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A RESPONSE FROM THE VISITOR FROM ANOTHER PLANET

*J. Cunyon Gordon**

On Monday, August 31, 1992, I clutched a podium in front of a hundred young people assembled in a semicircular room. Knowing they had come to judge me, I felt anxious, even though I had survived ordeals before. I had waited expectantly as a trial judge said, "Will the accused please rise" to a client accused of murder. I had stood before appellate judges imploring them to protect my teenaged client's right to confront his accusers. I had leaned into the dismissive face of a U.S. district court judge arguing that the Army did not have the right to discharge a decorated soldier who said he was gay. Then why, on that August day, did my blouse cling uncomfortably to my back as rivulets of sweat ran down, leaving me clammy and stuck together? Because these were no ordinary judges.

In front of me, in the wings to my left and right, and (could it be?) above and behind me sat second- and third-year law students, jaded consumers, clearly asking themselves, "Okay, where's the real professor?" I forced myself to swallow and spoke, introducing myself as a "visiting professor." A troublemaker broke through the silence and rasped, "From where?" I paused, thinking of the law firm partnership I had just jeopardized for a year's leave of absence and how alien it seemed from this classroom full of quizzical faces. I wished I could say "Stanford," or "Iowa," or "Wayne State," and swaddle myself in familiar legitimacy. At long last I stuttered, "From another planet." "Oh. A real lawyer for a change," beamed my erstwhile tormentor. Even over the rustle of readjusting seats, the students could hear the relieved puff of breath I let escape. Ice broken, melting, we began a discourse on the history, purpose, and armament of the nation's criminal justice systems, setting a tone of rigorous, challenging, "down and dirty" grappling that would carry us safely through a semester of criminal procedure. The seventy minutes passed too quickly. Afterwards, I had to be peeled off the floor, rehydrated, and unkinked.

I had come to the main phase of a journey from my home planet, law practice, to academia. Had I not believed an interrelationship ex-

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isted between them, I would not have stood there that airless afternoon. Over the previous ten months, however, I had navigated a miasma of mistrust and misperception. Many academics seemed to accord little value to my skills and experiences collected in eleven years of practice. Likewise, my firm, although it had graciously granted my leave of absence, may have considered my year in academia a less than bullish investment in its bottom line. The warm reception from my students, however, belied any sense of disconnection. With these contradictions fresh in mind, I read Judge Edwards' article,¹ expecting him to examine and dispel my own concerned confusion. He did not.

On the one hand, Judge Edwards' description of the landscape of law practice reverberates with ugly truths that coincide with my experience and observations: the legal profession is in One Helluva State. On the other hand, the culprit he blames for this ugliness, ranging from unethical practice² to lawyers' inability to write cogent briefs,³ is the growing influence of "outsider" scholars.⁴ How can Edwards so neatly pinpoint the scourges of practice and be so wrong about the relevant etiology? It was one of those things, as recording artists C + C Music Factory say, "that make you go 'hmmm. . . .'"⁵ After reflecting even more on the matters that preoccupied me during the past months, I concluded that, although Edwards cares no less deeply than I do about these issues, we approach them from opposite directions and see through different lenses.⁶ Through his one-dimensional lenses Edwards identifies the primary infections of law practice as a lack of ethics, diminishing practical capability, and too little commitment to public service.⁷ Through my 3-D glasses I see the same un-

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

2. "[P]ractical' scholars . . . are much better suited to teach law students what ethical practice means [whereas the theorists] . . . will be disadvantaged — 'in the effort to inculcate moral standards applicable to professional thinking and conduct in public roles.'" *Id.* at 74 (quoting Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L.J. 741, 791 (1992)).

3. Edwards, *supra* note 1, at 63-65. The "lack of depth and precision in legal analysis . . . [and inability] to focus an argument . . . are attributable in no small measure to failings in 'doctrinal education.'" *Id.* at 64-65.

4. *Id.* at 34-37. Edwards labels the "law and" and critical legal studies movements "impractical." I call "Crits" and "law ands" the "outsiders." Outsiders are those "whose marginality defines the boundaries of the mainstream." Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989).

5. C + C MUSIC FACTORY, *Things That Make You Go Hmmm. . . .*, on GONNA MAKE YOU SWEAT (Columbia Records 1990).

6. A lens is the partiality with which one examines and attempts to make sense of the world; it both shapes and reflects the way we understand it. *See, e.g.*, Delgado, *supra* note 4, at 2413.

7. Edwards keeps good company when he criticizes the failure of the bar to donate its time.

healthy influences, but I see them surrounded by life-threatening and systemic problems of racism, sexism, and elitism.

Our very different lenses also determine what we discern as the causes. Down the tunnel of his vision, Judge Edwards sees a cabal of “impractical” scholars whose disdain for practice propels the academy away from practice, elite law schools that give them a bully pulpit, and prestigious legal journals that publish their tracts.⁸ Yet, from that direction I feel a waft of fresh air from the voices only beginning to have influence. Where he sees a *dis*junction, I see a *con*junction. His paradigm of a disjunction serves an unfortunately divisive function: it aids and comforts those who would stanch change, who defend the traditional canon against outsiders.⁹ It fuels their engines.

In order to admit, as I do, that the related planets of practice and academia are conjoined, one has to realize, as I have, that the legacy of the heavily doctrinal education Edwards wants to preserve may be precisely the lawyers he upbraids — lawyers who generally do not live, work, and behave ethically (with fairness, compassion, and creativity) in a complex, heterogeneous society. This recognition in turn compels the conclusion I reach that the outsiders — with their challenges to the status quo’s values, their upstart theories and innovative pedagogies, and even their Star Trek-and-the-law scholarship — may help save Planet Practice.

I do not deny a personal stake in this debate. As a black woman practitioner scoping out academia, I have one foot in each world. Yet I am an outsider in both. Because a widening “gap” between them would be detrimental to my corpus, they had better be so close that an itch in one can be scratched in the other.

Taking the lead from Edwards’ use of anecdotal material — does he call it “narrative”? — I will share the insights gained during my year as the visitor from another planet¹⁰ and respond to the judge’s propositions en route. Part I is my view of “unethical practices”; Part

Hardly a month goes by these days when the ABA does not devote space to the need for pro bono work. See J. Michael McWilliams, *Making Time For Pro Bono*, ABA J., Apr. 1993, at 8; J. Michael McWilliams, *Standing Up For The Powerless*, ABA J., Feb. 1993, at 8. This year the ABA House of Delegates adopted a rule that urges lawyers to perform 50 hours of pro bono work a year.

8. Edwards, *supra* note 1, at 46.

9. This perennial debate resurfaced in the 1980s with ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY’S STUDENTS* (1987); see also DINESH D’SOUZA, *ILLIBERAL EDUCATION* (1991). For the flip side of the debate, see HENRY L. GATES, JR., *LOOSE CANONS* (1992); see also JULIUS GETMAN, *IN THE COMPANY OF SCHOLARS* 130-208 (1992).

10. Inspiration for my metaphor comes from the film *THE BROTHER FROM ANOTHER PLANET* (A-Train Films 1984). An interplanetary traveler who happens to look like “any other Brother” arrives on earth and gets buffeted through misadventures because he has no idea of the

II, of scholarship; Part III, of teaching; and Part IV, of the outsiders' contribution.

I. PLANET PRACTICE: A WIDER LANDSCAPE

I don't think ladies should be lawyers. I believe you belong at home raising a family.

— Cook County, Illinois judge¹¹

I guess they don't have many golf courses in the ghetto.

— Baker & McKenzie partner¹²

Edwards' catalogue of the woes of Planet Practice resonated so deeply that I thought he had stolen half my letters home. Aided by watchful former clerks, he spotted the greed, the dishonesty, the hollowness of the luxurious surroundings, the "Bill or be Banished" blues, the selfishness.¹³ In eleven years I had seen all of it, and more, on the landscape. But I believe "ethical" behavior means more than abiding by a code of professional responsibility; I believe racism and sexism¹⁴ are unethical.

You want unethical conduct? The quotes that opened this section are not isolated incidents in the lives of women and minority lawyers. Thirty-eight percent of female attorneys and twenty-two percent of male attorneys note differential treatment of male and female counsel by judges.¹⁵ *Women represent only twelve percent of federal judges and sixteen percent of lawyers who practice in the western U.S. courts.*¹⁶ In one megafirm a senior woman partner called a meeting of the women partners, prompting one male colleague to carp, "What if we held meetings of the men partners?" "You do," was the easy retort. "They're called Executive Committee meetings."¹⁷ Sometimes they "just don't get it."

rules, but appears to understand them. Although I was "passing" for a scholar simply because I was teaching at a law school, I was far from it.

11. Said to woman practitioner appearing before him in open court. Renee Cordes, *Senate Panel To Consider Simon Bill Attacking Gender Bias in Courts*, CHI. DAILY L. BULL., May 7, 1991, at 3 (hereinafter *Senate Panel*).

12. Said by partner to a black woman University of Chicago law student interviewing for associate position. *B&M Apologizes for Racism, Fights Partner's Sex-Bias Suit*, CRAIN'S CHI. BUS., Oct. 26, 1992, at 21.

13. Edwards, *supra* note 1, at 67 n.90, 68, 69 nn.95 & 96; see generally *id.* at 66-74.

14. See *Legal Sexism*, NATL. L.J., Apr. 2, 1990, at 12; *Unequal Partners*, ABA J., Apr. 1993, at 50.

15. James A. Knecht, *Only You Can End Gender Bias: Justice*, CHI. DAILY L. BULL., Apr. 29, 1992, at 6.

16. Harriet Chiang, *Sex Harassment Reported in Courts*, S.F. CHRON., Aug. 5, 1992, at A3.

17. Of Chicago's 25 largest firms, 9 have women in management committees; not one had a woman as managing partner. Mary Lou Song, *Women Note Visible Victories but Slow Gains*, CHI. LAW., June 1992, at 8-11.

Only 3.3% of the nation's 777,000-plus lawyers are black. Of these, thirty-one percent are in law firms — one-half the majority rate.¹⁸ Before I ventured away from the Planet Practice in 1992, I could convene a meeting of my firm's black partners in a single stall in the women's room, with no standees. That heartsunk feeling that all outsiders know sooner or later came at my first partners' meeting in January 1991. Row after row of beige heads perched atop dark blue and grey shoulders, interrupted by the glint of a brightly colored scarf or a gilt barrette, made a nightmarish scene, live and in one living color. It is hard to go back in there after that.

Yet, I have lived there and felt the painful sting of "isms" that left me asking if my skin is too thin. In one state courtroom, a prominent sign propped on the podium instructed, "ALL NON-ATTORNEY PERSONNEL MUST IDENTIFY THEMSELVES AS SUCH WHEN APPROACHING THE BENCH." Often law firms sent paralegals or docket clerks to enter uncontested orders. One morning my opposing counsel and I stepped up to the bench to argue a procedural motion. He stated his name, I stated mine, and the judge squinted and asked, "Miss, who is the attorney on the case?" My face went white-hot as I stood there stewing in my expensive suit of armor. Wrestling back the words, "Why, Yo' honah. Jes' little ol' me," created a bilious knot in my gut. Fortunately, a keen instinct for survival pushed out a simple "I am, Your Honor." The sniggles from the courtroom stung like nettles. I made excuses for him. Maybe I looked too young to be a great big important lawyer; maybe I looked lost; maybe I never introduced myself in court again without the title "Attorney" before my name and the name of my law firm after it. Otherwise I am invisible.

Survey after survey depicts how the practice of law has become a virtual jungle of sexism,¹⁹ racism, and "playing hardball."²⁰ Yet, Judge Edwards ignores them in a tract devoted to exposing and trying to resolve problems in law practice and education. Do these plagues — which are as widespread and destructive as bill padding and lying to opponents, if not more — deserve no mention?

That the unethical treatment of women, minorities, and minority

18. THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM (1992) 25, 26 (hereinafter TASK FORCE REPORT).

19. At least 30 states joined in recommending judicial education as a means of fighting discrimination against women, causing Senator Paul Simon to introduce the Equal Justice for Women in the Courts Act of 1991. See *Senate Panel, supra* note 11, at 3.

20. Andrew Grene, *Civility Panel Considers Detention for Rude Lawyers*, CHI. DAILY L. BULL., Apr. 8, 1993, at 1.

women is invisible or unimportant to such a keen and concerned observer of the profession tells me that I cannot trust that his flawed vision has not also skewed his evaluation of who the culprits are in the academy. No, it does not matter that Edwards' article was not on "race" or "woman trouble." He limits what he perceives in law practice to a vision that will sustain his purpose, the defense of the academy's traditional canon. Surely if "outsider" exclusion in the profession is part of the problem, then the emergence of outsiders in the academy could be the solution. When I start with these pandemic problems, it is not hard to trace them back to a resistant strain in the traditional academy.

II. DISDAIN FOR PRACTICE: PHASE ONE OF THE JOURNEY

Given Judge Edwards' and my picture of the practice landscape, it is small wonder that Edwards believes that academics hold its inhabitants in contempt for their base desires and baseless activity. A professor who feels disdain probably conveys that to her students, whether its object is practice or the plight of others. Edwards to the contrary, outsiders have no monopoly on arrogance or disdain. Indeed, I venture to say, they have not even a toehold in the market. Julius Getman thus describes his own decision to teach:

[T]he basic decision not to enter the field for which I was trained is one made by everyone who chooses teaching over a professional career. We reject the lives we are preparing our students to live. Embedded in this simple fact is an awful irony. We seek meaning by preparing students for a life we do not find meaningful.²¹

All academics, not only those whose scholarship tends toward the more theoretical, should challenge themselves to confront that irony. Given that outsiders still make up a minority of professors, and given Edwards' own data that a mere quarter of law professors have more than five years' practice experience,²² a great many traditionalists lack the long-term commitment to and understanding of practice that Edwards finds so crucial, and they perforce reveal their antipractice bias in class.

The cause for the disdain matters more than simply whether it exists. If the professoriate's disdain comes from perceiving practitioners

21. GETMAN, *supra* note 9, at 14.

22. Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REF. 191, 219 (1991), quoted in Edwards, *supra* note 1, at 50 n.48. From my review of the faculty biographies at my host school, the trend was to practice briefly, then reject it for the higher intellectual ground of academia. The self-righteousness that comes from suffering doubtless adds to the sense of superiority. I was delighted to find that the less traditional faculty members were the ones who actively mix with the "real world" and its problems.

as crass, dishonest materialists, the academy should struggle mightily to instill better values in students, most of whom become practitioners. More emphasis on building a sense of community, shared values, and respect for others' dignity would go far toward ending these negative behaviors. Oh, I am sorry; those are the outsiders' themes.²³ On the other hand, disdain for the perceived intellectual vacuity of practice may be every academic's occupational hazard.²⁴ Most of the academy's disdain for practice comes from the sheer arrogance of the scholarship enterprise that motivates most legal academic institutions. I would lay odds that the academic law of survival — publish or perish — was not coined by Crits.

My introduction to academia illustrates the focus and the cause of the disdain. In August 1991, I registered for a symposium for minority legal scholars and sent my résumé, which reflects substantial trial and appellate litigation experience in criminal and civil law, liberal public service, and pro bono advocacy. It also reveals that I had never published a law review article. The résumé caught the eye of law school bounty hunters and gatherers,²⁵ who told me about their curricula, collegiality, and visions for the future. I heard no inkling of a "Judge Edwards problem," that is, that practitioners had little to offer academia or that I was contemptible. In fact, the hunters tooted about my background and praised my ascension to partnership in a major law firm. They knew that a show of contempt was no way to bag a minority.²⁶ Seduced as I was by this show of respect for "real lawyering," I completely forgot my long-held opinion that academics are self-important, intellectual snobs. As a result, I was totally unprepared for the reality jolt I got at one school.

After a morning round of so-what-got-you-interested-in-teaching interviews with designated faculty members, I was hopeful that I had landed in a hospitable place to teach, learn, and ponder a transition to academia. In the early afternoon, I presented a talk to the faculty that seemed to be well-received. I had no "work in progress," the usual

23. "[S]torytelling focus[es] on . . . community-building . . . consensus, a common culture of shared understandings, and deeper, more vital ethics." Delgado, *supra* note 4, at 2414.

24. Academics look down their noses at practitioners the way practitioners look down their noses at academics. The expression, "Those who can, do. Those who can't, teach," was not born of mutual respect.

25. Whether they had formal affirmative action policies or not, they were trawling for minorities. At the time, I put aside where I stood on the debate, gift horses being what they are. Compare Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 with STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991).

26. At the time I interviewed, my host school had a black full professor, who was scheduled to visit away in academic year 1992-1993 and a Hispanic associate professor (both males).

presentation. My job talk was on an issue I was researching for clients I represented who were suffering alleged AIDS discrimination. The afterglow wore off when I was blind-sided by a Rambo-scholar who thrust himself in front of me in what animal behaviorists must call the "attack posture" and barked, "So what're you writing about?" Hackles fully up, defensive, I sneered, "I have been *practicing* law, not writing about it." Fortunately, a twenty-five-year veteran of the "academic game" heard this gaucherie, dragged me aside by the scruff, and threatened to circumcise me if I ever said that again. Wagging a finger in my face, my rescuer said, "Repeat after me: 'I HAVE A BURNING DESIRE TO WRITE. SCHOLARSHIP IS MY PASSION, AND THAT IS WHY I AM HERE. PRACTICE DOES NOT PROVIDE ME THE INTELLECTUAL RIGOR OR SATISFACTION I SO DESPERATELY WANT. IT IS A VERITABLE WASTELAND.' Got it?" Got it. Chanted it like a mantra at succeeding interviews and even through dinner. Still do. This near-miss confirmed two truths: scholarship, not teaching, is the be-all and end-all in academia, the coin of the realm;²⁷ and scholars, even traditional ones, consider law practice the province of the brain dead.

Although this "publish, publish, publish" carries the same malignant germ as the "money, money, money" that Edwards lambasted, I am not deterred from seeking my scholarly muse. One outsider-turned-insider urges new academics to "write about what you genuinely believe rather than . . . about what you are told . . . you ought to address."²⁸ I try to remain undaunted by the question of what scholarship is. Is it "essentially the restatement of other people's thinking," or is it writing that "involves a debate within the academy?"²⁹ Of this I am sure: while the academy battles over what constitutes "real" scholarship, it seems clear that traditional academics only want to see a certain kind, and only they can produce it.³⁰

III. PHASE TWO OF THE JOURNEY: THE PEDAGOGY OF THE OPPRESSED

Judge Edwards accurately perceives that the pedagogical dilemma is how to develop a teaching method that is at once theoretical, doctrinal, and practical. I disagree with him as to how that pedagogy could

27. A law review survey that one school circulated quite proudly ranks schools by pages published per faculty member in twenty leading journals! Note, *Chicago-Kent Law Review Faculty Scholarship Survey*, 66 CHI.-KENT L. REV. 509, 521 (1990).

28. Aviam Soifer, *MuSings*, 37 J. LEGAL EDUC. 20, 22 (1987).

29. GETMAN, *supra* note 9, at 44.

30. See GATES, *supra* note 9, at 33.

be improved, but I applaud his concern. The fact that he worries at all about teaching sets him apart from many academics.³¹ I thought I understood the concept of academic freedom, but to my surprise my host school was blissfully aloof about the content and manner of my teaching. I took this to be more evidence that academia was another planet. Imagine a partner telling an associate, "Oh, go on and handle that antitrust matter any way you'd like"

Teaching itself is so difficult; I wanted badly to do it well. When done well, it "[makes] students feel capable" and gives them an elevated sense of potential.³² I wanted myself and them to accomplish feats of academic brilliance in class, but I also wanted to leave them feeling good and capable, rather than simply to "train" them to be "useful." I also realized that education, the great equalizer, can foster elitism. I join Professor Getman in condemning legal education for its arrogant assumption of intellectual superiority; its social, intellectual, and professional rating systems; its limited focus; its overemphasis on professional competence; [and] its failure to provide an opportunity to express other aspects of our intellectual ability, such as creativity, empathy, and understanding³³

The overemphasis on "pure doctrine," when combined with traditional pedagogical methods, instills an intellectual arrogance that students blithely take with them, whether to practice or back to academia. Edwards hectors the outsiders for "abstract" scholarship, detachment, and incapacity to "integrate the 'academic' with the 'practical.'"³⁴ Objection, Your Honor. The outsiders offer a version of the law not "divorced from reality" as Edwards claims, but *hyper*-real. They bring in more reality, certainly more of a certain *kind* of reality, than traditionalists like Edwards can abide, but it is that ingredient that Getman laments was left out of his own education. As a result, these outsiders do pose a clear and present danger to the tyranny of "neutrality" in the canon. Feminist legal theorists³⁵ cut right to the nuggets, challenging the androcentric, individualistic values they see undergirding traditional interpretations of legal doctrine.³⁶

31. "Publishing articles . . . has greater payoffs than teaching in terms of prestige, raises, job offers, and promotions. . . . [W]e seem to have developed a whole new culture of young academics . . . determined to research, write, and publish while they incidentally meet with . . . classes." GETMAN, *supra* note 9, at 40.

32. *Id.* at 17.

33. *Id.* at 13.

34. Edwards, *supra* note 1, at 42.

35. See, e.g., FEMINIST LEGAL THEORY (Katharine T. Bartlett & Roseanne Kennedy eds., 1991); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987).

36. See, e.g., Mary I. Coombs, *Shared Privacy and The Fourth Amendment, or The Rights of Relationships*, 75 CAL. L. REV. 1593 (1987). Professor Coombs draws on feminist legal theory to

The narrative scholars invite us to empathize by hearing the stories of marginalized "others."³⁷ Critical race theorists chip away at the perceived neutral principles of law, exposing how they reflect the hegemony of nonneutral values and wreak injustice upon certain disempowered people.³⁸ The motley crew of "law ands," (can't live with 'em, can't shoot 'em) import their interdisciplinary arts and sciences and make us realize that law is not insulated from the rest of society. All told, I learned the most about teaching from folks who want to shake up the academy a little. At their best, their contributions will affect not only what students learn in law school, but the manner in which they learn, and they will leave an indelible mark on those students.

Professor Andrew Taslitz suggested teaching goals that smacked of outsider influence: 1) integrate theory and practice the way practitioners do; 2) expand the ways in which students learn by doing; 3) make an "art" out of lawyering by understanding the theories of appellate cases; and 4) use tools of other disciplines.³⁹ To accomplish Goal Three, I immersed myself in pertinent scholarship. Contrary to Edwards' lament,⁴⁰ the journals brimmed with heavily doctrinal scholarship. There were scholarly surveys of law⁴¹ and critical analyses of relevant doctrinal developments, by both scholars⁴² and students,⁴³ although the outsiders contributed to the discourse.⁴⁴

emphasize the role that human interconnectedness should play in the courts' treatment of issues such as standing and consent in Fourth Amendment jurisprudence.

37. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987).

38. See, e.g., Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 80-82.

39. Andrew E. Taslitz, *Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think*, 43 HASTINGS L.J. 143 (1991). I do not suggest that Taslitz' goals were revelatory. In fact, their appeal was their common sense. When the school's "usual suspects," who encouraged and supported my learning endeavor, offered similar advice, I knew Taslitz was on the money. Thanks. See also Myron Moskowitz, *Beyond the Case Method: It's Time To Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992).

40. Edwards, *supra* note 1, at 42-43.

41. The *Georgetown Law Journal* publishes an annual survey of criminal procedure that I found invaluable in preparing for my course. E.g., Project, *Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1990-1991*, 80 GEO. L.J. 939 (1992).

42. See, for example, Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723 (1992), which became my bedrock for Fourth Amendment theory and doctrine.

43. See, e.g., Doyle J. Baker, Note, *Sobriety Checkpoints: Michigan Department of State v. Sitz*, 39 KAN. L. REV., at 111 (1991).

44. See, e.g., Ian C. Weiner, Note, *Running Rampant: The Imposition of Sanctions and the Use of Force Against Fleeing Criminal Suspects*, 80 GEO. L.J. 2175 (1992) (applying a law-and-economics (!) analysis to Fourth Amendment violations).

Goal One was served admirably by my text selection, the old Kamisar, LaFave and Israel⁴⁵ standard freshened up. Along with that, a chronicle of three years in the Manhattan District Attorney's office⁴⁶ provided an ingredient Judge Edwards should like: dirty realism. I especially urged those who believed they would spend their early professional years arguing weighty constitutional issues to read carefully about prosecuting subway "token suckers."⁴⁷ I said *dirty* realism. For Goal Two, Taslitz recommended an innovative criminal procedure text that teaches almost exclusively with problems.⁴⁸ I wanted to use problems in class, but neophytes should steer wide of new texts; we need to call on veteran users in emergencies. So my research assistant and I devised some problems, set them in local neighborhoods, and used incidents that were as often "ripped from today's headlines" as from reruns of *Miami Vice* and *Dragnet*. Although I tried not to shrink from tough issues of race, class, or sex, I confess that in order to "raise consciousness" I created "neutral" villains who had committed insurance fraud or insider trading rather than subway muggings.

Because I believe, along with Edwards, that professors should avoid divorcing doctrine from the reality that purports to inform it, I hope he would not object to my method of introducing reality. One kind of reality is political. Edwards cringed at the notion that an academic might express skepticism about the fairness of federal courts in a class.⁴⁹ I say two words in response: Clarence Thomas. The blatantly partisan political squabbling that attended his nomination and confirmation removed any lingering doubt that the federal bench is not deeply politicized.

Another kind of reality is that which comes from understanding and empathizing with the day-to-day reality that never comes across in dry appellate opinions. Do students think that Supreme Court Justices travel much by interstate bus? Or that Justice O'Connor has ever been approached sitting on the back seat of one by armed police officers and asked for identification?⁵⁰ I don't think so. The Court often

45. YALE KAMISAR ET AL., *BASIC CRIMINAL PROCEDURE* (7th ed. 1990 & Supp. 1992). The text's severe editing of reported cases is redeemed by abundant references to historical material, original source studies from other disciplines, and scholarly treatments of a number of criminal procedure issues.

46. DAVID HEILBRONER, *ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A.* (1990).

47. *Id.* at 12-13.

48. WELSH S. WHITE & JAMES J. TOMKOVICZ, *CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF* (1990), *discussed in* Taslitz, *supra* note 39, at 150-63.

49. Edwards, *supra* note 1, at 61.

50. Justice O'Connor authored *Florida v. Bostick*, 111 S. Ct. 2382 (1991). The Court held

benefited from a story from Justice Thurgood Marshall (maybe the original narrative scholar). Similarly, a student trying to understand the Court's attempts to balance the rights of suspects against the obligation of police to keep communities safe in accordance with constitutional principles can benefit from dirty realism. Edwards should therefore not urge professors to teach antiseptically. I would no sooner teach criminal procedure doctrines and theory "wholly divorced" from the reality of race, class, power, and even partisan politics⁵¹ than Edwards would teach law and economics "wholly divorced" from cases. Pretending that case law develops neutrally would be not only "impractical" but disingenuous. My kind of honesty may lead to the classroom becoming a "battleground" for ideas, but pretense leads to the very result Judge Edwards wants to avoid — lawyers unable to grapple with "hard" issues in practice. The important caveat — and very tricky goal — is to use one's own opinions to advance the debate rather than to end it.

Yet another kind of shared reality comes from using tools that concretize what students are learning.⁵² For instance, arrest reports, search warrants, and *Miranda*⁵³ waiver forms can make students "see, feel, and smell" living, breathing 3-D doctrine. Visuals have a way of illuminating and demystifying the law's nuances and obscurity. For instance, the tension in Fifth Amendment doctrine and confessions may be conveyed better by a videotape of a district attorney's interrogation of a woman suspected of committing murder by arson;⁵⁴ a dramatization of a confession obtained by trickery;⁵⁵ or a TV version of a coerced *Miranda* waiver.⁵⁶ One reason criminal procedure fascinates me is the players involved, people who never quite materialize in

that no Fourth Amendment seizure occurred "[s]o long as the reasonable person would feel free 'to disregard the police and go about his business.'" 111 S. Ct. at 2386 (quoting *California v. Hodari D.*, 111 S. Ct. 1547, 1552 (1991)). It applied that standard to the petitioner, a black male in his twenties, finding that he was "free to leave" the encounter between him and the police in the back of a bus bound from Miami to Atlanta. 111 S. Ct. at 2386-87. It is folly for a law professor to fail to point out that the doctrine of the "reasonable person," *wholly divorced from reality*, may not apply to poor black males.

51. Who can ignore the Rehnquist Court's full assault on the Bill of Rights in service to a politically conservative agenda? During the 1990 and 1991 Terms, the Court rejected defendants' Fourth Amendment claims that had been upheld by state courts or lower federal courts in the vast majority of criminal cases it heard. Maclin, *supra* note 42, at 728 n.15; *see also* Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to The Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

52. *See* Taslitz, *supra* note 39, at 144.

53. *Miranda v. Arizona*, 384 U.S. 436 (1966), held that police must advise a suspect in custody of certain rights before beginning to interrogate the suspect.

54. *See* *People v. Vese*, 417 N.Y.S.2d 1015 (1979).

55. *See* *Miller v. Fenton*, 796 F.2d 598 (3d Cir.), *cert. denied*, 479 U.S. 989 (1986).

56. *Homicide: Confession Is Good for the Soul* (NBC television broadcast, Mar. 3, 1993).

the case law or academic theories. Few in my class had ever had more than a casual encounter with the police. As a result, when we grappled with the doctrines concerning constraining police behavior, we invited a cop to class. A veteran of Boston's finest guest-lectured and favored the class with a terrifying demonstration of a "stop and frisk." Although *Terry v. Ohio* clearly describes the frisk,⁵⁷ when this beefy plainclothes officer kicked the student volunteer's legs apart and groped him roughly from shoulder to butt to groin to ankle, the class recoiled. Especially those who could see a 9mm pistol in his waistband. (The cop's, not the student's.) No young prosecutor or defender should enter a courtroom with a sterile or romanticized notion of how the Fourth Amendment "constrains" a citizen's encounter with the police. While Edwards focuses primarily on exposing students to the reality of practice, I would emphasize the reality of reality. Importantly for this debate, one need not have practiced law to gain insights into, or to convey to students the value of, the enterprise they will enter.

I believe Edwards would agree that I can and should integrate theory, doctrine, and realism in this way, as long as I first instill a healthy respect for "real" doctrine. I am not so sure that I want to do that. I really did want my students to develop a suspicion of power and of those who seek to use the law to corral power at the expense of the weaker. I wanted students to question those who claim that the traditional view is "objective" or "real" simply because it survives uncriticized. Thus armed, I expect them to go out into Planet Practice and challenge judges and other practitioners to put on new lenses, or at least to acknowledge they are wearing lenses already. I expect their exposure to reality to cause them to respect their colleagues, to care about their stories, and to behave "ethically" toward them.

IV. ALIGNING THE PLANETS

Modifying the substance of what students learn in law schools will only partially cure Planet Practice. I learned that how I taught was just as important as what I would teach.⁵⁸ I read articles on the new

57. *Terry v. Ohio*, 392 U.S. 1, 16-17 & n.13 (1968). *Terry* held that a law enforcement officer can intrude briefly on an individual's liberty in order to dispel an articulable suspicion that the individual is engaged in or has engaged in criminal conduct, question the person, and "frisk" him for weapons.

58. The outsiders' nontraditional approaches to substance and method inure to the benefit of the profession. Students should learn "legal language and interpretation," Edwards, *supra* note 1, at 61, and to "use cases," but also the ethics of mutual respect and inclusion.

pedagogy⁵⁹ and attended the 1992 Workshop of New Law Teachers sponsored by the Association of American Law Schools, one of the organizations Edwards blames for its role in "opening up" the academy. As a result, I rejected Professor Kingsfield⁶⁰ as a role model and chose to conduct both my large class and my spring seminar in an "interactive" feminist pedagogical mode. Instead of the stand-up-and-be-humiliated style of pseudo-Socratic method, I relied heavily on volunteers willing to work to argue doctrine, theory, and policy with themselves and their classmates. We struggled to harmonize inconsistent precedent and understand reversals in trends, and we excoriated the Court when it revealed that it was "clueless" about the real world. Once (or twice) we were downright cynical.

When we create a community in the class in which all voices are given an opportunity to be heard and exchange is robust and deep but not vicious, everyone leaves feeling "capable, with an elevated sense of potential."⁶¹ Every time a woman is encouraged to speak out in a law school class, and a man waits his turn while listening to her, another nail goes in sexism's coffin. When women talk, we may have to lean to hear their "small, soft voices, often courageously trying to speak up."⁶² Some of the invisibility⁶³ that women and minorities suffer in Planet Practice starts in "Kingsfield" classes. There, the white male student, who spars with the white male professor for the majority of the class period and survives, learns that he can survive. On the other hand, when students of color and women are "spared" that exercise,⁶⁴ the opposite message is conveyed to all students: you, my younger self, are being transformed "into one worthy of mingling with the country's professional, intellectual, political, and social elite."⁶⁵ And you, invisibles, are not. To be fair, I must tell you that one white

59. *E.g.*, Becky Thompson & Estelle Disch, *Feminist, Anti-Racist, Anti-Oppression Teaching*, 41 *RADICAL TCHR.* 4 (1992).

60. Professor Kingsfield is the venerable contracts professor of JOHN JAY OSBORN, *THE PAPER CHASE* (1971). He was brought to memorable life by John Houseman in the 1973 eponymous movie *THE PAPER CHASE* (Twentieth Century-Fox 1973). Unfortunately, for many law students, Kingsfield is the paradigm of a law professor. Students may resist non-Kingsfields. *See, e.g.*, PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

61. *See supra* text accompanying note 32.

62. ADRIENNE RICH, *Taking Women Students Seriously*, in *ON LIES, SECRETS, AND SILENCE* 237, 243 (1979).

63. *See* Kim A. Taylor, *Invisible Woman: Reflections on the Clarence Thomas Confirmation Hearing*, 45 *STAN. L. REV.* 55 (1992).

64. Susan Faludi describes Allan Bloom's puzzlement at the reaction of women students to his excluding them. He explained that some of them "actually got mad because he didn't call on them during the question and answer period." SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 294 (1991).

65. Getman, *supra* note 9, at 10.

student in my large class said he perceived that I was "harder" in class on white men than on others. His remark reminded me of the news accounts of the debate on the military's ban on gays, in which straight military men vocally object to having openly gay men as shipmates and say that the gay men will prey upon them. Suddenly when the "object" shoe is on the other foot, these men understand in a deeply personal way the deleterious effect of unwanted, even if imagined, sexual attention. Got it? Keep it. When the chosen ones who survived Kingsfield go to the Planet, they take with them the feeling of power and superiority they get from being clones. Clones graduate to become the associates, partners, and judges who think women should be at home, who sexually harass their colleagues,⁶⁶ and who rest comfortably on statistics that confirm what they already believe about themselves. Some return to the scene of the crime to perpetuate the same fraud on the next generation of law students. Smart money says they do not become unfair, racist, sexist, unethical, or greedy by reading Toni Morrison⁶⁷ in Family Law or Faulkner in Legal History or from studying Icelandic tribes.

When Edwards skewers the outsiders who tell stories or write about economics or philosophy, he wholly ignores that they have done what he condemns practitioners for failing to do: elevated passion over the pursuit of filthy lucre. Moreover, until they really take over academia, many of them do more than merely forgo law firm loot for the scholar's slim purse. The cost of disrupting the status quo may be the lost chance at tenure, even jobs in the first place, in the tightening academic market. They win the opprobrium of the mainstream plutocracy.⁶⁸ Their existence alone under those conditions is a fine lesson for law students to learn, even if not one of them ever "uses" it in practice.

I have gone on a while about how "practical" I found the work and themes of the outsiders. I have one final pitch to make on their behalf. Their work may actually be practical in the more conventional

66. For three recent cases involving sex discrimination claims brought by women attorneys against their employers, see *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175 (E.D. Pa. 1990), *rev'd*, 983 F.2d 509 (3d Cir. 1992); and *Halbrook v. Reichhold Chem., Inc.*, 735 F. Supp. 121 (S.D.N.Y. 1990).

67. Toni Morrison won the National Book Critics Award for *SONG OF SOLOMON* (1977) when I was in law school, although I believe there is no causal connection. I was so excited that I ran into the common room at school, with a *Time* magazine in my fist that had the goddess on the cover. I saw one of my white male classmates, whom I had mistaken for well educated, and exclaimed "Toni Morrison is on the cover of *Time!*" "Who is he?" my ex-friend asked, sincerely. Whack! Invisible.

68. There is a developing cottage industry built on trashing the outsiders. See, e.g., Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); don't see Michael Weiss, *Feminist Pedagogy in the Law Schools*, ACAD. QUESTIONS, Summer 1992, at 75.

way Edwards uses it, as in “usable to judges or practitioners in resolving a particular problem.” Not two weeks ago I participated in the annual judicial training of the judges for the Superior Court of the District of Columbia. This two-day program included sessions on sentencing, judicial ethics, criminal discovery, and judicial involvement in child placements. Five real academics and I facilitated two-hour discussions with groups of judges, using fiction to help them understand their own profession. Everyone had prepared by reading two short stories: *Billy Budd*⁶⁹ and *The Two*.⁷⁰ Before long the judges were sharing personal stories about the ways prejudice can infect and affect judgment, the difference that one’s culture makes in exercising judgment, and even the effect of work issues on their families. Edwards might harrumph that such an exercise was a waste of the judges’ and the professors’ time. Even if the discussion does not in the strictest sense “aid the court’s understanding of the doctrine” of responsibility or self-defense or provide a pithy quote for a judicial opinion (unless we get lucky), it is “practical” in the sense of adding value to the enterprises of all involved. Personally, I know that when I next appear before a trial or appellate judge, I will do so convinced that a heart beats under the robes. I consider that practically a victory.

V. THE FINAL CHAPTER: BEAM ME BACK

Will I survive straddling the gap between practice and the academy? I hope so. In order for me to navigate between the two closely aligned planets, we must ensure the survival of both our species. First, we should recognize that there is a conjunction between what we do substantively and pedagogically in our law schools and what happens on Planet Practice. Then we should trust the market. With so many law schools, a few can specialize in abstraction, and all can be more charitable to the “outsiders.” If a school goes stark raving Crit (or law and . . .), its reputation as a theory-only school will spread, and if the canonists are right, its graduates will starve because they cannot practice law, write briefs, or talk to clients except in riddles. Enrollment will plummet and that school will close. We will be well rid of the place. *If* they are right.

As for scholarship, I would add to Judge Edwards’ prescription

69. HERMAN MELVILLE, *BILLY BUDD, SAILOR* (1924).

70. GLORIA NAYLOR, *The Two*, in *THE WOMEN OF BREWSTER PLACE*, 129 (1983). “The Two” tells a passionate story of two black lesbians who live in a quiet working class black community whose denizens do not accept their being “that way.” The story culminates in a paroxysm of terror and violence that opens issues of prejudice and tolerance, victims and victimizers, culpability and the lack thereof.

this notion of “practical” scholarship: it deepens one’s understanding, makes us understand and care about other human experiences, enhances a sense of community, transports us out of the workaday, or makes us go “hmmm . . .” Law school curricula should — no, must — include not only abstract and even radical theory, but cinema and fiction and philosophy and music. Journals should continue to publish articles about theory — even “wholly divorced from” cases if necessary — although theory rarely is now, and will hardly be. Law schools should examine current teaching methods that reinforce values that later lead to unethical conduct, both my and Edwards’ kind. They must encourage faculty to experiment with pedagogies that involve *all* students in the learning experience. Faculty should teach with problems, ask hard questions, tell stories, hear stories, have parties, and take field trips.

If we open law schools to fresh influence, students will find passion and passionate scholars and teachers who respect the richness of ideas and difference. If we continue to fight it, the toxic “-isms” will kill us off long before marauding gangs of “Crits” and “laws ands” theorize us into submission.