LISTENERS AND EAVESDROPPERS:
SUBSTANTIVE LEGAL THEORY
AND ITS AUDIENCE

MEIR DAN-COHEN*

This symposium adds to an already substantial amount of self-examination to which legal scholarship has subjected itself of late. Though as we all know persistent efforts at self-awareness are not always the signs of spiritual soundness, such efforts have their undeniable payoffs. For our present purposes they provide us with a store of existing articulations regarding legal scholars' self-understanding. One feature of legal scholarship that the existing literature establishes beyond dispute is heterogeneity. Legal scholars are doing very different things both in terms of the methodologies they use and the goals they seek to accomplish. Consequently, generalizing about legal scholarship is bound to ignore important distinctions and is likely to be vacuous. To avoid these dangers I will refrain from examining "legal scholarship" as such, but will focus instead on what I take to be one significant branch of it. Indeed the branch has grown in size and importance to the point where it now deserves a name of its own. I propose to call it "substantive legal theory," and in Part I I describe the kind of scholarship that I mean to label. This form of scholarship raises, more starkly than other familiar forms of legal scholarship do, the question of its relationship to the practice of law. I analyze the problem in Part II by contrasting the discourse of practitioners and judges on the one hand with that of substantive theorists on the other. This discursive contrast argues against the view of legal theory as addressing practitioners and decisionmakers with the ambition of advising them how to act. But if so, whom does substantive legal theory address and to what end? I take up these questions in Part III. I try to show that by clarifying the concept of an "audience" we are able to articulate an educational mission for substantive legal theory that does not depend on maintaining unity of discourse with practitioners and that does not presume to instruct decisionmakers as to what they should do.

* Professor of Law, University of California, Berkeley and Tel Aviv University, Israel. Copyright © 1992 by Meir Dan-Cohen. I would like to thank for their helpful comments my friends and colleagues Angela Harris, Sanford Kadish, Robert Post, Ed Rubin, and Frank Zimring.

569
I. THE DILEMMA OF SUBSTANTIVE LEGAL THEORY

A good point of departure—that will help introduce both a common ground as well as some disagreements—is Richard Posner’s definition of what he calls “legal theory”: “the study of law . . . ‘from the outside,’ ” using the methods of scientific and humanistic inquiry to enlarge our knowledge of the legal system.”¹ This definition captures some of the essentials of the kind of legal scholarship I have in mind. However, a terminological amendment would be useful here: adding the adjective “substantive” to the idiom “legal theory” as defined by Posner, helps mark the distinction between the latter and a very different use to which the term “legal theory” is often put. In this common usage “legal theory” is a rough synonym of jurisprudence or general jurisprudence and it concerns questions regarding the nature of law, the meaning of its normativity, its general structure and sources and so on. If legal theory is to apply to the study of questions such as these it would be perhaps advisable to qualify it as “general,” or “formal legal theory.” In contrast, “substantive legal theory,” at which Posner’s definition aims (and which his own scholarship exemplifies) concerns substantive, normative legal questions; it seeks to enhance our understanding of them and to improve our capability to cope with them. To this end it uses, self-consciously and systematically, the resources of other disciplines, primarily those of the social sciences and the humanities. In this it differs quite dramatically, as Posner correctly notes,² from a more traditional genre of legal scholarship which is concerned predominantly with doctrinal analysis and which in outlook and methodology resembles, and is continuous with, judicial opinions and other pronouncements of legal practitioners.

With the exception of the terminological amendment I have proposed, Posner’s conception and advocacy, as well as his own practice, of this brand of legal scholarship understood along the lines I have just described, seem to me on the right track. Still, his formulation also indicates some potential disagreement regarding the nature of substantive legal theory and its main tasks.

A clue to an important query, and a possible controversy, is provided by the main theme of Posner’s article in which the above definition of legal theory appears. As indicated by its title,³ the article describes, explains, and celebrates the decline in law’s autonomy, a decline associated with law’s increasing dependency on various other

². Id. at 778-79.
³. See supra note 1.
disciplines. But the incursions on law by other disciplines that Posner documents concern legal scholarship. They do not touch nearly as obviously or directly the practice of law. Posner simply overlooks the fact that "law" is both the name of a social institution and of an academic discipline that has the former as its subject matter. Such oversight is perhaps natural (and self-serving) in someone whose career straddles this divide. Still, the oversight can only breed a confusion that substantive legal theory, conscious of its academic credentials and clearheaded about its scholarly mission, should be careful to avert. The relationship between a discipline and the area it studies is a difficult matter and one that varies from field to field. But the relationship can be adequately considered only when the relata are kept firmly apart. The application of the word "law" to both the discipline and to its subject matter is an inconvenience that should not turn into a trap: the study of law, for one, can become interdisciplinary without law thereby losing any of its autonomy.

But whereas one should not confuse law as a field of study with law as a field for study, one should not commit the opposite error, of which Posner is also guilty, of consigning "legal theory" to an external perspective, by assigning to it the study of law "from the outside." To be sure, many important investigations can be said to assume such a posture: a legal historian, for example, trains the instruments of her trade on the law "from without," trying to explicate legal phenomena in the same vein as other processes and events. But "substantive legal theory," as often practiced to good advantage by Posner himself, takes a different, internal point of view. The questions that legal economists typically ask, and to which they proffer detailed answers—when should tort law impose strict liability and when should it prefer a negligence standard; which contracts should be breached and which enforced; what should be the measure of damages—are distinctively substantive, normative lawyers' questions. What distinguishes these questions is not the perspective from which they are asked—this is as "internal" as that of any lawyer's or judge's—but rather the way in which they are answered.

That legal academics should ask the same questions as legal practitioners encourages the mistake of confounding, under the single label "law," the former's enterprise with the latter's. On the other hand, insisting on the scientific, interdisciplinary nature of legal scholarship naturally leads to assigning it the task of observing the law from the outside. But substantive legal theory is neither continuous with the practice of law, nor is it a mere external observer of it. In his impor-

4. Id. at 766-73.
tant meditation on the nature and the mission of legal scholarship Professor Edward Rubin successfully avoids both pitfalls. But though I find his characterization of what I call "substantive legal theory" eminently illuminating and the case he makes for such scholarship thorough and compelling, I think that he too ultimately fails to relate in a satisfactory way the scholarly enterprise he advocates to the practice of law.

Unlike Posner, Rubin is acutely aware of the gap between the study of law and its practice. Professor Rubin's chief complaint against traditional, "doctrinal" legal scholarship regards the "unity of discourse" it maintains with judges, lawyers and other functionaries of the legal system. In this I fully concur. Indeed I can here even indulge the academic's ultimate narcissistic delight by quoting Rubin quoting me on this point. A legal scholar who maintains "unity of discourse" (to use Rubin's happy phrase) with judges and lawyers will find herself acting "as a kind of deputy-judge, presiding over moot courts, or a shadow lawyer writing mock briefs for hypothetical or past disputes." Rubin urges legal scholars to develop their own voice, a voice distinct from that of officials and practitioners, resonant instead with the humanistic and social disciplines to which Posner also alludes. With such a distinctive voice, legal academics will be better able to engage in the normative study of legal issues, i.e., issues that are of professional interest to the more practical legal actors such as lawyers and judges.

At this point, however, Rubin's conception of legal scholarship of the kind he advocates falters. The scholarly discourse that Rubin favors "consists largely of prescriptions that scholars address to public decision-makers for the purpose of persuading those decision-makers to adopt specified courses of action." It is to the achievement of this task that according to Rubin the unity of discourse constitutes "the greatest single impediment." But this claim is remarkable: Why should fracturing the unity of discourse between scholars and practitioners facilitate communication between the two groups and increase—rather than destroy—the scholar's ability "to speak to public decision-makers in a persuasive manner"?

6. Id. at 1859.
7. Id. at 1879 (quoting Meir Dan-Cohen, Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society (1986).
8. Rubin, supra note 5, at 1891-95.
9. Id. at 1881 (footnote omitted).
10. Id.
11. Id. at 1900.
Rubin may in fact sense the paradox when he points out that "judicial decisionmakers themselves may be developing a style that relies on identified normative positions and empirical elaboration,"\(^\text{12}\) resembling the style of scholarly argument that he endorses. "To the extent that this process occurs," argues Rubin, "the fit between normatively-based legal scholarship and judicial decisionmaking would become much closer."\(^\text{13}\) Indeed so, but only by reestablishing the unity of discourse whose destruction is Rubin's main theme.

That judges, or any other public decisionmakers, should become practitioners of substantive legal theory is neither particularly likely nor clearly desirable. But the fact that Rubin makes such a prognosis is itself symptomatic of the paradox at the heart of his position. The paradox however is the sign of a real dilemma. It is born of the academic lawyer's desire to have it both ways: he wants to forge a distinctive identity as a scholar who practices the academic discipline of law while also maintaining his identity as a lawyer who contributes to legal practice.\(^\text{14}\) Rubin tries to cater to both desires. To satisfy the first, Rubin proposes the disruption of the unity of discourse;\(^\text{15}\) he accommodates the second wish by suggesting that legal scholars' task is to address their more practically oriented colleagues and to persuade them as to how they should act.\(^\text{16}\) But the latter suggestion is at odds with the first: creating a discourse of their own hardly equips legal scholars for persuasive communication with those not privy to that discourse.

Having it both ways is however a common and sometimes worthy ambition; so it is important to get a better sense of the gulf that separates the legal practitioner from the theorist in order to appreciate how

\(^{12}\) Id. at 1901.

\(^{13}\) Id. The main theme of Bruce A. Ackerman, Reconstructing American Law (1984) is the transformation of lawyers' discourse along similar lines to those described by Rubin. I cannot take up Ackerman's views here, and shall only remark that even if the same discursive modes were to appear in practitioners' talk as in scholars' talk, their meanings (a deliberately vague term) could still remain distinct, and genuine unity of discourse between the two groups need not thereby be reinstated. But the resulting increased surface resemblance between the two discourses could induce error and encourage abuse.

\(^{14}\) Professor Pierre Schlag provides a similar diagnosis of the problem at the heart of legal scholarship. See, e.g., Pierre Schlag, Normativity and the Politics of Form, 139 U. Pa. L. Rev. 801 (1991). He points out that "normative legal thinkers want to persuade an important institutional actor (usually a judge) to adopt a particular norm," and concludes that "if normative legal thinkers are aware of the rhetorical, the power dimensions of normative legal thought, they can no longer claim that their thought is outside the field of coercion and manipulation." Id. at 843-851. I attempt, however, to suggest an altered self-understanding for substantive legal theory—that by giving up the ambition (or fantasy) of influencing decisionmakers, it avoids Professor Schlag's bleak conclusion. See infra Part III. Consequently, I find the implications of the discursive divide I describe more liberating than depressing.

\(^{15}\) Rubin, supra note 5, at 1891-95.

\(^{16}\) Id. at 1900-04.
illusory is the prospect of uniting them both in a single discourse. This I will try to do in the next section. However, demonstrating the unbridgeable rift between theorist and practitioner would seem to impale us on one of the horns of the dilemma manifested in Rubin’s position: If legal theorists do not engage practitioners in their discourse, whom are they addressing, and what would possibly be the point of their enterprise? I will take up these questions in Part III.

II. PRACTITIONERS' DISCOURSE AND THEORISTS' DISCOURSE

By a discourse I mean, roughly, the set of linguistic formations, background assumptions, and pragmatic orientations that make communication among those who share them significantly easier and more complete than communication with those who do not. No rigid boundaries circumscribe a discourse and no precise conditions define it. Still, in distinguishing the discourse of practitioners (and judges) from that of scholars it will be useful to focus on three types of elements that participate in forming and delineating a single discourse: the situation or the context in which speech takes place; the identity of the speakers; and the characteristics of the speech itself. These are all interrelated, and all three are aspects of the discursive divide that I want to describe. In rough outline, the picture is this. The practitioners’ discursive situation is marked by coercion and bureaucracy; this situation issues or manifests itself in detached roles that preserve a gap between practitioners’ personal identity and their professional engagements; this gap in turn relates to the essentially strategic and insincere quality of practitioners’ speech. The theorist, in contrast, acts in a context that is neither coercive nor bureaucratic; her role is nondetached—it is bound up with her personal identity; and her speech is truth (or understanding)—oriented and sincere.

As the reader must have already noticed, in drawing the above picture I use some conceptual equipment borrowed from other writers. Let me then first identify and briefly explain these conceptual resources that I use.

I have described the practitioners’ various roles as detached, and implicit in this description is the concept of role-distance, which I borrow, with some modifications, from the work of the sociologist Erving Goffman. The term “role-distance” belongs to the vocabulary of the self as well as to the vocabulary of social role, and serves as a bridge between the two. It is part of a dramaturgical imagery of the self, according to which the self consists, at least in part, of the social roles

---

17. See ERVING GOFFMAN, Role Distance, in ENCOUNTERS: Two STUDIES in THE SOCIOLOGY OF INTERACTION 83 (1961).
that it enacts. The special insight that the concept of role-distance imports into this picture relates to the self's capacity to locate itself, metaphorically speaking, at variable distances from the different roles that it occupies. Although identification with a role and detachment from it are not fixed properties of roles— I can become at times self-conscious about, and distanced from, every one of my roles, just as it seems that every role can in principle be worn tightly by someone—a certain degree of uniformity in the style of enacting different roles exists. Some roles call for greater identification than others. Certain roles are in general more likely to be enacted at a distance than other roles. So it is meaningful, though not altogether accurate, to speak in general terms about "detached" as opposed to "nondetached" roles. What I shall have to say depends, at any rate, on the soundness of this distinction.

The second piece of theoretical equipment that I use is the distinction drawn by Professor Jürgen Habermas between two kinds of discursive social action: "communicative action" and "strategic communication."18 In communicative action, the participants are oriented toward reaching agreement through understanding. In strategic communication, by contrast, participants are oriented toward success; they have a specific goal determined antecedently to their discursive behavior that the latter is designed to promote.

Finally, in describing legal practitioners' speech as insincere I allude to speech act theory, and specifically to Professor John Searle's view that sincerity—that is, roughly speaking, an assumption of correspondence between an utterance and the speaker's appropriate state of mind—is one of the fundamental conditions for the successful performance of any speech act.19

That practitioner speech is strategic and insincere, I suggested, relates to the detached nature of the practitioner's role, which in turn is born of the bureaucratic and coercive setting within which legal practice typically takes place. I will now try to clarify and support the connection between these different elements with the help of a simple example.

A. Practical Discourse—The General Picture

Consider a typical organizational role, say that of an AT&T oper-

ator. Let me draw attention to a few aspects of this role. Notice first that it would be altogether appropriate for the operator to keep that role at a distance. He can be an accomplished operator even though he just, as it were, goes through the motions of being an operator (as long as, of course, he goes through them well enough). One important implication of, as well as evidence for, this observation concerns the source, relative to the self, of the normative guidance provided by the role. Insofar as the role that I enact is a detached one, I experience the role's imperatives as external, and thus potentially as constraints. Potentially, because the role's requirements may coincide, of course, in general or in any specific instance with my wants and desires. But this coincidence is, in principle, adventitious; it is not an essential part of my relationship to a detached role. If the operator is to perform his tasks, he must be motivated somehow—bribed or coerced—to do so. The most common combination used to this effect contains elements of both kinds of inducement. Performing a detached role is therefore not, as such, a display of autonomy.²⁰

This is not the place to attempt a full account of the relatively high degree of role-distance that at least in this society is deemed appropriate in bureaucratic organizations. But we can at least glimpse in passing one explanation—albeit a highly speculative one—that relates to the instrumental nature of these entities and to the prevailing ethical ambivalence toward such instrumentalism. By isolating the self from the organization role, role-distance shields the self, to a degree, from the blatant instrumentalism of these organizations. At the same time, role-distance gives these organizations as well as their members a certain flexibility and adaptability that is likely to be conducive to the organization's operational success. Detached roles can be, if necessary, redefined or reassigned without thereby playing havoc with the selves of the roles' individual bearers.

These characteristics of the operator's role are reflected, and further accentuated, when we consider the operator's speech. Let me focus on a very simple and common speech act: the display of courtesy involved in the expression of gratitude. As anyone who has ever needed his or her assistance knows, the operator concludes each exchange, no matter how short or trivial (and these exchanges tend to be both), by proclaiming: "Thank you for using AT&T." Though on the

²⁰. I say "as such" because depending on a more detailed theory of autonomy, as well as on the nature of the second-order reasons one may have for enacting the detached role, its enactment may count as autonomous after all. The important point is that the individual's very engagement in the specific tasks of a telephone operator does not purport to express the operator's own will. Contrast, for example, the way that properly discharging parental duties is ordinarily supposed to be a manifestation of the parent's own will.
surface this utterance looks (or rather sounds) no different from any ordinary expression of gratitude, its unusual characteristics are easy to uncover. First, the operator's utterance is in compliance with his role's imperatives, and like the other imperatives associated with a detached role, the duty to say "thank you" also remains external to the individual performer. Since the operator has no internal motivation to speak, such motivation must be provided for from the outside by the organization in the form of either inducement or coercion. A recalcitrant operator surely would be threatened with dismissal if he fails to perform the incantation, irrespective of the earnestness of his belief that the required practice is silly and inappropriate for him or for the role he plays. Or imagine the operators going on partial strike, their union decreeing: "No more of this 'thank you' silliness until we get a raise." It would seem altogether appropriate for AT&T to meet the union's demands by actually paying the operators to perform that particular aspect of their task. It is through such external organizational inducement or compulsion that the operator can be expected to perform the utterance.

The detached nature of the operator's role issues in, and is corroborated by, what may be described as a rather remarkable linguistic aberration of his speech act: its failure to comport with the requirement of sincerity. To see this most clearly it will help to recall Professor Searle's evidence for the view that sincerity is usually a condition for the successful performance of a speech act. He observes that "it is linguistically unacceptable (though not self-contradictory) to conjoin the explicit performative verb with the denial of the expressed psychological state."21 By uttering the expression "thank you," for example, one does not quite assert that one is grateful, so that one is not involved in a contradiction if one adds to that expression the words "but I'm not really grateful." Yet such a locution ("thank you, but I'm not really grateful") is undeniably odd, and in Searle's view this linguistic oddity attests to the fact that the normal use of an expression such as "thank you" is taken to satisfy the condition of sincerity—that is, it presupposes, and is taken to express, the actual psychological state of gratitude.

However, in the operator's case we can find an opposite and equally instructive oddity. It would be quite ludicrous for the overly zealous telephone operator to say "Thank you for using AT&T," and then add "and I really mean it." Since the motivation for the utterance arises from a source external to the operator—the operator is

detached from his role, and the obligation to make the utterance is imposed by the organization—he is not expected to entertain any relevant state of mind with regard to the utterance.

To be sure, not all organizational roles are as strictly circumscribed as is the operator's role, and they may involve greater leeway in the formulation of the appropriate communications than the operator is afforded. Yet the example of the operator helps accentuate features that are common to all organizational position-holders and their speech acts. Statements made by organizational position-holders carry with them the explicit or implicit understanding that they are made "from the corporate point of view" and in one's "official capacity." Consequently, professions of sincerity (akin to the operator's inappropriate "I really mean it" assurance) are in such cases out of place. They would smack of what we might call, borrowing Sartre's well-known expression, "bad faith," by which I mean an excessive identification with what is supposed to be a detached role.22 Sincerity, which is one of the most basic conditions for the successful performance of an individual speech act, simply does not belong in the organizational language game.

If the telephone operator's recitation of thanks is not designed to express his gratitude, what is it designed to do? The answer is suggested by the bureaucratic setting in which the utterance is made. By perceiving AT&T as a business corporation we conceptualize it in strictly instrumental terms: we view it as a formal structure designed to promote some predetermined goals (such as maximize profit, or provide telephone services, etc.). The roles it defines and their requisite performances—including their discursive performances—all derive from such overriding goals and are designed so as to maximize the attainment of those goals. Seen in this light, the point of the operator's mock politeness is rather clear: it simply serves the business purpose of trying to secure customers' continued patronage. This rather obvious interpretation of the "thank you" practice marks it as an instance of strategic communication: the utterance does not perform its usual linguistic function indicated by its content (i.e. the expression of the speaker's gratitude) but is rather used for a predetermined purpose that is ulterior to that function and that content.

I hope that at least in the case of the AT&T operator the relationship between a coercive and bureaucratic setting, a detached role, and

---

22 Sartre's own use of this term is broader, roughly designating any enactment of a social role that is oblivious to the contingency of one's being in that role and to the choice that is inescapably involved in assuming the role. See Jean-Paul Sartre, Being and Nothingness: An Essay on Phenomenological Ontology 47-70 (H. Barnes trans. 1957).
speech that is strategic and insincere is now sufficiently clear to serve as a model for a description of legal discourse. I should preface the transition by recognizing the obvious: the roles of both lawyer and judge are much more complex and multifaceted than that of the operator. Still the analogy will be helpful, I hope, in accentuating some distinctive features of practical legal discourse, and in comparing it to the discourse of substantive legal theory.23

B. Lawyer Talk

Consider the lawyer first. We can get a clue to the nature of her speech by recalling the problem we just raised when we put the AT&T operator's thanks to the test of sincerity. Analogously, try to imagine a lawyer presenting a compelling legal argument, only to be greeted at the end of his speech with the judicial question: “Very persuasive, but do you really believe what you've just said?” A judge, probing into the lawyer's sincerity, would be breaching some of the fundamental rules of the game. The point here, as in the operator's case, is not that the one protagonist or the other—the operator or the lawyer—might lack the psychological state that his or her speech act ostensibly expresses. This fact, in itself, would be utterly inconsequential. The point is that in both situations the norm of sincerity does not at all apply. This conclusion accounts for the indisputable oddity, in both cases, of inquiring about or affirming the psychological state that other speakers, using the same language under different circumstances, would be expected to possess. This is not to say, of course, that the lawyer can get away in court with absolutely any argument; there are limits to what the lawyer is allowed to say, limits that shape and restrict his or her speech. But sincerity has nothing to do with these limits. The condition of adequacy of a lawyer's speech act is not a pure heart, but only a straight face.

Lawyers routinely say, and indeed are expected to say, things they are not supposed to believe. Are they therefore irredeemable liars or dissemblers? Perhaps so. But their ultimate salvation, if there is to be any, lies in role-distance. When arguing before a court, the lawyer

---

23. The following characterization of the role and discourse of lawyers, judges, and scholars involves many obvious simplifications and idealizations, of which two are particularly significant. First, I treat each person as the occupant of just one of these roles and ignore the possibility (and problems) of a dual or triple “identity.” Secondly, I characterize each role in terms of some typical, paradigmatic set of functions and activities, ignoring important variations and deviations in the actual content of these roles. Accordingly, I am interested in the speech that a lawyer produces qua lawyer, engaged in the functions I ascribe to her (primarily litigation)—similarly, in the case of the judge and the theorist. My analysis of legal discourse applies most strictly to the various actors' role-bound communications: the brief, the opinion, the article, and the relationships among them.
typically performs a highly detached role. As with the telephone operator, the lawyer's role involves a script (or rather, in this case, a range of scripts), which the lawyer is motivated to utter simply by being paid to do so. We must further investigate the shape and the point of this arrangement. But we can already observe that it is only a picture such as this that can take lawyers off the moral hook and preserve their rectitude by maintaining a space—visible and generally recognized—between their person and their role, and thus between their beliefs and their utterances.24

What is the point of a role that systematically engages its holders in the performance of insincere speech acts? There is a conventional answer to this query: We should not consider a single lawyer's speech in isolation, but rather we should view it as part of a process. And the process, unlike its component parts viewed separately, is designed to attain legal truth. By pitting one-sided lawyers against each other, the process assures that each side of the coin is minted meticulously for the judge to inspect and make the right decision.

The premise that underlies this conventional account—that legal truth will best emerge out of the opposition between two deliberate efforts to distort it—raises, of course, many difficult problems.25 But I shall not challenge this premise here. Instead, I want to suggest that even if we grant its validity, grounds remain for dissatisfaction with the account of litigation that rests on it. First, this account assigns to the lawyer a function that is best understood as a "latent function": one that ought to be hidden from the lawyer himself. On the premise we granted, truth is best served when each lawyer acts as if he or she were devoted to his or her client's cause. But if the lawyer took seriously the notion that all this is done only in the service of his real function—to attain the truth—he might be tempted, consciously or unconsciously, to cheat against his assigned role by himself glimpsing the truth and smuggling it into his presentation, thereby undermining the process that his one-sidedness is supposed to serve. The acceptance of the proposed account of a lawyer's role by the lawyers themselves accordingly would be self-defeating. Evidence abounds that lawyers, in fact, do not construe their role in light of the conventional

24. My view of the lawyer's role is accordingly antithetical to the one suggested by Professor Charles Fried in The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L.J. 1060 (1976) (arguing that an attorney is a legal friend who makes his client's interests his own insofar as necessary to preserve the client's autonomy within the law). I side instead with Fried's critics, according to whom, "in most lawyers are free-lance bureaucrats." Edward A. Dauer & Arthur Allen Leff, The Lawyer as Friend, 86 Yale L.J. 573, 581 (1977) (reply to Professor Fried).

25. Such problems are discussed, for example, in Jerome Frank, Courts on Trial: Myth and Reality in American Justice 80 (1949).
account. What lawyer, for example, would ever celebrate his or her latest defeat in court by toasting to the victory of truth?

The second inadequacy of the proposed account is that it explains only some, but not all, of the prominent features of lawyers' discourse. Even if presenting one-sided arguments can be thought plausibly to promote truth, it is much more difficult to maintain such optimism with regard to other aspects of the lawyer's performance. I have in mind practices such as "courtroom tactics" or "litigation strategies." These terms do not, after all, describe some devious practices of shady lawyering; they are part and parcel of the prevailing conception of a lawyer's role, and they can be featured unabashedly in any law school's curriculum.

We need an account of the lawyer's role that encompasses these additional features and serves, without self-destruction, the lawyers themselves in the construal of their task. Such an account is, of course, readily available. It is simply that the lawyer's role is designed to help his or her client win a lawsuit. Insofar as litigation is concerned, this is the lawyer's primary function; occasional lame references to the lawyer as an "officer of the court" can neither mask nor change this overwhelming reality. We must dwell longer on such characterization of the lawyer's role, but we can first draw out its implications for the kind of discourse in which lawyers engage. Their discourse is a paradigmatic case of strategic, success-oriented communication. It is geared toward the attainment of a preconceived goal—that is, a favorable outcome for one's client. In speaking, the lawyer is acutely aware of the identity of his or her audience—the judge or the jury. The latter's disposition and attitude, inasmuch as he can ascertain them, strategically guide both the style and the content of the lawyer's speech.

---

26. See, e.g., Mirjan R. Damaska, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process 143 (1986) ("The invocation of counsel as officer of the court is designed to constrain the excessive amalgamation of the lawyer's interest with that of his client and to forestall the transformation of privately managed litigation into a melee of self-seeking.").

27. This characterization of lawyers' speech should be distinguished from a related one proposed by Joseph Raz. The latter is based on his distinction between "committed" and "detached" normative statements. Committed statements are made by those who accept the validity of a normative system. Detached statements do not imply such acceptance: the speaker makes them from the point of view of someone who accepts the system's validity, without being himself so committed. According to Professor Raz, the lawyer advising her client is a good example of such detached, non-committed speech. But notice that detached speech can still be sincere: In the usual case, the lawyer would be expected to convey to her client her sincere view of the legal situation (whether or not she also accepts it as sound or authoritative). By contrast, the strategic communication that I ascribe to the lawyer in court is "detached" in a stronger sense, in that it is exempt from the norm of sincerity altogether. See Joseph Raz, Practical Reason and Norms 170-77 (1975); Joseph Raz, The Authority of Law: Essays on Law and Morality 153-77 (1979). As Raz points out, the distinction is present, albeit in a less
The account of lawyering that I have just outlined is so obvious that we may fail to be puzzled by it, but it is important for my argument that we are. However, our perceptions and beliefs in this area are sufficiently mixed that it should not be difficult, I hope, to provoke the requisite puzzlement. Think of it this way: Here is the judge heroically laboring at the altar of truth, while being constantly diverted by two characters who view it as their legitimate purpose to deflect her, each one trying to sway the judge in his preferred direction. The same incongruity can be stated in different terms. The judge, we are told, engages in an herculean effort at interpretation. She is trying to divine the right answer to the legal problem by (ideally) constructing a comprehensive theory of law that would best fit the extant legal materials and present them in the most attractive moral light. But the other discussants, from whom she seeks assistance and illumination, instead of joining the interpretive effort, overtly adopt a strategic mode and, by using various discursive tactics, they try to extract a favorable result from the judge.

This dissonant mixture of discursive styles is no doubt puzzling, but we can start toward a solution by observing how far removed the circumstances of a trial are from conditions that, according to Habermas, ought to characterize truth-oriented communicative action. The participants in the latter enterprise each have an equal claim to interpretive truth. They are motivated to reach common understanding, and their mutual accommodation is free from coercion. But this picture is a poor model for the trial in which, at the end of the day, the judge's interpretive conclusion will prevail, even in the face of lingering disagreement, as a result of the superiority not of reason but of brute force. Faced with the prospect of an unwelcome (and perhaps unwarranted) interpretation forced on them by the judge, the litigants' response is not surprising. They resort to an expert in strategic communication—a lawyer—to make right the discursive imbalance and to reduce the likelihood that coercive measures will be visited upon them.

This leads us finally to consider the context within which the lawyer operates. This context is defined by the state, an entity character-
ized by both its bureaucratic and coercive features. We often think of
the state as a vast bureaucracy or, perhaps more accurately, as a con-
glomerate of bureaucracies—all impersonal, goal-oriented, self-perpet-
uating organizations. Such entities inspire distance, and we tend to
experience our interactions with them, in whatever role or capacity, as
remote and external. The state is also the quintessential coercive col-
lectivity. It often addresses us by means of threats, backed by the
most brutal force. Reliance on such external motivation for compli-
ance with the state’s demands both fosters and reflects distance. It is
at once a recognition and a consolidation of the fact that one’s actual
continued assent is not required or expected as a condition of one’s
playing a role in a collective enterprise. When we contemplate the
state under both of these aspects—bureaucracy and coercion—we
think of a collectivity whose claims are external to us and from whose
clutches we flee by maintaining a distance between our engagements
with it, on the one hand, and our true selves, on the other.30

C. Judicial Talk

Turning now to the judicial role, we encounter at the outset a
seemingly very different picture. A prominent strain in contemporary
jurisprudence, identified most famously with the work of Professor
Ronald Dworkin, portrays the judge as rooted in a common culture
and a shared morality, and as the exponent of an evolving tradition.
She is, in Professor Owen Fiss’s idiom,31 the articulator of our (that is
the community’s) public values. She engages in what is a quintessen-
tially interpretive venture, of which Dworkin’s analysis is as good as
we have ever had: The judge tries to express in her decision the best
vision of the community’s tradition that she can divine.32 In doing so,
there is no space, as Professor Stanley Fish insists, between the judge’s

30. For a similar conception of the state and its relation to the self see Peter Gabel, The Phenome-
These aspects are, of course, not the only aspects under which the state can be contemplated. The state
is not just bureaucracy and coercion. To be an American, for example, is not only to stand in a certain
relationship to the American government and to be subject to its coercive threats. It also means to
share important bonds of language, culture, history, and morality with a vast number of other people.
“American” is accordingly a summary reference to a composite role, or perhaps even more accurately,
a cluster of roles, many of which are nondetached, inextricable constituents of an American’s innermost
identity. But the bureaucratic and coercive aspects of the state are particularly relevant in connection
to law. Law characteristically provides the context or the medium within which we encounter the state
as government, that is to say, in its bureaucratic and coercive capacities. There is considerable litera-
ture warning against the fallacy and the danger of conceiving of the state in excessively communal
terms. A well-known example is Robert A. Nisbet, The Quest for Community (1953).
32. See, e.g., Ronald Dworkin, Law’s Empire (1986).
personal and judicial views on the matter. There is no space, because her judicial views are her personal views, just as being a judge is being simply who she is at the relevant time and with regard to the relevant issues. Seen in this light, the judge's interpretive utterances are marked by sincerity: They convey her genuine vision, conditioned but not separated by her role, of the proper disposition of the case, supported by what she takes to be the best arguments and the right principles.

This is an ennobling, almost beatific, picture of the judicial role and it is valid as far as it goes. But it does not go very far. It starts to come apart as soon as the judge looks down from these interpretive heights at the litigants and recalls the bearing that the conclusions she reaches will have on them. The judge must then realize that in the litigants' ears, her interpretive pronouncements are liable to be converted into hard-edged communication, as they come down not just clothed in the state's authority, but also backed by its superior physical force. That is an essential part of the legal context—the acceptance of the judge's position by the litigants is not conditional upon their reaching an agreement on the merits of her position, an agreement discursively worked out through the free flow of unconstrained, truth-oriented speech. On the contrary, the parties' assent is ultimately secured through brute force. We have already observed the implications of this all-important fact for the lawyer's role. But this fact is significant in shaping the judge's role as well. Even if the judge sets out to perform a feat of Dworkinian interpretation in the context of community, she then must convey her interpretive conclusions to the litigants. And in doing so, she must shift, as we have just observed, into an altogether different discursive mode. The judge presents the litigants with a non-debatable proposition; the ultimate purpose of the judge's utterances is to secure compliance, not to generate agreement—and her speech act is accompanied by a threat of force. In short, we have here the makings of strategic communication that stands in sharp contrast to the interpretive soliloquy in which the judge may have engaged before.

We have now come up with a composite, two-stage depiction of judicial discourse. First, the judge engages in Dworkinian interpretation in which, as you remember, she is instructed to scan all relevant legal texts and construct a theory that fits them best, while presenting them in the most attractive moral light. Having reached in this way a conclusion that she believes to be right, the judge then faces the additional task of writing an opinion—i.e., addressing the parties in a way

33. See Stanley E. Fish, Still Wrong After All These Years, 6 LAW AND PHIL. 401, 412 (1987).
designed to secure their compliance with the results of the interpretive exploration.

But a moment's reflection will reveal that this two-stage process, with its promise of peaceful coexistence between truth-seeking interpretation and strategic communication in the judicial role, is highly problematic. It faces an obvious difficulty: If the actual judicial pronouncements—the judicial opinions—are crafted strategically, with an eye to communicative exigencies, then it makes no sense to take these same opinions at face value as the texts that ought to guide and to ground the interpretive efforts during the first stage. Once we allow strategic concerns to enter into judicial speech, we cannot maintain the interpretive stage intact. When legal material becomes infected with strategic, success-oriented considerations, it no longer can plausibly be held up as the repository of the community's accumulated wisdom and ideals. The text was designed with a motive ulterior to that of discovering the truth and conveying it so as to promote understanding and foster agreement. Now as a truth seeking interpreter, I must somehow see through the rhetorical devices and the strategic intentions. Making the judicial text as rendered the object of my interpretation is bound to lead me astray.

I have focused so far on the relation in which the judge stands to the parties, but the communicative exigencies of her role do not stop here. In articulating our public values, to use again Fiss's phrase, judges do not view themselves, nor are they viewed by others, as contributing to the public's enlightenment along lines essentially similar to, say, moral philosophers or legal scholars. The judge's proffered articulations do not engage in discursive competition with the other sources, and her claim to interpretive superiority is not put to the test of general assent. A judicial pronouncement is presented as unconditionally valid; it must be followed whether or not we concede its truth or accept its authority. In either case, it is backed up by the state's force, ready to descend on those who resist the judicial interpretation and would opt for a different articulation. The fact that the state's power underwrites the judge's pronouncements reveals their true discursive point. Judicial utterances are supposed to secure certain forms of conduct, not only to highlight or recommend their desirability. These utterances are therefore success- rather than truth-oriented; they are instances of strategic communication rather than of truth-oriented communicative action.

Characterizing judicial communications as strategic is consistent with the view of the judicial role as detached. This perception of the judicial role is corroborated by the judge's insignia—such as the black
robe—which serve so dramatically and vividly to depersonalize the judge and emphasize the official, rather than the personal capacity in which she acts. Finally, the judge's strategic speech and her detached role are both consistent with the bureaucratic and coercive aspects of the state that are inextricably connected with the judicial role. It is an avowed purpose of this social structure to secure order and promote cooperation, by force if need be, in the face of recalcitrance, moral diversity, and disagreement. This is an agenda far removed from the spirit of community and fraternity that underlies and motivates Dworkin's theory of law. And it is in relation to this agenda that the judicial role must be understood.

D. Theoretical Versus Practical Discourse

Given the preceding description of practical legal discourse—both by lawyers and judges—the contrast with the legal theorist's discourse should be now easy to appreciate. We can mark the difference in terms of each of the three constituents of discourse that I've distinguished: situation, identity, and speech.

Perhaps the most significant characteristic that distinguishes the theorist's situation from the practitioner's is that in the relevant sense the theorist's speech involves no personal stakes. Scholars are essentially free of the coercive and bureaucratic structures within which practitioners spend their professional lives. The scholar's pronouncements are not scripted by or for the sake of any external agency in whose service or on whose behalf the scholar operates. Instead the scholar's role is eminently personal; hers is a vocation for reflection guided by the search for truth and enlightenment. Speaking in her own voice the theorist is fully answerable to the norm of sincerity. Moreover, the social conditions of the scholar's speech probably resemble more closely than any massive social arrangement the ideal speech situation envisaged by Habermas. Such conditions are conducive, therefore, to the production of communicative action, free of strategy and manipulation.

This description of scholarly discourse involves of course a considerable idealization—we are only too well aware of the bureaucratic structures within which academic life is lead, and of lapses from the disinterested search for truth of which we are so often guilty. But even if actual scholarly production falls short of the ideal I've described, the ideal is a valid one, and we can coherently strive to ap-

34. See Habermas, Communication and the Evolution of Society, supra note 18.
35. Such lapses are discussed in David Bryden, Scholarship About Scholarship, 63 U. Colo. L. Rev. 641 (1992).
proximate it. The obstacles we encounter and the weaknesses we display are all aberrations of our enterprise; they are not, as is the case in the practical domain, intrinsic characteristics of it.

The sharp divide I have just described between theoretical and practical discourse is perhaps sufficient to dispel any hope or desire for merging them into one—into a unified system of genuine communication. It may, however, appear that the gap, though evident and large, is not necessarily unbridgeable; that the two groups can still communicate, perhaps by raising their voices and shouting at each other across the gulf that separates them. Let me therefore add the following comments, which if not fatal to this prospect, will at least further discourage it.

First, discourse implies reciprocity. If theorists address practitioners, they must also be willing to listen to them. But for the reasons we have already observed, a genuine openness to practitioners' utterances is likely to lead the theorist astray. Being strategic communications, lawyers' briefs and judicial opinions are in principle poor evidence of the truth of their positions or of their writers' intentions and beliefs. Of course, such materials are themselves part of the data for theoretical study; they help define the theorist's subject-matter. But this does not imply that the theorist communicate with judicial or lawyerly pronouncements any more than the biologist should be expected to engage in conversation the amoeba under the microscope.

Perhaps more importantly, the theorist cannot address the practitioner without thereby losing the purity of her own communicative action and lapsing into strategic communication herself. The search for truth and illumination often involves abstraction, idealization, and simplification. The theorist's discourse is characterized by flights of imagination as well as the strictures of logic, rather than by the more practical virtues of good judgment and common-sense. Like all theoretical discourse this one too is answerable to norms of harmony, elegance, and economy; this discourse can be exploratory, tentative, adventurous, and playful. It is in short the discourse of ideas rather than the discourse of action. But when the products of the theorist's endeavor are communicated to the practitioner, they cannot be conveyed in the spirit in which they were produced. The practitioner will likely register the theorist's products simply as additional ammunition, to be used strategically in advancing his case or cause. So now, when addressing the practitioner I as a scholar must anticipate the distortions that my utterances may undergo and try to correct for them in advance. This, however, affects my own speech with strategic consid-
erations. My identity as scholar becomes fractured; my utterances—insincere.

These difficulties are if anything compounded when theory is addressed to decisionmakers, such as judges. The absence of genuine dialogue that I've already mentioned combines with the decisionmakers' coercive power to create a potentially dangerous situation. Two characteristics of the theoretical enterprise contribute to this danger. One is its tentative and exploratory spirit; the second is the idealizations and simplifications it involves. These properties present no serious difficulty so long as the conditions of an "ideal speech situation" required by the idea of communicative action are met; specifically, so long as closure on any given point must await mutual understanding and agreement of all participants. But when this condition is not satisfied, the tentativeness and the idealization characteristic of theorists' statements invite error. Even if we credit the decisionmaker with an openmindedness that cannot be in fact always expected of political actors, a bona fide effort to "apply" the theorist's provisional and simplified conclusions may involve severe misunderstandings and blunders. However, in the absence of genuine dialogue, the misunderstanding will always be revealed when it already is too late to rectify: that is, in the context of a judicial (or other official) coercive action. The slow and incremental dialogic process through which misunderstanding can be weeded out, understanding forged and truth approximated, a process that is the essence of the scholarly enterprise, is wrought, in this scenario, on the backs (indeed, one is tempted to say, with alarming literalness, over the dead bodies) of some of the process's unwilling victims.

Mindful of this prospect, sensitive and responsible legal theorists are likely to adopt a policy of caution: they will be less willing to hazard the provisional, the idealized, and the speculative. Such a policy may indeed reduce some of the error and avert some of the harm that premature judicial "application" might involve. But the cost to the scholarly enterprise of such restraint is clear. Incipient ideas, which with the help of collective discursive cultivation could have born magnificent fruit, are withheld from circulation out of caution and responsibility. In this way the project of addressing and instructing public decisionmakers is bound to inhibit and stifle the theoretical discourse.

III. THE AUDIENCE AND TASK OF SUBSTANTIVE LEGAL THEORY

Nothing I said in the foregoing section rules out the possibility that substantive legal theory—let alone other forms of scholarship—
address practitioners, and try to influence their activities and decisions. Although I have pointed to serious obstacles and significant costs of such an agenda, some theorists may nonetheless feel that the obstacles are surmountable and the costs are worth incurring for the sake of the direct influence that addressing and instructing practitioners seem to promise. I will not dwell on this possibility any further, but will assume instead that in light of what I have said such an interpretation of their mission provides substantive legal theorists with a shaky raison d'être. Is there an alternative? If substantive legal theory is not addressed to practitioners and decisionmakers, to whom does it speak? Does it have an audience at all?

The obvious answer seems to me to follow directly from Professor Rubin's suggestion that legal scholars disrupt the unity of discourse with practitioners: to take seriously the idea of an independent, distinctive discourse implies that legal scholars who engage in this enterprise simply talk to one another. A domain of discourse defines and circumscribes its own audience. But this suggestion may seem unsatisfactory. Are academic lawyers who subscribe to substantive legal theory doomed to irrelevance? Are they fated to remain enclosed within their own discursive circle, unheard and ignored by the legal profession and the rest of the world?

Such anxieties betray an oversimplified, unitary conception of the notion of an "audience," a conception that has so far inhibited, I believe, the debate concerning legal scholarship's proper audience. However the word "audience" in its ordinary use designates very different communicative settings. Distinguishing them provides the key to an adequate consideration of substantive legal theory's audience and its task.

A. Listeners and Eavesdroppers

Consider the role of the audience in two common kinds of events: a lecture and a play. In a lecture the audience has the discursive role of the listener: the speaker actually addresses the audience, and to that end she must strive for discursive unity with her audience. Communicating to and with the audience is what the lecture is all about, and any discursive discrepancy between speaker and listener will be an impediment to the communicative success of this venture. The situation in the theater is radically different. Here the actors communicate with one another, not with the audience. To secure such communication

the language of each speaker must be suited to the discursive aptitude of his listeners—i.e., the other protagonists in the play to whom he speaks—not to that of the audience in the auditorium. Relative to the discourse that takes place on the stage the people in the audience are *eavesdroppers* who listen in unnoticed on other people's conversations.

Recall now Professor Rubin's view that the task of legal scholarship is to address and persuade public decisionmakers. Using the distinction we just drew it is clear that he applies the lecture conception of an audience to those decisionmakers: they are the intended listeners to whom scholarly speech is directed. I have pointed out the incongruity between this conception of an audience and Rubin's advocacy of breaching the unity of discourse between scholars and lawyers. But the alternative to Rubin's conception of the communicative goal of scholarly discourse is not a kind of collective scholarly solipsism that excludes practitioners from its ambit altogether. Instead lawyers, judges, and other decisionmakers can still perform in regard to the newly constituted scholarly discourse the role of audience, though in the sense suggested by the theater analogy.

This role, it should be noted, is a distinctively passive one. In a lecture, it is altogether appropriate for the audience to speak to the lecturer either by disputing with him or at least by posing questions to him. This is a mark of the fact that lecturer and audience form a single discursive community or inhabit the same universe of discourse. In contrast, any similar interventions by the theater audience would be perceived as brute disruptions of the play. Here again the theater analogy seems to me to apply to the legal situation. The suggestion that legal scholars sever the unity of discourse with practicing lawyers and create a discourse of their own has the further implication, for which I have already argued, that practitioners and decisionmakers as such are excluded from active participation in that discourse. This seems to me a sound implication of Rubin's view, though perhaps not one that he himself anticipates. It comports with my belief that there can be no discursive community—no genuine dialogue—between seekers after truth and illumination and result-oriented wielders of power. The most important methodological significance of this position is that substantive legal theory decidedly does not participate in a dialogue in which judicial opinions or other official pronouncements count as interlocutors.

Every analogy has its perils, and the one I just drew is no exception. Nonetheless, it seems to me that without overdrawning the analogy we can derive some additional instruction from it. As the theater

---

example suggests, assigning to decisionmakers the discursive role of eavesdroppers rather than listeners to substantive legal theory by no means demotes them to a secondary or inferior status relative to that enterprise. After all, the primary goal of the actors' play acting is the edification and entertainment of the audience. If it were not for the audience the theatrical enterprise would lose most of its point. Still, the theater's mission is best served when the actors ignore the audience and concentrate instead on creating and inhabiting the make-believe world within which their fictional discourse is conducted. So also in the case of law. Much of the point of substantive legal theory derives from the realization that it is conducted in the presence of a large audience consisting of practitioners and decisionmakers. But it doesn’t follow that the legal theorist's task is to address this audience and treat it as her listeners, let alone that she must convey to them persuasive communications which presume to prescribe the decisions they should reach and the actions they should take.

To be sure, the goals of legal scholarship are not quite those of the theater. Though the audience's edification and entertainment do apply here as well, the more prominent tasks that would be natural to ascribe to substantive legal theory are the audience's enlightenment and education. These are of course foggy goals, but the limited scope of the present paper provides me with a convenient excuse against having to dissipate the fog here. Still, I can take some preliminary and tentative (that is, theoretical) steps in this direction.

B. Theory and Education

To clarify what I mean by education I will distinguish it from two other tasks that law professors also perform: training and teaching. These different tasks can be better understood with the help of two other distinctions I need to draw. Both of these distinctions relate to different aspects of what we may refer to as a lawyer's, and indeed every person's, general capabilities. Insofar as training, teaching, and education are designed to produce in some sense a better lawyer, they can be said to concern themselves with increasing a person's relevant capabilities. Now the first distinction that I want to draw is between background and foreground capabilities. These are spatial metaphors, and the locations they respectively designate are relative to consciousness. Roughly, those capabilities the activation of which involves our consciousness are in the foreground; capabilities, or aspects of capabilities which operate without conscious awareness are background. The second distinction is between cognitive and noncognitive capabilities.
The terms are sufficiently (though not altogether) self-explanatory so as not to require additional comment.

We can now consider the three didactic tasks we’ve identified in terms of these distinctions. Training has to do with the development of skills, typically accomplished by a supervised and controlled engagement in operations which require the exercise of those skills. It thus typically engages noncognitive background capabilities. By teaching, in contrast, I refer to the activity of imparting knowledge. Knowledge, in turn, here refers to things that are committed to memory, and which are activated in a person’s relevant performances by being recalled. There are many things that it is useful for the lawyer to know: e.g., what the rule against perpetuities means and that hearsay evidence is not generally admissible. By providing and inculcating such useful information law professors enrich the lawyer’s cognitive foreground capabilities.

But in addition to enhancing the noncognitive background skills and the cognitive foreground knowledge, law professors can also participate in enriching the lawyer’s cognitive background capabilities. This is the task of education, and substantive legal theory is part of that task. How does substantive legal theory contribute to the enrichment of the lawyer’s wealth of cognitive background capabilities? What kind of education does it provide?

Drawing further on the theater analogy that I’ve used, the answer seems to me to depend, at least in part, precisely on the unreality of the theoretical discourse. This unreality has educational value in two ways. The first concerns the nature of the theorist’s discourse itself. In the preceding section I have characterized that discourse in terms of a noncoercive and nonbureaucratic situation; a unified, non-detached identity; and in terms of sincere, truth-oriented communicative action. These properties contrast favorably with the corresponding characteristics of practitioners’ discourse; they stand to the latter as an ideal. From the practitioner’s perspective this ideal must seem like a fantasy or utopia. But therein lies its educational value. When substantive legal theorists talk to one another about the same questions as those that occupy the lawyer but in such a dramatically different vein, they display in a particularly vivid and compelling fashion a discursive ideal, indeed a discursive utopia, that provides the practitioner with a novel point of view and hence a new understanding of her own discursive practices.

39. See supra Part IID.
40. The economists’ “problem of second best” is a reminder of the fallacy of the belief that approximating an unattainable ideal is always a good thing. But keeping an ideal alive, thus providing a
The second way in which the unreality of substantive legal theory has educational value is more important, but also more complex, so I can do it even less justice than I did the first. This second way depends on a view of the educational process as consisting in the provisional suspension of some aspects of socially constructed reality, so as to allow people to recognize possibilities that the process of socialization suppresses or omits. The main vehicles that theory uses to this end are ideas, by which I mean successful, albeit always partial and provisional, feats of escape from the determination of our cognitive faculties by the hegemonic, yet unavoidable and indispensable, forces of culture and society.41

As I have already implied by contrasting education with teaching, the practitioner is not expected in the course of her legal activities to “remember” the ideas presented to her by substantive legal theory in the way she is supposed to recall the hearsay rule or the statute of limitations. Ideas best serve their educational function by being forgotten: having been absorbed into the person’s background experience and the configuration of background attitudes and beliefs they exert their influence by guiding from behind the scene, as it were, one’s understanding and use of those pieces of professional knowledge that one possesses.

CONCLUSION

This article itself is of course a piece of theory. I’ve been willing to hazard in it incipient thoughts and venture highly speculative suggestions only in the secure knowledge that I’m participating in a symposium with other scholars and assigned commentators who will be quick to set me straight wherever necessary, and who will help, through a mutual process of discursive elaboration, to separate the wheat (if any) from the chaff. Consistency with the views herein expressed requires, in any event, that this article be addressed exclusively to other theorists. Other readers, notably practitioners, are eavesdroppers. But as I hope is clear from what I’ve said, these readers should not be the least offended by this designation. As in the case of the contrasting image to the conditions of coercion and bureaucracy that make strategic and insincere speech imperative, may have value apart from the suggestion that it ought to be emulated when these conditions do prevail. Professor Leff provides what is without doubt the Wittiest summary of the logic behind the second best problem: “[I]f I am on a desert island, subsisting solely on coconuts and oysters and beginning to hate it a lot, and across the bay from me there is another island, lush and fertile, I do not improve my position in life by swimming half way across.” Arthur Allen Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 Va. L. Rev. 451, 476 (1974).

41. Needless to say, an idea can eventually join these hegemonic forces, but by then it will have lost its status as an “idea.” This possibility is one of the central themes in Peter Gabel & Duncan Kennedy, Role Over Beethoven, 36 Stan. L. Rev. 1 (1984).
theater audience, it is after all due to them that my and other theorists' performances—complete with some gesturing, clowning, and all—take place and have a point.