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Cover Page Footnote

This article was made possible by my two-year presence at Yale Law School. I would like to thank Dean Tony Kronman, Dean Barbara Safriet and Judy Couture for their help, guidance and support during my time as an L.L.M. candidate and as Tutor in Law. The article was inspired by and informed by my supervisions in the clinical faculty at Yale Law School: Brett Dignam, Steve Gunn, Carroll Lucht, Steve Wizner and, especially, Kathleen Sullivan. I owe a tremendous debt of gratitude to the following people who have improved this article immeasurably with their comments and contributions: Jean Edwards, Christy Fisher, Natalie Klein, Gideon Parchomovsky, Russ Pearce, Bob Stevens, Kathleen Sullivan, Steve Wizner and Karen Yau. Finally, I would like to thank Antonio Baretto, Daniel Bonilla, Vladimir Dubra, Natalie Klein, Nathalia Mendieta, Dafna Nathan, Gideon Parchomovsky, Ivan Popov, Radoslav Prochazka, Esteban Restrepo, Ralf Sauer, Brian Willen and, of course, The Core, for their numerous acts of kindness and generosity towards me which have enriched both my article and, especially, my time at Yale.

ARTICLES

FOUND! THE LOST LAWYER

*Kirsten Edwards**

NEWSFLASH: FOUND! THE LOST LAWYER IN THE BASEMENT OF RUTTENBERG HALL

Relief, shock, and confusion reign today in the wake of the surprise announcement that has rocked the legal academy—the lost lawyer-statesman has been found. The lost lawyer, one of the legal profession’s most beloved figures, subject of numerous articles and the world’s longest and most eloquent missing persons report—The Lost Lawyer by Anthony T. Kronman¹—was discovered alive and well in the basement of Yale Law School’s Ruttenberg Hall. Dean Kronman was said to be elated by the news. Although the Dean’s official statement was drowned out by the din of nearby dining hall construction, the words “magical” and “today is a day for delightful whimsy” were made out by Knight Fellowship journalists covering the story. Kronman rushed to the scene, pausing only briefly to ask directions to the Ruttenberg Hall clinic offices.

Preliminary news reports suggest that the lost (but now found) lawyer was enjoying a casual lunch with Yale Law School clinical students, discussing ethical dilemmas arising out of their casework and recommending possible public interest career options, when she was discovered by a disoriented law school tour party. An incoming J.D.

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1. Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993).

student, who had recently completed her Ph.D. dissertation entitled *The Lost Lawyer: A Hermeneutic Dialectic of Intractable Solipsism*, suddenly gasped as she recognized and identified the legal academy's most sorely missed statesman. Official sources are downplaying initial suggestions that the sighting was a hoax. Suggestions of fraud are inevitable after the embarrassing publicity incurred when a claimed sighting of the lost lawyer sitting in Langdell Hall at Harvard Law School with Elvis Presley, Bigfoot and the Loch Ness Monster was proved false. That controversial claim occurred only days after Harvard Law School slumped to third behind Yale and Stanford in the influential *U.S. News and World Report* law school rankings. Back at Rittenberg Hall, the lawyer-statesman herself seemed bemused by all the attention, stating: "What do you mean lost? I've been here all along."

INTRODUCTION

In 1999 I took leave from my position as a law professor in an Australian law school to spend two years at Yale Law School, first as a masters student, then as a research associate and tutor of graduate students. What I discovered was a perplexing, and at times infuriating, paradox. On the one hand high profile legal scholars and judges were tearing their hair out in speeches, books and law review articles about the state of legal education and the legal profession. All were mourning the rise of materialism in law firms and the dominance of intense theoretical abstraction in elite law schools. Law students were seen as less practical, law graduates were seen as less ethical, and scholars believed that few now viewed law as a true profession, a noble calling, aimed not just at the pursuit of wealth but also at helping those in need.

On the other hand, I became completely enamored of American clinical legal education. It seemed to me that clinicians in law schools were doing incredible things towards educating and inspiring students to be ethical, practically wise and caring professionals. In other words, clinics seemed to be the only part of the law school turning out the kind of lawyer that everybody not only wished for, but appeared to think was lost long ago. Yet, despite these efforts, the contribution of clinical education seemed to be ignored in these well-publicized laments. Not that anyone was critical of clinical education, far from it; but given the shining light of clinics in what appeared to be an otherwise bleak picture painted of the American legal profession and academy, I could not understand why they were always assigned a cameo appearance rather than a starring role.

This article seeks to accomplish two goals. Descriptively, the article offers a contemporary portrait of elite law schools. It reviews, admittedly with some degree of humor, the factors that shape elite law schools and elite law firms. My exposition pays special attention to

the role of clinical education in the “post-lawyer-as-statesman” era. Normatively, this article proposes ways in which clinical education can contribute to shaping the values, ethics and humanity of lawyers. Specifically, exposure to clinical education can revive many of the virtues of the “golden age” of the legal profession, such as commitment to public-interest work, community leadership and pursuit of the public good. Unfortunately, an obsession with academic prestige has blinded elite scholars, perhaps willfully, to the contribution of clinical legal education. In contrast to the prevalent ideology in elite law schools, this article calls for celebration of clinical education and recognition of its potential to alleviate serious concerns about the development of the American legal landscape.

Part I of this article discusses the influential writings of Yale Law School Dean Anthony Kronman and D.C. Circuit Judge Harry Edwards on the shortcomings of contemporary legal education, particularly at elite schools. Part II looks at the factors which shape the unique composition of current elite law school student bodies and faculties. It suggests that homogeneity and elitism have become dominant values in elite law schools today. It looks at how these values combine with the pressures and temptations facing students attending elite law schools and seeks to explain why so many enter law school with the desire to serve the public good and leave instead working for large private firms where many do “succumb . . . to . . . pervasive materialism.”²

Part III examines how clinical legal education can help to arrest this trend. That part argues that by giving students strong role models and a more contextualized legal experience in law school, and by integrating ethical teaching into their legal training, law schools can teach students how to adopt and embody the traits of the lawyer-statesman. Part IV contrasts the potential of clinical legal education to promote the lawyer-statesman ideal with the solution suggested by Kronman and Edwards: practical doctrinal scholarship. It questions why Kronman and Edwards ignore the strong potential of clinical legal education and suggests that the neglect of clinical education by the authors is indicative of deeper flaws in their approach.

In examining the approach of Kronman and Edwards, this article adopts their methodology. Kronman and Edwards do not rely so much on reams of empirical data as their own feelings—feelings borne of talking to friends, colleagues and clerks, of observing students and lawyers and reading the newspaper.³ Thus, in addition to

2. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 73 (1993).

3. For example, Judge Edwards sent out a survey to all of his former law clerks and quotes their responses throughout his article. See *id.* at 41-42. Kronman's liberal use of newspapers, journals and popular literature about law school can be seen in his notes section. See Kronman, *supra* note 1, at 383-415.

conventional academic literature, this article draws upon the author's experiences at Yale Law School, those of friends and colleagues at other elite law schools, and popular books about law schools and legal education. It is important to remember, however, that Kronman, as dean of the country's number one law school, and Edwards, as judge on the D.C. Circuit Court of Appeals, occupy positions in the elite of American society. When Kronman and Edwards talk about lawyers, law students, the legal academy and the legal profession, they are not talking about the profession or legal education as a whole. They are talking about the elite, and the evidence they advance is drawn from discussions and experiences with the elite: students in top law schools, practitioners in Wall Street and D.C. firms, their friends, and, in Edwards's case, his law clerks.⁴ When Kronman and Edwards seek the lost lawyer they are looking for him or her at Harvard and Yale, not Pepperdine.

I. THE LAMENTS OF KRONMAN AND EDWARDS

In 1993 Anthony Kronman published *The Lost Lawyer: Failing Ideals of the Legal Profession*, a book that issued a dire warning: "[T]he [legal] profession now stands in danger of losing its soul."⁵ A year before, Judge Harry Edwards published an article in the *Michigan Law Review* stating: "For some time now, I have been deeply concerned about the growing disjunction between legal education and the legal profession."⁶ He entitled the article *The Growing Disjunction Between Legal Education And The Legal Profession*. Both publications have been enormously influential and both prompted a flurry of review pieces and replies—the *Michigan Law Review* devoted an entire volume to responses to Edwards's initial piece from a number of prominent legal scholars.⁷ The

4. According to his acknowledgments, Judge Edwards attended law school at the University of Michigan, served as a tenured professor of law at Michigan Law School and Harvard Law School and "[s]ince joining the D.C. Circuit in 1980, he has continued to teach part-time at various law schools, including Pennsylvania, Harvard, Duke, Georgetown, Michigan and, most recently, New York University." Edwards, *supra* note 2, at 34 n.*. The named schools are all considered elite top ten schools. The clerks whom Edwards cites frequently were also the very top graduates of elite law schools:

Thirty former law clerks (who served with me during the 1980-1981 through the 1990-1991 court terms) responded, in some detail. They are a varied group, having graduated from ten different law schools: Berkeley, Boston University, Buffalo, Duke, Georgetown, Harvard, Michigan, NYU, Stanford, and Yale. Nearly every one finished law school at or near the top of his or her class; 16 were Supreme Court clerks; six were law review editors-in-chief; and many have received offers to enter (or serious invitations to consider) law teaching.

Id. at 42 n.15.

5. Kronman, *supra* note 1, at 1.

6. Edwards, *supra* note 2, at 34.

7. See Symposium, *Legal Education*, 91 Mich. L. Rev. 1921 (1993).

assertions of Kronman and Edwards⁸ were not only the subject of numerous academic inquiries but sparked intense debate in law school faculty lounges about the state of legal practice and the legal profession.⁹

While displaying many differences in style and content, the works have the same central theme. Kronman and Edwards paint a picture of an ideal legal professional. Their lawyer is practically wise and helps his¹⁰ clients arrive at practical solutions and sensible local results.¹¹ He is highly ethical, aware of his duties both to serve his clients zealously and to be a loyal officer of the court.¹² Their lawyer holds a strong sense of devotion to the law itself and its role in promoting the public good, accepting without question the need to perform pro bono work regularly.¹³ Kronman calls this ideal practitioner “the lawyer-statesman.”¹⁴

Both Kronman and Edwards find the lawyer-statesman to be an endangered, if not extinct, species in a modern legal profession they find rampantly materialistic, unethical and removed from contributing to the common good.¹⁵ They place the blame for the decline of the profession primarily at the feet of the legal academy – especially legal scholarship movements such as law and economics and critical legal studies.¹⁶ Edwards states: “While the schools are moving toward pure theory, the firms are moving toward pure commerce, and the middle ground—ethical practice—has been deserted by both.”¹⁷

Kronman and Edwards reason that highly theoretical movements like law and economics and critical legal studies promote an instrumentalist view of legal doctrine and reasoning that is lacking in inherent ideals and moral content.¹⁸ Kronman argues: “Together

8. For the duration of the article, I will refer to Dean Kronman and Judge Edwards as “Kronman” and “Edwards.” This is purely for brevity and is certainly not intended to imply any lack of respect.

9. While the works of Kronman and Edwards were probably the most influential, a number of works containing similar themes were published at around the same time. See, e.g., Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (1994); Sol M. Linowitz, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (1994).

10. The use of the masculine descriptor here is not accidental—both Edwards and Kronman describe the lawyer statesman in ways which indicate that he is male.

11. See Kronman, *supra* note 1, at 2-3; Edwards, *supra* note 2, at 59.

12. See Kronman, *supra* note 1, at 14-15, 127, 365; Edwards, *supra* note 2, at 38, 66-74.

13. See Kronman, *supra* note 1, at 14, 365; Edwards, *supra* note 2, at 38, 73.

14. Kronman, *supra* note 1, at 3.

15. See, e.g., Edwards, *supra* note 2, at 38 (“He or she will have gained the impression that law practice is . . . grubby, materialistic, and self-interested and will not understand, in a concrete way, what professional practice means.”); see also *id.* at 68-74.

16. See Kronman, *supra* note 1, at 4, 167-68; Edwards, *supra* note 2, at 35, 47-48.

17. Edwards, *supra* note 2, at 34.

18. See, e.g., Kronman, *supra* note 1, at 167 (“Those who embrace the methods of economics as the best ones for thinking about law and who acquire the intellectual

these two movements have had a large influence on American legal scholarship during the past twenty years, and . . . both have fostered a style of thought that depreciates the value of practical wisdom."¹⁹ Kronman and Edwards submit that by removing any notion of moral content from the law, critical scholarship movements foster disdain, cynicism and distrust towards the law and legal methods, leading law students to abandon any notion of a career in law as a noble calling.²⁰ As a result, law students schooled in such critical scholarship develop moral ambivalence towards legal ethics and pro bono work and "succumb all the more readily to the pervasive materialism of the law firms."²¹

Both Kronman and Edwards believe that the problem starts, and therefore the solution must be introduced, at law school. Kronman states: "However diverse their professional experiences may be in other respects, . . . lawyers still share at least one thing in common: they have all been law students at one time or another, and it is as students that their professional habits . . . take shape."²² Edwards starts his piece with a quote from Felix Frankfurter: "In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them."²³

The central change that Kronman and Edwards suggest law schools make is in scholarship. While conceding that law and economics and other critical legal movements play a valuable role in the academy, both Kronman and Edwards call for a return to more simple doctrinal scholarship.²⁴ Edwards writes: "My principal cure for the 'elite' law

habits these methods encourage are therefore likely to be blinded to the value of practical wisdom and to the conditions of moral life that make the need for it imperative."); Edwards, *supra* note 2, at 47-48 (commenting on the impractical nature of law and economics scholarship).

19. Kronman, *supra* note 1, at 165.

20. See Kronman, *supra* note 1, at 167 ("The critical legal studies movement [has] . . . exerted an influence on American law teaching second only to that of law and economics, [and] has also helped establish the atmosphere of mistrust that . . . surrounds the virtue of practical wisdom."); Edwards, *supra* note 2, at 47 ("At its best, CLS usefully questions and challenges the political premises that serve as the foundation of our system of justice; at its worst, CLS is hopelessly destructive because it aims to disrupt the accepted practice of judges, administrators, and legislators with no prescriptions for reform."). Dean Garth of Indiana Law School has made a similar point: "The best post-realist teachers are often masters at showing students that their most cherished beliefs are simply a matter of opinion or supportable only by some more or less plausible arguments that could be countered by other more or less plausible arguments." Bryant G. Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems*, 64 Ind. L.J. 433, 440 (1990).

21. Edwards, *supra* note 2, at 73.

22. Kronman, *supra* note 1, at 109.

23. Edwards, *supra* note 2, at 34 (citation omitted).

24. There is a difference in nuance between the authors here. Throughout his piece Edwards calls directly for practical doctrinal scholarship. See generally *id.* Kronman has a broader conception of ideal law teaching and scholarship than just doctrinal work but continually emphasizes the need for all scholarship and teaching to

schools' pedagogy is the same as my cure for their scholarship. The schools must seek a balance of 'practical' and 'impractical' scholars"²⁵ Both Kronman and Edwards submit that if law school pedagogy and scholarship is directed towards what is practical and what is "true,"²⁶ the professional ideals of the lawyer-statesman may be revitalized.²⁷ Students will realize their calling to serve the needs of their clients and communities in a competent, ethical and useful manner and will find a moral anchor in their own devotion to the law.²⁸

This article is intended as a critique of Kronman and Edwards, but it adopts most of their central ideals and premises. It agrees that the lawyer-statesman is a professional ideal that law schools should promote and develop in their students. It agrees that legal ethics and pro bono obligations are inadequately taught in law schools and are sorely lacking in much of the profession. This article also adopts the idea that changes in legal education can help remedy problems that exist in the legal profession. The central premise of this article, however, is that Kronman and Edwards have a misplaced focus on scholarship. This article suggests reasons, separate from legal scholarship movements such as critical legal studies and law and economics, for the dearth of practical wisdom, legal ethics and pro bono commitment in law schools and the legal profession.

This article also proposes a solution different from the one suggested by Kronman and Edwards—that of clinical legal education. Increased investment in, and celebration of, clinical legal education is the best way to promote the three main attributes of the lawyer-statesman—practical wisdom, ethical conduct and a commitment to pro bono activity. This article contrasts the potential of clinical legal education to promote the lawyer-statesman ideal with the approach suggested by Kronman and Edwards, and concludes that their approach is both unrealistic and trapped in the past. Furthermore, it suggests that the emphasis placed by Kronman and Edwards on scholarship is not only misplaced but also destructive of the ultimate goals they seek to promote.

emphasize "practical wisdom." See Kronman, *supra* note 1, at 265-70, 375-76.

25. Edwards, *supra* note 2, at 62.

26. Kronman states: "Scholarship . . . aims at the truth [T]he law teacher's highest responsibility is to convey a scholarly love of truth to his or her students" Kronman, *supra* note 1, at vii.

27. See, e.g., *id.* at 365 ("One should not despair, therefore, about the possibility of reviving the legal profession's ethic of public service."); Edwards, *supra* note 2, at 78 ("I have no doubt that, if individual lawyers and legal institutions took professionalism to heart, the growing disjunction between legal education and practice would be reversed.").

28. See, e.g., Kronman, *supra* note 1, at 145-46 ("[T]he more a lawyer values the well-being of the law, the more likely he is to be able to summon such courage when needed This internal anchorage of his devotion to the law in the good lawyer's craft gives it a strength and resilience it would not otherwise have.").

A plea for clinical legal education might be seen as slightly bizarre, a combination of stating the obvious and refusing to take yes for an answer. A number of professors try to limit clinical programs or the amount of clinic courses students can take—warning against the dangers of distraction from scholarly pursuits, or a trend towards trade-school teaching—but most professors happily support clinics. Certainly few law school deans, especially Kronman, will claim to be anything but totally supportive of clinical education. Students love it, and alumni donors both love it and support it generously. But will the dean know the way to the basement office?

It is true that clinical legal education is highly regarded in elite schools, provided that it stays within its niche: a haven for self-selected students with an interest in poverty law and, for those interested in practice and litigation, an excellent way to build skills by practicing as a *de facto* lawyer. This article seeks to broaden the concept of clinical legal education and to celebrate it. It is not advancing the idea of a clinical law school, nor even compulsory involvement in clinical work, but rather an attitude towards clinics akin to, for example, constitutional law or contracts, which many schools do not require but which all would strongly encourage students to take. Of course clinical education will agree with some students more than others, but so will constitutional law or contracts. This article argues that given the common ground which exists about what is wrong with the legal profession and elite education, and the potential of clinical legal education to ameliorate some of these problems, it should be taken more seriously—at least as seriously as the cure advanced by Kronman and Edwards: practical doctrinal scholarship.

II. PORTRAIT OF A MODERN (ELITE) LAW SCHOOL

A. *Composition of the Student Body*

Elite law schools are highly expensive and extremely selective. To gain admission to an elite law school, applicants must be prepared to pay college and law school tuition fees and devote seven years to full-time education. They must excel in college (usually a well known and highly ranked college, often in the Ivy League),²⁹ and they must achieve a high score on the Law School Admission Test (“LSAT”).

29. For example, in the year 2000 at Yale Law School J.D. students who graduated from Harvard and Yale dominated the population with 86 and 66 students respectively (in an overall J.D. student body of 592). Overall, 242 students attended Ivy League colleges (approximately forty-one percent). Adding elite colleges like Stanford, Berkeley and Duke brings the percentage to fifty-one percent. Few other colleges have even ten representatives and most have fewer than three. 96 Bulletin of Yale University No. 8 (Yale Law School 2000-2001).

These admission prerequisites strongly influence the socio-economic composition of elite law school student bodies. Admission to an elite law school depends in large part on success in high school. While not officially considered in law school admissions, high school achievement is relevant to the quality of college attended by a student, academic and extra-curricular success at that college, and successful test-taking abilities of a kind reflected in competitive Scholastic Aptitude Test ("SAT") and LSAT scores. Yet success in high school, and later in college, are to a great extent predetermined by socio-economic factors. These factors include attending a well-funded school, having the ability to work and interact with staff and students without the pressure of part-time employment or child care responsibilities, and living in a low-crime neighborhood conducive to study, without excessive noise or other distractions. Students with successful, educated parents, who invest time and energy in their children's education, assist them with studies, provide tutors and help with college applications, enjoy a great advantage.³⁰

Elite law students are also self-selecting. Those who care for children or elderly relatives part-time cannot hope to obtain the financial resources necessary to fulfill commitments to their families and devote sufficient time to their studies. Those from disadvantaged backgrounds may be intimidated by the size of educational debt incurred by attending an elite school or may just be intimidated by the concept of attending an elite law school, assuming they may never fit in. The focus on recent grades and LSAT scores reduces the admission rate of students who have taken time off from school to raise families, care for relatives or pursue alternative careers.

In the absence of reliable empirical data there is a strong likelihood that most students who attend elite law schools are from comfortably wealthy, educated, professional homes of the middle and upper class.³¹

30. For evidence of the startling correlation between parental income and SAT results, see Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953, 988 (1996) ("At over 25% of the colleges participating in a 1984 validity study conducted by the ETS, the correlation between SAT scores and family income was larger than the correlation between SAT scores and freshman grades."). Sturm and Guinier also detail the race, class and gender biases underlying the SAT and LSAT tests. For a fascinating history of the class considerations underlying the development of the SAT test, see Nicholas Lemann, *The Big Test: The Secret History of the American Meritocracy* (1999).

31. Kronman notes that students from primarily working class backgrounds at Yale Law School have gone as far as forming an organization, First Generation Professionals, "to help their members overcome their lack of professional role models and to promote recruitment at the school." Kronman, *supra* note 1, at 408 n.57; see also Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 Harv. L. Rev. 1239, 1283 (1993) ("Most law school graduates are white and belong to the upper and middle classes."). Ogletree notes, "For the 1992-1993 academic year, the mean adjusted gross income of parents of Harvard Law School students receiving loan assistance was \$102,088." *Id.* at 1283 n.174 (citing Memorandum from the Harvard Law School Financial Aid Office to Charles

Anecdotal experience suggests many have been preparing for the rigors of an Ivy League legal education almost all their lives – attending prestigious schools such as Andover and Phillips-Exeter Academy,³² then on to an Ivy League college before going to law school.³³ This is not to suggest that law students lack interest in the public good. Many come to law school infused with idealism, some having performed community service work in high school and college and many keen to utilize their legal training to achieve public good. Some commentators have used this fact to place the blame for the legal profession's lack of public service at the feet of law schools, i.e.: "they come in desperate to work for the poor and leave desperate to work for corporate firms."³⁴

This argument, however, ignores the qualities inherent in law students that can produce such changes without any corrupting efforts by law schools. By virtue of their socio-economic background, elite law students are somewhat removed from the realities and hardships faced day to day by a great number of disenfranchised Americans. Few will have experienced first hand the daily struggles of communities to obtain food, medical care and housing, and few will be fully aware of the extent to which these hardships are prevalent in society. While wealth does not obviate social conscience, many law students may entertain ideas of public interest work, but will not have a burning desire to help borne of constant brutal experience, nor may they realize the extent to which public interest lawyers are urgently needed in a community. It is likely that law school students initially want to go into public interest law because they think it would be an interesting and rewarding career path that provides the additional benefit of assisting the community. Such ambitions are inevitably

Ogletree, Assistant Professor 13 (Mar. 11, 1993) (on file at the Harvard Law School Library)).

32. Phillips-Exeter Academy is the alma mater of Christopher Columbus Langdell, the man regarded as the founding father of elite law schools. See Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967*, at 165 (1967).

33. Many will be following in their parents' footsteps: "About one in five students at schools such as Harvard and Yale is a child of an alumnus . . . [and] despite weaker GPAs, extracurricular activities, and SAT scores, legacy applicants enjoy twice as great a chance of being admitted to Harvard and Yale and almost three times as great a chance of being admitted to Princeton." Sturm & Guinier, *supra* note 30, at 995 n.184 (citing Mark Megalli, *So Your Dad Went to Harvard: Now What About the Lower Board Scores of White Legacies?*, *J. Blacks Higher Educ.* 71, 72 (Spring, 1995)). Not only does Yale Law School select more students from those colleges than any others but also it explicitly favors children of Yale Law School alumni in the selection process.

34. This is a paraphrase of the address given by Professor Steven Bright to the Yale Law School graduating class of 1999. See also Richard D. Kahlenberg, *Broken Contract: A Memoir of Harvard Law School 5* (1992) ("We came to law school talking about using the law as a vehicle for social change, but when it was time to decide what we would do with our lives, we fell over each other to work for those law firms most resistant to change.").

going to falter if students are presented with other interesting and rewarding career paths. When interesting and rewarding career paths are combined with unbelievable temptation in the form of salary and perks, only an indefatigable desire to serve the public good is likely to survive.

B. *The Faculty*

The faculty of elite law schools has also become remarkably homogeneous. A perusal of the law school bulletins of the top five schools will reveal tenured faculty with strikingly similar resumes—attendance at a prestigious Ivy League school, usually with attendant honors such as Phi Beta Kappa and graduation Summa or Magna Cum Laude; some post graduate work—often on a prestigious scholarship at Oxford or Cambridge, or perhaps a Ph.D. in economics or philosophy; then back to a top five law school where high grades and law review editorship will lead them to prestigious judicial clerkships. After clerking, academics will rarely spend more than four years in legal practice before returning to academia – usually they will spend their time outside the academy in a “blue chip” law firm or in a prestigious governmental position.³⁵ Once placed at a law school, the top-level academic will concentrate on the one thing that will guarantee him or her certain success – steady publication in elite law journals.³⁶

The law faculty of an elite school is made up of diverse personalities, and a great number of professors do not in fact evidence the stereotypical disdain for students, innovative teaching methods, and practical lawyering of which they are often accused. But elite law professors almost universally share a number of common traits: a lack of time to develop close, strong and personal relationships with their students due to class sizes and the time demands of producing regular, high-quality scholarship; little experience practicing law outside the

35. See Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 Minn. L. Rev. 705, 761 (1998).

36. The link between success at elite law schools and producing scholarship has become almost a truism; Schiltz states:

Scholarship—particularly highly theoretical scholarship—is “the hallmark of intellectual worthiness” in the academy. Because “[a]cademic prestige derives almost entirely from one’s reputation as a scholar,” and because “academic prestige seems to be the only game in town,” the “importance of scholarship to the careers of law teachers is difficult to overestimate.”

Id. at 751 (quoting Paul D. Reingold, *Harry Edwards’ Nostalgia*, 91 Mich. L. Rev. 1998, 2000 (1993); Roger C. Cramton, *Demystifying Legal Scholarship*, 75 Geo. L.J. 1, 8 (1986); and John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. Legal Educ. 343, 348 (1989)). Schiltz goes on to cite nine authorities testifying to the importance of legal scholarship in tenure decisions. *Id.*

academy (usually less than four years);³⁷ a lack of involvement in community or public interest legal work;³⁸ and a healthy, usually well-deserved, confidence in their own scholarly abilities (a confidence often extending to an attachment to their own perceptions of the nature of law and legal reasoning and how law should be taught to students).

Critiques of full-time academics ensconced in elite law schools are longstanding and too numerous to mention, except by way of summary—they are arrogant and remote, they are intellectual to the point of abstraction, they are too attached to old-fashioned teaching methods, they ignore teaching to focus on scholarship, and so on. But it would be foolish to expect wholesale change. The pedigree of its academics holds many advantages for elite law schools. With the prestige hierarchy of law schools and law journals well known (now even codified in *U.S. News and World Report's* annual survey³⁹) and comfortably stable, a school can ensure it maintains its elite status by hiring those with the best credentials, most impressive publications, and finest reputations. Students respond well, conferring credibility on those who have succeeded at the games they are trying to play. What budding tennis player would turn down the chance to get tips from a top ten player? As they compete for scholarships, top grades, law journal posts, and prestigious clerkships, students are comforted by the knowledge that their teachers have gone before them and emerged with flying colors. The primary mission of elite law schools is to attract the best quality students and the primary mission of top quality students is to attend the best quality law schools. Law schools cannot guarantee that they have hired the best teachers, the most caring professors, and the most wise and ethical role models, nor could they prove that they had done so, even if they managed to

37. *Id.* at 761 (“[N]ot a single member of the (huge) Harvard Law School faculty has practiced in a law firm at even a senior associate level in the last thirty years.”).

38. Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 *Fordham L. Rev.* 2415, 2438 (1999). Rhode notes:

In the AALS law school survey, only about half of the administrators of pro bono programs agreed that “[m]any of the faculty [at their] school provide good role models to the students by engaging in uncompensated public-service work themselves.” About one-fifth disagreed and one-third were unsure. As some administrators added in followup interviews, if *they* were ignorant about professors’ involvement, most students probably were as well.

Id. (quoting Richard A. White, Draft: Report on the AALS Survey of Law Schools and Public Service Programs 42 (1998)).

39. Most law schools are publicly critical of the law school rankings of *U.S. News & World Report*. The methodology is attacked by law schools which perform badly, and the significance of the rankings is downplayed by those schools which perform well. Despite this, it is well known that the rankings are extremely, and increasingly, influential to both students and law schools. See, e.g., Paula Gaber, “*Just Trying to be Human in this Place*”: *The Legal Education of Twenty Women*, 10 *Yale J.L. & Feminism* 165, 173 n.55 (1998); Rhode, *supra* note 38, at 2440.

succeed.⁴⁰ But while students and faculty (and university money) are attracted to a conception of the “best school”—and the criteria for “best” maintains a degree of consensus—the composition of faculty is likely to remain.

C. *The Temptations*

Those who mock law students for “selling out” to corporate firms often lack understanding of the pressures and temptations law students face. Seven years of eking out a student existence and three years of buying expensive law books leave many eager to jump at the chance to buy “furniture . . . not constructed of particle board . . . bestsellers before they [come] out in paperback . . . [and] clothing made of natural fibers.”⁴¹ While many students hail from comfortable or even wealthy families, few will remain unfazed after they have accumulated a debt of between \$50,000 and \$100,000.⁴² For those who plan to raise a family and/or buy a house—and the areas where most elite law graduates will settle and practice, such as New York, Boston and San Francisco, have phenomenally expensive housing markets—it is almost impossible to work in traditional public interest jobs which pay under \$50,000, even with a generous loan forgiveness program.⁴³ In the midst of these financial concerns, firms come calling with offers that make John Grisham’s *The Firm* look cheap.

Starting salaries at New York law firms have escalated, initially to keep pace with those of Internet start-up companies and now those of investment banks and management consultants that employ young

40. As Kronman has explained: “[At Yale Law School], the heaviest stress mark is placed on scholarly achievement. . . . There are hundreds and hundreds of quality teachers and only a handful of academic scholars of first rank. This place aims to be a place of leaders.” Jody Feder, *To Teach Her Own: Why Teaching Skills Don’t Seem To Matter At Yale Law*, 3 Yale Law School Docket No. 2, at 14 (November 2000).

41. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand. L. Rev. 871, 925 (1999).

42. To use an anecdotal illustration, I never met one J.D. at Yale Law School who spent a summer break on vacation – they all work. Every J.D. I have queried about this phenomenon has replied that loan obligations necessitate summer employment. For a more scholarly discussion of the impact of law school loans, see Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry Into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. Rev. 829 (1995).

43. Some law schools offer loan forgiveness programs whereby students are not required to pay, or have to repay less of, their law school loans if they earn under a certain amount and/or work in certain public interest jobs. In 1991 Yale Law School was forgiving loans to students earning less than \$28,000. In the same year, the starting salaries of corporate firms were around \$90,000. Although many starting salaries are now in excess of \$120,000, the threshold for forgiveness of entire annual loan obligations at Yale Law School has only increased to \$39,000. Yale Law School: Tuition, Expenses, Financial Aid, and Loan Forgiveness (2001-02), available at <http://www.law.yale.edu/yfs/admis-jdtuition.htm>. Students earning over \$39,000 per year are “expected to contribute 25 per cent of their incomes in excess of that amount toward repayment.” *Id.*

law graduates.⁴⁴ A first-year associate from an elite law school can earn between \$110,000 and \$200,000 per year (more than a newly appointed Federal Court judge). Additional sweeteners such as guaranteed three-year bonuses of \$50,000, or even yearly bonuses of up to \$100,000, are the subject of endless discussions at law schools, as are perks such as free massages, gymnasiums that press clothes and shine shoes while employees work out with provided gym gear, town cars that ferry employees to work and home on call, and free restaurant meals brought directly to the office. Many New York firms no longer even require employees to wear suits, having moved to casual clothes all year round, again to compete with Internet companies.

After seven to ten years of higher education, students are offered the professional respect that they crave. Interviewees are told of the multi-million dollar deals they can work on, the business leaders and industry captains they will work alongside. Associates, and especially partners, of large law firms enjoy enormous prestige and status within elite social circles of the major cities. Best of all, students do not need to seek out these opportunities; they do not even need to apply. Law firms come to elite law schools practically begging students to sign up. Students are flown across the country to interview for firms in cities ranging from Denver, San Francisco and Los Angeles to Chicago, Boston and New York, a phenomenon described by former Yale Law School student Chris Goodrich in a book chapter aptly titled "Pigs in Space."⁴⁵ After a law school experience where some students feel they "have been treated as incompetents, terrorized daily, excluded from privilege, had their valued beliefs ridiculed, and in general felt their sense of self-worth thoroughly demeaned,"⁴⁶ they are flattered and cajoled, wined and dined, and keenly sought after.

At least as important as money in the big firm job frenzy is the operation of another self-selecting trait of almost all elite law school students: competitiveness.⁴⁷ Elite students have become addicted to

44. See David Leonhardt, *Law Firms Rushed to Raise Salaries to Stem an Exodus to Start-ups. Now the Bill is Coming Due*, N.Y. Times, May 22, 2000, at C4; see also David Leonhardt, *Law Firms Pay Soars to Stem Dot-Com Defections*, N.Y. Times, Feb. 2, 2000, at A1.

45. Chris Goodrich, *Anarchy and Elegance: Confessions of a Journalist at Yale Law School* 125 (1991). A 1999 Yale Law Revue skit joked about the fabrications students used in interview programs to convince firms (and perhaps themselves) that they were interested in West Coast firms, exploiting their interest to get an interview and thus a free trip to the West Coast.

46. Scott Turow, *One L* (1977), *quoted in* "Atticus Falcon," *Planet Law School: What You Need to Know (Before You Go) . . . but Didn't Know to Ask* 286 (1998).

47. Schiltz notes:

First they competed to get into a prestigious college. Then they competed for college grades. Then they competed for LSAT scores. Then they competed to get into a prestigious law school. Then they competed for law school grades. Then they competed to make the law review. Then they

the spoils of their academic victories, and the significance of the “cocktail party factor” is impossible to discount. As one Harvard Law School graduate put it, “After years of savoring other people’s reactions when you said you were at Princeton College [sic] or Harvard Law School, it was tough to contemplate the reaction to your declaration ‘I’m a legal-services lawyer.’”⁴⁸ Continual hard-won success in high school, college and law school conditions many law students to have an almost Pavlovian response to a competitive challenge. Getting a job at the biggest, best and highest paying firm soon becomes another flaming hoop for the law student to jump through.⁴⁹

Of course large firms exact their pound of flesh by expecting associates to work extraordinary hours.⁵⁰ Students will admit to being well-informed of the horror stories of long hours, high pressure and arduous work at high-profile firms, but their first-hand experience will be otherwise. Almost all elite law students undertake full-time employment as summer associates after their second year of law school. A summer associateship is an ideal opportunity—even for those students firmly committed to participating in public interest work. Idealistic students tell themselves they can experience the horror of firm life and get it out of their system. After all, it is only for the summer—they are not so much selling their souls as briefly renting them out. For noncommittal students, the time allows them to evaluate firm life and practice without sacrificing the critical career goal of “keeping their options open,” and all with a salary well in excess of what is needed to pay off crushing student loans.⁵¹

Once at the firm, students are hard pressed to find the horrors about which they have heard. Summer associates rarely work longer

competed for clerkships. Then they competed to get hired by a big law firm. Schiltz, *supra* note 41, at 905.

48. See Kahlenberg, *supra* note 34, at 7 (“I came to learn that in the legal profession it was infinitely more important to be respectable than to be admirable and that salary replaced grades as the badge of merit and achievement.”).

49. Students also complain of the practical difficulty in trying to forge another path:

Identifying job opportunities with small firms, the government, and public interest groups is difficult, as they do not interview on law school campuses or advertise in major trade journals. Also, unlike big firms, they usually cannot hire a year in advance. It takes a lot of guts to hold out for a small firm, government, or public interest job during the third year of law school, as one of your friends after another signs up with a big firm.

Schiltz, *supra* note 41, at 941.

50. Dennis Curtis, *Can Law Schools and Big Law Firms Be Friends?*, 74 S. Cal. L. Rev. 65, 74 n.14 (2000) (“At the biggest firms in the biggest cities, associates and partners commonly bill 2,000 to 2,500 hours per year”).

51. Professor Harold Koh of Yale Law School argues that most elite law students choose their career by the following questions: “What job will most impress others; what job will help me pay off my loans; and what jobs will keep my options open.” Obviously a summer associateship at a blue chip firm is three for three.

than nine to five, are given the best, most interesting work (often pro bono cases), are assigned the nicest partners, and are treated with kid gloves by firm employees. They are wined and dined constantly in five-star restaurants,⁵² provided with baseball and tennis tickets (prime seats, of course), and encouraged to attend bonding activities such as horseback riding and whitewater rafting—even water pistol fights with partners. Many attend parties at partners' sumptuous mansions or on their huge yachts—the subtext of “all this could be yours” barely disguised.⁵³ For these travails, summer associates are paid between \$2,200 and \$2,500 per week. Students claim to be well aware that “summers” see a deceptively rosy picture of firm life. But as the evidence suggests, even the most public spirited tend to return to the devil they know when offered a secure and prestigious position in a familiar environment with seemingly friendly faces and an

52. Most law firms will pick up the bill for lunch or dinner if a summer associate attends the meal. “Summers” are thus highly sought after dining companions by firm associates during their stay.

53. Schiltz provides a wonderfully detailed example of this:

During your first month working [as a summer associate] at the big firm, some senior partner will invite you and the other new associates to a barbeque at his home. This ‘barbeque’ will bear absolutely no relationship to what your father used to do on a Weber grill in your driveway. You will drive up to the senior partner’s home in your rusted Escort and park at the end of a long line of Mercedeses and BMWs and sports utility vehicles. You will walk up to the front door of the house. The house will be enormous. The lawn will look like a putting green; it will be bordered by perfectly manicured trees and flowers. Somebody wearing a white shirt and black bow tie will answer the door and direct you to the backyard. You will walk through one room after another, each of which will be decorated with expensive carpeting and expensive wallpaper and expensive antiques. Scattered throughout the home will be large professional photographs of beautiful children with tousled, sun-bleached hair.

As you enter the partner’s immaculately landscaped backyard, someone wearing a white shirt and black bow tie carrying a silver platter will approach you and offer you an appetizer. Don’t look for cocktail weenies in barbeque sauce; you will more likely be offered pâté or miniature quiches or shrimp. A bar will be set up near the house; the bartender (who will be wearing a white shirt and black bow tie, of course) will pour you a drink of the most expensive brand of whatever liquor you like. In the corner of the yard, a caterer will be grilling swordfish. In another corner will stand the senior partner, sipping a glass of white wine, holding court with a worshipful group of junior partners and senior associates.

The senior partner will be wearing designer sunglasses and designer clothes; the logo on his shirt will signal its exorbitant cost; his shorts will be pressed. He will have a tan—albeit a slightly orange, tanning salon enhanced tan—and the nicest haircut you’ve ever seen. Eventually, the partner will introduce you to his wife. She will be beautiful, very thin, and a lot younger than her husband. She, too, will have a great tan, and not nearly as orange as her husband’s. You and the other lawyers will talk about golf. Or about tennis. After a couple hours, you will walk out the front door, slightly tipsy from the free liquor, and say to yourself, “This is the life.”

Schiltz, *supra* note 41, at 912-13.

enormous paycheck—all before finishing law school and without so much as writing a cover letter.

Many believe that in choosing the corporate firm option students receive tacit or even explicit encouragement from the faculty. Some professors encourage students to try working at a firm (like they did) for a few years to benefit from the training the firms provide and to evaluate the experience. Other professors suggest that the work performed by large firms is the most genuine and intellectually challenging.⁵⁴ Some commentators argue that law schools push their graduates towards large law firms by a more subconscious process: “To students, usually possessed of extremely talented minds and competitive personalities, law schools send a message about values. That message is that the path to success—the way to ‘win’—is to get a job with a large law firm.”⁵⁵

D. *The Practice of Law: Golden Handcuffs Versus Psychic Income*

One could be forgiven, on the strength of recent literature on the subject, for thinking that once a law student joins a large elite law firm her life is ruined forever. Kronman’s and Edwards’s descriptions of a legal profession that is rapacious, soulless and driven solely by greed are supplemented by those who present a devastating portrait of the personal life of a corporate lawyer. Influential popular literature, including *Double Billing*,⁵⁶ Cameron Stracher’s best-selling semi-autobiographical novel about a Harvard Law graduate at a large New York firm, and *Who’s Killing the Great Lawyers of Harvard*,⁵⁷ a recent Esquire magazine article, portray a corporate law firm world populated by obsessively driven and critical partners overseeing exploited and overworked associates. Unhappy with work and life, and increasingly dysfunctional in the larger world, lawyers feel unable to leave, shackled by “golden handcuffs”—the money and prestige which lured them into practice. Alcoholism, divorce and misery are common and many associates are apparently suicidal, or at least on the verge of a major breakdown.

In many ways these images are as destructive as the myths that lure elite law graduates to corporate firms in the first place. When law graduates become aware that many law firms are in fact populated

54. See Henry Rose, *Law Schools are Failing to Teach Students to Do Good*, Chi. Trib., Jul. 11, 1990, at 17 (“The subliminal message of [law school] training is clear to most students: ‘Real’ lawyers work in large firms representing corporate and affluent clients.”).

55. Talbot “Sandy” D’Alemberte, Keynote Address, in *The MacCrate Report: Building the Educational Continuum* 4, 13 (Joan S. Howland & William H. Lindberg eds., 1994).

56. Cameron Stracher, *Double Billing* (1998).

57. Robert Kurson, *Who’s Killing the Great Lawyers of Harvard*, Esquire, Aug. 2000, at 82.

with decent hardworking people, who apparently have outside interests, healthy family lives, a compassionate attitude toward the poor and a commitment to social justice, they dismiss the literature as mythical, perhaps prompted by academic jealousy of corporate glamour, income and prestige.⁵⁸

Similar divisions arise about the place of pro bono and public interest work at firms. Elite law students interested in firm work have become weary of pious peers' accusations of being "sellouts," "yuppie scum," or victims of "the great corporate suck,"⁵⁹ and many argue that it is simplistic to present a dichotomy of public interest: good, corporate firm: bad.⁶⁰ Some student groups have identified firms which are "family friendly" or committed to pro bono activity and encourage students to make these issues a priority in interview questioning and when choosing a firm. In response to student demand, a number of firms have showcased a range of pro bono opportunities and allowed students to split their summers⁶¹ with public interest or government organizations. Idealistic students argue that they will not be corrupted by firm life. They commit themselves to changing the firm culture from the inside or using the money they are paid to make charitable contributions or fund personal public interest projects in the future. Other students are less quixotic but defend their choice on the basis that they are advancing corporate prosperity for the good of the entire nation.

But while critics of firm life and practice may have overstated their case, even commentators who have built careers on deflating powerful myths and images about the evils of the legal profession⁶² concede that some emerging facts about corporate professional life are too disturbing to dismiss. The suicide rate among white male lawyers is twice that of the general population.⁶³ Falcon warns prospective law students:

58. See, e.g., John P. Heinz et al., *Lawyers and their Discontents: Findings from a Survey of the Chicago Bar*, 74 Ind. L.J. 735, 757 (1999) ("Law professors may find comfort in believing that practicing lawyers are unhappy [because they may] feel better about their perceived (if not real) financial sacrifice.").

59. These quotes are from conversations the author has participated in, overheard, or seen posted on The Wall (a public discussion space) at Yale Law School.

60. See Charles Silver & Frank B. Cross, *What's Not To Like About Being a Lawyer?* 109 Yale L.J. 1443, 1449-66 (2000) (reviewing Arthur L. Liman, *Lawyer: A Life of Counsel and Controversy* (1998)).

61. A number of firms will even pay a student's salary for the entire summer period although the student will spend only half the summer working for the firm and the other half for a public interest organization.

62. See, e.g., Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (1991); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4, 5 (1983); Silver & Cross, *supra* note 60, at 1492.

63. Silver & Cross, *supra* note 60, at 1476 n.197.

[Y]ou won't hear (until after you've become a lawyer) that the rate of clinical depression among lawyers is four times that of the general population, that the rate of alcohol and drug addiction is higher for attorneys—especially trial attorneys—than for any other profession. (Various surveys show that it's perhaps as high as 60%).⁶⁴

Other statistics show that lawyers are more likely to divorce and never remarry, and to suffer from stress-related health problems like ulcers, heart disease and, in pregnant women, miscarriages.⁶⁵ These statistics are across all attorneys, but anecdotal accounts and some recent research suggest the corporate firm population is the most blighted.

A Michigan Law School survey of the classes of 1990 and 1991 five years after graduation discovered, consistent with findings in similar surveys, that the highest earning private practitioners reported the lowest level of job satisfaction. Law professors and public interest attorneys derived the most “psychic income” from their work but “lawyers in all other types of practice f[ou]nd their work intrinsically more satisfying than their counterparts in large private practices—sometimes considerably more satisfying.”⁶⁶ Surveys by journals, bar associations and newspapers note that large firms are being forced to develop financial incentives to prevent young associates from leaving in droves, and even partners are reported to be miserable.⁶⁷

The principal culprit for corporate malaise is one fact that seems uncontested: lawyers in large prestigious firms are working longer hours than ever before. As Kronman argues, “the lengthening of the working day at large firms across the country is a remarkable phenomenon and must be counted among the most significant changes that have taken place in recent years in the nature of large-firm practice.”⁶⁸ From this phenomenon it is possible to draw more

64. Falcon, *supra* note 46, at 301. Other estimates are more conservative but still alarming. See, e.g., *Getting Better*, L Magazine: Life-Liberty-Law School, Feb. 2001, at 12 (“The American Bar Association Commission on Lawyer Assistance Programs . . . estimates that while 10 percent of the general population has problems with alcohol abuse, anywhere from 15 to 18 percent of the lawyer population suffers from the same problem.”).

65. Schiltz, *supra* note 41, at 880.

66. Kenneth G. Dau-Schmidt & Kaushik Mukhopadhyaya, *The Fruits of Our Labors: An Empirical Study of the Distribution of Income and Job Satisfaction Across the Legal Profession*, 49 J. Legal Educ. 342, 362 (1999).

67. See, e.g., Alex M. Johnson, Jr., *Think Like A Lawyer, Work Like A Machine: The Dissonance Between Law School And Law Practice*, 64 S. Cal. L. Rev. 1231, 1231-32 (1991) (describing young associates' complaints of dissatisfaction at law firms); Schiltz, *supra* note 41, at 888 (“Indeed [h]appy law partners are a small minority these days.”) (quoting *Is it Possible to Put Passion Back into Practice of Law?*, Partner's Rep., Nov. 1994, at 1)); Seth Oltman, *Attrition Condition*, L Magazine: Life-Liberty-Law School, Nov./Dec. 2000, at 37 (noting that a National Association for Law Placement study of nearly 5500 lawyers from the classes of 1991 to 1998 found that 38.3% of associates leave by their third year and 59.6% by the end of their fifth year).

68. Kronman, *supra* note 1, at 281-82.

controversial, but entirely logical, conclusions about the changing nature of firm practice.

It would appear that lawyers in large firms (those where elite law students dominate) are performing less pro bono work than before. A recent *New York Times* article noted that large New York firm pro bono commitments have dropped considerably, dipping below the professions own guidelines, despite record profits and booming business.⁶⁹ There is no evidence that firm employees care any less about the poor; in fact there is increasing evidence that more students include pro bono opportunities in their criteria when choosing firms, that firms are getting better at publicizing pro bono opportunities, and that performing a lot of pro bono work is not considered an impediment to partnership chances.⁷⁰ But good intentions dissipate quickly under the external pressures of a competitive environment and radically higher billing expectations,⁷¹ and the internal pressures placed by associates on themselves to merit their own, arguably excessive, salaries. Pro bono work ends up being last on a long list of priorities. For an overworked young associate it is “pro bono or go home-o.”⁷²

The billing-oriented culture at corporate law firms also has an impact on the quality of training given to young associates. Many would argue that the “apprenticeship system” for which the elite firms were previously renowned has begun to deteriorate.⁷³ Senior attorneys simply do not have as much time to devote to mentoring as they once had. It is perhaps no coincidence that during the current period of decline in mentoring, there has been a concomitant increase in complaints about the ethical conduct of attorneys.⁷⁴ Whether lawyers, especially those in firms, behave less ethically than before is subject to debate.⁷⁵ It is beyond dispute, however, that complaints

69. Greg Winter, *Legal Firms Cutting Back on Free Services for Poor*, N.Y. Times, Aug. 17, 2000, at A1; see also, Stracher, *supra* note 56, at 51 (“[S]ince 1992, according to The American Lawyer’s latest survey, pro bono hours have plunged from about 56 hours per lawyer to 36 hours.”).

70. Esther F. Lardent, *Pro Bono Work is Good for Business*, Nat’l L.J., Feb. 19, 2001, at B20 (“Although there have been no national surveys to date of changes in attitudes among younger lawyers, anecdotal information and related developments, such as the increase in law school public service projects and the growth of fellowship and rotation programs, confirm the heightened interest in pro bono among the younger generation of attorneys.”); see also Stracher, *supra* note 56, at 51 (noting that while some law firms had reduced the credit given to associates for pro bono work and had instigated pro bono minimums, firm associates seem more aware of their pro bono obligations, and that some firms have reversed restricted policies after an outcry by associates); Edwards, *supra* note 2, at 69-71 (noting opinions of former law clerks on pro bono work).

71. Curtis, *supra* note 50, at 74 & n.14; Stracher, *supra* note 56, at 51.

72. Stracher, *supra* note 56, at 51.

73. Curtis, *supra* note 50, at 69.

74. Glendon, *supra* note 9, at 28; see Schiltz, *supra* note 41, at 908.

75. See Galanter & Palay, *supra* note 62; Glendon, *supra* note 9; Silver & Cross,

have risen and public esteem for the legal profession has suffered—a fact noted by many prominent figures, not least former Supreme Court Chief Justice Warren Burger in a well-known address at Fordham Law School.⁷⁶

Placed in a competitive environment where billing is paramount, and lacking guidance from senior attorneys, the self-image of the elite student-turned-attorney can begin to suffer. The grand irony is that those who chose prestigious firms out of a need to feel distinguished or special come to realize that they are being treated as the opposite. When files are dumped on their desk without a word of thanks, or even explanation, or when they overhear a stressed partner bark “get me a body,” few bright young associates feel that their years of educational achievement and elite law school training are being adequately recognized or rewarded. Yet, despite all these pressures, most lawyers will eschew the potential psychic income offered by different career options and remain in the golden cage. “The tombstone of many a Wall Street lawyer . . . is carved with the epitaph ‘I kept my options open.’”⁷⁷

A common student myth is that it is easy to move from the private sector to public interest work but that public interest work can stigmatize a student who might later want to work in the corporate sphere. In fact, entry into a private firm effectively closes career options.⁷⁸ Despite many students going to firms for “two years” to gain experience, training or funds for future public interest work, once ensconced the majority will stay. Some will go to prestigious government agencies or work as United States Attorneys—jobs considered respectable career stepping stones that do not forfeit a right to return to private practice. But most of those who leave large firms will bypass public interest work and go to work for different firms or large corporations as in-house counsel. Some will just leave the law altogether.

Richard E. Neustadt, professor at Harvard College, has said, “I have lost some friends on the Harvard Law faculty by teasing them about the business I claim they are in: turning many of my public-spirited undergraduates into cash-hungry corporate attorneys heading off toward midlife crises!”⁷⁹ Is this truly the business that elite schools

supra note 60, at 1475.

76. Warren E. Burger, *The Decline of Professionalism*, 63 *Fordham L. Rev.* 949, 950 (1995).

77. Kahlenberg, *supra* note 34, at 23 (citation and internal quotation marks omitted).

78. In fact, the stigma may work the other way. I have been told by some public interest employers that they are wary of hiring lawyers who have spent time practicing at a private firm because they are skeptical that the lawyer will cope with the lifestyle change and salary plunge and doubt if they have sufficient commitment and dedication to public interest work.

79. Kahlenberg, *supra* note 34 (testimonial of Professor Richard Neustadt on

are in? The first part of this article has sought to undermine the myth that students are fervently committed to public interest law when they arrive at law school only to be transformed into corporate monsters by the time they leave. The truth, as always, is somewhere in the middle. Most elite students are good but privileged people attracted to public commitment but also drawn by money and prestige. While they may succumb to the temptation of the big law firms, they do not abandon all notions of social justice when they make the choice to go to large private firms. Law firms have shown themselves to be responsive to students' pro bono interests, but young associates have also proven vulnerable to external pressures imposed by firm culture and, as a result, are doing less pro bono work and behaving less ethically (or at least appearing to). In addition, many of them are unhappy, or at least unfulfilled, and some, judging by the suicide rate, are even seriously depressed.⁸⁰

If a law school is going to refute Neustadt's accusation, it must therefore focus on two goals. The first is to somehow, in the face of enormous external pressure, increase the number of students who enter into public interest law in the first place. The second, and arguably more important, goal is to shape the values and ethics of those who will not go into public interest work: the majority who will work for private firms. If elite young lawyers are to stay at firms, what can be done to increase the level of pro bono work performed within those firms, to keep lawyers mindful of the need for public service work, and to increase the likelihood that they move in and out of public interest work in the manner of old "lawyer-statesmen" like Arthur Liman?⁸¹ Furthermore, how can law school act to ensure more ethical practice and responsible conduct while lawyers are working within the firm; and how can they guide students towards a humane self-understanding that may insulate them from the more dramatic adverse affects of the stress, pressure and hard work they will encounter? The next section discusses how clinical legal education can contribute to meeting these challenges.

book jacket).

80. Silver & Cross, *supra* note 60, at 1476.

81. See *infra* notes 89-90 and accompanying text.

III. WHAT CAN CLINICAL LEGAL EDUCATION DO?⁸²A. *Role Models*

It is well-known that effective role models greatly increase the chance that students will follow certain career paths. This is especially true when students need to resist a powerful dominant culture in order to pursue their goals. The lack of public interest role models within elite faculties has already been noted,⁸³ but not all law professors in elite faculties push their students towards corporate work; in fact, a number of them regularly attempt the opposite and publicly proselytize the work performed by public interest advocates. The problem is that professors face a large impediment in encouraging students to enter public interest fields: the credibility gap. Student responses range from amused skepticism to indignation when professors who clerked for the Supreme Court before putting in time at a prestigious law firm exhort the rewards of undertaking legal service work immediately after law school and “poo-poo” students’ yearning for prestige. Some star faculty members will take on many pro-bono projects, but students are well aware that their own public interest enterprises, whether performed during law school or while working at a firm, are unlikely to merit a television appearance, book deal or their picture on the front page of *The New York Times*.

Clinical law professors stand before students as people who have genuinely taken a different road and not only survived but flourished. Performing public interest work with an admired and respected professional can inspire students to previously unimagined career paths. Unlike the law professors who extol the virtues of law firm life, many clinical professors actively discourage firm careers, citing long hours, tedious work and the decline in human spirit and imagination they have observed in previous students now working at firms. Furthermore, clinical professors offer students more than just vague encouragement to assist the community. Clinical professors are a resource for students who are interested in public interest work but do not know where or how to begin. Because they have moved in circles different from the mainstream faculty, they can share their

82. This article does assume some knowledge of what clinical legal education is: a program which allows law students to work with real clients as junior lawyers under the supervision of experienced clinical faculty. This article also confines its discussion to the traditional domain of clinics: poverty lawyering and related work in areas such as disabilities, criminal legal assistance, capital punishment, landlord and tenant, immigration and family law. It does not discuss the other types of clinics which exist such as those where students work on international human rights projects or in more commercial fields designing business plans, corporate structures and even taxation strategies for businesses and non-profit organizations. Many of the article’s arguments, however, are enhanced by the existence of these more diverse clinics.

83. See *supra* Part II.B.

experiences in practice, as well as those of colleagues and friends in the public interest realm.

Almost as important as the faculty are the clinical students. It takes an immense amount of courage to resist not just the wining and dining of corporate firms but the onset of anxiety when the whole law school appears to have sewn up permanent job offers.⁸⁴ As the law school becomes awash in pinstripe during interview season and dining halls boom with discussions of six-figure salaries, enormous bonuses and luxurious accommodations and perks, the clinic provides a community for the brave hearted. Of course many clinic students interview and take jobs with corporate firms, but the atmosphere and work performed penetrate the air of inevitability that pervades the rest of the law school.

B. *Exposure to Community and Client Needs*

As mentioned above, many law students come to law school without a profound sense of the depth of poverty or need for legal services within many communities.⁸⁵ Student desire to practice public interest law is influenced greatly by the sense that their services are not just valued but in fact can be integral to the survival of a community. No inundation of information about income gaps, increasing homelessness or the plight of the poor is a substitute for actually meeting and befriending a seriously deprived person. As Arthur Koestler puts it, “[s]tatistics don’t bleed,”⁸⁶ and pro bono work can help “sensitize professionals to worlds they usually ignore.”⁸⁷ Exposure to extremes of deprivation and hardship might be expected to deter or repel students, but most seem to become infused with passion and zeal to make a difference.⁸⁸ Such passion is fueled by the

84. See *supra* note 49.

85. See *supra* Part II.A.

86. Rhode, *supra* note 38, at 2431 (quoting Arthur Koestler).

87. *Id.* at 2435 (quoting former Tulane Law School Dean John Kramer); see also Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich. L. Rev. 2099, 2105 (1989).

88. Silver and Cross warn of the risks of exposing students to the life and values of those on the wrong side of the tracks:

Some pro bono representations involve accused murderers, thieves, rapists, wife-beaters, child molesters, drug dealers, and gang-bangers—bad people who do bad things. After getting to know these individuals, some lawyers may favor the death penalty more strongly than before.

... Many poor people have problems because they make bad choices. Unemployment sometimes occurs because employees have engaged in illegal or irresponsible behavior at work. Alcoholism and drug addiction sometimes persist because abusers have refused treatment or surrounded themselves with temptations. Diseases sometimes occur because people are ignorant, superstitious, obese, inert, promiscuous, unclean, or unreliable with medications. Excessive debt sometimes reflects immoderate spending. Will lawyers who are required to represent clients who make poor choices move to the left politically? Or will the experience of representing people

discovery of just how easy it is to make a difference. Almost all clinical students will have success stories – welfare benefits granted, housing obtained, an eviction prevented, a disability recognized – and all because of *their* efforts. Junior corporate associates will wait much longer to gain the satisfaction of a clear victory through their work alone.

Exposure to clinical work also tends to undermine pervasive myths, harbored within the legal profession, about the value of poverty lawyering. Take the arguments expressed by Charles Silver and Frank B. Cross in their recent essay, *What's Not to Like About Being a Lawyer*,⁸⁹ in the *Yale Law Journal*. In reviewing *Lawyer: A Life of Counseling and Controversy*, the memoirs of notable Yale alumnus Arthur Liman, and commenting on Liman's commitment to pro bono public interest work, Silver and Cross state: "What puzzles us is his belief, which others share, that public service is a higher calling than other legal work."⁹⁰ Silver and Cross argue, "lawyers who help paying clients with private matters make valuable microeconomic contributions by helping create and maintain the world of commerce and valuable micropolitical contributions by maintaining a culture in which people actively create and use legal rights."⁹¹ The authors claim that the way for law graduates to help end poverty is to work to promote prosperity: "The tendency of economic growth and cash transfers to reduce poverty is supported by considerable empirical evidence. The tendency of legal services to do so is not."⁹²

The influence of the type of arguments made by Silver and Cross cannot be underestimated. They are parroted by almost anyone who has joined a large corporate firm. They are intuitively appealing and comforting to corporate lawyers and phrased in the type of language they become accustomed to using. Of course the argument is a version of "the trickledown effect" approach promoted by the

whose values are unlike theirs and who fail to help themselves harden them against the poor? We will not pretend to know.

Silver & Cross, *supra* note 60, at 1492 (emphasis added). Silver and Cross are right – we don't know how many students will be turned off. But we also don't know how many students will be turned on to public interest lawyering as a result of their clinic experiences. See *infra* notes 95-96 and accompanying text.

In general, most clinic students I have met emerge with a more nuanced understanding of the causes of crime and poverty and are less prone to simplistic ideas such as "criminals are bad people who do bad things" or "poor people make bad choices and fail to help themselves." Many may begin to see crime and poverty as the outgrowth of a totality of circumstances: they may find a child molester or abuser who himself endured horrendous abuse; they may find that addiction has a genetic link or a strong basis in neglect, abuse and trauma; they also may find that the values of "those people" are in fact remarkably similar to their own. See also *infra* note 107 and accompanying text.

89. Silver & Cross, *supra* note 60.

90. *Id.* at 1494.

91. *Id.* at 1449.

92. *Id.* at 1482.

Reaganomics school of thought in the 1980s. Most clinic students quickly become skeptical of such arguments after they discover the levels of poverty that still exist within the ostensibly prosperous United States community, especially the large, indeed increasing, demand experienced by homeless shelters, soup kitchens and charitable organizations.⁹³ Silver and Cross do not dispute that poverty still exists, nor do they suggest that lawyers do nothing but work in large firms. What they argue is that pro bono legal services are inefficient:

We see no reason to encourage lawyers to make donations of legal services their preferred form of charity. Many poor people need money, hot meals, home repairs, medical assistance, transportation, and help with chores far more than they need legal services. Lawyers should provide the forms of charity that poor people need most, especially gifts of cash.⁹⁴

Silver and Cross acknowledge that most promoters of pro bono work do not object to infusions of cash, but they question whether such donations are likely to be made. Silver and Cross point to the remarkable philanthropy of George Soros and Bill Gates (neither of whom, ironically, are lawyers or law graduates).⁹⁵ Their extraordinary generosity and valuable contributions to public work were made possible by achieving enormous wealth, and Silver and Cross ask, to paraphrase, would it be better if they had sacrificed their hours

93. See, e.g., Elizabeth Becker, *Millions Eligible for Food Stamps Aren't Applying*, N.Y. Times, Feb. 26, 2001, at A1; Nina Bernstein, *Homeless Shelters in New York Fill to Highest Level Since 80's*, N.Y. Times, Feb. 8, 2001, at A1.

94. Silver & Cross, *supra* note 60, at 1478.

95. In fact, Gates and Soros are good examples of the power of actual exposure. Bill Gates has undergone a transformation in his philanthropy. Initially his grants and donations concentrated on providing access to computing technology to the underprivileged—a tactic dismissed by many as a cynical public relations exercise that insidiously promoted the monopoly of Microsoft operating systems. Gates tells the story of how, one day in an impoverished shanty town in Soweto, South Africa, he realized that the town had only one power outlet and thought to himself, “Hey, wait a minute . . . computers may not be the highest priority in this particular place.” Jean Strouse, *How to Give Away \$21.8 Billion*, N.Y. Times, Apr. 16, 2000, (Magazine) at 56. Gates subsequently donated considerably more attention to global health issues and has donated over \$750 million to health initiatives run by WHO, UNICEF and other charitable foundations. *Id.* Gates’s recent grant of \$40 million to homeless shelters could equally have been the result of a transformative experience while standing inside a shelter. George Soros is clearly convinced of the value of legal services—a large proportion of public law initiatives in America are at least partly funded by the Soros Foundation. See, e.g., *Lawyers for the Poor Earn Little Money, Lots of Satisfaction; Philanthropist’s Grants Pay Salaries, School Loans*, St. Louis Post-Dispatch, Oct. 18, 1998, at D10; *Philanthropist Challenges Others to Invest in Justice*, Metropolitan Corporate Counsel, Sept. 1998, at 33; Henry Weinstein, *Billionaire’s Matching Grant Program to Benefit Legal Aid Services*, L.A. Times, June 3, 1998, at A28 (describing Soros’s generosity in funding organizations and programs that provide legal services for the poor).

creating wealth to instead lend an unskilled hand in a soup kitchen?"⁹⁶ I can think of two answers prompted by my clinical experience. First: yes, if only by working in a soup kitchen did they become aware of how many people outside the restaurants of the business district of Manhattan were actually starving. Experience provides impetus for change. Many wealthy men and women are aware of the horrendous effects of disabilities but only become passionate advocates for the rights of the disabled after they (or their friend or sister) give birth to a disabled child. Similarly, many students only become aware of just how clumsy the invisible hand of the marketplace can be when they see a client to whom they have become attached suddenly become homeless, be denied benefits, be denied access to education or their children, or even be put behind bars.

My second answer draws from the Chinese proverb: "Give a man a fish and you feed him for a day. Teach a man to fish and you feed him for a lifetime."⁹⁷ Poverty lawyering at best teaches the client how to fish, at worst sews the client a valuable net. When Silver and Cross state, "[r]are indeed is the indigent person who would rather have twenty hours of a lawyer's time than \$5,000,"⁹⁸ they are being extraordinarily short sighted. Clinical lawyers work to secure permanent affordable housing, to obtain recognition of disabilities so that clients can obtain life-long pensions, and to keep clients in their own houses and out of homeless shelters and prisons. In real financial terms most of these services are worth far more than \$5,000 in cash. Twenty hours with a poverty lawyer could net a disabled client over a quarter of a million dollars over a lifetime.⁹⁹ More significantly, clinical lawyers and students work to help people help themselves. They teach people how to apply for benefits, challenge administrative decisions, exercise their own legal rights and assist others in their community in exercising theirs. Clinical lawyers also work for long-term change. They work to implement legislative reforms and they initiate impact litigation in order to challenge welfare laws or change

96. Silver & Cross, *supra* note 60, at 1483-84.

97. Harold V. Cordry, *The Multicultural Dictionary of Proverbs* 258 (1997).

98. Silver & Cross, *supra* note 60, at 1484.

99. This figure is based on an eligible client obtaining a federal Social Security Insurance ("SSI") pension. In the year 2000 a base monthly payment of SSI was \$500. Over thirty years (without accounting for inflation) this would amount to \$180,000. Over sixty years (children are eligible for SSI) the figure would be \$360,000. SSI recipients are also eligible for food stamps, Medicaid and state subsidized income and subsidized housing. In Connecticut, in the year 2001 an SSI recipient would receive approximately \$800 per month in combined federal and state income and food stamps. Over thirty years (without accounting for inflation) this would amount to \$288,000. The value of medical services and subsidized housing would of course greatly increase the value. Interview with Mary-Christy Fisher, staff attorney, New Haven Legal Assistance (June 5, 2001); *see also* Linda Landry, *An Advocate's Guide to Surviving the SSI System: Financial and Other Nondisability Criteria 1* (2000). Of course Silver and Cross may object to the provision of these government services, but an evaluation of such objections is beyond the scope of this article.

the structure and management of prisons, schools and other public institutions to better suit the needs of the disadvantaged.

Preliminary evidence suggests that clinical legal education works to achieve the goal of getting students more involved in public interest work. Deborah Rhode of Stanford Law School made encouragement of clinical legal education, including endorsing mandatory involvement in clinics, the cornerstone of her term as President of the American Association of Law Schools ("AALS"). She found:

At Tulane, the first school to impose pro bono requirements, two-thirds of graduates reported that participation in public service had increased their willingness to participate in the future, and about three-quarters agreed that they had gained confidence in their ability to represent indigent clients. At other schools, between three-fourths and four-fifths of students who participated in mandatory pro bono programs also indicated that their experience had increased the likelihood that they would engage in similar work as practicing attorneys. . . .

. . . .

From the limited evidence available, the safest generalization seems to be that positive experience with pro bono work as a student will at least increase the likelihood of similar work later in life.¹⁰⁰

Of course it is naïve to expect that more clinical work in law school will prompt a student stampede from corporate interviews to legal services clinics. And it is true, some will be put off or at least harden in their reluctance to work in impoverished environments¹⁰¹ because clinic work is difficult, demanding, emotionally draining and often frustrating (although there is a perverse "marine attitude" among some elite students that makes these challenges quite attractive). But exposure to clinic work adds a realistic dimension to the philosophy of

100. Rhode, *supra* note 38, at 2434-35.

101. Arguably it is a mistake to think that a clinic has "failed" if it puts students off a career in public interest work. See Abbe Smith, *Carrying on in Criminal Court: When Criminal Defense is not so Sexy and Other Grievances*, 1 Clinical L. Rev. 723, 724 (1995). Smith responds to an article by a student who was deterred from a career in criminal defense after a semester of clinical experience:

[L]ike many students who explore criminal defense practice in a law school clinic, Rader struggled hard with what it means to be a criminal lawyer and whether the fit was a good one for him. He learned a lot about how the American criminal justice system works—or doesn't—in the setting in which most people experience the criminal law. He experienced and grappled with a wide range of ethical and tactical dilemmas. Notwithstanding enormous institutional constraints, he represented his clients well. What clinical teacher could ask for more?

Id. at 724-25 (responding to Robert Rader, *Confessions of Guilt: A Clinic Student's Reflections on Representing Indigent Criminal Defendants*, 1 Clinical L. Rev. 299, 302 (1994)).

a “noble profession.” For those leaning towards public interest work, clinical experience illustrates the excitement, responsibility and rewards that are inherent in community service work. For the majority of students, who will go into law firms no matter what, clinical experience cannot reduce the competitive billing pressures in firms. It does, however, provide insight into poverty, knowledge of the difference that lawyers can make, and some powerful and memorable images to be conjured up when the next “pro bono opportunity” e-mail arrives. Clinics are not a complete solution but are infinitely preferable to the alternative. Ignorant of the work that clinical lawyers perform, convinced that their work enhances the prosperity of all, and increasingly forgetful of the need that exists outside oak-paneled conference rooms, the likelihood is that associates will eschew both pro bono opportunities and cash donations as they succumb to the constant pressure to bill more and work harder, forgetting about the world outside corporate practice.

C. Ethics

Few would deny that the teaching of legal ethics and professional responsibility by traditional coursework has been an abject failure at most law schools. “[T]he legal ethics course is—not to put too fine a point on it—the dog of the curriculum, despised by students, taught by overworked deans or underpaid adjuncts, and generally disregarded by the faculty at large.”¹⁰² There is an emerging consensus that to be taught well ethics must be taught practically, not academically.¹⁰³ Current literature suggests that ethics are “more likely to be caught than taught,”¹⁰⁴ that students and practitioners learn ethics not through being taught ethical content but through being presented with ethical dilemmas, observing how to resolve them in an ethical manner, and integrating the lessons learned into their practice.

In an article directed at ethical teaching in elite schools,¹⁰⁵ Patrick Schiltz (graduate of an elite law school, former Supreme Court clerk, and partner in a national law firm before making the transition to teaching) identifies three challenges to teaching ethics in a way that makes a lasting impact upon future lawyers. The first challenge for an ethics teacher is to expose the frequency with which ethical dilemmas arise. Schooled in the dramatically exaggerated ethical conflicts depicted in popular culture, students struggle to believe that they will

102. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 Geo. J. Legal Ethics 31, 37-38 (1995).

103. See Robert F. Cochran, Jr., *Lawyers and Virtues: A Review Essay of Mary Ann Glendon's A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society and Anthony T. Kronman's The Lost Lawyer: Failing Ideals of the Legal Profession*, 71 Notre Dame L. Rev. 707, 726-728 (1996).

104. *Id.* at 727 (internal quotation marks omitted).

105. See Schiltz, *supra* note 35.

ever behave as unethically as the lawyers they see on television, or that they will regularly find themselves in ethical quandaries. Their academic attention to legal ethics inevitably declines.¹⁰⁶

Second, and complicating matters further, the content of ethics cannot be taught precisely in the classroom. The genuine content of ethics is not so much defined by precise legal codifications like the Model Rules of Professional Conduct or by case law, but rather consists of “the entire ensemble of understandings that lawyers observe in their dealings with one another, with clients, and with the courts.”¹⁰⁷ Lawyers develop an understanding of the ethical norms of the profession through exposure to them in practice and by maintaining and fostering connections with lawyers throughout the legal community.

Finally, unlike the unusual and borderline cases that students often study in class, Schiltz argues that most ethical dilemmas students face in practice are common ones.¹⁰⁸ They are ethically difficult, not because lawyers struggle with identification of the relevant issue or rule but due to the circumstances in which a lawyer will be placed. Schiltz gives the example of padding a time sheet.¹⁰⁹ A recent elite law school graduate at a large firm will be under tremendous pressure—both from the firm and her own competitive instincts—to bill as much time as is humanly possible in order to keep pace with her colleagues. She will be exhausted, having worked the consistently long hours expected of a junior associate. Most likely she will feel isolated in the atmosphere of increasing competition between associates at law firms, and she may lack guidance as more and more senior attorneys abandon mentoring relationships with junior staff to devote their full attention to working and billing in a thriving but intensely competitive legal market. For a graduate to know how to respond ethically in such situations she must have learned how to integrate ethical conduct from an early stage in her legal development, so that instead of struggling to make an ethical decision under pressure, the lawyer almost reflexively behaves ethically.¹¹⁰

Schiltz's approach to teaching ethics can be compared to the challenges of teaching a novice driver. Driving skills are best taught early so that tasks like regularly checking rear mirrors or smoothly changing gears are integrated into the overall learning experience until they are performed by rote and without thought. This is the best way to ensure that they are performed in times of high stress and under time pressure. To take the analogy one step further, intense instruction on road rules is not going to prepare a driver adequately

106. *Id.* at 709-10, 718-20.

107. *Id.* at 718-20 (quoting Glendon, *supra* note 9, at 78).

108. *Id.*

109. *Id.*

110. *See id.* at 736.

for getting out on the road, where he will find that rules are constantly subverted by the other drivers and it is in fact impossible to both drive safely and obey all traffic rules.¹¹¹ To learn which rules must be adhered to in order to ensure safety and legality and which can safely be bent to ensure both safety and convenience, requires careful teaching and observation with an experienced driver.

Clinical teachers are better suited than the elite law school mainstream faculty to meet the three challenges set out by Schiltz.¹¹² A clinical law student quickly becomes aware of the breadth and complexity of ethical questions that lawyers face each and every time they undertake a case. Clinical supervision provides the time and the opportunity for practical ethical mentoring. It allows students to discuss ethical conflicts with experienced and skilled practitioners who usually have formed and maintained a variety of connections and networks with the legal community which assist them in navigating the ethical norms of the profession. Clinical class time is devoted to more academic explorations of ethical issues, as well as global issues of justice and equality that drive the work of public interest attorneys.

While clinical experience is ideally suited to those who plan to embark on careers in public interest law, Schiltz's approach reveals why clinical training can be of particular value in teaching ethics to students who will practice entirely in the world of commerce. The appellate case law of the mainstream law curriculum does little to alert students to ethical dilemmas faced by lawyers. A course in professional responsibility, where students will encounter only bold and dramatic ethical conflicts, adds little more. Without experience in spotting, let alone resolving, common ethical dilemmas, most students

111. Schiltz uses a similar analogy: "Just as there are 'posted' and 'real' speed limits in each community—and just as 'real' speed limits vary among communities that observe the same 'posted' limits—so too are there 'posted' and 'real' rules when it comes to sanctioning unethical conduct." *Id.* at 718.

112. Schiltz writes:

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

First, the academy must accept that one of its functions is to prepare students to practice law—and to practice law ethically. . . .

Second, every faculty must include a number of people who have substantial experience practicing law or a genuine interest in the work of practitioners and judges. . . .

Finally, professors must be willing to spend time with students.

Id. at 747. These characteristics stand in direct contrast to the composition of the faculty of elite law schools. The lack of time and practical experience is self-evident and has been discussed above. The attitude of most elite law professors toward the goals of law schools is aptly summarized by Owen Fiss: "Law professors are not paid to train lawyers, but to study the law and to teach their students what they happen to discover." See "*Of Law and the River*," and *Of Nihilism and Academic Freedom*, 35 J. Legal Educ. 1, 26 (1985) (letter from Owen Fiss to Paul D. Carrington among exchange of letters in response to Paul D. Carrington's article *Of Law and the River*, 34 J. Legal Educ. 222 (1984)).

will only have law firm culture to guide them when they leave law school. In contrast, not only will clinic veterans be more sensitized to the frequency with which ethical dilemmas arise and the need to contextualize their dilemmas within the practicing norms of the profession, but they will have integrated a notion of a moral compass into their own legal development.

Ideal ethical training leaves a student asking the questions "am I doing what is right, what is ethical, what is professionally appropriate" as frequently as they would check their side-view mirrors. After all, as Schiltz submits, behaving ethically is not always complicated:

For the most part, the principle that practitioners use to distinguish the ethical from the unethical is the same one that most people use to distinguish good deeds from bad deeds: The Golden Rule. Do unto others as you would have them do unto you. Be honest. Be fair. Be courteous. Be compassionate. Be true to your word. As Abraham Lincoln recognized, "virtue in a lawyer [is] not much different from common decency in any other calling."¹¹³

Clinical training encourages just such an approach. While traditional teaching methods can leave students believing "[t]here is always an argument the other way and the devil often has a very good case,"¹¹⁴ clinical teachers encourage students to get in touch with and trust their moral intuitions. For example Bob Solomon and Steve Wizner of Yale proudly promote the maxim "if it offends your sense of justice there is a cause of action."¹¹⁵

D. Humanity

Kronman states, "[I]ndeed many hope that the intrinsic satisfaction that [a career in law] affords will be important enough to play a significant role in their fulfillment as human beings."¹¹⁶ An integral part of Kronman's thesis is that students should develop a moral compass or rudder that will help them navigate the ruthless materialism of an often unethical profession.¹¹⁷ This development requires a law school experience where students grow and develop as human beings and are able to trust their own moral instincts. Most accounts of elite law schools however, including those devoured by law school bound college graduates, such as *One L*,¹¹⁸ *The Paper Chase*¹¹⁹ and *Planet Law School*,¹²⁰ savage the impact that elite law

113. Schiltz, *supra* note 35, at 709 (alteration in original) (citations omitted).

114. Rhode, *supra* note 38, at 2446 (quoting Stewart Macaulay, *Law Schools and the World Outside the Doors* II 25 (1982)).

115. Stephen Wizner, Speech delivered to Association of American Law Schools, Section on Clinical Legal Education (Jan. 6, 1994).

116. Kronman, *supra* note 1, at 2.

117. *See id.* at 145-46; *see also supra* note 28 and accompanying text.

118. Turow, *supra* note 46.

119. John Jay Osborn, *The Paper Chase* (1971); *The Paper Chase* (20th Century

schools have on students' development as human beings. The professors are portrayed as cruel and sadistic egomaniacs, relishing their expertise while terrified students flounder hopelessly in confusion. No account seems to suggest that law school is an experience worthwhile for its own sake, an enjoyable intellectual exercise. The elite law school is viewed instead as an ordeal to be endured like boot camp, but it is worse than boot camp because there is hardly any suggestion that law school prepares students for the profession which they are about to enter. While students are encouraged to take comfort that they are developing some basic skills (analytical reasoning, problem solving, oral expression and the amorphous "thinking like a lawyer"), practical training in specific lawyering skills is largely non-existent.

The following quotes provide a good illustration of how elite law schools have been perceived as destroying the humanity of students:

The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice—to knock these out of you along with woozy thinking . . . [I]t is an almost impossible process to achieve the technique [of thinking like a lawyer] without sacrificing some humanity first.¹²¹

*Intimidation is the law school dragon. . . [and the Socratic method is] designed to make you look stupid, cause traumatic embarrassment, and make you feel like you were never cut out to be a lawyer in the first place.*¹²²

[T]he Socratic method . . . can also be thought of as The Professor Always Wins, and the Student Lives in Terror. Make no mistake, *terror is an integral part of the law school experience . . .*¹²³

[Before reaching their second year, students] . . . have been treated as incompetents, terrorized daily, excluded from privilege, had their valued beliefs ridiculed, and in general felt their sense of self-worth thoroughly demeaned.¹²⁴

Law [school] had made me less human, asked that I dismiss my moral center as a dangerous, incomprehensible Pandora's box.¹²⁵

The *main* goal of law school, especially what occurs in first-year, is *to destroy students' belief in morality*, and to replace it with cynicism

Fox 1973).

120. Falcon, *supra* note 46.

121. Karl Llewellyn, *The Bramble Bush: On Our Law and Its Studies* 116 (1960).

122. George J. Roth, *Slaying the Law School Dragon: A Primer on How to Survive and Combat Law School Intimidation* (1981), *quoted in* Falcon, *supra* note 46, at 285.

123. Mark H. McCormack, *The Terrible Truth About Lawyers* (1987), *quoted in* Falcon, *supra* note 46, at 285.

124. Turow, *supra* note 46, *quoted in* Falcon, *supra* note 46, at 286.

125. Goodrich, *supra* note 45, at 115.

and amorality. At that, it succeeds very well. The “terrorism” and intimidation are a crucial part of this process.¹²⁶

[My class room experience] was probably characterized by a lot of fear.... I felt pretty lost. I... personally found classes intimidating.¹²⁷

Law students tend to identify the Socratic teaching method (sometimes referred to as “S&M”) as the principle culprit for their traumatic experiences.¹²⁸ Kronman and Edwards primarily blame law school content, especially the critical legal studies movement’s endorsement of moral relativism tending towards nihilism.¹²⁹ But it can be argued that the problem stems not from what is being said to the students, nor even the method by which it is said, but rather the attitude of the people who are doing the talking. It is important to note that the comments above were made about law school experiences which occurred¹³⁰ in 1933, 1942, 1957, 1979, 1987, 1989 and 1996, respectively, encompassing changes in legal scholarship and teaching methods and predating the movements that Kronman and Edwards identify as the source of the problem. The words most commonly used in the quotes are “intimidation” and “terror.” Is it possible that students’ senses of justice, humanity and common good are harmed less by the lack of certainty of legal principle, or lack of reverence for the traditions of law, than by teachers who deliberately and systematically undertake to ruin students’ sense of self-worth and the value of their own ideas?

For example, at Yale Law School students revere professors, like Steven Bright, who use rigorous and demanding questioning methods.¹³¹ They reward professors, like William Eskridge, who specialize in esoteric “law and . . .” fields of scholarship,¹³² and they

126. Falcon, *supra* note 46, at 290.

127. Gaber, *supra* note 39, at 181 (alteration in original).

128. See, e.g., Falcon, *supra* note 46, at 285 (“The inordinate competition is engendered by a system of daily recitation which is *designed to make you look stupid, cause traumatic embarrassment, and make you feel like you were never cut out to be a lawyer in the first place.*”); Jennifer Howard, *Learning To “Think Like A Lawyer” Through Experience*, 2 *Clinical L. Rev.* 167, 172 (1995) (“The traditional Socratic method emphasizes client-less analysis in a situation of competition and isolation, and in the process seriously undermines students’ confidence and self-esteem.”).

129. See Edwards, *supra* note 2, at 69.

130. The first six dates are those of the respective author’s attendance at law school, not publication dates.

131. Professor Bright is consistently nominated for student-voted teaching awards and was selected by students to deliver the 1999 Yale Law School Graduating Address.

132. Professor Eskridge was awarded the 2000 Yale Law Women Teaching Award and selected by students to deliver the 2001 Graduating Address. Professor Eskridge teaches mainstream classes like Civil Procedure and Constitutional Law, but his teaching award for the year 2000 was primarily based on his successful teaching of the course: “Sexuality, Gender and the Law”.

value those, like Owen Fiss, who are critical of legal traditions and premises.¹³³ Anecdotal evidence suggests that what students value most fundamentally about these teachers is that they care about their students as human beings. This sentiment is not derived as much from the content of the professors' courses, or their views of the value of law as a tradition, as the way that they actually speak and interact with students. One Yale student said of Professor Bright: "He's just like—Steve. He's got this wonderful personality. He's genuinely interested in everything you have to say. He would drop everything, even though he's swamped and busy . . . his door was always open."¹³⁴ An Asian student told me that she liked the class of Owen Fiss, probably Kronman's intellectual nemesis in the arguments he advances, because he was one of the few professors who ever bothered learning to pronounce her name correctly.

Learning names will not cure every ill. The intimidation and personal alienation experienced by new law students is a complex subject. Some of the anxiety experienced by elite law students is inevitable given the composition of the student body. It has been suggested by psychologists that law students share certain common traits. Research validates the lawyer stereotype: intelligent, dominant, aggressive, ambitious, competitive people who are not particularly warm and fuzzy types and who crave attention and have the ability to lead others.¹³⁵ Placing such people together in a competitive environment inexorably leads to some unpleasant consequences. After amassing a high degree of achievement in order to be accepted to an elite law school, students develop expectations of themselves and their own success which cannot possibly be met by law school. Many elite students will fail (at least in their own minds, by being average) for the first time in their lives at law school. Those who are grappling with a sense of failure will meet others who have a "tendency to respond to stress by becoming more aggressive and ambitious."¹³⁶

Placed in this type of environment, students sometimes feel the need to act out the worst stereotypes of lawyerly aggression and

133. Both Edwards and Kronman identify Professor Fiss as a spokesperson for the kind of teaching and scholarship towards which they direct their concern. Professor Fiss remains, judging by comments to me and enormous enrollments, one of the most popular teachers at Yale Law School.

134. Gaber, *supra* note 39, at 213.

135. See Nancy B. Rapoport, *Dressed For Excess: How Hollywood Affects The Professional Behavior Of Lawyers*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 49, 70 (2000); see also Susan Daicoff, *Lawyer, Know Thyself: A Review Of Empirical Research On Attorney Attributes Bearing On Professionalism*, 46 Am. U. L. Rev. 1337 (1997).

136. Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 Geo. J. Legal Ethics 547, 594 (1998).

amorality. This may be influenced by images of lawyers and law professors as portrayed in popular culture. Students, who see many negative movie and television portrayals of lawyers, can unconsciously adopt the worst traits of the profession.¹³⁷ Intimidated by the success of their peers and afraid of failure, students cling to stereotypes, thinking if they act “more like a lawyer” they are more likely to succeed. Even professors can fall into this trap. Surrounded by super-successful peers and aggressively intelligent and ambitious students, some professors seem to deliberately imitate the teaching styles depicted in movies like *The Paper Chase* and books like *One L*. Falcon calls this the “Kingsfield” or “Perini” syndrome—named after the professors portrayed in *The Paper Chase* and *One L*, respectively.¹³⁸ While the authors created their mythical professors as amalgams of the worst excesses of law school teaching, many professors see some cache in being like them, mistaking bullying with being brilliant and demanding.

So why does it matter if students are a little miserable at law school? Making any institution more humane is obviously a goal in itself, but the issue has greater significance for the purpose of this article. First, students are more vulnerable to being wooed by corporate firms if their self-esteem and self-worth has been shaken by law school.¹³⁹ It has been oft repeated that both full-time public interest work and pro bono work in law firms require a certain amount of courage to swim against the stream of the dominant law school and corporate firm culture.¹⁴⁰ Of course temptation will always

137. See generally Michael Asimow, *Bad Lawyers in The Movies*, 24 *Nova L. Rev.* 533 (2000); Rapoport, *supra* note 135.

138. Falcon, *supra* note 46, at 122-24; see also James D. Gordon III, *How Not to Succeed in Law School*, 100 *Yale L.J.* 1679, 1688 (1991). Gordon relates the following story:

A law professor's greatest aspiration is to be like Professor Kingsfield in the movie *The Paper Chase*. One professor who saw the movie decided (this is a true story) to act out one of the scenes from the film in his class. He called on a student, who replied that he was unprepared. The professor said, “Mr. Jones, come down here.” The student walked all the way down to the front of the class. The professor gave the student a dime, and said, “Take this dime. Call your mother. Tell her that there is very little chance of your ever becoming a lawyer.” Ashamed, the student turned and walked slowly toward the door. Suddenly, however, he had a flash of inspiration. He turned around, and in a loud voice, said, “NO, Clyde.” (He called the professor by his first name.) “I have a BETTER idea! YOU take this dime, and you go call ALL YOUR FRIENDS!!!” The class broke into pandemonium. The professor broke the student into little bitty pieces.

Id. at 1688.

139. Kennedy has commented: “Law school . . . teaches students that they are weak, lazy, incompetent and insecure. And it also teaches them that . . . large institutions will take care of them almost no matter what.” Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (1983), quoted in Kahlenberg, *supra* note 34, at 163.

140. See *supra* Part II.C.

be present, but the palliative tonic of money, prestige and flattery may hold less sway to those who can maintain a robust self-image. The connection may seem somewhat tenuous but it has been a consistently iterated theme in elite law school memoirs like *One L* and *Broken Contract*,¹⁴¹ and there is at least some anecdotal evidence that students who attend more humane institutions are more likely to be attracted to public interest work than those who attend schools renowned for their aggressive and competitive atmospheres.¹⁴²

Secondly, as Kronman and Schiltz argue, a sense of humanity and moral imagination, along with a moral compass or anchor, are important tools in the goal to behave ethically.¹⁴³ This makes sense: the more connected a law graduate is with his innate moral sense, the more likely he is to uphold the moral norms of the noble profession. Furthermore, lawyers often fall down in their duties to their clients or the public good not because of ignorance of appropriate professional conduct but because disillusionment and burnout leave them too emotionally exhausted to comply with the often heroic demands of noble and ethical conduct.¹⁴⁴ The experience or fear of emotional burnout is also often the reason why lawyers leave or avoid public interest work or pro bono obligations.¹⁴⁵

The vulnerability of legal professionals to the more dramatic manifestations of anxiety and depression seems to begin at law school. Numerous studies of law students show that they suffer from high levels of tension, anxiety and depression, sometimes even higher than their counterparts in medical schools.¹⁴⁶ A rigorous legal education

141. Kahlenberg, *supra* note 34, at 144; Turow, *supra* note 46, at 6.

142. For example many law students and professors (and not just those at Yale) have told me that Yale students are more likely to participate in public interest work than those at the famously competitive Harvard or Chicago law schools.

143. See Kronman, *supra* note 1, at 145-46; Schiltz, *supra* note 35, at 732. Schiltz comments:

An attorney who is integrated internally uses the same moral compass in all aspects of her life. She does not have one set of ethics for home and another for the office. . . .

A person with a strong enough moral compass may very well resist the pressures of the legal profession on her own

Id.

144. See Ogletree, *supra* note 31, at 1289-90.

145. See Deborah L. Arron, *Running from the Law: Why Good Lawyers are Getting Out of the Legal Profession* 2-3 (1989); Barry A. Farber, *Crisis in Education: Stress and Burnout in the American Teacher* 24 (1991); Ogletree, *supra* note 31, at 1289-90; Rader, *supra* note 101, at 302.

146. See Daicoff, *supra* note 135, at 1407 (providing a comprehensive examination of the literature that demonstrates that law students find law school psychologically and emotionally difficult); Peter G. Glenn, *Some Thoughts About Developing Constructive Approaches to Lawyer and Law Student Distress*, 10 J.L. & Health 69, 69 (1995-96) (explaining that law students report high levels of distress in law school); Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 Cumb. L. Rev. 63, 66 (1995-96) (noting that many first-year law students become overwhelmed by "failure anxiety"); Suzanne C. Segerstrom,

experience may once have been thought to toughen students up, but the better view promotes self-esteem over brutalization and suggests that the fewer emotional scars inflicted upon a student before embarking on her career in the stressful real world the better.¹⁴⁷

At this point it is instructive to note two things. First, the students who are hit hardest by the intimidation of law school, and those who are most vocal in making demands for a kinder, gentler law school, are those who represent its new face—women and ethnic minorities. Minority students and women (who despite their almost equal numbers report feeling like a minority) are tired of feeling intimidated and worthless. In 1998 the Yale Journal of Law and Feminism published “Just Trying to Be Human in this Place,”¹⁴⁸ an article which evaluated the experiences at Yale Law School of twenty women, including women of color. The piece had a tremendous impact on a law school that prides itself on being the most “humane” and “gentle” of the elite law schools,¹⁴⁹ and an “emergency town meeting” of students and faculty was called to address the revelations. The article was consistent with the concerns articulated in numerous studies of female and minority students at elite law schools.¹⁵⁰ The women reported that in their first year of legal education “their voices were ‘stolen’ from them”¹⁵¹ in a cold, sexist and dehumanizing environment.¹⁵²

In contrast to the mainstream law school, many students, especially women and minorities, reported finding their safe haven from terror and intimidation in the clinical environment: As one student put it, “I’m really grateful for the [Yale Legal Services] clinic, and having that be just sort of a place to go. And that was also a community of people, that were there.”¹⁵³

Most law school students would agree that ‘the clinic rats’—the students who form the core of the clinical sub-culture of a law school—are among the friendliest and the happiest students. The

Perceptions of Stress and Control in the First Semester of Law School, 32 Willamette L. Rev. 593, 595 (1996) (“[L]aw students consistently reported significantly higher levels of stress than did medical students . . .”).

147. See *infra* note 166 and accompanying text.

148. Gaber, *supra* note 39.

149. See, e.g., Kahlenberg, *supra* note 34, at 19 (“If we’d wanted soft, we would have gone to Yale, where people are said to like law school.”).

150. See, e.g., Lani Guinier, *Lessons and Challenges of Becoming Gentlemen*, 24 N.Y.U. Rev. L. & Soc. Change 1 (1998); Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 Berkeley Women’s L.J. 1 (1989-90); Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 Stan. L. Rev. 1547 (1993); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 Stan. L. Rev. 1299 (1988).

151. Gaber, *supra* note 39, at 167 (citing Lani Guinier et al., *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. Pa. L. Rev. 1, 2 (1994)).

152. *Id.*

153. *Id.* at 182 (alteration in original).

same is often said of clinical faculty. When asked to identify a mentor, a favorite professor, or just a faculty member they felt comfortable talking to at Yale, students consistently nominated clinical professors.¹⁵⁴ One student made the following statement: "My interaction with the clinical faculty is wonderful. I don't know, they're just very friendly, warm people."¹⁵⁵ Students identified other "nice professors" and expressed hope that they could work towards improving the law school environment, but it seems clear, at least at Yale, that clinical professors have had by far the most success.

Of course this revelation was not controversial. The clinic has long been regarded as a comforting environment to the self-selected "warm and fuzzy types" outside the traditional mold of law students and law professors. In *Just Trying to be Human in this Place*, Gaber notes that student comfort with the clinical faculty went beyond personalities; the students also valued diversity.¹⁵⁶ The clinical staff at Yale is divided equally along gender lines and includes the faculty's first and, until recently, only tenured woman of color. Students at Yale value their interactions with non-clinical faculty members of color,¹⁵⁷ and have been persistently vocal in their demands for more professors of color. The clinic, however, is the only place where their calls for minorities appear to have been heard.

Secondly, there are certain inherent qualities that lead to a perception of the clinic as a "community" rather than an intimidating environment of ambitious individuals. In a clinic, the competitive environment of law school evaporates. Students are not graded nor are they called upon to perform and be judged by professors and peers, as they are in a typical classroom setting.¹⁵⁸ The only way for a student to succeed in a clinical setting is to represent a client to the best of the student's ability. At best, clinical students discover that collaboration is an important lawyering skill that enhances both the working environment and the representation.¹⁵⁹ At worst, a competitive student will become invisible, devoting herself only to an impoverished client.

Ironically, the ambitious and competitive student may benefit most from clinical legal education. Legal education literature has identified "empathy" as a critical legal "skill" that clinics try to develop in their

154. *See id.* at 211.

155. *Id.* at 212.

156. *See id.*

157. *See id.* at 211.

158. Many students report that elimination or reduced emphasis on grades does not eliminate competition as they are most intimidated by the assessments of faculty and other students when they speak in class.

159. David F. Chavkin, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 *Clinical L. Rev.* 199, 204 (1994); Howard, *supra* note 128, at 192-97.

students.¹⁶⁰ The most effective way to develop empathy in a clinical setting is to encourage a strong identification with the client.¹⁶¹ Even the most ambitious student, and the one least sympathetic to the plight of the actual client, will at some level identify with the client's cause because that is the most effective, in fact only, way to notch a legal "win." Armed with this basic prerequisite, students in clinics embark upon an educational journey towards a realization that is at once simple and obvious and yet almost impossible to teach: institutions respond differently to different people, even when they have apparently identical legal claims.

What better way to teach this lesson than through actual experience? An ambitious young law student can digest and critique Charles Lawrence's seminal work, *Unconscious Racism*,¹⁶² with great aplomb; but the student is considerably more likely to internalize Lawrence's thesis when a brilliant and painstakingly prepared legal argument for a client of color is arbitrarily dismissed by a hostile judge who mutters something under his breath about "these people."¹⁶³

This transformative lesson is most important for those elite students who do not embark upon careers in public interest law. Many elite law students, especially those who excel at prestigious law firms and then move into government or public policy work, will eventually occupy positions which influence the shape and practices of courts,

160. See Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School*, 45 Stan. L. Rev. 1695, 1707 (1993) (commenting that students who do pro bono work, "perhaps for the first time, learn to identify with the powerless, and find gratification serving these clients"); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report - Of Skills, Legal Science and Being a Human Being*, 69 Wash. L. Rev. 593, 620 (1994) (noting that "lawyers must learn how to 'feel with' others" and that "'empathy training' is an essential part of the client-lawyer relationship").

161. See Ogletree, *supra* note 31, at 1271; Alan A. Stone, *Legal Education on the Couch*, 85 Harv. L. Rev. 392, 429-30 (1971).

162. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

163. This illustration is based on the author's own experience. See also Homer C. La Rue, *Developing an Identity of Responsible Lawyering Through Experiential Learning*, 43 Hastings L.J. 1147 (1992). La Rue comments:

[T]he student . . . remarked that the judge never really saw who his client was. The judge only saw a poor person of color and assumed that she was trying to get more than that to which she was entitled. He was genuinely outraged at the judge's inability or unwillingness to see past her racial and class biases. The student noticed how his own desire to 'win' pushed him to identify with his client in way that permitted him to experience, if only for a moment, the powerlessness of a person who lives her life in a state of subordination.

Id. at 1154-55.

Compare this experience with Kronman's assertion that practical wisdom requires that "a lawyer must be able to lose himself in that other person's situation, to see it from within in a way that makes it possible for him not just to name but appreciate the interests, values, and ambitions that inform it." Kronman, *supra* note 1, at 299.

administrative agencies and other social institutions. Clinical lawyering requires students to see institutions through their clients' eyes, and to be institutional translators in order to articulate the needs of their clients to agencies who hold the power to grant or deny them.¹⁶⁴ The ever-present operation of racial and class biases, and insight into the terror experienced by disadvantaged clients who have to confront the legal institutions through which lawyers move with ease, have been identified as the most important institutional lessons to be drawn from clinical lawyering.¹⁶⁵ But the lessons also operate at a more practical and mundane level. Students who may one day design operating procedures realize that the most basic requirement, form or procedural step may have a dramatic impact upon a client with a complicated and challenging life. Just as the simple act of picking up a client for an appointment can expose an elite student to home environments and deprivations they have never seen or even contemplated before, the very act of responding to an institutional demand to schedule an appointment for a client who is juggling the demands of a disability, children or just ensuring her own continued existence can force the student to reevaluate his understanding of the most basic of procedures.

Of course none of these insights are original—an entire body of clinical literature has developed around this theme, complemented by educational literature which promotes experiential training, legal education scholarship which stresses the need for law students to be more exposed to institutional processes, and feminist theory which emphasizes the development of the “ethic of care.”¹⁶⁶

164. See, e.g., Philip M. Genty, *Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 *Clinical L. Rev.* 273, 274 (2000) (describing how representing needy clients in two family court cases helped the author “to realize that in both cases the clients were looking to me to help them be understood and, more importantly, respected” by social service agencies and the legal system).

165. See, e.g., Gerald P. López, *The Work We Know So Little About*, 42 *Stan. L. Rev.* 1 (1989); Stephen Wexler, *Practicing Law for Poor People*, 79 *Yale L.J.* 1049 (1970).

166. See Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982); Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 *J. Legal Educ.* 612, 616-17 (1984); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 *Hastings L.J.* 1175, 1180-86 (1992); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 *Minn. L. Rev.* 1599, 1617-19, 1654-56 (1991); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 *S. Cal. L. Rev.* 1231, 1256-59 (1991); Peter Margulies, *Re-Framing Empathy in Clinical Legal Education*, 5 *Clinical L. Rev.* 605, 606-07 (1999); Abbe Smith, *Rosie O'Neill Goes To Law School: The Clinical Education Of The Sensitive New Age Public Defender*, 28 *Harv. C.R.-C.L. L. Rev.* 1, 6-10 (1993); Harvey M. Weinstein, *The Integration of Intellect and Feeling in the Study of Law*, 32 *J. Legal Educ.* 87, 90-92 (1982).

But that is the beauty of clinical legal education – it can be so many things to different people. It combines the development of the skills needed for prudence and practical judgment while enhancing the innate empathy and compassion of law students that Kronman identifies as necessary for a professional's moral anchor.¹⁶⁷ It bridges the disjunction between law and practice that so concerns Edwards. It promises a kinder, gentler law school experience, with the outside possibility of a few less heart attacks and suicides and a few more born-again public interest lawyers. Who can deny it offers as much to elite law students as a contracts class?

IV. A CRITIQUE OF KRONMAN AND EDWARDS

A. Clinical Legal Education Versus Practical Doctrinal Scholarship

Part I of this article described how the selectiveness and expense of elite schools leads to a student body composed primarily of a certain restricted demographic, namely the children of middle and upper-class professionals. That part suggested that the common socio-economic experience of elite law students is one removed from exposure to extreme hardship and thus removed from an understanding of the need for public interest lawyers. It also argues that current elite law faculty members are inadequate role models for students. Even with the best of intentions, elite law school professors lack both the practical experience and time to inspire or advise students to work in the public sector, and they lack the skills needed to integrate practical ethical lessons into students' legal training. Without exposure to public interest work or guidance from elite faculty, most law students will succumb to the financial temptation and competitive allure of large private firms. All the factors discussed derive from the nature of elite law schools and are likely to continue as long as there is demand for such schools. Each factor also exists entirely independently of legal scholarship movements such as critical legal studies or law and economics.

Part II presented a solution directed at creating law students who embody the traits of the lawyer-statesman. Clinical legal education contextualizes the legal experience of elite law students. It exposes them to both the deprivation that exists in communities and the enormous satisfaction to be gained from helping alleviate disadvantage. Furthermore, it undermines myths about poverty lawyering that are pervasive within the corporate legal community. Clinical law teachers can act as role models to students. They work openly towards the public good and can advise students how to tread

167. See Kronman, *supra* note 1, at 145-46; see also *supra* note 28 and accompanying text.

alternative, and perhaps more satisfying, career paths. Finally, clinical teaching is best placed to cultivate practical wisdom and ethical professional ideals by integrating an understanding of ethical dilemmas and ethical professional norms into a student's development as a professional and, just as significantly, as a human being. Clinical legal education is therefore ideally suited to developing the three qualities of the lawyer-statesman which Kronman and Edwards most admire: commitment to pro bono activity, practical wisdom and ethical professional practice.

In comparison, the solution proposed by Kronman and Edwards—an increased focus on practical doctrinal scholarship—seems inadequate and unrealistic. Both Kronman and Edwards continually refer to their desire that law graduates perform more pro bono work. Kronman states: “the level of public-spiritedness within the profession is today dismally low and needs to be increased. Lawyers should spend more time on law reform and the pro bono representation of worthy causes and clients.”¹⁶⁸ Edwards argues: “Law students need concrete ethical training. They need to know why *pro bono* work is so important.”¹⁶⁹

It can be assumed that Kronman and Edwards would like a number of law graduates to work in public interest law full time and others to combine pro bono work with commercial endeavors in the manner of Arthur Liman. What Kronman and Edwards do not show, however, is exactly how making law teaching and scholarship more practical will make students immune to the temptations posed by the financial rewards of corporate practice. Nor do they demonstrate how knowledge of legal doctrine will lead students to resist the enormous pressure on associates to abandon pro bono work and bill competitively with their peers. What both Kronman and Edwards assume is that if students identify law as a higher calling, and then become attached to an image of themselves as lawyer-statesmen, they will just perform pro bono work in the fine traditions of the past:

Kronman talks of how the common law tradition helps to inspire in new attorneys a devotion to “the well-being of the law” and “the soundness of the legal order.” The stronger the “anchorage of his devotion to the law,” the more likely a lawyer will be able “to summon . . . courage when needed” to resist the forces in the profession pushing him toward unethical conduct.¹⁷⁰

Is this likely? Kronman seems to suggest that tradition can be a more powerful force than legal training or the professional practice of colleagues. Is devotion to the law sufficient to withstand the pressures placed on competitive people in stressful environments like law school

168. Kronman, *supra* note 1, at 365.

169. Edwards, *supra* note 2, at 38.

170. Schiltz, *supra* note 35, at 734 (citations omitted).

and legal practice? As Edwards states: "The J.D. who has no interest in pro bono work, and knows nothing of professional responsibility, will succumb all the more readily to the pervasive materialism of the law firms."¹⁷¹ Where are J.D.s going to obtain this interest and how are they going to learn professional responsibility? Elite law students generally do not come from backgrounds where knowledge of the desperate need for public interest work can be expected, and the law faculty is too concerned with scholarship to perform or encourage pro bono work. Shifting the emphasis of scholarship from theoretical to practical addresses neither of these problems.

Part of Edwards's solution seems to require a change in the composition of elite law school faculty to draw more from practitioners with experience in both commercial and public interest work. Edwards is critical of law professors who are "ivory tower dilettantes"¹⁷² and "wholly lacking in legal experience or training."¹⁷³ He refers without comment to a clerk's suggestion that more practitioners be hired,¹⁷⁴ but he never explicitly endorses such a move. Nor does he explain how such a move could take place given the dominance in elite schools of the full-time academic and the requirement of constant high-level scholarship to obtain tenure. What Edwards instead endorses is that full-time academics, especially those who have already achieved tenure, refocus their scholarship toward more useful, doctrinal goals.¹⁷⁵

It is questionable just how realistic such a proposal is. Kronman and Edwards seem to expect elite law school faculty to inculcate students with a reverence and devotion for the traditions and ideals of the lawyer-statesman when large numbers of elite professors have in fact spent their entire highly decorated professions pursuing precisely the movements Kronman and Edwards so abhor—law and economics and other critical legal movements. As Kronman states in his acknowledgments: "Above all I have benefited from the skeptical encouragement of two of my colleagues, Bruce Ackerman and Owen Fiss. I doubt that I shall ever persuade these two good friends that I am right."¹⁷⁶ These leopards are kings of the intellectual jungle and Kronman acknowledges they won't change their spots. Does he really expect that a plea for the lawyer-statesman ideal will turn around all the others?

At best Kronman and Edwards can hope that some law school faculty will teach in a practical doctrinal manner and encourage

171. Edwards, *supra* note 2, at 73.

172. *Id.* at 36.

173. *Id.* at 36-37.

174. *Id.* at 66.

175. *Id.* at 77 ("I see no reason why a tenured professor cannot simply choose to engage in 'practical' scholarship and pedagogy.")

176. Kronman, *supra* note 1, at viii.

students to pursue careers which enhance the public good. What will this achieve? It is likely that elite students will simply adopt the approach of Silver and Cross. They will consider that they are serving a higher calling by performing exclusively corporate work. Silver and Cross conclude their article: "The message we have extracted is not 'Lawyers: We do pro bono work' or 'Lawyers: We do public service.' These justifications cover activities that few lawyers perform. It is 'Lawyers: We solve problems and help people build the world they want to live in.'"¹⁷⁷ Arguments like those of Silver and Cross assuage the cognitive dissonance a public-interest minded lawyer in a firm might experience and they do so in the language of advancing a practical and doctrinal ideal. Such arguments are far more dangerous to pro bono work than any offered by law and economics or critical legal studies.

B. "But I've Been Here All Along . . ."

Given the limitations of practical doctrinal scholarship as a model and given the potential of clinical legal education to triumph over the obstacles to promoting the lawyer statesman ideal, why don't Kronman and Edwards adopt clinical legal education as their battle cry? Their failure to even acknowledge clinical practice is puzzling.

Both Kronman and Edwards call for an increased recognition among law teachers that they are training future lawyers, not just future legal academics.¹⁷⁸ For Kronman this means particular attention to the case method.¹⁷⁹ "Kronman shows how lawyers historically have had a special role in exercising judgment through their capacity to advise and represent their clients—that is, in their relationship to actual cases."¹⁸⁰ One would assume that Kronman would then endorse clinics, where students work with actual cases. This would surely help in the development of practical wisdom to be utilized later in practice, not to mention making the stressed new law graduate's life a lot easier. In *Double Billing*, a best-selling and frighteningly accurate portrayal of New York big-firm life, Harvard Law School graduate Cameron Stracher writes:

Learning the facts of a case is the most important part of practicing law and, of course, not taught in traditional law school classes. No professor dumps one hundred thousand pages of documents on a student's desk and tells him to figure out what's going on. No one

177. Silver & Cross, *supra* note 60, at 1502.

178. Kronman, *supra* note 1, at 264-70, 265 ("Most law students do not expect to work in universities. In teaching law, one must accept this fact and help to prepare students for a life lived in the world of affairs and not, like the teacher's, at a contemplative distance from it."); see Edwards, *supra* note 2, at 35-42.

179. Kronman, *supra* note 1, at 375.

180. Michael A. Fitts, *The Complicated Ingredients of Wisdom and Leadership*, 16 Harv. Blackletter L.J. 17, 21 (2000).

introduces the student to fifty corporate employees and asks her to interview them in order to understand the issues. The facts of a case, when they are presented, are summarized in neat paragraphs, easily digested, simplified. Who can blame the first-year associate for panicking? She's never seen a fact in the wild before.¹⁸¹

But when Kronman complains that “[m]uch academic legal writing in America today is marked by a contempt for the claims of practical wisdom,”¹⁸² he is not suggesting that scholarship or teaching should actually be practical. In a chapter on law schools of over 100 pages, Kronman traces the development of different schools of legal reasoning – beginning with Christopher Columbus Langdell and encompassing Jerome Frank, Karl Llewellyn, Duncan Kennedy, Richard Posner and Roberto Unger.¹⁸³ Kronman bemoans the development of the law and economics and critical legal studies movements on the basis that they undermine a lawyer's conception of a distinctive legal profession and the practical wisdom of legal scholarship – leaving only cynicism, distrust and confusion, emotions that, he argues, have seeped into the profession to the detriment of society.¹⁸⁴ Yet the notion of clinical training is not mentioned at all – not even in Kronman's discussion of Jerome Frank, one of the most well-known and vocal proponents of clinical legal education of the twentieth century¹⁸⁵ and namesake of Yale Law School's own clinic: “The Jerome N. Frank Legal Services Organization.”

When Kronman talks about practical wisdom, practical scholarship and professional ethics, he is seemingly blind to the possibility that exposure to actual practice could achieve or enhance any of these values among students. When Kronman states, for example, “the notion that lawyers have distinctive skills and belong to a special profession is threatened not only by Unger's new critical science of law, but by every program that seeks to replace traditional forms of legal understanding with a comprehensive moral theory systematically built up from elementary philosophical ideas,”¹⁸⁶ he is not suggesting that students practice or even develop many of these distinctive skills. What Kronman is defending is “a comprehensive moral theory systematically built up from elementary philosophical ideas.”¹⁸⁷ It is safe to assume that a student in Kronman's ideal contracts class will be spared some of the darker and more complex implications of

181. Stracher, *supra* note 56, at 50.

182. Kronman, *supra* note 1, at 271.

183. *See id.* at 165-271.

184. *Id.* at 167 (“The critical legal studies movement . . . [has] exerted an influence on American law teaching second only to that of law and economics, [and] has also helped establish the atmosphere of mistrust that now surrounds the virtue of practical wisdom.”).

185. *See id.* at 185-94.

186. *Id.* at 264.

187. *Id.*

critical legal studies but they will certainly never actually see a contract, let alone participate in drafting one.¹⁸⁸

Edwards has a similar obsession with practical doctrinal scholarship at the expense of actual practical training. Having lamented the lack of ethics in the legal profession, the inattention to pro bono responsibilities, and the poor preparation that legal education provides for future practitioners, Edwards announces: "My principal cure for the 'elite' law schools' pedagogy is the same as my cure for their scholarship. The schools must seek a balance of 'practical' and 'impractical' scholars"¹⁸⁹

Why the focus on scholarship? It is not as if Edwards is unaware that clinical legal education redresses many of the ills of which he complains. A former clerk (and current law professor), wrote him: "Students need to learn other things [besides doctrine]. It would be useful, I think, if wanna-be lawyers knew something about negotiating, trying cases, and working with clients."¹⁹⁰ Another former law clerk (and current practitioner) wrote: "I know that my friends who did clinical work knew how to perform basic litigation tasks . . . when they graduated. . . . It's this kind of craftsmanship, as opposed to substantive knowledge in any particular area of the law, that turns out to be essential for young litigation associates."¹⁹¹ Yet another, a current government lawyer, wrote: "[Law school had] a comprehensive legal justice and clinical program. . . . In law school, I saw social justice as a tool for helping people live lives that were less fettered by injustice and legal obstacles and I still see it that way."¹⁹²

So Edwards's former clerks, all graduates of elite schools, now performing a variety of legal tasks, think clinics enhance practical skills, professional responsibility and conceptions of justice. Why relegate these comments to footnotes, not even granting clinics a separate heading? Why not "the clinic" rather than "practical doctrinal scholarship" as the cornerstone of the cure? This is not to suggest that "practical doctrinal scholarship" is an inadvisable goal that should not be promoted; nor is it to suggest that practical scholarship is unrelated to clinical education. If current legal scholarship promotes contempt for practical wisdom, it makes sense that clinical training will be treated with contempt. Recognizing that the issues are intertwined, Kronman could usefully expand his practical wisdom argument to show how it applies to clinical training at law schools.

188. For a discussion of the pedagogical benefit of a practical approach, see Edith R. Warkentine, *Kingsfield Doesn't Teach My Contracts Class: Using Contracts to Teach Contracts*, 50 J. Legal Educ. 112 (2000).

189. Edwards, *supra* note 2, at 62.

190. *Id.* at 62 n.78.

191. *Id.*

192. *Id.* at 72 n.104.

Ironically, Kronman's and Edwards's discussions come at a time when the quality, and especially the quantity, of the legal academy's scholarship has been the subject of savage criticism. As Schiltz notes:

Rodell wrote, "There are two things wrong with almost all legal writing. One is its style. The other is its content." . . . There is a voluminous and repetitive literature criticizing legal scholarship as being, among other things, voluminous and repetitive. . . . [C]ommentators seem to be engaged in a contest to determine who can come up with the most quotable criticism of modern legal scholarship. One strong contender for the honor is Michael Paulsen, who wrote: "If you want to read incomprehensible, pretentious, pompous, turgid, revolting, jargonistic gibberish, read the law reviews." Roger Cramton also qualifies for his assertion that modern legal scholarship consists largely of "interminable and virtually incoherent metaphysical reinventions of the legal wheel, combining colossal arrogance with limited understanding." And Kenneth Lasson deserves some consideration for his entry: "Scholarship could be valuable; most of it isn't. Whatever rich stew there might have been thins quickly into gruel through the sheer multitude of journals seeking fodder for their troughs. Slops fill the law reviews."¹⁹³

Kronman and Edwards would endorse much of the criticism. It is not as if they want more, and more useless, theoretical scholarship. I imagine they want professors to write less often, but on more useful and practically relevant subjects,¹⁹⁴ a task most often performed, again, by clinical teachers. So why does Kronman not even give clinics a mention? It is not as if Kronman and Edwards are actually against clinical legal education. Kronman has been very supportive of the Yale Law School clinic during his deanship at Yale, and Edwards states simply, in his only comment on the issue in the main text of his article, "[t]hus, I agree that law schools are insufficiently clinical."¹⁹⁵ But the neglect of the topic in their writings is like a deafening silence.

There are two ways to view Kronman's and Edwards's silence on clinical legal education. The first is to assume that their silence is an accidental concomitant of being absorbed in the legal education

193. Schiltz, *supra* note 35, at 789-90 (quoting Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38, 38 (1936); Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 Alb. L. Rev. 671, 677-78 n. 7 (1995); Roger Cramton, *Demystifying Legal Scholarship*, 75 Geo. L.J. 1, 14 (1986); and Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 Harv. L. Rev. 926, 928 (1990)).

194. See Edwards, *supra* note 2, at 34-37.

195. *Id.* at 62. It is perhaps misleading to say it is Edwards's only comment. He does quote a clerk who endorses this approach and he does note that many commentators have proposed more clinical offerings. See *id.* at 62 & n.78. He also states, however, that while not dissenting from the view, he has a different focus. He never states why his focus is not on clinics. *Id.* at 62.

debates of thirty years ago, when clinics were, like moot court, a "side show" promoted primarily as a skills-enhancing activity.¹⁹⁶ The second is to assume that their silence is deliberate. Kronman and Edwards ignore clinical legal education because it lacks the prestigious cache required by elite schools to maintain their dominance. The following and final sections of this article explore both possibilities, suggesting that the most fundamental flaw in the approach of Kronman and Edwards is their complete failure to acknowledge the real history of elite law schools and the most powerful force behind it: prestige.

C. Beyond Skills Training¹⁹⁷

Any paper which promotes clinical legal education tends to reopen the debate which has dogged legal education throughout its history: just what is a law school for? Should a law school develop skills or scholarship? Should it focus on law or lawyering? A traditional argument for clinics might refer to the MacCrate Report's lists of necessary and desirable skills for legal practitioners.¹⁹⁸ Of those skills, very few are covered by the traditional law school curriculum. While elite law schools claim to enhance analysis, problem solving and reasoning, they do nothing to promote skills in client counseling, drafting and negotiating. Others refer to Jerome Franks's famous statement: "What would we think of a medical school in which students studied no more than what was to be found in such written or printed case-histories and were deprived of all clinical experience until after they received their M.D. degrees?"¹⁹⁹

Skills-based arguments, however, are of limited utility. Elite law schools are not medical schools and elite law graduates are not typical legal practitioners. Their graduates are not likely to enter into solo

196. See Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Legal Education*, 34 UCLA L. Rev. 577, 577 (1987) (comparing law school to a circus where the theoretical issues are studied in the "main tent" and practical issues are merely a "sideshow").

197. Wizner, *supra* note 115.

198. See Robert MacCrate (chairperson), *Legal Education and Professional Development: An Educational Continuum*, 1992 ABA Sec. Legal Educ. & Admission B. 141-207; see also Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, 64 Tenn. L. Rev. 1099 (1997). Originally clinicians used skills-based arguments to justify the presence of clinics in law schools. See, e.g., Steven Wizner and Dennis Curtis, "Here's What We Do": *Some Notes About Clinical Legal Education*, 29 Clev. St. L. Rev. 673 (1980). Now clinicians are wary of skills-based arguments, not only because they view their pedagogical role far more broadly (for the reasons discussed above) but because law schools can easily replace clinics with more cost-effective skills-building activities like practice simulations, losing the professional and personal advantages of live-client clinics. See Genty, *supra* note 164, at 282-83; Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 Stan. L. Rev. 1731 (1993).

199. Jerome N. Frank, *Why Not A Clinical Lawyer-School?*, 81 U. Pa. L. Rev. 907, 916 (1933).

practice for the majority of their careers, nor will they necessarily specialize immediately upon graduation, like doctors moving through internships, residencies and medical boards. An elite law graduate may be destined for specialization in a large law firm, a high-level government position, a teaching position or consultancy at an elite school, political office or the judicial bench. Many will achieve more than one of these goals—some all. It may be for this reason that elite law schools have avoided skills training in favor of taking the best and brightest students, occupying their minds for three years with scholarship and problem solving, and assuming that they possess the intelligence, analytical skills and intellectual rigor to absorb the information necessary to succeed in their chosen career paths. The technique appears to have been a success. Elite law schools have met with no opposition from the legal profession and their graduates continue to be highly sought after, considerably more so than graduates of lower tier schools that concentrate on developing practical legal skills.

But another, more sinister, reason can be suggested for the elite legal profession's apparent acquiescence in the traditional methods of legal training. By taking students from elite law schools, the elite sector of the profession populates itself with people of the right pedigree and background. Thus the profession cares little whether students have developed practical skills or dirtied their hands with clients in clinics, provided they have the socio-economic prerequisites and, ideally, the connections to associate with elite clients. There is certainly ample evidence to suggest that the evolution of elite legal education, from the apprentice system of Tapping Reeve and the textbook teaching style of Theodore Dwight, to the case method of Christopher Langdell and the James Barr Ames model of a full-time academic teacher, was as much based on who the academy wanted to keep out as on enhancing the skills of those it wanted to keep in.²⁰⁰

D. Nostalgia

Kronman and Edwards have been accused of falling into the trap of legal nostalgia—harking back to a non-existent golden age when men were men, lawyers were men, and lawyers were statesmen. Hanna Holborn Grey has commented:

The language of educational criticism... is most often that of longing. The rhetoric of concern about higher education stands as a surrogate for talking about a confusing and always changing world,

200. See Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 102-29 (1976); Robert F. Cochran, Jr., *Professionalism In The Postmodern Age: Its Death, Attempts At Resuscitation, And Alternate Sources Of Virtue*, 14 *Notre Dame J.L. Ethics & Pub. Pol'y* 305, 306-08 (2000); Alfred S. Konefsky & John Henry Schlegel, *Mirror, Mirror On The Wall: Histories Of American Law Schools*, 95 *Harv. L. Rev.* 833, 844 (1982).

of sketching out the ideals of a better, more coherent, and once-stable universe. Yearning for the idyllic way things were when one went to college, the wish that the place would never change, the fear that it has done so; all this represents a common form of expressing distress and disillusion with a threatening, uncertain, and mystifying world that now challenges cherished beliefs and once-secure anchors, one that threatens to repudiate the clarities and simplicities of a better time. . . .²⁰¹

While most legal education scholars endorse the lawyer-statesman ideal, many dispute that a golden time of good ethics, statesmanship and commitment to public good ever existed. Galanter argues:

That a much higher proportion of lawyers (or elite lawyers) were engaged in disinterested public service in the good old days seems highly unlikely. A sense of professional obligation to provide legal services *pro bono publico* is far more evident today than it was during Professor Glendon's Golden Age. As one 1940 graduate, looking back on changes in the profession, observed: "During my law school days I cannot remember ever hearing the words 'pro bono' or any reference to a professional obligation to give free public service."²⁰²

To Galanter the legal profession has not undergone so much a change in standards as one in honest exposure:

One reason such comparisons are difficult is that information about law practice in the Golden Age was much more restricted than in the present period. In the late 1970s, there was a sudden and dramatic expansion in the availability of information about law practice. With the growth of a more intrusive and candid legal journalism, more ample directories, and more penetrating scholarly research, information about the earnings, fees, clients, internal politics, and business strategies of law firms became accessible beyond a narrow circle of insiders. . . . So it is difficult to distinguish how much has changed in what lawyers are doing and how much in what Steve Brill is making us unable to ignore.²⁰³

Others suggest that the ethical and statesman-like qualities to which Kronman refers are concepts loaded with implicit elitist assumptions about the status of women, ethnic minorities and the working classes. Nuanced histories on the development of "standards" and "ethics" in the legal profession disclose that concepts like "quality" and "ethics" were used in an attempt to keep women, Jews, blacks and other "undesirables" out of the legal profession.²⁰⁴ Law schools which

201. Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 Dick. L. Rev. 549, 552 (1996) (quoting Hanna Holborn Gray, *The Leaning Tower of Academe*, 49 Bull. Am. Acad. Arts & Sci. 34, 35-36 (1996)).

202. *Id.* at 559.

203. *Id.* at 558 (citations omitted).

204. See Auerbach, *supra* note 200, at 102-29; Robert Stevens, Two Cheers for 1870: The American Law School 463-64 (1971); Konefsky & Schlegel, *supra* note 200,

catered to those traditionally denied an elite law school education—night schools and those which opened their doors to women and ethnic minorities—were ruthlessly denigrated by elite law schools intent on their demise.²⁰⁵ While the sexism, racism and class bias of the elite schools was often blatant, the banner that they fought under was often labeled “ethics” and to some the banner is still marked with its historical stain.²⁰⁶

Kronman counters these arguments by begging the reader not to throw the baby out with the bath water. He admits that many lawyers fell short of their stated ideals:

The profession’s past had its shameful aspects too, including, most obviously, its racial, religious, and sexual exclusivity. But these failings are so striking, and our sense of rectitude in having overcome them so intense, that we lose sight of what was better in its past and fail to notice how impoverished the ideals of American lawyers have become.²⁰⁷

Kronman’s analysis raises an intriguing issue—to what extent are the ideals to which he refers inherently exclusive? To what extent can the shameful aspects of their formation be separated from their content, and to what extent are they one and the same?²⁰⁸ Many would argue that the death of the lawyer-statesman ideal is an inevitable concomitant of the demise of the exclusivity of the legal profession.²⁰⁹ It might seem the height of prejudice to assume that women and ethnic minorities inevitably bring ethical decline, but some see the onset of aggressive competition within the legal profession so lamented by Kronman as actually desirable. Silver and Cross argue that the changes are desirable for the client:

The changes that occurred during the middle of the twentieth century made legal services easier to find because they forced lawyers to serve clients more economically. This made life harder

at 844.

205. See, e.g., Michael Rustad & Thomas Koenig, *The Impact of History on Contemporary Prestige Images of Boston’s Law Schools*, 24 Suffolk U. L. Rev. 621 (1990).

206. See, e.g., David B. Wilkins, *Practical Wisdom For Practicing Lawyers: Separating Ideals From Ideology In Legal Ethics*, 108 Harv. L. Rev. 458, 464 (1994) (reviewing Kronman, *supra* note 1) (“Yet as many commentators have documented, these lawyers routinely deployed arguments about the importance of maintaining professional ideals as a means of excluding women and minorities, erecting protectionist barriers to competition from laymen, and shielding incompetent colleagues from public sanction.” (citations omitted)).

207. Kronman, *supra* note 1, at 5.

208. Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* 230, 235 (Robert L. Nelson et al. eds., 1992) (“It is important to take full account, not only of the failure of professionals to live up to their ideals, but of the extent to which the ideals themselves have been bound up with the rationalization of hierarchy inside and outside the profession.”).

209. Cochran, *supra* note 200, at 308-11.

for lawyers, but it made clients happier. And is not making clients happy, in the main, what professionalism is about? Anticompetitive regulations may have boosted lawyers' earnings and morale and enabled them to be more statesman-like and less service-minded than lawyers are today, but only a person with a lawyer-centric view of the world would find these compelling reasons to mourn the past.²¹⁰

Others point to the advantages for lawyers who fall outside the traditional elites. Jill Conway, an Australian author, tells of her initial horror when she discovered competitive students from Harvard Law School hiding legal texts in the library: "It took me some time to understand that my ideas about fair play came from a smallish society with tiny and fairly stable elites, for whom the prizes of success were reasonably predictable."²¹¹ After all, for all its excess, the dictatorial regime of billable hours has all the hallmarks of a predictable and egalitarian meritocracy. Firms still discriminate in hiring minorities, and a focus on long hours hampers women with familial responsibilities. But for those who are willing and able to invest the hours and generate revenue, many minorities are well aware that their chances of success and partnership are far greater than they ever would have been if promotion were based on the assessment of a small group of men, all with similar schooling and background, judging against their perceived standard of the great "lawyer-statesman." Perhaps it is for this reason that Galanter has "the impression that some sections of the American legal world—women and minority lawyers, plaintiffs' lawyers, ADR practitioners, law and economics types, feminist legal theorists, to mention just a few—are less susceptible to the charms of the good old days."²¹²

CONCLUSION: PRESTIGE

The principal obstacle to the embrace of clinical legal education is not a misunderstanding of its role as a purely skills-enhancing activity but the fact that it does not enhance the major factor that has shaped elite law schools throughout their history—a competitive advantage borne of academic prestige. This is a complex problem that goes beyond the pure snobbery that some have alleged.²¹³ As one of Edwards's clerks aptly summed up:

[Clinics] are the things that law schools do poorly: partly they don't want to spend the money (clinicals are expensive); partly the current

210. Silver & Cross, *supra* note 60, at 1477 (citations omitted).

211. Jill Ker Conway, *True North* 22 (1994).

212. Galanter, *supra* note 201, at 561 n.52.

213. Falcon, *supra* note 46, at 161 ("[T]he more reputable the law school, the more likely its clinics will be of low quality. Prestigious schools tend to think that anything having to do with the real world, as part of the curriculum, is beneath that school's dignity.").

law school faculty don't have these skills; and partly it is hard to know how to integrate clinical teachers (who often don't publish) with the standard academic hiring and promotion process.²¹⁴

Kronman and Edwards can be accused of falling into the same trap as those whom they criticize. Schiltz remarks:

Unfortunately, though, I have found that, in one important respect, lawyers and law professors have more in common than they might like to admit. Put charitably, the professional lives of both are increasingly focused on one narrow purpose. Put less charitably, the professional lives of both are increasingly dominated by greed. For lawyers, it is greed for money; for law professors, it is greed for academic prestige.²¹⁵

Kronman and Edwards, and elite law students, are in an elitist double bind. There are many law schools that teach innovatively and win prizes for their efforts. Many schools place great emphasis on quality legal writing. Many devote a great deal of resources to clinics, externships and internships for credit. Many law schools have professors with a great deal of practical experience who engage in valuable practical and doctrinal scholarship. Many have caring professors and gender and ethnic diversity. Kronman could be dean of one, Edwards could hire clerks from such schools, and the best students could attend them—but they are just not elite schools. Students want to be at elite schools and they want the opportunities only available to those at elite schools—and elite schools are determined by the scholarship and pedigree of their faculties.

Clinics provide a partial way out of this trap. Already ensconced in elite law schools, they allow for elite professors to pursue the scholarship that determines their career and the prestige of their law school. Clinics allow the best law students to attend elite schools, and avail themselves of the increased opportunities afforded by these

214. Edwards, *supra* note 2, at 62 n.78. The expense of clinics as an obstacle should not be underestimated. Rhode writes:

For many law school and central university administrators, public-service initiatives seem less pressing than other budget items more directly linked to daily needs and national reputations. For example, *U.S. News & World Report* rankings of law schools have become increasingly important. Not only are pro bono opportunities excluded from the factors that determine a school's rank, they compete for resources with programs that do affect its position.

Rhode, *supra* note 38, at 2440 (citations omitted).

The primary attraction of law schools to university administrators is that they can charge high tuition to students without incurring the equipment costs of schools of science and medicine. Furthermore, the classic elite school teaching style using the Socratic case method allows for a high student/faculty ratio. Even the full-time academic model is advantageous—lawyers leaving practice are inevitably going to expect salary parity with their previous professions.

215. Schiltz, *supra* note 35, at 706.

schools, without turning their back on the qualities that enhance the lawyer-statesman ideal.

But if clinics as they currently exist at elite law schools were a complete solution, then Kronman and Edwards would have nothing to write about. A great deal more needs to be done. Clinics need to be moved from the sideshow to the big top of elite legal education. Clinics need more money so that more students can move into clinics without losing the value of mentoring and the warm personal relationships engendered by a low faculty-student ratio. The policy of imposing credit limits on clinical activities should be questioned, and the possibility of making pro bono work compulsory should at least be explored. Other obstacles to the full integration of clinics include the secondary status of clinical professors, the separate location of many law school clinics, and the inability of clinical professors to vote on faculty and tenure decisions.

These practical matters, however, are insignificant compared to the need for clinical legal education to be recognized and celebrated by the leading figures of elite education—people like Dean Kronman and Judge Edwards. Clinical Professor Steven Wizner once said of Dean Kronman: “[T]he greatest thing he ever did for the [Yale] clinic was to leave it alone.”²¹⁶ This may have once been true, but the time has now come to shout from the rooftops about the contribution of clinical education to the lawyer-statesman ideal. Only with high-profile champions can clinical legal education hope to obtain the prestige necessary for true integration. Of course, for an elite law school dean to fully champion clinical education is to take an enormous leap, risking both money and status, but then again no one says it better than Kronman himself:

The capacity to resist these pressures is in part a matter of courage. A courageous lawyer is prepared to take risks for what he or she believes is right—to risk anger, contempt, and a lower income for the sake of the law’s own good—and nothing can be a substitute for the fortitude this requires.²¹⁷

216. Interview with Professor Stephen Wizner (Aug. 18, 2000); see also Laura G. Holland, *Invading the Ivory Tower: The History of Clinical Education at Yale Law School*, 49 J. Legal Educ. 504, 533 (1999).

217. Kronman, *supra* note 1, at 145.

Notes & Observations