Articles

Why Teach Legal Theory Today?

By Guilherme Vasconcelos Vilaça[*]

Abstract

Is legal theory relevant to legal practice? Should legal theory be part of the academic legal curriculum? This article outlines three propositions in relation to these longstanding contentious questions. First, it argues that existing literature has pursued an inadequate argumentative strategy by (1) assuming that there is a single yes or no answer to the questions surrounding the relevance of legal theory; and (2) treating legal theory and legal practice as discrete, unrelated entities. This article distinguishes between different styles of doing legal theory and legal practice, and argues that the role of legal theory needs to factor in changes in the substance of law, legal reasoning, and legal careers. Second, focusing on European civil law countries, this article concludes that most legal theory is irrelevant for conventional legal practice. Concomitantly, it suggests that the constitutionalization, transnationalization, and Europeanization of legal systems are changing the practice of law in a way that is more congenial to theory than hitherto. It also contends that legal roles embodying a legislative standpoint within law are creating a demand for increased theoretical sophistication. Third, this article suggests what a course in legal theory, sketched along the lines of the analysis carried out, might look like.

[*] Lecturer in Law, Xi'an Jiaotong University School of Law and Guest Research Fellow at the University of Lisbon Research Centre for Public Law, guilhermevilaca@mail.xjtu.edu.cn. This paper was long in the making. It was triggered by a couple of job interviews in which I was asked to speak about the role of legal theory within legal practice and legal education. I thank Dennis Patterson for saying out loud, in an exchange, what I always knew intuitively: Most legal theory is useless for legal practice. I owe Tuomas Tiittala, Walter Rech, and Marina Lostal for their deep and incisive comments to the paper as well as for countless discussions on legal education. The paper greatly benefited from Nicola Field's expert editing. All errors remain mine.

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A. Background

Students, teachers, and established practitioners alike often hate legal theory. The premise behind this abhorrence is that legal theory has little or no value within legal practice and is thus only useful to obscure minds interested in prima facie esoteric questions.[1] The words of Denis Browne, a professor of jurisprudence, are familiar enough: "I cannot see my way to argue that the study of Jurisprudence is a necessary preliminary to the successful and competent conduct of a professional practice**;** the facts seem irreconcilable with such a contention."[2]

This view is perhaps especially justified given the contents of European teaching on legal theory. The typical legal theory course, compulsory or elective, focuses on some of the following questions: the nature of law; the status and evolution of legal science; the historical relationship between law and justice and law and morality; and the concepts of legal system and legal validity as well as basic concepts such as rights, obligation, and duty. Canonically, students read Austin, Kelsen, Hart, Dworkin, Marxism, natural law, critical legal studies, and perhaps some authors from Scandinavian legal realism.[3]

Given this list, one is presumably entitled to ask what (practical) good comes from such abstract and historical theoretical reflections on law. Yet there has been little discussion in European legal academia on the status and content of legal theory in the legal curriculum. Following the UNESCO 1950–1952 inquiry into the teaching of social sciences, which included law and specifically the teaching of jurisprudence, a couple of papers appeared in the UK.[4] More recently, Michel Troper and Françoise Michaut edited a volume that

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[1] For a development of this and other charges, *see* Bjarne Melkevik, *Pourquoi Étudier La Philosophie du Droit? Quelques Réflexions Sur L'enseignement de la Philosophie du Droit*, Colloque SPQ, "Enseigner la philosophie" (1998), *available at* http://www.reds.msh-paris.fr/communication/textes/mel3.htm. Lledó calls attention to a related problem. *See also* Juan Antonio Pérez Lledó, *Teoría y Práctica en la Enseñanza del Derecho*, 5 REVISTA SOBRE ENSEÑANZA DEL DERECHO 185 (2007). Students often complain that the study of law is too theoretical. Focusing on Spain, Lledó successfully argues how legal education can be theoretical in a bad way, i.e., reproducing the legislator's words, omitting practical consequences of theoretical disputes, emphasizing taxonomical conceptual analysis, and engaging in authentic interpretation of important legal theorists.

[2] Denis Browne*, Reflections on the Teaching of Jurisprudence*, 2 J. SOC'Y PUB. TCHRS. L. 79, 79 (1953).

[3] *See, e.g.*, Roger Cotterrell, *Pandora's Box: Jurisprudence in Legal Education*, 7 INT'L J. LEGAL PROF. 179, 180 (2000); Csaba Varga, *The Philosophy of Teaching Legal Philosophy in Hungary*, IUSTUM AEQUUM SALUTARE 165 (2009). This crude generalization is also based on my personal knowledge of different European law schools as well as a brief consultation of a number of legal theory course profiles.

[4] *See* C. J. Hamson, *The Teaching of Law: Reflections Prompted by the Unesco Inquiry 1950–1952*, 2 J. SOC'Y PUB. TCHRS. L. 19, 19–20 (1954); Browne, *supra* note 2; *see, e.g.*, W. Friedmann, *Legal Theory and the Practical Lawyer*, 5 MOD. L. REV. 103, 107 (1941).

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discusses the teaching of jurisprudence in many European countries.[5] However, this volume has failed to generate public debate.[6] For example, while the volume edited by Sean Coyle and George Pavlakos[7] examines the relationship between legal theory and legal practice, it does so according to the established canons of professional analytic jurisprudence. As such, it both disregards existing debates on legal education and does not concretely demonstrate how legal theory can contribute to legal practice. The situation in the U.S. and Australia is quite different, perhaps because these countries do have specialized journals in legal education[8] and perhaps due to higher tuition fees. Thus, there has been a lively debate concerning legal education and the place of theory within it.[9]

What, then, are the arguments commonly invoked to support the place of legal theory in legal education? Usually, authors justify the inclusion of legal theory on the basis of three sets of considerations: (1) Its intrinsic value for understanding the practice of law;[10] (2) its

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[5] *L'Enseignement de la Philosophie du Droit* (Michel Troper & Françoise Michaut eds., 1997) [hereinafter Troper & Michaut].

[6] *But see* Melkevik, *supra* note 1, at 2; Cotterrell, *supra* note 3, at 181; Lledó, *supra* note 1, at 86; Varga, *supra* note 3, at 165–66. In the 1970s, Cotterrell & Woodliffe had already noticed "the absence of any public debate in academic circles of the place of jurisprudence in the structure of legal education." Roger Cotterrell & J. C. Woodliffe, *The Teaching of Jurisprudence in British Universities*, 13 SOC'Y PUB. TCHRS. L. 73, 73 (1975).

[7] JURISPRUDENCE OR LEGAL SCIENCE? A DEBATE ABOUT THE NATURE OF LEGAL THEORY 1 (Sean Coyle & George Pavlakos eds., 2005) [hereinafter JURISPRUDENCE OR LEGAL SCIENCE?].

[8] For example, the *Legal Education Review* in Australia, the *Journal of Legal Education*, the *Clinical Law Review*, and *A Journal of Lawyering and Legal Education*, all in the U.S., have been very active. The *European Journal of Legal Education* seems to have ceased to exist in 2008 after publishing only four volumes. Nowadays, the *German Law Journal* is the outlet that pays more attention to the reform of legal education, e.g., the 2009 special edition, *Transnationalising Legal Education*. Finally, one should keep in mind four additional reviews: the *International Journal of the Legal Profession*, the *Journal of Commonwealth Law and Legal Education*, and the *Law Teacher and Legal Studies* that replaced the *Journal of the Society of Public Teachers of Law* in which a number of papers on the teaching of jurisprudence in the UK had appeared.

[9] For Australia, see John Goldring, *The Place of Legal Theory in the Law School: A Comment*, 11 BULL. AUSTL. SOC'Y LEGAL PHIL. 159 (1987); Charles Sampford & David Wood, *The Place of the Legal Theory in the Law School*, 11 BULL. AUSTL. SOC'Y LEGAL PHIL. 98 (1987) [hereinafter Sampford & Wood, *The Place of the Legal Theory*]; Charles Sampford & David Wood, *Legal Theory and Legal Education: The Next Step*, 1 LEGAL EDUC. REV. 107 (1989); Jonathan Crowe, *Reasoning from the Ground Up: Some Strategies for Teaching Theory to Law Students*, LEGAL EDUC. REV. 49 (2011). For the U.S., see Leonard L. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1978); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, J. LEGAL EDUC. 591 (1982); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Harry T. Edwards, *Reflections (On Law Review, Legal Education, Law Practice, and My Alma Mater)*, 100 MICH. L. REV. 1999 (2002); Jules Coleman, *Legal Theory and Legal Practice*, 83 GEO. L.J. 2579 (1995); Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707 (1996); Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649 (2011); Ernest J. Weinrib, *Can Law Survive Legal Education?*, 60 VAND. L. REV. 401 (2007) [hereinafter *Survive Legal Education*]; ON PHILOSOPHY IN AMERICAN LAW (Francis J. Mootz III ed., 2009) [hereinafter Mootz].

[10] *See* Coleman, *supra* note 9.

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natural place of belonging in academic as opposed to professional training—the former being "persistently 'reflexive' and self-conscious in a way that professional training need not be";[11] and (3) its instrumental value for the development of students' capacity to think critically about law and to connect it to its wider context.[12]

While I recognize the merits and espouse some of the traditional intrinsic and instrumental lines of argument identified above, I contend they have failed to raise awareness of the importance of legal theory within legal practice. Because I maintain that legal theory has a role to play in legal practice, changing this misguided perception—not defending legal theory per se—is my primary aim in this article.

I suggest that this new focus requires a shift in the argumentative strategy currently found in the literature. Accordingly, this article proposes that existing literature is misguided in assuming that both legal theory and legal practice are single entities in themselves. There is simply no a priori justification for asserting that all styles of legal theory might be either wholly useful or wholly useless to legal practice. Thus, the central question is not whether legal theory is useful for or within legal practice, but whether different styles of legal theory are relevant for different forms of legal practice. This article argues that a defense of legal theory education needs to take into account changes in: (1) the modes of legal reasoning deployed by relevant actors; (2) the substance of law; and (3) legal careers.

This article proceeds along the following lines. Section B argues that within European civil law countries most legal theory is of little to no use for legal practice as it is conventionally understood.[13] I substantiate this proposition by distinguishing between different styles of legal theory and asserting how and why they are not directly relevant for legal practice. Section C argues that conventional lawyering increasingly requires augmented theoretical

[11] Sampford & Wood, *The Place of the Legal Theory*, *supra* note 9, at 105. *See also* Varga, *supra* note 3, at 182. I do not wish to fully evaluate this argument here, but it seems to me that it begs the following question: Why should law be an academic subject instead of a professional one? All around the world, legal education reform has favored expanding skills training (e.g., the spread of clinical legal education). *See* Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN ST. INT'L L. REV. 421 (2004). Because this is not the focus of the present article, see Charles R. Irish, *Reflections of an Observer: The International Conference on Legal Education Reform*, 24 WIS. INT'L L.J. 5 (2006); THE INTERNATIONALIZATION OF LAW AND LEGAL EDUCATION, (Jan Klabbers & Mortimer Sellers eds., 2009) [hereinafter INTERNATIONALIZATION].

[12] *See* Browne, *supra* note 2, at 79; Cotterrell, *supra* note 3, at 182; Crowe, *supra* note 9, at 9.

[13] *See* Troper & Michaut, *supra* note 5. In the common law world, the opinion that, despite all its current problems, legal theory is worthwhile for legal education and practice also seems to prevail. *See, e.g.,* JURISPRUDENCE OR LEGAL SCIENCE?, *supra* note 7; Mootz, *supra* note 9. *But see, e.g.,* Larry Alexander & Emily Sherwin, *Law and Philosophy at Odds*, *in* ON PHILOSOPHY IN AMERICAN LAW 241, 246 (Francis J. Mootz III ed., 2009) (claiming that even if philosophy may be of use to law, individuals may be unable to apply it in real life); Philip Leith & John Morrison, *Can Jurisprudence Without Empiricism Ever be a Science?*, *in* JURISPRUDENCE OR LEGAL SCIENCE? A DEBATE ABOUT THE NATURE OF LEGAL THEORY 147 (Sean Coyle & George Pavlakos eds., 2005) (arguing that jurisprudence needs to be empirical if it wants to be of interest for legal practice).

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sophistication due to the Europeanization and transnationalization of law, as well as the move towards rights adjudication. Thus, legal theory has an important role to play in the improvement of legal reasoning. Section D suggests that some types of legal theory are necessary for legal practice because law schools are now obliged to envisage the latter in a broader way. Building upon this analysis, I submit that the market for legal services is increasingly in need of lawyers who are capable of adopting a legislative and forward-looking viewpoint, as well as of utilizing resources from a multiplicity of disciplines. Section E concludes with a discussion of how the contents of a general subject in legal theory would look, and a defense of my approach against some specific potential objections.

Before proceeding, I would like to clarify some aspects of my conceptualization of legal practice. Throughout this article I rely on a distinction between two forms of legal practice—professional, or conventional, and transformative, or critical.[14] In professional legal practice, lawyers, judges, and prosecutors are the classical actors and all act "within the bounds of the law or within the constraints of the legal or social system."[15] The goal of lawyers is to deploy existing law to persuade judges, who usually make decisions on the basis of the law as it is. In transformative practice, classical and new actors try to change the law and the legal system. European civil law cultures, pervaded as they are by legal formalism and positivism, are somewhat resistant to critical legal practice based on theoretical approaches that regard disputes as opportunities to reform the law. The same civil law cultures tend to be blind to forms of argument based on non-legal materials. Finally, I assume that legal practice is about persuasion and winning cases, not about better understanding or explaining the law as it is often upheld in legal theory.[16] Thus, I am interested in actual legal practice over theoretical or idealized legal practice.

To those to whom these assumptions seem conservative and old-fashioned, I would like to address a word of caution. I am not denying that judges engage in creative legal reasoning and make law in some situations; they do. But the age-old comparative question "Do judges make law?" is excessively abstract. The objection arising from the view that professional or conventional practice have never been truly stable (i.e., a closed, uncontested system)[17] is not available either; I shall argue that we are now seeing a situation where constitutionalization, transnationalization, and Europeanization of the law are beginning to break traditional boundaries in conventional legal practice, and are cracking its legal-formalist nature in a way that is congenial to legal theory. I insist that the guiding question for whoever is interested in the matters of this paper should concern

[14] *See* William H. Simon, *Visions Of Practice In Legal Thought*, 36 STAN. L. REV. 469, 469–70 (1984). The terms are Simon's, but I employ them here with variations.

[15] *Id.* at 489.

[16] *See, e.g.,* JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001).

[17] *See* Simon, *supra* note 14.

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whether specific forms of argument[18] are accepted in conventional legal practice. As Condon, a professed radical lawyer, recognized:

> If you are alienated not from the people but from the system you will not be able to go into that courtroom. If you do decide to go in, it doesn't matter where your office is or how your personnel are referred to or how decisions are made in your office, your only job is to be as competent as you are capable of being. This involves professional training and development. When you're there you must be there to win and you don't have to be a radical to win—you have to be the best lawyer you are capable of being.[19]

B. Three Styles of Doing Legal Theory

I submit that the widespread conceptualization of legal theory and legal practice as unitary and discrete objects of analysis greatly damages a complex analysis of their interaction. It licenses, for instance, sloppy uses of the expression "legal theory," which is often employed to describe general legal theory—e.g., analytic jurisprudence, theory in substantive law—e.g., contract law, or narrower topical legal theories—e.g., economic analysis of law at the same time.[20]

Against this trend, I believe that there is no a priori reason why all styles of legal theory have to be either wholly useful or wholly useless for legal practice. Similarly, there is no rational basis for assuming that different forms of legal practice require the same style of legal theory. Thus, the first step in clarifying the relationship between legal theory and legal practice is to distinguish between the many different styles or enterprises within legal theory. Then, we need to examine the potential of each different style of legal theory for legal practices.

[18] *See* DENNIS PATTERSON, LAW AND TRUTH (1999).

[19] Gene Ann Condon, *Comments on You Don't Have to Love the Law to be a Lawyer*, 29 GUILD PRAC. 19, 21 (1972).

[20] Philosophical commentary on the nature and character of legal theory, however, is more developed. Recently, Dagan and Kreitner have justified the autonomy of legal theory by distinguishing it from the "law and … " scholarship and the "law as craft" stance. *See* Hanoch Dagan & Roy Kreitner, *The Character of Legal Theory*, 96 CORNELL L. REV. 671 (2011). Legal theory has been distinguished between *prudentia* (practically and normatively oriented) and *scientia* (inquiring on the essential features of law). *See* JURISPRUDENCE OR LEGAL SCIENCE?, *supra* note 7. For a normative view of legal analysis, see ROBERTO MAGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996). Unfortunately, these works never discuss concretely the impact of legal theory on legal practice.

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The analysis developed in the following sections is impressionistic and admittedly selective. It will not do justice to the richness of the positions and theses available in each jurisprudential tradition, but it will hopefully enable a fresh reconceptualization of the links between legal theory and legal practice.

I. Analytic Jurisprudence

1. Hart & Kelsen

Perhaps the most widely shared understanding of legal theory refers to analytic jurisprudence.[21] The focus of this discipline is to interrogate essential features of law, such as establishing which properties and elements across time and space a normative system needs to exhibit to be called "law."[22] The background to this debate was the broader theme of attempting to distinguish law from morality—i.e., to determine the "province of jurisprudence."

Hart's definition of the legal system as a collection of primary and secondary rules is paramount.[23] Without the latter in the form of a rule of recognition—as in primitive societies and international law—we would not be able to identify a legal system, properly speaking. Another example is Kelsen's description of the legal system as being exclusively comprised of norms, rather than facts, organized in a hierarchical fashion.[24] Since *The Concept of Law* commanded the field of legal theory, recent debates in analytic jurisprudence have followed the signposts of Hart's manifold contributions. For example, both inclusive and exclusive positivists have struggled to determine whether morality can be part of the legal system through an act of incorporation, or whether it must always remain separate from law.[25]

Now, this style of handling legal theory has little to offer the legal practitioner because analytic jurisprudence focuses on the "existence question": Which features allow us to say that a legal system exists? Both Hart and Kelsen answer this question by focusing on the abstract skeleton of legal systems and their sources. Neither they nor their followers mix such theoretical discourse with actual positive law. This is problematic because the existence question is irrelevant today from a legal practice perspective as most legal orders

[21] For a micro history of analytic legal philosophy, see Brian Bix, *On Philosophy in American Law: Analytical Legal Philosophy, in* ON PHILOSOPHY IN AMERICAN LAW 99 (Francis J. Mootz III ed., 2009). For a critical assessment of the discipline, see Leslie Green, *General Jurisprudence: A 25th Anniversary Essay*, 25 OXFORD J. LEGAL STUD. 565 (2005).

[22] Andrei Marmor, *On the Limits of Rights*, 16 LAW & PHIL. 1 (2007).

[23] *See* H. L. A. HART, THE CONCEPT OF LAW (1994).

[24] *See* HANS KELSEN, PURE THEORY OF LAW (1978).

[25] *See* Danny Priel, *Farewell to the Exclusive-Inclusive Debate*, 25 OXFORD J. LEGAL STUD. 675 (2005).

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identify and contain both primary and secondary rules, including a master rule of recognition—a Constitution.

Constitutions regulate lawmaking and legal adjudication. Additionally, positive law often specifies the sources of law, methods of interpretation, and content-rich rules of behavior, both in the form of commands and power conferring rules. Domestic legal systems also feature a myriad of specialized legal institutions that clearly demarcate law as a distinctive institutional normative system. In other words, in most countries, practitioners do not have to find or establish the legal system to practice. Instead, they act according to specific rules with contested content, as established by authorized sources of law. Performance, however, is never a static process determined once and for all, as analytic jurisprudence has it. Thus, determining what law is requires digging into the activity of specific legal agencies and roles. For example, if courts determine that soft laws—e.g., codes of conduct—produce legal effects—despite not being posited by authorized lawmakers—then legal practitioners need to take this into account. Analytic jurisprudence, as the endless debates on soft law demonstrate, is still at a loss for words regarding whether and how to name this law. The problem behind analytic jurisprudence's lack of capacity to communicate with legal practice lies in the fact that positive legal systems solve the existence question and determine the building blocks of legal practice for legal practitioners. In turn, analytic jurisprudence cannot account for the dynamic aspects of legal practice, nor can it theorize norm-usage, as in soft law phenomena.

For similar reasons, it is hard to see how exclusive positivism,[26] which rejects the idea that moral sources can affect the existence and validity of law, is useful for practitioners when most legal orders, at least in Europe, are axiological, not logical, systems.[27] Indeed, in the aftermath of World War II, many European legal orders have undergone a process of material constitutionalization. This process has meant that constitutions have established legal orders that should be seen to pursue and reflect important core values such as human dignity, due process, and various other fundamental rights. Furthermore, most constitutions (and supreme courts) enforce these legal values through specific institutional arrangements, such as judicial review and "perpetuity clauses," guaranteeing the prohibition of norms that violate rights, as well as constitutional amendments that directly suppress established rights and fundamental legal principles. Given these conditions, what is a legal practitioner expected to do with the conceptual thesis of separation between law and morality, if in most positive legal orders there is no longer such separation? Accordingly, the current challenge is methodological and dynamic: How can one practice and theorize law within constitutionalized legal orders, where conflicts of rights, balancing

[26] *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 180 (2002).

[27] *See* CLAUS-WILHELM CANARIS, PENSAMENTO SISTEMÁTICO E CONCEITO DE SISTEMA NA CIÊNCIA DO DIREITO (2008).

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exercises, and teleological and contextual interpretation pervade? More succinctly, how can we theorize law when all law has become so-called applied constitutional law?

In my view, Hart must take the largest share of responsibility for the schism that has arisen between legal theory and legal practice. It all started when he covertly replaced the "What is law?" question for its apparent twin "What is a legal system?" in *The Concept of Law.* With this shift, legal theory became structuralist, interested in system-properties and links between static elements, rather than in understanding the actual workings of law.[28] When applied to international law, this research agenda quickly revealed its latent problems. Hart postulated that whereas international law could be law if thought to be law by international agents, it was not a legal system due to the absence of a rule of recognition.[29] An inquisitive mind would ask: "What type of problems would be solved by discovering that international law is a legal system?" and "What proportion of international legal phenomena do we neglect by focusing on the international system level?"

Choosing to explore the question "What is law?" by examining law's systemic properties also renders analytic jurisprudence unproductive when applied to transnational law. Rules that are issued by private lawmakers are of dubious legal status despite producing very real legal effects. After all, there is no global rule of recognition, and no authoritative list of sources and lawmakers. In this context, recent analytic jurisprudential work tries to revert to the "What is law?" question, suggesting that legal rules are those rules that are decisive and oriented toward justice,[30] or content-independent rules.[31] Yet, this is hardly helpful for the legal practitioner, since it is obvious that much transnational regulation—financial regulations, food and product quality rules—is content-independent, not oriented towards justice, and presumably not decisive because, as soft law, their legal status is ambiguous.[32] Yet, these norms guide behaviors, regulate spheres of action, and are invoked and used in international judgments.[33] I shall say something more about it later on, but here it suffices to suggest that if legal theory wants to be responsive to changes in social organization and

[28] Leith and Morrison also blame Hart for the unproductive detour of legal theory. *See* Leith & Morrison, *supra* note 13. For Schlag's take on Hart, *see* Pierre Schlag, *Law and Philosophy in the Hyperreal*, *in* ON PHILOSOPHY IN AMERICAN LAW 263 (Francis J. Mootz III ed., 2009).

[29] *See* HART, *supra* note 23, at 220.

[30] *See* DETLEF VON DANIELS, THE CONCEPT OF LAW FROM A TRANSNATIONAL PERSPECTIVE 105–06 (2010).

[31] *See* KEITH CULVER & MICHAEL GIUDICE, LEGALITY'S BORDERS: AN ESSAY IN GENERAL JURISPRUDENCE 155 (2010).

[32] Guilherme Vasconcelos Vilaça, *Law as Ouroboros* (Dec. 17, 2012) (unpublished Ph.D. thesis, European University Institute) (on file with author) [hereinafter *Ouroboros*].

[33] INTERNATIONALIZATION, *supra* note 11, at 172.

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normative sources, then it needs to account for the dynamics of legal practice, including questions of effectiveness and norm-using.[34]

In other words, analytic jurisprudence is interested in neither the actual practice of law nor in the knowledge of positive law. Rather, it focuses on the abstract, aprioristic, static, and systemic study of the legal system. For the legal practitioner, this style of legal theory is of little interest.[35]

2. Dworkin

Throughout his career, Ronald Dworkin produced a spin-off of the analytic tradition. While still interested in speaking about the essence of law, Dworkin changed the research focus from the legal system's properties to judicial practice.[36] Dworkin rejected the separability thesis, claiming that positivism could not account for the ways in which morality enters the law.[37] He posited that one could not understand actual adjudication—e.g. *Riggs v. Palmer*—without principles, which he defined as objects, along with commands and permissive rules, in law's ontology.

For Dworkin, law is the combination of legal rules, and principles underlying those rules, which impregnate previous case law. Adjudication requires judges to identify the moral theory that best fits and justifies existing case law and legal rules. It could be said that

[34] Goldmann's legal dogmatics work, which catalogues international legal instruments, is a good example of a theoretical approach guided by legal practical concerns. *See* Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GERMAN L.J. 1865 (2008). Calliess and Zumbansen's encyclopedic work on a theory of transnational law shows the limits of comprehensive theoretical approaches which do not include a legal practice point of view. *See* GRALF-PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW (1st ed. 2010).

[35] Steven D. Smith, *Jurisprudence: Beyond Extinction*, *in* ON PHILOSOPHY IN AMERICAN LAW 249 (Francis J. Mootz III ed., 2009). Hart's emphasis on the internal point of view as upheld only by legal officials also deprives his jurisprudence of critical bite. Finally, even in the heyday of positivism—when Hart won the debate against Fuller—it remained mysterious how one could make the case that the separation of law and morality was desirable, because it preserved the possibility of criticising positive law from the outside. On the impossibility and meaninglessness of making such a claim, see Liam Murphy, *Better to See Law This Way*, 83 N.Y.U. L. REV. 1088 (2008).

[36] RONALD DWORKIN, LAW'S EMPIRE 11 (1986) (assuming that a central task of legal philosophy is "intelligent and constructive criticism of what our judges do"). For a trenchant critique of a jurisprudence modeled after judicial practice, see Schlag, *supra* note 28, at 263 ("Be intellectually serious. Drop the received scholarly agendas. Forget reflective equilibrium. Ditch the ideal observer. Throw your copy of 'The Concept of Law' into a lake and give 'Law's Empire' to a homeless person. Also, stop worrying about helping the courts with their various legitimation needs. They don't need you. Really. They'll be just fine.") It remains unclear, however, how Schlag's jurisprudence contributes to legal practice, albeit he seems to be committed to practically relevant legal theory.

[37] The positivist reaction, recognizing that Dworkin was right but that his account did not presuppose a necessary link between law and morality, confirms the sterility of general jurisprudence debates for legal practitioners.

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Dworkin frames a close relationship between legal practice and legal theory in the opening pages of *Law's Empire*: "Since it matters in these different ways how judges decide cases, it also matters what they think the law is, and when they disagree about this, it matters what kind of disagreement they are having."[38]

At first sight, Dworkin's new focus seems useful for legal practitioners because it deals explicitly with actual legal practice. Soon, however, the limits of his strategy start showing. Perhaps because Dworkin wishes to avoid the position that judicial interpretation is unrestrained,[39] he postulated that all cases have a "right answer." Then, he imagined an ideal judge, Hercules, capable of screening all existing statutes and precedents, and ascertaining the moral principles that best fit all materials. Evidently, Hercules would also be capable of finding the "right answer."[40] As a result, the contribution of Dworkin's legal theory for legal practice becomes more ambiguous than initially expected. Clearly, practitioners cannot carry out Hercules' learned examination of all relevant legal and political traditions. While it is true that we should not overstate the differences between civil and common law traditions, in the former, judges or lawyers cannot openly engage in political theorizing. In addition, most cases do not require interpreting the whole history of the law that may be at stake. Finally, Dworkin never developed a robust model of legal reasoning that would be capable able of telling us how to work out the fit between principles, precedents, and rules in a concrete case, or to ascertain the correctness of our reading of legal history and political principles.

A case in point is Dworkin's famous thesis of rights as trumps.[41] According to him, rights should always trample considerations of policy, but he never provides guidelines for how to solve conflicts of rights. This is problematic because most considerations of policy can easily be framed in rights parlance. For instance, the public policy debate of whether or not to ban smoking from public spaces can be framed as a dispute between the right to health and the right to develop one's personality freely. If this is so—and there is much evidence of the pervasiveness of rights talk in American society[42]—then the problem is less the conflict between rights and policy considerations and more that between rights.

These remarks hint at something fundamental: Contrary to what Dworkin wanted to achieve, his theory of law and adjudication is descriptive rather than interpretative.[43] Since

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[38] DWORKIN, *supra* note 36, at 3.

[39] In the style of Critical Legal Studies.

[40] DWORKIN, *supra* note 36.

[41] *See* Ronald Dworkin, *Rights as Trumps, in* THEORIES OF RIGHTS (J. Waldron ed., 1984).

[42] *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

[43] *See* RICCARDO GUASTINI, LA SINTASSI DEL DIRITTO 32–33 (G. Giappichelli ed., 2011).

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there is only one right answer, and the ideal judge can achieve it, then there are no real conflicts or gaps in the application of law. Therefore, there is no real theoretical disagreement in Dworkin's theory of law, despite this being his original research question. As Douzinas et al. have written, "Despite his imperial edifice, Dworkin *only touches* on the question of interpretation in law."[44]

But then theory cannot add much. Legal practitioners already knew that there is disagreement in law, and they have to address it, Dworkin notwithstanding. Thus, while Dworkin's theory effectively clarified that the nature of some disagreements in legal practice referred to principles or grounds of law, rather than legal rules, its impact on conventional legal practice appears to be more modest. In addition, Dworkin's theory of law is a theory of adjudication only, as if the latter accounts, or could account, for the diverse forms legal practice takes. In the same way that Kelsen and Hart neglected judicial practice, Dworkin neglects, consciously, what lies outside adjudication.[45] Still, legal practice not only necessitates adopting the judge's point of view but also that of the legislator, the legal practitioner, the public-interested lawyer, or the legal reformer. For example, the legal practitioner's goal is to persuade the judge or the other party's legal team that it has a stronger case, not to find the legal interpretation that ensures law's integrity.[46]

All things considered, Dworkin's descriptivism effectively contributed to the perpetuation of analytic jurisprudence's narrow scope of inquiry. Therefore, it is doubtful that Dworkin succeeded in steering legal theory away from speculation about the essence of law or from engagement in the idealization of judicial practice.

II. The "Law and . . . " Scholarship

I dub a second style of doing legal theory the "Law and . . . " movement. This is the approach that dominated legal scholarship in the second half of the twentieth century.[47] Despite its bewildering diversity, "Law and . . . " scholarship combines law with external disciplines such as politics, anthropology, race, economics, psychology, development,

[44] Costas Douzinas et al., *Is Hermes Hercules' Twin? Hermeneutics and Legal Theory*, *in* READING DWORKIN CRITICALLY 138 (Alan Hunt ed., 1992) (emphasis added).

[45] *See* DWORKIN, *supra* note 36, at 12.

[46] It is interesting to notice that legal theory often assumes that judicial practice is, descriptively, geared towards truth or an equivalent ideal, such as integrity. This understanding seems to be at odds with actual judicial and lawyering practices, especially in common law countries, given its adversarial conception of legal process. *See, e.g.*, Robert A. Kagan, *Globalization and Legal Change: The "Americanization" of European Law?*, 1 REG. & GOVERNANCE 99 (2007); DENNIS PATTERSON, LAW AND TRUTH (1999).

[47] *See* Shai Lavi, *Turning the Tables on "Law and . . .": A Jurisprudential Inquiry into Contemporary Legal Theory*, 96 CORNELL L. REV. 811 (2011); Carrie Menkel-Meadow, *Taking Law and _____ Really Seriously: Before, During, and After "The Law,"* 60 VAND. L. REV. 555 (2007).

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aesthetics, deconstruction, music, literature, postmodern studies, ethics, and so on. The problem with these approaches, from a conventional legal practice point of view, lies in the fact that they are assumed to be external to law. In other words, they describe, assess, and prescribe treatments of law on the basis of, or in relation to, a set of values, methods, and goals that are not necessarily those of positive law. In what follows, for reasons that will become clear, I distinguish between "law and social sciences" and "law and humanities" movements.

1. "Law and Social Sciences"

Let us consider the example of "law and economics."[48] This combinatory study proposes a twofold program: (1) A re-description of existing legal rules according to economic concepts and theories such as incentives, transaction costs, and rational-choice theory; and (2) the evaluation of existing legal rules from an efficiency point of view (reducing justice and other substantive goals of positive law to economic efficiency).[49] Paradigmatically, law and economics developed the theory of efficient breach, according to which a party to a contract should be allowed to breach it and pay damages if such a course of action would be cost-justified—if the total benefits outweigh total costs, including compensation for breach of contract. Furthermore, Posner also claimed that this theory successfully explained existing law: The prohibition of penal clauses or punitive damages for non-tortious breaches of contract. From an efficiency point of view, it was claimed, punitive damages/clauses may induce contractual performance even when that would be inefficient.[50] Another landmark law and economics output is the view that, in tort law, liability should be assigned to the least-cost avoider in order to reduce the social costs of accidents. Despite its sophistication, however, both "efficient breach" and "least-cost avoider" doctrines are somewhat alien to the realities of offering legal advice, litigating, and adjudicating in the European civil law tradition. Why is that?

First, the theory of efficient breach violates the rule at the core of contract law in civil law countries. The rule *pacta sunt servanda* embodies a deontological foundation for contract law that law and economics replaces for a consequentialist one. The issue here is not discussing which philosophical foundation is superior, but to notice that this shift does not

[48] Thomas S. Ulen, *The Impending Train Wreck in Current Legal Education: How We Might Teach Law as the Scientific Study of Social Governance*, 6 U. ST. THOMAS. L.J. 302, 306 (2009) (suggesting that law and economics combinatory study is producing a revolution in legal academy based on "the importation of the scientific method into the study of law," which, according to the author, leads to a focus on empirical work, traditionally neglected in conventional legal scholarship).

[49] Richard Posner was the author who perhaps best personified and carried out this two-sided research program. *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (2010). For an economic analysis of civil law, see CLAUS OTT & HANS-BERND SCHÄFER, THE ECONOMIC ANALYSIS OF CIVIL LAW (2005).

[50] *See* POSNER, *supra* note 49.

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fit the civil law tradition well. If the premise of contract law is that contracts should be respected and performed according to good faith, then it cannot endorse generally instrumental breaches.[51] Furthermore, throughout my legal education and research into different civil law systems, I have never heard of historical debates concerning the *travaux* of important civil codes, legal scholarship, and jurisprudence upholding the doctrine of efficient breach in contract law. These admittedly anecdotal impressions are confirmed by Scalise Jr.'s research on the inexistence of efficient breach in civil law.[52] He provides a number of historical sources on the moral foundations of contract and promises and then goes on to analyze different "structural hurdles" such as the preference for specific performance, a broader conception of damages, and cultural hurdles like the different role of judges and different admissible methods of legal reasoning that are obstacles to the adoption of efficient breach anytime soon in the civil law tradition.

But if efficient breach is alien to the legal cultures in which it is being deployed, then the law and economics (per)version of the *pacta sunt servanda* rule is a "just-so story."[53] Two consequences follow. First, if law and economics does not meet the burden of proof of showing how efficient breach exists and fits civil law systems better, then its strategy falsifies the latter's tradition. Second, and consequently, "just-so stories" have no currency in legal practice unless admitted by judges, and as such it would be hard, or impossible, for a practitioner to make an argument in court based on one. As is often pointed out, efficiency is neither a source of law nor a traditional legal *topos* in European civil law countries.[54] Therefore, the re-description side of the law and economics agenda is one that is often ill suited to advance conventional legal practice in Europe.[55]

The above considerations lead us to the second reason that makes the law and economics approach—and most other "law and . . . " movements, as we shall see—of limited use for

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[51] Notice that efficient breach is hard to justify even from an economic perspective since trust in the institution of contract could break down in the presence of pervasive uncertainty regarding contract performance.

[52] *See* Ronald J. Scalise Jr., *Why No "Efficient Breach" in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721 (2007).

[53] Jeanne L. Schroeder, *Just So Stories: Posnerian Economic Methodology* (Cardozo Law Sch. Pub. Law Working Paper No. 013, 2000), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=229874.

[54] *See* Scalise Jr., *supra* note 52; Kenneth Glenn Dau-Schmidt & Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, 44 COLUM. J. TRANSNAT'L L. 602 (2006); and Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555 (2008). This is no mere civil law idiosyncrasy. For the common law world, *see generally* Schroeder, *supra* note 53; CHARLES FRIED, CONTRACT AS A PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981) (upholding the moral idea of "contract as promise").

[55] It is somehow dismaying that the most recent law and economics textbook for civil law countries ignores the relationship of law and economics and legal practice in Europe. *See* EJAN MACKAAY, LAW AND ECONOMICS FOR CIVIL LAW SYSTEMS (2013).

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conventional legal practice. The other example mentioned above—that liability should be assigned to the "least-cost avoider" to minimize the social cost of accidents—aptly illustrates this new argument. This is an odd solution because it asks the judge to go beyond the parties to the legal dispute in deciding who should be liable. In other words, the purpose of assigning liability becomes not only to decide the actual controversy between the parties, but also to set the right incentives to secure efficient behavior in the future. That is, the actual controversy between John and Mary ought to be functionalized to ensure Bill's, Ann's, and Mark's efficient conduct—abstract bystanders. However, tort claims in the law and economics robes break down the system of legal concepts common to most legal orders. That system is one based on concepts that aim to redress the wrongful harm suffered by A and caused by B.[56] Reducing the social costs of accidents by punishing the "least-cost avoider" may lead to the imposition of liability to third parties who are foreign to the specific legal dispute. Since what matters is the reduction of total social costs, tort liability can be designed to set the right behavioral incentives and to reduce the costs of litigation—given the inefficiency of tort liability claims—regardless of the relationship between the parties to the actual legal dispute.[57]

Legal philosophers in the common law world reacted quickly, subjecting law and economics to a scathing critique. For example, Coleman states that law and economics ignores the corrective justice ideal that impregnates current American tort law.[58] In short, he argues that the parties to a tort case want and expect to see their concrete case litigated and not, as law and economics would have it, their case instrumentalized to pursue goals that transcend the legal relationship created between tortfeasor and victim. Weinrib adds to this critique explaining at length that one cannot meaningfully apply and work through American tort law with the language of law and economics.[59] As such, there is an obvious gap between this legal theory and actual legal practice. But he adds, this is a problem for all instrumentalist analyses of law:

> Regardless of the goal it advances, an instrumentalist analysis of private law mischaracterizes its object in the same way that economic analysis does. An instrumentalist approach makes three errors. First, it imports outside goals for immanent concepts of private law. Second, it ignores the relationship between a

[56] *See Survive Legal Education*, *supra* note 9, at 407.

[57] *See id.*

[58] *See* COLEMAN, *supra* note 16.

[59] *See Survive Legal Education, supra* note 9, at 406–07.

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> plaintiff and a defendant. Third, it wrongly converts all private law into public law.[60]

Coleman and Weinrib's critiques are, to my mind, spot on, but I would like to add a further point that better fits the purposes of this article. Put briefly, law and economics typically assumes that there is no difference between adopting the legislator or the legal practitioner's perspective. However, this is a difficult claim to make. Legislators' activity is forward-looking and most often regulates outside of any particular case. Conversely, judges mostly decide in a retrospective fashion. Even if they engage in consequentialist adjudication, the fact that they are bound to do justice in the concrete past dispute before them necessarily affects their capacity to act in a forward-looking way. From this angle, the main reason why law and economics is apparently so much at odds with legal practice has to do with the fact that the former speaks from the legislative point of view. And it adopts the legislative standpoint by both endorsing an interpretation of the law that is forward-looking and functional to the pursuit of social efficiency—at the expense of the actual case, as shown earlier—and by advocating a reformist stance in legal interpretation and legal practice. But in the same way that civil law scholarship and practice has been reluctant to pay heed to economic arguments, it also upholds a formalist approach to law[61] rather than a policy approach.[62] With the exception of constitutional cases, as discussed below, legal practice in civil law countries is mostly about solving a concrete dispute by means of legal formal argument, not about regulating a class of disputes.[63] Overall, conventional civil law practice does not openly engage in policy considerations that require the adoption of a legislative standpoint.[64]

It is nevertheless important to bear in mind that Weinrib's argument against law and economics hides a strong bias; he believes in law's essence. For example, he upholds the view that private law is an essentially distinctive mode of ordering that cannot and should not be conflated with that of public law. However, once we link the value of legal theory to legal practice then this appears to be an illegitimate move. From the point of view of knowing whether law and economics is relevant for legal practice, the answer has to be

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[60] *Id.* at 411.

[61] Duncan Kennedy, *Legal Formalism, in* 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8634–38 (N. J. Smelser & P. B. Baltes eds., 2001), http://duncankennedy.net/documents/Legal%20Formalism.pdf.

[62] *See* Ralf Michaels, *American Law (United States), in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 66, 71–73 (Jan M. Smits ed., 2006).

[63] This may be due to the lack of early codified bodies of law. *See* Scalise, *supra* note 52, at 756–57 ("Thus, when faced with a breach of contract case judges are free to write in a theory of efficient breach as the next chapter in the novel.").

[64] *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (2007); Scalise, *supra* note 52, at 755.

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"yes" if legal practice absorbs economic arguments and jargon, or if we consider legal education to cater to legal practitioners working in jobs that require adopting the legislative point of view.[65] These views will be developed further in Sections D and E below. Presently, I would like to suggest that the conclusions drawn from law and economics apply generally to most "law and social sciences" movements. In other words, be it in the robes of critical legal studies, empirical legal studies, Marxism, "law and development," "law and race," or "law and gender," theoretically sophisticated arguments will only be directly relevant to conventional legal practice if they are narrowly defined and if they fit actual practice. Since most of these enterprises adopt a transformative or critical approach to law, that will not generally be the case. Some brief examples illustrate this point.

Knowing that constitutional judges vote according to their political preferences may be very useful for reforming the law, leading to changes in appointment procedures and in legal training, but its value for legal practice remains limited.[66] By the same token, one can evaluate whether existing law privileges capital over labor, e.g., contract or commercial law, but such an argument cannot be made openly in legal practice because most European legal orders do not recognize that the law is itself a part of the superstructure of the capitalist state. This is particularly evident in the case of the current Portuguese Constitution of 1976, which was amended to eliminate so-called socialist language and provisions. Similarly, a critical approach to law will, nowadays, only have legislative appeal. But the issue does not only concern positive law. It is also the spirit of lawyers and their *habitus* that currently disregard arguments based on class.[67]

For similar reasons, law and gender as well as law and race—despite its modest currency in European legal academia—can now have significant impacts on legal practice because post-World War II constitutionalism has recognized race and gender equality as constitutional values and pertaining to fundamental rights. In doing so, it opened up the possibility for constitutional litigation, thus paving the way for actual transformative legal practice to challenge existing laws directly.

[65] An altogether different issue is the fact that law and economics impregnates the logics of some of our legal institutions. For example, economic considerations are pervasive within the managerial discourse used to justify the move towards alternative dispute resolution mechanisms or plea-bargaining arrangements. *See Ouroboros*, *supra* note 32.

[66] *See* Nuno Garoupa, *The Politicization of Kelsenian Constitutional Courts: Empirical Evidence, in* EMPIRICAL STUDIES OF JUDICIAL SYSTEMS 149 (K. C. Huang ed., 2008).

[67] This may help to explain Hirschl's empirical argument, according to which social rights adjudication fares much worse than liberal rights adjudication. And this is despite the fact that social rights are increasingly recognized in many constitutional orders. *See generally* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2007).

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Conventional legal practice is about deploying the law as it is in court, in settlement negotiations, or in preventive legal advice.[68] And frequently this is at odds with "law and . . . " scholarship which, maintaining a strong theoretical focus, is external to existing law and takes a legislative and reformist perspective.

2. "Law and Humanities"

The usefulness of the "law and humanities" movements—such as "law and aesthetics," "law and literature,"[69] and "law and postmodern studies"[70]—for legal practice is even harder to establish.[71] Often, law and humanities scholarship is defined and defended on the basis of its contribution to the development of an ethically richer and more sensitive legal consciousness—i.e., one that listens to "the Other"[72] and is conducive to the transformation of existing practices and institutions. Thus, law and humanities writings seek to educate a generation of lawyers to be better people and more in tune with the demands of justice. For example, Gearey's opening lines of "The Recording Angel" in his book *Law and Aesthetics*, proclaim:

> We are in pursuit of a style of thinking. Circling back to the beginning of the book, this section offers a closing interpretation of Shelley's assertion that poets are the unacknowledged legislators of the world. It has already been argued that a poet should not impose a morality through his poetry. Moral standards are always specific and limited to a time and place. What, then, is the poet's legislation?[73]

[68] I know this is a controversial point, and it is not the purpose of the paper to articulate fully my views on the issue of the objectivity of law. Following Patterson's account, I maintain that any legal practitioner that is competent in the practice of law will know that some claims cannot be made. *See generally* PATTERSON, *supra* note 46.

[69] *See, e.g.*, IAN WARD, LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES (1995).

[70] *See, e.g.,* Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991).

[71] I should make clear that it is not my intention to denigrate these legal theory schools. My own Ph.D. thesis and much of my research deals with abstract and philosophical (legal) sources, using poetic titles and inspiration from a range of different *academic* disciplines. I restate that my purpose in this article is twofold. First, it is time to acknowledge that most legal theory has little to offer legal practice. Second, legal theorists need to rise to the challenge of showing connections to legal practice as well as to justify their teaching of legal theory. Both claims have to be read in the context of teaching legal theory. I believe it should be up to each academic to decide what to research.

[72] COSTAS DOUZINAS & ADAM GEAREY, CRITICAL JURISPRUDENCE: THE POLITICAL PHILOSOPHY OF JUSTICE (2005).

[73] ADAM GEAREY, LAW AND AESTHETICS 125 (2001).

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This quotation hints at an insuperable linguistic gap between law and humanities and actual law. If the purpose is to improve legal practice by making it more ethical, clearly a more concrete focus on the roles of lawyers and the details of legal practice is needed. After all, the legal field, as currently structured, deliberately avoids appealing to generally accepted ideas of equity and moral autonomy in legal reasoning. It also grounds the symbolic power of lawyers in the possession and exercise of a distinctive *habitus*.[74]

But law and humanities also faces greater problems than its law and social sciences counterpart. Whereas the latter may produce normative scholarship that can aim at reforming the law by legislation and constitutional litigation, the focus of law and humanities on moral development is too removed to do the same.[75] Furthermore, would it be desirable if legal operators started doing justice in their daily practice? Given widespread postmodern disenchantment with values and moral reasoning, the possibility of large-scale, concrete, open, moral reasoning in law could amount to the replacement of common-good ideals with individual preferences.[76]

Does this mean that I am against educating a generation of lawyers that are excellent human beings, and oppose law and humanities playing a role in legal education? Of course not. Law and humanities scholarship raises a necessary challenge to the prevalent idea that law is only propositional. Rather, law and humanities emphasizes the performative nature of law and legal practice and this can only help to instill the idea that law is constructed, and thus, never natural. Consideration of works such as Saramago's *Blindness* or Kafka's *The Castle* or *The Trial* can help in reflection on big questions about law—the nature of our legal system and the violence it imposes—as opposed to the costs or drawbacks of not having such a system. Thus, law and literature can certainly play a role in the development of a critical approach towards existing law.[77] In this respect, while not directly useful in conventional legal practice, it can fuel transformative forms of legal practice such as cause-lawyering, constitutional litigation, and legislative reform.

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[74] *See* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 818–19 (1987).

[75] A debate similar in content is taking place concerning the role of literature in ethics, a much less institutionalized and positivized practice than law. *See* Martha C. Nussbaum, *Exactly and Responsibly: A Defense of Ethical Criticism, in* MAPPING THE ETHICAL TURN: A READER IN ETHICS, CULTURE, AND LITERARY THEORY 59 (T.F. Davis & K. Womack eds., 2001).

[76] *See* Guilherme Vasconcelos Vilaça, *Badiou's Ethics: A Return to Ideal Theory*, 3 BADIOU STUD. 271 (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2415726.

[77] *See generally* JEFFREY C. KINKLEY, CHINESE JUSTICE, THE FICTION: LAW AND LITERATURE IN MODERN CHINA (2000) (discussing the use of crime narrative to denounce the Chinese socialist legal system).

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In addition, the study of law and literature can be a breath of fresh air for law students. For instance, in Shakespeare's *The Merchant of Venice*, Antonio's trial vividly illustrates the doctrine of abuse of law as well as the subtleties of legal reasoning:

> SHYLOCK: An oath, an oath. I have an oath in heaven!
> Shall I lay perjury upon my soul?
> No, not for Venice.
>
> PORTIA: Why, this bond is forfeit,
> And lawfully by this the Jew may claim
> A pound of flesh, to be by him cut off
> Nearest the merchant's heart. Be merciful:
> Take thrice thy money; bid me tear the bond.
> . . . .
> PORTIA: A pound of that same merchant's flesh is thine,
> The court awards it, and the law doth give it.
>
> SHYLOCK: Most rightful judge!
>
> PORTIA: And you must cut this flesh from off his breast;
> The law allows it, and the court awards it.
> . . . .
> PORTIA: Tarry a little, there is something else.
> This bond doth give thee here no jot of blood.
> The words expressly are ' a pound of flesh'.
> Take then thy bond, take thou thy pound of flesh,
> But in the cutting it, if thou dost shed
> One drop of Christian blood, thy lands and goods
> Are by the laws of Venice confiscate
> Unto the state of Venice.
>
> GRATIANO: O upright judge!
> Mark, Jew - O learned judge!
>
> SHYLOCK: Is that the law?
>
> PORTIA: Thyself shall see the Act.
> For as thou urgest justice, be assured
> Thou shalt have justice more than thou desirest.
>
> GRATIANO: O learned judge! Mark, Jew: a learned judge.

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> SHYLOCK: I take this offer then. Pay the bond thrice
> And let the Christian go.[78]

Other works may also be used to illustrate any branch of law. But this practice makes law and literature a more useful teaching method and teaching material rather than a content-oriented discipline,[79] or an independent theoretical approach that is directly useful for legal practice.

To conclude, Balkin & Levinson superbly summarize the bias against humanities in the dominant view of what "thinking like a lawyer" means:

> A 'good lawyer' is a rigorous thinker who does not waste time denouncing injustice at the expense of legal analysis. It is only the insufficiently rigorous and well-trained, whom legal training has inadequately 'disciplined,' who think that the solution to a legal problem is resolved by asking which result is more just. Even scholars who believe it important to emphasize issues of justice are careful to instill analytical rigor and skepticism in their charges. They too, seek to distinguish what is law from what is right.[80]

III. Legal Theory as Political Philosophy

A third style of doing legal theory focuses on the relationship between law and justice. Law as political philosophy studies the questions of whether and how law should pursue justice, either as a substantive ideal in the form of goods *à la* Rawls' *A Theory of Justice*[81] or as a procedural ideal as in Habermas' *Between Facts and Norms*.[82] Indeed, these approaches are basic normative attempts to justify the role of law in society by arguing either: (1) that law needs to recognize each one of us a basic set of goods because that is

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[78] WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1 (M. M. Mahood ed., Cambridge U. Press 2d ed. 2003) (1598).

[79] Two sources conflate this distinction. *See* Imer Flores, *The Struggle for Legal Philosophy (vis-à-vis Legal Education): Methods and Problems*, 5 MEX. L. REV. 125 (2012); *see also* ALTERNATIVE METHODS IN EDUCATION OF PHILOSOPHY OF LAW AND THE IMPORTANCE OF LEGAL PHILOSOPHY IN THE LEGAL EDUCATION (Imer Flores & Gulriz Uygur eds., 2010).

[80] Jack Balkin & Stanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L & HUMAN. 155, 185 (2006).

[81] JOHN RAWLS, A THEORY OF JUSTICE (1999).

[82] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (2008).

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what all of us would desire under the veil of ignorance, or (2) understanding the role of law as the preeminent discourse and medium for social integration. Given the current functional differentiation of social systems going on according to their own logic, Habermas worked from the assumption that law offers the only language capable of mediating among different systems' rationalities. Thus, compared to his earlier juridification thesis, the project turned into a normative thesis legitimating law according to discourse theory. Once again, the normative nature of the political philosophy branch of legal theory makes it hard for it to impact actual legal practice. For a legal practitioner, it is obvious that law is the language in which social conflict is expressed, be it between employers and employees, journalists and abusive governments, students and teachers, or service providers and clients.

At this point, some readers may point out that I am being unfair to the merits of Habermas' thought, since *Between Facts and Norms* addresses such middle-ground concerns. Indeed, speaking within the context of constitutional adjudication and conflicts of rights, Habermas states that judges should not act as legislators as that would violate the necessary discursive foundations for just lawmaking. He premises this thesis on a methodological point: Courts should not, as he says the German Constitutional Court does, treat conflicts of rights as conflicts of values.[83] For Habermas, conflicts of rights are actually conflicts of rules that may be managed routinely according to simple syllogistic reasoning. In essence, Habermas is suggesting that determining whether a car falls under the rule "vehicles are not allowed in the park" poses the same qualitative challenge as deciding whether to privilege the right to life over the mother's right to choose in abortion cases. As with Dworkin, this analysis is simply too abstract to advance legal practice either theoretically or practically. Why is this?

Habermas posits, more than argues, that conflicts of rights are not conflicts of values. This is convenient due to his belief that values are incommensurable. Otherwise, according to his own epistemological premises, there would not be a way of rationally settling such conflicts. Such a view on conflicts of rights, however, is hard to maintain as the problem with conflicts of rights stems from the fact that rights are in fact placeholders for values. Admittedly, these values are not values as such, but legally recognized values—in other words, historical sedimentations and concretizations of values.[84] So, for example, if we discuss whether smoking in closed spaces should be forbidden, we need to reconcile the legal values of public and individual health with individual freedom and the right to develop one's personality. Without further demonstration on how to accomplish this through rules and syllogisms, Habermas' methodological thesis remains unwarranted. Indeed, the problem is not nominalist ("What is the nature of conflicts of rights?") but, rather, practical ("How can we solve conflicts of rights?"). In this vein, Habermas' criticism

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[83] *See id.* at 253.

[84] *See* Andrei Marmor, *On the Limits of Rights*, 16 LAW & PHIL. 1 (1997).

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lives at the purely theoretical level, and is required by the broader discourse-theory distinction between adjudication and legislation. The former "applies" the law, whereas the latter "justifies" it. Yet, anyone who has read a legal decision on rights adjudication cannot fail to see that Habermas' distinction is normative, not descriptive. Indeed, this is a clear case of theory distorting the workings of law and legal institutions in the name of ideal claims—i.e., the proposition that democracy and rights are interlinked and that the legitimacy of political authority depends upon the fact that all parties affected by regulation consent to it. As with Dworkin, such a focus is of limited interest for legal practitioners.

IV. Legal Theory and Conventional Legal Practice: A Claim

Breaking down the enterprise of legal theory into different styles and clearly demonstrating that I have been interested in linking legal theory to conventional legal practice, Section B has offered evidence to substantiate an uncommon claim: *Most legal theory is not useful for conventional legal practice.*

According to my analysis, this is because the styles of legal theory share some of the following features. They:

> (1) Focus on systemic and static aspects of the legal system;
> (2) Assume a legislative/law reform point of view because they are grounded on external sources to law and thus cannot be directly applied in conventional legal practice;
> (3) Are historically *passés*; and
> (4) Either caricature legal practice or conceptualize it at too abstract a level and therefore fail to offer valuable insights for legal practitioners.

If these conclusions hold, then the poor reputation of legal theory amongst law students and legal practitioners should not surprise us. Students often enter European legal education expecting to be trained to think like a domestic lawyer within a positivist judicial culture. Disassembling legal theory into different styles has shown that the direct impact on conventional legal practice of classical topics in jurisprudence courses is minimal. Furthermore, from the sample of approaches examined here, it also seems that most legal theoretical approaches are never explicit about the links to and implications for legal practice.[85] Somehow, we are made to believe that, for instance, the importance of Hart's or Kelsen's theories for one's legal education and legal practice are entirely obvious, or that being an empowered critical legal practitioner will magically find a way to be definitive in one's daily, conventional legal practice.

[85] *See* Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y. REV. L. & SOC. THEORY 369 (1983).

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At the same time, this section reprehends legal theories' limited interest in and for legal practitioners; it opens *a contrario* two ways out. Legal theory could become useful if the discipline addresses the limitations described above and if it is shown that changes in legal practice and legal careers require a non-conventional lawyering standpoint. I hinted repeatedly at both the need for legal theory to deepen its account of legal reasoning as a key element of the practice of law, and at the potential for different styles of legal theory to further the type of legal practice that involves the adoption of a legislative or reformist stance to law.

Altogether, it is seriously misleading to claim that the root of the problem with legal theory lies primarily in the disjunction between theory and practice. Instead, as the remainder of this article will explain, a more productive guiding distinction is one that considers whether theory is interesting or uninteresting for legal practice,[86] suggesting how theory can fit legal practice, and what legal practice comprises. What remains now is to examine how the nature of changes in legal practices and in legal careers justifies the claim that legal theory ought to play an important role in legal education and practice.

C. The Growing Need for Legal Theory: Changes in Legal Practice

The previous section established that, due to the positivist nature of European legal cultures, most styles of legal theory are not useful within conventional legal practice. In contrast, this section argues that there is much room for some styles of legal theory in transformative or critical legal practice. In order to make this claim, I shall briefly show how the constitutionalization, transnationalization, and Europeanization of law are causing upheavals in conventional legal practice. My aim is to highlight the way in which these changes require greater theoretical sophistication, thus making legal theory necessary for legal education. This section also embodies the general thrust of this article by asserting how a pragmatic defense of the role of legal theory in and for legal practice cannot analyze legal theory or legal practice as discrete phenomena. The argument is not exhaustive, but illustrative. More empirical evidence and work are needed, but hopefully this article connects parts of the puzzle that are seldom joined. As such, it provides pointers for additional empirical evidence.

I. Constitutionalization, Legal Reasoning, Normative Legal Practice

Law is changing. The new constitutionalism of the past sixty years outlined a model of law based on the protection of fundamental rights and judicial review.[87] This innovation produced a shift in the ruling principle of legal orders; constitutionality replaced legality.

[86] *See* James Boyd White, *Law Teachers' Writing*, 91 MICH. L. REV. 1970, 1970 (1993).

[87] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY (2007).

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Over time, and in combination with other legal innovations, this shift altered the nature of legal reasoning in a way that requires legal theoretical sophistication. In a nutshell, the principle of constitutionality dictates that all norms and behaviors not conformant to the constitution are void. In addition, judicial review mechanisms were created, both by legislators and judicial will, to ensure the constitutionality of laws. As mentioned earlier in the paper, post-World War II European constitutions became morally charged documents as fundamental rights and other political-moral values were incorporated. The combination of these developments confronted European legal cultures with two possibilities: (1) Kelsenian formal judicial review would be restricted to declare the unconstitutionality of laws that were passed in violation of established procedures; or (2) substantive judicial review in which all laws[88] against constitutional norms but also principles, rights, and values ought to be deemed void.[89] This development requires increased theoretical sophistication from legal practitioners in two ways.

First, rights adjudication presupposes a specific style of legal reasoning. Because European constitutions establish a normative ideal at which law should aim, legal cases should be reconstructed in this new mix of teleological and deontological reasoning. For example, if one wants to claim that the act of forcing tobacco companies to include health warnings on their package designs violates the right to economic initiative, one has to face the counter rights claim that smoking violates public health. Alexy offers such an example taken from an actual case:

> The Court qualifies the duty of tobacco producers to place health warnings regarding the dangers of smoking on their products as a relatively minor interference with freedom of occupation. By contrast, a total ban on all tobacco products would count as a serious interference. Between such minor and serious cases, others of moderate intensity of interference can be found. In this way, a scale can be developed with the stages "light," "moderate" and "serious." Our example shows that valid assignments following this scale are possible. The same is possible on the side of the competing reasons. The health risks resulting from smoking are high. The reasons justifying the interference therefore weigh heavily. If in this way the

[88] I am oversimplifying things. Different jurisdictions work with distinct objects of constitutional review.

[89] There is important variation among legal orders. For example, judicial review and rights-talk is not as prominent in some Scandinavian countries. *See, e.g.*, Ran Hirschl, *The Nordic Counternarrative: Democracy, Human Development, and Judicial Review*, 9 INT'L J. CONST. L. 449 (2011), http://icon.oxfordjournals.org/content/9/2/449.full.pdf.

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> intensity of interference is established as minor, and the degree of importance of the reasons for the interference as high, then the outcome of examining proportionality in the narrow sense can well be described—as the Federal Constitutional Court has in fact described it—as "obvious."[90]

In other words, rights adjudication requires constant balancing between different legal values and norms[91] that, in turn, necessitates sophisticated legal argument and usage of empirical evidence in order to establish the needed teleological claims. If we now reconsider the above quotation from Alexy, determining how to specify what should count as light or severe restrictions as well as determining which right is more important is far from obvious. If rights are not of equal importance, then a minor restriction of a weightier right may trample a severe restriction of a lesser right.[92] Furthermore, constitutional adjudication often has to rely on extra-legal disciplines. For instance, the discussion of whether restrictions in access to professions are constitutionally justified demands an inquiry into the effects of monopolies, and thus resort to economics. Constitutional adjudication also requires normative skills in the creation of the projected axiological horizon of the constitutional project. Thus, determining whether forbidding same-sex marriage, or cutting wages and pensions of civil servants, breaches the principle of equal treatment, entails, even if not explicitly articulated, both normative and ideological arguments.[93]

Secondly, changes in legal reasoning triggered by the combination of reported legal and political developments favor the appearance of public-interest litigation or cause-lawyering, that is, normatively oriented legal practice.[94] In other words, the constitutionalization of legal orders and new constitutional reasoning reveal cracks in positivist legal practice. Constitutions establish the normative project to be pursued by a given political and legal order. This normative vision, however, is not easily available for everyone simultaneously because, as demonstrated, principles and values are not of "yes or no" resolution, but need to be optimized. The constitutional normative project becomes an easy object of legal disputes voiced by those that disagree with historical

[90] Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS 131, 136–37 (2003).

[91] *See* Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 INT'L J. CONST. L. 263, 269–70 (2010), http://icon.oxfordjournals.org/content/8/2/263.full.pdf.

[92] *See Ouroboros*, *supra* note 3232.

[93] It is hard to understand why, given the described developments in positive law, normative legal theory insists on talking about the good in isolation from established constitutional values. *See* Robin West, *Towards Normative Jurisprudence*, *in* ON PHILOSOPHY IN AMERICAN LAW 55 (Francis J. Mootz III ed., 2009).

[94] *See* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001).

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concretizations of the principles. Furthermore, because of the nature of constitutional questions, public-interest litigation or litigation aimed at declaring existing laws unconstitutional finds a new arena; but, as the perspective of reformist or constitutional litigation is that of the legislator, theory plays a role.

It is still difficult to make explicitly feminist, economic, or political-theoretical claims in most positivist legal cultures, but, if legal professionals study the basics of these disciplines in legal education, they will have the resources as well as the awareness to mobilize the law in order to advance particular normative projects. Thus, the teaching of critical theoretical perspectives is of paramount importance in making future legal practitioners aware of the possibilities of reforming the law from within legal practice. As a result, legal education based upon legal theory can become transformative not only of the legal order, but also of legal practice itself. Logically, the scope of the possibilities for this type of normative legal practice and its impact in a given legal culture is conditioned by, among other things, procedural rules; but, because constitutional judges have the final word in determining the constitutionality of laws and constitutional reasoning is far more open-ended, lawyers have strong incentives to engage in activist litigation.

Finally, rights reasoning and rights adjudication also impact on legal practice. For instance, given the central position of constitutional courts in contemporary European legal orders, national parliaments have already started to modulate legislative bills, taking into account the possible reaction of such courts.[95] Consequently, lawmakers also need to get acquainted with this style of legal reasoning.

II. The Transnationalization of Law

Changes in law have also taken place outside the nation-state. In particular, the Europeanization of domestic laws and the emergence of the so-called transnational legal sphere are heavily impacting conventional legal practice. I believe these changes demand more theoretically sophisticated lawyers.

Transnational law, as referred to often in this article, stands for normative phenomena of hybrid and ambiguous legal nature, that produce effects and guide behavior, such as: international rankings like the PISA assessment; product and food quality standards; private financial rules; internet-related disputes; international financial and construction contracts; and transnational arbitration. Transnational law creates a challenge for legal education as it requires a legal practice that is less based upon propositional knowledge of law and more reliant on the development of skill sets, personal relations, creative

[95] *See* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000).

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lawyering, and a legislative point of view applied to the concrete case.[96] Lawyers have to become "creative problem solvers"[97] or display "the ability to rise above the technical level."[98] The point is that lawyers involved in transnational legal disputes will have to engage with lawyers from different legal jurisdictions with distinctive styles of legal reasoning.[99] It will become increasingly important to learn how to think and act like, for instance, a common law or an Asian lawyer, rather than solely relying on foreign substantive law.[100] This is because in transnational legal disputes, the legal framework is often uncertain, soft, and rudimentary. In other words, legal advice and planning, contracts, and legal disputes, are to be solved by intense negotiations with the counterparties. Even if international standard contracts, model laws, arbitration rules, and other harmonized procedures exist, these are still optional or *de jure*.[101] As Quack reasons, in the transnational sphere, lawyers act as "advisors and draftspersons," "disseminators and standard setters," and "public experts and lobbyists."[102] That is, lawyers engage in activities ranging from contractual innovation and concrete problem-solving to helping establish general transnational norms.

In conjunction, the internationalization of commerce, the mix between private and public rules and goals, and the apparent autonomy of the transnational commercial world all conjure a lawyer that is aware of his or her role as a legislator and a mediator across distinctive legal cultures. Importantly, the transnationalization of law and disputes

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[96] Transnational law's impact on legal curricula across the world has been widely discussed even though it is difficult to understand what exactly is transnational law and why all the hype around it. For a critical view, see Catherine Valcke, *Global Legal Teaching*, 54 J. LEGAL EDUC. 160 (2004) (emphasizing that first we need to determine the goals we want to pursue through the subject). On transnational legal education, see T. Alexander Aleinikoff, *Law in a Global Context: Georgetown's Innovative First Year Program*, 24 PENN ST. INT'L L. REV. 825, 825–27 (2006); Duncan Bentley & John Wade, *Special Methods and Tools of Educating the Transnational Lawyer*, 55 J. LEGAL EDUC. 479 (2005); Simon Chesterman, *The Evolution of Legal Education: Internationalization, Transnationalization, Globalization*, 10 GERMAN L.J. 877 (2009); Efrén Rivera-Ramos, *Educating the Transnational Lawyer: An Integrated Approach*, 55 J. LEGAL EDUC. 534 (2005).

[97] Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319 (1999) (arguing that lawyers currently have to address many non-legal questions and only an interdisciplinary education and a holistic approach to legal problems can prepare them adequately).

[98] John Flood *Megalawyering In the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice*, 3 Int'l J. Leg. Prof. 169, 190 (1996).

[99] Sigrid Quack, *Legal Professionals and Transnational Law-Making: A Case of Distributed Agency*, 14 J. LEADERSHIP ORG. STUD. 643, 646 (2007).

[100] *See* William Ewald, *Comparative Justice (I): What Was it Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1896 (1995).

[101] William E. Scheuerman, *Globalization and the Fate of Law, in* RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 243 (David Dyzenhaus ed., 1999) (suggesting that this uncertain legal landscape will last because it actually favors the current capitalist and entrepreneurial model's need for "flexible rules").

[102] *See* Quack, *supra* note 99.

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uncovers a simple fact: The judge is not the only decision-maker. Rather, legal practice is often a relational activity, and lawyers need skills for this relational network.

In short, law graduates must be prepared to practice outside their national jurisdiction and think accordingly. Some even believe that legal education should be entirely revamped to accommodate the changes described above. For example, McGill Faculty of Law has created a new degree to deliver a "trans-systemic legal education" to prepare students to understand and operate amidst multiple legal sources, legal orders and legal traditions.[103] As highlighted here, the development of conceptual analysis and theoretical sophistication will be important in helping future legal practitioners to create a common vocabulary and understanding of law in these changed social and legal circumstances.

III. The Europeanization of Law

Another earlier important change in the legal landscape has been the Europeanization of law. In this article, I am not particularly concerned with how domestic laws are substantively determined by European law. Of course, to apply domestic law well, one needs to be knowledgeable of European law. Legal curricula have adapted by offering many courses on European law, some focusing on the general principles, institutions, and landmark cases, others specializing in, for instance, competition law. Some universities went even further as the examples of Maastricht's University European Law School and the Hanse Law School attest.[104] Yet the Europeanization of law also justifies a more theoretically sophisticated and distinctive style of legal reasoning. Thus, as in transnational law, law students need to learn how to think like a European lawyer. As we shall see below, this implies greater familiarity with rights discourse and methodology as well as consequentialist reasoning.

The first way in which European law has impacted practice in European legal orders has to do with rights adjudication taking place at the European Court of Human Rights (ECtHR) and the European Court of Justice (CJEU).[105] Indeed, domestic plaintiffs can now routinely claim before the ECtHR that the legislation of a given member state violates their rights under the European Convention. Despite the fact that the European Court of Justice is not

[103] Helge Dedek & Armand De Mestral, *Born to be Wild: The 'Trans-systemic' Programme at McGill and the De-Nationalization of Legal Education*, 10 GERMAN L.J. 889 (2009).

[104] Recently, the European Commission announced the intention to have fifty percent of legal practitioners in the European Union attending European judicial training by 2020. *See* Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2011) 551 final (Sept. 13, 2011), http://ec.europa.eu/justice/criminal/files/2011-551-judicial-training_en.pdf.

[105] *See* MICHEL DE S.-O.-L'E. LASSER, JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE 1–3 (2009).

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a specialized human rights court, its jurisprudence has favored the expansion of rights claims and the style of rights reasoning in legal practice across the European Union. A good example of this is the chain of decisions after *Francovich*[106] that established member-state liability for the breach of EU law. The jurisprudence of both courts thus provides new avenues for normative legal practice that aims to change domestic law.[107]

The second way in which the Europeanization of law is impacting legal practice has to do with the style of legal reasoning displayed by the European Court of Justice. Indeed, the latter is widely held as deploying a teleological and contextual approach to adjudication that is geared towards European integration and the development of a common market. Fennelly provides a comprehensive formulation of the teleological method:

> The characteristic element in the Court's interpretative method is, as stated at the outset, the so-called "teleological" approach, an expression frequently employed in writings, in argument by parties before the Court, and occasionally by Advocates General, but rarely used by the Court itself. The preferred language of the Court remains close to the *van Gend en Loos* formulation, namely that it is necessary to consider "the spirit, the general scheme and the wording," supplemented later by consideration of "the system and objectives of the Treaty." In more recent years, the idea of "context" has been added, and the prevailing wording, varying minimally from case to case, has been that it is necessary when interpreting a provision of Community law to consider "not only its wording, but also the context in which it occurs and the objects of the rules of which it is a part."[108]

Let me illustrate these remarks with a contested issue in the *Pringle* judgment,[109] i.e., the compatibility of the European Stability Mechanism with article 125 TFEU on the no-bail-out clause.[110] The latter's *telos* lies in providing the states with incentives to enforce a strict

[106] Case C-6/90, Francovich and Bonifaci v. Italy, 1991 E.C.R. I-5357.

[107] *See Ouroboros*, *supra* note 32.

[108] Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 FORDHAM INT'L L.J. 656, 664 (1996).

[109] Case C-370/12, Pringle v. Government of Ireland, Ireland and the Attorney General, (Nov. 27, 2012), http://curia.europa.eu/.

[110] *See* Paul Craig, *Pringle: Legal Reasoning, Text, and Teleology*, 20 MAASTRICHT J. EUR. & COMP. L. 3 (2013).

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budgetary policy, thus preventing morally hazardous behavior. At the same time, the application of contextual reasoning forces us to consider a second teleological step: the goals and project of the EU constitutional project. Thus, according to Tuori, this "'second-order' *telos* of the no-bail-out clause undoubtedly includes the *financial stability of the euro* area as a whole."[111] Contextual considerations—the absence of a detailed legislative framework applicable to the issues at stake and the slow process of European integration—may also be taken into account by the Court. Thus, political science and comparative institutional analysis are tunes playing in the background; they cannot be ignored. Furthermore, paired with the above-mentioned legislative obstacles, the Court's self-appointed role of ensuring the completeness of the EU legal order has led to a problem-based development of EU law and conceptual creativity. All in all, with these methods of legal reasoning in place, knowing and using EU law is quite a task for civil law students, practitioners, and others.[112] Sophisticated tools of legal reasoning, as well as theories that help with seeing the full specter of relationships, elements, and laws that are mobilized in determining what the applicable law is, will be paramount.

D. Legal Professionals, Legal Disciplines, and the Growing Need for Legal Theory

I started by claiming that legal theory is of little use for legal practice narrowly defined. Conversely, Section C has suggested that recent developments in legal practice demand greater theoretical sophistication from lawyers.

In what follows, I wish to suggest that there is another reason why theory is increasingly important in legal education. This requires rethinking what we understand as legal professionals and legal careers and the skills these require. It may surprise many to learn that few works on legal education explicitly connect the optimal mix amongst theoretical, doctrinal, and practical training to the kind of legal professional that law schools are interested in nurturing.[113] For anyone acquainted with law schools around Europe, it is clear that law students are assumed to be a country's future lawyers, judges, and prosecutors.[114] Because these legal roles typically operate in Europe within a highly

[111] *Id.* at 10 (emphasis added).

[112] Mark Dawson, *How Does the European Court of Justice Reason?: A Review Essay on the Legal Reasoning of the European Court of Justice*, 20 EUR. L.J. 423 (2014).

[113] For two recent exceptions, see James R. Maxeiner, *Integrating Practical Trainng and Professional Legal Education, in* THE INTERNATIONALIZATION OF LAW AND LEGAL EDUCATION 37 (J. Klabbers & M. Sellers eds., 2009); Ulen, *supra* note 48. *See also* Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943). Notice that Ulen's argument and Lasswell & McDougal's argument are much more radical than mine, because they justify legal education on the basis of advances in legal science and a normative view of what lawyers should do, without necessarily relating it to the needs of actual legal practice.

[114] For a similar assumption in the U.S., *see generally* SUSAN ECHAORE-MCDAVID, CAREER OPPORTUNITIES IN LAW AND THE LEGAL INDUSTRY iv (2007).

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positivist legal culture, doctrinalism in legal education is self-justifying. What about other legal careers?

Some graduates will become lobbyists, public-interest advocates, litigators, clerks to lawmakers, lawmakers, academics, or will work for regulatory agencies, such as competition or financial-markets' authorities.[115] In other words, they will enter a professional world that requires competence well beyond training concerning how to make formalistic legal arguments before judges.[116] Furthermore, even if some begin their careers as traditional lawyers, some graduates may well move on, sooner or later, to fulfill different professional roles in either private or public sectors.[117] Finally, some lawyers and judges will also practice and specialize in new legal disciplines.

There are also additional reasons why legal theory is necessary in the education of these legal professionals. Novel disciplines, such as competition law, require legal practitioners who can understand and speak the language of economics. For instance, defining the relevant market of any given product for the purpose of determining market power cannot be performed without complementary knowledge in economics. Similarly, determining whether an oligopoly is in place may well require a complicated evaluation of whether there is an alternative, rational economic explanation for apparently concerted price adjustments. Economics, however, cannot usurp law in legal practice. Economic concepts are only a source of law if they are, in fact, recognized by law.[118] Thus, it is not enough to study competition law and microeconomics separately; for legal practice, one needs to understand how economic arguments can impregnate legal reasoning.

The simple fact that legal professionals will join with lobbying groups, regulatory agencies, and lawmakers will further force them to see law as a social engineering tool:[119] A mode of

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[115] I am not suggesting that these professions will crowd out classical legal careers but am calling attention to the fact that if the law degree educates students interested in a broad range of careers, then it should also become more responsive to changes in the skills required by such professions.

[116] *See* Simon, *supra* note 14, at 492–93. Regarding European law, see Flood, *supra* note 98, at 192 (discussing how lawyers often have to engage in "non-legal activities" such as lobbying in order to both influence law-making according to their clients' interest and be able to understand the point of view of European institutions on existing law).

[117] Flood, *supra* note 98, at 170.

[118] This gap justifies many critiques of EU competition law by economists who find, for instance, the pursuit of social justice or the political protection of small businesses and enterprises to be unjustified on efficiency grounds.

[119] The link between careers and education allows me to evade a critique that can be made of Ulen. *See* Ulen, *supra* note 48. Let me remedy this omission. He argues that legal education needs to be more theoretical in order to catch up with the most recent developments in legal research. But this is a seriously biased argument that assumes that legal education and the faculty composition of law schools ought to follow developments, whichever they are, in legal science. In this way, legal education trains students irrespective of the demands of

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governance that provides incentives, facilitates compliance and strategic reactions, as well as one that is in tune with the protection of gender equality, or recognizes social disadvantage. In essence, projecting the effects that a law may trigger has become the bread and butter of a growing number of professionals. Regulatory agencies are a good example of this trend. Recently, the Bank of Portugal and the Portuguese Securities Market Commission, like other banks and agencies throughout the world, had to decide—even if the decision appeared to be made by the EU—how to manage the possible imminent bankruptcy of the biggest Portuguese private bank. This required taking into account systemic risk, protection of trust in capital markets, depositors' rights to preserve their savings, differentiated responsibility of shareholders and owners of obligations as well as the division between subordinated and non-subordinated obligations—all issues that required decisions that transcend the boundaries of an exclusively and traditional legal answer.[120]

Lawmaking—modernized in recent times with increased attention on legislation as a science, theories of regulation, and legislation as jurisprudence (*legisprudence*)—also requires greater theoretical sophistication via law and social sciences and law and critical studies. Parallel to this development, there is increased importance of regulatory impact assessment studies as a fundamental tool to increase the quality of legislation.[121] A recent strategy adopted at the EU and OECD levels is the Better Regulation agenda which aims to improve the quality of lawmaking by subjecting important bills to *ex ante* impact assessment studies, e.g., the REACH regulation. This comprises economic, administrative, social, distributive, gender, and other possible impacts of the legislative proposals. Furthermore, *ex post* studies to measure actual effects of regulation are to be promoted, making legislation and the act of legislating an experimental social-scientific activity.

To comply, lawyers need to update the basic assumptions of human and social behavior with which they generally work. Rather than common sense and rule-of-thumb, or comparative law support, legislative studies are forcing lawmaking to come to terms with states of the art in economics, sociology, and psychology. Arguably, the discipline making

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legal practice and thus, contra Ulen, the disjunction between education and practice may widen. Ulen's argument reveals two unjustified assumptions: (1) That law should be studied as an empirical science; and, (2) that practice should not necessarily co-determine university education. Ulen's thesis also omits the fact that most law professors of elite American law schools have little practical experience and little influence outside those universities. *See* Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMP. L. REV. 393 (1997).

[120] *Cf.* RICHARD SUSSKIND, THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY (1996) (suggesting the market for legal services is changing due to technology and pressure from other markets and forcing lawyers to start acquiring a whole new set of skills and functions), *with* Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-first Century*, 96 IOWA L. REV. 1649 (2011) (offering a more condensed account). These authors further the idea that legal practice and what counts as a legal professional is changing and this needs to be factored in legal education.

[121] *See* REGULATORY IMPACT ASSESSMENT: TOWARDS BETTER REGULATION? (Colin Kirkpatrick & David Parker eds., 2007).

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the biggest impact so far has been economics, since most of regulatory impact assessment studies' potential lies in the use of a common metric to measure costs and benefits of different options to achieve a given goal. Here, solid theoretical knowledge will advocate for cost-benefit analysis, cost-effectiveness, and other procedures, as well as information constraints. Furthermore, despite lawyers' criticism of cost-benefit analysis as putting a price on everything and assuming that all values are equal, these are assumptions that can be modeled differently.[122] Indeed, cost-benefit analysis can account for distributive effects, and in any case, best practice suggests that analysis should never be carried out by policymakers.

Viscusi, a leading risk-analysis author, famously showed, against conventional wisdom, that society makes a profit for every packet of cigarettes smoked.[123] He explained that differentials in results stem from the fact that studies refused, on moral grounds, to quantify savings in medical expenses and pensions, arising from smokers' lower longevity, as an economic benefit.[124] Furthermore, regulatory studies may be tailored to list costs and benefits without any quantitative measurement, or decision-makers may decide that gender or distributive criteria should prevail, notwithstanding the substantiality of costs. A simple qualitative analysis based upon economic incentives may suggest that a policy of freezing rents, such as the one adopted in Southern European countries during the twentieth century, may well play against the professed objective of providing affordable housing for those in need. Why?

If rents are frozen, tenants already bound by rental agreements are clearly benefited, for they pay increasingly less in rent over time. Conversely, landlords have no incentive for upkeep since income from rents cannot be raised in the foreseeable future. Furthermore, because they know that future rental agreements will be subject to the same limits, landlords have incentives to charge very high prices to new tenants in order to account for the loss of future capacity to raise rents. Deterioration in construction is also likely, as well as many void dwellings. Thus, the aim of the legislation is defeated.

I do not wish to be misinterpreted here. I am critical of the economic account of human action and doubt the behavioral economics therapy. Be that as it may, law and economics, as well as other disciplines that investigate human action like psychology or sociology, confront us with a naked truth: Lawmakers write explanatory memoranda and laws based on implicit assumptions about human behavior, legal compliance, and the role and effect

[122] Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 9–10 (Harvard Law Sch. John M. Olin Ctr. for Law, Economics, & Business, Working Paper No. 72, 1999).

[123] *See* W. Kip Viscusi, *The New Cigarette Paternalism*, 25 REG. 58, 62 (2002), http://object.cato.org/sites/cato.org/files/serials/files/regulation/2005/12/v25n4-13.pdf.

[124] *See id.*

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of regulation within society. The role of the new lawyer—and part-time social scientist—consists in being able to understand how new findings impact the quality and effectiveness of legislation.

The bottom line is that developments such as the Better Regulation agenda will trigger an increase in the demand for lawyer-economists or lawyers sensitive to an understanding of law and its effects in context. As a young researcher, I became an associate to the European Network for Better Regulation, an academic and practitioners' outlet that discussed national agendas on the evaluation of legislation. The most frequently voiced concern by local partners was the lack of human resources equipped with the capacity to perform actual regulatory impact assessment studies.

E. Conclusions: What Kind of Legal Theory?

In a nutshell, this article suggests that the importance of legal theory in and for legal practice cannot be determined by legal theory's intrinsic features. Instead, we need to differentiate amongst styles of legal theory and combine this knowledge with the current *Zeitgeist* in legal life. Within this framework, I have claimed that most legal theory is useless for conventional legal practice as traditionally understood in Europe. However, recent developments in law—constitutionalization, Europeanization, and transnationalization—demand stronger theoretical sophistication. This applies both at the descriptive level—i.e., in order to know, understand, and apply existing law—as well as at the normative level—i.e., to mobilize law to promote social change. Furthermore, I have suggested that, once legal practice is more broadly defined, it would encompass careers that require lawyers to adopt a legislative point of view. This task demands a social-scientific and normative approach to law. Finally, taking into account that the interests of theorists and practitioners of law may always and inevitably be in conflict,[125] and that legal practice is often skeptical of legal theory's value, this article has suggested that it should be up to the latter to justify its place in legal education.[126]

Such an arrangement would overcome some of the limitations of seeing law and legal education as purely determined either by academics[127] or practitioners.[128] This balance is

[125] *See* Andrew Halpin, *Law, Theory, and Practice: Conflicting Perspectives?*, 7 INT'L J. LEG. PROF. 205, 218 (2001).

[126] It is important to dispel the idea that academics do not need to justify what they do. *See, e.g.*, STEFAN COLLINI, WHAT ARE UNIVERSITIES FOR? (2012) (arguing in favor of humanities or non-technical education in universities). *See also* Ribstein, *supra* note 9, at 1651 (suggesting that legal academics have been very successful in teaching what they choose).

[127] *See* Ulen, *supra* note 48, at 326.

[128] *See* Learned Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law?*, 24 MICH. L. REV. 466 (1926).

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particularly important in Europe, where a strong positivist and formalist approach to legal practice still prevails. A focus on contemporary specific legal developments and their entanglement with different theories and philosophies also enables us to confront recent arguments in favor of the teaching of legal philosophy. For instance, Flores makes a case for the importance of theory by appealing to a historical analysis and comparing Langdell's and Holmes' approaches to law.[129] As I hope I have shown, there is little to gain from reissuing debates in isolation from the actual demands and developments in legal practice, the substance of law, lawmaking, and legal academia.

Only the million-dollar question remains: What then should we be teaching as legal theory? I will clarify the argument made so far and address some anticipated objections. First, to maximize the understanding of the role that theory plays in legal education and legal practice, a compulsory course in legal theory must be offered at the beginning of any law education. Such a course would clarify how different forms of legal practice require correspondingly different styles of legal theory and communicate clearly the core attitudes and careers, and the different theoretical skills they require. Broadly speaking, these are conventional legal practice, transformative practice, and legal roles that ask for a legislative point of view. Crucially, such a subject would teach the basic idea that there is no discussion about the law without conceptualization and theorization, even if these remain unarticulated. The approach sketched here avoids doing so in purely theoretical fashion and consequently in isolation from specific professional and institutional developments.

Second, I believe that a compulsory subject in legal theory should consist of an introduction to both legal reasoning and multiple theories of law, showing how different conceptualizations of law and legal problems trigger varying answers. Thus, legal theory should be a window into critical legal studies, law and economics and policy, theories of regulation and law-making, anthropological studies of legal practice,[130] law and gender, cause lawyering, law and literature, and other theoretical approaches to law. As emphasized throughout this article, however, attention must be paid to showing how law and social sciences and law and humanities are distinct from one another and intersect legal practice differently.

Third, legal theory should be taught from a problem-based perspective. Thus, students should learn "by doing" the difference between making descriptive and normative claims, and how these can be mobilized from various legal roles. What does this mean? Teaching should mix theoretical lenses with the concrete materials—cases, contracts, impact assessment studies—provided by the different developments in legal practice and legal careers—i.e., constitutionalization, Europeanization, transnationalization, scientificization of law. In other words, the teaching of legal theory should have as a reference legal

[129] *See* Flores, *supra* note 79, at 131.

[130] *See, e.g.,* BRUNO LATOUR, THE MAKING OF THE LAW: AN ETHNOGRAPHY OF THE CONSEIL D' ÉTAT (2010).

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reasoning and how the latter communicates with normative legal practice, inventiveness in transnational legal practice as well as lawmaking and institutional design.[131] Before readers ask, "How on earth do you expect to teach such sophisticated legal materials to first-year students?" I acknowledge that designing and choosing materials for such a course, which sensitizes students to the roles theory may come to play in law, requires much work and care. Importantly, theoretical ideas are not communicated in isolation from specific everyday legal events and materials. Furthermore, a general course in legal theory should not replace specialized courses such as law and literature, law and economics, legal sociology or constitutional law, as discussed below. Such a course could be administered with a highly flexible schedule throughout the year, alternating between conventional lectures and intensive one-day workshops.

Fourth, and perhaps radically, I submit that no general jurisprudence should be taught per se, given its lack of usefulness for legal practice and the fact that it is a largely bankrupted enterprise. As shown, the "existence and essence of the domestic law question" is hardly relevant nowadays. If anything, general jurisprudence could be a resource to approach significant problems defined outside of its discourse, such as the study of transnational law. I reiterate that one should follow a problem-based approach and focus on concrete events that link different normative spaces, such as the *Kadi* judgement[132] or internet disputes to mention but two examples, rather than theorizing *in abstracto* the nature of the transnational legal sphere according to a list of features that any legal system should display. Studying Austin, Hart, Kelsen, Dworkin, Raz, and many others could suit an elective course in legal theory. It would be, however, more appropriate to call that "A History of Analytic Jurisprudence."

Fifth, and related to the last point, the course in legal theory I advocate is entirely at odds with Varga's own proposal that starts thus:

> Accordingly, it deals, firstly, within the *paradigms of legal thought*, with the *Methodological directions in thinking* (through the example of legal development [by the classical Greek antiquity and especially *dikaion* justice, the Roman praetorian law and Justinian's codification, the Enlightened absolutism and the French *Code civil*], of geometry [of Euclid, as challenged by Bolyai/Lobachevsky, and ending in Einstein's

[131] *See* STEPHEN TOULMIN ET AL., AN INTRODUCTION TO REASONING (1984); NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW (2005). For a philosophical articulation of the view that knowing the law consists in following the forms of argument recognized in the practice of law, see PATTERSON, *supra* note 18.

[132] Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Council & Commission, 2008 E.C.R. I-6351.

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> revolution], as well as of the potentialities—in human thinking making use of texts—of Autonomy with fertilising ambiguity [exemplified by the New Testament's parabolic argumentation, Cicero's rhetorical testimony, Augustine's confessional style, the Talmudic lesson of tradition accumulated, Orthodox Christianity, and Modern "irrationalism"… .[133]

Varga's work is worth mentioning here because it starts from a similar concern to mine: The decay of "legal philosophy as an educational subject" in continental Europe. Furthermore, his paper offers the most comprehensive articulation of the "philosophy of teaching legal philosophy" written in recent times. Thus, it is doubly paradoxical that a contemporary work complaining about the poor condition of legal philosophy's teaching offers as therapeutic a course in legal theory that practically covers landmarks of the whole comparative history of cultural, religious, social, methodological, and philosophical thinking about the law. In other words, both the content of Varga's proposal and the argumentative strategy employed—assuming that the benefits of reading Cicero, Aristotle, or Leibniz for legal and cultural education, as well as legal practice, are obvious—appear to be part of the problem we both want to address. With such a program, however, one is highly unlikely to promote a legal theoretical education that appeals to students in general and helps some of them in their future legal practice. I do not wish to engage in empty polemics. One of my most formative legal-education experiences was studying legal theory at University of Trento Faculty of Law at a time when legal reasoning was approached in a purely abstract way, by means of studying pre-Socratic philosophers including Thales, Parmenides, Heraclitus, and others.[134] Only eight students enrolled on this module. My point is simple: The travails of legal theory cannot be overcome by preaching to the already converted.[135]

There are three possible objections that could be launched against the case I have made here. First, some may argue that my analysis dissolves legal theory as an autonomous subject by reducing it to specialized disciplines such as constitutional law, law and economics, or European legal reasoning. Thus, why insist on teaching a separate course in legal theory? Such a course gives students, from the outset of their legal education, a picture of the possibilities, uses, and limits of different theories and methods before they jump into fully-fledged specialized courses in which disciplinary biases are often hidden or lost within the details.

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[133] Varga, *supra* note 3, at 170.

[134] *See* FRANCESCO CAVALLA, LA VERITÀ DIMENTICATA ATTUALITÀ DEI PRESOCRATICI DOPO LA SECOLARIZZAZIONE (1996).

[135] *See, e.g.*, Cotterrell, *supra* note 3, at 182.

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Second, one may object that the case I make for legal theory's relevance does not apply to ordinary legal practice, and, thus, speaks only to a legal elite or elite law schools. Having been brought up in a small town in Portugal, I am well aware of the fact that legal practice in big cities bears little resemblance to that which takes place in the countryside. This hardly scratches my argument however. I am not advocating for an overhaul of legal education modeled after theories, nor have I argued that we ought to make several legal theoretical courses compulsory. A course along the lines sketched above simply provides a primer in legal interpretation as well as insight into the different ways in which law can be mobilized. Basically, even if not useful on a daily basis, legal theory will make students aware that law could always be different from how it is, while providing some tools to make things happen.

The final objection may disagree with my apparently disenchanted view of legal practice and legal theory. This is a thorny issue, given my natural interest in humanities, but here is my reply. First, we are talking about only a single course in legal theory. It cannot possibly, nor is it designed to, provide a blueprint for an entire legal education. Second, despite my interest in ethical reflection and some experience in teaching ethics, I doubt the effects of heavy emphasis in ethical education. I have come to share Bernard Williams's fear that philosophical inquiry may well destroy ethical knowledge.[136] Moreover, it is also difficult to establish that morally educated persons make better concrete decisions. Third, I share a pragmatist commitment to social life and, as such, I am interested in the role of values in actual social practices rather than values as ideal constructs. I have tried to demonstrate that, with the constitutionalization trend, law absorbed relevant moral values that now need to be dispensed judiciously through legal practice. The legal theory in which I believe acknowledges this phenomenon and, thus, focuses on concrete problems and materials rather than abstract and theoretical speculation on the relationship between law and justice. Lastly, because my analysis distinguishes between legal theories that are more explicitly normative than others, and discusses how different legal roles can engage in transformative legal practice, the utopian dimension of law is safeguarded.

[136] *See* BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY (2006).

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