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THINK LIKE A LAWYER, WORK LIKE A MACHINE: THE DISSONANCE BETWEEN LAW SCHOOL AND LAW PRACTICE

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As the recruiting season descends upon us each fall, we in legal education watch as our best (and even our more average) students are lured to big firms by promises of starting salaries that top \$70,000. This is my eighth year of teaching,¹ and in the past two or three years, my former students have returned to recruit my current students. I am struck by the returning graduates' frustration and disillusionment with their careers. When they drop by my office to say hello or elicit information about current students, they complain about the practice of law and especially about their lack of preparation for what the practice of law truly entails. Increasingly, former students would rather discuss the prospect of leaving their large firms for academia or smaller firms than discuss the current students they are trying to recruit. Moreover, the size of the firm in which these former students practice seems to correspond to the degree of dissatisfaction they express.

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1. To provide insight on my perspective, I note that I practiced law a total of four years—two years immediately following my graduation from law school in 1978 and two more years following a two-year teaching stint at the University of Minnesota School of Law. I spent all four years with the same large, Los Angeles-based firm, Latham & Watkins. When I permanently left Latham & Watkins six years ago to accept my current teaching position at the University of Virginia School of Law, the firm numbered approximately 300 lawyers. It is now the third largest California-based law firm, with a total of 635 attorneys. *The Top 50: California's Largest Law Firms*, CAL. LAW., Nov. 1990, at 48.

However, none of my specific comments are directed at Latham & Watkins. I have yet to hear former students who are Latham & Watkins associates complain about their experience with the firm. I cannot say whether this is because Latham & Watkins is really different or because my students hesitate to discuss the firm's disadvantages with me.

At first I believed that their complaints simply reflected these new lawyers' adjustments to the long hours and tedious work required of young associates. However, I realized that my own and my peers' transition from law school to law practice did not create the same deep dissatisfaction. The nature and the number of my students' complaints seemed unusual and revealed to me the seriousness of the problem that currently plagues American law school graduates.

Why the difference? Was our collective experience atypical, or has something radically changed since I graduated from the University of California at Los Angeles Law School in 1978? I believe that the problem begins with the shock of entering the "real world" work environment after many years in an academic environment. While this is a problem in any profession, it may be exacerbated in the legal profession by the unrealistic picture presented by the popular television show *L.A. Law*.² But the problem really lies in the process by which we educate³ law students and prepare them (or fail to prepare them) for legal practice.

As I considered the problem, I realized how much legal education and legal practice have changed since I entered law school in the fall of 1975. In many of the courses offered at our top law schools, the study of law now means in essence the study of anything but law. These courses reflect what has been charitably called a growing orientation toward academic theory, which takes the form of "law and other" courses, such as law and philosophy, but offers little or no law.

Almost concomitantly, however, the practice of law has marched in a totally different direction—toward commercialization. My former students report that law practice has become more like a trade than a profession, with an emphasis on money and profit rather than on service and justice. This upset my former students largely because it surprised them.

2. As indicated below, *infra* notes 79-82 and accompanying text, much of the economics of law practice depends on a high associate-to-partner ratio. Hence, any portrayal of a law firm that has, as of the fall of 1990, seven partners and three associates like the one in the television show *L.A. Law* must be regarded as unrealistic. In addition, the associates on *L.A. Law* frequently conduct their own trials, yet are rarely shown doing the tedious and time-consuming pretrial work generally required of young litigation associates. It seems inconceivable that intelligent and usually aware students could believe such a distorted depiction of reality, but my personal belief is that the popularity of *L.A. Law* and the 1987 collapse of the stock market are two reasons for the record number of applications to law school the last two years. See *infra* note 76 and accompanying text.

3. I had a strong desire to use the word "train" instead of "educate" but rejected it for two reasons. First, law schools abhor the image of training schools and do everything in their power to maintain their image as educators. See *infra* notes 26-29 and accompanying text. Second, I believe that young lawyers are dissatisfied partly because elite law schools give students little or no training in what it is like to practice law. The fallacy in such an approach is discussed *infra* at notes 96-99 and accompanying text.

Their idealized view of firm practice (based largely on summer clerkships and clouded by visions of how they would spend their “obscene” paychecks) was not the reality they discovered when they entered the legal profession. They had little accurate information about the practice of law in the late eighties and early nineties.

I know from my own experience in a large corporate law firm that the practice of law is constantly changing. The failure of law schools to adequately inform the students of these changes might partially explain the students’ ignorance about the real world of practice. Law firms are growing larger and becoming increasingly commercialized, and lawyers must adjust to the resulting changes. But recent graduates have no opportunity to adjust because they are unaware of the changes. Law schools continue to focus more on interdisciplinary, law-related studies and theories of law, and less on the realities of practice. Consequently, the gap between the students’ antiquated, idealized view of the law and the actual legal world they enter causes unexpected dissatisfaction.

That realization led to my final observation. I was struck by how little information about the legal profession is accessible to our students. This raises a larger and more important point: Why do we in legal education ignore the practice of law and view the legal profession only as a vehicle for a “law and other” studies? Why are there not more courses, articles, and empirical studies about the legal profession? The dissemination of such information would help prepare our students for the practice of law.

Those observations, distinct but related, have prompted the first of what I foresee as a trilogy of articles to address what I perceive to be the root of the dissonance between law school and law practice:

(1) Legal educators, with our increasing orientation away from law and the practice of law, are failing to adequately prepare students to practice law.

(2) The practice of law has undergone revolutionary changes (for the worse in my opinion) that need to be addressed by both the bar and the academy.

(3) Our students, caught with one foot in academics and the other in practice, must be exposed to studies of the legal profession while they are still in law school through the development and addition to our curriculum of courses that focus on the legal profession.

This Article focuses on the first issue: What is wrong with legal education? How have law professors helped to create the dissonance our

students feel when they enter legal practice? What role should law schools play in preparing students to become lawyers?⁴

Part I discusses the historical development of the mission of American law schools and concludes by examining the nature of legal instruction today and its utility for practicing lawyers. Part II briefly focuses on the changing nature of the legal profession and the emergence of the business ethos that threatens to overtake other norms inherent in the traditional practice of law. Part III details the failure of the current system of legal education to prepare students adequately for the practice of law in the 1990s. It points out that the debate today is not over the merits of clinical versus traditional legal education, but rather over the proper methodology of legal education, the information students should be given regarding legal practice, and from whom they should get that information. Finally, Part IV proposes some tentative conclusions (which will be fully explored in the second article of this trilogy) concerning ways to narrow the distance between legal education and legal practice. It includes a call for more traditional law teaching and the development of courses that study the practice of law.

I.

Given its historical antecedents, legal education has accomplished its primary goal of carving out a respectable niche for itself in academia. No serious debate exists any longer about whether law schools belong in the modern university.⁵ Law began to belong at universities when it began to be treated as a profession rather than a trade, which occurred when leading law schools adopted the Langdellian approach to legal study. This scientific method of inductively discovering legal principles by reading and analyzing appellate opinions created intellectual respect for the study of law and resulted in its acceptance as an academic discipline.⁶ Today, law schools not only fit into the framework of the modern

4. Because, as I have said, the three issues are related, from time to time I briefly address the second and third issues as well. However, they will be fully examined in subsequent articles.

5. See Ely, *Through A Crystal Ball: Legal Education—Its Relation to the Bench, Bar, and University Community*, 21 TULSA L.J. 650 (1986). Ely observed that:

Almost from the outset . . . some commentators questioned whether the law school was an appropriate addition to the university family. Writing early in this century, Thorstein Veblen contended that "the law school belongs in the modern university no more than a school of fencing or dancing." The core of Veblen's objection, of course, was the vocational emphasis which he perceived in legal education.

Id. at 652 (quoting T. VEBLÉN, *THE HIGHER LEARNING IN AMERICA* 211 (1918)).

6. See MacCrate, *Paradigm Lost—or Revised and Regained?*, 38 J. LEGAL EDUC. 295 (1988). MacCrate chronicled the Langdellian methods' origins:

university but have become indispensable. The thought of Harvard, Yale, Stanford, the University of Virginia, or the University of Southern California without a law school is inconceivable. Indeed, much of the prestige associated with august universities is attributable to the reputation of their professional schools, including, most prominently, their law schools.

However, the Langdellian view of legal education as an academic discipline is not without flaws; many have argued that it is schizophrenic, pulling legal educators in the two contrary directions of professionalism and academics.⁷ Professor Thomas Bergin has argued that “[b]y compelling true academics, or those who have the potential for serious scholarship, to play out a Hessian-trainer role, and by compelling highly skilled Hessian-trainers to make believe they are legal scholars, the disease dilutes both scholarship and Hessian-training to the advantage of neither.”⁸

During the first half of this century, the predominant mission of elite law schools⁹ was to train future lawyers. Academic scholarship, although not ignored, was secondary to the mission of training and producing practicing lawyers.¹⁰ Indeed, the articles published by legal

The current paradigm for the teaching of the law was formed in the late nineteenth century under the aegis of Christopher Columbus Langdell at Harvard, who implemented the analysis of appellate opinions as the basic method of law school instruction. . . .

....

. . . . At the heart of Langdellian theory was the postulate that the law was an inductive science whose principles could be discovered in cases. Further, the principles derived from empirical study were thought to be in turn free of moral values.

Id. at 295, 299 (footnote omitted).

7. See R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 264 (1983).

8. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 645 (1968).

9. What I call “elite law schools” include those most commonly referred to as the “top twenty.” Others call them the “high-prestige” schools. See e.g., Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 549 n.65 (1988). Everyone’s list of the elite schools is somewhat different; I follow that of Professor Chused, which is composed of the following 22 schools, in alphabetical order: University of California at Berkeley, University of California at Los Angeles, University of Chicago, Columbia University, Cornell University, Duke University, Georgetown University, George Washington University, Harvard University, University of Illinois, University of Michigan, University of Minnesota, New York University, Northwestern University, University of Pennsylvania, University of Southern California, Stanford University, University of Texas at Austin, University of Virginia, University of Wisconsin, Vanderbilt University, and Yale University. *Id.* at 549 n.65. See also Morse & Wagner, *The Best Graduate Schools*, U.S. NEWS & WORLD REP., April 29, 1991, at 74 (The top 25 law schools are all those on Professor Chused’s list except University of Illinois, and with the addition of University of California (Hastings), University of Iowa, University of North Carolina, and University of Notre Dame.).

10. R. STEVENS, *supra* note 7, at 270.

scholars of the day were written for the practitioner and not for the academic scholar.¹¹

However, professors who once trained prospective lawyers have, at elite law schools, become true academicians,¹² highly specialized and almost exclusively engaged in pure, as opposed to practical, research.¹³ The practice of law has also become increasingly specialized. What is interesting (and predictable), however, is that the evolution of specialization in practice has taken place in *practice* areas, such as mergers and acquisitions,¹⁴ that legal education, focused on such specialties as law and philosophy, law and economics, and critical legal studies, does not address.¹⁵ Even law school courses in, for example, Real Estate Transactions only prepare the student for practice in general and perhaps for the bar examination in particular. The disunity between the specialties required in legal practice and those taught in law schools reflects the failure of law professors to pay close attention to changes in legal practice.

One reason that law professors have increasingly focused on theoretical research rather than on the practice of law is that they have recognized the need for new legal theories. As legal realists ripped the law from its Langdellian moorings in the early part of the century, new theories were needed to provide a foundation upon which to build society's vision for the law.¹⁶ Legal realism filled the vacuum.¹⁷ In the fifties and

11. *Id.*

12. See *infra* notes 28-30 and accompanying text.

13. One commentator observed the following:

Law Reviews are filled with . . . grandiose reflections about political philosophy, legal history, and social order, topics with scant interest for busy practitioners. The audience for this latter category is really other professors or perhaps the occasional judge. There is widespread agreement that law review articles are too long and overly documented and that a significant split exists between the interests of many academics and the needs of the practicing bar. Put bluntly, much of what academic lawyers turn out in the name of scholarship is of little utility to the average lawyer.

Ely, *supra* note 5, at 654 (footnotes omitted).

14. For a discussion of what happens when a new specialty like mergers and acquisitions is no longer in demand, see *infra* note 49.

15. This has not happened in medical education. Medicine has become increasingly specialized, but the curriculum has responded with courses designed to train the students in specialized areas. See, e.g., UNIVERSITY OF VIRGINIA SCHOOL OF MEDICINE ELECTIVES 1990-1991 HANDBOOK 67 (1990) (offering a course entitled "Red Blood Cells and Catecholamines Metabolism").

16. I find it quite interesting and informative that the discussion focuses on the *theory* of law and not the *practice* of law. While law schools and academics have been searching for the correct underpinnings of the legal profession, the practice of law has grown at a staggering rate and has had to grapple with its own problems. See *infra* notes 37-50 and accompanying text. Perhaps someone can link the growth of the profession to the academic debate that has taken place over the theoretical grounding of the law; I fail to see the connection.

sixties, the process theorists began to counter the claims of the legal realists.¹⁸ More recently, theories have arisen in the areas of law and economics,¹⁹ law and philosophy,²⁰ critical legal studies,²¹ critical feminist theory,²² and critical race theory.²³

Because law reflects the increasingly diverse, pluralistic nature of our society, the study of law has been affected by challenges not only to basic critical assumptions, but also to the use of law as a societal tool with which to govern individual behavior. Feminists, scholars of color, proponents of critical legal studies, and others have attacked the traditional ideas of law and lawyering as elitist and reflective of white, male hegemony.²⁴ In this way the growth of pluralism in all of academia has found its way into law schools and embedded itself in law school curricula. Philip C. Kissam documented the advent of this pluralism:

The breakdown in traditional law school methods is also evident in the manifold types of contemporary legal scholarship now being published. . . . There are for example, many legislative policy studies,

17. The legal realists, led by Karl Llewellyn, see K. LLEWELLYN, *BRAMBLE BUSH* (1930), and Jerome Frank, see J. FRANK, *LAW AND THE MODERN MIND* (1935), attacked the view of Langdell and others that law and the ascertainment of correct law was an exact science. The legal realists asserted that the law was infected with societal values and biases and thus was not value-neutral and objective:

The Realists went a long way toward killing the idea of the system altogether. All legal logic came under suspicion. American law became increasingly purposive, increasingly secularized, and increasingly atomized. Whatever enhanced value this instrumental approach gave to social and political causes of the right and left as they sought to enlist the law on their side, law became less valuable as an objective force binding together different elements in the community. It was one thing to agree that legal objectivity and neutrality were myths; it was another to destroy such myths, providing as they do vital elements of social control, without offering any alternatives. Such an undermining of legal sinews proved to be the Realists' lasting monument.

R. STEVENS, *supra* note 7, at 156 (footnotes omitted).

18. For the seminal work in process theory, see H. HART & A. SACKS, *THE LEGAL PROCESS* (1958). For a summary and a critical legal studies critique of process theory, see Peller, *Neutral Principles in the 1950s*, 21 J. L. REFORM 56 (1988).

19. See, e.g., C.J. GOETZ, *CASES AND MATERIALS ON LAW AND ECONOMICS* (1984); R.A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986); R. COOTER & T. ULEN, *LAW AND ECONOMICS* (1988).

20. Cook, *Forward: The Post-Modern Quest for Community: An Introduction to a Symposium on Republicanism and Voting Rights*, 41 FLA. L. REV. 409 (1989).

21. M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); R.M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986).

22. See, e.g., Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 619 (1989).

23. See, e.g., Johnson, *The New Voice of Color*, 100 YALE L.J. — (1991); Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 706 n.5; Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 758 n.2.

24. For a discussion of the voice of color and the role that white, male hegemony has played in articulating a standard of merit that debases the value of color, see Johnson, "Racial Critiques of Legal Academia": A Reply in Favor of Context, 43 STAN. L. REV. 137 (1990).

much economic analysis of law, a significant literature on the sociology of law, and many philosophical excursions by law professors—all from various points of view. There are also hybrid sorts of literature that can fairly be described as “meta-doctrinal”; these articles examine legal doctrine from a nontraditional perspective by exploring the implicit rather than explicit premises, values and analytical methods that may lurk in the contingent masses of legislative and judicial materials.²⁵

Whatever the cause, in the last half-century the faculties of elite law schools have resolved their dichotomous mission—their role as both teachers of academics and trainers of lawyers—by identifying themselves as academicians first and foremost. One commentator predicted the plight in which law schools now find themselves and pleaded with them “not [to] lose sight of our basic discipline”.²⁶

As the scope and demands of scholarship broaden and intensify, some law teachers lose their way and find themselves in a limbo where they are no longer lawyers, but also not quite behavioral scientists. One of the worst things that could happen to legal education is that the law schools should join the already-long procession of university departments engaged in a wistful search for a subject matter. We need not search. Our mission, as it has been for the past eight hundred years in the universities of the Western world, is the study of law and the institutions of the law. Our duty is to make our thought and our teaching more effective.²⁷

Some would argue that the battle has already been lost, that legal education is currently engaged in a futile search for an identity. First, at the most prestigious law schools, professors are no longer hired for their experience or knowledge as practitioners.²⁸ Such a theoretical orientation has caused many to inveigh against law schools’ lack of emphasis on the actual practice of law.²⁹ Second and more important, as law schools have expanded their search for an academic foundation upon which to

25. Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251, 296-97 (1986) (footnotes omitted).

26. Cribbet, *The Changeless, Ever-Changing University: The Role of the Law School*, 26 ARIZ. L. REV. 241, 256 (1984).

27. *Id.* (quoting F. ALLEN, LAW, INTELLECT AND EDUCATION 57 (1979)).

28. The qualifications required for an entry-level academic position at our most prestigious law schools are subject to immense dispute and are beyond the scope of this Article. See, e.g., Johnson, *supra* note 23, at 146-49.

29. See Pye, *Legal Education in an Era of Change: The Challenge*, 1987 DUKE L.J. 191, 198-99. Indeed, I am not the first to argue that the study and practice of law have taken divergent paths or that law schools have become too academic. Jerome Frank, one of the early realists, made a similar argument:

ground the study of law, the legal academy has welcomed scholars whose primary interests are “anything but law” (ABL).³⁰ Many of these relatively new professors are committed intellectually and emotionally to their “other” subject and have chosen to teach at a law school perhaps because law professors are paid more than other academics.

Unfortunately, due both to their extra-legal intellectual interests in the “other” and to the changing nature of the legal profession, these “other-diverted” scholars are indifferent to the profession; many are cynical about the law generally and convey that sense to the students. As Jay Westbrook has pointed out to me, this dose of cynicism transmitted and *learned* by the students feeds the collapse of professionalism that is currently developing in practice.³¹

Consequently, legal educators have come full circle. Cries that the law school should not be included in the modern university because it provides training, not education, would be ludicrous today. Law schools, at least elite law schools, now attempt (poorly, I believe) to educate their students in economics, political philosophy, hermeneutics, and epistemology. Perhaps we are doing a splendid job of preparing our best and brightest students to become law professors, molded in our own image. However, for the remaining students something is missing, and I contend that the something may be the study of legal doctrines and legal rules beyond the first year of law school³² and the study of the legal profession *qua* legal profession.³³

The Law student should learn, while in school, the art of legal practice. And to that end, the law schools should boldly, not slyly and evasively, repudiate the false dogmas of Langdell. They must decide not to exclude, as did Langdell—but to include—the methods of learning law by work in the lawyer’s office and attendance at the proceedings of courts of justice. . . . They must repudiate the absurd notion that the heart of the law school is its library.

R. STEVENS, *supra* note 7, at 156-57 (footnote omitted) (quoting J. Frank, What Constitutes a Good Legal Education, Speech to the Section of Legal Education (1933), *cited in* E. LEE, THE STUDY OF LAW AND PROPER PREPARATION 29 (1935)).

Of course, Professor Frank’s position was a precursor to the call for clinical legal education in the 1960s. R. STEVENS, *supra* note 7, at 157. Here, I am not focusing on the ongoing debate concerning the role of clinical education in our legal curriculum. Neither am I referring to the now dead debate over whether law schools should serve merely as a training ground for future practitioners. Most, if not all, would agree that the so-called training function is not the primary mission of the law school. Thus, the answer is not more clinical legal education but increased study of the legal profession and the practice of law. See *infra* note 110 and accompanying text.

30. I owe this apt characterization to Professor Jay Westbrook of the University of Texas at Austin.

31. See *infra* notes 37-46 and accompanying text for a discussion of the decline of professionalism and the concomitant increase of the business aspect of the legal profession.

32. See *infra* notes 59-63 and accompanying text for further discussion.

33. See *infra* notes 106-16 and accompanying text for further discussion.

However, before we turn to those issues, we must briefly consider the radically changing nature of the legal profession. Professors have failed to recognize that the profession with which we are associated has become less like a profession and more like a business—a billion-dollar business—in which money is the only measure of success, and justice, fairness, and order rarely count. Litigation has become more complex, our society more litigious, and the number of lawyers has exploded—nearly doubled—in the last thirty years,³⁴ spawning a thirty-billion-dollar-plus-per-year industry.³⁵ Consequently, while legal education has marched in one direction, embracing fully the tenets of academia, the profession has reflected the hedonism of the eighties and has gone in the other direction, toward crass commercialism. Unfortunately, our students suffer the most from this divergence.³⁶

II.

Anyone who analyzes the legal profession today is immediately impressed by the growth and proliferation of large firms and the implications of this trend for the practice of law in the 1990s and beyond.³⁷ The profession of law is quickly evolving into the business of law, and, consequently, law firms are internalizing and reflecting certain business norms.³⁸ As a result, commentators report that there has been a phenomenal growth in the size and profitability of law firms.

The data over the last decade dramatically document the trend toward larger legal institutions. Firms are becoming behemoths. Today [1989], Baker & McKenzie has more than a thousand lawyers. . . . New York's largest law firms are exploding in size, and that growth reflects a national trend. . . . With the expansion in size has come a growth in revenues and per-partner profits.

34. See Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 571 (1983).

35. See Cutler, *Conflicts of Interest*, 30 EMORY L.J. 1015, 1016 (1981).

36. Professor Cribbet has enumerated the goals of legal education:

[We may believe] that future lawyers are being educated, (1) to assume direction of all phases of the areas of personal conduct inherent in a complex society and economy; (2) to provide a very large proportion of national leadership at all levels of authority; and (3) to serve, at little or no compensation, the needs of indigent criminal defendants and to participate, so far as a lawyer can, in the war on poverty.

Cribbet, *supra* note 26, at 251 (quoting A. CASNER & W. LEACH, *CASES AND TEXT ON PROPERTY* 3-4 (2d ed. 1969)). However, the vast majority of our students go on to practice in corporate law firms.

37. See, e.g., Fitzpatrick, *Legal Future Shock*, 64 IND. L.J. 461 (1989); Galanter & Palay, *Why the Big Get Bigger*, 76 VA. L. REV. 747 (1990).

38. See, e.g., Gilson & Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567 (1989).

. . . The firm earning the largest revenues . . . was Skadden Arps, \$290 million; the fiftieth largest firm had \$70 million in revenues; the one hundredth largest, \$45 million. Average per partner profits at Wachtell, Lipton in New York were \$1.4 million; at Cravath, \$1.2 million; at the fiftieth largest firm, \$285,000; at the one hundredth largest firm, \$155,000.³⁹

Most commentators predict that this trend toward growth will continue and will culminate in nationwide law firms with branch offices in every major business area of the country along the lines of the Big Six (formerly the Big Eight) accounting firms.⁴⁰

. . . The firms' growth and emphasis on profitability has also radically changed the ethos of the average firm. James F. Fitzpatrick commented on the phenomenon:

One of the most dramatic changes in the last third of this century in the practice of law is the loss of loyalty and "family" in law firms. A most remarkable phenomenon in American business and professional life for many decades was the stability of the American law firm. The lawyer who went with a firm planned, barring disaster, to stay there most of his career. . . . That bonding tradition is breaking down now and, unhappily, will become even less apparent in the future. We are entering an era where talented lawyers with a large book of business will be "at play" in the market, with firms bidding for those services.⁴¹

In addition, many other aspects of what has been regarded as traditional firm practice are changing rapidly. Firms are forming and breaking up at previously unknown rates. Similarly, they are becoming increasingly commercially aggressive and diverse.⁴² For example, the traditional

39. Fitzpatrick, *supra* note 37, at 462.

40. *Id.* at 462-63; *see also* Galanter & Palay, *supra* note 37, at 807 (comparing law firms' development to that of accounting firms:

Combining the shrinkage of the "promotion-to-partnership" core with the coverage-driven push toward greater size, more locations, and greater range of services lets us imagine giant national (or even international) firms that bear some resemblance to the "Big Eight" accounting firms in size and structure. Law firms might similarly rely on salaried employees and more bureaucratic systems of control, though conflict of interest problems might place an upper bound on the degree of possible concentration.

Id. (footnote omitted)).

41. Fitzpatrick, *supra* note 37, at 463; *see also* Rehnquist, *The Legal Profession Today*, 62 *IND. L.J.* 151 (1987) ("Institutional loyalty appears to be in decline. Partners in law firms have become increasingly 'mobile,' feeling much freer than they formerly did and having much greater opportunity than they formerly did, to shift from one firm to another and take revenue-producing clients with them." *Id.* at 152.).

42. Fitzpatrick, *supra* note 37, at 465. Robert Smider has cited several factors responsible for increased salaries:

All of this competition is putting pressure on California's aristocratic old firms. These firms must fill their ever-rising demands for excellent first year associates, while competing against starting salaries that may hit \$80,000 in New York this year [1987] or next. To add to the pressure, upstart law firms promise to double the salary of California rainmakers if

career pattern of an associate, according to which a lawyer either makes partner or is forced to leave the firm (what has been described as the promotion-to-partner tournament⁴³), is changing in response to the economic dynamism of today's practice.⁴⁴

More important, the role of corporate lawyers also appears to be changing. Some commentators believe that lawyers no longer act as independent, influential counselors to their clients but rather as conduits for information or insurers of their clients' activities.⁴⁵ Thus some contend that although "lawyers in large firms adhere to an ideology of autonomy in their perceptions of both the role of legal institutions in society and the role of lawyers vis-a-vis clients . . . this ideology has little bearing on their practice."⁴⁶

they jump firms. At O'Melveny, half a dozen partners have been wooed away by competitors since 1982.

Snider, *Inside the Megafirms*, CAL. LAW., Sept. 1987, at 32, 34.

43. See Galanter & Palay, *supra* note 37, at 780-84.

44. See Gilson & Mnookin, *supra* note 38. Snider also noted changes in the structure of law partnerships:

At other giant firms, the seven year track still endures. The twist is that those who don't make it in seven are beginning to stay on as permanent associates. The old up-or-out system—where associates ascend to partnership or leave—is breaking down.

Firms today [1987] are on the brink of creating a new class of lawyer, neither young associate nor profit-sharing partner. The designation "of counsel" previously denoted retired partners; now it can mean lateral hires or associates not voted in, yet not voted out. "What 'partner' means will undergo some changes," predicts managing partner Edward M. Leonard at Brobeck's Palo Alto office. "I think there's going to be some variation in the basic partnership structure."

Snider, *supra* note 42, at 37. Galanter and Palay noted the difficulties in maintaining new partnership structures:

For instance, the percentage of associates becoming partners seems to be declining in some firms, and the years to partnership have lengthened. In addition, law firms now [1990] make wider use of nonequity partnerships, paralegals, "temporary" attorneys, "second-class" associates with no expectation of making partner, and the practice of retaining as permanent associates those passed over for partnership. But each of these adjustments conflicts to some extent with the purposes and goals of the firms' tournaments. Slowing down a firm's growth potential in this manner creates difficulties in the compensation, recruitment, motivation, and retention of productive young associates.

Galanter & Palay, *supra* note 37, at 803.

45. See Kagan & Rosen, *On the Social Significance of Large Firm Practice*, 37 STAN. L. REV. 399 (1985).

46. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 504 (1985). Nelson analyzed the relationship between the practice of lawyers in large firms and their political, legal, and professional attitudes:

The dominance of client interests in the practical activities of lawyers contradicts the view that large-firm lawyers serve a mediating function in the legal system. . . . Although the growth of large law firms reflects the increased demand for legal services by corporations—and thus, by implication, the increasing importance of the expertise and organizational capacity that large firms offer—this does not mean that a more autonomous professional organization is emerging. If anything, trends in the organization of corporate legal services will widen the gap between the ideology of autonomy and a client-dominated practice.

Id. at 505.

Furthermore, as many have been noticing for years, the work habits of corporate attorneys have changed. Lawyers in large firms⁴⁷ are billing incredible hours and individual lawyers' practice at large firms has become increasingly narrow in focus even though the practice of law itself has expanded rapidly. As a result, the conception of well-rounded lawyers able to handle most, if not all, of their clients' problems is obsolete. Today, narrowly specialized lawyers are joining other lawyers with complementary specialties to create megafirms. Associates are trained upon entry into the firm in an area of specialization (often selected for the associate by the firm⁴⁸) and receive little, if any, work outside the specialty.⁴⁹ Observing this trend, Chief Justice William Rehnquist has hypothesized that associates are frustrated with their plight because the work is less than satisfying.⁵⁰

These changes in the practice of law raise intriguing questions about the role of legal education in the 1990s and beyond. Perhaps legal educators ought to inform their students of these changes. At the very least, students should have access to this information should they be interested in obtaining it. Yet law schools seem less interested in the legal profession than ever. They seem to see themselves as postgraduate academic centers that focus primarily on the study of society rather than the study of legal doctrines or of law as an institution. Meanwhile, law firms continue to focus neither on society as a whole nor on legal doctrines *per se* but rather on the business of law.

A sign of the divergent paths that legal academia and legal practice are currently taking is the changing nature of firm recruitment practices.

47. I consider a firm of fewer than 50 lawyers to be small, one of 50 to 100 lawyers to be medium-sized, one of 100 to 200 lawyers to be large, and one of 200 to 300 lawyers to be very large. Following Snider, *supra* note 42, I am calling any firm of more than 300 lawyers a megafirm.

48. Snider has documented this practice: "Robert M. Jason says O'Melveny & Myers decided early that he would be a municipal bond tax lawyer. 'They hadn't even consulted with me,' says Jason, who stayed three years at O'Melveny. . . . 'My recollection of [O'Melveny] is being in the library buried in the municipal bond regulations.'" Snider, *supra* note 42, at 37.

49. Rehnquist, *supra* note 41, at 153. Unfortunately, one consequence of this increasing specialization is that lawyers may find themselves out of work when their specialties become less profitable:

The boon for public-service law is spurred by hard times for associates at large New York firms that in the 1980s thrived on deals in junk bonds, real estate, and mergers and acquisitions. Now [1990] that the securities-industry boom is over, 750 to 1,500 New York associates have been fired, most in their second to fifth year of practice, according to legal-search consultants. Hardest hit are lawyers at firms specializing in corporate finance, tax, real estate and other Wall Street-related areas.

Gross-Glaser, *Firing Trends: Laid-off New York Associates Keep Headhunters Busy*, A.B.A. J., Aug. 1990, at 23.

50. Rehnquist, *supra* note 41, at 154.

Evidence suggests that megafirms and high-prestige firms are recruiting at law schools that they have previously shunned.⁵¹ Although this is a touchy subject that firms and law schools prefer not to discuss, many believe that firms are casting a much wider net to gather the appropriate fish. Obviously, one cause for this development may be that demand has outstripped supply.⁵² As the practice develops and these megafirms and high-prestige firms continue to grow, more bodies are required to fill positions.⁵³ It is not unheard of for some of the megafirms to offer more than seventy-five students permanent, entry-level positions in the same year.⁵⁴ Yet the elite law schools have not grown correspondingly.⁵⁵ Undoubtedly, this is a major reason that firms are hiring at schools they

51. Snider noted the trend toward expanded hiring:

Firms are not always hiring students from the top of the class. And they are recruiting from schools they wouldn't have dreamed of visiting before.

"Firms that are growing like crazy can no longer afford to limit their search to the top 10 percent of the top 10 law schools . . . They're going to have to go deeper into the class or go to perhaps 30 schools."

Grades are out as the sole hiring criterion; well-rounded candidates are in. The Brobeck firm's literature states, "Lawyers with a good sense of humor will have an added advantage" in the hiring process.

Snider, *supra* note 42, at 35. Galanter and Palay attributed the new hiring practices to growth in the profession:

[E]xponential growth poses an additional problem for the large law firm: Where will it find the ever-increasing number of associates it requires? Traditionally, the large law firm hired most of its associates right out of elite law schools. Presumably the firms believed that they could more easily find associates of a particular quality and productivity at these schools. But as firms have grown at ever-increasing rates, these schools have lost the ability to provide the necessary pool of associates. To make up for the shortfall of new associates graduating from elite schools, firms can . . . expand the pool of potential recruits [and] . . . hire from less prestigious law schools.

Galanter & Palay, *supra* note 37, at 804 (footnotes omitted).

52. Gilson and Mnookin have addressed expanded hiring practices and the diminishing role of elite law schools:

The business of major corporate law firms and, hence, their demand for associates, appears to be growing so fast that the traditional sources of new associates—elite national law schools—no longer provide an adequate supply. The least restrictive version of the familiar story told by major law firm recruiters is that their firms hire as new associates only law students in the top half of their class at, say the top twenty law schools. It now appears that this source of associate supply does not meet current firm demand.

Gilson & Mnookin, *supra* note 38, at 589 (footnotes omitted).

53. Gilson and Mnookin provided interesting statistics:

One commentator recently calculated that in 1986, a total of 6080 students received law degrees from schools comprising his top-twenty list, resulting in 3040 graduates in the top half of their classes. He then calculated that 4807 new associates began working for the top 250 law firms that year, a number that exceeded the supply of top-half, top-twenty graduates by some 58 percent.

The clear implication of this calculation is that major firms may have begun to hire from a different and perhaps less capable pool of associates than in the past.

Id. at 589-90 (footnotes omitted).

54. See Snider, *supra* note 42, at 35 ("More than 75 associates are joining Gibson, Dunn this fall [1987], for example, and Latham & Watkins has just hired about 70. In the meantime, expansion of law schools peaked in the 1970s and the number of graduates has remained the same.")

55. *Id.*

have traditionally ignored.⁵⁶ The recent effect of the Wall Street crash of 1987 and the recession has slowed the pace of firm growth and its concomitant recruitment. However, given the structure of the firms⁵⁷ and the cyclical nature of the economy, I view this slowdown as a relatively short-term development that will not materially affect firm growth and size.

On the other hand, perhaps a more disquieting reason explains why these firms are willing to expand beyond their traditional horizons. Practicing attorneys have mentioned to me their increasing dissatisfaction with the graduates of some elite law schools. These incredibly bright graduates may have tremendous ability to assimilate both legal education and legal practice but have no idea what practice entails and have no desire to discover its intricacies when forced to confront it. Faced with the pressure and demands placed on young associates at large firms, they express their dissatisfaction by leaving the firms. They have no incentive to stay and try to change the firms, because most of the power in a firm hierarchy is vested in senior attorneys who benefit economically from the maintenance of the status quo.⁵⁸

But even if new associates stayed at their jobs, problems would remain. Legal educators at elite schools produce what they must perceive to be a finished product, one capable of entering the practice of law upon graduation.⁵⁹ Law firms, however, view that finished product as, at best, a diamond in the rough. They still must educate new associates about the intricacies of the practice of law. From the perspective of these

56. See Jensen, *Perks: When Salaries Aren't Enough*, NAT'L L.J., June 22, 1987, at 1, col. 1 (describing expanded law school recruiting and hiring by some of the megafirms), cited in Gilson & Mnookin, *supra* note 38, at 590 n.67; see also Snider, *supra* note 42, at 35 ("Recruitment can take megafirms to Arizona State, Marquette, Miami, Tulsa, St. John's and Wake Forest—universities better known in the sports pages than in law journals . . . 'All law firms are having to take a few more risks than they would have had to before.'" (quoting William W. Vaughn, litigation departments head at O'Melveny & Myers)).

57. See *infra* notes 79-81 and accompanying text.

58. *Id.*

59. For the purpose of this Article, I will ignore the entry barrier presented by most state bar examinations and the degree to which legal education does (or does not) prepare students to surmount that barrier. However, it is important to briefly consider elite schools' attitudes towards state bar examinations.

It is common knowledge that most elite schools quite appropriately do not design their curriculum to improve their students' chances of passing a particular state bar exam. Most elite schools are national law schools and therefore do not focus on any one state's laws, including the laws of the state in which the school is located. On the other hand, something is wrong when law schools point to their students' low bar passage rates as a badge of their elite status. And there is something perverse about a legal education that forces students to spend additional money and time learning black letter law for the bar examination after three years of education and instruction.

firms, law schools do not produce lawyers.⁶⁰ Some megafirms have adapted so well to this state of affairs that they actually prefer to train their attorneys within their own systems.⁶¹

Yet law firms do rely on law schools. First, they depend on the sorting process of elite law schools' admissions decisions. That is, firms prize law students not for what they have learned about law but rather for the intelligence and potential that law schools rewarded by admitting them. We at elite law schools serve as gatekeepers to the legal profession through our decisions regarding whom to admit. Because a law school admitted "Recruit X," who went to an undergraduate school without a national reputation and who took courses about which a law firm knows little and cares even less, the law school has put to rest the firm's anxieties about "Recruit X" 's intelligence and adaptability.

Second, firms depend on the sorting process law schools create when they require first-year students to take the same courses. Some schools go further and "objectively" sort the students by intelligence⁶² via a mean grading system that ensures a uniform grading policy in the first year curriculum.

And, third, given the collapse of rigor at the undergraduate level, firms depend on law schools to teach students to think analytically during the first year. That is, although we legal educators have embraced fashionable "other" disciplines and have ignored the profession and practice of law, legal education successfully teaches students the marketable skill of rigorous, analytical thinking only by largely excluding these "other" courses from the first-year curriculum. Indeed, many larger law firms consider legal education beyond the first year superfluous to the firm's mission of recruiting, training, and retaining lawyers.⁶³

60. My basis for this claim is my own experience at Latham & Watkins and conversations with former students whose experience coincides with my own.

61. A personal anecdote may illustrate this point. After I clerked the summer between my second and third years of law school at Latham & Watkins and accepted an offer to join the firm following graduation, I asked members of the recruiting committee which courses they thought I should take to prepare for law practice at Latham. They did not advise me to enroll in any particular courses, but they did advise me *not* to take trial advocacy even though I planned to pursue a career in litigation. The firm wanted to train me to litigate the "Latham & Watkins way." Former students report similar experiences. Theodore Voorhees has published a book to help law firms make up for law schools' deficiencies. T. VOORHEES, *THE PRACTICAL LAWYER'S MANUAL OF LAW OFFICE TRAINING FOR ASSOCIATES* (1969).

62. This assumes, perhaps erroneously, that the more successfully students perform on exams, the more intelligent they must be.

63. My basis for this claim is my own and others' experience in practice.

I am not arguing that law schools should confine themselves to sorting students and teaching them to think precisely and analytically: far from it. Rather, I am observing that recent developments in the marketplace lead one to question how well the elite law schools are performing their role as providers of raw talent.

What this portends for the future of the legal profession and legal education is anyone's guess. I envision one scenario in which law schools become so specialized and stratified that students at some schools study everything except the practice of law (the "academic model" of law school) while students at other schools study only the practice of law (the "practitioner model" of law school).⁶⁴ Some would argue that even the practitioner model schools do not actually prepare students for the practice of law. Rather, by rote memorization they prepare students for the bar exam. Thus they disserve legal education just as much as the elite schools do.⁶⁵ But even if they truly prepared students for practice, the practitioner model schools would still distort the role that legal education should play in our society just as the academic model schools do. Chief Justice Rehnquist has drawn an apt comparison:

[T]he profession of law [is like] a multi-legged stool—one leg is the practicing bar, another leg is the judiciary, another leg is the academic lawyers [i.e., professors], another leg the government lawyers. No leg of the stool can support the profession by itself, and each leg is heavily interdependent on the others.⁶⁶

64. My unscientific survey of colleagues reveals that Yale is a leader among the academic-model schools; proportionately more clerks and law teachers graduate from Yale than from any other school because of Yale's superior academic reputation. Yale is joined by other elite schools in producing the vast majority of the law professors in the country and the overwhelming majority of law professors at the elite schools:

Sixty percent of the nation's law teachers at the 160 accredited schools ha[ve] been produced by 20 schools (Harvard, Yale, Columbia, Michigan, Chicago, NYU, Georgetown, Texas, Virginia, Berkeley, Pennsylvania, Wisconsin, Northwestern, Stanford, Iowa, Illinois, Minnesota, Cornell, Duke, and George Washington). At the 20 most prestigious schools, 90 percent of the faculty [are] from these 20 schools.

R. STEVENS, *supra* note 7, at 287 n.83 (citing Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501, 508).

65. Professor Cribbet has criticized taking too narrow a view of law schools' role:

If a legal education is designed solely to prepare the student to pass a bar examination, to know the rules (whatever that may mean), and to learn "the tricks of the trade," then the law school does *not* belong in the modern university. These things can be handled outside the academy and with far less of an expenditure of time, money, and energy. Such a design would also result in an unlearned bar and in lawyers ill-equipped to serve the needs of a complex, democratic society. . . . To the extent that law schools see themselves in such a narrow role, they are sowing the seeds of their own destruction.

Cribbet, *supra* note 26, at 250-51.

66. Rehnquist, *supra* note 41, at 157.

Thus, a law school without any concern for the goals of the practicing bar is useless. Conversely, law schools that serve only as training schools reduce the profession to a trade like plumbing or carpentry. Hence, those of us who are concerned with the future of legal education must increase the study of *the law* in our elite law schools. This will ensure that academic lawyers maintain contact with the practicing bar and will prevent law schools from deteriorating into trade schools. We must not abdicate the study of law either to those who adopt wholly the "other" philosophy or to those who adopt the rote memorization of law as a prelude to a bar review course. Both have their place in our law school curriculum,⁶⁷ but when either predominates, legal education fails in its mission to students, to the bar, and to society.

Professors should also play a subtle third role: Perhaps we can influence the profession away from the view that money is the only gauge of successful lawyering. Through our students we may be able to infuse into the profession the concept that legal issues that affect society in fundamental ways are much more meaningful than the bottom line. Further, we as teachers may pass on the belief that lawyers have a *duty* to look to social issues beyond the bottom line. I do not think it is coincidental that as we in academia have increasingly removed ourselves from practice, legal practitioners have adopted views antithetical to the ideals of justice, fairness, and equality, favoring instead the goals of money and profitability.⁶⁸

The balance between academics and practice is a difficult one to maintain, one that the academy has grappled with for over a century.⁶⁹ But the increasing distance between legal education and the legal profession raises new questions about the balance as the gulf between education and practice manifests itself in disillusioned attorneys who are leaving their jobs, and even the profession, in droves.

The implications of this disillusionment are alarming. The best and the brightest will continue to attend law school because a legal degree is flexible and attractive in our increasingly complex, litigious society.⁷⁰ However, if they are not interested solely in making money, they may

67. For example, a procedure course taught at the University of Virginia School of Law is designed specifically to teach Virginia's procedural and jurisdictional rules to students who intend to practice there. UNIVERSITY OF VIRGINIA COURSE OFFERING DIRECTORY 1990-1991. That course, however, is clearly the exception; nor should it be the norm for the law school curriculum.

68. See *supra* notes 38-42 and accompanying text.

69. See R. STEVENS, *supra* note 7, at 232-47.

70. But observe the reactions of these students when they enter practice. See *infra* notes 72-77 and accompanying text.

leave practice to become writers, actors, anthropologists, or musicians. The impact on the expanding profession and practice of law will be devastating. Who will be left? The least and the dumbest, along with those of the best and the brightest who seek only economic success? If legal practice does not begin to match students' expectations, the profession may suffer a "brain drain" of catastrophic proportions. This deleterious result can be avoided in one of two ways: Either law schools can begin to inform students about the practice of law so that students may make an informed choice about their future careers, or law practice at large firms can begin to accommodate the social and academic needs of associates.⁷¹

III.

*More Lawyers Would Rather Do Other Work*⁷² is the title of a recent news article that details the frustrating plight of a large percentage of recent law school graduates. They enter the profession, discover that practicing law is not as rewarding as they thought it would be, and choose to leave the profession.⁷³ What is truly disconcerting is that starting salaries in excess of sixty or seventy thousand dollars a year⁷⁴ are not enough to keep them at their firms or even in the profession. Strangely, at the same time that these new lawyers are expressing dissatisfaction at a troubling rate,⁷⁵ applications to law schools are at an all-time high.⁷⁶

71. Accurate information about what practice is really like may cause students to abandon their studies. But I hope instead that it will encourage students to pressure law firms to accommodate their needs. I will address this latter possibility in the second article of this trilogy. See *supra* notes 3-4 and accompanying text. Briefly, however, I believe that firms will not accommodate associates unless associates achieve significant power within the firm—an unrealistic condition given the way firms are currently structured. See *infra* notes 79-81 and accompanying text.

72. *More Lawyers Would Rather Do Other Work*, The Daily Progress, Oct. 12, 1989, at D6, col. 1 [hereinafter *More Lawyers*]. A recent *National Law Journal* poll reported that more than twenty percent of the lawyers surveyed were either somewhat or very dissatisfied with their careers. *Loving the Law*, USA Today, June 29-July 1, 1990, § 1A, at 1, col. 1.

73. *More Lawyers*, *supra* note 72.

74. Snider, *supra* note 42, at 35 ("To compound recruiting difficulties, Wall Street firms continue to hike starting pay well above what their California peers want to offer. Last year's [1986] 'Cravath crisis' began when New York's Cravath, Swaine & Moore adorned its incoming class with \$65,000 salaries—\$75,000 for those who had clerked for a judge.").

75. A 1984 *American Bar Association Journal* poll of lawyers found that 41% would rather do something else. Career counselors say the rate of dissatisfaction may be as high as 50% among big-city lawyers today, with lawyers flocking to seminars on how to change professions. *More Lawyers*, *supra* note 72, at 35.

76. Boalt Hall Law School of the University of California at Berkeley, for example, had a 29% increase in applicants last year, the biggest jump since 1972. *Id.*; see also *Applications Up*, LAW SERVICES REP., April-May 1988, at 1.

What is going on out there? I suspect that these new lawyers are learning the hard way that their large salaries are in fact barely adequate compensation for difficult, demanding jobs that require them to be effectively on call twenty-four hours a day.⁷⁷ Moreover, many are learning that the glamorous legal jobs they envisioned are not only decidedly unglamorous but downright trivial and boring.⁷⁸

Clearly, part of the blame for these ills must be placed squarely at the feet of the practicing bar. In their ever-increasing zeal to make more and more money, to become the biggest and best law firm with the most exciting clients, law firms may have become legalized Ponzi schemes⁷⁹ in which the blood and sweat of new associates lines the pockets of the

77. *More Lawyers*, *supra* note 72 (“Associates in large firms are required to bill between 1900 and 2300 hours a year, which means working 60 to 80 hours a week” (quoting career counselor Martha Fay Africa)). Snider also addressed the demand for billables:

No California giant runs harder than Latham & Watkins, where last year [1986] the average annual billing per attorney was close to 2,100 hours. Though continuing to turn down work, the firm is much busier than it was even two years ago While Gibson, Dunn associates are salaried, they aren't any less busy. Says associate Amy R. Forbes, still at her desk one recent weeknight at 10 p.m., “There's an excruciating amount of pressure—every one has a can-do attitude. You're constantly wondering, “Am I doing well enough?””

Snider, *supra* note 42, at 35-36.

Some believe that the large-firm attrition may be attributed to the long hours that accompany high salaries:

Research within the legal profession shows that in the first three years of practice, nearly half of all lawyers change firms. . . . Young lawyers fresh out law school get \$60,000 to \$65,000 a year to start in large downtown firms, but they soon find they pay dearly for their high salaries. They often work until 10 or 11 at night and weekends.

More Lawyers, *supra* note 72.

78. The Daily Progress article elaborated:

Frustrated lawyers typically complain that they are required to sacrifice a personal life for endless hours of meaningless paperwork. They say they end up helping ungrateful corporations instead of individuals and suffer the wrath of working people who blame them for much of what's wrong with society. Stinging lawyer jokes are plentiful.

More Lawyers, *supra* note 72.

79. These are pyramid schemes in which earlier investors are paid with the investments of later investors. The scheme continues to work only if new investors are continually lured in at an exponential rate. Law firms can be analogized to Ponzi schemes in that they require a large number of new associates to bill tremendous numbers of hours so that a small number of partners can be paid exorbitant salaries. The only way these new associates can profit as much as the partners do is by bringing in an even larger number of new associates to bill a tremendous number of hours when they themselves are partners. Hence, the rapid growth of law firms in the past decade:

Under the conventional model, law firm profitability became a “Ponzi scheme”: Adding a partner lowered the line of demarcation on the pyramid between profit sharer and profit contributors. This reduced average partner income unless productive associates (profit contributors) were added in a ratio equal to that existing before the admission of the new partner.

Bower, *Rethinking Law Firm Organization—The New Pyramid*, A.B.A. J., April 1989, at 90; see also Snider, *supra* note 42, at 37 (“Some current associates wonder if there will be room at the top for them. Is the partnership track just a disguised pyramid scheme whose victims will be the last ones hired?”).

senior members of the firm.⁸⁰ The structure of the law firm under "promotion to partnership" causes exponential growth that the firm must maintain.⁸¹ Thus, law firms have been forced to focus on profit, with the result that associates must work more and more hours on projects that a few years ago the firm perhaps would not have accepted or would have given to a paralegal.⁸²

One might ask at this point, so what? Who cares if new lawyers are unhappy? Law, like medicine, dentistry, or any other profession, is a business, and young lawyers should simply adjust.

This response raises normative issues,⁸³ but it raises descriptive ones as well. I believe that the methodology of legal education, not just the proliferation of "law and other" courses, fails to prepare law students to face the more unpleasant realities of modern law practice. As law professors' academic horizons expand to include philosophy, hermeneutics, economics, epistemology, and whatever else is currently in vogue,⁸⁴ law students at elite schools obtain a fairly diverse, well-rounded education that not only teaches them to think like lawyers⁸⁵ but also teaches them about academic disciplines they failed to encounter in their undergraduate or postgraduate education. However, a law degree is not supposed to be a substitute for a good advanced liberal arts degree.⁸⁶ As a colleague pointed out to me, if a law degree were merely a broad liberal arts degree, we would have difficulty defending the fact that we pay law professors

80. See Snider, *supra* note 42, at 34 ("These dollars translate into sizable per-partner profits—\$570,000 at Latham & Watkins, which ranked eighth nationally in that category in this year's [1987] *American Lawyer* survey. Profits per partner at other big firms in California ranged from \$215,000 at Pillsbury, Madison & Sutro to \$410,000 at Gibson, Dunn.")

81. Snider forecasts no end to the expansion:

As the megafirms lumber into the next century, many wonder where expansion will end. When present managing partners were starting out, no one could conceive that law firms would accommodate even 100 lawyers. Today [1987], leaders of the Brobeck firm see no barrier to having 700; Gibson, Dunn administrators say 1000 would be no problem; Latham & Watkins' growth plan projects more than 1,000 lawyers by century's end; and O'Melveny and Pillsbury partners say there are no growth ceilings. Baker & McKenzie, the worldwide partnership based in Chicago, already has exceeded 800.

Id. at 37. See also Galanter & Palay, *supra* note 37, at 806-11 (describing the different types of law firm that huge growth might produce).

82. See *supra* notes 37-49 and accompanying text.

83. These normative issues will be addressed in the second article of this trilogy. See *supra* note 4 and accompanying text.

84. See *supra* notes 12-15 and accompanying text.

85. The phrase "to think like a lawyer" today means, more or less, to be capable of independent thought, a highly prized attribute in today's hierarchical, technocratic society.

86. Further, there is a distinct possibility that law schools cannot provide a good advanced liberal arts education because many of the "law and other" courses are taught by people who are uninterested in "law" and unqualified to teach "other."

approximately double what we pay liberal arts professors. Law school is not liberal-arts graduate school; we pay law professors high salaries because teaching law is different from teaching other disciplines.

At best, elite law schools prepare their top five students to become law professors but fail to prepare the rest of their students to become practicing lawyers. Not only do they fail to educate their students in legal doctrine and rigorous analytical thinking beyond the first year, but they also fail to impart the proper state of mind for legal practice. Elite law school education contrasts starkly with the reality of practice, and students suffer as a result. In legal education we encourage students to explore the relationship between law and other academic disciplines, and then we send them out into the real world unable to practice a kind of law that rarely recognizes law's relationship to anything but money. We teach them to think like lawyers while they are students, but as junior associates they are treated like drones who must suppress their individuality and intelligence for the good of the firm's bottom line. The discordant emphases of legal education and actual practice are the root of the dissatisfaction that new lawyers experience.

Finally, I believe that the dissonance students feel during their early years in practice is also directly attributable to the lack of information about what the practice of law truly entails. This often leads to something like market failure. For example, if one views the legal profession in economic terms, recruiters who descend upon law schools can be analogized to the sellers of goods because they attempt to sell the top law students on their firms. The law students are the "buyers" of these goods in the sense that they choose firms from among many offered to them.⁸⁷ Their choices benefit the buyers, who gain a stream of income and rewarding work, and benefit the sellers, who gain the best attorneys (judged by profitability, return on investment in training,⁸⁸ and development of client base). If the market works efficiently, the student-buyers

87. One can argue that each party to this transaction is acting, to some degree, as both buyer and seller. Law students must sell themselves and their credentials to interest the firms. At this point the roles are reversed and the firms try to sell their product in competition with other firms. I have chosen to simplify the process by casting firms as the sellers and the students as the buyers. My unscientific sampling of my former students reveals that most of the students who have expressed dissatisfaction with firm practice were among the most highly recruited.

88. One student investigated the cost to firms of new associates:

The cost of a first year associate, in "hard" (as opposed to "soft" or attorney time) dollars, was estimated by one firm to run as high as \$500,000. The expenses included office space, professional and health insurance, moving expenses, bar expenses, secretarial salary and benefits packages.

Note, *Summer Associate Programs: It Pays to Advertise*, 39 U. MIAMI L. REV. 1019, 1030 (1985) (authored by Eric F. Gebaide).

select the Pareto-optimal firm, meaning that neither the students, the firms, nor the clients could benefit more without making someone else worse off.⁸⁹ A market failure occurs, however, when resources are used in a less-than-optimal way. I contend that information asymmetry has led to a market failure in the allocation of resources in the legal profession.⁹⁰

The information asymmetry occurs because the sellers of the good—the large law firms—have an incentive to hide the realities of practice at their firms so that students will believe that the firms will be ideal places to work. Likewise, students possess information about themselves that they may be unwilling or unable to disclose to the firms. Both parties may act strategically to increase their respective positions in the marketplace. For example, students may overestimate their ability to do the work or maintain the billable hours required by their firm's profit projections. Similarly, law firm summer programs⁹¹ may mislead students concerning the demands of firm practice and the difficulty of maintaining the required billable hours. Such strategic behavior hampers the free flow of information between the parties. The result is a mismatch between the students and the firms. This in turn leads to higher transaction costs in the form of firms' investment in training lawyers who leave after a year or two and lawyers' start-up costs when they join new firms.⁹²

Law schools and legal educators have not helped to correct the lack of information despite urgings from the bar and the bench.⁹³ First and

89. See R. COOTER & T. ULEN, *supra* note 19, at 49-50, for further discussion of Pareto efficiency.

90. Cooter and Ulen discussed the relationship between lack of information and market failure: The fourth source of market failure is a *lack of information*, for example, about who is selling the desired good or about the quality of goods offered for sale. It is often the case that sellers know more about the quality of goods than do buyers. . . . When sellers know more about a product than do buyers, or *vice versa*, information is said to be distributed asymmetrically in the market. [S]evere asymmetries can disrupt markets so much that a social optimum cannot be achieved by voluntary exchange.

Id. at 48 (emphasis added). Market dysfunction also exists because student-sellers seem to believe that their grades and their schools' reputations are accurate measures of the product for sale. They are therefore unable to inform firm-buyers of the true quality of the product. Even if students do not believe otherwise, the market dysfunction will continue because many firms will not believe otherwise. For example, even though megafirms are expanding their recruiting efforts to feed their voracious appetites for associates, see *supra* notes 51-57 and accompanying text, they will still probably pass over students in the middle of their classes at nonelite law schools.

91. See Note, *supra* note 88.

92. See R. COOTER & T. ULEN, *supra* note 19, at 100-102.

93. Professor Danner noted the deficiency in information provided at law schools:

Ten years ago [1979], I would have recommended that the standard law school curriculum should include a course (or two) on the institutional aspects of law firms and that law school faculties should take the initiative in exploring the secrecy-shrouded world of large

foremost, the legal academy's repudiation of the training function⁹⁴ has caused law professors to shy away from teaching law in law courses. This reactive, narrow view of the study of law misconceives the scope and purpose of what legal studies and the legal profession should entail. Many have confused the study of law and the legal profession with the training function normally associated with clinical programs or have incorrectly assumed that one necessarily leads to the other. As a result, I contend that the academic community has shied away from the study of law and the legal profession because of the questions such a study could raise concerning the "educational mission" of the law school.⁹⁵

The consequence of the academic community's aversion to anything that smacks of training is that law schools now cannot provide meaningful information about law practice even if they want to. This is so because law schools hire scholars of law and philosophy and law and economics but not, to my knowledge, scholars of law and the legal profession or law and the practice of law. Quite the contrary: Those with such expertise are presumptively disqualified from teaching at many of our elite schools.⁹⁶

Consequently, law students learn about legal practice from law firms, without any guidance from a neutral third party such as a member of the academic legal community.⁹⁷ Some find this acceptable given both the number of articles in the popular press about the practice of law and the fact that law students customarily spend their summers working at law firms.⁹⁸ However, summer associate programs, no matter how

law firms. The basic premise was, and is, that more information will produce more information on all sides. . . .

. . . [L]aw schools have an important role to play in the development of further information about the large law firms and in the reflective analysis of the data.

Danner, *Looking at Large Law Firms—Any Role Left for the Law Schools*, 64 IND. L.J. 447, 459-60 (1989); see also Rehnquist, *supra* note 41, at 154 (arguing that the academic community must devote more attention to the issues raised by the existence and operation of large firms).

94. See *supra* notes 9-29 and accompanying text.

95. *Id.*

96. See *supra* note 28 and accompanying text.

97. I mean "neutral" in the sense that the academic legal community has no incentive to engage in strategic behavior regarding the claims it makes about legal practice or the quality of an individual student. See *supra* notes 87-92 and accompanying text.

98. See Danner, *supra* note 93, at 453 ("No longer can we urge law schools to become the pioneers in developing information about law firms. The legal press has already seized the initiative in exploring this territory. Summer clerking has also contributed to the flood of public information about large firms.").

informative,⁹⁹ are no substitute for the information that legal educators could and should provide.

It is true that some students investigate legal practice on their own. Frequently, such students choose not to buy into the fiction that bigger is better and that money and big-law-firm prestige *are everything*. A few years ago I believed that large-firm practice provided lawyers with the most interesting challenges; I would have found it odd and quite disturbing if one of my best students had selected a smaller, boutique firm instead.¹⁰⁰ Yet recently I wholeheartedly endorsed a bright former student's decision to forego big-firm practice in favor of practice in a much smaller firm. The student chose less money (and, by some accounts, less prestige) in favor of more life outside the firm.¹⁰¹

But even though a few students do independently evaluate their practice options, the fact remains that the great majority of students must make career choices without adequate information and with only one year of traditional legal education. Some make the right choice and

99. The information that summer programs provide is of questionable quality because the programs seem to exist primarily to advertise the benefits of the firms to future associates. See Note, *supra* note 88, at 1030; see also Snider, *supra* note 42, at 35 ("Some of the lavish [summer] programs entail weekends in the Sierras, river rafting expeditions, yacht parties in Newport Bay and the best seats at the Hollywood Bowl and Universal Studios Amphitheater.").

100. Boutique firms represent a recent development in the legal profession. They are small firms that specialize in one area of the law and resist the growth urges that appear to attack megafirms. More important, they apparently value the lifestyle of the associates as well as the firm's profitability. See Snider, *supra* note 42, at 32 ("California's megafirms are responding to unprecedented competition in the state's legal marketplace. Boutique law firms, for example, now counsel clients in such specialties as health care and microcomputing."). Galanter and Palay also discussed the boutique firms' emergence:

The "boutique" firm is one that seizes upon the specialization, rationalization, and marketing themes of the big firm, but abandons the aspects of hierarchy, coverage, and size. The term "boutique" has come to refer to those highly specialized small firms residing in the corporate hemisphere. These firms cultivate their comparative advantage in selected specialties and suppress any push toward more general coverage in order to maintain their attractiveness for referral work from big firms. Despite their size, such firms compete with big firms for lawyers. Typically, though, these firms have a lower ratio of associates to partners than do big firms.

Galanter & Palay, *supra* note 37, at 808-09.

101. This lifestyle choice is similar to one faced by practicing lawyers who are considering becoming law professors: Do they remain in practice, with its much higher salary and unpleasant lifestyle, see, e.g., Fowler, *Attorneys Plagued with Stress*, Daily Progress, Jan. 28, 1990, at C5, col. 1, or do they join academia, with its much lower salary but beneficial lifestyle? Notice that I did not indicate that teaching requires fewer hours than practice. As an associate who spent four years in practice and billed a fair number of hours, I believe that one can work as hard, if not harder, in teaching than in practice.

The difference is in both the nature of the work and one's interest in the work. It is a lot more interesting and enjoyable to prepare a law review article on a subject in which one is interested than to prepare answers to a set of boilerplate interrogatories. And one works harder on matters that are intrinsically interesting and rewarding.

some make the wrong one. Students who choose wrongly should not be told that the blame is wholly theirs because they did inadequate independent research on the practice of law. No student should be forced to do such important research without guidance. The legal profession is as much a legitimate area of inquiry, scholarship, and teaching as any other. We are doing a disservice to ourselves, our students, and the profession if we continue to ignore the interesting questions that the profession of law raises.

IV.

As the chasm between legal education and practice continues to widen, law professors and law students must address the following question: What should be done to rectify the problem?

Some have suggested clinical programs as a total or partial solution. However, clinical programs are too narrowly focused.¹⁰² The issue is not whether the student can adequately cross-examine a witness, take a deposition, or manage a small case. Rather, the issue is whether we are giving our students the skills and legal knowledge they will need and whether we should inform them about the nature of practice. Clinical programs do not address this issue.¹⁰³

A number of steps can be taken to ease the dissonance between legal education and the legal profession. Some would argue that these steps have been taken by practitioner-model schools, which proclaim to the world that they are designed for the law student interested in the practical, real-world aspects of lawyering, not the theoretical fluff of the elite schools.¹⁰⁴ However, the practitioner model does not resolve the issue. First, my anecdotal impression of practitioner-model schools is that they

102. Howard R. Sacks described legal clinics:

Legal clinics train students in the skills of a lawyer by involving them in actual legal cases. Students practice legal skills as they assist actual clients. Under instructor supervision, students gain valuable insight into contemporary legal problems and into the nature and structure of legal institutions and agencies. . . . Legal clinics are thus a forum for the development and exercise of the skills and knowledge gained in the classroom.

Sacks, *Clinical Legal Education at the University of Connecticut School of Law*, 16 CONN. L. REV. 765 (1984).

103. I am not trying to minimize the role of clinical programs in legal education. That often-debated topic is beyond the scope of this Article. I do feel, however, that the debate over the role of clinical programs has obscured the larger issue: Are we in legal education adequately preparing our students for the rigors of practice that await them? In other words, clinical legal education may provide students with additional, and some would argue better, skills with which to practice law. However, clinical legal education does not prepare students for the time demands and pressures entailed by the practice of law.

104. See *supra* notes 64-67 and accompanying text.

focus not on the practice of law but rather on the rote memorization that will help students to pass the bar.¹⁰⁵

More important, even if practitioner-model schools did focus on practice, the problem of what should be done at the elite schools would remain unsolved. Faculty and students at elite schools must reexamine the purpose of legal education. I hope that they will conclude that the proper emphasis in legal education should be the normative and predictive role that law plays in our society. I hope that they will conclude that "law and other" courses should emphasize the "law," not the "other," and should provide no more than an enriching additional perspective.

One immediate possible solution to students' dissonance is to add courses to the law school curriculum about the challenges students will face in the legal profession.¹⁰⁶ Although this will not resolve the problem created by legal education's misplaced emphasis on "law and other," it will give the students some practical, useful information. It may even create future proponents of a radically different legal profession that embraces traditional values such as justice and fairness.

Thus, I believe that courses on the structure of megafirms and the practice of law at such firms should be added to the curriculum.¹⁰⁷ I have often thought it odd that law schools offer courses in corporations or business associations but not in legal institutions (except a course on legal ethics, sometimes inaccurately titled "Legal Professions"¹⁰⁸). A course that focuses on the issues raised by the practice of law and the legal profession in today's large law firm would be a welcome addition to a law school's curriculum. Although a full description of such a course's goals and methodology must wait for the third part of this trilogy,¹⁰⁹ my preliminary thoughts follow.

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

106. Danner suggested a course about the law firm itself:

I also continue to believe that the law school curriculum could benefit from the focal point which would be provided by a course on large law firms. Whether or not such courses are added to the curriculum, the basic need is to find a group of law school faculty who will answer the call for more systematic, thoughtful study of large law firms.

Danner, *supra* note 93, at 460.

107. Under such a proposal, Galanter and Palay's recent article on the growth of large law firms would be required reading for all law students. The article raises a number of complex, interesting issues that can be addressed fruitfully in the classroom setting. See Galanter & Palay, *supra* note 37.

108. Thus far I have assiduously avoided mentioning the legal ethics course required by most law schools and bar examinations. That course, with its focus on ethical norms inherent in the profession, will never provide the type of information that a course in firm management, for example, would provide about the practice of law.

109. See *supra* notes 3-4 and accompanying text.

The course that I envision will not contain any information on how to practice law. It will not be a substitute for a clinical course on how to draft a complaint, depose witnesses, and so on. Instead, it will focus on the legal profession as a regulated industry and what that entails for the practice of law.¹¹⁰ When I consider the queries I currently receive from bright second- and third-year law students, I am struck by how little they and we know about the basics of the practice of law and the legal profession. I cannot think of any other profession that requires a postgraduate degree and yet provides so little information about students' future careers. For example, some students have told me that billing two thousand hours a year should not be a problem, since it averages only forty hours per week for fifty weeks; they have no clue about the tremendous effort and discipline it takes to bill at that hectic clip over the year. Similarly, I have also had students in my office who have offers from both corporate law firms and corporations and who have no idea what the differences are and how important their initial choice will be.

As a result, the course that I envision might begin with the study of the relationship between the size of the law firm and the services the firm provides. In addition, because the legal organization of the firm is a mystery to most students (given the demise of partnership and agency courses in our modern-day curriculum), weeks can be spent exploring the form and function of a partnership and a partnership agreement, including issues of compensation structure,¹¹¹ pension and retirement benefits, partnership draws, and unit values. Stanford Law School's February 1984 *Symposium on the Law Firm as a Social Institution*¹¹² examined a number of issues that may appropriately be addressed in a course on the practice of law and the legal profession, including the social significance of large-firm practice.¹¹³ I cannot emphasize enough my belief that law is a substantial business worthy of study in its own right. Several years ago Professor Robert Gordon wrote:

When one thinks about it for a moment, it seems astonishing that law firms should have for so long remained almost unexplored in legal

110. Perhaps the real problem with a course that focuses on the legal profession is that it would probably require the instructor to depart from the Socratic and case methods of analyzing legal issues. The course might be best taught using non-traditional materials or as a seminar.

111. For a detailed look from an academic perspective at the economics associated with firm compensation, see Gilson & Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985).

112. 37 STAN. L. REV. 271 (1985).

113. See Kagan & Rosen, *supra* note 45; see also Nelson, *supra* note 46 (discussing additional issues appropriate for such a course).

scholarship. These are, after all, social institutions of some prominence. They have a significant place in the economy, billing some \$38 billion annually. . . . Yet the legal academy from its inception has on the whole made a determined decision to remain aloof from the institutions where most of its students will spend their careers. . . . As far as I know, we have never produced, for teaching purposes, *any* good descriptions, much less scholarly analyses, of what it is that corporate lawyers spend most of their time doing.¹¹⁴

But adding courses to the curriculum is not enough. The courses must be taught by Distinguished Professors of Law in the Practice of Law and the Legal Profession. Given their elite status and emphasis on inquiry, law schools should have an incentive to provide this type of interdisciplinary study. Although applications to law schools are at an all-time high,¹¹⁵ the profession may not maintain its popularity in the face of more and more articles about lawyers' dissatisfaction.¹¹⁶ By informing and educating students about the legal profession, law schools will produce not only better lawyers but a better, healthier profession.

More important, experts in legal practice and the legal profession will have the knowledge and authority to argue for change within the profession. If we educate students about the costs created by unfettered growth and the demands placed on attorneys in that environment, I predict that many will decide that less—fewer hours, fewer attorneys, and even fewer dollars in their paychecks—is more. Thus, faculty experts on the practice of law and the legal profession may restore to the profession some of the ideals and values that have been lost in the race to be the biggest and the most profitable.

V. CONCLUSION

The primary academic mission of our elite law schools today seems to be to produce law professors and, as an afterthought, legal practitioners. Although some may regard legal education as an advanced liberal arts degree, I believe we fail to provide our students with an adequate legal education when we expose them to "law and other" courses that cynically dismiss the law as irrelevant. Our law schools must begin to emphasize law, legal reasoning, analytic thinking, and the case method of analyzing problems in order to prepare our students to become lawyers.

114. Gordon, *Introduction to Symposium on the Corporate Law Firm*, 37 STAN. L. REV. 271, 271-72 (1985).

115. See *supra* note 76.

116. See *supra* note 72.

Furthermore, although our mission is not to train lawyers, we legal educators should provide students with more information about the practice of law and the legal profession so that students can make meaningful career choices. Provided with this knowledge, students can either adopt or reject the values of commercialism and profit making that are endemic to most large-firm practice today.

As matters stand, we send our students into the inaw of a profit-making business without any knowledge of its ideology and lifestyle. Law firms view our graduates as potential profit centers whose initial purpose is to provide the firm with every last dollar that can be squeezed out of their carcasses. The students' resultant disillusionment and despair can only reflect poorly on the education they have received from us. We tell students they are going to be professionals and we give them the skills to exercise independent judgment. However, once out of school and into law firms, students are often treated like wage slaves who must restrain their individuality for the good of the bottom line.

Perhaps if we educate students about the profession of law they will reject the rampant commercialism that is contaminating the profession. With real knowledge of what awaits them (and, after all, isn't knowledge power?), our students may decide in favor of justice and professionalism. Thus, the study of the legal profession at our elite law schools may serve many purposes. It will reduce the dissonance our students experience when they leave law school for the legal profession, for it can shed light on a system run amok. And the disinfectant power of that light may alter the profession's belief that profit is the only valid gauge of success.

However, the occasional symposium issue of a prominent law review¹¹⁷ that focuses on the practice of law and the legal profession is not enough. The legal academy needs to commit resources to the specialized study of the legal profession. Without professors devoted to this academic discipline, the distance between the academy and practice will increase and students will continue to despair when they enter the real world of practice.

Finally, the study of the practice of law and the legal profession is warranted because it is only when we know what practice entails for our students that we can fully perform our role as educators. Moreover, if our conception differs from the actuality, we have a duty to exert our influence to justify our conception to our students. One hopes that they will then carry that conception into the profession.

117. See *supra* note 112; *Symposium: The Growth of Large Law Firms and Its Effect on the Legal Profession and Legal Education*, 64 *IND. L.J.* 423 (1989).