

1998

Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney

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Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney

Patrick J. Schiltz*

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I would be remiss if, in this Article about the moral formation of young attorneys, I failed to thank my own mentors. Professors Clark Byse and Paul Weiler became my mentors in law school, Justice Antonin Scalia became my mentor during my clerkship with him, and James Fitzmaurice and John French (two of my partners) and David Hardy (one of my clients) became my mentors while I practiced law. I am grateful to all of them.

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For lawyers, money is increasingly the be-all and end-all.¹

[S]cholarship, not teaching, is the be-all and end-all in academia.²

I started teaching two years ago, after practicing law for eight years. I did not expect the transition to be easy. I had read of "the growing disjunction between legal education and the legal profession."³ I had heard that few professors had any real experience practicing law and that most were not interested in the work of practicing lawyers and judges. Indeed, I had heard that many in the academy—particularly in the elite schools—actually disdained the practice of law, which they regarded as "the province of the brain dead."⁴

In my first two years of teaching, I have found the gulf between the academy and the profession to be pretty much as advertised. Unfortunately, though, I have found that, in one important respect, lawyers and law professors have more in common than they might like to admit. Put charitably, the professional lives of both are increasingly focused on one narrow purpose. Put less charitably, the professional lives of both are increasingly dominated by greed. For lawyers, it is greed for money; for law professors, it is greed for academic prestige.

Gordon Gekko was wrong:⁵ Greed is not good. The greed of lawyers and law professors is a case in point. As the lives of

1. Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1683 (1994).

2. J. Cunyon Gordon, *A Response from the Visitor from Another Planet*, 91 MICH. L. REV. 1953, 1960 (1993).

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

4. Gordon, *supra* note 2, at 1960.

5. Gordon Gekko is the character played by Michael Douglas in the movie *Wall Street* who is best known for saying: "[G]reed . . . is good. Greed is right. Greed works." WALL STREET (Twentieth Century Fox 1987).

senior lawyers—particularly those in the elite firms—become dominated by the pursuit of billable hours, and as the lives of law professors—particularly those in the elite schools—become dominated by the pursuit of published pages of scholarship, both lawyers and law professors are turning their backs on much else that is important. And among the most critical of the responsibilities that senior lawyers and law professors are abandoning is the moral formation of the young—the shaping of law students and new lawyers into ethical practitioners.

Over the past decade or so, the pressure on novice lawyers to act unethically has increased substantially. At the same time, the help that senior lawyers and law professors have given young lawyers to resist those pressures has decreased substantially. These trends have been most apparent in the large firms and the elite law schools, but no part of the profession has remained unaffected. Unless these trends are reversed—unless some balance and perspective are restored within the leading institutions of the legal profession—the profession's already deplorable ethics will only get worse.

Part I of this Article discusses the critical role that senior lawyers can play in shaping novice attorneys into ethical professionals. It describes why new attorneys are particularly vulnerable to forces in the profession that lead lawyers to act unethically. It then explains how moral formation by senior attorneys—a process to which I will refer as “mentoring”—can help junior attorneys to resist those forces by strengthening their character and by anchoring them both “internally” to their own values and “externally” to the community in which they work. Part I concludes by describing how several recent developments—developments rooted in the increasing materialism of the legal profession—have led both to an increase in the pressure that pushes young lawyers to act unethically and to a decrease in the mentoring that helps young lawyers resist that pressure.

Part II discusses whether and to what extent the legal academy could fill the gaps that are being created by the profession's abandonment of mentoring. It argues that law schools have the capacity to replace many of the traditional functions of professional mentoring, including its role in character formation and integration. However, Part II contends that the academy is unlikely to assume those responsibilities because of an increasing materialism of its own—a materialism

measured mainly in academic prestige rather than personal income.

In Part III, this Article concludes by arguing that while research and writing should continue to be a major goal of the academy, it should not be the only goal. Rather, law professors should take seriously their responsibility to prepare their students to practice law—and, in particular, to practice law ethically. Law professors have always influenced the ethics of their students, for such influence is unavoidable. In the past, though, law professors had a safety net: They knew that any mistakes they made would likely be corrected through professional mentoring. Little remains of that safety net today.

I. MORAL FORMATION AND THE PROFESSION

A. LEGAL ETHICS FROM THE PRACTITIONER'S PERSPECTIVE

To appreciate the relationship between ethics and mentoring, one must first understand something about legal ethics as actually experienced in the practice of law. Often, the topic of legal ethics as discussed in law reviews or law school classrooms is far removed from the topic of legal ethics as experienced by practitioners. One seeking to understand why some lawyers practice ethically and others do not would be well advised to avoid much of the academic writing about ethics, and instead to focus on the mundane realities of the daily lives of practicing lawyers.

1. Ethics in Theory vs. Ethics in Practice

During my eight years in private practice, I was a trial attorney, an appellate attorney, an outside general counsel, an expert witness, and a client. I prosecuted, defended, supervised, settled, tried, arbitrated, and consulted on hundreds of cases in almost all fifty states and several foreign countries. I worked with many of the most highly regarded attorneys in America and with a few attorneys who have since been disbarred. I worked with the world's largest law firms and with solo practitioners. I worked in big cities and tiny towns, in conference rooms and courthouses, in dog bite cases and in some of the biggest lawsuits of the past decade. I saw just about every kind of lawyer practice just about every kind of law in just about every kind of setting.

Coming to academia as an experienced practitioner, I was struck at once by the substantial difference that often exists

between legal ethics as discussed in the law reviews and legal ethics as experienced by practitioners. For one thing, the type of “meta” questions that so intrigue academics—questions such as whether the word “ethics” has any real meaning—are of little interest to most real world lawyers. For another thing, academic writing about legal ethics often focuses on the hard cases at the margins; it sometimes loses sight of the fact that the easy cases far outnumber the hard ones, and that the easy cases are, well, easy.

Most practitioners believe that there is such a thing as “ethical” behavior and have no difficulty distinguishing ethical from unethical conduct over the run of cases.⁶ For the most part, the principle that practitioners use to distinguish the ethical from the unethical is the same one that most people use to distinguish good deeds from bad deeds:⁷ The Golden Rule. Do unto others as you would have them do unto you. Be honest. Be fair. Be courteous. Be compassionate. Be true to your word. As Abraham Lincoln recognized, “virtue in a lawyer [is] not much different from common decency in any other calling.”⁸

In the hard cases, reasonable people can disagree about what it means to be “honest” or “fair.” But in the easy cases, they cannot, and they do not. In every community in which I practiced, lawyers agreed that some attorneys in the community practiced ethically and some did not, and even agreed to a substantial extent on which lawyers fell into which category. Most attorneys would view academic debates about the meaning of “ethics” as rather far removed from their daily experience.

Legal ethics as approached by the academy differ from legal ethics as approached by practitioners in another respect. One of the dominant subjects of modern scholarship on legal

6. I should qualify this a bit: Most lawyers have no difficulty distinguishing ethical from unethical conduct within the prevailing culture, which is a culture of neutral partisanship. See *infra* pp. 711-712. As is described below, the culture of neutral partisanship is so deeply engrained in practicing lawyers that few question it. See *infra* note 16. Examining the dominant culture of neutral partisanship is one of the most valuable contributions that academics can make to the legal profession.

7. See STEPHEN L. CARTER, INTEGRITY 237-38 (1996).

8. MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 70 (1994) (summarizing Lincoln's views); see also DAVID HERBERT DONALD, LINCOLN 149 (1995) (describing Lincoln's career as a practicing attorney and noting “the universal belief in [Lincoln's] absolute honesty,” the care and attention that Lincoln gave the work of every client, and Lincoln's “fairness to his opponents”).

ethics is role-differentiated morality.⁹ Those doing this work ask questions like, "What clients may an ethical lawyer represent?" and "Which of a client's ends may an ethical lawyer pursue?"¹⁰ Typically, the central concern of this scholarship is the good attorney who is asked to represent the bad client, or the good attorney who is asked to help a bad client achieve an immoral or unjust end.¹¹

This is important work. On a couple of occasions, I found myself grateful that it was being done.¹² But as important as this academic work on the "bad client" is, much of it is peripheral to the day-to-day lives of practicing attorneys. Lawyers simply are not asked very often to do horrible things on behalf of horrible people. In most cases, a legal dispute has arisen precisely because something has occurred about which two reasonable people can disagree. It is rare that a lawyer does not have a reasonable argument to make in support of a client's position.

9. See generally DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 133-57 (1994).

10. Some of the best scholarship in this area includes the work of Monroe Freedman, see, e.g., MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975); Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U. L. REV. 331 (1987); Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191 (1978); Stephen Pepper, see, e.g., Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995) [hereinafter Pepper, *Limits of the Law*]; Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613; and Thomas Shaffer, see, e.g., THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994); THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* (1981).

11. See Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319, 320 (1987) ("Most discussion in legal ethics these days is discussion of how a lawyer can protect herself from her client's bad morals.").

12. Soon after I began practicing law, I was asked to help represent a prisoner who had kidnapped, raped, tortured, and murdered two young girls. A few years later, former Roman Catholic priest James Porter asked me to represent him in connection with over 100 sexual abuse claims that were about to be filed against him. Newspapers have (unfairly) described Porter as a "monster," *A Measure of Justice for Porter*, PATRIOT LEDGER (Quincy, Mass.), Dec. 8, 1993, at 30, available in 1993 WL 3598617, as "evil," *Sexual Predators: Acts of Evil, Covered Up by Institutional Evil*, STAR TRIB. (Minneapolis), Dec. 9, 1993, at 30A, available in 1993 WL 11293817, and as having "entered the annals of infamous Americans," Linda Matchan, *Town Secret*, BOSTON GLOBE, Aug. 29, 1993, at 10, available in 1993 WL 6606470 (Magazine). In both cases, I accepted the representation, having been influenced by the scholarship that I read in law school and in practice.

Moreover, most clients are decent people. I liked and admired virtually everyone whom I represented. True, some of them had done bad things (although even those clients had almost always acted carelessly rather than intentionally). But there was some good in all of them. Finally, I never had a client who wanted "just" legal advice. Every one of my clients welcomed, and many invited, discussion about what was right, as well as what was legal.¹³

In my experience, lawyers typically assess the ethics of other lawyers not based upon whom they represent or what ends they pursue, but based upon *how* they do their work each day.¹⁴ The ethic of "neutral partisanship"¹⁵ is so deeply engrained in the practicing bar that few attorneys are considered unethical merely because of whom they represent or what relief they seek in court.¹⁶ By the same token, even the most

13. This probably would have been true even if many of my clients had not been the leaders of religious organizations. See THOMAS L. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* 214 (1991) ("Every business lawyer I have observed confirms the impression I got from being an apprentice business lawyer in the early 1960s—that business people are subject to moral influence from their lawyers.").

14. In the O.J. Simpson criminal case, for example, Simpson's attorneys were widely criticized by other attorneys not for representing a man thought by many to be guilty, but for the manner in which they *conducted* that representation.

15. See RHODE, *supra* note 9, at 144. The neutral partisan does not judge whether her client is a good or bad person, or whether her client is right or wrong. Rather, she represents her client's interests to the best of her ability, and leaves it to the legal system to make judgments about her client. See *generally id.* at 133-57.

16. One of the most recent and comprehensive examinations of the legal profession was written by Anthony Kronman, Dean of the Yale Law School. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993). It is an altogether impressive work, but it is a bit off-target in describing the lives of practicing lawyers. For example, Kronman describes practitioners as being caught in a difficult dilemma:

On the one hand, they are expected to be partisan champions of their clients' interests, and on the other, impartial officers of the court, duty-bound to uphold the law's integrity. When these allegiances conflict, a lawyer cannot fulfill all of his responsibilities at once. He must choose between them, and this creates a moral dilemma for the lawyer involved. . . .

Here . . . the real challenge is not to overcome the dilemma (for that cannot be done), but to resist the temptation to resolve it by always putting the client's well-being before the law's. . . . [T]he forces pressing in this direction are very strong, and the lawyer who cannot resist them will eventually cease to see his situation as morally problematic at all.

passionate defenders of neutral partisanship agree that there are limits on the *way* that lawyers should represent people or pursue ends. For example, there is almost universal agreement that no lawyer should "lie, cheat, or humiliate" in the course of representing a client.¹⁷ In sum, few lawyers would consider another attorney to be unethical because she represented a mass murderer or because she sought to have a meritorious claim against her client dismissed on a procedural technicality. But a lawyer will be considered unethical, even if she represents only noble people pursuing noble ends, if, in the course of that representation, she acts dishonestly or abusively.¹⁸

To understand the impact of mentoring on ethics, then, one must be familiar not with academic discussions of ethics—which, as I have said, sometimes focus on issues that are of little concern to the day-to-day lives of lawyers—but with ethics as viewed from the practitioner's perspective. In particular, one must understand the following:

Id. at 144-45. Kronman encourages attorneys to resist these pressures, and he believes that "the more a lawyer values the well-being of the law"—the more he "care[s] about the soundness of the legal order"—the more likely it is that he will "be able to summon such courage when needed." *Id.* at 145.

I view the situation differently. First, I think Kronman has underestimated the extent to which the ethic of neutral partisanship is already engrained in the practicing bar. I suspect that the overwhelming majority of practicing lawyers long ago stopped seeing as "morally problematic" the dilemma between being "partisan champions of their clients' interests" and being neutral, impartial servants of "the soundness of the legal order." See Carl T. Bogus, *The Death of an Honorable Profession*, 71 *IND. L.J.* 911, 922 (1996). Second, as I will discuss below, see *infra* pp. 735-736 and note 90, I doubt that lawyers are inspired nearly as much by something as abstract as "the well-being of the law" as they are by their families, their friends, and their faith. See generally SHAFFER, *supra* note 13.

17. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1083 (1976). Fried, like most advocates of the neutral partisanship model, "distinguish[es] between the lawyer's own wrong and the wrong of the system used to advantage by the client." *Id.* at 1084. This distinction is reflected in "the difference between humiliating a witness or lying to the judge on one hand, and, on the other hand, asserting the statute of limitations or the lack of a written memorandum to defeat what you know to be a just claim against your client." *Id.*

18. I should stress that I do not mean to *endorse* neutral partisanship; I mean only to describe the reality of legal practice today. The question whether a lawyer or law firm should represent people or organizations who engage in socially harmful conduct is much more difficult than the attitude of the practicing bar would suggest. As I said, see *supra* note 6, some of the most valuable work on ethics done by academics is work that critically examines neutral partisanship.

First, whether law is practiced ethically in any particular community depends not upon the community's formal rules, but upon its culture. Second, the culture of a legal community does not reflect "big" decisions that members of the community make about "big" problems, as much as it reflects the dozens of ordinary, mundane decisions that every attorney makes—and makes intuitively—every day. And finally, the intuition that guides these decisions is in large part a product of the mentoring received by the attorney. In sum, conduct is influenced by culture, culture by intuition, and intuition by mentoring.

The remainder of Part I.A. will discuss the first two elements of this equation. Part I.B. will consider the last element at length.

2. The Irrelevance of Rules

The formal rules of professional responsibility are often the focus of discussions of legal ethics in law reviews, bar journals, and other periodicals, as well as at academic conferences, bar conventions, and other professional meetings. In one sense, this is as it should be. The rules are important, for they affect the conduct of lawyers (in both anticipated and unanticipated¹⁹ ways) and they influence the values of the profession. In another sense, though, it is easy to overestimate the degree to which formal rules determine whether lawyers behave unethically or whether the profession regards particular types of conduct as unethical. I had cause to refer to the *Model Rules of Professional Conduct*²⁰ exactly twice in eight years; I almost never heard any other lawyer refer to them. Lawyers make decisions every day about what conduct is ethical and about whether they will behave ethically, but often the formal rules have little to do with those decisions.

The (substantial) irrelevance of the rules is in part a reflection of their generality and vagueness. They are not very specific about very much.²¹ Even when they are specific, they

19. For example, a lawyer who was misled by the rules of professional conduct to believe that her duty of confidentiality is virtually absolute might be induced by the rules to aid and abet a client in committing fraud or other misconduct.

20. The MODEL RULES OF PROFESSIONAL CONDUCT (1983) have been adopted in about four-fifths of the states, including Minnesota, the state in which I practiced. See ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT 01:101 (1997). About one-fifth of the states continue to use the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980). See *id.* at 01:301.

21. Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment*

often leave ample wiggle room for clever lawyers—who, after all, spend much of their professional lives manipulating rules. “Moral questions are often too complex and multifaceted to lend themselves to rule-bound solutions.”²² That is as true in the legal profession as anywhere else.

The irrelevance of the rules is in part a reflection of the fact that much of what a lawyer does is done in private—indeed, in situations that are secret by force of law. “Rules are unlikely to provide an effective threat of sanction when neither lawyer nor client wants to reveal what they do.”²³ To a substantial extent, the rules depend upon the good faith of attorneys and clients—not always the ideal people to monitor their own behavior.

The irrelevance of the rules is also a function of enforcement problems. Attorneys and judges do not like punishing other attorneys and judges.²⁴ Most unethical conduct does not involve such “felonies” as stealing from clients or forging documents; rather, it involves such “misdemeanors” as padding bills or misrepresenting facts in a brief. These less serious offenses were likely committed at one time or another by many of those who now enforce the rules of professional responsibility.²⁵

in the Teaching of Legal Ethics, 38 WM. & MARY L. REV. 145, 172 (1996).

22. Pepper, *Limits of the Law*, *supra* note 10, at 1607.

23. Robert F. Cochran, Jr., *Lawyers and Virtues: A Review Essay of Mary Ann Glendon's A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society and Anthony T. Kronman's The Lost Lawyer: Failing Ideals of the Legal Profession*, 71 NOTRE DAME L. REV. 707, 723 (1996).

24. ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 453-60 (3d ed. 1989).

25. It is difficult to know just how common these common practices are. See Darlene Ricker, *Greed, Ignorance and Overbilling*, A.B.A. J., Aug. 1994, at 62 (discussing the prevalence of overbilling). With respect to padding time sheets, for example, my perception that the practice is common is widely shared. See Bogus, *supra* note 16, at 922 (“Padding time records is a genuine professional plague, one not confined to a few firms or even a few lawyers within most firms. It is a silent epidemic.”); William G. Ross, *The Ethics of Hourly Billing By Attorneys*, 44 RUTGERS L. REV. 1, 3 & n.5 (1991) (collecting reports of widespread padding). However, a 1991 survey of private practitioners and corporate counsel conducted by William Ross suggested that “fraudulent billing occurs but remains the exception.” *Id.* at 16.

Only 12.3% of the private practitioners and 15.2% of the corporate counsel who responded to the survey's question about padding of hours stated that they believe that lawyers “frequently” pad their hours to deliberately bill clients for work which they never performed. But some 38% of the private practitioners and 40.7% of the corporate counsel stated that they believe that lawyers “occasionally” pad their hours. Only 42.4% of the private practitioners and 35.6% of

On several occasions, I complained bitterly to a colleague when a judge would not sanction one of my opponents for obvious and blatant misconduct. More often than not, the colleague would respond: "Of course not. The judge used to do the same thing when he practiced law."

Mostly, though, the irrelevance of the rules simply reflects the fact that rules do not define ethical behavior. Complying with the rules of professional conduct no more makes an attorney ethical than complying with the criminal law makes a person moral. It simply means that the attorney or the person is not a law breaker. Behaving ethically requires something more than compliance with rules;²⁶ it requires "compliance-plus." (Indeed, in some situations, behaving ethically may even require rule defiance.) An incident from my practice will help to illustrate the point:

James Fitzmaurice, who was my partner and mentor, once sued an insurance company on behalf of another law firm. The insurance company had refused to pay our client for several years of work that the firm had done for one of the company's insureds. The company had also refused to pay several other law firms, and all of them had brought their own claims. Millions of dollars were at stake.

The insurance company was represented by an attorney whom the associates working with Fitzmaurice referred to as the "junkyard dog." This lawyer was about as difficult and obstreperous and just plain nasty as a lawyer could be. And he was as gratuitously mean to Fitzmaurice as he was to anyone.

One day, Fitzmaurice received a thick unmarked envelope in the mail. The envelope contained a copy of a lengthy memo-

the corporate counsel stated that they perceived that such padding "rarely" occurs, and only 7.3% of the former and 8.5% of the latter contended that it virtually "never" occurs.

Id. Almost 60% of those surveyed by Ross admitted that they were aware of at least some specific instances in which lawyers had padded their hours. See *id.*

I find it astonishing that almost half of the lawyers surveyed by Ross reported that padding "rarely" or "never" occurs. Ross probably has it right when he speculates that, while most attorneys may not be engaging in what they would *define* as "padding" or "churning," they may be engaging in "liberal methods of time recordation" and other "more complex practices that ultimately may amount to no more than sophisticated versions of those same two abuses." *Id.* at 89.

26. See David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 58 (1995) ("[B]ecause the *Model Rules* have been legalized, and de-moralized, lawyers are necessarily and inevitably thrown back on the resources of their own judgment.").

randum that our opponent had written to his client, the insurance company. The memo summarized the strengths and weaknesses of the company's position and set forth our opponent's strategy for handling the case. It was obvious upon a quick skim of the memo that it was an extremely confidential document that had been improperly leaked to our opponent's adversaries by someone in his office—presumably, someone with a grudge against him.

Several of the attorneys suing the insurance company received this memo in the mail. All of them used it—and did not even tell our opponent that they had it—with the exception of Fitzmaurice. Fitzmaurice sent it back to our opponent with a cover letter that explained how Fitzmaurice had received the memo and that said—truthfully—that Fitzmaurice had neither read the memo carefully nor made any copies of it.

This incident demonstrates the irrelevance of rules in two respects. First, in assessing the ethical quality of Fitzmaurice's conduct and that of the other plaintiffs' attorneys, few lawyers would give a moment's thought to the rules of professional responsibility. Neither Fitzmaurice nor any of the other plaintiffs' attorneys violated any rule;²⁷ in other words, they were identical in the extent to which they complied with the rules. But few lawyers would consider the ethical quality of their conduct to be identical. Most attorneys would likely agree that Fitzmaurice's actions reflected the highest professional ethics and that the actions of the other attorneys, while not unethical, were not particularly praiseworthy. In other words, Fitzmaurice's conduct would likely be viewed as more ethical than

27. None of the *Model Rules of Professional Conduct* seems to forbid either the actions of Fitzmaurice or the actions of the other plaintiffs' attorneys. In 1994—long after this incident occurred—the American Bar Association issued a formal opinion in which it acknowledged that “the Model Rules do not offer explicit guidance” on this issue, but nonetheless found that an attorney in Fitzmaurice's position

has a professional obligation to notify the adverse party's lawyer that he or she possesses such materials and either follow the instructions of the adversary's lawyer with respect to the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from the court.

ABA Comm'n on Ethics and Professional Responsibility, Formal Op. 382, at 2 (1994). However, as the ABA itself acknowledged, several state bar ethics committees disagree with the ABA and hold that an attorney in Fitzmaurice's position is not obligated to inform either the adverse party or the court of the receipt of the materials and may make full use of the materials in litigating the case. *See id.* at 3-4.

the conduct of the other attorneys, even though, from the standpoint of the rules, their behavior was indistinguishable.²⁸

Second, and more importantly, just as the rules would be irrelevant to most attorneys in *assessing* Fitzmaurice's conduct, the rules were irrelevant to Fitzmaurice in *deciding* how to act. Fitzmaurice decided how to handle the situation without reference to any rule; indeed, Fitzmaurice decided how to handle the situation without even doing much deciding. As I will describe below,²⁹ for Fitzmaurice and for all attorneys, acting ethically is—and must be—habitual. It is an instinctive reflection of character, rather than a considered application of positive law. Fitzmaurice acted as he did because that is what seemed right to him intuitively; the rules had nothing to do with it.

Not only do the rules of professional responsibility have little to do with how an attorney will behave and little to do with whether an attorney's behavior will be regarded by other lawyers as unethical, the rules do not even have much to do with whether behavior that is considered unethical will be sanctioned—formally or informally. That depends far more upon the culture of each legal community than upon the governing rules.

Because I served as national counsel to several clients, and because I worked on several cases that were national in scope, I spent a lot of time on the road. I was struck by how each community I visited had an ethical climate that was as distinct as its meteorological climate. Two legal communities governed by precisely the same rules of professional conduct often differ dramatically in their ethics. Ethics in New Orleans bear little resemblance to ethics in Minneapolis. One does not practice law in Texas as one practices law in North Dakota. This is true even though the attorneys in all of these jurisdictions are governed by almost identical formal rules.³⁰

28. The typical fax cover sheet used today by the typical law firm—which threatens dire consequences to anyone who mistakenly receives the fax and does not *immediately* destroy or return it—suggests that, while conduct like Fitzmaurice's may be considered more ethical, conduct like that of the other plaintiffs' attorneys may be considered more common.

29. See *infra* Part I.A.3.

30. Louisiana, Minnesota, Texas, and North Dakota have all adopted the *Model Rules of Professional Conduct*. See 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § AP4:107, at 1269-70 (2d ed. Supp. 1994).

Over time, each legal community develops its own culture or "common law" of ethics, which comprises "the entire ensemble of understandings that lawyers observe in their dealings with one another, with clients, and with the courts."³¹ For the most part, this common law does not define what the community considers unethical. Lying, stealing, and cheating are considered unethical because of the prevailing moral norms, not because of the common law of a particular legal community. Rather, this common law defines what unethical conduct the community will tolerate. It defines what unethical behavior will be punished—through informal reprobation if not through formal fines and suspensions—and what unethical behavior will go unpunished. Just as there are "posted" and "real" speed limits in each community—and just as "real" speed limits vary among communities that observe the same "posted" limits—so too are there "posted" and "real" rules when it comes to sanctioning unethical conduct.³²

3. The Relevance of Intuition

Every lawyer, every law firm,³³ and every legal community has its own moral fabric.³⁴ Some lawyers and firms and communities are simply more ethical than others. They are more honest. They are more courteous. They treat others with more compassion and fairness. They live up to their word more often.

The moral fabric of a lawyer or law firm or legal community bears little relationship to the stuff of the typical law school class on professional responsibility. For one thing, as I have just described,³⁵ it does not depend upon the formal rules that are the focus of most law school classes. For another, few lawyers commit the type of blatant ethical violations that result in some of the published opinions that students read. Few lawyers steal from their clients, manufacture evidence, or help their clients commit crimes. For yet another, few lawyers face the agonizing dilemmas that are often featured in law school

31. GLENDON, *supra* note 8, at 78.

32. Richard A. Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975, 979-81 (1990).

33. By "law firm," I refer not merely to traditional law firms, but to all groupings of practicing attorneys, such as a legal department of a corporation, a public defender's office, or a legal aid clinic.

34. Michael Kelly has documented the radically different ethical cultures that exist in various practice settings. See MICHAEL KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE* (1994).

35. See *supra* Part I.A.2.

casebooks. Few will have a client confide that he or she committed a crime for which an innocent person is about to be executed. Few will learn that a plaintiff is unknowingly suffering from a life-threatening condition that was caused by the lawyer's client.³⁶ And few will have a client confess to a murder for which he or she has not been charged and disclose the location of the victim's body.³⁷

However, most lawyers (at least most litigators) will have hundreds of phone conversations and write hundreds of letters. They will draft and answer discovery requests. They will ready their clients' documents for production. They will prepare clients for depositions. They will negotiate settlements. They will write briefs. They will be asked questions by judges. They will make assertions to jurors. They will fill out time sheets and send bills to clients. They will assign work to secretaries. They will be invited to do pro bono work. They will be asked by their children to spend more time with them.

The moral fabric of an attorney is stitched out of the dozens—hundreds—of decisions that she makes each day. It is stitched out of the tone of voice she uses in talking with others, out of her choice of adjectives while writing a letter, out of the care she takes in describing what she represents to be the truth of a matter. It is stitched out of one decision after another, each of which may be mundane in itself, but all of which combine to form the moral fabric of the attorney, and combine with like decisions of other attorneys to form the moral fabric of law firms and legal communities.

Not only are these decisions mundane, they are made almost instinctively. "Discernment is hard work; it takes time and emotional energy."³⁸ Busy lawyers have neither. When an attorney is asked a question by a client or judge, or when she sifts through documents that have been demanded by her opponent, or when she fills out her time sheet before rushing out of the office, she will have fractions of seconds to make decisions. She will have little time to think, much less to seek the counsel of colleagues or texts. She will act almost instinctively. What she does will not reflect the quality of her mind as much

36. See *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962).

37. See *People v. Belge*, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975), *aff'd*, 376 N.Y.S.2d 771 (App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976).

38. CARTER, *supra* note 7, at 10.

as it will reflect the quality of her character; it will not reflect discernment as much as it will reflect habit.³⁹

B. THE ROLE OF MENTORING IN FOSTERING ETHICAL BEHAVIOR

The preceding Part has argued that the ethics of a legal community do not depend upon its rules but upon its culture. It also argued that the culture of a legal community is made up of the thousands of instinctive, mundane decisions that its members make every day—decisions that, at bottom, are a reflection of character. What, then, is the role that mentoring plays in developing the character of attorneys—and thus in influencing the ethics of the legal profession generally?

A novice attorney learns the value of a mentor either by having one or by not having one. I was fortunate to have one. His name was James Fitzmaurice. Fitzmaurice became my mentor in 1987, shortly after I joined Faegre & Benson, a large law firm in Minneapolis. Fitzmaurice was an outstanding lawyer. He invariably had more potential clients who wanted to retain him than he had time to give them. There was almost no limit to the amount of time that he could have billed or money that he could have made.

I spent hundreds of hours with Fitzmaurice. He invited me to accompany him to meetings, hearings, and trials. He took me along on out-of-town trips. When he was placing an important call, he put the call on a speaker phone and invited me to listen in. He did the same thing when he received important calls, making small talk with the caller until his secretary could find me and send me scurrying down to Fitzmaurice's office.

Fitzmaurice stopped by my office almost daily, when he was in town, just to shoot the breeze. He invited me to lunch dozens of times. Often, he would take me to the venerable Minneapolis Club, where he would point out various of the movers and shakers in town and tell me stories about them. Over the eight years that we worked together, Fitzmaurice told me countless stories about his experiences with various judges, lawyers, and clients. In short, Fitzmaurice acted as the quintessential mentor.⁴⁰

39. See Pepper, *Limits of the Law*, *supra* note 10, at 1608 ("Moral perception and decision making are determined not primarily by rules or principles, not primarily by cognitively processed analytic choices, but primarily by character. Moral character in turn is made up of habits of moral perception and conduct.") (footnote omitted).

40. Although Fitzmaurice is the focus of my discussion of mentoring, and

Most of those in the legal profession understand that mentors like Fitzmaurice play an important role in teaching novice lawyers how to practice law *well*.⁴¹ What is not widely under-

although I will refer throughout this Article to the singular "mentor," mentoring can be done—indeed, is best done—by multiple mentors. See Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291, 346-48 (1995). I am fortunate to have had several mentors. See *supra* note * (introductory footnote).

41. Fitzmaurice taught me to practice law *well* in several respects:

First, Fitzmaurice taught me the technical craft of lawyering, such as how to draft complaints, answers, discovery requests, jury instructions, and the like. This technical information was the least valuable thing that Fitzmaurice gave me, not because it wasn't important, but because I could have learned it by reading books or by talking to other attorneys.

Second, Fitzmaurice taught me how to work effectively with others. To practice law is to be involved continuously in trying to persuade others and in having others try to persuade you. An attorney must convince her clients to abandon unreasonable positions and pay overdue bills. She must continually negotiate with her opponents on scheduling matters, protective orders, and settlements. She must try to persuade arbitrators and judges to see the world her way. She must work with her own partners on personnel and compensation matters. It was through observing Fitzmaurice's work, and through having Fitzmaurice observe mine, that I learned how to work effectively with others. See generally Thomas L. Shaffer, *Moral Implications and Effects of Legal Education or: Brother Justinian Goes to Law School*, 34 *J. LEGAL EDUC.* 190, 191-92 (1984).

Third, Fitzmaurice taught me how to deal with facts. The life of a law student revolves around law, but the life of a lawyer revolves around facts. In law school, facts generally come neatly pre-packaged by judges, professors, and casebook authors, and therefore students are never taught how to find, assess, or use them. In contrast, a practicing lawyer spends her professional life immersed in facts. When the phone rings, when the fax machine hums, when the client stops by for a meeting, when the judge calls court to order, the focus of the lawyer will be facts. Most attorneys can quickly gain a grasp of the basic legal doctrines that shape most of their work. But the facts change from case to case, and the facts within a case never sit still. A lawyer never stops trying to find, understand, and communicate facts. Fitzmaurice taught me how to do that.

Finally, Fitzmaurice helped me develop what might be described as affective knowledge. Various commentators have alluded to this knowledge—or to something very much like it—in various ways. See, e.g., KRONMAN, *supra* note 16, at 2 ("a wisdom that lies beyond technique—a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess"); THOMAS L. SHAFFER & ROBERT S. REDMOUNT, *LAWYERS, LAW STUDENTS, AND PEOPLE* 12 (1977) ("consciousness of human experience and skill in dealing with it"); Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 *J. LEGAL EDUC.* 247, 250 (1978) ("[e]motion, imagination, sentiments of affection and trust, a sense of wonder or awe at the inexplicable"); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 *WASH. L. REV.* 593, 605-06 (1994) ("intuition, feeling, and sympathy"). There was a reason why Fitzmaurice told me countless war stories about countless people, and why he had me sit in on

stood is that, as important as mentoring is in teaching young attorneys to practice law well, it is far more important in teaching them to practice law *ethically*. To fully understand why, one first must focus on the sorry state in which the novice attorney often finds herself.

1. The Sad Life of the Novice Attorney

For a number of reasons, the life of a new attorney—particularly a new attorney who is about to begin work at a large law firm—is often an unhappy one:⁴²

so many meetings and telephone calls, and why, when we would travel or lunch together, he sometimes talked more about the biography or history that he was reading than about the case on which we were working. Fitzmaurice was teaching me about people. Fitzmaurice knew that lawyers who do not understand people generally, and the people with whom they are working specifically, cannot practice law effectively.

Despite the importance of affective knowledge, and despite the fact that the “affective aspects of lawyering can be taught and learned,” Menkel-Meadow, *supra*, at 606, the academy seems to have little interest in the matter. Almost 40 years after one former dean of the Harvard Law School forcibly argued that law schools must teach “human relations,” Erwin N. Griswold, *Law Schools and Human Relations*, 1955 WASH. U. L.Q. 217, 225, a task force to which another former dean of the Harvard Law School belonged (the “MacCrate Commission”) barely acknowledged the importance of affective knowledge in its report on legal education, *see* SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ABA, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) [hereinafter MACCRATE REPORT]. Worse, rather than teaching students to “think like a lawyer,” law schools are in fact anaesthetizing students to the affective knowledge that is so critical a part of the thinking of real lawyers. *See* Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 224 (1984) (describing legal education as a “process by which law students can numb themselves to many of their more desirable human impulses” and “lose feelings for the human tragedies in which [they will] participate”); John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343, 348 (1989) (arguing that legal education “tends to disable students from recognizing and coping with the distinctly human or interpersonal dimensions of client and societal problems”).

42. Admittedly, some of the observations that I make in this and subsequent Parts of this Article most directly pertain to the private practice of law in medium and large firms. Not all attorneys practice in such settings, of course, but “firm practice has emerged as the predominant setting for lawyers in private practice.” BARBARA A. CURRAN & CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S*, at 7 (1994). About three-quarters of attorneys are in private practice, and over half of them practice in law firms. *See id.*; Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry Into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 839-40 (1995); MACCRATE REPORT, *supra* note 41, at 31. Moreover, although only about 15 to 18% of those in private practice are members of firms with more than 50 attorneys, *see* Kornhauser & Revesz, *supra*, at 840; MACCRATE REPORT, *supra* note 41,

First, it is quite possible that she has taken a job in which she has little or no interest. Crushing student loan debt leaves many law graduates feeling that they have no alternative but to accept the best paying position available.⁴³ A student with \$100,000 or more in debt that must be repaid within ten years may feel that she is in no position to put job satisfaction ahead of income. It is hard to imagine anything worse than spending week after week doing work in which one has no interest, but that is precisely what many recent law school graduates are doing.

Second, not only may the new attorney be starting a career in which she has no interest, she may be starting a career that many of her professors—possibly the only professional role models she has had to date—have openly treated with indifference or disdain.⁴⁴ The contempt of her former professors toward the practice of law is unlikely to put a spring in the new lawyer's step as she walks into the lobby of her office on her first day of work.

Third, the new attorney may begin her professional career with the values and convictions that once guided her life in shambles. Today's "post-realist teachers are often masters at showing students that their most cherished beliefs are simply a matter of opinion or supportable only by some more or less plausible arguments that could be countered by other more or less plausible arguments."⁴⁵ By "mak[ing] every position respectable," law school can destroy a student's "sense of integrity and personal self-worth," and leave her with "the feeling of being unmoored with no secure convictions and hence no iden-

at 33, large firms "exercise an influence, both within the profession and outside it, that far exceeds [their] numerical strength," KRONMAN, *supra* note 16, at 273; see also Bryant G. Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems*, 64 IND. L.J. 433, 433 (1989); Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421, 1449 (1995).

43. Lewis Kornhauser and Richard Revesz have recently challenged the accepted wisdom that increasing educational debt has pushed students away from accepting jobs in the not-for-profit sector and toward law firms and large corporations. They concede that the cost of attending law school has risen dramatically in real terms and that the increase has resulted in a significant rise in student loan debt. However, they argue that it is not the rising debt burden, but instead the growing disparity between the salaries paid by for-profit employers and the salaries paid by not-for-profit employers, that has resulted in increasing numbers of students choosing private practice. Kornhauser & Revesz, *supra* note 42, at 874-90.

44. See *infra* notes 224-248 and accompanying text.

45. Garth, *supra* note 42, at 440.

tity at all.⁴⁶ The result of this “process of moral neutering”⁴⁷—a process described vividly in popular accounts of the law school experience such as *The Paper Chase*,⁴⁸ *One L*,⁴⁹ and *Broken Contract*⁵⁰—is that the recent graduate, at the dawn of her professional career, may be in a moral vacuum, susceptible to the strongest influences—good or bad—experienced in her new milieu.⁵¹

Fourth, particularly if the new attorney is working in a large firm or a large community, she may feel isolated and alone, with little sense of connection to her professional colleagues. Both the size of law firms⁵² and the number of people

46. KRONMAN, *supra* note 16, at 114-15. Kronman also mentions that students sometimes describe this experience, “not inappropriately, as the experience of losing one’s soul.” *Id.* at 115. Margery Schultz, speaking of her fellow law professors, says, “We sever all sense of ‘I know what I think about this and I know what my responsibility is.’ . . . We make them face the limits of their assumptions and their viewpoints. And then we leave them there.” SOL M. LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 117 (1994) (quoting Schultz). Walt Bachman describes how “law students are distanced from personal values, from the very precept that such values are paramount,” until they “become morally neutered.” WALT BACHMAN, *LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION* 57 (1995). And Roger Cramton argues that law schools “feed value skepticism” by giving students a “steady diet of borderline cases,” by stressing “the perceived arbitrariness of categories and line drawing,” and by overemphasizing “the uncertainty and instability of law.” Cramton, *supra* note 41, at 254-55 (emphasis omitted).

47. BACHMAN, *supra* note 46, at 52 (emphasis omitted).

48. JOHN JAY OSBORN, *THE PAPER CHASE* (1971).

49. SCOTT TUROW, *ONE L* (1977).

50. RICHARD D. KAHLBERG, *BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL* (1992).

51. See Thomas L. Shaffer, *The Lost Lawyer: Failing Ideals of the Legal Profession*, 41 *LOY. L. REV.* 387, 392 (1995) (book review) (“The situation of law graduates at the beginning of their lives as lawyers is one of painful moral confusion—a confusion that takes on frustrating reality when they come face to face with the demands of modern law practice.”).

52. Between 1975 and 1987, “the median number of lawyers in the 200 largest law firms . . . grew from 68 lawyers to 205, [and] the number of firms with more than 100 lawyers grew from 45 to 247.” MACCRATE REPORT, *supra* note 41, at 78. Not only are the largest firms “growing in absolute terms, but . . . their rate of growth [is apparently] increasing as well.” KRONMAN, *supra* note 16, at 274; see also Michael J. Lawrence, Note, *The Fortified Law Firm: Limited Liability Business and the Propriety of Lawyer Incorporation*, 9 *GEO. J. LEGAL ETHICS* 207, 221-22 (1995). The impact of the growth of firms on the legal profession has been exhaustively analyzed. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991); ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988); Steven Brill, *The Law Business in the Year 2000*, *AM. LAW.*, June 1989 (Mgmt. Rep.); Sympos-

practicing law⁵³ have risen dramatically in recent years, and, in general, "there [has been] a marked shift to practice in larger settings."⁵⁴ The larger any enterprise, the more difficult it is to feel as though one is a part of it. The lack of integration between a young attorney and her firm or professional community is likely to cause her both to feel less incentive to behave honorably and to feel less accountable for any unethical conduct in which she engages.

Finally, the life of a new attorney may very well be miserable. She will face unrelenting pressure to bill hours from the moment she sits down in her new office.⁵⁵ It is common today for law firms to expect associates to produce 2000 hours per year⁵⁶—hours that are collectable, not just billable.⁵⁷ As a result, a young attorney may find herself spending sixty, seventy, or even eighty hours per week in the office.⁵⁸ This, of course,

sium, *The Growth of Large Law Firms and Its Effect on the Legal Profession and Legal Education*, 64 IND. L.J. 423 (1989).

53. In 1951, there were 221,605 lawyers in the United States; the ratio of population to lawyers was 695 to 1. By 1971, the number of attorneys had grown to 355,242, and the ratio fallen to 418 to 1. By 1991, the attorney population had grown to 805,872, and the ratio fallen to 313 to 1. It is estimated that, by 2000, there will be 1,005,842 attorneys in the United States—one for every 267 Americans. See BARBARA A. CURRAN, ABA, *WOMEN IN THE LAW: A LOOK AT THE NUMBERS* 7 (1995) [hereinafter *WOMEN IN THE LAW*]; MACCRATE REPORT, *supra* note 41, at 15.

54. Kornhauser & Revesz, *supra* note 42, at 839.

55. On the pressure on young attorneys in particular to bill hours, see LINOWITZ, *supra* note 46, at 107-08; Lilly, *supra* note 42, at 1446-47. On the rising pressure on all attorneys to bill more hours, see *infra* Part I.C.1.

56. See BACHMAN, *supra* note 46, at 103; Bogus, *supra* note 16, at 924; Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 97 & n.52 (1994); Ross, *supra* note 25, at 3-4.

57. Because new lawyers are inefficient, and because clients are increasingly stingy in paying for the time of their attorneys, see *infra* notes 114-116 and accompanying text, many of the hours that a new attorney records on her time sheets cannot be billed to clients. Such hours are considered "billable," but they are not "collectable." In my former law firm, and in almost all big firms of which I am aware, the firm's managers look at "realization reports" in making decisions about compensating and promoting associates. Those realization reports indicate how much of the time billed by a particular associate was actually collected from a client. See Joel A. Rose, *Criteria for Associate Gaining Partner Status*, N.Y. L.J., May 6, 1997, at 5.

58. See KRONMAN, *supra* note 16, at 281-82, 301-02; THOMAS L. SHAFFER, *LAWYERS IN THE UNITED STATES: A BRIEF MORAL HISTORY* 41 (1995); LEONA M. VOGT, *FROM LAW SCHOOL TO CAREER: WHERE DO GRADUATES GO AND WHAT DO THEY DO?* 53-54 (1986); Deborah K. Holmes, *Learning from Corporate America: Addressing Dysfunction in the Large Law Firm*, 31 GONZ. L. REV. 373, 382 (1995-96); Rosilyn S. Smith, *A Profile of Lawyer Lifestyles*, A.B.A. J., Feb. 1984, at 50.

leaves room for little else in the attorney's life. Much of what gives the lives of most people joy and meaning—family, friends, hobbies, the arts, recreation, exercise—are absent from her life.⁵⁹ If, as one former practitioner wrote, "10% of a lawyer's soul dies for every 100 billable hours worked in excess of 1500 per year,"⁶⁰ then most young attorneys lose half of their souls every year.

It is not only the quantity of hours demanded that will make the life of the new associate miserable, but what she will be doing during those hours. Much of the work of attorneys is numbingly dull; no one can appreciate just how dull until she spends several weeks in a musty warehouse reading tens of thousands of pages of documents from the archives of a manufacturer. As the legal profession becomes more specialized,⁶¹ and as even the most senior lawyers are called upon to perform the same narrow tasks again and again, the work gets only less interesting.⁶²

As the new attorney works long hours doing dull work, she will experience other aspects of modern practice that will make her unhappy. For one thing, she will experience the rising incivility that has been the focus of so much commentary,⁶³ espe-

59. See YOUNG LAWYERS DIV., ABA, *THE STATE OF THE LEGAL PROFESSION* 1990, at 24 (1991) [hereinafter *STATE OF THE LEGAL PROFESSION*] (reporting that 71% of male attorneys and 84% of female attorneys "frequently feel fatigued or worn out by the end of the work day," and 55% of male attorneys and 61% of female attorneys "don't have enough time for themselves.")

60. BACHMAN, *supra* note 46, at 107 (emphasis omitted).

61. See KRONMAN, *supra* note 16, at 275-76; MACCRATE REPORT, *supra* note 41, at 40-46; *STATE OF THE LEGAL PROFESSION*, *supra* note 59, at 14; Lawrence, *supra* note 52, at 222.

62. James E. Moliterno, *Legal Education, Experimental Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 97-98 (1996).

63. Recent commentary has come from:

(1) *Courts and judges*. See FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT (1992), reprinted in 143 F.R.D. 441 (1992); Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513 (1994); Harry L. Carrico, *Adhering to a Different Honor: The Necessity for a Return to Professionalism in the Practice of Law*, 39 FED. B. NEWS & J. 321 (1992); Eugene A. Cook, *Professionalism and the Practice of Law*, 23 TEX. TECH L. REV. 955 (1992); Brent E. Dickson & Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 VAL. U. L. REV. 531 (1994); R.J. Gerber, *Victory v. Truth: The Adversary System and Its Ethics*, 19 ARIZ. ST. L.J. 3 (1987); Re, *supra* note 56; Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990).

(2) *The organized bar and its members*. See COMMISSION ON PROFESSIONALISM, ABA, ". . . IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986), reprinted in 112 F.R.D. 243 (1986) [hereinafter *IN THE SPIRIT*]; Ivan E. Barris, *Is Courtesy Really Contagious?*, 59 MICH. B.J. 506 (1980); Alfred F. Belcune, *Restoring the*

cially if she litigates. Every day, she will encounter "aggressive, manipulative, half-truthful and other destructive behaviors."⁶⁴ For another, as her firm pressures her to bill more hours, she will experience pressure from her clients to minimize the amount of time billed on any particular matter.⁶⁵ And, at the same time that she is told to minimize the amount of time that she spends on any particular matter, the new attorney will be expected to do excellent work and achieve favorable results—which, of course, takes time. In the midst of all of this, the new attorney will be told that, as she spends almost every waking moment doing dull work for the existing clients of senior attor-

Cathedral, 39 FED. B. NEWS. & J. 282 (1992); Maurice E. Bone, *A Lawyer's Choice—Civility or Hardball*, 79 ILL. B.J. 216 (1991); James E. Brill, *Save the Whales: Among the Many Worthy Causes, Let's Also Save the Profession*, A.B.A. J., Oct. 1993, at 110; John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL. U. L. REV. 563 (1994); N. Lee Cooper, *Courtesy Call: It is Time to Reverse the Decline of Civility in Our Justice System*, A.B.A. J., Mar. 1997, at 8; Gail Diane Cox, *Lawyers Still Wage Uncivil War: Civility Codes Are in Vogue, but Insults, Threats, Lies and Hardball Haven't Stopped*, NAT'L L.J., July 17, 1995, at A1; John J. Curtin, Jr., *Civil Matters*, A.B.A. J., Aug. 1991, at 8; Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931 (1993); Bartlett H. McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings*, 164 F.R.D. 283 (1996).

(3) *The academy.* See Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113 (1995); Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995); Catherine Therese Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945 (1991); Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994); Geoffrey C. Hazard, *ABA Eyes Hardball Play*, NAT'L L.J., Oct. 30, 1995, at A21-22; Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH L. REV. 31 (1993); Matasar, *supra* note 32; Leonard Pertnoy, *Order in the Court*, 43 SYRACUSE L. REV. 1159 (1992); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992).

(4) *Law students.* See Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751 (1994); Colin Croft, Note, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256 (1992); Andrew R. Herron, Comment, *Collegiality, Justice, and the Public Image: Why One Lawyer's Pleasure Is Another's Poison*, 44 U. MIAMI L. REV. 807 (1990).

64. BACHMAN, *supra* note 46, at 107.

65. This pressure is not likely to be applied directly, as few novice lawyers have much direct contact with clients—particularly about billing matters. Rather, this pressure is likely to be applied by the client to one of the novice lawyer's supervisors and by the supervisor to the novice lawyer.

neys, she had better start bringing in clients of her own if she expects to make partner.⁶⁶

In sum, the practicing lawyer, particularly at the beginning of her career, is "a sorry figure indeed."⁶⁷ Polls consistently show that "[l]awyers throughout America, in every type of practice and at every level of seniority, are increasingly dissatisfied with their professional lives."⁶⁸ Mary Ann Glendon speaks of American lawyers being "in the grip of a great sadness."⁶⁹ Anthony Kronman talks of the "crisis of morale" in the profession.⁷⁰ Sol Linowitz laments that his is "an unhappy profession."⁷¹ Thomas Shaffer says of young attorneys in big firms: "I have never met one of them who did not seem tired."⁷² I was stunned two years ago when, after I announced that I was giving up my partnership in a big firm to teach, many of my colleagues and many other attorney friends told me how desperately they would like to leave the practice of law. Almost without exception, these were successful lawyers who I thought were satisfied with their lives.⁷³

66. See Donald B. Ayer, *Stewardship*, 91 MICH. L. REV. 2150, 2156 (1993); Chris Klein, *Associate Job 1: Land Clients*, NAT'L L.J., Mar. 31, 1997, at A1. Of course, the time she spends trying to attract clients will mostly be unbillable.

67. Shaffer, *supra* note 51, at 392.

68. Holmes, *supra* note 58, at 375-76; see also Bogus, *supra* note 16, at 940 (asserting that the legal profession is in a "general state of demoralization and depression"); David Margolick, *More Lawyers Are Less Happy at Their Work, a Survey Finds*, N.Y. TIMES, Aug. 17, 1990, at B5 ("[J]ob dissatisfaction among lawyers is widespread, profound and growing worse."). To cite just two of many surveys revealing this dissatisfaction: A survey done by the ABA in 1990 found a sharp decrease in the number of attorneys who said they were "very satisfied" with private practice. See STATE OF THE LEGAL PROFESSION, *supra* note 59, at 52. A 1992 survey of California Bar members found that 70% of the lawyers polled would choose another career if they had the opportunity. See Robert N. Saylor & Anna P. Engh, *Litigators to Examine Lack of Funding, Access*, NAT'L L.J., Aug. 9, 1993, at S3.

Lawyers are also unhealthy—terribly unhealthy. A 1991 study by Johns Hopkins University "showed lawyers as the most depressed group among the 12,000 people surveyed." LINOWITZ, *supra* note 46, at 242. Three in four lawyers are chronically anxious, and one in three suffers from depression. See Holmes, *supra* note 58, at 376. Rates of alcoholism, substance abuse, and depression among lawyers are far higher than among the general public. See *id.* at 377-78; Ramos, *supra* note 1, at 1685, 1715-16.

69. GLENDON, *supra* note 8, at 14.

70. KRONMAN, *supra* note 16, at 2.

71. LINOWITZ, *supra* note 46, at 242.

72. SHAFFER, *supra* note 58, at 41.

73. Walt Bachman had a similar experience. After he announced that he was leaving his firm to write, teach, and do public service work, "[t]ime and again, lawyers at the pinnacle of their careers telephoned me or came into my office (usually closing the door discreetly behind them so as not to be over-

I have noted several aspects of the situation of new attorneys that leave them ethically vulnerable—especially the corrosive effect of law school on their values and the large size of the firms and communities in which many of them work. It is important to note, though, that the unhappiness of many new lawyers is itself a threat to their ethical development.

An attorney who experiences misery in her professional life can fight or flee—that is, she can fight to make her unhappy work situation better or she can flee it by rigidly separating her professional life from her personal life. That many attorneys take the latter route is demonstrated by the fact that so many good people are unethical lawyers. It never fails to astonish me how many attorneys who are truly decent people—who would give strangers the shirts off their backs—will also routinely pad their time sheets or draft misleading answers to interrogatories or misrepresent the holdings of cases. Many attorneys, it seems, decide at some level that “work is one thing, life is something else, and each of these ‘spheres’ . . . has its own morality.”⁷⁴ How else can one explain the large number of attorneys who, on the one hand, will instantly return change mistakenly received from a gas station cashier, but, on the other hand, will routinely steal from clients by padding their bills?⁷⁵ This pressure to separate the professional from the personal—to develop one set of ethics for the office and another for the home—only intensifies the ethical vulnerability of the young attorney.

2. The Role of the Mentor: Integration and Character Formation

A new attorney beginning the private practice of law is entering a profession that is obsessed with the pursuit of money. Many commentators have lamented the increasing commercialization of the legal profession,⁷⁶ but few have captured the extent

heard) to reveal their secret aspirations for escaping from their lives in the law.” BACHMAN, *supra* note 46, at 12.

74. SHAFFER, *supra* note 58, at 53.

75. Some commentators surmise that maintaining one set of ethics for the office and another for the home must take a substantial psychological toll on attorneys. See, e.g., Matasar, *supra* note 32, at 982. They may be right. It is possible, though, that these commentators assume a level of self-awareness and self-examination that simply does not exist in the lives of many attorneys. My impression is that few of the “good lawyers” who do “bad things” have even noticed the discrepancy between their professional and personal moralities.

76. See GALANTER & PALAY, *supra* note 52, at 2-3 (“[Although] laments about commercialization and the loss of professional virtue have recurred

of this affliction. Perhaps that is because it almost defies description. How can one explain why so many attorneys lead absolutely miserable lives so that they can earn very, very large salaries instead of just very large salaries? So that they can live in 4000 square foot homes that they never see instead of in 3000 square foot homes that they have time to enjoy? So that their children can spend two weeks a year with them on fabulously expensive vacations instead of having dinner with them every night?

It is hardly surprising that, in a profession composed of so many people who would rather make, say, \$150,000 and be mostly unhappy than make, say, \$120,000 and be mostly happy,⁷⁷ young lawyers find themselves under tremendous pressure to act in ways that make money for their firms, their clients, and themselves. Often, that means acting unethically. Most attorneys do not act dishonestly or abusively or uncivilly because they enjoy it; most do so because they have gotten in the habit of doing so, and most have gotten in the habit of doing so because it is profitable. In short, as the new attorney enters the profession, the overriding pressure that the new attorney is likely to experience is to make money, and that pressure will often translate into pressure to act unethically.

regularly for a century . . . there is something different this time around. The present 'crisis' is the real thing . . .") (footnote omitted); GLENDON, *supra* note 8, at 6 (noting increasing prevalence of the view "that law is a business like any other; and that business is just the unrestrained pursuit of self-interest"); LINDOWITZ, *supra* note 46, at 22 ("Too many in my profession have taken a calling that sought the good society and twisted it into an occupation that seems intent primarily on seeking a good income."); Bogus, *supra* note 16, at 913 ("[T]he practice of law is suffering from increased commercialization."); Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 527 (1994) ("Within the bar there is a sense that the practice of law as a profession is declining: that it is devolving into a business . . ."); Curtin, *supra* note 63, at 8 ("The law is edging ever closer to being a business rather than a profession, a development which emphasizes the bottom line above all other concerns."); Edwards, *supra* note 3, at 67-68 (criticizing the increasing commercialization of the practice of law); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1240 (1991) (arguing that the practice of law "has become less like a profession and more like a business . . . in which money is the only measure of success, and justice, fairness, and order rarely count").

77. In a firm that followed the old adage "a third for the lawyer, a third for overhead, and a third for profits," \$30,000 in salary would represent 450 billable hours of work for an associate whose time was billed at \$200 per hour—or about 10 to 12 weeks of work.

The new attorney will need help if she is to resist this pressure. Law school may have deprived her of one source of help—the values that shaped her life before her professors got hold of them—and the size of her firm or community may deprive her of another—a sense of attachment to people or institutions. Moreover, her unhappiness with what she experiences at work may cause her to seal off her professional life from her personal life, making it easier to apply an ethical code in the work place that is far more “flexible” than the one that she applies when dealing with family and friends.

In this situation, the mentor can play a critical, perhaps indispensable, role in helping the novice attorney to develop into an ethical practitioner.⁷⁸ He⁷⁹ does so in two ways: First, he

78. Obviously, mentors can do so only if they practice ethically themselves. Fortunately, though, those who are willing to mentor are almost by definition people who value something other than money, for mentoring is usually costly to them. If a mentor has successfully resisted the overwhelming pressure to care only about money, then the mentor has at the same time resisted the source of much of the pressure to act unethically.

79. Throughout the remainder of this Article, I will occasionally use male pronouns when referring to mentors and female pronouns when referring to law students and novice attorneys who need mentoring. I do this because it will make this Article easier to follow and, more importantly, because it will draw attention to a shameful reality that should not be hidden by neutral or female pronouns: Because of the legal profession's discriminatory treatment of women, any attorney—male or female—who seeks mentoring today is likely to have to seek that mentoring from a man.

Women have entered the legal profession in substantial numbers only in recent years. See MACCRATE REPORT, *supra* note 41, at 18-22; WOMEN IN THE LAW, *supra* note 53, at 7-8. As a result, most potential mentors—that is, law professors and senior attorneys—are male. Women comprise about 7% of those members of the legal profession who are at least 45 years old—that is, those best suited to mentor—but over 35% of those who are under the age of 30—that is, those most in need of mentoring. See *id.* at 13; Kornhauser & Revesz, *supra* note 42, at 848. And over 42% of those graduating from law school in 1995 were female. See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES 66 (1996) [hereinafter REVIEW OF LEGAL EDUCATION].

The vast majority of women attorneys are in private practice, see WOMEN IN THE LAW, *supra* note 53, at 14, and over half of the women in private practice are employed by law firms, see *id.* at 21. In firms of all sizes, almost a third of associates, but only 10% of partners, are women. WOMEN IN THE LAW, *supra* note 53, at 25-27. The disparity is even greater in “elite” law firms, where almost 40% of the associates, but just over 10% of the partners, are female. See Kornhauser & Revesz, *supra* note 42, at 853.

The mentor-mentored gap is not as substantial in the academy. Almost 44% percent of law students are women, REVIEW OF LEGAL EDUCATION, *supra*, at 74, while just under 30% of law school faculty members are female, Association of Am. Law Sch., Table 2A (visited July 14, 1997) <<http://www.aals.org/stats/>

helps to shape her character—that is, he helps to mold her into an ethical person. Second, he helps her to integrate, both “internally” and “externally.” I will address integration first, and then turn to character formation.

a. Integration

To be ethical, an attorney must be anchored. If she is not anchored, she is like a buoy that is not anchored: She will drift with the strongest current. As noted, the strongest currents in the legal profession will push her toward acting in the short-term economic interests of her clients, her firm, and herself, even if it means acting unethically.

An attorney can be anchored or integrated in two ways: internally or externally.

i. Internal Integration.

An attorney who is integrated internally uses the same moral compass in all aspects of her life. She does not have one set of ethics for home and another for the office. If she values such things as honesty, decency, compassion, justice, and mercy, instead of—or in addition to—making money, that will not change after she sits down at her desk in the morning. Like Atticus Finch, she knows that she “can’t live one way in town and another way in [her] home.”⁸⁰

A person with a strong enough moral compass may very well resist the pressures of the legal profession on her own, but a mentor can help. The mentor can, of course, be important simply by modeling integrated behavior—that is, by serving as a role model. But there are two more specific ways in which a mentor can help a young attorney to become internally integrated:

First, a mentor, like any friend, can help a young attorney identify and understand her moral compass, which may have taken a beating in law school.⁸¹ A moral compass is not static; the moral compass of a recent law school graduate is different from the compass that she had as a child and different from the

T2A.html>. Moreover, the gap appears to be closing: While only 18.1% of full professors are female, 41.8% of associate professors and 52.8% of assistant professors are women. *See id.*

80. HARPER LEE, *TO KILL A MOCKINGBIRD* 288 (Popular Library ed. 1960).

81. *See supra* notes 45-51 and accompanying text.

compass that she will have after twenty years of practice.⁸² Also, no one is ever fully aware of all elements of her moral compass, or of their relative importance. Everyone has had the experience of "discovering" a belief or the depth of a belief only after a long talk—or series of talks—with a trusted friend. The mentor can be that friend.

Second, even a young attorney with a strong moral compass and a high degree of self-awareness will need help as she negotiates the unfamiliar territory of her new profession. It is one thing to know that one values honesty; it is quite another to know what acting honestly means when, for example, a civil litigator negotiates a settlement. Similarly, it is fine to value compassion, but it is difficult to know what it means to be compassionate when a prosecutor must decide how to charge a case or what sentence to recommend. A mentor with a moral compass similar to the young lawyer's has already traveled this ground and can be extremely helpful as the young lawyer struggles to practice law in an integrated manner.⁸³

82. See generally LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* (1981) (examining stages of moral development).

83. The moral compasses of novice attorneys may not be what they used to be, given that both families and schools—the two most important sources of a young person's values—have undergone substantial change in recent years.

First, regarding families: According to recent census data, only 71% of children lived with both of their parents in 1993, down from 85% in 1970. See U.S. DEPT OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 1994, at 66 tbl.80 (1994). Over 50% of children who live with both parents are in households where both of the parents work; almost 60% of children who live with one parent are in households where that one parent works. See *id.* at 67 tbl.81. If parents teach values to children primarily through their example, then children are receiving less teaching than they used to, both because one of two possible teachers is absent from the home in more cases, and because the teachers who do live at home have less time to spend with their "students."

Second, regarding schools: The problem in elementary and secondary education is not that teachers *cannot* convey values, but that they *won't*—or at least that they won't convey any value other than value relativism. Many of today's teachers appear to accept the notion that "education can be a value-neutral process in which teachers simply convey facts and the students simply receive them, in which behavior is neither right nor wrong but a matter of personal choice, in which judgments are neither better nor worse but simply someone's opinion." Margaret Steinfels, *The Catholic Intellectual Tradition*, 25 *ORIGINS* 169, 173 (1995). Roger Cramton believes that this same "moral relativism and value nihilism" is infecting legal education as well. Cramton, *supra* note 41, at 253.

In short, families and schools, which "once served as seedbeds . . . for personal and professional virtues are themselves in considerable disarray."

ii. External Integration

As just described, an attorney can be integrated internally to her own sense of right and wrong. Such an attorney is unlikely to develop one set of ethics for work and another for home, and thus she is more likely to resist pressure at work to act unethically. But an attorney will be substantially supported in her efforts to resist such pressure if she is also anchored externally to a source outside of herself. This external integration may be thought of as either "vertical" or "horizontal."

Vertical integration is what Mary Ann Glendon and Anthony Kronman seem to have in mind in their recent books on legal education and the legal profession.⁸⁴ Both seem to recognize that it is critical that attorneys be anchored to something if they are to resist forces within the profession pushing them toward unethical conduct. Both also seem to look to history or tradition as the source of that anchorage, and both argue that legal education should convey that history or tradition through the use of the case method and the study of the common law.

Glendon talks of the common law tradition as "a vigorous conversation across generations about the goods embodied in our legal and political order."⁸⁵ This conversation, she says, "helps to orient and reinforce each lawyer's quest for a morally coherent professional life."⁸⁶ Kronman talks of how the common law tradition helps to inspire in new attorneys a devotion to "the well-being of the law" and "the soundness of the legal order."⁸⁷ The stronger the "anchorage of his devotion to the law," the more likely a lawyer will be able "to summon . . . courage when needed" to resist the forces in the profession pushing him toward unethical conduct.⁸⁸

Glendon and Kronman are unquestionably onto something. An attorney who feels connected to a great and worthy tradition, a tradition that has inspired in her a devotion to the legal order, will surely find it easier to resist behaving in ways that dishonor that tradition.⁸⁹ But I doubt that this type of vertical anchoring

GLENDON, *supra* note 8, at 83. If, as a result, the moral compasses of young attorneys are not as well developed, then the value of mentoring may be less in aiding internal integration, and more in character formation.

84. GLENDON, *supra* note 8; KRONMAN, *supra* note 16.

85. GLENDON, *supra* note 8, at 243.

86. *Id.* at 83.

87. KRONMAN, *supra* note 16, at 145.

88. *Id.* at 145-46.

89. The same can be said of an attorney who perceives her work as being "embedded in broad social, economic, political, historical, and for some, spiri-

to the past is common among attorneys today. In addition, it is a rare lawyer who is inspired to do much of anything—much less anything that takes great courage—by devotion to something as abstract, remote, and bloodless as “the well-being of the law.”⁹⁰

Where attorneys find inspiration—other than in their religious beliefs—is in the same places that most people do: in their families, friends, colleagues, and community. Thus, while anchoring is indeed critical to the ethical practice of law, the anchoring that most matters is horizontal—that is, outward to those people about whom the lawyer cares—rather than vertical—that is, backward to a history or tradition. Horizontal integration fosters ethical behavior in at least three ways:

First, horizontal integration lessens a new lawyer’s sense of anonymity and thus heightens her sense of accountability. The practice of law has become less ethical and less civil as it has become more anonymous.⁹¹ It is easier to act badly around strangers whom one is unlikely to encounter again than it is to act badly around those whom one knows. Through Fitzmaurice’s mentoring, I got to know many clients, lawyers, and judges. And through Fitzmaurice’s war stories, I came to feel as if I knew many people whom I had not actually met. Thanks to Fitzmaurice, I was less anonymous. I got to know people, and people got to know me.

tual contexts.” Brest & Krieger, *supra* note 76, at 530.

90. As I noted, *see supra* note 16, I found Kronman’s book to be weakest in its psychoanalysis of practicing attorneys. The lawyers that Kronman has come to know during his years teaching in New Haven seem to be quite different from the lawyers that I came to know during my years practicing in Minneapolis. Kronman speaks fervently about devotion to law, the legal system, and “the ideal of the lawyer-statesman” as a vital source of inspiration and moral guidance for practitioners. *See KRONMAN, supra* note 16, at 3. But I do not know a single attorney who finds much inspiration or guidance in the same place that Kronman does. By contrast, I know countless attorneys who find moral and ethical inspiration where many millions of Americans do—in their religious convictions. Kronman talks with a religious fervor about the legal order, but he does not talk with a religious fervor about religion. Indeed, he barely mentions it. It seems odd to begin a book by promising an examination of the “spiritual crisis that strikes at the heart of [the] professional pride” of American lawyers, *id.* at 2, and then to say virtually nothing of the role of faith.

91. As I have described, *see supra* notes 52-54 and accompanying text, the practice of law has become more anonymous as the total number of lawyers, the percentage of lawyers practicing in firms, and the size of firms have all grown. Also contributing to the increased anonymity is the fact that, as senior lawyers become more jealous about protecting “their” clients, *see infra* Part I.C.3, and less free to delegate work to others, *see infra* Part I.C.4.b, junior lawyers have less contact with clients, co-counsel, opposing counsel, and judges.

Second, horizontal integration increases the cost of unethical behavior. When an attorney feels no connection to others, her unethical behavior dishonors only herself. But when an attorney is integrated with her colleagues, clients, friends, and family members, her unethical behavior dishonors them as well. Had I acted in an unethical way while practicing law, I not only would have shamed myself, I would have shamed Fitzmaurice, and my firm, and the many long-time clients who were publicly identified with my firm. In other words, Fitzmaurice increased the cost of any unethical behavior I might commit just by becoming my mentor—and, by connecting me through his mentoring to others in my firm and community, he increased the cost even more.

Finally, when an attorney is anchored to her firm or community, she acquires a feeling of ownership. Just as people who own their homes tend to take better care of them than people who rent, so too do attorneys who feel at least a semi-permanent connection to a legal community take better care of it than those who do not. This was one of Fitzmaurice's consistent themes: He regularly told me that, while a case or relationship with a client may last for only a few months, a lawyer may spend his entire life working in his professional community, so he should work to make the community as honorable as possible.⁹²

b. Character Formation

As important as mentoring is to integration, and as important as integration is to ethical behavior, the role of mentors in shaping character is even more important. I have argued that acting ethically is not a matter of cognitively applying positive norms to morally complex situations, but rather a matter of instinctively making the thousands of mundane decisions that arise in daily life.⁹³ Because those decisions are so numerous and reflexive, they are necessarily a reflection of character. One can behave ethically, day in and day out, only if one is a good person.

92. As I would travel around the country working with lawyers on various cases, I noticed that lawyers who practiced in smaller towns usually appeared to have more of a stake in their local legal communities—more of a sense that what harmed the community harmed them personally—than lawyers who practiced in large urban areas. That may explain, at least in part, why practicing law in places like New York City and Los Angeles was much less pleasant than practicing law in places like Cedar Rapids and Muskegon.

93. See *supra* Part I.A.3.

Internal integration is important. A person may have an honorable code of personal ethics, but she will not practice law honorably unless she integrates that code into her professional life. By the same token, integrating a person internally will do little good if she is a rotten person. Put differently, while it is surely important to help a young attorney identify her moral compass and apply it in her professional life, it is even more important that the compass itself be sound.

Similarly, external anchoring cannot, by itself, make an attorney an ethical practitioner. External anchoring plays only a supporting role. An attorney who is an ethical person and who seeks to behave ethically at work will be aided substantially if she is externally anchored—that is, if she feels a sense of ownership in her firm and community. But no amount of external anchoring will substitute for being an ethical person in the first place.

How, then, can a mentor help a new attorney become an ethical attorney in the first place? “[A]cquiring virtue is like acquiring any other skill.”⁹⁴ Just as novice attorneys can be taught to write a brief or argue a motion, they can be “formed to act morally, . . . formed in certain habits.”⁹⁵ And moral formation best occurs when the novice attorney is “in a one-on-one relationship with a mentor, observing the mentor exercising virtues and exercising virtues under the direction of the mentor.”⁹⁶ Paul Carrington captured this process well in his essay, *Of Law and the River*,⁹⁷ in which he discusses Mark Twain’s training as a cub pilot on a Mississippi riverboat by master pilot Horace Bixby:

Twain . . . recognized Bixby not merely as a hard taskmaster, but also as an example of what a pilot is and can be. Twain knew that it was the character and values of Bixby that he had learned first and that he would forget last. It was Bixby’s example, not his preachments or his manners, that operated most powerfully.⁹⁸

Of all that Fitzmaurice did for me, the most important thing was to help me develop into an ethical lawyer. Just as Twain

94. SHAFER, *supra* note 58, at 12 (quoting Philip Rhinelander).

95. Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393, 397 (1990-91).

96. Cochran, *supra* note 23, at 727; see also Shaffer, *supra* note 95, at 397 (“You learn these moral habits as you learn your craft; you learn them from elders in your calling.”).

97. Carrington, *supra* note 41.

98. *Id.* at 225.

spent hundreds of hours with Bixby, I spent hundreds of hours with Fitzmaurice. Just as it was "the character and values of Bixby that [Twain] learned first and that he would forget last," it was Fitzmaurice's character and values that most influenced me, and whose influence will last the longest. And just as "[i]t was Bixby's example, not his preachments" that most affected Twain, so too, it was Fitzmaurice's example that most affected me.

Fitzmaurice did not teach me to practice law ethically through his words. I do not recall him ever saying, "This is what an ethical lawyer does." Rather, he taught me through his deeds. He taught me by being a decent man who practiced law every day in a decent manner. Moral formation "rests on small matters, not great ones,"⁹⁹ and what I recall most about Fitzmaurice are "the small matters":

I recall how Fitzmaurice would take strident letters or briefs that I had drafted and tone them down. I recall how Fitzmaurice would run into an attorney who had treated him shabbily and greet the attorney warmly. I recall how Fitzmaurice would time and again refer clients and files to young lawyers in our firm who were having trouble attracting business. I recall how Fitzmaurice never blamed others for his mistakes, but often gave others credit for his accomplishments. I recall how often Fitzmaurice took the blame for mistakes that I and other young attorneys made. I recall how Fitzmaurice, at the conclusion of a trial or hearing, would walk over to the client of his adversary and say, "I just want you to know that your attorney did a terrific job for you." In short, what I best recall about Fitzmaurice were not occasions of great moral heroism, but his "quiet, everyday exhibitions of virtue."¹⁰⁰ It was through such exhibitions that he helped shape my character and instill in me the habit of acting ethically.

The type of mentoring that Fitzmaurice provided to me and to many other young lawyers like me does not occur only in big firms or only between partners and associates. Clients can be a source of mentoring, as one of my clients was for me. Prosecutors can mentor other prosecutors, legal aid lawyers other legal aid lawyers, corporate counsel other corporate counsel, and solo practitioners other solo practitioners.¹⁰¹ Even judges can serve

99. SHAFFER, *supra* note 13, at 85.

100. SHAFFER, *supra* note 58, at 56.

101. See Jill Schachner Chanen, *Solo But Not Alone*, A.B.A. J., June 1997, at 92 (describing mentoring of solo practitioners by other solo practitioners).

as mentors—to each other and to the attorneys who appear before them.¹⁰²

C. THE DEATH OF MENTORING IN THE PROFESSION

Mentoring in the profession is dying—a victim, ironically, of the same force that has created such a strong need for mentoring in the first place: the practicing bar's increasing obsession with money. Almost all lawyers work for money. The first person to become a lawyer likely did so to earn a living, and the last person to become a lawyer will likely do so for the same reason. But there seems to be widespread agreement that something has changed in the legal profession in the past decade or two.¹⁰³ Judge Harry Edwards writes that the practice of law has undergone a “radical transformation” on account of the “tremendous pressure to create revenues,” which, he says, did not exist when he practiced law in the 1970s.¹⁰⁴ Every experienced practitioner I know agrees with him.¹⁰⁵

102. The experience of former ABA President Talbot D'Alemberte was common among attorneys of his generation:

After I tried my first cases, when it was still apparent I didn't know what the hell I was doing, the judges would pull me aside at the end of a case and invite me into their chambers, and we'd talk about trial practice. . . . The judges felt that there were standards of practice in that community and the judges helped the young lawyers who came into the community to grow into those standards.

Talbot D'Alemberte, *Talbot D'Alemberte on Legal Education*, A.B.A. J., Sept. 1990, at 52, 52-53. The experience of Louise LaMothe, the first woman to chair the ABA Section of Litigation, was atypical, but nevertheless illustrative of the fact that mentors can arise in a variety of settings:

My most important early mentor was a man with whom I never practiced. We never even worked in the same city. Prentice Marshall (now a senior district court judge in the Northern District of Illinois) encouraged me as a young lawyer at the National Institute for Trial Advocacy in 1972, gave me my first opportunity to teach at NITA as his assistant in 1973, and took an interest in my career. From him I learned not just how to try a case, but how to act like a lawyer; he supported my efforts, corrected my errors, and reinforced many of my ideas.

Louise A. LaMothe, *Where Have All the Mentors Gone?*, LITIG., Winter 1993, at 1.

103. See *supra* note 76.

104. Edwards, *supra* note 3, at 72.

105. Obviously, the fact that Judge Edwards and the senior practitioners that I know think that the profession has changed for the worse does not, in itself, make that true. As Judge Edwards himself recognizes, writing and thinking about the legal profession is often marked by nostalgic longing for “good old days” that were not as “good” as people remember. See Harry T. Edwards, *A New Vision for the Legal Profession*, 72 N.Y.U. L. REV. 567, 571-

The increasing materialism of the legal profession—the emphasis on “the bottom line above all other concerns”¹⁰⁶—has manifested itself in many ways, each of which has helped to destroy mentoring:

1. Every big firm lawyer—from the most senior partner to the most junior associate—is under tremendous pressure to bill hours.¹⁰⁷

[V]irtually every firm now requires its lawyers to bill substantially more hours than in the past. There has been a universal trend to increase the minimum floor of hours . . . for every lawyer, whether partner or associate.

. . . Across the country, lawyers' lives have been transformed by a ceaseless spiral of mandated workaholism.¹⁰⁸

This is the dominant force in leading law firms today. Only one who has recently practiced law in such a firm can appreciate how thoroughly this “tyranny of the time sheet”¹⁰⁹ consumes the lives of lawyers. Even today, two years after I submitted my last time sheet, I feel myself getting jumpy when colleagues or students stop by my office to talk, because I have been so conditioned to regard time spent talking with anyone except clients as wasted.

The extraordinary pressure to bill hours is almost single-handedly responsible for the death of mentoring. Time that a lawyer spends either mentoring or being mentored is, for the most part, nonbillable. Thus, pressure to bill hours—pressure to “bill or be banished”—is necessarily pressure not to mentor. There is no stronger pressure experienced by lawyers in private practice today.

72 (1997). Nonetheless, the particular changes that I describe below—such as the increased pressure to bill hours, the increasing competitiveness of the legal market, and the increase in lateral movement of lawyers—have been so well established in the sources I cite and elsewhere that they are not seriously disputed. The broader question of whether the legal profession of today is, on the whole, “better” than the legal profession of 20 or 50 or 100 years ago is hotly debated. See generally Atkinson, *supra* note 63.

106. Curtin, *supra* note 63, at 8.

107. See GALANTER & PALAY, *supra* note 52, at 52-53; KRONMAN, *supra* note 16, at 301-03; Ayer, *supra* note 66, at 2151, 2156; Stephanie B. Goldberg, *Bridging the Gap: Can Educators and Practitioners Agree on the Role of Law Schools in Shaping Professionals? Yes and No*, A.B.A. J., Sept. 1990, at 44; Gordon, *supra* note 2, at 1956; Lucy Isaki, *From Sink or Swim to the Apprenticeship: Choices for Lawyer Training*, 69 WASH. L. REV. 587, 588 (1994); Holmes, *supra* note 58, at 382; LaMothe, *supra* note 102, at 2; Lilly, *supra* note 42, at 1446-48; Ramos, *supra* note 1, at 1685, 1715; Ross, *supra* note 25, at 3-4.

108. BACHMAN, *supra* note 46, at 103.

109. Bogus, *supra* note 16, at 924.

2. All lawyers—but particularly the senior lawyers who make the best mentors—are also under tremendous pressure to generate business (that is, to attract and retain clients).¹¹⁰ When I began practicing law ten years ago, an attorney could be seen as a valued member of his firm even if he did not generate business, as long as he did good work for the clients of his partners or otherwise contributed to the well-being of his firm (such as by mentoring). Today, attorneys who do not have a “book of business” of their own find it increasingly difficult to prosper, no matter how valuable their other contributions. An hour devoted to bringing in business is valued much more today than an hour devoted to mentoring a junior colleague.

3. In deciding how to compensate their partners, more and more firms are focusing almost exclusively on such “objective” criteria as hours billed and business generated.¹¹¹ As a result, “more senior lawyers hoard work rather than delegating it to younger lawyers and training them along the way.”¹¹² In that way, partners keep their own billable hours high and ensure that others will not get credit for the business that they have generated. The impact on mentoring is obvious.

4. Lawyers have to attract business in an environment that has become intensely competitive.¹¹³ It once was considered unseemly for one firm to attempt to take away the clients of another firm. Today, it is almost considered unseemly *not* to covet the clients of other lawyers and to do one’s best to lure those clients away.

As the market has become more competitive, clients have become increasingly demanding.¹¹⁴ They want good results, and they want them cheaply. Clients scrutinize legal bills more carefully¹¹⁵ and are quicker to challenge bills that seem too high or that reflect unnecessary work or disbursements.¹¹⁶ Also, clients are less loyal to particular firms—or even to law firms generally.¹¹⁷ Clients now hire lawyers, not firms,¹¹⁸ and if they are

110. See GALANTER & PALAY, *supra* note 52, at 52-53; Ayer, *supra* note 66, at 2151, 2156; Klein, *supra* note 66, at A24-25; LaMothe, *supra* note 102, at 2; Lilly, *supra* note 42, at 1446.

111. See GALANTER & PALAY, *supra* note 52, at 52-53.

112. LaMothe, *supra* note 102, at 2.

113. See Ayer, *supra* note 66, at 2151, 2153-54; Bogus, *supra* note 16, at 913; Holmes, *supra* note 58, at 379-80; Ramos, *supra* note 1, at 1683-84.

114. See Holmes, *supra* note 58, at 380-81.

115. See *id.*

116. See Ayer, *supra* note 66, at 2154; Ross, *supra* note 25, at 4 & n.9.

117. See GALANTER & PALAY, *supra* note 52, at 51; MACCRATE REPORT,

dissatisfied with the work of a lawyer on a particular matter, they will change lawyers in the blink of an eye.¹¹⁹ In many respects, of course, this increasingly competitive environment has benefitted society; without question, it has resulted in higher quality legal services being provided at lower prices. At the same time, it has resulted in a number of changes detrimental to mentoring:

a. Lawyers are under substantial pressure to minimize fees and costs on their files. Thus, at the same time that they are under pressure to bill more hours overall and to get favorable results for their clients, lawyers are under pressure to bill fewer hours on each of their files.¹²⁰ That means more time is "written off" (not billed) and thus that attorneys must work even longer hours to meet their billable hour quotas.¹²¹ The more hours an attorney has to devote to the work of clients, the fewer hours the attorney has available to mentor or be mentored.¹²²

b. Because clients are purchasing legal services in a buyers' market, they are in a position to insist that partners personally do their work, and not pass it on to new or less busy attorneys.¹²³ This makes it more difficult for senior attorneys to nurture the careers of their junior colleagues, either by referring work to them or by working with them on projects.

c. The cost of mentoring has increased. In the days of loyal clients and lackadaisical monitoring of legal expenses, time that a senior lawyer spent serving as a mentor, and time that a junior lawyer spent being mentored, could be charged to the client. Thus, a senior lawyer might invite a junior lawyer to accompany him to court so that the junior lawyer could see how a motion is argued. A client would be charged for the time of both, even though the presence of the junior lawyer was not necessary.¹²⁴

supra note 41, at 78-79; Epstein et al., *supra* note 40, at 315; Holmes, *supra* note 58, at 380; James W. McRae, *The Law Firm of the Future*, LAW PRAC. MGMT., Oct. 1996, at 22-23.

118. See KRONMAN, *supra* note 16, at 286.

119. See *id.* at 276-77.

120. See Ayer, *supra* note 66, at 2156.

121. See *id.*; Bogus, *supra* note 16, at 923.

122. See LaMothe, *supra* note 102, at 2.

123. See *id.*

124. When I was being mentored by Fitzmaurice, I was a young associate, and thus I was not aware of the extent to which clients were asked to pay for my "training." I know that Fitzmaurice did bill for both his time and mine when that was clearly appropriate, such as when a client invited both of us to a meeting. I know that Fitzmaurice billed for neither his time nor mine when the two of us would have lunch or engage in informal conversations; indeed, I

Passing off training costs in this manner was wrong, of course, and as the market for legal services tightened, clients struck back. Clients today are reluctant to permit two or more attorneys employed by the same law firm to bill the time that they spend talking with each other. Many clients flatly refuse to pay for more than one attorney to attend a hearing or deposition without the prior permission of the client. This obviously makes it difficult for firms to pass off training costs as they did in the past. As a result, every hour that a senior lawyer spends mentoring a junior lawyer costs the law firm whatever one or both of the attorneys would have billed had they not been talking with each other.¹²⁵

5. As starting salaries skyrocketed in the 1980s,¹²⁶ pressure grew for new associates to pay for themselves as quickly as possible. Informal apprenticeships have become a thing of the past; firms are no longer willing to lose money on associates during their first few years of practice as they slowly learn their craft.¹²⁷ Instead, associates are expected to hit the ground running—that is, racking up billable hours.¹²⁸ As I have noted, attorneys generally cannot bill the time that they spend being mentored, and thus novice lawyers are under as much pressure not to be mentored as experienced lawyers are not to mentor.

6. To be more competitive and more profitable, firms have grown larger¹²⁹ and added branch offices in distant locations.¹³⁰ Lawyers now “practice in larger settings.”¹³¹ When Fitzmaurice began his career at Faegre & Benson in the 1960s, all of the

did not even record that time, so it could not have been billed. Between these two extremes, there were many judgment calls—such as when my attendance at a deposition would be helpful to Fitzmaurice, but not strictly necessary. In general, Fitzmaurice told me to record my time on these tasks and to let him worry about whether the client would be billed or my time “written off.” I do not know how he made those decisions.

125. See GLENDON, *supra* note 8, at 32; Holmes, *supra* note 58, at 384; Isaki, *supra* note 107, at 588.

126. See Holmes, *supra* note 58, at 381; Kornhauser & Revesz, *supra* note 42, at 865-74.

127. See Joel F. Henning & Mindy A. Friedler, *Training Senior Lawyers to Be Better Trainers*, LAW PRAC. MGMT., Mar. 1993, at 60, 61 (“[H]igh starting salaries mean firms cannot afford to give associates the time to develop, so they must be brought up to speed and made productive earlier.”).

128. See GALANTER & PALAY, *supra* note 52, at 52-53; GLENDON, *supra* note 8, at 27.

129. See *supra* note 52 and accompanying text.

130. See KRONMAN, *supra* note 16, at 274-75; Lawrence, *supra* note 52, at 221-22; *Trends*, NAT'L L.J., Dec. 26, 1994, at C12.

131. Kornhauser & Revesz, *supra* note 42, at 839.

firm's attorneys could (and did) sit around a single conference room table. When I left Faegre & Benson in the 1990s, we had to rent a large hotel ballroom and fly people in from all over the world when we wanted to get the attorneys together. When Fitzmaurice started, he saw almost every one of his colleagues every day; when I left, I probably saw fewer than ten percent of my colleagues on any given day. Obviously, today's large, far-flung law firm is far less hospitable to mentoring than the relatively small, single location firm of the past.

7. Lawyers are far less loyal to their firms today than they were even ten years ago.¹³² As the practice has become more commercialized, and as information regarding the profitability of law firms has become more widely available, the lateral movement of attorneys has increased.¹³³ When an associate is hired by a law firm, a partner knows that it is likely that either he or the associate will be working elsewhere in five to ten years.¹³⁴ Not surprisingly, "some partners now view associates as mere labor assets, dispensable workers instead of colleagues and future partners."¹³⁵ Needless to say, this substantially diminishes the incentive to mentor.¹³⁶ James Moliterno put it well: "The investment of partner and associate time in the sort of time intensive one-on-one development that worked in the past makes little economic sense in today's legal environment. The investment simply cannot be protected and is far less likely to pay dividends compared to the recent past."¹³⁷

As a result of these developments—all of which have been fueled by the materialism of the practicing bar—mentoring is rapidly disappearing,¹³⁸ and not just in the senior partner–junior

132. See Holmes, *supra* note 58, at 385; Moliterno, *supra* note 62, at 97.

133. See GALANTER & PALAY, *supra* note 52, at 54-55; KRONMAN, *supra* note 16, at 277-78; Elson, *supra* note 41, at 354; Klein, *supra* note 66, at A25; LaMothe, *supra* note 102, at 2.

134. See McRae, *supra* note 117, at 22 (reporting that, in the past 10 years, "vastly larger number of senior associates than ever before began to move from one law firm to another").

135. LaMothe, *supra* note 102, at 2.

136. Mentoring always presents what an economist would describe as a collective action problem—that is, a situation in which the benefits of an action (mentoring) are enjoyed by many (the entire legal community), but the costs of that action are mainly borne by the actor (the mentor). The increase in the lateral movement of attorneys only exacerbates the problem.

137. Moliterno, *supra* note 62, at 98.

138. See Brest & Krieger, *supra* note 76, at 528 ("[M]entoring of junior lawyers by their more experienced seniors has declined in the face of economic pressures."); James E. Brill, *The Secret of Success*, A.B.A. J., Oct. 1992, at 100

associate context on which I have focused.¹³⁹ Relationships between attorneys and clients are "more fluid and . . . less continuous,"¹⁴⁰ and thus it is less likely that a young attorney might be mentored by a client or that a client might be mentored by one of her outside lawyers. The increase in the number of lawyers¹⁴¹ and burgeoning caseloads¹⁴² have left judges unable to mentor as they once did.¹⁴³ As the result of waves of budget-cutting, many government officials must do more with less, making it difficult for prosecutors, public defenders, and other government lawyers to mentor their new colleagues. And corporations have been as tough on their own legal departments as they have been on their outside lawyers, leaving corporate counsel with less time to mentor or be mentored.¹⁴⁴

("[S]enior lawyers no longer have time to mentor new lawyers or to leverage the firm's store of information and experience."); Cochran, *supra* note 23, at 727 (describing mentoring as "becoming increasingly uncommon today"); Curtin, *supra* note 63, at 8 ("Older lawyers less and less are fulfilling their traditional roles as mentors to young lawyers on matters of ethics and etiquette."); Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession"*, 69 WASH. L. REV. 561, 571 (1994) ("More and more, I fear that partners are failing to fulfill the critical responsibility of mentoring."); Elson, *supra* note 41, at 353 n.32 ("[T]he lack of mentor training is now as serious a problem for new associates in large law firms as it is for solo practitioners."); LaMothe, *supra* note 102, at 2 (noting "[t]he decline of mentoring"); Lilly, *supra* note 42, at 1450 (same); Moliterno, *supra* note 62, at 97 ("Mentoring is much less common in the 1990s . . ."); Re, *supra* note 56, at 95 ("[M]entoring . . . of new lawyers and associates has almost vanished.").

139. See *supra* note 42.

140. KRONMAN, *supra* note 16, at 277.

141. See *supra* note 53 and accompanying text.

142. Between 1970 and 1995, filings per judgeship in federal district courts increased from 317 to 436. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 10 (1995). During the same period, appeals per judgeship in the federal appellate courts increased from 130 to 292. See *id.* Although comparable statistics are not available for state judges, it seems likely that many of them have experienced a similar caseload growth. See NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1990 (1992); BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS 1993: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT (1995). See generally KRONMAN, *supra* note 16, at 320-25 (describing the reasons for the increases in judicial caseloads).

143. See D'Alemberte, *supra* note 102, at 52-53; Isaki, *supra* note 107, at 588.

144. The decline of mentoring affects the newest members of the profession, and thus it is particularly harmful for women and minorities, who have entered the legal profession in substantial numbers only in recent years. See *supra* note 79. And it is not only their newness that makes it difficult for women and minorities to find mentors.

The rare senior attorneys who do take the time to mentor are likely to be

In sum, it is exceedingly unlikely that those graduating from law school today will find "an environment that will nurture in them the habits necessary to choose wisely when confronting moral problems and mentors who will exhibit and cultivate [ethical behavior]."¹⁴⁵ Mentoring is dying, and as it dies, so too does much that is good in the legal profession. The end result is a profession that is less civil, less ethical, and less committed to any value except material gain.

II. MORAL FORMATION AND THE ACADEMY

As the gateway through which virtually every new lawyer passes,¹⁴⁶ the academy is an obvious candidate to replace what has been lost by the profession's abandonment of mentoring.¹⁴⁷

attracted to junior attorneys with whom they have a lot in common; similarly, junior lawyers are likely to be attracted to potential mentors with whom they can easily identify. The dearth of minorities among the senior ranks of the legal profession makes it that much more difficult for minorities to find effective mentoring, as does the prejudice that continues to infect the profession. See Marcia Chambers, *Sua Sponte*, NAT'L L.J., Feb. 1, 1993, at 17, 18.

Women face similar hurdles. Women are only slightly better represented among experienced members of the legal profession than minorities, and sexism is no less prevalent than racism. Also, responsibility for child care still falls disproportionately on women, meaning "[t]hey miss out on much informal contact simply by being engaged elsewhere." LaMothe, *supra* note 102, at 2. Finally, senior male attorneys—particularly those who have little experience working with women as equals—may feel reluctant to mentor younger females. They may fear that such mentoring will leave them open to allegations of sexual harassment or romantic involvement. See CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 288 (2d ed., Univ. of Ill. Press 1993); Chambers, *supra*, at 18. Louis LaMothe summarized the overall situation for women and minorities:

These days, what is a problem for young men is a crisis for young women and for minority lawyers. For the latter groups, the informal mentoring system—the "old boy" network—never functioned. Efforts targeted at women and minorities have traditionally stopped when hiring goals are met. Once hired, women and minorities feel abandoned, left to fend for themselves in career development.

LaMothe, *supra* note 102, at 2; see also Luban & Millemann, *supra* note 26, at 79-80.

145. Pepper, *Limits of the Law*, *supra* note 10, at 1609.

146. See MACCRATE REPORT, *supra* note 41, at 108.

147. Even if mentoring were thriving in the profession, it would still be important for the academy to do its own mentoring. First, learning is a life-long process; the values of attorneys are shaped by what they experience before, during, and after law school. See Robert MacCrate, *Keynote Address—The 21st Century Lawyer: Is There a Gap to Be Narrowed?*, 69 WASH. L. REV. 517, 524 (1994). Good mentoring in law school will never hurt a student. Second, even the best mentors are bound to be better at some aspects of mentoring than others. For example, one mentor may profoundly influence the values of a new attorney, while another may aid the new attorney in integrating those

That raises two questions: First, *can* the academy do so? Second, *will* the academy do so? I will address the latter question first.

A. THE ACADEMY'S WILLINGNESS TO PROVIDE MENTORING

If the academy is to provide effective mentoring, at least three conditions are necessary (although not sufficient):

First, the academy must accept that one of its functions is to prepare students to practice law—and to practice law ethically. Professors must “accept[] the idea that they [a]re training practicing lawyers and underst[and] the aim of their classroom teaching to be the cultivation of those qualities that a lawyer needs to succeed in practice.”¹⁴⁸

Second, every faculty must include a number of people who have substantial experience practicing law or a genuine interest in the work of practitioners and judges. A faculty that includes professors who have experience in practice or who at least have an interest in the work of practitioners—that is, in the work that most of the faculty's students will be doing for the rest of their lives—will be better suited to mentor than a faculty that does not.

Finally, professors must be willing to spend time with students. Although what goes on in the classroom can contribute to character formation and integration, effective mentoring is difficult without at least some one-to-one contact between mentor and mentored.

All of these conditions appear to be vanishing in the academy. The reason why they are vanishing, and therefore why the academy is becoming as hostile to mentoring as is the profession, is that the academy appears to be in the grip of a materialism that is not unlike that of the profession, except that its focus is the accumulation of academic prestige rather than material wealth, and it is measured in pages published rather than hours billed. I will first examine this phenomenon and then describe its impact on mentoring.

1. Materialism in the Academy

Lest I be identified at the outset of my academic career as “align[ing] . . . with the anti-intellectuals and philistines,”¹⁴⁹ let me stress as strongly as I can that not one word that I have written

values into her professional life. Finally, as the number of mentors increases, so does the external integration of the young attorney being mentored.

148. KRONMAN, *supra* note 16, at 266.

149. Elson, *supra* note 41, at 344.

above, and not one word that I will write below, is in any way meant to diminish the value of research and writing. I take a back seat to no one in the degree to which I value and respect good scholarship. Indeed, I left a successful legal practice precisely because of my desire to research and write as part of a scholarly community.¹⁵⁰

I recognize that there is some sentiment in the academy to "mold faculty as position players, not as clones of one another" by "let[ting] the writers be writers, the scholars scholars, teachers teachers, and leaders leaders."¹⁵¹ I certainly do not dispute that the academy should "move away from rewarding 'scholarship' *alone*"¹⁵²—indeed, that is a major theme of this Article—but it seems to me that no faculty member, no matter how talented a teacher or effective a leader, can be allowed to turn his or her back on scholarship altogether. Certainly, a law school faculty should reflect a mixture of skills and interests, but it is unthinkable that any member of the faculty could cut himself or herself off from the intellectual life of the academy.

In short, I do not question for a moment whether scholarship is valuable, nor do I question for a moment whether scholarship should be a major responsibility of law school faculties. What I do question—and it is all that I question—is whether scholarship should be the *only* thing that is valued in the academy.

Law professors have long suffered "from a kind of intellectual schizophrenia"¹⁵³—a schizophrenia that has existed in some form for over a century.¹⁵⁴ Inside the classroom, law professors

150. I do not think it betrays any disrespect for the practice of law to recognize that it can be a frustrating place for someone with an academic bent. Stephen Gillers put it well:

When I went into practice I was astonished at how much a lawyer even at the highest levels is occupied with the minute and tendentious aspects of cases. Questions of right and wrong, I found, questions of what the rules *should* be, played no role. It was all finding the facts that supported your client and trying to keep the facts that harmed him away from your opponents.

LINOWITZ, *supra* note 46, at 137 (quoting Gillers). Gillers is accurate not only in describing why practicing law can frustrate those who have an academic interest in law, but also in describing how dealing with fact dominates the day-to-day lives of practitioners. See *supra* note 41.

151. Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 949 (1990).

152. *Id.* (emphasis added).

153. Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 638 (1968).

154. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 5 (1983).

have a responsibility to prepare their students to practice law. Outside the classroom, law professors have a responsibility to "expand[] legal knowledge and thought for their own sake."¹⁵⁵ This "conflict"¹⁵⁶ or "tension"¹⁵⁷ between teaching and scholarship confronts every law professor with a difficult dilemma:

[I]s it our task to prepare students for the practice of law or is it to advance the frontiers of knowledge? Do we write for judges, lawyers, legislators, administrators, and students or do we write for other legal scholars—or possibly scholars in other disciplines? Are we primarily teachers or is our first responsibility to scholarship?¹⁵⁸

Traditionally, then, legal education has been perceived as a discipline that is "at odds with itself"¹⁵⁹ and the law professor as a person "divided against himself."¹⁶⁰ On one side of this divide are those like Paul Brest who view the "primary aim" of legal education as "prepar[ing] students to become skillful and responsible practicing lawyers, policymakers, and judges."¹⁶¹ On the other side are those like Owen Fiss, who assert that "[l]aw professors are not paid to train lawyers, but to study the law."¹⁶²

The long tug-of-war between teaching and scholarship appears to be nearing an end. If teaching is not yet face down on the ground, it is quickly being dragged toward that ignoble end. Scholarship, not teaching, has become "the currency of our profession,"¹⁶³ "the coin of the realm,"¹⁶⁴ "the preeminent faculty value,"¹⁶⁵ "the be-all and end-all in academia."¹⁶⁶

155. Paul Brest, *Plus Ça Change*, 91 MICH. L. REV. 1945, 1945 (1993).

156. Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 8 (1986).

157. KRONMAN, *supra* note 16, at 265.

158. Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1070 (1986) (footnote omitted).

159. Paul D. Reingold, *Harry Edwards' Nostalgia*, 91 MICH. L. REV. 1998, 2000 (1993). Reingold and many others have pointed out that, while most of those in graduate education teach students who plan to become teachers and therefore are academically inclined, law professors teach students who, with few exceptions, are interested in practicing law and have little interest in more academic concerns. *See id.* at 2001.

160. Bergin, *supra* note 153, at 637.

161. Brest, *supra* note 155, at 1945.

162. "Of Law and the River" and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1, 26 (1985) (a letter from Owen M. Fiss to Paul D. Carrington). Fiss went on to say that law professors are also paid to "teach their students what they happen to discover" while studying the law. *Id.*

163. Robert H. Abrams, *Sing Muse: Legal Scholarship for New Law Teachers*, 37 J. LEGAL EDUC. 1, 11 (1987).

164. Gordon, *supra* note 2, at 1960.

165. Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 399 (1990).

Nowhere is this more clear than in the tenure process. In today's academy—particularly in the elite schools—the predominant message communicated to newly appointed faculty is that tenure will depend mostly, if not entirely, on scholarship, and that one's teaching will not even factor into the decision unless it is so bad as to provoke student rioting (and even that may not be disqualifying¹⁶⁷). As one commentator wrote:

The formal policy governing tenure is likely to make its award dependent upon teaching, research and writing, and institutional (including public service) contributions. In fact—and increasingly—the decisive criterion for the award of tenure is scholarship. (In a growing number of elite schools it is, effectively, the *only* measure of tenure worthiness.)¹⁶⁸

Another agreed:

At many institutions . . . the production of scholarship has become the preeminent faculty value, far outweighing any other consideration factored formally into the promotion and tenure calculus. . . . [A]lthough movement by a faculty member from untenured to tenured status . . . is possible without much more than minimally competent classroom performance, it is almost impossible without a solid record of published scholarship.¹⁶⁹

With few exceptions, virtually everyone who has addressed the issue seriously in the past ten years has agreed that "writing is far and away the dominant consideration in the tenure decision."¹⁷⁰

166. Gordon, *supra* note 2, at 1960.

167. See *infra* Part II.A.2.a.

168. Lilly, *supra* note 42, at 1438 (footnote omitted).

169. Scordato, *supra* note 165, at 399.

170. Abrams, *supra* note 163, at 13; see also MACCRATE REPORT, *supra* note 41, at 5 (noting the importance of writing to tenure decisions); Abrams, *supra* note 163, at 11 ("In making tenure decisions, virtually all law schools attempt to evaluate a candidate's scholarship, teaching, and service . . . but I submit that writing is the dominant concern . . ."); Mary Kay Kane, *Some Thoughts on Scholarship for Beginning Teachers*, 37 J. LEGAL EDUC. 14, 14-15 (1987) (noting pressure on untenured faculty to write to achieve tenure); Lilly, *supra* note 42, at 1440 (quoting Judge Richard Posner's statement that "tenure decisions . . . will depend much more on scholarly achievement than on teaching quality"); John E. Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317, 319-20 (1985) (noting that faculty must publish to achieve tenure); Reingold, *supra* note 159, at 2001 (asserting that the "key" to tenure is "the theoretical article"); Barbara Bennett Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life*, 91 MICH. L. REV. 1977, 1993 n.53 (1993) ("[T]enure . . . at elite schools depend[s] on scholarship, not teaching."); Elyce H. Zenoff & Elizabeth A. Moody, *Law Faculty Attrition: Are We Doing Something Wrong?*, 36 J. LEGAL EDUC. 209, 220-21 (1986) ("[I]t seems clear that demonstrated achievement in scholarship as a requirement for tenure is becoming more significant and widespread."). Over two-thirds of the law schools responding to a recent AALS survey reported that they had changed

The pressure to publish is not felt solely by those without tenure. Scholarship—particularly highly theoretical scholarship¹⁷¹—is “the hallmark of intellectual worthiness” in the academy.¹⁷² Because “[a]cademic prestige derives almost entirely from one’s reputation as a scholar,”¹⁷³ and because “academic prestige seems to be the only game in town,”¹⁷⁴ the “importance of scholarship to the careers of law teachers is difficult to overestimate.”¹⁷⁵ Intellectual satisfaction, prestige, promotions, increased salaries, and opportunities to move laterally all depend as much upon writing, and as little upon teaching, as does tenure.¹⁷⁶

The emphasis on scholarship has reached the point that many now claim that a professor’s success actually depends more upon the *quantity* of his or her writings than their quality. One law school dean, addressing an AALS workshop for new faculty, warned that “quantity rather than quality of writing carries significantly more weight in tenure decisions.”¹⁷⁷ Others

their tenure procedures, and “[m]ost of the changes included either an added emphasis on scholarship or quantification of the scholarship obligation.” *Report of the AALS Special Committee on Tenure and the Tenuring Process*, 42 J. LEGAL EDUC. 477, 484 (1992).

171. See *infra* text accompanying notes 238-242.

172. Reingold, *supra* note 159, at 2001.

173. David P. Bryden, *Scholarship About Scholarship*, 63 U. COLO. L. REV. 641, 643 (1992); see also MACCRATE REPORT, *supra* note 41, at 5 (reporting that scholarship is the primary determinant of the prestige of schools and faculty members); John O. Mudd, *Academic Change in Law Schools*, 29 GONZ. L. REV. 29, 60 (1993-94) (asserting that academic prestige depends upon “writing law review articles,” not “creating innovative courses or developing new teaching materials”); Scordato, *supra* note 165, at 383 (“[T]he perception of prestige of law schools as institutions depend[s] more upon the production of published legal scholarship than on classroom teaching effectiveness . . .”); Woodhouse, *supra* note 170, at 1993 n.53 (“[P]restige at elite schools depend[s] on scholarship, not teaching.”).

174. Cramton, *supra* note 156, at 14; see also *id.* at 13 (“We now live in a copycat world in which the limited goal of academic prestige seems to be the dominant value everywhere . . .”).

175. Elson, *supra* note 41, at 354.

176. See JULIUS GETMAN, *IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION* 40 (1992) (stating that “prestige, raises, job offers, and promotions” depend more upon scholarship than teaching); Elson, *supra* note 41, at 354 (“Hiring, promotion, pay, collegial recognition, societal prominence, and intellectual satisfaction is [sic] mainly a function of the production of scholarship.”); Scordato, *supra* note 165, at 383 (“[T]he advancement of individual law faculty careers . . . depend[s] more upon the production of published legal scholarship than on classroom teaching effectiveness . . .”).

177. Abrams, *supra* note 163, at 12; cf. Lasson, *supra* note 151, at 927 (“Nowadays the goal of publication is much less to find answers than to avoid perishing in pursuit of promotion and tenure.”).

have claimed that, even with respect to the writings of those already tenured, “[q]uality is somewhat less important than quantity.”¹⁷⁸ One would expect that if many law professors were indeed writing out of a desire to achieve promotion, tenure, and prestige rather than out of scholarly interest, and if quantity was indeed rewarded over quality, then the legal academy would suffer from a lot of very bad writing. According to many commentators, that is precisely what the academy suffers from today.¹⁷⁹

In sum, the academy appears to be in the grip of a materialism that is as pervasive as the materialism gripping the practicing bar. Although the academy’s materialism is of a different nature—it focuses on the pursuit of prestige rather than wealth, and it is measured by publications rather than billings—the academy’s materialism, no less than the profession’s, is claiming mentoring and, in a larger sense, the ethical practice of law as its victims.

2. The Death of Mentoring in the Academy

As described above,¹⁸⁰ three conditions are necessary if the academy is to provide effective mentoring for students: First, the academy must regard preparing students to practice law as a worthy endeavor. Second, those who have practiced law or who are interested in the work of lawyers must be able to find places on law school faculties. And third, professors must be willing to spend time with students. In large part because of the academic materialism that I have described, all of these conditions are be-

178. Bryden, *supra* note 173, at 643; see also *id.* at 647 (“For a legal scholar, the most valuable writing skill is the ability to transform a five-page article into an eighty-page article (or better yet into two forty-page articles).”); Cramton, *supra* note 156, at 14 (“Professors who publish, even those whose publications are trivial and mediocre, will earn more, get promoted faster, and migrate to the more ‘prestigious’ universities.”); Kent D. Syverud, *Taking Students Seriously: A Guide for New Law Teachers*, 43 J. LEGAL EDUC. 247, 259 (1993) (“Sometimes . . . we publish as much as we can, even in obscure journals, simply to demonstrate our productivity and to gain a reputation among other academics.”). David Bryden argues that, because quantity is valued more by the academy than quality, “we are under great pressure to repeat what others have said, or to address a trivial new problem, or to invent a trivial or foolish new point about an important problem.” Bryden, *supra* note 173, at 643. Bryden posits that one reason for the emphasis on quantity over quality is that “quantity is easier to measure, especially in a profession consisting of specialists who generally do not read, and cannot evaluate, works outside their fields.” *Id.*

179. See *infra* notes 331-342 and accompanying text.

180. See *supra* text accompanying p. 747.

coming increasingly difficult to find, particularly in the elite schools.¹⁸¹

181. One barrier to effective mentoring cannot be attributed to the pressure to produce scholarship. As I have discussed, *see supra* Part I.B.2.a.i, one of the most important functions of mentoring is encouraging students to identify the values that are important to them and to consider whether and how they can practice law consistently with those values. In other words, through their mentoring, professors can facilitate what I have called "internal integration."

For many of our students, religion will serve as a primary source of their values. It is difficult to know just how influential religion is in the lives of law students or anyone else. Stephen Carter has asserted that for "roughly half of Americans . . . religious tradition is very important in reaching moral decisions." STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 56 (1993). And public opinion polls consistently show that substantial majorities of Americans believe in God, pray, attend religious services, and claim that religion is important in their lives. *See* George Gallup, Jr., *Religion in America: Will the Vitality of Churches Be the Surprise of the Next Century?*, PUB. PERSP., Oct./Nov. 1995, at 1, 1-2. In one recent survey of American adults, "63% stat[ed] that their [religious] beliefs keep them from doing things they know they shouldn't do. Only 4% [said] their beliefs have little or no effect on their lives." *Id.* at 3.

However, polling data about religion appear to be unreliable, notwithstanding the considerable efforts of pollsters to filter out the tendency of respondents to answer questions in socially acceptable ways. *See id.* at 6. One recent study comparing "church attendance rates based on counts of actual attenders to rates based on random samples of respondents who are asked to report their own attendance" found that "[c]hurch attendance rates for Protestants and Catholics are approximately *one-half* the generally accepted levels." C. Kirk Hadaway et al., *What the Polls Don't Show: A Closer Look at U.S. Church Attendance*, 58 AM. SOC. REV. 741, 742 (1993).

Notwithstanding the difficulties in measuring religious influence with precision, it seems likely that many law students—perhaps a majority, perhaps not—draw ethical guidance primarily from their religious beliefs. If we are to assist our students in internal integration, we must be willing to discuss with them their religious convictions and the role that those convictions will play in their professional lives. (A professor should be able to discuss religion with her adult students, regardless of the nature of her own views on religion.) If we are not willing to discuss religion openly, we will be poorer mentors for it.

Apparently, though, few law professors are willing to put religion on the table. According to Thomas Shaffer, "the [legal] academy, more than any other, has systematically discouraged and disapproved of invoking . . . religious tradition as important or even as interesting." SHAFER, *supra* note 13, at 214. Religion is generally ignored in discussions about legal ethics and in the materials that students use in studying ethics. SHAFER, *supra* note 58, at 75; Patrick J. Schiltz, *Keeping the Faith: Because Religion is Ignored in Colleges, Professionals Take an Incongruous Approach to Ethical Decisions*, CHI. TRIB., May 7, 1996, § 1, at 19. Indeed, the academy's distance from religion is so pronounced that, as I noted earlier, a recent and prominent book about the "spiritual crisis" of American lawyers written by a leading academic barely mentions religion. *See supra* note 90. Instead, the book asserts

a. *Regard for Teaching*

The conflict between scholarship and teaching not only produced a winner in scholarship, but a loser in teaching. Teaching is widely viewed today as "an intellectually uninteresting, rather undignified and vaguely disreputable, perhaps philistinian pursuit."¹⁸² It has been described as "a subordinate activity"¹⁸³—something that professors do "incidentally"¹⁸⁴ and treat as "an adjunct of legal scholarship."¹⁸⁵ Barbara Woodhouse described teaching as "the professor's pro bono work—something extra, done for love, and in the face of formidable institutional disincentives."¹⁸⁶ Woodhouse characterized "the risk to scholars of devotion to teaching" as being similar to "the risk [] to associates of devotion to pro bono work."¹⁸⁷ After all, she points out, "[t]he catchy phrase 'Bill or Be Banished' is but a play on the words 'Publish or Perish.'"¹⁸⁸

Because the pressure to devote time to scholarship falls most heavily on those professors pursuing tenure, it is not surprising that the pressure *not* to devote time to teaching likewise falls most heavily on those who are new to the academy. When tenure committees place most (or total) weight on scholarship and little (or no) weight on teaching, then

the opportunity cost to law school professors of developing and improving their courses beyond the point necessary to prevent open complaints by their students exceeds the practical benefits to be derived from any incremental improvement in those courses. As a result, law professors . . . face powerful practical incentives to develop their courses only to the point where students are not openly complaining, and to then devote the remainder of their personal resources to producing published scholarship.¹⁸⁹

that the "only" place that we "disenchanted moderns" can meet our "need to believe that [our] lives are worth living"—now that it is "unthinkable that one can find even the smallest part of an answer [to the ultimate question of life's meaning] by choosing a legal career"—is "in the realm of personal relations, of brotherly and erotic love, in the sphere of private life." KRONMAN, *supra* note 16, at 369-70. This no doubt would come as a surprise to many people of faith.

182. Elson, *supra* note 41, at 354.

183. Lilly, *supra* note 42, at 1440 (quoting Judge Richard Posner); see also *id.* at 1468 (describing the "creeping subordination of teaching"); Elson, *supra* note 41, at 379 (asserting that the academy "subordinates students' professional development to faculties' scholarly interests").

184. GETMAN, *supra* note 176, at 40.

185. KRONMAN, *supra* note 16, at 269.

186. Woodhouse, *supra* note 170, at 1993.

187. *Id.*

188. *Id.*

189. Scordato, *supra* note 165, 374-75.

This dynamic is “particularly pernicious from a pedagogical perspective” because it focuses the pressure not to devote time to teaching precisely on those professors “who are in the formative stage of their teaching career, developing what may be a lifelong approach to the law school teaching function.”¹⁹⁰

Little that I have experienced in my first two years of teaching suggests that these descriptions of the pressure on young faculty to compromise teaching are overblown. Even before I stepped into a law school classroom for the first time, I heard the marvelous “keynote” address that Harold Koh delivered at an AALS workshop for new law faculty. Koh told the following story:

Shortly after I started teaching at Yale, I was invited to lunch by one of the senior members of the faculty. [At lunch] . . . my senior colleague said, “What are you going to write about this? Scholarship this. Research this. Write this. Will you write this? How about writing this?” . . . Finally, about an hour into the lunch, I kind of meekly said, “What about teaching?” And he said, “You know, Harold, let me tell you something about this business. Being a good teacher is like hitting a homerun at the faculty softball game. . . . If you can do it, they’ll be impressed that you can do that *too*. But, in the end, every reward that you get from this profession . . . will be a result of your scholarship, so don’t spend a second more on your [teaching] than is absolutely necessary.”¹⁹¹

My experience has not been much different than Koh’s. Shortly before my first class, one senior colleague advised me that the quality of my teaching would affect my prospects for tenure only if I was so bad that I was burned in effigy by my students on the front lawn—“and even then, it would depend on the size of the fire.” After my first set of teacher-course evaluations were processed, another colleague warned that my good ratings meant that I had probably devoted too much time to teaching. “This is like the bar exam,” he said. “You want to do just well enough to pass. Anything above that is a waste of time.” It says something about the prevailing attitudes toward teaching when a new professor can be warned about teaching too *well*.¹⁹²

190. *Id.* at 382.

191. Audio tape of Workshop for New Law Teachers, held by the Association of Am. Law Sch. (July 20-22, 1995) (on file with author). Koh went on to say that, after much thought, he decided to reject the advice of his senior colleague.

192. I should stress that both of my colleagues were merely describing what they regarded as the unfortunate reality of the tenure process. Both made it clear that they lamented the fact that teaching was valued so little.

In today's academy, where professors who are devoted to teaching are considered "nonconformists"¹⁹³ and students are expected to be content with "what is left over after professors give elsewhere their best efforts,"¹⁹⁴ there is undoubtedly little enthusiasm for mentoring. As I discuss below,¹⁹⁵ law professors can mentor and thereby shape students into ethical people who will practice law ethically. But, before they can do so, they must first regard professional training not as something done grudgingly to pay the bills, but as a worthy endeavor in itself. That attitude seems to be on the wane among law professors today.¹⁹⁶

b. *Experience in Practice*

For reasons that I describe at length below,¹⁹⁷ professors who have practiced law are generally in a better position to mentor than those who have not. Such professors have "a distinctive form of understanding that comes only with experience."¹⁹⁸ That understanding will enhance both their writing and their teaching by, among other things, making it easier for them to address ethical issues in a relevant and meaningful way. The fact that they have practiced law will also make these professors more effective role models, in part because they are less likely to be disdainful of their students' future profession, and in part because they are more likely to understand the non-monetary rewards of that calling. And the presence on a faculty of professors with experience in practice will make better mentors of those faculty members who do *not* have such experience by broadening the intellectual mix of the institution to include more practical perspectives. For these reasons, every law school faculty should include professors who have substantial experience practicing law.

There has long been a tension between those who believe that experience in practice is desirable for law professors and

193. GLENDON, *supra* note 8, at 244.

194. Shaffer, *supra* note 51, at 392.

195. See *infra* Part II.B.

196. One should not confuse the desire to be a *popular* teacher with the desire to be an *effective* teacher. Everyone likes to be liked, and, with the advent of computerized teacher-course evaluations, it is increasingly difficult for professors to entertain the illusion that they are more popular than they actually are. Thus, it is not unusual for professors to devote some time to teaching in order to become better liked. But that is entirely different from regarding teaching as an intrinsically valuable activity and striving to teach more effectively.

197. See *infra* text accompanying notes 308-320.

198. KRONMAN, *supra* note 16, at 73.

those who do not. As in the case of the teaching-scholarship conflict, the conflict over the desirability of practical experience appears to be nearing an end, and once again mentoring appears to be on the wrong side of history. The view that practical experience can be valuable is fast becoming an anachronism. This is true particularly in the elite schools, but, trends in the academy being what they are, it is likely to become true in non-elite institutions as well.

When Christopher Columbus Langdell appointed James Barr Ames to the Harvard Law School faculty in 1873, "the feeling was dismay and grief."¹⁹⁹ Ames had never sat on the bench and had virtually no experience practicing law, causing many to wonder how he could possibly prepare students for the profession.²⁰⁰ Ames's appointment, though, was entirely consistent with Langdell's philosophy. If, as Langdell believed, law is "a system of axioms and corollaries" that can be scientifically derived from the study of judicial opinions, then "experience of any but the simplest and least-developed kind [becomes] irrelevant to the understanding of law."²⁰¹ Roughly speaking, it is no more necessary that a law professor have experience as a practitioner than it is necessary that a biology professor have experience as an amoeba. In Langdell's words:

A teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often traveled it before. What qualifies a person, therefore, to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience in learning law.²⁰²

Although Langdell's jurisprudential views were long ago discredited, his hostility to the notion that practical experience is useful to law professors not only survives, but flourishes, not-

199. Franklin G. Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 511 (1920).

200. See STEVENS, *supra* note 154, at 38; Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501, 502. This concern turned out to be well founded, at least according to Paul Carrington, who wrote that

for all of his admirable attributes, Ames may stand as a paradigm of the legal scholar who failed to ground his work in reality and who devoted his career to a romance with ideas that did not work. His were the "brilliant" ideas unsuited to the real experience of ordinary people.

Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L.J. 741, 788 (1992).

201. KRONMAN, *supra* note 16, at 184.

202. STEVENS, *supra* note 154, at 38 (citation omitted).

withstanding withering attacks on Langdell's view by Jerome Frank and others.²⁰³ This neo-Langdellianism, combined with the presumption that every experienced attorney seeking a faculty appointment is burned out and looking for a cushy job, means that today only two types of practitioners can realistically hope to be appointed to the faculties of elite schools: (1) those who have practiced law for no more than three or four years, and (2) those who have practiced law for more than three or four years, but who have rebutted the "burnout" presumption by publishing law review articles while practicing.

Of course, this makes it virtually impossible for anyone who has "really" practiced law to be appointed. Most lawyers practice in law firms,²⁰⁴ and the first few years in a law firm rarely give an attorney a realistic impression of the practice of law. A young practitioner's first few years are heavy on legal research and writing, and light on precisely those things that make up the professional life of most lawyers: counseling, negotiation, client contact, trials, firm management, and the like. To gain a real understanding of the practice of law, one must do it for more than a few years. However, it is precisely those lawyers "who have spent more than a few years in practice [who] almost never receive a tenured appointment to an elite law faculty."²⁰⁵

There is an exception to this rule: If, while practicing, one has published a couple of law review articles, particularly highly theoretical articles of the type that are in vogue in the academy,²⁰⁶ one still can hope for a faculty appointment, even if one has practiced law for more than a few years. However, no experienced attorney—with the exception of the rare Superman or Superwoman among us—can engage fully in the practice of law while publishing scholarship that will be respected in today's academy. A busy attorney is fortunate to see the sun more than once or twice a week, much less to devote hundreds of hours to scholarship.

For most busy practicing lawyers, just keeping up in their area of specialty takes more time than they have; it is unrealistic to think that they could or would do the reading and research necessary to produce high-level theoretical work, even if they had the inclination to do so.²⁰⁷

203. *See id.* at 156-57.

204. *See supra* note 42.

205. Lilly, *supra* note 42, at 1436.

206. *See infra* notes 238-242 and accompanying text.

207. Reingold, *supra* note 159, at 2001.

I suppose that if one was a quite junior or senior attorney, did not sleep much, had no family (or a family that was remarkably understanding), carefully limited the time made available to clients, and conscripted young colleagues to assist with the research, one could publish while practicing. But few attorneys are in this position. For the most part, an attorney cannot both experience the "real" practice of law and publish. There are just not enough hours in the day.

The bottom line is that "[t]he new requirements for admission to the faculty virtually rule out anyone who has spent a substantial amount of time in an active practice."²⁰⁸ Again, the emphasis is on the word "substantial." In 1991, the *University of Michigan Journal of Law Reform* published a study of the backgrounds of those teaching in American law schools during the 1988-89 academic year.²⁰⁹ The study found that the proportion of professors who had at least *some* experience in practice had actually grown.²¹⁰ But the study also found that "although more and more professors have had some exposure to the practice of law, . . . the vast majority of professors teaching law have had very little experience in practicing law."²¹¹ Over twenty percent of the nation's law professors had absolutely no experience of any kind in practice.²¹² Only one quarter of all professors had practiced law more than five years.²¹³

The data regarding the academy as a whole are interesting, but not as relevant to the future direction of the academy as data regarding those teaching in the nation's elite law schools. The elite law schools are the trend setters. They tend to hire only their own graduates,²¹⁴ and their graduates make up a disproportionate share of the faculties of non-elite schools. One-third of those teaching at American law schools received their J.D. de-

208. *Id.*; see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2204-05 (1993). I am happy to say that my own school has resisted this trend, which is why I have a job.

209. Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191 (1991).

210. *See id.* at 212-26.

211. *Id.* at 219.

212. *See id.* at 213 tbl.14.

213. *See id.* at 219.

214. The Michigan study found that 85.2% of the professors teaching at the seven most highly ranked law schools received their J.D. degrees from one of those same seven schools. *See id.* at 231 tbl.30.

grees from one of only five schools—Chicago, Columbia, Michigan, Harvard, and Yale²¹⁵—and “the nation’s twenty top-ranked law schools” produce about sixty percent of all professors.²¹⁶ It is thus not surprising that

[w]e now live in a copycat world If the elite schools go a particular route, it seems inevitable that nearly every university law school in the land will move or be moved in the same direction. There is now a national market for law teachers, and most new teachers attended one or another of the top-rated schools. Their ideas about teaching law and about legal education were formed at these schools²¹⁷

If it is indeed true that as Harvard goes so goes the academy, then a close examination of the Harvard Law School faculty should provide particular insight into the future of legal education.²¹⁸ That future will apparently include faculties made up almost entirely of people without substantial experience practicing law—or at least practicing in the private sector. Although most Harvard *graduates* go on to practice in private law firms,²¹⁹

215. See *id.* at 194 & n.19.

216. *Id.* at 226; see also Fossum, *supra* note 200, at 507 (finding that of all law professors teaching in 1975-76, 58.9% graduated from one of the top twenty law schools).

217. Cramton, *supra* note 156, at 13 (footnote omitted).

218. The following assertions about the Harvard faculty are based upon the biographical information published in the 1995-96 edition of the *AALS Directory of Law Teachers*. ASSOCIATION OF AM. LAW SCH., THE AALS DIRECTORY OF LAW TEACHERS 1995-96 (1995). Admittedly, the information contained in the *AALS Directory* is self-reported, incomplete, and imprecise, but it is the best information about the backgrounds of law professors that is readily available, which is why those studying the law teaching profession often use it. See Borthwick & Schau, *supra* note 209, at 194; Fossum, *supra* note 200; Zenoff & Moody, *supra* note 170, at 211. For purposes of my research, I have defined as “faculty” only those holding the rank of professor, associate professor, or assistant professor, unmodified by such terms as adjunct, clinical, visiting, or emeritus. See Zenoff & Moody, *supra* note 170, at 212. Two members of the Harvard faculty—David Rosenberg and Detlev Vagts—did not submit biographical data to the AALS, and thus are not included in my statistics.

219. As I noted earlier, see *supra* note 42, about three-quarters of American attorneys are in private practice, and over half of them practice in law firms. A substantially greater proportion of Harvard Law graduates practice in private law firms. According to statistics compiled by the placement office at Harvard Law School (and on file with the author), during the six year period from 1990 to 1995, the proportion of Harvard graduates who began their careers by joining law firms ranged from a high of 65.8% in 1990 to a low of 56.6% in 1992. The proportion of graduates doing clerkships after graduation ranged from a high of 29.1% in 1991 to a low of 23.8% in 1994. Assuming that the majority of those clerking join law firms after their clerkships end, roughly three-quarters of Harvard Law graduates begin their careers in law firms. Of course, some of those who begin in firms eventually leave them, just

most Harvard *professors* have little or no such experience. Only three of the seventy-five members of the Harvard Law faculty have more than five years experience in private practice. The youngest of those three is sixty-six years old, last practiced law in 1964, and was appointed to the Harvard faculty in 1966. In other words, not a single member of the (huge) Harvard Law School faculty has practiced in a law firm at even a senior associate level in the last thirty years.

If current trends hold, the Harvard faculties of the future will have even less collective experience in private practice. The thirteen oldest members of the current Harvard faculty have an average of 4.3 years' experience in private practice; three of them have more than five years' experience, and only four have none. By contrast, the thirteen youngest members of the Harvard faculty have an average of about ten *months*' experience in private practice; none of them has more than five years' experience, and ten have none. Looked at another way, the fifteen faculty members appointed before 1966 have an average of 2.75 years' experience in private practice, and only five of them have none. By contrast, the fourteen Harvard faculty members appointed after 1991 have an average of .786 years' experience in private practice, and ten of the fourteen have none.²²⁰

The future seems clear. If current hiring trends continue, soon there will not be a single member of the Harvard Law School faculty who will have substantial experience doing what

as some of those who do not begin in firms eventually join them, but neither Harvard nor any other source appears to keep statistics on where Harvard Law graduates practice five years, ten years, or longer after graduation.

220. A few members of the Harvard faculty do have experience practicing law in governmental or public interest settings. Also, many members of the Harvard faculty are renowned for their extensive outside activities. Finally, some members of the Harvard faculty work closely with the bar and/or study its work. All of this no doubt helps provide some understanding of the world of practice.

Nevertheless, there is a large difference between occasionally doing some of the things that a practitioner does and *being* a practitioner—just as there is a large difference between occasionally teaching a class as an adjunct professor and being employed full time as an academic. A tourist who takes a hike through a national park knows more about it than someone who does not, but a ranger who lives and works in the park every day knows far more about it than the tourist. Having lived on both sides of the fence that separates the profession from the academy, I know that there is a dramatic difference between being a professor who occasionally handles an appeal or consults with a law firm and being a lawyer who is fully engaged in every aspect of the practice of law. The point remains: Almost no Harvard law professor has substantial experience doing what the vast majority of his or her students will do—live and work as a lawyer in a private law firm.

the vast majority of Harvard graduates will be doing: practicing law in the private sector. Indeed, if current trends continue, the average Harvard faculty member will soon have only a bit more experience in private practice than the average summer associate.

True, Harvard is an extreme case. Indeed, Harvard is extreme even among the elite schools,²²¹ where “[p]rofessors . . . are even less likely to have practice experience than their peers at lower-ranked schools.”²²² But if Harvard continues to “dominate[] the development of legal education,”²²³ there is little reason to hold out hope for another of the conditions necessary for successful mentoring of students—the presence on each faculty of people with substantial practical experience.

c. Interest in the Work of Practitioners

The dearth of faculty with substantial practical experience may reflect a lack of interest on the part of elite schools in appointing practitioners, or it may reflect a lack of interest on the part of practitioners in being appointed by elite schools. Common sense,²²⁴ anecdotal evidence,²²⁵ and the professional literature²²⁶ all suggest that the former is the more likely explanation. However, the latter possibility should not be dismissed out of

221. Yale is even more extreme. According to the data reported in the *AALS Directory*, the average professor at Yale Law School has only 0.74 years' experience in private practice, not a single professor has more than five years' experience, and over three-quarters of the faculty has no experience whatsoever.

222. Borthwick & Schau, *supra* note 209, at 219. In the Michigan study, “37% of the professors at ‘the seven highest-ranked schools’ had no practice experience at all”—in private practice or elsewhere. *Id.*

223. STEVENS, *supra* note 154, at xv.

224. It seems rather difficult to believe that there are no experienced practitioners in the United States who have the interest and qualifications to teach at the nation's top law schools.

225. David Bryden reports:

Several years ago, I interviewed a Supreme Court clerk who was interested in teaching. She had been the president of the Harvard Law Review. “When I'm done clerking,” she asked, “should I practice law for a while before becoming a teacher?” I offered the standard advice, saying that a couple of years of practice, though not essential, would be helpful. “That's interesting,” she replied. “Several of my friends on the Harvard faculty advised against it. They thought it would give me a taint.”

Bryden, *supra* note 173, at 642-43. My experience and the recent experience of many others suggest that this candidate's friends on the Harvard faculty are not alone in considering practical experience as giving a hopeful academic “a taint.”

226. See *infra* note 247.

hand. Although it is no doubt true that the main reason that those with practical experience are not well represented on the faculties of elite schools is that the elite schools do not want them—or, more accurately, that the elite schools want to hire people with traits and accomplishments that experienced practitioners are unlikely to have—it is also true that the idea of teaching at an elite school is losing its attraction for many qualified practitioners.

In an influential article, Judge Harry Edwards of the United States Court of Appeals for the District of Columbia Circuit decried what he called “the growing disjunction between legal education and the legal profession.”²²⁷ Judge Edwards’ article sparked a great deal of debate in the academy—so much debate, in fact, that the *Michigan Law Review* devoted a forum to the article.²²⁸ In the course of the debate, substantial (although far from universal) agreement emerged on two points.

First, there is indeed a large and growing gap between the academy and the profession.²²⁹ Various commentators agree with Judge Edwards that there is a “disjunction,”²³⁰ “division,”²³¹ “detach[ment],”²³² “dissonance,”²³³ or “separation”²³⁴ between the law schools and the practicing bar. A recent ABA President lamented:

I can't think of any other profession that operates with so little connection between those who are practicing and those who are the gatekeepers for the profession. . . .

....

We are very much a divided profession. Our academic side is over here and the practicing lawyer is over there, and they don't connect very often.²³⁵

227. Edwards, *supra* note 3, at 34. Judge Edwards followed up his article with two “postscripts.” See Edwards, *supra* note 208; Edwards, *supra* note 138.

228. Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993).

229. See generally Elson, *supra* note 41, at 350; Herma Hill Kay, *President's Message: Lawyers and Law Teachers: Are We in the Same Profession?*, NEWSLETTER (Association of Am. Law Sch., Wash., D.C.), Dec. 1989, at 1; Lilly, *supra* note 42, at 1428; Clarence Thomas, Speech, Cordell Hull Speakers Forum (November 17, 1994), in 25 CUMB. L. REV. 611, 612-18 (1995).

230. Reingold, *supra* note 159, at 2000.

231. Borthwick & Schau, *supra* note 209, at 193.

232. GLENDON, *supra* note 8, at 178.

233. Johnson, *supra* note 76, at 1233.

234. Roger C. Cramton, “The Most Remarkable Institution”: *The American Law Review*, 36 J. LEGAL EDUC. 1, 10 (1986).

235. D'Alemberte, *supra* note 102, at 52-53.

Many in the academy agree that this gap, which has "never"²³⁶ been wider, "shows every sign of widening further."²³⁷

Second, it is generally agreed that Judge Edwards has put his finger on what is either a cause or a symptom (or both) of the gap: legal scholarship that is moving "in the direction of the theoretical and academic" and away from "the practical and professional."²³⁸ Traditional legal scholarship—that is, "scholarship that is primarily devoted to the analysis of legal doctrine and that tries to communicate directly with practitioners and judges"²³⁹—is widely viewed as "passé, unprofitable, perhaps even pernicious."²⁴⁰ What is valued is "specialized interdisciplinary or theoretical work written for narrow academic audiences."²⁴¹ As a result, "the academically elite law school is increasingly a colonial outpost of the graduate school, dominated

236. GLENDON, *supra* note 8, at 178.

237. Reingold, *supra* note 159, at 1999.

238. Byse, *supra* note 158, at 1088; *see also* Reingold, *supra* note 159, at 1999 ("[T]he focus of the legal academy has shifted steadily and with increasing speed from doctrine to theory.")

239. Steven D. Smith, *In Defense of Traditional Legal Scholarship: A Comment on Schlegel, Weisberg, and Dan-Cohen*, 63 U. COLO. L. REV. 627, 627 (1992).

240. *Id.*; *see also* KRONMAN, *supra* note 16, at 267 (arguing that traditional legal scholarship is no longer valued); Byse, *supra* note 158, at 1089 ("Writing for the legal profession sometimes is publicly assigned a low priority by some law teachers."); Paul D. Carrington, *The Dangers of the Graduate School Model*, 36 J. LEGAL EDUC. 11, 12 (1986) ("[D]iminishing value is assigned to work that might be useful to students and lawyers."); Edwards, *supra* note 138, at 568-69 ("[T]oo many legal academics . . . view what practitioners and judges do as 'mundane' and 'dull,' while the obscure work of a new breed of law scholars is viewed as 'richer and more complex.'") (footnote omitted) (emphasis omitted); Elson, *supra* note 41, at 350 (arguing that legal scholarship that is accessible to attorneys, judges, and legislators is disparaged by the academy).

241. Cramton, *supra* note 156, at 9; *see also* Carrington, *supra* note 200, at 789 (taking note of "the academization of the law teacher"); Cramton, *supra* note 234, at 10 (arguing that law professors are increasingly producing scholarship that is "abstract, theoretical, and academic" and written "primarily for other academics"); Harry H. Wellington, *Challenges to Legal Education: The "Two Cultures" Phenomenon*, 37 J. LEGAL EDUC. 327, 327 (1987) ("As a group, law teachers today are more academically oriented than they were 25 to 30 years ago. . . . My colleagues today care more about intellectual movements in faculties of arts and sciences than they used to; they care less about the activities of the bar, and, perhaps, even the output of the bench."). Mary Ann Glendon claims that "[t]he ratio of 'practical' to 'theoretical' articles has dropped in 25 years from over four-to-one to about one-to-one." Mary Ann Glendon, *What's Wrong with the Elite Law Schools*, WALL ST. J., June 8, 1993, at A16.

by persons whose primary interests are in almost any other discipline than law."²⁴²

Those with extensive experience in practice are almost always going to be ill-prepared to do the highly theoretical interdisciplinary work that is valued in this environment.²⁴³ Practitioners spend their time acquiring expertise in law, not in philosophy or economics. If, "for purposes of appointment, tenure, and academic recognition, theory is in, doctrine is out,"²⁴⁴ then it is only logical that those with experience in practice and interest in law are going to be "presumptively disqualified from teaching at many of our elite schools."²⁴⁵ It is thus not surprising that "the shift toward theory . . . has all but eliminated the hiring of new professors with substantial backgrounds or interests in practice."²⁴⁶

It is important to note that the attitude of the elite schools toward the practicing bar goes far beyond indifference and the

242. Carrington, *supra* note 200, at 789; see also Francis A. Allen, *The Dolphin and the Peasant: Ill-Tempered, but Brief, Comments on Legal Scholarship*, in PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 183, 184-85 (Peter Hay & Michael H. Hoeflich eds., 1988); Johnson, *supra* note 76, at 1238-39; Arthur Allen Leff, *Law and*, 87 YALE L.J. 989 (1978).

243. Practice also ill-prepares attorneys to teach in another sense: More than anything, the academy values a "brilliant" idea, which often means an idea that is counterintuitive or that has not previously occurred to anyone. See RICHARD LEVIN, NEW READING VS. OLD PLAYS 196 (1979) ("[Professors] know that their interpretations are not likely to be published unless they say something . . . that has never been said before, which all too often means . . . that they must say something very strange."). See generally Daniel A. Farber, *Missing the "Play of Intelligence"*, 36 WM. & MARY L. REV. 147 (1994); Daniel A. Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367 (1987); Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986). But practitioners have little use for such ideas. The success of a practitioner largely depends upon her ability to persuade, and that, in turn, largely depends upon her ability to present ideas in a way that seems intuitive and obvious. "Brilliant" ideas, precisely because they are novel and counterintuitive, often make clients, regulators, and judges nervous, and thus do not often work well in persuading.

244. Lilly, *supra* note 42, at 1432; see also Edwards, *supra* note 138, at 568; Edwards, *supra* note 208, at 2198-2200.

245. Johnson, *supra* note 76, at 1254.

246. Reingold, *supra* note 159, at 2003; see also Lilly, *supra* note 42, at 1436 ("The doctrinal analyst is seldom admired, rarely recruited, and infrequently appointed."). Mary Ann Glendon tells the story of

the visiting professor at a top law school who asked a group of colleagues at the lunch table whether they would hire a teaching prospect who was very smart but interested only in teaching and writing about law. "Certainly not," was the answer. "If she only wanted to do law, by definition she could not be very smart!"

GLENDON, *supra* note 8, at 223.

feeling that practitioners are unqualified to teach. Rather, the word used most frequently by commentators to describe the academy's attitude toward the practice of law and/or the practicing bar is "disdain."²⁴⁷ The academy has come a long way from the days when Karl Llewellyn took a two year leave of absence to practice law after "[f]eeling his lack of practical experience as a weakness."²⁴⁸

For a number of reasons, the same trends that have created such a disdain in the academy toward the profession may be creating a disdain in the profession toward the academy—and may

247. See, e.g., GLENDON, *supra* note 8, at 217 (opining that many law professors today have "disdain or indifference toward the sorts of careers most of their students will follow."); Ayer, *supra* note 66, at 2150 ("What appears to have changed most on the law school side since I attended law school in the early 1970s is . . . the degree of active disinterest, even disrespect and *disdain*, of many faculty members at elite institutions toward the work of practicing lawyers and judges."); Cramton, *supra* note 41, at 259 ("[L]aw teachers . . . have forsaken the profession that the law student plans to enter; and their attitude toward practitioners is often touched with an air of superiority and *disdain*."); Lilly, *supra* note 42, at 1460 ("[T]here is a growing *disdain* in the academic world for practice, practicing lawyers, or in some cases for law itself."); Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3, 7 (1991) ("Most of us . . . communicate *disdain* for real world activity and practice."); Reingold, *supra* note 159, at 2000 ("No doubt . . . law professors as a class have looked down on lawyers. . . . Judge Edwards is surely right that the rarified air in today's faculty lounge is suffused with a stronger scent of *disdain*.") (emphasis added in all instances).

Other commentators have expressed a similar view, without actually using the word "disdain." See, e.g., Edwards, *supra* note 138, at 568-69 (claiming that "too many legal academics" communicate to practitioners an "attitude . . . [that] comes (and is received) as 'we're better than you.'"); Edwards, *supra* note 3, at 37 (criticizing the growing number of professors "who use the law school as a bully pulpit from which to pour scorn upon the legal profession."); Gordon, *supra* note 2, at 1960 ("[S]cholars, even traditional ones, consider law practice the province of the brain dead."); Johnson, *supra* note 76, at 1239 (arguing that law professors are "indifferent to the profession"); Wellington, *supra* note 241, at 329 ("Too many very able academic lawyers . . . scorn the practicing lawyer and his work.").

248. GLENDON, *supra* note 8, at 193. It is interesting to note that extensive experience in private practice did not prevent some well-known lawyers from going on to distinguished careers. Hugo Black spent 17 years in private practice, see LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 229 (1994), Louis D. Brandeis 38 years, see *id.*, William J. Brennan, Jr. 14 years, see *id.*, Benjamin Cardozo 23 years, see *id.* at 230, Learned Hand 13 years, see HAROLD CHASE ET AL., BIOGRAPHICAL DICTIONARY OF THE FEDERAL JUDICIARY 114-15 (1976), John Marshall Harlan II 18 years, see EPSTEIN, *supra*, at 232, Oliver W. Holmes, Jr. 15 years, see *id.* at 233, Charles Evan Hughes 29 years, see *id.* at 233, Robert H. Jackson 21 years, see *id.*, William Rehnquist 16 years, see *id.* at 236, Harlan Fiske Stone 25 years, see *id.* at 237, and Byron R. White 14 years, see *id.* at 238.

be creating a gap not just between law professors and practicing lawyers, but between law professors and their own students.

First, practitioners look at law very differently from many prominent scholars. I attended law school in the mid-1980s, the high season of the Critical Legal Studies movement. On many days, I had not even eaten breakfast before I watched one of my professors deconstruct something. Many of my professors were openly derisive of doctrine and treated it as nothing more than a figleaf masking naked policy choice. In fact, many of them seemed to think that, because of the indeterminacy of language, doctrine could never be anything more than a ruse or palliative, misleading the public and judges themselves about the "real" basis of judicial decisions.

Three years of law school left me—and many of my classmates—intensely cynical and skeptical. But my budding romance with deconstruction was itself deconstructed when I started practicing law. In the substantial majority of cases in which I was involved, the parties, the attorneys, and the judge not only agreed that language had meaning, but even agreed on what it meant (that is, on the content of the legal principles governing the case). What was most often in dispute was the facts. My impression is that most practitioners (and judges²⁴⁹) believe in doctrine; rightly or wrongly, they believe that legal principles can be meaningfully articulated and objectively applied.²⁵⁰

Second, most practitioners not only believe that doctrine exists, but they are interested in it, and particularly in its impact on the world around them. For the practitioner, law is highly contextual. But "there is a striking fact about much . . . legal literature: it is noncontextual. It does not come to grips with the stuff of adjudication."²⁵¹ To succeed in the academy, one must be interested not in the "grubby facts of day to

249. See, e.g., Alvin B. Rubin, *Does Law Matter? A Judge's Response to the Critical Legal Studies Movement*, 37 J. LEGAL EDUC. 307, 307-08 (1987) ("[L]egal doctrine is a real force, judges follow it, and they decide all but a small fraction of the cases that come before them in accordance with what they perceive to be the controlling legal rules.").

250. For a forceful exposition of the contrary view—that is, the view that legal principles cannot be applied consistently and objectively—see Mark V. Tushnet & Jennifer Jaff, *Critical Legal Studies and Criminal Procedure*, 35 CATH. U. L. REV. 361 (1986); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 825 (1983); Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 691 (1985).

251. Wellington, *supra* note 241, at 329.

day life," but in "the grandness of theory."²⁵² Precisely the opposite is true in the profession. Thus, there is a mismatch between the contextual approach to law that interests the practitioner and the abstract approach that is valued by the professor.²⁵³ This mismatch appears to be largely responsible for the spate of recent complaints by attorneys and judges about the irrelevance of modern legal scholarship to their work.²⁵⁴

Finally, the typical practitioner may find herself disinclined to enter the modern academy for a more fundamental reason: Most practitioners value—and, if they started teaching, would be attracted to—precisely the type of doctrinal scholarship that is scorned. With 3,000,000 judicial opinions now available through Westlaw and LEXIS and over 100,000 new opinions being added to the databases each year,²⁵⁵ few practitioners are likely to

252. Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 775 (1986). Friedman explains:

Those legal scholars who dominate writing in the leading journals are men and women who are fond of books, essays, and discussions; they are at home in the milieu of argument and logic; grubby facts of day to day life attract them less than the grandness of theory; they are looking for universal truth, and they do not expect to find it among the nuts and bolts of some particular place and time.

Id.; see also Cramton & Koniak, *supra* note 21, at 163 ("[T]he ethos of legal scholarship over the last two decades has celebrated the abstract, expressing contempt for the contextual characteristics that make law, Law. The quest has been for an escape from the specific into the general, the universal, and the eternal.").

253. See Lilly, *supra* note 42, at 1434; Reingold, *supra* note 159, at 2001-02.

254. See, e.g., *United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars* (\$639,558) in *United States Currency*, 955 F.2d 712, 722 (D.C. Cir. 1992) (Silberman, J., concurring) ("[M]any of our law reviews are dominated by rather exotic offerings of increasingly out-of-touch faculty members."); Cramton, *supra* note 234, at 10 (stating that legal scholarship has become "of much less utility to the bench and bar"); Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 319-20 (1989) (characterizing legal scholarship as increasingly unhelpful to judges); Lasson, *supra* note 151, at 930-32 (asserting that most of what is published in law reviews is of little interest to practitioners and judges); Laurence H. Silberman, *The Clarence Thomas Confirmation: A Retrospective*, 23 CUMB. L. REV. 141, 146 (1993) ("[M]ost law reviews have become virtually irrelevant to judges.").

255. See ROBERT C. BERRING, *FINDING THE LAW* 3 (10th ed. 1995). Robert Martineau summarizes the explosive growth of doctrine that confronts practitioners:

Each of the more recent volumes of F.2d contains approximately 1500 pages, compared to 1000 when F.2d was first published in 1925. It took fifty years to issue the first 500 volumes of F.2d, but only eighteen years, 1975 to 1993, for the last 499. The number of opinions sent to West for publication each year by both state and federal

agree that doctrinal scholarship "is a largely completed task" or that writing about doctrine is "as exciting an intellectual endeavor as straightening or occasionally rearranging pictures in an art gallery."²⁵⁶

Most attorneys find it difficult just to keep up with the law in the subject areas and jurisdictions in which they practice, much less to step back and get some sense of the ebb and flow of the law. A typical practitioner feels an acute need for doctrinal summary, synthesis, guidance, and illumination, and thus is likely to admire and appreciate the work of the great doctrinalists—the Areedas,²⁵⁷ Corbins,²⁵⁸ McCormicks,²⁵⁹ Prossers,²⁶⁰ Scotts,²⁶¹ Wigmores,²⁶² and Willistons.²⁶³ Today, though, these same doctrinalists "would be denied tenure at many of our leading law schools or, perhaps more accurately, would never receive a faculty appointment."²⁶⁴ In George Priest's view, "[t]he treatise is no longer even a credit" to the modern law professor.²⁶⁵ Many

courts increased from 27,336 in 1964 to 66,500 in 1992, even with the large number of unpublished opinions and dispositions issued without opinion. Significantly, the 1964 total of 27,336 opinions was approximately 200 less than in 1929, and only about 8000 more than in 1895. . . .

In addition to the 66,500 opinions received for publication, approximately 33,500 additional opinions are included in Westlaw. Essentially, 100,000 opinions are being added to the database each year. And these do not include all of the opinions being written, because some courts, including several federal courts of appeals, do not send their opinions to Westlaw or LEXIS. If every opinion of every court were included, the total would probably exceed 150,000 per year.

Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 143-44 (1994) (footnotes omitted).

256. John Henry Schlegel, *Searching for Archimedes—Legal Education, Legal Scholarship, and Liberal Ideology*, 34 J. LEGAL EDUC. 103, 108-09 (1984).

257. PHILLIP E. AREEDA, *ANTITRUST LAW* (1978).

258. ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* (1952).

259. CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* (1954).

260. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* (1941).

261. AUSTIN W. SCOTT, *THE LAW OF TRUSTS* (1939).

262. JOHN H. WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* (1904).

263. SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1920-22).

264. Lilly, *supra* note 42, at 1462.

265. George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 437 (1983).

agree with him—or at least agree that his view is widely shared.²⁶⁶

Putting aside for a moment the impact of this change in scholarly orientation on the academy's ability to mentor, its impact on *scholarship*—on its ability to discover truth and expand knowledge—is almost surely deleterious. It is hard to argue with Paul Reingold's contention that:

as the law faculty replicates itself, favoring the abstract theorist with an almost Darwinian determination, the new academy will be narrower, more rigid, and less respectful of the range of styles and interests that it once tolerated, and even encouraged and welcomed, in earlier days.

There is an irony that such narrowness and rigidity should occur now, . . . [a]t the very time when diversity of personnel is an explicit goal. . . . [E]ven when the law schools succeed in hiring a more diverse faculty in multicultural or gender terms, the value of that diversity may be offset, or at least undercut, by the uniformity in the style of the teachers' thinking.²⁶⁷

David Luban and Michael Millemann describe one symptom of this intellectual narrowness:

[L]aw professors, who often have a passionate interest in The Law and in judges (especially Supreme Court Justices and former law professors on the appellate bench), are surprisingly uninterested in *lawyers*. As an intellectual matter, this skewed interest reflects a fundamental misunderstanding of the legal system, because the overwhelming preponderance of legally significant decisions are made by lawyers, not judges, legislators or theorists; and the overwhelming preponderance of lawyer decisions will never be reviewed or even perceived by any other official.²⁶⁸

A professor with substantial experience in practice has learned to see the law "in terms of people with names and faces and histories and personal struggles."²⁶⁹ That perspective—the

266. See KRONMAN, *supra* note 16, at 267; A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 678-79 (1981) (observing that the shift away from traditional scholarship "offers no hospitality to the legal treatise."); Robert Stevens, *American Legal Scholarship: Structural Constraints and Intellectual Conceptualism*, 33 J. LEGAL EDUC. 442, 446 (1983) ("If greater prestige is accorded to service in Washington than to a serious scholarly treatise, then naturally the energies of young teachers are going to be channeled in a certain direction.")

267. Reingold, *supra* note 159, at 2002; see also GLENDON, *supra* note 8, at 223 ("As retirements and deaths take their toll, intellectual diversity on law faculties can only be expected to decrease.")

268. Luban & Millemann, *supra* note 26, at 38.

269. John R. Quinn, *The Exercise of the Primacy: Facing the Cost of Christian Unity*, COMMONWEAL, July 12, 1996, at 14.

unique understanding that comes only from living and working where the theory of the law meets the reality of the world—is a perspective that must be represented in the academy if the academy is to succeed in its quest for knowledge. It is hard to imagine anything more harmful to the health of the academy than a lack of intellectual diversity.

In any event, my concern here is not with the impact of the academization of the law school on scholarship, but with its impact on mentoring. As the gap between the academy and the practice widens, so does the gap between the academy and its own students.²⁷⁰ “[A] professional faculty that has lost interest in most of the work of its alumni has also lost interest in its students.”²⁷¹ It is highly unlikely that students will receive the mentoring that will help shape them into ethical practitioners in a law school that, at best, has no interest in the work they will do, and, at worst, actually disdains the careers they have chosen.

d. Time with Students

The final feature of the modern academy that makes it hostile to mentoring is its attitude toward mentoring itself—that is, toward the notion of professors giving one-on-one attention to students. If scholarship is valued a lot and teaching a little, spending time with students outside of class seems to be valued not at all.

In my first year of teaching, I was struck by how often I was approached privately by students and asked some variant of the question: “What should I do with my life?” My advice was sought on many occasions by students who, for various reasons, were not sure if they should be in law school or were not sure what they should do after law school. Again and again, students wanted to talk to me privately about decisions that, for them, were extremely personal and important.

These entreaties present both a danger and an opportunity to us professors. They are a danger because, if they are not handled carefully, they can eat up a lot of our time, to the detriment of our scholarship and teaching. But they are also an opportunity, because they present us with a chance to influence our students and, through them, the broader profession. My

270. See Cramton, *supra* note 156, at 14 (asserting that the academization of the law school “will tend to cut law teachers off from law students”); Lilly, *supra* note 42, at 1466 (“In no other part of the university is there such a disjunction between the faculty and its students.”).

271. Carrington, *supra* note 240, at 12.

own life provides a good example of the considerable impact that even a few minutes of a professor's time can have on a student.²⁷² Given the frequency with which students seek one-on-one mentoring, and the unique danger and opportunity that these requests present, one would expect that a new professor would hear a lot about the mentoring of students—particularly, about how a professor can most effectively and appropriately respond to invitations to mentor. Instead, the topic seems to be almost completely ignored by the academy.

With one prominent exception,²⁷³ the “advice to the new teacher” articles that almost every novice professor reads say nothing about effective mentoring.²⁷⁴ At the workshop sponsored

272. I would not have accepted an invitation to join the law review if Gary Bellow, a professor whom I had never met, had not called me and spent a half hour explaining why, even if I was certain that I wanted to be a trial attorney, it would be better for me to work on the law review than to do intensive clinical work under his supervision. (I was not permitted to do both.) I would not have been offered my clerkship if Clark Byse, a professor from whom I had taken one class but did not otherwise know, had not spent an hour talking with me and then called a former student of his named Scalia on my behalf. I would not have become a law professor if Paul Weiler, a professor whom I had never met, had not agreed to advise my law review note and then spent several hours talking with me about the law and teaching. None of these professors had anything to gain by spending time with me; in fact, I undoubtedly took time away from their scholarship and other interests. But, had they not spent time with me, my professional life would have turned out much differently, and whatever influence I have had on my own students would not have existed.

273. Kent Syverud may be the only recent commentator who has explicitly addressed student requests for mentoring and who has written about the opportunity, as well as the danger, that such requests present. In an essay addressed to new professors, Syverud advises that a student who seeks the counsel of a professor on personal decisions “has trusted you with the most important and in some ways the most personal decision in her life, which is what to do with that life. That student wants a mentor, and has flattered you incredibly by choosing you.” Syverud, *supra* note 178, at 258. Syverud warns new teachers to protect their scholarship and teaching from being unduly harmed by the demands of mentoring. *See id.* at 248, 253-54. But, he says, “in many law schools today the problem is at the other extreme. . . . In the important struggle to reach an audience outside our law school [through our scholarship], we sometimes badly neglect the audience that is right under our noses: our students.” *Id.* at 259. He continues:

I have a colleague, a scholar with broad experience and an international reputation for his writing, who insists that the biggest impact he will make in this world is through the students he teaches. I agree. The startling truth is that, with the exception of a few dozen law professors, our ideas will improve the world more through our students than through our writing.

Id.

274. Douglas Whaley's article contains one short paragraph on contact

by the AALS for new faculty in 1995, mentoring was not mentioned at all in any formal presentation, until a member of the last panel on the last day of the workshop made a brief allusion to it. In the dozens of articles that have been written in the last decade about legal education—many in response to the criticisms of Judge Edwards²⁷⁵ and the MacCrate Commission²⁷⁶—almost nothing has been said about mentoring. Indeed, although law professors have on countless occasions implicitly recognized the value of mentoring by writing tributes to their own mentors,²⁷⁷ they have written virtually nothing that explicitly addresses the mentoring of students by professors. Even Judge Edwards, who has been as vocal as anyone in urging law professors to make “a greater commitment to teaching ethics,”²⁷⁸ has said little about shaping ethics outside of the classroom.

with students outside of class, which focuses mainly on the appropriateness of attending student parties. See Douglas J. Whaley, *Teaching Law: Advice for the New Professor*, 43 OHIO ST. L.J. 125, 133-34 (1982). Two paragraphs of Susan Becker's article address “Student Contact Outside the Classroom” but are devoted almost entirely to giving new teachers advice on how to avoid that contact, rather than on how to use it effectively. See Susan J. Becker, *Advice for the New Law Professor: A View from the Trenches*, 42 J. LEGAL EDUC. 432, 445-46 (1992). Donald Weidner's article does not mention mentoring at all, which is understandable, given that it is focused on scholarship. See Donald J. Weidner, *A Dean's Letter to New Law Faculty About Scholarship*, 44 J. LEGAL EDUC. 440 (1994).

275. See, e.g., Symposium, *supra* note 228.

276. See, e.g., Symposium on the 21st Century Lawyer, 69 WASH. L. REV. 505 (1994).

277. See, e.g., Michael P. Dooley, *Tribute: John A.C. Hetherington*, 80 VA. L. REV. 1197, 1198 (1994) (“John became my mentor and dear friend.”); Joseph D. Grano, *Wayne R. Lafave*, 1993 U. ILL. L. REV. 181, 181 (“[Wayne LaFave was] the teacher I regard as my mentor.”); Andrew R. Klein, *Isn't Teaching a Wonderful Job? Don Fyr as a Teacher, a Friend, and a Mentor*, 43 EMORY L.J. 1145, 1145 (1994) (“There are few people who have made an impact on my life like Don Fyr did—as a teacher, as a friend, and as a mentor.”); Wayne R. LaFave, *Frank Remington: The Man and His Work*, 1992 WIS. L. REV. 570, 570 (“I can proudly describe him as my mentor and my friend (as can untold others).”); Paul J. Liacos, *In Memoriam: Professor Austin T. Stickells*, 27 SUFFOLK U. L. REV. 1, 1 (1993) (“Austin was my friend and mentor.”); Joseph M. Perillo, *John Calamari—A Memorial*, 63 FORDHAM L. REV. 935, 935 (1995) (“John was my mentor.”); Daniel Shaviro, *Walter Blum*, 62 U. CHI. L. REV. 1359, 1360 (1995) (“Because of Walter's tireless mentoring, he inspired gratitude as well as admiration.”); Joseph Rosenberg, *Remembering David Kadane: Teacher, Mentor, Colleague and Friend*, 19 HOFSTRA L. REV. 733, 734 (1991) (“David was truly my teacher, mentor, and colleague all rolled into one.”); David B. Wilkins, *In Memoriam: Albert M. Sacks*, 105 HARV. L. REV. 20, 21 (1991) (“I was given a five-year lesson in what it means to be a teacher by someone who would become not only my mentor, but also one of my best friends.”).

278. Edwards, *supra* note 208, at 2209.

In a sense, the lack of attention given to mentoring should not be a surprise. If, as I have argued,²⁷⁹ the academy places little value on teaching *wholesale*—that is, on working with students inside the classroom—then it can hardly be expected to place much value on teaching *retail*—that is, on working with students outside the classroom on a one-to-one basis. At bottom, professors are discouraged from mentoring for the same reason that they are discouraged from teaching: Both take time away from scholarship, and, in today's academy, scholarship is fast becoming "the be-all and end-all."²⁸⁰

B. THE ACADEMY'S ABILITY TO PROVIDE MENTORING

The fact that law professors *will* not mentor would mean little if law professors *could* not mentor. But they can.

In general, law professors cannot mentor as well as practitioners. The high faculty-student ratio that exists throughout the legal academy²⁸¹ means that universities²⁸² and law professors²⁸³ enjoy high income and that law students enjoy little per-

279. See *supra* Part II.A.2.a.

280. Gordon, *supra* note 2, at 1960.

281. See Mudd, *supra* note 173, at 57 (referring to the "notoriously high student-to-faculty ratio under which law schools operate" and noting that, "[w]hile graduate programs in other disciplines typically function with fewer than ten students for each professor, law faculties are pleased if their ratio falls below twenty to one").

282. According to one law school dean:

For years, law schools have been treated as cash cows, places from which universities can grab "serious" money quickly without too much damage to the schools' quality. The truth is: law schools are excellent revenue sources. Typical law school classes are taught with teacher to student ratios of sixty- or seventy-to-one (taught in multiple sections of the same course). Therefore, it makes very little difference to the quality of the program to add another twenty or fifty or even a hundred students to distribute through those sections. Expansion will not significantly affect what goes on in the classroom and yet has the potential of bringing in more revenue to the university.

Richard A. Matasar, *The MacCrate Report from the Dean's Perspective*, 1 CLINICAL L. REV. 457, 470 (1994); see also Mudd, *supra* note 173, at 59 ("The economic facts of university life are that most law schools generate income for their universities, subsidizing other more costly programs. Any university president can quickly calculate the advantages of a program operated at a very high student/faculty ratio and for which students are willing to pay substantially more tuition.") (footnote omitted).

283. Law professors are notoriously well paid relative to other faculty. See Mudd, *supra* note 173, at 59. During the 1996-1997 academic year, full professors in "[a]ll major fields" (excluding law) were paid an average of \$64,760 at public colleges and \$63,042 at private colleges. Denise K. Magner, *Faculty*

sonal attention.²⁸⁴ Thanks to the high faculty-student ratio, the Professor Kingsfields of the world can teach contracts to 150 students at once—and make a good living doing it—and then, at the end of the year, still not know the names of their students.²⁸⁵

Thus, while a typical law firm may have one senior lawyer for every junior lawyer who needs mentoring, a typical law school faculty may have only one professor for every twenty or twenty-five students who need mentoring.²⁸⁶ And while an attorney may see her mentor daily, sometimes for several hours a day (and usually alone), a student may see a professor only three or four hours per week (and almost always in a classroom filled with other students). Because of the high ratio between law professors and law students, no professor—not even a clinician—can spend hundreds of hours with a particular student in a wide variety of contexts, as Fitzmaurice did with me. Without question, a typical law professor cannot mentor his students as well as a typical practitioner can mentor his younger colleagues.²⁸⁷

Salaries Outpace Inflation at Public Colleges, Survey Finds, CHRON. HIGHER EDUC., Apr. 25, 1997, at A12. By contrast, a 1996 survey of selected law schools found annual salaries for full professors ranging from \$142,750 to \$72,309. See Margaret Cronin Fisk, *Massive Bonuses Are the News of the Hour*, NAT'L L.J., July 15, 1996, at C2.

284. See Terrance Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 169 (1984) ("The deplorable faculty-student ratio at all law schools largely precludes a level of personal contact which might permit faculty members to become an important personal influence in the lives of their students.").

285. See OSBORN, *supra* note 48, at 216-17.

286. A law school may not have a student-faculty ratio in excess of 30:1 if it is to be accredited by the ABA. ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standards 201 & 402, Interpretations of Standards 201 & 401-05 (1994). According to the *Princeton Review*, the student-faculty ratio at American law schools ranges from 11:1 to 27:1. IAN VAN TUYL, *THE PRINCETON REVIEW STUDENT ACCESS GUIDE TO THE BEST LAW SCHOOLS* 101 (1996).

287. In the words of the *MacCrater Report*:

[L]aw schools can help students to recognize ethical dilemmas and can provide the rudiments of training for resolving them. It must be emphasized, however, that the exposure of students to these issues in law school clinical programs, or in the classroom, is very limited compared to the variety and complexity of the ethical dilemmas that students confront in practice. . . . [A] young lawyer's ethical standards are likely to be shaped far more by his or her mentors in the early years of practice than by the experiences one acquires in the limited practice setting available in law school.

MACCRATER REPORT, *supra* note 41, at 235.

The advantage that the profession has over the academy should not be overstated, though. In a few respects, the academy is actually better suited to provide mentoring than the profession. First, students come to law school for the very purpose of learning; most are as receptive to being taught as they will ever be. Second, professors are paid to teach, have substantial experience teaching, and are supposed to have special expertise in teaching. And third, law students and their professors have no common agenda other than the professional development of the students. In all these respects, a law professor is at an advantage vis-à-vis practitioners when it comes to mentoring.

Notwithstanding these advantages, it still remains true that, in general, law professors cannot mentor as well as practitioners. But that is not to say that law professors cannot mentor at all. That law professors can do only a little does not justify doing nothing at all. As I have described, the two most valuable functions of professional mentoring are character formation and integration. Both functions can be performed by the academy, at least to some extent, even while maintaining high faculty-student ratios.

1. Character Formation

Until recently, most professors "regarded character (or its lack) as something that students bring with them when they come to law school. A typical attitude is that law professors do not form character—that is the job of families and religious or ethical traditions."²⁸⁸ One professor sharing this view wrote: "By the time they reach us, law students' minds and souls are set in cement that is fast hardening."²⁸⁹ Another agreed: "As for the task of instilling legal ethics in law students . . . , I can think of few things more futile than attempting to teach people to be good."²⁹⁰

It is almost surely true that the character of a student is largely formed by the time she leaves childhood. A law professor cannot make a dishonest person into an honest one, or an uncar-

288. GLENDON, *supra* note 8, at 241.

289. James J. White, *Letter to Judge Harry Edwards*, 91 MICH. L. REV. 2177, 2188 (1993).

290. Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1924 (1993); see also James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprenticeship System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83, 95 & n.67 (1991).

ing person into a compassionate one. But, thanks in large part to the critical theorists, the academy seems increasingly to recognize²⁹¹—and empirical and anecdotal evidence seems increasingly to confirm²⁹²—that professors cannot avoid influencing the character of their students to some extent. Most students enter law school in their early to mid twenties, often just weeks after graduating from college. They walk into the law school classroom knowing virtually nothing about the profession in which they will likely spend the rest of their lives. Law school will represent the “most formative and intensive stage” of their legal careers,²⁹³ it will be where “their professional self-conception first takes shape.”²⁹⁴

Over the next three years, the law student will spend literally hundreds of hours with her professors. Her professors will be the most important—perhaps the only—professional role models that she will have during this formative stage of her career. Her professors will influence her in the readings that they assign, in the hypotheticals that they invent, in the war stories that they tell, and in the comments that they make in class. In all these ways, we professors “convey notions of who we think the ‘real lawyers’ are.”²⁹⁵

We also convey notions of what we think “real practice” is. If, for example, we never pause to reflect upon the ethical impli-

291. See, e.g., SHAFFER, *supra* note 13, at 84 (rejecting “the trite falsehood that a twenty-two-year-old in a university law school is too old to learn morals”); Carrington, *supra* note 200, at 747 (“[M]ature adults tend to share the standards of professional conduct of those who initiate them into their professional roles. Insofar as American law teachers are professional preceptors of their students, they enjoy an opportunity for influence as role models and in their control of the agenda of professional preparation.”) (footnote omitted); Cramton & Koniak, *supra* note 21, at 190 (“When asked by Socrates whether virtue could be taught, Protagoras, in a lengthy reply, affirmed that it could be. . . . We agree.”); Menkel-Meadow, *supra* note 247, at 3 (“Law teachers cannot avoid modeling some version of ‘the good lawyer’; thus, they cannot avoid teaching ethics.”); Moliterno, *supra* note 290, at 95 (noting the impact of law school on the moral development of students). The *AALS Statement of Good Practices* insists that professors be guided by the highest ethical and professional standards precisely because professors serve as role models, and do so “inevitably.” See ASSOCIATION OF AM. LAW SCH., STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES 1 (Nov. 17, 1989) (citation omitted).

292. See Deborah L. Rhode, *Ethics By The Pervasive Method*, 42 J. LEGAL EDUC. 31, 42-50 (1992).

293. MacCrate, *supra* note 147, at 524.

294. KRONMAN, *supra* note 16, at 269.

295. Menkel-Meadow, *supra* note 247, at 8.

cations of the cases, hypotheticals, and war stories we use, then we communicate that real lawyers don't worry about ethics. Indeed, if our teaching is sufficiently infused with "a moral relativism tending toward nihilism,"²⁹⁶ then we may even communicate that conduct is incapable of being defined as "ethical" or "unethical."²⁹⁷ And if we express disdain for the practice of law—if we imply that one cannot "take a law degree and do noble things with it"²⁹⁸—then "[w]e undermine any authority we might have as purveyors of ethical messages about good lawyering."²⁹⁹ The more we treat the practice of law with indifference or disdain, the more we communicate to our students that the work that most of them will do has no value other than as a means of earning money. Such a message makes it impossible for us then to inspire our students to act ethically.

Even more influential than our formal teaching is the example that we provide.³⁰⁰ "While teachers naturally emphasize what they are attempting to teach—the formal curriculum—the total learning environment influences what students learn. Ethics, in particular, is primarily taught by example."³⁰¹ Empirical research suggests that formal instruction in what is generally called "professional responsibility" has little impact on the future behavior of students.³⁰² Far more influential than formal classroom instruction are the informal lessons that we professors provide by the way we conduct ourselves, and, in particular, by the way we treat our students and others.³⁰³

296. Cramton, *supra* note 41, at 262.

297. *But see* Stanley Fish, *Anti-Professionalism*, 7 CARDOZO L. REV. 645, 673-74, 676-77 (1986).

298. Syverud, *supra* note 178, at 257.

299. Menkel-Meadow, *supra* note 247, at 7.

300. *See* CARTER, *supra* note 7, at 241 ("[T]he principal education for character that we do, we do by example."); Cramton & Koniak, *supra* note 21, at 192 ("For when all the specific lessons have been forgotten, the character of the teacher may remain imprinted upon the student's mind."). Roger Cramton and Susan Koniak, recognizing that "virtue is best taught by example," have recently proposed that law schools take into account "the character and moral vision of the ethics teacher" in making decisions about hiring and promotion. *Id.* at 190.

301. Cramton, *supra* note 41, at 253.

302. *See* Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537, 544 & n.26 (1991) (collecting sources).

303. *See* William T. Braithwaite, *Hearts and Minds: Can Professionalism Be Taught?*, A.B.A. J., Sept. 1990, at 70, 72; Cramton, *supra* note 41, at 253. Roger Cramton and Susan Koniak put it succinctly: "[O]ur students watch us

When our doors are shut to our students, we teach them to shut their doors to their younger colleagues. When we treat our colleagues with contempt simply because we disagree with them, we teach our students to act uncivilly toward those judges and lawyers with whom they will have professional disagreements. When we treat language and facts as infinitely manipulable, we encourage our students to misrepresent law and misstate fact—indeed, we teach them that there is no such thing as misrepresenting law and misstating fact. When our commitment to serving the disadvantaged is expressed mostly in words, we teach our students that they can fulfill their commitment by writing checks and signing petitions, rather than by doing pro bono work or seeking public interest jobs. When our only concern is our own academic prestige as measured by the pages we publish, we teach our students to value only their own professional prestige as measured by the cases they win or the money they earn.

It is inevitable that a law student's character will be shaped by what she experiences in law school, and it is inevitable that, whether they want to or not, her professors will play a major role in that process of character formation. "[M]oral influence is inevitable. It is not possible to choose to have no moral influence: The choice is between good moral influence and bad moral influence."³⁰⁴ In other words, the question for us academics is not whether we will shape the character of our students, but how.³⁰⁵ There is much that we can do to ensure that we influence our students in a positive manner:

First, as many have argued,³⁰⁶ we can teach ethics pervasively. We can put ethical issues on the table. We can do so not

to see whether we mean what we say." Cramton & Koniak, *supra* note 21, at 193.

304. SHAFFER, *supra* note 58, at 59 (discussing the influence of attorneys on clients).

305. See CARTER, *supra* note 7, at 238 ("[T]here is no way to avoid teaching values. . . . The question before us is only whether we choose to do it deliberately or by happenstance.").

306. See generally RHODE, *supra* note 9; Robert M. Ackerman, *Law Schools and Professional Responsibility: A Task For All Seasons*, 88 DICK. L. REV. 202 (1984); Warren E. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 388-90 (1980); Edwards, *supra* note 3, at 38; David T. Link, *The Pervasive Method of Teaching Ethics*, 39 J. LEGAL EDUC. 485 (1989); Menkel-Meadow, *supra* note 247, at 9; Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 732-33 (1993-94); Rhode, *supra* note 292; Jack L. Sammons, Jr., *Professing: Some Thoughts on Professionalism and Classroom Teaching*, 3 GEO. J. LEGAL ETHICS 609, 615 (1990).

just in professional responsibility class, but in all classes, and we can do so not just in class, but in our contacts with students outside of class. I have found my students eager to discuss ethical issues, when those issues are presented in a way that has some relevance to the work that they intend to do. Many of the best class discussions that I have led concerned the type of real life ethical dilemmas that I faced and that my students will face themselves. By putting ethical issues on the table in law school, we can help to instill in our students the habit of putting ethical issues on the table in practice.

Moreover, teaching ethics pervasively can and should involve more than using the classroom as a forum for the discussion of ethical issues. It should involve the use of the classroom as a model of ethical action. All professors—from the most ardent deconstructionist³⁰⁷ to the most ardent doctrinalist—can demonstrate in class a serious commitment to teaching and an intense engagement with the subject matter being taught. And all professors can convey that they are driven to study what they study because of ethical imperatives. In short, a professor can model ethical behavior in his or her capacity as a teacher, without direct reference to the ethical issues that arise in legal practice.

Second, we can avoid treating the practice of law—the chosen profession of most of our students—with indifference or disdain. We can try to understand and to communicate to our students the many rewards and opportunities of practicing law beyond earning money. We can familiarize our students with the great lawyers who have done great things for other than monetary reasons. We can even acknowledge how lawyers and lobbyists have helped to shape society—often for the better—while also making a good living. In short, we can recognize, implicitly and explicitly, that the practice of law has a value other than as a means of making money.

Third, we can appoint to law school faculties people who have practiced law—and done so for more than a year or two. We can ensure that somewhere on every faculty—even on the most elite faculties—is a professional responsibility teacher who has had a client, or a civil procedure teacher who has drafted an

307. A legal deconstructionist does not have to be an ethical nihilist. To say that "law is politics" is to say something deconstructionist about law, but it is not, in itself, to say something deconstructionist about politics. Thus, a legal deconstructionist can model a form of moral engagement with "justice," even if he or she cannot model a form of moral engagement with "law."

interrogatory, or an evidence teacher who has tried a case. Such practical experience can help a professor—particularly one who wishes to be intentional about shaping students into ethical practitioners—in at least three ways: it will help in writing about ethics; it will help in teaching about ethics; and it will make the professor a more effective role model.

First, as to scholarship: Whether or not “legal scholars *must* have some real understanding of practice before they can usefully address the ethical problems of the profession,”³⁰⁸ such an understanding can certainly help. “We all recognize that there is a distinctive form of understanding that comes only with experience, and that those who lack it do not possess.”³⁰⁹ It seems only logical that the broader the base of knowledge of a faculty—the more “distinctive form[s] of understanding” represented among its members—the better the faculty will write and teach about ethics (as well as other topics).

As I said earlier,³¹⁰ much of the academic literature on legal ethics is disconnected from the realities of the practice of law. Because many of those writing about legal ethics have not practiced law themselves, much of their scholarly work reflects what they have read or heard about the practice of law, rather than what they have actually experienced. This “detached” research is important, because the scholarship of former practitioners like me may be hampered by the fact that, as hard as we try to be objective, we sometimes filter what we learn through our own often unrepresentative experiences. But such detached research is and always must be incomplete, for “the knowledge that such [research] yields will always resemble a child’s knowledge of drunkenness, and can never by itself produce the different kind of understanding that experience alone provides.”³¹¹ Again, the broader the base of knowledge of the academy, the better its work on legal ethics.

Second, as to teaching: Many in the academy scorn “war stories,” and for good reason. Used improperly, they can waste

308. Edwards, *supra* note 3, at 73 (emphasis added). Judge Edwards endorses the view of “[a] named partner at one of the major law firms in Washington, D.C.” that “there can be difficult and even excruciating problems of conflicts, ethics, candor, and even civility which are beyond the contemplation of one who has not experienced them in practice.” Edwards, *supra* note 208, at 2214-15.

309. KRONMAN, *supra* note 16, at 73. Ironically, these words were written by the Dean of the Yale Law School, on whose faculty is no one with substantial experience in the private practice of law. See *supra* note 221.

310. See *supra* Part I.A.1.

311. KRONMAN, *supra* note 16, at 73.

time and take the place of hard thinking by both professor and student. By the same token, war stories, when used carefully, can be marvelous teaching tools. They can add "a practical dimension to the educational experience,"³¹² and thus make classroom instruction more meaningful to students. They can also "help students remember the theoretical point they illustrate much longer than would otherwise be the case."³¹³ It is one thing to teach about the theory of ethics and to immerse students in abstract thought. It is quite another to teach about the practical reality of ethics, and to draw the attention of students to problems confronted by flesh-and-blood attorneys with whom they can readily identify—perhaps because one of those attorneys is their own professor.

Experience as a practitioner can do more than give a professor a supply of war stories. It is likely to make the professor less inclined to communicate disdain for the profession. It is hard to show contempt for a profession to which one has devoted many years and to which one's friends continue to devote themselves. In addition, only by practicing law can one fully appreciate all of the rewards and opportunities that practice provides.³¹⁴ A professor who has practiced law will be better able to help students resist the increasing commercialization of the practice.

Experience as a practitioner may be valuable in another respect: Although it would be difficult to prove, I suspect that professors who have practiced law—who have spent several years helping real people with real problems—are more likely to "eschew the bloodless relativism that implicitly teaches students to regard law as a game akin to 'switch sides' as played in high school and college debating societies."³¹⁵ Given their backgrounds, it seems only logical that former practitioners will be more likely to focus on the human impact of what is discussed in the law school classroom and to convey to students that law is not a game, but a deadly serious business with real conse-

312. Becker, *supra* note 274, at 434.

313. Syverud, *supra* note 178, at 250; *see also* Whaley, *supra* note 274, at 135 ("[The] legal points made in the course of [war] stories stay with students and are well remembered after much else is forgotten.").

314. Alasdair MacIntyre refers to these as "internal goods," which, in his view, are "something that only those who participate in the practice can understand." SHAFFER, *supra* note 58, at 47-48 (discussing MacIntyre's views as applied to the legal profession); *see also* SHAFFER, *supra* note 13, at 56 (same); Shaffer, *supra* note 95, 408-09 (same).

315. Alan Hirsch, *The Moral Failure of Law Schools*, TROIKA, Nov./Dec. 1996, at 31, 33.

quences for real people. This, in turn, will make it less likely that students will experience the "moral neutering" that I have described.³¹⁶

Third, as to serving as a role model: There is inevitably a "do as I say, not as I do" problem for the law student in viewing a law teacher as a model.³¹⁷ Obviously, most law professors have forsaken the practice of law to some degree, in that most have chosen not to practice. But there is forsaking and then there is forsaking. It is one thing to practice for several years, join the academy, and continue to attend to the problems of the profession in one's writing and teaching; it is quite another to never practice, disdain the practicing bar, and devote as little attention as possible to the profession for which one's students are preparing.

As I discussed above,³¹⁸ those professors who have practiced law are more likely to focus on the work of practicing lawyers and judges in both their scholarship and their teaching. This, in turn, will make them more effective in serving as role models for—and thus in shaping the character of—their students. In the words of Paul Carrington:

A teacher who is seen by students to be disengaged from political reality and the humdrum affairs of professional life may be disadvantaged in the effort to inculcate moral standards applicable to professional thinking and conduct in public roles. Thus, a professor of literary or economic theory, however able, will not be a professional role model for novice public lawyers, however much the professor manifests the appropriate intellectual skills.³¹⁹

Although my anecdotal evidence is limited, it supports Carrington's observation. Rightly or wrongly, I find that, in some areas at least, my advice or example seems to carry particular weight with students because I have done what most of them want to do: practice law as a partner in a big law firm. It seems plausible that teachers who have practiced law and who are interested in the work of lawyers will often have more impact as role models than those who have never practiced law and whose academic interests are far removed from the concerns of their students.³²⁰

316. See *supra* notes 45-51 and accompanying text.

317. Cramton, *supra* note 41, at 259.

318. See *supra* Part II.A.2.b.

319. Carrington, *supra* note 200, at 791.

320. Consider, for example, the case of women students. Most women (like most men) attending law school plan to practice law (usually in a law firm), and one of the most pressing concerns of female students (but apparently not

There is one final thing that the academy could do to better shape the character of its students. Recognizing that “[v]irtues are more likely to be ‘caught than taught,’”³²¹ we can give our students wide exposure to lawyers acting ethically. “We learn about character by observing people who have it, and we ‘do’ ethics when we attempt to describe what makes such people admirable.”³²² History provides us with limitless examples of attorneys who practiced law honorably and who used their law degrees to do noble things. A professor’s own experience practicing law (if the professor has experience practicing law) can provide many more examples. We can introduce our students to these honorable men and women and to the honorable things that they have done with their law degrees.

More importantly, we can act ethically ourselves. We can demonstrate a commitment to something other than our own self-interest by, for example, making time for students outside of class and occasionally devoting our energies to work that benefits others more than ourselves. We can treat each other civilly, and thus demonstrate that one can respect and even like those with whom one disagrees professionally. We can be fair and honest in our teaching and our scholarship. We can treat those around us—particularly our students—with dignity and compassion.

In sum, we in the academy can shape the character of our students in precisely the same way as lawyers in the profession can shape the character of recent graduates. We can influence our students by what we say and by what we do—and by making our students aware of what others have said and done. Practicing lawyers will generally be in a better position to shape the characters of young attorneys than we in the academy are. But to say that others have a better opportunity is not to say that we have none.

of as many male students) is balancing the demands of family and career. “Women, especially, [find] marriage and child raising hard to reconcile with the demands of a legal career, and almost impossible to combine with the fast track in law firms.” GLENDON, *supra* note 8, at 88; *see also* KRONMAN, *supra* note 16, at 293 (discussing how the burden of balancing family and career places female lawyers at a “competitive disadvantage”). It seems reasonable to assume that these women would identify more readily with, and thus find more influential as role models, women faculty members who had confronted the same challenge that so concerns them. Unfortunately, such women faculty members appear to be extremely rare.

321. Cochran, *supra* note 23, at 727.

322. SHAFFER, *supra* note 13, at 39.

2. Integration

We likewise have an opportunity to assist our students in becoming integrated, both internally and externally.

a. Internal Integration

Like the mentor in practice, we can help our students to identify the values that are important to them and to explore how they can act consistently with those values in the practice of law. We can—in class discussions, in private conversations, in supervising papers, in drafting exams, and in working with students on pro bono matters—ask students to think hard about their own sense of right and wrong and about how they can practice law in a way that they consider moral.

Students give us ample opportunity to engage them in such conversations. In just my first few weeks of teaching, I discovered that there is an endless supply of students who are anxious about their future and who welcome the opportunity to discuss seriously what they will do with their law degrees. Simply asking a student who seeks a recommendation, “Why do you want to practice law in a big firm?” or “Why do you want to clerk for a trial judge?” can nudge the student toward the serious self-examination that many lawyers do not undertake until they wake up one morning and realize that they are not happy representing big corporations in antitrust matters or indigent parents in child custody disputes.

Students should be encouraged to integrate their values not only in decisions about what they will do, but also in decisions about how they will do it. A student who values honesty should be challenged to consider what acting “honestly” means in various contexts, such as in responding to discovery requests. A student who values compassion should be challenged to consider what it means to treat the adversary of one’s client with “compassion.” A student whose Christianity is the source of her values should be challenged to consider how one can be an effective litigator while forgiving seventy times seven³²³ or while turning the other cheek.³²⁴

Challenging students in this way will help them to integrate internally. Most of our students will encounter strong pressure to develop one set of ethics for work and another for home.³²⁵ We

323. See *Matthew* 18:21-22 (Douay).

324. See *Matthew* 5:38-42 (Douay); *Luke* 6:29-30 (Douay).

325. See *supra* notes 74-75 and accompanying text.

can anticipate this pressure and help our students to resist it if, as we introduce them to their new life in the law, we also challenge them to bring along their personal values.

b. External Integration

We professors can help our students to integrate externally with the legal community that they are preparing to join. Those professors who have themselves practiced in a community, who now teach in that same community, and whose students tend to remain in the area after they graduate are in an ideal position to assist with external integration. All professors, though, can help to engender in their students a sense of connection to the broader legal community.

In the first place, we can help our students to get to know each other and to feel that they are joined in a common enterprise. Instead of lecturing to large classes, giving out assignments that are completed individually, and grading on a curve, we could teach in smaller settings and in ways that encourage students to work together and learn from each other—just as they will have to work with and learn from their colleagues in practice. We could also help our students to get to know us, and we could get to know them. We could communicate to our students that what they do after graduation is important to us—that, in a sense, we will feel some stake in the use they make of the education that we give them.

We can also introduce students to the practicing bar through internships and clinical programs, as well as through involving the bar in the activities of our schools. Mandatory pro bono programs, which appear to have worked well at the relatively few schools that have tried them,³²⁶ have obvious potential for integrating students with the practicing bar. Moreover, by keeping up with developments in the profession, and by discussing those developments with our students, we can help them to feel that they are already part of a distinct and unique commu-

326. See Caroline Durham, *Law Schools Making a Difference: An Examination of Public Service Requirements*, 13 *LAW & INEQ. J.* 39 (1994); Howard Lesnick, *Why Pro Bono in Law Schools*, 13 *LAW & INEQ. J.* 25 (1994); *Required Law School Pro Bono Programs: Preparing Students for Ethical Obligations*, N.Y. L.J., Jan. 30, 1995, at 2. As of 1993, twenty law schools required students to do public interest or pro bono work before graduating. See *Law School Public Service Graduation Requirements*, NAPIL BRIEFS (Nat'l Ass'n for Pub. Interest Law, Wash., D.C.), Summer 1993.

nity. Finally, we can communicate respect for that community, or at least for its possibilities.

In these and other ways, we can help to lessen the feelings of isolation and anonymity that many of our students will experience. We can increase the likelihood that, regardless of what they choose to do or where they choose to do it, our students will feel that they are known and that what they do is noticed. And we can impress upon students what Fitzmaurice impressed upon me: The legal profession is where most of them will spend the rest of their working lives, and therefore they have a large stake in making it as decent and honorable as possible.

At bottom, mentoring involves the creation of a community. "No one becomes virtuous alone. We learn in the community what virtue is and how to practice it: We learn as we are part of the community."³²⁷ When we ask whether the academy can mentor students, we are really asking "whether it can constitute the kind of community and tradition that can nurture virtue and character."³²⁸ It would indeed be sad if the answer to this question were "no." I do not think it is.

III. CONCLUSION

The legal profession is presently "in the grip of a great sadness."³²⁹ At the heart of that sadness, and at the root of much of the incivility and unethical conduct that plagues the profession, is a question of perspective. There is nothing wrong with lawyers working hard, billing hours, and trying to achieve favorable results for clients. Achieving financial success for oneself and one's clients is important. The problem with the profession is not that financial success is an important goal, or even that financial success is the most important goal. It is that financial success has become the *only* goal for far too many lawyers. All other goals—spending time with family and friends, learning about and enjoying the world, serving the public interest, and, of course, mentoring the young—have been pushed aside in the pursuit of material wealth. Lawyers have enjoyed great financial success as a result, but that financial success has come at a high cost.

The legal profession will be no happier or healthier until more lawyers bring better perspective to their lives. An attorney

327. SHAFFER, *supra* note 13, at 84.

328. Pepper, *Limits of the Law*, *supra* note 10, at 1608.

329. GLENDON, *supra* note 8, at 14.

at a large firm who can either bill 1800 hours per year and make \$120,000 or bill 2250 hours per year and make \$150,000³³⁰ needs to think hard about what will make her a better or happier person: an extra \$30,000 on top of a \$120,000 salary or an extra 450 hours of life outside of work? At some point, an attorney needs to ask herself: "How much is enough?" To be sure, not every attorney will answer that question the same way. But every attorney should at least ask herself the question. Too few attorneys are doing so today, which is why too many attorneys are unhappy.

I cannot speak with the same confidence about the academy. I had a lengthy and extensive exposure to practice, but I am still new to teaching. That is why I have relied mainly on my own observations (supported by the observations of others) in Part I of this Article and mainly on the observations of others (supported by my own observations) in Part II. Nevertheless, if those upon whom I have relied have accurately described the current state of legal education, then the academy has a problem of perspective that is every bit as serious as the profession's.

Legal scholars seem to be about as close to consensus as they can get on two points. First, most scholars agree that there is an oversupply of bad scholarship. Every year, over 150,000 pages of legal scholarship are published by hundreds of law reviews.³³¹ Some of those journals collect over 1000 submissions annually.³³² There is simply an enormous amount of scholarship published—so much scholarship, in fact, that conscientious professors cannot keep up with what is published in their areas of interest.

Worse, much of this scholarship is bad. Most of what law professors write is published in unrefereed journals, meaning that just about anyone can get just about anything published somewhere. And with appointment, promotion, tenure, and prestige

330. See *supra* note 77.

331. Precise estimates vary, in part because of definitional problems. Kenneth Lasson "conservative[ly]" estimates that there are over 800 legal periodicals that publish over 5000 pieces annually. See Lasson, *supra* note 151, at 928. Ten years ago, Roger Cramton estimated that there were over 250 "school-centered" law reviews publishing over 150,000 pages each year. See Cramton, *supra* note 234, at 2. Judge Judith Kaye reported that "well over 300 publications" were printing in excess of 150,000 pages of legal scholarship annually. Kaye, *supra* note 254, at 318. And Mary Ann Glendon put the number of student-edited law reviews at 425. See GLENDON, *supra* note 8, at 205.

332. See Erik M. Jensen, *The Law Review Manuscript Glut: The Need for Guidelines*, 39 J. LEGAL EDUC. 383, 383 (1989).

now depending—at least in the view of some³³³—as much upon the quantity of scholarship as its quality, law professors publish even when they have nothing to say. The result is an endless stream of repetitive, wheel-reinventing, self-referential “scholarship” that would never see the light of day in other disciplines.

In his classic article on the shortcomings of legal scholarship, Fred Rodell bemoaned the “qualitatively moribund while quantitatively mushroom-like literature of the law.”³³⁴ Rodell wrote, “There are two things wrong with almost all legal writing. One is its style. The other is its content.”³³⁵ Rodell was under no illusion that his sharp criticism would make any difference. In fact, he confidently predicted that “law reviews will keep right on turning out stuff that is not fit to read, on subjects that are not worth the bother of writing about them.”³³⁶

Innumerable modern commentators believe that Rodell’s prediction of sixty years ago has proved to be accurate. There is a voluminous and repetitive literature criticizing legal scholarship as being, among other things, voluminous and repetitive.³³⁷ “[T]here seems to be general agreement” that “[p]ublished arti-

333. See *supra* notes 177-179 and accompanying text.

334. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936).

335. *Id.*

336. *Id.* at 45.

337. See Bergin, *supra* note 153, at 646 (criticizing legal scholarship); Bryden, *supra* note 173, at 643 (“Too much of our scholarship is about analytically interesting but trivial topics, or rehashes familiar arguments concerning important topics. Like graduation speakers, we drone on and on even when we have hardly anything to say.”); Cramton, *supra* note 156, at 1, 7-8, 11, 14-15 (criticizing modern legal scholarship); Cramton, *supra* note 234, at 8 (same); Edwards, *supra* note 3, at 46-47 (same); Farber, *Missing the “Play of Intelligence”*, *supra* note 243, at 158 (decrying the “stylistic weaknesses” and “intellectual aridity” of much modern legal scholarship); Farber, *Brilliance Revisited*, *supra* note 243 (criticizing modern legal scholarship); Farber, *The Case Against Brilliance*, *supra* note 243 (same); Lasson, *supra* note 151 (same); Nowak, *supra* note 170, at 319 (“[P]rofessors on the whole cannot write and most professors do not have anything significant to say.”); Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 677-78 n.7 (1995) (“[L]aw reviews tend to place a premium on length, jargon, and unintelligibility in selecting which articles to publish.”); Posner, *supra* note 290, at 1928 (“Much [of the] vast scholarly output is trivial, ephemeral, and soon forgotten.”); Scordato, *supra* note 165, at 395 (“[O]ne encounters little difficulty finding explicit and often scathing expressions of dissatisfaction with modern legal scholarship.”); *id.* at 395-98 nn.75-87 (collecting citations to criticisms of modern legal scholarship); Elyce H. Zenoff, *I Have Seen the Enemy and They Are Us*, 36 J. LEGAL EDUC. 21, 21 (1986) (noting the widespread dissatisfaction with modern legal scholarship).

cles lack originality, are boring, too long, too numerous, and have too many footnotes.³³⁸ A few commentators suggest that most scholarship is read by no one but promotion-and-tenure committees.³³⁹ Other commentators seem to be engaged in a contest to determine who can come up with the most quotable criticism of modern legal scholarship. One strong contender for the honor is Michael Paulsen, who wrote: "If you want to read incomprehensible, pretentious, pompous, turgid, revolting, jargonistic gibberish, read the law reviews."³⁴⁰ Roger Cramton also qualifies for his assertion that modern legal scholarship consists largely of "interminable and virtually incoherent metaphysical reinventions of the legal wheel, combining colossal arrogance with limited understanding."³⁴¹ And Kenneth Lasson deserves some consideration for his entry: "Scholarship could be valuable; most of it isn't. Whatever rich stew there might have been thins quickly into gruel through the sheer multitude of journals seeking fodder for their troughs. Slops fill the law reviews."³⁴²

The second point on which there is a near consensus in the academy is that we do a poor job of teaching ethics. In fact, for every professor who has written that the academy is marked by an overabundance of bad scholarship, there is another who has written that the academy suffers from an underabundance of effective teaching about legal ethics.³⁴³ Most American law schools

338. Zenoff, *supra* note 337, at 21 (footnotes omitted).

339. See GLENDON, *supra* note 8, at 205 ("Anyone who samples the contents of recent law journals . . . might be forgiven for suspecting that many articles will be read by no one at all, other than the writer's promotion and tenure committee."); see also LASSON, *supra* note 151, at 943 (claiming that law review articles are "widely unread"); NOWAK, *supra* note 170, at 321 ("We do not need to worry about the consumers of law reviews because they really do not exist.").

340. Paulsen, *supra* note 337, at 677-78 n.7.

341. Cramton, *supra* note 156, at 14.

342. Lasson, *supra* note 151, at 928.

343. See ABA, IN THE SPIRIT, *supra* note 63, at 266-70; SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ABA, LONG-RANGE PLANNING FOR LEGAL EDUCATION IN THE UNITED STATES 11, 29 (1987); MICHAEL J. KELLY, LEGAL ETHICS AND LEGAL EDUCATION 1, 5-28 (1980); LINOWITZ, *supra* note 46, at 121-22; MACCRATE REPORT, *supra* note 41, at 235; Ackerman, *supra* note 306, at 208; Robert H. Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273, 274, 278-280 (1976); Walter H. Bennett, Jr., *Making Moral Lawyers: A Modest Proposal*, 36 CATH. U. L. REV. 45, 51-54 (1986); Burger, *supra* note 306, at 388; Cramton & Koniak, *supra* note 21, at 146-48; Robert C. Cumbow, *Educating the 21st Century Lawyer*, 32 IDAHO L. REV. 407 (1996); James R. Elkins, *Moral Discourse and Legalism in Legal Education*, 32 J. LEGAL EDUC. 11, 12-13 (1982); Philip C. Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251, 284 & n.101 (1986);

confine their attempt to teach ethics to offering a single class in professional responsibility (some do even less³⁴⁴), and, at most schools, "the legal ethics course is—not to put too fine a point on it—the dog of the curriculum, despised by students, taught by overworked deans or underpaid adjuncts and generally disregarded by the faculty at large."³⁴⁵

True, criticism of legal scholarship falls into familiar patterns, while criticism of ethical training reflects a huge variety of opinions as to what is wrong and what would be better. But that should not obscure the fact that there is almost universal dissatisfaction with the way law schools teach ethics and widespread agreement that "most faculties have, at best, approached the task half-heartedly."³⁴⁶

If, as seems to be the case, there is a near consensus in the academy that too much time is devoted to writing—particularly bad writing—and not enough time is devoted to preparing students to practice law ethically, then why doesn't somebody do something about it? Why don't law faculties shift at least a bit of time and energy away from writing law review articles and toward shaping students into ethical practitioners? No doubt, there are a number of reasons.³⁴⁷ However, with scholarship

Daniel S. Kleinberger, *Wanted: An Ethos of Personal Responsibility—Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers*, 21 CONN. L. REV. 365, 367-69 (1989); Luban & Millemann, *supra* note 26; Menkel-Meadow, *supra* note 247, at 3-4, 9; Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RES. J. 247, 273-74; Rhode, *supra* note 306, at 732-33; Rhode, *supra* note 292, at 31-32; Sammons, *supra* note 306, at 610; Shaffer, *supra* note 51, at 392; William H. Simon, *The Trouble With Legal Ethics*, 41 J. LEGAL EDUC. 65 (1991); James P. White, *Professionalism and the Law School*, 19 CUMB. L. REV. 309, 316 (1989); Michael E. Wolfson, *Professional Responsibility as a Lawyering Skill*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 297.

344. See Cramton & Koniak, *supra* note 21, at 147 & n.14.

345. Luban & Millemann, *supra* note 26, at 37-38 (footnote omitted); see also Cramton & Koniak, *supra* note 21, at 146-47 ("[L]egal ethics remains an unloved orphan of legal education. . . . Many law school faculties remain convinced that the subject is unteachable or believe that it is not worth teaching.").

346. Brest, *supra* note 155, at 1951.

347. For example: (1) Most professors probably do not think that it is *their* scholarship that is the problem, but "the other guy's." It is hard to tell "the other guy" that he should cut back on his writing. (2) Every professor knows how to write a law review article, but, particularly given the dearth of practical experience in the academy, few professors are likely to feel as confident about their ability to train students to practice law ethically. Indeed, as I noted, see *supra* text accompanying notes 288-290, some think it altogether impossible to teach people to be good. (3) Scholarship provides rewards that are immediate, objective, and often tangible, whereas the rewards of teaching

emerging not just as the academy's most important goal, but as its *only* goal,³⁴⁸ it is hard to avoid the conclusion that the main culprit is the academy's "own version of creeping materialism when time and energy spent on innovative teaching or on mentoring students is considered, by definition, time lost to the real work of academicians—production of printed pages of scholarship."³⁴⁹

Like the "creeping materialism" of the practicing bar, the "creeping materialism" of the academy comes at a price. That price is most immediately paid by the newest members of our profession, who cannot receive from either their teachers or their senior colleagues the mentoring that is so critical to their ability to practice law well and, especially, to practice law ethically. But, in the long run, we all pay the price, for as mentoring goes, so goes the ethics of the legal profession. Every day that I practiced law I saw first-hand the real pain suffered by real people because of unethical lawyering—ranging from the minor inconvenience to my children of having their father spend yet another weekend at the office dealing with yet another abusive motion served at 4:59 p.m. on a Friday, to the anguish of a sexual abuse victim forced to drop a meritorious lawsuit to protect herself from being revictimized by unscrupulous insurance defense attorneys, to the fear and heartbreak of a vulnerable senior citizen whose life savings were depleted because of unnecessary lawyering done by his greedy attorney. In a very real sense, this pain—multiplied many times over—is the cost of the profession's and the academy's abandonment of mentoring.

We professors will influence the character of our students, whether we want to or not. We can do it well, or we can do it poorly. We should choose to do it well. Choosing to mentor me cost Fitzmaurice hundreds of hours of time and tens of thousands of dollars. In return, Fitzmaurice got only two things: First, he was, in a sense, able to repay the attorney who had been his mentor decades earlier. And second, he had the satisfaction of knowing that when he died—which he did, at a young age, just three years ago—the profession that he loved would be a little more decent and a little more civil and a little more ethical because he had taken the time to mentor me, and to mentor many others like me. That was good enough reason for Fitzmaurice to mentor his colleagues. It should be good enough reason for us to mentor our students.

are long term, largely subjective, and often intangible.

348. See *supra* Part II.A.1.

349. Woodhouse, *supra* note 170, at 1994.