

Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves

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I. INTRODUCTION

Today we step into an important and often heated debate about the role of law schools in legal education. Some say that law professors should impart less knowledge about doctrine and more about policy and broader social issues, while others decry the declining place that doctrine and issues of importance to the profession hold in law school. One part of that broader debate is the role of legal scholarship: should law professors write *for* lawyers and judges, or should lawyers and judges—*but not* law professors—address the concerns of the profession?

These are important issues that divide the legal academy and evoke strong feelings and beliefs on all sides. This Article addresses the question of legal scholarship and the role that law professors should play in publishing articles that matter to judges, lawyers, and other legal decision-makers. Much of the pertinent literature incorrectly assumes that law professors are in no better position than lawyers or judges to write “engaged scholarship” (a term defined with care below). Instead, not only do law professors have a unique capacity to provide this form of scholarship, they have an obligation to do so.

Law professors occupy a unique position in the profession. The American Association of Law Schools (AALS) notes that “[t]he fact that a law professor’s income does not depend on serving the interests of private clients permits a law professor to take positions on issues as to which practicing

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lawyers may be more inhibited.”¹ In contrast, client relations, firm politics, and the exigencies of maintaining a successful practice preclude most lawyers from writing articles that reflect what they truly believe the law can and should provide.² The AALS recognizes that this freedom is not just a nice aspect of a professor’s job, but a social responsibility: “[W]ith that freedom from economic pressure goes an enhanced obligation to pursue individual and social justice.”³ This Article is, in a sense, an inquiry into whether law professors are meeting that obligation today. We ask whether academic writing currently lives up to this standard, and, if not, how law professors can do more to meet it.

The fact that we both practiced law before becoming professors doubtless affects our perception. In our experience as practitioners, the disconnect between many law faculty articles and the actual practice of law often surprised us. Others previously have noted the same problem.⁴ For example, Judge Harry T. Edwards bemoaned “the growing disjunction between legal education and the legal profession” in his seminal article.⁵ Judge Edwards opined that law schools and legal scholars were on a vastly different path than the rest of the legal profession, “emphasizing abstract theory at the expense of practical scholarship.”⁶

Judge Edwards’ musings were not just dire predictions of the future of legal scholarship. Our own experiences have borne out the scholarship/academic disconnect. We both practiced at large firms and represented clients with complex legal problems, yet too infrequently found articles written by law faculty that addressed the legal issues our clients faced. These “practical

1. ASS’N OF AM. LAW SCHOOLS, STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES Part IV (Nov. 17, 1989), at <http://www.aals.org/ethic.html> [hereinafter AALS STATEMENT].

2. These considerations often prevent them from writing at all. See Michael J. Saks et al., *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 30 SUFFOLK U. L. REV. 353, 365 (1996) (noting difference between 1960 and 1985 ratios of judge and practitioner articles to professor articles). While in 1960 the ratio of published judge or practitioner articles to those published by law professors was 1:1, by 1985 that ratio was 1:2.24. *Id.*; see also *infra* Part VI (focusing on reasons why judges and practitioners are writing fewer articles).

3. AALS STATEMENT, *supra* note 1, Part IV.

4. See Michael D. McClintock, *The Declining Use of Legal Scholarship By Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 659 (1998) (recognizing judges’ and practitioners’ complaint “that academia is losing touch with the practice of law”). The bench and bar “increasingly feel that there is a lack of legal scholarship that they can use when they face their daily case loads.” *Id.* “[A] decline in citation, when combined with the pleas of judges and practitioners for more ‘practical’ articles, is persuasive evidence that the bar is finding legal scholarship less relevant to the practice of law.” *Id.* at 660. Further, “many practicing lawyers believe law professors are more interested in pursuing their own intellectual interests than in helping the legal profession address matters of important current concern.” AMERICAN BAR ASSOCIATION, AN EDUCATIONAL CONTINUUM REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 4-5 (1992).

5. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1993) [hereinafter Edwards, *Disjunction*]; see also Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 763 n.23 (2004) (summarizing brouhaha Judge Edwards’ article caused).

6. Edwards, *Disjunction*, *supra* note 5, at 34.

issues”—issues that clients, lawyers, and even legislators need guidance on—are amazingly complex, often require interdisciplinary legal analysis, and present rich and intricate issues of law, theory, and practice. Yet, articles seldom tackled these complex issues in a way that was meaningful to us as practicing lawyers. Instead, many law review articles do the opposite of what Edwards suggested, relying on theory alone, rather than the marriage of theory and practicality. In short, many law review articles do not engage any aspect of the profession.

This Article explores that omission, and enters into the long-standing and somewhat contentious debate about the purpose of legal scholarship.⁷ It advocates increased production of engaged scholarship by law faculty, not as a mere professional responsibility, but as a matter of necessity. Although others have made similar calls in the past, we note several structural reasons affecting lawyers and judges that preclude them from preparing the same quality and quantity of analysis as law professors.⁸ No other group—not lawyers, judges, or law students—is in position to provide quality engaged scholarship. The assumption that judges and lawyers are in position to write engaged scholarship is simply wrong. More significantly, the failure of professors to do so degrades the ability of courts to fairly ascertain the law, negatively affects our own students, and could negatively affect the perception of law schools and law faculty held by the public, the bench, and the bar. In sum, there is a need for more engaged scholarship, law professors are uniquely situated to fill that need, and doing so is in our best interest.⁹

7. We do not write this piece without some trepidation. We are both untenured faculty members writing at a time when many in academia—no doubt including some who will soon serve on our own tenure review committees—believe that engaged scholarship (a term we define with care below) is not a worthwhile aspect, let alone an appropriate focus, of a law professor’s career. See Edwards, *Disjunction*, *supra* note 5, at 77 (recognizing “a junior professor might risk his or her career by eschewing high theory”); see also Mary C. Daly, *What the MDP Debate Can Teach Us About Law Practice in the New Millennium and the Need for Curricular Reform*, 50 J. LEGAL EDUC. 521, 543 (2000) (noting “[c]alls for reform are rarely welcome, especially if they are inspired by law practice concerns”); Edwards, *Disjunction*, *supra* note 5, at 36 (stating “[t]he problem is not simply the number of ‘practical’ scholars, but their waning prestige within the academy”). We are convinced, however, that engaged scholarship and abstract theory are not mutually exclusive goals. First, as discussed below, both have unique places in our writing repertoires. See *infra* Parts II-III. Second, engaging in one sort of writing does not preclude engaging in the other, even within the same piece. We simply point out that law professors occupy a unique position and have a professional responsibility to provide engaged scholarship, which is much-needed but too infrequently produced by the academy. See Philip F. Postlewaite, *Publish or Perish: The Paradox*, 50 J. LEGAL ED. 157, 158 (2000) (arguing professors should write for “the academy, the student body, the general public, and the profession”).

8. We hope it goes without saying that some judges and practitioners already do produce very good engaged scholarship. Our discussion relates only to the groups as a whole.

9. See *infra* Parts V-VI. The solution is to modify our own writing. Many scholars have bemoaned the law review system itself. See Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 DENV. U. L. REV. 661, 661 n.1 (1998) (collecting this literature and noting that it “goes back quite far”). But, as Lawrence Friedman notes, “the problem is not really the law reviews: the problem is legal scholarship itself—the subject matter that fills the law reviews.” *Id.* at 665. Law professors are best situated to address this problem.

II. TERMINOLOGY

Defining the difference between a “theoretical” and a “practical” law review article is a quest that has occupied many and defeated all.¹⁰ Judge Edwards has probably come closest with his discussion of practical law as an intersection between doctrine and theory.¹¹ Reducing practical scholarship to a kind or class of writing, however, is somewhat beside the point. We reject the distinction between “theoretical” and “practical.” Instead, the focus should be on what we call “engaged scholarship.”¹²

Engaged scholarship addresses problems related to the law, legal system, or legal profession that affect a significant portion of society or the legal community.¹³ It identifies current legal issues, offers possible solutions to legal problems, or meaningfully informs decision-makers on the issues before them. Judge Edwards noted two characteristics of this type of scholarship: it is “prescriptive” in that it solves legal problems, and “doctrinal” because it offers solutions without ignoring the existing sources of law that “constrain or otherwise guide” decision-makers.¹⁴ Engaged scholarship tackles any number

10. Part of the problem with this discourse and the heated debates concerning the production of practical versus theoretical scholarship is the presupposition that one is more valuable than the other. For example, in Richard Posner’s discussion of Judge Edwards’ article, he asks “where is it written that all legal scholarship shall be in the service of the legal profession?” Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1928 (1990) [hereinafter Posner, *Deprofessionalization*]. While we agree with Judge Edwards that purely theoretical scholarship causes a disjunction between the academy and practicing lawyers, that observation is not the ultimate focus of this Article. See Edwards, *Disjunction*, *supra* note 5, at 34-36 (contending lack of practical scholarship results in disjunction between professors and practitioners). Instead, our focus is on the idea that engaged scholarship has numerous benefits and that law professors are the best, and perhaps only, group that can write it. See also Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1328 (2002) (noting legal scholarship addressing legal scholarship problematic due to assumptions about what is valuable). Rhode points out that “[t]he legal profession has no shared vision of what kinds of scholarship are most valuable or even most valued by the academy.” *Id.*

11. Edwards, *Disjunction*, *supra* note 5, at 35 (noting practical scholarship “is not wholly doctrinal,” and instead “integrates theory with doctrine”).

12. To be clear, law professors already produce engaged scholarship. We are not suggesting that this is a new theory or a radical change to the current status of legal scholarship. Each form of scholarship—that directed to lawyers, judges, legislators, the public, or other law professors—serves a purpose. See DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 6 (1997) (noting only academics have ability to make decisions absent external forces). Farber and Sherry suggest that “[u]niversities increasingly have come to be treasured as enclaves of reason in an unreasoning world.” *Id.* Unfortunately, the legal academy values some forms of scholarship more than others, improperly demoting engaged scholarship in importance. See Edwards, *Disjunction*, *supra* note 5, at 35 (observing many “law schools . . . emphasize[e] abstract theory at the expense of practical scholarship”).

13. See Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1850 (1988) (describing “standard legal scholarship” as intending to persuade judges or other public decision-makers). Rubin’s definition of “standard legal scholarship” parallels our definition of “engaged scholarship.” See *id.* Scholarship that affects only a few, or that discusses issues that are insignificant to a larger portion of society, should find other outlets such as the Internet, web logs, or reasoned letters.

14. Edwards, *Disjunction*, *supra* note 5, at 42-43. For example, many note that critical legal studies scholars do not solve legal problems. Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Solutions*, 50 U. MIAMI L. REV. 707, 742

of issues, but does so with an eye toward improving the process of law or educating those who affect it. Engaged scholarship brings legal theory to the worker bees of the legal beehive, and does so in a way that enables them to actually use the information.

Importantly, scholarship does not have to adopt any particular form to become engaged. It is often highly theoretical, for theory—particularly when courts or practitioners misapply or misunderstand it—can profoundly affect the legal system, lawyers, and society. Thus, theoretical articles, or those enmeshed in the rhetoric or substance of various sub-disciplines, inform the practicing lawyer as much as any other secondary legal source. Likewise, engaged scholarship can be doctrinal, practical, positivist, or merely descriptive. It is the function, rather than the form, that is critical.

Accordingly, it is the *purpose* of the scholarship that is key to engagement. “[L]egal scholarship, in whatever form,” must have as “its object influencing the direction of the law—ideally by moving judges, lawyers, legislators, and bureaucrats to rethink or reconsider a particular problem.”¹⁵ The goal of engaged scholarship is to influence or shape the law itself, rather than comment on its status. It brings the law to those who actually use it, and molds the way lawyers, judges, and other decision-makers make decisions, resolve disputes, or guide clients. Thus, if the scholarship is engaged, its form is irrelevant to the inquiry. Any form of writing can achieve engagement so long as it is meaningful to the target audience.¹⁶ If the writing’s purpose is to affect legal decision-making, the engagement is accomplished regardless of the vehicle employed.¹⁷ For this reason, we do not espouse any particular *form* of scholarship. Scholarship simply should have engagement as its goal.

Furthermore, engaged scholarship already abounds. For example, Professor Mark Lemley has published several articles that are highly theoretical, but address issues of critical interest to litigants. Though his articles are published in such journals as the *Yale Law Review*,¹⁸ which many consider the most theoretical of the law journals, courts have nonetheless repeatedly relied upon them in deciding real-world disputes.¹⁹ Another example is Professor Mark

(1996) (noting many have “scorned” critical legal studies approach “as anti-doctrinal and thus useless for . . . actual practice”). Rather, they create conflict by deconstructing sources of the law. Somewhat different is the role of “law and . . .” scholars, who solve legal problems, but do so by ignoring existing precedent. See Edwards, *Disjunction*, *supra* note 5, at 47. Although both perspectives have value, they offer little utility for the legal decision-maker.

15. Ronald J. Krotoszynski, Jr., *Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption*, 77 TEX. L. REV. 321, 327 (1999).

16. See Rubin, *supra* note 13, at 1886 (noting adjustments in voice of scholarship). Traditionally, scholars directed their work toward judges, legislators, and regulatory policymakers. *Id.*

17. See Rubin, *supra* note 13, at 1850-51 (noting standard legal scholarship’s success turns on whether decision-makers or scholars deem its conclusions persuasive).

18. See generally Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687 (1999) (setting forth legal theory with practical implications).

19. See *CPC Int’l, Inc. v. Skippy Inc.*, 214 F.3d 456, 462 (4th Cir. 2000) (citing Mark A. Lemley, *The*

Grady, whose writings on tort law have likewise appeared in theoretical journals,²⁰ but have addressed critical practical issues and have been cited by the courts.²¹ These authors and their writings exemplify, but do not define, what we mean by engaged scholarship.

Many other academic authors have eschewed this sort of writing—and, indeed, condemn it—in favor of articles that are admittedly useless to the legal profession.²² Therefore, the call to return to engaged scholarship is keen. But before we understand why engaged scholarship is uniquely the province of the law professor, we must first understand how the disjunction between engaged scholarship and academic writing came about.

III. THE SHIFT FROM ENGAGED SCHOLARSHIP TO ACADEMIC SCHOLARSHIP

We only briefly note what seems unquestioned by many: that academic writings have become less engaged with issues facing the profession.²³ There is considerable literature describing law faculty's shift in focus from practical to theoretical.²⁴ The ivory-tower academic has become a foregone conclusion

Modern Lanham Act and the Death of Common Sense, 108 YALE L.J. 1687 (1999)); see also *Elvis Presley Enterp., Inc. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003) (citing Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998)); *Dispatch Automation, Inc. v. Richards*, 280 F.3d 1116 (7th Cir. 2002) (citing Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111 (1999)); *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986 (N.D. Ill. 2003) (citing Mark A. Lemley, *Anticompetitive Settlement of Intellectual Property Disputes*, 87 MINN. L. REV. 1719 (2003)).

20. Mark F. Grady, *Untaken Precautions*, 18 J. LEGAL STUD. 139 (1989). Additionally, Professor Deborah L. Rhode's career has been described as "counter to the perception of legal academics as overly theoretical or impractical." Bruce A. Green, *Deborah L. Rhode's Access to Justice*, 73 FORDHAM L. REV. 841, 842 (2004) (recounting Rhode's contributions to the practice).

21. See *Troy v. Kampgrounds of Am., Inc.*, 581 A.2d 665, 669 (Pa. Super. Ct. 1990).

22. See Schuwerk, *supra* note 5, at 763 n.23 (describing responses to Judge Edwards' position that most scholarship of "little use" to legal profession).

23. See Saks, *supra* note 2, at 369 (noting academic scholarship does not reflect issues facing profession). One study indicated that law review articles in the 1960s had more utility for practicing attorneys than articles published in the 1980s. *Id.* Other groups experienced varying degrees of utility with respect to the 1980s articles, but scholars showed the greatest increase in utilization. *Id.* In other words, legal scholars found law review articles more useful in the mid-1980s than they did in the 1960s. *Id.* Perhaps this result is due to the fact that scholars are now writing for other scholars, rather than for the bar. Interestingly, articles published in elite law school journals were most useful to scholars, while those published in the mid-level law reviews were most useful to practitioners and judges. *Id.* at 370.

24. See Richard S. Harnsberger, *Reflections About Law Reviews and American Legal Scholarship*, 76 NEB. L. REV. 681, 693-94 (1997) (attributing shift in part to advent of New Deal); see also Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1314-16 (2002) (noting pre-1970 legal scholarship targeted only legal profession, and later scholarship looked at law from outside) [hereinafter Posner, *Today*]. Judge Edwards calls these individuals "'impractical' scholars," meaning they "produce[] abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner." Edwards, *Disjunction*, *supra* note 5, at 35. We call these professors "displaced scholars" because for them law has simply become a vehicle for engaging in other studies. Judge Edwards notes that many elite legal scholars aspired to be professors in other disciplines and came to the law as a second choice. Harry T. Edwards, *Symposium on the 21st Century Lawyer: Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession"*, 69 WASH. L. REV. 561, 562 (1994) [hereinafter Edwards, *Postscript*].

at many universities. Significantly, because they so heavily influence legal education, it is the model at the “elite” or “upper-tier” law schools.²⁵ As a consequence, the content of law reviews has become more theoretical.²⁶ Not too long ago law journals covered “the bread and butter stuff of the practice,” but today the number of practical articles has dwindled.²⁷ Some scholars estimate that while at one time there were five practical articles for every theoretical one, today the ratio is one to one.²⁸ Thus, the academy as a whole is shifting from practice to theory, at least in its scholarly writings.²⁹

Perhaps in response, statistics show that lawyers and judges cite law review articles very rarely compared to primary sources.³⁰ There are, no doubt, many

These individuals had no interest in practicing law, but were excellent students. *Id.* Accordingly, law schools hired them as faculty members and they could then freely pursue the disciplines they sought originally. *Id.* Hence, the “displaced scholar” moniker.

25. See Graham C. Lilly, *Law Schools Without Lawyers?: Winds of Change in Legal Education*, 81 VA. L. REV. 1421, 1428-29 (1995) (discussing movement toward academic learning); Richard E. Redding, “Where Did You Go to Law School?”: *Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 594 (2003) (noting most law professors graduated from elite schools).

26. See Friedman, *supra* note 9, at 668 (criticizing detached and untestable nature of theoretical legal scholarship). Many contend that much of this “theory” is, to say it charitably, too theoretical. See Harnsberger, *supra* note 24, at 682 (complaining law reviews “full of useless theoretical articles”).

27. Harnsberger, *supra* note 24, at 691.

28. Harnsberger, *supra* note 24, at 693; see also Rubin, *supra* note 13, at 1835 (containing excellent extended discussion of some nuances we omit).

29. See Saks, *supra* note 2, at 370-71 (arguing while ratio decreasing, number of practical law review articles increasing because more articles published). Some scholars believe that these results do not mean a decrease in practical scholarship given the fact that more and more pages of law review are being published each year. See *id.* Instead, they attribute the perception of a decrease in practical pieces to the fact that elite law schools are becoming more and more theoretical, and because undue attention is paid to those law reviews, they signal a trend that does not exist. *Id.* at 373. The fact that lawyers and judges appear to rely most heavily on the elite law reviews, rather than the second and third-tier schools that *are* producing engaged scholarship, exacerbates this trend. *Id.* Accordingly, they argue the gap between the legal academy and the legal profession that Judge Edwards was concerned with could be overcome by redirecting attention to the other law journals. See Edwards, *Disjunction*, *supra* note 5, at 34; Saks, *supra* note 2, at 374; see also Posner, *Deprofessionalization*, *supra* note 10, at 1924 (arguing practical scholarship’s relegation to lower-tier law schools not problematic because their professors equally well-equipped). We wonder, however, whether these arguments hold water. First, even if this theory is correct, it means that law professors at the elite schools, or those that may be *best*-equipped to write engaged pieces, are still not doing so. Second, it ignores the eventual trickle-down effect that changes in the elite-school scholarship will eventually have on law schools at large. The top ten or fifteen law schools’ impact on legal education is widely perceived as significant. See Lilly, *supra* note 25, at 1428-29. Where Yale, Harvard, and Stanford go, so too will the rest of the academy. Thus, the shift away from engaged scholarship at these schools likely will repeat itself at other law schools.

30. See Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051 (1991) (reiterating low percentage of law review citations); Louis J. Sirico, Jr. & Jeffery B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 134 (1986) (noting low level of citations to law review articles). Judges likely are not just ignoring law review articles because they offer little utility, but also because judges do not participate in the discourse that these articles represent and thus do not understand much of it. See Posner, *Today*, *supra* note 24, at 1324 (noting practitioners and judges “free to eavesdrop [on this discourse] but few bother”). For example, Posner stated that he “cannot think of a single work of English or American legal scholarship published before 1970 that would have posed the slightest difficulty of comprehension to judges and lawyers.” *Id.* at 1320. Today, however, many practitioners and judges do not participate “because

reasons for this occurrence. One judge recently examined this issue and wrote:

Undoubtedly one of the reasons is the esoteric nature of many articles, but there are other reasons that have little to do with the merits of law review articles themselves. Foremost is the fact that the relevant authority for [judicial] decisions . . . comes from [controlling authority]. . . . Law review articles provide little assistance, unless they happen to focus on the particular relevant legal issue.

Another, and probably equally important, reason is the lack of free time to browse through the pages of all the law reviews we receive I believe most academics have no appreciation of the time pressures under which conscientious federal appellate judges are working these days. . . . Given all the other demands on our time, reading law review articles, particularly those that are long, dense, and obscure, is not high on our list.

. . . . Another reason for the lack of frequent citation of articles in appellate opinions is the fact that they are rarely cited by the lawyers who write appellate briefs. . . . If a law review article is not among the secondary sources listed in a brief, it is unlikely the judge or the law clerks will take the time to search one out, particularly if there is ample discussion of the issue in case law.³¹

Thus, instead of relying on law review articles, practicing attorneys are returning to the law itself as the source for legal reasoning. Lawyers and judges are tending to rely upon their own logic skills, rather than to apply legal theory synthesized and articulated by others.³² As a result, law review articles are in danger of existing in a medium that is “largely opaque to the judge and practicing lawyer.”³³ Too much of legal scholarship is becoming “law professor scholarship,” a discourse among theorists with little practical application. Even defenders of post-modern legal scholarship admit that “some

they would not understand the language they were overhearing.” *Id.* at 1324.

31. Dolores K. Sloviter, *In Praise of Law Reviews*, 75 TEMP. L. REV. 7, 9-10 (2002).

32. Judges and lawyers likely rely on their own skills because they are not finding the engaged scholarship they need. Many judges have admitted that they would and do use law reviews to aid their decision-making when helpful articles are available. See, e.g., Benjamin N. Cardozo, *Introduction to SELECTED READINGS ON THE LAW OF CONTRACTS FROM AMERICAN AND ENGLISH LEGAL PERIODICALS* vii, ix (Ass’n of Am. Law Schools ed., 1931) (noting “willingness to cite . . . law review essays . . . in order to buttress a conclusion”); William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 227 (1965) (stating he drew “heavily from [law reviews] for ideas and guidance” throughout career); Edwards, *Disjunction*, *supra* note 5, at 46 (recognizing “high quality, ‘practical’ article[s] . . . immensely useful to [judges]”).

In a recent piece, Professor Howard Friedman examines the disjunction between the academic view of business associations and what is occurring in the real world. See generally Howard M. Friedman, *The Silent LLC Revolution—The Social Cost of Academic Neglect*, 38 CREIGHTON L. REV. 35 (2004). Professor Friedman notes that limited liability corporations have become the dominant form of business adopted in the United States, but have received little academic coverage. *Id.* at 72-74. He believes that this “academic neglect” is creating a disjunction between academic learning and practice and was caused in part by some of the same issues we address: the law review system, the pecking order of schools, and a lack of academic interest in matters of practical import. *Id.* at 73-74.

33. Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 4 (1998).

legal scholarship has devolved so far into deconstructionist or post-modern jargonism as to no longer be coherent.”³⁴ Some law reviews are becoming nothing more than battlegrounds for theoretical camps where the members fight over their ideas with passionate publications that have no intent of engaging the profession or legal decision-makers.³⁵ The demise of the law review article as a player in doctrinal development is clear. The issue is the reasons for this change.

IV. WHY LAW PROFESSORS ARE NOT PROVIDING MORE ENGAGED SCHOLARSHIP

If the American Bar Association (ABA) is correct in calling upon law professors to produce engaged scholarship because it serves an important social purpose, why are professors producing less of it? There are several reasons why this type of scholarship is not at the forefront of scholarly writings.

First, law professors frequently have little or no practice experience, and they often have graduated from law schools where they were taught by professors with little practice experience. Recent AALS hiring reports show that, while eighty-five percent of incoming law professors have some practice experience, the average number of years of such experience was 1.4 years among law professors hired at “top 25” schools, 3.8 years at all other schools, and 3.7 years of experience for law professors generally.³⁶ The result is an academy consisting primarily of individuals who do not like to write about practical issues because they were taught by professors who did not face them. Additionally, assuming their brief careers were at large law firms, these individuals faced very few practical issues themselves. During their first three or four years at large firms, many lawyers do not see the inside of a courtroom, seldom have client contact, and often perform document review and other similar tasks. A professor with limited experience at a large law firm will not have tried many, if any, cases, argued many, if any, appeals, or negotiated many, if any, deals. Most of the time, she will have conducted research, drafted memos or briefs, reviewed documents, or revised agreements.

Given human nature, once these individuals have the academic freedom to write about anything they choose, they are less likely to write about subjects with which they are unfamiliar. Thus, many professors discuss the abstract implication of their legal ideas, rather than risk misapplying those ideas to real

34. Krotoszynski, *supra* note 15, at 324.

35. See Edwards, *Disjunction*, *supra* note 5, at 37 (discussing “recent fiasco at Harvard Law School”).

36. Redding, *supra* note 25, at 601. “[F]or many faculty members the road to teaching has been short and narrow: a brilliant record in an Ivy League law school, a clerkship for a distinguished judge . . . , and then straight to the classroom.” Judith T. Younger, *Legal Education: An Illusion*, 75 MINN. L. REV. 1037, 1041 (1990). An ABA committee studying law school hiring patterns “remarked, ‘[w]ere we biologists studying inbreeding, we might predict that successive generations of imbeciles would be produced by such a system.’” Lilly, *supra* note 25, at 1454.

legal issues. Limited practical experience translates into limited practical application, primarily out of discomfort. While the possible effects of limited practical experience on the classroom environment are not unimportant, our focus is on its impact on academic work product. Professors who have little practice experience are presumably less likely to be aware of, or interested in, issues that arise in practice. Rather than seeking out opportunities to ground their legal theory in reality, those with little practice experience may, quite naturally, ignore reality because it is not on their radar screen.³⁷

Second, and perhaps related to the first reason, in some measure professors hold the practice of law in disdain:

[O]ne of the most striking characteristics of our leading law schools today is the attitude of contempt that prevails in them toward the old-fashioned virtue of practical wisdom. Why this should be so is a long and complicated story. One thing, however, is clear. The mistrust of practical wisdom and of arguments appealing to it, which is symptomatic of so much of contemporary legal scholarship, has led to a new and disturbing division within the profession as a whole, between the practicing bar and the professorate.

There will, of course, always be a separation of sorts between those who choose an academic career in law and those who practice their craft in some more worldly setting. In this country, such a separation has existed for at least a century, since legal education began to assume an academic character. In recent years, however, the separation has widened considerably. Most practicing lawyers still believe that excellence in the practice of law requires prudence or sound judgment, a view shared by those law teachers whose primary identification continues to be with the practicing bar. Many law teachers, however (including some of the most widely read and well-respected ones) take a different and more disparaging view of these qualities. In their view, an insistence on the importance of practical wisdom is to be regarded either as an ideological ploy or as a sign of scientific naiveté. To be sure, practicing lawyers and law teachers inevitably will have different interests and aims. This difference in outlook becomes troubling however, when it is accompanied by a loss of respect on the one side for the qualities of mind and temperament whose possession is regarded by those on the other as a badge of professional pride.³⁸

37. Lilly, *supra* note 25, at 1434-35 (discussing lack of elite law school professors' practice experience). According to Lilly, "[a]cademic lawyers appointed to these highly-ranked schools have . . . less experience in the profession than do faculty appointees generally, and are therefore less likely to be familiar with professional concerns." *Id.* (citations omitted); *see also* United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars in United States Currency, 955 F.2d 712, 722 (D.C. Cir. 1992) (Silberman, J., concurring) (noting "many . . . law reviews . . . dominated by rather exotic offerings of increasingly out-of-touch faculty members").

38. Anthony T. Kronman, *Living the Law*, 54 U. CHI. L. REV. 835, 870 n. 58 (1987). Others have noted, rightly, that "[d]isdainful teachers surely engender the same attitude in some students." Edwards, *Disjunction*, *supra* note 5, at 61; *see also* Schuwerk, *supra* note 5, at 767 (suggesting "[m]any law professors do not like practicing lawyers, and consistently denigrate them" in class). Schuwerk believes that because many

Judge Edwards notes that the “displaced scholars” discussed above “encourage only those . . . students who are themselves that interested in interdisciplinary work to consider careers in academia.”³⁹ These law professors “view law practitioners as several cuts below plumbers in both the intellectual challenge and moral utility of their work.”⁴⁰ Teaching students how to actually engage in legal practice, or writing to bench and bar about how to solve legal issues, is secondary to professing and developing novel legal theory. Accordingly, these professors are not likely to produce engaged scholarship.⁴¹

Similarly, some law professors are disdainful of engaged scholarship itself. Posner notes that “[t]raditional doctrinal scholarship is disvalued at the leading law schools. They want their faculties to engage in ‘cutting edge’ research and thus orient their scholarship toward . . . other scholars, not even limited to law professors”⁴² For those professors, writing engaged scholarship for legal decision-makers is contrary to their own academic goals. Some professors believe writing engaged scholarship is akin to teaching clinical classes, a task that they believe should be relegated to lesser legal minds.⁴³

Third, some issues or areas of law, though important in practice, are simply of little academic interest.⁴⁴ Practical issues facing attorneys and courts are

professors who “tried to practice law . . . were not very good at it,” they engage in “venomous criticisms” of the profession and its members. Schuwerk, *supra* note 5, at 767-68. Although beyond the scope of our paper, a certain unhealthy cognitive dissonance must affect some of those whose lives are spent ostensibly educating students for careers that they find not worth pursuing. See Edwards, *Disjunction*, *supra* note 5, at 36 (noting “waning prestige” of engaged scholarship); Schuwerk, *supra* note 5, at 769-770 (discussing other pathologies).

39. Edwards, *Postscript*, *supra* note 24, at 562 (explaining how academics’ interest in fields other than law causes rejection of doctrinal analysis).

40. Donald B. Ayer, *Stewardship*, 91 MICH. L. REV. 2150, 2150-51 (1993).

41. See Brian Leiter, *The Law School Observer*, 4 GREEN BAG 2D 447, 447-48 (2001) (contrasting two schools of thought developing at elite law schools). The implications of the shift away from engaged scholarship reach more than just the production of scholarship. It could signal an end to legal academia as we know it: “[I]f the ‘best’ students continue to flock to Yale, instead of gravitating towards more solidly Arguments Cultures schools, will that mean that the academy as a whole moves in a similar direction? Will Law Schools of 2020 look like English Departments of 1990?” *Id.* at 448; see also J. Cunyon Gordon, *A Response from the Visitor from Another Planet*, 91 MICH. L. REV. 1953, 1968 (1993) (discussing gap between practice and academics). Gordon believes that “market” forces will take care of schools that drift too far in the theoretical direction:

If a school goes stark raving Crit . . . , its reputation as a theory-only school will spread, and if the canonists are right, its graduates will starve because they cannot practice law, write briefs, or talk to clients except in riddles. Enrollment will plummet and that school will close.

Gordon, *supra*, at 1968.

42. Posner, *Today*, *supra* note 24, at 1321; see also Edwards, *Disjunction*, *supra* note 5, at 36 (suggesting “problem is not simply the number of ‘practical’ scholars, but their waning prestige within the academy”) (emphasis added).

43. See Edwards, *Disjunction*, *supra* note 5, at 54 (explaining professors’ viewpoint). “[Disdain for engaged scholarship] assumes that the interpretation of a large body of complicated texts is a mechanistic task, no better accomplished by Lawrence Tribe or Charles Wright than anyone else. It wholly overlooks the fact that interpretation, like theorizing, may involve considerable efforts and talent.” *Id.* Posner suggests that a decrease in engaged scholarship at elite law schools does not matter because the second and third-tier schools pick up the slack. See Posner, *Deprofessionalization*, *supra* note 10, at 1924-25.

44. For example, one scholar argues that professors are biased against the study of constitutional torts:

born of necessity, rather than excitement. Professors choose to forego these boring subjects and write about more esoteric topics that pique their interest. We are also guilty of producing academic scholarship spawned solely by curiosity, rather than utility. Investigation, research, and hypothesizing for their own sake certainly have inherent value. We simply note that engaged scholarship may be overlooked because it may not be sexy.

Fourth, some faculty members likely believe lawyers and judges already meet the need for engaged scholarship.⁴⁵ The irony of this belief is that lawyers and judges should not be considered the source of engaged scholarship, but rather its audience. Lawyers and judges face too many hurdles to carry the engaged scholarship torch.⁴⁶ They simply cannot be the sole source of the scholarship they also rely upon. Not only would their doing so reinforce the disconnect between the legal academy and the legal decision-makers, with each group writing only for themselves, but the idea that they could do so ignores the practical barriers that we discuss below. Lawyers and judges cannot bear the engaged scholarship burden; therefore, law professors must.

Finally, there are also more mundane dynamics at work. Noting “the increased academification of law school professors,” Judge Posner surmised that professors “are much more inclined than they used to be to write for other professors than for judges and practitioners,” in part because “there are so many more law professors than there used to be.”⁴⁷ Law professors are able to write about esoteric topics and abstract legal theory because they have an audience who is willing to read it: themselves. Today there are more than 400 journals, and those journals are getting fatter every publication.⁴⁸ “[I]t has

The constitutional tort area is an orphan among academic areas. Tort teachers and scholars seem rarely to have the interest or background to struggle with the constitutional issues involved and regard the mainstream tort issues as relatively elementary. At the same time, constitutional teachers and scholars disdain the area as not involving sufficiently rich issues of constitutional policy and doctrine to be of interest.

William Burnham, *Separating Constitutional and Common Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 541 n.112 (1989).

45. See Rubin, *supra* note 13, at 1889 (questioning whether judges need instruction on “how to interpret prior cases or . . . construct legal argument[s]”).

46. See *infra* Part VI.A–B and accompanying text (discussing obstacles to lawyer and judge production of engaged scholarship).

47. Posner, *supra* note 33, at 4.

48. Friedman, *supra* note 9, at 663 (estimating law reviews publish over 150,000 pages each year); see also Saks, *supra* note 2, at 363–64 (noting vast increase in number and size of law reviews between 1960 and 1985). The problem is so prevalent that law reviews have actually responded. In an American Constitution Society For Law and Policy web-log entry appearing on February 7, 2005, the editors reported that the “flagship” law reviews, including those of Columbia, Cornell, Duke, Georgetown, Harvard, Michigan, Stanford, Texas, U. Penn., Virginia, and Yale, have joined together to request that articles be pared down:

In mid-December, the *Harvard Law Review* conducted a nationwide survey of law faculty regarding the state of legal scholarship. Nearly 800 professors completed the survey and submitted their feedback. Complete tabulations of the survey will soon be available on the web. Importantly, the survey documented one particularly unambiguous view shared by faculty and law review editors alike: the length of articles has become excessive. In fact, nearly 90% of faculty agreed that articles

become possible for [law professors] to have a nonnegligible audience for their work even if their work is read only by other law professors”⁴⁹ Law professors write unengaged scholarship for the same reason many people do things—because they can.

All these factors indicate why the production of engaged scholarship is declining. Despite these dynamics, however, law professors are the best source of this scholarship for numerous reasons.

V. THE NEED FOR ENGAGED SCHOLARSHIP AND THE ENDS IT SERVES

Although the actual production of engaged scholarship is important, it is not just an end, but also a means. Everyone benefits from its production. By writing engaged scholarship, professors will become better professors and serve their students better, while at the same time guiding the bench, the bar, and other legal decision-makers in all branches of government. Both private citizens and commercial corporations exist in an increasingly complex legal environment that requires an understanding of both intradisciplinary and interdisciplinary issues. Thus, engaged scholarship is not just a hypothetical calling, it is born of necessity. Responding to the call will benefit the groups law schools were originally designed to serve: students, to whom professors’ greatest responsibilities lie, and the bench, bar, and other legal decision-makers for whom the academic community should be the keepers and the pioneers of legal doctrine. By producing engaged scholarship, academics serve all these groups, as well as themselves.

A. Student Beneficiaries

1. Engaged Scholarship Serves Student Needs

At the outset, it is important to note why the law review system exists in its

are too long. In addition, dozens of respondents submitted specific comments, identifying the dangers of this trend and calling for action. Survey respondents suggested that shorter articles would enhance the quality of legal scholarship, shorten and improve the editing process, and render articles more effective and easier to read.

The law reviews listed above are very grateful for the constructive feedback and wish to acknowledge a role in contributing to this unfortunate trend in legal scholarship. To the extent that the article selection or editing process encourages the submission and publication of lengthier articles, each of the law reviews listed above is committed to rethinking and modifying its policies as necessary. Indeed, some have already done so. The vast majority of law review articles can effectively convey their arguments within the range of 40-70 law review pages, and any impression that law reviews only publish or strongly prefer lengthier articles should be dispelled. Ultimately, individual law reviews will have to decide for themselves how best to resolve these concerns. Please know, however, that editors across the country are cognizant of the troubling trend toward longer articles and are actively exploring how to address it.

Ian Millhiser, *Citechecking Just Got a Little Easier*, ASC Blog (Feb. 7, 2005), at <http://www.acsblog.org>.

49. Posner, *supra* note 33, at 4.

current form. Law reviews were created to be student-edited, rather than peer-reviewed, as a means to further instruct law students.⁵⁰ “[L]aw reviews were not originally designed to serve as the primary vehicle for legal scholarship.”⁵¹ Instead, they were educational tools for law students to give them “training and practice.”⁵² Engaged scholarship meets this valid need better than any other sort of writing. Journals serve an important purpose in providing each school’s best students learning experience with writing, source verification, and related skills. Through the editorial process, law review members fine-tune their writing skills and learn a tremendous amount from the process of reading academic submissions.

When articles become too divorced from practice, however, editing, source-checking, and reading articles fails to meaningfully develop such skills.⁵³ Students do not learn how to write effectively as lawyers by editing poetry. They do not learn how to carefully evaluate a cited legal source for direct analytical support by reading literary references. They do not appreciate the problems facing bench, bar, and legislators by editing articles that bear no connection to those audiences. Most importantly, students do not gain an understanding of how to practically apply the doctrines they are learning if they review only theory.⁵⁴ If the law student cannot understand the practical application of an article because it has none, she cannot critically evaluate reasoning and judge whether it comports with pertinent legal scholarship and jurisprudence. Instead, she is forced to take the writer’s words as truth and essentially ignore the primary function of her editorial position. In effect, the law review ceases to provide a source of education for those students who actually run it, as it was designed to do. Instead, the schools’ best students become mere grammar, spelling, and punctuation checkers.

The irony of this process is not lost on us. Most academics from other disciplines are amazed at the entire law review process.⁵⁵ Rather than receiving peer-reviewed editing, law review articles are judged, edited, and revised by second- and third-year law students. Once the law review consists only of theoretical articles, however, the subject matter becomes so specialized that

50. See Friedman, *supra* note 9, at 662 (observing primary law review goal originally “training and practice for students”). *But see* Harnsberger, *supra* note 24, at 691 (asserting “chief [law review] purpose” was to “give news of the institution and assist practitioners”).

51. Friedman, *supra* note 9, at 662.

52. Friedman, *supra* note 9, at 662; *see also* Harnsberger, *supra* note 24, at 686 (noting employers evaluate students using law review criteria because it is “school within a school”).

53. See David L. Gregory, *The Assault on Scholarship*, 32 WM. & MARY L. REV. 993, 999 (1991) (noting professors cannot “foster [students’] critical analytical skills . . . because . . . own skills will atrophy” without writing); *see also* Posner, *Deprofessionalization*, *supra* note 10, at 1927 (stating increase in interdisciplinary legal scholarship “impedes . . . gatekeeper function . . . scholarly journals are supposed to perform”).

54. See Edwards, *Disjunction*, *supra* note 5, at 39 (contending “theory [will not] be useful if the law student does not know doctrine first”).

55. See Friedman, *supra* note 9, at 661 (noting astonishment from other disciplines regarding law review structure).

these students may be incapable of judging the content. Thus, the least-equipped individuals become the gatekeepers for the ivory tower ideas. A better alternative would be to create specialized peer-review journals for the theorists and reserve law reviews for engaged scholarship.

For these reasons, engaged scholarship furthers one of the original purposes of law reviews—that of an instructional tool. It creates a forum for ideas that is understandable to and engages its student authors. Engaged scholarship marries theory and doctrine in a way that educates students beyond the classroom. It teaches students new perspectives on the doctrinal subjects that they are concurrently learning or that they will face in practice. Articles that address concrete legal, social, or policy issues also fine-tune students' writing skills by requiring them to think critically about the underlying substance and the support for the authors' views. Engaged scholarship performs an important function for law reviews and enables them to better serve their purpose as educational tools.

2. *Engaged Scholarship Facilitates Better Instruction*

Likewise, engaged scholarship is better suited to making law professors better teachers. Law students attend law school in large measure to become lawyers, or at least to acquire training in lawyering. Yet, often their instructors have practiced only briefly.⁵⁶ The result is a legal academy that understands much about the law and legal institutions, but often lacks a meaningful appreciation of the practical application of the subjects it teaches.

One way professors can battle their lack of practical experience is to immerse themselves in the very issues that they would face as legal decision-makers or clients. For example, a torts professor should know and understand the torts issues facing real people and corporations. The best way to get this knowledge, aside from tort practice, is to research and write on such issues. The professor can impart this practical doctrinal knowledge to his students even if he has never faced the issues in practice. Research and writing about real issues will ground his knowledge in the realities of law practice, allowing him to better understand the issues that his students will likely encounter. He may then prepare his students for those issues as part of their legal training.

In contrast, professors who do not fully engage the issues actually confronting the profession risk becoming wholly unfamiliar with such issues and less able to provide meaningful education.⁵⁷ The “widening divide

56. See *supra* note 36 and accompanying text (setting forth law professor practice experience statistics). We should make clear that we believe a core purpose of law schools is to train lawyers. That belief, which underlies many of our arguments, is of course another issue that splits law faculty.

57. See Edwards, *Disjunction*, *supra* note 5, at 57 (examining reasons why theoretical professors unable to teach doctrine). Edwards suggests that “[i]mpractical’ scholars often are inept at teaching doctrine, for either lack of any practical experience or lack of interest in the subject matter, or both.” *Id.* “The law student who merely takes a variety of pure theory courses, and learns that ‘practitioners [a]re sell outs,’ will be

between the research and teaching function,”⁵⁸ coupled with the fact that most faculty have little or no practice experience, concerns us. Every perspective is important in the classroom, and the development of effective lawyers requires input from professors of varied backgrounds. Thus, professors who have lawyering experience bring something of great value to the classroom that professors lacking substantial practical experience cannot.⁵⁹ Though they have their own unique strengths, the latter can remedy this shortcoming by engaging themselves in their subject-matter’s legal discourse. Reading and writing about only secondary sources, rather than delving into case law and other primary sources, leaves professors one step removed from engaged scholarship.⁶⁰

Professors who do not have significant lawyering experience and yet abjure engaged scholarship may reduce their ability to provide students with the significant perspective of the actual practice of law.⁶¹ As one long-time

woefully unprepared for legal practice.” *Id.* at 38; *see also* Judith Resnik, *Ambivalence: The Resiliency of Legal Culture in the United States*, 45 STAN. L. REV. 1525, 1525 (1993) (observing “law professors tend to teach what they themselves have been taught”). Professor Schuwerk laments that “[o]ur failure to show a greater interest in the actual workings of the law inevitably works to cut us off from our students, and to cut us off from the richness of experience that inevitably arises from studying the application of abstract legal propositions to complex social interactions.” Schuwerk, *supra* note 5, at 762.

58. James W. Torke, *What is this Thing Called the Rule of Law?*, 34 IND. L. REV. 1445, 1455 (2001).

59. Leiter, *supra* note 41, at 447-48 (comparing different law professor cultures). “The organized bar accuses [law schools] of failing to graduate students with even the minimum skills and competencies to represent clients.” Daly, *supra* note 7, at 521.

60. Reliance only on secondary sources raises another important issue. Many theoretical pieces are the result of interdisciplinary approaches to solving legal problems, such as “law and . . .” theories or critical legal studies. This sort of scholarship not only divorces theory from practice, but also demeans those individuals who spend years getting advanced degrees in other disciplines. *See* Edwards, *Disjunction*, *supra* note 5, at 40 (questioning why law professors write “articles . . . better written by economists or political scientists”). This ivory-tower thinking presupposes that anyone with a J.D. can simply pick up a few books about history, psychology, sociology, or economics and understand those theories as readily as they understand the law they spent three years learning, a theory that might be valid, but is beyond the scope of this discussion. We simply argue that even multi-disciplinary scholarship should be engaged.

61. Post-academic real world experience is beneficial as well:

[A] teacher who engages in work as a legal consultant or expert witness gains exposure to aspects of law and lawyering otherwise closed off to academics. That can benefit the teacher and the teacher’s constituencies by providing insights that can be brought to bear on both teaching and scholarship. If effective learning depends on context, then so may effective teaching. Teachers’ work is most often solitary; teaching and writing is not, as a rule, team sport. So it might be that teachers who occasionally work collaboratively with real lawyers on real cases may see and capitalize on pedagogical opportunities for student collaboration, because of an understanding of the importance of cooperative work in the world outside the ivory tower. And perhaps teachers who lose all contact with practicing lawyers, especially if their teaching involves maintaining expertise in what lawyers do, are not as effective as they would be with additional contact with lawyers or clients or both. This concern should be readily apparent to any who believe that law schools should be doing more to relate their teaching to the actual practice of law. Short of teachers’ taking law office sabbaticals, as one judge has suggested, consulting and expert witnessing may readily provide the real-world contact that faculty otherwise lack and make them better able to bridge the worlds of academia and practice. Further, teachers who occasionally work closely with lawyers on cases may develop ties to the legal community that otherwise they would not have; those ties may benefit students hunting for employment or the institution hunting for donors.

professor recently wrote, “[w]e neglect at our peril . . . the fact that most of us do not know very much about how law is practiced, even in the substantive areas in which we specialize.”⁶² Accordingly, engaged scholarship is a practical bridge between minimal or non-existent practice experience and the duty to impart meaningful knowledge to students.

B. Engaged Scholarship Enhances Relations with Bench and Bar

In addition to its benefit to students, engaged scholarship has the practical application of educating the bench and bar about how to solve the legal issues facing these groups. The bench and bar should not be discounted as an audience. Not only can they use engaged scholarship to its fullest potential, judges and practicing lawyers should be able to rely upon academia to put cutting-edge legal theory to practical use because they are, as a practical matter, unable to do so. More pragmatically, because the bench and bar have a real impact on how law schools are perceived, academics should write in ways that garner their respect and approval.

1. Ambassadors to Legal Theory

Legal scholars are the ambassadors between high legal theory and those actually practicing law. We do not denigrate the role that theory has in shaping the law. But theory that is not motivated to shape the law is disengaged. Practice today leaves little time for practicing lawyers or judges to produce novel or high legal theory. Academics alone have the time and resources to fashion novel ideas about the law or research how legal theory affects or impacts populations as a whole. Thus, it is more likely that academics will be the source for most new legal theory.

Academics should not, however, ignore the responsibility to ground their theories in real legal issues. The bench and bar depend on academics to tie new ideas to existing legal issues because practicing attorneys simply do not have the time or resources to do so themselves. Additionally, the originator of a legal theory is in the best position to understand how his idea will impact the law and should educate the reader accordingly.

The AALS has recognized this responsibility by calling for engaged

Paul T. Hayden, *Professional Conflicts of Interest and “Good Practice” in Legal Education*, 50 J. LEGAL EDUC. 358, 367 (2000) (citations omitted).

A professor who had not practiced since 1982 recently took a sabbatical so that she could practice law, and then examined in an article the question of whether professors have an ethical obligation to engage in the practice of law. See generally Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 Loyola L. Rev. 623 (2004). Much like us, she ultimately decided that “at minimum, law professors should be encouraged, if not required, to stay connected to the world of practice.” *Id.* at 643.

62. Schuwerk, *supra* note 5, at 759.

scholarship.⁶³ If “scholarship in the law schools is not even close to the real world,” and if law review “articles are theoretical dialogues, mostly between professors,” then law review articles will be deemed “not merely unhelpful,” but “useless” to the bench and bar.⁶⁴ This trend is already apparent: judges’ infrequent reliance on law review articles in their decision-making is evidenced by the low number of law review articles cited by the courts.⁶⁵ To test this trend, we surveyed every opinion written by the United States Supreme Court during the 2003-2004 term. In those opinions, 3,998 sources were cited. Only 744 of those citations were to secondary sources, and only 108 of those citations were to law review articles. In other words, less than three percent of the sources the Supreme Court cited were the law review articles that are supposed to analyze the cutting edge of legal issues, doctrine, and theory.⁶⁶ These numbers indicate that judges are relying on black letter law and their own legal reasoning, rather than the theories and discussions proffered by the individuals who ostensibly should be at the forefront of legal knowledge, to effectuate their opinions.⁶⁷

The demise of law reviews as a voice in judicial-doctrinal development of the law is significant. The loss of an engaged academic voice has negative consequences for the proper development of the law because judges and lawyers lack the time, skill, and neutrality to assure its proper development themselves.⁶⁸ Likewise, this demise has the potential to adversely affect students and academia. Articles that have little or no perceived value to anyone but a few law professors will come to be read only by those few law professors.

63. See AALS STATEMENT, *supra* note 1.

64. Harnsberger, *supra* note 24, at 690; see also Thomas Grisso & Gary B. Melton, *Getting Child Development Research to Legal Practitioners: Which Way to the Trenches?*, in REFORMING THE LAW: THE IMPACT OF CHILD DEVELOPMENT RESEARCH 146, 159-61 (Gary B. Melton ed., 1987) (reporting only one-third of forty judges had read article in their state university’s law review). The survey referenced in Grisso and Melton’s article also revealed that while only ten percent of the judges had read at least one article in any law review, most had read state bar publications and journals. See *id.*; see also Victor L. Streib, *Academic Research and Advocacy Research*, 36 CLEV. ST. L. REV. 253, 256 (1988) (observing advocates lack time to review articles and receive little judicial encouragement to do so); Torke, *supra* note 58, at 1455 (noting judge and practitioner citation of law review articles dwindling). “Indeed, one of the jokes at the appellate court where I clerked was that a sure sign of desperation was having to repair to the law reviews for legal authority.” Richard E. Redding, *How Common-Sense Psychology Can Inform Law and Psycholegal Research*, 5 U. CHI. L. SCH. ROUNDTABLE 107, 116 n.68 (1998).

65. See *supra* note 30 and accompanying text.

66. See Sloviter, *supra* note 31, at 9-10 (suggesting possible explanations for this record). It could be that articles *are* being read, but not cited. See *id.* at 10 (recognizing lack of citation does not necessarily indicate articles ignored or not useful). Yet, the insignificant number of citations suggests that law review articles do not engage judges. See *supra* note 30 and accompanying text (noting low number of court citations to law review articles).

67. See *supra* note 30 and accompanying text (suggesting judges likely relying on black letter law out of necessity rather than choice). Many judges would likely use more fully engaged scholarship as a valuable resource in their decision-making. See *supra* note 32 and accompanying text (discussing judges’ willingness to use helpful law review articles).

68. See *infra* Part VI.A–B (discussing obstacles to lawyer and judge production of engaged scholarship).

The social utility of publishing such works is obviously doubtful.⁶⁹ Furthermore, if the purpose of faculty writings is not to further the ends of the legal system's active participants, then such writings become unbounded. Judge Posner recognized that the growing academification of legal scholarship has changed the self-perception of professors. While they once "thought of themselves as lawyers first and professors second and saw their role in relation to the judiciary as a helping one," now "many law professors, especially the most prestigious ones at the most prestigious schools, think of themselves primarily as members of an academic community engaged in dialogue with other members of the community and the judges be damned."⁷⁰ Such a self-perception distances these writers even further from the realities of legal practice.

Producing engaged scholarship ensures that those who formulate and best understand legal theory can also explain its practical application. Therefore, through engaged scholarship, academics become the bridge between legal theory and reality.

2. Pragmatic Considerations

The reduction in engaged scholarship can and will reduce the prestige of law faculty in the eyes of both bench and bar, who, not unimportantly, directly affect the prestige of the entire law school.⁷¹ Law schools depend on the backing of lawyers for a number of reasons. On a practical level, alumni provide substantial grants of money, on which some law schools depend for financial security. Alumni also provide a source of employment for the law school's ever-emerging graduates. And perhaps even most pragmatically, *U.S. News and World Report*, in its oft-criticized though widely followed rankings, relies upon the reputation of a school among lawyers and judges as a basis for its calculations.⁷² In short, what the bench and bar think about a law school matters, and the usefulness of a school's scholarship is a factor that the bench and bar consider when forming their opinions. Thus, law schools cannot

69. One suggestion for the high-theorists is to exchange ideas by email or web log, rather than through the lengthy publication process. The benefits of doing so are many. For example, the writer reaches his target audience quickly and efficiently, publication resources in national law reviews are conserved, and any reticence concerning the national audience is reduced. More importantly, students on law reviews will then focus on and obtain the educational benefit of reading, reviewing, and cite-checking articles that engage law practice, and legal decision-makers will have access to a greater volume of engaged scholarship. See *infra* Part V (demonstrating need for engaged scholarship).

70. Posner, *supra* note 33, at 10.

71. See Mary Ann Glendon, *Law in a Time of Turbulence*, in 60 VITAL SPEECHES OF THE DAY 620-21 (1994) (concluding lessened production of useful scholarship causes legal academy to lose "prestige it once enjoyed").

72. See *America's Best Graduate Schools 2005: Law Methodology*, U.S. News & World Report, at http://www.usnews.com/usnews/edu/grad/rankings/about/06law_meth_brief.php (last visited Apr. 19, 2005) (setting forth law school ranking methodology).

“distance themselves too far from the discipline of the name they bear” without negatively impacting their reputation.⁷³ For these reasons, producing engaged scholarship helps professors as well as students, lawyers, and judges.

Despite the numerous reasons why law professors *should* produce engaged scholarship, some argue that it should be provided entirely by others such as lawyers, judges, or law students. As discussed below, however, only professors have the resources and freedom to meet this critical need.⁷⁴

VI. WHY ACADEMICS SHOULD BEAR THE STANDARD

A. *Lawyers Are Biased, Busy Writers*

Not all bright lawyers become law professors. Among those who stay with the practice, no doubt some are as capable as any law professor of writing an engaged law review article and devising cutting-edge legal theory, and some do. Practicing lawyers have long produced scholarship. For example, marketing experts have recognized that even before the Supreme Court approved lawyer advertising in *Bates v. State Bar*,⁷⁵ many lawyers published in legal journals as a form of marketing.⁷⁶ Other practicing attorneys, particularly those with an eye toward a future academic position or those desiring to attract clients with specialized needs, publish to build their own resumes. Still others publish simply because they feel compelled to write about their profession. Yet, practicing lawyers are not the best source for neither theoretical academic writing nor engaged scholarship.

First, lawyers face formidable practical barriers to producing thorough engaged scholarship. The practice of law is, unlike academia, client-oriented. Lawyers conduct legal research and write in response to the needs of their clients. They cannot bill clients for time spent researching issues not pertinent to their clients' cases. Thus, often the only legal issues a practicing attorney has time or money to research are the issues his clients face. If the lawyer wants to be paid for the work, the clients' needs dictate the areas the lawyer can

73. Harnsberger, *supra* note 24, at 699. We cannot ignore the fact that some of the most theoretical journals, those at the highest ranked schools, for example, are considered the most prestigious despite the lack of engaged scholarship. For schools that fall toward the middle of the pack, however, the lack of engaged scholarship can significantly change the way the school is evaluated due to the potential impact such scholarship has on the bench and bar's perception of the school. See Harnsberger, *supra* note 24, at 699 (suggesting lack of engaged, useful scholarship erodes crucial bar association backing of law schools).

74. *But cf.* Posner, *Today*, *supra* note 24, at 1320 (suggesting professor engaged scholarship decrease causes lawyer and judge retreat from producing scholarship). Posner noted that when legal scholarship was “aimed squarely at the profession at large, particularly judges and lawyers, . . . [the] orientation enabled judges and lawyers to contribute to it.” *Id.* As the discourse in law reviews grows more esoteric, these audiences are less likely to participate. See *id.*

75. 435 U.S. 350 (1977).

76. See Robert W. Denny, *Trends Report: Law Practice Marketing After 30 Years: “Are We Almost There?”*, L. PRAC. 8, 9 (July/Aug. 2004) (examining lawyer advertising trends).

research, regardless of his interests.

Even when the lawyer *is* able to write about topics that interest him, he must take care not to compromise his clients' future interests. Woe is the lawyer who has his own scholarly writing cited as a source against his clients' interests (or the interests of other firm clients) in litigation. Thus, practitioners who do write often hedge on issues or forego controversial topics to avoid negatively affecting their clients. In reality, practicing lawyers have very little of what academics relish: academic freedom.

Furthermore, the amount of time that lawyers have to write articles is severely limited. Practicing lawyers simply do not have the time to conduct doctrinal research, and equally important, to engage in studied consideration of the results of their work:

The research limitations on the lawyer advocate are often severe Little time, less assistance, and even less encouragement often lead the advocate to what can only be described as a "quick and dirty" foray into the primary law sources. Beckoning side trips must be shunned, and background reading of law review articles is an extravagant luxury.⁷⁷

The articles recounting and usually bemoaning or criticizing the 2000-plus hour annual billing requirements many lawyers face at larger firms demonstrate that time for academic inquiry is limited.⁷⁸ Unfortunately, based on their class rankings and the prestige of their law schools, lawyers in these firms are the practitioners most likely to write. Practicing lawyers are barely able to juggle the demands of the profession with their families, interests, and hobbies. Often balls are dropped. Writing and publishing scholarly works adds not balls, but knives and swords, to the practicing lawyer's act, and so is something that most choose to forego. Academics themselves often have a hard time meeting even basic scholarship requirements at their schools, despite the fact that they teach or prepare for class in far fewer than 2000 hours a year. Thus, we can hardly expect practitioners to regularly produce engaged scholarship when professors have a difficult time doing so. Practicing lawyers are just too busy.

Second, even when lawyers do write articles, they are often biased, either intentionally or unintentionally. Scientific publications have long recognized the opportunity for bias in published pieces,⁷⁹ and law review articles are

77. Streib, *supra* note 64, at 256. Furthermore, "[n]o motivation exists to expand knowledge or produce insightful critiques of existing knowledge unless" client needs are served. *Id.*

78. See Arthur Austin, *One Person's Challenge is Someone Else's Stress*, 3 TEX. REV. L. & POL. 157, 160-62 (1998) (reviewing book bemoaning plight of large firm first-year associates). See generally Douglas E. Litowitz, *Young Lawyers and Alienation: A Look at the Legal Proletariat*, 84 ILL. B.J. 144 (1996) (analyzing unhappy state of young lawyers from Marxist perspective).

79. See 21 U.S.C.A. § 360aaa-5 (West 2005) (recognizing "scientific or medical journals" have publicly-stated policy to disclose authors' conflicts or biases); John Alan Cohan, *Psychiatric Ethics and the Emerging Issues of Psychopharmacology in the Treatment of Depression*, 20 J. CONTEMP. HEALTH L. & POL'Y 115, 160-162 (2003) (discussing ethical issues facing pharmaceutical companies or other outside entities that fund scientific studies).

falling under the same scrutiny.⁸⁰ Savvy litigants are willing to fund studies that help their positions, and clients are willing to support research and writing efforts of their lawyers, provided that the final product helps their interests. One ironic example comes from an article complaining about bias in scientific literature created through the efforts of plaintiffs' counsel.⁸¹ The article, written by two lawyers from large defense-oriented firms and a doctor who had been their expert witness, lamented that "[o]riginal research on the plaintiffs' side, in turn, may drive defendants to respond with litigation focused research of their own."⁸² But regardless of which side began the practice, all parties can recognize the ethical problems arising from the creation of industry-funded research. When practicing lawyers are actually using scholarship as a tool for advocacy, they reduce the reliability of what they produce.

The adversary system itself also creates *unintentionally* biased writing. Lawyers examine issues when clients task them to do so. Though occasionally clients do seek dispassionate opinions about the law, more often the lawyer engages in legal analysis and writing only in the robe of an advocate. The perspective that an advocate has on the meaning of the law, seen through the lens of his client's interests, is inherently incomplete and potentially biased. "[T]he most serious problem stems from the role of the lawyer as advocate. No motivation exists to expand knowledge or produce insightfully critiques of existing knowledge unless this would serve to join the desired result for the client."⁸³ In other words, lawyers easily assume the opinions and views of their clients about legal issues because that is what they are paid to do.⁸⁴

Bias, intended or not, reduces the reliability of lawyer-written scholarship. Judges and other decision-makers who rely on lawyer-written articles seriously risk being influenced by "the blatant advocacy on which our litigation process is based."⁸⁵ Additionally, as mentioned above, even if bias is not present or is recognized by the author, practitioner-authored pieces sometimes avoid making clear statements of what the law is, or ought to be, to avoid client conflicts or client relations issues. Obligations to clients and law firms constrain the ability of lawyers to provide full and unfettered analyses of the law.

80. See Jonathan Solish, *Editor-in-Chief's Column*, 18 FRANCHISE L.J. 2, 2 (1998) (refuting bias accusations and explaining journal's policy to combat hidden bias in practitioner pieces).

81. See generally William L. Anderson et al., *Daubert's Backwash: Litigation-Generated Science*, 34 U. MICH. J.L. REFORM 619 (2001).

82. *Id.* at 621.

83. Streib, *supra* note 64, at 256.

84. See Charles Q. Socha & H. Andrew Rzepiennik, *All Journal Articles Are Not Created Equal: Guidelines for Evaluating Medical Literature*, 67 DEF. COUNS. J. 61, 77-78 (2000) (describing conflicts of interest and bias past service as expert witness can create).

85. Anderson, *supra* note 81, at 621.

B. Judges Face Similar Limitations

Theoretically, in contrast to practicing lawyers who spend large amounts of time dealing with the business aspects of practice and who are inherently constrained by their clients' interests, judges are in a much better position to write without bias and to do it well. There can be no doubt that as a group judges are as qualified to write about doctrine as law professors. The reality, however, is that judges are just as limited in their writing abilities as practicing lawyers, primarily by the same constraints:

Practicing attorneys lack the mindset, the resources, and the ethical latitude, certainly as far as such an unrestricted inquiry might not further their clients' interests. Appellate judges are restricted in their opinions to the advocacy briefs of the parties, their own limited research and that of their clerks, and the issues presented to the case before them.⁸⁶

Judges have very little time to pursue scholarly endeavors, and when they do, they often rely on biased material given to them by advocating lawyers. Accordingly, there several reasons why judges as a group cannot regularly produce engaged scholarship.

First, judges face the same time constraints plaguing practice. While judges may not have a rolodex full of clients to drum up business from or represent, they do have entire dockets of warring parties feeding a steady stream of problems and papers to the judges for their immediate consideration—and that is when the judge is not overseeing an actual trial. The overcrowded nature of judicial dockets is widely noted,⁸⁷ as is the inordinate amount of attention that criminal cases demand.⁸⁸ Judges attempt to control these demands on their time through page and time limitations, but they are simply sticking their fingers in a dam that is over-flowing with litigation. The primary job of judges is to decide disputes, not write articles or analyze the law.⁸⁹ Consequently, they have little time to produce engaged scholarship.⁹⁰

86. Streib, *supra* note 64, at 257. Streib notes that university professors in other disciplines are unable to fill this gap because of their unfamiliarity with the law. *Id.*

87. See Slovirer, *supra* note 31, at 9 (recognizing judges' time constraints). "[M]ost academics have no appreciation of the time pressures under which conscientious federal appellate judges are working these days." *Id.*

88. See *United States v. Richardson*, 161 F.3d 728, 733 (D.C. Cir. 1998) (describing procedures to alleviate "increasing criminal case load[s] in our trial courts").

89. Judges themselves recognize the proper focus of their jobs. See *United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars in United States Currency*, 955 F.2d 712, 722 (D.C. Cir. 1992) (Silberman, J., concurring) (urging judges to focus on drafting opinions). Judge Silberman concludes that law reviews are dominated by exotic articles written by "out-of-touch faculty" and encourages judges to reject this trend by refraining from writing on issues that are outside the scope of the cases before them. *Id.*

90. See Slovirer, *supra* note 31, at 9-10 (stating time constraints restrict many judges from even reading law review articles). This critical issue is overlooked by those who believe that judges are as well-positioned as professors to analyze legal doctrine. See Rubin, *supra* note 13, at 1889 (questioning whether "judges really need" help interpreting precedent or "construct[ing] a legal argument").

Second, just as the adversarial process creates inherent biases in practitioner writing, judges' scholarship may be inadvertently biased because it springs from the biased perspectives of the parties before them. Naturally, because judges are pressed for time, they are more likely to write about issues that they confront in their own courtrooms.⁹¹ And, while they often are at the forefront of novel legal issues, they may not be able to fully canvas the law for solutions. Due to the tremendous time constraints of their job, some judges must rely in varying degrees upon the legal sources and information provided to them by litigants. Unfortunately, judges receive biased, imperfect information because litigants frame the law to support their own interests. As noted above, lawyers have little time and incentive to provide unbiased and complete views of the law to judges. They are paid and ethically obligated to advocate for their clients and are not required to disclose any authority other than adverse authority in the controlling jurisdiction.⁹² Consequently, the work product an advocate provides to a court can ethically avoid discussion of persuasive, sound case law from another jurisdiction. The net result is that a judge hears the issues framed only by the parties before her without any objective perspective. For the busy judge who has little time to explore the law herself, the biased source of information may lead to inherently biased or myopic discussion of the issues the judge wants to explore.

Finally, judges may not be the best source for certain kinds of scholarship because most do not specialize and thus lack the doctrinal expertise of their academic counterparts.⁹³ Many judges are jacks of all trades but masters of none. Judges are called upon daily to make decisions on a huge *breadth* of legal issues, but because they must dabble in so many different subjects, they often cannot become experts, or have significant *depth*, in any one subject area. Even judges in particularized courts may not see, appreciate, or understand a nuance of that court's subject matter unless the issue actually arises. Thus, while a judge may understand the effects of interdisciplinary issues better than even academics do, his lack of doctrinal expertise or depth in particular

91. Our observations also explain why judicial opinions themselves sometimes contain imperfect doctrinal analysis. See *U.S. v. Lipscomb*, 299 F.3d 303, 348 (5th Cir. 2002) (mentioning "district court's doctrinal mistakes" as reason for reversal).

92. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (1983); see also A.B.A. Comm. on Ethics and Prof'l Responsibility, Formal Op. 280 (1949) (explaining narrow scope of disclosure duty). Interestingly, the limited scope of disclosure Rule 3.3(a)(2) requires can lead to less disclosure of precedent favorable to plaintiffs. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2). A defendant need disclose only controlling adverse authority, and a plaintiff with less resources may not uncover persuasive authority. See *id.* Academic writing can therefore balance judicial perspective.

93. With limited exceptions, most courts are courts of general jurisdiction presiding over countless legal issues and areas of the law. Even specialized courts may not cover doctrine as narrowly as professors. For example, the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over patent appeals, would not encounter the same depth of patent expertise as a professor who teaches, researches, and writes about specific patent issues. In part as a consequence of their general jurisdiction, appellate courts rely on lawyers "to inform the discussion." *Indep. Towers v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003).

subjects prevents him from crafting the best marriage between theory and practicality. For these reasons, judges should not be considered the primary source of engaged scholarship.

C. Law Professors, in Contrast, Have the Resources and Ability

In contrast to the harried bench and bar discussed above, law professors can devote the time, energy, and expertise to producing engaged scholarship. Law professors are uniquely situated to serve as the bridge between legal theory and practical application for a number of different reasons.

First, law professors do not face the resource constraint that practicing lawyers and judges face. Professors are paid precisely to engage in the study and analysis of law. They usually have unlimited free access to resources such as computer research, library staff, and even research assistants. Most professors have reasonable teaching loads that give them ample time outside of the classroom for scholarly pursuits. Many schools pay law professors stipends to allow them even more time to explore their scholarly interests.⁹⁴ In fact, at most schools scholarship is not just an indulgence, it is a requirement. Only law professors have publication criteria as part of their job evaluation. “Indeed, it is part of their contract with the university, the profession, and society.”⁹⁵ Lawyers and judges are not expected to write because they are too busy working as lawyers and judges. Law professors, on the other hand, are expected to produce scholarship because they have the resources, intellect, and expertise to do so.

Second, most law professors are better equipped to produce objective evaluations of the law because they are not confronted with the inherent biases of legal practice. Professors have a luxury enjoyed by no one else: experience and perspective unbridled by commitments to client, employer, or position.⁹⁶

94. See Streib, *supra* note 64, at 255 (explaining “professor[s] . . . admonished to ‘seek truth’ and ‘to go where no mind has gone before’”).

95. Streib, *supra* note 64, at 257. Judge Edwards warns that “if law schools continue to stray from their principal mission of *professional* scholarship . . . society will be the worse for it.” Edwards, *Disjunction*, *supra* note 5, at 41.

96. See Schuwerk, *supra* note 5, at 753 (noting absence of constraints on academic analysis). Indeed, “we pride ourselves on being able to provide more diverse, if not more balanced analyses on the questions we choose to examine.” *Id.* When the professor serves as an outside expert, however, the same limitations and biases that affect lawyers can arise.

Working as a paid legal consultant or expert witness presents the most controversial example of this category of conflict. Clearly, the professoriate is not of one mind on whether such work should ever be undertaken by full-time teachers, as was made clear in a section program at the 1999 AALS annual meeting titled The Ethics of Ethics Consulting. Working for money—big money, at that—as a consultant or expert may be seen as compromising the objectivity required for effective scholarship on the same subject matter. A teacher who wishes to be, and remain, marketable to paying clients (and their law firms) may avoid taking controversial positions on particular issues so as not to be seen as too partisan to be a good witness or consultant. Such work may also simply take away too much time and attention from some or all of the core functions of teaching, scholarship, and service.

The AALS's *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities* acknowledges that "[t]he fact that a law professor's income does not depend on serving the interests of private clients permits a law professor to take positions on issues as to which practicing lawyers may be more inhibited."⁹⁷ Thus, only law professors have the academic freedom to produce objective engaged scholarship.

Third, law professors have expertise in their specific subject matter that surpasses the knowledge of lawyers and judges who must understand numerous subjects. Professors can, and often are expected to, become highly specialized in their subjects.⁹⁸ They have the time and resources to concentrate their expertise in discrete areas of the law. In other words, they have a depth of knowledge in their subjects that other attorneys lack. While judges and practitioners have breadth of knowledge, they do not have the time, resources, or need to develop the law professor's depth. This capacity for depth is unique to the law professor and provides a compelling reason why law professors are better equipped to opine on particular issues.

Only law professors have real academic freedom and can use that freedom to produce engaged scholarship. "Many issues will never be researched in any scholarly manner if not by law professors."⁹⁹ Law professors are thus the best source for unbiased engaged scholarship.

VII. CONCLUSION AND CALL FOR ENGAGED SCHOLARSHIP

If you are reading this Article, you probably think law professors are smart because you likely are a law professor. There is no doubt that, as a whole, law professors are intelligent. But there are also smart lawyers and smart judges. What sets professors apart is not intellect, but the fact that professors do not

Critics of such professorial activity may draw upon the "professionalism" paradigm of lawyering, which springs in part from the idea that lawyers have certain core functions and owe core duties, which are impinged upon by "unprofessional" activities. Perhaps the most apt analogy here is to the controversy over a lawyer's doing business with a client. While neither the law nor ethics rules prohibit such transactions, many commentators condemn such lawyer conduct as unprofessional, partially on the ground that such transactions are simply outside of a lawyer's core duties and responsibilities and may interfere with them. Similarly, a teacher who engages in paid outside work as a consultant or expert witness may be seen as "unprofessorial," taking on a job that is outside the core professorial functions of teaching, scholarship, and service and that threatens to interfere with them. Taking on paid outside legal work, for example, may diminish the teacher's ability to do pro bono service outside the law school—an instrumental concern—and may be seen as pandering to self-interest over a moral "responsibility to serve others"—an intrinsic one. An even more sinister conflict emerges when a teacher who consults for a client writes a seemingly objective article that is then used by that client as an advocacy tool.

Hayden, *supra* note 61, at 366 (citation omitted).

97. AALS STATEMENT, *supra* note 1.

98. Schuwerk, *supra* note 5, at 758-59 (adding professors "neglect at [their] peril" knowledge about actual law practice in areas of specialization).

99. Streib, *supra* note 64, at 257.

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have the ethical, temporal, or practical constraints that inhibit practitioners and judges from engaging in comprehensive and unbiased scholarship. Professors alone have that ability and academic freedom, and should recognize that legal decision-makers need their scholarship. The best approach is scholarship that balances theory and engagement. As professors, we must produce it for the benefit of our students, our profession, and ourselves. Accordingly, we call on the legal academy to assume this responsibility and write more useful and engaging articles, and fewer articles like this one.