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THE DISJUNCTION BETWEEN JUDGE EDWARDS AND PROFESSOR PRIEST

*Louis H. Pollak**

With characteristic vigor, Judge Harry Edwards, in his essay *The Growing Disjunction Between Legal Education and the Legal Profession*,¹ has censured the law schools and, secondarily, the bar, for what he sees as profoundly disturbing trends pulling academics and practitioners farther and farther apart. Judge Edwards' censure is not proffered off the cuff. He has carefully polled his former law clerks on their perceptions of their law school years and of their postclerkship professional experiences — whether in private practice, in government, or in teaching. In the text and footnotes of his essay, Judge Edwards quotes his law clerks' responses in considerable and very interesting detail. These responses, largely if not uniformly confirmatory of Judge Edwards' own intuitions, constitute much of his ammunition. For my part, I must confess that, although I share certain of Judge Edwards' concerns, I do not view the American legal landscape with the same degree of alarm.

Judge Edwards' central criticism of law schools (institutions that, Judge Edwards, as an erstwhile academic of distinction, is particularly qualified to judge) is that they are rapidly becoming schools of "theory," giving short shrift to — en route to abandoning — "doctrine." This development, Judge Edwards feels, has already put at risk not only the law schools' pivotal role as centers of legal research but their crucial pedagogical role.

As faculty research increasingly disfavors "doctrine" in favor of "theory," Judge Edwards foresees a breakdown in the vital and long-established symbiosis between the professoriate — the producers of legal scholarship — on the one hand, and the bar and bench — the hitherto consumers of legal scholarship — on the other. Lawyers and judges, accustomed to looking to the treatises and law review articles of "practical" scholars for guidance on "how the legal regime works"² — and, presumably, how to make it work better — will no longer find such guidance.

* U.S. District Judge, Eastern District of Pennsylvania. — Ed.

1. 91 MICH. L. REV. 34 (1992).

2. *Id.* at 56.

The pedagogical scene, as Judge Edwards sees it, is just as bleak. He feels that the mounting scorn of "theory"-minded professors not only for "doctrine" proper but for the very functions lawyers and judges perform is threatening to play havoc with what, historically, has been the law schools' primary mission — imparting appropriate professional instruction to the coming generations of members of the bar.

What sort of instruction is called for? We would of course all agree that what is *not* called for is the rote learning that passes bar examinations. Rather, the law schools fulfill their instructional responsibility by establishing the conditions for a vigorous intellectual interchange that embraces: (1) the study of the law's major fields and (2) attentive consideration of abiding principles — (a) individual integrity as an advocate and an officer of the court, and (b) collective responsibility for advancing the social order — that give moral and civic definition to the law as a public profession.³ But Judge Edwards senses that theoreticians are so indifferent to the problems with which

3. A wide variety of teaching methods lend themselves to the achievement of these goals. In my view probably the most effective method — but also, unfortunately, the most labor-intensive method — is the one practiced back in the 1930s by Wiley Rutledge before he left teaching for the bench. Rutledge's theory and practice of teaching have been evocatively described by a quondam junior academic colleague, Willard Wirtz. As Wirtz explains, Rutledge felt that conventional legal education had serious limitations:

Wiley Rutledge was proud of the law schools and of the profession for which they train. But he spoke out repeatedly against the impersonalness of legal education and against the reflections of that same quality in the profession itself. He protested the hollowness of curricula and courses in which the value elements inherent in sound legal concepts emerge only incidentally. He pointed out the inevitability of false emphasis resulting from the climaxing of each semester with a series of examinations which reveal only clinical accomplishment. We train artisans, he said, while a democratic society pleads for architects.

Louis H. Pollak, *Wiley Blount Rutledge: Portrait of A Judge, in SIX JUSTICES ON CIVIL RIGHTS 177, 179-80* (Ronald D. Rotunda ed., 1983) (quoting Willard Wirtz, *In Memory of Wiley Blount Rutledge*, PROC. OF THE BAR & OFFICERS OF THE U.S. SUP. CT. 19, 20-21 (Apr. 10, 1951)). As Wirtz tells it, Rutledge realized that, in order to overcome the artificiality of classroom presentation, what was critical was:

treating his students as human beings, getting to know them as individuals. He did this, seemingly oblivious to the other demands upon his time, by opening his office door and his home, inviting the students in singly and in groups of two or three, and then sitting and talking with them. The conversation would be personal at first, as teacher and student found out what underlay the other's reactions. Then it would broaden out, proceeding with an awareness of assumptions, predilections and biases. Now the human heart of the subject matter of the day's lecture could be taken up intelligently, and that of the morning's headlines. The subject would become not just a particular case or a news story but how a decent, honest, intelligent man approaches any subject coming within the professional competence and obligation of the lawyer. For an hour or so law would be taught as it was a hundred years ago when the neophyte learned his profession in the office of an established member of the bar. "Reading law" they called it. But it was so much more than that. It was the transmission of a tradition of professional service, the handing on perhaps less of information than of a spirit and a whole quality of professional competence and responsibility.

Id. at 180 n.5 (quoting Wirtz, *supra*, at 20-21).

As one who was privileged to learn from Rutledge when serving as the Justice's law clerk, I can attest to the success of his method.

lawyers deal that in many law school classrooms serious examination of such problems, and concomitant training in the skills required to address such problems, have become passé.

Finally, Judge Edwards is dismayed — and, in my judgment, properly so — at the degree to which, in the everyday practice of law, dedication to the bottom line seems to take precedence over (1) allegiance to norms of ethical conduct and (2) a felt responsibility to take up the cudgels for unrepresented litigants. Judge Edwards views the failure of practitioners to conform to the rhetoric of high professional standards as further evidence of the growing gap between the schools and the practitioners.

I. THE INDICTMENT OF THE LAW SCHOOLS

Judge Edwards' indictment of the law schools is fueled in substantial measure by rhetoric emanating from the academy. Exhibit A is a paragraph from a paper on legal education written by Professor George Priest back in 1983:

The Enlightenment is coming. Its source seems to be the increasing specialization of legal scholarship. If these intellectual trends continue — as I believe they will — the structure of the law school will change. The law school will of necessity become itself a university. The law school will be comprised of a set of miniature graduate departments in the various disciplines. Introductory courses may be retained (if not shunted to colleges). Even then, a wedge deeper than the one we see today will be driven between those faculty members with pretensions of scholarship and those without. The ambitious scholars on law-school faculties will insist on teaching subjects of increasingly narrow scope. The law-school curriculum will come to consist of graduate courses in applied economics, social theory, and political science. Specialization by students, which is to say, intensified study, follows necessarily.⁴

4. George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 441 (1983). A reading of his immediately preceding paragraph may facilitate an understanding of what "Enlightenment" Professor Priest had in mind:

Behavioral science contradicts the primacy of law. As a greater proportion of law teachers become interested in the behavioral sciences, the structure of the law school will be forcibly changed. A law school, of course, could react to these developments by searching out a faculty devoted to the unique interest and importance of the legal system. But that will never do. Law school curricula will always follow the most persuasive explanations of the law. And the best writing about the legal system is interdisciplinary. As a consequence, the structure of the law school and its curriculum must change. Currently, to the student, legal education resembles undergraduate education. The student takes a sampler of courses. The objective of the course of study is a liberal education: to expose the student to a broad set of different subjects. There is little writing and little specialization. . . . In contrast, the virtues of the generalist are foreign to college faculties and unknown in graduate departments. In this respect, faculties of modern law schools resemble faculties of medieval universities. We await the Enlightenment.

Id. at 440.

A. *Scholarship*

Five years after he started awaiting the Enlightenment, Professor Priest undertook to explain the new look of “the theories that dominate modern legal scholarship”:

What has changed in the modern world is that, while the theories and organizing structures of traditional legal practice are theories about law and are only applicable to law, the theories of modern legal education are theories of economists, critical scholars, and sociologists. They are theories about behavior or about understanding in which law has no special place.

The most important modern change between the theories underlying legal practice and the theories underlying modern legal scholarship relates to the respective source of the theories. Historically, the theories of traditional legal practice, because relevant only to legal phenomena, were developed only in law schools. The work of the law schools and the concerns of the bar were largely identical. Today, however, the theories that dominate modern legal scholarship are the theories of modern social science or social criticism, and their source is quite independent of law schools. These theories are developed in departments of social sciences or the humanities by a set of independent scholars. Most importantly, these scholars from other disciplines, because they are not burdened by the mastery of the legal system’s details, proceed at a much faster pace and with much greater range than lawyers. The most important difference between the legal scholarship of today and that of twenty-five years ago is the tremendous increase in the velocity of ideas relevant to the law.⁵

What Professor Priest applauds, Judge Edwards condemns: “[T]his is my main point — pure theory should not wholly displace the production of treatises or articles that, *inter alia*, focus on legal doctrine. Unfortunately, this displacement is now beginning to occur and therewith a grave disjunction between legal scholarship and the legal profession.”⁶

To some extent the polarity between Judge Edwards and Professor Priest is more rhetorical than real. Judge Edwards does not insist that only “practical” scholarship — the treatise or the doctrinal law review article — is of value to lawyers and judges; he acknowledges that various kinds of “impractical” scholarship *also* can serve our legal system.⁷ Further, Professor Priest, for all his professed monasticism,

5. George L. Priest, *The Increasing Division Between Legal Practice and Legal Education*, 37 *BUFF. L. REV.* 681, 681-82 (1988-1989).

6. Edwards, *supra* note 1, at 57.

7. *Id.* at 56. For the purposes of this brief commentary on Judge Edwards’ essay, I have assumed that the distinctions between “practical” and “doctrinal” scholarship and “impractical” and “theoretical” scholarship are manifest. But I must confess to some unease about the viability of the assumption. To be sure, one can readily assign large quantities of law-related literature to one category or another. But a good deal of the literature — including much of some value —

has in fact been known to consort with the legal laity and even to write articles of interest to the laity.

But if, nonetheless, we stipulate that a significant amount of current scholarship about legal phenomena is written from relatively abstruse behavioral science perspectives that are largely inaccessible to the bar and to the bench, it still does not follow that there has been a radical displacement and consequent dearth of doctrinal literature. Law reviews have proliferated in number and in specialization; and, concurrently, the established law reviews have broadened in scope.⁸ It would appear that a plenitude of "practical" writing is still available — if only lawyers would spend the (billable?) time required to read it, cite it, and build on it in their briefs.⁹ Thus, while it is unsurprising that the bar would generally be turned off by the high scholarship¹⁰ that has become very much in vogue in certain corners of the academy, that is no excuse for turning away from the law reviews altogether.

B. *Pedagogy*

Judge Edwards fears that the professors who constitute the "theory" sector of the professoriate have so little interest in what lawyers and courts do that they cannot be relied on to carry out in responsible fashion the teaching of courses that have conventionally been the heart of the curriculum. Had Judge Edwards called Professor Priest to the witness stand in support of this aspect of his indictment, he would have elicited what appears *prima facie* to be valuable corroborative testimony. In Professor Priest's 1983 paper the following appears:

From the standpoint of the instructor . . . legal education is more primitive than college education, and most closely resembles high school or perhaps junior high school education. Today, virtually every law-school faculty member is able to teach every subject in the curriculum. One might grouse if one were assigned a remote course. But most of us, I would guess, would pride ourselves on our ability, were it important enough to the institution, to teach any subject at all in the law-school

would appear to belong in both categories. Moreover, some of the literature has a hard time qualifying for either category.

8. As to the degree of infiltration of "theory" in the law reviews, see Edwards, *supra* note 1, at 49-50 nn.44-46. "Theory" may not, in fact, be much of a novelty: Professor Stephen Burbank, in an essay introducing a 1988 symposium on "great" law review articles, finds in the symposium papers "reason to doubt claims that legal scholarship today is vastly different than it was thirty or fifty years ago." Stephen B. Burbank, "*Plus Ça Change . . .?*," 21 U. MICH. J.L. REF. 509, 510 (1988).

9. As for judicial reliance on law review articles and other legal materials, see Edwards, *supra* note 1, at 49 n.44, 51 n.50.

10. Some high scholarship — like some low scholarship — seems in fact to be of good quality.

curriculum. Indeed, the response of all but the junior faculty would be to engage in a challenge as to whether one needed one week's preparation or one day's.¹¹

Perhaps Judge Edwards made no mention of this portion of Professor Priest's testimony because he, like me, finds it improbable that a witness as talented and insightful as Professor Priest actually believed what he wrote. I suspect that Professor Priest was, through hyperbole, trying to make a debating point.¹² I do not think Professor Priest really thinks that "legal education . . . most closely resembles high school or perhaps junior high school education." Indeed, I doubt that he would vote tenure to a colleague, however capable a devotee of high scholarship, whose attitude towards teaching was that condescendingly myopic.

Has law teaching deteriorated? Perhaps so, but I am unaware of any real evidence to that effect — or, at least, of any evidence that is more than anecdotal.¹³ If reliable evidence demonstrated that (1) the training of newly minted lawyers has markedly slipped and (2) flawed teaching — teaching that is disrespectful of the subject matter — is disproportionately to be found among professors whose scholarly interests are primarily "theoretical,"¹⁴ that should raise warning signs for the faculty committees primarily responsible for the initial appointment and subsequent promotion of new colleagues. But before we accept and act on the proposition that "theory" professors cannot or will not teach, the evidence ought to be clear and convincing.

11. Priest, *supra* note 4, at 440.

12. I might add here that I also wonder whether Professor Priest was not a bit hyperbolic on the previous page of his 1983 essay when he wrote:

The demands of scientific theory create extraordinary internal conflict for the lawyer who develops an interest in social science. The lawyer-economist, -sociologist, -political scientist, -social theorist finds himself a modern-day Henry Adams, whose education teaches him that his training is obsolete and that the more he develops his scientific interest, the more obsolete his basic training — legal training — will become. The legal scholar may have been certain as he selected his career that the law and the legal system were subjects of central intellectual importance, but now theory tells him that he was wrong. Those with true intellectual courage would abandon the law and become full-time social scientists — but I know of none who have done so.

Id. at 439. Maybe Professor Priest meant what he wrote but was misled by Henry Adams. For my part, I do not suppose that Henry Adams, notwithstanding his avowals of scholarly incompetence, ever actually entertained the notion that "his training [as a historian was] obsolete." He was, after all, an immensely gifted historian, and I think he knew it.

13. In saying this I certainly mean no disrespect to the former Edwards law clerks whose views the Judge systematically collated. I am sure that some of their teachers were below par, as were one or two of mine 45 years ago.

14. By negative implication, Professor Priest offered mild support for such a finding: in talking about how the "increasing velocity of ideas" makes for "an increasing rate of faculty obsolescence," Professor Priest notes what he regards as the unsurprising corollary "that the best prepared law teachers . . . are the most traditional of former scholars." Priest, *supra* note 5, at 683.

My own sense of the quality of current law teaching is based almost entirely on the caliber of the law clerks with whom I have been privileged to work over the past fifteen years. I find them to be extraordinarily well-educated — well-read in the law and beyond it — and highly sophisticated.¹⁵ My intuitive judgment is that more and more law schools are doing a better and better job.¹⁶

C. *The Verdict*

For the reasons stated, I do not think the evidence supports Judge Edwards' indictment of the law schools. But the bringing of the indictment has, nonetheless, served a useful purpose. There is not, in my judgment, any danger that the law school of the future will fulfill Professor Priest's prophecy and "of necessity become itself a university." The law school of the future — whether public or private — is unlikely to have the resources to pursue such a path; nor should it if the resources were at hand. In short, I regard the dangers Judge Edwards perceives to be overblown. Nonetheless, Judge Edwards' essay operates as an early warning signal. It is an admonition that law faculties should, with a view to maintaining a wholesome balance between the "practical" and the "impractical," continue to be at pains to recruit a substantial cadre of persons whose scholarship and whose pedagogy will be marked by an informed interest in the world of actual lawyers, actual judges, actual legislators, and actual regulators.¹⁷

15. I must admit that my confidence in current legal education was shaken some time back when I found that a law clerk trained at a school that I will, to preserve its anonymity, refer to as "Harvard" had never heard of a case called *Gibbons v. Ogden*, 9 Wheat. 1 (1824). But, on reflection, it came to me that this glaring omission — does an omission actually glare? — was neutralized, indeed outweighed, by the fact that she knew everything else.

Of course, my assessment of the quality of my law clerks' training is highly subjective. Nonetheless, I venture the guess that Judge Edwards' assessment of the quality of his law clerks' training would be very similar. Concededly, however, the law clerks with whom Judge Edwards and I are well acquainted are too few in number to be presented as representative samples of lawyers and schools.

16. A very different picture of the quality of contemporary legal education is presented by one of the current rising stars of litigation, Vincent LaGuardia Gambini. Mr. Gambini graduated from Brooklyn Academy of Law in the mid-1980s. He reports that at law school he learned contracts but not procedure. "The law firm that hires you, they teach you procedures. Or you can go to court and watch." See *MY COUSIN VINNY* (20th Century Fox 1992). If you have already seen *My Cousin Vinny*, see it again. (The foregoing is written in shameless imitation of The Great Ely Footnote — footnote 63 of Professor John Hart Ely's *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *IND. L.J.* 399, 414 n.63 (1978), the first portion of which reads as follows: "See *W. SHAKESPEARE, MACBETH*, act IV, scene I. (Actually, I suppose you've already seen it).")

17. I would note that persons trained in law and in another discipline can do valuable "practical" work and valuable "impractical" work on both the research and teaching sides of the law school agenda. But I would also note that possession of a degree in a discipline other than law is hardly a *sine qua non* for valuable research and teaching, whether "practical" or "impractical": American law, for all its shortcomings, would have been infinitely poorer had it not been for the writing and teaching of some mere LL.B.s.

II. ETHICS

In the closing portion of his essay, Judge Edwards expresses his unhappiness with what he sees as the bar's widespread inattentiveness to appropriate standards of ethical practice. Judge Edwards defines ethical practice broadly, in words on which it would be hard to improve:

"Ethics" may bear upon the practice of law in two different ways. First, it bears upon the choice of clients. The good lawyer should not simply serve the richest clients, who will pay the fattest fees. Rather, the lawyer has an ethical obligation to practice public interest law — to represent some poor clients; to advance some causes that he or she believes to be just; to deploy his or her talents pro bono rather than pro se, at least in part. Second, ethics bear upon the lawyer's representation of a particular client. This is the domain of professional responsibility: the ethical lawyer cannot always advance the client's narrow self-interest, because the lawyer is an officer of the court as well as an advocate.¹⁸

Judge Edwards' strictures with respect to the anti-ethical, including anti-pro bono, momentum of increasingly bottom-line oriented practice seem to me right on target. Law schools most certainly have a responsibility to inculcate both an understanding of the proper way to practice law and a commitment to represent the unrepresented. Judge Edwards seems to feel that law schools generally are doing far too little on these fronts.¹⁹ Perhaps so. But the schools with which I am most familiar are putting strong and welcome emphasis on the development of programs responsive to such concerns. I cite as one encouraging example the statement of the former Edwards law clerk whom the Judge identifies as Government Lawyer 2:

[My law school] offered programs in, and gave serious attention to, the problems of under-represented and unrepresented individuals. I personally participated in a program to assist battered wom[e]n obtain TROs and other legal redress against those abusing them. In addition, I participated in [the law school's] externship program Both of these programs helped instill in me a desire to work in the public sector.²⁰

CONCLUSION

If the law schools can work to produce, and the profession can undertake to recruit, respect, and reward, more lawyers like Government Lawyer 2, the integrity of the schools and of the profession will be secure. Judge Edwards was right to remind us of Justice Frankfurter's apothegm that "the law and the lawyers are what the law

18. Edwards, *supra* note 1, at 67.

19. *Id.* at 73-74.

20. *Id.* at 72 (quoting former law clerk). I bet I know what school that is.

schools make them.”²¹

21. *Id.* at 34 (quoting Letter from Felix Frankfurter, Professor, Harvard Law School, to Mr. Rosenwald 3 (May 13, 1927) (Felix Frankfurter Papers, Harvard Law School Library), *quoted in* RAND JACK & DANA C. JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* 156 (1989)).