Students as Teachers, Teachers as Learners

Derrick Bell
New York University School of Law

Erin Edmonds
STUDENTS AS TEACHERS, TEACHERS AS LEARNERS

Derrick Bell* and Erin Edmonds**

Knowledge emerges only through invention and re-invention, through the restless, impatient, continuing, hopeful inquiry [men and women] pursue in the world, with the world, and with each other.

. . . .

. . . Education must begin with the solution of the teacher-student contradiction, by reconciling the poles of the contradiction so that both are simultaneously teachers and students.

— Paulo Freire, Pedagogy of the Oppressed

FOREWORD

Dear Harry:

Your published critique of legal education, legal scholarship, and big law firm practice brought to mind our many discussions during your years on the Harvard Law School faculty, and particularly the many weekends my family spent at your summer home on Cape Cod. I recall those discussions generated far more heat than agreement. It was fun. In your strong attack on what you call “Law and” scholarship, the Harry Edwards trademark, “strong views, vigorously expressed,” is much in evidence.

As you will see, I agree with some of your criticism of legal education and legal scholarship. Much of what you condemn in large firm practice concurs with reports from hosts of former law students who, despite their high salaries, are unhappy with both what they are doing and how they are doing it. Even so, if we had talked prior to publishing your piece, I would have vigorously challenged some of your assumptions.

While it is true that critical race scholars and more than a few teachers in other “law and” fields depart from the traditional in legal writing and teaching, we do so precisely because we share your view that law students need a thorough grounding in the law — as it is.

* Weld Professor of Law, New York University School of Law. B.A. 1952, Duquesne; L.L.B. 1957, Pittsburgh. — Ed.
Many of our students are committed to careers in public service or law reform. They must both learn contemporary doctrine and gain skill in using that knowledge to structure arguments and write briefs that effectively challenge the many injustices that now threaten our society in ways so dire, so dangerous, that few in policymaking positions are willing even to contemplate, much less attempt, much-needed reform.

I know it was not your intention to undermine these commitments, but the fact is that, at many law schools, a strong and quite vocal majority of tenured law teachers are opposed to all writing that fails to adhere to traditional standards of scholarly writing. These protectors of scholarly orthodoxy are not able to define with any degree of specificity what they deem worthy. Perhaps for this reason, many law teachers — tenure safely earned years before — perform a strange obeisance to their scholarly ideals by writing little or nothing at all. But it is not this unhappy truth that motivates this rebuttal.

Rather, I want to diminish the effects of those traditional-minded faculty who are circulating your piece with great glee. They read it as both a condemnation of nontraditional scholarship and as the perfect weapon with which to oppose hiring or tenuring teachers attracted to any of the “law and” fields. Although you are far from the first person to criticize nontraditional writing, conservatives get special mileage when they are able to quote a black man whose views can be contorted into support for their opposition to nontraditional scholarship in general and, in particular, any such writing by minority law teachers.

You certainly did not intend your article to make life harder for the next generation of Harry Edwards and Derrick Bells. At no point do you raise issues of race or charges of discrimination. But this fact does not lessen the potential for serious harm your piece can and, I fear, will prove to be to the careers of many young law teachers who are meeting resistance and rejection as they attempt to address current legal issues with what you damn with faint praise as “law and” writing.


As legal academics, we are constantly engaged in the process of evaluating legal scholarship, but we have no theory of evaluation. In fact, we rarely seem to perceive the need for such a theory. We conclude that a work of scholarship is good or bad, true or false, by intuition, trusting in some undefined quality of judgment. This leads to a wide range of conceptual and practical difficulties, difficulties that have festered to produce confusion and malaise throughout the field.

*Id.* at 889.

I doubt that anything I can say in rebuttal can dissuade the status quo forces on law faculties from citing your article to justify their opposition to anything nontraditional — regardless of quality and worth. I write because my commitment to critical race theory scholars requires a response to your charges which, as applied to them, are inaccurate and misdirected.

In my response, I want to emulate your praiseworthy technique of drawing on the views and experiences of your former law clerks. After deciding to respond to your article, I recruited as coauthor, Erin Edmonds, a former student whose research efforts added greatly to my recent book, *Faces at the Bottom of the Well: The Permanence of Racism*. After reading her draft, I decided that her views so well set out what I wanted to say that I found little either to add or to alter. Thus, while this response is coauthored, the Foreword is entirely mine, and the substance of the response is almost entirely Erin’s. I retain the collective “we” in her work to reflect my agreement with her views.

Erin and I write in the hope that some of those who now share your reservations about nontraditional legal scholarship will find reason to reconsider. We write, as well, to provide a basis for defending nontraditional scholars and their work from those committed to opposing what they find unfamiliar and thus threatening. At the least, they may come to respect, as you and I do, the voices of our former students and clerks.

Yours truly,
Derrick

INTRODUCTION

In a recent article, Judge Harry Edwards writes about what he sees as a growing disjunction between legal education and the legal profession:

[M]any law schools — especially the so-called “elite” ones — have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy. Many law firms have also abandoned their place, by pursuing profit above all else. While the schools are moving toward pure theory, the firms are moving toward pure commerce, and the middle ground — ethical practice — has been deserted by both. This disjunction calls into question our status as an honorable profession.5


Judge Edwards divides his analysis of the cause of the crisis in ethical lawyering into an overview and three parts. The overview and first two parts deal mainly with the role of law schools and legal curriculum in what he views as the deterioration of responsible, capable practitioners. This article takes issue with some of the assumptions, analyses, and conclusions those sections contain. The third part of Edwards' article analyzes the role of law firms in causing that same deterioration. This article agrees with and will elaborate upon that part of Edwards' treatment.

Fundamentally, our position is that Edwards either overstates the case for the decline of doctrine in law schools — and hence misanalyzes the cause for the crisis in the legal world — or he conflates the (arguably) antidotal tendencies of critical legal studies (CLS) with many other branches of modern jurisprudence, such as feminist jurisprudence, critical race theory, and gay and lesbian studies. This conflation, being overbroad, misleads the unfamiliar audience, and it reinforces the notion that nontraditional legal studies are little more than fluff. The conflation also reiterates, perhaps unintentionally, the master discourse's derisive tone towards all that is not the master discourse. We agree that there is a serious crisis of ethics in the world of the legal practitioner. We heartily agree that law firms' quest for profits, and that quest's alarming demand for lawyers who are insensitive to all but billable hours, contributes to the current crisis in ethical lawyering. We disagree, however, that what is needed is more traditionalist doctrine from the law school. Nor do we agree that what is to be avoided is more interdisciplinary work.

We approach Judge Edwards' article, we hope, with the respect due a thoughtful piece of work by an honored member of the profession. When our positions conflict with or criticize his, we intend that our message be not divisive, dismissive, or final, but rather that it be an indication of our desire to carry on constructive dialogue with those who, like Judge Edwards and ourselves, care deeply about the disposition of the legal world.

I.Judge Edwards' Position on Law Schools and Legal Curriculum

The chain of logic in Edwards' argument, vastly simplified, goes something like this:

- The profession needs ethical practitioners.6

6. Ethical practitioners are lawyers who occupy the middle ground between pure theory and pure commerce. Id. Ethical lawyers are professional; they "know why pro bono work is so
The teaching of doctrine makes ethical lawyers.7

"Practical" scholarship — which is prescriptive and doctrinal8 — makes ethical lawyers.

What is not doctrinal is "impractical"; it is either not directly prescriptive,9 or it is directly prescriptive but wholly theoretical.10

"Impractical" scholarship is crowding out practical scholarship.11

The modern trend in leading law schools is away from doctrinal teaching and toward impractical scholarship.12

The absence of doctrinal teaching and the rise of impractical scholarship therefore cause or exacerbate the decline of ethical practitioners.

Edwards employs the terms "practical," "doctrinal," and "ethical" subtly; summaries of Edwards' arguments about law schools, and therefore law schools' role in the decline of the profession, are admittedly somewhat crude. For the purposes of this response, however, the summaries will have to do.

Edwards says that "many law schools — especially the so-called 'elite' ones — have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy."13 Because practical scholarship is prescriptive and doctrinal,14 and because it is set in opposition to "abstract theory," abstract theory is therefore not prescriptive, not doctrinal. The statement goes deeper in

important," and they appropriately interpret cases and statutes as "normative texts . . . not mere missiles to be hurled at oppo[onents]." Id. at 38.

7. Edwards states that a full and rich doctrinal education is a crucial part of the lawyer's technical development . . . . Any hack can misread cases, statutes, and other legal texts; it is much harder to read them well. Second, a doctrinal education is a crucial part of the lawyer's ethical development. The ethical lawyer should only advance reasonable interpretations of the authoritative texts — interpretations that are plausible from a public-regarding point of view. Id. at 59.

8. Id. at 42-43. "Practical" legal scholarship, for Edwards, is prescriptive: it analyzes the law and the legal system with an aim to instruct attorneys in their consideration of legal problems; to guide judges and other decisionmakers in their resolution of legal disputes; and to advise legislators and other policymakers on law reform. It is also doctrinal: it attends to the various sources of law (precedents, statutes, constitutions) that constrain or otherwise guide the practitioner, decisionmaker, and policymaker. Id. (footnote omitted).

9. In other words, it does not address a problem that some practitioner or governmental decisionmaker must resolve. Id. at 46. Critical legal studies (CLS) exemplifies this type of "impractical" scholarship. Id. at 47.

10. It prescribes a decision but ignores the applicable sources of law. Id. at 46. Law and economics exemplifies this type of "impractical" scholarship. Id. at 47.

11. Id. at 50-51.

12. "[S]chools are moving toward pure theory." Id. at 34.

"The 'impractical' scholar . . . produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner. As a consequence, it is my impression that judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy." Id. at 35.

13. Id. at 34.

14. Id. at 42-43. The paradigm, he says, of practical legal scholarship is the treatise. Id.
its meaning: abstract theory is impractical, spreading wildly, and therefore dangerous. Edwards focuses his discussion of dangerous or potentially dangerous modern trends on critical legal studies. In doing so, without explanation, he includes feminist jurisprudence, critical race theory, and other disciplines that he terms interdisciplines, sometimes referring to them as "law ands." The inference from this focus is that when Edwards is talking about the greedy nontraditional onslaught, he refers to critical legal studies, the "law and" movements (law and economics, law and literature), feminist jurisprudence, and critical race theory. Edwards credits what have been called nontraditional methodologies with overrunning the traditional methodologies.

Further, Edwards suggest that "abstract theory," (in contrast to "practical scholarship") is not useful, at least in his assessment of what is useful. Critical legal studies, which exemplifies impractical scholarship, has "little direct utility for practitioners, judges, administrators, or legislators." 15

Edwards is also concerned that there are too many "law and" scholars. 16 Doctrinal analysis, he says, citing Richard Posner, "is currently endangered at leading law schools." 17 "Practical" scholars, he argues, face not only decreasing numbers, 18 but also "waning prestige within the academy." 19 "Practical" scholars confront "aggressive intolerance," 20 uncongeniality, 21 and an "influx of 'impractical' scholars." 22

According to Judge Edwards, this decline of practical scholarship and doctrinal education, combined with the law firms' abdication of their role in training lawyers, has somehow created a seriously endangered species: the ethical practitioner. Judge Edwards does not use the term "ethical" in the same way one would use "principled" or "moral," although that is part of Edwards' claim. "Ethical" seems, rather, to mean "useful to judges, legislators, and administrators" as well as "aware of the lawyer's role as an officer of the court." Edwards seems to suggest that impractical or interdisciplinary methods teach that practitioners are sellouts, 23 although this claim is not sub-

15. Id. at 47.
16. Id. at 50.
18. Id.
19. Id. at 36 (emphasis omitted).
20. Id. at 37.
21. Id. at 51, 62.
22. Id. at 59.
23. Id. at 38.
stintiated. Would-be lawyers in school therefore conclude that “law practice is necessarily grubby, materialistic, and self-interested.” Implicitly, those eager lawyers troop like lemmings over cliffs of replication, becoming themselves “grubby, materialistic, and self-interested.” This is a crude summary of how and why law schools produce unethical lawyers.

If law school fails in its task of producing ethical practitioners, what then does Judge Edwards think law school should do to meet its task? The answer is a bit circuitous. Law schools should fulfill their obligation to serve the system of justice by producing “practical” scholarship — scholarship “which addresses concrete problems.” Law schools should “train[ ] their students to practice law in a competent and ethical manner.” While schools should not become antitheoretical, they should hire more “practical” scholars. Law schools should make themselves congenial places for concrete, “practical” analysis, and therefore for “practical” scholars. Law schools should assign the “practical” scholars to teach the doctrinal curriculum rather than, for example, assigning a Crit to teach a traditional or first-year course like Contracts. Finally, law schools should attend more carefully to training graduates who can write in a cogent, organized, and instructive fashion.

II. Judge Edwards’ Position on Law Schools’ Contribution to the Decline of Ethical Practitioners

Judge Edwards obviously and understandably writes with the frustration of one behind the bench who must view antagonism running rampant and probably a good deal of terrible writing as well. But especially in the portion of his analysis that attributes unethical lawyering in practice to the success of nontraditional disciplines in law school, Judge Edwards is out of touch with the disciplines he is assessing — out of touch with their method, out of touch with their frequent ethic of progressivism and egalitarianism, and out of touch with their aspiration not to taunt the law but to transform it. On the other hand,

24. Would-be lawyers seem to be quite a bit more suggestible in Judge Edwards’ assessment than most law students with whom we have been in contact.
25. Id. at 38.
26. Id.
27. Id. at 38-39.
28. Id. at 39.
29. Id. at 50.
30. Id. at 51.
31. Id. at 62.
32. Id. at 63-65.
as will be developed in the second part of this essay, Judge Edwards seems very plugged into the pulse of the profit-driven engine of corporate law. That engine propels lawyers into workaholism and billable frenzies, to the exclusion of time or effort for public service, and very often to the exclusion of personal lives with partners, family, and friends. A secure, well-rounded lawyer worries not only whether she has done enough work, which is the hallmark of the obsession with hours, but whether she has done good enough work, whether that requires producing an excellent draft or a commitment to work with those in need.

A. Confusing by Conflation

Judge Edwards confuses by conflation. Edwards uses the term “nontraditional” to embrace CLS, law and economics, law and literature, and “other interdisciplinary approaches, such as feminist legal studies, critical race studies, and moral theory.” 33 Although he credits all of these movements as having the “potential to serve important educational functions,” 34 he also disparages them all, as a group. His is not mere generalization, nor even overbroad generalization; Edwards, by lumping together anything that departs from what he considers “practical” or “traditional,” misrepresents the disciplines. He misrepresents their similarities (and common failings, in his estimation). And he reproduces that strange state of affairs where one feels that the elephant, hyperbolically afraid of a mouse, describes the rodent as something closer to a rhinoceros. To extend the pest metaphor: at the end of his article, Edwards notes with some relief that interdisciplinary movements “have not yet overrun the law schools.” 35 In short, Edwards overcredits the strength of the nontraditional movements even while he undercredits their validity.

Here, Edwards badly misses the mark. The nontraditional is valid not because it complements the “real” bulk of legal scholarship. The nontraditional is valuable because it redefines what is “real” legal scholarship. Understandably, one who deals day in and day out with doctrine as it lags behind a revolution in thought may be unhappy.

33. Id. at 49-50. Edwards adds:
[L]aw schools are moving toward pure theory . . . .
Over the past two decades, law and economics, law and literature, law and sociology, and various other “law and” movements have come to the fore in legal education. We also have seen a growth in critical legal studies (CLS), critical race studies, and feminist legal studies movements.
Id. at 34-35.
34. Id. at 35.
35. Id. at 77.
about that transformation. But to blame the arrival of fresh voices, often voices disempowered in the past, for the ethical failing of lawyers today is like blaming rock and roll for crack addiction.

Edwards is careful to acknowledge that which he views as potentially positive in these movements but consistently concludes that, while useful in a limited sense, interdisciplinarian scholarship ultimately ranges from the irrelevant to the dangerously all consuming. For example, he notes various contributions each of the movements has made to the law school: CLS has provided a "critical, antiestablishment view" largely absent in the past; law and economics has "improve[d] lawyers' understanding of efficiency"; law and literature has taught us to "read texts more closely and subtly"; feminist jurisprudence and critical race theory have inquired "usefully" about "whether the existing legal system is fundamentally unfair." Despite his attempts at balance, the conclusion that follows still hints at an onslaught of dangerous material: "However, I am concerned that there are too many 'law and' scholars." That conclusion comports with the tone that peppers his article's description of the nontraditional in many places, a tone that reveals something between fear of and disdain for the nontraditional disciplines — again, grouped as "nontraditional" or "impractical" without meaningful distinction.

Edwards speaks tellingly, for example, of these movements (feminists, race crits, Crtts, "law and" proponents) as "valuable additions." He calls interdisciplinarians "ivory tower dilettantes." He claims that the "impractical" scholars scorn doctrine, that they "scorn each other," and that their "aggressive intolerance" creates an inhospitable atmosphere at law schools — inhospitable to those scholars who wish "to provide helpful guidance on pressing social problems, and not to fight ivory tower conflicts that are irrelevant to the outside world." Rejecting Professor George Priest's "graduate school" model of legal education (which "all too many" law professors now favor), Edwards notes the "arrogant, antidocrinal bias of interdisciplinarians." While he says that law schools should have interdisciplinarians, he warns in the same breath that law schools should

36. Id. at 49-50.
37. Id. at 50.
38. Id. at 49 (emphasis added).
39. Id. at 36.
40. Id.
41. Id. at 37.
42. Id. at 37-38.
43. Id. at 40.
not have scholars whose work "serves no social purpose at all." He decries that portion of interdisciplinary scholarship that he calls "insouciant pastiches," and, insisting that "no self-respecting academic journal would publish such scholarship," Edwards concludes that these so-called pastiches "have no place in the law reviews."

Edwards highlights the student at Harvard Law School who "was fortunate to get mainly Traditionalists [his] 1L year . . . . [Others] got stuck with Crits, and ended up at best wasting a year, and at worst becoming alienated from law school and the law." Critical legal studies, which Edwards categorizes as "impractical" because it is not directly prescriptive, at its best usefully challenges the justice system's political foundation, and at its worst is "hopelessly destructive because it aims to disrupt the accepted practice of judges, administrators and legislators with no prescriptions for reform."

Proponents of CLS have certainly faced previously the charge of nihilism, that is, that their method seeks to annihilate the stability and self-assurance of long-held canons of law without offering any particular replacement. In jargon, Crits are accused of "trashing" mainstream legal academia without offering any alternative. In reality, although this is not the place to develop a full argument about the method and mission of CLS, CLS scholars have offered plenty of constructive, concrete alternatives; some of those constructive and concrete alternatives, through years of hard work and pressure, have even been enacted. These alternatives are just not the alternatives that sit well with the politics of the mainstream. But "undesirable in the eyes of the mainstream" does not equal what Edwards calls "hopelessly destructive."

More important than the debate about the constructiveness or concreteness of CLS is the tacit inclusion of other disciplines that are somewhat related to CLS and probably sympathetic to much of CLS's ideology — with the exception of the conservative law-and-economics movement — but are astonishingly different disciplines. Feminist jurisprudence, for example, shares with CLS — and every other method that questions the status quo, including liberalism — a critical approach. Feminist jurisprudence also rejects the notion that current hi-

44. Id. at 36.
45. Id. at 56.
46. Id. at 39 (quoting Practitioner #1, at 1).
47. Id. at 47.
49. See id. at 297-304 (discussing a range of concrete CLS contributions, from proposals to expand the rights of workers to strike over midterm grievances, to reformulating our ideas about the meaning of informed consent in the medical area).
erarchies (in this case, male supremacy) are natural, immutable, and acceptable. But where CLS critiques many power relations, including that of men over women, feminist jurisprudence focuses, albeit not exclusively, on the disparity of power between men and women.50

Feminist jurisprudence has forced or seeks to force change in plenty of "concrete" areas; "concrete" at least, from the point of view of a woman. There are many examples: Elizabeth Schneider, along with other feminist lawyers, has created and is refining constantly what has come to be known as the "battered woman's defense."51 Catharine MacKinnon and Andrea Dworkin have pioneered not only new perspectives on the violence towards women in pornography, but they have also drafted legislation to prevent pornographic exploitation.52 Feminist efforts have finally brought the frequency and ugliness of sexual harassment to the forefront of the legal consciousness; today, because of these concrete and constructive efforts, most if not all businesses have policies against sexual harassment. Laws against sexual harassment in the workplace are enforced more frequently. Feminist efforts have also brought about concrete laws in the rape context: no longer, in most states, is a victim's past sexual history admissible. Rape shield laws protect rather than blame the potential victim. The concrete, practical list goes on.

Feminist jurisprudence, therefore, is impractical only if one believes that the needs and claims of real women have no merit in the

50. See e.g., CATHARINE A. MACKINNON, Difference and Dominance: On Sex Discrimination, in FEMINISM UNMODIFIED 32 (1987). MacKinnon states:
To summarize the argument: seeing sex equality questions as matters of reasonable or unreasonable classification is part of the way male dominance is expressed in law. If you follow my shift in perspective from gender as [mere] difference to gender as [male] dominance, gender changes from a distinction that is presumptively valid to a detriment that is presumptively suspect.
Id. at 44.

Feminism has been charged with being too tied to the idea of "gender" — not because the subordination of women has ended, but rather because white feminists may practice "gender essentialism" to the exclusion of race and class factors, which results in the silencing of women of color. See e.g., Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1990).

51. See Phyllis L. Crocker, The Meaning of Equality for Battered Women Who Kill Men in Self-Defense, 8 HARV. WOMEN'S L.J. 121 (1985); Elizabeth M. Schneider, Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense, 15 HARV. C.R.-C.L. L. REV. 623 (1980); Anita L. Grant, Note, The Battered Woman: When a Woman's "Place" Is in the Courts, 10 CRIM. JUST. J. 273 (1988). Challenging the male-normed assumption that self-defense requires "imminent" harm (like a gun to the head), feminist lawyers have successfully demonstrated that a sensible woman who has been beaten bloody time and again, knowing her physical limitations in relation to a man's, would not wait for the moment her abuser raised his hand to strike with deadly force. She would have no chance. A battered woman's conception of self-defense, especially in the frequent cases where the man threatens that next time he will kill her, is to stop his abuse where the law does not.

52. See CATHARINE A. MACKINNON, Linda's Life and Andrea's Work, in FEMINISM UNMODIFIED, supra note 50, at 127.
traditional canon — because feminist legal studies certainly attends to the doctrinal analysis that Edwards defines as a hallmark of "practical" scholarship. How can one seek to change doctrine that one does not know about or thoroughly understand? To be sure, feminist legal studies is often explicitly prescriptive, another of Edwards' characteristics for practical or useful scholarship: adherents draft concrete model laws that prescribe that men may not abuse women with impunity, may not exploit women with impunity, and may not dismiss centuries of "tradition" with the caveat that "boys will be boys." Feminist legal scholars and activists also concretely lobby politicians to buttress, through new legislation, right-to-choice law that is increasingly under attack in the Supreme Court. Through scholarship and coalition, feminist legal adherents concretely encourage women to bring hitherto buried charges of sexual harassment against Supreme Court nominees and congressmen. When the work of feminist legal scholars is not explicitly prescriptive, it is often implicitly so; in their writing, their conferences, and their classrooms they explore how best to ensure that women shed their second-class cloak in both the letter and spirit of the law.

To call this type of work "impractical" by lumping it with law and economics, for example, is at best misguided. The "impractical" label, or the insinuation that feminist legal work is marginal to "real" legal scholarship, misapprehends feminist legal studies. It misapprehends the very real extent to which women insist on being included in the master discourse of law — not as afterthoughts or side commentators, but as full and equal participants. The work of feminist legal studies seeks to understand and make law more responsive to 51 percent of the population. The history of law has been a history of male (white) supremacy; to interpret doctrine in a positivistic fashion — that is, in the way it has always been done — does more than merely condone male supremacy. It fortifies it.

Critical race theory, also included by Edwards in the impractical, interdisciplinary, somewhat-useful-but-ultimately marginal category, deserves more accurate analysis than that. Examples of "doctrinal" and "practical" critical race scholars abound:

- Chuck Lawrence's analysis of and recommendations for reinterpreting First Amendment law;\(^ {53} \)
- Mari Matsuda's analysis of and recommendations for interpretation of equal protection laws, in the context of her discussion of reparations to African Americans, Asian Americans, and Native Americans, all of

whom were or are legally mistreated on the basis of race;\textsuperscript{54}

- Patricia Williams' incisive analysis of doctrinal contract and constitutional law in her breathtaking book, \textit{The Alchemy of Race and Rights};\textsuperscript{55}

- Kim Crenshaw's demonstration that Title VII's employment discrimination prohibition in particular, and the law in general, treats women of color as if they were invisible;\textsuperscript{56}

- Richard Delgado's ground-breaking treatment of civil rights literature;\textsuperscript{57}

- Robert Williams' historiographical analysis of the Western legal canon's treatment of indigenous peoples;\textsuperscript{58}

- Derrick Bell's constitutional law classes are almost entirely doctrinal, and very practitioner-oriented; students form teams of advocates, take opposite sides on a pressing and concrete constitutional issue — for example, poor women's lack of access to the "right" to an abortion — and must brief and argue their case before a panel of student "judges." His scholarship, too, uses doctrine as a departure point for his now-famous storytelling method, a method whose usefulness may not be immediately apparent to someone who reads briefs all day long.

Perhaps someday, however, the experientially based viewpoint will replace the contemporary and positivistic obsession with the "rules of law and the law of rules." The positivist bases validity on that which is in place simply because it has endured for a long time, thus ignoring the fact that Black women and men, Asian women and men, and white women could not vote or hold office when many of these rules had their genesis.

Critical race theory, in other words, both "trashes" and seeks to transform current doctrinal law — both statutes and their interpretations. When at all possible, adherents of critical race theory generally try to work with the doctrine that is in place. But when the doctrine is completely inhospitable to reform, should critical race scholars be called "impractical" or their work "a valuable addition" simply because they propose entirely new doctrine, doctrine that is substantively as well as facially loyal to the proposition that the law has no business


in subordinating, or assisting in the subordination of, people who are not white?

We have argued that Edwards' treatment of what he calls "impractical" scholarship mischaracterizes many of the disciplines he targets as members of that group. Further, simply because he groups all non-traditional work together, he sweepingly delegitimizes work whose legitimacy is almost always in question anyway, given the intransigence of traditional approaches to law. We have noted that his decrying of the decline of "traditional, practical, useful, doctrinal" scholarship and training seems both inaccurate (in terms of the "decline") and a bit nostalgic (perhaps it is time to change?). We have pointed to places where, despite good efforts to be fair to the contributions of nontraditional approaches, he retreats to a somewhat defensive, and somewhat derisive, treatment of those methods. In addition to our concern that Edwards unfairly conflated feminist jurisprudence and critical race theory with what he deems impractical, we doubt some of the assumptions on which his analysis rests.

B. Hidden or Questionable Assumptions in Edwards' Article

There are more subtle problems with Edwards' analysis of legal scholarship and training, including quite a few hidden and questionable assumptions. Perhaps the most general and most frustrating is his tacit advocacy of legal positivism. That is, Edwards wants to focus on the rules of law and the law of rules; he wants to predicate ethical lawyering on the capacity to summarize, interpret, and communicate what is contained in current legal texts. Implicitly, Edwards exalts the evolution of doctrine. But perhaps the current set of rules is, on any moral analysis, unethical. Suppose those who drafted the rules did so with insidious intent, or in a context in which they ignored entire populations of people. Perhaps the evolution of these rules occurred in a white male heterosexist Christian supremacy. Is the evolution therefore still valid? Is it therefore ethical to adhere to one's interpretation simply because the law has developed in the way that it has? In short, Edwards adheres to a gradualist, positivist ideology, and he uses that ideology as his normative yardstick, without ever explaining why the laws of old are necessarily the laws of good.

There are specific examples of hidden assumptions as well. First, and not in any order of importance, Edwards agrees with Judge Stanley Fuld's position on what a law review article should accomplish. Edwards writes, "[t]he article writer should serve as a 'judge of judges,' or of other governmental decisionmakers; he or she should assume the same attitude toward authoritative texts that the deci-
sionmaker rightly would. Only if the writer does so will the article have practical import." In making this statement, Edwards assumes 1) articles should only be written for those who interpret or create legal texts; 2) judges and governmental decisionmakers fairly represent the community which the law is supposed to serve; 3) there is a "right" attitude toward authoritative texts; 4) authoritative texts ought to be interpreted within their bounds, not questioned outright; and 5) the "authoritative" in "authoritative texts" is acceptable.

Second, Judge Edwards questionably describes the clerks whom he polled for supporting material as "among the most talented and successful people in the legal profession." Are these people "among the most talented and successful" because their work has not been marginalized by generally hostile social forces and particularly hostile legal ones? Are they successful because they excel at the status quo game? Is that the only definition of "successful" that members of our profession want to advance?

Third, Judge Edwards defines the paradigm of "practical" legal scholarship to be the treatise. There are other possibilities. The important political and educational efforts — as well as the amici curiae filed in Roe v. Wade — to make abortion legal in this country certainly seem paradigmatically "practical" in hindsight. Academic legal work that gives the otherwise voiceless a voice — stories, for example, told from the point of view of the oppressed — when there is simply no existing legal framework within which to discuss the oppressiveness of (white, male, straight, Christian) "objectivity" — may be able to affect pragmatically those in power in a way that treatises on existing law cannot. Human beings are enormously creative, and we often understand and learn by metaphor. Why should that type of learning not be "practical"? If it opens the eyes of the collectively empowered; if, for example, it leads one and then another judge to reconsider the way she looks at homosexual custodianship of children; if it unearths the hidden issues of a popular — and powerful — culture so that real dialogue may begin, how is that not "practical"?

Fourth, Edwards subtly assumes that "plain language" is existent, verifiable, and valid. Speaking of the "practical" scholar who should use "theory" only on "hard" or "very hard" issues (but not for

60. Id. at 42.
61. Id. at 43.
63. Edwards, supra note 5, at 44.
“easy” ones), Edwards writes, “the ‘practical’ scholar who is addressing a judge does not advance theoretical reasons for some outcome that the plain language of a relevant statute prohibits.” Aside from any CLS critique that there is no such thing as “plain language” absent the ideological context in which it is written, read, interpreted, and applied, Edwards does not even seem to flinch at his rather absolutist and bright-line designation of “plain language.” Isn’t that what a lot of the arguing in the law is about, just exactly what is the “plain language” interpretation of a particular rule?

Fifth, Edwards dubiously intimates that the law should be or remain isolationist. He warns that “[t]oo many law professors are ivory tower dilettantes,” and he speaks of nontraditional methods as “academic” and “completely imitat[ing] the professors of arts and sciences.” The assumptions here are that law professors should not, as a rule, dabble or be involved in other disciplines, and that if they are, they are not scholars in a legal sense and are mere imitations of a form not suited to them. But why should the law be autonomous, a sphere of human life unto itself? In fact, can the law even pronounce itself isolationist? The insinuation that the law is a self-evident and naturally evolving system of rules and logic that should remain apart from “academic disciplines” in its “practical” moments is simply formalism with a modern face.

Finally, and perhaps most disconcerting, Edwards assumes that “traditional” legal study appropriately does not include disciplines like critical race theory and feminist legal studies. When assessing with approval that many law school courses still bear “traditional” labels, in the next breath Edwards warns of “the influx of ‘impractical’ scholars,” thereby relegating all that he has designated as “impractical” — CLS, “law ands,” critical race theory, feminist legal studies — as a threat to, and not part of, what should be considered as appropriate traditional training. Why shouldn’t law schools require every poten-

64. Id.
65. Id. at 36.
66. Id. at 48.
67. The idea that the law is not isolationist, even if it advertises itself as such, is quite old. At the beginning of the twentieth century, realists began their critique of formalism by pointing out that legal rules have context and history, and that the interpretation of those rules does not occur in a vacuum. See, e.g., Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989). Grey states:

Not only Holmes, but Gray, Nicholas St. John Green, Thayer, and Wigmore, and in the next generation Arthur Corbin — conceptualists all in their legal scholarship — were critics of (or at least deviants from) Langdellianism. They did not accept Langdell’s insistence that legal thought could and should be autonomous and universally formal as well as conceptually ordered.
Id. at 825.
tial lawyer to learn about the history, legal and otherwise, of race relations, as well as where the doctrine stands today? Why, given the incarceration, unemployment, poverty, and underemployment rates of African, Native, and Latino Americans, should any law student not be required to learn about how racially subordinated status was encoded very early in legal documents like the Constitution? Why, given that the overwhelming majority of those who rape and murder women are their male partners or acquaintances, should gender discrimination not be a required part of the traditional curriculum? The crimes against people of color and against women are part of a long and ugly tradition, from which the law, in letter and spirit and effect, cannot divorce itself.

C. Inaccurate Equivalents

Judge Edwards, probably unintentionally, also creates subtle but insidious equivalents in his analysis of how law schools create unethical lawyers. Most perplexing is the article's general suggestion that nontraditional disciplines, which allegedly disdain doctrine and practitioners, are responsible in large part for the increase in unethical lawyers. More specifically, for example, Edwards' analysis implies that nontraditional disciplines do not teach people to use legal texts, to interpret texts skillfully, and to communicate both orally and in writing. The logic goes something like this: critical race theory, critical legal studies, and feminist jurisprudence, for example, are "interdisciplinary" and "impractical" and are therefore, according to Edwards' earlier description, nondoctrinal. In contrast, doctrinal education means that:

the law student should acquire a capacity to use cases, statutes, and other legal texts. . . . This person is also skilled at interpretation: the reading of a case or statute, or a mass of case law, or a complex regulatory scheme. Finally, this person can communicate the interpretive un-

68. Judge Edwards states:

[Ethics can and should be taught pervasively, in almost every law school course. As one former law clerk notes: "[T]here is very little emphasis on the role of the attorney in society, the boundaries of good advocacy, or the responsibility of the attorney to other parties and courts in law school." The "role of the attorney" can be addressed whenever law teachers discuss practical legal problems — be they problems of contracts law, or antitrust law, or labor law. Here, again, is the link between scholarship and pedagogy: "practical" scholars, who attend concrete legal problems in their scholarship, and ideally have practiced law themselves, are much better suited to teach law students what ethical practice means. Edwards, supra note 5, at 74 (footnotes omitted) (quoting Practitioner # 10, at 5). The inference here is that those whom he calls "impractical" scholars — again, critical legal scholars, critical race scholars, feminist legal scholars, "law and" scholars — do not address "concrete legal problems" in their scholarship and are not well suited to teach students what ethical practice means.}
derstanding, both orally and in writing. 69

By positing a doctrinal education as text oriented, interpretive, and communicative, and by juxtaposing doctrinal ("practical") against nontraditional ("impractical") disciplines, Edwards communicates that nontraditional disciplines do not teach textual use, interpretation, or communication.

We believe he is either mistaken or unfamiliar with the essence of many of the movements he designates as "nontraditional." Indeed, the essence of critical race theory, for example, revolves around critiquing modern cases, statutes, interpretations, and other legal texts. It is impossible to launch a sophisticated critique of a discipline one does not understand. Perhaps Edwards is therefore saying that critical-race-theory critiques are not sophisticated. In addition, critical race theory is almost exclusively about interpretation, especially of fundamental fairness in the law — it simply seeks to teach people how to interpret doctrine and texts and precedent in ways other than the traditional white male perspective. Finally, critical race theory, often communicated in uncommon ways (like Bell’s stories, Williams’ vignettes, and Matsuda’s metaphors and allusions to popular culture), may be better at communicating and teaching people to communicate than what has been, up to now, a very strict and structured formula for communicating legal interpretations.

Feminist theory, too, albeit "nontraditional," has everything to do with interpreting text and communicating that interpretation. In fact, much of feminist legal work tries to tease out the voice of women, or the absence thereof, in "authoritative" legal texts — certainly a controversial subject, but no less "doctrinal" or "interpretive" for being so. If feminist lawyers are not always able to communicate their interpretations via treatise or brief and must therefore do so in law review articles and conferences, it is probably because they lack the access to the courts and legislatures, not the talent to communicate their interpretations.

D. Unsupported Assertions

Finally, there are crucial and controversial claims in his article that Edwards simply asserts without explanation. For example, Edwards states that "[t]here is good reason to doubt . . . whether there is any coherent design or consistency in legal education any longer." 70

69. Id. at 57.
70. Id. at 58-59.
What reason grounds his doubting? Was there ever coherence or consistency in legal education? Is the law itself coherent and consistent?

In another place, he “insist[s] merely that doctrine should be taught well, where it is taught.”71 This “mere” insistence seems to fly in the face of a rather long article that makes much more than just this point; the statement, and the rest of the article, does not acknowledge even the possibility that the “traditionalists” have failed their task.

Judge Edwards describes, without explanation, the “waning prestige” of “‘practical’ scholars” within the academy.72 What evidence supports his statement about “waning prestige”? Our experience is quite the contrary; nontraditionalists often have a very hard time being taken seriously and being offered tenure.73

Judge Edwards also accuses interdisciplinarians of “us[ing] the law school as a bully pulpit from which to pour scorn upon the legal profession.”74 Again, the statement is unsubstantiated and differs from our experience. I recently confronted bully pulps in my and my peers’ “traditional” or “doctrinal” contracts, torts, property, constitutional law, and race-racism classes. On the pulpit stood the professor, whom Edwards would probably describe as a “practical” scholar, bullying not the profession of law, but rather the student wanting to enter it. Is that better than bullying the profession? Despite a wide variety of “interdisciplinary” or “impractical” classes, this graduate of Harvard Law School never heard a so-called “impractical” scholar de­ride the practice of law at all, much less in bullying fashion.

Citing Harvard as an example, Judge Edwards announces that the “legal academy sometimes has become uncongenial to thoughtful, dia­logic, unbiased scholarship.”75 Is there such a thing as “unbiased” scholarship? How would Edwards reply to Duncan Kennedy’s inti­mation that “there is no intellectual space outside of ideology”?76 Could he reply to it?

To his credit, Judge Edwards uses strong terms. To his detriment, the terms are not self-evident. “The ethical lawyer,” he writes, “should only advance reasonable interpretations of the authoritative

71. Id. at 62.
72. Id. at 36.
74. Edwards, supra note 5, at 37.
75. Id.
texts.” Goodness. What is “reasonable”? The NAACP lawyers’ legal arguments in Brown v. Board of Education probably were not “reasonable interpretations of authoritative texts.” The “authoritative texts” of that time accepted without question a Fourteenth Amendment whose drafters had not anticipated school desegregation and a decision in Plessy v. Ferguson that separate could be equal. Is Judge Edwards willing to argue that what is not perceived by the mainstream as a “reasonable” interpretation is therefore an unethical interpretation? Is he willing to argue that rejecting the authoritative texts out of hand is unethical?

Finally, Judge Edwards cites a law clerk describing another student’s experience in an “impractical” scholar’s first-year civil procedure class. “I can’t imagine,” the clerk writes, “a more damaging experience for law students than to be stuck in [that professor’s] class.” It is difficult to take this claim seriously if the most damaging experience this student can think of consists in attending a nontraditional presentation of civil procedure. Since anecdotal evidence is the support for much of Edwards’ article, let us offer an anecdote about damaging pedagogy.

Day after day in my first-year contracts class at Harvard, we plowed through cases, statutes, and the Uniform Commercial Code with great thoroughness and care. The professor, a white man, reiterated his commitment to doctrine, and we found ourselves imperiled daily as he scanned his seating chart for victims. He usually ended up impaling the student during a procession of complicated questions, and he seemed particularly disdainful when women would get quiet in the face of his humiliation. He made a few students cry and a few leave the class permanently. He was, ironically, very interested in the concept of the “ethical” lawyer. Time and again he would exhort us to “read intelligently,” to “speak coherently,” and to “be prepared.” He told war stories about his tenure in private practice. Into his concept of “ethical” there never strayed one iota of compassion, listening, empathy, a willingness to compromise, or setting aside one’s ego. We

77. Edwards, supra note 5, at 59.
79. 163 U.S. 537 (1896).
80. One also thinks of NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964), and Gomillion v. Lightfoot, 364 U.S. 339 (1960). In NAACP v. Alabama ex rel. Flowers, the Court read First Amendment protection into settled law that corporations were entities of the state and subject to all reasonable state rules. Southern states had been suppressing groups like the NAACP through the state’s authority to regulate corporations. In Gomillion, attorneys for plaintiff convinced the Court to set aside its long-standing refusal to adjudicate conflicts over legislative boundary drafting (that is, political gerrymandering).
81. Edwards, supra note 5, at 60 (quoting Practitioner #1, at 3).
were to win, and to win thoroughly. And doctrinally. At the final exam, I could not believe my eyes when I read the question that asked whether under contract law a white aunt had the right to disinherit a grand-nephew who was Black, because he was Black. I looked up, and I was one of the few white faces to do so. What I saw was awful: in the eyes of many of the African-American women swelled huge tears; great frustration raged in the eyes of the African-American men. Then we all had to write the final exam. Or fail. In that same doctrinalist’s casebook (from which he taught), he began a chapter on offer and acceptance in contract law with an epigraph containing dialogue between a man and a woman: the woman, upon being propositioned, said “no.” And the question was: Ah, yes, but did she really mean it?

In another doctrinalist’s class, we spent one day — one day — discussing rape law. The doctrinal development of Miranda, which I have never had occasion to use, took two weeks. In yet another traditionalist’s class, we spent one day — one day — discussing the enslavement of Black human beings as property. The law of perpetuities, which I have never seen since, took three weeks.

In sum, Edwards notes that our “status as an honorable profession” is being called into question. Whether we were ever so honorable is another article entirely. But to attribute the decline of our honorability to a (factually questionable) coup d'état by nontraditional-nondoctrinal-“impractical” legal studies seems tenuous at best, unfair and distorted at worst. While Judge Edwards says he rejects Langdellian formalism and does not believe the case method is an effective method of teaching, in the end his prescription for what law schools absolutely cannot do without, and allegedly are losing rapidly, sounds very much like nineteenth-century formalism.

On the other hand, Edwards’ analysis of how law firms have contributed to the self-absorption of legal practitioners is very contemporary. It seems strange that, in the first part of his article, he essentially concludes that the law should be isolationist, that nonlegal scholars do interdisciplinary work better than legal scholars, and that the “practical” scholar has no business doing anything except writing treatiselike articles that tell judges how to decide hard or very hard cases. What is strange is that, in the second part of his article, he admonishes current practitioners to uphold the legal ethic of public service, which is not so different than what many, if not most, of the interdisciplinary movements advocate.82 The involved lawyer cannot also be an isolationist

---

82. Save law and economics, and law and literature, perhaps.
lawyer. Edwards seems acutely aware that law firms, driven today as never before by profit and billable hours, have created lawyers who have no time and no energy for public service, lawyers who can barely take care of themselves, much less the problems of other people.

II. SUMMARY AND ANALYSIS OF EDWARDS' CLAIM THAT LAW FIRMS HAVE ABDICATED THEIR ROLE IN SHAPING ETHICAL PRACTITIONERS

Judge Edwards writes:

Few of my former law clerks are sanguine that practicing lawyers have reached the right balance [between their duties as "advocates" and "officers of the court," between pro bono representation and profit seeking]. Almost every respondent to my survey deplored the ethical failings of the practicing bar. There was a general consensus that practicing lawyers are overly concerned with profit: "they care about money, money, money." One clerk suggested that private firm lawyers must "Bill or Be Banished." 83

Law firms have become maniacal in their quest to squeeze every drop, no matter the human cost, from their associates. This quest for profits, with its outrageous pressure to bill high hours and work longer hours (leaving at 7 p.m. after a ten-hour day is considered "leaving early") is destroying the spirit of many young lawyers. Very often we are not people; when partners or senior associates need help on a big or pressing project, their panicked demand is: "We need bodies." In fact, we regularly refer to ourselves as "fungible" and "dispensable." These have become terms of art in a profession whose central concerns are supposedly to execute justice and to be responsive to the human element. What kind of self-image does such self-reference suggest? How is it that a profession that supposedly revolves around human conflict and resolution has become so thing oriented, so goods oriented?

Along similar lines, it is common knowledge that young associates may not be "profitable" in their first year, given learning time, the cost of recruiting the associate, and other factors. But why do we commonly know, or even need to know, about a lawyer's "profitability"? Does that lawyer do good work? Does that lawyer treat clients with respect? Does that lawyer treat other lawyers with respect? Is that lawyer committed to public service? "Profitable" does not include any of these measurements. "Profitable" means that a lawyer bills a quan-

83. Edwards, supra note 5, at 67 (footnotes omitted) (quoting Practitioners #1, at 4 and #14, at 3).
tity of hours to clients that will bring in about four times as much revenue as her salary.

Partners, mostly men and mostly white, no matter the city, no matter the firm, exercise an unwarranted amount of control over not only the lives of associates (for example, giving assignments at 6 p.m. that are due the next morning), but also over their psyches as well. Most associates would never dream of telling a partner “no,” and many will put up with professional abuse that they would never take elsewhere. There is, unfortunately, an ethic of bullying that begins in first-year classes (where the professor reigns supreme) and continues in practice (where the partner reigns supreme). American law, being adversarial in nature, not only attracts antagonistic characters, it creates them. There is a significant minority of senior practitioners who mistreat the very people whose loyalty and good work the senior partners need to cultivate. No one learns well, over a long period, in an uneasy work environment. Law firms have become subsidized tan­trum industries.

We agree, therefore, with Judge Edwards when he decries the extent to which firms have contributed to the profession’s misshapen image. He has an ally in, and sounds very much like, the critical legal scholar Duncan Kennedy, who wrote ten years ago:

The total number of [attorney] jobs that directly serve the public interest is small. . . . The notion that lawyers as a group work at a profession which is intrinsically involved with justice, or that lawyers are at least on the front lines of class struggle, is one of the things that allow left students to resolve their ambivalence enough to go to law school. But in fact the profession is mainly engaged in greasing the wheels of the economy. 84

Law firms, and the legal profession, will eventually pay the price if some sort of reform is not instituted immediately. Good work cannot be produced over any significant length of time from overextended, insecure, one-dimensional people. We are on the way to a profession of burnouts, if we are not there already.

By way of anecdotal reporting, let us say that we are also acquainted with some of “the best and the brightest,” whom we will quote anonymously herein, in the same way that Edwards used his former clerks’ responses. No particular firm is represented, and no particular school is represented. All of the people in the examples we will set forth are graduates of “so-called elite” law schools. All have had experience in large law firms. Most are still employed at large law

---

84. Duncan Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic Against the System 34 (1983). This publication is known colloquially as “The Red Book.”
Recent Graduate #1's experience at a large corporate law firm, although occasionally enjoyable in terms of what he is learning, forces him to work ten- to fourteen-hour days regularly, and most weekends. Recent Graduate #1 is African American. After working for six months at his law firm, he concluded dejectedly, upending all his earlier sentiments about getting ahead by working hard and not worrying about race, that he was "just a n____r with an Ivy League law degree." He stays because he has school loans to pay.86

Recent Graduate #2, who majored in psychology and is terrific with people, fights off the daily depression that her first-year associate job at a big firm creates. When she talks to her peers, they too are unhappy, but they are even more terrified of losing their jobs. It is difficult to bill the hours demanded and also to do good work. Recent Graduate #2 has been "kindly" warned that her hours are low, with no reference to the quality of her work, nor to what she has learned; five months into her career, a partner called her into his office to convey how important it was for her to "make target" (about 160 billable hours, which requires more than 200 hours of actual working time) every month. Recent Graduate #2 also has to maneuver often to avoid what she feels are sexual or romantic overtures from a male partner. Recent Graduate #2 is an activist feminist. But she does not have enough "hard" evidence to present to what she knows will be a grilling committee, so she simply goes out of her way frequently to avoid her harasser. Recent Graduate #2 stays because she has school loans to pay.87

Recent Graduate #3 is a third-year associate at a large corporate law firm. She often says, "I hate my life," and "I have no life to hate." One day a group of us from different firms were discussing the common and disturbing scene of a partner's yelling at a young associate who looks humiliated and ashamed. This woman, whose common sense I had up until then respected, bluntly informed me that "We [associates] are paid to take sh— from partners."88

Recent Graduates #4 through #8 left their firms after less than one year despite their loans. The reason? Dreadful work, dreadful

85. For the sake of convenience, and to preserve the anonymity of the persons surveyed, they are identified as Recent Graduate #—.
86. Interview with Recent Graduate #1 (Dec. 1992).
88. Conversation with Recent Graduate #3 and others (Feb. 1993).
hours, and dreadful pressure to be money-making machines. 89

Recent Graduate #10 calls his first-year associate work dulling to the point of depression. He billed 230 hours last month. He feels guilty for working any less than fourteen-hour days. An associate not much older than he regularly tells him that his efforts are not satisfactory. He rarely speaks with partners, never sees clients, and spends most of his time doing what he calls “no brainer” work. He is committed to pro bono work but can rarely find the time to do any. 90

Recent Graduate #11, understanding as most associates do that big firm work does not vary much in substance for the most part, entered her firm because its hiring seemed to be more progressive than that of most big firms. Although there were no African-American partners, no Latino partners, no Asian-American partners, no openly gay or lesbian partners, and only a handful of white women partners, the firm’s associate ranks looked encouraging. Recruiting had done a better-than-average job of attracting a group of junior attorneys who resembled both the law school community and the community at large. The recession hit. Associates, under direct pressure to leave or indirect pressure to remove themselves voluntarily, began to depart in large numbers. Recent Graduate #11 noticed that a startling proportion of those leaving were not white men. When Recent Graduate #11 brought her concerns to partners she believed would be responsive, one of them privately agreed with her assessment that the firm had retreated on its commitment to transforming the old-boy network. Another partner, probably in mistaken and unconscious collusion (Recent Graduate #11 is white), said among other things, “We can only give them [people of color] the opportunity to come. We can’t force them to take advantage of it.” 91

Reification is the process of regarding that which is not a material thing as if it were a material thing. American law has a long history of its privileged citizens’ treatment of other human beings as if they were things. American law has a long tradition, in other words, of reification. The Constitution and common law designated enslaved Blacks as property, as chattel goods, as things to be had — fungible, dispensable, purchasable. 92 White male legislators “herded” Native Ameri-

89. Interview with Recent Graduate #9 (Jan. 1992) (discussing Recent Law School Graduates #4-#8).
90. Interview with Recent Graduate #10 (May 1993).
91. Letter from Recent Graduate #11 (July 1993) (on file with author).
92. See, e.g., DERRICK BELL, RACE, RACISM AND AMERICAN LAW § 1.6 (3d ed. 1992): Beginning with the early colonial period and extending up to the time of the Civil War, there was a vast amount of litigation at both the state and federal levels involving blacks. In virtually all of the cases, blacks were the subjects and not the parties in the litigation. They
cans onto reservations, described them as "savage beasts," and treated these original residents as if they lacked personhood.93 The white-male-dominated army summarily rounded up Japanese Americans like cattle into "war relocation camps" during World War II.94 White government scientists used African-American men as laboratory animals for the testing of syphilis.95 Doctors, some carrying out government orders, involuntarily sterilized, and still sterilize, poor women, Black women, American-Indian women, and Latinas.96 The state appropriated the bodies of all women by condoning female genital mutilation to stop everything from "truancy" to sexual pleasure.97 The state still treats women's bodies as things, as apart from personhood; in the eyes of the law, a woman's body is a reproduction vehicle that must be carefully regulated, whether by requiring a woman seeking an abortion to second-guess her decision or by preventing women from working in certain industries (which ought to be made safer regardless) simply because they have one-half of the ability to bear children (at last count, it did take sperm).

---

were property subject to ownership; and the law, reflecting as it did then the prevailing belief in the inherent inferiority of all blacks, experienced little difficulty in treating them as " chattels personal."

Id. § 1.6, at 16 (3d ed. 1992) (footnote omitted) (citing I-IV JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (Helen T. Caterwall ed., 1926-1936); KENNETH M. STAMPP, THE PECULIAR INSTITUTION 197-236 (1956); see also Bell, supra, §§ 1.6-.11, at 15-36.

93. See, e.g., ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990); see also Williams, supra note 58. Williams states:

[T]he Founding Fathers of the United States . . . retained the legal legacy of a European Christian conqueror's superior rights of self-rule and jurisdiction over the territory and resources held by non-Christian "savages." That medievally-derived legacy of racial discrimination against indigenous tribal peoples today is found firmly embodied and institutionalized in the Supreme Court's unquestioned reliance on and elaboration of the core doctrines of Federal Indian law.

Id. at 68.

94. See Korematsu v. United States, 323 U.S. 214 (1944).

95. See, e.g., Alan R. Geraldi, Comment, In His Image: On Patenting Human-Based Bioproducts, 25 U.S.F. L. REV. 583, 595 n.105 (1991) ("[I]n a case study initiated by the United States Public Health Services in 1930, a group of African-American males, who were infected with syphilis, were not only left untreated, they were prevented from getting treatment so that the progression of the disease could be studied.") (citation omitted).


Clitoridectomy was widely practiced in Europe and the United States, especially during the second half of the nineteenth century . . . .

. . . It was often performed in mental hospitals until 1935. Doctors in America were willing to perform even infibulation [the sewing together of vaginal lips] into the twentieth century to keep females from masturbating. Holt's Diseases of Infancy and Childhood (1936) recommended cauterization or removal of the clitoris to cure masturbation in girls. . . . Scholar Lilian Passmore Sanderson writes that both [clitoral excision and labial infibulation] are still performed in the United States and Europe.

Id. at 110-11 (footnotes omitted).
This "thingification" of human beings is a means of controlling them — for awhile. Sooner or later most human beings, no matter how dejected, no matter how convinced they are that they will never be treated as anything except a thing for use or exploitation by another, will check out. They will fight back and insist that they are not labor machines; or, that being impossible, they will mentally and emotionally check out from the labor they are doing. The idea of a bunch of spaced-out, overworked, socially impaired attorneys may have been amusing to the "honorable" old company of white male lawyers from chummier, more pedigreed times. Today it is a reality. Moreover, the people making the decision to run law firms like labor camps are, for the most part, still white men.

To be overly concerned with profit, especially in the context of the law, has led to the mistreatment of human beings. In a modern sense, law firms' hyperfocus on profit has created a generation of lawyers whose minds are numb. The pressure to bill hours and increase profits has created lawyers whose commitment to being "honorable" of necessity lags far behind their commitment simply to make it through the day, the week, the year. Tellingly, the worst of the work-crazed firms are called "sweatshops." There, as in most firms, most associate work is monotonous, detailed, and difficult. For years, there is little "hands-on" training, which creates a late learning curve akin to a pressure cooker. Who has time or energy, given this environment, to be a "public servant"? Who has time to notice that the members of the profession grow increasingly indecent, increasingly incapable of deeming worthy anything but corporate America's problems?

On this count, Judge Edwards is right. If, as Felix Frankfurter says, "the law is what the lawyers are," then we had better be prepared for a law that encourages sacrifice to the dollar even more than it does at present. We had better be prepared for a law that in letter, as well as in practice, slants toward the powers of capital. We had better be prepared, in short, for a law that not only glorifies the greed of unchecked markets, but that sacrifices everything in order to assist in that greed.

Fortunately, there are alternative visions. With the exception of law and economics (whose focus is efficiency), those alternative visions are shaped and advanced by the very disciplines that Judge Edwards fears. There is the environmental law's vision of a country who takes

her resources and her unborn citizens seriously enough to take good care of the earth. There is the feminist vision of a country whose laws do not allow women to be beaten with impunity, whose laws enforce the idea that traditional "women's" work should be compensated, whose laws ensure that women make one dollar for every man's dollar doing identical work, and not seventy cents. There is the critical race scholars' vision of a country whose laws enforce the substantive imperatives — and not just the facial machinations — of racial equality; whose laws guarantee voting rights, a jury of peers, housing, and education to Blacks, Latinos, Asian Americans, and Native Americans.

There is, in short, no shortage of alternative visions, many of which are progressive and humanitarian. As the first part of this article argued, the alternative visions taught in law school today are not to blame for the current crisis of ethics in the profession and its obsession with profits. Indeed, the "alternative" visions may be the only hope to turn the profession toward an "honorability" that goes beyond the niceties of aristocratic gentlemen and is truly honorable.