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Judge Edwards' Indictment of "Impractical" Scholars: The Need for a Bill of Particulars

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JUDGE EDWARDS' INDICTMENT OF "IMPRACTICAL" SCHOLARS: THE NEED FOR A BILL OF PARTICULARS

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Judge Harry Edwards' article, *The Growing Disjunction Between Legal Education and the Legal Profession,*[1] is, at least, two articles in one. The first article develops the theme that a serious gap exists between the work of legal academics and the interests of working judges. The second takes up a very different point: the perceived tendency of practicing lawyers to be "moving toward pure commerce" and away, presumably, from "ethical practice."[2] What links these two concerns is a view that the contemporary legal academy is straying from its traditional mission. In particular, according to Judge Edwards, himself a distinguished legal academic prior to his appointment to the bench, members of the legal professoriate should devote themselves to "training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use."[3] Law schools do not fulfill this mission, in part because of the purported capture of much of the legal academy by "[t]he 'impractical' scholar . . . [who] produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical matter."[4]

I have no doubt that Judge Edwards speaks for at least some persons within the legal academy and, certainly, many more outside those environs. His article has provoked much "faculty-lounge" conversation. If truth be known, however, there is nothing particularly original about Judge Edwards' initial perceptions,[5] which in large measure boil down to the well-documented disinclination of an increasing number of legal academics to write about the American legal system from the "internal" perspective of the judge or practitioner and

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

2. *Id.* at 66.

3. *Id.*

4. *Id.* at 35.

5. See, for example, the articles collected in *A Symposium on Legal Scholarship,* 63 COLO. L. REV. 521-750 (1992).

an inclination instead to write for an audience consisting primarily of other scholars whose lives are lived "outside" the actual practice of law as conventionally defined.[6] The reasons for this development are multiple and complex, ranging from the contingencies of political elections and the "capture" of the judiciary, in the last decade especially, by a political party with which most legal academics do not identify, to much vaster cultural issues surrounding the concept of "modernity" and "modernization."[7] In any event, though, many legal academics no longer "depend on maintaining unity of discourse with practitioners" or "presume to instruct decisionmakers as to what they should do."[8] Whether or not Judge Edwards seeks "instruction," he undoubtedly wishes to force legal scholars to consider the implications of their work. Whatever one thinks of his specific answers, his critique of the growing disengagement between scholars and judges raises important questions. I am, therefore, grateful to the editors of the *Michigan Law Review* for inviting me to participate in this symposium.

Some of my interest in Judge Edwards' article stems from the fact that I have taught, in addition to constitutional theory, courses on the professional responsibility of lawyers for the past dozen years. I seriously doubt, though, that my identity as a professional responsibility teacher explains my presence in this symposium. Surely the most likely reason for the editors' invitation is their awareness that Judge Edwards focused at least some of his critique on a letter that I had written him in 1991 when it seemed that we would appear together at a University of Colorado conference on "Constitutional Theory and the Practice of Judging."[9] He was to comment on a paper that I would deliver.

In that letter,[10] I outlined what I proposed to say.[11] As I recall, I indicated my pleasure in the prospect of our meeting (for the first time) in Colorado, in part because I knew from some of his previous

6. *See* Robert Post, *Legal Scholarship and the Practice of Law,* 63 COLO. L. REV. 615, 617 (1992).

7. *See, e.g.,* Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts,* 139 U. PA. L. REV. 1597, 1627-53 (1991).

8. Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience,* 63 COLO. L. REV. 569 (1992). The latter clause quoted from Dan-Cohen suggests also what has come to be called the "critique of normativity." *See, e.g.,* Pierre Schlag, *Normativity and the Politics of Form,* 139 U. PA. L. REV. 801 (1991).

9. Edwards, *supra* note 1, at 36. The proceedings of that conference were published in *Ira C. Rothgerber, Jr. Conference on Constitutional Law: Constitutional Theory and the Practice of Judging,* 63 U. COLO. L. REV. 291-480 (1992).

10. I did not retain a copy of the letter. The excerpt quoted in the text accompanying note 14, *supra,* comes from a quotation from the letter in Judge Edwards' article.

11. My talk was published as Sanford Levinson, *The Audience for Constitutional Meta-Theory (Or, Why, and To Whom, Do I Write the Things I Do?),* 63 U. COLO. L. REV. 389 (1992).

writings and speeches at the American Association of Law Schools that he was not likely to agree with much, if any, of my approach to legal scholarship. As it happened, Judge Edwards was unable to attend the conference; in many ways, though, I view at least part of his *Michigan Law Review* article as the response he might well have given. I will therefore focus most of my own remarks on his response to my letter. Because it is also relevant to this symposium that I teach professional responsibility, I will conclude my remarks by addressing some of Judge Edwards' comments about current developments in the legal services industry.

I can summarize my response as follows: Although Judge Edwards' article certainly seems to be leveling a heartfelt indictment, it lacks a sufficiently precise bill of particulars to know exactly whom he has accused of doing what. Nor does one know exactly what penalty Judge Edwards would exact from the miscreants. Unless he supplies such a bill, his indictment should be dismissed, though, presumably, without prejudice to its reinstatement should he wish to do the hard work of supplying evidence for the charges he set out.

I. PLURALISM AND THE LEGAL ACADEMY

Judge Edwards introduces my letter as being from "a well-known professor at a prominent law school."[12] I do not know why he chose not to identify me; perhaps he wanted to "protect" me from being identified with what he regards as such fallacious views. In any event, the excerpt he quotes is as follows:

> I suppose that we both agree that there is an ever-increasing split between the academy and practicing judges (not to mention practicing lawyers). . . . I presume that a good illustration of the split would be [an article of mine]. . . . Although a couple of cases are mentioned, it is in no serious sense meant to be a contribution to the discussion of any of the contemporary doctrinal issues of undoubted importance to our society.
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> . . . Though I am always delighted to discover that a judge has [read] anything I have written . . . I can't honestly say that I expect many judicial readers nor am I willing to redirect my writing in ways likely to increase the number.
>
> . . . I view my task as a legal academic as similar more to the member of a university department of religion, somewhat detached from the practices he/she is studying. . . . One need not be a devotee of a particular religion in order to find its practices or doctrines fascinating . . . .[13]

12. Edwards, *supra* note 1, at 36.

13. *Id.* I do not recall precisely which article I mentioned in the letter. In my published article, I referred to two then-recent pieces of mine, Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended? (a) <16; (b) 26; (c) >26; (d) all of the above)*, 8 CONST. COMMENTARY 409 (1991), and Levinson &

"I am still astonished," Judge Edwards then writes, "by the professor's frank admission that he is 'unwilling to redirect' his writing in useful ways, since he prefers to study whatever 'fascinates' him."[14] Although "law schools *should* have interdisciplinary scholars," this welcome should not run to "scholars whose work serves no social purpose at all." After all, says Judge Edwards, "[w]e do not give tenure to stamp collectors."[15]

Judge Edwards obviously wishes to attack "impractical" scholarship — and the scholars who produce such writing — and to encourage instead the writing of "practical" scholarship. He apparently defines such scholarship by applying a test of "usefulness" or of "social purpose," though it is absolutely crucial to note that Judge Edwards defines these terms only from the perspectives of particular members of the community, that is, "judges, legislators, and practitioners."[16] The central point of his argument, after all, is his dismissal of any claims that some particular piece of writing would be of great "use" to other members of the scholarly community interested in a given theoretical issue. Nor does he seem to support the notion that the in-depth development of such issues serves the great "social purpose" to which universities profess their devotion: encouraging learning as an end in itself.

To some extent, Judge Edwards is returning to one of the great debates of the 1960s — the role of "relevance" in defining the university curriculum and assessing the work of members of the university community. He firmly rejects an "ivory tower" conception of the university in favor of one that emphasizes its utility (or lack of it) to the surrounding community. This issue, which is obviously of general importance, is especially salient for those of us involved in the education

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Balkin, *supra* note 7. I have elaborated on the analogy between law and religion and the concomitant tension presented by viewing the law school as more comparable to a seminary or to a secular department of religion in SANFORD LEVINSON, CONSTITUTIONAL FAITH 155-57 (1988).

14. Edwards, *supra* note 1, at 36. I gather Judge Edwards views it as an admission against interest.

15. *Id.* (emphasis added). I presume that Judge Edwards means to say that being a stamp collector is not a good reason to receive tenure, rather than to suggest that engaging in the heretofore honorable hobby of stamp collecting would disqualify someone from receiving tenure. The former is true, but it is true as well of being a committed supporter of world peace or a major contributor to the American Cancer Society. What one does "off the job" should be irrelevant to receiving an academic appointment, particularly one with lifetime job security. As to "on the job" conduct, I assume that Judge Edwards would accept the scholarly legitimacy of an article treating some of the legal issues that undoubtedly surround stamp collecting, particularly if "practicality" is a desiderata of the scholarly endeavor. *See, e.g.*, Stephen R. Field, *Collectibles as Investments: Artworks and Stamps*, 39 INST. ON FED. TAXN. 35-1 (1981); Robson Lowe, *Marketing a Stamp Collection: It Is the Executor's Responsibility to See that All Items Are Properly Evaluated and Offered to the Appropriate Market*, 120 TR. & EST. 51 (July 1981).

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

of aspiring professionals. I myself have written of the importance of remembering that "my primary occupation, for which I am well paid, is teaching the young who wish to embark on a life very different from mine, i.e., the actual practice of law,"[17] and I reject any argument that legal academics should disregard this reality of our students' lives and aspirations.

Still, not surprisingly, I disagree with much of what Judge Edwards says, at least insofar as I perceive it as an attack on just the sort of writing I (often) do. But maybe that perception is itself subject to challenge. As already noted, I think that the greatest weakness of Judge Edwards' article is its abstraction: for all of its considerable passion and polemical overtones, it is often difficult to figure out precisely what he is arguing.

One possibility, especially tempting to someone writing a "reply" to Judge Edwards, is to view him as denouncing "impractical" scholars and calling in effect for their (or our) expulsion from the legal academy. There are certainly passages, for example, that are harshly critical of critical legal studies and potentially quite exclusionist in their implications.[18] As one might readily predict, I would disagree wholeheartedly with any such arguments.

On balance, though, it seems tendentious to ascribe such intolerance to Judge Edwards, for he also expresses support for "interdisciplinary" scholarship and his belief in the desirability of pluralistic methodologies and approaches to the study of law. Thus, even in regard to critical legal studies, he notes that "[a]t its best, CLS *usefully* questions and challenges the political premises that serve as the foundation of our system of justice";[19] I assume, therefore, that Judge Edwards would welcome at least some CLS adherents into his scholarly universe.

A more "moderate" reading of Judge Edwards' argument, therefore, is simply that the "scholarly law school," which he himself says

17. LEVINSON, *supra* note 13, at 165.

18. See especially Judge Edwards' reference to "some" unnamed CLS scholars as practitioners of a clearly unacceptable "legal nihilism." Edwards, *supra* note 1, at 47. Judge Edwards also quotes Paul Carrington's famous suggestion that " '[p]ersons espousing [this] view, however honestly held, have a substantial ethical problem as teachers of professional law students.' " *Id.* at 47 n.36 (quoting Paul D. Carrington, *Of Law and the River,* 34 J. LEGAL EDUC. 222, 227 (1984)). I have offered my own response to Professor Carrington's article in LEVINSON, *supra* note 13, at 157-79.

19. Edwards, *supra* note 1, at 47 (emphasis added). Judge Edwards writes that "various nontraditional movements have the potential to be valuable additions to the law school. CLS scholars have provided a critical, anti-establishment view that, in the past, was largely absent from the law schools." He goes on to acknowledge the contributions of law and economics, law and literature, feminism, critical race studies, and moral theory, all of which "usefully inquire whether the existing legal system is fundamentally unfair in its construct." *Id.* at 50.

"ideally, should have a balance of 'practical' and 'impractical' professors"[20] has become imbalanced toward the "impractical." Those in charge of faculty hiring should presumably compensate for this purported situation by seeking to secure the proper balance. I am sure that Judge Edwards and I disagree about how many "law and" scholars are "too many," but our disagreements might turn out to be more marginal than might be anticipated, if closely examined. As a member both of the general University of Texas Law School faculty and of its appointments committee in particular, I have often voted in favor of candidates whose approaches to the study of law, and indeed, conceptions of legal education, are not my own, precisely because I value a pluralistic legal academy. The same has proved true of many of my colleagues, who have little more liking than Judge Edwards for some of the directions legal scholarship has taken but nevertheless have accepted the legitimacy of their presence at the University of Texas.

But even this more "moderate" argument raises some important questions that Judge Edwards does not directly address. I can make my point most vividly by noting that the article would have been much improved had one been able to ascertain with greater precision which legal faculties Judge Edwards would like to see hire which candidates. That is, once one rejects the "immoderate" interpretation of the article as a call for a general purge of the "impractical," it becomes impossible to talk in terms of the legal academy in general. Instead, one's analysis must become far more specific and contextual, focusing on a particular law school or candidate for a position. As anyone knows who lives within the academy, decisions about appointing particular individuals to our faculties best reveal the concrete meaning of our debates about the best way to study law or to engage in any other concrete project.

Consider the fact that the most important action taken by the faculty of the University of Michigan Law School in the last decade was surely the appointment of Catharine MacKinnon to its ranks. Does Judge Edwards applaud that or bewail it? What would he have advised — or what did he advise — his friends on the Harvard Law School faculty to do in their well-publicized consideration of Professor MacKinnon in the spring of 1993?[21] How does he view the particular mix of interests and intellectual tendencies on those two, or other, faculties?

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20. Edwards, *supra* note 1, at 50.

21. She gained a majority, but not the institutionally required two-thirds, vote to appoint her to the Harvard faculty. *See* Chris Black, *Harvard Law Sees Setbacks in Bid To Diversify Its Faculty,* BOSTON GLOBE, Mar. 18, 1993, at 44.

There is at least one problem attached to the specific reference to Professor MacKinnon. How, precisely, does one classify her, and more importantly, why? Judge Edwards might well have praised her work and endorsed her appointment because MacKinnon is in fact just the kind of "practical" scholar he is praising. After all, she did pioneering work on establishing liability for sexual harassment.[22] Further, her efforts, albeit extremely controversial, to protect women from freely available pornographic material led, in Minneapolis and Indianapolis, to the actual passage of legislation[23] and stimulated a vital national debate that millions of Americans — and, no doubt, an increasing number of persons worldwide — view as absolutely central to the way we organize ourselves socially. It is hard to think of anyone within the contemporary legal academy whose work has had more practical influence, whether for good or for ill. But perhaps Judge Edwards would have emphasized instead the formidably theoretical aspects of MacKinnon's work[24] and thus, in effect, disqualified her from further consideration, especially at an "overheated"[25] Harvard, whose temperature he seems to attribute, at least in part, to its purported oversupply of impractical theorists.

MacKinnon obviously explodes the distinction upon which Judge Edwards' article rests, at least if one talks about the overall oeuvre of a scholar as distinguished from her particular articles.[26] It is almost absurd to have to decide whether her work is "practical" or "impractical," "theoretical" or "doctrinal."[27]

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22. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

23. The legislation, however, was vetoed in Minneapolis, *see* Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis,* 39 STAN. L. REV. 607, 644 (1987), and struck down by the Seventh Circuit Court of Appeals in Indianapolis. American Booksellers Assn. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd. mem.,* 475 U.S. 1001 (1986).

24. *See, e.g.,* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989). Judge Edwards notes, without indicating any disagreement, that a former law clerk had identified "both Professor Catharine MacKinnon and Judge Richard Posner [as] prominent theorists." Edwards, *supra* note 1, at 47 n.37. Many of the same questions raised about Professor MacKinnon's qualifications for membership on an Edwardsian faculty could, of course, also be raised about Judge Posner's.

25. Edwards, *supra* note 1, at 38.

26. This is not to suggest that the distinction between "practical" and "impractical" has any general theoretical merit. It would be easy enough to show that much highly "theoretical" work, deemed "impractical" by its initial audience, turned out, over time, to have significant influence on the surrounding culture.

27. As I write this essay, President Clinton has just withdrawn the nomination of Professor Lani Guinier to be Assistant Attorney General in charge of civil rights enforcement, purportedly because of his disagreement with the views she expressed in several of her articles concerning enforcement of the Voting Rights Act of 1965 and subsequent amendments. Does the onslaught against Professor's Guinier's views — which, for the record, I find extremely thoughtful — establish them as (dangerously) "theoretical" and "impractical"? For example, Harvard law professor Mary Ann Glendon uses Professor Guinier to exemplify the purported emphasis by elite law

By failing to discuss the concrete work of a single scholar and by focusing instead on isolated comments, such as those in my letter, or on the anecdotal musings of his former law clerks, Judge Edwards leaves his readers — or at least this reader — confused about his intentions. Still, I hope I have made clear that even the "moderate" version of his argument has real consequences for the decisionmaking process at law schools interested in retaining some sense of "balance" between competing approaches to the study of law and the preparation of students for their probable vocation as practicing lawyers.

Let us assume for the moment that the current "balance" is acceptable to Judge Edwards and that he is concerned only that there are ominous trends bespeaking the shift toward an unacceptable "imbalance" in favor of "impractical" theory. One might simply trust legal academics to know when that point is being reached and to adjust accordingly — whatever precisely that means. But Judge Edwards may well not trust existing faculties, especially at the elite institutions at which he has taught and from which he draws the overwhelming number of his law clerks, to make the kinds of adjustments he favors. Moreover, he clearly believes that the stakes are enormous. Thus I wonder if Judge Edwards, as distinguished from Professor Edwards, is altogether comfortable leaving decisions about faculty hiring to the faculty itself if the (im)balance is becoming as dire as he suggests.

Consider, for example, the role that the American Bar Association now plays, by invitation rather than by force of law, in the appointment of federal judges. Declarations of fitness for the office are often crucial to appointments. Might Judge Edwards be tempted to advise trustees of universities to appoint somewhat similar committees — consisting of judges, legislators, administrators, and selected practitioners — who could offer their own assessments of the current "balance" of faculty members or of the "usefulness" of the scholarship likely to be produced by particular candidates for appointment? If Judge Edwards would resist such a suggestion, I would like to know why, at least if he believes his own argument about the social consequences of the legal academy's going further down the particular path

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faculties on theory rather than practice. Thus she writes that "[t]he roots of [Guinier's] difficulties lie in a legal academic establishment that is woefully out of touch with American culture and political life" and that exhibits "[a] growing disdain for the practical aspects of law [and] a zany passion for novelty." Mary A. Glendon, *What's Wrong With the Elite Law Schools*, WALL ST. J., June 8, 1993, at A14. If, as I think is likely, Judge Edwards agrees with the overall description, then it seems logical to ask him if Professor Guinier's appointment to law schools like Harvard or Michigan would (further) make them unacceptably imbalanced. If Judge Edwards believes that this is an unfair question, he should explain why.

of the law that so perturbs him. If Judge Edwards would in fact embrace my suggestion, then his views are indeed a pernicious attack on hard-won faculty autonomy.

II. MOTIVATION AND SCHOLARSHIP

If Judge Edwards writes ambiguously about the actual welcome he would give those whose approaches to law are very different from his own, his argument is quite definite and readily comprehensible concerning what should (not) motivate scholars. As noted earlier, he objects vehemently to my comment that I write about what "fascinates" me. It seems clear that Judge Edwards was himself fascinated — or, more accurately, appalled — by my use of the word "fascinating," for later in his article he states that " '[p]ersonal fascination' is not a sufficient justification for scholarship, of any kind."[28]

This may be the most telling difference between us, for "fascination," I believe, is at the heart of the scholarly vocation or, indeed, almost any truly enjoyable life. It is intended to evoke what a more explicitly Marxist thinker might have termed "unalienated" labor, that is, choosing one's own work because it satisfies one's internal needs for self-development — including the need to understand one's world — rather than responding to the external demands of dominant others.[29] Judge Edwards' denigration of the importance of "fascination" — indeed, of its very legitimacy — is what is most truly disturbing, even authoritarian, about his article.

To be sure, I agree with Judge Edwards that "fascination" is not a *sufficient* condition to embark on a scholarly project or, more certainly, to praise the choice of a topic,[30] but this concession is surely trivial. I know of no one inane enough to argue the opposite. Inevitably, we assess the importance of a topic when assessing the work of a scholar; as my colleague Louise Weinberg has remarked, we often rate our colleagues by a quality that she terms "taste" in the choices they make of topics to study. "Taste" refers not to norms of etiquette, but to an ability to identify and then illuminate significant problems. We legitimately hold it against someone that he or she is not "fascinated" by such problems, though it is the achievement of truly generative scholars to recognize the importance of problems previously dismissed as insignificant. Of course, as suggested earlier, different communities

28. Edwards, *supra* note 1, at 56.

29. *See, e.g.*, KARL MARX, THE ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844, *excerpted in* THE MARX-ENGELS READER 70-81 (Robert Tucker ed., 2d ed. 1978).

30. *Id.* at 56.

might be "fascinated" by different problems, as is presumptively the case with judges, on the one hand, and legal academics, on the other.

Surely it is that difference in what fascinates, rather than fascination itself, that is at the heart of the controversy between Judge Edwards and scholars like myself. It is almost bizarre to hold it against someone, as Judge Edwards appears to do, that "fascination" plays an important role in explaining a decision to allocate one's scarce time and energy to studying one problem rather than another. Judge Edwards defines the legal scholar basically as a consultant or uniquely high-level research assistant available for hire to work on problems assigned by "practitioners, judges, administrators, or legislators."[31] Although the scholar may be autonomous in the sense of being formally uncontrolled by the judge or practitioner, there is, otherwise, precious little autonomy in Judge Edwards' vision. The Edwardsian scholar is, to adopt a phrase from the language of professional responsibility, an "officer of the court" — or a de facto member of the practicing bar — subject in effect to the direction of the judge or the managing partner concerning what problems to consider, even if not necessarily what specific arguments to craft.

This may be, to be sure, a caricature of Judge Edwards' view, but I do not believe it is a fundamentally unfair interpretation of the criteria his article offers to determine whether the requisite degree of "practicality" is present in a scholar's work. I would love Judge Edwards to inform me that I fundamentally misunderstand his argument on this point, that he is in fact not hostile to the idea that scholars should be "fascinated" by what they study, and that the presence of such "fascination" should be a *necessary,* even if certainly not a sufficient, condition of a fulfilling life as a legal scholar — or as anything else.

III. "PRACTICALITY," "IMPRACTICALITY," AND THE DEGRADATION OF LEGAL PRACTICE

As noted earlier, some of the most interesting passages in Judge Edwards' article concern his vision of legal practice, both as ideal and as instantiated in current practice. Thus he writes that "[t]he ethical lawyer should only advance reasonable interpretations of the authoritative texts — interpretations that are plausible from a public-regarding point of view."[32] This is, to put it mildly, not what the actual

31. *Id.* at 47. It is worth noting that Judge Edwards does not include in his list of acceptable reference groups "dissident organizations," "community groups," and the like, though he might well reply that the term "practitioners" is sufficiently all-embracing to include those who minister to such groups.

32. *Id.* at 59.

practice of law reveals, however, and he seems to suggest that the ever-increasing deviation from this aspirational norm is ascribable to the increasing presence of "impractical theoreticians" in the legal academy. "[S]cholars," Judge Edwards informs us, "who attend to concrete legal problems in their scholarship, and ideally have practiced law themselves, are much better suited to teach law students what ethical practice means."[33] He then quotes Paul Carrington's suggestion that teachers who are " 'seen by students to be disengaged from political reality and the humdrum affairs of professional life may be disadvantaged' " — "indeed, *will* be disadvantaged," Judge Edwards adds — " 'in the effort to inculcate moral standards applicable to professional thinking and conduct in public roles.' "[34]

I put to one side the problems involved in defining what might count as engagement in "political reality," though heaven help us if it is limited to the definitions that might be offered even by distinguished, and relatively liberal, federal judges like Judge Edwards. As Judge Edwards himself admits, however, immersion in the "humdrum affairs of professional life" scarcely seems to provide any kind of immunization against the various viruses of moral misconduct.

The very first page of his article, after all, includes the statement that "[m]any law firms . . . pursu[e] profit above all else" and are therefore "moving toward pure commerce" and away from "ethical practice."[35] Elsewhere he writes, altogether accurately, that "many law firms have transformed themselves into 'money machines,' " where "[m]aterialistic goals . . . overcome ethical considerations in private practice."[36] Judge Edwards thus writes of the "institutional pressures" placed on "altruistic individuals" practicing within the "typical materialistic law firm . . . to behave in a materialistic," and presumably less than truly ethical, fashion.[37] Indeed, it should be clear, even to those who did not read the original article, that it is replete with what can only be described as harshly critical commentary concerning the contemporary practice of law, supported sometimes by reference to the comments of Judge Edwards' former law clerks.[38] Thus, as a final example, Judge Edwards suggests that law firms will often teach their new associates "to misconstrue cases and statutes, to write obfus-

33. *Id.* at 74.

34. *Id.* (quoting Paul Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy,* 41 DUKE L.J. 741, 791 (1992) (emphasis added)).

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

36. *Id.* at 68.

37. *Id.* at 71.

38. *See, e.g., id.* at 68-71.

catory briefs, [and] to overpaper a case . . . ."[39]

I have no disagreement with Judge Edwards about a single sentence quoted in the previous paragraph. Whatever the explanation, one need only read *The American Lawyer* or, increasingly, the front pages of the *New York Times* or *Wall Street Journal* to realize that a culture dominated by maximization of profit and "the bottom line" has created a class of lawyers who, invoking the professional maxim of "zealous advocacy,"[40] seem remarkably uninterested in the "public-regarding" implications of their arguments. I might note that the legitimacy of this indifference has been defended by some notable scholars,[41] not to mention distinguished practitioners.[42]

One would scarcely know this, though, from reading Judge Edwards, so eager is he to pin the blame for our present discontents on the "impractical" or "theoretical" scholar. Thus Judge Edwards replaces my ellipsis at the conclusion of the paragraph above with the assertion that the kind of (mis)education he denounces "will be all the smoother if [young associates] studied only pure theory in law school."[43] I would be astonished if there were even the proverbial scintilla of evidence to support this assertion or the linked proposition that teachers of the type approved by Judge Edwards are more successful in inculcating "correct" ethical norms than are teachers like myself — assuming that I am not the "type" most cherished by Judge Edwards. Indeed, Judge Edwards' attempt to blame "impractical" academics for the present ethical state of the legal services industry would be laughable if it were not otherwise so pathetically misleading as a diagnosis of our present discontents.

At the very least, Judge Edwards presents no genuine evidence about the actual ways that "impractical" scholars teach their legal profession courses, nor does he address the specific inadequacies of any of our syllabi. Perhaps, though, the point is that syllabi — and the

39. *Id.* at 39.

40. See, for example, the "Preamble: A Lawyer's Responsibilities," to the American Bar Association's, *Model Rules of Professional Conduct,* which states that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES OF PROFESSIONAL CONDUCT 5 (1992).

41. *See, e.g.,* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation,* 85 YALE L.J. 1060 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities,* 1986 AM. B. FOUND. RES. J. 613. Professor Fried, of course, went on to become Solicitor General of the United States, and there is no reason to believe that legal practice has led him to recant the views expressed in his 1976 essay.

42. *See, e.g.,* Charles Curtis, *The Ethics of Advocacy,* 4 STAN. L. REV. 3 (1951); *see also* Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty,* 29 EMORY L. REV. 909, 918 (1980) ("The *prevailing notion among lawyers* seems to be that the lawyer's duty of loyalty to the client is the first, the foremost, and, on occasion, the only duty of the lawyer.") (emphasis added).

43. Edwards, *supra* note 1 at 39.

actual content of one's ideas — do not matter, that only someone with experience in the trenches of legal practice, whom students perceive as "practical," could possibly reach students and therefore serve as an effective teacher and role model. There may be some truth to this proposition, but one needs evidence for it rather than raw, unsupported assertions about complex reality. One hopes that Judge Edwards, when hearing criminal appeals, asks more by way of evidence in regard to the indictments brought by prosecutors or the convictions they gain from juries.

More is involved in this debate, though, than the sociology of the legal services industry, as important as that is. There are also, dare I say it, issues of law and legal interpretation. How does Judge Edwards read some of the existing statutory law governing lawyers? Consider, for example, Rule 11 of the Federal Rules of Civil Procedure or Rule 38 of the Federal Rules of Appellate Procedure, both of which prohibit lawyers from offering "frivolous" legal arguments in the course of litigation.[44] Should one read these statutes, and related rules of professional conduct,[45] to require lawyers, on pain of sanctions and even potential disbarment, to refuse to present any arguments that they find "[un]reasonable interpretations of the authoritative texts" or that are otherwise "[im]plausible from a public-regarding point of view"?[46] I do not think one has to believe in radical indeterminacy in order to find these notions to be "void for vagueness"[47] rather than serious norms designed to guide lawyers in doing their work. I certainly invite Judge Edwards to visit my course on the legal profession and to teach my students the "real" meaning of the relevant federal rules or bar codes of conduct.

Consider one more example, the meaning to be assigned 12 U.S.C. § 1813(u), which involves the liability of an "institution-affiliated party" for "any violation of any law or regulation" or "any unsafe or unsound practice" that "is likely to cause more than a minimal financial loss to, or a significant adverse effect on," an "insured depository

44. *See* Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?* 24 OSGOODE HALL L.J. 353 (1986).

45. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1992).

46. Edwards, *supra* note 1, at 59. The only Rule 11 case on which Judge Edwards has written, Hilton Hotels Corp. v. Banov, 899 F.2d 40 (D.C. Cir. 1990), involved a lawyer's insufficient efforts to determine the existence of facts asserted by the client prior to filing the complaint alleging them. There was little doubt that the claim would have been at least nonfrivolous had the facts been as the client alleged.

47. *See* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

institution."[48] It was this statute, among others, that served as the basis of charges brought by the Office of Thrift Supervision (OTS) of the United States Department of the Treasury against various partners of the law firm of Kaye, Scholer, Fierman, Hays & Handler. The charges related to the firm's representation of the management of Lincoln Savings Bank, which catastrophically mismanaged the institution and contributed significantly to the general savings and loan crisis of the late 1980s.[49] Among the charges OTS alleged was that the firm should have disclosed to the Bank's board of directors information about the highly questionable banking practices in which the management of the Bank was engaged.

Although the law firm settled with OTS by agreeing to pay forty-one million dollars, it resolutely denied any wrongdoing. Among the most interesting paragraphs in Kaye, Scholer's Response to OTS' Notice of Charges[50] is the following:

> . . . Professor Geoffrey C. Hazard, Jr., of the Yale Law School, the nation's foremost authority on legal ethics, is of the opinion that Kaye Scholer was not required to disclose to the Bank Board client confidences or to provide to the Bank Board possible adverse characterizations of Lincoln's conduct. On the contrary, it is Professor Hazard's opinion that:
>
> > The disclosures and representations that the OTS alleges should have been made to the Bank Board by Kaye Scholer in fact would have violated the standards of ethical conduct and professional responsibility generally recognized as applicable to Kaye Scholer in its role as litigation counsel.[51]

To put it mildly, I am curious about Judge Edwards' view of Professor Hazard's legal analysis for Kaye Scholer and, should he disagree with it, Judge Edwards' willingness to ascribe it to Hazard's generally "impractical" or "theoretical" orientation toward the analysis of what the

48. *See* 12 U.S.C. § 1813(u) (1988), *quoted in* STEVEN GILLERS & ROY D. SIMON JR., *The Kaye Scholer File, in* REGULATION OF LAWYERS: STATUTES AND STANDARDS 732 (1993).

49. For the general facts, see GILLERS & SIMON, *supra* note 48, at 729-32. The OTS complaint is reprinted in *id.* at 734-72. The Kaye, Scholer episode has already generated substantial literature. *See, e.g., In the Matter of Kaye, Scholer, Fierman, Hays & Handler: A Symposium on Government Regulation, Lawyers' Ethics, and the Rule of Law,* 66 S. Cal. L. Rev. 977 (1993).

50. The response is reprinted in GILLERS & SIMON, *supra* note 48, at 772-78.

51. *Id.* at 773. Professor Hazard is also the director of the American Law Institute, not heretofore identified with the "impractical" or "theoretical" wing of the academy castigated by Judge Edwards — although, by way of disclosure, I should note that I have been a member of the A.L.I. since 1986.

The New York Times apparently agreed with Professor Hazard, editorializing that the government was in effect making "novel demands that the lawyers abandon their customary loyalty to clients." *Accountability by Sledgehammer,* N.Y. TIMES, Mar. 10, 1992, at A24, *quoted in* Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will,* 66 S. Cal. L. Rev. 1075, 1075 n.2. Professor Koniak cited statements by other defenders of the firm, though she notes that there were many critics as well. *See* Koniak, *supra,* at 1075 n.3.

American Law Institute terms "the law governing lawyers."[52]

The obvious problem facing anyone trying to think seriously about the practices of contemporary American lawyers is that there is wide divergence within the professional legal community about what kinds of inferences one can "reasonably" draw from "authoritative legal texts," not to mention a potentially wider divergence as to what constitutes a truly "public-regarding point of view" about any concrete issue of the day. I dare say that most practicing lawyers would, for better or worse, find Judge Edwards' comments about the duty of the ethical attorney to be hopelessly abstract and impractical — though this is certainly not a good reason to reject his overall message about the nature of contemporary legal practice.

IV. CONCLUSION

So where does this leave us? Are Judge Edwards and I implacable foes (doubtful) or uneasy allies (just as doubtful)? Or, more likely, might we sometimes be one, and sometimes the other? For better or worse, the only way to find out is by addressing specific examples. To paraphrase Justice Holmes:[53] "General propositions do not [make] concrete cases."[54] That insight is no less true for such potentially vaporous abstractions as "practicality" and "impracticality" than for the meaning of "due process of law."

52. This is the title given to the restatement project underway regarding the duties of practicing lawyers.

53. By the way, in which box — "practical" or "impractical" — would we put most of his scholarship?

54. Lochner v. New York, 198 U.S. 45, 76 (1905).