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ANOTHER "POSTSCRIPT" TO "THE GROWING DISJUNCTION BETWEEN LEGAL EDUCATION AND THE LEGAL PROFESSION"

Harry T. Edwards*

"The Gap Between Legal Education and the Needs of the Profession," the subject of this symposium, is a matter about which I have had much to say over the past two years. In the October 1992 edition of the *Michigan Law Review,* I expressed my deep concern about "the growing disjunction between legal education and the legal profession," in an article with the same title.[1] My thesis was as follows:

> 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. . . .
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> 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.[2]

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1. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession,* 91 Mich. L. Rev. 34 (1992).

2. *Id.* at 34, 41.

The response to the article has been nothing short of extraordinary. Indeed, the editors of the *Michigan Law Review* received so many strong reactions to my article that, in August 1993, they devoted an entire Symposium edition to the subject.[3] I have been overwhelmed by responses to my article, with letters, calls, and oral comments from law school deans, faculty members, students, and members of the bench and bar. Almost all of those from whom I have heard agree that the legal community faces a significant problem.

What is the "problem" of which I speak? I recently heard from the former dean of one of the so-called "elite" law schools, who described the situation as follows:

> [T]he problem began in the late '60s when an increasing number of individuals who aspired to become history professors or economics professors or philosophy professors or political science professors or literature professors discovered that there were few, if any, opportunities in those fields. After spending several years doing graduate work, they finally faced reality and attended law school.
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> Most of these individuals had no real interest in law or in becoming a lawyer, but many were excellent students. As a result, they were hired by law faculties . . . in increasing numbers. After obtaining tenure, many of them began moving back towards their real academic interests—philosophy, political science, economics, history, literature, etc. This led to an explosion of interdisciplinary work in law, as well as to an increasing rejection of the importance of doctrinal analysis even in mainstream courses.
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> Today, this generation of scholars is dominant in legal education, and their priorities hold sway. Moreover, the problem is compounded by the fact that these very same academics tend to encourage only those of their students who are themselves interested in interdisciplinary work to consider careers in academia. And those students who are not interested in interdisciplinary work, but are merely extraordinarily talented lawyers, shy away from a career in the academy because they know that the kind of work that they would be interested in doing is not valued.[4]

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3. Symposium, *Legal Education,* 91 Mich. L. Rev. 1921 (1993).

4. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript,* 91 Mich. L. Rev. 2191, 2198 (1993).

The other side of the coin with respect to the "Growing Disjunction" is the view from the profession. The best way for me to give a sampling of this view is to quote the managing partner of one of the largest firms in the country, who offered the following observations in response to my Michigan article:

> Lawyers and law professors [have lost] . . . a sense of stewardship for the law as an institution.
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> What appears to have changed most on the law school side since I attended law school in the early 1970s is . . . the degree of active disinterest, even disrespect and disdain, of many faculty members at elite institutions toward the work of practicing lawyers and judges .... Many in the academy apparently view law practitioners as several cuts below plumbers in both the intellectual challenge and moral utility of their work. Imbued with this view, hundreds of law school graduates are sent forth each year to pursue a livelihood that they are encouraged to see as redeemed only by the lucre with which it will line their pockets, at least for awhile.
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> As for law practice itself, it is certainly true that its character of life has fundamentally changed in recent years. The number of lawyers has grown at an extraordinary pace. Law practice has become more competitive and specialized, with an increased emphasis on securing business, prompting the remark that it is now "more like a trade than a profession, with an emphasis on money and profit rather than on service and justice." With ever growing specialization, personal horizons have narrowed, hours have become longer, and the focus on law as an enterprise driven by the demands of the market place has become more and more central.
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> Lost in both of these developments is the concept of the law as a vocation, in which the lawyer and the law professor owe principal duties not only to self and to client (or to student), but to the courts, to the institution of legal rules, and ultimately to the public.[5]

In constructing a vision of legal education, I tend to agree with Professor J.B. White, who has written that, in order for legal academic work "to be of value to the law it is essential that the work in question express interest in, and respect for, the possibilities of what lawyers and judges do."[6] Too many legal academics seem to forget that law schools

5. Donald B. Ayer, *Stewardship*, 91 Mich. L. Rev. 2150, 2150–51 (1993) (footnotes omitted).

6. James Boyd White, *Law Teachers' Writing*, 91 Mich. L. Rev. 1970, 1976 (1993).

are professional schools, not graduate schools. We grant J.D.'s, not Ph.D.'s. Upon graduation, our students are qualified to seek licenses that are not available to persons who do not have a legal education. Thus, the public has a right to assume that holders of these licenses have attained a certain level of technical competence, share a commitment to a defined set of ethical norms, and accept the responsibility to interpret and practice the law in public-regarding ways. At its simplest level, law students must learn what the law *is,* and how lawyers employ or enforce the law on behalf of clients.

I do not doubt for a moment the importance of *theory* in legal education. Good legal scholarship and teaching, as I envision it, is not wholly doctrinal. Rather, in my view, a good law teacher employs theory to criticize doctrine, to resolve problems that doctrine leaves open, and to propose changes in law or in systems of justice. Ideally, then, a legal scholar always integrates theory with doctrine.

Law schools are not "trade schools;" so there can be no dispute that, in addition to theory, quality legal education also must include an understanding of relevant *interdisciplinary considerations,* analyses of *social impacts* (such as the effects of law on the disadvantaged), and *proposals for reform.* At bottom, however, "professional education" must focus on certain skills with respect to which a trained "professional" can be viewed as an authority. We are professionals because we can practice *within defined legal systems* performing jobs that others in society are neither skilled nor certified to perform.

In legal education, the principal problem that I see nowadays is the lack of a healthy *balance* between "impractical" and "practical" teaching and scholarship. By "practical," I mean teaching and scholarship that is both *prescriptive,* in the sense that it instructs lawyers, judges, and other legal decisionmakers on how to resolve legal issues, and also *doctrinal,* in the sense that it gives due weight to the various constraining sources of law, namely precedents, statutes, and constitutions. The paradigm example of "practical scholarship" is the law treatise. In contrast to the "practical" theory employed by the "practical" scholar, the "impractical" scholar's scholarship consists of "abstract" theory divorced from legal doctrine—that is, divorced from the authoritative sources of law that necessarily constrain the arguments available to a legal professional.

Not all "impractical" teaching and scholarship is bad. Indeed, certain interdisciplinary and critical legal studies work has the potential to be quite valuable in legal education. For example, law students will have a better sense of their professional mission if they have some understanding of *history, literature,* and *philosophy;* they will have a

broader view of society's ills if they know some *social science;* they will be better able to contemplate possible reforms if they reflect on thoughtful critical legal studies; and they will be better able to perform certain lawyering tasks if they can master some *statistics, economics,* and *psychology.* But, law schools cannot be overweighted by teachers and scholars whose principal interests are in areas other than the law. The business of law is about prescriptions, not abstract reflections of the sort indulged in many Ph.D. programs. Reflections may *inform* prescriptions, but the connection cannot be lost. My objection to so-called "law-and" scholarship is not to the relevance of the "ands" but to the idea that the "ands" (as opposed to the "law") will become the "ends" of professional education.

Recently, Professor Paul Carrington, formerly Dean of the Duke Law School, sent me a copy of a letter that he had written to Judge Richard Posner, telling Judge Posner that he had "missed the point" in criticizing my *Michigan Law Review* article.[7] In his letter, Professor Carrington wrote:

> Law teaching is not, as you suggest, very much like breeding salmon. Just about all the big legal ideas there are or ever will be were known in the time of Justinian. About all we can do is rearrange them from time to time to fit new realities. Legal scholarship that takes leave of reality is not only useless, but is likely the product of the kind of self-indulgence that teaches students to disregard professional duties. Grandiosity is in this context a cardinal sin for a law teacher. A law teacher who lays 6000 legal eggs in the hope that one will produce a great fish is not merely a sap, but is at least mildly corrupt. Marx would have been a lousy law teacher even if he were entirely right . . . .
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> [T]here are today more than a few teachers who, if one is to judge by their writing, are inclined in a search for academic status to lead their students into the wilderness and leave them there. If teachers forsake duty to seek status, why should students not forsake duty to seek what they want?[8]

"Impractical" scholars often are inept at teaching doctrine, for either lack of any practical legal experience, lack of interest in the subject

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7. Letter from Paul D. Carrington, Professor of Law, Duke University School of Law, to Hon. Richard A. Posner, Judge, United States Court of Appeals for the Seventh Circuit (Feb. 7, 1994) (on file with author).

8. *Id.* at 1–2.

matter, or both. And they have little sense of ethical problems in the profession because, often, they hold practitioners in disdain. It is therefore hardly surprising that many distinguished practitioners in the profession are now plainly dubious of the skills of the new generation of "theoretical" legal scholars. One such practitioner wrote to me, saying:

> I dearly would love to see some of the younger "theoretical" members of any major law faculty argue a real case in front of the Supreme Court (sans doctrine, of course), or even argue a tough motion before a smart [United States] District [Court] judge . . . . Alternatively, I'd like to see them sit down privately with members of the House or Senate, and answer their questions about how to craft a fair and workable piece of legislation, based solely on theory. If they actually tried this, maybe the dichotomy you identified wouldn't exist any more. On the other hand, many of them would be so bad at it that things might get worse, not better.[9]

There are at least two important connections between a full "practical" education in law school and ethical practice. First, an ethical lawyer should only advance reasonable interpretations of authoritative texts—interpretations that are plausible from a public-regarding point of view. As should be obvious, although some of the critics of my earlier writings on this subject seem not to comprehend the point, "plausible" interpretations need not simply parrot readings of the law as it is, but can argue forcefully and persuasively for change. For example, the work of the late Justice Thurgood Marshall and his colleagues at the NAACP Legal Defense Fund, which culminated in *Brown v. Board of Education,*[10] was eminently "practical" and "ethical," yet fundamentally changed this nation's law.

Thus, an ethical lawyer's work should be reasonably faithful to authoritative sources of law, and to the public values they embody. This is what law schools must teach. The doctrinal capacity—the capacity to develop and communicate a true understanding of some legal regime—is a necessary condition for ethical practice. In other words, to fulfill one's ethical duty of only advancing reasonable interpretations, one first must have received the doctrinal education necessary to be able to distinguish reasonable from unreasonable interpretations.

Second, legal scholars must have some real understanding of practice before they can usefully address the ethical problems of the profession.

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9. Harry T. Edwards, *supra* note 4, at 2213 (brackets and ellipses in article).

10. 347 U.S. 483 (1954).

On this score, a named partner in a prestigious Washington, D.C., law firm offered the following view:

> I have always thought that it is a good idea for law teachers to have some experience in practice before they go into teaching—to have some exposure to what goes on in the real world and how there can be difficult and even excruciating problems of conflicts, ethics, candor, and even civility which are beyond the contemplation of one who has not experienced them in practice.[11]

In any event, even without practical experience, a law professor ought to *care* about the workings of the legal profession. In his letter to Judge Posner, Professor Carrington pressed this point, as follows:

> The way one teaches professional ethics is not by a course in ethics, but by being a professional person who takes her duties to law seriously. If as teachers we do what we can to illuminate and improve the law, and deal with our students fairly, we have done what we can to teach professional ethics. If instead we pursue academic status in other disciplines and treat law as a paltry thing, we are doing the thing most likely to encourage main-chancing. Students, like Holmes' dog, can tell the difference between these two activities.[12]

I agree with Professor Carrington. I also agree with Professor J.B. White when he cautions against

> tendencies in modern scholarship and teaching of different kind, which would supplant legal thought with forms of social science or with a kind of purely political discourse.[13]

I have been mostly amused by the critical articles (such as Judge Posner's)[14] appearing in the Symposium edition of the *Michigan Law Review*.[15] My own reaction to these articles has been that most have tended to prove my point. I was therefore gratified when I recently received a copy of an interesting paper authored by Rudy Buller, an Oxford-trained litigation lawyer from Canada, who is now a graduate

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11. Harry T. Edwards, *supra* note 4, at 2215.

12. Letter from Paul D. Carrington, *supra* note 7, at 1.

13. James Boyd White, *supra* note 6, at 1976.

14. Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 Mich. L. Rev. 1921 (1993).

15. *See* note 3 *supra*, and accompanying text.

scholar and J.S.D. candidate at Columbia Law School.[16] Mr. Buller's paper presents a long commentary on the *Michigan Law Review* Symposium, concluding that:

> The manner in which Judge Edwards' relatively straight-forward theses have been misinterpreted by "impractical" scholars provides some confirmation for his view that they suffer from a degree of "ineptitude" in the understanding and application of legal doctrine.[17]

Having described the "problem" in general terms, I offer herewith my top-ten list of its worst effects:

First, at a number of schools, faculty hiring is tilting in favor of "impractical" scholars.

Second, course offerings have changed dramatically. Professor J.J. White's article in the *Michigan Law Review* Symposium documents how skewed faculty hirings arguably have limited *advanced* level offerings in a number of practical courses.[18] My own view of student transcripts supports this observation.

Third, too little attention in time and money is spent on written work, clinical training, and ethics.

Fourth, we refuse to do any real "cost-benefit" analysis of what is useful in legal education. So we continue to indulge the personal preferences of law teachers as to what to teach. I suspect that if we ever seriously assessed our course offerings, more high quality clinical courses would be taught, and a large number of esoteric "seminars" would disappear.

Fifth, too many law teachers hold the profession in disdain, and a number of such professors are assigned to teach basic law courses in which students likely are most impressionable.

Sixth, too many legal academics, like Dean Bollinger (who wrote an article for the Michigan Law Review Symposium), view what

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16. Rudy Buller, *The Judge Edwards/Rest of the World Debate: A Microcosm of One of the Problems in Legal Education* (1993) (This paper, which is on file with the author, was originally prepared for the Columbia Law School graduate seminar in legal education taught by Professor Peter Strauss.)

17. *Id.* at 9.

18. James J. White, *Letter to Judge Harry Edwards*, 91 Mich. L. Rev. 2177, 2181–84 (1993).

practitioners and judges do as "mundane" and "dull," while the obscure work of a new breed of law scholars is viewed as "richer and more complex."[19] This attitude is communicated to students, implicitly and explicitly. Worst is that the attitude is not coupled with any meaningful proposals for reform of the profession; rather, it comes (and is received) as "we're better than you."

Seventh, legal scholarship often does not aim to serve the profession.

Eighth, "advocacy" seen by judges sometimes is horrendous. Research, writing, and oral arguments are sometimes awful, and the prospect of fees seems to prompt too much litigation. Most distressing, however, is that some attorneys and their clients are too loose with the truth in litigation.

Ninth, in my view, there is a growing inattention to the needs of the disadvantaged.

Tenth, the law schools do not really heed the views of practitioners. We "survey" students at the end of our courses (when they are really not in a position to assess what we are doing). But we refuse to heed the advice of the people we have trained once they become licensed to practice law (in part because practitioners are viewed as less worthy).

In response to some of the conditions of which I speak, Professor Frank Allen, the former Dean of the Michigan Law School, has argued that

> most interested observers sense that this is a period of ... considerable peril in the intellectual life of American law schools ....
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> [T]he law school [should not] 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,

19. Lee C. Bollinger, *The Mind in the Major American Law School*, 91 Mich. L. Rev. 2167, 2176 (1993).

> but also in the attitudes they apparently spawn toward other kinds of useful and important work.[20]

I, too, am deeply concerned with the intellectual life of American law schools. In my view, if current trends continue, the gap between legal education and the needs of the profession will only widen.

The question now is: What do we do? The ABA's "MacCrate Report"[21] takes a stab at the problem, offering a number of useful recommendations for enhancing professional development during the law school years.[22] The difficulty that I have with the MacCrate Report, however, is not with its statement of goals, but, rather, with its failure to deal directly with the growing imbalance between practical and impractical scholarship and teaching in legal education. The Report seems not to comprehend that there are many academics in legal education who would reject or ignore its goals because they do not really view legal education as a form of *professional training.*

Frankly, I am not entirely sure what can or should be done to cure the problems that I see in legal education. The underlying issues often are laden with sharp ideological differences among law faculty members, so resolution of these issues will not come soon or easily. My greatest concern now is that too many students are being taught by too many law professors who hold the legal profession in disdain and who propose nothing to reform the profession.

While I am somewhat skeptical about the prospects for meaningful reform in legal education—at least in the near term—I am more hopeful about the practicing bar's capacity to change for the good. In fact, there are already signs of change in the profession.

Not too long ago, the American Bar Association launched a major new initiative designed to increase the availability of legal services to those who cannot afford a lawyer. This new "law firm challenge" calls on big-firm lawyers to devote up to 5% of their billable hours to *pro bono* work. The Attorney General, Janet Reno, has endorsed the program, and it has been reported that a number of firms have agreed to participate. Programs like this are long overdue, for *all* members of our

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20. 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).

21. Section on Legal Educ. and Admissions to the Bar, American Bar Ass'n, *Legal Education and Professional Development—An Educational Continuum* (Report of the ABA Task Force on Law Schools and the Profession: Narrowing the Gap, 1992).

22. *See id.* at 330–34.

profession *ought* to be willing to contribute time and/or money to advance the public good. Such programs also will help to shift the current emphasis in law practice away from matters focused on marketing, commerce and profits.

Another change that law firms can make is to renew the commitment to mentoring between senior and junior lawyers. More and more, I fear that partners are failing to fulfill the critical responsibility of mentoring. I hear that many young associates feel that they are treated as fungible billing automatons, with partners seeking to squeeze out of them as many hours as possible. This is a tragedy, because the mentoring process should serve two critically important functions in our profession. First, mentoring is the way that much of the technical craft of lawyering is transferred from generation to generation; and, second, mentoring ideally involves ongoing discussion of the moral and ethical principles that bind our profession.

There are many other possibilities for change, but I will leave it to the other participants in this symposium to offer additional suggestions.

CONCLUSION

In order to deal with problems that we now face, it seems to me that the entire legal academic community must work collectively to find a middle ground where a greater number of practical scholars flourish alongside their theory-oriented counterparts in an environment of mutual respect; both should contribute to an education for students that better prepares them for practice, and both should share the fundamental belief that scholarship that seeks to inform and guide practitioners, legislators, other policymakers, and judges is a valuable, indeed necessary, component of any law school's mission. Nor should the academy be the only focus of attention. The members of the practicing bar must—if they wish to remain in a *profession*—put forth a significantly greater effort toward achieving the ideal of ethical practice, an ideal from which too many firms and individual attorneys appear to have strayed.

In any event, there must be a better bridge between legal education and practice. On this point, one of my critics, Professor Robert Gordon, has correctly observed that:

> The Judge seems to be arguing that both teachers and firm lawyers have been seduced from their real vocation by the fatal attraction of neighboring cultures: the practitioners by the commercial culture of their business clients, the academics by the disciplinary paradigms

> and prestige of theory in the rest of the university. The "deserted middle ground" is the ground of *professional* practice—practical, yet also public-minded. Perhaps without straining his thesis too far we could ascribe to Judge Edwards a "republican" view of the legal profession, in which legal scholars, practitioners, judges, legislators, and administrators—despite their separate interests and distinct roles in a division of labor—are all participants in a common enterprise. They are, or at any rate ought to be, engaged in trying to construct the legal system as a medium in which the pursuit of private advantage—their own and that of their clients and constituencies—can be aligned with some plausible conception of the public interest.[23]

As I have told Professor Gordon, at least on this point, we see eye-to-eye.

23. Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 Mich. L. Rev. 2075, 2076 (1993).