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## Harry Edward's Nostalgia

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# HARRY EDWARDS' NOSTALGIA

*Paul D. Reingold\**

## I. THE RISE OF THEORY

The law lives a double life. On the one hand it refers to complex norms that define and describe our history and culture. In this sense, “the law” serves as a kind of magical shorthand. In two syllables we can conjure up an array of ideas and activities — relationships of power, systems of governance, methods of resolving disputes, even some of the core values — that give our society its character and shape. On the other hand the law is also something that gets practiced. Grounded in substantive and procedural rules as well as in convention, the law — the representation of clients — is a daily event. The practice of law both affects the law as a cultural construct and is equally a product of it. That is, changes in the norms of practice constantly and incrementally alter how we think about the law writ large, while the norms of practice themselves, and even their incremental changes, are reflections of the power relationships, systems of governance, methods of dispute resolution, and core values that make our society what it is.

Until fairly recently, the work of people who thought and wrote about the law in its broadest cultural sense, and the work of those who thought and wrote about the law as it was practiced, did not intersect very much. The broad cultural issues tended to be the province of philosophers or political theorists or other academic social critics, while traditional legal scholarship — as it appeared in law school journals — remained firmly rooted in lawyers’ questions. This is not to suggest that legal academics wrote nothing but practice manuals, but it is true that until the last twenty years or so most legal academic effort went into texts that were of direct use to practicing lawyers. Law reviews were a common starting place for lawyers’ legal research, and lawyers and judges who subscribed to law reviews could expect to find useful articles that routinely touched on their areas of practice or that influenced their thinking.

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As Judge Harry Edwards recently complained,<sup>1</sup> except for student notes, or an occasional symposium issue, that is no longer the case. Today's journals are filled with a very different kind of scholarship, written by a different species of law professor and targeted at a different audience. Edwards is surely correct that most legal scholarship nowadays has little to offer to practicing lawyers, to judges, or to legislators.<sup>2</sup>

Although Judge Edwards also addresses changes in the profession, his primary concern is with the changes in legal scholarship and legal pedagogy, and the effects that those changes have had on the relationship between legal educators and the bar. Edwards notes with alarm, as others have noted before him,<sup>3</sup> that as the focus of the legal academy has shifted steadily and with increasing speed from doctrine to theory, the distance between legal academics and the profession has widened and shows every sign of widening further.

At the outset, Edwards concedes that the distance between the academy and the profession — and he means not just the distance of interest and emphasis, but also of mode of thought and expression — is not all for the bad. He finds the new legal academy to be in some ways less narrow and less rigid than the old; it has become more open to the ideas and contributions of other disciplines. He grants that the expanded curriculum — with its liberal arts flavor — adds spice to the otherwise bland second and third years. And he at least pays lip service to the argument in favor of the interdisciplinary approach — that though today's students may graduate knowing less about the law than their forebears, they know more about the wider world of ideas.

Edwards also acknowledges a second value in the shift toward theory — that some of the most powerful recent critiques of law have come from within the legal academy itself. People who are trained also as lawyers — as opposed to philosophers or linguists or political theorists or sociologists — make distinctive contributions when they focus their attention outside the limited frame of reference of doctrine. Edwards appreciates that much of the new scholarship — critical legal studies, feminist legal theory, critical race theory, law and economics,

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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. "The ratio of 'practical' to 'theoretical' articles has dropped in 25 years from over four-to-one to about one-to-one." Mary Ann Glendon, *What's Wrong with the Elite Law Schools*, WALL ST. J., June 8, 1993, at A14.

3. Edwards acknowledges that he is hardly the first to chart the change in the direction of the legal academy or to express concern about it. See Edwards, *supra* note 1, at 34 n.2, 41 nn.13-14. Edwards wants to ensure that the echoes of these earlier articles do not die out, so that we do not accept the change unthinkingly or without a clear view of what has been lost.

law and literature — has not only changed the map of the legal academic world but has altered, to a degree, the contours of other disciplines as well.

## II. THE DOWN SIDE

For Judge Edwards, however, the down side of the tilt toward theory far outweighs these benefits. Four problems are prominent.

### A. *The Denigration of Practice*

The first problem is the ongoing denigration of practice, which just galls him. No doubt since the apprenticeship system ended and a law degree became a requirement for licensure, to some degree law professors as a class have looked down on lawyers. Such egotism and elitism should be expected. People tend to place a high value on their own choices, so naturally people who choose to teach feel superior to those who choose differently. (Practicing lawyers, as a class, share the comparable but inverted feeling — that law teachers, as a class, however bright they may be, are essentially incapable of functioning in the real world and would fall on their faces if they stepped out of the ivory tower.)

Regardless of which club is more exclusive or, better put, regardless of which group would be more or less capable of performing well or happily in the other's domain, Judge Edwards is surely right that the rarefied air in today's faculty lounge is suffused with a stronger scent of disdain. He may be hard pressed to prove that law professors now view the practice of law as a less noble calling than they did in the past, but certainly fewer teachers allow themselves to be sullied by it.

The disjunction — to use Edwards' word — between the academy and the profession is striking, but for a teacher the disjunction between law professor and law student is especially unsettling. It is hard to think of another discipline that is so at odds with itself in the basic education it provides. Physicians who teach in medical schools are, in the main, themselves clinical specialists, or at least hands-on researchers. In most graduate schools in the humanities and social sciences, the students will go on to academic careers, doing the same sort of work, and leading the same sorts of lives, as their professors. Even in the hard sciences, students tend to elect an applied or a theoretical field early on, and as they travel their career paths they will be taught, for the most part, by like-minded instructors.<sup>4</sup>

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4. The business schools may have moved toward theory in somewhat the same way as the law schools, but in business a different ethic is at work right from the start, and the aura of the

Only law schools (among all graduate schools) hire teachers whose primary interest is increasingly in theory to train students who, with very few exceptions, will spend their lives in practice.<sup>5</sup> This postgraduate separateness of purpose — like any unfamiliarity — can create mutual disrespect, undercutting the educational mission for both teachers and students.<sup>6</sup> Edwards fears that, as practice becomes something foreign to the law professor, it also becomes something lesser, which in the end diminishes both teacher and student.

### B. *The Lack of Diversity*

The second problem Edwards identifies — though I may characterize it a little differently than he does — is that even though the new law faculty is more interdisciplinary than the old, in important ways it is less diverse. As in the past, only those students with the highest academic records can meet the faculty admission requirements, but today the “best” students are defined not just as the ones who earned the highest grades, but also as those who have shown themselves to be theorists. More than any other criterion — above a certain cut-off point — the theoretical article is the hallmark of intellectual worthiness; it is the key to successful initial placement and ultimately to tenure.

The new requirements for admission to the faculty virtually rule out anyone who has spent a substantial amount of time in an active practice. For most busy practicing lawyers, just keeping up in their area of specialty takes more time than they have; it is unrealistic to think that they could or would do the reading and research necessary to produce high-level theoretical work, even if they had the inclination to do so.

But the problem goes deeper than that. The fact is that the people

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academy is more something to cast off than to bask in. Business schools have a much more practical curriculum than law schools — in business school case studies teach direct managerial and decisionmaking skills, while in law school case study is simply a vehicle for learning doctrine and theory. Even if business schools are a shade more academic than they used to be, they are no more theoretical than law schools were twenty years ago — at the point in time where Edwards would probably say that the balance between doctrine and theory was about right.

5. The new law school has, in this sense, taken on more of the character of an undergraduate college, in which most of the teachers are full-time scholars, even though most of the students will pursue other careers. The difference is that the point of college is to expose young people to a very wide range of fields and ideas (arts, humanities, social sciences, physical and biological sciences, sports and extracurricular activities, and so forth), as part of a foundational liberal education. And of course the people who teach these varied disciplines, and the lifestyles they represent, and the ways of thinking they embody, are all over the map.

6. The aphoristic truth is that familiarity breeds contempt, but surely it is the inability to bridge the gaps of custom, of style, of values — let alone of culture or religion — that causes far more harm than the dullness of the too well known.

who are likely to be drawn to practice, and who will excel at it, are not the ones who will be drawn to, and who will excel at, theory. Consequently, the flow of people between the academy and the world of practice, and especially from practice into the law schools, has slowed to a trickle.<sup>7</sup> In Judge Edwards' view, as the law faculty replicates itself, favoring the abstract theorist with an almost Darwinian determination, the new academy will be narrower, more rigid, and less respectful of the range of styles and interests that it once tolerated, and even encouraged and welcomed, in earlier days.

There is an irony that such narrowness and rigidity should occur now, when the law schools are trying so hard to shed their white male image. At the very time when diversity of personnel is an explicit goal, the schools have made it tougher to recruit women and people of color. The pool of candidates who can meet the requirements of the highest academic credentials *and* an inclination toward theory is certain to be smaller than the pool of candidates who could have met the academic criteria and who also would have fit comfortably into the wider range of work performed — and accepted as valid and worthy — by the faculties of ten or twenty or thirty years ago. And even when the law schools succeed in hiring a more diverse faculty in multicultural or gender terms, the value of that diversity may be offset, or at least undercut, by the uniformity in the style of the teachers' thinking.

### C. *The Loss of Commentary*

The third problem is what the profession has lost. In Judge Edwards' view, until recently the legal academy served a highly useful social purpose in the form of commentary. Doctrine was influenced or changed for passing through the hands of academics, who examined it both before it got to the courts for application, and again coming back from the courts, as new decisions were handed down. The legal academy was like a layer of porous rock through which water filters up and down, being purified and clarified in both directions.

Now that whole layer of commentary is gone. Courts no longer — or rarely — base their decisions on the work of academics, and lawyers no longer — or rarely — argue their cases relying on current academic commentary about those decisions. An enormous social resource, supported by the broadest possible base and providing an invaluable public service at an invisible cost, has quietly disappeared.

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7. No doubt the disparity in salary accounts for some of the change, too. But the reality is that someone with a background in practice is a strange duck on a modern law faculty. The gulf between what the lawyer does and what the scholar does is, today, close to unbridgeable.

#### D. *The Change in Pedagogy*

The fourth problem Edwards identifies is the failure of the new faculty to deliver doctrinal education. He is convinced that as long as the faculty is comprised mostly of “impractical” legal scholars — meaning, more or less, pure theorists — the teaching of doctrine will never get its due. The theorists are simply the wrong folks for the job. Edwards is careful to emphasize that doctrine need not be taught in all courses, but that “[t]he 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>8</sup>

Edwards concedes that in his ideal law school curriculum theory would still have an important place, and that once doctrine — and the capacity to use it — had been learned in the first two years, “the remaining time can and should be used for clinical courses, as well as for doctrinal and theoretical electives”<sup>9</sup> and for better training in legal writing.

### III. CLINICAL LESSONS

#### A. *The Rise of Clinics*

At the same time that the legal academy began to move slowly but ineluctably from doctrine to theory, many law schools introduced, and then expanded, their clinical programs. Although many clinical teachers have remained outside of the permanent faculty — in short-term positions funded by grants or other soft money — a number have been afforded full faculty status, either in tenured positions or in a parallel track that approximates tenure. Most of these teachers spend the bulk of their time supervising students in some form of live-client clinic. They remain quite actively engaged in the practice of law, despite being housed inside the academy. Their numbers are still small, but among a faculty of, say, thirty to fifty “stand-up” teachers, it is now fairly common to find a handful of career clinicians.

The coincidence of the timing of these two events — (1) the shift toward theory that has all but eliminated the hiring of new professors with substantial backgrounds or interests in practice (while the elders with those backgrounds or interests vanish by attrition and nonreplacement); and (2) the ascension of clinics, and the consequent admission to the faculty of small numbers of practicing lawyers —

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8. Edwards, *supra* note 1, at 62.

9. *Id.* at 63.

seems too great to ignore. Although the two trends may be driven by different forces, and may have evolved in response to different concerns, they cannot help but strike me as complementary.<sup>10</sup> At the least, the rise of clinics offers lessons about the fall of doctrine.

For clinical teachers, who approach the legal world from the practitioner's perspective, Judge Edwards' disjunction has always been apparent. Even before the polar shift from doctrine to theory — when clinics were still in their infancy — the law school environment was unfriendly, and often downright hostile, to the clinical teachers. Most of the faculty, including many of the older, more doctrinal faculty members, resisted the clinical movement, fearing that the admission of nonacademic practitioners would degrade the law school's standing in the academic community.

That tension has diminished over time because the number of clinical teachers has not risen high enough to pose a real threat, and, more importantly, because the movement toward theory has more than offset any impression that the law schools were becoming trade schools. Indeed, the argument can be made that, by letting the clinics in the door and then by admitting the clinicians to the permanent faculty, the law schools conveniently — and ironically — greased the wheels of change from doctrine to theory: the academic faculty now had one more excuse to do what they wanted to do all along, and so the pace of change accelerated. The need to keep up the front (that law professors knew something about the practice of law) was gone because anyone who wanted to learn how to practice law could sign up for the clinic.<sup>11</sup>

### B. *The Effect of Marginalization*

The clinical teachers have always had to endure the hardship of working in an institution that placed little institutional value on what they did. That is, the *teaching* of the practice of law was at least as marginalized and denigrated as the practice of law itself. Thus, for the clinicians, there is a deeper irony in the shift from doctrine to theory. Little did the older, more “doctrinal” faculty know that within a few

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10. The rise of clinics may also reflect an acknowledgment that practice has changed so much in the last twenty-five years that law school graduates can no longer expect on-the-job training under the watchful eyes and gentle hands of a senior mentor. If the big firm “tutelage” system were ever a valid excuse for law schools to turn out graduates who were incapable of practicing law, in the current law firm and business climate that excuse is gone.

11. Another irony of the tilt toward theory is that the attitude toward the clinical faculty has improved. Initially the clinicians were viewed with skepticism by the doctrinalists, some of whom had moved into teaching from silk-stocking firms or high government posts. The shift toward theory has made the clinicians' acceptance easier, because the new theorists suffer no illusions about their knowledge of practice or about their own marketability.

years they would be regarded with the same baleful eye as the clinicians. With theory as the lodestar in the new legal academic universe, the doctrinalists and their work have become marginalized too. What goes around comes around.

When people like Edwards rail against the current turn of events, they are necessarily on the defensive, and their clarion call has a plaintive quality about it. They seem old-fashioned and stubborn, caught in the pose of looking back in anger, or at least with nostalgia. The disquieting judgment hovering over them is that their conservatism derives from their own failure — that they cannot do this new work, and do not really understand it, because they are a rung down the intellectual ladder. And of course, where only theory has value, such an indictment cannot be disproved except in the language of theory. So they are caught in a catch-22, and the inner circle remains a closed one. (As the theorists have taught only too well, and as the clinicians have known all along, marginalization imposes burdens, not the least of which is silence; those on the outside lose the ability or the standing to make a credible critique.) For Edwards, this exclusivity, or hierarchy, of theory is its most damaging aspect, although he never quite names it.

What Judge Edwards really shows is that the academic world remains an intellectual pecking order as fiercely competitive as the first year of law school, and too often just as intolerant and to as little purpose. In this regime, traditional legal scholars are like solid B students — irrelevant to the academic meritocracy. They can spot the issue (that theory *is* the issue of our time), but they lose credit on the analytical side — they are marked down because they do not bring to the discussion the theorist's aptitudes, let alone the theorist's language or approach.

### C. *The Cure of Practice*

Edwards brings to bear on the academy the open vision of a practitioner. In the practice of law, as in judging (as in life), a far wider array of skills has value than what is valued today in a law professor. What Edwards wants in the end is for some of that multiplicity to inhere in the academy. He wants law school to be a place where many styles of excellence are supported, where teachers and practitioners and scholars can do good work without having to fit a prescribed mold to be accepted.

But wishful thinking will not reform the academy. Judge Edwards is wrong to look backward, as if the best mix were twenty years ago and as if only we could return to the golden age. We cannot go back;

law schools are going to become more academic and more like graduate schools, and at some law schools doctrine will all but disappear from the scholarly agenda. So the real trick, even in a law school grounded in theory, is to relearn tolerance, and ultimately I think this is what Edwards is after. How do academics, and we legal academics especially, learn to value and respect work that is different from our own? How do we instill — in students *and* in faculty — a sense of appreciation for what others do, be it writing about doctrine or practicing law? How do we get the academy to practice what it preaches — that diversity (of opinion, of style, of thought, of ethnicity and gender and age, of scholarship, of work) is inherently important? The hardest question is, can we teach students to think critically without being consumed by the academic's obsession with rank?

In my view, clinical legal education may well provide an answer. When clinical legal education — and by that I do not mean simple skills training, any more than teaching torts consists only of the rote learning of elements — is integrated fully into the law school curriculum, then theory and practice have the chance to merge. If law schools required every student to take a clinic (or God forbid, required every teacher to teach in one), then institutional values would change. This is not to say that theory should play a lesser role than it does now, but theory would be regarded differently for having to compete daily with the issues of doctrine, and procedure, and policy, and strategy, and ethics, and business and personal skills, and so forth, that are more important to *lawyers*.

When students are engaged in the practice of law while still in school — and in my view the more sophisticated the practice the more engaged they are — their very engagement changes their attitude toward the rest of their courses, and toward the academic enterprise. They are more active and more challenging (but less competitive for having learned the value of teamwork); they are more confident, more mature, and more knowledgeable about their own educational needs.<sup>12</sup> Their exposure to a wide spectrum of people — poor people, criminals, the disabled, the mentally ill, landlords, tenants, children, lawyers, judges — enlarges them and alters the way they think of themselves as students. And their exposure to the institutions of law as they exist in reality — not in theory — gives them new (lawyers') lenses with which to view the claims of their teachers. With a foot in the world of practice — where their decisions have consequences for others, and where their work must be cooperative to succeed, and

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12. At present, they can also be more alienated if they feel that too many of their courses have no bearing on their careers.

where their theories are put to the test — they bring back to the larger law school something of the experience of practicing law.

Central to that experience is an idea that is antithetical to academic thinking: that what matters is not who is right, but what works. All first-rate practice will share certain features, but the issue of “rightness” is literally an academic question. Success outside of the university is measured not in terms of theoretical rightness, but in cases or convictions won, or profits made, or policies changed to favor a client’s interests. The successful practitioner must be open to all sources of help, from all disciplines. One day sociology might hold the solution to a problem, and the next day economics or psychology might be key. The question is never who has the more elegant theory, but which discipline or argument will work best to persuade an appellate judge, a legislator, or a corporate board to decide an issue the way the lawyer’s client wants the issue decided.

In sum, if Edwards is right that law school has become too much an academic institution, then clinical legal education can help restore the balance — or at least redress some of the side-effects — by rebuilding the sense of the law school as a *legal* community. I am suggesting that, given where the law schools are going, the integration of theory and practice is more likely to come from the students *up* rather than from the academic faculty *down*. The best hope to preserve the legitimacy of practice within the academy is not to pray for doctrine’s return, but to expand the clinical curriculum. And when more than a handful of clinical teachers — especially at what Edwards calls the “elite” law schools — are actually practicing law, then even the academic debate within the faculty at those schools might gradually become less tangential to the concerns of the legal profession.<sup>13</sup>

## V. THEORY’S LEGACY

Law school has always been a kind of a false graduate school. When it displaced the apprenticeship system, its purpose was to standardize the teaching of substantive and procedural law through a uniform core curriculum, originally based on the reading of hornbooks and treatises and later focused almost exclusively on the study of appellate opinions.<sup>14</sup> In time, law school courses gained a distinctive in-

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13. On a more basic level, if law schools are going to be more like graduate schools, and if the faculty is going to be composed of highly specialized theorists whose interests have little to do with the canon of law that the bar examination tests and that practice presupposes, then something has to act as the bridge between law as a construct and law in the courthouse or on the street. The clinics neatly serve this function, too.

14. See John H. Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311, 314-20 (1985).

tellectual content, which consisted of a style of analytical reasoning that was deemed to be central to law and that came to be described in the phrase “thinking like a lawyer.”<sup>15</sup>

In fact, however, law schools have never had a very clear picture of what legal education should be, and for the better part of a century they have failed to design a curriculum that could sustain the interest of both the students and the faculty beyond the second year. Even in the heyday of doctrinalism, it was hard to find a justification for the third year of law school, apart from the dollars generated to support faculty research.

To a clinical teacher, the new theory has no more — and probably no less — to do with the education of lawyers than did the old doctrinalism, with its endless reading of appellate cases and its relentless emphasis on analytical argument. Although both are necessary, neither doctrine nor theory alone — nor the two together — provides sufficient *intellectual* skills to prepare students to practice law. Theory may have overtaken doctrine at the “elite” schools, but Judge Edwards is still right that the best legal education will have to include doctrine, and theory, and clinical instruction, and probably something from a range of other disciplines as well, in order to cover all the bases.<sup>16</sup>

The shift toward theory alarms me less than it alarms Judge Edwards because I view it as the kind of organic change that is inevitable in the life of an academic institution. Yes, the shift toward theory will drive the academy and the legal profession further apart for a time, but that “disjunction” cannot be helped. The new legal theory *itself* destroys the cohesiveness of professional identity. As the new legal theory deconstructs the law, it strips away many of law’s virtues, revealing a racist, sexist, propertied, dominance-oriented, self-perpetuating institution, and turning the lawyer’s pride of profession into a moral swamp.<sup>17</sup>

Edwards also misses the point that theory’s target includes the cultural construct of legal education itself. Doctrinalism surely does as much as other legal institutions to preserve the law as we know it. If

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15. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 41, 56 (1983).

16. I like to tell my students that the best preparation I got in law school for my trial practice came not from my law school courses, but from the novel a week I read for the better part of three years.

17. Edwards himself suggests that as practice has become more venal and more profit oriented, it has discouraged those reflective or altruistic souls who care more about ideas or justice than about money. They take refuge in the academy as professors, or they move to other fields. So there are separate dynamics within the academy *and* within the profession that drive the two apart, and for now the twain shall not meet.

the shift toward theory and the insights that theory reveals about law as a cultural construct prove to be worthwhile, it will be because they change not only the way we think about the law, but also the way we practice it and the way we educate students to prepare for a career in it.

### CONCLUSION

Judge Edwards is right that the shift toward theory puts the law schools closer to the mainstream of American graduate education. It broadens the students' opportunities, fosters new scholarship, and, not incidentally, positions law faculty in a more central and more powerful place within the academic world. But at the same time, the theorists come laden with serious baggage. As the gulf between the teachers and their students widens, the work of the students — and the legal profession — gets subtly devalued, and the law faculty looks destined to become more homogenous at the very time when it aims for diversity. In addition, the essential social function that the faculty served in the past, in the form of providing doctrinal commentary used by lawyers, judges, and legislators, has been all but lost. And with the overthrow of the doctrinalists, no one remains to teach what for Edwards is the law schools' core program — the capacity to use doctrine.

But Judge Edwards cannot ignore theory's critique of law any more than he can pretend that the law schools will return to doctrine. By looking forward instead of backward, we may find that clinical legal education can bring us closer to Edwards' vision of what law schools ought to be, while still giving theory its due. At law schools where clinics are an integral part of the curriculum, and where the clinical faculty have an equal voice with their academic colleagues, the balance between theory and practice — a balance that fosters an environment where all kinds of legal work, doctrinal or theoretical or otherwise, is supported and appreciated — might actually be closer to reality than Edwards realizes. In this future, doctrine could play a stronger role not because lawyers or judges want guidance, and not because of any inherent primacy of doctrine as a legal educational tool, but simply because clinical law students need arguments and answers.