

THE MICRO-MACRO LEGAL CONTINUUM AND THE LEVELS OF LAW

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What is the relationship between individual and collective legal action? How does a single lawsuit, a single statute, a solitary administrative regulation, or a specific executive order affect legal doctrine? More generally, what about the broader law? In an attempt to answer that question, this essay articulates two interrelated concepts: the micro-macro legal continuum and the levels of law.

First, the micro-macro legal continuum demonstrates how the type of law can affect legal actors' professional judgment and decision-making. Paralleling the division between microeconomics and macroeconomics, the porous boundary between micro law and macro law is dictated by different legal roles. Whereas legal actors practicing micro law are more limited in their judgment and decision-making, legal actors engaging macro law can exercise greater independent judgment and decision-making. While practitioners tend to engage more micro law and academics more macro law, this need not always be the case.

Second, both micro and macro law can impact society at three different levels. These three levels of law parallel the three levels of military art. The lowest level, the tactical level of law, focuses solely upon the people directly impacted by the particular law. Conversely, the highest level, the strategic level of law, is concerned with the broader policy implications beyond the people directly impacted by the particular law. The intermediate

* Associate Professor of Law, West Virginia University. Because the author is an American lawyer and law professor, the vast majority of examples in this essay are from American legal sources. That being said, however, the ideas in this essay hopefully should apply equally to the Indian legal system and other democratic legal systems. Furthermore, some of the ideas in this essay are also discussed in a forthcoming article. Will Rhee, Law and Practice, 9 LEGAL COMM. & RHETORIC (2012). The author thanks Atiba Ellis, Jena Martin-Amerson, Sean Tu and Adriane Williams for their outstanding comments and Vrinda Bhandari, Priya Urs and the rest of the Board of the Socio-Legal Review for their superb editing. All errors are the author's sole responsibility. Additional comments are welcome at william.rhee@mail.wvu.edu.

level, the operational level of law, links the tactical and strategic levels. The operational level of law uses micro law to change or to develop macro law.

Together the micro-macro legal continuum and the three levels of law provide an alternative legal problem-solving framework more accurate than current less sophisticated approaches such as the so-called “great disconnect” between the legal academy and legal practice. Although this alternative legal framework requires refinement and empirical testing, it can help develop a new “law and practice” movement that seeks to enrich the study of law with the unique intra-disciplinary insights of legal practice.

Modern democracies today face many challenging problems. Law can help address those problems. Academics and practitioners need to coordinate their efforts along the entire micro-macro legal continuum and at the different levels of law to innovate more effective legal solutions to these problems.

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I. INTRODUCTION

One of law's most important functions is solving problems.¹ The way laws and lawmakers frame problems, therefore, defines not only the boundaries of what is considered “inside” or “outside” the problem, but also what is considered a successful solution.² Thus, the cognitive framework we employ to solve problems can affect the nature and quality of our solutions.³

A well-established framework in American law is that there is—in the now-famous words of Judge Harry Edwards—a “disjunction” between the academic study of law and the practice of law.⁴ In June 2011, the U.S. Supreme Court Chief Justice John Roberts agreed with Judge Edwards and observed that there remains a “great disconnect” between American legal practitioners and legal academics.⁵

This essay seeks to challenge the “great disconnect” framework with an alternative holistic framework that examines law in two ways—how legal actors initially create, revise or analyze law and how law subsequently impacts society. First, the micro-macro legal continuum demonstrates how the type of law can affect the legal actors’ professional judgment and decision-making. Second, the tactical, strategic and operational levels of law demonstrate three different perspectives through which to evaluate law’s societal impact. Both concepts are connected. Although practitioners might focus more on micro law and academics

1 See, e.g., Paul Brest & Linda H. Krieger, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811, 811-12 (1999).

2 See generally PAUL BREST & LINDA H. KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS 34-42, 70-76, 420-28 (2010) (collecting authorities).

3 As Brest and Krieger observed, we often are unaware of the limiting effects of our own frames: A particular frame inevitably provides only one of a number of possible views of reality and implicitly blocks the consideration of alternative perspectives with other possible solutions. When you are viewing a situation through a particular frame, though, it seems to provide a complete picture of reality. Indeed, the frame is often invisible: You have the illusion that you’re seeing the world “just as it is,” and it is difficult to imagine that there could be another way to view it. *Id.* at 35.

4 Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

5 *Fourth Circuit Judicial Conference: A Conversation with Chief Justice Roberts* (C-SPAN television broadcast Jun. 25, 2011), available at <http://www.c-spanvideo.org/program/FourthCi>.

might focus more on macro law, the operational level of law demonstrates that their efforts are interrelated.

This framework is explored in three parts. Part I describes the micro-macro legal continuum. Part II then explains how both micro law and macro law can impact society at a tactical, strategic or operational level. Part III explains how this holistic view can integrate the study and practice of law. Finally, the essay concludes with observations on how this holistic framework could contribute to the intra-disciplinary study of law through another “law and” movement, ironically called “law and practice.”

II. HOW THE TYPE OF LAW AFFECTS JUDGMENT AND DECISION-MAKING

The micro-macro legal continuum divides law into micro law and macro law.⁶ This micro-macro distinction parallels the well-established division between microeconomics and macroeconomics.⁷ Whereas microeconomics addresses the behaviour of individuals (i.e., producers, consumers, households, firms and industries within their economic environment and how they respond to changing conditions),⁸ macroeconomics addresses the aggregate effects of economic activity (i.e., through regional, national and international measures, such as inflation, unemployment and the demand and supply of money).⁹ Although macroeconomic theories must be linked to microeconomic behaviour, there is no consensus among economists about either the boundary between microeconomics and macroeconomics or the nature of their relationship.¹⁰

6 Cf. Mathias M. Siems, *Legal Originality*, 28 OXFORD J. LEGAL STUD. 147, 149-150 (2008); Minna J. Kotkin, *Creating True Believers: Putting Macro Theory into Practice*, 5 CLINICAL L. REV. 95, 97, 99 (1998); Carrie Menkel-Meadow, *Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering Education*, 4 ANTIOCH L.J. 287, 289 (1986); Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories about Lawyering*, 29 CLEV. ST. L. REV. 555, 556 (1980) (all employing a micro-macro law distinction).

7 This division was first coined by Ragnar Frisch. Lief Johansen, *Ragnar Frisch's Contributions to Economics*, 71 SWEDISH J. ECON. 306 (1969).

8 JAE K. SHIM & JOEL G. SIEGEL, *MACROECONOMICS* 3 (2d ed. 2005).

9 *Id.*

10 Abdallah Zouache, *On the Microeconomic Foundations of Macroeconomics in the Hayek-Keynes Controversy*, 15 J. HIST. OF ECON. THOUGHT 105, 106 (2008).

There are many definitions of law and this essay seeks to avoid the black hole question, “what is law?”¹¹ Consequently, this essay uses the rather broad term “legal actors” to represent anyone who formally or informally impacts or influences law in a democracy—however law may be defined.

Formally, all three democratic branches of the government contain legal actors: elected legislators (and their staff) who enact statutes; judges (and the lawyers representing both sides in a litigation) who decide cases and publish judicial opinions; and the executive (and its cabinet) which implements statutes and publishes administrative regulations and decisions, are all legal actors.

There are also informal legal actors who influence the law. For example, lobbyists (and the organisations or causes they represent) influence the legislators and the executive through political endorsements and campaign contributions. Community activists (and the people they lead) influence elections through grassroots organising and public protest. Even reactionary movements without clearly defined goals or organisers, like the worldwide Occupy Wall Street Movement,¹² appear to be influencing national policy. Pundits and academics who publicly critique existing law also have left their indelible mark on law.

The porous boundary between micro law and macro law is the legal actors’ role and accompanying constraint upon their judgment and decision-making. Whereas legal actors practicing micro law are more limited in their judgment and decision-making, legal actors engaging in macro law can exercise greater independent judgment and decision-making.

1. Micro Law

Micro law is the type of law where a legal actor’s judgment is constrained by her professional role. Instead of relying upon her own independent judgment regarding how best to solve a particular legal problem, the legal actor must defer to professional and ethical considerations that limit her range of available options.

11 See, e.g., Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586, 616 (2010).

12 See generally Alasdair S. Roberts, *Containing the Outrage: How Police Power Tames the Occupy Movement*, BOSTON REV. (Nov. 14, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959542.

In short, legal actors practicing micro law are accountable to third parties. A legal actor practicing micro law might represent clients in a particular lawsuit or constituents who elected her to enact a particular statute. She therefore must attempt to attain their objectives—even if she personally disagrees with those objectives—if she wants to avoid malpractice for failing to uphold the attorney-client relationship,¹³ or if she wants to be re-elected to public office.¹⁴ Likewise, a judge ideally is supposed to exercise judicial restraint,¹⁵ follow binding precedent, even if she personally disagrees with that precedent,¹⁶ and restrict her decision-making to the specific case or controversy before her,¹⁷ or face public reversal by a reviewing court (or, if she is a member of the highest court in the jurisdiction, face public criticism of her reasoning from her fellow justices).¹⁸

Such third-party accountability is the clearest with a discrete law or issue. For example, a client will know whether her lawyer represented her interests appropriately in a particular lawsuit. Likewise, a voter can easily learn whether an elected legislator or executive passed a promised piece of legislation or shared the voter's views on a particular hot-button issue.

Thus, not surprisingly, micro law—like microeconomics—typically examines individual legislation, executive action, administrative rulemaking, litigation and transactions, whereas macro law—like macroeconomics—examines law more collectively. Furthermore, although individual micro laws in aggregate constitute macro law—again like microeconomics and macroeconomics¹⁹—the boundary

13 See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.1-1.18 (2010) (describing the attorney-client relationship and the duty of zealous representation).

14 Under the theory of retrospective voting, voters in a democracy retrospectively determine at election time whether the executive and legislative branches have best represented their interests and vote accordingly. MORRIS FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (1981).

15 See generally Symposium, *Can Originalism Be Reconciled with Precedent?*, 22 CONST. COMMENT. 257 (2005).

16 See, e.g., Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use To Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1190 (1999).

17 See U.S. CONST. art. III, § 2, cl. 1; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *United States v. Torres*, 182 F.3d 1156, 1164 n.2 (10th Cir. 1999); CODE OF CONDUCT FOR UNITED STATES JUDGES CANON 3 (2009).

18 Elected judges also face the same re-election concerns as legislators.

19 See *supra* note 7 and accompanying text.

between micro and macro law varies according to the context. Moving from micro law to macro law, the continuum ranges from a discrete law or issue to a specific area of legal doctrine²⁰ (e.g., American securities law) through all legal doctrine (e.g., all American law) to general law (e.g., theories of general jurisprudence²¹ that seek to transcend the legal doctrine of any particular nation).

2. Macro Law

In contrast, macro law is the type of law where a legal actor's judgment is less constrained by her professional role. Legal actors engaging macro law can, therefore, exercise much more independent judgment than when creating micro law. Macro law is concerned with systemic issues beyond the scope of individualised decision-making.

In short, legal actors engaging macro law are less accountable to third parties. Although the precise line between micro law and macro law is unclear (hence the need for a continuum), legal actors at the highest national or international level, such as the U.S. Congress, the U.S. Supreme Court and the U.S. President, often engage macro law when deciding issues of national policy. Even these top-level legal actors, however, still regularly create, critique and revise micro law.

Perhaps the most familiar legal actors engaging macro law are law professors writing academic legal scholarship.²² Because a law professor enjoys academic freedom,²³ she has fewer constraints on her professional judgment than a legal

20 "Legal doctrine" is defined as "the various sources of law (precedents, statutes, constitutions) that constrain or otherwise guide the practitioner, decision maker and policymaker." Edwards, *supra* note 4, at 43. *See also* Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 *YALE L.J.* 1113, 1113-14 (1981) (for a similar definition). Legal doctrine is meant to encompass law as it is actually used on a daily basis by legal practitioners in all branches of a democratic government.

21 A theory of general jurisprudence assumes "that there are certain elements and concepts common to all legal systems," and attempts to identify and analyze them. BRIAN Z. TAMANAI, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* xiii (2001).

22 There are, of course, ample law review articles about micro law as well. Legal scholarship, however, writes more about macro law than most other forms of micro law practitioner instrumental writing such as briefs and memoranda of law.

23 *See generally* Matthew R. Krell, *The Ivory Tower Under Siege: A Constitutional Basis for Academic Freedom*, 21 *GEO. MASON U. CIV. RTS. L.J.* 259 (2011).

actor creating micro law.²⁴ A law review article—what Pierre Schlag calls “air law”²⁵—is “written on behalf of no client, in no pending case, without a court date and addressed to no one in particular.”²⁶

As exhibited by the difference between a legal brief and a law review article, micro and macro law employ different forms of legal analysis. Both have substantially different evidentiary burdens, admissible authority and preferred methods of reasoning. Because micro law is more specific than macro law, micro law has a much less onerous evidentiary burden than macro law which, because of its broader scope, is much harder to prove. Likewise, micro law’s admissible authority is usually restricted to much more formalist binding precedent and previous legal decisions than macro law which, because of its broader scope, is more open to creative, non-legal sources. Finally, micro law generally employs greater inductive reasoning, where “the claim is that the premises provide some grounds or support for the truth of the conclusion,”²⁷ and macro law generally employs greater deductive reasoning, where “the claim is that the premises, if true, provide conclusive grounds for the truth of the conclusion.”²⁸

A rather stark illustration of the difference between the relatively unconstrained judgment of a law professor analysing macro law versus the more constrained judgment of a legal practitioner creating micro law is the failed nomination of Professor Lani Guinier for Assistant Attorney General for Civil Rights, U.S. Department of Justice. As a law professor, Guinier had written extensive legal scholarship about race—scholarship that she later believed was blatantly mischaracterised to destroy her nomination.²⁹

24 See *supra* Part I.A.

25 Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803, 813 (2009).

26 Richard A. Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, 97 GEO. L.J. 845, 845 (2009).

27 DOUGLAS LIND, LOGIC AND LEGAL REASONING 6 (2d ed. 2007).

28 *Id.*

29 Lani Guinier, *Who’s Afraid of Lani Guinier?*, N.Y. MAG., Feb. 27, 1994, at 44 (commenting that “[l]ooking back, it is remarkable how I could so easily be labeled a Quota Queen by so many, despite the complexity of my essays”).

As head of the Civil Rights Division, Guinier would have been charged with leading the agency that “serves as the federal government’s public and internal voice on civil rights, representing the United States in the nation’s courts and serving as an authority and resource for other government agencies on issues relating to discrimination.”³⁰ A large part of Guinier’s job would have been overseeing the micro law litigation brought by the Division in U.S. federal courts.

Then-Senator Joe Biden, Chair of the Senate Judiciary Committee, law school graduate and future Vice-President of the United States,³¹ commented on the impact of Guinier’s scholarship upon her confirmation hearing:

If she can come up here and explain herself, convince people that what she wrote was just a lot of academic musing, who knows? . . . I suppose it’s conceivable that she could be confirmed. If she comes up here and says she believes in the theories that she sets out in her articles and is going to pursue them, not a shot.³²

Simply put, a law professor engaging macro law has greater freedom to express her own personal beliefs without worrying about micro law judgment constraints.³³ Table 1 summarizes key differences between micro law and macro law.

TABLE 1: MICRO LAW VERSUS MACRO LAW

Characteristic	Micro Law	Macro Law
Legal Actor’s Judgment	Most constrained by third parties involved in the creation or revision of a particular micro law.	Less constrained by third parties.

30 Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL’Y REV. 211, 212 (2008).

31 *Vice President Joe Biden*, <http://www.whitehouse.gov/administration/vice-president-biden> (last visited 10 February 2012.).

32 Robert C. Post, *Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship*, 11 CONST. COMMENT. 185, 185 (1994) (citation omitted).

33 Although academic freedom is conducive to creativity, the exigencies of practice might lead to more creative and more realistic solutions as well. Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV. 623, 644 (2004).

Scope	Single legal action.	Multiple legal actions, often considered from an aggregate or collective perspective.
Evidentiary Burden	Less onerous burden because restricted to specific context.	More onerous burden because of a broader applicable scope.
Admissible Authority	More restricted to formalist binding precedent and previous decisions. Less open to creative, non-legal sources.	Less restricted by binding precedent and previous decisions. More open to creative, non-legal sources.
Reasoning	Greater inductive reasoning.	Greater deductive reasoning.

III. THREE LEVELS OF LAW

Both types of law—micro law and macro law—can impact society in three different ways. These three different ways are reflected in three levels of law: tactical, strategic and operational. These three levels were originally conceived by 19th century German military planners, further developed by 1920s Soviet military theoreticians,³⁴ and perfected in the 1980s American AirLand Battle Doctrine.³⁵ Today, all U.S. military services recognise the same three levels in warfare.³⁶ These three levels are considered “interdependent” and “there are no finite limits or boundaries between them.”³⁷ Moreover, business literature has already adopted these three levels to management.³⁸ Definitions taken from the current U.S. Army

34 MILAN N. VEGO, *OPERATIONAL WARFARE* 2 nn.1, 2 (2000).

35 Frederick W. Kagan, *Operational Art*, *JOINT FORCE. Q.*, Autumn/Winter 2001-02, at 111.

36 VEGO, *supra* note 34, at 17 n.1.

37 HEADQUARTERS, DEPARTMENT OF THE ARMY (U.S.), *FIELD MANUAL 3.0: OPERATIONS 2-2* (2001).

38 *See, e.g.*, Derek Thomason, *Strategic, Tactical, Operational*, *MFG. ENG’R*, June/July 2004, at 34 (describing three levels of demand management—strategic, tactical and operational).

Field Manual 3.0: Operations³⁹ will be used to explain these concepts' application to law and society. Although law has often been analogised to warfare,⁴⁰ there are many aspects of law, such as transactional law, that do not resemble warfare. The military analogies herein are only used because the military study of warfare invented the concept of operational art.

While the tactical and strategic levels of law are perhaps different names for familiar legal concepts, the rationale for importing these military planning terms into law is the novel concept of operational art. Operational art appears to be a much needed, yet foreign concept to American law.⁴¹ The operational level of law links practitioners and academics to argue that any perceived "disconnect" between the two is a false one. But before this essay can explore the operational level of law, it must explain the tactical and strategic levels.

1. Tactical Level of Law

First, the tactical level of war is "the realm of close combat, where friendly forces are in immediate contact and use direct and indirect fires to defeat or

39 See HEADQUARTERS, DEPARTMENT OF THE ARMY (U.S.), *supra* note 37.

40 See, e.g., Richard F. Devlin, *Law, Postmodernism and Resistance: Rethinking the Significance of the Irish Hunger Strike*, 14 WINDSOR Y.B. ACCESS TO JUST. 3, 35 (1994) ("law is war"); Oliver R. Goodenough, *Cultural Replication Theory and Law: Proximate Mechanisms Make a Difference*, 30 VT. L. REV. 989, 990 (2006) (analogising the evolution of law to memetics, the natural selection of cultural elements).

41 Although scholars have discussed the operational level of law in other contexts, the author is not aware of any prior attempt to apply the operational level to the concept of law itself. For example, the operational level has been used with regard to legal practitioners' practical concerns. See, e.g., RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 41 (2003) (arguing that certain legal theory "has little to contribute to law at the operational level?"). The operational level has also been used to explain the law of land warfare as applied to military operations. See, e.g., Laurie E. Blank & Amos N. Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT'L SECURITY J. 45 (2010); Center for Law and Military Operations (CLAMO), The Judge Advocate General's School, *Preparation Tips for the Deployment of a Brigade Operational Law Team (BOLT)*, ARMY LAW., July 2001, at 51; H. Wayne Elliott, *Systemizing Operational Law*, ARMY LAW., Nov. 1992, at 32. Finally, the operational level has been used to describe government legal liability. See, e.g., *Lee v. Department of Health and Rehab. Servs.*, 698 So.2d 1194 (Fla. 1997); *City of St. Petersburg v. Collom*, 419 So.2d 1082 (Fla. 1982) (government liability for "operational-level" functions). See also Adam H. Morse, *Rules, Standards, and Fractured Courts*, 35 OKLA. CITY U. L. REV. 559 (2010) (operational standards in divided U.S. Supreme Court opinions).

destroy enemy forces and to seize or retain ground.”⁴² Military tactics are focused upon fire and manoeuvre to destroy the enemy right in front of you. Although many small-unit tactical engagements can have an aggregate effect beyond each individual tactical engagement (i.e., winning a battle that might lead to winning a war), the tactical level is solely concerned with winning the battle going on in front of you right now.

In a similar fashion, the tactical level of law focuses solely upon the people directly impacted by a particular law and includes the legal actors advocating or opposing the specific law and those immediately affected by the specific law. The particular law often explicitly names the people immediately affected. This tactical level is unconcerned with the law’s precedential or systemic effects beyond the people immediately involved. In other words, even though laws often have precedential or systemic effects, the tactical lens ignores those effects to focus solely upon the people directly affected by the law. Another way to look at this tactical level is to determine the target audience of the particular law, “Who specifically are you trying to benefit or burden with this law?”⁴³

Here are some simple illustrative examples by the branch of democratic government. With legislation, the tactical level is the legal actors seeking to pass or block the particular piece of legislation and the people specifically named in the legislative purpose of the statute. For example, the tactical level of a welfare-reform law would be the legal actors advocating for and against the new law and the target audience, people on welfare. With litigation, the tactical level is the parties in the lawsuit. For example, the tactical level of a personal injury lawsuit would be the plaintiff widow and the defendant employer. With a transaction, the tactical level would be the two parties who made the deal and perhaps the competitors who sought to stop the deal from happening. For example, the tactical level of a merger would be companies A and B that merged and another company C that had initially sought to merge with company A but failed to close the deal. With administrative rule making, the tactical level would be the legal

42 HEADQUARTERS, DEPARTMENT OF THE ARMY (U.S.), *supra* note 37, at 2-5.

43 See Will Rhee, *Entitled to Be Heard: Improving Evidence-Based Policy Making Through Audience and Public Reason*, 85 IND. L.J. 1315, 1318 (2010).

actors who supported or opposed the new rule and the target audience of the new rule. For example, the tactical level of new mine safety regulations would be the energy enthusiasts who oppose the regulations, the environmental and labour agencies who support the new regulations, the relevant federal and state regulatory agencies, and the target audience, mine owners and workers.

As these examples demonstrate, the tactical level is most applicable to micro law. Nevertheless, macro law can also be viewed from the strategic level of law. This is most common with the deductive application of a macro legal principle to a specific micro law instance.⁴⁴ For example, the concept of due process and having an opportunity to be heard before facing civil penalties arguably is an established macro legal principle in American civil law.⁴⁵ The tactical level of this macro law might be its pedestrian application in countless “easy” micro law cases.⁴⁶ The level of law most applicable to such macro law, however, is the strategic level of law.

2. Strategic Level of Law

Second, in marked contrast to the tactical level is the strategic level. The strategic level of war is “that level at which a nation, often as a group of nations, determines national and multinational security objectives and guidance and develops and uses national resources to accomplish them. . . . The National Command Authorities (NCA) translate policy into national strategic military objectives.”⁴⁷ When the Prussian General Carl von Clausewitz famously labelled war as “politics by other means,”⁴⁸ he was referring to the strategic level.

As the familiar phrase “strategy and tactics” indicates, the strategic level of war and the tactical level of war are different sides of the same coin. Whereas

44 See, e.g., RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 8-14 (3d ed. 1997) (explaining the *ratio decidendi* legal principle in common law reasoning).

45 See U.S. CONST. amend. XIV; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

46 See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 119-20 (2d ed. 1994).

47 HEADQUARTERS, DEPARTMENT OF THE ARMY (U.S.), *supra* note 37.

48 CARL VON CLAUSEWITZ, *ON WAR* 87 (Michael E. Howard & Peter Paret eds., trans., 1976) [1832].

the strategic level is concerned with broader foreign policy and national security implications beyond the fire and manoeuvre necessary to win a single tactical military engagement, the tactical level is solely concerned with the fire and manoeuvre necessary to win the specific military battle and is unconcerned with the broader implications of the battle.⁴⁹ These two levels of course are interdependent⁵⁰ because the primary means of attaining strategic military objectives during war are tactical battles.

In a similar fashion, the strategic level of law and the tactical level of law are different sides of the same coin. Whereas the strategic level is concerned with the broader policy implications beyond passing new legislation, winning a lawsuit, closing a deal or announcing a new executive order, the tactical level is solely concerned with passing the new legislation, winning the lawsuit, closing the deal or announcing the new executive order, and is unconcerned with the broader policy implications of these new laws. The two levels are also interdependent because the primary means of attaining strategic legal objectives is through creating or revising law on the tactical level.

As these examples demonstrate, the strategic level is most applicable to macro law. Nevertheless, micro law can also be viewed from the strategic level of law. This is most common when large private or public organisations attempt to use micro law to attain strategic objectives. For example, when the U.S. Congress enacted the Defense of Marriage Act of 1996⁵¹ authorising American states not to recognise other states' same-sex marriages, a micro law federal statute was used for a strategic purpose, to intrude on the traditional state regulation of marriage to discredit the validity of same-sex marriages and to bolster the concept of traditional marriage between a man and a woman.⁵² Two other infamous examples of micro law attaining strategic objectives are the civil rights cases *Cooper v. Aaron*⁵³

49 VEGO, *supra* note 34, at 1 (“Strategy is not concerned with actual fighting”).

50 HEADQUARTERS, DEPARTMENT OF THE ARMY (U.S.), *supra* note 37.

51 Codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738c (2006).

52 See generally Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913 (2011).

53 358 U.S. 1 (1958).

and *Korematsu v. United States*.⁵⁴ While both concerned racial discrimination, *Cooper* prevented the state of Arkansas from subverting American school desegregation whereas *Korematsu* upheld the forced internment of Japanese-Americans during World War II.

First, in *Cooper*, the only opinion signed by all nine members of the U.S. Supreme Court,⁵⁵ the Court observed that “[a]s this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government.”⁵⁶ In response to the Court’s *Brown v. Board of Education* decisions⁵⁷ desegregating the nation’s public schools, the Arkansas General Assembly amended its state constitution “to oppose ‘in every Constitutional manner the Un-constitutional [*Brown*] desegregation decisions”⁵⁸ and enacted two micro laws “relieving school children from compulsory attendance at racially mixed schools” and “establishing a State Sovereignty Commission.”⁵⁹ When the Little Rock, Arkansas school district sought to enforce a federal court desegregation order by allowing nine black students to attend the previously all-white Central High School, the Arkansas Governor unilaterally—without a request from the school district—ordered the Arkansas National Guard to prevent the black students from attending the high school.⁶⁰

In response to this unprecedented post-Civil War challenge to the supremacy of federal government power, the United States, through the U.S. Attorney General, entered the case as *amicus curiae* upon the request of the district court judge and asked the district court “to enjoin the Governor of Arkansas and officers of the Arkansas National Guard from further attempts to prevent obedience to the court’s order.”⁶¹ After a hearing, the district court granted the injunction.⁶² The U.S. President subsequently federalised the Arkansas National Guard and

54 323 U.S. 214 (1944).

55 358 U.S. 1 at 4 (1958).

56 *Id.*

57 347 U.S. 483 (1954), *supplemented*, 349 U.S. 294 (1955).

58 *Id.* at 9.

59 *Id.*

60 *Id.* at 9-11.

61 *Id.* at 11-12.

62 *Id.*

ordered them to cooperate with federal troops dispatched to the area to oversee the desegregation of Central High School.⁶³ Finally, the Court clearly explained how the Arkansas legislature and governor were bound to obey the Court's interpretation of the U.S. Constitution in *Brown*.⁶⁴

Cooper demonstrated in dramatic fashion how micro law—in this instance, the straightforward implementation of a higher court's binding precedent by a lower court—can achieve strategic objectives. From a formalist perspective, there was no reason for *Cooper* to be controversial or even to require another decision by the U.S. Supreme Court—let alone one issued by all members of the Court in an exceptional demonstration of unity. The individual parties involved, however, turned this simple case into a serious constitutional conflict. Both the Arkansas governor and legislature and the U.S. federal judiciary and President employed the confrontation surrounding this micro law to ultimately reaffirm the supremacy of the federal Constitution and the federal government over states' rights.

Second, in perhaps one of its worst reasoned opinions, the U.S. Supreme Court upheld the forced internment of Japanese-American citizens and naturalised aliens in the infamous *Korematsu* case.⁶⁵ Although the U.S. Supreme Court has never overturned this precedent, creative micro law from the U.S. Congress, the U.S. district court and the U.S. President has managed to discredit *Korematsu* at a strategic level.

Taking the lead to remedy this long-standing injustice, the U.S. Congress established, through a federal statute,⁶⁶ the Commission on Wartime Relocation and Internment of Civilians in 1980. Congress provided the Commission with hearing and subpoena power.⁶⁷ In its final Report, the Commission “concluded that ‘broad historical causes which shaped’” the exclusion and detention of Japanese-Americans ““were race prejudice, war hysteria and a failure of political

63 *Id.* at 12.

64 *Id.* at 17.

65 323 U.S. at 217-18.

66 Commission on Wartime Relocation and Internment of Civilians Act, Pub.L. No. 96-317, § 2, 94 Stat. 964 (1980).

67 *Korematsu v. United States*, 584 F. Supp. 1406, 1416 (N.D. Cal. 1984).

leadership.’ As a result, ‘a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.’⁶⁸ Five years later, the U.S. Congress passed the Civil Liberties Act of 1988,⁶⁹ formally apologising for the Japanese internment and providing \$20,000 in reparations for each surviving victim.⁷⁰

Following the Congress’ lead, the U.S. District Court for the Northern District of California, the trial court where the original *Korematsu* case had been filed, granted Fred Korematsu’s petition for a writ of *coram nobis* to vacate his conviction for well-documented government misconduct in his original case.⁷¹ Although not confessing any error, the United States joined the petitioner in asking that his conviction be dismissed.⁷² Finally, in granting the petition and vacating the conviction, the district court recognised that *Korematsu* unfortunately remained a valid—albeit limited—precedent.⁷³

Finally, in 1998, President Clinton followed the court and the Congress by awarding Fred Korematsu the Presidential Medal of Freedom for his courage in opposing such injustice.⁷⁴ On May 20, 2011, Acting Solicitor General Neal Katyal issued a press release confessing that the Solicitor General deliberately suppressed exculpatory evidence from the *Korematsu* case.⁷⁵

Like *Cooper*, the remarkable series of legislative, judicial and executive micro law actions in response to *Korematsu* also demonstrate how micro law can

68 *Id.* at 1416-17 (quoting PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 18 (1982)).

69 50 U.S.C. §§ 1989b-1 to b-4(a) (1988).

70 Kathleen A. Bergin, *Authenticating American Democracy*, 26 *PACIFIC L. REV.* 397, 434 n.202 (2006).

71 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

72 *Id.* at 1413.

73 *Id.* at 1420.

74 See Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 *VIR. L. REV.* 407, 414 n.13 (2005).

75 Neal Katyal, *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, THE JUSTICE BLOG (May 20, 2011), <http://blogs.justice.gov/main/archives/1346>.

creatively achieve strategic objectives. As the unusually dramatic nature of these examples shows, it is rare for one micro law to achieve such strategic significance. A solitary micro law usually will not have relevance at the strategic level. The combined, cumulative effect of many related micro laws, however, can often have strategic significance. Micro law aspires for strategic significance through the operational level of law—the bridge between the tactical and strategic levels.

3. Operational Level of Law

Finally, the operational level of war “links the tactical employment of forces to strategic objectives. The focus at this level is on operational art—the use of military forces to achieve strategic goals through the design, organization, integration, and conduct of . . . a series of tactical actions . . . , coordinated in time and place, to accomplish operational, and sometimes strategic objectives in an operational area. These actions are conducted simultaneously or sequentially under a common plan and are controlled by a single commander.”⁷⁶ Because wars can only be fought at the tactical level, yet they ultimately are waged to achieve strategic objectives, the “[t]actical perspective is too narrow, and strategic perspective is too broad, to ensure the most effective use of military and nonmilitary sources of national power in the accomplishment of strategic objectives. The principal role of operational art is to . . . ‘orchestrate’ the employment of military forces and nonmilitary sources of power to accomplish strategic and operational objectives.”⁷⁷

A simple example of how a series of tactical military engagements attained the operational level of war is the U.S. Task Force Kingston in the Korean War. On November 21, 1950, 21-year-old Second Lieutenant (the lowest U.S. Army officer rank⁷⁸) Bob Kingston and his platoon of 33 soldiers were ordered to reconnoiter and, if possible, take a Korean city.⁷⁹

76 HEADQUARTERS, DEPARTMENT OF THE ARMY (U.S.), *supra* note 37.

77 VEGO, *supra* note 34, at 1.

78 See Commissioned Officer Rank, <http://usmilitary.about.com/od/theorderlyroom/1/blofficerrank.htm> (last visited 4 July 2012).

79 Martin Blumenson, Task Force Kingston, *ARMY MAG.*, Jan. 2001, <http://www3.usa.org/webint/DeptArmyMagazine.nsf/byid/KGRG-6FJHGD>. See also HEADQUARTERS, DEPARTMENT OF THE ARMY (U.S.), *FIELD MANUAL 22-100: ARMY LEADERSHIP 4-13 to 4-14* (1999) (describing Task Force Kingston).

What began as a rather routine tactical mission, over the next eight days evolved into a series of successive tactical engagements with significant operational, if not strategic, significance. Because of Lieutenant Kingston's demonstrated effectiveness, his commanders kept on attaching greater resources to his platoon and ordered him to continue his advance towards the Chinese border.

By November 28, 1950, what had become Task Force Kingston comprised of not only Lieutenant Kingston and his 33-man platoon, but also additional soldiers, two tanks, three Jeep-mounted machine guns, three trucks with four .50-caliber machine guns, four trucks with twin 40-mm anti-aircraft guns, heavy mortars, an engineer platoon, an artillery forward observer (to direct and adjust artillery fire), a tactical air controller (to direct air strikes) and a bulldozer (to clear road blocks). Lieutenant Kingston now commanded 111 men, including nine officers of a higher rank—one major, three captains, and five first lieutenants.⁸⁰ On November 28, 1950, Task Force Kingston achieved its strategic objective, becoming one of two U.S. units to reach the Chinese border on the Yalu River.⁸¹ In doing so, Task Force Kingston had advanced all the way through to the end of enemy North Korean territory.

In a similar fashion, the operational level of micro law is how micro law attempts to influence macro law. The operational level links the tactical and strategic levels of law. Because employing micro law on the tactical level to influence macro law on the strategic level takes creativity, the ability to attain the operational level is often called operational art. This concept of operational art appears to be absent from current American conceptions of law.⁸² Without an understanding of operational art, it is not surprising that the “great disconnect” paradigm treating legal practitioners and legal academics as dichotomous predominates.⁸³

80 *See supra* note 78.

81 Blumenson, *supra* note 79.

82 *See supra* note 41 and accompanying text.

83 *See supra* notes 4-5 and accompanying text.

In a democracy, macro law can only be changed or sustained through micro law.⁸⁴ Operational art uses micro law to change or sustain macro law. Although operational art is most common to legal actors who seek to use micro law to change society,⁸⁵ operational art is also necessary for legal actors who wish to thwart such change and thereby preserve the status quo. Law rarely stays stagnant.

Operational art is an art because there are elements of unpredictability, chance and improvisation in operational legal efforts. Like Task Force Kingston and its higher commanders, legal actors employing micro law operationally often have no idea how their efforts will ultimately turn out. They simply seek to catalyze a chain of events that hopefully will result in—depending on their desire to advance or thwart legal change—significant or minimal macro legal change. Much of the final outcome is beyond their control.

As the micro law efforts surrounding the *Cooper*⁸⁶ decision demonstrate, when legal actors seek to use micro law to achieve strategic objectives through operational art, there often are opposing forces seeking to achieve different strategic objectives. The Arkansas governor and legislature in *Cooper* apparently unsuccessfully attempted to use their own micro law to achieve their strategic objectives of discrediting Brown and establishing the macro legal principle that a state can refuse to enforce what it perceives as an unconstitutional federal encroachment of its power.

Although operational art aspires to strategic objectives, it often falls short of them. Operational objectives are objectives that are beyond the scope of mere tactical concerns, yet arguably have not yet achieved strategic significance. For example, as demonstrated by *Cooper*, with the benefit of hindsight, *Brown*⁸⁷ now can be considered a micro law that achieved strategic significance. *Brown's* triumph, however, was the product of decades of previous National Association for the Advancement of Colored People Legal Defense Fund “impact” litigation,

84 In a dictatorship, a dictator ostensibly could change even macro law through autocratic fiat.

85 U.S. Federal Rule of Civil Procedure 11(b)(2) offers a good definition of such legal change efforts, a “non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law.” FED. R. CIV. P. 11(b)(2).

86 *Cooper v. Aaron*, 358 U.S. 1 (1958).

87 *Brown v. Board of Education*, 347 U.S. 483 (1954).

that arguably achieved operational objectives which paved the path for *Brown's* eventual strategic success.⁸⁸

Considering the operational level of law also raises a provocative research question, what is the relationship between individual and collective legal action, between micro and macro law? Does an individual micro legal action—a single lawsuit, a single statute, a solitary administrative regulation, or a specific executive order—have a macro legal effect? If yes, how much? Does such effect vary according to the character or nature of the particular micro law? Or is the converse true? Does macro law affect micro law? If yes, how much? Does such effect vary according to the character or nature of macro law?

Similarly, how much impact, if any, can an individual legal actor's efforts make upon macro law and society? For example, does individual attorney skill really matter or are legal outcomes more predetermined by larger social forces? Can a more skilful attorney obtain a more favourable outcome for her client in a criminal lawsuit than a less skilful attorney?⁸⁹ Or are all legal actors just bourgeois instruments of oppression?⁹⁰ Table 2 summarises all three levels of law.

TABLE 2 : THE THREE LEVELS OF LAW

Level of Law	Primary Focus	Complementary Level of Law
<i>Tactical</i>	People directly impacted by the law. To include the legal actors advocating or opposing the law, and the law's target audience. Typically micro law's focus.	Converse of the strategic level.

88 See MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (2d ed. 2004); GENNA RAE McNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1984).

89 See Jennifer B. Shinall, *Slipping Away from Justice: The Effect of Attorney Skill on Trial Outcomes*, 63 VAND. L. REV. 267 (2010); David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145 (2007).

90 See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 591-92 (1982).

<i>Strategic</i>	The broader policy implications beyond the people directly impacted by the law. Typically macro law's focus.	Converse of the tactical level. The primary means of attaining strategic objectives, however, is through creation or revision of law on a tactical level.
<i>Operational</i>	Links the tactical and strategic levels. Operational art is the employment of micro law with the goal of achieving strategic objectives and influencing macro law.	Above the tactical level. Operational objectives are intermediate objectives that are beyond tactical objectives, but below strategic objectives.

IV. A HOLISTIC VIEW OF LAW

Having explained this alternative holistic framework, the essay will now use this new framework to critique the “great disconnect” framework that treats the practice and study of law as two independent, largely unrelated enterprises.

1. Integrating the Practice and Study of Law

Legal practitioners and legal academics are more akin to colleagues with different areas of specialisation and accordingly different levels of constraint upon their professional judgment, than diametric opposites. Although practitioners and academics generally do gain expertise through greater experience in certain activities such as creating or revising micro law or writing scholarship about macro law,⁹¹ the same could be said about legal actors with different areas of specialisation.⁹²

Conceptually, there is no reason why a legal actor cannot be both an academic and a practitioner at the same time, or specialize in one or the other at different

91 See PAUL J. ZWIER, SUPERVISORY AND LEADERSHIP SKILLS IN THE MODERN LAW PRACTICE 26-28 (2006).

92 For example, transactional academics or practitioners might have greater expertise with drafting, interpreting and critiquing contracts than litigation academics or practitioners, but such a difference in specialization and experience does not render either less of an academic or practitioner than the other. See, e.g., Karl Llewellyn, *The Modern Approach to Counseling and Advocacy—Especially in Commercial Transactions*, 46 COLUM. L. REV. 167, 168 (1946).

times of her career.⁹³ As the micro-macro legal continuum and operational legal art demonstrate, a legal actor can create micro law or affect macro law at the same time or at different times in her career.

Indeed, both legal practitioners and legal academics are probably well aware of counterexamples that transcend such over-simplistic characterisation. For example, clinical and skills professors have for long successfully straddled both the practice and academic worlds.⁹⁴ Not only have legal practitioners authored innovative legal scholarship,⁹⁵ but also legal academics have become renowned legal practitioners.⁹⁶ Moreover, some legal doctrinal concepts that practitioners today take for granted were first invented or popularized by legal scholarship.⁹⁷ Likewise, legal practitioners have inspired new legal scholarship.⁹⁸

93 *Accord* Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1601 n.3 (1991).

94 *See generally, e.g.*, J.P. Ogilvy with Karen Czapanskiy, *Clinical Legal Education: An Annotated Bibliography (third edition)*, 12 CLINICAL L. REV. 101, 248 (2005).

95 Judges also have authored innovative scholarship. Some of the most cited legal scholars of all time—including Judge Richard Posner, Justice Oliver Wendell Holmes, Jr., Judge Guido Calabresi, Judge Frank Easterbrook and Justice Felix Frankfurter—are or were practicing jurists. Fred Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 tbl.6 (2000). While these judges may have authored much of their scholarship as law professors—except for Justice Holmes, who was a law professor for only months, THE CANON OF AMERICAN LEGAL THOUGHT 21 (David Kennedy & William W. Fisher III eds., 2006) — the point is that there are people, obviously capable of producing quality scholarship, who chose to practice law.

96 Some well-established legal academics—such as Erwin Chemerinsky and Lawrence Tribe—are also renowned for practicing law. *See, e.g.*, Erwin Chemerinsky, *Why Write?* 107 MICH. L. REV. 881, 888 (2009); Vanessa Gregory, *Indefensible*, AM. PROSPECT, Jan. 1, 2011, at A11. At different times in their career, some lawyers rotate between the academy and practice.

97 *See, e.g.*, Kennedy & Fisher, *supra* note 95, at 9; 47 (citing Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913)) (the concept of rights, duties, powers, liabilities, immunities, disabilities, privileges and “no-rights”); 85, 90 (quoting Robert Hale, *Commissions, Rates, and Policies*, 53 HARV. L. REV. 1103, 1143 (1940)) (concept of policy arguments to justify legal doctrine); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 148 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (concept of a principle or policy underlying every rule and standard); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-88 (1976) (concept of rules versus standards).

98 Perhaps the best example of legal practice that has catalyzed new legal theory and academic scholarship is *Brown v. Board of Education*, 347 U.S. 483 (1954), *supplemented*, 349 U.S. 294 (1955). As Justice Breyer commented, in the Supreme Court’s “finest hour,” *Brown* “challenged” the nation’s history and “helped to change it.” Parents involved in

Instead of viewing law through oversimplified and biased “practice” or “academic” lenses, the micro-macro legal continuum and the three levels of law provide a more subtle, more accurate and more practical picture. In the final analysis, this holistic paradigm should result in better legal problem-solving.

2. A Holistic View of Legal Problems and Solutions

Legal problems can be analysed more accurately and comprehensively as micro or macro law at its tactical, strategic or operational levels. Hannah Arendt has characterised the different purposes of macro law and micro law as the “old and complicated” conflict between “truth and politics.”⁹⁹ Because it is not constrained by the expediency of micro law, macro law can seek truth.¹⁰⁰ Precisely because it is constrained by such expediency, micro law is limited by political role.¹⁰¹ Politics, of course, is how micro law is created and revised in a democracy.

Because micro law is the only way to create or revise law in a democracy, micro law is paramount to any realistic conception of law. Chief Justice John Roberts raised a valid concern when he recently commented, “[I]f the Academy is interested in having an influence on the practice of law, on the development of law, they would be wise to stop and think, ‘Is this area of research going to be of help to anyone other than other academics?’”¹⁰² For macro law to have relevance to policy makers and practitioners, it must be connected to micro law. Whether or not one agrees with the Chief Justice’s criticism of academic legal scholarship,

Cnty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 867 (2007) (Breyer, J., dissenting). Although “[t]raditional legal academic publishing played little or no role in establishing the theoretical and doctrinal basis for *Brown*,” Rachel F. Moran, *The Presidents’ Messages: Transformative Scholarship: Legal Academic Knowledge for What?*, AALS NEWS, Aug. 2009, at 6, available at http://www.aals.org/services_newsletter_presAug09.php. The legal academy has subsequently produced a prodigious amount of legal scholarship theorizing, lionizing, criticizing and eulogizing *Brown*. See, e.g., MARTHA MINOW, IN *BROWN’S WAKE* (2010).

99 Post, *supra* note 32, at 187 (quoting Hannah Arendt, *Truth and Politics*, in BETWEEN PAST AND FUTURE 227 (1978) (internal quotation marks omitted)).

100 Post, *supra* note 32, at 186.

101 Post, *supra* note 32, at 187.

102 See *supra* note 5.

his common criticism concerns the content of academic legal scholarship, not whether academic legal scholarship can ever have relevance to practitioners.

As the famous MacCrate Report on American legal education observed with its as-of-yet unfulfilled proposal for an American Institute for the Practice of Law,¹⁰³ practitioners can unquestionably benefit from the serious academic study of the practice of law. While the question of whether academics currently fulfils this need is beyond the scope of this essay, there is no question that well-crafted, relevant academic legal scholarship about micro law could be useful to practitioners. Practitioners probably would welcome it.

Because macro law can influence micro law deductively and through the operational level of law, practitioners also can benefit from the study of macro law—even academic scholarship about macro law that upon first glance might appear irrelevant to them. Much has been written about how practitioners that focus solely on micro law and the tactical level of law can become alienated from the legal profession.¹⁰⁴

In some respects, macro law is like religion. Whether or not anyone wants to discuss macro law, everyone unavoidably has an opinion on it. Even believing that it is impossible to form an opinion—being agnostic—is, nevertheless, having an opinion. Likewise, in the light of micro law and macro law’s unavoidable and public impact upon our daily lives, we cannot help but have an opinion about whether the implicit or explicit rules contained in micro and macro law are wise, accurate or just.¹⁰⁵ Although the appearance of objectivity is the hallmark of

103 AMERICAN BAR ASSOCIATION, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM, REPORT ON THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* 337-38 (1992) (popularly known as the “MacCrate Report”).

104 *See, e.g.*, Michael A. Wilkinson, *Is Law Morally Risky? Alienation, Acceptance and Hart’s Concept of Law*, 30 OXFORD J. LEGAL STUD. 441, 463 (2010) (“Analogous to the claim that the system of modern capitalist accumulation alienates man from his labour, the system of modern law alienates man from society and his shared social norms, resulting in a state of anomie, a reaction to his overexposure to specialized legal norms and increasingly autonomous systems of regulation.”).

105 *Accord* Cass R. Sunstein, *On Legal Theory and Legal Practice*, in *THEORY AND PRACTICE: NOMOS XXXVII* 268 (Ian Shapiro & Judith Wagner DeCew eds., 1995) (“All descriptive claims about the content of law depend in some important way on ideas about the right, the good, or both.”).

good academic or practical advocacy,¹⁰⁶ everyone has a personal opinion about law, regardless of whether their opinions are made public or kept confidential.¹⁰⁷

Because ignorance of the law is no excuse for wrongdoing,¹⁰⁸ every person makes an implicit or explicit value judgment when she decides to follow, ignore or violate law. Even if a particular law does not affect us personally, we still form opinions about it because of its impact on others. By obeying micro or macro law, one implicitly or explicitly supports the status quo. By ignoring or violating micro or macro law, one implicitly or explicitly prioritises some belief other than fidelity to pre-existing rules. So a legal actor cannot avoid having an implicit or explicit opinion about law. Because macro law examines these opinions in pursuit of truth and justice—however those concepts are defined—every practitioner should care about macro law.

Accordingly, both academics and practitioners can benefit from studying and practicing both micro and macro law at all three levels of law. Given the prevalence of the “great disconnect” meme in American law, could academics and practitioners possibly work together for common tactical, operational and strategic goals? Yes, through a “law and practice” movement.

V. CONCLUSION: TOWARDS “LAW AND PRACTICE”

The term “law and practice” here is employed with intentional irony because, through the proliferation of “law ands”, legal academics have ironically welcomed interdisciplinary strangers into their home while maintaining within the walls of that same home their feud with their legal practitioner siblings. Because the legal academy and legal practice remain two sides of the same legal profession, perhaps a more accurate but less descriptive term would have been just “law”. The proliferation of such “law and” scholarship in the American legal academy reflects a consensus that the study of law “is not to be understood on its own terms, but requires the application of some method or substance provided by

106 See, e.g., T. Evan Schaeffer, *Five Steps Towards Persuasive Writing*, 86 ILL. B.J. 343, 344 (1998).

107 Cf. *Mann v. Thalacker*, 246 F.3d 1092, 1098 (8th Cir. 2001) (“Judges are trained to lay aside personal opinions and experiences when they sit in judgment.”).

108 See, e.g., *Lambert v. California*, 355 U.S. 225, 228 (1957) (stating that the “rule that ‘ignorance of the law will not excuse’ . . . is deep in our law”).

other disciplines.”¹⁰⁹ After all, many disciplines other than the legal profession have long studied micro and macro law.¹¹⁰ Underlying all “law and” scholarship is the assumption that the discipline after the coordinating conjunction can provide additional insights to the traditional study of law.¹¹¹

As Judge Edwards observed, “‘Law and’ scholars with true intellectual confidence would acknowledge the legitimacy of alternative, and complementary, approaches.”¹¹² Law and practice is such an alternative and complementary approach to other “law and” scholarship. Just as the study of law has been enriched by the interdisciplinary perspectives of other disciplines,¹¹³ the study of law can be enriched by the unique *intra-disciplinary* insights of legal practice.

The ideas of a law and practice movement and the holistic framework introduced in this essay undoubtedly require further refinement. In particular, the implicit and explicit assumptions behind the micro-macro legal continuum and the three levels of law are ripe for qualitative and quantitative empirical testing. This essay is intended to be just the first statement in an ongoing dialogue. I hope to develop both the micro-macro legal continuum and the three levels of law concepts in future scholarship.

There are many pressing legal issues that require the coordinated efforts of both academics and practitioners along the entire micro-macro law continuum. Law and practice encourages practitioners and academics to employ, study, critique and revise both micro and macro law. Although most legal actors because of limited time, limited resources or professional necessity will attain greater expertise in either micro law or macro law, or focus more on the tactical or strategic levels of law, they can nevertheless collaborate with their professional counterparts. Finally, the hybrid study and practice of micro and macro law can ultimately result in more effective legal insights and innovations.

109 Marc Galanter & Mark A. Edwards, *Introduction: The Path of the Law Ands*, 1997 WIS. L. REV. 375, 376 (1997).

110 See, e.g., Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1316 (2002).

111 Accord Lee C. Bollinger, *The Mind in the Major American Law School*, 91 MICH. L. REV. 2167, 2167 (1993).

112 Edwards, *supra* note 4, at 52.

113 BAILLEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW 5-72, 131-194 (1994).