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Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications

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Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications

JEAN R. STERNLIGHT*

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Symbiosis: The intimate living together of two dissimilar organisms
in a mutually beneficial relationship.¹

I. INTRODUCTION

Lawyers and legal academics are waging a fierce war over the soul of legal education in the United States.² The various battles in this war include disputes over the proper emphasis on teaching versus scholarship; the need for clinical, practical, or transaction-oriented education versus the need for theoretical education; and the need for traditional doctrinal work versus the need for interdisciplinary or more liberal arts-oriented education within law schools.³ The war also plays itself out in discussions over law school hiring and tenure decisions.⁴

1. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993).

2. This article only focuses on the debate over legal education in the United States. Nonetheless, because it is hard to imagine a system of legal education in which a debate over the proper role of theory and practice does not exist in some form, the ideas expressed in this article may be relevant in other countries as well. See *infra* note 59.

3. The large number of reports, law review articles, conferences, and symposia recently devoted to issues of legal education illustrates the deep concern over these issues. See, e.g., Proceedings of the Fifty-Third Judicial Conference of the District of Columbia Circuit, 145 F.R.D. 149, 201 (1992) [hereinafter *D.C. Circuit Conference*]; A Symposium on Legal Scholarship, 63 U. COLO. L. REV. 521 (1992); Colloquium on Legal Scholarship, 13 NOVA L. REV. 1 (1988); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); *Legal Education and Professional Development-An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSION TO B. [hereinafter *MacCrate Report*]; Bayless Manning et al., *The James McCormick Mitchell Lecture: Legal Education for a Changing Legal Profession*, 37 BUFF. L. REV. 657 (1988); *Papers from the Yale Law Journal Symposium on Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981) [hereinafter *Yale Symposium*]; Symposium, *Civic and Legal Education*, 45 STAN. L. REV. 1525 (1993); Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993); Symposium, *Legal Scholarship*, 39 J. LEGAL EDUC. 313 (1989); Symposium, *The Growth of Large Law Firms and Its Effect on the Legal Profession and Legal Education*, 64 IND. L.J. 423 (1989); Symposium, *The Justice Mission of American Law Schools*, 40 CLEV. ST. L. REV. 277 (1992).

4. Those schools that are placing an increasingly heavy emphasis on theory, and particularly interdisciplinary theory, are often reluctant to hire as professors persons with more than just a few years in practice. Instead, they often prefer to hire a person with a Ph.D. in social science or another discipline in addition to a J.D. See, e.g., *D.C. Circuit Conference*, *supra* note 3, at 220

The "war" over legal education does not necessarily pit academics against practitioners. Rather, not only practitioners⁵ and judges,⁶ but also many legal academics are questioning the purpose and value of law school teaching in general and legal academic scholarship in particular.⁷ Proclaiming a widening gap between legal practice and legal education, many critics of existing legal education mostly focus their attacks on what they see as the increasingly theoretical and interdisciplinary aspects of legal education.⁸

While the critics' views are diverse in content and degree two principal claims emerge: that law schools are failing to teach students how to practice law and that professors are wasting vast amounts of time writing highly theoretical articles, read only by other academics, that focus on "anything but law."⁹ Practitioners and their allies often reserve their harshest criticisms for the anti-black letter critical legal studies movement, and for the recent growth in so-called "meta" theory¹⁰ and

(Judge Harry Edwards expresses concern over the "trend to hire law teachers who have little or no practical experience, and who have little or no interest in doctrinal analysis . . . [and the] trend to hire 'law and' types and 'impractical' scholars who are disdainful of legal practice."); see also MARY ANN GLENDON, *A NATION UNDER LAWYERS* 223 (1994) ("Persons whose main interests are in fields other than law now wield considerable influence on the hiring and promotions process, especially at elite schools.").

5. E.g., Talbot D'Alemberte, *Law School in the Nineties*, 76 A.B.A. J. 52, 53 (1990) (stating as ABA president-elect: "We are very much a divided profession. Our academic side is over here and the practicing lawyer is over there, and they don't connect very often."); *MacCrate Report*, *supra* note 3, at 240 (ABA task force's conclusion that law schools do not teach full range of needed legal skills).

6. See generally Edwards, *supra* note 3 (federal judge's critique of legal education as insufficiently practical and doctrinal).

7. E.g., *D.C. Circuit Conference*, *supra* note 3, at 215 (comments of Emma Jordan, president of the Association of American Law Schools and Professor of Law at Georgetown, noting that some elite law schools exhibit an inappropriate scorn for legal practice); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1236-39 (1991) (law professor's charge that law schools err in seeing themselves as postgraduate academic centers rather than as trainers for future practitioners); Harry H. Wellington, Charles Evans Hughes Lecture to the New York County Lawyers Association (Apr. 8, 1993) (on file with author) (former Dean of Yale Law School noting and criticizing the gap between legal education and legal practice).

8. See, e.g., Edwards, *supra* note 3, at 42-57; Johnson, *supra* note 7, at 1236-39; and see *infra* text accompanying notes 145-154.

9. See, e.g., Johnson, *supra* note 7, at 1238-39 (criticizing phenomenon of law schools that teach ABL—"anything but law"). But see Francis A. Allen, *The Dolphin and the Peasant: Ill-Tempered, but Brief, Comments on Legal Scholarship*, in *PROPERTY LAW AND LEGAL EDUCATION* 183, 184-85 (Peter Hay & Michael H. Hoeflich eds., 1988) (asserting with praise that academically elite law schools have become dominated by persons primarily interested in disciplines other than law).

10. "Meta" theory has been defined as theory about theory. 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, 396-402 (1992). Professor Levinson explains that where a traditional constitutional theorist proposes his or her own theory as a means of decoding the true meaning of the Constitution, a meta-theorist views the Constitution as an "arena" or "inkblot" in which

"law and" scholarship. Those disciplines include law and economics, feminist and critical race theory, law and society analysis, and the law and literature movement.¹¹

Academia's responses to these criticisms have been varied. Many professors praise the disjuncture between legal practice and legal theory.¹² Such theory advocates proudly proclaim that law schools are not mere trade schools, and that cutting edge meta-theoretical scholarship is important in reconceptualizing our legal system. These theorists charge law schools with the duty to address problems raised in such disciplines as economics, sociology, psychology, philosophy, theology, literature, and history, and to teach future lawyers and civic leaders how to think critically about law and our legal system.¹³ Such theoreticians contend it would waste law school faculty as a resource to spend too much, or perhaps even any, time teaching students the "nuts and bolts" of how to practice law. They argue that such training is best provided by future employers out in the real world.¹⁴

different theories compete, without a single theory emerging as *the* correct theory. *Id.* at 396-97, 399.

11. While these various "law and" theories often represent vastly different ideological approaches, they nonetheless share the goal of providing descriptions and system critiques of our current legal system and theories based on methodologies and principles drawn from other fields. See generally Philip C. Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251, 296-97 (discussing growth of legal analysis from various perspectives such as sociology, economics, philosophy, legislative policy, and literature). A new legal journal called *Law & Southern California Interdisciplinary Law Journal* was established by the University of Southern California in 1992 not for publishing traditional legal scholarship but rather to seek articles based on "perspectives of disciplines upon which the law is premised." *Foreword* to 1 S. CAL. INTERDISCIPLINARY L.J. i, iv (1992).

12. As Owen Fiss put it: "Law professors are not paid to train lawyers, but to study the law and to teach their students what they happen to discover." Letter from Owen M. Fiss to Paul D. Carrington, in Peter W. Martin et al., *Of "Law and the River," and of Nihilism and Academic Freedom*, 35 J. Legal Educ. 1, 26 (1985). See also J. Peter Byrne, *Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education*, 43 J. LEGAL EDUC. 315, 328-29 (1993) ("Teaching law school would be unbearably puerile without the intellectual challenge and gravity of scholarship."); George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 439 (1983) (favorably recognizing the gap between theory and practice).

13. See Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 638, 656-57 (1968) (discussing the modern law professor's schizophrenic attempt to be both a "Hessian" trainer of lawyers for practice and a true academic, and concluding that the two roles should be separated into an LL.B. track, actually aimed at preparing lawyers for practice, and a Ph.D. program, aimed at those who wish to become legal academics or high level policy makers).

14. Not surprisingly, adherents to this view believe law schools should hire as professors persons with solid academic credentials, as opposed to practical experience. In fact, such theoreticians may often view more than a few years of practice negatively, even where the practitioner has a strong academic background, believing that the immersion in practice will have tainted the individual's academic abilities. See Johnson, *supra* note 7, at 1243 (law schools see themselves as geared to study society, not legal doctrine); Robert Stevens, *American Legal*

Critics and defenders of current legal education clearly have very different views as to the appropriate purpose and means of legal education and scholarship. Furthermore, the views differ quite sharply even among the critics and among the defenders. However, one belief is implicitly (if not explicitly) expressed by virtually all attackers and defenders: highly theoretical "law and" theories have no direct relevance to practicing attorneys. Critics of current legal education often target such theories as among the prime villains, charging them with causing the failure of classroom education and the irrelevance of scholarship.¹⁵ Nonetheless, even defenders of the current system do not, by and large, praise such abstract theories for assisting private attorneys in daily private practice. Instead, the defenders claim that such theories are admirable for other reasons, such as training people how to think or critique the current system. Some might add that such abstract theories may aid judges or legislators in reaching better decisions or crafting better legislation.¹⁶ While defenders of theory frequently contend that the most theoretical work has practical value,¹⁷ they usually fail adequately to support their broad assertion by showing how theoretical work is useful to practitioners.¹⁸ More important, such defenders fail to accept the

Scholarship: Structural Constraints and Intellectual Conceptualism, 33 J. LEGAL EDUC. 442, 446 (1983) (doctrinal practitioner-oriented work is not valued in academia). For a general discussion of the theoreticians' views see *infra* text accompanying notes 160-181.

15. See *infra* text accompanying notes 108-159.

16. See *infra* text accompanying notes 162-181. Curiously, academics seem more interested in training public practitioners (judges and legislators) than in training private practitioners. Yet, most legal academics do not attempt to make their theories readily accessible or understandable—even to judges and legislators.

17. Catharine MacKinnon is an academic who staunchly defends theory for its practical value. She states: "It is common to say that something is good in theory but not in practice. I always want to say, then it is not such a good theory, is it?" Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J. L. & FEMINISM 13 (1991).

18. See *infra* text accompanying notes 180-181. There are of course some exceptions. A number of feminist theorists have recently written books and articles focusing explicitly on the connection between theory and practice. See, e.g., RUTH COLKER, *PREGNANT MEN: PRACTICE, THEORY, AND THE LAW* (1994); Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 25-26 (1990) (calling for scholarship that would connect "grand theory" and "personal narratives"); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991) [hereinafter Goldfarb, *A Theory-Practice Spiral*]; MacKinnon, *supra* note 17; Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992); Barbara B. Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life*, 91 MICH. L. REV. 1977 (1993). See also James Boyle, *The Anatomy of a Torts Class*, 34 AM. UNIV. L. REV. 1003, 1003 (1985) (complaining that "almost nobody writes about the peculiar fusion of abstract theoretical aims . . . and concrete classroom experiences" and showing how abstract critical legal studies theories can be used to teach torts); Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717 (1992) (showing the relationship between critical legal studies and clinical approach). See generally Symposium, *Theoretics of Practice: The Integration of*

full implications of the thesis that theory has practical value when the defenders discuss how theory should be presented and how lawyers should be educated.¹⁹

Yet, persons who are in full possession of their common sense, such as nonlawyers and first year law students, know that ideally hostility should not exist between legal practice and legal academia or between theory and practice.²⁰ Such sensible persons are generally quite surprised to learn that law schools are highly reluctant to hire "the practitioner," and that, particularly at elite schools, professors often sneer at books and articles oriented toward practice, doctrine, or (perhaps worst) teaching.²¹ Such sensible persons are also surprised to hear that practitioners have relatively little respect for many law school professors or their theories.²²

In this Article I urge that practice and even the most abstract theory are complementary, not contradictory. They can and should be integrated symbiotically. Thus, I vehemently reject many practitioners' position that abstract legal theory is generally useless intellectual self-indulgence. I similarly reject the extremist academic view that legal practice is brain-deadening and merits minimal attention in law schools.²³ Rather, I believe that even the most seemingly "high fallutin" theories can provide practical assistance to lawyers solving "nuts and bolts" real world problems.

Progressive Thought and Action, 43 HASTINGS L.J. 717 (1992). In a related context, Professor Blasi has recently argued that theories of cognitive science may be applied to teach practical lawyering skills. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313 (1995). This article generalizes and builds upon these works.

19. See *infra* text accompanying notes 320-337.

20. As Oliver Wendell Holmes said in 1897: "Theory is the most important part of the dogma of the law . . . It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject." Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

21. See, e.g., J. Cunyon Gordon, *A Response from the Visitor from Another Planet*, 91 MICH. L. REV. 1953, 1958-60 (1993) (a partner at a large firm, writing of her experience as a visiting lecturer, describes the mutual disdain in which practitioners and academics hold one another).

22. At this point it seems appropriate to confess that I was inspired to write this article, in part, by my own transition from legal practitioner to legal academic. Having practiced for eight years, I decided to follow through on my long term goal to become a law school professor. I found my friends in practice quite skeptical of my plan. They essentially told me legal academia was a useless enterprise, and that I should not waste my talents writing articles that only a handful of other legal academics would read. I soon found that legal academics often have an equally, if not more, unflattering view of practice. After eight years of practice (in my mind not a terribly long period of time), the one question I could count on getting from academics was: "Why did you wait so long?" My friends in academia explained the reigning view that too much practice is brain-deadening. I vowed at that point to work to bridge the very wasteful and frustrating gap between theory and practice.

23. See *infra* text accompanying notes 182-319.

Specifically, I advocate a common sense jurisprudence toward law and its practical applications.²⁴ This jurisprudence includes three basic tenets. First, it contends that theories should be drawn from real world phenomena.²⁵ Second, it posits that theorists should attempt to devise solutions that have some chance of success given existing political and economic conditions.²⁶ Third, the common sense jurisprudence calls upon theorists to explain or package their works so as to make them accessible and useful to practicing attorneys.²⁷

Given my thesis it would be ironic and disappointing if I merely argued, as an abstract matter, that there can be a complementary relationship between abstract theory and practice. Instead, I will use a real world example to demonstrate how abstract theories can assist the practitioner. Specifically, I will take as a hypothetical the subject of my last article: whether mandatory testing of pregnant women for the HIV virus should be allowed.²⁸ I will then examine some of the insights that may be gleaned by applying to this problem three sets of abstract theories: law and economics, critical legal studies, and feminist theory.²⁹

I believe that more interaction between theory and practice will not only benefit practitioners, but will also benefit theorists. Legal theorists can make their work more powerful by focusing on real world problems, viable solutions, and effective communication with practitioners. Legal

24. Significantly, in the world of physical science, whereas transcendent theories used to be regarded as the most valuable type of scholarship, there is now an increased appreciation for applied works which focus on reality. Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L.J. 741, 803 (1992).

25. A well developed body of feminist methodology that focuses in part on context and deriving theories from real world experiences. While a serious review of this literature is beyond the scope of this article, I discuss feminist methodology in somewhat greater detail *infra* at text accompanying notes 282-286. See generally *Introduction to FEMINIST LEGAL THEORY: FOUNDATIONS* 529-36 (D. Kelly Weisberg ed., 1993) (discussing feminist methodological works by Catherine A. MacKinnon, Elizabeth M. Schneider, Mary Jane Mossman, Katharine T. Bartlett, Lucinda M. Finley, Marie Ashe, and Patricia J. Williams).

26. Dreaming has some potential value, in that solutions once thought impractical or even impossible may sometimes turn out to be very practical indeed. After all, the circumnavigation of the world, the elimination of slavery, and the grant of voting and property rights to women all came about through dreaming. Nonetheless, theorists should devote more of their efforts to solutions with the greatest opportunity for success.

27. Abstract theorists are like huge manufacturers in that they churn out large amounts of difficult-to-handle products. If these manufacturers refuse to package their products for the end user, the practitioner, and if no retailer steps in to fill the need, the production efforts will be largely wasted.

28. Jean R. Sternlight, *Mandatory Non-Anonymous Testing of Newborns for HIV: Should It Ever Be Allowed?*, 27 J. MARSHALL L. REV. 373 (1994).

29. I could not possibly, in this single article, do full justice to each of these enormous fields and their potential contributions. Nonetheless, I hope to provide examples of how abstract theory can be applied to concrete problems and to inspire others to take this analysis further. Of course, a few scholars have already begun to develop just such applied analyses. See *supra* note 18, and *infra* note 270 and accompanying text.

theories cannot, or at least should not, arise wholly formed from intellectual contemplation. Instead, such theories are and should be drawn from real world phenomena.³⁰ By recognizing the real world origins of their theories, by seeking viable solutions to problems, and by clearly presenting their theories to practitioners, legal academicians can make their theories more cogent and more useful.³¹

I do not mean to suggest that critics who see abstract theory and practice as currently opposed to one another are simply mistaken. Rather, such critics are responding to an actual phenomenon: the absence of an extensive and accessible body of applied theory. Thus, the proper solution to the perceived conflict between theory and practice is not simply to substitute practice for theory, nor is it to remain smugly content with the status quo. Instead, both academics and practitioners must strive to integrate theory and practice more fully. As academics, we must develop and cogently present the *applications* of our theories. Similarly, students and practitioners must not assume that all academic work is pointy-headed nonsense but rather should be willing to look to academia for new and creative solutions to real world legal problems. Practitioners who fail to do so are failing to zealously represent their clients.

The common sense appeal of a symbiotic relationship between theory and practice is so strong that some may respond that my thesis is neither novel nor profound. At one level this is probably true. When pressed, most theoreticians would have to admit that practice has some ultimate relevance and use.³² At minimum, legal theorists would likely all agree that their work derives from real world phenomena, as opposed to otherworldly sources. Similarly most practitioners would have to admit that at least a few academic theories in the history of the world have proved useful in practice.³³ Yet, examination of theoreticians' and

30. This idea is not new. See *infra* text accompanying notes 48-55 (contrasting classical and modern views of theory); Holmes, *supra* note 20, at 460-61, 477-78 (arguing that while we need more theories in the law, such theories must be derived from reality); see also THOMAS HOBBES, LEVIATHAN 113 (C.B. Macpherson ed., 1968) (1651) ("[T]he privilege of Absurdity" belongs to "no living creature . . . but man on[]ly. And of men, those are of all most subject to it, that professe Philosophy.").

31. See *infra* text accompanying notes 181-321.

32. See, e.g., George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 MICH. L. REV. 1929, 1936 (1993) (recognizing that interdisciplinary research can contribute to doctrinal work and is also valuable when trying "to understand best how the law can advance the interests of society").

33. A law review article written in 1890 by Samuel Warren and Louis Brandeis is often credited for playing a critical role in the development of a constitutional right to privacy. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), and the discussion thereof in JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 734-35 (2d ed. 1993). Guido Calabresi had a similar effect on the analysis of tort law with economics. See GUIDO

practitioners' behavior disproves the pollyannish view that theory and practice have already been properly integrated. As a general rule, today's theorists scorn rather than embrace practice. They believe that practitioner-oriented education should play a minimal role in law school; they do not view the immediate purpose of theory as assisting practitioners or policymakers; they do not attempt to write their theory in a style, nor publish it in a forum, geared to assist practitioners in their work. For the most part they seldom integrate practical applications into their discussions of legal theory.³⁴ Similarly, today's practitioners rarely look to legal academics or theorists for assistance. They often scorn theoretical efforts as useless without actually having read the works. To the extent practitioners do look at law review articles, they use such articles primarily as a source for citations, rather than as a source of academic enlightenment or theory.³⁵ Judges make somewhat more use of legal scholarship, but are influenced most by the articles granted lower status in academia: doctrinal pieces that summarize a particular area of law or call for certain legislative changes.³⁶ Nor is there evidence that legislators base any policy debates on the latest purely theoretical writings by followers of such schools as critical legal studies, law and economics, or feminist legal theory.³⁷

Section I establishes the background context for this discussion. First, Section I(A) provides my definitions for the terms "theory," "practice," and "doctrine," while briefly discussing my definitions in the context of philosophers' definitions of related terms over the years.³⁸ Section I(B) then provides an historical examination of the relationship between theory and practice in American legal education.³⁹ In Sections II and III, I detail critics' current attack on legal education⁴⁰ and the

CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970). Frank I. Michelman's discussion of property rights in *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967), was cited favorably by the Supreme Court in *Penn Cent. Transp. Co. v. City of New York*, 436 U.S. 104, 128 (1978).

34. See *infra* text accompanying notes 160-181.

35. See, e.g., Max Stier et al., *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN. L. REV. 1467, 1485-87 (1992).

36. See, e.g., Edwards, *supra* note 3, at 35 ("[I]t is my impression that judges, administrators, legislators, and practitioners have little use for much of the [impractical] scholarship that is now produced by members of the academy."); Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 319 (1989); Stier et al., *supra* note 35, at 1482-86.

37. The survey prepared by Max Stier and others, *supra* note 35, does not even include an analysis of the use of law review articles by legislators. However, one may reasonably presume that busy legislators and their aides rely on such articles less frequently than do practicing attorneys.

38. See *infra* text accompanying notes 48-57.

39. See *infra* text accompanying notes 58-107.

40. See *infra* text accompanying notes 109-159.

academy's response,⁴¹ focusing particularly on the desired relationship between theory and practice. Section IV next sets out my own view that theory and practice should be linked through a jurisprudence of applications, and supports this view by applying three abstract theories to a current legal problem.⁴² Finally Section V details steps academics, practitioners, and students should take to further a jurisprudence of applications.⁴³

I hope this Article will help make the potential symbiotic relationship between abstract legal theory and practice a reality. My not so modest goal is to inspire practitioners, policymakers, judges, and academics to embrace one another (at least figuratively), and to turn what today is too often hostility and disrespect into a strong, respectful, mutually beneficial relationship.

I further believe that by better linking theory and practice we can gradually move toward a more just society.⁴⁴ A theory that ignores real world problems and real world solutions is inherently elitist, as are legal institutions that refuse to focus on such problems. But just as the problems are linked, so too may be the solutions. Perhaps as we begin to recognize the importance of using theory to address such problems as oppression and poverty we will begin to make our legal institutions themselves more just. As we refocus our curriculum and writing,⁴⁵ and as we revise our hiring and admissions practices,⁴⁶ we may allow previously silenced voices to be heard more clearly.⁴⁷

II. SETTING THE CONTEXT

A. *Defining Theory and Practice*

Many great philosophers have focused on the nature of theory and practice, and the relationship between the two. Classical philosophers

41. See *infra* text accompanying notes 160-181.

42. See *infra* text accompanying notes 182-319.

43. See *infra* text accompanying notes 320-344.

44. Colleague Meg Baldwin distinguishes between my "efficiency" thesis, which seeks to help theorists and practitioners better meet their existing goals, and this normative thesis.

45. Cf. BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* 20-21, 41 (1994) (claiming that "engaged pedagogy necessarily values student expression" and cultural diversity within that student body).

46. See, e.g., DEREK BELL, *CONFRONTING AUTHORITY* 77 (1994) (discussing how even law schools that begin to hire minorities try to hire minorities whose credentials and views are most similar to those possessed by the majority).

47. See generally DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983) (arguing that lawyers can work together to transform society).

such as Aristotle distinguished theoretical inquiry, the study of truth for its own sake, from either productive or practical inquiry, and regarded pure theory as the highest and purest form of knowledge.⁴⁸ More modern philosophers including Kant,⁴⁹ Hegel,⁵⁰ Marx,⁵¹ and Arendt⁵² have focused substantial attention on the proper relation between theory (pure reason) and the practical or physical world (praxis), generally recognizing that theory and practice are intertwined.⁵³ Whereas empiricists contended that all theories must be testable and capable of verification by experiment,⁵⁴ postmodernists challenge this view, arguing that there is no real distinction between objective verifiable facts and subjective normative views.⁵⁵

For purposes of this Article, I will be less ambitious in defining theory, practice and doctrine. I define theory as a general proposition or set of general propositions used either to explain or predict certain phenomena or to critique certain phenomena and call for change. In the context of legal analysis, theory, so broadly defined, can be broken into two subcategories: doctrine and abstract theory. Doctrine, as I shall employ the term, is a set of general propositions used to define or

48. Martin Ostwald, *Introduction to ARISTOTLE, NICHOMACHEAN ETHICS* xiv (Martin Ostwald trans., Bobbs-Merrill 1978); see also NICHOLAS LOBKOWICZ, *THEORY AND PRACTICE: HISTORY OF A CONCEPT FROM ARISTOTLE TO MARX* (1967) 3-46; T. Ball, *Plato and Aristotle: The Unity Versus the Autonomy of Theory and Praxis*, in *POLITICAL THEORY AND PRAXIS: NEW PERSPECTIVES* 57 (Terence Ball ed., 1977).

49. IMMANUEL KANT, *CRITIQUE OF PURE REASON* (F. Max Müller trans., 2d ed. 1905) (1781); IMMANUEL KANT, *ON THE OLD SAW: THAT MAY BE RIGHT IN THEORY BUT IT WON'T WORK IN PRACTICE* (E.B. Ashton trans., 1974) (1793); see also LOBKOWICZ, *supra* note 48, at 120-39 (discussing Kant's works on theory and practice).

50. See LOBKOWICZ, *supra* note 48, at 143-81 (discussing Hegel's views on theory and practice). Lobkowicz argues that the theory/practice relation, treated by Hegel in terms of the opposition between is and ought, is "one of the cardinal points on which Hegel's whole philosophy turns." *Id.* at 143.

51. See, e.g., KARL MARX, *Theses on Feuerbach*, in *WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY* 400-01 (Lloyd D. Easton & Kurt H. Gaddis eds. & trans., 1967) (1888) (critiquing Feuerbach's philosophy for failing to focus on sensuous human activity—i.e. "Praxis"); see also LOBKOWICZ, *supra* note 48, at 239-426 (discussing Marx's views on theory and practice).

52. See Richard J. Bernstein, *Hannah Arendt: The Ambiguities of Theory and Practice*, in *POLITICAL THEORY AND PRAXIS: NEW PERSPECTIVES* 141 (Terence Ball ed., 1977) (discussing views of theory and practice expressed by Arendt in such works as *THE HUMAN CONDITION* (1955)).

53. See also JÜRGEN HABERMAS, *THEORY AND PRACTICE* (John Viertel trans., 1973); Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 V.A. L. REV. 937 (1990) (applying Ludwig Wittgenstein's philosophy in an argument for a pragmatic narrative view of law); see generally RICHARD J. BERNSTEIN, *THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY* (1976).

54. See BERNSTEIN, *supra* note 53, at xv; Mark Spiegel, *Theory and Practice In Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 596-97 (1987).

55. See generally POSTMODERNISM AND LAW (Dennis Patterson ed., 1994).

describe an existing body of cases. It is a form of theory in the sense that it consists of *general* propositions. Doctrine attempts to categorize and describe a group of decided cases with a limited set of principles. However, doctrine is drawn only from the decided cases or from statutes. Pure doctrinal analysis does not seek to criticize or defend the rules, but only to describe them. Although a doctrine may be used to criticize a particular outcome as inconsistent with the prevailing rule of law, doctrine does not direct, critique, or challenge the prevailing rules.

Abstract theory on the other hand, as I will use the term, is rooted outside of the decided cases. A fully developed abstract theory, for example, may be based on a body of work from a discipline outside of law. The discipline of law and economics, for example, analyzes legal cases and statutes pursuant to the theories developed by economists. Alternatively, an abstract theory may be based on a less developed policy perspective. One might theorize, for example, that changes in the phases of the moon cause judges and jurors to issue certain kinds of decisions. While quite possibly unfounded, this would be a nondoctrinal theory.

Because abstract theory is based outside of legal doctrine, it is critical by nature. That is, if an abstract theory based on something other than legal doctrine is applied to a body of legal doctrine it will reveal ways in which the doctrine might evolve or change entirely. Economic theory, for example, can be used to advocate making doctrinal rules of law more "efficient." Alternatively, an abstract theory such as critical legal studies, that does not espouse a single substantive result, can still be used to provide insights that will allow legal doctrine to evolve and change.

Finally legal practice, as I use the term, refers simply to the actual use of legal concepts and processes by lawyers, clients, judges, and legislators. Thus, legal practice includes both private practice (in which lawyers are retained to represent particular clients), and public practice (the development of law by legislators and the interpretation of law by courts).

When I call for a common sense jurisprudence linking the theory and practice of law I ask that academics direct their theories toward both private and public practitioners. I do not consider a theory to be practically-oriented merely because it discusses a legal issue that arose at least once in practice. Virtually all theories do at least that. Rather, a theoretical approach fitting the parameters suggested in this Article should address the issues that arise in practice and that are significant, from a societal perspective. Significance should be measured not by the degree of intellectual stimulation the problem presents to the theoretician, but

rather in terms of benefits to be provided to others.⁵⁶ Further, to be practical a theory must also present approaches that are economically, politically, and otherwise viable in the real world.⁵⁷ It must also be presented in terms that can be easily digested and applied by legal practitioners.

B. *A Brief Historical Summary of Legal Education in the United States*

Practitioners and theoreticians have been fighting over the purpose and appropriate nature of legal education in the United States for a long time.⁵⁸ By studying changes in legal education in the United States⁵⁹

56. While I recognize that such "significance" can be measured very differently, depending upon one's social theory, I demand only that the theoretician believe her own work to be socially significant.

57. I do, however, recognize that the links to practice may take some time to develop, and that we must make *some* room in academia for theories that presently appear impractical.

58. See generally JAMES W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 258-85 (1950) (comparing those modes of legal education that treated law as part of a liberal education and also those modes oriented to the practice of law); ROBERT B. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICAN FROM THE 1850S TO THE 1980S* (1983); see also James P. Rowles, *Toward Balancing the Goals of Legal Education*, 31 J. LEGAL EDUC. 375, 394 (1981) (pointing out that student criticisms of law school education trace back at least to the 1930s). The practice/theory tension exists in other disciplines as well. E. Gordon Gee & Donald W. Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695, 762-838 (finding tension between theory and practice in fields of education such as business, medicine, and accounting).

59. Legal education in other countries is both similar to and different from our own. As one commentator has noted, whereas U.S. law schools focus on educating attorneys, many European law schools focus on educating judges, and, perhaps for that reason, take an approach more synthetic and doctrinally oriented than our own. See generally Richard Stith, *Can Practice Do Without Theory? Differing Answers in Western Legal Education*, 4 INT'L & COMP. L. REV. 1 (1993). Significantly, tension between legal theory and legal practice has emerged in other countries as well. See, e.g., Alexander J. Black, *Separated by a Common Law: American and Scottish Legal Education*, 4 IND. INT'L & COMP. L. REV. 15 (1993); Gee & Jackson, *supra* note 58, at 762-838 (finding tension between theory and practice in the British legal system); Juergen R. Ostertag, *Legal Education in Germany and the United States—A Structural Comparison*, 26 VAND. J. TRANSNAT'L L. 301 (1993) (discussing tension between theory and practice in German and American systems); Symposium, *Winds of Change—A Global Look at Legal Education*, 72 OR. L. REV. 941 (1993) (including articles discussing the system of legal education in England and Wales, Germany, Hungary, Russia, Canada, Australia, South Africa and Japan, and noting the presence or absence of skills training in each system); Sandra R. Klein, Comment, *Legal Education in the United States and England: A Comparative Analysis*, 13 LOY. L.A. INT'L & COMP. L.J. 601 (1991). While a detailed examination of other countries' legal education systems is beyond the scope of this article, it is significant that many other countries have sought to resolve this tension by creating an apprenticeship period for law school graduates. See, e.g., Joanne Fedler, *Legal Education in South Africa*, 72 OR. L. REV. 999, 1008 (1993) (graduates must either perform articles of clerkship or perform community service and complete a four-month practical course); Francis A. Gabor, *Legal Education in Hungary*, 72 OR. L. REV. 957, 961 (1993) (upon completion of course work Hungarian law students must first complete a six month apprenticeship, then defend their dissertation and take comprehensive exams, and then complete another apprenticeship of two or three years before taking the bar exam); Lisa A. Granik, *Legal*

over the years, as well as criticisms of the alternative versions of legal education that have existed, we can learn some important lessons for the future. However, in no period in our history of legal education have we adequately blended the role of abstract theory and practice.

When this country declared its independence there were no law schools. Lawyers were educated through general liberal arts studies and then through apprenticeships to practicing attorneys.⁶⁰ Liberal arts studies provided general training in morality and ethics, as well as in writing. Apprenticeships then focused on very practical skills, rather than on theoretical approaches to legal argument or on theoretical critiques of the legal system.⁶¹ There were no law review articles.⁶²

Although there is no doubt that apprenticeship produced some excellent attorneys, the practice was criticized at the time, and also retrospectively, for failing to provide enough doctrinal and theoretical training.⁶³ The pure apprenticeship system was thought by some to place too much emphasis on "nuts and bolts," thereby failing to provide future attorneys with the analytic tools to be sufficiently creative.

When the first law schools were founded, beginning in the late eighteenth century,⁶⁴ their primary aim was to provide fit leaders for our new legal and political institutions.⁶⁵ Whereas leaders of Great Britain

Education in Post-Soviet Russia and Ukraine, 72 OR. L. REV. 963, 971 (1993) (Russian law students must complete a summer-long practicum); Ross Nankivell, *Legal Education in Australia*, 72 OR. L. REV. 983, 984 (1993) (no Australian state has a bar exam but all require graduates to complete professional training before entering practice); Constance O'Keefe, *Legal Education in Japan*, 72 OR. L. REV. 1009, 1011-13 (1993) (all those who seek to actually practice law must spend two years at a special institute emphasizing litigation and practical experience and must rotate through a series of apprenticeships); Ostertag, *supra*, at 305, 332-38 (German system relies on a two-and-a-half year preparatory service following graduation to teach students necessary skills); Clive Walker, *Legal Education in England and Wales*, 72 OR. L. REV. 943, 945 (1993) (following graduation law students in England and Wales must complete an apprenticeship of one or two years).

60. See Gee & Jackson, *supra* note 58, at 722-23; see also STEVENS, *supra* note 58, at 3; Warren E. Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 FORDHAM L. REV. 1, 2 (1980); Carrington, *supra* note 24, at 760.

61. Gee & Jackson, *supra* note 58, at 722-25; see generally LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 97-98, 318-19 (2d ed. 1985); HURST, *supra* note 58, at 256-57; STEVENS, *supra* note 58, at 3-34 (discussing transition from apprenticeship to law school as accepted mode of legal education).

62. For example, Harvard's well-respected review did not begin publishing until more than 100 years after the American Revolution, in 1887. 1 HARV. L. REV. 1 (1887). See generally FRIEDMAN, *supra* note 61, at 630-31 (discussing earliest law reviews).

63. See Burger, *supra* note 60, at 2 (claiming that apprenticeships resulted in inadequate training in legal theory); Gee & Jackson, *supra* note 58, at 731.

64. The first private law school established was the Litchfield School, which opened in 1784. Gee & Jackson, *supra* note 58, at 726. The first law schools existed concurrently with the apprenticeship system. *Id.* at 722. Even in the new law schools the emphasis was practical rather than theoretical. *Id.* at 731. See also FRIEDMAN, *supra* note 61, at 319-20.

65. Carrington, *supra* note 24, at 748, 757.

had derived their status from royal blood or from inherited positions of power, our leaders would derive their status from their perceived ability to serve as moral leaders.⁶⁶ Significantly, law schools in this early era did not emphasize technical competence, but rather focused on broad moral training.⁶⁷

In the late 1800's, with the rise in professionalism, Harvard Law School Dean Christopher Columbus Langdell initiated a significant change in legal education. Langdell's revolutionary curriculum focused on law as a science, and was based almost exclusively on the study of appellate cases.⁶⁸ Langdell's focus on law as science rejected both the apprenticeship and the moral leader versions of preexisting legal education.⁶⁹ Thus Langdell stated:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer.⁷⁰

Although initially quite controversial, by the 1920s and 1930s Langdell's appellate approach to legal education was well ensconced in law schools throughout the country.⁷¹

The Langdellian approach can be viewed as both theoretical and practical.⁷² In contrast to the apprenticeship system it seems theoretical, in that it seeks to apply general rules of science to law. Yet, the Langdellian case method, based on decided cases, can also be viewed as

66. *Id.* at 757-60.

67. *Id.* at 757. Cf. STEVENS, *supra* note 58, at 1-36 (noting that the emphasis of early law school education was on liberal arts).

68. JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* 9-17 (1914). But see STEVENS, *supra* note 58, at 3-4, 36 (arguing that Litchfield began teaching "law as science" in 1784 and also deemphasizing the contributions of Langdell).

69. Rejecting the practical, Langdell stated: " 'What qualifies a person to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes—not experience, in short, in using law, but experience in learning law.' " Jerome Frank, *Why Not A Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 908 (1933) (quoting Langdell).

70. REDLICH, *supra* note 68, at 11 (emphasis ignored) (quoting C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871)).

71. Robert Stevens, *Two Cheers for 1870: The American Law School*, in *LAW IN AMERICAN HISTORY* 405, 443 (Donald Fleming & Bernard Bailyn eds., 1971) (In 1924, Theodore Woolsey of Yale stated: " 'The old way bred great lawyers, but like the caste mark of the Brahmin, the case system is the cachet of the crack law school of today.' ") (citation omitted); FRIEDMAN, *supra* note 61, at 615-20 (Langdell's approach was initially rejected by students, professors, and practitioners, but it came to be accepted because it supported the prestige and independence of legal learning). At the same time, law schools increasingly became part of universities, with fewer law schools remaining freestanding institutions. Edward S. Godfrey, *Legal Education and the University (Part I)*, 18 ALB. L. REV. 137, 139 (1954).

72. Spiegel, *supra* note 54, at 581-86.

a practical, systemic method for teaching the skill of case analysis.⁷³

Langdell's "scientific" case method approach has been subjected to harsh criticism. The Carnegie Commission sponsored two studies, known as the *Redlich Report of 1914*⁷⁴ and the *Reed Report of 1921*,⁷⁵ each of which found significant problems with and limitations to the Langdellian approach, including its failure to address adequately the practical side of law.⁷⁶ Also, beginning in the 1920s, the Legal Realist movement challenged both Langdell's insistence that legal principles could be objectively deduced from appellate cases and the Langdellian abandonment of practical training.⁷⁷ Today, the Langdellian emphasis on appellate cases continues to be criticized for rejecting the importance of facts as building blocks for arguments and cases,⁷⁸ and thus overemphasizing the importance of one set of legal skills (analysis) to the exclusion of others.⁷⁹

In a sense, the Legal Realists blended theory and practice. On the one hand, many Legal Realists such as Frank and Llewellyn urged that law schools train practicing lawyers.⁸⁰ At the same time, Legal Realists were far more theoretical than the Langdellians, drawing on social science theories in their analysis of legal institutions.⁸¹ Yet, the Legal Realists did not truly blend theory and practice in the manner urged in this Article. Specifically, they did not attempt to present their new social science theories in a form that could be used by practicing attorneys.

Although the Legal Realists surely influenced legal education, they were not able to topple the Langdellian focus on appellate cases. While

73. *Id.* at 585-86.

74. REDLICH, *supra* note 68.

75. ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921).

76. See STEVENS, *supra* note 58, at 112-30. The Redlich Report criticized overuse of the case method approach, particularly as applied to non-common law courses and upper-level students. REDLICH, *supra* note 68, at 50. The Reed Report argued that there should be a variety of modes of legal education, and that while the case method might work well enough at Harvard it did not work well, for example, in the fast growing night school sector of law schools. REED, *supra* note 75, at 381.

77. Although the Langdellian approach emphasized legal doctrine, which clearly has its source in practice, critics argued that the "scientific" approach failed to provide necessary knowledge and skills. See, e.g., THE COMMITTEE ON CURRICULUM OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, THE PLACE OF SKILLS IN LEGAL EDUCATION (1944), reprinted in 45 COLUM. L. REV. 345 (1945) [hereinafter LLEWELLYN REPORT]; Frank, *supra* note 69, at 910-12 (1933) (criticizing the Langdellian teaching method for failing to teach many of the skills needed by practicing lawyers).

78. See, e.g., Burger, *supra* note 60, at 3.

79. See, e.g., Anthony G. Amsterdam, *Clinical Legal Education-A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984).

80. Spiegel, *supra* note 54, at 586-87.

81. *Id.* at 586.

some of those professors who sympathized with the Legal Realist perspective introduced new teaching methods and materials, the vast majority of schools continued to use either the case method or a modified case method, and to teach primarily from appellate cases.⁸²

Meanwhile, a gradual evolution was taking place in the nature of legal scholarship. Specifically, law professors began to write many more articles, and many more theoretical pieces.⁸³ Whereas law review articles had initially been short, straightforward, primarily practice-oriented pieces, geared to assist practicing lawyers or judges in solving specific legal problems,⁸⁴ the new articles were much lengthier, more theoretical, more heavily footnoted, and more oriented to fellow academics than to practicing lawyers, public servants, or judges.⁸⁵

The new style of law review article was not welcomed by all with open arms. In 1936 Professor Fred Rodell wrote *Goodbye to Law Reviews*, published by the *University of Virginia Law Review*, in which he stated: "There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground."⁸⁶ As far as content, Rodell opined that law scholarship was failing adequately to address society's problems or offer helpful solutions.⁸⁷ While many others joined Rodell in criticizing the increasingly obscure nature of law review articles,⁸⁸ the trend toward academization continued.⁸⁹

In the 1970s, perhaps influenced in part by the ferment of the 1960s, numerous additional reports and articles appeared criticizing various aspects of legal education and scholarship. The reports generally

82. Stevens, *supra* note 71, at 481-82.

83. See generally Carrington, *supra* note 24, at 786-92 (arguing that one adverse consequence of the Langdellian technocratization of law school was isolation of legal study from broader intellectual efforts, which ultimately led many law professors to teach subjects other than law in the classroom). Carrington opposes "pure" academicization, which is unrelated to the real world, and instead urges that professors should again seek to inculcate moral standards and assist public leaders. See *id.*

84. See STEVENS, *supra* note 58, at 270 (showing that early scholarship was primarily doctrinal and practitioner oriented).

85. Carrington, *supra* note 24, at 289-90.

86. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936) [hereinafter Rodell, *Goodbye*]. Notwithstanding Rodell's promise never to write another law review article, in 1962 he wrote a follow up article concluding that the problem had only worsened. He claimed that whereas law should be used to solve the world's problems, law review articles are largely stuffy, fluffy, and read only very rarely. Fred Rodell, *Goodbye to Law Reviews-Revisited*, 48 VA. L. REV. 279, 286-90 (1962).

87. Rodell, *Goodbye*, *supra* note 86, at 42-43.

88. E.g., STEVENS, *supra* note 58, at 164 n.13.

89. See generally Carrington, *supra* note 24, at 789-90; Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191 (1991).

focused on the tension between theory and practice in legal education and criticized law schools for failing adequately to address this problem. For example, in 1971 the Association of American Law Schools issued the *Carrington Report*, urging that the traditional first year curriculum be replaced with courses focusing on law and social control, legal advocacy, legal doctrine and method, legal decision making, and legal planning. These courses would be geared to teaching students how to actually practice law, and would make heavy use of adjunct faculty, recognizing that "few who select themselves as academic lawyers are motivated by an intense interest in the practical arts."⁹⁰ Just one year later the Carnegie Commission on Higher Education issued *New Directions in Legal Education*, also known as the *Packer-Ehrlich Report*, calling for greater diversification among law schools and urging that the minimum number of years of schooling for a law degree be reduced to two years as this would be sufficient to provide most students with the basic knowledge required to practice law, and might allow students to obtain more specialized training in their third year.⁹¹

Then, in 1977, academics Gordon E. Gee and Donald W. Jackson published their voluminous study based on personal investigation of ten law schools.⁹² Finding a ubiquitous tension between theory and practice,⁹³ Gee and Jackson observed that "[t]he desired objective that history perhaps provides us is the capacity to steer a course between the Scylla of 'practical experience' and the Charybdis of 'systematic academic preparation.'"⁹⁴ They concluded that "[t]he solution—and the problem—is to make theory and other non-bread-and-butter knowledge useful."⁹⁵

Two years later, in 1979, the ABA Section on Legal Education and Admissions to the Bar issued the *Cramton Report*, specifically criticizing law schools' inattention to training and lawyering skills.⁹⁶ Meanwhile, also in the 1970s and into the 1980s, Chief Justice Burger wrote numerous articles and gave many speeches attacking the competency of practicing lawyers. He was particularly critical with respect to their practice skills, and blamed that incompetency primarily on law schools'

90. *Training for the Public Professions of the Law*, 1971 ASS'N AM. L. SCHS. ANN. MEETING § II, reprinted in HERBERT L. PACKER & THOMAS EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* app. at 111-12, 130-31 (1972).

91. PACKER & EHRLICH, *supra* note 90, at 77.

92. Gee & Jackson, *supra* note 58, at 70.

93. *Id.* at 927-28.

94. *Id.* at 761.

95. *Id.* at 962.

96. See STEVENS, *supra* note 58, at 240 (discussing *Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools*, 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSION TO B. (the *Cramton Report*)).

failure to provide adequate practical training.⁹⁷

Notwithstanding the very substantial scorn heaped upon law schools by various legal institutions, legal scholars, and even the Chief Justice, the basic law school curriculum changed very little from the 1970s into the 1990s.⁹⁸ Perhaps the most noteworthy change in the typical law school curriculum during that period was the addition of clinical education.⁹⁹ And yet, even the addition of some clinical education has not made a tremendous difference in terms of students' overall experiences. Not all students are provided with the opportunity to take even a single clinical course,¹⁰⁰ and clinical faculty are still treated like second-class, or perhaps third-class, citizens among law school faculty.¹⁰¹

At the same time, the 1970s and 1980s gave birth to some exciting new interdisciplinary approaches, including critical legal studies, law and economics, feminist theory, and critical race theory.¹⁰² The confluence of the growth of those theories with the call by some for more practical and more ethical legal education, heightened preexisting tensions between theory and practice in legal education, and called into question the proper purpose of legal education.

Interestingly and unsurprisingly, the *Boyer Report*, produced in 1990 by the Carnegie Foundation for the Advancement of Teaching,¹⁰³ revealed that the basic trends identified in this Article with respect to legal education can be found generally in the development of higher education in the United States. Specifically, the *Boyer Report* found that

97. See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973); see also Burger, *supra* note 60, at 22 (taking an unfavorable view of legal education compared to medical education, and proposing more clinical and apprenticeship-type training for lawyers as a means of combining the best of the various eras of legal education).

98. See, e.g., Comments of Roger Cramton (former Dean at Cornell Law School), *D.C. Circuit Conference*, *supra* note 3, at 211 ("The truth is that legal education is much the same as it was fifty years ago. The real complaint is that law schools are stuck in a hundred-year old rut.").

99. Karl E. Klare, *The Law-School Curriculum in the 1980s: What's Left?*, 32 J. LEGAL EDUC. 336, 342 (1982); Marjorie A. McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y.L. SCH. L. REV. 239, 242 n.16 (1990) (noting that by 1979, 80% of American law schools offered some form of clinical program, 58% of those being in-house clinics). But cf. Priest, *supra* note 12, at 437 (arguing that the most important development in legal scholarship in the past fifty years has been "specializ[ation] according to the separate social sciences").

100. McDiarmid, *supra* note 99, at 246 (noting that only 30% of law students get live-client clinical experience).

101. Comments of Emma Jordan (then-president of the Association of American Law Schools), *D.C. Circuit Conference*, *supra* note 3, at 221.

102. While not all these theories draw on an alternative fully developed discipline, such as economics, they are "interdisciplinary" in the sense that they draw on materials and bodies of thought not traditionally deemed part of legal analysis.

103. ERNEST L. BOYER, *SCHOLARSHIP RECONSIDERED: PRIORITIES OF THE PROFESSORiate* (1990).

from the colonial era to as late as the 1860s, American colleges and universities focused on teaching students to be civic and religious leaders.¹⁰⁴ Then, beginning in the 1820s and particularly with the establishment of land grant colleges in the 1860s, colleges and universities began emphasizing public service.¹⁰⁵ Subsequently, particularly in the late nineteenth century, American institutions of higher learning began to emphasize "pure" or basic scientific research.¹⁰⁶ These trends roughly parallel the path of American legal education: from apprenticeships to law schools oriented toward producing societal leaders, to the Langdellian emphasis on "scientific" study of legal principles.¹⁰⁷

This overview of legal education in the United States allows us to draw some significant conclusions with respect to the relationship between theory and practice. First, although a number of different systems of legal education have attempted to resolve the tension between theory and practice, none has proved totally successful. So, as we address alternative programs, we should place such proposals in historical context, thereby avoiding reinvention of wheels that have already gone flat. Second, history reveals that the current academic emphasis on pure theory, and particularly interdisciplinary theory, is a relatively recent phenomenon. Thus, we should not be afraid to challenge this emphasis or at least contemplate adjusting the emphasis. Third, and most significantly, although theory and practice historically have been emphasized in varying degrees, and although many people in practice and academia have abstractly urged *integration* of theory and practice, no period has particularly emphasized the development of a jurisprudence to foster the *application* of abstract theory to practice. These concepts will be developed in further detail in Section IV.

III. CURRENT ATTACKS ON LEGAL ACADEMIA AND LEGAL THEORY

While practitioners and theoreticians have long been fighting over the purpose and appropriate nature of legal education,¹⁰⁸ there is a general consensus among both the supporters and detractors of modern legal education that the gap between practice and academia has widened in recent years.¹⁰⁹ This widening gap has inspired increasingly frequent

104. *Id.* at 3.

105. *Id.* at 4-5.

106. *Id.* at 6-7.

107. See *supra* text accompanying notes 58-73.

108. See *supra* text accompanying notes 58-102.

109. See, e.g., *D.C. Circuit Conference*, *supra* note 3, at 201-22 (Dean Robert Pitofsky, Judge Harry Edwards, Dean Roger Cramton, and Professor and AALS President Emma Jordan all agreed that the gap between legal practice and law teaching has widened in recent years); Stevens, *supra* note 14, at 444-45 (claiming that given the tremendous gap between theory and practice,

and intense attacks toward both legal classroom education and legal scholarship.¹¹⁰ Although there are of course interrelationships between the criticisms of teaching on the one hand and scholarship on the other, it is helpful to examine the two sets of criticisms separately. In Section A, I will analyze current attacks on legal teaching. In Section B, I will examine current attacks on legal scholarship.

A. Attacks on Legal Teaching

Law school instruction is currently under attack from all corners. Practitioners complain that law schools are failing to teach students skills they will need to practice law;¹¹¹ judges complain that law schools are failing to provide students with the training they will need to appear competently in court.¹¹² Even some legal academics have joined the fray, agreeing that current law school curriculum and teaching methodology are resulting in ill-prepared graduates.¹¹³ While many critics focus on law schools' alleged failure to convey a variety of practical

legal academics must take care not to render themselves totally irrelevant); Wellington, *supra* note 7 (concluding that although there "was no disfunction between legal education and the legal profession," when he started teaching, there is presently a significant gap). Compare George L. Priest, *The Increasing Division Between Legal Practice and Legal Education*, 37 BUFF. L. REV. 681, 683 (1987) (celebrating the division between practice and theory) with Priest, *supra* note 32, at 1944 (concluding that interdisciplinary work and doctrinal work should be regarded as functionally cooperative, rather than antithetical).

110. See *infra* text accompanying notes 111-181. The increasing popularity of clinical education can, however, be seen as a contrary trend. See generally McDiarmid, *supra* note 99 (analyzing the current status of clinical education).

111. See, e.g., MacCrate Report, *supra* note 3, at 5; Kathy Biehl, *Things They Didn't Teach in Law School*, 75 A.B.A. J. 52, 52-55 (1989) (lamenting that typical law school programs leave graduates unprepared for their first years of firm employment); D'Alemberte, *supra* note 5, at 52 (claiming that legal education, as currently structured with limited contacts between schools and practitioners, does not benefit either the profession or the students); Joseph M. McLaughlin, *Law Schools Must Demand that Students Learn Law*, B. LEADER, July-Aug. 1975, at 17, 19 (giving examples of "maladies of legal education," as law school dean, and exhorting the profession to "speak out" with criticisms).

112. See, e.g., Burger, *supra* note 60, at 20-21 (law schools' failure to train future lawyers adequately is resulting in poor trial skills); Edwards, *supra* note 3; Harry T. Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL EDUC. 285, 285 (1988) (arguing that legal education "is falling short of any meaningful effort to 'shape the legal profession'"); Sherman G. Finesilver, *The Tension Between Practical and Theoretical Legal Education: A Judge's View of the Gap*, 1977 B.Y.U. L. REV. 1061, 1062-63. But see Carl McGowan, *The University Law School and Practical Education*, 65 A.B.A. J. 374, 378 (1979) (claiming that law schools are doing a fine job of educating future attorneys and should continue to focus on theory rather than practical skills-based training).

113. See, e.g., Amsterdam, *supra* note 79; Roger C. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 330 (1982) (claiming current law school curriculum is neither sufficiently theoretical nor sufficiently practical); John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343 (1989); Klare, *supra* note 99, at 336; A. Kenneth Pye, *Legal Education in an Era of Change: The Challenge*, 1987 DUKE L.J. 191, 197-200. See generally GLENDON, *supra* note 4 (arguing that

skills, others attack law schools for failing to instill morality or for failing adequately to study the place of law in society.¹¹⁴

Those who argue that law schools are failing to provide students with necessary practical skills often contend that law schools are over-emphasizing explication of appellate cases and spending insufficient time on other necessary skills.¹¹⁵ Litigators, such as Professor and former Dean Anthony Amsterdam, focus on additional talents needed in practice including fact-finding, problem-solving, and negotiation, and urge that these subjects can and should be taught in law school through clinical and other courses.¹¹⁶ Amsterdam, as well as such other academics as James Boyd White, urge that the primary goal of law school should be to teach its graduates how to learn law on their own and how to make new law.¹¹⁷

Meanwhile, some professors are advocating more reliance on a problem oriented or "transactional" approach that requires students to engage in more role playing exercises, to examine actual business docu-

current law school curriculum is too focused on teaching students to make adversarial arguments as to "rights" and insufficiently focused on training students to solve common problems).

114. See, e.g., Talbot D'Alemberte, Keynote Address, The MacCrate Report Conference Proceedings (Sept. 30 - Oct. 2, 1993) (West Pub.) at 12 ("Law schools are not fulfilling the mission which I will, without apology, call the seminary mission. They are not teaching law students about justice, they are not preparing them for a life of 'republican virtue.'"). Some, of course, criticize legal education both for failing to teach practical skills and for failing to think critically about morals and politics. See Klare, *supra* note 99, at 336 ("Law-school education does not, by and large, train students either to practice law or to engage in serious legal scholarship. Rather, the law-school curriculum disenfranchises students intellectually and disables and incapacitates them professionally.").

115. E.g., MacCrate Report, *supra* note 3, at 138-40 (listing broad array of needed legal skills). See generally, Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993) (analyzing survey data regarding what law schools do and do not teach, and concluding that while law schools do not teach all skills which are needed in practice, developments in legal academia can sometimes reshape practice); Daniel J. Givelber et al., *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. LEGAL EDUC. 1, 3 (1995) (citing education theory, authors argue that students receive meaningful education through working part-time and summers for law firms). These calls for more skills training are not entirely new. In 1944, the LLEWELLYN REPORT, *supra* note 77, also criticized complete reliance on the case method. *Id.* at 369. It asked law professors to provide students with an *advocate's* perspective and to focus on the *many* skills required of good practitioners. *Id.*

116. Amsterdam, *supra* note 79, at 614-15 (cataloguing skills needed in practice). Critics who contend that law schools are not teaching sufficient litigation-oriented practical skills often praise clinical education but concede it is not sufficient to provide the practical skills that are needed, at least as it currently exists at most schools. Such advocates believe that insufficient resources are devoted to clinical education and that clinical education is too "marginalized" relative to the standard curriculum. See, e.g., Klare, *supra* note 99, at 342. Cf. Symposium, *Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future*, 36 CATH. U. L. REV. 337 (1987) (praising contributions of clinical education).

117. Amsterdam, *supra* note 79, at 613; James B. White, *Doctrine In A Vacuum: Reflections On What A Law School Ought (And Ought Not) To Be*, 36 J. LEGAL EDUC. 155, 162 (1986).

ments, and to solve problems on behalf of their imaginary clients.¹¹⁸ Similarly, Professor Mary Ann Glendon recently argued that law schools are focusing excessively on "rights" arguments and failing to provide students with the training they require to negotiate solutions for their clients.¹¹⁹ The American Bar Association has called for more skills-oriented legal education as well. In July, 1992, an ABA task force issued the *MacCrate Report*,¹²⁰ which concluded that law schools need to make significant curricular changes in order to provide students with more of the skills they will need in practice. While concluding that the so-called "gap" between theory and practice is better viewed as a "continuum," with future lawyers acquiring relevant skills before, during, and also after law school,¹²¹ the report nonetheless found that law schools are not doing an adequate job of providing students with the broad range of skills they will need in practice.¹²² Among the solutions offered by the *MacCrate Report* are more clinical and skills training, providing students with the list of relevant skills so that they can seek

118. E.g., Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992); see also Lynn M. LoPucki & Elizabeth Warren, SECURED CREDIT: A SYSTEMS APPROACH (1995) (case book using transaction-oriented approach). See generally Tapes of Workshop on the Transactional Approach to Law, held by the Association of American Law Schools (Oct. 13-15, 1994) (on file with AALS) (including discussions of how to teach transaction-oriented courses in such areas as contracts, corporations, secured transactions, and international business transactions). Significantly, these advocates of a transactional approach do not spurn legal theory such as law and economics or law and sociology but rather seek to integrate such theories into a more practically-oriented curriculum. In this they lead the way down the path advocated in this article.

119. GLENDON, *supra* note 4. Glendon approvingly quotes Abraham Lincoln's laudatory remarks about compromise. *Id.* at 55. She advocates a return to the craftsmanship and common law tradition espoused by Karl Llewellyn, in order to allow lawyers to better fill society's need for planners, compromisers, and problem-solvers. *Id.* at 256-94.

120. *MacCrate Report*, *supra* note 3. The report is named after Robert E. MacCrate, Esq., Chairperson of the Task Force on Law Schools and the Profession: Narrowing the Gap. The task force was formed in 1989 by the ABA Section of Legal Education and Admissions to the Bar, to address the perceived gap between legal practice and legal education. *Id.* at 3.

121. *Id.*

122. Specifically, the report stated that although law schools do quite well in teaching legal analysis, they do a poor job of teaching nine other basic skills needed by legal practitioners: problem solving, legal research, factual investigation, communication, counseling, negotiation, litigation, alternative dispute-resolution procedures, organizing and managing legal work, and recognizing and resolving ethical dilemmas. *Id.* at 138-40. The *MacCrate Report* also produced a list of values which practitioners should possess. *Id.* at 140-41.

The report relied on (and included as Appendix B) an American Bar Foundation Study by Bryant G. Garth, Donald D. Landon, and Joanne Martin entitled *Learning Lawyering: Where Do Lawyers Acquire Practice Skills?* Based on a survey of Chicago large law firm partners, Chicago recent bar admittants, and practitioners in rural and mid-sized towns in Missouri, the study examined knowledge and skills respondents regarded as important to practice, and their view of the role law schools should play in providing such skills. Respondents from all groups found law schools could, but nonetheless failed to, provide adequate training in oral communication, written communication, and drafting. *MacCrate Report*, *supra* note 3, app. at 381.

their own training, and more skills training through post-law school sources.¹²³ Implicit in the report is a belief that while more academic/theoretical legal scholarship may have value, it cannot significantly provide practical skills. Remarkably, the ability to master and ultimately apply abstract theories is nowhere mentioned in the report as important to attorneys in their day-to-day lives.

Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit also recently wrote a controversial critique of legal education.¹²⁴ His article, entitled *The Growing Disjunction Between Legal Education and the Legal Profession*, has sparked intense discussions within academia.¹²⁵ Judge Edwards does not mince words. Instead, using a survey of his own former law clerks for support, he aims his criticisms directly at the abstract theorists in legal education, stating:

For some time now, I have been deeply concerned about the growing disjunction between legal education and the legal profession. I fear that our law schools and law firms are moving in opposite directions. The schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use. The firms should be ensuring that associates and partners practice law in an ethical manner. *But 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.*¹²⁶

Taking as his premise the idea that the purpose of law school should be to educate future lawyers,¹²⁷ Judge Edwards argues that because various adherents of “law and” movements,¹²⁸ as well as of critical legal studies, critical race theory, and feminist legal theory, possess

123. *MacCrate Report*, *supra* note 3, at 233-72.

124. Edwards, *supra* note 3. Judge Edwards had previously written *The Role of Legal Education in Shaping the Profession*, *supra* note 112, and has spoken extensively regarding legal education. See, e.g., *D.C. Circuit Conference*, *supra* note 3, at 202-09.

125. The article has also inspired a major symposium, published at 91 MICH. L. REV. 1921-2219 (1993), including remarks by many well known academics, judges, and practitioners.

126. Edwards, *supra* note 3, at 34 (emphasis added). Judge Edwards also criticized the firms for pursuing profit above all else, and concluded that “[w]hile 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.” *Id.*

127. *Id.* at 41 (law schools have a “principal mission of professional scholarship and training”). Judge Edwards explicitly rejects the “graduate school” model of legal education espoused by George Priest. See Priest, *supra* note 12, at 441. Edwards states: “For if lawyers are no different from economists or political scientists, then why do they need J.D.s rather than M.A.s or Ph.D.s?” Edwards, *supra* note 3, at 40.

128. Judge Edwards particularly mentions law and economics, law and literature, and law and sociology, while noting that those are merely examples. Edwards, *supra* note 3, at 34.

"a low regard for the practice of law[,] their emergence in legal education has produced profound and untoward side effects."¹²⁹ The judge asserts that students who merely take a variety of pure theory courses from such professors "will be woefully unprepared for legal practice,"¹³⁰ and that law school students today are receiving a worse doctrinal education than students did in past years.¹³¹

Still, Edwards would not banish all theory entirely from the curriculum. He believes that those "practical" theories which use abstract notions to critique doctrine and cases are useful to practitioners.¹³² However, Edwards would replace much of the current abstract theorizing with more doctrinal, practice-oriented teaching, and would also keep the more theoretical abstract critiques out of the first year curriculum.¹³³

Whereas Judge Edwards calls for a return to more doctrinally-oriented education,¹³⁴ others, who share his belief that law schools need to do a better job of training practitioners, have offered a variety of proposed solutions including more clinical education, more externships, increased reliance on problem-solving as well as case analysis, and establishment of "bridge-the-gap" and other post-law school continuing education programs.¹³⁵ Some have also called for creation of separate

129. *Id.* at 35; see also D'Alemberte, *supra* note 5, at 53 (large number of law professors do not respect practitioners). Cf. Collier, *supra* note 89, at 194 ("[B]ecause of the radically different structures of authority in law and humanities, the hope that humanist theory will be able to provide a source of intellectual authority for law is largely a vain one.").

130. Edwards, *supra* note 3, at 38.

131. See *id.* at 58-59. Judge Edwards states that while law students still "receive a rudimentary doctrinal education . . . [they] often do not receive the full and rich doctrinal education they deserve." *Id.* at 58. He decries the "impractical" scholars:

The nihilist scholar, who believes that texts are infinitely plastic and subjective, can only teach students to destroy legal texts, not to construct them. Similarly, the law-and-economics scholar, who accepts that doctrine does constrain but is preoccupied with theory, will not give sustained and subtle attention to cases, statutes and the like.

Id. at 59-60. Thus, Judge Edwards believes that whenever such a scholar teaches what ought to be a doctrinal course, the students suffer. While emphasizing the need for doctrinal education, Judge Edwards also states that there should be more clinical education in the curriculum. *Id.* at 62.

132. *Id.* at 35, 65. Edwards would even allow the "impractical" theories to remain part of the curriculum to a limited degree. He states that though the various identified movements have little or nothing to contribute to the practice of law, "all of these movements . . . have the potential to serve important educational functions and, therefore, should have a permanent home in the law schools." *Id.* at 35.

133. He believes that first year students, who have not yet mastered legal doctrine, are in no position to understand theoretical critiques. *Id.* at 39-40.

134. See *id.* at 62.

135. None of the currently offered "bridge the gap" programs are very extensive. See *MacCrate Report*, *supra* note 3, at 289-99 (discussing several states' programs); see also Burger, *supra* note 60, at 7 (urging more apprenticeship and clinical programs). Some have also argued

tracks for teaching and scholarship, to allow hiring and tenuring of persons who are most competent to engage in the training of future lawyers, but may not have an interest in or the ability to engage in the type of scholarship currently required by the Academy.¹³⁶

Meanwhile, current law school education has also been criticized for reasons other than, or in addition to, its failure to teach practical skills.¹³⁷ A number of persons, both within and without academia, have criticized law schools for failing to produce ethical or moral lawyers.¹³⁸ Relatedly, some have attacked legal classroom education on the ground that it causes too many students to opt for careers in relatively large firms rather than in small firms, public interest organizations, or government service.¹³⁹ Such critics argue that students, recognizing their own inadequate preparation, gravitate to the large firms because those firms are most capable of spending the resources necessary to provide students with the training they still require.¹⁴⁰ Several critics have also suggested that the widening gap between academia and practice, and particularly between highly theoretical "law and" approaches and the harsh practicalities of the real world, leave law school graduates more vulnerable to disillusionment and severe job dissatisfaction than they would be if they received more adequate classroom training.¹⁴¹ Again, many of these critics specifically note that were law professors to devote less time to scholarship or their own pet theories, law graduates might be more ethical, and, more likely, more able to accept jobs other than at large

that a more intellectual, graduate school-type approach to law school, that taught students how to learn on their own, would also produce more skilled practicing attorneys. See White, *supra* note 117, at 161.

136. E.g., Marin R. Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 410-16 (1990).

137. Some critics, of course, believe that law schools *over* emphasize practical skills, at the expense of further education in theory, doctrine, or the study of law in our society.

138. See D.C. Circuit Conference, *supra* note 3, at 219 (comments of Emma Jordan); Talbot D'Alemberte, *Teaching About Justice and Social Contributions*, 40 CLEV. ST. L. REV. 363 (1992) (law schools are failing to prepare students adequately to fight for justice); Edwards, *supra* note 3, at 66-74.

139. E.g., D'Alemberte, *supra* note 114, at 10-11; see also Klare, *supra* note 99, at 336 ("The primary function of law schooling is to prepare and to socialize students for entry into a very narrow range of career lines."); David N. Rockwell, *The Education of the Capitalist Lawyer: The Law School*, in LAW AGAINST THE PEOPLE 90 (Robert Lefcourt ed., 1971); Ralph Nader, *Crumbling of the Old Order: Law Schools and Law Firms*, NEW REPUBLIC, Oct. 11, 1969, at 20, 21.

140. Klare, *supra* note 99, at 336. In today's tight job market, we must further recognize that not all students will be able to find firms to provide them with adequate training. Unfortunately, this lack of training will often hurt those students most who entered law school with the worst writing skills due to less advantaged prior education. The lack of legal training will ultimately harm consumers of legal services as well.

141. Johnson, *supra* note 7, at 1250-51.

firms.¹⁴²

In sum, most current critics of legal education equate theoretical education with impractical education.¹⁴³ These critics state or imply that to the extent that theories have any value whatsoever, the value is not to the practice of law but rather to some other ultimate purpose of legal education.

B. Attacks on Legal Scholarship

Those persons who have attacked law school teaching as impractical and inadequate have generally attacked legal scholarship even more harshly. At a conference, Robert Pitofsky, professor and former dean at Georgetown University, summarized recent criticisms as a conclusion that legal scholarship "is increasingly theoretical, impractical, esoteric, [and] spuriously scientific."¹⁴⁴ He noted the contrast between today's legal scholarship, in which academics reject the opportunity to influence real world decisions in order to maintain purity of vision, with the scholarship of yesteryear, in which scholars sought to play a real world role.¹⁴⁵ Critics have also attacked today's legal scholars for their unwillingness to engage in empirical research.¹⁴⁶

142. E.g., Edwards, *supra* note 3, at 67-74. See generally Robert L. Bard, *Legal Scholarship and the Professional Responsibility of Law Professors*, 16 CONN. L. REV. 731 (1984) (claiming that the current emphasis on producing a large amount of legal scholarship, not necessarily of high quality, shortchanges students who would be better served by improved legal education, public service, and increased emphasis on professional responsibility).

143. In Section IV I will discuss the work of some persons who at least credit the idea that theoretical legal education can be highly practical. See *infra* text accompanying notes 196-200.

144. D.C. Circuit Conference, *supra* note 3, at 202. The conference was a bench/bar conference devoted to the nature of legal education. See also Stevens, *supra* note 14, at 446 ("Indeed, to have written the standard practitioner's work in a substantive field of law might well be the kiss of death for one who wants to be employed in one of our leading law schools."). Stevens concludes that legal scholars must try to bridge the gap with practice or else risk that future legal scholarship will take place outside of law schools. *Id.* at 448.

145. D.C. Circuit Conference, *supra* note 3, at 202.

146. E.g., Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 323 (1989) (While attacking others for failing to conduct empirical research that might be grounded in fact and contain testable premises, Schuck admits the same failing in his own work); see also Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1893-1900 (1988) (advocating that legal scholars more consciously set out their normative goals and support their assertions through empirical work to better serve policymakers). Such empirical work might, for example, examine the frequency with which certain kinds of decisions are made, the dollar amount of awards issued in various jurisdictions, or the frequency with which certain issues are reversed on appeal. This type of research does not purport to assert that legal principles themselves may be deduced scientifically.

Practitioners¹⁴⁷ and judges¹⁴⁸ have joined academics¹⁴⁹ in criticizing legal scholarship as too ethereal. Many have noted that law review articles are frequently directed toward an audience consisting of a very small number of legal academics in the author's own specialty area, rather than toward an audience of practitioners, judges, or policymakers.¹⁵⁰ Studies have revealed that to the extent law review articles are

147. The *MacCrate Report* summarizes many practitioners' view of legal scholarship: Practitioners tend to view much academic scholarship as increasingly irrelevant to their day-to-day concerns, particularly when compared with the great treatises of an earlier era. It is not surprising that many practicing lawyers believe law professors are more interested in pursuing their own intellectual interests than in helping the legal profession address matters of important current concern.

MacCrate Report, *supra* note 3, at 5. In a recent speech, Talbot D'Alemberte quotes an excerpt from John Mortimer's series, *Rumpole of the Bailey*, which makes a similar point:

An eminent law professor, upon meeting an eminent practitioner, inquires "What do you think of academic lawyers down at the Old Bailey?" The practitioner replies: "Well to tell you the truth, . . . we hardly think of them at all." The Oxford law don then goes on to inquire: "But you'll have read my paper on 'The Concept of Constructive Intent and Mens Rea in Murder and Manslaughter' in *The Harvard Law Review*?" "Oh rather," lied the practitioner, "Your average East End jury finds it absolutely riveting."

D'Alemberte, *supra* note 114, at 6.

148. Judge Edwards states:

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.

Edwards, *supra* note 3, at 35.

149. See GLENDON, *supra* note 4, at 204-05 (bemoaning loss in status of the legal treatise and voicing suspicion that "many articles will be read by no one at all, other than the writer's promotion and tenure committee"); Elson, *supra* note 113; Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 918 (1986) [hereinafter Farber, *The Case Against Brilliance*] (claiming that current scholarly standards place too much emphasis on "brilliance", that is, clever but highly counterintuitive theories, at the expense of common sense); Daniel A. Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367 (1987) [hereinafter Farber, *Brilliance Revisited*]; see also Alfred S. Konefsky & John H. Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833, 848-49 (1982) ("[L]egal scholarship is in many ways a bad joke."); Mary Ann Glendon, *What's Wrong With the Elite Law Schools*, WALL ST. J., June 8, 1993, at A16 (arguing that legal establishment failed adequately to critique the theories of Professor Lani Guinier, because the legal establishment is disdainful of, and thus out of touch with, the real world).

150. See Banks McDowell, *The Audiences for Legal Scholarship*, 40 J. LEGAL EDUC. 261, 262 (1990) (asserting that law professors at elite schools write primarily for other elite, and for persons in other disciplines); John E. Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317, 321 (1985) ("We do not need to worry about the consumers of law reviews because they really do not exist. A few professors who author texts must read some of the articles, but most volumes are purchased to decorate law school library shelves."); Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 135 (1986) (claiming that a growing proportion of academic writing is directed toward scholars rather than towards the bar or the bench). Compare Stier et al., *supra* note 35, at 1485, an empirical survey of Stanford graduates, judges, and professors, which concludes that although

read at all, they are read primarily by legal academics. Most practitioners rarely consult law review articles.¹⁵¹

The increased emphasis placed on interdisciplinary works, particularly at the most elite law schools, has generated particular criticism.¹⁵² Judge Edwards states: "Our law reviews are now full of mediocre interdisciplinary articles. Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it."¹⁵³

Law schools' current emphasis on scholarship has also been criticized on the ground that time spent on scholarship could be better spent on teaching. Adherents of this view dispute the frequently argued tenet that scholarship and teaching are mutually reinforcing.¹⁵⁴

The debate that is taking place within legal academia regarding the

attorneys and judges are relatively uninterested in reading law reviews for academic enlightenment or for theoretical frameworks, they do like to use law reviews on occasion for cites and new approaches.

151. See James W. Ely, Jr., *Through a Crystal Ball: Legal Education—Its Relation to the Bench, Bar, and University Community*, 21 TULSA L.J. 650, 654 (1986) (asserting that law review articles are largely useless for the busy practitioner); Julius Getman, *The Internal Scholarly Jury*, 39 J. LEGAL EDUC. 337, 339 (1989) (Scholarly movements such as law and economics or feminist theory limit legal scholars' ability to be self-critical: academics should write so that persons in the outside world will find their work of some value.).

152. Even some scholars who basically support and encourage interdisciplinary work have recognized that it can be problematic to the extent it causes legal academia to drift farther apart from the real world of practitioners. E.g., Francis A. Allen, *Legal Scholarship: Present Status and Future Prospects*, 33 J. Legal Educ. 403, 404 (1983) ("The new [interdisciplinary legal] scholarship . . . threatens a breach . . . of the symbiotic relationship, between the schools on the one hand, and the courts and the profession on the other. . . . Many in the law schools are speaking a language incomprehensible to lawyers and judges."); see also Carrington, *supra* note 24, at 790-91 (opining that while some interdisciplinary work is desirable, particularly to relieve legal academia's technocratic impulse, the problem with pure academia is that it is not geared to public decisionmaking but instead glories in its own irrelevance).

153. Edwards, *supra* note 3, at 36. Judge Edwards quotes with some disdain a letter written by a law school academic who viewed himself as if he were in a university religion department, and who contended that he would not be willing to change his writing to encourage more judges to read it. *Id.* In a later article, Professor Sanford Levinson of the University of Texas proudly admits he is the academic quoted by Judge Edwards, and defends that statement. Sanford Levinson, *Judge Edwards' Indictment of "Impractical" Scholars: The Need for a Bill of Particulars*, 91 MICH. L. REV. 2010, 2011-12 (1993).

154. See Elson, *supra* note 113, at 370-71 (asserting that the limited value of scholarship does not justify the slighting of teaching, which is required); Scordato, *supra* note 136, at 369-70 (noting that teaching and scholarship are not mutually supportive and arguing that continuing adherence to dualist model is detrimental to both teaching and scholarship); Dennis J. Turner, *Publish or be Damned*, 31 J. LEGAL EDUC. 550, 552 n.7 (1981) (citing a study purporting to demonstrate the insignificant relationship between teaching and scholarship). Cf. Paul D. Carrington, *The University Law School and Legal Services*, 53 N.Y.U. L. REV. 402, 409-10 (1978) (claiming the training of future lawyers is well served in an atmosphere where scholarship is paramount). But see Carrington, *supra* note 24, at 790 n.250 (criticizing his own "glib assumption that the academic enterprise necessarily reinforces good teaching").

proper role and content of legal scholarship must also be examined in the broader context of liberal arts education in the United States. In 1990 the Carnegie Foundation for the Advancement of Teaching issued the *Boyer Report*.¹⁵⁵ The report argues that "scholarship" has come to be defined too narrowly, including solely what the report calls the "scholarship of discovery".¹⁵⁶ Demonstrating through historical analysis that the current narrow research-based definition of "scholarship" is a relatively recent phenomenon arising in the nineteenth century,¹⁵⁷ the report argues that the definition should now be expanded to include teaching, integration, and application as on a par with discovery.¹⁵⁸ "Surely, scholarship means engaging in original research. But the work of the scholar also means stepping back from one's investigation, looking for connections, *building bridges between theory and practice*, and communicating one's knowledge effectively to students."¹⁵⁹

In short, while legal teaching and scholarship are currently under attack from a variety of different perspectives, they are being criticized most harshly for their lack of contact with, and relevance to, the real worlds of private practice and public policy. Many of the critics of current legal education are most dissatisfied with interdisciplinary and other abstract theories, which such critics see as having little or no relevance to practicing attorneys, judges and policymakers.

IV. IN DEFENSE OF THEORY

Although, as discussed above, many have attacked the role and use of legal theory in legal education and scholarship, many have also championed legal theory over the years. Praises offered for legal theory parallel their authors' views as to the purposes of legal education.¹⁶⁰ In the Sections that follow, I will discuss three primary justifications offered for teaching and writing about legal theory: theory's ability to explain our world, theory's ability to serve as a source of personal morality and social justice, and theory's ability to assist real world lawyers in achiev-

155. BOYER, *supra* note 103.

156. *Id.* at 15-18.

157. *Id.* at 7-13.

158. *Id.* at 75.

159. *Id.* at 16 (emphasis added). The report explains that with the scholarship of application "theory and practice vitally interact, and one renews the other." *Id.* at 23.

160. Compare Frank I. Michelman, *The Parts and the Whole: Non-Euclidean Curricular Geometry*, 32 J. LEGAL EDUC. 352, 353 (1982) (arguing that legal education has three objectives: benefitting future clients, society at large, and the students) with Graham Hughes, *The Great American Legal Scholarship Bazaar*, 33 J. LEGAL EDUC. 424, 425 (1983) ("The tug between the concept of the law school as a graduate academy of political philosophy and the more workaday view of it as an intensive training ground for the practice of law has always carried the seeds of the conflict that may now be burgeoning."). See generally *Yale Symposium*, *supra* note 3.

ing their clients' ends.¹⁶¹

A. Use of Legal Theory as a Cognitive Tool

Legal theory has often been praised for the predictive, descriptive, and synthetic assistance it provides in helping us understand our existing world and legal system. Adherents of this view believe legal theory can assist us in determining how various cases will turn out, how various doctrines interrelate, and how legal doctrines and systems interact with other modes of social organization.

Some who praise legal theory as a cognitive tool view theory essentially as a science. Christopher Columbus Langdell's works perhaps epitomize this view, drawing an express analogy between the study of law and the study of physical science.¹⁶² However, others whose views are regarded today as less extreme than Langdell's have also praised legal theory for the explanatory assistance it provides in the classroom and in scholarly writings.

While many of the judges and academics who praise the explanatory value of legal theory are speaking primarily of *doctrinal* theory,¹⁶³ the explanatory value of legal theory is also praised by those who advo-

161. Quite clearly one could come up with alternative justifications. It is equally clear that one may believe that legal theory is legitimated by more than one of these justifications. See, e.g., Paul Brest, *Plus Ça Change*, 91 MICH. L. REV. 1945, 1945 (1993) (While the primary aim of law school is to train skillful and responsible lawyers, policymakers and judges, legal scholarship should not only aid these professionals but also serve "the intellectual purpose of expanding legal knowledge and thought for their own sake."); see also Paul D. Reingold, *Harry Edwards' Nostalgia*, 91 MICH. L. REV. 1998, 1998 (1993) (Law schools and legal academic writing serve the dual purposes of training and assisting practitioners, and providing and describing complex norms).

162.

[L]aw, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer . . . and the shortest and the best, if not the only way of mastering the doctrine effectively is by studying the cases in which it is embodied Moreover, the number of legal doctrines is much less than is commonly supposed.

CHRISTOPHER C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS*, vii (1871). See also STEVENS, *supra* note 58, at 66 (discussing Harvard President Charles Eliot's description of Langdell's work as akin to a laboratory science, in which the law library was the laboratory).

163. See, e.g., John P. Dawson, *Legal Realism and Legal Scholarship*, 33 J. LEGAL EDUC. 406, 410 (1983) ("[L]aw faculties have rendered an indispensable service in keeping our law as coherent and intelligible as it now is."); Kaye, *supra* note 36, at 319 (Judge, New York Court of Appeals) (claiming that law reviews can and increasingly should provide valuable doctrinal analysis rather than focusing on impractical abstract theory such as hermeneutics); Ellen A. Peters, *Reality and the Language of the Law*, 90 YALE L.J. 1193, 1193 (1981) (then Associate Justice, Connecticut Supreme Court) ("As a judge on an appellate court. . . I look to the writings of scholars to provide me with broad perspectives, with a sense of past and of future, that busy brief-writers and harried law clerks cannot often encompass."); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1925-26

cate more interdisciplinary theoretical work. Such advocates often see legal theory as a subset of broader humanistic discourse.¹⁶⁴ For example, Professor George Priest argued in 1983 that "[i]t is accepted today, virtually universally, that the legal system can be best understood with the methods and theories of the social sciences."¹⁶⁵ Explicitly analogizing lawyers, and particularly legal academics, to behavioral scientists, Priest argued that to best understand our legal system, law schools should cease differentiating themselves from the rest of the university. "The law-school curriculum will [and should] come to consist of graduate courses in applied economics, social theory, and political science."¹⁶⁶ While by 1993, Priest had somewhat moderated his views, recognizing that there is a role for doctrine as well as interdisciplinary work within law schools,¹⁶⁷ he still believed that abstract interdisciplinary theory is necessary to aid in understanding our legal system.¹⁶⁸

B. *Legal Theory as a Source of Justice and Morality*

Many look to legal theory as a source of justice or morality. There are two primary branches of this school of thought. Some advocate legal training in general, and legal theory in particular, as a means of making individuals better or more moral people.¹⁶⁹ Others, relatedly,

(1993) (Judge, U.S. Circuit Court of Appeals for the Seventh Circuit) (praising value of theoretical doctrinal analysis).

164. See Allen, *supra* note 152, at 405 (1983) (claiming that many in legal education regard the primary task of jurisprudence to be the formulation of new intellectual and moral bases for law); David Barnhizer, *The University Ideal and the American Law School*, 42 RUTGERS L. REV. 109, 113-14 (1989) (discussing how law schools can and should pursue the university ideal of the pursuit of knowledge for its own sake); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 769 (1987) (praising growth of interdisciplinary legal analysis as a means of understanding legal system); Priest, *supra* note 12, at 441 (predicting approvingly that law schools will become like graduate schools in social science); Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L. REV. 1205, 1206 (1981) (wishing legal scholars would address the central issue of our century: the conflict between subjectivity and objectivity). But see THORSTEIN VEBLÉN, *THE HIGHER LEARNING IN AMERICA* 155 (1918) (arguing that law school does not belong in the university); Collier, *supra* note 89, at 271 (arguing that given the radically different structure of authority in law, by comparison to the humanities, the hope that humanistic theory will be able to provide a source of intellectual authority for law is largely vain); Wellington, *supra* note 7, at 5 ("A law school cannot be a little faculty of arts and sciences.").

165. Priest, *supra* note 12, at 437.

166. *Id.* at 441.

167. Priest, *supra* note 32, at 1936.

168. *Id.* Cf. Rand E. Rosenblatt, *Legal Theory and Legal Education*, 79 YALE L.J. 1153 *passim* (1970) (claiming that because major theoretical questions have not yet been answered, law schools, if serious about intellectual engagement with social problems, will, like the social sciences find themselves drawn into a large theoretical crisis).

169. The individuals to be "bettered" may include not only students but also other readers and perhaps even authors of legal theory.

believe legal theory can effectively be used to critique our society and system of government.

Historically, many persons believed legal training should be geared primarily to turning law students into better persons: into leaders of society.¹⁷⁰ Professor Paul Carrington, for example, argues that in the first century of American legal education, because leaders' status derived from their morality and fitness to lead, rather than from their royal blood, a line was seldom clearly drawn between professional training and general education.¹⁷¹ Others have urged that legal scholarship today does, and to a greater extent should, help individuals become more moral and better people.¹⁷²

Many see legal theory not so much as a source of individual morality but rather as a basis, at least potentially, upon which to critique or serve society at large. For example, Professor Charles R. Lawrence, III argues that law school teaching and theoretical scholarship can and should fit into the tradition of "the Word," an African-American "tradition of teaching, preaching, and healing . . ."¹⁷³ Arguing that scholarship must strive to be both pragmatic and utopian, Professor Lawrence

170. See *supra* text accompanying notes 60-67.

171. Carrington, *supra* note 24, at 756-57, 802-03. Professor Carrington assesses the possible role of law school teaching as a foundation of restrained democratic government. Discussing a variety of factors that he believes have taken legal education away from a focus on public morality and public affairs, Carrington concludes that more emphasis should be placed on scholarship with relevance to real world problems. *Id.* at 802-03. See also ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 123-26 (1835) (Mentor ed., 1986) ("In America, there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class, and the most cultivated portion of society.").

172. E.g., D'Alemberte, *supra* note 138, at 370 (arguing that law schools should revive the Jeffersonian model of legal education as moral education, which encourages lawyers to pursue their own justice mission); Terrance Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 166-68 (1984) (claiming part of the responsibility of law schools is to instill moral character in students); see also D.C. Circuit Conference, *supra* note 3, at 215-20 (comments of Dean Emma Jordan) (identifying a need for more moral education); Bryant G. Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems*, 64 IND. L.J. 433, 445 (1989) (arguing that law schools should teach future lawyers to be guided by morality); Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 955 (1981) (asserting that legal scholarship plays an important role in the process of moral education that is indispensable to law students' training).

173. Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2238 (1992). Lawrence further describes "the Word" as "an interdisciplinary tradition wherein healers are concerned with the soul and preachers with the pedagogy of the oppressed . . . an articulation and validation of our common experience . . . a practice of raising questions about reasons for oppression." *Id.* See generally HOOKS, *supra* note 45; WILLIAMS, *supra* note 47. Cf. Carrington, *supra* note 24, at 802 (claiming that the unwelcome reality for legal academics is that they are often forced to choose between work that can be applied usefully to public affairs and work that is more intellectually ambitious and likely to win academic recognition).

explains that legal theory can help heal and reform society.¹⁷⁴ Professor Edward Rubin asserts that when legal scholars properly set out the normative justifications for their work, especially if supported by empirical analysis, they can provide a real service for policymakers.¹⁷⁵ Professors Derrick Bell and Emma Jordan have also argued that specific theories, such as critical race theory, are valuable because they offer a pragmatic means to critique our social structures.¹⁷⁶ Some practitioners even praise abstract legal theory for the support it may provide in critiquing the existing establishment.¹⁷⁷

C. *Legal Theory as a Tool for Practitioners*

Finally, some purport to praise legal theory not only for its humanistic insights or moral value, but also for the nuts-and-bolts assistance it may provide to legal practitioners. Most who praise legal theory for its practical assistance praise the most doctrinal aspects of legal theory.¹⁷⁸ While such doctrinal theory, of course, will have value for practicing attorneys, judges, and legislators,¹⁷⁹ its utility is well-accepted and is not the subject of this Article.

By contrast, very few legal academics or practitioners purport to value nondoctrinal theory for the practical assistance it may provide.

174. Lawrence, *supra* note 173, at 2239; see John E. Cribbet, *The Changeless, Ever-Changing University: The Role of the Law School*, 26 ARIZ. L. REV. 241, 250-51 (1984) (maintaining that law schools should not only prepare students to pass the bar but should also serve the needs of society).

175. Rubin, *supra* note 146, at 1900.

176. *D.C. Circuit Conference*, *supra* note 3, at 216 (comments of Emma Jordan) ("[T]he newly emerging genre of critical race legal theory and feminist legal theory offer [sic] a window of intellectual opportunity, through which lawyers can begin to reimagine a just and fair society."); Derrick Bell & Erin Edmonds, *Students as Teachers, Teachers as Learners*, 91 MICH. L. REV. 2025, 2052 (1993) (arguing that alternative visions offered by critical race theorists and others doing "law and" work may offer our only hope of making the legal profession honorable).

177. *E.g.*, Gordon, *supra* note 21, at 1961-62. As a large firm partner Gordon contends that it is the work of "outsider" theoretical scholars, such as feminists and critical race theorists, which are most helpful to her as a practitioner, in that the heavily doctrinal education, praised by some, essentially promotes the existing establishment, whereas the outsider scholarship can be used to critique the establishment. *Id.*

178. *See, e.g.*, Posner, *supra* note 163, at 777 ("Disinterested legal-doctrinal analysis of the traditional kind remains the indispensable core of legal thought . . ."); Charles B. Nutting, *Training Lawyers for the Future*, 6 J. LEGAL EDUC. 1, 4 (1953) (arguing that the most practical education possible is the most theoretical, because mental analysis is the most important skill for the student); Kaye, *supra* note 36, at 316 (claiming that law reviews can be valuable for doctrinal as opposed to abstract analysis).

179. Doctrine assists practitioners by seeking to find common threads among seemingly disparate cases or groups of cases, or by critiquing a holding or proposed holding as inconsistent with precedent. Doctrinal analysis taught in law school is also praised for training future lawyers how to think and how to argue. *See* McGowan, *supra* note 112, at 378 (maintaining that law schools are solely responsible for providing the theoretical training only they can provide, in order to help students think like lawyers).

Occasionally, both practitioners and academics have praised seemingly ethereal and impractical theories such as law and economics, feminist theory, or critical race theory for their value.¹⁸⁰ Yet, while some have abstractly asserted that nondoctrinal theories may have practical value, most have failed to support their argument with specifics. Nor have such advocates demanded that abstract theories be connected to practical solutions or presented so as to allow legal practitioners to easily incorporate the theory into their work.¹⁸¹

In sum, defenders of abstract theory generally do not cite its practical contributions to the everyday work of practicing attorneys, judges, and policymakers, but rather defend it on other moral or educational grounds. Further, even those few persons who do praise abstract theory for its practical value often lavish that praise too easily. They usually do so without actually developing the connection to practice nor spelling out the consequences of a true link between the worlds of abstract theory and the practice of law.

V. THE SYMBIOTIC RELATIONSHIP BETWEEN THEORY AND PRACTICE: ADVOCATING A JURISPRUDENCE OF LAW AND PRACTICAL APPLICATIONS

In contrast to the vast majority of practitioners and academics discussed above, I believe that highly abstract legal theories do, and to a greater extent can, prove very helpful to legal practitioners in their daily work. For example, the critical legal studies approach, scorned by many as anti-doctrinal and thus useless for the actual practice of law,¹⁸² can provide great assistance in conceptualizing approaches and drafting briefs on real legal problems.¹⁸³ The law and economics school, criticized by many as a mere attempt to analyze decisions through a highly unrealistic and politically conservative lens,¹⁸⁴ has and can provide litigators, transactional attorneys, and policymakers with valuable analytic

180. See Bell & Edmonds, *supra* note 176, at 2036-37 (praising practical value of feminist and critical race theory); Gordon, *supra* note 21, at 1961 (praising practical value of "outsider" theories for practitioners); Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075, 2095 (1993) (claiming that the various "law and" theories may provide valuable skills training); Posner, *supra* note 163, at 1925-26 (discussing contributions of law and economics theory to antitrust, deregulation, family law, and employment law); James B. White, *Law Teachers' Writing*, 91 MICH. L. REV. 1970, 1970 (1993) ("It is often the most theoretical work that will prove of surprising practical value . . .").

181. There is, however, a body of feminist theory that attempts to link abstract theory to practice issues. See *infra* notes 270, 283-87 and accompanying text.

182. E.g., Edwards, *supra* note 3, at 47.

183. See *infra* text accompanying notes 212-54.

184. See, e.g., Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980); Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

tools.¹⁸⁵ Feminist theory, seen by some as largely irrelevant sermonizing ramblings, can provide litigators and policy makers with fresh ways of formulating arguments and solving problems.¹⁸⁶

In Section IV(A) I will discuss what I view as the ideal relationship between theory and practice in legal education and practice. I call this ideal relationship "symbiotic" because, although I see theory and practice as conceptually distinct, I believe that both theory and practice can be strengthened by their relationship with one another.¹⁸⁷

In Section IV(B) I will use a hypothetical to establish that even the most abstract legal theories can in fact have real practical value. Finally, in Section IV(C), I will discuss the implications of my thesis for both legal academics and legal practitioners. Specifically, I will argue that abstract legal theories can only prove valuable to practitioners if academics work to establish a jurisprudence of practical applications.

A. *All Legal Theories Should Be Designed and Presented to Have Practical Value*

Most agree that the primary purpose of law school is to train future lawyers.¹⁸⁸ While some academics may protest the "trade school" label,¹⁸⁹ and many may argue that law schools serve valid purposes in addition to training lawyers,¹⁹⁰ few could actually deny, if pressed, that law schools exist primarily to prepare lawyers for practice.¹⁹¹

185. See *infra* text accompanying notes 255-67.

186. See *infra* text accompanying notes 270-316. See generally Schneider, *supra* note 18.

187. See generally Cramton, *supra* note 113, at 331 ("Theory and practice are not opposed but illuminate and inform each other."); Gordon, *supra* note 180, at 2096 ("I will not try to make an extended case for the practical value of theory. The whole 'theory-practice' distinction strikes me as unutterably daffy. The point of theory is to clarify and inform practice: if it does not, it is just bad theory."); White, *supra* note 180, at 1970 ("The opposition between 'theoretical' and 'practical' is, I think, misleading. It is . . . often the immersion in practical particularities that will stimulate the most valuable thought of a general kind."). Professor Blasi has applied a similar argument to that pariah of many theorists, clinical education, showing that cognitive psychological theories can help us provide future attorneys with necessary legal skills. Blasi, *supra* note 18.

188. See Brest, *supra* note 161, at 1945; Elson, *supra* note 113, at 344; Johnson, *supra* note 7, at 1235. The history of American legal education also demonstrates that over the course of the last two centuries, law schools have been devoted primarily to training attorneys. See *supra* text accompanying notes 58-107.

189. See, e.g., MacCrate Report, *supra* note 3, at 4 ("Law schools offer the traditional responses: 'We teach them how to think, we're not trade schools, we're centers of scholarship and learning, practice is best taught by practitioners.'"); Johnson, *supra* note 7, at 1254 (discussing legal academy's repudiation of "the training function").

190. See *supra* text accompanying notes 160-177.

191. My own institution, Florida State University College of Law, has adopted a mission statement providing that "[t]he Chief purpose of our research and instruction is to gain understanding of the role of legal concepts and values." While this mission certainly does not oppose training students to be practitioners, the wording of the statement illustrates legal academics' discomfort with espousing training of lawyers as their primary function.

Similarly, law reviews ought to have some value to those who practice law, whether as litigators, corporate attorneys, judges, or legislators. Although it may be appropriate for law reviews to publish some articles appealing solely to legal educators, certainly, law reviews ought also serve the needs of those engaged in the practice of law. Practitioners, including judges and legislators, do not have as much time as academics to reflect broadly on implications going beyond their particular case or on interactions between a variety of legal doctrines and theories.¹⁹² Thus, it seems eminently sensible that legal scholars ought to help meet this need.¹⁹³

The idea that legal theory and legal practice should be integrated is not new. Oliver Wendell Holmes, in 1897, urged that legal theory must be derived from practice, and that legal theory should play an important role in practice, stating:

[Law is not] a deduction from principles of ethics or admitted axioms or what not [but rather] prophecies of what the courts will do in fact We have too little theory in the law rather than too much Theory is the most important part of the dogma of the law The danger is that the able and practical minded should look with indifference or distrust upon ideas the connection of which with their business is remote.¹⁹⁴

By the 1930s, Legal Realists such as Jerome Frank were more concerned that legal practice was being underemphasized in legal education than that theory was being omitted. Frank advocated hiring more professors with practical experience and sought the establishment of clinical programs.¹⁹⁵ Yet, the Legal Realists did not attempt to evict theory from the law schools and in fact praised abstract theory as a counter to Langdellian formalism.

Modern commentators often urge that legal theory and legal prac-

192. Although some academics criticize practitioners as lazy, petty, or nonintellectual for failing to use abstract theory in their work, I believe practitioners simply cannot afford to spend their limited time on deciphering and applying abstract theory. With more help from academia they might use abstract theory more often.

193. Admittedly practitioners must and do contemplate how a rule in one case may be praised or criticized in view of its effect on other cases. After all, this analysis supports the familiar "slippery slope" argument. Nonetheless, academics have the opportunity to engage in more wide-ranging analysis, unconstrained by an immediate need to bill their time to a particular case. See Edwards, *supra* note 3, at 65-66 (claiming that ideally law school teachers and scholars would bridge the gap between theory and practice by integrating theory with doctrine in order to solve difficult legal problems); Gee & Jackson, *supra* note 58, at 962 (urging that professors should strive to demonstrate the practical value of theoretical insights).

194. Holmes, *supra* note 20, at 460-61, 476-78.

195. Frank, *supra* note 69, at 917-20; Jerome Frank, *A Plea For Lawyer-Schools*, 56 YALE L.J. 1303, 1313-16 (1947).

tice should be integrated.¹⁹⁶ For example, Gordon Gee and Donald Jackson stated in 1977: "A defense by traditional legal educators of theoretical training misses the mark if it only defends an isolated theoretical approach to law. The solution—and the problem—is to make theory and other non-bread-and-butter knowledge useful."¹⁹⁷ The general principle that theory and practice ought to be integrated seems fairly non-controversial.

However, as discussed above, even a person who accepts the general principle that some theory is relevant to practice may still dispute the notion that the most abstract theories are or can be relevant to practitioners. For example, Judge Edwards and many others believe *doctrinal* theory is useful, but doubt the practical value of critical legal studies or other more abstract theories.¹⁹⁸

Moving beyond the well-accepted principle that doctrinal theories are useful to practice, my main point is that certain abstract theories have practical value. Others have made this argument in limited ways. For example, Richard Posner and others have praised the practical contributions of law and economics.¹⁹⁹ Ruth Colker, Derrick Bell, and others have praised the practical value of feminist and critical race theories.²⁰⁰ Yet few of these scholars have actually taken on the task of

196. See Cramton, *supra* note 113, at 331 (positing that theory and practice support each other); Eric S. Janus, *Clinics and "Contextual Integration": Helping Law Students Put the Pieces Back Together Again*, 16 WM. MITCHELL L. REV. 463, 463 (1990) (stating that clinical education is desirable because it links theory, practice and values); Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57, 57 (1992) (claiming that the true goal of legal education should be to teach students to think like lawyers by integrating theory and practice).

197. Gee & Jackson, *supra* note 58, at 962.

198. E.g., Edwards, *supra* note 3, at 47.

199. Posner, *supra* note 163, at 1925-26 (discussing contributions of law and economics school to fields of antitrust, deregulation, family law, and employment law); see also Tapes of Workshop on the Transactional Approach to Law, *supra* note 118 (arguing that law and economics and other approaches are useful in practice and should be made accessible to students through problem-oriented pedagogy); Wellington, *supra* note 7 (noting that much useful work by law and economics scholars has been absorbed by practitioners). But cf. Harry H. Wellington, *Challenges to Legal Education: The "Two Cultures" Phenomenon*, 37 J. LEGAL EDUC. 327 (1987) (contending that much useful legal academic theory has less impact than it should, in part because too few academics are doing applied work).

200. COLKER, *supra* note 18 (attempting to develop a feminist jurisprudence that works in practice as well as in theory); Bell & Edmonds, *supra* note 176, at 2033-36; Fineman, *supra* note 18, at 25 (claiming that feminist scholars should seek to fill the gap between "grand theory," which is too general and abstract to be useful, and personal narratives, which are too specific); Schneider, *supra* note 18 (discussing importance of linking feminist theory with practice); see also Gordon, *supra* note 21, at 1961-62 (arguing that "outsider" theorists, including feminists and critical race theorists, actually offer more realistic insights than do traditional scholars); Elizabeth M. Schneider, *Rethinking the Teaching of Civil Procedure*, 37 J. LEGAL EDUC. 41, 44 (1987) (emphasizing the need for a strong link between theory and practice in the teaching of civil procedure).

demonstrating the utility of abstract theory to practitioners.²⁰¹ Nor have they applied their insights to a theory of legal education. In an attempt to do so this Article expands and develops the work of these scholars.

B. *A Demonstration that Abstract Legal Theory Can Have Practical Value*

In this Section, I use a hypothetical to demonstrate that seemingly abstract theories can in fact be relevant to the practice of law. Specifically, I attempt to package some of the insights provided by advocates of critical legal studies, law and economics, and feminist jurisprudence. My goal is to help policymakers and legal advocates more effectively address the question analyzed in my own most recent article: whether newborn children should be subjected to mandatory non-anonymous testing for HIV (the virus that causes AIDS).²⁰²

In typical law professor style, I will pose two hypothetical scenarios. First, I will discuss insights provided by the three abstract theories to a hypothetical lobbyist opposed to a mandatory testing law. I will also discuss insights provided by the theories to a hypothetical plaintiff's attorney representing a mother opposed to imaginary mandatory testing legislation. One could, alternatively, use each of these theories to assist a lobbyist and litigator who favored testing. For simplicity, I have selected one set of possible practical uses to explicate my points, and occasionally mention the counter arguments in footnotes.²⁰³

As I commence this discussion, I offer a disclaimer. Critical legal studies, law and economics, and feminist theory are all tremendously rich and complicated bodies of work. Each of these fields could offer *many* insights into the above hypotheticals; moreover, theorists within a given area would likely disagree even among themselves as to what insights are best derived from the field. My goal is not to single-handedly develop an applied jurisprudence with respect to each of these disciplines. Indeed, each analysis could itself be the subject of an entire article. Nor is my goal here to convince readers that mandatory testing of newborn for HIV is inadvisable or unconstitutional. Rather, my much more modest ambition is to demonstrate that abstract theories *can* have practical value. I thereby hope to inspire other academics and practition-

201. While some might argue their theory is so clearly relevant as to render this demonstration unnecessary, the continuing discomfort with abstract theory requires theoreticians to defend their work.

202. Sternlight, *supra* note 28.

203. In either case, I do not pretend that the arguments generated by the three theories are all compelling. Indeed, I do not believe that the theories alone *can* be convincing, absent factual or empirical support. Instead, the value of the theories is that they offer insights which, if supported by evidence or found inherently believable, may be compelling.

ers to utilize abstract disciplines for practical assistance and to develop these linkages.

1. SETTING UP THE HYPOTHETICAL

In the interest of brevity, and because the detail is not necessary, I will not provide the specifics of the mandatory testing legislation. In essence it would simply require that each child born in any public or private facility in the imaginary State of Nirvana be tested for HIV, with or without the consent of either the child or the parent.²⁰⁴ The statute would require all Nirvana medical facilities involved in the birthing process to ensure that the testing be accomplished, and would subject any violators to strict penalties. All of the plaintiff-side lawyers opposing the statute will use their respective policy arguments to argue that the statute is unconstitutional under the Fourteenth Amendment of the U.S. Constitution because it violates the Fourth Amendment's prohibition on unreasonable search and seizures,²⁰⁵ the right to privacy, and/or the equal protection clause. Essentially, both the privacy and due process arguments ultimately require the court to weigh the government's interest in testing against the mother's and child's interest in avoiding the test.²⁰⁶

My hypothetical poses the question of whether newborn children may or should be tested for the HIV virus on a non-anonymous basis without their parents' consent. As I have discussed elsewhere, many persons concerned with public health have proposed such mandatory testing in order to provide better medical care to those newborns revealed to be HIV infected.²⁰⁷ Opponents of the testing argue that it is unnecessary and unduly invasive of mothers' and children's privacy interests, particularly given the facts that: (1) identifying a newborn as HIV infected also identifies the mother as such;²⁰⁸ (2) under existing tests only approximately one third of the newborns who test positive at birth are actually HIV infected, because two thirds of the newborns who test positive are instead merely carrying maternal antibodies that will disappear after about a year;²⁰⁹ (3) no cure for the virus currently exists;²¹⁰ and (4) revealing mother and child to be HIV infected may

204. Obviously, a newborn child could not provide her own knowing consent.

205. The Fourth Amendment has been incorporated into the Fourteenth Amendment due process clause. *Wolf v. Colorado*, 388 U.S. 25, 26-27 (1949). See generally Sternlight, *supra* note 28, at 379-81.

206. Sternlight, *supra* note 28, at 380.

207. *Id.* at 381. See also Linda F. Post, *Unblinded Mandatory HIV Screening of Newborns: Care or Coercion?*, 16 *CARDOZO L. REV.* 169, 172 (1994).

208. Sternlight, *supra* note 28, at 376-77.

209. *Id.*

210. *Id.* at 377.

place them and their family at great risk of discrimination.²¹¹

2. CRITICAL LEGAL STUDIES

a. Discussion of the Theory

As I commence this discussion I must renew my earlier caveat. It would be impossible for me to do justice to the breadth and complexity of critical legal studies ("CLS") in this brief analysis. As one (somewhat frustrated) editor noted:

A really representative book on critical legal studies would include examples of socialist, structuralist, deconstructionist, feminist, phenomenological and Hegelian critical legal theory—as well as four or five other approaches. It would explore a number of CLS analyses of race, gender and class, and give ample room to the thoughtful criticisms which have been made of them. It would also be longer than the *Encyclopaedia Britannica*.²¹²

Thus, instead of attempting to summarize that which cannot be summarized briefly, I will focus on two strands of CLS work that I find particularly useful for the problem at hand.²¹³

Critical legal studies, in many senses a successor to the Legal Realism of the 1930s and 1940s,²¹⁴ is based on the premise that subjective value choices and policy choices are inherent in the law. Thus, much CLS work is devoted to the project of "deconstructing" others' analyses that purport to derive the legal or "right" answer from certain words or legal principles that purport to be objective.

211. *Id.* at 383.

212. James Boyle, *Introduction to CRITICAL LEGAL STUDIES* xiii (James Boyle ed., 1992) (footnotes omitted). For a more complete discussion of CLS, I refer readers not only to Boyle, *supra*, but also to such collections and bibliographies as MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1982); *A Symposium of Critical Legal Studies*, 34 AM. U. L. REV. 929 (1985); Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984); and *Perspectives on Critical Legal Studies*, 52 GEO. WASH. L. REV. 239 (1984); see also ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990); ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986).

213. Although some might argue that I am cheating by focusing on those strands of CLS most useful to prove my point, I believe this selection is both necessary and justifiable. It is necessary because I could not possibly discuss all aspects of the wide-ranging theory. It is justifiable because I have never asserted that *all* abstract theories have practical value but only that some do and more can. Thus, even if my selection is biased in favor of those abstract theories with practical value, I will have proved my point.

214. See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* (1936); EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1948); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960) [hereinafter LLEWELLYN, *COMMON LAW*]; KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (1962); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

Duncan Kennedy's pioneering work, *Form and Substance in Private Law Adjudication*,²¹⁵ is still one of the best examples of the CLS deconstructionist approach.²¹⁶ In that article, Kennedy explores "the nature and interconnection of the different rhetorical modes found in American private law opinions, articles and treatises."²¹⁷ He concludes that just as two rhetorical modes of "individualism" and "altruism" oppose one another in debates on substantive issues, a mode of clearly defined highly administrable rules opposes a mode of equitable ad hoc decisions in debates on form.²¹⁸ Kennedy then goes on to argue that these substantive and formal debates are related to one another. "[A]ltruistic views on substantive private law issues lead to willingness to resort to standards in administration, while individualism seems to harmonize with an insistence on rigid rules rigidly applied."²¹⁹

Kennedy's second and most important conclusion is that neither substantive nor formal conflict in the law can be reduced to a neutral calculus or right answer. Rather, legal debates inevitably reflect the underlying conflict and fundamental contradictions between individualism and altruism—"irreconcilable visions of humanity and society, and . . . radically different aspirations for our common future."²²⁰ Kennedy sees the rhetorical constructs of "altruism" and "individualism" as neither verifiable empirical assertions nor logically pure models, but rather as useful, recognizable stereotypical rhetorical modes.²²¹

The opposition between the altruistic and individualistic forms of argument cannot produce a single right answer because for each "pro" argument from within the altruistic mode there is an equivalent "con" argument from within the individualistic mode. Citing to Karl Llewellyn's "famous set of contradictory 'canons on statutes,'" Kennedy explains that "for each pro argument there is a con twin."²²² As Kennedy readily admits, "[t]here is nothing innovative"²²⁴ about his effort to break down the position that "legal argument is autonomous from moral,

215. 89 HARV. L. REV. 1685 (1976).

216. Other examples include: Kenneth M. Casebeer, *Teaching an Old Dog Old Tricks: Coppage v. Kansas and At-Will Employment Revisited*, 6 CARDOZO L. REV. 765 (1985); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209 (1979); Mark Tushnet, *The U.S. Constitution and the Intent of the Framers*, 36 BUFF. L. REV. 217 (1987).

217. Kennedy, *supra* note 215, at 1685.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 1722-23.

222. *Id.* at 1723 (citing LLEWELLYN, *COMMON LAW*, *supra* note 214, at 521-35).

223. *Id.*

224. *Id.* at 1724.

economic, and political discourse in general.”²²⁵ Rather, his unique contribution is his “attempt to show an orderliness to the debates about ‘policy’ with which we are left after abandonment of the claim of neutrality.”²²⁶

Specifically, the orderliness consists of the fact that each “pro” or “con” can be identified with a larger rhetorical mode on any given point. For example, Kennedy shows that the individualist moral ethic of self-reliance consistently comes up against the altruistic ethic of sacrifice and sharing.²²⁷ The individualistic economic rhetoric of achieving the maximum public welfare through nonintervention consistently competes with the altruistic ethos of achieving equity through adjudication and intervention.²²⁸

In a subsequent work, *Freedom and Constraint in Adjudication: A Critical Phenomenology*,²²⁹ Professor Kennedy spells out his theory of legal reasoning in a different context.²³⁰ Focusing on the reasoning process of a hypothetical judge who perceives “a conflict between ‘the law’ and ‘how-I-want-to-come-out,’”²³¹ Kennedy portrays the judge as mentally canvassing a series of options: changing the rule, limiting the rule with a countervailing alternative rule, or using policy arguments to reinterpret the rule. Here, in discussing potential policy arguments, Kennedy explains:

The arguer can pick and choose from a truly enormous repertoire of typical policy arguments and modify what he finds to fit the case at hand. The arguments come in matched contrary pairs, like certainty vs. flexibility, security vs. freedom of action, property as incentive to labor vs. property as incipient monopoly, no liability without fault vs. as between two innocents he who caused the damage should pay, the supremacy clause v. local initiative, and so on.²³²

As Kennedy recognizes, much of his analysis would be as helpful to

225. *Id.*

226. *Id.*

227. *Id.* at 1751.

228. *Id.*

229. 36 J. LEGAL EDUC. 518 (1986).

230. In another work, *The Structure of Blackstone's Commentaries*, *supra* note 216, Kennedy does a careful textual analysis of Blackstone's 18th century *Commentaries on the Laws of England*. Kennedy, again focuses on the use of “rhetoric” in law. He attempts to show that the law, which Blackstone sought to portray as systematic and thematically coherent, is instead a battleground of conflicting principles. Blackstone's attempt at systematization is ultimately dependent on categorizations such as the “public/private” distinction, which categorizations Kennedy argues are, themselves, suspect. *Id.* at 215. In the end, asserts Kennedy, the various legal decisions all come down to a conflict between collective and individual self-determination. *Id.* at 211-13.

231. Kennedy, *supra* note 229, at 518.

232. *Id.* at 534.

potential advocates as to judges.²³³

I believe, and will endeavor to show, that Professor Kennedy's theoretical framework, once made intellectually accessible to the average attorney, can provide substantial assistance to the practitioner. In fact, Professor James Boyle, in *The Anatomy of a Torts Class*,²³⁴ has laid much of the framework for my enterprise by writing an excellent article demonstrating how the deconstructionist CLS approach can be used to teach a first year torts class.²³⁵ Boyle explains to his students:

There are three main techniques which you need to learn if you want to argue about rules or past decisions. The first is the technique of making both purposive and formalist arguments about the meaning of words or rules. The second is the technique of generating both broad and narrow rules from the same case. The third is the general technique of factual and legal manipulation. All three techniques can be learned and, with a little practice, applied to almost any legal dispute.²³⁶

Boyle distinguishes this approach from the nonprecedential approach of making policy arguments. Here, like Duncan Kennedy, he likens the policy arguments to mere pairs of clichés—always juxtaposed and loaded with normative implications.²³⁷ He breaks the policy arguments into five categories: arguments about “formal realizability” or “judicial administration” (firm rule v. flexible standard); arguments about “institutional competence” (whether courts are or are not the right body to resolve the dispute); “moral arguments” (e.g. freedom v. security or morality as form, such as keeping bargains, v. morality as substantive fairness); “social utility/deterrence arguments”²³⁸ (flexibility v. stability as the best mode of encouraging productivity); and “economic arguments” (assumptions of perfect competition v. obvious market imperfections such as transaction costs, social costs, irrationality, etc.).

233. *Id.* at 518, 522.

234. Boyle, *supra* note 18. Boyle expresses gratitude to Duncan Kennedy for both inspiring the article and also providing Boyle with his torts teaching materials. *Id.* at 1003, 1015 n.14.

235. It is not coincidental that Boyle, who has written one of the few articles applying abstract theory to practical problems, shares many of my views about legal scholarship and teaching. He observes that “if there is one issue on which there is general consensus among law teachers, it is that legal education is even sicker than legal scholarship. First year angst, second and third year burnout, not enough theory, not enough practical skills . . .” *Id.* at 1005. Like me, Boyle seeks to blend abstract theory with practical advocacy, complaining that “almost nobody writes about the peculiar fusion of abstract theoretical aims . . . and concrete classroom experiences . . .” *Id.* at 1003.

236. *Id.* at 1052.

237. *Id.* at 1056-60. While admitting that the use of categories “is a bad idea,” Boyle nonetheless asserts that they serve a valuable purpose. *Id.* at 1056.

238. Boyle admits that these “tend to intersect with moral and economic arguments.” *Id.* at 1058.

Boyle goes on to provide an example of how to use these various arguments to take a position in favor of or against creation of a legally protected interest in freedom from malicious and unfair competition. I will attempt to show how Kennedy's and Boyle's approach can be immensely useful to practicing attorneys, judges, and policymakers, as well as to law students.

A second aspect of CLS scholarship also examines law as part of a much broader social and political movement, but focuses particularly on the role of the lawyer or law professor given the ultimate connection between law and politics. For example, Peter Gabel and Paul Harris, in an article entitled *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*,²³⁹ discuss how a CLS lawyer should not only make legal arguments in court but should also focus on community and client empowerment, public relations, and political activism.²⁴⁰ Discussing particular cases, including the trial of the Chicago Eight,²⁴¹ Gabel and Harris provide specific suggestions for how the attorney should politicize her cases.²⁴² The authors further argue that seemingly non-political cases can and should be dealt with using broader political strategies as well.²⁴³

b. Insights for Lobbyist Opposing Legislation

The deconstructionist focus on law as rhetoric provides the lobbyist with a tool kit of possible types of policy arguments. Specifically, the lobbyist opposed to mandatory testing of newborns for HIV may look to the array of policy arguments discussed by Professors Duncan Kennedy, James Boyle, and others for assistance in developing her opposition to such testing.²⁴⁴

As outlined above, Professors Kennedy and Boyle set out five major categories of policy arguments that can generally (or perhaps always) be used on any given point: formal realizability; institutional competence; morality; deterrence or social utility; and economics. The lobbyist opposed to mandatory testing of newborns for HIV may use this

239. 11 N.Y.U. REV. L. SOC. CHANGE 369 (1982-1983).

240. *Id.* See also Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1087-88 (1970) (advocating political organization in conjunction with traditional legal defense).

241. *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

242. Gabel & Harris, *supra* note 239, at 380-81.

243. *Id.* at 389-94 (illustrating how seemingly nonpolitical cases often contain politically charged issues which, if identified and tied to interest groups, can bring about social change).

244. See Boyle, *supra* note 18, at 1056-63; Kennedy, *supra* note 215; Kennedy, *supra* note 229.

categorization of arguments to develop more policy arguments than may initially have sprung to mind.

First, in terms of *formal realizability* the lobbyist may argue that it is unfair, harsh, and overly rigid to force women to be tested (through mandatory testing of newborns) but not to force testing on fathers or, indeed, on any other members of society. That is, the lobbyist could argue that the mandatory testing of all newborns is both overly inclusive and underinclusive. It is overinclusive in that statistically many newborns, depending on their socio-economic background, are at essentially no risk of testing positive for HIV. It is underinclusive in that many other members of society are at much higher risk of testing positive than is the typical newborn. If the purpose of the mandatory testing is to reduce the spread of AIDS, society should only mandate testing, if ever, in situations where the testing is warranted by the specific circumstances. The lobbyist could also employ another favorite administrability technique—the “slippery slope” argument. Today the government proposes mandatory testing of newborns for HIV. What might the government try tomorrow? Mandatory testing of all persons? Mandatory testing of newborns for all possible diseases? Mandatory testing of newborns (or all persons) for all possible genetic proclivities?²⁴⁵

Second, in terms of *institutional competence*, the lobbyist can argue that mandatory medical testing should not appropriately be imposed by a state legislature. The lobbyist could argue that medical decisions, by their nature, are personal and fact specific, and should be left to the discretion of the patients and appropriate medical personnel, not legislated by a state. The lobbyist could further argue that if *any* legislative body were to impose the testing it should be the federal rather than a state government. Since, people and diseases can easily cross state lines, a state-by-state rule makes little sense.²⁴⁶

Third, as a matter of *morality* the lobbyist may argue that it is wrong to punish (through forced testing) a woman who may have done nothing inappropriate or immoral. Even if the woman ultimately tests positive it may be because she was duped into having sexual relations with a man who was HIV positive. Further, the lobbyist may argue a woman has a *moral right*, as a matter of privacy and personal control, to

245. The lobbyist favoring testing could make a formal realizability argument saying it is far easier, cheaper, and less invasive of privacy to test all newborns for HIV, rather than to attempt to impose tests merely in certain situations, or to convince parents of the need to have their children tested.

246. Equally, the lobbyist favoring testing could argue that a legislature, representing the majority's views, is precisely the best body to protect societal interests.

determine whether, when, and to what extent her HIV status should be revealed.

Fourth, as a matter of *deterrence and social utility* the lobbyist may argue that the mandatory testing will deter numerous women from obtaining prenatal care and thus prove counterproductive in terms of AIDS education and prevention. Women who fear testing, often those most likely to test positive, may either avoid prenatal care altogether or obtain such care from a state that does not mandate testing of pregnant women.²⁴⁷ Ultimately, the mandatory testing rule could, therefore, prove counterproductive by discouraging mothers from obtaining the prenatal care that could inform them as to the risks of HIV transmission and allow them to be tested on a voluntary basis.

Fifth and finally, in terms of *economics*, the lobbyist may argue that given the relatively low incidence of HIV, the cost of mandatory testing will far exceed the value of early detection. The lobbyist may further argue that dollars spent on mandatory testing could be better spent on education. Most generally, the lobbyist may argue that because mothers can be assumed to be rational people who love and value their children, there is no need to force them to be tested. Rather, such governmental interference is likely to create a market inefficiency.

Of course, one need not be a disciple of CLS to come up with these policy arguments. No doubt many good lawyers who have no knowledge or understanding of CLS could come up with many or even all of these arguments. Further, as presented, the arguments are somewhat superficial. To be powerful they would require some empirical or anecdotal substantiation. Nonetheless, the CLS approach to law is very valuable to the lobbyist in that by revealing the inevitably indeterminate nature of our system of law it empowers advocates to make arguments they might otherwise fail to see. Further, the CLS method provides an organized method that assists the advocate in quickly generating a series of policy arguments. Having identified the arguments to be made, the lobbyist can then collect more data to support the points. Although the lobbyist may be able to generate the arguments without the CLS method, CLS makes the task quicker and easier.

c. Insights for Plaintiff's Attorney Opposing Legislation

The plaintiff's attorney opposed to mandatory testing legislation

247. That is, those women who are in a high risk group, for example, because they use drugs or are partners of drug users, are the ones who may well shy away from procedures likely to subject them to mandatory testing. In making this assertion one need not presume that women in high risk groups care less about their children, but only that they respond rationally to the risks of discrimination and breach of confidentiality. See generally Sternlight, *supra* note 28, at 383.

may use the deconstructionist strand of CLS theory to help her generate the kinds of policy arguments already addressed above with respect to the lobbyist. The plaintiff's attorney may then work these policy arguments into her brief by making them part of her due process thesis that the legislation undercuts the mother's rights and does not serve a compelling government interest or meet a special need.²⁴⁸ That is, the plaintiff's attorney can use the policy arguments to help her show that upon balancing the woman's privacy interests against the government's interest in testing, the legislation fails under the Fourteenth Amendment.²⁴⁹ She will elevate the mother's interests with the morality and formal realizability arguments; she will attack the government's justifications with the economic efficiency, deterrence and institutional competence arguments.²⁵⁰ Again, while I would never try to argue that *only* a CLS devotee could come up with these arguments, I do believe that the theory can help an attorney generate more and better policy arguments more quickly than she otherwise would.

The plaintiff's attorney who is well-versed in the power calculus strand of CLS theory espoused by Peter Gabel and others, will look beyond the Fourteenth Amendment analysis to view law as part of a broader social and political movement.²⁵¹ This politicized attorney may therefore seek to organize a political opposition to the legislation and build coalitions of persons opposed to the legislation. This political activist may, for example, focus on the adverse impact on African Americans, Hispanics, and poor members of our society, that would likely be caused by mandatory testing.²⁵² That is, the supposedly benign testing subordinates those groups already most subordinated in our society. Even if the adverse impact would not support a claim of discrimination under the Constitution,²⁵³ the plaintiff's attorney might use this fact

248. See generally *id.* at 379-81. In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 634 (1989), for example, the Court held that mandatory drug and urine tests are permissible without a warrant or reasonable suspicion if the government can point to special or compelling interests. Similarly, in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989), the Court found that once the government establishes a special need for the information sought, the courts must look only to whether the public interest in drug testing outweighs personal privacy interests.

249. The attorney could use these arguments to support her position that the legislation fails both because it infringes on the penumbra of privacy rights and because it violates the Fourth Amendment. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

250. See *supra* text accompanying notes 218-39.

251. See *supra* text accompanying notes 240-47.

252. See, e.g., Taunya L. Banks, *Women and AIDS—Racism, Sexism, and Classism*, 17 N.Y.U. REV. L. & SOC. CHANGE 351 (1989-90).

253. See, e.g., *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that to establish discriminatory purpose in violation of the equal protection clause a plaintiff must show that the policy was selected because of, and not just in spite of, its adverse impact); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

to generate political opposition to the legislation in the community. Similarly, the politically active plaintiff's attorney may focus on the presumption upon which mandatory testing legislation would impliedly be based: Why don't we trust mothers to have their newborns tested if such testing is in their newborns' best interest? Do we trust women less than men? Do we trust women who are members of minority groups less than white women? Why is the statute geared to *mandate* testing rather than to encourage testing through better education, protection of confidentiality, and protection against discrimination? These kinds of social/political issues might help the plaintiff's attorney to organize groups of mothers, obtain assistance from already organized groups such as the NOW or the NAACP, and to galvanize public opposition. On the other hand, the attorney who remains narrowly rooted in the legal doctrine will miss out on these opportunities.²⁵⁴

In sum, the CLS perspective offers both lobbyist and plaintiff's attorney some tools or arguments they might not otherwise have used.

3. LAW AND ECONOMICS

a. Discussion of the Theory

The theory of "law and economics" applies the insights of microeconomic theory to legal problems and policy decisions. Accepting the premise that humans usually act as "rational" beings who seek to maximize their utility by obtaining as many benefits as possible (subject to their budgeting constraints), the theory examines legal issues in terms of such phenomena as supply and demand, incentives, and costs and benefits.²⁵⁵ At a more advanced level, many adherents of the law and economics approach seek to take into account situations in which the free market will not necessarily yield an optimal result—such as where there is a lack of full information, where there are externalities or public goods at issue, or where there is an unequal initial distribution of goods.²⁵⁶ Law and economics analysis has been applied to an extremely broad array of subject areas including, but certainly not limited to, con-

254. At a minimum, the doctrinally rooted attorney would define such activities as extrinsic to her professional role.

255. See generally ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (1988); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

256. One of the earliest and still best articles discussing these issues in a legal context is Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

tracts,²⁵⁷ torts,²⁵⁸ corporate law,²⁵⁹ criminal law,²⁶⁰ family law,²⁶¹ land use,²⁶² and AIDS and the law.²⁶³

b. Insights for Lobbyist Opposing Legislation

Before commencing this analysis it is important to observe that solid law and economics analysis requires empirical work as well as arm chair analysis. As Professor David Charny points out in his review of Professor Philipson's and Judge Posner's book on AIDS, any trend at all, upward or downward, can be consistent with economic theory, depending on the values assigned to certain variables and depending, as economists would say, on the shape of the curves.²⁶⁴ Nonetheless, I will not attempt to engage in empirical analysis here, but will instead simply lay out arguments that could ultimately be subjected to empirical testing.

A lobbyist opposing mandatory testing of newborns for HIV based on law and economics arguments could break the analysis into two portions. First, the lobbyist could argue that the added government regulation is unnecessary in that the free market will assure an optimum level of testing of newborns.²⁶⁵ To support this argument the lobbyist will point out that mothers can be assumed to love their children and that mothers will therefore *voluntarily* have their children tested where the test is in the child's best interest.²⁶⁶

257. E.g., Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980).

258. E.g., Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

259. E.g., Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985). Most academic writing and teaching in the corporate law area is now based at least in part on law and economic analysis. See generally WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* (5th ed. 1993); ROBERTA ROMANO, *FOUNDATIONS OF CORPORATE LAW* (1993).

260. E.g., Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232 (1985).

261. E.g., GARY S. BECKER, *A TREATISE ON THE FAMILY* (1981); RICHARD A. POSNER, *SEX AND REASON* (1992); Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35 (1978). Cf. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

262. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

263. TOMAS J. PHILIPSON & RICHARD A. POSNER, *PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE* (1993); David Charny, *Economics of Death*, 107 HARV. L. REV. 2056 (1994) (reviewing and critiquing the Philipson and Posner analysis).

264. Charny, *supra* note 263, at 2059.

265. Actually, the lobbyist need not show that the free market result is a *perfect* result, but only that it is preferable to the result that would occur under the regulation.

266. The mother might or might not have the child tested depending on such factors as the accuracy of the test, the likelihood the child would benefit from her status being known (e.g. due to the availability or absence of a cure), and the cost of the cure in terms of money and potential

Advocates of testing will respond, however, that where the mother's own HIV status will be revealed through the testing of the child, we cannot presume that the mother will act in the child's best interest at the expense of her own. To counter such arguments the lobbyist opposing testing may also argue that the mandatory testing would, given economic analysis, be counterproductive. By imposing a mandatory test the government would be increasing the "cost" imposed on a mother seeking medical services in connection with her pregnancy and delivery. That is, the mother who opposed testing could seek to avoid it by avoiding pre or post-natal medical treatment that would bring her to the attention of the authorities. Thus, to escape testing, at least some mothers would avoid medical treatment altogether by delivering the child outside of a medical facility, thereby potentially inflicting even greater harm on the child and on society as a whole.

The lobbyist opposing mandatory testing would also use economics to argue that mandatory testing is not an efficient means of preventing illness due to HIV. The lobbyist would compare the cost of mandatory testing for all mothers to the likely benefit achieved from detecting a few more cases of childhood HIV. The lobbyist would also argue it would be cheaper and more effective to spend government money on providing better information to prospective mothers, thereby encouraging them to obtain testing voluntarily, than on a mandatory test.

Of course, none of these arguments are the exclusive property of adherents of law and economics. However, those well-versed in law and economics will likely be better able to generate these and other economics-related arguments than those less familiar with the field.

c. Insights for Plaintiff's Attorney Opposing Legislation

The plaintiff's attorney who is well-versed in law and economics will use economic arguments to show that the legislation lacks a sound policy foundation and is thus unconstitutional. Specifically, the plaintiff's attorney will challenge the statute on the grounds that it effectively mandates a nonconsensual search of the mother, violates the mother's privacy rights, and unconstitutionally discriminates between victims of HIV and other viruses. The defendant will respond that nonconsensual blood tests are permissible, notwithstanding any Fourth Amendment privacy interests, so long as they are supported by special or compelling interests. The defendant will further argue that the distinction drawn between HIV and other viruses is constitutional, so long as it is rational.

At this point the law and economics educated plaintiff's attorney

discrimination. This analysis also assumes that the mother possesses accurate information about the advantages and disadvantages of the test.

will use her economics to argue that the statute is very unwise, and thus not supported by a compelling interest and not even rational. Specifically, the plaintiff's attorney will make many of the same policy arguments outlined above for the lobbyist. She will argue that the mandatory testing statute is unnecessary given the mother's existing incentives, that it would cost more than it would produce in benefits, and that it would give mothers incentives to avoid professional medical assistance. Given all of these problems, the plaintiff's attorney would assert the statute lacks a rational basis and can not withstand constitutional scrutiny.

4. FEMINIST LEGAL THEORY

a. Discussion of the Theory

Feminist legal theory is quite diverse. While feminist theorists share certain views and approaches, such as a focus on women and an antipathy to patriarchy and the subjugation of women,²⁶⁷ it is impossible to summarize feminist theory as a single unified body. Instead, drawing on the foundational works of Alison Jaggar²⁶⁸ and others, I will attempt to summarize some of the particular schools of feminist thought.²⁶⁹ I will also take note of the substantial body of work focusing on feminist methodology, and discuss how it relates to my own jurisprudence of applications.

After summarizing certain feminist legal theories I will then show how several particular feminist insights might prove useful to a litigator or policymaker opposed to mandatory testing of newborns for HIV. A number of feminist theorists have recently, and quite consciously, focused on applying their works to both theory and practice.²⁷⁰ I will build upon these books and articles.

"Liberal" feminists derive their name from the classic liberal philosophy of John Stuart Mill, Harriet Taylor Mill, Mary Wollstonecraft, and others.²⁷¹ The basic contention is that men and women are equal

267. See *Introduction to FEMINIST JURISPRUDENCE* 3 (Patricia Smith ed., 1993) ("The rejection of patriarchy is the one point on which all feminists agree.").

268. ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983).

269. Even within the various schools of theory, feminists disagree on numerous issues. Therefore, I again warn that my summary cannot do full justice to the theory.

270. See, e.g., COLKER, *supra* note 18; Fineman, *supra* note 18, at 25-26 (calling for scholarship that would connect "grand theory" and "personal narratives"); Goldfarb, *A Theory-Practice Spiral*, *supra* note 18; MacKinnon, *supra* note 17; Schneider, *supra* note 18; Woodhouse, *supra* note 18.

271. See, e.g., HARRIET T. MILL, *Enfranchisement of Women*, in *ESSAYS ON SEX EQUALITY* 89 (Alice S. Rossi ed., 1970) (advocating not only suffrage but also equal access to education, employment, and political life); JOHN S. MILL & HARRIET TAYLOR, *Early Essays on Marriage and Divorce*, in *ESSAYS ON SEX EQUALITY*, *supra*, at 65; MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMEN* (Carol H. Poston ed., 2d ed. 1988) (1792) (advocating equal education).

and should be treated equally and provided equal access to the public sector. More controversially, liberal feminists believe that just as women should not be restricted from access to certain jobs or education, similarly, they should not receive special benefits because of their gender.²⁷² Rather, the individualistic doctrine calls for equal access, equal rights, and equal freedom.²⁷³

The "relational" or "cultural" feminists dispute the "liberal" position that women and men are, and should be, treated the same. Greatly influenced by the educational psychology enunciated by Carol Gilligan's *In a Different Voice*,²⁷⁴ the relational feminists contend that men and women interact with the world around them based on very different moralities.²⁷⁵ Whereas the male morality focuses on what Gilligan calls "the ethic of justice" based on abstract rules, principles, and rights, the female morality is instead based on an "ethic of care." This female ethic centers on concrete relationships, concern for others, and responsibility. In one application of this view, theorist Leslie Bender speculated on the differences that might exist in tort law were it based on the female rather than the male moral view of the world.²⁷⁶ Robin West has argued that essentially all of our jurisprudence would look very different if it were based on a relational rather than an individualist conception of human nature.

"Radical" feminists, such as Catharine MacKinnon,²⁷⁷ also challenge the view that men and women are essentially the same and should

See generally JAGGAR, *supra* note 268, at 27-50, 173-206 (discussing liberal feminists' theories of human nature and of politics).

272. See, e.g., Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 380 (1984-1985) (women should not receive special benefits based on pregnancy, such as maternity leave, unless special benefits are also afforded to comparably disabled men). Cf. ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* 1 (1988) (critiquing the liberal position).

273. Robin West argues that the liberal individualist approach is itself masculine. She argues that a truly feminist theory would emphasize connection, rather than separation. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2-3 (1988).

274. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

275. See, e.g., NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978) (suggesting that women's world view is more connected to others than is men's); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

276. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 33-36 (1988) (arguing, for example, for a rule establishing a duty to rescue to replace our current no-duty rule).

277. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter *MACKINNON, FEMINISM UNMODIFIED*]; CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter *MACKINNON, TOWARD A FEMINIST THEORY*].

be treated as such.²⁷⁸ As MacKinnon puts it, sex discrimination is not about difference or sameness but rather about dominance:

[A]n equality question is a question of the distribution of power. Gender is also a question of power, specifically of male supremacy and female subordination. The question of equality, from the standpoint of what it is going to take to get it, is at root a question of hierarchy, which—as power succeeds in constructing social perception and social reality—derivatively becomes a categorical distinction, a difference.²⁷⁹

According to the radicals, patriarchy or male dominance permeates every aspect of our society. It is both foolish and impossible to seek to “equalize” jobs or benefits for women as long as the basic patriarchal structures continue to exist.

Yet, these sex-based differences are so pervasive as to be virtually unrecognizable. As radical feminist Shulamith Firestone put it: “Sex class is so deep as to be invisible.”²⁸⁰ Specifically, the radicals focus on the way in which such institutions and phenomena as marriage, child-raising, pornography, and battering result in the subordination of women.²⁸¹

Despite their fundamental differences, liberal, relational, and radical feminists share certain methodologies. An increasing number of feminists have begun to emphasize the “anti-essentialist” point that it is wrong to group all women together, thereby ignoring key distinctions based on race, class, ethnicity, and sexual preference. They argue that in grouping all women together some theoreticians implicitly assume that all women are white, middle class, middle aged, non-disabled, and heterosexual.²⁸²

More fundamentally, feminists tend to emphasize an experiential analysis.²⁸³ Rather than working top-down, by first formulating and then applying abstract theories and concepts, feminists generally build their analyses from the ground up.²⁸⁴ Relying on such methodologies as

278. See generally JAGGAR, *supra* note 268, at 83-122, 249-302 (discussing radical feminists' theories of human nature and of politics).

279. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 277, at 40.

280. SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* 1 (1970).

281. See generally ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1979); MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 277; MACKINNON, *TOWARD A FEMINIST THEORY*, *supra* note 277.

282. See, e.g., Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 *BERKELEY WOMEN'S L.J.* 191, 206 (1989-1990); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990).

283. See, e.g., Deborah L. Rhode, *Feminist Critical Theories*, 42 *STAN. L. REV.* 617, 619-21 (1990).

284. Katharine Bartlett observes that feminists both ground their theories in practical problems

consciousness-raising²⁸⁵ and narrative scholarship,²⁸⁶ feminists often try to tie their work closely to the experiences of real women.

Clearly my own jurisprudence of applications shares with the feminists a concern with the real world. However, whereas most feminist analysis tends to emphasize development of the theory itself, my own focus is primarily on the application of the theory, once developed, and on adequately communicating the theory to legal practitioners. Thus, I see the two approaches as related and complementary, but not the same.

b. Insights for Lobbyist Opposing Legislation

Feminist legal theory provides the insight that women should not be subordinated or treated as inferior to men.²⁸⁷ Nor should women be treated as mere vessels made for carrying unborn children.²⁸⁸ Lobbyists opposed to mandatory testing of newborns for HIV might use this argument to bolster their position that, at least absent a very clear benefit to the children, testing should not be imposed. Requiring the testing of newborns without regard for its effect on mothers, is effectively saying that mothers must endure any hardship that might possibly prove beneficial to the child. In other words, society is treating the woman as an incubator and mother, rather than as a person in her own right.

A number of feminists have spelled out similar arguments in discussing abortion. Sylvia Law, for example, has argued that anti-abortion laws effectively force women, but not men, to bear the burdens of an unwanted pregnancy, thereby imposing an inferior status on women.²⁸⁹ Frances Olsen argues that "[t]reating a fetus as morally equivalent to a child . . . is yet another example of society's tendency to devalue the

and further rely on "practical reasoning." Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 850 (1990).

285. Catharine MacKinnon has called consciousness raising "the major technique of analysis, structure of organization, method of practice, and theory of social change of the women's movement." Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515, 519 (1982) (footnote omitted).

286. See, e.g., WILLIAMS, *supra* note 47; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

287. Liberal feminists, radical feminists, relational feminists, and socialist feminists all share this view. The radical feminists place the greatest emphasis, however, on abolishing institutions that subordinate women. They also focus on revealing how certain seemingly commonplace assumptions reflect society's sexist attitudes. See *supra* notes 281-85 and accompanying text.

288. In *PREGNANT MEN*, Professor Ruth Colker analyzes in detail the closely related question of how society should treat pregnant women. COLKER, *supra* note 18. She concludes that "[t]he challenge for feminists is to get society to view women's reproductive capacity *accurately and compassionately* rather than to insist that it is irrelevant in women's lives." *Id.* at 165. Thus, she compares the way pregnant women are treated to the way men are, or would be, treated in the most closely analogous situations such as surrogate parenthood.

289. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1014 (1984).

work that women do. . . . [and that] [p]rohibiting abortion denigrates women as moral decisionmakers, and it reinforces their role as sexual objects"²⁹⁰ While the abortion context can be distinguished on the ground that a newborn, unlike a fetus, is indisputably a person, the gist of the argument is really the same: women should not be treated as mere incubators for their children.²⁹¹

Lobbyists opposed to mandatory testing might also draw on the anti-essentialist position taken by many modern feminists.²⁹² Specifically, they could argue that while purporting to treat all women the same, the mandatory testing in fact has a far more detrimental impact on poor women and women of color. Assuming the mandatory testing were done on a state by state basis, it would be imposed most frequently on those women who, due to poverty, could not avail themselves of the local laws by "escaping" to a state that did not impose testing. Even if mandatory testing were done nationally, its effects would likely be harshest on those poor women who, for example because they rent, would face eviction if their status were revealed. Poor women and women of color will also be affected disproportionately because they are disproportionately HIV infected.²⁹³

This anti-essentialist approach is advocated, for example, by Professor Ruth Colker. She argues that the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁹⁴ striking down a spousal notification requirement but upholding a twenty-four hour waiting period in abortion cases, reflects an essentialist approach to women and is therefore discriminatory. She states:

The Court understood the problem of violence in the private sphere for pregnant married women, who are disproportionately older, white, and middle class, but did not understand this problem for pregnant unmarried women, who are disproportionately younger, disproportionately African-American, and poor. Thus, the Court in *Casey* overturned the spousal notification requirement but did not overturn the waiting period requirement. This blindness on the part of the Court is a reflection of the essentialist perspective that the Court uses

290. Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 120-21 (1989).

291. Although the fetus is arguably not a person, some might contend that the state has stronger grounds for prohibiting abortions than for mandating testing for HIV. Whereas a successful abortion will definitely prevent the birth of a child, determining that a newborn is HIV positive may not lead to any increase in the quality or length of the child's life. See Sternlight, *supra* note 28, at 374.

292. See *supra* text accompanying notes 282-85.

293. Taunya L. Banks, *The Americans with Disabilities Act and the Reproductive Rights of HIV-Infected Women*, 3 TEX. J. WOMEN & L. 57, 360-61 (1994).

294. 505 U.S. 883 (1992).

when considering the reality of women's lives.²⁹⁵

That is, whereas the twenty-four hour waiting period might not impose a hardship on a middle class woman, it might make abortion impossible for a poor woman who had already traveled far from home and given various excuses for her absence to her employer and others. Policy makers who are particularly concerned about the welfare of poor women and women of color may be swayed by these arguments. At a minimum, familiarity with feminist analysis would better prepare the lobbyist to confront a potentially patriarchal legislature.

c. Insights for Plaintiff's Attorney Opposing Legislation

Feminist theory offers the plaintiff's attorney opposed to mandatory testing the insight that arguing based on principles of equality may be more successful than arguing based on privacy or due process. A number of feminists have observed that privacy arguments can be troubling in that "the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor; has preserved the central institutions whereby women are *deprived* of identity, autonomy, control and self-definition"²⁹⁶ Thus, in the area of abortion, for example, a number of commentators have urged that restrictions on abortion violate the equal protection clause.²⁹⁷ Similarly, the attorney opposed to mandatory testing of newborns might choose to fight the measure on equal protection rather than privacy grounds.

A plaintiff's attorney opposing the mandatory testing on equal protection grounds might look to feminist theories of equality or antisubordination for support. However, as Professor Ruth Colker eloquently discusses in *Pregnant Men*,²⁹⁸ the attorney attempting to present such arguments faces two major doctrinal hurdles: *Geduldig v. Aiello*,²⁹⁹ in which the Supreme Court held that discrimination on the

295. COLKER, *supra* note 18, at 91.

296. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 277, at 101; *see also* Olsen, *supra* note 290, at 111-14.

297. Olsen, *supra* note 290, at 118 (citing articles by various authors). Olsen further argues that the Court itself has begun to recognize a gender dimension to the abortion debate. *Id.* at 117.

298. *See* COLKER, *supra* note 18, at 129-30.

299. 417 U.S. 484 (1974). In ruling that a state run disability plan that denied coverage to pregnant women was not unconstitutional the Court stated:

While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.

Id. at 496 n.20.

basis of pregnancy is not on its face intentional sex discrimination;³⁰⁰ and *Massachusetts v. Feeney*,³⁰¹ holding that in order for a plaintiff to show a law is unconstitutionally discriminatory on the basis of sex, plaintiff must show that the statute was adopted because of, and not merely in spite of, its adverse impact on women.³⁰² Feminist theories may offer a route around or over the doctrinal hurdles created by *Geduldig* and *Feeney*. *Geduldig* poses a roadblock to those who espouse a liberal feminist view of equality. Whereas the liberal feminists depend on an argument that women are essentially the same as men,³⁰³ the Supreme Court has found that the ability to become pregnant is a difference that justifies different treatment. However, the feminist can attempt to distinguish *Geduldig* by using radical feminist theory opposing the subordination of women by men. Specifically, rather than arguing that women and men are identical, the attorney could argue that the mandatory testing legislation would not have been imposed if it would have revealed the HIV status of the father, and not just the mother.³⁰⁴ That is, the attorney would argue that the differences between men and women do not justify the social subordination of women.

One tack plaintiff's counsel might take to present this argument doctrinally would be to emphasize the Court's recent decision in *International Union v. Johnson Controls, Inc.*³⁰⁵ In that case the Court, overruling both the trial court and the court of appeals, held that pursuant to Title VII,³⁰⁶ and the Pregnancy Act of 1978³⁰⁷ it was impermissible for the employer to exclude from the workplace women who were or might become pregnant in order to protect their potential unborn children. The

300. Technically, one could try to distinguish *Geduldig* with the argument that mandatory testing is not being applied to pregnant women but rather to women who have just given birth. Nonetheless, it is likely that the Court would reach a similar conclusion: a mere focus on persons who have just given birth is not sex discrimination. If the plaintiff could convince the court that discrimination based on childbirth was sex discrimination the statute would be entitled to "intermediate" level scrutiny and would be upheld only if the state could demonstrate that the statute served an important governmental interest and was substantially related to that objective. See *Craig v. Boren*, 429 U.S. 190, 197 (1976). Otherwise, the statute would be reviewed under a mere "rational basis" test.

301. 442 U.S. 256 (1979).

302. *Id.* at 279. The Court found that only those statutes that discriminate intentionally are unconstitutional. While the plaintiff's attorney might also conclude, based on her theoretical analysis, that the prevailing Supreme Court cases are flatly wrong and ought to be overruled, I will focus primarily on how the attorney might attempt to use her theory to win *within* the constraints of existing doctrine.

303. See *supra* text accompanying notes 275-77.

304. But cf. Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 35 n.129 (1992) (arguing that counterfactual hypotheticals are not useful).

305. 499 U.S. 187 (1991).

306. 42 U.S.C. § 2000e (1988).

307. 42 U.S.C. § 2000e(k) (1988).

Court explained: "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."³⁰⁸ In other words, the Court found that it was inappropriate to treat the woman as a mere vessel holding the life of her potential unborn child.³⁰⁹ While *International Union* is a Title VII employment discrimination case, and thus not immediately applicable in this nonemployment context, it supports plaintiffs' position that women must not be subordinated based on their reproductive status.³¹⁰ *International Union* recognizes the arguably radical position that the mere possession of female reproductive organs cannot justify social exclusion and oppression.

Plaintiff's counsel may use feminist anti-essentialist theory to support a second equality argument in opposition to the mandatory HIV testing. Plaintiff's counsel could argue that the statute must be examined in terms of its detrimental impact on those women least able to cope. The HIV virus has been shown to disproportionately affect poor women and women of color.³¹¹ Those same women, once revealed to be HIV infected by the mandatory testing of their newborns, would be vulnerable to discrimination with respect to employment, housing, insurance, medical care, and other benefits. Yet, no men would be so endangered by the mandatory testing. Plaintiff's counsel could use these facts and arguments to claim intentional sex discrimination.³¹²

In other words, even if the statute might be found constitutional as

308. 499 U.S. at 211.

309. The petitioners and amici curiae emphasized in their briefs that the employer's policy of excluding all potentially fertile women from the workplace was based on a stereotype that "women are marginal workers whose economic importance and need for employment is necessarily subordinate to their child bearing role." Brief for Petitioner at 24, *International Union* (No. 89-1215). Petitioners further observed that the employer's "logic" would "permit employers to exclude all fertile women from almost all nonsedentary jobs and many other positions as well." Reply Brief for Petitioners at 5, *International Union* (No. 89-1215).

310. *But cf.* *Rostker v. Goldberg*, 453 U.S. 57, 76 (1981) (holding that it is constitutional to apply military draft to men but not to women because women are intrinsically not combat ready); *Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977) (deciding that it is legitimate to exclude women from positions in men's maximum security prison based on possibility women might be raped, which the Court labeled as a vulnerability essential to womanhood).

311. Banks, *supra* note 293, at 360-61.

312. See generally Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989) (arguing that African-American women should be viewed as a distinct group, separate from either the group of all women or the group of all African-Americans, and that this group should be allowed to prevail on a discrimination claim even where the two larger groups could not). Admittedly, it may be tough to convince the current Court that these actions evidence intent. See Eric Schnapper, *Two Categories of Discriminatory Intent*, 17 HARV. C.R.-C.L. L. REV. 31 (1982) (advocating a broadening of the concept of intent).

applied to white middle class women, it should be found unconstitutional as applied to poorer members of society. Professor Ruth Colker used just such an argument in the amicus brief she drafted in *Barnes v. Moore*,³¹³ a Fifth Circuit Court of Appeals case on the constitutionality of a mandatory twenty-four hour waiting period in abortion cases. Colker argued that the waiting period would have a particularly detrimental effect on women who were poor, adolescent, involved in abusive relations, or disabled.³¹⁴ Such women would be least able to arrange the minimum of two visits to an abortion clinic necessitated by the waiting period. Again, the point is that even if some (white, upper middle class) women might be able to cope with the waiting requirement, the statute is unconstitutional as applied to the many women who are not as privileged. Although the arguments failed in *Barnes*,³¹⁵ it may well be accepted by another court or in another context.

Finally, the plaintiff's attorney might attempt to use her feminist arguments to convince the Court to reverse its earlier ruling in *Feeney* and/or *Geduldig*. Yet, while feminist antistatutory theories, for example, certainly favor the reversal of both cases, this does not seem a particularly fruitful approach given the Court's current composition.

5. CONCLUSIONS AS TO THE PRACTICAL VALUE OF LAW AND ECONOMICS, CRITICAL LEGAL STUDIES, AND FEMINIST THEORY

Through my examination of the HIV hypothetical I have attempted to demonstrate that each of the three abstract theories provide practical insights for both lobbyists and litigators. However, it is not critical to my general argument that each and every component of these analyses be accepted. No doubt each reader will find certain of my specific arguments are less convincing than others.

Nonetheless, I may have succeeded in my mission. My goal was not to dispositively prove the unconstitutionality (or even undesirability) of mandatory testing of newborns for HIV. To do so I would certainly have had to try to muster some empirical data in support of my arguments. Rather, I sought only to provide the insight that abstract theories can and should have practical applications. In fact, if, through the critiquing of my presentation and analysis, better ways to apply these or other abstract theories are conceived, then I am delighted. The whole

313. 970 F.2d 12 (5th Cir. 1992).

314. See COLKER, *supra* note 18, app. at 215 (copy of amicus brief).

315. The Fifth Circuit upheld the statute as constitutional within hours of the oral argument. *Id.* at 28.

point is to encourage others to see and explicate the possible practical value of abstract theory.

C. *The Need to Develop a Jurisprudence of Applications*

Great optimists may believe that the mere recognition of the relevance of abstract legal theory to the nuts-and-bolts practice of law will mend the rift between theory and practice. Law professors will be able to teach abstract theory to their hearts' content; law students will absorb the theory; and ultimately, the law students will go on to become legal practitioners who can use abstract theories to solve practical problems.

Unfortunately, little in life, or certainly legal education, is so simple. Not *all* abstract theories devised by law professors are necessarily useful to the real world of law practice. Even if inspired by a real world event, some theories may prove to have no practical relevance whatsoever in that the proposed solutions will simply never be accepted.³¹⁶ Further, even where an abstract theory *can* be relevant to legal practice, the relevance of such abstract theory will not always be readily apparent. Rather, a jurisprudence of application must be developed to connect abstract theory to the world of practice. Theorists must not simply produce grand works and then place all the burden of an application on practitioners. Instead, they must *show* the student and practitioner how the theory can help them in their daily tasks.

A few legal academics have already recognized the crucial need for a jurisprudence of applications. For example, Harry H. Wellington, former Dean of Yale Law School, argued in 1987 that potentially valuable academic work has less influence than it should because "too few [academics] are doing the applied work that should be an important part of the mission of law schools."³¹⁷ Feminist theorists including Ruth Colker and Elizabeth M. Schneider have recognized the need for a link between feminist theory and practice, and also attempted to develop such a link

316. See generally Farber, *The Case Against Brilliance*, *supra* note 149; Farber, *Brilliance Revisited*, *supra* note 149 (criticizing theories that, while clever, contribute little to the solution of real world problems).

317. Wellington, *supra* note 199, at 329; see also Wellington, *supra* note 7. Somewhat similarly Paul Carrington, former Dean of Duke University School of Law, has argued that in order to have more influence in the real world, legal scholarship should follow the path of the physical sciences by limiting its sights and emphasizing work that "rediscovers reality", as opposed to focusing primarily on "transcendent" scholarship. See Carrington, *supra* note 24, at 803. But, Carrington seems less sure than Wellington that the abstract theory can itself have practical value. *Id.* at 802 (Legal academics face "an unwelcome reality that there is often a choice to be made between work that can and may be applied usefully to current public issues and work that is intellectually more ambitious, more personally gratifying, and more likely to win recognition among academicians.").

in their work.³¹⁸ Moreover, as discussed earlier, the Carnegie Foundation's *Boyer Report* concluded in 1990 that academics throughout higher education need to work toward developing more applications-oriented scholarship.³¹⁹

I believe the absence of a real commitment to a jurisprudence of applications within legal academia today helps explain many otherwise puzzling contradictions. The absence of a discipline *connecting* theory and practice helps explain why, even given academia's recognition in principle that law schools should serve practitioners, students and practitioners find that much of what academia has to offer is irrelevant. The absence of a jurisprudence of applications also helps explain why theory and practice seem to be moving further apart, even as many academics and practitioners recognize that the two ought to be integrated.

VI. POLICY CONSEQUENCES OF THE SYMBIOTIC RELATIONSHIP BETWEEN THEORY AND PRACTICE

While I believe that both academics and practitioners need to work on developing interconnections between theory and practice, I hold academics more responsible than practitioners for developing the jurisprudence of applications. Academics have both the understanding of theory and the time necessary to develop applications. Practitioners may well have neither.

A. *Academia's Role in Developing a Link Between Theory and Practice*

1. CONSEQUENCES FOR TEACHING

Legal academics should work toward developing a link between theory and practice in their teaching by first providing students with theoretical insights and then also taking the next and, often quite difficult, step of showing them how the theory can effectively be used by a practitioner.³²⁰ Thus the first step a professor or school must take to forge the link between theory and practice is to teach theory, and not just

318. COLKER, *supra* note 18; Schneider, *supra* note 18. Schneider writes that her article, a nuts-and-bolts guide on representing battered women which draws upon feminist theory, was inspired by her "sense of disconnection between the two dimensions of [her] own work, feminist theory and feminist practice." *Id.* at 521. See also Fineman, *supra* note 18 (positing that feminist scholars should seek to fill the gap between "grand theory" and personal narratives); Schneider, *supra* note 200 (urging need for greater link between theory and practice in teaching civil procedure).

319. See *supra* text accompanying notes 103-06.

320. But see Reingold, *supra* note 161, at 2007 (suggesting that given where law schools are going, the integration of theory and practice is more likely to come from the students, and move upward to the professors, than from professors down to students).

focus on "black letter law" or doctrine. Schools may find it efficient to teach a number of alternative theoretical perspectives simultaneously, perhaps in a first year jurisprudence course.³²¹ Whether or not such a course is taught, individual professors should provide students with theoretical perspectives relevant to their courses.

Next, the school or teacher that provides theoretical perspectives must also show students how these perspectives can be applied in practice.³²² Assuming, for example, that a teacher chooses to use a law and economics approach and/or a feminist theory approach to help the students gain new insights about family law, that professor should also show the students how those types of arguments can be used by a litigator, judge, lobbyist, or legislator handling certain specific family law issues. Developing the connections between theory and practice is difficult,³²³ and thus very valuable.³²⁴ Students cannot be expected to develop such a jurisprudence on their own.³²⁵ Professors must help by at least providing students with real and concrete examples of how the particular theory can be applied.³²⁶

Professors may find it effective to use a problem-oriented or transactional teaching method,³²⁷ at least for a portion of the course, to give

321. Some schools are already teaching such courses. A new text has recently been written for use, *inter alia*, in the first year of law school. BAILEY KUKLIN & JEFFREY W. STEMPEL, *FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER* (1994).

322. *E.g.*, BOYER, *supra* note 103, at 77 (concluding that in academia generally there is a greater need for applied work which builds bridges between theory and practice); JANUS, *supra* note 196, at 463 (claiming the great value of clinical education is that, as all legal education should, it links theory, practice, and values). As stated, some professors and schools are already attempting to blend theory and practice. *See, e.g.*, WOODHOUSE, *supra* note 18, at 1982-85 (describing authors attempt to blend theory and practice in a course entitled "Child, Parent, and State"); Tapes of Workshop on the Transactional Approach to Law, *supra* note 118 (On tape six, Professor Victor Goldberg of Columbia describes the course he teaches integrating and applying law and economics concepts to deal making.).

323. *See* ELSON, *supra* note 113, at 351 (educating students for practice can be more complex than teaching pure theory).

324. *See generally* WELLINGTON, *supra* note 7, at 5 ("[T]oo few are doing the applied work that should be an important part of the mission of law schools.").

325. *Cf.* POSNER, *supra* note 163, at 1927 (although much interdisciplinary scholarship is potentially valuable, much of it is bad in that it is not comprehensible to its audience—students); JAMES J. WHITE, *Letter to Judge Harry Edwards*, 91 MICH. L. REV. 2177, 2183 (1993) (maintaining that students don't benefit from a lot of heavy theory because they "do not have the intellectual enzymes to transform these abstract ideas into digestible, intellectual food. . . . The teacher sees manifold opportunities to apply his theories in other courses, but the students cannot see beyond the horizon that consists of a merciful escape from the torment of theory.").

326. WELLINGTON, *supra* note 199, at 329 (more law professors should do applied work). In order to assist professors in bridging the theory/practice gap, one former judge suggests that professors take periodic sabbaticals to work in a law office. EDWARD D. RE, *Law Office Sabbaticals for Law Professors*, 45 J. LEGAL EDUC. 95, 97 (1995).

327. *See supra* note 118 and accompanying text. Professor Blasi observes:

The insights of cognitive science provide additional support for considering a

students an opportunity to apply some of the theories they have learned.³²⁸ Law school teachers may also find it effective to broaden the scope of their teaching to include not only analysis of appellate cases but also some discussion of other legal skills such as fact-gathering, developing lawyer/client relationships, reviewing actual legal documents, and choosing between various alternative solutions to legal problems.³²⁹ By so broadening the scope of their courses professors may find it easier to show students how various legal theories can help the students be effective in as lawyers. Professors who not only teach theory, but also teach students how theory can be applied, will likely find both that student interest in the theory is enhanced, and that student understanding of the theory is improved.³³⁰ I also believe that by teaching students how to apply theory professors will help students happier with their law school experience. Too often those students who are least familiar with theoretical approaches find the most theoretical course tortuous and highly damaging to their self-esteem. Combining theory with practice would provide a more validating experience to those students who have strong interpersonal or practical skills but lack a background in theory.

Legal academics should also work to enhance the connection between theory and practice by changing their expressed negative attitudes towards practice and even teaching. Academics, in their teaching, mentoring, and scholarly capacities, should cease making comments that lead students to see theory and practice as conflicting with one another. Instead, academics should attempt to help students see those disciplines as symbiotically supportive. Similarly, academics should cease disparaging practice and practitioners. Too many academics, consciously or not, encourage students to see legal practice (to which most of the students are headed) as an intellectual wasteland.

problem-based curriculum more analogous to the curricula now being widely adopted in medical education, a "case method" closer to that of the modern Harvard Business School than to the method Langdell brought to Harvard Law School, now emulated throughout American legal education.

Blasi, *supra* note 18, at 319.

328. Gordon, *supra* note 21, at 1963 (advocating a problem-oriented approach to teaching, as a means of introducing reality into the classroom).

329. See, e.g., Amsterdam, *supra* note 79, at 612 (claiming that law schools are currently failing to provide law students with the full array of necessary skills); Wellington, *supra* note 7, at 6 (arguing that law professors must focus not only on appellate analysis but also on such other aspects of practice as strategic decisions, definition of goals, evaluation of means, uncovering of facts, and oral and written communications). My point is that it is not enough merely to add skills components to law school courses. Rather, professors must show how abstract theory can help solve practical problems discussed in a skills portions of a class.

330. Michelman, *supra* note 160, at 353-54 ("It is axiomatic in learning theory that when cognitive studies are accompanied by active engagement in their application to concrete problems, a likely result is fuller comprehension, better retention, and apter recall of the cognitive material.").

Too many academics also value scholarship far more highly than teaching.³³¹ While it is to some extent natural and understandable that legal academics, who have themselves chosen the law school over the law firm, would prefer academia to practice, such academics do a real disservice to their students when they criticize practice. Moreover, such academics also do a disservice to their theoretical scholarship when they fail to show students the relevance, and thus power, of their theories. Instead, too often students accept the professors' point that the worlds of practice and theory have little in common and then go on to embrace the world of practice and reject the world of theory.

Similarly, legal academics should consider modifying their attitudes with regard to hiring practitioners. Currently many law schools, and particularly the most elite schools, regard substantial practical experience negatively. The premier hiring prospect is a person who did very well at an elite school, perhaps possesses a graduate degree in a field such as philosophy or history, went on to do a prestigious appellate clerkship, and then obtained approximately four or fewer years of practice experience before deciding to move to academia. A candidate who possessed otherwise identical credentials, but had ten years of practice rather than four, might well be rated lower.³³² Yet, it is those practitioners who may be best qualified to help bridge the gap between theory and practice. Having been in practice for a substantial number of years, they are in an excellent position to identify and advocate the value of legal theory.

I believe that at a minimum academics should not refuse to hire otherwise qualified persons simply because such persons have supposedly been tarnished by too much practice.³³³ I also suggest that law schools consider broadening their hiring pool to consider persons with more varied backgrounds. Where an important goal is narrowing the gap between theory and practice by building a jurisprudence of applications, a candidate with more impressive practical experience but less impressive purely academic credentials may sometimes be the better choice. More generally, law schools should hire persons with an array

331. See Woodhouse, *supra* note 18, at 1993-94 (lamenting that teaching has become a low status activity in legal academia).

332. Many legal academics apparently believe that the learning curve in practice is extremely steep, and that someone with three or four years of experience possesses as much practical skill and knowledge as someone with ten years of experience. My own view is different. Because law practice requires a broad array of skills including legal analysis, counseling, writing, and creative problem solving, I believe that additional experience provides substantial additional reward. Clients, who are often willing to pay more to have a partner, generally seem to share this view.

333. This reluctance may reflect a natural tendency to hire in one's own image, and thus avoid the threat of a new model of professor who may ultimately set standards the old guard cannot easily meet.

of different talents and life experiences, rather than hiring all professors from a single mold.³³⁴

Finally, legal academics and administrators should rethink their criteria with respect to admitting students to law school. Once we begin to reenvision legal theory and law schools as directed to solving the problems of the real world, we may conclude that the LSAT and even undergraduate grade point averages are not the most accurate measures of who would perform best in law school or as a lawyer. As Professor Gary Peller explains, the culture of rationality and impersonality that currently permeates our law schools is not inevitable but rather reflects certain Western cultural biases.³³⁵ Peller points out that if we were to transform our view of law schools to value cooperation and empathy, rather than competitiveness, dispassion, and aloofness, different people would be deemed qualified to enter law schools and would succeed.³³⁶

As we gradually change law school curriculum, along with hiring and admission practices, to better solve our actual problems, I believe we will create a powerful and synergistic mechanism for social change. By attempting to address practical problems we will tend to become less elitist and more diverse in terms of class, race, and ethnicity.³³⁷ After all, many of the world's most pressing problems are themselves concerned with issues of race, class, and ethnicity. In turn, as law schools become more diverse they will naturally tend to focus more on solving real world problems, rather than on issues of pure and abstract theory.

2. CONSEQUENCES FOR SCHOLARSHIP

Legal academics should take a variety of specific steps to develop links between theory and practice in their scholarship. First, in selecting topics about which to write, legal academics should take into account the

334. Cf. Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845 (1994) (arguing that narrative scholarship is enhanced by encouraging members of traditionally excluded groups to tell their stories).

335. Gary Peller, *Espousing a Positive Vision of Affirmative-Action Policies*, CHRON. HIGHER EDUC., Dec. 18, 1991, at B1, B2.

336. *Id.*

337. For discussions of elitism within American law schools and legal scholarship, see generally Bell, *supra* note 46 (discussing racism and elitism at Harvard Law School); WILLIAMS, *supra* note 47 (reflecting on her experiences as a black female law professor); Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1351 (1992) (discussing mechanisms used to exclude minority voices, ten years after originally identifying the problem); Benita Ramsey, *Introduction to Symposium, Excluded Voices: Realities in Law and Law Reform*, 42 U. MIAMI L. REV. 1, 1 (1987) (discussing "how differences in opinions, motivations, and language can construct social and political ideas that may form the basis for law reform"); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (including articles by Milner S. Ball, Derrick Bell, Mari J. Matsuda, Patricia Williams, and Steven L. Winter, discussing the significance of diverse voices in legal scholarship).

potential practical applications of their work. All else being equal the legal academic should lean toward writing articles that will likely provide the most assistance to practicing attorneys, judges, lobbyists, and legislators. That is, to the extent that legal academics choose to focus their efforts on legal theory, the theoretical analysis should arise out of concern for real world problems, and a recognition of which solutions may be actually viable. If a particular theory has *no* imaginable relevance to practicing attorneys, judges, or legislators, legal academics should generally not focus their efforts on developing that theory.

Of course, I do recognize that law schools do not exist *solely* to serve practice and policymakers. Law schools also exist *in part* to serve an intellectual role—as a member of the larger university. After all, academics are among the few members of our society who have time to reflect on issues that lack immediate urgency. Thus, I concede that legal academics may *sometimes* be justified in devoting their efforts to theories not directly geared to practice or real world problems. I also recognize that legal theories that initially have no apparent practical relevance may later be found to have a value.³³⁸ I do not seek to discourage all creative theorizing.

However, law is an applied field and legal theory should primarily be directed to real world problems. My point with regard to topic selection is not that pure theorizing should be eliminated altogether, but rather that a much smaller percentage of legal academics' time should be devoted to theories with no apparent practical application. While I do not suggest that all law review articles must have immediately apparent practical applications, I do believe relevance to real world problems should count as a positive and not a negative.

Of course, development of a new theory or analysis is a difficult task that may take place in various stages, and it would not be appropriate to require theoreticians to fully develop the practical implications of their theory before presenting their analysis. Nonetheless, I suggest that theoreticians engage in the following mental exercise before devoting vast portions of their lives to a new theory. The theoreticians should picture themselves presenting their work, together with any valuable applications they think it may have, to a room filled with practicing attorneys, judges, and legislators who are interested only in performing

338. Colleague Mark Seidenfeld, in reviewing an earlier draft of this work, recounted a story to demonstrate this point. He said that the great German mathematician, Bernhard Riemann, having developed a geometry of curved spaces in varying numbers of dimensions, proudly proclaimed that he had at last developed a geometry unconnected to the real world. About fifty years later, Albert Einstein used Riemann's work as the basis for his physics of gravity, showing that Riemannian geometry was in fact connected to reality. See MICHAEL WHITE & JOHN GRIBBEN, *EINSTEIN: A LIFE IN SCIENCE* 129-30 (1994).

their jobs well. If the room's reaction is total boredom and confusion, then the theoretician should consider working on another project. Once a theory has been presented it is entirely appropriate for us to judge it, at least in part, by the extent to which the theory has or is likely to have real world value.

Second, moving beyond topic selection, legal academics should focus their work not only on "pure" theory, but also on the application of theory to practice.³³⁹ In order for students, practicing lawyers, judges, and policy makers to understand the valuable contributions that can be made by theory, someone needs to write about those potentially valuable contributions. One cannot expect students and practitioners to develop a jurisprudence of practical applications on their own: academics must lead the way and show that the theories can have real world value. Rather than sneering at such applied work academics should value it as highly or more highly than the most theoretical works.

Third, academics need to present their theories in forms that can readily be understood by nonacademics. Too often legal academic writing is quite obscure and difficult to understand.³⁴⁰ While occasionally, perhaps, obscurity is warranted by the extreme complexity of the subject, more often obscurity is unnecessary. At a minimum, academics ought to be able to draft versions of their work that would be understandable to students and practitioners. They may then choose to draft more complex versions for fellow academics as well.³⁴¹

Some might object to "watering down" their works merely to make them comprehensible to students or practitioners. However, I believe this is the wrong way to think about this issue. Philosophers have long debated whether a tree falling in the forest makes any noise if no one is there to hear it. While reasonable people may disagree about the tree, few could deny that a theory that is incomprehensible to most of its supposed audience has little value. For theoreticians to have any kind of significant impact on the real world they must make their theories relevant and comprehensible to that world.³⁴² In fact, theoreticians will likely find that taking the effort to base their theories on, and apply their

339. See BOYER, *supra* note 103, at 21-23 (calling for all academics to place greater emphasis on applied work); Wellington, *supra* note 199; Wellington, *supra* note 7.

340. Cf. Gordon, *supra* note 180, at 2103-04. While recognizing that law review articles are often quite reader-unfriendly, Gordon attributes this failing more to academics' unrealistically high expectations of practitioners' interest than to academics' disdain for practitioners. *Id.*

341. See White, *supra* note 325, at 2183 (students may not be capable of grasping complex legal theories).

342. *Id.* (students, unassisted, cannot be expected to understand or apply "a whole lot of heavy theory").

theories to, the real world will lead to the development of stronger more durable theories.

3. RESPONSES TO COUNTERARGUMENTS

Some academic theorists may take umbrage with my views, fearing that I am trying to deprive them of the opportunity to theorize about whatever they might wish, in the manner they find most rewarding. They may further argue that the scholar who is most capable of developing a truly insightful theory will not necessarily have the interest or ability to develop practical applications for that theory.

I have several responses. First, I believe my views are very supportive of, rather than hostile to, legal theory. In some ways I value theory more than many theorists in that I, unlike some of them, think that the theories can have direct relevance to legal practitioners. If theorists can successfully develop a jurisprudence of law and practical applications, demonstrating the direct relevance of their theories, I believe the role of abstract theory in law schools and legal practice will be greatly enhanced.

Second, as noted above, I do not believe that all legal theories presented in law school classes or legal journals must necessarily have a direct practical application. I recognize that law schools and legal journals serve multiple purposes. Thus, while I do believe that most theories and theorists should be geared toward real world problems, I also see value in a limited amount of non-practically oriented theory.

Third, not *all* legal theorists must turn to applied work. Rather, I would expect that many scholars would spend all or part of their time on pure theory, as opposed to working on practical applications of that theory. My point is not that *all* theorists need to do applied work, but rather that all theorists should value such work and that *substantially more* legal academics need to devote themselves to connecting theory to practice. Currently far fewer academics are doing applied work, as called for in this Article, than are engaging in pure theoretical analysis.³⁴³ While many theoreticians admittedly take step one, by writing about real world problems, they often don't take the next steps of showing practitioners how the theories can be used to draft actual legislation or agreements or to win a case in litigation. Nor can practitioners be expected to fill this void. They have neither the time nor perhaps the ability to produce such analysis, particularly given the dense nature of many legal theories. Rather, it is the academic who develops the theory who is in the best position to explicate any practical value the theory may have. Even if

343. See Wellington, *supra* note 199, at 329 (claiming that too few legal academics "are doing the applied work that should be an important part of the mission of law schools").

some theorists are ultimately required to redirect some of their energy from pure theory to practical applications, this would not necessarily be a bad or unfair thing. Legal academics ought to be responsive to the needs of law students, practitioners, and our society.

From the opposite perspective, some may also object that I am overly optimistic as to the potential value of abstract theory. However, I do not mean to suggest that all theories, particularly in their current forms, can have immediate practical applications.³⁴⁴ Some theories may, for example, consist of a critique of a current body of law or legal institution that may not, at least in the short term, provide immediate assistance to practicing attorneys, judges, or legislators. Some theories may be so unrelated to real world problems or so internally inconsistent that they may never have a real world application. My point is not that *all* theories have practical application but that *many* theories *can* have practical value, and that theoreticians should strive for some practical application—if not to litigation then to judging or lawmaking.

B. *Consequences for Practicing Attorneys, Judges, and Policymakers*

Practicing attorneys, judges, and policymakers must also play roles in developing the symbiotic relationship between theory and practice. Too often, practitioners reject works and theories of legal academics out-of-hand, assuming without even investigating that academics will have no relevant input on any given issue. However, academics, in fact, may have a great deal to offer practitioners. Whereas practitioners may sometimes continue to see and deal with problems in the same way they have always done, academics offer new and creative ways of solving legal problems.

Particularly as academics begin to develop a jurisprudence of practical applications, and their works become more accessible to practitioners, practitioners must look to academia for help on practical problems. That is, when looking for ideas on how to win cases, decide cases, or write legislation, practitioners should think back to their law school training, seek continuing legal education, and look to law review articles or books written by legal academics. Practitioners should not assume that all theory is irrelevant nor that all works of legal academics are

344. Ironically, my argument could be taken as further justification for the most highly theoretical and seemingly impractical works of today's legal academics. However, as I hope I have made clear in the body of this article, while I believe that many, but not all, theoretical works *can* have great value, I also believe that those who develop such theories have a responsibility to infuse their work with practical value. If the academics who develop the meta theories do not work to show their relevance to the real world, I doubt that anyone else will take on this difficult endeavor.

useless. In fact, practitioners who close their eyes to the value of theory may be violating their ethical duty to represent their client zealously.

Practicing attorneys, judges, policymakers, and students also have roles to play in encouraging academics to develop a jurisprudence of practical applications, as discussed in this Article. Law schools and legal academics often feel quite insulated from the pressures of the real world, and so engage in whatever pursuits the professors find intellectually stimulating. Yet, if practitioners, judges, and policymakers were to unite in demanding change in the focus of legal academia, some change would surely occur. Practitioners, judges, and legislators ultimately have tremendous influence over law schools, particularly as alumni, funders, and arbiters over bar passage. Thus, practicing attorneys have tremendous power to encourage if not dictate a change in law school teaching and scholarship, to place greater emphasis on both the practical value of legal theory and the jurisprudence of practical applications of such theory.

VII. CONCLUSION

At the outset of this Article, I spoke of the battles that often seem to rage in and around legal education: battles between scholarship and teaching; between academics and practitioners; between abstract theory and doctrine; and between theoretical and clinical teaching techniques. I truly believe that in fighting these battles against one another we miss a wonderful opportunity to join forces and work for a common good. As the *Llewellyn Report* stated in 1945:

But if there be one school in a university of which it should be said that there men learn to give practical reality, practical effectiveness, to vision and to ideas, that school is the school of law. Our suggestion is that, rightly approached, the road to sure vision proves to be at the same time the road to true command of skill in practice: that lesson from classic class-instruction is what needs relearning and reapplication in the light of current conditions.³⁴⁵

Ironically, and sadly, it has now been fifty years since the *Llewellyn Report* was published, and its message still sounds fresh and relevant. We have not yet learned its lesson.

My call now is to end these battles. We need not choose between theory and practice, nor between teaching and scholarship. Instead, let us use our creative energies and common sense to make these bodies of work mutually supportive. Perhaps if we begin to work together theoreticians and practitioners can truly come to respect one another's impor-

345. See LLEWELLYN REPORT, *supra* note 77, at 391.

tance. Let us use our theoretical insights to work for solutions to the very practical problems in our classrooms and in our world. Let us work together to achieve justice.