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## ARTICLES & ESSAYS

**Law and Practice**

Will Rhee

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One of law's most important functions is solving problems.<sup>1</sup> Accordingly, one of the primary purposes of legal doctrine<sup>2</sup>—the written, black-letter law in the books<sup>3</sup> employed daily by lawmakers to keep a democracy functioning—is to solve problems. The way legal doctrine frames problems therefore defines not only the boundaries of what is considered “inside” or “outside” a problem but also what is considered a successful solution.<sup>4</sup> Thus, the cognitive framework we employ to solve problems can affect the nature and quality of our solutions.<sup>5</sup>

This article advocates an *intradisciplinary*<sup>6</sup> “law and practice” legal framework that unites normative theory<sup>7</sup>—a prescription for how one

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1 See e.g. Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 Temp. L. Rev. 811, 811–12 (1999).

2 Legal doctrine is defined as “the various sources of law (precedents, statutes, constitutions) that constrain or otherwise guide the practitioner, decisionmaker, and policymaker.” Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 43 (1992). Legal doctrine is meant to encompass law as it is actually used on a daily basis by legal practitioners in all branches of a democratic government to include transactional law. Legal doctrine in transactions, mediations, and alternative dispute resolution (ADR) tends to be post-mortem analyses of transactions, mediations, and ADR gone wrong, leading to litigation (and judicial opinions) or administrative or legislative reform (and regulations or statutes).

3 See e.g. Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12, 14–15 (1910).

4 See generally Paul Brest & Linda Hamilton Krieger, *Problem Solving, Decision Making, and Professional Judgment: A Guide for Lawyers and Policy Makers* 34–42, 70–76, 420–28 (Oxford U. Press, Inc. 2010) (collecting authorities).

5 *Id.* at 35.

6 “Intradisciplinary” is defined as “being or occurring within the scope of a scholarly or academic discipline or between the people active in such a discipline.” *Merriam-Webster Collegiate Dictionary* (Merriam-Webster 2012), <http://www.merriam-webster.com/dictionary/intradisciplinary> (accessed Feb. 17, 2012). The relevant discipline here, of course, is law (or the legal profession). The term “intradisciplinary” is intentionally used to contrast with the more familiar *interdisciplinary* “law ands.” See e.g. Marc Galanter & Mark Alan Edwards, *Introduction: The Path of the Law Ands*, 1997 Wis. L. Rev. 375, 376.

7 “Norms” are “[s]tandards for how one ought to act. . . . In the terms of practical reasoning, norms are standards that give reasons for action.” Brian H. Bix, *A Dictionary of Legal Theory* 149 (Oxford U. Press 2004). The word “normative” implies

should act—and practical lawmaking<sup>8</sup>—a description of how legal actors<sup>9</sup> actually create and revise legal doctrine in a democracy—to solve legal problems. This combination of both normative theory and practical lawmaking provides an absolute advantage<sup>10</sup> over the isolated employment of either.

Normative theory and practical lawmaking provide further insight into what political theorist Hannah Arendt called the “old and complicated” conflict between “truth and politics.”<sup>11</sup> Because it is governed by the rule of law, practical lawmaking in a democracy unavoidably involves politics and the imperfect political process.<sup>12</sup> In contrast, normative theory answers the “why” truth question of practical lawmaking—politics to what end?<sup>13</sup>

In light of legal doctrine’s public impact upon our daily lives, we cannot help but have an opinion about whether practical lawmaking is consistent with our own implicit or explicit normative theories. Much like religious beliefs, although we may not talk about our normative theories in public, we all have them. Even disputing the very validity of normative theorizing—like agnosticism—is itself a normative theory.

“[w]hat *ought* to be done. The normative aspect of a discussion or a set of facts is its implications for how people should act, how rules should be changed, or even how theories should be constructed.” *Id.* at 148 (emphasis in original). Normative questions are “‘should’ questions, questions about how individuals or institutions should act.” Aaron Rappaport, *The Logic of Legal Theory: Reflections on the Purpose and Methodology of Jurisprudence*, 73 *Miss. L.J.* 559, 572 (2004). A “legal theory” is “a set of general propositions used as an explanation” of law that are “sufficiently abstract to be relevant to more than just particularized situations.” Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 *Minn. L. Rev.* 1599, 1601 n. 3 (1991) (citation omitted). For further discussion of normative theory, see *infra* sec. I.B.2.

<sup>8</sup> “Practical lawmaking” is what legal actors do to keep a democratic government functioning by creating and revising legal doctrine. Practical lawmaking thus is inseparable from legal doctrine. For further discussion of practical lawmaking, see *infra* sec. I.B.4. For a definition of “legal actors,” see *infra* n. 9.

<sup>9</sup> There are many definitions of law; in this article I seek to avoid the black-hole question, What is law? See e.g. Frederick Schauer, *The Best Laid Plans*, 120 *Yale L.J.* 586, 616 (2010). Consequently, this article uses the rather broad term “legal actors” to represent anyone who formally or informally affects or influences law in a democracy, however law is defined. Formally, among the three democratic branches of government—elected legislators (and their staff) who enact statutes, judges (and the lawyers representing both sides in a litigation) who decide cases and publish judicial opinions, and the executive (and her cabinet) who implements statutes and publishes administrative regulations and decisions—all are legal actors. Informally, however, lobbyists (and the organizations or causes they represent) who influence those legislators and the executive through political endorsements and campaign contributions, community activists (and the people they lead) who influence elections through grass-roots organizing and public protest, and pundits and academics who publicly critique existing law are also legal actors.

<sup>10</sup> “Absolute advantage” is an economic concept wherein a party “can produce [a] good at lower cost or with higher productivity than the other party.” Gregory W. Bowman, *The Comparative and Absolute Advantages of Junior Law Faculty: Implications for Teaching and the Future of American Law Schools*, 2008 *B.Y.U. Educ. & L.J.* 171, 183 (internal citation and quotation marks omitted).

<sup>11</sup> Hannah Arendt, *Truth and Politics*, in *Between Past and Future: Eight Exercises in Political Thought* 229 (The Viking Press, Inc. 1968).

<sup>12</sup> Keith Whittington et al., *The Study of Law and Politics* in *Oxford Handbook of Law and Politics* 3 (Keith Whittington et al., eds., Oxford U. Press 2008).

<sup>13</sup> See *supra* note 7 and accompanying text.

This hybrid intradisciplinary framework is examined in five sections. Section I rejects a competing framework, the so-called theory–practice divide, as a false dichotomy and argues that legal academics<sup>14</sup> and legal practitioners<sup>15</sup> tend to specialize in micro law or macro law. Section II explains how legal actors strive to avoid cognitive dissonance, the psychological discomfort that results when practical lawmaking appears to contradict a preferred normative theory.<sup>16</sup> Section III elaborates how all legal doctrine implicitly or explicitly embodies normative theory. In a similar manner, section IV explains that because the only way to create or amend legal doctrine in a democracy is through practical lawmaking, normative theory must also consider practical lawmaking. Section V elaborates this hybrid combination of theory and practice, ironically called “law and practice.” A law and practice movement could not only improve actual legal representation with more objective and more effective skills instruction but also create more accurate and more intellectually rigorous legal scholarship with immediate applicability to the real world.<sup>17</sup>

## I. The Theory–Practice Divide Is a False Dichotomy

The so-called theory–practice divide is amorphous and unhelpful. Even on its own terms this so-called divide is not between all legal theory and all legal practice but rather between a particular kind of legal theory—normative theory—and a particular kind of legal practice—practical lawmaking. A better description of the relationship of theory to practice is as a micro–macro legal continuum, one that parallels the well-established relationship between microeconomics and macroeconomics.

### A. The theory–practice divide

Chief Justice John Roberts recently decried “a great disconnect” between legal academics who “deal with the legal issues at a particularly abstract

<sup>14</sup> The theory–practice divide also distinguishes between “legal academics” and “legal practitioners.” “Legal academics” are tasked with the dedicated scholarly study of law and the “improvement of the legal profession through legal education.” Bylaws of the Ass’n of Am. L. Schs., Inc., Art. I, § 1-2 (adopted Dec. 29, 1971; amended through Jan. 2008), [http://www.aals.org/about\\_handbook\\_bylaws.php](http://www.aals.org/about_handbook_bylaws.php) (accessed Feb. 23, 2012).

<sup>15</sup> “Legal practitioners” are commonly defined as that portion of the legal profession in which public and private “lawyers, clients, judges, and legislators” actually use legal concepts and processes. Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. Miami L. Rev. 707, 718 (1996). In this article I argue that this distinction is illusory: both legal academics and legal practitioners are legal actors. See *supra* note 9.

<sup>16</sup> See Michael Vandenbergh et al., *Regulation in the Behavioral Era*, 95 Minn. L. Rev. 715, 759 (2011) (citing Leon Festinger, *A Theory of Cognitive Dissonance* 2–3 (Stan. U. Press 1957)); see also *infra* sec. II.A.

<sup>17</sup> Given its hybrid thesis, I aspire for this article to reach legal academics, legal practitioners, and those who self-identify with both labels. Thus, I seek to explain its points as plainly as possible in the text, leaving more scholarly details to the footnotes.

and philosophical level” and legal practitioners.<sup>18</sup> This is not a new sentiment. As the Chief Justice himself recognized, he agrees with his friend and fellow jurist, Judge Harry Edwards, U.S. Court of Appeals for the District of Columbia Circuit.<sup>19</sup> Judge Edwards, a former law professor and the author of the famous law review article, “The Growing Disjunction between Legal Education and the Legal Profession,” is perhaps the most well-known critic of the so-called theory–practice divide in the U.S. legal profession.<sup>20</sup> This so-called theory–practice divide has many manifestations<sup>21</sup> and is not limited to law.<sup>22</sup>

The theory–practice divide assumes that legal academics are concerned primarily with legal theory to the exclusion of legal practice and that legal practitioners are concerned primarily with legal practice to the exclusion of legal theory. Many others have already written extensively about this divide and its possible causes.<sup>23</sup> Fundamentally, though, the theory–practice divide is a false dichotomy.<sup>24</sup> The debate over legal theory and legal practice—insofar as there is any distinction at all—is really between normative theory and practical lawmaking.

## **B. The theory–practice divide is between normative theory and practical lawmaking**

Even assuming that the theory–practice divide exists, the dividing line between so-called legal theory and so-called legal practice is amorphous. In spite of the many articles written about this so-called divide, “it is surprising that little attention has been devoted to attempting to specify what an author means when he or she uses these terms.”<sup>25</sup>

18 Videodoc, C-Span Video, *A Conversation with Chief Justice Roberts*, Fourth Circuit Judicial Conference (June 25, 2011) (available at <http://www.c-spanvideo.org/program/FourthCi>).

19 U.S. Ct. of App. for the D.C. Cir., *Harry T. Edwards*, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+HTE> (accessed Feb. 23, 2012).

20 Edwards, *supra* n. 2, at 34.

21 See e.g. Marc O. Degirolami, *The Excitement of Interdictory Ideas: A Response to Professor Anders Walker*, 8 Ohio St. J. Crim. L. 155, 158 (2010).

22 Sara L. Rynes et al., *Across the Great Divide: Knowledge Creation and Transfer between Practitioners and Academics*, 44 Acad. Mgt. J. 340, 340 (April 2001).

23 See e.g. Judith Wegner, *Reframing Legal Education's "Wicked Problems,"* 61 Rutgers L. Rev. 867, 969–70 (2009) (collecting authorities). The debate over the theory–practice divide is relevant to the question of how to prepare law students to be practice-ready lawyers, as well, a pressing pedagogical question that has likewise been addressed by many others. See e.g. Symposium, *The Profession and the Academy: Addressing Major Changes in Law Practice*, 70 Md. L. Rev. 307 (2011) (collecting authorities).

24 Accord Sarah Buhler, *Skills Training in Clinical Legal Education: A Critical Approach*, 6 Can. Leg. Educ. Annual Rev. 1, 8 (2011); Nisha Agarwal & Jocelyn Simonson, *Thinking Like a Public Interest Lawyer: Theory, Practice, and Pedagogy*, 34 N.Y.U. Rev. L. & Soc. Change 455, 474–75 (2010) (collecting authorities).

25 Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. Rev. 577, 595 (1987).

Ironically, a sincere examination of the bounds of the definition of legal practice implicates legal theory and thereby undermines the credibility of the entire divide. Professor Stanley Fish has even argued that legal theory can be “made to disappear in the solvent of an enriched notion of practice.”<sup>26</sup> Similarly, former law professor and current White House Regulatory “Czar” Cass Sunstein has observed that “the distinction between legal theory and legal practice is at most one of degree.”<sup>27</sup> After his experience practicing law, former Acting Solicitor General and current Professor Neal Katyal commented that “[c]ombining theoretical and practical skills was eye-opening, allowing me to see the ways in which practice shapes theory and theory shapes practice.”<sup>28</sup>

### 1. Legal theory

What is legal theory? If legal theory is merely “a set of general propositions used as an explanation” of law that are “sufficiently abstract to be relevant to more than just particularized situations,”<sup>29</sup> then legal practitioners unavoidably use legal theory every day to accomplish their job of practical lawmaking. All practitioners develop through experience their own “theories of practice”<sup>30</sup> concerning how best to accomplish their practitioner tasks. Judge Edwards himself acknowledged that legal practitioners can fruitfully employ legal “theory to criticize doctrine, to resolve problems that doctrine leaves open, and to propose changes in the law or in systems of justice.”<sup>31</sup> Justice Oliver Wendell Holmes, Jr.—himself a longtime legal practitioner and judge<sup>32</sup>—wrote that legal theory is “the most important part of the dogma of the law” and should not “be feared as unpractical” because, “to the competent, it simply means getting to the bottom of the subject.”<sup>33</sup> In other words, “theory is also just another name

26 Stanley Fish, *Doing What Comes Naturally* ix (Duke U. Press 1989).

27 Cass R. Sunstein, *On Legal Theory and Legal Practice*, in *Theory and Practice: Nomos XXXVII* 267, 267 (Ian Shapiro & Judith Wagner DeCew, eds., N.Y.U. Press 1995). For further discussion about Sunstein’s current position, see *infra* note 53.

28 Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 Harv. L. Rev. 65, 69 (2006). For further discussion about Katyal’s later practice experience, see *infra* note 53.

29 Goldfarb, *supra* n. 7, at 1601 n. 3.

30 “Theories for practice” are called “schema” in cognitive science and provide practitioners with “a kind of toolkit of well-founded procedures within clearly delineated areas of professional work.” William M. Sullivan et al., *Educating Lawyers* 100–01, 103 (Jossey-Bass 2007) (citations omitted). The question is not whether practitioners use schema in problem-solving—according to cognitive science; all do. But *which* schema? Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. Leg. Educ. 313, 381 (1995). All practitioners—novice through expert—must construct their own schema to use in problem-solving from their personal experience to make the overwhelming details of a problem manageable. *Id.* at 355, 379.

31 Edwards, *supra* n. 2, at 35.

32 Holmes wrote his masterpiece, *The Common Law*, while he “practiced commercial and admiralty law.” *The Canon of American Legal Thought* 21 (David Kennedy & William W. Fisher III, eds., Princeton U. Press 2006). He was a law professor at Harvard for only a few months before he became a judge. *Id.*

33 Oliver Wendell Holmes, *The Path of the Law*, 78 B.U. L. Rev. 699, 715 (1998).

for thinking, for deciding, for arguing and examining one's own beliefs and principles as well as the beliefs and principles we have been taught. Theorizing is something that we all do."<sup>34</sup>

## 2. Normative theory

Within the vague boundaries of so-called legal theory, is there a more definite concept? Yes, normative theory. Normative theory is a subset of legal theory that prescribes norms with which to determine the validity of legal doctrine.<sup>35</sup> It is what Justice Stephen Breyer implied when he wrote that "there is evidence that law review articles have left terra firma to soar into outer space."<sup>36</sup>

Unlike the ambiguity of other types of legal theory, because normative theory makes prescriptive claims about truth or effectiveness,<sup>37</sup> it is easy to recognize. All legal theory can be unpacked to reveal an underlying assumption or first principle. That postulate is a normative theory. Because legal doctrine regulates human conduct, legal doctrine unavoidably relies upon implicit or explicit normative assumptions whose legitimacy can be scrutinized by normative theory. While legal doctrine can create elaborate decisionmaking procedures in an attempt to promote alleged impartiality, the "unavoidable fact is that no matter how hard we try to define impartial decision procedures, we face persistent disagreement both about basic notions of what is good and right and just and about which procedures are suitably impartial."<sup>38</sup> "Law," as Sunstein observed, "is a normative enterprise; it is inevitably philosophical."<sup>39</sup> Practitioners who claim to ignore legal theory might nevertheless "unconsciously employ methods derived from theory . . ."<sup>40</sup>

## 3. Legal practice

Similarly, what exactly does it mean to practice law? This question unavoidably implicates the black-hole legal-theoretical question of what law is.<sup>41</sup> Is practicing law restricted to lawyers and judges—licensed

34 Ruthann Robson, *Lesbian (Out)Law: Survival under the Rule of Law* 15 (Firebrand Books 1992).

35 See *supra* note 7 and accompanying text.

36 Stephen G. Breyer, *Response of Stephen G. Breyer*, 64 N.Y.U. Annual Survey Am. L. 33, 33 (2008) (citation omitted). Justice Ruth Bader Ginsburg has added that "some in the academy are writing on topics or in a language ordinary judges and lawyers do not comprehend." Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 Geo. L.J. 2119, 2127 (1995).

37 See Arendt, *supra* n. 11, at 229.

38 Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. Rev. 899, 907 (2009).

39 Sunstein, *supra* n. 28, at 267.

40 Katyal, *supra* n. 29, at 73; see also *infra* n. 55.

41 See *supra* note 9 for additional discussion.

members of the Bar? Surely the members of the executive and legislative branches—whether lawyers or not—also practice law. What about populist “bottom-up” movements?<sup>42</sup> Must, or can, the Montgomery, Alabama, bus boycott and the 1960s civil rights movement also be considered practicing law?<sup>43</sup> How about reactionary movements without clearly defined goals or organizers like the worldwide “Occupy Wall Street” movement?<sup>44</sup> What about informal agreements between neighbors outside the bounds of formal legal doctrine?<sup>45</sup>

#### 4. Practical lawmaking

Likewise, within the elastic confines of so-called legal practice, is there a more definite concept? Yes, practical lawmaking. Practical lawmaking is a subset of legal practice that focuses upon the professional advocates and lawmakers—lawyers, legislators, judges, and executive officials—who staff all three democratic branches of government and produce official legal doctrine.<sup>46</sup> Legal practitioners—whose full-time job is to create and revise legal doctrine—understandably ask how a particular law review article or normative theory will help them accomplish their day-to-day job of practical lawmaking.<sup>47</sup>

Although practical lawmaking has clearly defined roles, procedures, and boundaries, it is not necessarily the only way to practice law. Other legal actors with less clearly defined roles, procedures, and boundaries may practice law as well. But those other legal actors are not typically the ones who criticize the theory–practice divide. When legal practitioners critique the theory–practice divide, they are not referring to all legal practice but rather to practical lawmaking, the subset with which they are most familiar and over which they have the most control.

Given the vague, overlapping nature of legal theory and legal practice, the so-called divide actually refers to the much narrower, well-defined division between normative theory and practical lawmaking. Much debate between practitioners and academics over legal theory really concerns

42 Christopher Coleman et al., *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 L. & Soc. Inquiry 663, 667 (2005).

43 See *id.*; see also generally Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925–1950* (2d ed., U.N.C. Press 2004); Raymond D'Angelo, *The American Civil Rights Movement: Readings and Interpretations* (McGraw-Hill/Dushkin 2001); Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (U. Penn. Press 1983).

44 See generally Alasdair Roberts, *Containing the Outrage: How Police Power Tames the Occupy Movement*, Bos. Rev. (web) 1, 1 (Nov. 14, 2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1959542](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959542).

45 Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* vii (Harv. U. Press 1991).

46 See *supra* note 8 and accompanying text.

47 Accord Paul Brest, *Plus Ça Change*, 91 Mich. L. Rev. 1945, 1949 (1993).

48 Singer, *supra* n. 39, at 901–04.



conflicting normative theory, “[f]inishing the ‘[b]ecause [c]ause.’”<sup>48</sup> Legal practitioners are some of the fiercest critics of normative theory because they are unconvinced of normative theory’s usefulness in their day-to-day job of practical lawmaking.<sup>49</sup> But counterexamples undermine even this subset of the theory–practice divide.

### C. Counterexamples contradict the theory–practice divide

When pressed, most thoughtful legal actors would concede that the theory–practice divide is an oversimplification. Furthermore, many might agree that “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.”<sup>50</sup>

At least five facts undermine the credibility of this theory–practice divide framework. First, legal practitioners have authored innovative legal scholarship, the supposed bastion of legal theory.<sup>51</sup> Second, legal academics have become renowned legal practitioners.<sup>52</sup> Third, some legal doctrinal concepts currently taken for granted in practical lawmaking were first developed or popularized in legal scholarship.<sup>53</sup> Fourth, legal theory has catalyzed changes in legal doctrine.<sup>54</sup> Finally, practical

<sup>49</sup> See e.g. J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 Yale L.J. 105, 135 n. 52 (1993); see also generally Michael C. Dorf, *Justice Scalia Suggests That the Legal Academy is Out of Touch: Is He Right?*, <http://writ.news.findlaw.com/dorf/20100308.html> (Mar. 8, 2010); Seth P. Waxman, *Rebuilding Bridges: The Bar, the Bench, and the Academy*, 150 U. Pa. L. Rev. 1905, 1909 (2002) (former Solicitor General commenting that “at the Supreme Court, academic citations are viewed as largely irrelevant—only a true naïf would blunder to mention one at oral argument”).

<sup>50</sup> Sternlight, *supra* n. 15, at 712.

<sup>51</sup> Legal practitioners have published scholarship in the most prestigious law reviews like the top-ranked *Harvard Law Review* and *Yale Law Journal*. Allen Rostron & Nancy Levit, *Information for Submitting Articles to Law Reviews & Journals*, <http://ssrn.com/abstract=1019029> (Feb. 22, 2011); see e.g. Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 Harv. L. Rev. 930, 930 n. \* (1987); H. Thomas Austern, *Presumption and Percipience about Competitive Effect under Section 2 of the Clayton Act*, 81 Harv. L. Rev. 773, 773 n. \* (1968); Sidney B. Jacoby, *Judicial Control of Administrative Action in India*, 70 Harv. L. Rev. 1326, 1326 n. \* (1957); see also e.g. George W. Conk, *Is There a Design Defect in the Restatement (Third) Of Torts: Products Liability?*, 109 Yale L.J. 1087, 1087 n. \* (2000); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537, 2537 n. \* (1991); Aaron Wildavsky, *Changing Forward Versus Changing Back*, 88 Yale L.J. 217, 217 n. \* (1978); Carlos L. Israels, *Securities Law: Fraud: SEC Rule 10b-5*, 77 Yale L.J. 1585, 1585 n. \* (1968). An estimated 86.6% of newly hired tenure-track law professors practiced law before entering the academy. Richard E. Redding, “Where Did You Go to Law School?”: *Gatekeeping for the Professoriate and its Implications for Legal Education*, 53 J. Leg. Educ. 594, 600–01 & 602 tbl. 3, 612 (2003), and some law professors—most notably clinical professors—continue to practice law and write scholarship. See Stephen Ellmann, *What We Are Learning*, 56 N.Y. L. Sch. L. Rev. 171, 200 (2011).

Judges also have authored innovative scholarship. Some of the most-cited legal scholars of all time—including Judge Richard Posner, Justice Oliver Wendell Holmes, Jr., Judge Guido Calabresi, Judge Frank Easterbrook, and Justice Felix Frankfurter—are or were practicing jurists. Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. Leg. Stud. 409, 424 tbl. 6 (2000); 2 Almanac of the Federal Judiciary 3–7, 14–21, 25–27 (Wolters Kluwer Law & Bus. 2012) (available at 2012 WL 366281, 2012 WL 366385, 2012 WL 366389); Mary McManamon, *Felix Frankfurter: The Architect of “Our Federalism,”* 27 Ga. L. Rev. 697, 702 (1993). Whereas these judges may have authored much of their scholarship as law professors (except for Justice Holmes, who was a law professor for only months, see Kennedy & Fisher, *supra* n. 33, at 21) others obviously capable of producing quality scholarship chose to practice law.

lawmaking has inspired new legal theory and academic scholarship.<sup>55</sup>

In spite of these factual counterexamples, the selection of a cognitive framework such as the theory–practice divide ultimately is a subjective choice because “[t]here is always a level of generality at which any two things can be said to be essentially the same, and always a level of particu-

52 Just as there is no reason why an accomplished legal practitioner cannot write quality scholarship, there is no reason why a legal academic cannot become a successful practitioner. There can be much transfer between their respective skill sets. David A. Binder et al., *A Depositions Course: Tackling the Challenge of Teaching for Professional Skills Transfer*, 13 Clin. L. Rev. 871, 882 & n. 32 (2007) (collecting authorities). Legal academics can be just as intelligent and diligent as legal practitioners. Some well-established legal academics—such as Erwin Chemerinsky and Lawrence Tribe—are also renowned for practicing law. See e.g. Erwin Chemerinsky, *Foreword: Why Write?* 107 Mich. L. Rev. 881, 888 (2009); Vanessa Gregory, *Indefensible*, 22 Am. Prospect A11, A11 (Jan. 1, 2011) (discussing Tribe). At different times in their career, some lawyers rotate between the academy and practice. For example, in the former-law-professor-turned-President Obama Administration, Paul Horwitz, *Honor's Constitutional Moment: The Oath and Presidential Transitions*, 103 Nw. U. L. Rev. 1067, 1079 (2009), several former law professors serve as practicing public officials, including former Solicitor General and current U.S. Supreme Court Associate Justice Elena Kagan (who apparently had little to no courtroom experience before becoming Solicitor General), current Legal Advisor for the U.S. Department of State (and past Yale Law School Dean) Harold Koh, past Acting Solicitor General (and law professor) Neal Katyal, and Administrator of the White House Office of Information and Regulatory Affairs (and the most-cited contemporary law professor) Cass Sunstein. See e.g. Fox News, *Kagan a Courtroom Novice No Problem for High Court, Supporters Say* (May 10, 2010) (available at <http://www.foxnews.com/politics/2010/05/10/kagans-judicial-inexperience-minor-hurdle-despite-early-criticism/>) (discussing Kagan); Harold Hongju Koh, *Statement by Harold Hongju Koh, Legal Advisor, United States Department of State, Regarding Crime of Aggression at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court*, <http://usun.state.gov/briefing/statements/2010/139000.htm> (Mar. 23, 2010); Harold Hongju Koh, <http://www.law.yale.edu/faculty/HKoh.htm> (accessed Mar. 1, 2012) (discussing Koh); *Meet the Solicitor General*, U.S. Dept. of Just., <http://www.justice.gov/osg/meet-osg.html> (accessed Mar. 1, 2012); Aziz Haniffa, *Neal Katyal a Step Closer to Solicitor General's Post*, 40 India Abroad (N.Y. ed.) 35, A11 (May 28, 2010) (available at 2010 WLNR 11205030); Professor Neal Katyal Homepage, *Neal Kumar Katyal*, <http://www.law.georgetown.edu/faculty/nkk/publications.html> (accessed Mar. 1, 2012) (discussing Katyal); Zachary A. Goldfarb, *Obama, GOP Unveil Competing Plans for Job Growth*, Wash. Post A15 (May 27, 2011) (available at [http://www.washingtonpost.com/business/economy/obama-gop-unveil-competing-plans-for-job-growth/2011/05/26/AG3aDKCH\\_story.html](http://www.washingtonpost.com/business/economy/obama-gop-unveil-competing-plans-for-job-growth/2011/05/26/AG3aDKCH_story.html)); Shapiro, *The Most-Cited Legal Scholars*, *supra* n. 52, at 424 tbl. 6 (discussing Sunstein). Both Koh and Katyal have been counsel of record in high-profile lawsuits. Although Koh had never appeared in a real courtroom before, he led the *Sale v. Haitian Centers Council, Inc.*, litigation, 509 U.S. 155 (1993), all the way to the U.S. Supreme Court. Harold Hongju Koh, *Foreword*, in Brandt Goldstein, Roger Citron, & Molly Beutz Land, *A Documentary Companion to Storming the Court* xxiii (Aspen Publ'g 2009). Similarly, Katyal led the *Hamdan v. Rumsfeld* litigation all the way to the U.S. Supreme Court and thereby created new law concerning the procedural treatment of military combatants. 548 U.S. 557 (2007).

53 Kennedy & Fisher, *supra* n. 33, at 9. Here are a few illustrative examples: In 1913, Wesley Hohfeld recognized eight types of legal relations that have become commonplace in legal doctrine today: rights, duties, powers, liabilities, immunities, disabilities, privileges, and “no-rights.” *Id.* at 47–54 (citing Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913)). In 1923, Robert Hale’s “considerations of social advantage” innovated the use of policy arguments to justify legal doctrine, a common tactic of legal practitioners and lawmakers today. *Id.* at 85, 91 (citing Robert Hale, *Commissions, Rates, and Policies*, 53 Harv. L. Rev. 1103, 1143 (1940)). In 1958, Henry Hart and Albert Sacks, the acknowledged fathers of the so-called “legal process school,” further elaborated that “[u]nderlying every rule and standard . . . is at the least a policy and in most cases a principle. This principle or policy is always available to guide judgment in resolving uncertainties about the arrangement’s meaning.” Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* 148 (William N. Eskridge, Jr. & Philip P. Frickey, eds., Foundation Press 1994). In response at least in part to the legal process school, Duncan Kennedy in 1976 examined the many dimensions of the difference between “rules,” directives that require lawmakers and officials “to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way,” and “standards,” norms that directly refer to “substantive objectives of the legal order” and allow lawmakers considerable discretion in their interpretation. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1687–88 (1976).

54 Several changes in legal doctrine can trace their origins to legal theory first articulated in legal scholarship. As Neal Katyal observed, “Some practitioners unconsciously employ methods derived from theory[.]” Katyal, *supra* n. 29, at 73. For example, the tort of intentional infliction of emotional distress was first articulated in a famous 1939 law review article by Dean Prosser. *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 65 (Ky. 1996) (citing William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874 (1939)). The famous (or infamous) right of privacy was first articulated in an 1890

larity at which they can be distinguished.”<sup>56</sup> The key is “not, Which description is right?, since all may be; but, Which level of description is most enlightening?”<sup>57</sup> Our choice of cognitive legal framework is not just a matter of personal preference but rather affects our enlightenment of solutions to legal problems.

Anecdotal experience nevertheless suggests that legal academics and legal practitioners at times do appear to be talking past one another.<sup>58</sup> Legal academics often favor normative theory over practical lawmaking.<sup>59</sup> Legal practitioners often focus on practical lawmaking and ignore normative theory.<sup>60</sup>

So how can legal actors solve problems better by using both normative theory and practical lawmaking? How can focusing primarily on one to the exclusion of the other limit not only the evaluation of legal problems but also the effectiveness of their possible solutions?

law review article coauthored by two legal practitioners, one of whom would later become a U.S. Supreme Court Justice. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L.J. 123, 128 (2007) (discussing Brandeis).

<sup>55</sup> Perhaps the best example of practical lawmaking that has catalyzed new legal theory and academic scholarship is the celebrated U.S. Supreme Court opinion of *Brown v. Board of Education*, 347 U.S. 483 (1954), *supplemented*, 349 U.S. 294 (1955). As Justice Breyer commented, “In this Court’s finest hour, *Brown v. Board of Education* challenged [the nation’s] history and helped to change it.” *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 867 (2007) (Breyer, J., dissenting). Although “[t]raditional legal academic publishing played little or no role in establishing the theoretical and doctrinal basis for *Brown*[.]” Rachel Moran, *The President’s Message: Transformative Scholarship: Legal Academic Knowledge for What?* 2009-3 aalsnews 1, 6 (Aug. 2009) (available at [http://www.aals.org/services\\_newsletter\\_presAug09.php](http://www.aals.org/services_newsletter_presAug09.php)), the legal academy has subsequently produced a prodigious amount of legal scholarship theorizing, lionizing, criticizing, and eulogizing *Brown*. See e.g. Martha Minow, *In Brown’s Wake* (Oxford U. Press 2010). Despite initial criticism of its reasoning, see e.g. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959), *Brown* has become one of the most celebrated Supreme Court opinions of all time. See e.g. Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 Rutgers L. Rev. 383, 383–84 (2000). *Brown* itself has spawned a number of normative theories such as the anticlassification doctrine (refraining from using any racial classifications—even remedial ones—in law), the antisubordination doctrine (helping formerly marginalized people attain equal status with privileged people), and the interest-convergence thesis (assuming the permanence of American racism). See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 Harv. L. Rev. 1470 (2004) (for anticlassification and antisubordination normative theories); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980) (normative theory on the permanence of American racism).

<sup>56</sup> Michael Scriven, *Methods of Reasoning and Justification in Social Science and Law*, 23 J. Leg. Educ. 189, 189 (1970). This distinction is often known in academic discourse as the classic lumper–splitter problem. See e.g. George Gaylord Simpson, *Principles of Animal Taxonomy* 135–40 (Columbia U. Press 1961).

<sup>57</sup> Scriven, *supra* n. 57, at 189.

<sup>58</sup> Cf. Richard Brust, *The High Bench vs. the Ivory Tower*, A.B.A. J. (Feb. 1 2012) (available at [http://www.abajournal.com/magazine/article/the\\_high\\_bench\\_vs.\\_the\\_ivory\\_tower/](http://www.abajournal.com/magazine/article/the_high_bench_vs._the_ivory_tower/)); Robert Post, *Legal Scholarship and the Practice of Law*, 63 U. Colo. L. Rev. 615, 615 (1992).

<sup>59</sup> See e.g. J. Cunyon Gordon, *A Response from the Visitor from Another Planet*, 91 Mich. L. Rev. 1953, 1960 (1993) (observing that legal academics “consider law practice the province of the brain dead”).

<sup>60</sup> See e.g. Brent E. Newton, *Practicing What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. Rev. 105, 105–56 (2010).

<sup>61</sup> Wayne Melville & Xavier Fazio, *The Life and Work of John Snow*, 74 Sci. Teacher 41, 41 (Oct. 2007).

Instead of viewing normative theory and practical lawmaking as opposites, a continuum of micro law and macro law may provide legal actors with a more comprehensive and thereby more useful cognitive framework. Legal practitioners tend to specialize in micro law. Legal academics tend to specialize in macro law. Both legal practitioners and legal academics, however, can engage both micro and macro law along a micro–macro legal continuum.

#### D. The micro–macro legal continuum

Dr. John Snow's hybrid—micro, macro, *i.e.*, theoretical, practical—study of the spread of cholera in London led him to be “hailed as the father of modern epidemiology.”<sup>61</sup> In 2003, he was “voted the greatest doctor of all time” by the British newspaper *Hospital Doctor*.<sup>62</sup> Just as Dr. Snow's combination of micro *and* macro, theoretical *and* practical research *and* action enabled him to recognize how to stop cholera and to innovate public-health-research methodology, the hybrid study and practice of micro and macro law can result in new legal insights and innovations.

This micro–macro distinction<sup>63</sup> parallels the well-established division between microeconomics and macroeconomics.<sup>64</sup> Whereas microeconomics addresses the behavior of individuals (*i.e.*, producers, consumers, households, firms, and industries within their economic environment and how they respond to changing conditions),<sup>65</sup> macroeconomics addresses the aggregate effects of economic activity (*i.e.*, through regional, national, and international measures such as inflation, unemployment, and the demand and supply of money).<sup>66</sup> Although macroeconomic theories must be linked to microeconomic behavior, there is no consensus among economists about either the boundary between microeconomics and macroeconomics nor the nature of their relationship.<sup>67</sup>

Likewise, the porous boundary between micro law and macro law is the legal actors' roles and accompanying constraints upon their judgment

62 *Id.*

63 Cf. Mathias M. Siems, *Legal Originality*, 28 Oxford J. Leg. Stud. 147, 148–50 (2008); Minna J. Kotkin, *Creating True Believers: Putting Macro Theory into Practice*, 5 Clinical L. Rev. 95, 97, 99 (1998); Carrie Menkel-Meadow, *Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering Education*, 4 Antioch L.J. 287, 289 (1986); Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories about Lawyering*, 29 Clev. St. L. Rev. 555, 556 (1980) (all employing a micro–macro law distinction).

64 This division was first coined by Ragnar Frisch. Leif Johansen, *Ragnar Frisch's Contributions to Economics*, 71 Swedish J. Econ. 302, 305–06 (1969).

65 Jae K. Shim & Joel G. Siegel, *Macroeconomics* 3 (2d ed., Barron's Educ. Series, Inc. 2005).

66 *Id.*

67 Abdallah Zouache, *On the Microeconomic Foundations of Macroeconomics in the Hayek-Keynes Controversy*, 15 European J. History of Econ. Thought 105, 106 (2008).

and decisionmaking. Whereas legal actors practicing micro law are more limited in their judgment and decisionmaking, legal actors engaging macro law can exercise greater independent judgment and decisionmaking.

### 1. Micro law

Micro law is the type of law in which a legal actor's judgment is constrained by her professional role. Rather than rely upon her own independent judgment to determine how best to solve a particular legal problem, the legal actor must defer to professional and ethical considerations that limit her range of available options.

In short, legal actors practicing micro law are accountable to third parties. A legal actor practicing micro law might represent clients in a particular lawsuit or constituents who elected her to enact a particular statute. She therefore must attempt to attain their objectives—even if she personally disagrees with those objectives—if she wants to avoid malpractice for failing to uphold the attorney–client relationship<sup>68</sup> or if she wants to be reelected to public office.<sup>69</sup> Likewise, a judge ideally is supposed to exercise judicial restraint,<sup>70</sup> follow binding precedent—even if she personally disagrees with that precedent<sup>71</sup>—and restrict her decisionmaking to the specific case or controversy before her<sup>72</sup> or face public reversal by a reviewing court (or, if she is a member of the highest court in the jurisdiction, face public criticism of her reasoning from her fellow justices).<sup>73</sup>

Such third-party accountability is clearest with a discrete law or issue. For example, a client will know whether her lawyer represented her interests appropriately in a particular lawsuit. Likewise, a voter can easily learn whether an elected legislator or executive passed a promised piece of legislation or shared the voter's views on a particular hot-button issue.

68 See e.g. Model R. of Prof. Conduct 1.1–1.18 (ABA 2010) (describing the attorney–client relationship and the duty of zealous representation).

69 Under the theory of retrospective voting, voters in a democracy retrospectively determine at election time whether the executive and legislative branches have best represented their interests and vote accordingly. See generally Morris P. Fiorina, *Retrospective Voting in American National Elections* (Yale U. Press 1981).

70 See generally Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 Const. Commentary 257 (2005).

71 See e.g. Donald Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 Wm. & Mary L. Rev. 1143, 1190 (1999).

72 See U.S. Const. art. III, § 2, cl. 1; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *United States v. Torres*, 182 F.3d 1156, 1164 n. 2 (10th Cir. 1999); Model Code Jud. Conduct canon 2 (ABA 2010).

73 Elected judges also face the same reelection concerns as legislators. See Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. Rev. 69, 76–90 (2011).

Thus, not surprisingly, micro law—like microeconomics—typically examines individual legislation, executive action, administrative rule-making, litigation, and transactions, whereas macro law—like macroeconomics—examines law more collectively. Furthermore, although individual micro laws in aggregate constitute macro law—again like microeconomics and macroeconomics<sup>74</sup>—the boundary between micro and macro law varies according to context. Moving from micro law to macro law, the continuum ranges from a discrete law or issue to a specific area of legal doctrine (e.g., American securities law) through all legal doctrine (e.g., all American law) to general law (e.g., theories of general jurisprudence<sup>75</sup> that seek to transcend the legal doctrine of any particular nation).

## 2. Macro law

In contrast, macro law is the type of law in which a legal actor's judgment is less constrained by her professional role. Legal actors therefore engaging in macro law can exercise much more independent judgment than when creating micro law. Macro law is concerned with systemic issues beyond the scope of individualized decisionmaking.

Although the precise line between micro law and macro law is unclear—hence the need for a continuum—legal actors at the highest national or international level, such as Congress, the Supreme Court, and the President, often engage macro law when deciding issues of national policy. Even these top-level legal actors, however, still regularly create, critique, and revise micro law.

Perhaps the most familiar legal actors engaging macro law are law professors writing academic legal scholarship.<sup>76</sup> Because a law professor enjoys academic freedom,<sup>77</sup> she has fewer constraints on her professional judgment than a legal actor creating micro law.<sup>78</sup> A law review article—“air law”<sup>79</sup>—is “written on behalf of no client, in no pending case, without a court date and addressed to no one in particular.”<sup>80</sup>

<sup>74</sup> See *supra* notes 65–67 and accompanying text.

<sup>75</sup> A theory of general jurisprudence assumes “that there are certain elements and concepts common to all legal systems” and attempts to identify and analyze them. Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* xiii (Oxford U. Press 2001).

<sup>76</sup> Ample law review articles address micro law as well. Legal scholarship, however, writes more about macro law than about forms of micro-law, such as practitioner briefs and memoranda of law. See e.g. Eugene Volokh, *Academic Legal Writing: Law Review Articles, Student Notes, Seminar Papers, and Getting on Law Review* 35–36 (4th ed.,

Foundation Press 2010) (noting that law review articles focusing on a single case tend to be less influential than those focused on a broader legal issue).

<sup>77</sup> See generally Matthew Reid Krell, *The Ivory Tower under Siege: A Constitutional Basis for Academic Freedom*, 21 Geo. Mason U. Civ. Rights L.J. 259 (2011).

<sup>78</sup> See *supra* sec. I.D.1.

<sup>79</sup> Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 Geo. L.J. 803, 812 (2009).

<sup>80</sup> Richard A. Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, 97 Geo. L.J. 845, 845 (2009).

As exhibited by the difference between a legal brief and a law review article, micro and macro law employ different forms of legal analysis. Both have substantially different evidentiary burdens, admissible authority, and preferred methods of reasoning. Because micro law is more specific than macro law, micro law has a much less onerous evidentiary burden than macro law, which, because of its broader scope, is much harder to prove. Likewise, micro law's admissible authority is usually restricted to much more formalist binding precedent and previous legal decisions than macro law which, because of its broader scope, is more open to creative, nonlegal sources. Finally, micro law generally employs greater inductive reasoning, wherein "the claim is that the premises provide *some* grounds or support for the truth of the conclusion";<sup>81</sup> macro law generally employs greater deductive reasoning, wherein "the claim is that the premises, if true, provide *conclusive* grounds for the truth of the conclusion[.]"<sup>82</sup>

A stark illustration of the difference between the relatively unconstrained judgment of a law professor analyzing macro law versus the more constrained judgment of a legal practitioner creating micro law is the failed nomination of Professor Lani Guinier for Assistant Attorney General for Civil Rights, U.S. Department of Justice. As a law professor, Guinier had written extensive legal scholarship about race, scholarship that she later believed was blatantly mischaracterized to destroy her nomination.<sup>83</sup>

As head of the Civil Rights Division, Guinier would have been charged with leading the agency that "serves as the federal government's public and internal voice on civil rights, representing the United States in the nation's courts and serving as an authority and resource for other government agencies on issues relating to discrimination."<sup>84</sup> A large part of Guinier's job would have been overseeing the micro-law litigation brought by the Division in U.S. federal courts.

Then-Senator Joe Biden, Chair of the Senate Judiciary Committee, law school graduate, and future Vice President of the United States,<sup>85</sup> commented on the impact of Guinier's scholarship upon her confirmation hearing:

If she can come up here and explain herself, convince people that what she wrote was just a lot of *academic* musing, who knows? . . . I suppose

81 Douglas Lind, *Logic & Legal Reasoning* 6 (2d ed., The Natl. Jud. College 2007).

82 *Id.*

83 Lani Guinier, *Who's Afraid of Lani Guinier?* The N.Y. Times Mag. 38, 44 (Feb. 27, 1994).

84 Senator Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 Harv. L. & Policy Rev. 211, 212 (2008).

85 Vice President Joe Biden, <http://www.whitehouse.gov/administration/vice-president-biden> (accessed Mar. 5, 2012).

it's conceivable that she could be confirmed. If she comes up here and says she believes in the theories that she sets out in her articles and is going to pursue them, not a shot.<sup>86</sup>

Simply put, a law professor engaging macro law has greater freedom to express her own personal beliefs without worrying about micro law judgment constraints.<sup>87</sup>

The micro–macro legal continuum raises another intriguing research question: What is the relationship between individual and collective legal action, between micro and macro law? Does an individual micro legal action—a single lawsuit, a single statute, a solitary administrative regulation, or a specific executive order—have a macro legal effect? If yes, how much? Does such effect vary according to the character or nature of the particular micro law? Or is the converse true? Does macro law affect micro law? If yes, how much? Does such effect vary according to the character or nature of macro law?

Similarly, how much impact, if any, can an individual legal actor's efforts make upon macro law and society? For example, does individual attorney skill really matter, or are legal outcomes more predetermined by larger social forces? Can a more skillful attorney obtain a more favorable outcome for her client in a criminal lawsuit than a less skillful attorney?<sup>88</sup> Or are all legal actors just bourgeois instruments of oppression?<sup>89</sup>

Figure 1 summarizes key differences between micro law and macro law.

<sup>86</sup> Robert Post, *Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship*, 11 Const. Commentary 185, 185 (1994) (citation omitted).

<sup>87</sup> Although academic freedom is conducive to creativity, the exigencies of practice might lead to more creative and more realistic solutions as well. Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 Loy. L. Rev. 623, 644 (2004).

<sup>88</sup> See Jennifer Bennett Shinall, Student Author, *Slipping Away from Justice: The Effect of Attorney Skill on Trial Outcomes*, 63 Vand. L. Rev. 267 (2010); David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. Chi. L. Rev. 1145 (2007).

<sup>89</sup> See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Leg. Educ. 591, 591–92 (1982).



Figure 1: Micro Law versus Macro Law

Characteristic	Micro Law	Macro Law
Legal Actor’s Judgment	Most constrained by third parties involved in the creation or revision of a particular micro law.	Less constrained by third parties.
Scope	Single legal action.	Multiple legal actions, often considered from an aggregate or collective perspective.
Evidentiary Burden	Less onerous burden because restricted to specific context.	More onerous burden because of broader applicable scope.
Admissible Authority	More restricted to formalist, binding precedent and previous decisions. Less open to creative, nonlegal sources.	Less restricted by binding precedent and previous decisions. More open to creative, nonlegal sources.

II. Cognitive Dissonance When Practical Lawmaking and Normative Theory Appear to Contradict

Promoting consistency between our preferred normative theory and practical lawmaking is an example of avoiding hypocrisy. No one wants to be a hypocrite. When we sense hypocrisy between what we believe and what we do, we understandably try to change or to camouflage such hypocrisy. That human tendency has been named “cognitive dissonance.”<sup>90</sup>

When faced with cognitive dissonance between the reality of practical lawmaking (and its associated written product, legal doctrine<sup>91</sup>) and one’s preferred normative theory, a legal actor has only three choices—to obey, to ignore, or to violate legal doctrine. Obedience to existing doctrine includes legal change efforts within the system.<sup>92</sup> Ignorance of existing doctrine is what many busy nonlawyers choose daily.<sup>93</sup> Violation of existing doctrine encompasses civil disobedience and even armed rebellion.<sup>94</sup> Every legal actor implicitly or explicitly chooses one of these three options.

90 See e.g. Girardeau A. Spann, *Constitutional Hypocrisy*, 27 Const. Commentary 557, 571 & n. 56 (2011) (citing Leon Festinger, *A Theory of Cognitive Dissonance* 1–31 (Stanford U. Press 1957)). See also *supra* n. 16.

91 For a definition of “legal doctrine,” see *supra* n. 2.

92 Federal Rule of Civil Procedure 11(b)(2) offers a good definition of such legal change efforts: a “nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law[.]” Fed. R. Civ. P. 11(b)(2).

93 Corky Siemaszko, *Ignorance Is Law of this Land. 38% of Americans Fail Citizenship Test—70% Don’t Know Purpose of Constitution*, N.Y. Daily News 2 (Mar. 22, 2011) (available at 2011 WLNR 5572225) (citation omitted).

94 See generally Mary Ellen Snodgrass, *Civil Disobedience: An Encyclopedic History of Dissidence in the United States* vol. 1–2 (M.E. Sharpe, Inc. 2009).

One example of cognitive dissonance between practical lawmaking and normative theory is that of legal practitioners, who can experience cognitive dissonance between their personal ideals and the disillusioning reality of their practice. Another is that of legal academics, who can experience cognitive dissonance between their scholarly commentary and its lack of real-world impact.

### A. Disillusionment in practical lawmaking

Like most working Americans, legal practitioners not surprisingly crave meaning and significance in their professional life. In his book *The Lost Lawyer*, Anthony Kronman, former Dean of Yale Law School, recognized that “whatever external goals they aim to achieve through the practice of law, most lawyers also hope that their work will be a source of satisfaction in itself. Indeed, many hope that the intrinsic satisfactions it affords will be important enough to play a significant role in their fulfillment as human beings.”<sup>95</sup> There is ample evidence, however, that many legal practitioners are dissatisfied with practical lawmaking.<sup>96</sup>

For example, a 1994 California Bar Association–RAND study found that two thirds of the surveyed attorneys believed that lawyers leave practical lawmaking “because of dissatisfaction with the practice of law.”<sup>97</sup> Only half of the polled attorneys, if given a do-over, “would still choose to be lawyers.”<sup>98</sup> Their overall view of the legal profession was “profoundly pessimistic.”<sup>99</sup> “Many believe[d] that attorneys are compromising professional standards, and many fear[ed] that ethical behavior, civility, and collegiality will decline in the future. They [saw] a profession increasingly buffeted by economic pressures and a future in which lawyers’ quality of life will deteriorate rather than improve.”<sup>100</sup> Whether these dire predictions proved true is beside the point because they provide empirical evidence that legal practitioners have viewed and continue to view practical lawmaking in a similarly negative light.

Legal practitioners’ judgment is constrained by their professional role when practicing micro law.<sup>101</sup> When practicing micro law, as most legal

95 Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 2 (Harv. U. Press 1993).

96 See e.g. Michael L. Rustad & Thomas H. Koenig, *Review Essay: Competing Visions of Angst among Elite Lawyers*, 2006 U. Ill. L. Rev. 475, 476 n. 4 (2006) (collecting authorities).

97 Deborah R. Hensler & Marisa E. Reddy, *California Lawyers View of the Future: A Report to the Commission on the Future of the Legal Profession and the State Bar* 12 (RAND 1994).

98 *Id.* at xii, 9.

99 *Id.* at 9.

100 *Id.*

101 See *supra* sec. I.D.1.

practitioners do, they are professionally and ethically restricted from following their own personal values when those values conflict with their clients' interests.<sup>102</sup> The belief that micro practical lawmaking "frequently forces its practitioners to act in ways inconsistent with their own personal values is a key reason why an increasing number of attorneys feel that they lack integrity and have thus become dissatisfied with the legal field."<sup>103</sup> Psychologist Eric Fromm called such cognitive dissonance "schizoid self-alienation[,] . . . the psychological conflict caused by the failure of our career path to fit with our aspirations and dreams."<sup>104</sup> Such cognitive dissonance can alienate legal actors from practical lawmaking.<sup>105</sup>

Whether practitioners admit it or not, at the heart of this cognitive dissonance is a tension between their perception of practical lawmaking and their implicit or explicit preferred normative theory. Practitioners, however, are not alone. Legal academics suffer from a similar tension.

## B. Scholarly desire for real-world impact

Both practitioners and academics frequently joke about how legal scholarship is rarely read outside of the academy. In his recent talk, the Chief Justice quipped, "Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the Bar."<sup>106</sup>

Likewise, law professors are understandably self-conscious about how most American legal scholarship is apparently read only by other law professors.<sup>107</sup> For example, Professor Sanford Levinson's comments about legal academics' lack of engagement with the real world probably make some law professors cringe. In 2007, Levinson reportedly told Harvard

102 *Id.*

103 Arthur Gross Schaefer & Leland Swenson, *Contrasting the Vision and the Reality: Core Ethical Values, Ethics Audit and Ethics Decision Models for Attorneys*, 32 *Pepp. L. Rev.* 459, 460 (2005).

104 Rustad & Koenig, *supra* n. 97, at 477 & n. 10 (citing Erich Fromm, *The Sane Society* 124 (Holt, Rinehart & Winston 1955)).

105 See e.g. Michael A. Wilkinson, *Is Law Morally Risky? Alienation, Acceptance and Hart's Concept of Law*, 30 *Oxford J. Leg. Stud.* 441, 463 (2010).

106 C-Span, *supra* n. 18.

107 Sherrilyn Ifill responded to the Chief Justice's recent ribbing as neither "very funny" nor "very true" and admonished him and other judges at least to read legal scholarship before they disparage it. American Constitution Society, ACSBlog, *Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship*, <http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%99take-on-academic-scholarship> (July 5, 2011). See also Chemerinsky, *supra* n. 53, at 881 & n. 1 (admitting that although much of his scholarship "likely never has been read by anyone," he "prefer[red] not to know the reality that some of what [he has] written almost surely never has been read or cited"). In 2009, Dean Chemerinsky was the "most-cited full-time legal academic" in the United States. Rachel M. Zahorsky, *Irvine by Erwin*, ABA J., [http://www.abajournal.com/magazine/article/irvine\\_by\\_erwin/](http://www.abajournal.com/magazine/article/irvine_by_erwin/) (Aug. 1, 2009).

Law School students that if law professors attempted to become involved in the real world, then “the world would probably recoil in horror.”<sup>108</sup> He concluded that being a law professor is “bad for people who like to make a difference in the real world” because “[i]ncreasingly, this is an ivory tower profession.”<sup>109</sup>

Although whether or not practitioners use legal scholarship has little bearing on its quality (after all, how can practitioners judge what they have not even read?), what law professor does not appreciate it when lawmakers use her scholarship in practical lawmaking?<sup>110</sup> As Professor Richard Lempert wrote, “Law professors want their scholarship to matter.”<sup>111</sup>

American law professors remain citizens in a democracy dominated by practical lawmaking and the rule of law.<sup>112</sup> Micro legal doctrine unavoidably and publicly affects their own lives or the lives of their friends and loved ones daily. Even a legal academic who avoids writing about practical lawmaking in her highly theoretical macro legal scholarship cannot help but notice the disparity between her preferred normative theory and the practical lawmaking in action all around her. To avoid cognitive dissonance in both academics and practitioners, therefore, practical lawmaking should consider normative theory.

### III. Practical Lawmaking and Normative Theory

Law professors in law review articles frequently write about normative theory.<sup>113</sup> Some legal practitioners believe normative theory has little to no relevance to their job of practical lawmaking.<sup>114</sup> Some probably agree with Judge Roger Miner, U.S. Court of Appeals for the Second Circuit, who said that if he “saw the word ‘normative’ in one more law review article,” he “would scream.”<sup>115</sup>

If belief in or concern about normative theory were akin to religious belief, such practitioners would be atheist or agnostic. Just as atheism and

<sup>108</sup> Dina Awerbuch, *Prof. Levinson Demystifies the Path to Legal Academia*, Harv. L. Rec., <http://hlrecord.org/?p=12363> (Oct. 19, 2007). In fairness to Levinson, he was merely relating what he understood as the legal academy's status quo and was not necessarily representing his own personal views. For his own personal views, see Sanford Levinson, *Judge Edwards' Indictment of "Impractical" Scholars: The Need for a Bill of Particulars*, 91 Mich. L. Rev. 2010 (1993).

<sup>109</sup> Awerbuch, *supra* n. 109.

<sup>110</sup> For examples of legal scholarship that innovated legal doctrinal concepts practitioners now take for granted, see *supra* n. 54.

<sup>111</sup> Richard Lempert, *Breaking Deadlock, Shattering Ideals*, 1 L., Probability & Risk 83, 93 (2002).

<sup>112</sup> For further discussion about the rule of law in a democracy, see *infra* sec. III.A.

<sup>113</sup> Accord Peter Goodrich, *Pierre the Anomalist: An Epistemology of the Legal Closet*, 57 U. Miami L. Rev. 791, 810 (2003).

<sup>114</sup> See *supra* note 50 and accompanying text.

<sup>115</sup> Roger J. Miner, *A Significant Symposium*, 54 N.Y. L. Sch. L. Rev. 15, 18 (2009).

agnosticism themselves are religious beliefs insofar as they are beliefs about religion,<sup>116</sup> disregard of or disdain for any normative theory of law are themselves normative theories.<sup>117</sup> Although there are some generally accepted names and definitions for normative theories, there is much variation.<sup>118</sup> Unlike legal doctrine, normative theory has no authoritative rulebook for its terms.

A survey of specific examples of why normative theory matters to both academics and practitioners is helpful to an understanding of its application and scope.<sup>119</sup> Still, such a survey only scratches the surface of this deep and complex topic: all practical lawmaking is unavoidably normative.<sup>120</sup> Although legal practitioners might reject this claim, such agnostic or atheist practitioners by default subscribe to two normative theories essential to the rule of law.

### A. Legal doctrine's default normative theories

The ostensibly objective rule of law is often contrasted with the supposedly subjective rule of people.<sup>121</sup> The rule of law is “that of a regime of rules, announced in advance, which are predictably and effectively applied to all they address, including the rulers who promulgate them—formal rules that tell people how the state will deploy coercive force and enable them to plan their affairs accordingly.”<sup>122</sup> In essence, the rule of law can be summarized as, “No person was above the law; all must obey it; and it should favor no [person] against another.”<sup>123</sup> The ideology of legalism applies equally to the rule of law: “the ethical attitude that holds moral

<sup>116</sup> Cf. Nelson Tebbe, *Nonbelievers*, 97 Va. L. Rev. 1111, 1112–13 (2011) (discussing the growing involvement of nonbelievers in the sociopolitical network, including bringing religious freedom claims). Just as the lack of any religious belief or the denial of all religious beliefs is nevertheless a norm about religion, so is the lack of any normative theory or the denial of all normative theory a norm about normative theory.

<sup>117</sup> See Jeanne Schroeder & David Carlson, *Law's Non-Existent Empire*, 57 U. Miami L. Rev. 767, 768–70 (2003).

<sup>118</sup> See e.g. Bix, *supra* n. 7, at i.

<sup>119</sup> Professor Robert Burns has written thoughtful legal theory about the American trial. See Robert P. Burns, *The Death of the American Trial* (U. Chicago Press 2009); Robert P. Burns, *A Theory of the Trial* (Princeton U. Press 1999). Burns explained how normative theory can interpret practical lawmaking:

My goal here is close to what Hannah Arendt called “thinking what we do,” that is, to raise to a higher level of self-consciousness the normatively based practices in which we are actually engaged. This goal is consistent with that most traditional, and paradoxical, of philosophical goals—to think the concrete.

Burns, *A Theory of the Trial* at 4 (citations omitted).

<sup>120</sup> See *supra* notes 38–41 and accompanying text.

<sup>121</sup> See, e.g., Brian Z. Tamanaha, *Law as a Means to an End* 217–19 (Cambridge U. Press 2006); see also generally *Freedom and the Rule of Law* (Anthony A. Peacock, ed., Lexington Books 2010); Ronald A. Cass, *The Rule of Law in America* 27, 31 (The Johns Hopkins U. Press 2001); William C. Whitford, *The Rule of Law*, 2000 Wis. L. Rev. 723 (2000); Austin Sarat & L. F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 Yale L.J. 1663, 1667 (1989).

<sup>122</sup> Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 Theoretical Inquiries L. 441, 441 (2010).

conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.”<sup>124</sup> The rule of law is “a faith in the power of reason.”<sup>125</sup>

The imperfect implementation of this rule of law concept is legal doctrine. Because legal doctrine employs written language, all legal doctrine in a democracy unavoidably relies upon two normative theories to function: formalism and positivism. All legal practitioners, therefore, who create or revise legal doctrine implicitly or explicitly believe in formalism and positivism.

### 1. Formalism

Formalism is “usually used in a pejorative sense, to describe analysis . . . that moves mechanically or automatically from category or concept to conclusion, without consideration of policy, morality, or practice.”<sup>126</sup> Nineteenth- and twentieth-century formalists supposedly believed that “the law was comprised of principles—including definitions, concepts, and doctrines—broad in their generality, few in their number, and clear enough to permit answers to questions of law to be more or less directly deduced. The formalists also believed that the law generally is, and should be, unresponsive to particular factual contexts and circumstances.”<sup>127</sup>

Although formalism in legal doctrine has its limits, the rule of law’s fidelity to rule-following is founded upon formalism.<sup>128</sup> In fact, such formalism is an essential prerequisite for the notions of fair notice and due process<sup>129</sup> fundamental to legal doctrine as embodied by the legal maxim “*nulla crimen sine lege* (no crime without a posited rule).”<sup>130</sup>

If legal doctrine were not finite, publicly available in writing, and—at least on some level—governed by legal reasoning, it would hardly be fair to expect lawyers, let alone the general public, to be aware of the legal obli-

123 Peter Charles Hoffer, *A Nation of Laws: America’s Imperfect Pursuit of Justice* 83 (U. Press Kansas 2010).

124 Judith N. Shklar, *Legalism* 1 (Harv. U. Press 1964).

125 Pierre Schlag, *The Enchantment of Reason* 19 (Duke U. Press 1998) (quoting *America’s Best Graduate Schools*, U.S. News & World Rep., Mar. 20, 1995, at 84) (internal quotation marks omitted). [That is all the information in the book’s endnotes—no author was listed.]

126 Bix, *supra* n. 7, at 69–70; see also, Frederick Schauer, *Formalism*, 97 Yale L.J. 509, 509, 548 (1988).

127 Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century’s End*, 49 Am. U. L. Rev. 1, 10–12 (1999). Professor Brian Tamanaha has persuasively argued through his historical research of the so-called formalist–realist antithesis that common-law judging for well over a century was viewed through “balanced realism” before legal realists created the self-serving myth of the formalist–realist divide. Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* 6 (Princeton U. Press 2010). For a discussion of balanced realism, see *infra* sec. III.D.

128 See e.g. Jean Stefancic & Richard Delgado, *How Lawyers Lose Their Way: A Profession Fails its Creative Minds* 34–36 (Duke U. Press 2005).

129 See e.g. U.S. Const., amend. XIV, § 1, cl. 2; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

130 Geoffrey Samuel, *Epistemology and Method in Law* 32 (Ashgate Publg. Co. 2003).

gations imposed by legal doctrine. It is of course well established that ignorance or mistake of the law generally is not an excuse.<sup>131</sup>

## 2. Positivism

Positivism “assumes[] that it is both possible and valuable to have a morally neutral descriptive or conceptual theory of law. . . . ‘Positive law’ is law that is created by human officials and institutions.”<sup>132</sup>

Legal practitioners who are atheist or agnostic about normative theory are either intentionally or unintentionally agreeing with positivism. Accepting existing legal doctrine as the status quo starting point for practical lawmaking is accepting positivism.

Perhaps the most-common examples of positivism’s impact upon American law are legal doctrinal courses in law school and the bar examination to become an American lawyer. When legal academics teach courses on particular areas of legal doctrine, it is clearly assumed that there is a finite body of legal doctrine that must be mastered—regardless of its morality or efficiency—because it is the currently prevailing positive law. The traditional law school issue-spotting hypothetical essay exam, and, indeed, the bar exam as well, assumes that there is a doctrinally “right” answer.<sup>133</sup>

## B. Conflicting normative theories critical of legal doctrine’s rule of law

Perhaps the only commonality between the many varied theories of what can be termed “Critical Jurisprudence” is shared skepticism of the so-called rule of law and its underlying formalist and positivist normative theories.<sup>134</sup> Three of these many reactionary normative theories are legal realism, natural law, and a catch-all, other postmodern legal criticism.

### 1. Legal realism

“Legal realism” is a loose label for “legal commentators, primarily from the 1930s and 1940s,” who sought to enable “citizens, lawyers, and judges to understand what was *really* going on behind the jargon and mystification of the law.”<sup>135</sup>

Historically, legal realism is considered the movement that first burst formalism’s bubble.<sup>136</sup> Most practitioners today accept legal realism’s core belief that practical lawmaking “will vary according to the identity of the

<sup>131</sup> See e.g. *Lambert v. California*, 355 U.S. 225, 228 (1957).

<sup>132</sup> Bix, *supra* n. 7, at 120.

<sup>133</sup> See e.g. Philip C. Kissam, *The Discipline of Law Schools: The Making of Modern Lawyers* 51–52 (Carolina Academic Press 2003); accord Pierre Schlag, *The Aesthetics of American Law*, 115 Harv. L. Rev. 1047, 1068–69 (2001).

<sup>134</sup> Stephen E. Gottlieb et al., *Jurisprudence Cases and Materials: An Introduction to the Philosophy of Law and Its Applications* 323 (2d ed., Matthew Bender & Co., Inc. 2006).

<sup>135</sup> Bix, *supra* n. 7, at 3 (emphasis in original).

decisionmakers and the cultural influences bearing upon them”<sup>137</sup> as a matter of course. It is cliché to say that “we are all realists now.”<sup>138</sup> Although that is not true,<sup>139</sup> both formalism and positivism are essential prerequisites to the so-called rule of law<sup>140</sup>—legal actors today appear to agree with legal realism that practical lawmaking is often political and unpredictable.<sup>141</sup>

## 2. Natural law

“Natural law” is “a mode of thinking systematically about the connections between the cosmic order, morality, and law. This approach has been around, in one form or another, for thousands of years.”<sup>142</sup> Instead of deferring to legal doctrine or other positive law, natural law posits that a higher form of law can trump legal doctrine or other positive law. Although natural law’s ambit is vast—incorporating even religion itself—most relevant here is practical lawmaking’s appeal to justice.

Justice often serves in practical lawmaking as the one-size-fits-all escape valve when all other arguments fail. American legal doctrine is replete with general references to the pursuit or furtherance of justice.<sup>143</sup> Although many practitioners undoubtedly have “an intuitive sense of justice[,]”<sup>144</sup> reasonable minds can disagree. Discussing or debating justice unavoidably presupposes a normative theory of justice.<sup>145</sup>

## 3. Other postmodern legal criticism

Many more normative theories are critical of the rule of law. Here are some highlights:<sup>146</sup>

136 Bailey Kuklin & Jeffrey W. Stempel, *Foundations of the Law: An Interdisciplinary and Jurisprudential Primer* 153 (W. Publ. Co. 1994); see also generally Michael Steven Green, *Legal Realism as Theory of Law*, 46 Wm. & Mary L. Rev. 1915 (2005). Brian Tamanaha disputes this historical interpretation. Tamanaha, *supra* n. 128, at 6.

137 Kuklin & Stempel, *supra* n. 137, at 156.

138 See Alice Ristroph, *Is Law? Constitutional Crisis and Existential Anxiety*, 25 Const. Commentary 431, 433–34 & n. 9 (2009) (citations omitted).

139 See e.g. Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 Iowa L. Rev. 195, 214–15 (2009).

140 See *supra* sec. III.A; accord Katrina Miriam Wyman, *Is Formalism Inevitable?* 57 U. Toronto L.J. 685, 703–04 (2007).

141 Kuklin & Stempel, *supra* n. 137, at 157.

142 Bix, *supra* n. 7, at 143.

143 See e.g. Fed. R. Civ. P. 1, 8, 15, 17, 26, 27, 32, 61, 65, 71, A, C, F; Fed. R. Crim. P. 1, 5.1, 6, 7, 11, 14, 15, 18, 21, 26.2, 32.1, 33, 42, 46; Fed. R. Evid. 104, 612, 613, 807.

144 Richard A. Posner, *The Problems of Jurisprudence* 391 (Harv. U. Press 1990); Richard A. Posner, *Legal Scholarship Today*, 115 Harv. L. Rev. 1314, 1319 (2002).

145 Amartya Sen, *The Idea of Justice* viii (Harv. U. Press 2009). Normative theory is essential to determining justice because, as Neal Katyal observed, “The parties to a lawsuit do not focus on general welfare; they focus only on their own.” Katyal, *supra* n. 29, at 81. Likewise, as Ronald Dworkin observed, the notion “that a judge can always decide what the law requires without calling on any moral or political convictions or any theory of justice” is “ludicrous.” Ronald Dworkin, *The Temptation of Elena Kagan*, N.Y. Rev. of Books, <http://www.nybooks.com/articles/archives/2010/aug/19/temptation-elena-kagan/?pagination=false> (Aug. 19, 2010); see also Ronald Dworkin, *Law’s Empire* 97 (Harv. U. Press 1986).



### *a. Three types of critical movements*

Critical jurisprudential movements responding to formalism, positivism, and the rule of law can be divided into three types. First, political movements like feminist legal theory<sup>147</sup> “examine critically the impact of law and legal institutions on the success or failure of particular political values.”<sup>148</sup> Second, interdisciplinary movements like law and economics<sup>149</sup> “attempt to study law from the perspective accorded by other disciplines[.]”<sup>150</sup> Third, “some of these movements examine the impact of law, or the role of law, on a community’s culture or in the development of its social mores.”<sup>151</sup>

### *b. Three legal indeterminacy themes*

Within these three critical movements is a key debate over legal indeterminacy, the “argument that legal questions do not have correct answers, or at least not unique correct answers. The issue is sometimes presented differently: whether the *legal materials* are collectively sufficient to determine a (single right) answer to the legal question.”<sup>152</sup> A related question concerns the determinacy of legal doctrine: whether, how, and to what extent lawmakers should and actually do rely upon legal doctrine (as opposed to other authorities) when making real legal decisions.<sup>153</sup>

Legal indeterminacy has three related themes. First, “antifoundationalism” claims “that social theory cannot give a single objective description of life” or of the law, “nor can language mirror objective reality.”<sup>154</sup> Second, “deconstruction” is the “quest for decomposing and exposing the alleged fictions, fallacies, and pretensions of Western categories of thought.”<sup>155</sup> Finally, “relativism” or “pragmatism” claims that “because there is no single truth that is knowable,” there should be “a

146 For general overviews of critical jurisprudence, see for example Kenneth Einar Himma, *The Nature of Law: Philosophical Issues in Conceptual Jurisprudence and Legal Theory* (Foundation Press 2011); Isaak I. Dore, *The Epistemological Foundations of Law: Readings and Commentary* (Carolina Academic Press 2007); Gottlieb et al., *supra* n. 135; Bix, *supra* n. 7; Kuklin & Stempel, *supra* n. 137.

147 For a discussion of feminist legal theory, see *infra* sec. V.C.4.

148 Gottlieb et al., *supra* n. 135, at 323.

149 For a discussion of law and economics, see *infra* sec. V.C.3.

150 Gottlieb et al., *supra* n. 135, at 323.

151 *Id.*

152 Bix, *supra* n. 7, at 97 (emphasis in original); see also e.g. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462 (1987) (collecting authorities).

153 See e.g. Marc Galanter, *The Legal Malaise; or, Justice Observed*, 19 L. & Socy. Rev. 537 (1985); Richard L. Abel, *Law Books and Books about Law*, 26 Stan. L. Rev. 175 (1973); Pound, *supra* n. 3 (all discussing the difference between legal doctrine as written or interpreted and as applied or ignored).

154 Dore, *supra* n. 146, at 754.

pragmatic accommodation toward and tolerance of multiple conceptions of truth.”<sup>156</sup>

### **C. Practical lawmaking is ground zero for debates over normative theory**

The purpose of this broad-brush overview of legal doctrine’s default normative theories and corresponding conflicting theories critical of the rule of law was to debunk the myth that practical lawmaking is somehow independent of or removed from normative theory. Perceiving them as such is indeed a false dichotomy.<sup>157</sup> Such an overview reveals not only that practical lawmaking relies upon formalism, positivism, and the rule of law, but also that it is ground zero for debates over normative theory. All normative theory about legal doctrine can be considered either supportive or critical of practical lawmaking’s rule of law assumptions.

In light of the desirability of uniting normative theory and practical lawmaking, is there a particular type of normative theory most conducive to the law and practice framework? Yes, balanced realism.

### **D. What is needed is balanced realism**

This overview of normative theories supportive or critical of the rule of law demonstrates that both kinds of normative theories are useful when creating, critiquing, and revising legal doctrine. Because proponents of law and practice believe that both normative theory and practical lawmaking together are essential to solve legal problems,<sup>158</sup> they prefer normative theories that balance a skepticism of and a fidelity to legal rules called “balanced realism.”

[Balanced realism] has two integrally conjoined aspects—a skeptical aspect and a rule-bound aspect. It refers to an awareness of the flaws, limitations, and openness of law, an awareness that judges sometimes make choices, that they can manipulate legal rules and precedents, and that they sometimes are influenced by their political and moral views and their personal biases (the skeptical aspect). Yet it conditions this skeptical awareness with the understanding that legal rules nonetheless work; that judges abide by and apply the law; that there are practice-related, social, and institutional factors that constrain judges; and that judges render generally predictable decisions consistent with the law (the rule-bound aspect).<sup>159</sup>

155 *Id.*

156 *Id.*

157 For further discussion, see *supra* sec. I.

158 For further discussion, see *supra* notes 10–13 and accompanying text.

Legal rules and their criticism are unavoidably codependent, as legal practitioner Felix Cohen<sup>160</sup> observed in his celebrated 1935 law review article, “Transcendental Nonsense and the Functional Approach”:<sup>161</sup>

The positive task of descriptive legal science cannot . . . be entirely separated from the task of legal criticism. The collection of social facts without a selective criterion of human values produces [a] horrid wilderness of useless statistics. The relation between positive legal science and legal criticism is not a relation of temporal priority, but of mutual dependence. Legal criticism is empty without objective description of the causes and consequences of legal decisions. Legal description is blind without the guiding light of a theory of values. It is through the union of objective legal science and a critical theory of social values that our understanding of the human significance of law will be enriched.<sup>162</sup>

Without the criticism of realist or postmodern legal scholars, the myth of legal science can perpetuate privilege, hierarchy, and oppression. There is a danger of “putting all of our intellectual eggs in a solitary basket”<sup>163</sup> and of arrogantly “assum[ing] that the professional role of the lawyer is morally defensible—that legal thinking in general and the ideology of advocacy and the adversary system in particular are socially and ethically justifiable.”<sup>164</sup>

In contrast, however, legal criticism without constructive suggestions about how to improve practical lawmaking may be dismissed as nihilistic by the very privileged and powerful people who need to be listening.<sup>165</sup> Ironically, a common—and unfair—rejoinder to such legal criticism is, “Now I’m no great defender of the rule of law, but what would you put in its place?”<sup>166</sup> The rejoinder is unfair because legal criticism—even criticism without constructive suggestions for change—nevertheless is the first step for legal change. That being said, at some point legal practi-

159 Tamanaha, *supra* n. 128, at 6; accord Frederick Schauer, *Rules and the Rule of Law*, 14 Harv. J.L. & Pub. Policy 645, 677 (1991).

160 Kennedy & Fisher, *supra* n. 33, at 165–69.

161 According to one study, the seventy-second most-cited law review article of all time. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 Chi.-Kent L. Rev. 751, 766 tbl. I (1996).

162 Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 849 (1935).

163 James R. Elkins, *Moral Discourse and Legalism in Legal Education*, 32 J. Leg. Educ. 11, 15 (1982).

164 *Id.* at 12.

165 Angela P. Harris, *Teaching the Tensions*, 54 St. Louis U. L.J. 739, 750 & n. 50 (2010) (collecting authorities); see also Judith S. Kaye, in *Comments on Professor Spann’s Paper*, 1988 Annual Surv. of Am. L. 259, 269 (1988); Alvin B. Rubin, *Does Law Matter? A Judge’s Response to the Critical Legal Studies Movement*, 37 J. Leg. Educ. 307 (1987) (two judges’ responses to critical legal theory).

tioners need to attempt to translate such criticism into practical lawmaking to make such legal change reality. Legal doctrine in a democracy thus needs both legal science and legal criticism.<sup>167</sup>

### C. The legal determinacy paradox

The debate over practical lawmaking highlights the fundamental challenge of legal doctrine, the legal determinacy paradox. Although legal doctrine can often be considered indeterminate,<sup>168</sup> the function of legal doctrine remains to provide the official written instructions that keep our democratic governing institutions running. The legal determinacy paradox is the unavoidable structural dilemma of legal doctrine that requires its oversimplified framing in imperfect words for public notice even though the very act of framing legal doctrine can result in its unjust perpetuation of privilege, the marginalization of oppressed groups, or the obstruction of the social policies or societal efficiencies that it seeks to promote. Professor Ruth Gavison echoed this paradox when she concluded, “[N]o legal theorist has ever argued that the legal system is nothing but rules,” and “[N]o one has argued that we can have a legal system without legal rules.”<sup>169</sup>

Based upon the specific factual and procedural circumstances, different types of legal doctrine might require a more positivist–formalist or realist–postmodern conception.<sup>170</sup> Because legal doctrine legitimately can be considered a finite body of positive law that is both teachable and learnable<sup>171</sup> and because legal doctrine remains governed by a “grammar” of logical reasoning,<sup>172</sup> legal doctrine in a democracy must incorporate legal formalism.<sup>173</sup>

Paradoxically, however, the very process of publicly putting legal doctrine down into words to further fair notice and due process<sup>174</sup> can be abused to perpetuate privilege and the status quo under the guise of false objectivity. As the realist and postmodern critique of legal doctrine demonstrates, what might appear on the surface to be the so-called “rule of law,” upon closer scrutiny could actually be the “rule of men”—rich, white, privileged, powerful, self-protecting, self-perpetuating men. All

166 Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 L. & Soc. Inquiry 779, 780 (1992). For examples of attempts by critical legal theorists to develop such positive programs, see *infra* sec. V.C.6.

167 *Contra* Schlag, *supra* n. 140, at 214–15.

168 For a definition of “legal indeterminacy,” see *supra* notes 153–57 and accompanying text.

169 Ruth Gavison, *Comment: Legal Theory and the Role of Rules*, 14 Harv. J.L. & Pub. Policy 727, 731–32 (1991).

170 See Cass R. Sunstein, *Problems with Rules*, 83 Cal. L. Rev. 953, 955 (1995) (advocating a context-specific form of legal decisionmaking).

171 Samuel, *supra* n. 131, at 32.

172 Lind, *supra* n. 82, at 1.

173 For a discussion of formalism, see *supra* sec. III.A.1.

174 For a discussion of fair notice and due process, see *supra* notes 130–31 and accompanying text.

realist and postmodern critical jurisprudence can be considered a reaction—from a variety of different jurisprudential viewpoints and identities—to the rule of law and its concomitant ideology of rule-following legalism.<sup>175</sup> To avoid cognitive dissonance,<sup>176</sup> legal actors must have internal consistency with practical lawmaking—in creating, ignoring, or revising legal doctrine—and with their preferred normative theory.

This codependent cycle of the creation, critique, and revision of legal doctrine underlies the need for neither a solely positivist—or formalist—nor a solely realist—or postmodern—view of legal doctrine, but rather a balanced realist view.<sup>177</sup> Although balanced realism aims to balance the need for both realistic skepticism and rule-bound formalism, balanced realism nevertheless provides no guidance on how to select a critical jurisprudential theory to balance with formalism and positivism when assessing existing legal doctrine.

Although interdisciplinary legal insights from other academic disciplines play a critical role in the normative assessment of existing legal doctrine,<sup>178</sup> practical lawmaking, the actual creation and revision of legal doctrine, remains controlled by legal practitioners. When legal actors engage in either practical lawmaking to create or revise legal doctrine or legal doctrine's critique through normative theory, they do so the same way: through advocacy<sup>179</sup> (employing some combination of pathos, ethos, or logos<sup>180</sup>) and the creation of legal rhetorics<sup>181</sup> (the common ways both practitioners and academics use words to communicate to a legal audience, be it lawmakers or law professors). Both legal advocacy and legal rhetorics employ legal reasoning and often make claims concerning the pursuit of justice.<sup>182</sup>

In addition to interdisciplinary insights, the normative critique of legal doctrine is also informed by—among other considerations—legal

175 See Gottlieb et al., *supra* n. 135, at 323; Shklar, *supra* n. 125, at 1.

176 For a discussion of “cognitive dissonance,” see *supra* sec. II.

177 “Balanced realism” is defined *supra* sec. III.D.

178 Kuklin & Stempel, *supra* n. 137, at ch. 1–3, 6.

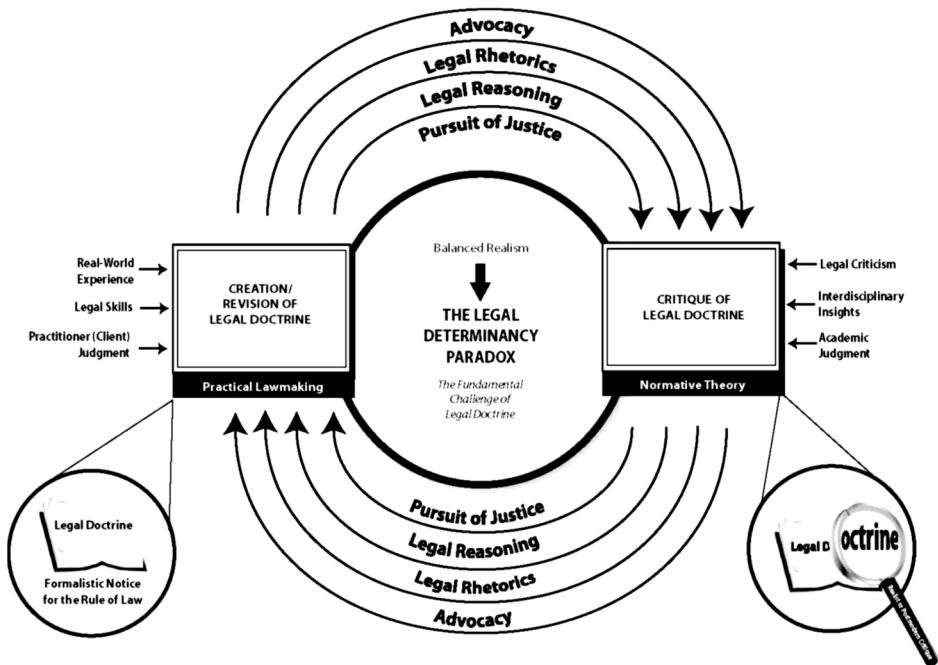
179 As Jed Scully realized, “[T]here is convincing evidence that the concept and practice of advocacy is much broader than its connection to any judicial system.” Jed Scully, *Advocacy without Borders—Advocacy in the Twenty-First Century*, 23 Am. J. Tr. Advoc. 347, 352 (1999). Because, like any other lawyer, a legal academic seeks to persuade her audience, legal scholarship is just another form of advocacy.

180 These three core modes of advocacy were first coined by Aristotle. While “ethos” concerns ethics, credibility, and character; “logos” refers to logical arguments based upon reason; and “pathos” refers to emotional and narrative arguments. Helen A. Anderson, *Changing Fashions in Advocacy: 100 Years of Brief-Writing Advice*, 11 J. App. Prac. & Process 1, 3 n. 7 (2010) (citation omitted). The debate over which mode should dominate in advocacy traces back to Aristotle and Plato. *Id.*

181 Legal “rhetorics” is “the art of using language to persuade, that is, to seek agreement, cooperation, or action” in the law. Eileen A. Scallen, *Evidence Law as Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching and Ethics*, 21 Quinnipiac L. Rev. 813, 829 & n. 63 (2003). The term is plural because “the labeling or definition of ‘rhetoric’ is a crucial rhetorical act in itself.” *Id.* at 830.

criticism<sup>183</sup> and academic judgment.<sup>184</sup> In a similar manner, the creation and revision of legal doctrine is informed by—among other considerations—real-world experience, legal skills,<sup>185</sup> and practitioner (or, where appropriate, client) judgment.<sup>186</sup>

The diagram below illustrates this legal determinacy paradox.



<sup>182</sup> For a discussion of legal doctrine's use of appeals to the pursuit of justice—a natural law concept—see *supra* notes 143–46 and accompanying text.

<sup>183</sup> For a discussion of critical jurisprudence, see *supra* sec. III. B.3.a.

<sup>184</sup> As discussed *supra* sec. I.D, because it is not ethically constrained by the attorney–client privilege or the limits of individual lawmaking, academic judgment is broader than practitioner judgment.

<sup>185</sup> Legal skills are “a range of lawyering tasks, such as . . . interviewing and counseling, negotiating, fact investigation, legal research, legal analysis and developing a case theory (for either a transaction or a litigated case), trial advocacy, mediation, appellate advocacy, and legal drafting.” Deborah Maranville, *Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Clinical Experiences*, 7 Clin. L. Rev. 123, 129–30 (2000).

<sup>186</sup> As discussed *supra* sec. I.D, because it is ethically constrained by the attorney–client privilege or the limits of individual lawmaking, practitioner (or client) judgment is narrower than academic judgment.

The public nature of this paradox demonstrates that the creation-and-revision process on the one hand and the critique process on the other hand are codependent in their use of legal doctrine itself. Once legal doctrine is created or revised, it must be promulgated in writing to provide the public with positivist and formalistic notice of the new legal doctrine as required by the democratic rule of law.<sup>187</sup> Correspondingly, the realist and postmodern critique of that same doctrine would be impossible without the promulgation of such doctrine. In other words, the normative critique of legal doctrine ironically relies upon legal doctrine's publication in writing and its public availability, two values that are characteristic of positivism and formalism.

Although normative theory and practical lawmaking are interrelated, how should legal actors discriminate between the many available normative theories? The only way to test the quality or applicability of particular normative theories is through practical lawmaking. Normative theory, therefore, should consider practical lawmaking.

#### IV. Normative Theory and Practical Lawmaking

Although normative theory in concept is essential for practical lawmaking, individual normative theories can vary in their quality or real-world applicability.<sup>188</sup> Moreover, normative theories can vary in persuasiveness and scholarly nature: although a common-sense legal theory based solely upon a practitioner's experience might not be as persuasive or scholarly as the more-established jurisprudential movements summarized earlier,<sup>189</sup> this *ad hoc* theory based upon personal experience is no less of a normative theory than, say, natural law.<sup>190</sup>

Because what looks good in theory might not actually work in practice, normative theory needs practical lawmaking to test theory with real-world implementation.<sup>191</sup> After all, in most other fields of the academy, "theory has to be testable; it is a hypothesis, a prediction, and

187 See *supra* notes 129–32 and accompanying text.

188 See Jules L. Coleman, *Legal Theory and Practice*, 83 Geo. L.J. 2579, 2580 (1995).

189 See *supra* sec. III.

190 For a definition of "natural law," see *supra* sec. III.B.2.

191 For examples of scholarship that tests normative theory with practical lawmaking, see Craig S. Warkol, *Resolving the Paradox between Legal Theory and Legal Fact: The Judicial Rejection of the Theory of Efficient Breach*, 20 Cardozo L. Rev. 321, 343 (1998) (explaining why judges may have rejected the theory of efficient breach of contract in practical lawmaking); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395, 395–400 (1995) (developing a "fidelity theory" to explain how doctrinal changes in U.S. constitutional law "may maintain fidelity with past understandings of the document's meaning and purpose"); Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 Nw. U. L. Rev. 54, 55 (1989) (testing Jürgen Habermas' theory of communicative action with existing First Amendment legal doctrine).

therefore subject to proof.”<sup>192</sup> Although normative theory, because of its often philosophical nature, might be impossible to test conclusively, one still can hypothesize testable effects in practical lawmaking that might either support or refute the normative theory.<sup>193</sup>

Accordingly, practical lawmaking provides a readily accessible and relevant source of empirical legal data with which to test normative theory in two ways. First, practical lawmaking can provide a new legal-realist critique of normative theory. Second, legal academics who selectively cherry pick legal doctrine, such as appellate opinions, as evidence to support their preferred normative theory out of its practical lawmaking context risk committing the fallacy of suppressed evidence.

### A. A new legal-realist critique of normative theory

Legal realism has long distinguished between the “law in the books” and the “law in action.”<sup>194</sup> New legal realism employs quantitative empirical studies of practical lawmaking—such as legal outcomes in judicial decisionmaking—to determine whether normative theory on paper reflects empirical, ground truth.<sup>195</sup>

Practical lawmaking thus provides empirical data with which to test normative theory without the translation concerns of other interdisciplinary sources. Unlike legal doctrine, which after all is the product of practical lawmaking, all of the social sciences initially must translate practical lawmaking into their own respective concepts and categories before interdisciplinary analysis can take place.<sup>196</sup> Furthermore, in light of the complex human makeup of legal institutions, practical lawmaking might be a source of data with which to test normative theory superior to interdisciplinary sources because of practical lawmaking’s “unmediated

192 Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 Denv. U. L. Rev. 661, 668 (1998).

193 Cf. Robert M. Lawless et al., *Empirical Methods in Law* 10–13 (Aspen Publishers 2010). For example, the normative theory that increased punishment and retribution is the best deterrent to crime is difficult to test directly. *Id.* at 12. Though not testing that normative theory directly, in a controversial series of articles, Professors Steven Levitt and John Donohue III identified testable factors associated with that normative theory such as more police, more certain prison sentencing, the decline of the crack cocaine epidemic, the legalization of abortion, the strong economy, changing demographics, better policing strategies, gun control laws, concealed carry laws, and the increased use of capital punishment to test as explanations for the well-documented decline of crime in the 1990s. *Id.* at 12–13 (citing Steven Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six Factors That Do Not*, 18 J. Econ. Persp. 163 (2004); John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q.J. Econ. 379 (2001); John J. Donohue & Steven D. Levitt, *Further Evidence That Legalized Abortion Lowered Crime: A Reply to Joyce*, 39 J. Hum. Res. 29 (2004)).

194 Katherine R. Kruse, *Getting Real about Legal Realism, New Legal Realism, and Clinical Education*, 56 N.Y. L. Sch. L. Rev. 659, 660 (2012) (quoting Pound, *supra* n. 3, at 15) (internal quotation marks omitted).

195 See Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. Chi. L. Rev. 831, 834–35 (2008).

196 David Nelken, *Can Law Learn from Social Science*, 35 Isr. L. Rev. 205, 206 n. 3 (2001). For an excellent recent discussion of these issues, see Elizabeth Mertz, *Undervaluing Indeterminacy: Translating Social Science into Law*, 60 DePaul L. Rev. 397, 397 (2011).



access to actual human situations and problems in contemporary life.”<sup>197</sup> In addition, legal “[p]ractitioners . . . often have sensible insights” on the normative questions underlying legal theory and “may provide useful insight into why something is done a certain way, or why a new theory might destabilize other areas of law.”<sup>198</sup>

Finally, the “logic of relying on practitioners” is prevalent in legal doctrine.<sup>199</sup> For example, *Chevron* deference in administrative law is premised upon listening to practitioners.<sup>200</sup> Likewise, the Geneva Conventions require military professionals (*i.e.*, practitioners of a different kind) and not politicians to determine whether someone is a prisoner of war.<sup>201</sup>

## B. Fallacy of suppressed evidence

Legal academics who claim that their scholarship can serve as a practical guide for lawmakers or cite appellate opinions, statutes, or other legal doctrine as supporting authority in their scholarship must be open to practical application considerations—to include an examination of the practical lawmaking used to create legal doctrine—or risk committing the fallacy of suppressed evidence. The fallacy of suppressed evidence occurs “whenever an argument is stated as authority, and a relevant, damaging portion of that authority is intentionally or accidentally omitted.”<sup>202</sup>

Legal scholarship that selectively employs legal doctrine, yet disdains the practical lawmaking actually used to create that same legal doctrine, would commit this fallacy. For example, an article that cites a judicial opinion as supporting authority for its thesis yet disdains practical lawmaking makes the fallacious assumption that the cherry-picked judicial opinion rationally reflects the article’s argument when in actuality other considerations not reflected in the opinion but part of practical lawmaking, such as unfair factual findings,<sup>203</sup> incompetent lawyering, or politics, might have been the real cause. Likewise, legal scholarship that claims to provide pragmatic guidance to lawmakers while disdaining the

197 Hanoch Dagan & Roy Kreitner, *The Character of Legal Theory*, 96 Cornell L. Rev. 671, 679 (2011).

198 Katyal, *supra* n. 29, at 70.

199 *Id.* at 70 n. 20.

200 *Id.* at 70 nn. 20, 160 (citing *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984)).

201 *Id.* at 70 n. 20.

202 Grain Dealers Mut. Ins. Co. v. Farmers Alliance Mut. Ins. Co., 42 Fed. Appx. 219, 200 (10th Cir. 2002) (Aldisert, J., sitting by designation) (citing Jack L. Landau, *Logic for Lawyers*, 13 Pac. L.J. 59, 93–94 (1981)).

203 For example, legal academics who uncritically accept the reported facts of a judicial opinion as true are making a considerable assumption. An examination of the practical lawmaking used to create that judicial opinion as well as of the advocates and parties involved might cast doubt on the accuracy of those reported facts. See Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* 287 (Harv. U. Press 2000).

practical lawmaking that lawmakers actually use when creating legal doctrine would also commit this fallacy.

Normative theory can have “epistemological integrity” only if understood “in context and in complexity”<sup>204</sup> because “[l]ive-client” examples provide data on “the extrajudicial facts, the systematic values of the forum, the norms of the community, the options open to opponents of our client’s interests and many other factors” that “do not and cannot exist in the simulated or hypothetical instance.”<sup>205</sup> Practical lawmaking tests normative theory with “nuances that only real experience can provide.”<sup>206</sup> Both practical lawmaking and normative theory can be leveraged through law and practice.

## V. A Law and Practice Movement

### A. Another “law and”

The term “law and practice” here is employed with intentional irony because, through the proliferation of “law ands,” legal academics have ironically welcomed interdisciplinary strangers into their home while maintaining within the walls of that same home their feud with their legal-practitioner siblings.<sup>207</sup> Because the legal academy and legal practice remain two sides of the same legal profession, perhaps a more accurate but less descriptive term would have been just “Law.”<sup>208</sup> The proliferation of such “law and” scholarship in the American legal academy reflects a consensus that the study of law “is not to be understood on its own terms, but requires the application of some method or substance provided by other disciplines.”<sup>209</sup> After all, many disciplines other than law have long studied legal doctrine.<sup>210</sup> Underlying all “law and” scholarship is the assumption that the discipline after the coordinating conjunction can provide additional insights to the traditional study of law.<sup>211</sup>

As Judge Edwards observed, “‘Law and’ scholars with true intellectual confidence would acknowledge the legitimacy of alternative, and comple-

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<sup>204</sup> 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, 287 (1990).

<sup>205</sup> *Id.* at 288.

<sup>206</sup> *Id.* In contrast, legal scholarship that refrains from claiming any usefulness to lawmakers or from citing any real-world legal doctrine as evidentiary authority might be practically unwise but logically would be free to disdain practical lawmaking.

<sup>207</sup> See e.g. Kathleen M. Sullivan, *Forward: Interdisciplinarity*, 100 Mich. L. Rev. 1217, 1217 (2002); George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. Leg. Educ. 437, 437 (1983).

<sup>208</sup> See *supra* nn. 14–15.

<sup>209</sup> Galanter & Edwards, *supra* n. 6, at 376.

<sup>210</sup> See e.g. Posner, *Legal Scholarship Today*, *supra* n. 145, at 1316.

<sup>211</sup> Accord Lee C. Bollinger, *The Mind in the Major American Law School*, 91 Mich. L. Rev. 2167, 2167 (1993).

mentary, approaches.”<sup>212</sup> Law and practice is such an alternative and complementary approach to other “law and” scholarship. Just as the study of law has been enriched by the interdisciplinary perspectives of other disciplines,<sup>213</sup> the study of legal doctrine can be enriched by the unique insights of practical lawmaking.

## B. The inside perspective of law

The essential difference, however, between law and practice’s intradisciplinary approach and the interdisciplinary approach of other “Law ands” is perspective. Whereas the interdisciplinary approach uses an *outside* perspective, “roughly, looking at legal phenomena from the standpoint of one or more of the social sciences[,]” law and practice’s intradisciplinary approach uses an “*inside* perspective,” focused “on legal rules and procedures the way that lawyers and judges usually see them—from *within* the legal system . . . .”<sup>214</sup> As David Kennedy and William Fisher III aptly articulated in the legal reasoning context, law and practice scholarship is focused upon the

vigorous intellectual tradition *within* the field of law. Scholars in [other fields] all refer to law, and each of these disciplines has its own—outsider’s—idea about what law is and how it works. The experience of lawyers and legal scholars reading the work of colleagues in other fields is often a frustrating one. “If only they had a better sense of how law worked from the *inside*,” we often think, or “if they had only gone to law school.”<sup>215</sup>

Although law and practice welcomes the “outside” perspective tools and insights of other disciplines, there are two instrumental differences between law and practice and other interdisciplinary movements. Not only is law and practice ultimately controlled and guided by the legal profession (perhaps as part of an interdisciplinary team but a team always led by a lawyer<sup>216</sup>) but also law and practice is limited to furthering justice—however defined<sup>217</sup>—in legal doctrine used by lawmakers in the real world through *both* scholarship *and* practical action.

212 Edwards, *supra* n. 2, at 52.

213 Kuklin & Stempel, *supra* n. 137, chs. 1–3, 6.

214 Stewart Macaulay et al., *Law in Action: A Socio-Legal Reader* 1 (Foundation Press 2007) (emphasis in original).

215 Kennedy & Fisher, *supra* n. 33, at ix (emphasis in original).

216 Since Louis Brandeis’ so-called “Brandeis brief” in *Muller v. Oregon* (see Jennifer Friesen & Ronald Collins, *Looking Back on Muller v. Oregon*, 69 A.B.A. J. 293 (1983)) interdisciplinary research has been a commonplace tool of

legal practitioners. “Practicing lawyers frequently make use of nonlegal learning and data in arguing cases, as do political actors who shape the law. So do judges who interpret the law and apply it to specific factual contexts.” Kuklin & Stempel, *supra* n. 137, at 1. Law and practice agrees with Judge Fuld that interdisciplinary scholarship “must seek to relate the law to the problems of the community at large.” Stanley Fuld, *A Judge Looks at the Law Review*, 28 N.Y.U. L. Rev. 915, 917 (1953). This approach uses interdisciplinary research “as a tool that lawyers can use for legal ends.” *The Role of Social Science in Law* xiii (Elizabeth Mertz, ed., Ashgate Publ. Co. 2008).

Thus, by design, law and practice seeks to combine insights from both academics and practitioners. It seeks to encourage traditionally theoretical macro legal scholarship to incorporate more practice and traditionally practical micro skills scholarship to incorporate more theory. With their real-world perspective of the feasibility of proposed reforms, practitioners can make genuinely needed contributions to legal scholarship. In addition, actual practice experience provides a readily accessible and relevant source of empirical legal data.<sup>218</sup> Likewise, academics not only can become creative and formidable practitioners, but also through their scholarship and lobbying efforts can address macro legal issues beyond the scope of micro law and thereby help alleviate some of the alienation of practical lawmaking,<sup>219</sup> wherein lawyers who focus solely on practical lawmaking may feel disconnected from a sense of justice.

Critical to law and practice is this indispensable combination of theory and practice and of academics and practitioners. Such a hybrid, by definition, must always employ insights from both sides of law and of the legal profession. All law and practice scholarship requires both theory and practice: because law and practice seeks to further justice,<sup>220</sup> normative theory is essential to define and understand justice; because law and practice is focused upon legal doctrine used by actual lawmakers, practical lawmaking also is paramount.

Law and practice does not intend to criticize existing forms of legal scholarship, which generally are of high quality and great value. Purely theoretical articles and nuts-and-bolts practice guides are equally illuminating in very different yet complementary ways. Let the uninhibited waters of academic freedom flow. Consequently, law and practice scholarship should not supplant but rather supplement all existing legal scholarship.

### C. Some potential past examples

Although a comprehensive list of law and practice examples requires more research, here are seven potential candidates for such scholarship: (1) formalism and positivism; (2) logical reasoning; (3) law and economics; (4) feminist legal theory; (5) *Brown* and Transformative Law and Scholarship; (6) academic–practitioner partnerships; and (7) empirical studies of micro law.

217 For a discussion of legal doctrine's evocation of justice, see *supra* sec. III.B.2.

218 See *supra* sec. IV.A.

219 Wilkinson, *supra* n. 106, at 463.

220 See *supra* note 146 and accompanying text.

### 1. Formalism and positivism

Formalism<sup>221</sup> and positivism<sup>222</sup> are legal theories so entrenched in practical lawmaking that legal practitioners may not even be aware that they rely upon them by default.<sup>223</sup> Although practitioners recognize the limits of both theories,<sup>224</sup> both nevertheless continue to define how law is conceptualized and analyzed in a democracy.

### 2. Logical reasoning

Likewise, logical reasoning—in particular, the syllogism—has supplied the predominant language of legal discourse since Aristotle.<sup>225</sup> This legal theory has so pervaded academic and practical legal discourse that even its deconstructionist critics are forced to rely upon logical reasoning to craft the very arguments revealing logical reasoning’s limitations. Even narrative jurisprudence relies upon logic.<sup>226</sup>

### 3. Law and economics

Law and economics is “[t]he application to various legal questions of the forms of analysis found in economics . . . .”<sup>227</sup> As exemplified by the Federalist Society and the Olin Foundation, the law and economics movement arguably is one of the most successful examples of normative theory in practical lawmaking and legal academic–legal practitioner collaboration. What began as a network of conservative law students and lawyers, the Federalist Society had considerable impact in President George W. Bush’s Administration and on his judicial appointees.<sup>228</sup> Similarly, the conservative Olin Foundation has generously funded law and economics research in the academy.<sup>229</sup>

Law and economics rhetoric is commonly used by legal authors—including academics and practitioners.<sup>230</sup> Such “market efficiency” rhetoric has become so prevalent that many policymakers currently believe “that the primary path to greatness in the social sectors is to become ‘more like a business.’”<sup>231</sup> Moreover, law and economics “can

221 For a definition of “formalism,” see *supra* sec. III.A.1.

222 For a definition of “positivism,” see *supra* sec. III.A.2.

223 See *supra* sec. III.

224 *Id.*

225 See Lind, *supra* n. 82, at 120.

226 Storytelling is still a form of communication and as such must have logical coherence to be understood. See generally Symposium, *Legal Storytelling*, 87 Mich. L. Rev. 2073 (1989).

227 Bix, *supra* n. 7, at 115.

228 See e.g. Theresa M. Beiner, *Shift Happens: The U.S. Supreme Court’s Shifting Antidiscrimination Rhetoric*, 42 U. Toledo L. Rev. 37, 82–84 (2010).

229 Thomas O. McGarity, *A Movement, a Lawsuit, and the Integrity of Sponsored Law and Economics Research*, 21 Stan. L. & Policy Rev. 51, 59–66 (2010).

230 Michael Murray, *Law and Economics as a Rhetorical Perspective in Law* 30, <http://ssrn.com/abstract=1830573> (Apr. 2011).

231 Jim Collins, *Good to Great and the Social Sectors: A Monograph to Accompany Good to Great* 1 (Jim Collins, 2005); see also Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 Nw. U. L. Rev. 1227, 1227 (2003).

provide litigators, transactional attorneys, and policy makers with valuable analytical tools.”<sup>232</sup> Finally, law and economics’ normative theoretical assumptions—particularly that of “[h]omo economicus,”<sup>233</sup> the rational cost-benefit maximizing person—have been criticized by behavioral economics,<sup>234</sup> law and socioeconomics,<sup>235</sup> and neuroeconomics.<sup>236</sup>

#### 4. Feminist legal theory

Feminist legal theory “focus[es] on the allegedly patriarchal nature of legal doctrine or the application of law—that is, the way law purportedly favours the interests of men over those of women and works to maintain a hierarchical structure in which men have more power than women.”<sup>237</sup>

Although feminist legal theory has changed legal doctrine in a number of areas, none perhaps has changed as radically as American domestic-violence law. Before the 1970s, domestic violence was not considered a legal problem requiring any government intervention: it was either condoned or viewed as a private family matter.<sup>238</sup> Today, domestic violence is a crime, and pro-arrest or mandatory-arrest policies have been almost uniformly adopted throughout the United States.<sup>239</sup> This remarkable transformation in legal doctrine over mere decades was a triumph of feminist legal theory applied to practical lawmaking. In fact, social science research in this area “for the most part, has followed from the agenda of the battered women’s movement and focused on either furthering its goals or evaluating progress toward them.”<sup>240</sup>

#### 5. *Brown* and transformative law and scholarship

Dean Rachel Moran, then-President of the Association of American Law Schools selected “transformative law” as her presidential theme.<sup>241</sup> Moran also showcased *Brown*, the successful impact litigation developed with little help from legal academics, as “a model for transformative legal scholars[.]”<sup>242</sup> Critical of existing legal scholarship, Moran observed that “*Brown* differs substantially from what we currently define as ‘scholarship’—a point that should prompt re-examination of how we use that

232 Sternlight, *supra* n. 15, at 741.

233 See e.g. Joseph E. Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy* 249 (W. W. Norton & Co., Inc. 2010). In fairness, law and economics has evolved to use more sophisticated models of behavior. See Richard A. Posner, *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression* xiv (Harv. U. Press 2009).

234 See generally Vandenberg et al., *supra* n. 16.

235 See generally Jeffrey L. Harrison, *Law and Socio-economics*, 49 J. Leg. Educ. 224 (1999).

236 See generally Jedediah Purdy, *The Promise (and Limits) of Neuroeconomics*, 58 Ala. L. Rev. 1 (2006).

237 Bix, *supra* n. 7, at 67.

238 Kristin Bumiller, *The Nexus of Domestic Violence Reform and Social Science: From Instrument of Social Change to Institutionalized Surveillance*, 6 Annual Rev. L. Soc. Sci. 173, 174 (2010).

239 *Id.* at 175–76.

240 *Id.* at 174.

241 Moran, *supra* n. 56, at 1.

242 *Id.* at 6.

term” and that “the transformative lawyering exhibited in *Brown* barely resembles our current notions of scholarship.”<sup>243</sup>

When articulating her vision of “transformative scholarship,” which can be considered a form of law and practice scholarship, Moran identified three models “for combining reform advocacy and academic respectability[:]”<sup>244</sup> (1) “[d]evoting sustained attention to a single problem[:]” (2) forming academic and nonacademic partnerships; and (3) “[e]mbracing controversy in a world that idealizes a studied distance from conflict[.]”<sup>245</sup>

Moran concluded, “A legal academy that recognizes that civic-minded research, far from being suspect, should be encouraged and embraced will be stronger for having made that choice.”<sup>246</sup>

## 6. Academic–practitioner partnerships

Informed by reformist critical legal movements that promote “scholars as justice practitioners’ and ‘activist lawyers as theorists”<sup>247</sup> such as Nisha Agarwal and Jocelyn Simonson’s “Summer Theory Institute[.]”<sup>248</sup> Gerald López’s “Rebellious Lawyering[.]”<sup>249</sup> Eric Yamamoto’s “Critical Race Praxis[.]”<sup>250</sup> and Phyllis Goldfarb’s “Theory-Practice Spiral[.]”<sup>251</sup> law and practice is nonetheless distinguishable by its lack of political agenda. Because law and practice is primarily concerned with methodology, law and practice scholarship can (and should) run the ideological gamut. Self-

243 *Id.* at 4, 6.

244 *Id.* at 6.

245 *Id.* at 6, 17, 18.

246 *Id.* at 18.

247 Julie A. Su & Eric K. Yamamoto, *Critical Coalitions: Theory and Praxis*, in *Crossroads, Directions, and a New Critical Race Theory* 379, 387 (Francisco Valdes et al., eds., Temple U. Press 2002).

248 Agarwal & Simonson, *supra* n. 24, at 457. The Harvard Law School Summer Theory Institute seeks “to bring theory to practice—along with a new conception of what kind of theory is directly relevant to public interest practice.” *Id.* Each summer, the two full-time practitioners lead twelve to fourteen law student interns at New York City public-interest organizations “to read and discuss social theory in the context of their day-to-day experiences working for social change through the law.” *Id.*

249 Gerald P. López, *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice* (Westview Press, Inc. 1992). López’s “rebellious idea of lawyering against subordination” is that “lawyers must know how to work with (not just on behalf of) their marginalized clients, “how to collaborate with other professional and lay allies rather than ignoring the help that these other problem-solvers may provide in a given situation[.] . . . how to educate those with whom they work, particularly about law and professional lawyering, and, at the same time, they must open themselves up to being educated by all those with whom they come in contact, particularly about the traditions and experiences of life on the bottom and at the margins.” *Id.* at 37.

250 See Su & Yamamoto, *supra* n. 249. Su and Yamamoto collaborated to force garment manufacturers and retailers to accept legal responsibility for the plight of garment workers kept in de facto slavery. *Id.* at 379; see also Moran, *supra* n. 56, at 17 & nn. 17, 20.

251 Goldfarb, *supra* n. 7, at 1599. Goldfarb’s “theory-practice spiral” is an “ongoing feedback relationship” between feminist theorists and clinical educators. *Id.* at 1617.

styled progressives, conservatives, and critical theorists are all welcome in this house.

## 7. Empirical studies of micro law

Because, as demonstrated by the legal determinacy paradox,<sup>252</sup> the creation and revision of legal doctrine is possible only through practical lawmaking, legal skills<sup>253</sup>—the means through which lawyers engage in practical lawmaking—can greatly influence legal doctrine. Given the importance of legal skills in the creation and revision of legal doctrine, micro-legal-skills scholarship needs to go beyond the National Institute for Trial Advocacy’s motto of “learning by doing”<sup>254</sup> to “learning *about* doing.” Micro-legal-skills instruction currently is limited by a first-generation methodology of “learning by doing” that fails to memorialize, test, or aggregate legal-skills data in a format usable by other legal scholarship.

Although this first generation “learning-by-doing” methodology has been effective in training accomplished lawyers, its lack of self-reflection and aggregation has prevented it from having relevance beyond practitioner training and thereby has perpetuated the so-called theory–practice divide. First-generation skills instruction “will teach one only what some people believe is effective, and that begs the question[,] How do those folks *know*?”<sup>255</sup> There thus is a need for a next generation “learning-about-doing” methodology with the requisite self-reflection and aggregation needed to provide a useful empirical legal-data source directly applicable to legal scholarship.

Here are some promising examples. The dialogue between Dean Robert Klonoff and practitioner Paul Colby<sup>256</sup> and litigation consultants Douglas Rich and Ellen Leggett<sup>257</sup> concerning the empirical testing of Klonoff and Colby’s sponsorship theory establishes a precedent for such next-generation skills training. Because forms of practical lawmaking such as courtroom proceedings and depositions are already memorialized by

252 See *supra* sec. III.E.

253 For a definition of “legal skills,” see *supra* n. 186.

254 National Institute for Trial Advocacy, *Publication Catalog* i, [http://www.lexisnexis.com/documents/pdf/20110707034204\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20110707034204_large.pdf) (2012).

255 Michael J. Saks, *Turning Practice into Progress: Better Lawyering through Experimentation*, 66 Notre Dame L. Rev. 801, 802 (1991).

256 Robert H. Klonoff & Paul L. Colby, *Winning Jury Trials: Trial Tactics and Sponsorship Strategies* (3d ed., Natl. Inst. Tr. Advoc. 2007).

257 Quentin Brogdon, *Mr. Brogdon Responds: A Reply to a Flawed Defense of Sponsorship Theory*, 63 Tex. B.J. 756, 756–58 (2000) (summarizing debate and collecting authorities).



legal practitioners, law and practice researchers can study transcripts and videotapes of actual court proceedings.

One potential success story is the apparent widespread acceptance of empirical legal scholarship analyzing judicial decisionmaking. Though the validity of these studies remains disputed,<sup>258</sup> what appears undisputed is that they present an example of how aggregating practical lawmaking—legal doctrine, namely judicial opinions and case outcomes—can create a form of practice-based legal scholarship whose scholarly rigor appears acceptable to the entire legal academy.<sup>259</sup>

#### **D. A more accurate and more rigorous study of legal doctrine**

Although law and practice does not intend to supplant other forms of scholarship, because it examines the entire micro and macro picture of legal doctrine instead of just a part, it should result in a more accurate and more intellectually rigorous study of legal doctrine. The hybrid study of the interrelationship between micro law and macro law may provide a more comprehensive and insightful perspective than the isolated study of either.

### **VI. Conclusion: How Academics and Practitioners Should Work Together**

The law and practice framework encourages practitioners and academics to employ, study, critique, and revise both micro and macro law. Because of limited time, limited resources, or professional necessity, most advocates and lawmakers will attain greater expertise in uniquely academic or practical pursuits, normative theory or practical lawmaking, micro law or macro law. But they can nevertheless collaborate with their professional counterparts.

For example, imagine the collaboration between a family law professor and a family law practitioner. With their shared interest in micro and macro family law, the professor might summarize a current normative theory in family law scholarship for the practitioner. In response, the practitioner might relate micro law experiences that provide empirical data consistent or inconsistent with the theory, which the professor might then use in future scholarship. The professor might also help the practitioner

258 See Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 Duke L.J. 1895 (2009).

259 See e.g. Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. Rev. 1133, 1133 (2010) (collecting authorities).

formulate an impact litigation strategy to make the applicable micro law more consistent with the professor's preferred theory. Because the professor knows that the practitioner will try to change the applicable legal doctrine to better reflect that theory, the professor will not experience cognitive dissonance.<sup>260</sup>

Likewise, the practitioner might tell the professor about systemic problems with family law legal doctrine. The professor might then lobby the legislature or write a law review article about these problems. Because the practitioner knows that the professor will try to do something about these problems, the practitioner will not experience cognitive dissonance.<sup>261</sup>

Many pressing legal issues require the coordinated efforts of both academics and practitioners. As Dean Raymond Pierce concluded, "This is an honorable profession that should play a major role in society in upholding justice and order. It should come together."<sup>262</sup> Surely the important social and legal issues of our time are worthy of the coordinated efforts of both academics and practitioners along the entire micro–macro legal continuum.

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<sup>260</sup> For a definition of "cognitive dissonance," see *supra* note 16 and accompanying text.

<sup>261</sup> *Id.*

<sup>262</sup> Brust, *supra* n. 59. For example, the critical issue of indigent access to counsel includes the political manipulation of legal clinic jurisdiction: powerful corporate interests afraid of legal-clinic litigation lobby state legislatures to force public law schools to stop representing indigent clients claiming corporate injury. This issue is so urgent that law professor and celebrity advocate Lawrence Tribe has been appointed to head the U.S. Department of Justice Access to Justice Initiative. See Gregory, *supra* n. 53, at A11. See also e.g. H. Reese Hansen, *The President's Message: Attacks on Clinical Programs and the Relevance of Core Values*, 2010-2 aalsnews 1–3, 13 (May 2010) (available at [http://www.aals.org/services\\_newsletter\\_presMay10.php](http://www.aals.org/services_newsletter_presMay10.php)); Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 Tul. L. Rev. 235, 235 (1999); Krell, *supra* n. 78, at 259.

