (new and expanded ed., 1991) (1962). As will be apparent, Michael Oakeshott's work has significantly influenced my remarks in this essay.

2. The classic statement of this is Friedrich Carl von Savigny's comments on the Roman jurists:

> [T]he action of the jurists, appears at first sight a dependent one, receiving its materials from without. However, by their giving to the materials so presented a scientific form which strives to disclose and perfect the unity dwelling in them, there arises a new organic life which shapes and reacts upon the materials themselves, so that from science as such, a new sort of generation of law incessantly proceeds.

FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 37-38 (William Holloway trans., 1867).

3. In Canada this happened relatively recently. The decisive event was the defection of three of Canada's leading law professors (Cecil A. Wright, Bora Laskin, and John Willis) from the law school operated by the Law Society of Upper Canada and their establishing the modern Faculty of Law at the University of Toronto in 1949. Within a decade, the Law Society of Upper Canada surrendered control of legal education to the universities by recognizing that graduation from a university faculty of law qualified the graduate to enter the profession without penalty. For a description of this "revolution" in Canadian legal education, see C. IAN KYER AND JEROME E. BICKENBACH, THE FIERCEST DEBATE: CECIL A. WRIGHT, THE BENCHERS, AND LEGAL EDUCATION IN ONTARIO 1923-1957 (1987). For a recent discussion, see R.C.B. Risk, *My Continuing Legal Education*, 55 U. TORONTO L.J. 313 (2005).

HeinOnline -- 60 Vand. L. Rev. 402 2007

> The schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use. . . . 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. . . . [I]f 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.[4]

Formulated in these terms, the critique forcefully indicates what its author thinks is at stake. The practice of law and its university study as currently constituted are regarded as competitors, such that the university's preoccupation with "theory" operates "at the expense of" practical professional concerns. The proper function of the university study of law, according to this critique, is to produce scholarly work for the professional consumption of those engaged in the practice of law. The diagnosis, in effect, is that the practice of law is effaced through university study, and the remedy suggested is that the latter be recalled to its "principal mission" of being useful to the former.

This criticism has, I think, a truth that should be recognized, though my version of this truth is perhaps not what its author intended. A disjunction between the practice of law and its university study would indeed be disquieting. This is not, however, because the disjunction would be a disservice to the legal profession (though it might be), but rather because it would be a disservice to the university itself.

The university exists as a locus for the study of law not for the sake of the legal profession, but because law is a component of the intellectual inheritance of civilization. The "principal mission" of university study is to care for and develop this inheritance. That the legal profession should benefit from this through the university's graduates and its ideas is all to the good. Moreover, it is both desirable and necessary that those who are most intimately connected with and conscious of the workings of law should support its study within the university—thus manifesting a commitment to the idea that law is integral to civilized modes of thinking and living. But criticism of the university study of law should come from a standpoint *internal* to university activity itself. Accordingly, the disjunction between legal education and the legal profession is troubling only if it represents a failure on the university's own terms.

The disjunction would be such a failure in the following sense. University study of any kind must have a definite object; it must be

4. Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34, 41 (1992). Judge Edwards's views are extensively discussed in Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993).

HeinOnline -- 60 Vand. L. Rev. 403 2007

the study of something. Law is a phenomenon that exists only through a set of legal doctrines, institutions and juristic activities. The university study of law can therefore be nothing other than the study of the practice of law. Accordingly, legal education is inevitably concerned with the activity of "judges, legislators, and practitioners," not in order to produce scholarship that they "can use" (though, if they can legitimately use it, so much the better), but in order to reflect upon the meaning and intelligibility of their activity. A disjunction between the practice of law and the university study of law is troubling because it suggests that the university study of law actually has no object, that is, that it is the study of nothing, similar to the zoological study of unicorns. Such study would be a failing from the university's standpoint, quite apart from its uselessness to the legal profession.

But what does it mean to say that the university study of law is disjointed from the practice of law? The answer lies in how these two activities conceptualize the character of law. If the university study of law expressly or implicitly attributes to law a different character than that which is presupposed in the practice of law, then one cannot say that the practice of law is the object of university study. Under those conditions, the practice of law and the university study of law would be activities lacking a common interest; the law that the latter studied would not be the same as the law that the former practiced.

Thus, the difference between the two activities of practice and university study has to be mediated through the third activity, that of understanding the law. For only when that understanding is common to the law as practiced and as studied is there no disjunction between legal education and the practice of law.

So formulated, the issue raised by the supposed disjunction between the legal profession and legal education turns out to be primarily one of legal theory rather than one of straightforward sociological observation. Of course, what is discussed in a university differs from what is discussed in a law office or a judges' conference. What might link the two is a conception of how law is to be understood. Those participating in university life as students, teachers, and scholars regard law as a significant component of civilization's intellectual inheritance and attempt to think through the features implicit in the practice of law that make that practice worthy of academic attention. The process of identifying these features and thinking them through requires reference, implicitly or explicitly, to some understanding of what the practice of law is. This is an exercise in legal theory, because legal theory consists of nothing but a self-conscious examination of the range of possible understandings of law. And so the critic who blames the disjunction on too much "abstract

HeinOnline -- 60 Vand. L. Rev. 404 2007

theory" necessarily, if ironically, issues an appeal for further theorizing.

In this Article, I wish to present more concretely this abstractly formulated notion of disjunction. My focus is on the way that this disjunction arises in the university study of private law. A justification for this focus is that private law, as the enduring bedrock of legal education, is a primary vehicle for the transmission of conceptions of legal understanding. More importantly, the simplicity and the restricted scope of the relationship between the parties allow the disjunction and its implications to be set out with particular clarity. Part II of this Article suggests that prevailing instrumentalist approaches within the legal academy, exemplified by (but not confined to) certain versions of the economic analysis of law, systemically distort legal practice. This distortion effaces the characteristic concepts of private law, ignores the direct relationship between the parties, and assimilates private law into public law. In these respects, economic analysis fails to comprehend private law as the distinctive kind of normative phenomenon that it is.

My purpose in making these observations is not to criticize economic analysis in particular, but to point to a structural problem that accompanies an assumption—that law is to be explained instrumentally—that is widely popular in the academic treatment of law and that yet separates the university study of law from law's practice. Economic analysis thus merely provides the paradigmatic example of an instrumentalism that emerges from a distinctly academic enterprise but that mischaracterizes the legal practice it purports to explain. In Part III, I will sketch a different mode of legal understanding that both respects legal practice and affirms private law as a component of our intellectual inheritance that is worth studying in its own terms. Finally, in Part IV, I will trace the implications of this mode of understanding for the interdisciplinary turn that is a conspicuous feature of contemporary legal education.

My goal in this Article is a modest one. It is easy to read critiques of present legal education as exhortations to exclude, either through curricular change or appointment policy, certain kinds of currently entrenched enquiry.[5] My argument here, however, is not about what to exclude but what to include. By exploring the supposed disjunction between practice and university study, and by suggesting how to overcome that disjunction, I want to point to a conception of the core of legal education, at least for private law, that links the three

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5. This is, for instance, the way Sandy Levinson reads Judge Edwards' critique as stated in Sanford Levinson, *Judge Edwards' Indictment of "Impractical" Scholars: The Need for a Bill of Particulars*, 91 MICH. L. REV. 2010 (1993).

activities. This in no way denies the insights of other ways of thinking about law. Inasmuch as they are about law, however, those insights presuppose—and therefore are ancillary to—an understanding of law that is not disjointed from the practice of law. Thus, my focus is on what legal education should necessarily deal with, whatever else it deals with.

II. DISJUNCTION: THE ROLE OF INSTRUMENTALIST ANALYSIS

A. The Example of Economic Analysis

To see the sort of disjunction that I have in mind, consider the notion, popular among expositors of the economic analysis of law, that economic efficiency is the key to understanding tort doctrine. The basic assumption of this approach is that a defendant should be liable for failing to guard against an accident only when the cost of precautions is less than the probable cost of the accident. From the economic standpoint, the goal of the liability rules of private law is to provide incentives for cost-justified precautions. Ambitious claims have been made on behalf of this mode of analysis: Economic ideas have been said to reveal the inner nature,[6] implicit design,[7] and unifying perspective[8] for tort law.

This approach constitutes a notable attempt to link the university study of law to the practice of law. On the one hand it draws on the insights of economics, the academic discipline that provides a systematic understanding of what Hegel called "the infinitely complex criss-cross movements of reciprocal production and exchange."[9] On the other hand, it deploys this discipline to explain leading doctrines in the practice of tort law. The vast academic literature that this attention to economic efficiency has inspired is one of the most impressive achievements of contemporary legal scholarship.

One would have thought that an approach that purports to reveal the inner nature of tort law would be particularly illuminating about the concepts that pertain to tort law. Negligence liability, for instance, involves a conjunction of legal concepts, such as duty, proximate cause, factual cause, and the standard of reasonable care.

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6. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 361 (1990).

7. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW vii (1987).

8. RICHARD A. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 2 (1982).

9. G.W.F. HEGEL, THE PHILOSOPHY OF RIGHT § 201 (T.M. Knox trans., Oxford University Press 1967) (1820).

HeinOnline -- 60 Vand. L. Rev. 406 2007

Such concepts are fundamental to our understanding of tort liability because they structure the thinking of those who participate in the practice. Through such concepts, tort law discloses its *own* normative character, thereby indicating the terms in which it is to be understood. Revealing the inner nature of such concepts would (one would expect) disclose how they function or should function within the reasoning of those engaged in legal practice. Among the issues that would then be addressed are: What are the conditions that call each of these concepts into play? How are they related to each other and do they form a coherent set? What is the relationship between the abstract formulations of these concepts and the institutional processes of adjudication that particularize them for specific cases? And are these concepts suitable vehicles for the normative considerations that justify or can justify the determination of liability? Attention to these issues would involve taking the concepts seriously as objects worth explicating in their own terms, with a view to examining whether they have or could have the significance that tort law ascribes to them when it orients legal practice, as manifested in the reasoning of lawyers and judges, along their lines.

In fact, economic analysis does the opposite. When economic analysis is presented as the key to understanding tort law, the point of the analysis is not to take the fundamental concepts seriously as concepts used in legal practice, but to render them otiose. Economic analysis has its own stock of ideas that operate without reference to the legal concepts. The result is that ideas about economic efficiency replace rather than illuminate the legal concepts. Instead of functioning as vehicles of thought, the legal concepts are at most labels pinned to conclusions once economic analysis has done all the work.

Consider two instances, causation and intention. Causation plays a central role in determinations of liability as a matter of legal practice. For the economic analysis of tort law, however, causation turns out to be an idea "that can largely be dispensed with."[10] Given that the purpose of tort law is thought to be the promotion of efficiency, the defendant will be held liable—and thus deemed to be the cause of an injury—when such liability will promote the efficient allocation of resources to safety. Thus, cause does not mark the law's concern for the transitivity of the relationship between the defendant's conduct and the plaintiff's injury, but functions merely as the label that is attached to the conclusion of a cost-benefit analysis. Because both parties might have taken precautions, the task for economic analysis is to determine not whether the defendant caused the

10. LANDES & POSNER, *supra* note 7, at 229.

HeinOnline -- 60 Vand. L. Rev. 407 2007

plaintiff's injury in the conventional legal sense, but which of them could have avoided the accident more cheaply.

Similarly dispensable is the concept of intention.[11] For the economic analyst, intention refers not (as it does in the law itself) to the actor's purpose with reference to a wrongful consequence, but the connection between the probability of harm and the ease with which the actor could have avoided it. What "establishes a clear-cut economic basis for condemning a distinct form of misconduct" is not the wrongfulness of making another's injury the object of one's conduct but instead the injurer's low cost of avoidance relative to the social benefits of the injurer's activity.[12]

The economic analysis, in other words, produces a disjunction between the significance of tort concepts for legal practice and their significance for academic study. While purporting to offer an account of legal practice—indeed, while claiming to reveal its inner nature—the economic approach instead effaces the very concepts that constitute legal reasoning when determining liability within that practice. In presenting its analysis of concepts like causation and intent, the economic analyst aims not to illuminate those ideas in their own terms, but to make them disappear in the face of the analytic power of economic efficiency. Economic analysis thereby offers a theory that negates rather than explains the concepts supposedly being analysed. The deficiency of this form of scholarship lies not in its presenting nothing about legal practice that "judges, legislators, and practitioners can use,"[13] but in its presenting nothing about legal practice at all.

There is a second respect in which economic analysis does not reflect legal practice. Through the process of litigation, the practice of law directly links the particular plaintiff to the particular defendant. Liability is thus a relational phenomenon in which the court responds to the wrong or injustice that the defendant has done to the plaintiff. This linkage assumes that the same reasons for liability apply simultaneously to both parties. In contrast, economic analysis does not treat the parties as directly connected. Rather, it views them each as subject to different incentives that somehow happen to be conjoined in a finding of liability. For economic analysis the point of liability is to induce the parties to take cost-justified precautions. These incentives, however, apply separately to each of them. Awarding damages against a defendant provides defendants with an incentive to act efficiently, "[b]ut that the damages are paid *to the plaintiff* is, from the economic

11. *Id.*

12. *Id.* at 153.

13. Edwards, *supra* note 4, at 34.

HeinOnline -- 60 Vand. L. Rev. 408 2007

standpoint, a detail."[14] The plaintiff's receipt of the damage award reflects a different group of incentives (such as the need to induce enforcement of the norm and to prevent prospective victims from preempting the precautions incumbent on actors)[15] that do not in themselves entail taking the money from the actual defendant. Both parties are thereby involved in the damage award, but for separate reasons. Efficiency might as easily be served by two different funds, one that receives tort fines from inefficient actors, another that disburses the indicated inducements to victims. Instead of linking each party to the other, economic analysis ascribes the presence of both as to a combination of incentives independently applicable to each. Accordingly, liability is the consequence of one-sided considerations that somehow come together, rather than of relational considerations that treat the parties as belonging together because of what the defendant has done to the plaintiff.

This sundering of the parties' relationship leads economic analysis to mischaracterize private law in a third way. The fundamental concepts that express the unity of the parties' relationship make private law a distinctive mode of legal ordering, with its own discourse, its own internal organization, and its own normative presuppositions. Within the legal domain, the distinctiveness of private law allows it to be contrasted to public law. Private law normatively connects the parties directly to each other, not to the state. Although the state is present through the machinery of adjudication, the purpose of this machinery is merely to give authoritative expression to what the relationship between the parties requires. In contrast, public law is concerned with the forms and limits of the state's exercise of power with respect to those who are subject to it. Whereas private law deals with the relationships between participants *in* the community, public law deals with the relationships between participants *and* the community as embodied in its official organs.

By denying the significance of fundamental concepts private law and negating the unity of the defendant-plaintiff relationship, economic analysis divests private law of the possibility of constituting a distinctive mode of legal ordering. From the economic standpoint, private law is to be understood as a judicially created and enforced regime for the taxation and regulation of inefficient activity.[16] Courts act as administrative tribunals that set norms for efficient behavior

14. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 143 (2d ed. 1977) (emphasis in original).

15. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 192 (6th ed. 2003).

16. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 48-49, 51 (1972).

HeinOnline -- 60 Vand. L. Rev. 409 2007

and exact fines when those norms are breached. The plaintiff's function in initiating a lawsuit is not to secure redress for wrongful injury but to claim a bounty for prosecuting inefficient economic activity. Economic analysis thus submerges the private nature of tort law in a public law of economic regulation.

Thus, the link that economic analysis posits between academic study and the practice of private law is vitiated by its mistaken characterization of that practice. Instead of illuminating private law, economic analysis discards its fundamental concepts, breaks apart its relationships, and subverts its private nature. The economic analysts are not so much concerned with understanding private law as with assessing the degree to which its rules coincide with what efficiency demands. Far from being the focus of their attention, private law is merely the foreign language into which economic discourse has somehow been translated.[17] The result is a profound disjunction between the economic analysis of law as a method of university study and the practice that is being studied.[18]

B. The Dynamic of Instrumentalism

My point in making these comments is not to criticize economic analysis in particular. Rather, in contemporary legal education, economic analysis is paradigmatic of the instrumentalist structure of academic enquiry. What occasions the disjunction with legal practice is this instrumentalist structure, not economic analysis as such. Economic analysis is nothing but an instance of a more comprehensive dynamic.

The instrumentalism of economic analysis consists in the interpretation of tort law as forwarding the goal of economic efficiency. As the disjunction just described indicates, the normative attractiveness of this goal—what makes it worthy of being considered a goal that tort law should forward—does not arise out of the law itself, by reflection, for instance on the fundamental concepts of tort law or on the nature of the relationship between the parties. Rather,

17. For law as the translation of economic principle, see LANDES & POSNER, *supra* note 7, at 23; POSNER, *supra* note 6, at 361.

18. Economic analysis may lodge itself within the practice through the influence of economic scholarship on judges, who then apply it in their judgments. Compare the observations of von Savigny, *supra* note 2. To the extent that this occurs, the disjunction between academic study and legal practice is lessened. However, in its stead a different and ultimately more serious problem arises. Because economic analysis cannot coherently reflect the character of the law, its entry into legal practice sets up irresolvable tensions between the law's fundamental concepts and relational structure, on the one hand, and the economic analysis on the other. Thus, the disjunction between academic study and legal practice is displaced by a disjunction internal to the legal practice, between the economic analysis and tbe practice's concepts and structure.

HeinOnline -- 60 Vand. L. Rev. 410 2007

this goal thought to be desirable independently of tort law and is then given to tort law from the outside. Tort law is only an instrument in the goal's promotion.

Economic efficiency is merely one of the goals that modern scholarship has proposed. These goals come in many varieties, ranging from the general, such as promoting communal responsibility[19] or basic aspects of the good[20] to the more specific, such as alleviating injury.[21] All such goals base their appeal on some conception of human welfare that is considered desirable independently of the law and that the law should therefore strive to forward.

A consequence of focussing on independently desirable goals is that private law is only indirectly implicated in the instrumentalist inquiry. The instrumentalist starts by looking past private law to a catalogue of favored social goals. Private law matters only to the extent that it forwards or frustrates these goals. What the instrumentalist proposes is not so much an understanding of private law as an understanding of social goals. The disjunction of legal education from legal practice is simply the difference between these two projects in understanding.

Regardless of the goal it advances, an instrumentalist analysis of private law mischaracterizes its object in the same way that economic analysis does. An instrumentalist approach makes three errors. First, it imports outside goals for immanent concepts of private law. Second, it ignores the relationship between a plaintiff and a defendant. Third, it wrongly converts all private law into public law.

Instrumentalist approaches substitute for the concepts of private law the outside notions that are appropriate for the promotion of the preferred goal. Instead of working out the meaning of the applicable legal concepts in particular situations, as legal practice requires, the instrumentalist specifies the mechanisms through which the social goal might be forwarded in different circumstances. Because the really important work is done by the apparatus of instrumental reasoning, the law's invocation of the standard legal concepts is regarded as a mere ritual,[22] a veil to be pierced by clear-headed

19. Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1480-1502 (1986).

20. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 59-75 (1979).

21. Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 785-88 (1967).

22. Jerome Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645, 653 (1931).

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analysis,[23] or even as a salutary obfuscation that itself has instrumental value.[24]

Second, within instrumentalist analysis the plaintiff and defendant are not directly related to each other, because no independently desirable goal is congruent with such a relationship. The goals are considered elements of the social good, and therefore are concerned with the overall benefit, however construed, to society as a whole, not with the relationship between two particular parties. Instead of linking the plaintiff to the defendant who has wronged her, instrumentalist analysis groups each party with those who are, from the standpoint of the goal in question, similarly situated. For example, the alleviation of injury, when considered as a goal of tort law, connects the injured party not to the particular person who has wrongfully caused the injury, but to other injured persons who have a like claim on the distribution of society's resources. Analysis in terms of a goal thus breaks apart the relationship between the parties, in order to apply the appropriate goal to each of them. The result is that reading an independently desirable goal back into private law creates a dissonance between the parties' nexus as a matter of legal practice and the goal's indifference to this nexus within the instrumentalist understanding of law. When university study accepts the instrumentalist understanding and develops it, this dissonance appears as a disjunction between university study and legal practice.

Third, for the instrumentalist, all law is public law. The favored goals must be selected by the state and inscribed into a schedule of collectively approved aims. The various method of elaborating the community's purposes—adjudication, legislation, administrative regulation, and so on—are merely the species of the generically single activity of making the goals a legal reality. The singling out of a particular goal from among all the possible goals, the balancing of one goal against competing goals, and the positing of the means for promoting the chosen goals require legislation by political authority. Norms of private law are therefore considered the product of legislative acts, even when formulated through the adjudicative process.[25] Instrumentalism thereby dissolves the very idea of private law as a distinctive mode of legal ordering. Private law turns out to be nothing but public law in disguise.[26]

23. Felix S. Cohen, *Transcendental Nonsense and thc Functional Approach*, 35 COLUM. L. REV. 809, 809-12 (1935).

24. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 107 (1975).

25. Oliver Wendell Holmes, Jr., *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 3 (1894).

26. Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 1 (1959).

HeinOnline -- 60 Vand. L. Rev. 412 2007

These three features of instrumentalist analysis are intimately connected. The legal concepts (such as causation and intent) are the apparatus that the law has elaborated to treat the relationship between the parties as a single normative unit. The process of determining a defendant's liability by working through these concepts is what stamps private law as a distinctive kind of normative ordering. The concepts, the relational unity, and distinctiveness of its form of legal ordering are thus the mutually entailed aspects of private law as a legal practice. Instrumental analysis distances itself from all of these when it distances itself from any of them.

To the extent that contemporary legal education revolves around instrumental understandings, it inevitably separates itself from private law as a legal practice. Economic analysis is simply exemplary in this respect. Those who, out of skepticism about or antagonism toward economic efficiency as a goal, think that legal education should center on different goals, contribute to this disjunction no less than do the economic analysts themselves. The disjunction is the consequence not of one particular goal or set of goals rather than another, but of the very orientation toward goals.

In the face of this disjunction between the instrumentalist understanding and the legal practice, two responses are tempting. Each of these responses leaves the disjunction intact, while submerging one or the other of the disjoined activities.

The first response is embodied in academic work that expressly disconnects the university study of law from legal practice. In private law this work takes the form of "decoupling" the position of the plaintiff from that of the defendant. One suggestion, for example, is that the defendant should pay more and the plaintiff should receive less than the compensatory amount, with the difference going to cover the state's administrative costs.[27] Another example is the suggestion that efficient incentives would be best achieved by arranging that contract damages be awarded to a third party rather than to the victim of the breach.[28] Such decoupling embraces the disjunction by foregoing the aspiration to see the university study of law as an endeavor to understand the practice of law. In terms of instrumentalist scholarship, proposals of this sort represent an advance over the more traditional project of explaining the law. They are based on the recognition that the relationship between the parties constricts the free play of instrumentalist reasoning. Once one unravels the parties' relationship, the limits of legal scholarship are

27. A. Mitchell Polinsky and Yeon-Koo Che, *Decoupling Liability: Optimal Incentives for Care and Litigation*, 22 RAND J. ECON. 562, 562 (1991).

28. Robert D. Cooter and Ariel Porat, *Anti-Insurance*, 31 J. LEGAL STUD. 203, 204 (2002).

HeinOnline -- 60 Vand. L. Rev. 413 2007

set not by the law as an object of the enquiry, but by the imagination, ingenuity and brilliance—all amply present—of the scholars themselves. This allows a more consistent presentation of the kind of instrumentalism favored by the particular scholar. But there is also a parallel disadvantage. Having severed the link to legal practice, these proposals seem to be nothing more than dreamy exercises in instrumentalist utopianism, far removed from the hard-headed contact with the real world that instrumentalists like to profess.

The second response goes in the opposite direction by emphasizing the primacy of legal practice. This response is exemplified in the call, mentioned earlier, for university study to adhere to its "principal mission" of professional training by producing scholarship that can be used by legal practitioners.[29] Offered in the name of overcoming the disjunction between legal practice and university study, the suggestion merely subordinates the latter to the former, raising the question of why this "mission" would require university study at all rather than a more direct system of professional training and apprenticeship. After all, on this conception, what are law professors except legal practitioners with more leisure and lower salaries? By connecting the university study of law with the demands of legal practice rather than with the purposes of the university, the suggestion dismisses the significance of any understanding of law that is not coterminous with legal practice itself. In effect, the university study of law is regarded merely as a parasite on the practice of law.

These two responses are the consequence of viewing law in instrumentalist terms. Instead of attempting to overcome the disjunction between university study and legal practice that instrumentalism creates, the responses cut the Gordian knot by accentuating one element and disregarding the other. The decoupling view has a strong notion of the university study of law, which, however, turns out to be not about law but about the possible artifacts of instrumental reasoning. In contrast, the parasitic view is attentive to legal practice but, given the open-endedness of instrumentalist analysis, sees little value in university study beyond what can be used by legal practitioners. In their separate ways each responds to the problem of disjunction by giving up on it.

29. Edwards, *supra* note 4, at 41.

HeinOnline -- 60 Vand. L. Rev. 414 2007