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# THE DEPROFESSIONALIZATION OF LEGAL TEACHING AND SCHOLARSHIP

*Richard A. Posner\**

The editors have asked me to comment on Judge Edwards' double-barreled blast at legal education and the practice of law.<sup>1</sup> This I am happy to do. It is an important article, stating with refreshing bluntness concerns that are widely felt but have never I think been so forcefully, so arrestingly expressed. Nevertheless I have deep disagreements with it.

Judge Edwards' thesis is easily summarized. Law schools should train ethical practitioners and produce scholarship that is useful to lawyers and judges. Law firms should practice law ethically. Neither is doing either any more. Especially but not only at the elite law schools, faculty, especially young faculty, is increasingly disdainful about the practice of law (including the judging of cases) and about the forms of legal scholarship that assist in that practice. The faculty is not interested in training ethical or *any* practitioners, or in professionally relevant scholarship. All it is interested in is theories about law — theories drawn from other fields such as economics and philosophy. “[W]e see ‘law professors’ hired from graduate schools, wholly lacking in legal experience or training, who use the law school as a bully pulpit from which to pour scorn upon the legal profession.”<sup>2</sup> As for law firms, they increasingly are interested in making money rather than in maintaining high ethical standards, and they are actually abetted in this unlovely endeavor by the law schools' growing indifference to instilling students with those standards. As for the scholarship that the new-fashioned law school faculty members are producing (as opposed to the kind of scholarship that they are not but should be producing), it probably has little value. Law professors are unlikely to be able to do economics or philosophy or literary theory or whatever as well as people who are trained in and work full time in those disciplines.

There is an obvious but perhaps superficial paradox to the article. It is not an article about legal doctrine, although as a judge and former

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\* Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. — Ed. I thank Dan Kahan, Lawrence Lessig, and Martha Nussbaum for their very helpful comments on a previous draft.

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

2. *Id.* at 37.

law professor that is presumably the only type of article that Judge Edwards would consider himself competent to write, or that he believes a law review competent to publish, under the austere standards that he has set down for the profession. It is an article about the sociology of legal education and practice. The author relies heavily on a traditional sociological technique, the survey, but admits that his survey did not produce "statistically reliable data."<sup>3</sup> That is an understatement. The survey was confined to Judge Edwards' former law clerks. He does not tell us what percentage responded or to what precise questions they were asked to respond; evidently the responses were not anonymous, although the article does not reveal the names of the respondents.

So even doctrinalists cannot resist writing the occasional nondoctrinal article and in so doing tumbling into the pitfall of amateurism that Judge Edwards rightly decries. But that is a trivial observation; let me move on to more serious matters. I think Judge Edwards is closer to the mark with respect to academic law than he is with respect to the practice of law. About the latter he remarks revealingly, "[t]he tremendous pressure to create revenues, which so many of my former clerks describe, is a wholly novel phenomenon. When I practiced law at a large firm, some twenty years ago, I felt no such pressure, nor did my colleagues. We enjoyed our work."<sup>4</sup> That "tremendous pressure to create revenues" could equally be described as competitive pressure to work hard. The practice of law has become more competitive since Judge Edwards' time in practice.<sup>5</sup> Naturally it is less fun. Competitive markets are not much fun for sellers; the effect of competition is to transform producer surplus into consumer surplus. The relation of all this to legal ethics, however, is complex. It is necessary to distinguish between two types of ethical obligation. One is to the client and is illustrated by rules against overbilling and conflicts of interest. The other is to the court or the community and is illustrated by rules against suborning perjury and abusing pretrial discovery. There is no reason to suppose that competition will seriously erode the first kind of ethical obligation — competitive markets are not notable for dis-serving their customers. But it may erode the second because the second type of obligation, consisting as it does of the lawyer's ethical obligations to people and institutions that are not his clients, dis-serves his clients, the customers. So there is a complicated tradeoff between

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3. *Id.* at 42.

4. *Id.* at 72.

5. For amplification and references, see Richard A. Posner, *The Material Basis of Jurisprudence*, 69 *IND. L.J.* (forthcoming Dec. 1993).

the gains to clients from greater competition in the legal profession and the losses to others. Judge Edwards does not allude to this trade-off — he does not have the consumer's perspective — and as a result he conveys an unduly negative impression of the current practice of law.

He is on stronger ground in his criticisms of the law schools. It is natural that I should think this because, as he generously acknowledges, I have made similar criticisms.<sup>6</sup> I certainly agree that he is right to criticize those brash youth who radiate disdain for conventional, which is to say doctrinal, legal scholarship. He is also right to note a shift away from doctrinal legal scholarship at the leading law schools.<sup>7</sup> Of course such scholarship continues to be written, even at those schools — even in the form of treatises (Areeda's multivolume antitrust treatise,<sup>8</sup> Farnsworth's three-volume contract treatise,<sup>9</sup> and Currie's treatise on the Clean Air Act<sup>10</sup> come immediately to mind). Some younger scholars at those schools have signed on as coauthors (notably Kaplow, on the Areeda treatise<sup>11</sup>), and many write doctrinal articles (such as Meltzer<sup>12</sup> at Harvard and Brilmayer<sup>13</sup> at N.Y.U.). Still, the drift away from this sort of work seems plain enough. Not that doctrinal scholarship as a whole is undergoing a serious decline. But its production has shifted toward scholars at law schools of the second and third tier. Is that a bad thing? Judge Edwards thinks it is because it is the only type of legal scholarship that he regards as useful or as likely to be well done by law professors, and because he thinks that the law professors who have turned their backs on it are unlikely to have much interest in instilling high standards of ethical practice of law in their students. Implicitly he believes that the leaders of the bar are likely in the future as in the past to be drawn disproportionately

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6. See especially Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 *YALE L.J.* 1113 (1981); see also Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 *HARV. L. REV.* 761 (1987), which appears in somewhat different form as chapter 14 of RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990).

7. See William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, *J.L. & ECON.* (forthcoming Apr. 1993).

8. PHILLIP E. AREEDA ET AL., *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* (1978 & Supp. 1992).

9. E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* (2d ed. 1990).

10. DAVID P. CURRIE, *AIR POLLUTION, FEDERAL LAW AND ANALYSIS* (1981).

11. AREEDA ET AL., *supra* note 8.

12. See Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 *HARV. L. REV.* 1731 (1991); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 *COLUM. L. REV.* 247 (1988).

13. See Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 *HARV. L. REV.* 297 (1979).

from the ranks of graduates of the first-tier law schools. So the fact that old-fashioned legal scholarship and old-fashioned indoctrination in the folkways of the traditional profession continue and even flourish in many lower-tier schools is not much consolation for him.

Judge Edwards' argument overlooks a lot. One thing it overlooks is that law schools have become larger and more numerous, and law school faculties have as a result expanded greatly, since the good old days when Judge Edwards was a practicing lawyer. They have also, I think, improved in quality across the board — and the gap between the quality of faculty at the different tiers of law schools has narrowed. Law, becoming a more lucrative profession, has also attracted abler young people to it, some fraction of whom become law professors. Law has also become more ramified and complex, but no area of practice is beyond the intellectual competence of the increasingly able faculties of the nonelite law schools, so that one can hardly regard the shift in legal doctrinal scholarship toward those faculties as a disaster for the profession. As for the task of instilling legal ethics in law students at elite, or for that matter at any, law schools, I can think of few things more futile than attempting to teach people to be good. "We learn how to behave as lawyers, soldiers, merchants, or what not by being them. Life, not the parson, teaches conduct."<sup>14</sup> Anyway, graduates of elite law schools face on average fewer temptations to engage in unethical behavior than the graduates of the nonelite law schools, for the latter graduates will be on average under greater competitive pressure. No doubt there is an informational function performed by instruction in legal ethics; not all ethical principles are intuitive. But I take Judge Edwards to be concerned about the lack of inspirational precepts and examples in the teaching of legal ethics at the elite schools rather than about a failure to impart prudential warnings.

Again there is irony in Judge Edwards' complaint. An exciting course in legal ethics, aimed at students at the best law schools, could not content itself with a careful exegesis of the American Bar Association's code of professional ethics. It would have to bring to bear on law the Western philosophical and ethical tradition. It would have to confront the student with the ethical questions about agency and advocacy raised by Plato in *Gorgias*<sup>15</sup> and answered by Aristotle in the *Rhetoric*;<sup>16</sup> with discussions of the role of lawyer as statesman and as

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14. Letter from Oliver Wendell Holmes to Frederick Pollock (Apr. 2, 1926), in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 178 (Mark D. Howe ed., 1941).

15. PLATO, *GORGIAS* (Terence Irwin trans., Oxford Univ. Press 1979).

16. ARISTOTLE, *RHETORIC* (W. Rhys Roberts trans., Modern Library 1984).

friend by scholars of jurisprudence such as Charles Fried and Anthony Kronman; with the philosophical literature on loyalty, commitment, detachment, and candor; with the profound depiction of the lawyer's role and character in literary works by Dickens and Tolstoy; with the criticisms of the traditional conceptions of the lawyer's role by legal realists, critical legal scholars, and feminist legal scholars; and with the behavior of the legal profession in crisis, for example in Nazi Germany. Could a purely doctrinal scholar teach such a course?

The most interesting question raised by Judge Edwards' article is whether the shift in the emphasis in legal scholarship at the leading law schools from doctrinal to interdisciplinary scholarship, or from the practical to the theoretical, has resulted in a net decline in the social value of legal scholarship. He is convinced that it has. His evidence is that he, and many of his former law clerks who responded to his survey, regard interdisciplinary scholarship as useless to the legal profession, even to its judicial branch of which Judge Edwards is a distinguished representative. Offered as it is without particulars, this verdict is extraordinary. Consider some of the developments in interdisciplinary legal scholarship over the past two or three decades. The one that I am most familiar with is law and economics, that is, the application of economics to law. To begin with, it is generally believed that law and economics has transformed antitrust law. It can, to be sure, be argued that all that law and economics *really* did, so far as its impact on the practice of antitrust law was concerned, was to provide conservative judges with a vocabulary and conceptual apparatus that enabled them to reach the results to which they were drawn on political grounds. Even if this is all that law and economics has done for (or to) antitrust, or for that matter to any other field of law, it would be far from negligible; to enable is to do much. But there is much more. Law and economics has contributed significantly to the deregulation movement, which has transformed the legal landscape in a number of fields of law, such as transportation law and communications law. It has transformed the proof of commercial damages. It has underwritten the movement toward awarding "hedonic" damages in personal injury cases, that is, damages for loss of the pleasure of living. It has influenced environmental regulation. It has contributed to the increasing judicial favor for giving commercial speech constitutional protection. It has armed divorcing women to argue that a husband's professional degree is a (human) capital asset to which the wife contributed and in which she should be recognized as having an interest. It has greatly influenced the proof of injury and damages in securities cases. It has changed the way in which lost earnings are

computed in tort cases. It has suggested new lines of proof in employment-discrimination cases (again through the human-capital model of earnings), at the same time casting new doubts on the theory of comparable worth. It has influenced the design of the federal sentencing guidelines (an economist was a member of the Sentencing Commission that promulgated the guidelines), which have transformed the sentencing process in the federal courts. It is powering a gathering movement to reform the Bankruptcy Code. It is influencing the standard for preliminary injunctions and for the constitutional right to a hearing. It is even influencing the way in which courts treat indigent litigants. Judge Edwards discusses none of these examples.

Furthermore, he does not discuss the criticisms that Bayesian probability theorists and cognitive psychologists have made of the rules of evidence, jury instructions, and burdens of proof — criticisms of immediate practical import, made by scholars who have at least as much to say about these matters as judges and practicing lawyers. He does not discuss the impact of feminist jurisprudence on rape law, sexual harassment, employment discrimination, and the legal protection of pornography; he does not, in fact, discuss feminist legal writing at all. He is silent on the growing literature, a literature informed by philosophy and literary theory, on the interpretation of constitutions and statutes, even though interpretation is the major function of the court on which Judge Edwards sits. The use of testimony by political scientists in reapportionment cases is ignored, along with (and related to the theory of interpretation) the burgeoning literature in public choice, economics, and political science concerning the legislative process.

The philistinism of the highly educated is captured in the slogan, "What I do not know is not knowledge," which is in truth how most of us think. We lawyers — especially ones of Judge Edwards' and my generation, who were trained at a time when the 'legal process' school, an updating of Langdell's notion of law as an autonomous quasi-scientific rigorous discipline, was in the ascendancy — find it comfortable and natural and even inevitable to believe that law is indeed an autonomous discipline. We are predisposed to believe that what there is to know about law is therefore a monopoly of legal professionals that must not be broken by interlopers from other fields or, worse, the legal professionals who have been seduced by other fields. But the truth is that professional knowledge is *characteristically* narrow, that this is the characteristic deformation of professionalization. Most physicians, for example, are narrowly focused on using orthodox treatment methods to treat a stereotyped list of crisis situations. Preventive

methods of an unorthodox character such as diet and exercise, or unorthodox treatments such as acupuncture and meditation, are slighted or disparaged, while whole fields of "medicine" broadly understood, such as securing a safe water supply or improving dental health, are placed outside of the boundaries of medicine altogether. As a result, many of the advances in human health, as well as most criticism of the medical profession, have come from outside the profession. It is the same with law. Conventional legal education puts blinders on the students, enabling them to tread doggedly a well-trodden path of professional success, and generates forms of scholarship that accept the borders of the path as the boundaries of the legal universe. It is to this that Judge Edwards would have the law schools confine themselves.

I am not starry-eyed about the new interdisciplinary legal scholarship. Much of it is bad, in part because a form of scholarship that is so difficult for most law students to understand places severe strain on the system for publishing legal scholarship, a system dominated by student-edited law reviews, and impedes the gatekeeper function that scholarly journals are supposed to perform. But when Samuel Johnson said that a writer is judged by his worst work when he is alive, and by his best work when he is dead, he was not intending to compliment the contemporary evaluation of achievement. We should consider whether legal scholarship would be enriched or impoverished if such scholars as Bruce Ackerman, William Baxter, Robert Bork, Guido Calabresi, Ronald Dworkin, Frank Easterbrook, Robert Ellickson, Richard Epstein, William Eskridge, Daniel Fischel, Thomas Grey, Henry Hansmann, Morton Horwitz, Thomas Jackson, Duncan Kennedy, Anthony Kronman, Catharine MacKinnon, Henry Manne, Frank Michelman, William Ian Miller, Martha Minow, John Noonan, George Priest, Matthew Spitzer, Cass Sunstein, Edward White, James Boyd White, and others almost too numerous to mention had either been deflected to other fields altogether or been apprenticed to Corbin, Wigmore, Williston, Prosser, or Scott. With many of those whom I have listed I have sharp disagreements. But I do not believe that the legal profession would be better without them or that they could be made to plow the narrow groove prescribed for legal scholars by Judge Edwards and his law clerks.

Judge Edwards might reply that much of what these fine interdisciplinary scholars whom I have listed do makes no contribution to the work of a judge or other practitioner. William Ian Miller writes about medieval Icelandic society. Kronman writes about Aristotle and Max Weber, and J.B. White about Jane Austen. Michelman has taken to writing esoterically about normativity, and much of Kennedy's writ-



ing seems self-parodic. Then there is a wild literature that I have avoided mentioning in which law professors in immensely long articles subject legal texts to the hermeneutic techniques of postmodernist literary theory. No judge could get *anything* out of that literature, and this unbridgeable gap is not merely a generational one.

But where is it written that all legal scholarship shall be in the service of the legal profession? Perhaps the ultimate criterion of all scholarship is utility, but it need not be utility to a particular audience. I am concerned that the production of legal scholarship is artificially encouraged by restrictions on entry into the legal profession, particularly the near-universal requirement that to be licensed as a lawyer one must have spent three years as a student at a law school. But if the requirement were abandoned, as I should very much like to see done, I am not sure that the balance between interdisciplinary and doctrinal legal scholarship would swing decisively in favor of the latter. Much interdisciplinary scholarship, *pace* Judge Edwards, serves the profession, and in all fields of scholarship professors frequently follow research paths that do not interest many of their students.

I said that I thought that the new legal scholarship should be judged by its best rather than by its worst examples. Judge Edwards might reply that the important thing is the ratio of the one to the other, that if most of the stuff is garbage, the price of the occasional pearl is too high. But there are few more elusive or problematic concepts than that of "waste." Out of 6000 eggs laid by a female salmon and fertilized by the male, on average only two salmon are born who live to adulthood.<sup>17</sup> Does this mean that 5998 eggs are "wasted"? Only if there is a more efficient method of perpetuating the species. Scholarship, like salmon breeding in the wild, is a high-risk, low-return activity. American universities are the finest in the world, but much of their vast scholarly output is trivial, ephemeral, and soon forgotten. Nothing ages faster than legal doctrinal scholarship, but its short half-life can be defended on the ground that such scholarship renders an immediate service to the profession. We should not be surprised, or lament, that so much of the new legal scholarship is of little value to anyone. That is the unavoidable price of a body of creative scholarship that has more practical relevance than Judge Edwards will admit, and a value as theory that his criteria for worthwhile scholarship, criteria understandably but nevertheless excessively narrow, prevent him from acknowledging.

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17. ROBERT TRIVERS, *SOCIAL EVOLUTION* 12 (1985). These figures are for salmon breeding "in the wild," not for selective breeding under controlled conditions such as on a fish farm.