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FOREWORD

Well before the UC Irvine School of Law opened its doors last fall, the founding faculty’s mantra was that the school must be “traditional enough to be credible, but innovative enough to justify our existence.” Following this lead, the inaugural class has tried to balance innovation with tradition in all our undertakings, including establishing the UC Irvine Law Review.

This inaugural issue is the product of an evolving process: “organic” and “democratic” became the recurring themes of the first year. Nearly the entire inaugural class of sixty students expressed interest in founding a law review. Although as 1Ls we were still learning to adjust to the demands of law school, we began to lay the foundation for the journal in our second semester with the goal of publishing during our second year. We benefited from the foresight of our faculty, who had organized a series of symposia that would generate content for the first volume. Within a matter of weeks, nearly a dozen preliminary committees—design, editorial, governance, training, and so on—were formed to gather research, present options to the group, and make decisions regarding the inaugural issue.

Our class was enthusiastic about the opportunity to build a law review from the ground up and to consider—and reconsider—the standard assumptions about law review success. Between the hurdles often required for admission to membership and their byzantine procedures, law reviews are steeped in tradition. But tradition for the sake of tradition was not good enough. At every step, we have asked ourselves why, and justified our decisions in creating an editorial process and making stylistic and content choices.

Seeking to create leadership roles for all committed members of the law review, while recognizing that we were new to the editing process, we set out to create a system where nearly every member would oversee an article in the first volume. We settled on an unconventional and egalitarian structure, creating small, fixed editing teams with leadership duties rotating within the team for each article in the first volume. The membership also elected a six-member governing board free of any individual titles or other hierarchy to oversee the initial set-up and administration. The governing board met throughout the summer to lay the groundwork for the first issue. By August, the first batch of articles had arrived, so the “real work” was ready to begin.

This unconventional approach also found its way to the substance and shape
of the content. At the inspired suggestion of Dean Erwin Chemerinsky, our first volume begins outside the usual bounds of law reviews. The inaugural issue focuses on innovations in legal education in general and the UC Irvine School of Law in particular, with faculty and students contributing non-traditional essays and perspective pieces. Exploring the developments in the field through the lens of our hands-on experiment, the issue is a reflection on both the founding of the school and the reality of putting innovative principles into practice.

The first two essays by Dean Erwin Chemerinsky and founding faculty member Joseph F.C. DiMento present the history of the law school and explain the core principles underlying the school's construction, from the teaching-focused philosophy that drove faculty hiring to the considerations in the physical building of the school itself. The next essays by faculty members Jennifer M. Chacón, Ann Southworth and Catherine Fisk, and Carrie Menkel-Meadow discuss the innovative classroom experience at UC Irvine School of Law. Professor Chacón explores the challenge of skills-oriented learning in a traditionally doctrinal subject, criminal law, and how she adapted her teaching methods for the Statutory Analysis class. Professors Southworth and Fisk discuss another first-year curricular innovation, the Legal Profession class, a dynamic ethics course, which uses guest speakers and interactive exercises to provide first-year students with an overview of the legal profession and presents the underlying ethical, economic, and social issues of the profession. Professor Menkel-Meadow explains the importance of “transnational” law in an interconnected world and the best methods for teaching it in a twenty-first century law school.

Looking beyond the classroom, other essays focus on creating the wrap-around intellectual environment to stimulate coursework. Associate Dean Beatrice Tice, the school’s chief librarian and a professor of international law, writes about the role of the library as the intellectual and physical center of a law school. Associate Dean of Clinical Education and Service Learning Carrie Hempel considers the challenges of starting a clinical program that will be a mandatory part of every student’s coursework. From points of view outside the legal profession, UC Irvine sociologist Carroll Seron explains her research tracking the career paths of the inaugural class, matching the group’s profile with the standard law school class, while psychologist Elizabeth F. Loftus and criminologist Gilbert Geis discuss the importance of incorporating an interdisciplinary perspective into legal studies. Professor and historian Christopher L. Tomlins then provides a comprehensive overview of the history of legal education, and analyzes the UC Irvine School of Law by asking, what would Langdell have thought?

This issue concludes with an essay by inaugural class members Denisha
McKenzie and David Rodwin that tells the UC Irvine story from the student perspective as they walk us through the formation of the Orange County Human Rights Association, a student group designed to address human rights issues through a local lens.

So, then—which way did we go? Trail-blazing or conventional? It’s too soon to tell. One single issue and its individual voices can hardly be taken as proof of institutional identity, and the membership and structure of the law review are still in a state of development. But it’s clear that what you hold in your hands (or are reading online) is the product of our democratic and entrepreneurial process—and that the dedication and spirit of the founding members have set the pace for the future. We have the rare opportunity to build a law review from scratch, and as we define and refine our processes and procedures over the months and years to come, we hope to continue to be traditional enough to be credible, but innovative enough to justify our existence.

UC Irvine Law Review Executive Board
March 2011
UC IRVINE LAW REVIEW
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Our membership, and the entire inaugural class. Whether as an article editor, lead article editor, research editor, board member, or student author, our membership displayed remarkable commitment and determination throughout the process.

Finally, we thank all of the supporters of the UC Irvine School of Law who helped make this law school, and this law review, a reality.
Symposium Issue

Training for the Practice of Law at the Highest Levels: Reflections from UC Irvine

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The Ideal Law School for the 21st Century

Erwin Chemerinsky*

I. GETTING INVOLVED

My involvement with the University of California, Irvine School of Law began with a phone call from Linda Cohen, a professor of economics at UCI and a former colleague of mine at the University of Southern California (USC). She explained that the University of California, Irvine was creating a new law school and she was on the dean search committee. Over the years, I had heard of various efforts to create a law school there and recalled hearing a few months earlier that the proposal had been finally approved by the University of California’s Board of Regents.1 Linda asked me for names of those I’d recommend for the deanship and I gave her a long list. Towards the end of the phone call, the conversation turned to whether I might be interested and I was sufficiently intrigued to say “maybe.”

I was invited to meet with the dean search committee and was sent a great deal of material concerning the new school. I was impressed by the extensive work that had been done and by the University’s goal that this be a top law school from the outset. But I was dismayed by the budget. The proposed budget for the school was completely unrealistic; funding for every area was far less than what a top law school would require. When asked by the dean search committee to assess their proposal, I decided to be totally honest. I praised the detailed report and the vision for the school, but I explained that their proposed dean’s salary was about half of what I was earning as a professor at Duke Law School, and that their top faculty salaries were about at the level of entry-level faculty hires. I was clear that I would not be interested in the position if that were the level of funding. I was candid that the law school could not be very good on the proposed budget.

I heard nothing from the dean search committee for almost two months and put it entirely out of my mind. I assumed that my candor about the funding for the school ended my candidacy for being dean. To that point, I had not given it enough thought to know if I was seriously interested, so I was not disappointed that it had not worked out. About two months after my conversation with the

* Dean and Distinguished Professor of Law, University of California, Irvine School of Law. I am grateful to Tracey Steele for his research assistance.

committee, I received an email from its chair saying that my initial interview went well and that they wanted me to return for two days of intensive interviewing.

Once more, candor seemed best and I said that I’d be interested so long as the University had the commitment to fund the law school adequately. If the school was to be funded at the proposed budget, I wasn’t interested and there was no point going further down that path. A year before, in 2006, I had been offered the deanship at the University of North Carolina Law School and declined because the funding of the law school was insufficient and the Chancellor and Provost rejected my proposal for increased monies for the law school. I had no desire to repeat the experience of going all the way through the process only to discover that the funds would not be there to achieve the vision for the school. It is so easy for university administrators to talk about how they want to create a great school, only to be unable or unwilling to provide the funds for top faculty, excellent students, terrific staff, and needed facilities.

Almost immediately after conveying my concern, I received a phone call from the Executive Vice Chancellor/Provost Michael Gottfredson. He explained to me that from the moment he came to UCI, his top priority was to create a law school and that there would be the funding to be a top law school. I was very impressed by his commitment to the school and by his promise of the funding needed. He was obviously very knowledgeable about law schools and had an impressive command of what would be needed to succeed. After my reassuring conversation with him, I accepted the invitation to interview for the deanship.

My two days at UCI were wonderful. Since there was no law school faculty to meet, I spent time with university administrators, deans from other schools, faculty from across campus, and supporters of the school. I was tremendously impressed, most of all, by my meeting with Chancellor Michael Drake. He had a sophisticated understanding of what it would take to create a great law school and said that his goal was, to use his metaphor, to “put it on the track” from the beginning as a top school. Our conversation was explicit about the money and strategy that would be needed to do this. I was dazzled by him and, more than anything else, my conversation with him caused me to take the idea of coming to UCI very seriously.

There was one disquieting note during my two days of interviews. At lunch with supporters of the school, one of them held up a copy of an article that I had written in the Daily Journal in which I had sharply criticized the Supreme Court’s recent decision upholding the federal Partial Birth Abortion Ban Act.2 He said that “wouldn’t fly” from the dean at an Orange County law school. I responded that the law school I envisioned would have no ideology and would be a place where faculty and students of all views could express and debate all ideas. My answer

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clearly did not satisfy him; he seemed agitated and said that the law school could not have an outspokenly liberal dean. I said that if that were the view, I was the wrong person for the job.

Other than that, though, the two days were exhilarating and even fun. It was exciting to imagine creating a new law school. After spending time at UCI, I discovered myself thinking often about what I might do if I were named dean. For the first time, my wife and I began to seriously talk about whether this was something we would want to do, whether she would want to leave Duke for this, and whether we wanted to move the family back to Southern California after only a few years in North Carolina.3

In late July 2007, Gottfredson called to get a sense of how likely it was that I would accept if offered the position. I expressed my excitement, but also the fact that Catherine and I had not yet made up our minds and it would be a major career move for her too. Interestingly, in that call we also had our salary negotiation, which lasted about thirty seconds. He asked what I had in mind. I told him what the University of North Carolina offered me to be dean a year earlier. He agreed and asked me to send him a copy of their offer letter. I also expressed a need to work through a number of issues concerning the law school before accepting if the position were offered. My clear sense, for the first time, was that an offer was likely, but that they did not want to make an offer and have it declined.

Very soon after, I received a call inviting both Catherine and me to return to UCI for a day. We had a pleasant day meeting people, learning about the public schools for our younger children, and having a wonderful dinner with Drake, Gottfredson, and their spouses, a lawyer and an education professor respectively. Three days later, Michael Drake called and formally offered me the position of dean. I explained that I had a list of concerns regarding the law school, but I expected that we could work all of them out. We agreed that Gottfredson and I would handle these.

Over the next few weeks, Gottfredson and I had a series of amicable discussions about numerous matters such as funding for the law school, hiring of founding faculty, assuring the status of clinical faculty, and providing a commitment to funding for a loan forgiveness program. On the day after Labor Day, September 4, 2007, we completed our agreement on a long list of issues and I sent in my signed contract.

It is tempting at this point to skip what happened next, but it is too much a part of the DNA of the law school to ignore it. I’ll tell the story very briefly. On

3. I had been on the faculty of the University of Southern California (USC) Gould School of Law from 1983 to 2004, and moved to Duke University School of Law in 2004. My wife, Catherine Fisk, was also a professor at Duke. Previously, she had been at USC, and at Loyola Law School prior to that.
Thursday night, September 6, I received a call at home from Chancellor Drake saying that conservative opposition was developing to my appointment, apparently because of an op-ed that I wrote criticizing a proposal by Attorney General Alberto Gonzales to shorten the statute of limitations for those on death row to file a habeas corpus petition. I was skeptical of this being the basis for the opposition; I had written many far more controversial things. My appointment and salary needed to be approved by the University of California’s Board of Regents and there was concern over conservative opposition. Drake and I discussed the possibility of my coming to California the following week, after Rosh Hashanah, to speak to potential conservative opponents. Drake said that he would try to learn more and get back to me within a few days.

On the morning of Monday, September 10, Drake called me and said that he learned more and that we needed to strategize. We set a time for a call to talk the following morning. That night, Drake called me at home and said that he was coming to Durham the next morning to talk to me rather than have a phone conversation. We agreed that I would pick him up at the Raleigh-Durham airport and we would go to the lobby of an airport hotel to talk. I hung up from that call and immediately told my wife that he was coming to fire me. Why else would he make the trip to Durham?

As planned, at ten o’clock on Tuesday morning, I picked him up at the airport. As soon as he got in the car he told me that I was too controversial to go forward with as dean and that the offer was being withdrawn. We went to the local hotel as planned and talked in the lobby for almost an hour. He asked that we make an announcement that we had decided mutually to not go forward. I refused and said that while I had no current plans to go to the press, I would tell the truth if asked. Also, I had already arranged a board of advisors comprised of eminent judges, academics, and lawyers. I needed to tell them something. We agreed that I could say I was told that Drake concluded that I was too politically controversial to be dean. I drove him back to the airport and returned to my office. I called Catherine from my cell phone and recounted the conversation to her.

I called a few close friends to tell them what happened and taught my afternoon class. I was quite upset; I had never been fired before and it was a position about which I had gotten very excited. But I also was a tenured professor at a wonderful law school and loved my job; I hardly had much to complain about.

Over the next few days, my firing became a national story. It became public on Wednesday and I immediately began to get calls from reporters. Rosh Hashanah began on Wednesday night and we decided not to answer our phones.

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or check messages during the holiday. Both home and office voicemail boxes quickly became full. Major editorials appeared in the Los Angeles Times and the New York Times criticizing my firing and suddenly I had become the poster child for academic freedom.5

On Friday morning, I was in Williamsburg, Virginia, to participate in the annual Supreme Court Preview conference held at William and Mary Law School. Right before going to speak, I received a call from Michael Drake. He said that he had made a mistake and that he wanted me to be dean. I explained that I was in Williamsburg for the next two days and asked if we could talk on Sunday. He said that he wanted to come to Durham in person to talk with me. I tried to dissuade him of this; it was a long trip and we could talk by phone. He was insistent on getting together and we agreed to meet at my house on Sunday morning.

He and his wife, Brenda, arrived as planned on Sunday. Michael and I talked for several hours and I agreed to think about whether to accept the offer. I never would have accepted if it were not for my tremendous respect, admiration, and affection for Michael Drake. I do not know, and likely will never know, all of the pressure that he faced to fire me. But I know that he sincerely believed that in light of the opposition I would not succeed as dean and that if he went forward with me as dean, coalitions that he worked hard to build would be irreparably harmed. Sitting on the couch in my living room, he assured me that I would have the ability to say what I wanted if I became dean. He strongly reaffirmed his commitment to the law school.

On Monday morning, I called and accepted the position. We quickly drafted a statement which was released to the press. Within two hours of the announcement, I received over one hundred phone calls and over five hundred email messages. It was national and local news. The headline the next day of one of the local papers, the Raleigh News and Observer, had as its headline, “Professor Will Be Dean After All,” with a picture of me on the front page.6 That night I was in the Raleigh-Durham Airport to go to speak at a judicial conference. I went into the shop there to buy some gum and the woman behind the counter kept staring at me. Finally she said, “Wasn’t your picture on the front of today’s paper?” I nodded and she looked at me and said, “What were you arrested for?”

5. See, e.g., Editorial, A Bad Beginning at Irvine, N.Y. TIMES, Sept. 14, 2007, at A20; Douglas W. Kmiec, In Chemerinsky’s Defense, L.A. TIMES, Sept. 14, 2007, at A19. During these few days, I generally did not talk with the press about it. One exception was that the op-ed page editor of the Los Angeles Times, Nick Goldberg, called and asked me to write an op-ed. I initially refused, but when I could not sleep that night, I got up and wrote a piece expressing my dismay at being fired and my hope that UCI would go forward and create a great law school. Most of all, I wanted to express why I thought it so important that law faculty use their expertise to take public positions and educate the public, even on controversial matters. Erwin Chemerinsky, Chemerinskygate; Academic Freedom Matters, as My Case Proves, Professors Must Be Free to Speak out on Vital Issues, L.A. TIMES, Sept. 13, 2007, at A23.

II. GETTING STARTED

There were two key steps in getting started: recruiting terrific top-level administrators and hiring an outstanding founding faculty. I had been in legal academia long enough to know the critical importance of the assistant and associate deans who manage every aspect of the school. And my plan for creating a top law school from the outset was to recruit a founding faculty of eight to ten stars from top-twenty law schools. This would send a message of who we intended to be and help recruit great students and faculty. Drake and Gottfredson agreed to this approach of hiring eight to ten founding faculty to arrive a year before any students and to spend that year (2008–09) planning the law school.

I was committed to teaching at Duke Law School during the 2007–08 school year, and actually was teaching a significant overload of four classes in the law school plus an undergraduate political science class of two hundred and fifty students. It was an exciting, though crazy, year. I came to Orange County from Durham once every week from late September through mid-March. I never missed a class at Duke, but often did it by taking a six a.m. flight from the East Coast and a red eye back that night. But there was no other way to do the recruiting and hiring, and other tasks such as planning the initial offices, without being there.

I set out to hire five senior level administrators: an Assistant Dean for Administration and Finance to oversee the building, the budget, and personnel; an Assistant Dean for Communications to handle internal and external communications; an Assistant Dean for External Affairs and Development, obviously to oversee fundraising; an Associate Dean for the Library and Information Technology; and an Assistant Dean for Student Affairs and Director of Admissions. Since we would not have students in 2008–09, we did not need a dean for student affairs yet, but we would need a director of admissions immediately and combining the positions for the first years made sense.

Although it will never appear in any rankings, I think the law school’s greatest strength is the quality of these administrators and their staffs. Each of the hirings has its own story. In some instances, it was a personal contact, such as hiring Rebecca Ávila to be the Assistant Dean of Administration and Finance. I knew Becky from her time at the City Ethics Commission when I had served as a member of the Elected Los Angeles Charter Reform Commission. Subsequently, she was the Senior Associate Dean at the Annenberg School of Communications at USC for eight years and I heard that she might be interested in making a change. By December 2007, Becky had accepted my offer and has done a spectacular job of overseeing the hiring of staff in all areas, developing our facilities, and planning our budget.

I had known Rex Bossert for decades from when he was a reporter for the Daily Journal and more recently as editor-in-chief of the National Law Journal, the preeminent national legal newspaper. Rex has a Ph.D. in English from Stanford
and a J.D. from Northwestern and is qualified to be a faculty member in any law school. We began talking in the fall of 2007 of his joining us as Assistant Dean for Communications and by the following June we reached an agreement. The tremendous extensive publicity surrounding the law school is a credit to his hard work and contacts. One dean from a neighboring law school, upon meeting me for the first time, remarked, “I am so sick of reading about your school. What public relations firm do you use?” “Rex Bossert,” I replied.

Other administrators were the result of searches and I hired individuals that I had not known previously. Before I signed on as dean, the University had wisely conducted a search for an Assistant Dean of Development and External Affairs. They presented me three candidates to interview. From my first phone call, I knew that Charles Cannon was the ideal person. He had been at UCLA Law School for nineteen years. In addition to the obvious credentials—extensive experience in development at a University of California law school and in Southern California—I could tell from the outset that we would work well together. A very experienced director of development at another school told me that the key was to have an assistant dean for development who I’d feel comfortable with in a six-hour ride in a small car. I had met far too many development people who reminded me of a used car sales person and Charles was the opposite. He has the sincerity and class that were perfect for the position. I have now been at hundreds of meetings with him and never once has he said the wrong thing or been other than sincere in helping to sell the law school. Charles accepted my offer in the fall of 2007 and began work, as the first employee of the law school, in January 2008.

We did a national search for an Assistant Dean of Student Services and Director of Admissions. Victoria Ortiz was the Assistant Dean at the University of California, Berkeley, and again I knew that she was the right person from our first phone interview. She immediately projects enormous energy and enthusiasm and I knew she would be great at recruiting students. As I gathered information, I learned that she was beloved by students at Berkeley and was a fierce advocate for them within the law school. She proved the perfect fit for us and was instrumental in recruiting our first two classes.

The final senior administrative position was for the Associate Dean and Director of the Library and Information Services. We formed a separate committee to hire for this position. Beatrice Tice, who was the director of the law library at the University of Toronto and before that Associate Director at the University of Michigan, had grown up in Newport Beach and applied for the position. One need only walk into our magnificent library or meet our terrific librarians and library staff to see how fortunate we are that Beatrice joined us.

My description makes the hiring of these individuals sound much smoother than it was. More than once, I had to persuade higher-ups at UCI that not every senior administrator needed UC experience. More than once, I had to fight to get
approval for a higher salary than UCI was used to paying senior administrators and recognition that salaries in law schools are sometimes higher than in other places on campus. But ultimately each of these individuals was hired.

When I arrived in late June 2008, Charles, Becky, and Beatrice were already present and Rex and Viki arrived soon after. At that point, there were ten newly completed faculty offices, but the administrative suite would not be ready for another eight months. We moved into temporary offices with scrounged, used furniture. We had no assistants to answer phones or get supplies or help in any way. We seemed a very long way from being a law school.

We immediately began to hire staff in each area. This, of course, was a process that continued throughout the year and continues even now; as the law school expands, more staff are needed in every area. I truly believe that we have the best administrators and staff of any law school in the country.

Recruiting the founding faculty was an enormous effort with many highs and lows along the way, but ultimately with a happy ending. The first faculty member to sign on was my wife, Catherine Fisk, who was a chaired professor at Duke Law School and before that a professor at USC Law School and at Loyola Law School. I have often remarked, with total sincerity, that the best thing that UCI got by hiring me was having Catherine join the faculty.

Even before I formally accepted the deanship, I asked my former colleague at USC, Carrie Hempel, if she would come be the Associate Dean for Clinical Education and Service Learning. Carrie had spent fifteen years as a clinical professor at USC and was the best clinical teacher that I had ever seen. I knew that clinics would be a centerpiece of the law school I wanted to help create and thought that Carrie would be the ideal person.

Mike Gottfredson created an appointments committee to recruit the founding faculty. It was comprised of Catherine and me, who were in Durham, and five members of the UCI faculty who did law-related work (Linda Cohen, Joseph DiMento, Beth Loftus, Michael Clark, and Kerry Vandell). I immediately put together a wish list of potential faculty and asked for suggestions from colleagues and friends. My criteria were simple: I wanted stars at the peak of their career from top-twenty law schools who were outstanding scholars and teachers, and who were nice people. I was emphatic that we should pay no attention to field or area of expertise. I repeatedly said that my goal was a founding faculty that would produce a “wow” reaction from the academy and the profession. It was important that the faculty be diverse in every way, demographically and ideologically.

I decided that the key was to have no shame and that I should not hesitate to ask people if they were interested. I figured that most would be flattered to be asked even if they had no interest. I probably contacted about two hundred top faculty across the country. With one exception, they all were very gracious and expressed appreciation to be asked. To my surprise, about fifty said that they'd at
least think about it and about twenty-five showed serious interest.

I quickly discovered that there was a collective action problem: all wanted to know who else was interested, but none wanted me to disclose their identities to the others. They were clear that their signing on depended on who else was coming, but that made it a circular problem. Many strategies were developed to deal with this. I asked for permission to share the names confidentially with others who were interested and most agreed. We held a lunch at the AALS annual conference in January 2008 for the faculty who had expressed serious interest. We did so at a restaurant far from the convention site where we could get a private room. In February 2008, we offered to fly all who were interested, and their families, to UCI for a weekend together, including a dinner at Michael and Brenda Drake’s house. Southern California in February is a wonderful recruiting tool, especially for those coming from cold climates.

Altogether we made about twenty-two offers. Each of the candidates came to Irvine and spent a day on campus, meeting members of the hiring committee and the administration, seeing the campus, and looking at housing. One of the great recruiting advantages for UCI is a large neighborhood of faculty housing on campus, University Hills. I tried to be present whenever I could for the day-long visits, but my teaching schedule at Duke often made this impossible. Also, the faculty candidates met with the supporters from the community who had been instrumental in creating UCI School of Law. This group of volunteers—including Joe Dunn, Judge Andy Guilford, Tom Malcolm, Mark Robinson, Justice David Sills, Gary Singer, and Jim Swindle—were always available to help sell the new law school and Orange County.

I had never negotiated with law faculty before and it was an amazing experience. In thirty years as a law professor, I had never once negotiated for anything, always accepting the contract I was offered. Some of those to whom I made offers responded in exactly this way. Others engaged in protracted negotiations about everything from office size and location to type of house to salary and research money. I found myself discussing things like software packages and distance from offices to bathrooms. (Through it all, Mike Gottfredson showed amazing patience and support in helping to recruit the founding faculty.)

I constantly found that individuals were reluctant to commit until they heard who else was coming. Some who said that they were going to accept changed their minds. There was one discouraging day when five people declined offers. But over the course of a couple of months a fabulous founding faculty accepted. They were (with prior institutions): Dan Burk (University of Minnesota), Catherine Fisk (Duke), Carrie Hempel (USC), Trina Jones (Duke), Carrie Menkel-Meadow (Georgetown), Rachel Moran (University of California, Berkeley), Ann Southworth (Case Western), Grace Tonner (University of Michigan), Beatrice Tice (University of Toronto), and Henry Weinstein (a thirty-year reporter at the Los Angeles Times and previously an adjunct professor at USC). We also had on our
founding faculty four members of the UCI faculty who did law-related work and had been integrally involved in the planning of the law school: Joseph DiMento (international and environmental law), Linda Cohen (law and economics), Beth Loftus (law and psychology), and Kerry Vandell (law and business). The plan was for the founding faculty to arrive in the summer of 2008 and spend the following year hiring more faculty and planning the curriculum and other aspects of the school.

During the 2008–09 school year, a major focus was on faculty recruitment and we made twelve offers with the hope of adding six more faculty before the students arrived in August 2009. We had the entire founding faculty serve as the appointments committee with Catherine Fisk and Trina Jones serving as co-chairs. We discovered that tensions are inevitable in faculty hiring as there were, at times, disagreements over particular candidates. I had naively thought that having a dozen offers to make, with dozens more in the years to come, would lessen tensions. So often fights over faculty appointments seem to be based on battling over scarce resources. But all of the founding faculty members were deeply invested in the school; they had all made sacrifices and taken risks to come and felt passionately about who we should and shouldn’t hire. In the end, an exhausting process led to seven wonderful new members of our faculty: Mario Barnes (University of Miami), Alejandro Camacho (Notre Dame), Jennifer Chacón (University of California, Davis), Stephen Lee (our first entry-level hire who was coming from a fellowship at Stanford Law School), Christopher Leslie (Chicago-Kent), Tony Reese (University of Texas), and Chris Tomlins (American Bar Foundation).

Our goal was to hire four additional faculty during the 2009–10 school year and we succeeded in hiring three, but with two offers still outstanding as the individuals had commitments that made coming for 2010–11 impossible. Our next group of hires, who joined us in 2010, were Sarah Lawsky (George Washington University), Michael Robinson-Dorn (University of Washington), and Christopher Whytock (University of Utah).

The plan is to gradually expand the faculty to about fifty-five, with forty academic tenure-track faculty, ten clinical faculty, and five lawyering skills faculty. It means that we will be doing substantial hiring for a number of years to come.

The final initial challenge was recruiting our inaugural class. I worried constantly over how we could get outstanding students to come to a new, unaccredited law school. I had studied the history of other new law schools and knew that none had begun with what we wanted: students of the caliber of a top-twenty law school. In fact, in December 2008, I went to Chicago to meet with officials at the American Bar Association who oversee the accrediting of law schools and they told me that the kind of faculty that I was trying to recruit would have to get used to dealing with far less qualified students than they were accustomed to at a new school. I said nothing, but was determined that would not
Perhaps the single most important choice was an agreement with Michael Drake and Mike Gottfredson that we would begin with an inaugural class of sixty students. I thought that we could get sixty excellent students to come, but not two hundred. We had much to offer: a great founding faculty, a spectacular student-faculty ratio, and the excitement of being part of creating a new law school. To help begin the recruiting process, in the spring of 2008, I hired Karen Lash as a consultant. Karen had been an Associate Dean at USC before moving to Washington, D.C. to take a top-level position at Equal Justice Works. I had hoped that Karen might come to UCI as a senior administrator, but her family situation made a move back to the West Coast impossible. But Karen agreed to oversee the creation of our website to be ready with the arrival of the founding faculty in July 2008. I realized that one concern of prospective students would be over employment possibilities. Karen received promises from about seventy-five law firms, government offices, and public interest organizations that they would come interview on campus and seriously consider hiring our students. This was then prominently displayed on our website to provide reassurance to those applying to law school.

Still, I constantly worried whether this would be enough to bring great students to a new law school. After moving to Irvine, I spent the summer of 2008 going around to law firms and giving lunch talks. In the midst of one of these speeches, it occurred to me that we needed to raise enough money to offer every student in our inaugural class a full scholarship for three years of law school. I initially floated the idea past Charles Cannon, who responded enthusiastically. Undoubtedly, the scholarships were crucial in attracting our inaugural class. Our announcement of the plan for full scholarships for all students attracted national media attention.

Viki Ortiz traveled the country recruiting prospective students. We created an admissions committee, chaired by Carrie Hempel. Every admitted student received a phone call from Viki notifying him or her of the decision and then a phone call from me. We had no idea how many students to accept to achieve our goal of sixty; we had no track record and no other new law school had ever done this. We received 2,743 applications and accepted 110 students and were stunned when 68 accepted our offer of admission. There was a moment of worry because the largest room we would have for 2009–10 would seat sixty-two. But slowly and predictably, we lost some students; amazingly our inaugural class ended up with our target of exactly sixty students. Most importantly, they were terrific. By the numbers traditionally used to measure entering classes, LSAT and GPA, they were of the caliber of a top-twenty school, with a median LSAT of 167 and a median GPA of 3.61. But that does not begin to describe them. They are the best students that I have had in thirty years of teaching and have shown incredible energy and initiative in creating the institutions of the law school.
Our goal was to expand to eighty students for 2010–11. Unfortunately, it was not realistic to offer full scholarships to all students. But I knew that as a new law school, we still needed something dramatic. In December 2009, we announced that all students in the second class would receive at least a fifty percent scholarship. Once more, we did not have an idea of how many to accept to yield our target of eighty students. We accepted about 165 students and have 83 in our second entering class, a truly amazing yield exceeded by only Yale and Harvard. Most importantly, we were able to expand the class while maintaining the high quality of the students. By the numbers, the second class is virtually identical to the inaugural class. The top twenty-five percent LSAT is a point higher and the seventy-fifth percentile is a point lower, but those are not statistically significant differences.

The goal is to slowly expand to 200 students a class. Drake and Gottfredson have been emphatic that the class should be expanded only as the quality of the students allows. The hope is to add about twenty students a year. Also, beginning in 2011–12, it is expected that we will have transfer students.

One last aspect of getting started is worth mentioning: our facilities. Long before I got involved, it was decided that the law school would be primarily located in Berkeley Place, a two-building complex on the corner of the campus. It was ideally located for a law school. It was next to the business school and near the schools of social science and social ecology, which would facilitate interdisciplinary work and joint appointments. It was close to graduate student housing. (It should be mentioned that UCI helped our student recruiting enormously by promising that there would be space for every interested student to rent an apartment on campus.) Berkeley Place was next to a large parking lot which could be the eventual location of a new law school building.

But Berkeley Place also had many limitations. It was initially built as a 24 Hour Fitness center and private office space. It was never meant to house classrooms or a law library. One of the shocks upon arrival was learning that the upper floors could not hold the weight of library books; law library books weigh 150 pounds per square foot and the upper floors could hold only 100 pounds per square foot. The solution was to put compact shelving on the first floor and seating, with only minimal shelving, on the second floor.

The law school was initially allocated all four floors of one side of Berkeley Place and half of the first floor of the other. It was quickly realized that this was grossly inadequate space. I learned that despite all of the careful planning for the law school, no one had determined the space required for a law school or whether Berkeley Place was adequate. Upon arriving in 2008, a great deal of time was spent on planning space. After explaining our needs, we were allocated the rest of the first floor of the north side of Berkeley Place to build large tiered classrooms (the only place where the floor and ceiling were far enough apart to permit this) and a significant amount of space in a building directly across from Berkeley Place, a
multipurpose classroom and administration building. Detailed plans were developed to account for every inch of space. The choice was made to develop the facilities as if this would be the permanent home of the law school. It was essential from the outset to have facilities comparable to other top law schools around the country.

Construction was to occur in phases. The first phase was ten faculty offices and a conference room to be ready in July 2008 for the arrival of the faculty. Next came construction of the administrative suite and then the library, some classrooms, more faculty offices, and an outdoor student lounge to be done by the opening of classes in August 2009. The next phase, ready for August 2010, included six new classrooms, eighteen more faculty offices, space for the clinics, and an indoor student lounge and offices for student organizations such as law review, moot court, student bar association, and others. It has turned out wonderfully and credit for the huge effort goes to individuals such as Becky Ávila, Darryl Brown, Lisa Rehbaum, Pam Parham, and Dave Tomcheck.

Additional construction will provide a trial courtroom and a large classroom (completed in January 2011), expansion of the library, and additional faculty offices and classrooms on the fourth floor of the Law Building. The result is that by 2012, we will have fifty-five faculty offices, fifteen classrooms, and space for all else the law school needs to house. It will initially feel spacious, then comfortable, then crowded, and then over-crowded. Ultimately, the plan is to build a new law school building within about ten years. But the wonderful facilities that have been created for the law school have reduced the pressure to do this and have allowed development efforts to focus on student scholarships, faculty chairs, clinics, and centers rather than a capital campaign.

III. THE VISION

I felt from the outset that if we simply replicated other law schools we will have failed. There is not a need for another law school like all of the others that already exist. At our first meeting of the founding faculty in August 2008, I began by saying that we had the chance to create the ideal law school and in all of our choices we should be guided by that objective. I have repeated that at the first faculty meeting at the beginning of each year.

My central vision is that I want us to do the best possible job of preparing students for the practice of law at the highest levels of the profession. I certainly did not graduate from law school ready to practice law. On my first day at my first job after graduating from law school, as a trial attorney at the United States Department of Justice, my supervising lawyer told me that an answer to a

7. I am often asked whether there was a need for a new law school. I am never quite sure how to answer. Ultimately, my answer is that there is always a need for more terrific lawyers and I believe that we have the ability to do something different and better in training lawyers.
particular question could be found in the local rules of the federal district court. I did not know that there were local rules of the federal district.

Law schools do many things well, including teaching students skills such as the ability to read cases and construct legal arguments, and instructing students on the doctrines in many areas of law. But as many reports have noted, law schools are far less successful in preparing students for the practice of law.\(^8\) There are many reasons for this. I believe that elite law schools have long eschewed this as a primary objective. Long ago, they adopted the mantra that they teach students to think like lawyers and leave practical training for after graduation.

Also, the nature of most law school classes, a single instructor in front of a large number of students, does not lend itself to training in skills. This format of instruction works for conveying information, but skills cannot be learned in this way. No one would learn how to be a tennis player or a play a musical instrument by exclusively or primarily sitting in a classroom; that is true of any skill. More subtly, having a single instructor in front of a large number of students limits most evaluations in law school to the grade from a single final examination. No skills are taught by this experience; there is not even good instruction on the skill of taking law school exams because generally students receive no feedback other than a grade about their performance.

I also fear that the lack of skills training in most law schools is, in part, because most law school faculty are not equipped or oriented towards doing this. The trend over the last couple of decades, especially in elite schools, is to hire individuals with Ph.D.s, but with no practice experience. Even those who have practiced before going into teaching generally have done so for only a very short time. I have observed that very few faculty at elite law schools are actively engaged in the practice of law. My impression is that this has decreased over the thirty years that I have been an academic, partially because publication and other demands have increased and partially because those being hired are less oriented towards doing so.

Certainly, adjunct faculty, lawyers who are engaged in practice, are equipped to offer such skills training and every law school has a number of these individuals teaching in the upper-level curriculum. Also, some law schools now have “professors of the practice,” experienced lawyers who are hired full-time precisely because of the experience they bring to the school.

I also do not mean to overstate. There are law professors at many law schools very actively engaged in the practice of law. Throughout my career, I have handled both criminal and civil appeals, and I have served several times on government commissions.\(^9\) This is true of other faculty members, though my


\(^9\) I served as chair of the Elected Los Angeles Charter Reform Commission, as a member of
sense is that at most elite schools there are only a few such individuals.

All of this has combined to the quite valid criticism that law schools do not adequately prepare students for the practice of law. My vision of UCI School of Law is that we can do much better. One of the important things that we are doing to accomplish this is to require a clinical experience of all students as a condition for graduation. There are only a handful of law schools in the country which do this. I often have remarked that it would be unimaginable for a medical school to graduate doctors who had never interacted with patients or to say that it is just going to teach its students to “think like doctors.”

I strongly believe in the value of live-client clinics. Undoubtedly, I am influenced by my own experience in law school where by far my best experience was the two years I spent working at the Harvard Legal Aid Bureau. I repeatedly had the chance to meet with clients, to counsel them about their legal problems, and to represent them in court, including arguing a case in the Massachusetts Appeals Court.

Handling real cases gives a sense of law practice that can never be provided by a simulation. Real-world situations come with ambiguities and problems and unexpected developments that no classroom experience or simulation can offer. Most importantly, having a real client, with all of the responsibilities that entails, is an experience that no simulation can provide. Clinics allow students to develop practice skills under close supervision. Clinics allow students to see how doctrine and theory come together with practice.

Although most law schools now have clinics, few require a clinical experience because of the costs of clinical education. Supervising students handling legal matters requires a small student-faculty ratio. As mentioned above, our plan is to have at least ten clinical faculty. If each supervises eight students a semester, we will be able to handle 160 students a year in in-house clinics. We can boost this somewhat by using fellows, academic tenure-track faculty, and adjuncts to teach in clinics. For example, academic tenure-track faculty and adjuncts can be very successful in supervising appellate litigation clinics, where students brief and argue cases in courts of appeals. Additionally, there are some experiences—such as prosecuting misdemeanors—that a law school clinic cannot provide. By supplementing in-house clinics with a few carefully chosen external opportunities, we will be able to provide a clinical experience for all students.

the Governor’s Task Force on Diversity in State Government, and as chair of the Mayor’s Task Force on Government Contracting.

10. I recognize a tension in the objectives for the school that I have described. Having a faculty recognized as among the top twenty in the country requires hiring individuals who are prolific scholars with a national reputation in their fields. This, though, is not the same group of people who necessarily will be best suited towards the training in practical skills. My answer is to have a big tent; a law school faculty should be large enough to have faculty who are engaged in cutting-edge theoretical work and to have faculty with substantial practice experience.
The goal is to create clinics that provide students a sophisticated legal experience like that which they will have once they enter full-time practice. The cases must be ones which the students can handle; the students must be the ones who interact with the clients, who handle the negotiations, who do the drafting, and who argue the matters in court. It is important that the school offer a mix of litigation and transactional clinics. Our first clinic was an environmental law clinic, in part because of a $2 million gift we received for this. It is expected that our next clinics, to be in existence for our inaugural class’s third year, will be an immigration law clinic, an appellate litigation clinic, and a small business/community economic development clinic. Additional clinics will be created in subsequent years.

One other aspect of the clinics needed to be addressed. I have observed at most law schools that clinical faculty are essentially second-class citizens—or worse. For example, at most elite law schools, clinical faculty members are not eligible for tenure; they work on renewable contracts. At many schools clinical faculty members cannot vote on faculty appointments. If we were going to make clinical education a central part of the law school, we needed to handle this differently. Our clinical faculty members are eligible for tenure and, in fact, our first two clinical faculty members were hired with tenure.\textsuperscript{11}

The faculty at UCI unanimously approved a requirement that all students participate in a clinic in order to graduate. I think it will be one of our most distinctive and most important features.

We also sought to develop a first-year curriculum that reflected our vision about preparing students for the practice of law at the highest levels of the profession. During the year before students arrived, the entire founding faculty served as the curriculum committee. Before our initial meeting to discuss the first-year curriculum, a faculty member circulated a proposal that was very traditional: all the standard courses for the usual number of units. I felt that if we uncritically adopted this we would have squandered the opportunity offered by a blank slate. I suggested to the faculty that we begin by identifying the skills which we wanted our students to learn, and from that, reason to the curriculum we wanted to implement. Perhaps we would decide that the standard curriculum is best, but

\textsuperscript{11} As with so many things at the University of California, this proved more of a challenge than expected. Academic tenure requires substantial publication. Clinical faculty who meet this requirement certainly can be awarded academic tenure. But many clinical faculty members, owing to the demands of the position, do not have such publications. There is within the University of California an official designation for “Lecturers with Security of Employment” or “Lecturers with Potential for Security of Employment.” Security of employment is functionally the same as tenure; it requires “good cause” for termination and a procedural hearing. Our clinical faculty members thus receive the “working title” of “Clinical Professor of Law,” and they have either security of employment (in every way the same as tenure) or the possibility of security of employment, depending on their experience level. We have adopted the same approach for our Lawyering Skills faculty.
even then we would have a better sense of why we were doing this.

Over the course of many months, we had extensive discussions at faculty meetings over the content of the first-year curriculum. Frankly, they were the best faculty meetings that I had ever experienced. Everyone present shared a common objective and eagerly participated in the collaborative experience. I do not recall a single instance in which tempers flared or conflict arose during these discussions, though there were many disagreements and divergent views about what we should do. Our central challenge was to be sufficiently traditional to be credible, but sufficiently innovative to justify why we exist.

One of our first choices was to have a significant course on lawyering skills during the first year. All law schools have some type of legal writing and research course; unquestionably these are among the most important skills students need to learn. My sense is that these courses vary tremendously in quality. My own course in law school was taught by a teaching fellow and had remarkably little content or feedback. I have observed such classes at other law schools and have the impression that the grade in many of these courses turns on how well students do with citation form and knowing *The Bluebook*. I have written hundreds of briefs and have never once heard a judge criticize my “bluebooking” even though I only vaguely know these rules and often guess.

The hope is that we can do a better job of teaching writing and research, but the objective is also to teach other skills that lawyers use. For example, all lawyers must negotiate; so we should teach negotiation skills as part of the first-year class. All lawyers must do fact investigations; so we should teach about this in the first-year class. All lawyers must do interviews, such as of clients and prospective witnesses; so this, too, should be taught in the first year. In fact, we arranged with local legal aid and public defenders offices to allow our first-year students in their second semester to do intake interviews of actual clients. Initially, the students must watch an experienced lawyer do this and then the students are required to do the interviews. I think we may be the only law school in the country that has first-year students interacting with real clients.

We spent a great deal of time at our faculty meetings discussing how to integrate interdisciplinary perspectives into the first-year curriculum. As discussed below, I felt strongly from the outset—and the faculty agreed—that we should be extensively interdisciplinary. UCI has many faculty on campus doing superb work in law-related areas and this provides us a wonderful and unique resource. We considered many proposals: a separate class in the first year on interdisciplinary perspectives; having week-long courses in the middle of the semester to focus on specific fields; asking each professor to integrate interdisciplinary materials in his or her course. Each of these has virtues, but also serious drawbacks. A separate course, during the semester or in the midst of it, would remove interdisciplinary studies from the rest of the study of law. We looked at schools that tried this and the results were not encouraging. Asking everyone to do this likely would mean
great inconsistencies among faculty; some would do so extensively, others likely
hardly at all.

Ultimately, the solution we came to was to identify one course during the
first year as the portal for teaching some interdisciplinary perspectives. All who
would teach it would agree to give some instruction in law and economics, in law
and psychology, and in law and society. After discussion, we settled upon a year-
long first-year course in the Legal Profession as a way to accomplish this. It was
attractive to put this in the first year as a way of teaching ethics and
professionalism from the beginning of law school. But it also was a wonderful way
of teaching interdisciplinary perspectives as there is a rich literature about the
economics of the profession, the psychology of being a lawyer, and the legal
profession from a law and society perspective.

Quite importantly, the Legal Profession course also fit as a way to implement
the vision of preparing students for the practice of law. Every first-year student
was assigned to an experienced lawyer mentor and required to spend at least
twenty-five hours following the lawyer around. This would help give students a
sense of what lawyers really do. As part of the Legal Profession course, each
student was required to do an extensive interview with an attorney and write a
paper about it; many students did this with their mentors. Also, the Legal
Profession course brought in panels of lawyers from many different practice areas.
I have the sense that law students, especially at elite schools, have a very narrow
sense of the opportunities available as lawyers. These panels provide the students
a much broader sense of possibilities and of career paths. I have heard many
students say that the speakers from this class and from a speakers’ series put
together by Professor Henry Weinstein were the best part of their first-year
experience.

We also had extensive discussions about the rest of the first-year curriculum,
including what courses to teach and whether there should be an elective. A key
moment occurred when a faculty member observed that, more than anything else,
we are teaching analytical methods in the first year. I then suggested that we could
organize the first-year curriculum around these methods of analysis. As our
discussion developed, we agreed that analysis depends on the source of law;
statutory analysis is different from common law analysis and both are different
from constitutional analysis.

We decided to organize the remainder of the first-year curriculum, in
addition to Lawyering Skills and Legal Profession, around these methods of
analysis. Students would take courses in common law analysis, in statutory
analysis, in procedural analysis, in constitutional analysis, and in international legal
analysis. Substantive law would be used to teach about the methods of analysis so

12. Ann Southworth & Catherine Fisk, Our Institutional Commitment to Teach about the Legal
that students also would gain the traditional doctrinal knowledge. We decided to use contracts and torts to teach common law analysis and to leave property as an upper-level elective. In the fall, students would have a course on Common Law Analysis: Private Ordering, which would be primarily about the common law of contracts; in the spring, they would have a course on Common Law Analysis: Public Ordering, which would focus on torts. In the fall, there would be a course on Statutory Analysis, which would use criminal law as the basis for teaching about reading and arguing over statutes. The fall also would include a course on Procedural Analysis, which would focus on civil procedure, but ideally also teach about procedural rules generally and use examples from other areas as well. In the spring, there would be a class on Constitutional Analysis.

After months of discussion, a consensus developed to structure the curriculum in this way. That left one final decision and there was substantial disagreement over whether to teach international legal analysis in the spring or to have an elective that semester. Each side of this debate made persuasive arguments and ultimately the vote was not close: the choice was made to have a required class on International Legal Analysis in the second semester of the first year. The faculty was persuaded that analyzing international law issues is different from handling matters under others kinds of law and that globalization meant that a significant percentage of our students would have to deal in their careers with transnational legal issues.

It is too soon to assess the success of this curriculum. I think that the crucial question will be the extent to which we changed more than just the labels. My sense is that in some areas we have succeeded more than in others. Having read all of the student evaluations from the first year of classes and having talked to many of the students, it seems that both the Lawyering Skills and Legal Profession classes were tremendously successful and unlike anything that I have heard of at other law schools. It will be important after a couple of years to assess the first-year curriculum to see what has worked and to be sure that we are succeeding in a different approach.

During the 2008–09 school year, the attention on curriculum was almost entirely focused on the first year. Since we were beginning with sixty first year students in August 2009, it was less necessary to plan the upper-level curriculum. We set out to do that during the following year and found it to be more challenging than we expected.

We quickly decided that everything in the upper-level curriculum should be electives except for two requirements: a major paper to fulfill an upper-level writing requirement (as mandated by the ABA and as is common at all law schools) and a clinical experience. We decided to have no other upper-level requirements beyond the number of units needed for graduation.13 There were
arguments made for various courses being required—Property, Evidence, Business Associations, Administrative Law, and so on. I have been a law professor long enough to know that an impassioned argument can be made for countless courses being a requirement. But in the end we felt that students should be able to choose their classes based on their interests and that we would do our best to provide advice and guidance in course selection.

The challenge for the faculty was how to talk about the upper-level curriculum if everything is an elective. We decided on a few things. One is to encourage the incorporation of skills training into traditional doctrinal courses. For example, while at Duke, I taught a course on civil rights litigation and had all students draft a complaint, engage in a negotiations exercise, and do a discovery plan. The reaction of the students was overwhelmingly positive. I know that some of my colleagues have revamped their upper-level courses to include more simulations and more opportunities for exercises throughout the semester.

Another choice was to create capstone courses for the third year. These will be classes based on actual problems or simulations that allow students to integrate what they have learned in diverse classes and to apply the material as they will need to do as lawyers. We surveyed capstone courses across the country and discovered that the phrase has no consistent meaning. In some schools, a major, in-depth paper can be labeled a “capstone experience”; in other schools, it requires a practice experience.

We have agreed that “capstone” will have a more definite meaning at UCI. The goal is to allow students to take what they have learned in several classes in a field and apply this to a complex problem. These might be based on actual ongoing issues so their work might be of benefit to those handling the matter. Or a capstone might be built around a carefully constructed simulation. But the common goals of all of the capstones should be synthesis and application; they should allow the students to synthesize material learned in separate classes and to apply it to a new situation. A committee will be working during the 2010–11 school year to have these ready for the inaugural class in its third year, 2011–12.

Although my central vision for the school was preparing students for the practice of law at the highest levels of the profession, there are other core aspects of my vision as well. One is that there should be a tremendous emphasis on interdisciplinary study and understanding. I think that the most important development since I was in law school in the mid-1970s has been the realization that law is inherently interdisciplinary; it is informed by disciplines such as economics, psychology, sociology, and anthropology, and these disciplines in turn study law and offer tools for understanding it. In this sense, I applaud the increase

skills class. We did not need to require these in the upper-level curriculum because professional responsibility already is in the first year as part of the Legal Profession course and skills instruction is a part of the Lawyering Skills class and the clinical requirement.
in the number of law faculty with degrees in other disciplines and the great rise in interdisciplinary scholarship. At the same time, I realize that law schools exist preeminently for training students to be lawyers and a faculty must be a big tent, with room for faculty deeply engaged in the practice of law and for faculty who have never practiced law at all.

One challenge for law schools has been that interdisciplinary study had to be accomplished through existing structures; we had the advantage of being able to create structures from the outset to facilitate interdisciplinary research and teaching. Most law schools have accomplished this by hiring within the law school experts in fields such as economics and psychology and history. Although we, too, will do this, we also want to take more advantage than at other schools of the faculty already at UCI in other schools and departments. We began with four faculty from other departments as part of the law school faculty and now have added four others. The hope is that they, at times, will teach for us and often participate in faculty workshops and discussions.

We are working to create dual degree programs in many areas, ranging from M.B.A.s to M.D.s to Ph.D.s in various fields. Also, we want to strongly encourage our students not in dual degree programs to take courses in other departments and students in other departments to take courses in the law school. For instance, in addition to students in the J.D./M.B.A. program, many law students would benefit from taking classes in the business school and many business students would benefit from taking courses in the law school.

We hope, too, that our programs and centers will have a strong interdisciplinary focus. Thanks to a gift from the John and Marilyn Long Foundation, we have created, along with the business school, a joint U.S.-China Institute for Business and Law. We are in the process of creating an interdisciplinary Center on Race, Equality and the Law. Our hope is that our clinics might involve graduate and professional students from other disciplines.

Another key aspect of the vision for the school is an emphasis on public service. I went to law school because I wanted to be a civil rights lawyer. But ever since I was a law student, I have been dismayed at how little most law schools do to help students who want to pursue careers in public interest law. At many law schools, students hear about the importance of public service in the dean’s welcoming address at orientation and at the commencement speech at graduation, but rarely in between. I have witnessed time and again the pressures, subtle and overt, that channel students away from work in government and public interest organizations.

To be clear, I want the UCI School of Law to help each student find his or her ideal job. Of course, we will do everything to place our students who want to work in firms in that setting. My hope is that these students will do pro bono work at these firms. We have worked hard to arrange for firms to interview at UCI and to help our students get these positions.
But at the same time, it is very important to do all we can to encourage and assist those students who don’t want to go to a law firm and who want to pursue public service work. Some of the things are subtle in changing the message traditionally sent to first year students. The problem for first-year orientation is about access to justice. The problems for the Lawyering Skills course arise in a legal services context, not a corporate or business context. Throughout the first year, there are speakers, in the Lawyering Skills class and the student speaker series, who have pursued successful careers in public interest and government settings. As mentioned above, during the first year, all students must do intake interviews at a legal services or public defenders’ office, and during their third year all students must participate in a legal clinic.

The faculty adopted a policy strongly encouraging pro bono work for students and faculty. After careful deliberation, it was decided not to make this mandatory, which could cause resentments against pro bono work, but to do all we could to encourage it. We hired a terrific director of pro bono programs, Anna Davis, and she set out to immediately provide opportunities for students. In the first year, 2009–10, fifty-six of our sixty students did pro bono work. Over thirty exceeded the recommended number of hours.

It is crucial that we have a Director of Career Services who has public interest experience and who puts great emphasis on assisting students who wish to pursue this career path. I have seen career services directors at other law schools who implicitly, or sometimes even explicitly, pushed students towards law firms and away from working at public interest settings. I thought it essential that we arrange for a significant number of public interest and legal services organizations to interview our students during “on-campus interviewing.” One of the subtle pressures away from public interest is when all of the employers at on-campus interviewing come from law firms.

My goal is to provide a summer grant to every student who wishes to work at an unpaid government or public interest job during law school. The inaugural students created a Public Interest Law Fund to raise money for this and conducted a very successful auction. Also, we will fund these through the Al Meyerhoff Public Interest Fellowships, created in memory of a leading public interest lawyer with the assistance of his widow, Marcia Brandwynne. I am pleased that for our inaugural class we were able to provide a fellowship to every student needing one and hope that we will continue to do so in the future.

Before accepting the deanship, I received a promise from the Chancellor and the Provost that we could match the best loan forgiveness program that exists in the country. Although our inaugural class has full scholarships for all three years, after that such a program will be essential in facilitating students pursuing careers in public interest settings.

There is one final aspect of my vision for the school that is less tangible, but no less important. My hope is to create a law school that is a warm community.
Students, staff, and faculty all play different roles, but my hope is that we all will be united by our desire to develop a very special law school. I want us to be known among law schools as being unique in the community that we have created.

All institutions have cultures. I have realized it is so important from the outset to make conscious choices about the culture we want to create at UCI School of Law. Cultures are the product of countless small choices. For example, my contribution to the architecture of the law school was an insistence that there be comfortable chairs outside of all faculty offices so students waiting to see faculty members feel welcomed and don’t have to sit on floors. We try to put candy out in these locations to make them seem warm and welcoming. There is a strong norm of faculty being accessible to students, through office hours and times for informal interactions.

I was insistent that there be both an outdoor and an indoor student lounge from the time students arrived so there were comfortable places for students to study, relax, and interact. The choice was made that there would be no competitions during the first year—not moot court or mock trial or client counseling. There are enough stresses in the first year and inherent competitive pressures; there is no need to institutionalize this.

We made the choice to have a traditional grading system (A+, A, A-, etc.), but to have no class rank. After talking to many prospective employers, we decided that we would be doing our students a serious disservice if we had no grades. The reality, we were told over and again, is that employers depend on schools to sort students out through a grading system. We decided if there are going to be grades, a system with more gradations (such as with letter grades and pluses and minuses) is fairer and better than one with less (such as with the increasing trend towards systems using “High Honors,” “Honors,” “Pass,” and “Fail”). With fewer gradations, more inherently turns on smaller distinctions that have little meaning. The difference between the lowest “High Honors” and the highest “Honors” is inevitably negligible. But the difference in the weight for a grade point average is enormous. We also decided to create portfolios as a way to encourage students to keep work throughout law school in a form to show prospective employers so that they have more than grades to be evaluated on. It is too soon to know whether this will work.

Many other choices have been made in an effort to create a warm community. Once a semester, we have a joint meeting of all faculty and staff to go over matters of common interest, such as the budget for the year. Once each month we have a gathering of all faculty and staff to celebrate the birthdays during that month and have cake. We begin orientation with a picnic to which all students, staff, and faculty and their families are invited. We complete orientation with a dinner for all students at Catherine’s and my house, and have another dinner for all students at our house on the last day of classes. There is a dinner at
our house for the faculty and their families at the start of the school year and a lunch for the staff just before the December holidays. Meetings and events, for faculty and students, are generally held at lunch and food is always provided. Breakfast is provided to the students each day of the exam period.

Many schools do some of these things and each individually is relatively minor. But together, I think that they are creating the warm, nurturing environment that we seek to establish.

CONCLUSION

Being the Founding Dean of the University of California, Irvine School of Law is the most thrilling opportunity that I have ever had. I am tremendously grateful to the faculty, staff, students, and volunteers who have taken a leap of faith and joined in trying to build a very special law school. Most of all, I am appreciative of Chancellor Michael Drake and Executive Vice Chancellor/Provost Michael Gottfredson for giving me this opportunity, for their desire to create a top law school, and for steadfastly working to make that a reality.

This is written in the fall of 2010, three years after I accepted the position of dean, two years after the arrival of the founding faculty, a year after the beginning of classes, and as the second year of classes is underway. Many challenges lie ahead: significantly expanding the size of the faculty and student body, while keeping and even increasing their quality; creating new clinics and programs; raising significant amounts of money to make all of this possible; and continuing to foster a warm community. I have often described my experience as Founding Dean as like a ride on a very fast moving roller coaster. The three years of my involvement have flown by. Every day, week, and month has highs and lows, joys and frustrations. But it is an amazing ride and one I look forward to continuing for many years to come.
UCI Law: The First Half Century

Joseph F.C. DiMento*

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On Monday, August 24, 2009, sixty students took their first class at the University of California, Irvine School of Law (UCI Law). While the gestation of any major academic institution is a long process, those students opening their books to a new subject called Statutory Analysis were realizing the culmination of a process of planning, programming, fighting, politicking, strategizing, and coordinating among almost innumerable people that spanned almost half a century.

In this article I recount the history of UCI Law. I do so on the basis of archival materials that have been collected by the University of California, Irvine (UCI) administration, by the main UCI library, and by me.1 As a person involved

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1. Archival material comes from UCI Library’s Central Records Unit, AS-004, Special
in many of the activities and decisions that resulted in UCI Law I also add some firsthand information. Where I do this I strive to distinguish my personal assessment of what happened from my descriptions of what transpired.

Writing history should have a purpose. Mine is threefold for this undertaking. First, I describe an attempt to create a highly innovative professional school so that in the future observers can assess whether its supporters’ goals were met. Second, I aim to describe the challenge of creating new organizations in a highly complex multi-campus, the University of California, which has numerous decision-making points in part because of its system of governance shared between the administration and the faculty, and which has a wide range and large number of constituencies and stakeholders. Third, I hope to provide information about and insights into an undertaking of great interest to many people in and out of the legal community, across the state and the nation, who would not ordinarily follow the academic plan of a single campus; very few of them have had access to the wealth of information about the story of UCI Law that covers almost fifty years.

I. THE VERY EARLY YEARS

Official descriptions of UCI state: “The contemplation of a law school at Irvine is as old as the campus itself. One of the earliest images we have of our university is a videotape from the mid-1960s of our founding Chancellor, Dan Aldrich, walking around the empty grounds of the campus noting our plans for professional schools, including Law.”2 I have seen the videotape, and it does appear that the chancellor, dressed impeccably in a grey suit, making his way across windblown dirt mounds, with the first of the William Pereira Planet of the Apes-style buildings visible in the background, was referring to an area for professional schools, the campus being one zoned by academic discipline and academic function.

At the systemwide level of the University of California (UC), consideration of the need for an additional UC law school in Southern California dates back to decisions made by President Clark Kerr in 1961.3 Based on a faculty committee

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2. Memorandum, History of Law School Proposals at UCI (summarizing UCI’s efforts to create a law school between the mid-1960s and 2001) (on file with author).

3. Minutes, meeting of the Comm. on Educ. Policy at UCLA (Apr. 20, 1961) (on file with author). “Systemwide” here refers to the total University of California enterprise, sometimes, as here, to the Office of the President, sometimes to the Academic Senate, sometimes to both. On April 20, 1961, the UC president presented to the Committee on Educational Policy of the Regents a report by “the Committee on Additional Facilities in Legal Education.” The report noted that there were 19,381 lawyers in California in 1960 and almost 44,000 lawyers would be required by 1980 to maintain an acceptable ratio of persons to lawyers. In addition to expansion of the Berkeley and UCLA campuses, recommendations included the creation between 1965 and 1970 of a new law school at Davis, and “establishment of new law schools in Northern and Southern California.” The report called for
recommendation, he created an Advisory Committee on Law School Planning, charging it with creating a complete study of the needs of the state in legal education. In November 1967, the Office of the Vice President, Business and Finance, presented its report to the Preliminary Planning Committee. The study noted the shortage of lawyers in California and the uncertainty about how many newly educated law students would be necessary to alleviate the shortage. The study also discussed the cost, phasing process, location, technology, and facilities needed to construct a new law school.4

One month later the Advisory Committee Report on law school planning was issued.5 The report highlighted the shortage of lawyers in California, where the ratio between lawyers and “clients in need” was 1:700.6 A recommendation was made that the UC system open two new law schools. UC Riverside was named as the first location.7 The second law school should be at either the Irvine or Santa Barbara campus.8 The Advisory Committee suggested that an administrative committee consisting of law school deans and state bar members should decide where the second campus should open.

As to Irvine:

The Irvine campus is in the highest population density area and will increase its advantage on this score. It will be a large campus and will eventually be an extremely attractive site for a law school. Between Santa Barbara and Irvine, the former seems readier to proceed with a law school. Both campuses have expressed a desire for a law school, and each is in a rapidly developing situation. The committee’s recommendation here is to temporize and to defer decision for several years.9

As a result of the study, plans for a law school at UC Santa Barbara began—starting with budgeted funds. One of many cyclical downturns in the economy that would set back numerous attempts to go forward with a new school led to the proposal being removed from further consideration.10

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6. Id. at 2.
7. Id. at 1.
8. Id. at 2.
9. Id. at 12.
10. See Memorandum, Previous Reports on the Need for Another University of California Law School (internal document covering reports from 1961 to 1989) (on file with author). The story
At roughly the same time UCI Chancellor Aldrich presented his goals for creating a law school to an ad hoc committee. They were to (1) get a report from Angus Taylor on the development of law schools; (2) request advice from the recently opened UC Davis School of Law; (3) develop a plan so that the law school would reflect the environment of UCI’s institution and pioneer legal education; and (4) contact and form partnerships with legal education leaders, the American Bar Association, and local professionals. Soon thereafter Chancellor Aldrich appointed the members of the Preliminary Planning Committee as well as its chair, Professor Abraham Melden, a founding UCI faculty member and the first chair of the department of philosophy.

In 1971 Charles J. Hitch, UC president, sent to the UC Board of Regents another report on the need for additional law schools, this one a reply to Assembly Concurrent Resolution Number 81. It recommended the opening of two new law schools in Southern California, one “a Hastings-type school [practice-oriented and urban] . . . the other . . . a campus school . . . at either Santa Barbara or Riverside.”

Involving UC Santa Barbara has several chapters. Reportedly in 1971, “the Regents authorized the establishment of a law school at Santa Barbara and asked for further study of the desirability of a new law school in Southern California. The 1972–73 University budget requested initial funding for a Santa Barbara law school, but this request was denied by the state, as was a similar request in the 1973–74 budget.”

In 1963–64, Angus Taylor was chair of the statewide Assembly and Academic Council of the Senate. Taylor had several other roles: Professor of Mathematics, Emeritus, at UC Berkeley and UCLA; Vice President of Academic Affairs; University Provost, Emeritus; and Chancellor, Emeritus, at UC Santa Cruz. Special thanks to Jack Peltason for information related to this identification.

11. Memorandum from Charles J. Hitch to the Regents of the Univ. of Cal. (Sept. 27, 1971) (on file with author). The committee members were Professor Emeritus J.A.C. Grant, Political Science, UCLA; Dean Edward L. Barrett, Jr., UC Davis; Dean Marvin J. Anderson, Hastings College of the Law; and Paul A. Peterson of White, Price, Froehlich & Peterson, Inc. The report, “Report of the Advisory Committee on Need for a New Law School in Southern California,” referenced the April 17, 1961 report of a predecessor committee, a 1968 report of a new committee, and the Resolution introduced by the San Diego delegation in the Legislature. Report of the Advisory Committee on Need for a New Law School in Southern California (Aug. 5, 1971) (on file with author). Among the points made by the committee were the following: (1) “For white male applicants the pinch is even more severe;” referring to the supply constrictions in ABA approved law schools. Id. at 4. The report also addressed the type of faculty that a new school would recruit: “the faculty for a new school may have to be gathered by enticing seasoned men in the upper brackets away from the established schools.” Id. at 10. Hastings apparently at the time hired only men. (2) The report also noted the increasing interest in “internship programs, counseling projects, and even actual court appearances by advanced students under supervision,” referring to the interest in the Hastings, practice-oriented, urban model—presumably to counter a phenomenon cryptically referred to in the short report: “It has been truly said that no student in a Willistonian contracts class got within a light year of a negotiated business deal.” Id. at 12.

The report did mention Irvine, saying, “By the time the second school was to be authorized, [President Kerr’s new] committee assumed that the Irvine and San Diego campuses might also be in the picture as possible sites.” Id. at 1. But for the new report, Irvine was not a priority because the
In Orange County, the chairman of the Law School Advisory Committee, Deane E. Neubauer, wrote to Chancellor Aldrich about the law school recommendations.\textsuperscript{14} UCI should (1) establish a relationship with the surrounding Orange County community; (2) integrate plans for the law school in UCI’s five- and ten-year campus plans; (3) engage in preliminary recruitment efforts for a law school dean and law school librarian; and (4) determine the best space on campus for the law school’s location.

Soon thereafter appointments were made to the Friends of UCI School of Law Committee.\textsuperscript{15} In August 1968, Chancellor Aldrich accepted the Preliminary Planning Committee’s recommendations for the planning of the law school and made a commitment to move forward with the committee’s recommendations while requesting the continued support of the committee members.\textsuperscript{16}

Activity then turned to the organized bar. Mr. Newell, an attorney-at-law with his own firm in Costa Mesa, California, wrote to the president of the Orange County Bar Association (OCBA), commenting on ways to bring a law school to Orange County. Newell recommended that OCBA (1) demonstrate a need for an accredited law school in the county based on an increase in the population and a dearth of superior academic training locally; (2) communicate need for a law school to the Board of Governors of the California State Bar and urge them to send a recommendation to the California Higher Education Council; and (3) build an organized bar constituency to make appearances before the California Higher Education Commission and the Board of Regents, urging them to adopt academic approval and financial priority for the law school.\textsuperscript{17}

For the next few years there was little progress on a new University of California School of Law.\textsuperscript{18}

``Irvine campus is less fully developed, and Pepperdine College operates an accredited law school in nearby Santa Ana.`` Id. at 11.

\textsuperscript{14} Memorandum from Deane Neubauer to Univ. of Cal., Irvine Chancellor Daniel G. Aldrich (July 9, 1968) (UCI Archives, Box 93, Folder 483).

\textsuperscript{15} Memorandum on membership from Sch. of Law Comm. (Sept. 1967) (UCI Archives, Box 93, Folder 483). Appointed were Judge Frederick Hauser as the chairman of the committee, Eugene Barnes, Dennis Carpenter, Walter Chaffee, Baird Coffin, Mervin Glow, Donald Harwood, Louis Knobbe, John Kaer, Garvin Shallenberger, Warren Sikora, Walter Smith, and Stephen Tamura. H.B. Sterat, Assistant Chancellor, expressed regret that Judge Frederick Hauser resigned as chairman because of conflicts arising from a “misunderstanding.” Letter from James M. Day, president of The Friends, to Judge Frederick Hauser (Mar. 7, 1968) (UCI Archives, Box 93, Folder 483).

\textsuperscript{16} Memorandum to members of the Law Sch. Advisory Comm. from Univ. of Cal., Irvine Chancellor Daniel G. Aldrich (Aug. 21, 1968) (UCI Archives, Box 93, Folder 483).

\textsuperscript{17} Letter to Robert S. Barnes, President, Orange County Bar Ass’n, from Richard A. Newell, Attorney (Feb. 20, 1970) (UCI Archives, Box 93, Folder 483).

\textsuperscript{18} This said, there was activity regarding a law school in Irvine, one located cheek to jowl with UCI. Those actions gave some the impression that UCI had begun its own law school. In July 1973, UC Assistant General Counsel John Lundberg wrote to Chancellor Aldrich about an unfolding controversy. Evidently a private law school had been established by an attorney, one Mr. Egon Mittelmann, Esq., directly across the street from UCI at the Town Center building. It was named Irvine University School of Law (IU). Mr. Lundberg addressed the potential confusion between IU
Prompted in part by a proposal to the Regents in 1983 by the Trustees of California Western School of Law to merge their institution with UC San Diego, UC’s President Gardner asked the Law School Review Committee, which “had recently completed a system-wide program review of the University’s three law schools, to undertake a general study of the potential need for a fourth law school.” In general, when requests were made for establishing new law schools the systemwide response was to undertake or commission a report. There have

and UCI. Letter from John Lundberg, Univ. of Cal., Irvine Assistant Counsel, to Daniel G. Aldrich, Chancellor of Univ. of Cal., Irvine (July 19, 1973) (UCI Archives, Box 93, Folder 483). A letter from Chancellor Aldrich to Dean Mittelmann followed, requesting that all advertisements by IU disclose that IU was in no way affiliated with UCI. Lundberg requested notification of any further actions by IU that would indicate a false affiliation. At about the same time H. Bradford Artwood (who served in 1967 as the public affairs officer and later as the assistant chancellor of university relations) wrote to John Garfinkel of the California State Bar discussing the potential for legal action against IU. Letter from H. Bradford Artwood, Univ. of Cal., Irvine Assistant Chancellor, to John Garfinkel (misspelled as Garfenkel), Cal. State Bar (July 25, 1973) (UCI Archives, Box 93, Folder 483). Simultaneously Dean Mittelmann requested that Chancellor Aldrich allow IU students to take courses at UCI. Letter to Univ. of Cal., Irvine Chancellor Daniel G. Aldrich from Egon Mittelmann, Dean of Irvine Univ. Sch. of Law (July 30, 1973) (UCI Archives, Box 93, Folder 483).

In October of 1973, students at UCI through ASUCI, the student government, passed a “Resolution Refuting any Association with IU” and mandating that the IU bookstore post a disclaimer indicating no association between IU and UCI. Ass’d Students of Univ. of Cal., Irvine, Council Resolution (Oct. 9, 1973) (UCI Archives, Box 93, Folder 483). In the following year the University General Counsel concluded that there was no similarity between UCI’s letterhead and that of IU. See Letter from Eloise Kloke, Assistant Chancellor for Administration, to John Lundberg, Univ. of Cal., Irvine, to Eloise Kloke, Assistant Chancellor for Administration, Univ. of Cal., Irvine (May 8, 1974) (UCI Archives, Box 93, Folder 483). The Kloke letter wondered whether legal action should ensue; but UCI also received a complaint by an anonymous student who had applied to IU believing that it was affiliated with UCI. See Letter from Eloise Kloke, Assistant Chancellor for Administration, to Vice Chancellor Cox, Univ. of Cal., Irvine (Apr. 17, 1974) (UCI Archives, Box 93, Folder 483).

Rather than fight, Dean Mittelmann evidently decided to try to join. Letter to Univ. of Cal. Regent from Egon Mittelmann, Dean, Irvine Univ. Sch. of Law (Dec. 20, 1974) (UCI Archives, Box 93, Folder 483). Early in 1975 he wrote to the UC Regents requesting a merger between UCI and IU. He suggested that UCI would achieve a law school more quickly this way and he highlighted the benefits to UCI in light of IU’s growing student body of 100 students and its positive earnings. Almost immediately Angus Taylor replied to Dean Mittelmann, informing the dean about IU’s rejection of the offer for merger and indicating that IU’s intent for a law school would not include IU’s “type of program.” Letter to Egon Mittelmann from Angus Taylor (Jan. 8, 1975) (UCI Archives, Box 93, Folder 483).

A few more incidents occurred involving UCI and IU related to the confusion over the status of the latter, but in February IU had moved to a new location in Newport. Another merger request came two years later, this one from Northrop University to UCI. Letter to Univ. of Cal., Irvine Chancellor Jack Peltason from Howard Gensler, Dean, Sch. of Law, Northrop Univ. (Feb. 5, 1985) (UCI Archives, Box 412, Folder 141). Chancellor Peltason declined the offer, which involved establishing a concurrent five-year BA and JD program between the two schools.

Other activities related to a law school in Orange County included the initiative in the 1990s to have Whittier Law School merge with a UCI law school, sited on the Irvine campus, see text accompanying note 35; a fairly active exploration by Loyola Law School to expand into Orange County, see G.M. Bush, A Law School of its Very Own?, L.A. DAILY J., Mar. 14, 1991, at B1; and the creation of a law school at Chapman University in the mid 1990s.

been several.20 The 1983 report concluded that creation of a new law school was not warranted.

II. THE MIDDLE YEARS: ALMOST ACCOMPLISHED

The first comprehensive and formal actions for a School of Law at UCI came in 1989. The UCI Academic Senate created a Task Force to consider whether it would be appropriate to establish a School of Law at UCI. The 1989 Long Range Development Plan (LRDP), the master plan for each UC campus, also referenced a law school.

The Task Force had members from several disciplines and from the bar and bench.21 It considered questions of general need for a law school at UCI, intra-campus relations that might be fostered by a school of law, and ways of distinguishing the school by emphasizing specific legal foci. The points of reference were already “other first line schools of law at institutions such as Harvard, Northwestern, University of Chicago, Stanford, and the University of California.”22

The Task Force was instructed by the administration “not to dwell on external constraints; the charge is to determine if a law school makes sense for UCI and Orange County.”23 It was told that the UCI Senate Committee on Planning and Budget “had reviewed many professional schools before making recommendations as to which one should be considered for development on the UCI campus. The law school emerges as a strong favorite.”24 Although the UC Office of the President (UCOP) was not supportive of establishing another law school (UCOP had stated that UCI should not even raise the issue), the

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20. See text accompanying notes 33–41.
21. Memorandum from Howard Lenhoff, Chair, Academic Senate, Irvine Div., to Vincent P. Guinn, Prof. of Chemistry, Univ. of Cal., Irvine, regarding the charge to the UCI Law Task Force (June 29, 1989) (on file with author). The chair was Joseph McGuire, Professor of Management. Members were Joseph DiMento, Professor, Program in Social Ecology; A.I. Melden, Professor Emeritus, Department of Philosophy; Margaret Murata, Professor, Music; Edward Quilligan, Professor, Obstetrics and Gynecology; John Arguelles, California Supreme Court Justice (retired); Stephen Sugarman, Professor, UC Berkeley School of Law; Mr. Peter Zeughauser, attorney-at-law, the Irvine Company.
22. Id. at 2. The Task Force also collected data on supply and demand for lawyers. At the time there were sixteen ABA approved law schools. Approximately 70%, or 14,000+ students are enrolled in the ABA schools. Approximately 4,000, or roughly 24% are in the 18 California accredited non-ABA law schools. . . . In addition, there are 17 unaccredited law schools with a total enrollment of approximately 1,000 or approximately 5% of the student population. There are approximately 500 students who study through correspondence law schools, and they account for roughly 2% of the students. In addition, there are a small number of students who study through law office study or study in a judge's chamber. Letter from Allan B. O'Connor, Consultant, Comm. of Bar Exam'rs of the State Bar of Cal., to Patricia A. Adams, Office of Academic Affairs, Univ. of Cal., Irvine (Aug. 17, 1989) (on file with author).
23. Minutes of the UC Irvine Law School Task Force (Sept. 6, 1989) (on file with author).
administration indicated to the Task Force that there could well be “a change of heart next year or the following year.” UCI wanted to be prepared. Discussions among the Task Force members anticipated issues that would be pursued by supporters of UCI Law for years to come: “A Task Force member stated that a faculty of 23 to 25 would be needed. This would allow for an enrollment of approximately 450 students . . . [whereas] 40 or more FTE [Full-Time Equivalents] . . . would be a tremendous drain on campus resources.”

The Task Force unanimously recommended that a school of law be established at UCI. UCI Senate committees reviewed the report and it was endorsed by the Executive Committee of the UCI Academic Senate. On June 7, 1990, the UCI Representative Assembly endorsed the motion to establish a law school at UCI. There were only two dissents and no abstentions. Chancellor Peltason pointed out that UC President Gardner’s Advisory Committee on Professional Education, chaired by UC Vice President William Frazier, was studying the question of what professional programs should be offered in the UC system and which ones should be offered on one or more campuses. The next step would be to transmit the report and wait until the Frazier committee made a decision.

Chancellor Peltason discussed the proposal with UC President David Gardner. “According to Peltason, President Gardner asked him not to forward the proposal at that time because of budgetary constraints facing the whole UC system. President Peltason agreed, with the understanding that UCI would take up the issue again when the outlook for the budget improved.”

In anticipation of a formal submission in the future, in 1991 the UCI Law School Founders’ Committee was formed, composed of judges, lawyers, some faculty members, and others interested in the UCI initiative. During their deliberations a one million dollar gift from the Ivines was acknowledged, with Joan Irvine Smith stating: “They could be the Harvard of the West.”

In this period another systemwide effort to study need for additional legal

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25. Id.
26. Id. at 2.
27. Minutes of the Univ. of Cal. Academic Senate, Irvine Div., Representative Assembly (June 7, 1990) (on file with author). The minutes include a report from the Law School Task Force, which stated:

Professor Joseph DiMento presented the report on behalf of Chair Joseph McGuire, noting the presence of one of the Task Force’s members, Justice John Arguelles. Professor Dougherty noted with approval the interdisciplinary emphasis in the report and stated that it was in keeping with the campus mission, although he took exception to to [sic] the tone of the report.

Id. at 3.
29. A private practitioner who took an early leading role in the committee was Charlotte Sumrow-Pirch. As he would do throughout the long history of the law school as attorney and later as judge, Andrew J. Guilford took on another leadership position.
education in the UC system was chaired by UC Davis Law Professor Edward Imwinkelried for the Office of the President. In January 1991 the committee concluded, in a mixed analysis (7–2), that

there is a need to expand enrollment of the U.C. law schools. In the opinion of a majority of the committee members, an increase in U.C. enrollment would help meet the other legal needs . . . such as the need to enhance the diversity of the California legal profession. Moreover, as both law school applications and private law school tuition increase, a U.C. legal education is becoming more and more inaccessible to qualified graduates of California universities and colleges. A minority of the committee concludes that the available data do not warrant a general expansion of U.C. law enrollment. In the opinion of these committee members, California is likely to have a substantial surplus of attorneys for the foreseeable future; and an expansion of U.C. enrollment would not be a cost-effective method of meeting the other legal needs identified in this report.31

The report made some unanimous recommendations consistent with these overall conclusions including to “[r]equire all U.C. law students to perform a certain number of hours of pro bono service each year.”32

There was little formal movement on the UCI School of Law in the next few years, although law-related programs continued to grow and initiatives focused on the legal community were undertaken.33 During the administration of UCI’s third chancellor, Laurel L. Wilkening, 1993–1998, UCI was approached by Whittier Law School with a proposal for a merger.34 Several discussions and meetings took place and Whittier College itself as well as the Law School Dean and faculty were solidly in favor of joining with UCI. The Whittier offer was not accepted, but informal

31. Report from Edward Imwinkelried, Chair, Ad Hoc Planning Study Comm. for Prof’l Educ. in Law, Analysis of Graduate Legal Education at the University of California, 5 (Jan. 1991) (on file with author). Committee members in addition to the Chair were Joseph DiMento, UCI; Laura Kalman, History, UCSB; Loy Lytle, Psychology, UCSB; Miguel Mendez, Law, Stanford; Henry Ramsey, Jr., Dean, Law School, Howard University; Emma Lewis Thomas, Dance, UCLA; William Warren, Law, UCLA; Diane Yu, General Counsel, State Bar of California.

32. Id.

33. As in many major research universities, the study of law has been a part of UCI’s various curricula since the very beginning. Substantive law courses in many fields have been offered to undergraduate and graduate students through the Schools of Social Ecology and Social Sciences. There are minors in law and other fields, for example the Humanities and Law Minor. See Univ. of Cal., Irvine, Sch. of Humanities, Humanities and Law, http://www.humanities.uci.edu/humlaw/ (last visited Oct. 29, 2010). UCI offers a Mock Trial experience. See Mock Trial, http://www.irvinemocktrial.com/ (last visited Oct. 29, 2010). A Ph.D. program, as well as M.A. offerings, exist in Criminology, Law and Society. See Univ. of Cal., Irvine, Sch. of Social Ecology, Department of Criminology, Law and Society, http://cls.soceco.uci.edu/ (last visited Oct. 29, 2010).

34. I was involved in discussions of this merger.
exchanges between UCI and Whittier continued.

In 1999, the UC Office of the President added to the list of commissioned studies on the need for additional law education in the system. The office commissioned the RAND Corporation to undertake a study of the need for additional lawyers in California. The RAND Report, completed in 2000, concluded that supply met demand then and would meet or exceed expected growth in demand to 2015. However, “if the economy undergoes dramatic upward or downward shifts, major shortages or surpluses could result.” The report did note that “several expert interviewees underscored the importance of looking beyond supply and demand projections when considering the future of the profession and how it might best be served by the legal education system.”

The report noted that the Inland Empire and the San Joaquin Valley have the smallest number of lawyers per person in the state; that there are disparities in ethnic representation in the California bar; and that there might be a coming shortage of public sector lawyers.

III. The Unstoppable Attempt (1999–2007)

A. Academic Planning Council Call for New Initiatives: The Law School Proposal

The next serious effort to create the UCI law school began in October 1999 when Executive Vice Chancellor (EVC) William Lillyman called for proposals for new academic initiatives for the growing and then financially very strong campus. Several proposals were offered to the campus Academic Planning Council, and the law school presentation moved to the front of the campus priorities—first among the four areas selected for further development. The concept was reviewed by UCI Senate committees including the Graduate Council, Planning and Budget, and various school deans. Analysis was generally positive—if not enthusiastic—but there were some concerns about the effect of a new school on availability of resources for existing programs. During the discussions of the proposal the question often arose: are law students to be counted as

36. Id. at vii.
37. Id. at ix.
38. Id. at viii.
39. Id. at vii.
40. Id.
41. Letter from William J. Lillyman, EVC, Univ. of Cal., Irvine, to the faculty (Oct. 11, 1999) (on file with author) (“UCI has entered a period of unprecedented growth. . . . This academic year the Academic Planning Group will work in concert with academic deans and the Senate Council on Planning and Budget to review the establishment of potential new academic programs”).
42. I made the presentation with the strong support of William Parker, UCI’s associate executive vice chancellor at the time.
graduate students in the campus’ ongoing efforts to increase the percentage of graduates in the student body? There had been differing views of whether professional school students should be considered in attempts to make for a more balanced ratio for a major research university. If counted, there would be an additional rationale to proceed with the professional schools.

EVC Lillyman then appointed the Law School Work Group. He charged it with producing a proposal “for the establishment of a School of Law at UCI that will quickly achieve national eminence.” The Work Group met on dozens of occasions and presented the Proposal for a School of Law at the University of California (Proposal), which, as summarized below, addressed in a comprehensive manner the Law School of the future. The Group’s chair, Professor William Sirignano, stated early in the process that he would be part of the effort only if the goal was to create a superior proposal and a law school of very high national stature. All the Group members were in complete concurrence.

Part of the task of the Work Group was to solicit advice from leading members of the bar and the academic law community. Deans, other law school administrators, district court judges, firm partners, and others were asked questions relating to the need for UC-trained lawyers; the advantages, if any, of having the next UC School of Law placed at Irvine; the balance of basic coverage of law and specializations; recommendations about joint programs; faculty size; and space and resource needs.

43. The Work Group was chaired by William Sirignano, Professor of Mechanical and Aerospace Engineering and former Dean of the Engineering School; members were Michael P. Clark, Professor of English and Comparative Literature and Associate Executive Vice Chancellor for Academic Planning; Linda R. Cohen, Professor and Chair of Economics; Russell J. Dalton, Professor of Political Science; Joseph F. DiMento, Professor of Criminology, Law and Society and of Urban and Regional Planning; Mary C. Gilly, Professor of Management; and William H. Parker, Professor of Physics and Vice Chancellor for Research and Dean of Graduate Studies. Melissa Barrett, Tiffany Jue, and Michael Poston were staff to the Work Group. See Proposal by Univ. of Cal., Irvine, Proposal for a School of Law at the University of California, Irvine, 51 (Jan. 4, 2001).


45. Proposal for a School of Law at the University of California, Irvine, 45 (Jan. 4, 2001).

46. Personal communication to author.

47. See Proposal, supra note 45, at 54–55. Consulted were, David Baskin, Assistant Dean, UC Berkeley School of Law; David Carter, Judge, U.S. District Court, Central District of California; Barry Currier, Deputy Consultant, Office of the Consultant on Legal Education, American Bar Association; John Dwyer, Dean, UC Berkeley School of Law; John FitzRandolph, Dean, Whittier Law School; Mary Grivna, Assistant Dean, UC Davis School of Law; Andrew Guilford, Partner, Sheppard, Mullin, Richter & Hampton, and President, State Bar of California; Bruce Hallett, Managing Partner, Brobeck, Phleger & Harrison; Mary Kay Kane, Dean, UC Hastings College of the Law; Louis Knoble, Senior Partner, Knobbe Martens Olson & Bear; Richard Morgan, Dean, University of Nevada-Las Vegas; Nho Trong Nguyen, Judge, Orange County Superior Court, West Justice Center; Rex Perschbacher, Dean, UC Davis School of Law; John Power, Chief Financial and Academic Officer, UCLA School of Law; Martin Runkle, Director of the Library, University of Chicago; Myra Saunders, Associate Dean and Law Librarian, UCLA School of Law; Gary Singer, Managing Partner, O’Melveny & Myers; Matthew Spitzer, Dean, University of Southern California School of Law;
The Proposal presented an ambitious vision of a new School of Law. The School must "equip its students to address the broad philosophical and social functions of the law as well as the more technical and juridical aspects of their profession. It must prepare the students not only for leadership in the practice of law but also in business, politics and the social arena." The Proposal asserted that as "the complexity and diversity of our world increase rapidly, law will become an even more central and fundamental force for order and justice throughout society, and the demand for lawyers with sophisticated academic training will increase at a greater rate than the population at large." Law will become "the principal source of justice and social mobility which holds that complex world together." Lawyers will need "an education that combines mastery of the content of the law with a broad academic foundation in the philosophical, social and theoretical principles that connect that practice to the more general functions of law in contemporary society."

The Group proposed to develop a law school that would combine "broad and comprehensive training in the fundamental principles of the law with emphases on legal issues related to emerging technology and the globalization of the economy and culture." The considerable expertise in law that already existed at UCI would be called upon allowing the exploration of intellectual property, patents, and broader ethical and political issues, as well as linking to the "extraordinary initiatives in telecommunications and biomedical technology" at UCI. The new law school would be built with senior faculty with significant national and international scholarly reputations and with junior faculty “recruited from the top of the graduating classes of the best schools of law” and with “special promise as scholars and teachers.”

The Proposal’s vision was to encourage the new configurations of disciplinary and interdisciplinary work of the kind seen at the great universities: law and philosophy at the University of Michigan; law and economics at Chicago and Yale; and law and jurisprudence at Berkeley. Faculty would work with colleagues across the campus and, unlike some other institutions, “participation of law faculty in activities of the Academic Senate” would be encouraged. Clinical education would be central, so as to encourage students “to explore the social,

Kathleen Sullivan, Dean, Stanford Law School; Kathleen Vanden Heuvel, Deputy Director, Law Library, UC Berkeley School of Law; Barbara Varat; Associate Dean, UCLA School of Law; Jonathan Varat, Dean, UCLA School of Law; Judith Wright, Law Librarian, University of Chicago School of Law.

48. Id. at i.
49. Id.
50. Id.
51. Id.
52. Id.
53. Id. at 2.
54. Id.
55. Id. at 3.
intellectual, and professional benefits of a career in poverty-law, civil rights, and public-interest law.’’

Reflecting the interest of the Work Group but also its familiarity with the numerous reports questioning the need for more lawyers in absolute numbers, as opposed to the need for certain kind of lawyers, the Proposal asserted that

the School of Law at UCI will facilitate access to the legal profession for groups that are underrepresented at this time. By its mere presence in our community, it will encourage the educational aspirations and increase the upward mobility of a wide range of people who have little or no contact with the university now.’’

The Proposal made the point, repeated often in the decades of attempts to bring a public law school to Orange County, that “there is no public school of law south of Los Angeles, and the best private schools in the state are too small and expensive to be adequate substitutes for a high-quality public school of law.” Public access and public education were emphasized: “It has been over thirty years since a new public law school was formed in California. Consequently, of the total number of law degrees awarded in California from ABA-approved schools, the percentage awarded by public schools declined precipitously from 58% in 1966 to 26% in 1996.”

The law school was to “contribute significantly to the academic strength” of the campus. The Proposal emphasized the consistency with the earliest plans for the campus but also noted some more recent events. UC President Atkinson wrote in September 2000: “California’s burgeoning population and healthy economy will require great numbers of well-trained professionals.” He had urged the University to “intensify and accelerate” the effort to form more professional schools, particularly noting the possibility of a new school of law in Southern California.

The Proposal was highly detailed. It contained spreadsheets of various budget options including the FTE (full-time equivalent, i.e., funded permanent positions) associated with each of the functional areas of the School at opening, which was then scheduled for fiscal year (FY) 2004–2005, and “at maturity,” which was envisioned as FY 2011–2012. It addressed the recruitment of the first

56. Id. at ii.
57. Id. at iii.
58. Id.
59. Id.
60. Id. at ii.
61. Id. at 2.
62. Id.
63. Id. at 40.
students: “admission must be restricted to highly qualified applicants with a strong probability of excellent performance.” 64 It described critical outreach activities, shrewdly building on conclusions of reports that were not universally favorable to a new law school, remarking that “the Imwinkelried and RAND reports both noted the failure of the legal profession to represent the ethnic and cultural composition” of California. 65

In July 2000, Michael R. Gottfredson became the executive vice chancellor at UCI. Gottfredson, an experienced university administrator, was a quick study in decision-making in the UC system and had as a major priority the establishment of a law school at UCI. He had been a professor of law at his prior academic home, the University of Arizona. Gottfredson would assume leadership positions in the systemwide executive administration and in the process would become familiar with ways that academic programs advanced or were stalled. He would lead the academic development of UCI at a time of considerable resource expansion and dedication to a strategic plan for the overall development of the university. The plan resulted from the in-depth work of a number of subcommittees meeting over several months. The campus was looking to move UCI forward in a decade when growth was significant and many in the UCI community saw opportunities for increased national excellence in many fields. Within that strategic plan, professional schools would have a central focus. The law school thus was addressed, again, as a central part of UCI planning to continuously evolve as a comprehensive research university. This perspective, widespread across UCI, explains in part the considerable irritation with actions elsewhere in the system and the state to stymie what were appreciated as long-standing and well-developed plans.

B. Approval, Momentum, Resistance

On January 25, 2001, the Divisional Assembly of the UCI Academic Senate unanimously approved the proposal for a school of law at UCI. 66 The executive vice chancellor and the chancellor endorsed the proposal and it was submitted to UC Provost and Senior Vice President C. Judson King for review at the UC systemwide level. The proposal then underwent review by a number of systemwide committees with acronyms of CCGA, UCORP, UCEP, UCPB (pertaining, respectively, to graduate affairs, research, educational policy, and planning and budget). Review was extensive, sometimes critical and sometimes comparative with a UC Riverside law school proposal. 67 Committees called for

64. Id. at 42–43.
65. Id. at 44.
ever more detail on budget, relationship to graduate education, and need for UC-
educated lawyers.

Meanwhile UCI had solicited expressions of support for an Orange County
public law school from numerous entities within the county; endorsements came
in a flurry. These included major business associations, local government, the bar
and its subgroups (Celtic Bar Association, Lex Romana, the Asian American Bar
Association, etc.), virtually every large firm in the region, many small firms, and a
few highly involved solo practitioners. Along with verbal support, many of the
large firms sent statements of intent to assist the law school financially. In August
2001, the Joan Irvine Smith & Athalie R. Clark Foundation pledged one million
dollars “to be used, in connection with other University-secured funding, for the
establishment of a core collection for the library.”

UCI then revised the proposal, dated March 2001. The Academic Council of
the UC system endorsed the proposal in May 2001 and it was forwarded for
review by the California Postsecondary Education Commission, or CPEC. CPEC
is an agency which provides analysis and offers advice on education beyond high
school.

A long—and for UCI, immensely frustrating—set of interactions followed
wherein the campus tried to respond to CPEC’s concerns. Meanwhile, the chair
of the UC Academic Council, Michael Cowan, wrote to UC Provost King that “a
comparative University review of the proposals from UCI and UCR is desirable”
and offered Senate participation in the review. Thereupon Provost King asked the

approved the proposal in concept and UC Riverside then responded to the concerns the Council
identified. The Council approved the UC Riverside proposal and sent it to the California
Postsecondary Education Commission.

68. “(We understand that the collection likely will have a special emphasis on materials
relating to environmental law.)” Letter from Russell G. Allen, Joan Irvine Smith & Athalie R. Clarke

/SecondPages/CommissionHistory.asp (last visited Oct. 29, 2010). The CPEC webpage describes
CPEC as follows:

The California Postsecondary Education Commission was established in 1974 as the State
planning and coordinating body for higher education by Assembly Bill 770 (Chapter 1187
of the Statutes of 1973), Education Code Section Education Code 66900–66906. . . . The
Commission provides the legislative and the executive branches of government with advice
and information. . . . The Commission consists of 16 members, nine of whom represent
the general public, five who represent the major systems of California education: the
California Community Colleges, the California State University, the University of
California, the independent colleges and universities, and the California State Board of
Education, and two student representatives.

70. These concerns were expressed by CPEC Executive Director Warren Fox: “There is no
compelling reason to establish either School of Law within the University of California at this time.”
CPEC did find that UCI met its criteria based on academic content and quality. Letter from Warren
H. Fox, Exec. Director, Cal. Postsecondary Educ. Commission, to C. Judson King, Provost and
Senior Vice President, Academic Affairs, UC (June 20, 2001).

71. Letter from Michael Cowan to C. Judson King, Provost and Senior Vice President,
Academic Affairs, UC (July 5, 2001) (on file with author).
Executive Director of CPEC to temporarily suspend review of the two proposals, saying, “It is prudent to wait for an improvement in California’s economic outlook before requesting that the Commission continue its review.”

Then, Chancellor Ralph Cicerone wrote UC President Robert C. Dynes requesting to meet to discuss a law school at UCI. I was in attendance at one of these meetings. The president seemed taken aback by the directness of our request for action on the proposal.

In December 2004, UCOP announced that it intended to convene a study group to consider the process of systemwide planning of professional schools. The frustration level in the administration and Senate at UCI increased even further. As one UCI Work Group member noted in briefing the Administration, “it seems UCOP will keep conducting studies until it gets the answer it wants at any particular time.”

Efforts to move the proposal forward took various forms. One unfortunate episode involved the impending move of the California Court of Appeal (Fourth District) Courthouse in Santa Ana. In 2003, UCI was approached by some members of the bench and supportive California politicians about its interest in hosting the new court building. Campus leaders thought that the cooperative effort would be good for overall relations with the bench and might also restart activity for the UCI law school. If the campus was home to the court with its extensive library and other facilities, momentum for more legal initiatives might develop. What campus leaders did not know was that Santa Ana’s attempts to keep the court in the newly redeveloping city were energetic. After hearings in which UCI was portrayed in some testimony as an elitist institution trying to divert the development plans of a struggling, poor city, the Santa Ana site was selected.

Meanwhile, in attempts to associate UCI with legal scholarship the UCI Law Forum was established and a number of academics and practitioners were invited to give formal lectures. Among those who presented were then University of Chicago Professor Cass Sunstein and UC Berkeley Professor John Yoo.

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72. Letter from C. Judson King, Provost and Senior Vice President, Academic Affairs, UC, to Warren H. Fox, Exec. Director, Cal. Postsecondary Educ. Commission (Oct. 25, 2001) (on file with author). See also Memorandum from Ralph J. Cicerone, Chancellor, UCI, Statement in Response to the CPEC Review of UC Irvine’s Proposed School of Law (Sept. 20, 2001) (on file with author). After a considerable period of having the CPEC review on hold, when the UCI proposal was allowed to go forward, the Commission took an antagonistic view of it. (It had unfavorably compared the UC Irvine proposal to UC Riverside’s. Marla Jo Fisher, UCI Law School Plans Undercut, O.C. REGISTER, Sept. 19, 2001, (Local), at 1.)


74. See Memorandum from Planning & Budget, Possible Land Sale to Court of Appeal (Feb. 10, 2005) (on file with author). On January 29, 2004, UCI submitted a response to the “Request for Information” issued by the Administrative Office of the Court. On January 31, 2005, after the review process had narrowed the choice to a small number of possible sites, UCI submitted a review proposal which would effect a land sale of approximately 2.5 acres of land across from the UCI Research Park. Drawings of a specific site were created.
Invitations were also extended to high-level officials in the US Department of Justice and others, including Chief Justice William Rehnquist who politely declined the invitation in winter 2002. Foreshadowing future decisions, one of the experts suggested a leading presenter for the Forum: “a good person all around, who knows something about all these issues [i.e., the Constitution and surveillance] is Erwin Chemerinsky at USC.”

C. Academic Council and UC Regents

Despite the strong inertia in the UC system to maintain the status quo by studying need, nonetheless the UCI proposal went forward. Michael V. Drake, MD, was appointed chancellor of UCI in July 2005. Drake too had as a major priority moving the UCI Law proposal through systemwide review. In his first month as chancellor, his office wrote: “Chancellor Drake is very interested in reigniting the law school pursuit, and wants to begin talking about it with a small group.” Not only was Drake personally committed to the new school, but he also had knowledge of the UC system bureaucracy and experience within it, having served for five years as vice president for health affairs at the University of California’s Office of the President. Over the next two years, he utilized his personal knowledge and experience to successfully move the proposal through systemwide. Drake also had deep and close contacts with the Office of the President and the Regents, relationships which would prove critical in the ultimate systemwide approval. The chancellor also was aware of and became increasingly familiar with opposition to a new law school in several arenas in the state of California.

On January 3, 2006, Chancellor Drake forwarded to UC President Dynes “a new overview of our proposal for establishing a School of Law” at UCI pointing out that the proposal was originally submitted in February 2001 and revised in March 2001. On July 6, 2006, the Report of the Ad Hoc Committee to Evaluate UC Law School Proposals was issued. Two months earlier UC Provost Hume had appointed the committee to address the strengths and weaknesses of revised proposals for law schools at UC Irvine and UC Riverside. The committee

75. Email from Robert Post to author (Oct. 25, 2001) (on file with author).
76. Email from Carolyn Hunt to Michael Poston (July 19, 2005) (on file with author).
77. I too followed these positions within segments of UC, in some private universities, among some faculty, and at times in stages of review and comment. The UCI archives contains some of these perspectives. See supra note 1.
79. See Task Force on Planning for Doctoral and Professional Educ./Legal Educ. Advisory Subcomm., Report of the Ad Hoc Committee to Evaluate UC Law School Proposals: Report on UC Irvine Law School Proposal (July 6, 2006) (on file with author). Committee members were Christopher Edley, Dean and Professor of Law, UC Berkeley; The Honorable David B. Flinn, Judge of the Superior Court, County of Contra Costa; Pamela J. Jester, Director, Continuing Education of the Bar (CEB), State Bar of California; Duncan Lindsey, Professor, School of Public Affairs, UCLA;
unanimously and enthusiastically recommended approval of the UCI proposal. It addressed several criteria that had been established for evaluation of both the UC Irvine and the UC Riverside proposals. It found that a law school at UCI would address the inequity in access to public law schools that currently favors Northern California; it would produce a high caliber of lawyer; it would be positioned to prepare students to help underserved communities; and it would help meet one of UC’s fundamental responsibilities as a public research university: to provide legal education.80

Furthermore, UCI’s proposal met the committee’s criteria related to access, adequate planning, and creation of an exciting campus intellectual life. The UCI plan had strong community support (another criterion)81 and had no significant opportunity costs, since, as the committee noted, the original academic plan for UCI included a law school, and the school would be developed out of projected enrollment growth.82 Uncharacteristically for a UC report, the committee ended by saying: “we can only urge that once The Regents have acted, the completion of this decades-long gestation warrants a memorable celebration.”83 The Committee reported it was “[s]till reviewing the UC Riverside Proposal.”84

The systemwide Academic Council endorsed the proposed law schools at both Irvine and Riverside in August 2006. The endorsement was “based on the recommendation of the Coordinating Committee on Graduate Affairs (CCGA)” which according to UC procedures needed to review the proposals.85 In November of that year, the UC Office of the President recommended to the Regents the establishment of a law school at UCI, and at their meeting that month the Regents approved the UCI proposal.

Once again, CPEC did not concur with the UCI proposal. In September 2006, following its staff recommendation, CPEC voted 8–3, finding that the state had enough law schools to meet demand for lawyers; UCI had failed to satisfy criteria for a new school in the areas of societal need, program duplication, and total cost.86 Two months later the Regents approved the position and salary for Karl S. Pister, Chancellor Emeritus, UC Santa Cruz.

Karl S. Pister, Chancellor Emeritus, UC Santa Cruz.

80. Id. at 4–5.
81. Id. at 6.
82. Id. at 8.
83. Id.
84. Id. at 1.
86. See UCI, Academic Planning, Additional Information Submitted in Support of the Proposal to Establish a School of Law at the University of California, Irvine: Response to the CPEC Draft Report of September 2006 (submitted with an operational budget) (Oct. 23, 2006) (on file with author). The UCI responses to the CPEC Review were comprehensive. They addressed the distinctive programmatic features of UCI Law (“opportunity to pursue a first-rate legal education on the campus of a major public research university . . . distinguished by its emphases on the themes of emerging technologies and globalization of the economy”); joint degrees and inter-professional education; service to underserved communities and population; distinctive features of the campus and the region. The responses included
the dean of the School of Law at UCI, and in July 2007 the Regents formally voted to recognize CPEC’s objections but nonetheless proceed with the law school.

In parallel with faculty actions, other units within UCI were preparing for a major announcement and promotion of the new law school. An internal memo, “Launch of School of Law at University of California, Irvine” addressed the “Business Objectives,” “Marketing Objectives,” and “Message Platform” of the UCI School of Law.87

In August 2007, Donald Bren, the chairman of the Irvine Company, donated twenty million dollars to the law school, which for a short time was named “Donald Bren School of Law.” But the School, in line with others in the UC System, would ultimately be called the University of California, Irvine School of Law. The others are UC Berkeley School of Law, UC Davis School of Law, UCLA School of Law, and the affiliated UC Hastings College of the Law.88

IV. THE FIRST DECISIONS

A. The Founding Dean

Some members of the now-defunct Work Group and others then turned UCI’s attention to the search for a first dean. Merage Business School Dean Andrew Policano chaired the search group. The Search Committee first decided against using a “headhunter” after reviewing several proposals from consulting firms, most of which had no experience with law searches. For advice on selection of a law school dean the Committee called in for further consultations several highly respected law school deans and high level university administrators.

A short list of dean candidates was compiled; each was interviewed either in person or via teleconference for several hours, each dean Search Committee member having been assigned the same scripted questions to ensure that all areas of expertise were addressed.

A very short list of candidates that the Search Committee considered superior was forwarded to the provost. Soon thereafter, on August 16, 2007, an offer was made, subject to regental approval, to Erwin Chemerinsky, then at Duke and for many years at the University of Southern California. Professor Chemerinsky accepted the offer on September 4, 2007.

How will objective historical accounts, if any could be written, analyze the current statistics, addressing the CPEC criticism on absolute need. UCI updated information presented in the RAND Report, and addressed the number of existing and proposed programs in the field and the total cost of the UCI program.

87. Memorandum from Linda Martin et al., Porter Novelli, Launch of School of Law at University of California, Irvine (June 1, 2006) (on file with author).
decisions regarding the offer and rescission (September 11, 2007) and the subsequent renewed offer and final hiring (September 17, 2007) of the first dean? This is not the place to do that analysis. However, about the decisions the following might be considered factual.

On August 16, 2007, Professor Chemerinsky published an editorial in the Los Angeles Times in which he advocated California’s rejection of the U.S. Attorney General’s proposed regulation regarding the statute of limitations in habeas corpus cases. Chancellor Drake reportedly considered this a factor in his decision to withdraw his offer. “[W]e had talked to him in June about writing op-ed pieces and that he would have to focus on things like legal education in this new role. . . . It wasn’t the subject, it was its existence. What he said doesn’t matter.”

The interest in UCI Law, combined with what became a strong connection between the chancellor’s decisions and what many observers considered issues of academic freedom, resulted in major media attention. On September 13, 2007, Chancellor Drake appeared before hundreds of faculty members at a hastily called special meeting and stated, “My decision not to hire [P]rofessor Chemerinsky had nothing to do with academic freedom or the infringement of academic freedom in any way.” In an interview Chancellor Drake said: “It was the most difficult decision of my career.”

On September 14, 2007, Chancellor Drake wrote: “I made a management decision—not an ideological or political one—to rescind the offer to Professor Chemerinsky. The decision was mine and mine alone.” At the same time Professor Chemerinsky stated that the chancellor had told him that significant opposition to his hiring had developed: “We just agreed that in the public statement, we’d say that I had proved too politically controversial.”

On the weekend of September 15, 2007, Chancellor Drake traveled again to

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89. As an active player during this period in the Academic Senate (and earlier the administration), I am not the person to attempt it.
95. Therolf & Weinstein, supra note 92.
97. Therolf, Trounson, & Paddock, supra note 94, at A1. The Los Angeles Times reported on November 9, 2007, that a number of email messages to Chancellor Drake’s office were received in the aftermath of the rescission. These ranged from support for the chancellor’s judgment to a decision to end financial contributions to UCI. Garrett Therolf, Tony Barboza & Henry Weinstein, UCI Gave Bren a Say in Dean Selection, L.A. TIMES, Nov. 9, 2007, at B1.
North Carolina. Chemerinsky wrote an email on the following Monday: “After meeting with Chancellor Michael Drake at length this weekend, I accepted his renewed offer. He provided me the greatest possible assurance of academic freedom for the dean and all faculty.”98 Soon thereafter, Drake and Professor (and now Dean-designate) Chemerinsky issued a joint statement: the two pledged their commitment to academic freedom and said, “Many issues were addressed in depth, including several areas of miscommunication and misunderstanding.”99

To me, the event is like a Rorschach test. People see in the chancellor’s and dean’s actions very much what they bring to them. In any event the decision is truly history in the colloquial sense of that term. The dean and the chancellor became somewhat of a mutual admiration society, teaching a course together and speaking of one another’s accomplishments in the most positive terms.

B. Funding

Funding for the law school came in part from private gifts to support faculty chairs and tuition for the first class for three years and the second class at fifty percent for three years. However, Provost Gottfredson had for several years set aside or banked FTE in anticipation of the needs of the School, and considerable contributions of staff time and UCI resources were essential for creating the new professional school. Overall funding was to come from state enrollment growth funding and private contributions and eventually from student fee revenues. The California Legislature “did not appropriate any state funds specifically for the planning and startup costs of the School.”100

C. Facilities

Over the years the University had discussed the siting of a new law school and various places were considered, ranging from the grassy knoll near the Business School and the School of Social Ecology to the north campus. As it was becoming clear that the School would be approved, the UCI administration changed its orientation and the decision was made to remodel existing space on campus—the idea being that fundraising for the law school would be better done for scholarships, chairs, and other non-brick-and-mortar uses. A two-wing building, Berkeley Place, on the campus’ east side, once the home of entities as diverse as Family Fitness and the Academic Senate, was chosen as the site. The dean’s suite, several faculty offices, the library, and some classrooms were ready at

the time of the arrival of the first class, and additional offices, student spaces, and classrooms were completed by the time of arrival of the second class.

D. Early Actions

The first year of the operation of the School of Law saw the hiring of the founding faculty, the expansion of the original faculty core, the creation of a first-year curriculum, the admission of a first-year class, and almost countless other tasks that are necessary to bring about a new school. Those will be chronicled in a second segment of UCI history where some words will also be given to evaluation of the extent to which “the law school of the twenty-first century” is meeting its goals. Visions of modern legal education such as those expressed in the Carnegie Report (emphasizing skills, ethics and public service) can be translated into proposals and innovative curricula. An internal research project is monitoring and studying the extent to which they are being realized in practice at UCI. It is far too early to conclude very much. What is clear is that the first two admitted classes have been nationally competitive and on indicators of excellence would be admitted to first-tier law schools. Also clear is that the first faculty hires are diverse and have national reputations as scholars and teachers, and that early efforts to implement the vision of the proposal have begun: the funding of clinics, the creation of externships and internships, and the development of an innovative curriculum focusing on skills, public service, writing, and legal reasoning.

Dean Chemerinsky’s vision for the law school was ambitious. Among his goals: “We want to be a top twenty law school as soon as we can. . . . We have this wonderful opportunity to create the dream law school. . . . I don’t think law schools spend time preparing students for the practice of law. We can do a better job. I want every law student to have some clinical experience with at least one client before they graduate. . . . I want to teach fact investigation. . . . I would like to have smaller classes and multiple examinations.”

101. Founding faculty, with their previous institutions indicated in parentheses, are: Dan L. Burk (Minnesota), Linda Cohen (UCI), Joseph DiMento (UCI), Catherine Fisk (Duke), Carrie Hempel (USC), Trina Jones (Duke), Elizabeth Loftus (UCI), Carrie Menkel-Meadow (Georgetown), Rachel Moran (Berkeley), Ann Southworth (Case Western), Beatrice Tice (Toronto), Grace Tonner (Michigan), Kerry Vandell (UCI), and Henry Weinstein. At the same time senior executives were brought on: Rebecca Ávila (USC), Rex Bossert (National Law Journal), Charles Cannon (UCLA), and Victoria Ortiz (Berkeley). See Press Release, UC Irvine Law School ‘Dream Team’ Named, UC IRVINE TODAY (July 10, 2008), http://www.today.uci.edu/iframe.php?p=/news/release_detail_iframe.asp?key=1780.


V. CONCLUSION

The story of the creation of UCI Law is one of the development of a new academic unit in a multi-campus, highly bureaucratized institution. Without the focused efforts of certain “champions” UCI Law may well have been lost within the inertia of a system that did not need to take risks and within a political, academic, and fiscal environment which made the “no action” alternative safe and highly probable.

The first period of UCI Law history teaches some lessons about creating new organizations in an institution of great complexity. First, although there are natural constituencies for initiatives like a law school these do not always translate into dependable ongoing activity to bring about change. Most of the people in those constituencies (in our case the local bar and businesses, law firms both small and large, future law students and faculty, university planning personnel, etc.) do not have the motivation, time, or resources to focus on something as idiosyncratic as one academic entity. It is not in the job description or area of responsibility of many, and for those for whom academic planning is a profession, many competing ideas are constantly in play.

Creation of new entities must come within an environment of satisfaction with existing provision of services, immense competition for resources needed to create new places, and changes in leadership and administration at all levels. Opposition, indifference, and hostility faced the people who promoted UCI Law over the decades of UCI’s history. Champions included those with strong interests in this academic initiative and, in some cases, with the opportunity to pursue those initiatives while remaining engaged in other careers.105

Independent of the above, the “constants” of actual resource constraints are at times at work. The macro cycles that seem to define economic health also influence strongly the responses to efforts perceived as distributing or reallocating resources. The University of California saw these cycles in the 1970s and at the beginning of the 1990s and the new century. It may also be the case that resource constraints became a rationale for postponing a contested decision. With direct competition between sister campuses, with negative analyses from a meta-level analytical agency (CPEC) that had only advisory authority but some historical significance, the systemwide choice not to take action on a new law school may have been a strategy appreciated as generating less controversy than going forward with a selection.

But just as opposition at times coalesced throughout the long history of

105. Champions at UCI over the decades included William Parker and, in more recent years, the “Five Michaels”: Chancellor Drake, Provost Gottfredson, Vice Provost Clark, Associate Executive Vice Chancellor Arias, and Director Poston. Outside of the University, continuing exceptional support was provided by Senator Joe Dunn, the Honorable Andrew Guilford as both attorney and judge, Gary Singer, Tom Malcolm, Senator Dick Ackerman, and Mark Robinson, and a handful of other loyal friends of UCI in the bar.
consideration of a new law school in the UC system it was also often inchoate. This made possible an effective set of initiatives among a determined, small group of supporters for whom a law school at UCI was a major, if not the major, academic or political goal. Senator Joe Dunn, a leading proponent in California government, listed getting a law school at UCI as one of his two public service goals. This suggests some of the considerable support, often pent up, for UCI Law.

Finally proponents of new initiatives are aided by in-depth knowledge of the environments in which they are working. UCI is a very complex, highly bureaucratized major research university which gets important input on academic planning from both faculty and administration. The fact that UCI Law supporters knew where and when to act and when to wait, even if impatiently, made it possible to achieve the outcome that now seems inevitable but that for decades seemed to many to be unrealizable.

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A Law School for the 21st Century: A Portrait of the Inaugural Class at the University of California, Irvine School of Law

Carroll Seron*

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I. INTRODUCTION

Who are the lucky students who decided to be a part of the inaugural class at the University of California, Irvine School of Law (UCI Law)? Why did these highly qualified individuals decide to take a chance at a new school? In a word, many decided to come to UCI Law because they were drawn to the opportunity of being in the first class at a law school that seeks to reshape the curriculum of legal education.1

In this article, I examine these students’ decision in the context of the twin challenges of legal education. On the one hand, a large body of research on professional socialization suggests that UCI Law students’ values, commitments, and career trajectories will echo their counterparts at similarly situated, highly selective law schools: while many students begin their legal education with plans to be public interest lawyers, by the end of the first year their sights are set on careers

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*I Professor of Criminology, Law & Society, University of California, Irvine. I am grateful to Steven Boucher for preparing tables, Brian Williams for library research, and Xenia Tashlitsky for all of her hard work editing the manuscript and sticking with me to get the footnotes in order.

1. See infra pp. 64–65. All students also received scholarships to cover tuition for three years, assuming they remained in good academic standing.

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in corporate law, with the all-important caveat that they plan to keep their options “flexible.”\(^2\) On the other hand, an equally large body of research suggests that law schools do not operate in a vacuum, but are highly susceptible to institutional pressures to conform to the “taken-for-granted” practices of legal education; thus, while UCI Law begins with a faculty committed to an innovative approach to legal education, the pressures of accreditation, rankings, and professionalism itself may undermine their genuine aspirations to develop an alternative model.\(^3\) Of course, it is far too early to draw any conclusions about where the students at UCI Law will practice or whether the school itself will succeed in meeting its goal. Thus, my task in this article is much more modest.

First, I review the literature on professional socialization, focusing on the “match” between job seekers and opportunities. Second, I briefly describe the points of innovation in the curriculum at UCI Law, focusing on the role of clinical education in shaping a distinct identity.\(^4\) In the third part of this article, I present descriptive findings from a survey of the inaugural class at UCI Law; we plan to revisit these students as they launch their careers, so the goal in presenting these findings is to whet the reader’s appetite.

To be sure, the challenges of launching a new law school, particularly in a recessionary economy, are many. Equally, today’s law school graduates are facing challenges finding a job in the current economic climate; whether these challenges will be with us in 2012 when UCI Law graduates its first class remains an open question.\(^5\) But there is much to suggest that this thoughtful experiment is worth watching for the promise it holds in meeting many of the legitimate criticisms of legal education.\(^6\)

II. PROFESSIONALIZATION: LEARNING TO BE A LAWYER

It is a truism among scholars of the legal profession that law students begin their education with the goal of doing “good works” in such areas as criminal, family, environmental, or poverty law. But, the truism goes, by the end of the first year the vast majority of these same students have set their sights on corporate


\(^3\) Carrie Hempel & Carroll Seron, An Innovative Approach to Legal Education and the Founding of the University of California, Irvine School of Law, in Legal Professionalism in Crisis 170 (Scott L. Cummings ed., 2011).


\(^6\) See infra pp. 57–59 (describing, e.g., the school’s innovative clinical learning requirements).
practice, with the proviso that they plan to "keep their options open." Of late, it has been argued that the culprit in corrupting students' aspirations is students' educational debt; as students watch their debt mount, they claim that they cannot afford to take a public interest job, repay their loans, and begin to take on the responsibilities of adulthood. A closer look at this truism about student aspirations and debt reveals, however, a more nuanced picture.

Professional socialization unfolds in the immediate context of students' educational experience as well as in the broader context of the supply of and demand for various kinds of positions in the legal marketplace. Students are initiated into the world of law at school, where they are introduced to the knowledge and language of law, the skills and techniques of practice, and the values, ethics, and meaning of being an officer of the court. This experience unfolds, however, against the practical backdrop of getting a job upon graduation. I begin, then, by sketching the landscape of the supply of legal positions across various sectors of the profession.

The supply side of the equation: Over the last several decades, the size of the legal profession has grown enormously, from 355,242 lawyers in 1971 to 857,931 in 1995 to 1,180,386 in 2009. The growth in the size of the profession is, however, skewed toward positions in the for-profit side of the legal labor market. Kornhauser and Revesz describe this landscape, comparing the for-profit and non-profit labor market and average starting salaries in these sectors. For-profit positions refer to jobs in law firms, including the full range from solo and small firms to large, elite corporate firms and general counsel positions in corporations; non-profit positions refer to jobs in state, local, and federal government, legal services, public interest organizations, and legal education. A comparison of these sectors from 1960 to 1991 shows that the lion's share of positions, with some slight variations, has been in the private sector. The pattern remains for the period of 1991 to 2009. Within the for-profit sector, there has been a consistent

10. Kornhauser & Revesz, supra note 8, at 839.
pattern of growth in large firms and a concomitant increase in starting salaries at elite firms, particularly in the key cities of Chicago, Los Angeles, New York, and Washington, D.C.\(^\text{12}\)

To benchmark comparison to non-profit salaries, Kornhauser and Revesz use the starting salary of an assistant U.S. attorney. The discrepancy in the starting salaries of U.S. attorneys and large-firm lawyers remains significantly wide: in 2009, the median starting salary of an attorney at a large firm (251 or more lawyers) in Los Angeles was $160,000,\(^\text{13}\) whereas the starting salary of an Assistant U.S. Attorney was $49,544.\(^\text{14}\) Overall, there is greater opportunity for employment for lawyers in the for-profit sector, and there is an increasing inequality, as measured by income, between the sectors. Put differently, income levels in the non-profit sector (while always lower than for-profit jobs) have simply not kept pace with their for-profit counterparts.

The question arises whether debt burden at graduation is another factor pushing law students toward for-profit jobs where, as we have seen, the opportunities for employment are greater and the salaries are higher.\(^\text{15}\) Over the last two decades, there has been a rapid rise in law school tuition and, with that, law student debt.\(^\text{16}\) The tuition-debt trend has led to growing concern that debt is driving students away from careers in public service and government.\(^\text{17}\) But, as McGill finds, corroborating the earlier research of Chambers and Kornhauser and Revesz, “educational debt is not a significant predictor of whether or not students begin their legal careers in government or public interest jobs.”\(^\text{18}\) McGill examines the impact of debt from two perspectives, first by analyzing the impact of the legal labor market on student placement, and second by analyzing students’ attitudes and expectations toward employment. Again supporting findings from


\(^{13}\) How Much Do Law Firms Pay New Associates?, supra note 12.


\(^{15}\) See generally JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS 111–13 (1982); JOHN P. HEINZ ET AL., URBAN LAWYERS 57–60 (1992). Research has shown that the mobility patterns of law school graduates are highly stratified. On balance, graduates of local and regional schools are less likely to be recruited by large and even medium-sized corporate firms than their counterparts from elite law schools. As measured by LSAT score and college GPA, the profile of the inaugural class at UCI Law tracks with their counterparts from other elite law schools; see pp. 61–62 infra. Thus, it is reasonable to assume that UCI Law graduates will enjoy a range of employment opportunities.

\(^{16}\) McGill, supra note 7, at 678.

\(^{17}\) Id.

\(^{18}\) Id.; see also Kornhauser & Revesz, supra note 8, at 829; David Chambers, The Burdens of Educational Loans: The Impacts of Debt on Choice and Standards of Living for Students at Nine Law Schools, 42 J. LEGAL EDUC. 187 (1992).
Kornhauser and Revesz, McGill finds that

[D]ebt did not have a significant impact on the likelihood that schools’ students would enter the public sector, but other economic factors were influential. The salary gap [between for-profit and non-profit jobs] had a highly significant effect on students’ entrance into the GPI [government and public interest] sector . . . . The other significant economic factor was the . . . relative supply of GPI jobs. Students who graduated from schools located in states that employed a relatively higher proportion of lawyers in the public sector were more likely to send their graduates into that sector.19

Findings from surveys to a representative cross-section of graduates (i.e., from elite, prestigious, regional, and local law schools) reveal that, after controlling for debt, students who placed a high value on working in the GPI sector and then took summer jobs, particularly during the second summer, in that sector were significantly more likely to enter the GPI sector at graduation.20

In addition to the growth of the for-profit sector relative to the non-profit sector and the growing inequality between these sectors as measured by income, today’s law school graduates will experience significantly more job changes21 and specialized practices22 than their counterparts of earlier generations. As Heinz, Nelson, Laumann, and Sandefur show, increasing specialization and job changing is fueled, in large part, by the enormous growth in the size of large law firms over the last several decades. Growth in firm size has resulted in recruitment of associates from a wider spectrum of law schools; given the static size of the class of elite law schools and the concomitant growth in law firms, it was inevitable that firms would begin to recruit from a wider spectrum of backgrounds.23 While a larger proportion of the profession will work in a large law firm at some point in their careers, they are less likely to become partners and more likely to experience numerous job changes compared to earlier generations. Closely related to the

22. HEINZ, supra note 21, at 35–36.
23. Of course, the changes in backgrounds of elite firm lawyers are not only reflected in the wider representation of a cross-section of schools. Equally, the profession has undergone enormous changes in its racial and, especially, its gender composition. Not only is the profession more diverse, but minority and female graduates, at least at the entry stage, are recruited from law schools to large firms. The picture gets much more complicated, however, when we turn to an analysis of the probabilities of promotion to partnership. See HEINZ ET AL., supra note 21, at 73; Monique R. Pinkus-Payne et al., Experiencing Discrimination: Race and Retention in America’s Largest Law Firms, 44 LAW & SOC’Y REV. 553, 585 (2010).
increase in job changes, legal practice is today more specialized by areas of law—for example, taxation, patents, immigration, or entertainment law. Even before the shake-up in the legal labor market on the heels of the Great Recession, there was a lot more change in career patterns compared to earlier generations. How increasing specialization will affect career patterns remains, however, an open question: it is simply too soon to sort out whether specializations, and which specializations, will be advantageous or disadvantageous in the next decade.

There are several important messages to take away from this sketch of the supply side of the equation. First, the growing income inequality between the for-profit and non-profit sectors of the legal labor market coupled with the absolute growth in for-profit relative to non-profit jobs has real consequences for the proportion of students who opt for public sector jobs. Second, regardless of debt burden, those students who enter law school firmly committed to public sector work and stay the course by taking summer jobs (particularly during the second summer) in the government/public interest sector are significantly more likely to begin their careers there. Third, and quite importantly given the fiscal crises facing most states across the country, “the biggest barrier” is not the lack of demand for government and public interest jobs by graduates, but rather the short supply of such jobs. Fourth, regardless of where graduates begin their careers, they will experience significantly more job changes and work in more specialized fields of practice than earlier generations.

Becoming a lawyer: Sociologists have long demonstrated that professional work requires training in the technical expertise of a particular field, the skills and habits of mind to work effectively with clients, and an appreciation of the special ethical responsibilities that come with the privileges of professionalism. Indeed, a large body of research consistently demonstrates that professional work requires the intangible quality of exercising discretionary judgment in what are often messy, complex situations. Technical expertise is, therefore, a necessary but by no means sufficient foundation for a successful career in the law, or any profession for that matter.

Professional schools, including law schools, have struggled with finding an appropriate balance between what the most recent Carnegie Report, *Educating Lawyers: Preparation for the Profession of Law* (hereafter the Carnegie Report), describes as the three apprenticeships of legal education: (1) intellectual/cognitive, or the knowledge that derives from reading and learning the law; (2) expert practice, or the hands-on understanding and challenges of working with clients;
and (3) identity and purpose, or the development of a commitment to the special qualities of what it means to be an officer of the court.\(^\text{28}\) Assessing the current status of legal education, the Carnegie Report finds that, on balance, law schools continue to give much greater emphasis to an apprenticeship in intellectual/cognitive development and tend to marginalize apprenticeships in expert practice and identity and purpose. Over the last several decades, law schools have expanded their offerings in clinical legal education and made coursework in legal ethics a requirement, but these fundamental aspects of becoming a well-rounded practitioner do not receive the attention they require.\(^\text{29}\)

Against this backdrop, how, then, do students construct a professional identity? As Schleef notes, the “Holy Grail” among elite law students has been the well-documented pattern that students begin their studies with a commitment to “social justice” and end up opting for first jobs in corporate law firms.\(^\text{30}\) But, as Schleef goes on to note, students’ initial reasons for studying law are often more complex. While they are interested in “altruistic” careers, they are more often than not also concerned with the practical, including getting a job that will allow them to live comfortably and to do work that they will find interesting over the course of a long career. There are, her findings show, a sub-group of students who begin law school with a primary commitment to social justice issues (and this group tends to tip more toward women), but for most, there is a set of mixed motivations that capture students’ reasons for selecting law school. Importantly, and as noted earlier, students are concerned with remaining “flexible” about their future career plans; students do not so much reject their altruistic concerns, but rather reconstruct how they will go about fulfilling those commitments.\(^\text{31}\)

If students enter law school with a “lay mythology” of the law that is gleaned from television, novels, and movies, they graduate with a new mythology, one that is anchored in the values of the legal profession itself.\(^\text{32}\) In his thoughtful study, *Making it and Breaking It*, Stover describes the key characteristics of the first year of law school and identifies what might be described as the latent and manifest messages of the first-year ritual. It is a rite of professional passage that the first year of law school is highly stressful and, indeed, is designed to be so.\(^\text{33}\) Five “interrelated factors” contribute to this stress. First, students are called on to learn a new, often arcane body of knowledge; this is stressful in itself. Second, he argues, there is, as a general matter, relatively limited feedback to students about

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29. Hempel & Seron, supra note 3, at 178.
30. SCHLEEF, supra note 2, at 35.
31. Id.
32. STOVER, supra note 7, at 77–81.
33. Id. at 46; see also SCOTT TUROW, ONE L (1988) and MARTHA KIMES, IVY BRIEFS: TRUE TALES OF A NEUROTIC LAW STUDENT (2007) for firsthand accounts, as well as the iconic film, THE PAPER CHASE (Twentieth Century Fox Film Corp. 1973).
the quality of their work, which tends to create great uncertainty and anxiety among students about how they are doing by way of mastering these new materials. Third, though the Socratic method is not the only pedagogical style used by law faculty these days, it remains nonetheless popular with many. As a result, students find themselves in a situation where they confront the “daily possibility of exposure and embarrassment” for not knowing how to answer a question. Fourth, all students admitted to a highly selective law school have known academic success; in law school, they are confronted with equally successful counterparts and “must become accustomed to being ‘below average.’” Finally, there is the competitive aspect of law school as students seek to impress their peers and their teachers. The net effect of these first-year experiences “direct[s] beginning students’ attention toward their studies, leaving little psychic energy for [thinking about] long-term concerns.” 34 In a word, first-year law students are simply worried about getting through the hurdle and bracket concerns about why they are there.

Students emerge from the first-year ritual understanding that their all-important task is to master “systematic, analytical thinking” to solve complex legal problems, or to learn to “think like a lawyer.” In their classes, Stover finds, professors place a “repeated, if unintentional emphasis on the pecuniary aspect of legal practice” that is often heard through “‘green humor’” or poking fun at the profession’s preoccupation with earnings and money. If the intent of these often more liberal professors is to build rapport, Stover notes, his findings suggest that students hear the humor quite differently and begin to identify with a profession that places a high value on earning a lot of money. In subsequent business-oriented courses, students, who began their academic careers thinking that they would dislike these classes, report that they are surprised to learn that they actually enjoy the materials and the intellectual challenge; further, there is the often practical constraint that law schools offer more and a wider variety of courses in business-oriented fields. The skew toward starting their careers in a corporate firm is often cemented through summer jobs, where they find that they identify with and genuinely like their mentors at these work sites. Together, these experiences—socialization into the legal “mythology” that more intellectual rigor is required in specializations related to business, the impact of subtle jokes about money and law, and work experiences at large firms—underscore for these neophytes “the importance of money, prestige, and career advancement” as pivotal professional values.

It should come as little surprise that students’ values and commitments will change over the course of their legal education; indeed, it would be surprising if it were otherwise. Across a wide range of studies, the pattern of this change is quite consistent, from what might be described as a “popular” image of the altruistic

34. See also STOVER, supra note 7, at 43–67.
lawyer to a “realistic” image that is shared by those who are members of the legal fraternity (or sorority).35 These studies also make clear that law schools are by no means innocent in shaping this transformation in values and orientations. Finally, and despite their three years of education, students share a concern that they are not quite ready to enter the world of work and so view their first job as part of their education, or a more thorough apprenticeship in practice; many reach the conclusion that the best place to acquire an apprenticeship in practice is at a large firm with the resources to mentor and support them in the early phase of their career. In light of the patterns of legal employment and relative salary differentials, the increased emphasis on specialization in legal practice, and findings from the Carnegie Report’s assessment of legal education, students’ decisions about where best to launch their careers may not be so much a sign of cynicism as realism and, indeed, professionalization.

III. A LAW SCHOOL FOR THE 21ST CENTURY: THE FOUNDING OF THE UC IRVINE SCHOOL OF LAW

While law schools have little to no control over the legal labor market and the relative salary differences between for-profit and non-profit jobs, they do play a powerful role in shaping students’ socialization into the profession. Little has changed in the structure and design of legal education since the late nineteenth century, when Dean Langdell of Harvard Law School (HLS) devised a model of “teaching from casebooks in relatively large classes.”36 While the HLS model is cost-efficient and effective for teaching students how to analyze a legal question, it falls short of the mark for the many other skills required of a lawyer starting practice in the early twenty-first century.37

The opening of a new School of Law at the University of California, Irvine presents an opportunity to revisit the topic of professional socialization. The goals of UCI Law are captured on its website, which states, “UCI Law seeks to create the ideal law school for the 21st century by doing the best job in the country of training lawyers for the practice of law at the highest levels of the profession.”38 As the first new law school at the University of California in forty years, UCI Law recruited a law faculty from among the best schools in the country and a first-year class with a student profile comparable to top-twenty law schools. As Dean

35. Erlanger et al., supra note 20, at 860.
36. Erwin Chemerinsky, Rethinking Legal Education, 43 HARV. C.R.-C.L.L. REV. 595, 595 (2008); see also Hempel & Seron, supra, note 3.
38. About UC Irvine School of Law, UC IRVINE SCH. LAW, http://www.law.uci.edu/about_uci_law.html (last visited Sept. 6, 2010). Making the construct of practice the centerpiece of the UCI School of Law is distinct at this tier of legal education.
Chemerinsky states, “Our goal and the university’s goal was to be a top 20 law school from the moment we open our doors in August [of 2009].” In sum, the founding goals of UCI Law are to design a curriculum that places the concept of practice at the center of legal education and to be positioned among the top tier of law schools in the country.

The founding faculty at UCI Law have designed a curriculum that, it believes, is more responsive to the array of analytical tools required of legal practice. Perhaps the most innovative step, however, is the central place that will be given to the concept of practice and experiential learning, broadly defined. Indeed, in a step distinct from requirements at top-twenty law schools, the faculty reached the somewhat controversial decision to make a clinical course a requirement for graduation. The clinical requirement is, moreover, part of a broader emphasis on practice and hands-on experience that is woven into various facets of the curriculum.

Taking a cue from medical education, where students take clinical courses beginning in their third or fourth year, if not earlier, the curriculum at UCI Law will introduce practice skills beginning in the first year. For example, during the first year, students are required to take a Lawyering Skills course that introduces them to bread-and-butter requirements of legal research, writing, and analysis, as well as practice-oriented skills such as fact investigation, interviewing, counseling, negotiation, oral advocacy, and document drafting. During their first year, students also take a course in the Legal Profession where, among other things, they are required to interview a practitioner and relate his or her work experience to the scholarly literature. Building from course work, students get their hands “dirty”: in the second semester of Lawyering Skills, students move out of the classroom into practice settings, where they conduct intake interviews of actual clients for legal service organizations in Orange County. Additionally, each student is assigned both a junior and senior attorney mentor and is required to spend a

39. Id. For a further discussion see Hempel & Seron, supra note 3.
40. For a more detailed discussion of the innovative steps taken by faculty in the design of the first-year class curriculum, see Hempel & Seron, supra note 3.
41. Chemerinsky, supra note 36, at 595–96; see also RICHARD ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS (2008) (discussing ways in which legal practice can benefit from steps taken in medical practice).
42. Students attending law school at an accredited institution are required to take a course in professional ethics, which may be part of a course on the legal profession. At UCI Law, the legal profession is a two-semester requirement during the first year; both of these decisions are atypical compared to most schools. See Hempel & Seron, supra note 3.
specified number of hours observing lawyers at work. Thus, exposure to practice begins early and is systematically built into the curriculum beginning in the first year.

In the second year, students will select the clinical course they intend to take in the third year, either an in-house clinic or an externship course. Also during the second year, each student takes one or more courses designated as prerequisites for the clinical course requirement for the third year. These steps are designed to give students guidance in preparing for clinical coursework and in developing the habits of mind to integrate doctrinal analysis and practice. The implicit message of legal education is that, first, one learns the law and, second, one applies the law through practice. The pedagogical goal of UCI Law is to make the theory-practice, law book-law practice connection seamless and, in the process, demonstrate the challenge and complexity of both.

The faculty’s decision to require a clinical course is premised on the belief that all law students should learn, as part of their formal legal training, what it means to be a lawyer by actually practicing law. This practice should take place under the close supervision of an experienced attorney and involve opportunities for simulated practice, feedback on performance, and reflection. Each clinical course should provide students with the opportunity to engage in some of the specific skills they will use in their chosen practice, whether that choice is to become, for example, a transactional lawyer or litigator in private practice, a government trial attorney, or a legal aid lawyer practicing in the area of community economic development. It should also provide the student with opportunities to consider questions of professional responsibility in the context of the actual legal problems of a real client and instill the importance of regularly providing pro bono legal assistance as an essential responsibility of bar membership. Finally, each clinic should provide an opportunity for students to play an integral role in addressing broader social justice concerns through the legal problems it addresses.43

To be sure, the UCI Law faculty will face many challenges in implementing a curriculum that, in their assessment, is more responsive to the contemporary demands of legal practice. Nonetheless, it is expected that students will graduate with a stronger foundation in and understanding of the complexity of the demands of their chosen profession. Of course, it remains to be seen whether students’ evaluation of their legal education complements the faculty’s approach to their professional socialization. But, at this point, we can provide a very preliminary description of the inaugural class’s background, values, and aspirations.

43. For a further discussion of the clinical requirements at UCI Law, see Hempel & Seron, supra note 3.
IV. A PROFILE OF THE INAUGURAL CLASS AT THE UC IRVINE SCHOOL OF LAW

In this section, I present descriptive findings from a survey of the entering class at UCI Law; students completed the survey during the first few weeks of their first year, fall 2009. Almost all students completed the survey, for a response rate of ninety-eight percent. We consider UCI Law students’ demographic profile, educational background, reasons for going to law school, political orientation, and aspirations for work upon graduation.

Typical of the trend in legal education, the class is gender-balanced with, indeed, slightly more women (53%) than men (47%). The average age of the entering class is twenty-six years old. The racial/ethnic composition of the class is somewhat more diverse than the profile typical of elite law schools: while just under sixty percent of the class reports that they are white and two percent report that they are African-American, the remainder are a mix of Hispanic and Asian backgrounds. Table 1 also shows students’ religious identities, with over one-third (36%) identifying themselves as secular, and another third identifying as either Christian (18%) or Jewish (18%). Finally, Table 1 reports that thirteen percent of the inaugural class identify as Gay, Lesbian, Bisexual and/or Transgender (GLBT).

44. During orientation week, all students received an initial email from Dean Erwin Chemerinsky, which explained the goal and encouraged them to complete a 20–25 minute confidential online survey. The email also indicated that Carroll Seron of the Department of Criminology, Law & Society at UCI was conducting the research. For one month, non-respondents received a weekly email reminder to complete the survey.

45. As noted on some tables, there are some specific questions that students did not answer.


Table 1: Demographic Characteristics

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<thead>
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<th>Gender</th>
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<tbody>
<tr>
<td>Female</td>
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<tr>
<td>Male</td>
<td>47.3%</td>
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<table>
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<th>Birth Year (median)</th>
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<th>Race/Ethnicity</th>
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<tbody>
<tr>
<td>Caucasian</td>
<td>59.3%</td>
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<tr>
<td>Asian American</td>
<td>16.8%</td>
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<tr>
<td>Hispanic</td>
<td>9.3%</td>
</tr>
<tr>
<td>Multi-racial</td>
<td>9.3%</td>
</tr>
<tr>
<td>African American</td>
<td>1.9%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Religion</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Secular</td>
<td>36.4%</td>
</tr>
<tr>
<td>Christian</td>
<td>18.2%</td>
</tr>
<tr>
<td>Jewish</td>
<td>18.2%</td>
</tr>
<tr>
<td>Other</td>
<td>16.3%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sexual Orientation</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>GLBT</td>
<td>12.7%</td>
</tr>
</tbody>
</table>

Note: Percentages do not always add to 100 because some declined to answer.

Table 2 reports students’ educational background and work experience prior to entering law school. The inaugural class is a group of high academic achievers: over sixty percent of the entering class earned a grade point average in college of 3.74 (on a 4-point scale) or higher; the average LSAT score was 166.48 The largest proportion of the class majored in a social science discipline (42%), followed by a field in the humanities (30%). Table 2 also reports their typical work experience prior to law school, where the vast majority (89%) worked full-time, followed by a mix of part-time and volunteer work. Table 3 reports the type of college (public versus private) attended and whether it was in California. The largest proportion (41%) attended a private college out of California and, indeed, a larger proportion

attended a private (52%) college than a public (48%) college for their undergraduate education.

Table 2: Educational and Work Background

<table>
<thead>
<tr>
<th>Undergraduate Graduation Year (mean)</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>Undergraduate GPA</td>
<td></td>
</tr>
<tr>
<td>3.74–4.00</td>
<td>31.6%</td>
</tr>
<tr>
<td>3.50–3.74</td>
<td>31.6%</td>
</tr>
<tr>
<td>3.25–3.49</td>
<td>26.3%</td>
</tr>
<tr>
<td>3.00–3.24</td>
<td>10.5%</td>
</tr>
<tr>
<td>Undergraduate Major</td>
<td></td>
</tr>
<tr>
<td>Social Sciences</td>
<td>42.1%</td>
</tr>
<tr>
<td>Humanities</td>
<td>29.8%</td>
</tr>
<tr>
<td>Biological Sciences</td>
<td>3.5%</td>
</tr>
<tr>
<td>Physical Sciences or Mathematics</td>
<td>3.5%</td>
</tr>
<tr>
<td>Engineering</td>
<td>3.5%</td>
</tr>
<tr>
<td>Business</td>
<td>3.5%</td>
</tr>
<tr>
<td>Other</td>
<td>14.0%</td>
</tr>
<tr>
<td>LSAT Score (mean)</td>
<td>166</td>
</tr>
<tr>
<td>Work Experience Prior to Law School*</td>
<td></td>
</tr>
<tr>
<td>Full-time Job</td>
<td>86.7%</td>
</tr>
<tr>
<td>Graduate School</td>
<td>33.3%</td>
</tr>
<tr>
<td>Part-time Job</td>
<td>28.9%</td>
</tr>
<tr>
<td>Part-time Volunteer</td>
<td>17.8%</td>
</tr>
<tr>
<td>Full-time Volunteer</td>
<td>15.6%</td>
</tr>
</tbody>
</table>

* Work experience is only applicable to students that graduated from undergraduate school prior to 2009.
### Table 3: Crosstabulation Comparing Type of Undergraduate Institution and Location

<table>
<thead>
<tr>
<th></th>
<th>California</th>
<th>Out of State</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public School</td>
<td>32.1%</td>
<td>10.7%</td>
<td>42.9%</td>
</tr>
<tr>
<td>Private School</td>
<td>16.1%</td>
<td>41.1%</td>
<td>57.1%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>48.2%</strong></td>
<td><strong>51.8%</strong></td>
<td><strong>100.0%</strong></td>
</tr>
</tbody>
</table>

Note: Two respondents declined to answer and were not calculated as part of the denominator.

Assuming good academic standing, all inaugural students received a tuition waiver for each year of their legal education. Given the escalating cost of legal education, even at public universities, the financial support offered to this class was an exceptional opportunity.\(^{49}\) Despite this very generous support, the findings reported in Table 4 show that just under seventy-five percent of the class nonetheless expects that they will have debt for living expenses and related activities while in school. Their debt from law school will be added to their current educational debt—that is, on average, $12,595. While UCI Law graduates will incur less debt than their counterparts at other public, and particularly University of California,50 law schools, most will nonetheless have incurred some debt to cover the cost of their legal education. That said, the findings reported in Table 4 also suggest that the inaugural class is an optimistic group: on a scale from one to seven, where one is no influence and seven is high influence, on average, students do not foresee that their educational debt will affect where they choose to live (3.56), the sector of the legal labor market where they will get a job (3.88), when they will have children (4.02), which job to take (4.56), or their opportunity to purchase a home (4.64).

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\(^{49}\) I have noted that prior research shows that student debt is not a good predictor of students’ career choice. See supra pp. 52–53.

\(^{50}\) See School of Law Fees 2010–11, UC IRVINE SCH. LAW, http://www.reg.uci.edu/fees/2010-2011/law.html (last visited July 12, 2010) for a breakdown of the tuition and fees at UCI Law. The tuition at UCI Law is the same as UCLA School of Law, which are both lower than UC Berkeley. See Fees & Cost of Attendance, UC BERKELEY SCH. LAW, http://www.law.berkeley.edu/6943.htm (last visited Oct. 26, 2010).
Table 4: Debt and Tuition

<table>
<thead>
<tr>
<th>Current Educational Debt to Date (mean)</th>
<th>$12,595</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent that plan to borrow money to help finance law school</td>
<td>71.9%</td>
</tr>
</tbody>
</table>

To what extent will having education debt upon graduation from law school influence your decisions about: (1–7; 1 = no influence)

- Home ownership: 4.64
- What job to take: 4.56
- When to have children: 4.02
- What sector to work in: 3.88
- Where to live: 3.56

How important was the tuition scholarship in students’ decision to attend UCI Law? Table 5 reports students’ reasons for choosing to attend UCI Law in particular (upper panel) and law school in general (lower panel). These findings show that the tuition scholarship was clearly important in students’ decision making, but interestingly, it was not the most important factor. On a scale from one to five, where one is very important and five is very unimportant, students, on average, rated the most important reasons for selecting UCI Law as the reputation of the dean (1.47), followed by the reputation of the faculty (1.64), the faculty-student ratio (1.72), and the tuition scholarship (1.93).
Table 5: Important Factors in Choosing to Attend Law School

Rate the importance of each of the following factors in deciding to go to UCI law school (1–5; 1 = Very Important)

<table>
<thead>
<tr>
<th>Factor</th>
<th>Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reputation of dean</td>
<td>1.47</td>
</tr>
<tr>
<td>Reputation of faculty</td>
<td>1.64</td>
</tr>
<tr>
<td>Faculty-student ratio</td>
<td>1.72</td>
</tr>
<tr>
<td>Tuition scholarship</td>
<td>1.78</td>
</tr>
<tr>
<td>Law school’s commitment to public service</td>
<td>1.93</td>
</tr>
<tr>
<td>Work opportunities as a consequence of scholarship</td>
<td>1.98</td>
</tr>
<tr>
<td>Clinical requirement</td>
<td>2.10</td>
</tr>
<tr>
<td>Faculty contacts</td>
<td>2.14</td>
</tr>
<tr>
<td>Prestige</td>
<td>2.18</td>
</tr>
<tr>
<td>Location</td>
<td>2.24</td>
</tr>
</tbody>
</table>

Rate the importance of each of the following factors in deciding to go to law school (1–5; 1 = Very Important)

<table>
<thead>
<tr>
<th>Factor</th>
<th>Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Doors that are opened with a law degree</td>
<td>1.55</td>
</tr>
<tr>
<td>Intellectual challenge</td>
<td>1.66</td>
</tr>
<tr>
<td>Pursuit of social justice</td>
<td>1.83</td>
</tr>
<tr>
<td>Opportunity to work with other professionals</td>
<td>2.21</td>
</tr>
<tr>
<td>Compensation</td>
<td>2.72</td>
</tr>
<tr>
<td>Prestige of lawyers</td>
<td>2.79</td>
</tr>
<tr>
<td>Best way to get into politics</td>
<td>3.36</td>
</tr>
<tr>
<td>Wanted a graduate degree; J.D. best option</td>
<td>3.72</td>
</tr>
<tr>
<td>Uncertain of other options</td>
<td>3.88</td>
</tr>
<tr>
<td>Parental request/expectations</td>
<td>4.09</td>
</tr>
</tbody>
</table>

As discussed earlier, the cost-effectiveness of American legal education is often achieved through large classes or a high faculty-student ratio. One important goal of UCI Law is to change this formula such that the faculty-student ratio will be considerably lower than similarly situated schools. Whether through popular movies, such as The Paper Chase, memoirs of attending law school, such as Scott Turow’s One L, or stories from friends at other law schools, prospective students no doubt absorbed the popular image of a large law school classroom with rows and rows of students nervously waiting to be called on—and embarrassed. In
making their decision to attend UCI Law, the smaller faculty-student ratio ranked high in students’ estimation.51 Closely related to the above factors, the inaugural class rated UCI Law’s commitment to public service (1.93) and work opportunities (1.98) as among the very important factors in reaching their decision. Interestingly, the clinical requirement (2.14) is down a notch compared to the factors discussed thus far. Students may simply assume that they will take advantage of the clinical opportunities, regardless of the law school attended, and, hence, the requirement appears somewhat less significant. At the end of the day, these high-achieving students place primary importance on academic reputation, as reflected in the reputation of the dean and faculty, a set of factors that we might imagine shaped their choice of college as well. What is noteworthy about these findings is that while the tuition scholarship was clearly an important factor, it is somewhat lower down in the pecking order than academic reputation.

Students’ reasons for deciding to attend law school are reported in the lower panel of Table 5. Corroborating findings from studies of law school professionalization, these findings show that students’ decisions were shaped by a combination of familiar factors. Echoing findings from Schleef’s study, where a concern to remain “flexible” captures students’ goals, the inaugural class at UCI Law ranked “doors that are opened with a law degree” as the most important factor (1.55). Reflecting Stover’s findings that students “get” the message that what’s interesting about law is the “intellectual challenge” of solving complex legal problems, UCI Law students ranked this as the next most important factor (1.66). And, echoing any number of studies, UCI Law students place a high value on doing work in “pursuit of social justice” (1.83). These findings suggest that UCI Law students share with their counterparts at other similarly situated schools a familiar set of reasons for pursuing a law degree. The findings reported here also show, however, that these students do not give as much weight to the “compensation” (2.72) or “prestige” (2.79) side of the ledger. Whether students’ orientation to the practice of law remains organized around the hierarchy of values reported in Table 5, whether students’ jobs out of school complement these values, and whether students’ first-year optimism that whatever debt they do incur will not affect their decisions about jobs, where to live, and when to have children (see Table 4) is corroborated remain, of course, open questions.

Before turning to where students hope to find their first jobs upon graduation, we consider their political orientation, the kinds of memberships they had in various types of organizations, and the kinds of activities they did while in college (see Table 6). As a group, the inaugural class is decidedly more liberal on social (1.94) than on economic (3.06) issues. While they are, as a group, at the liberal end of this seven-point scale, there is a salient difference in their positions

51. For a further discussion on legal pedagogy, see Chemerinsky, supra note 36.
between economic and social issues.\textsuperscript{52} The middle panel of Table 6 reports extracurricular activities while in college. Just over three-fourths of the class (77\%) report that they worked while in college to help defray the costs of their college education; students were also active in clubs (72\%) and sports (33\%). Also notable, just over half of the class (52\%) spent some time on a study-abroad program while in college. At a more general level, the findings reported in Table 6 (lower panel) suggest that the UCI Law students join a variety of organizations. Overall, the findings reported in Table 6 suggest that the inaugural class is relatively homogenous by way of political orientation toward the liberal end of the spectrum and that they have engaged in a range of activities that are relatively typical of their age cohort.

\textsuperscript{52} These students are generally more liberal than the country as a whole. The General Social Survey (GSS) reports that in 2006, the most recent year for which data are available, 27\% of respondents considered themselves “extremely” to “slightly” liberal, 39\% considered themselves “moderate,” and 34.5\% considered themselves “slightly” to “extremely” conservative. See \textit{GSS Statistics}, NATIONAL OPINION RESEARCH CENTER AT THE UNIVERSITY OF CHICAGO, http://www.norc.org/GSS+Website/Browse+GSS+Variables/Subject+Index/ (last visited Oct. 26, 2010) (follow “p” hyperlink; then follow “political” hyperlink; then follow “political ideology” hyperlink; then follow “think of self as liberal or conservative” hyperlink). The GSS asks one composite question on political ideology.
Table 6: Politics and Civic Participation

Political leaning on social issues
(1–7; 1 = Liberal) 1.94

Political leaning on economic issues
(1–7; 1 = Liberal) 3.06

Percent that reported being a member of a:

<table>
<thead>
<tr>
<th>Organization</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Political Party</td>
<td>46.3%</td>
</tr>
<tr>
<td>College Alumni Association</td>
<td>25.5%</td>
</tr>
<tr>
<td>Religious Organization</td>
<td>18.9%</td>
</tr>
<tr>
<td>Political Advocacy Group</td>
<td>15.1%</td>
</tr>
<tr>
<td>Charitable Organization</td>
<td>14.6%</td>
</tr>
<tr>
<td>Service Organization</td>
<td>14.0%</td>
</tr>
<tr>
<td>Organized Sports League</td>
<td>11.5%</td>
</tr>
<tr>
<td>Community/Civic Organization</td>
<td>11.3%</td>
</tr>
<tr>
<td>PTA or other School Organization</td>
<td>5.8%</td>
</tr>
<tr>
<td>Private Clubs</td>
<td>3.9%</td>
</tr>
<tr>
<td>Gender-Based Organization</td>
<td>1.9%</td>
</tr>
<tr>
<td>Race- or Ethnic-Based Organization</td>
<td>1.9%</td>
</tr>
</tbody>
</table>

While in college, percent that participated in:

<table>
<thead>
<tr>
<th>Activity</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Work to support education</td>
<td>76.8%</td>
</tr>
<tr>
<td>Clubs</td>
<td>71.9%</td>
</tr>
<tr>
<td>Study abroad</td>
<td>51.9%</td>
</tr>
<tr>
<td>Sports</td>
<td>32.7%</td>
</tr>
<tr>
<td>Student government</td>
<td>19.2%</td>
</tr>
<tr>
<td>Religious organization</td>
<td>16.7%</td>
</tr>
<tr>
<td>Electoral campaigns</td>
<td>14.8%</td>
</tr>
<tr>
<td>Sororities/Fraternities</td>
<td>14.8%</td>
</tr>
<tr>
<td>Political action campaigns</td>
<td>11.1%</td>
</tr>
<tr>
<td>Debate team</td>
<td>5.6%</td>
</tr>
</tbody>
</table>
Finally, we consider students’ aspirations for their first jobs and their expectations for work both in the short term, for their first positions, and over the arc of their careers. The findings reported in Table 7 suggest that these high-achieving students came to law school with the received wisdom that a clerkship, particularly a clerkship for a federal district or appellate judge, is a solid (and prestigious) launching pad: forty percent report that they hope to secure a position as a law clerk upon graduation. On the other hand, a very small proportion of the entering class (5%) look forward to a first job in a medium to large corporate firm. Rather, the more typical hope is that they will land a position in government (18%) or a public interest organization (18%). Indeed, no one in the entering class reports that he or she is interested in beginning a career in a corporation, a pattern that is underscored by their limited interest, on average, in “working with business and financial concepts” (3.65 on a five-point scale, where 1 is very likely; see findings reported in middle panel of Table 7). Rather, and echoing their reasons for attending law school in the first place (see Table 6, again reported on a five-point scale where 1 is very important and 5 is very unimportant), they seek positions with “challenging and interesting work” (1.39), followed by “ethically and socially fulfilling work” (1.54) and “balance between personal life and work” (1.61).53 Again echoing earlier findings, on average, these findings suggest that these students are slightly more concerned about “job security” (2.14) than the “amount of compensation” in their first job (2.56).

53. Kornhauser & Revesz, supra note 8, at 939–40; McGill, supra note 7, at 702.
Table 7: Work and Life Expectations After Graduation

Likelihood of working full-time in the field of law within five years of graduation (1–5; 1 = Very Likely) 1.58

Top choice for first job after law school

<table>
<thead>
<tr>
<th>Job Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law Clerk</td>
<td>40.4%</td>
</tr>
<tr>
<td>Government</td>
<td>17.5%</td>
</tr>
<tr>
<td>Public Interest Organization</td>
<td>17.5%</td>
</tr>
<tr>
<td>Private Practice—Small and Solo Firm</td>
<td>7.0%</td>
</tr>
<tr>
<td>Private Practice—Medium and Large Firm</td>
<td>5.3%</td>
</tr>
<tr>
<td>Academia</td>
<td>5.3%</td>
</tr>
<tr>
<td>Other</td>
<td>5.3%</td>
</tr>
<tr>
<td>Contract Lawyer</td>
<td>1.8%</td>
</tr>
<tr>
<td>Corporations/General Counsel</td>
<td>0.0%</td>
</tr>
</tbody>
</table>

How important is each of the following considerations for selecting a first job after law school? (1–5; 1 = Very Important)

<table>
<thead>
<tr>
<th>Consideration</th>
<th>Importance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Challenging and interesting work</td>
<td>1.39</td>
</tr>
<tr>
<td>Ethically/socially fulfilling</td>
<td>1.54</td>
</tr>
<tr>
<td>Balance between personal life and work</td>
<td>1.61</td>
</tr>
<tr>
<td>Substantive area of work</td>
<td>1.71</td>
</tr>
<tr>
<td>Opportunities for advancement</td>
<td>1.75</td>
</tr>
<tr>
<td>Quality of supervision and training</td>
<td>1.78</td>
</tr>
<tr>
<td>Variety of work experiences</td>
<td>1.85</td>
</tr>
<tr>
<td>High level of responsibility</td>
<td>2.02</td>
</tr>
<tr>
<td>Opportunities to do pro bono service</td>
<td>2.07</td>
</tr>
<tr>
<td>Job security</td>
<td>2.14</td>
</tr>
<tr>
<td>Opportunities for movement to another job</td>
<td>2.47</td>
</tr>
<tr>
<td>Amount of compensation</td>
<td>2.56</td>
</tr>
<tr>
<td>Using negotiation skills</td>
<td>2.56</td>
</tr>
<tr>
<td>Location of spouse or partner’s job</td>
<td>2.64</td>
</tr>
<tr>
<td>Diversity</td>
<td>2.66</td>
</tr>
<tr>
<td>Concerns about the current state of the economy</td>
<td>2.76</td>
</tr>
<tr>
<td>Lifestyle amenities in surrounding area</td>
<td>2.78</td>
</tr>
<tr>
<td>Recognition</td>
<td>2.80</td>
</tr>
<tr>
<td>Working as a member of a team</td>
<td>2.87</td>
</tr>
<tr>
<td>Opportunities for travel</td>
<td>2.93</td>
</tr>
<tr>
<td>Time demands on spouse or partner’s job</td>
<td>3.20</td>
</tr>
<tr>
<td>Providing feedback on the work of others</td>
<td>3.35</td>
</tr>
</tbody>
</table>
Table 7 (continued)

| Non-child-related family responsibilities | 3.38 |
| Fit with needs and schedules of child/children | 3.61 |
| Working with business and financial concepts | 3.65 |

How important is each of the following long term goals to you? (1–5; 1 = Very Important)

<table>
<thead>
<tr>
<th>Goal</th>
<th>Importance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Have a satisfying career</td>
<td>2.33</td>
</tr>
<tr>
<td>Have both a satisfying career and a personal life</td>
<td>2.33</td>
</tr>
<tr>
<td>Help individuals</td>
<td>2.36</td>
</tr>
<tr>
<td>Change or improve society</td>
<td>2.44</td>
</tr>
<tr>
<td>Become an influential person</td>
<td>2.84</td>
</tr>
<tr>
<td>Accumulate wealth</td>
<td>3.04</td>
</tr>
</tbody>
</table>

V. CONCLUSION

In this short sketch, I have described the background and aspirations of the UCI Law inaugural class in the broader context of research on law students’ socialization to the norms and mores of the profession as well as the more specific context that shapes UCI Law’s approach to legal education. At a general level, the students who make up the inaugural class at UCI Law are motivated to study law as a way to enhance the public good. Upon graduation, many of them will have incurred some debt to cover the cost of their professional education, but at a level, on average, that will be significantly less than their peers from top-tier law schools. Prior research suggests, however, that commitment to government and public interest work trumps debt in an explanation of early career choice.54

Beyond tuition remission, the concept of practice is at the centerpiece of UCI Law’s mission. The synergy between learning to “think like a lawyer,” “practice like a lawyer,” and cultivate the multiple meanings of a professional identity will be integrated into the curriculum through courses as well as through work with mentors, simulations in various classes, and clinical classes. Whether and how these factors will shape UCI Law students’ aspirations and expectations over the next two years of their legal education remains an open question, but one that we will revisit as they approach the conclusion of their legal education.

54. Kornhauser & Revesz, supra note 8, at 939–40; McGill, supra note 7, at 702.
Our Institutional Commitment to Teach about the Legal Profession

Ann Southworth* and Catherine L. Fisk**

I. INTRODUCTION

During the autumn of 2008, the founding faculty at the University of California, Irvine School of Law (UCI) undertook a challenge: to create a first-year curriculum that captures the latest wisdom about what knowledge, skills, and values law schools should impart to their students. The faculty adopted a number of proposals, including a four-unit, year-long, required, first-year Legal Profession course. The course’s design responds to a number of calls for improved law school instruction on the legal profession and professional ethics. Most recently, the Carnegie Foundation’s 2007 report, *Educating Lawyers*, challenges law schools to create more opportunities for students “to learn about, reflect on, and practice the responsibilities of legal professionals.” It acknowledges that law schools have largely succeeded in honing students’ skills in legal analysis, but it faults them for failing to cultivate professional identity and knowledge about “the social and cultural contexts of legal institutions and the varied forms of legal practice.” In this respect, the report’s recommendations echo earlier demands for reform. The American Bar Association’s 1992 MacCrate Report, for example, claimed that law schools were not teaching students the skills they need to practice ethically.

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* Professor of Law, University of California, Irvine School of Law.
** Chancellor’s Professor of Law, University of California, Irvine School of Law.

2. Id.
3. ABA, COMMITTEE ON LEGAL EDUCATION, *LEGAL EDUCATION AND PROFESSIONAL*
Around the same time, Judge Harry Edwards complained that law schools had abdicated their responsibility to work with the profession to ensure that lawyers practice law honorably.4 Harvard’s David Wilkins has urged the legal academy to “make the norms, structures, and conditions of legal practice” the focus of “serious teaching [and scholarship],” and he has called law schools’ failure to do so thus far a “profound ethical failing.”5 Responding to these various critiques, our course illustrates some of the possibilities for, and rewards of, pursuing what Wilkins calls an “institutional commitment” to teach about the profession.6

UCI’s Legal Profession course offers students an empirically grounded understanding of actual practice realities and critical perspectives on those practices, drawn from history, sociology, anthropology, philosophy, and economics. It situates issues of professionalism in broader contexts, including the history and social structure of the bar, the market for legal services, and the organizations of practice. It relies heavily on theoretical and empirical literature about the profession, as well as case studies, simulations, and commentary by guest speakers. We require our students to engage with issues of the profession from the very start of law school, and we pitch the course in terms that appeal to the students’ self-interest—as an effort to help them chart successful, rewarding, and responsible careers in law.

This essay describes the premises, goals, circumstances of creation, and content of our Legal Profession course. We also assess the success of the course and identify continuing challenges. One of our purposes is to offer guidance to professors who might wish to teach a legal profession course similar to ours. Accordingly, we describe the course in detail in Section IV below. Those not interested in the particulars of the course design can read Sections II, III, and V and skim or skip Section IV.

II. THE PREMISES AND GOALS OF THE UC IRVINE LEGAL PROFESSION COURSE

The course rests on four basic premises. The first is that law schools are obliged to provide students with information and perspectives that will prepare them to navigate careers in law. That task requires attention to the profession’s

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4. Harry Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 MICH. L. REV. 34 (1992). Judge Edwards’s claim that law schools “should be training ethical practitioners” generated much less controversy than his assertion that they should be “producing scholarship that judges, legislators, and practitioners can use.” Id. at 34.


political and social history and the profession’s relationship to the market for legal services and to the legal system as a whole. It demands close examination of the various practice settings in which lawyers operate, the opportunities and challenges of each, and the broader cultural and economic forces that are reshaping the profession. Law students and young lawyers often intuit the values and power dynamics of the practice settings they consider and those they join. But the process of discerning and adapting to the goals and rewards of the workplace sometimes causes considerable stress. We hope to prepare students to make deliberate and informed rather than unwitting choices about where to practice and how to reconcile individual and institutional values. A law school career services office is not equipped to fulfill all these various purposes, and students should not be left to rely on legal recruiters and the legal press for instruction on issues so central to their futures. Nor should education about the profession be delayed until the second or third year of law school. Students want to learn about the profession they have chosen to enter in the first semester of law school, when they are often anxious about the decision to attend law school and eager to begin finding ways to match their interests, aptitudes, and ideals with available professional opportunities.

The second premise of our course is that developing students’ capacities for critical reflection about their roles and futures in the profession requires them to learn more than just the law that governs lawyers. The standard law school professional responsibility course tends to focus on the overlapping rules, regulations, and case law that govern individual lawyers’ conduct. It is important for students to learn that law, and they generally are obliged to obey it. But much of the law is incomplete or ambiguous, and it frequently vests lawyers with discretion. Deciding how to exercise discretion, and appreciating the likely

8. See Wilkins, Professional Ethics, supra note 5, at 56 (arguing that the legal academy’s failure to study and teach about the profession has created an enormous “knowledge vacuum” that leaves students, practitioners, and citizens vulnerable to “self-interested and inaccurate information merchants”).
11. See Kaufman & Wilkins, supra note 5, at 856–57; David Luban & Michael Millemann, Good Judgment: Ethics Teaching in Dark Times, 9 GEO. J. LEGAL ETHICS 31, 56 (1995); Deborah L. Rhode & David Luban, Legal Ethics 7–8 (5th ed. 2009); Richard L. Abel, Why Does the ABA
consequences of such choices, requires attention to information and perspectives that law alone cannot deliver. Whatever virtue there might be in teaching students to “lawyer” rules in other contexts, that approach is highly problematic as applied to the law governing lawyers’ own obligations; lawyers’ aptitude for finding legal ambiguity and exploiting it on behalf of clients tends to make the “bounds of the law” that are supposed to mark the limits of partisan advocacy highly indeterminate. Students need to understand that the efficacy and integrity of law depends upon their compliance with duties that compete with client demands—even when statements of those duties in the ethics rules are inevitably vague and imprecise. They also need to understand how the economics and social-psychology of law practice tempts lawyers beyond the bounds of ethical advocacy and counseling and how that phenomenon affects our legal system. Moreover, the law governing lawyers says almost nothing about some of the most important ethical issues confronting lawyers—e.g., what practice areas to pursue, which clients to represent, how to reconcile conflicts between legal requirements and conscience, and, generally, how to live a good life as a lawyer. At the macro level, the law governing legal practice is largely unhelpful for understanding the economic, political, and social forces that are reshaping our profession. Nor does that law, which focuses primarily on the duties of individual lawyers, offer much guidance about the challenges facing lawyers who practice in organizations or questions facing the profession as a whole.

Law schools, therefore, need to look to disciplines other than law—to moral


14. See David B. Wilkins, Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics, in EVERYDAY PRACTICES AND TROUBLE CASES 68, 71 (Austin Sarat et al. eds., 1998) (“The codes of professional conduct concentrate almost exclusively on defining the rights and obligations of individual lawyers.”).

15. Notable exceptions include Model Rules 5.1, which addresses the responsibilities of partners, managers, and supervisory lawyers, and 1.13, which addresses the duties of lawyers who represent organizations.
philosophy, economics, sociology, psychology, and organizational theory—and to sources outside the academy for perspectives from which students can draw in deciding how to resolve ambiguity, exercise discretion, and evaluate and navigate lawyers’ practices and institutions. Materials drawn from a large empirical literature on lawyers, including group portraits of lawyers working in a variety of settings and rich case studies of lawyers gone astray—along with commentary by guest speakers from various types of legal practice settings—can provide a “window on actual professional practice.” These accounts sometimes provide what the Carnegie Report calls “appealing representations of professional ideals.” They also help students appreciate the mix of factors that lawyers consider in evaluating career satisfaction—e.g., sense of purpose, intellectual challenge, relationships, compensation, autonomy, hours, and working conditions. Thus, our course reflects the view shared by many colleagues around the country that effective preparation for an ethical and rewarding practice cannot be based solely—or perhaps even primarily—on the study of the law governing lawyers and instead requires a much broader lens.

The third premise of the course is that the types of legal and ethical issues that lawyers face and the factors that influence their norms and behavior differ by practice type and setting. Some issues arise in virtually all types of practice. Attorneys in every sector confront time pressures, conflicts of interest, and confidentiality issues. Other issues are much more relevant in some practice settings than others. Lawyers are increasingly subject to rules and regulations that vary by practice specialty. Moreover, even for ethical concerns that cut across practice settings, “context counts.” Lawyers’ judgments about ethical issues are

16. KAUFMAN & WILKINS, supra note 5, at 852.
17. SULLIVAN ET AL., supra note 1, at 135.
18. See KELLY, supra note 13, at 10–15 (invoking Charles Taylor’s interest in an axis of ethics that focuses less on one’s obligations to others than on living a full life).
19. See, e.g., Elizabeth Chambliss, Professional Responsibility: Lawyers, A Case Study, 69 FORDHAM L. REV. 817 (2000) (describing a sociological approach); Luban & Millemann, supra note 11 (calling for courses that integrate theoretical classroom teaching and clinical casework to develop critical judgment); John M. Conley, How Bad Is It Out There?: Teaching and Learning About the State of the Legal Profession in North Carolina, 82 N.C. L. REV. 1943 (2004) (describing an anthropological approach); Wilkins, supra note 8, at 64 (“[A] course in professionalism must ultimately infuse the study of particular professional practices with normative perspectives from disciplines such as philosophy, sociology, psychology, and political science that stand outside the traditional discourse of professionalism.”).
20. To take a few obvious examples, bill padding is a matter of significant concern in private firms, but not in most in-house counsel positions or government offices. Similarly, prosecutors’ dilemmas in exercising charging discretion have no counterpart elsewhere. Issues about working with clients with diminished capacity are highly relevant in criminal, elder law, and trust and estates practices, but not in securities litigation and business transactions.
22. David Wilkins coined this phrase in describing why unitary codes of ethics should give way to more particularized standards of practice. See David B. Wilkins, Making Context Count: Regulating Lawyers After Kaye Scholer, 66 S. CAL. L. REV. 1145 (1993); Wilkins, Who Should Regulate Lawyers?, supra
and should be shaped by the nature of the tasks they perform, the institutional frameworks in which they work, the types and sophistication of clients they serve, and the consequences for third parties and the public. Context also counts in another important sense; lawyers tend to identify less with the profession as a whole than with their own subgroups and practice specialties. As Heinz and Laumann’s classic study demonstrated, the American legal profession is fundamentally divided by types of clients served, and the division among what they call the “hemispheres” of the bar has grown more pronounced over the last two decades. As the bar has become larger, less cohesive, and more specialized, the organized bar has found it difficult to forge a common identity and to articulate meaningful visions of professionalism. Lawyers often take their cues about appropriate behavior from other lawyers within their practice organizations and within their practice specialties. These contexts have become important “arenas of professionalism,” where lawyers’ views about their roles and obligations take shape. Indeed, practice settings appear to be at least as important as ethics rules, disciplinary processes, and liability controls in forging lawyers’ professional values. Therefore, practice settings and the norms that emerge from them are


29. Robert L. Nelson & David M. Trubek, Arenas of Professionalism: The Professional Ideologies of Lawyers in Context, in LAWYERS’ IDEALS/LAWYERS’ PRACTICES, supra note 27, at 177, 205 ("The legal workplace is an arena of professionalism in the sense that the specific organizational contexts in which lawyers work produce and reflect particular visions of professional ideals.").
worthy of careful consideration by anyone interested in promoting ethical law practice.\(^{30}\)

This premise about the nature of the law of professional responsibility and the circumstances that affect how lawyers respond to it highlights an advantage of teaching Legal Profession in the first year. While any law school course offers the opportunity to teach about the gap between the law on the books and the law in action, as well as the complex social processes that affect compliance with law, a first-year Legal Profession course affords an especially promising context in which to discuss these issues. Research on bar disciplinary processes demonstrates that there is little formal enforcement of the ethics rules.\(^{31}\) Yet, when the regulated group is one with which law students identify (their peers and future selves), students readily understand that law is not simply a set of government-mandated rules and that compliance is not simply a function of enforcement. Of course, exposure to evidence of the enforcement gap could potentially promote student cynicism—about individual lawyers who violate law without adverse consequences, the organized bar’s failure to adequately police lawyer misconduct, and the bar’s resistance to alternative sources of regulation. But our course also gives students an opportunity to consider the reasons for obeying law even in the absence of a significant threat of compulsion, to see that legal compliance is sometimes a function of the behavior of groups and organizations as well as individuals,\(^{32}\) and

\(^{30}\) Michael Kelly has argued that “[p]ractice organizations now by and large constitute the legal profession[s],” and that “no coherent account of professionalism, legal ethics, or the contemporary legal profession is possible without understanding the workings of practice organizations.” MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE 18 (1994). See also James E. Moliterno, Practice Setting as an Organizing Theme for a Law and Ethics of Lawyering Curriculum, 39 WM. & MARY L. REV. 393, 394 (1998) (arguing that “the ethics of lawyering varies according to the practice setting” and suggesting that law schools should use practice context as the organizing theme for ethics teaching).

\(^{31}\) Research documents many deficiencies in bar disciplinary processes. Lawyers and judges, who are best positioned to detect misconduct, rarely report it, and clients often lack incentives and/or resources to pursue complaints. RHODE & LUBAN, supra note 11, at 982. Moreover, only a small proportion of complaints that reach the disciplinary process actually result in any kind of sanction or other remedial measure. See 2008 Survey on Lawyer Discipline Systems, ABA CTR. FOR PROF'L RESPONSIBILITY (2009); Fred C. Zacharias, The Future Structure and Regulation of Law Practice: Confronting Lies, Victions, and False Paradigms in Legal Ethics Regulation, 44 ARIZ. L. REV. 829 (2002).

\(^{32}\) Mitt Regan’s account of the John Gellene case suggests that Gellene’s misdeeds were partly explained by Milbank Tweed’s “eat what you kill” culture, which encouraged aggressive, risk-taking behavior. MILTON C. REGAN, JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER (2004). Ted Schneyer, the leading advocate for imposing discipline at the level of the law firm, emphasizes how firms’ policies and procedures constitute an “ethical infrastructure” that “cuts across particular lawyers and tasks.” See Ted Schneyer, Professional Discipline for Law Firms?, 77 CORNELL L. REV. 1, 10 (1992). The strategies that liability insurance companies use to promote compliance with professional responsibility standards demonstrate this critical connection between firm culture, management policies, and the conduct of individual lawyers. See William H. Simon, The Ethics Teacher’s Bitterweet Revenge: Virtue and Risk Management, 94 GEO. L.J. 1985 (2006) (noting that liability insurers are beginning to require large law firms to adopt risk management measures that promote collaborative decision-making, such as peer review and confidential internal grievance
to observe how patterns of compliance and noncompliance constitute the meaning of law.

The final premise of the UCI Legal Profession course is that law students benefit from pedagogies that require active engagement and thereby lend elements of immediacy and self-discovery to the curriculum. Active engagement may be especially beneficial in courses in which lawyers are the central focus, such as skills training, professional responsibility, and legal profession classes.33 Other scholars have documented the benefits of teaching ethics in clinical contexts,34 but role-playing exercises can achieve similar ends; simulations allow students to step into the shoes of lawyers and other actors in real practice dilemmas and policy controversies and to enter the subjective experiences of the people involved.35 They help students appreciate external influences on lawyer conduct and the consequences of lawyers’ choices. Thus, role-playing is a useful strategy for implementing the Carnegie Foundation’s call to “engage the moral imaginations of students as they move toward professional practice.”36

With these premises in mind, our new first-year course is designed to achieve four primary goals. First, we seek to give students an understanding of the enormous range of activities in which lawyers engage and to help them assess the fit between various types of practice and their own skills, values, and aptitudes so that they can choose wisely and avoid the career dissatisfaction that plagues too many lawyers. Second, the course teaches and critiques the law governing lawyers. Although that is a fairly conventional goal of professional responsibility courses, we analyze the law primarily as it arises in the practice contexts where it is most salient—an approach that encourages students to consider how lawyers’ deliberations might be influenced by the institutional context of their work, their practice organizations and clientele, and other economic, cultural, psychological, and social factors. Third, we help students develop a capacity for critical reflection about lawyers’ work. We encourage students to be skeptical about self-


36. SULLIVAN ET AL., supra note 1, at 6.
congratulatory statements of professional ideals sometimes offered by lawyers and the organized bar, while also encouraging them to take seriously their own ethical obligations and to understand that many practicing lawyers do too. Finally, we seek to help them develop informed views about the issues facing the American legal profession as a whole in the twenty-first century, including questions relating to the cost of legal services, access to the legal system, the market for legal services, competition for regulatory control over the profession, diversity, globalization, and technology.

In designing this course, we have drawn ideas and inspiration from others too numerous to mention by name. UCI is only one among many law schools experimenting with methods of teaching about the legal profession and professional responsibility, and many of our ideas are based on the innovative writing and teaching of colleagues elsewhere. This essay is thus part of a rich and continuing conversation among scholars and teachers in the field.\(^\text{37}\)

III. BACKGROUND

The founding faculty and Dean Chemerinsky envisioned the Legal Profession course as a core part of the UCI School of Law curriculum. Curricular planning began in September 2008 with a faculty meeting at which we identified the skills and competencies that law students need to acquire to become effective and responsible lawyers: legal analysis, legal research, oral and written argumentation and exposition, drafting, negotiation, ethical judgment, fact investigation, problem-solving, close and critical reading, interviewing, counseling, cooperative learning and teamwork, and communication with clients, experts, and other nonlawyers with whom lawyers deal. In the next meeting, we discussed how to integrate interdisciplinarity into the curriculum. At a third meeting, we considered what courses to teach in the first year, and we immediately included Legal Profession on the list. The decision to teach Legal Profession as a required first-year course was based partly on our sense that students should immediately begin learning about the profession they are preparing to enter, as well as our expectation that they would need to know some basic ethics rules that might be relevant to pro bono projects in the first year and in their first summer jobs. It also reflected the view of some faculty that we should avoid any upper-level requirements beyond completion of a writing requirement and a clinical

\(^{37}\) To list any of the people whose writing or teaching has been particularly influential for us or any of the law schools that have adopted particularly interesting required professional responsibility courses risks offense by unintentional omission. Aside from acknowledging intellectual debts, the principal purpose for compiling such a list is to alert any reader who is new to the field of where to look for ideas for course design. Among the many law schools that have experimented with courses that are similar to ours in one way or another are American, California Western, Duke, Fordham, Georgetown, Harvard, Indiana University, Maryland, Mercer, New York Law School, Northwestern, North Carolina, Southwestern, Stanford, UCLA, University of San Diego, USC, and William and Mary.
experience.

As we discussed how to allocate units among first-year courses, we assumed that Legal Profession required, and therefore should be allocated, the same number of units (four) as most other first-year courses except Lawyering Skills, to which we assigned six units divided into three per semester. From that point forward, every curriculum discussion assumed that Legal Profession would be a required first-year course and that it would be taught as a year-long course of two units each semester.

Although the decision to spread the course out over the entire year was not driven by pedagogy as much as by a convenient division of the units of instruction, it has contributed to the distinctiveness of the course. The year-long format has enabled us to cover more material and to incorporate different types of learning and multiple forms of assessment, including role-play exercises, the research and writing of a major paper, and a wide array of speaker panels. Thus, it may be an important feature of the course design that was largely accidental.

A vision for the course that emerged early in the curriculum design process was that Legal Profession could include some aspects of interdisciplinarity and experiential learning as core elements. The founding faculty had identified interdisciplinarity and experiential learning as signature characteristics of the UCI School of Law for a number of reasons. As to interdisciplinarity, a significant factor was the large number of noted scholars elsewhere on the campus who study law through the lens of another discipline (including many in the Schools of Humanities, Social Ecology, and Social Sciences) and whose efforts led to the creation of the law school at UCI. We discussed various ways to incorporate interdisciplinary study into the law school curriculum, and a somewhat inchoate consensus emerged that Legal Profession might be an ideal first-year portal to interdisciplinary study. We cannot speak definitively to the reasons that faculty (other than ourselves) may have believed this, nor can we accurately declare it to be a universal view. What our notes and recollections of the curriculum planning discussion do allow us to say is that some felt that it would be desirable to teach interdisciplinary study of law, that it would be easy to convince law students of the professional utility of studying lawyers from the perspective of other disciplines, and that law students would learn a little bit about the study of law & economics, anthropology, sociology, and history painlessly as they learned about what scholars trained in these disciplines have said about the legal profession.

As to the experiential learning element of Legal Profession, the faculty deliberations evinced a general sense that it was desirable to introduce experiential learning as early as possible in law school and throughout the curriculum, and that

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38. We use experiential in the most general sense to refer to pedagogies that ask students, through simulation and/or involvement of practicing lawyers, to consider how they might act as a lawyer in a situation. We do not incorporate live-client representation in our Legal Profession course.
Legal Profession offered many opportunities to do so. But beyond that, the faculty left it up to us as to whether or how to incorporate simulations or other practice-based exercises into the course. In a way, Legal Profession became a course on which some of the founding faculty—and, significantly, not just those who teach the course—could focus their aspirations for how legal education could be enriched by being both more grounded in the real world of practice and more informed by interdisciplinary perspectives.

We attribute the institutional commitment of our law school to teaching Legal Profession in the first year to several factors, including the values and vision of the dean and many members of the founding faculty and the expectation that we should do better than conventional legal education in training lawyers. All curricular change is difficult, especially in the first year of implementation. It helped that we worked on a blank slate, with no status quo. This enabled us to commit the number of units necessary to cover the material thoroughly; because allocating four units to teaching Legal Profession was not perceived as subtracting units from courses the faculty already taught at UCI, there was no entrenched opposition.39

IV. THE LEGAL PROFESSION COURSE

When the two of us began planning the course, we immediately agreed to take a unified approach to the readings, the syllabus, and the various exercises and assessment devices. While this decision was in part a product of the particular circumstance that only one of us was a long-time teacher of the subject and a scholar of the profession, it also reflected our belief that collaborative teaching would be more enjoyable for us. The result—a school-wide, unified approach to the course—may be part of what contributes to student satisfaction: students apparently regard Legal Profession as a signature part of the UCI School of Law experience because it is an experience shared by all our first-year students. The unified format certainly facilitates planning of speaker panels, and it allows us to share the work of organizing and the fun of brainstorming.40

The organization of the syllabus reflects several of the course’s basic premises. During the first few weeks, we introduce broad questions about lawyers’ competing duties, as well as two large bodies of law that cut across practice areas—confidentiality and conflicts. But thereafter we discuss legal and ethical

39. The curriculum at UCI is described elsewhere in this Symposium issue. To put it briefly, the units devoted to Legal Profession are available because we decided to make Property an upper-level elective. Thus we avoided the problems described by Professor Bundy in his description of efforts to revamp the curriculum at Berkeley to make Legal Profession a required first-year course, which resulted in the course being allocated too few units to be taken seriously by students or to allow the faculty to realize the course’s potential. See Bundy, supra note 9, at 23–24.

40. Professors considering this form of collaborative teaching should ensure that every section is taught on the same days at the same time and that a room large enough to accommodate all students enrolled in all sections is available at the time when speaker panels are scheduled.
issues in the practice contexts where they are most relevant. The primary organizing theme of the course is the practice setting, and the survey of practice contexts accounts for the lion’s share of reading materials and class time. We save large questions about issues facing lawyers collectively for the end of the course, on the theory that students will be better prepared to consider those big picture questions after they have acquired a basic understanding of the profession’s structure and operation.

The course is organized in five segments (which we call units) with a total of forty-five reading assignments.\textsuperscript{41} Our class meets twice a week for an hour each session for twenty-six weeks through both the fall and the spring semesters, for a total of fifty-two class sessions. The first unit (comprising five one-hour classes) introduces the role of the lawyer, the concept of a profession (and the controversy over the concept), the profession’s demographics, and major sources of regulation and control of lawyers’ practices. As is common with introductory materials, our first unit attempts to capture the students’ interest by raising the big issues that we will consider throughout the course, including the ethical claims embedded in the notion of a profession, the American legal profession’s relationship to the market for legal services, and the agency of individual lawyers in deciding how to resolve the moral dilemmas they encounter in practice. Since the unit is covered in the first few weeks of the first year of law school, it also offers students an overview of the profession they have chosen to enter and an orientation to the pedagogical methods of legal education (close reading followed by class discussion). The second unit (three assignments; three classes) considers the duty of confidentiality, and the third unit covers conflicts of interest in five assignments taught in five classes. The second and third units are the most intensive discussion of legal doctrine and rely most heavily on the typical modified Socratic classroom method. As we cover the rules, we highlight for the students that rules-based discipline is only a tiny part of the professional experience of lawyers and that other sources of regulation—especially markets, liability controls, judicial and agency regulations, and workplace cultures—are typically much more relevant.

The fourth unit, by far the longest, is a study of professionalism in context. We systematically examine different practice settings in which lawyers work, including prosecutors’ offices, public defender organizations, private firms of all sizes, corporate counsel offices, nonprofit advocacy groups, legal aid, and government. For each of these, we offer students the best empirical and ethnographic accounts, drawn from various disciplines and from the popular press. We also present panels of speakers to discuss their work and practice organizations. These sources complement one another. The written sources

\textsuperscript{41} For the sake of simplicity, we describe here the version of the course we taught in 2009–10. As we explain below, see infra text accompanying note 44, in 2010–11 we have modified the course slightly, but the overall structure remains the same. Readers interested in examining the current syllabus are welcome to contact us.
provide background and allow students to draw general conclusions about the organizations, work, clients, and common ethical dilemmas in each practice type. The speakers illustrate variation and breathe life into the portraits of practice and practitioners offered by scholars and journalists. As Michael Kelly has noted about his in-depth accounts of five practice organizations, lawyers’ descriptions of their lives as lawyers tend to be “stories about what lawyers want to believe,” but they also give students an appreciation for how particular practice cultures, management practices, and incentive structures influence the lives of lawyers.\(^{42}\)

Together, these sources help our students assess the fit between various practice types and their own character traits, values, strengths, and aspirations in ways that career offices and the legal press cannot possibly hope to do.

Unit IV includes several sections. The first includes two assignments on criminal defense and two on criminal prosecution. (In 2010–11 we moved these assignments to Unit I to illustrate different conceptions of the lawyer’s role and to introduce guest speakers earlier in the course.) The next section includes five assignments on the individual and small business “hemisphere” of the profession. It addresses solo and small firm practice, advertising and solicitation, stratification within the plaintiffs’ bar, ethics in negotiation, and boutique firms. The next section covers the large organizational client hemisphere. It begins with two sets of readings on large firms, a class on supervisory and subordinate relationships, a case study of the downfall of Milbank Tweed’s John Gellene,\(^{43}\) a class on the distinction between counseling and advocacy, two sessions on in-house counsel, and one on government lawyers. The final section of the fourth unit covers the public interest sector and includes assignments on legal aid, cause lawyers, and accountability in the representation of groups.\(^{44}\)

The fifth and final unit of the course examines what we call “challenges for the profession in the twenty-first century.” We begin with three sets of readings on access to legal services: unauthorized practice and nonlawyer services, the cost of legal services, and pro bono. We then address multijurisdictional practice and bar admission, lawyer discipline, transnational practice and globalization, and diversity in the profession. The final two assignments of the year focus on professional identity and reflections on the future of the legal profession and the students’ places within it.

While some of the assignments in Units IV and V involve close reading of cases and rules (e.g., on client perjury and impeachment, the ethics of negotiation, professional identity, and reflections on the future of the legal profession and the students’ places within it.)

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42. KELLY, supra note 13, at 8. See also Deborah L. Rhode, Teaching Legal Ethics, 51 ST. LOUIS U. L. REV. 1043, 1055 (2007) (noting that “visitors from practice can . . . be excellent if they are candid and self-reflective and if they prepare something beyond war stories.”).

43. See Milton C. Regan, Jr., Bankrupt in Milwaukee: A Cautionary Tale, in LEGAL ETHICS: LAW STORIES (Deborah L. Rhode & David Luban, eds. 2006).

44. In 2009–10 we also included a section on the judiciary, with readings on judicial elections, on regulation of judicial speech off the bench, and on recusal, but we reluctantly cut that section in 2010–11 to save time.
supervisory and subordinate relationships, and lawyer discipline), other assignments consist entirely of excerpted articles. We offer students some of the classic readings on lawyers’ ethics, as well as recent empirical or policy-oriented analyses of particular practice settings and challenges facing the profession as a whole. On student evaluations, some students called for more policy analysis and theoretical and empirical literature and less law; others asked for the reverse. Our own sense is that a mix of law, policy analysis, and social science research is entirely constructive. Our students certainly gave us no indication that they thought that only the doctrine “mattered” or that the empirical and theoretical literature was not “real law.”

From the students’ standpoint, a highlight of the course is the variety of the classroom presentations and exercises. In 2009–10, we hosted thirteen different panels with a total of thirty-six speakers, mostly practicing lawyers in Orange County or Los Angeles. Each speaker was asked to spend no more than ten minutes discussing his or her career history and describing the challenges and rewards of his or her current practice. Most of each session was devoted to questions and answers with the students. Our panels included criminal defense lawyers (a state public defender, a federal public defender, and a lawyer in private practice handling white collar defense), criminal prosecutors (a state deputy D.A., an Assistant U.S. Attorney, and a lawyer handling internal affairs for a sheriff’s department), plaintiff’s attorneys, lawyers practicing in boutique firms (civil rights, intellectual property, and appellate), large firm lawyers, in-house counsel of companies of different sizes, government lawyers (local, state, and federal), legal aid lawyers, lawyers doing public interest impact litigation, judges (a federal district judge and a recently retired state trial judge who is working as a mediator), lawyers who supervise pro bono work for large law firms, and lawyers discussing racial, ethnic, and gender diversity.

One benefit of using speakers from the bench and bar is compliance with ABA Standard 302(a)(5) (requiring instruction in the legal profession); Interpretation 302–06 states that “A law school should involve members of the bench and bar” in instruction on the profession. ABA Standards and Rules of Procedure for Approval of Law Schools, 2009–2010, ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR (2009).

45. See, e.g., Rhode, supra note 42, at 1048 (noting the potentially perilous pressure to focus instruction on the ethics rules tested on the bar and the MPRE); Chambliss, supra note 19, at 850–54 (defending her sociological approach to teaching legal profession against arguments that it will not prepare students for the MPRE or the bar exam and that it provides insufficient coverage of the issues raised by the Model Rules).

46. One benefit of using speakers from the bench and bar is compliance with ABA Standard 302(a)(5) (requiring instruction in the legal profession); Interpretation 302–06 states that “A law school should involve members of the bench and bar” in instruction on the profession. ABA Standards and Rules of Procedure for Approval of Law Schools, 2009–2010, ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR (2009).
practice; a law professor with a Ph.D. in economics offered an economic analysis of the market for legal services; and a law professor with long experience in Law & Society scholarship brought his expertise on the British and Indian legal professions to bear in a discussion of globalization in the commercial sector.

Each speaker panel occurred during class time, although we often allowed more than the usual sixty-minute class period for a speaker panel, because our class met on Fridays and the students had a free period after the class. The overwhelming majority of students did not object to the extra time allocated to speakers. When we felt the need to cover the assigned reading before the panel, we did so. When we felt that the reading assignment was reasonably self-explanatory, we assigned the reading for the day of the speaker panel. We required the students to attend panels prepared to ask questions of the speakers, and we enforced the preparation requirement by having students submit their questions to us in advance of the panel. The best questions brought some insight from the assigned reading to bear on the phrasing of the question. Students interested in the practice areas of particular speakers appreciated networking opportunities after the formal session ended, and some students secured summer jobs based in part on these informal conversations. The panelists uniformly reported they enjoyed their chance to interact with the students; although it took several hours out of their busy days, they apparently relished the opportunity to reflect upon their professional experiences, to debate with fellow panelists, and to interact with students. We gave speakers the assigned readings before they attended class, and many of them skimmed or read the readings and used them as a jumping off point for their remarks.

The largest single assignment was to write a paper based on an in-depth interview of a lawyer of the student’s choice.47 The paper’s principal purpose was to require each student to have a lengthy and structured conversation with a lawyer about issues of professionalism, career satisfactions and challenges, and ethics (broadly defined), and to use the interview to engage with some of the issues that we had studied in class. A second major purpose was to offer each student the opportunity to develop his or her own theories about the lawyer’s role in light of the readings, speakers, and interviews. Our hope was that students would prepare for the interview, and also for the writing of the paper, by thinking carefully about how the issues we had discussed all year arose in the practice setting in which the interview subject practiced. The students were invited, essentially, to contribute to research on the profession in a small way through their own mini-ethnography of a lawyer and his or her practice environment. A third purpose was to allow students to practice interview techniques, an important skill for lawyers to develop, whether as part of a research project or as an aid to fact-

47. The inspiration for this assignment came from John M. Conley. See Conley, supra note 19, at 1956–60.
finding in law practice. A fourth purpose was to give students sustained commentary on original writing, which happens all too seldom in the first year of law school. A minor but not entirely inconsequential purpose of the project, given the interdisciplinary ambitions of the course, was to allow students to experience some of the joys and frustrations of qualitative empiricism so that they could appreciate the more rigorous works of legal anthropology and interview-based sociology that we had read throughout the year.

The students embraced the challenge of the interview paper. The remarkably varied interview subjects included a recently retired general counsel of a large government office, lawyers at various career stages in major law firms, an environmental advocate, a senior public defender, a prosecutor, the director of pro bono and training for a large firm, a solo practitioner, a litigator for an insurance company, a superior court judge, and a federal court of appeals judge. The students asked probing questions and elicited fascinating insights from their subjects and then used those insights to question, elaborate upon, or revise their own understandings of the issues we had covered in readings. Each student prepared and distributed a short written abstract of the paper to the rest of the class, so that, in addition to hearing the oral presentations, the students received the benefit of sixty interviews with lawyers in all sorts of practice settings.

We assigned less formal writing assignments as well. As noted above, each student was required to prepare a written question for each speaker panel. The task of framing questions is a valuable skill, and most students showed improvement over the course of the year. The quality of the questions also enabled us to assess, at least to some extent, student comprehension of the assigned readings. In addition, students wrote short (two- or three-page) reflection papers on their role-playing exercises.

The course used a total of about a dozen simulations and role-play exercises of varying length and complexity throughout the year, and students received individualized feedback on their performances on the simulations. Every student was required to play a leading role in at least two simulations, and most students availed themselves of the chance to play a leading role in three or more. One—a negotiation exercise based on the Valdez v. Ace Auto Repair problem—occurred outside the classroom, although the next class discussion focused on the problem. Some of the role-playing exercises occupied most of the class hour, while others lasted only a portion of it. Several were based on real cases, such as

48. We benefitted from using role-play exercises developed by others, including our colleague, Carrie Menkel-Meadow, who developed a superb collection of simulations with Murray Schwartz. MURRAY L. SCHWARTZ & CARRIE MENKEL-MEADOW, TEACHERS’ MANUAL, LAWYERS AND THE LEGAL PROFESSION: CASES AND MATERIALS (2d ed. 1985).
49. This simulation, developed by Henry Hecht, is based on a hypothetical problem originally published by the American Bar Association Consortium for Professional Education and the American Bar Association Center for Professional Responsibility. See RHODE & LUBAN, supra note 11, at 457.
one involving objections by a large law firm’s associates to the firm’s decision to represent a bank that holds the account of a Rwandan minister implicated in the 1994 genocide of Tutsis.\(^5\) Another involved a fictional meeting of Milbank Tweed’s firm management committee to decide what to do after John Gellene’s misstatements have come to light but before criminal charges have been filed against him.\(^5\) One particularly interesting role-play exercise required the students of a fictional new law school to debate what public interest law is and what counts as public interest work for purposes of determining eligibility to receive a grant funded by the new student-run Public Interest Law Fund (PILF). The exercise drew into the classroom the very real debate already informally underway among the inaugural class of students as they established the UCI PILF and raised money to fund summer public interest fellowships. Other simulations focused on unauthorized practice restrictions, resource constraints for public defenders, and a disciplinary proceeding against a solo practitioner charged with misconduct. Each student was also required to give a short (three- to five-minute) oral presentation of his or her lawyer interview paper, and students received brief feedback on their oral presentation skills.

The course used multiple forms of assessment. We gave mid-year and end-of-year exams that tested both the application of the law of lawyering to hypothetical facts and competence in discussing larger issues about the profession. The latter type of questions required resort to the speaker panels and the social science literature. Students received a final grade at the end of the year; we also gave them a provisional grade in December simply to give them an idea of their progress. One quarter of the final grade was based on the fall semester exam and one quarter rested on the spring semester exam. Class participation, including the role-playing exercises, accounted for twenty percent of the grade, and the writing assignments comprised the remaining thirty percent.

Based on what we learned during our first year, we are making some changes in our second year of teaching the course. We are trimming two or three assignments for 2010–11 in order to allow for more in-depth discussion of certain topics. As noted above, we are moving the materials and speaker panels on criminal defense and prosecution to the first unit. The latter change will help illustrate the real-world relevance of lawyers’ conceptions of role, and it mixes some of the more abstract elements of the course (drawn primarily from moral philosophy) with the more immediately riveting stories and concrete examples associated with criminal defenders and prosecutors. That revised approach also allows us to include two speaker panels—the students’ favorite element—early in the course. We have also updated the syllabus to take account of new scholarship,

\(^5\) See Rhode & Luban, supra note 11, at 181–82.

\(^5\) This excellent case study is Mitt Regan’s. See Regan, Bankrupt in Milwaukee: A Cautionary Tale, supra note 43; see also Regan, supra note 32.
current news stories, and recent cases.

V. EVALUATION OF THE COURSE: SUCCESSES AND CHALLENGES

By the conventional and short-term measure of a course’s success—student evaluations—the Legal Profession course was a success. The end-of-year written student evaluations were among the highest of any course in our inaugural year. Students praised the course’s utility. Generally, their favorite part was the speaker panels, but they also liked the focus on practice settings, the attention paid to what lawyers actually do, and the discussion of how lawyers reconcile their professional and personal lives and resolve the practical, ethical, and moral challenges they confront. They appreciated learning about the range of lawyers’ practices and the large number of career paths open to them; several students said they learned of possible careers of which they had not previously been aware, and some said they had tentatively ruled out types of practice that they had originally considered. Several students also reported satisfaction in knowing basic rules of ethics while handling pro bono projects during the spring semester of their first year (ninety-five percent of students did pro bono legal work) and during their summer jobs.

We were pleasantly surprised to discover that some of the features of the course that in some contexts can draw law students’ ire did not seem problematic to ours. Our students generally did not mind the dose of interdisciplinary readings. While we did not explicitly emphasize the interdisciplinary goals of the course—we simply presented materials from other disciplines as the best available research on the profession—students read excerpts of works in sociology, anthropology, philosophy, and economics without complaint. That the interdisciplinary materials were about the students and their chosen career appears to have made the readings seem relevant and useful rather than academic. We were also pleased that students were good-natured about the frequent short writing assignments and the fact that the course involved more work than conventional lecture and discussion courses. Their equanimity about the amount of effort required may be attributable to the fact that the work was spread out over the entire year so that no single Legal Profession assignment or exam was worth as much toward their GPA as a single exam in their other courses. It may be that students considered the course work helpful preparation for practice, and, in a bad economy, they seemed eager to gain the skills and knowledge necessary to get an edge in the job market.52

We do not have any measures of the course’s longer-term impact. Will students find the survey of practice settings useful in making career choices? Will they find greater career satisfaction than peers at other law schools that do not

52. The favorable reactions of our students to Legal Profession is consistent with what Professors Conley and Chambliss report about their own experiences with teaching unconventional courses about the legal profession grounded in sociological and ethnographic accounts of the profession. See Chambliss, supra note 19, at 851, 854, 856; Conley, supra note 19, at 1961 (both reporting favorable student reaction to their course).
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.offer such a course? Will they be more aware of their own agency in choosing styles of practice and in determining how to interact with clients, opposing counsel, and other participants in the legal system? Will they be more conscientious, ethical, or professional? Obviously, to the extent all the foregoing questions ask for comparisons between UCI School of Law graduates and other lawyers, we will never find answers; there are insurmountable difficulties of research design and measurement. But even if we do not attempt comparative judgments and focus solely on the course’s long-term influence on our own students, it will be years before we have data from which we could draw any solid conclusions.53

We can only speculate about why UCI students reported enjoying the Legal Profession course and saw it as a core part of the first year experience. As we suggested above, it may be that including the course in the first-year curriculum, assigning it the same unit value as every other course, and making it one of only two year-long courses, signaled its importance. It may be that no upper-level students were around to tell them which courses were serious and which were fluff. The course’s solid grounding in the “real world” of law practice, and its combination of skills, law, theoretical and empirical methods and training may have enhanced its appeal. That the course was largely the same for all 1L students—we assigned the same readings, speaker panels, simulation exercises, papers and examinations—may have encouraged students to treat it as an essential part of law school. It may be that in a year-long small-group (thirty students per section) format, the students enjoyed the opportunity to bond with each other and with the professor. It may be that the two of us really loved teaching it and did not hide our feelings. And it may simply be that everything at UCI School of Law is new, so the students understood the course to be just another aspect of being at an innovative new law school.

Although the course was successful, we still face many challenges. Perhaps the most significant one is trying to accomplish all the goals noted above in four

53. Beginning with the inaugural class, we have surveyed all of our students upon entering law school, and we plan to re-survey them at graduation and at intervals thereafter to gather data about their lives and careers. We hope that our survey will enable us to understand the impact of our curriculum, including the Legal Profession course, and other unique features of the early years of UCI Law (such as the reduction or absence of educational debt associated with the substantial scholarships for the first few classes).

54. For arguments that first-year courses communicate what law schools view as critical elements of legal education, see Russell G. Pearce, Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School, 29 Loy. U. Chi. L.J. 719, 736–37 (1998) (“[F]irst-year courses signal what it means to think and act like a lawyer.”); Howard Lesnick, Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum, 37 UCLA L. Rev. 1157, 1159 (1990) (“[I]t is what is imprinted in that initial immersion, and not any broader message of the three years, that shapes students’ consciousness of what is important and not important to being a lawyer. Any significant shift in the portrayal of law and lawyering in subsequent courses does not alter students’ ‘map’ of the legal world.”).
units. We sowed the seeds of many different ways of thinking about the profession and careers, and we attempted to teach a little bit of a wide range of skills. As with any survey course, achieving the right balance of breadth and depth is an elusive goal. We have already cut important and interesting topics from the syllabus (e.g., the judiciary) in order to cover other topics less summarily. Of course, these kinds of pressures are hardly unique to this course; professors struggle with breadth-versus-depth issues in most courses.

Identifying a logical and coherent structure for the course also remains a significant challenge. The problem is this: how to organize and synthesize the coverage of the basic law governing lawyers (e.g., confidentiality, conflicts of interest) with the contextual materials and the theoretical or “big picture” issues about the profession? Because the law of confidentiality and conflicts of interest is foundational, we taught it over the course of about four weeks beginning in the third week of the fall semester, and several students reported afterward that they felt the course really came to life when that part of the course ended. But to understand the origin and application of some rules requires knowledge about some practice settings in which the rules are most salient. Should one provide the context by teaching about practice settings and then cover the most relevant law, or can one understand the issues that arise in practice settings without first having learned the law and its underlying policy?55

It also remains a challenge to introduce other disciplines and the insights about the legal profession that they afford without oversimplifying. While other legal profession scholars and teachers have used a single discipline as the primary lens through which to study the profession,56 we prefer to draw on many. Our more eclectic approach allows us to take advantage of some of the best of social science and humanities research on lawyers, but it may be less intellectually coherent. And because both of us are legal generalists to a greater or lesser extent, our treatment of these materials may lack the rigor that others might bring to the task. We attempt to draw the disciplinary expertise that we lack from colleagues who graciously agree to guest lecture. But even the most talented guest lecturer finds it difficult to introduce a new discipline to an unfamiliar group of students and to explore it in any depth in a single hour-long class. Finally, to the extent that the founding faculty hoped that the UCI Legal Profession course would be a portal into interdisciplinary study of law by offering sustained discussion of the goals and methods of social science and humanities, we simply did not have the time to achieve that goal. We used bits of anthropology, moral philosophy, history, economics, sociology, and psychology to enrich students’ understanding of the legal profession. But we did not even try to teach students much about any

55. For a more detailed discussion of this tension, see Crampton & Koniak, supra note 23, at 165–67.

56. John Conley, for example, uses anthropology as his frame. See Conley, supra note 19. Elizabeth Chambliss uses sociology. See Chambliss, supra note 19.
of these disciplines per se or any of the rich debates about interdisciplinary studies of law. Students taking upper level “Law & ____” courses in any of these fields would likely enter with no more insight or sophistication about the interdisciplinary study of law than would students who have not taken our course. This is not a failing of our course, but it is a cautionary note about the limits of what can be accomplished in one four-unit class.

An additional difficulty over the long term will be staffing the course. It is a great deal of fun to teach, but it requires a huge amount of work to keep it flowing. There is always a speaker panel to plan, a set of questions from students to read, the next role-play exercise to design and participants to organize. It is a lot of work to grade two exams, a major paper, and a dozen short writings and role-play exercises, and to give individual feedback to students about paper drafts and oral presentations. For students and faculty alike, the course is more work than a four-unit course in which assessment is based exclusively on a final exam. It helps, of course, that we have all the same assignments and speakers for the whole 1L class so that we can share the planning and logistics, and it helps that the work is spread out over the course of the year. But it also means that we are busy with the course and with relatively demanding first-year students all year. When we are both eligible for sabbatical, the school will have to either condense the course to a single semester, which would make it almost impossible to have as many speakers and cover as much material, or find two faculty to replace us. And it is probably not realistic to expect a visitor to undertake the institution-specific work of teaching this kind of course. As with other ambitious efforts to enrich law courses through simulations, skills training, and other real-world elements, the long-term sustainability of the course will depend on attracting a corps of faculty committed to teaching it, and the history of other schools’ experience with this challenge is not encouraging.57

A fifth challenge is teaching materials. We heavily supplemented the only assigned casebook, and for most assignments we did not use a casebook at all. Choosing, editing, and distributing readings and obtaining copyright permissions is a considerable task. We liberally supplemented the major readings with short and timely news articles on as many topics as possible, and those will need to be updated annually. None of the major professional responsibility casebooks is well-suited for teaching a course such as this in the first year. Some books offer rich accounts of practice settings but are written for second- or third-year students who know more substantive law than first year students do. Some books offer a variety of opportunities to teach through simulations but are less appropriate for a course with a substantial empirical or interdisciplinary focus. And, of course, any

57. For example, Loyola Law School of Los Angeles, where one of us taught for over a decade, required in the second year a skills-based course called Ethics, Counseling and Negotiation. It was a constant struggle to recruit faculty to teach the course.
effort to tie readings to current events or to the particularities of local practice cultures is difficult to accomplish in a casebook intended for a national market.

Finally, professors teaching a course such as ours may find it challenging to recruit good guest speakers. It may be especially difficult if the professor teaches in a rural area or in a region in which he or she does not know the local legal community. The dean and the director for development will likely be happy, as ours were, to identify lawyers who would welcome the invitation to speak. They will likely also offer advice about avoiding unintentional offense to friends of the law school by extending invitations to some but not others. One can also reach out to colleagues, alumni, and acquaintances in the local bar to identify talented and inspiring public speakers. It is important to find speakers who react well—with candor and good will—to probing student questions about sensitive issues, such as the existence of and reasons for wrongful convictions in prosecutors’ offices, the lack of diversity at the higher echelons of large firms, or the matter of accountability between lawyer and client in issue-oriented advocacy organizations. It takes time and diplomacy to recruit and manage the constant stream of speakers, but our experience suggests that student gratitude and enthusiasm repay the effort.

VI. CONCLUSION

If law schools are to fulfill the Carnegie Report’s mandate to cultivate professional identity and teach students about the legal profession, learning about these issues should begin in the first year and continue throughout law school. We have argued that teaching Legal Profession can be rewarding to faculty and students alike when there is an adequate commitment of institutional support. What is needed is a sufficient number of units, faculty willingness to work a bit harder than usual, and an institutional and curricular message that knowledge about the legal profession is as essential to lawyers as is knowledge about contracts, torts, procedure, or any other staple of the first-year curriculum. Implicitly, we have argued that teaching a rigorous, interdisciplinary, and practice-based course in the first year is not only possible but perhaps even essential to fulfill the Carnegie Report mandate. The first year of law school communicates to students what concepts and values are foundational. Students begin to form their professional identities in the first year, and they make choices about career plans that can have lifelong impact. Moreover, professors in advanced courses who wish to raise nuanced and complex ethical issues that arise in particular practice settings (e.g., in tax, corporate, securities, or labor law), can do so at a reasonable level of sophistication only if students have already acquired basic working knowledge about the institutions of practice and the law governing lawyers. It is simply not realistic to expect professors in such courses to lay this groundwork as a prelude to addressing the complex variations on the problems of legal ethics that arise in their particular fields. Thus, ethics taught pervasively can be ethics never taught
seriously at all unless a foundation has been laid in the first year.

While it is essential to begin teaching students about the legal profession in the first year, it is important not to end there. As with any other subject, students interested in the legal profession and professional responsibility should be offered a menu of advanced courses. They should receive opportunities to take classes that focus on particular practice areas and on the specialized law that governs lawyers’ conduct in those fields. They should gain direct experience with the ethical dilemmas in live-client clinics. They also should be offered courses that compare professions and conceptions of role across occupations (e.g., medicine, journalism, engineering, business, architecture) and across national boundaries (to appreciate the similarities and differences between the American legal profession and legal professions in other countries). UC Irvine School of Law, situated in a large university with deep expertise in all these fields, strong interdisciplinary research and teaching traditions, and ambitions to build ties to practice communities around the globe, seems well-positioned to develop such a dynamic upper-level curriculum. However, is not unique in these characteristics: faculty at law schools across the country can draw on the resources of their universities, legal communities, and alumni to offer a rich upper-level curriculum on the legal profession and on professionalism more generally.

58. For a discussion of the usefulness of courses targeted to particular practice contexts, see Mary C. Daly et al., Contextualizing Professional Responsibility: A New Curriculum for a New Century, 58 LAW & CONTEMP. PROBS. 193 (1995); Bruce A. Green, Less is More: Teaching Legal Ethics in Context, 39 WM. & MARY L. REV. 357 (1998); Thomas B. Metzloff, Seeing the Tree Within the Forest: Contextualized Ethics Courses as a Strategy for Teaching Legal Ethics, 58 LAW & CONTEMP. PROBS. 227 (1995); Rhode, supra note 42, at 1051–52. For descriptions of specialized ethics courses—some offered as alternatives to a survey course on legal ethics and others as supplemental courses—see Daly, supra (describing specialized courses on ethics in corporate and international practice, public interest law, and criminal advocacy); John S. Dzienkowski et al., Integrating Theory and Practice into the Professional Responsibility Curriculum at the University of Texas, 58 LAW & CONTEMP. PROBS. 213, 224–26 (1995) (large firms); Green, supra, at 370–77 (corporate counsel, small firm, and solo practice); Heidi Li Feldman, Enriching the Legal Ethics Curriculum: From Requirement to Desirability, 58 LAW & CONTEMP. PROBS. 51 (1995) (insurance defense); Metzloff, supra, at 228–38 (civil litigation); Deborah L. Rhode, Annotated Bibliography of Educational Materials on Legal Ethics, 58 LAW & CONTEMP. PROBS. 361, 380 (1995) (describing George Fisher’s materials for course on prosecutorial ethics). Several excellent casebooks have been developed for specialized upper-level courses. See, e.g., CARRIE MENKEL-MEADOW & MICHAEL WHEELER, WHAT IS FAIR? ETHICS FOR NEGOTIATORS (2004); MILTON C. REGAN & JEFFREY D. BAUMAN, LEGAL ETHICS AND CORPORATE PRACTICE (2005); BERNARD WOLFMAN ET AL., ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE (3d ed. 1995).

59. See David B. Wilkins, Redefining the “Professional” in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism, 58 LAW & CONTEMP. PROBS. 241 (1995) (describing an intensive course for law and medical students titled “Ethical Dilemmas in Clinical Practice: Physicians and Lawyers in Dialogue”); Rhode, supra note 42, at 1055 (noting that perspectives from other occupations “frequently serve to jog otherwise unchallenged assumptions on issues like confidentiality, conflicts of interest, and third-party responsibilities” and that “courses that combined students and faculty from different disciplines offer particularly valuable settings to explore cross-cutting ethical concerns and prepare participants for an increasingly multidisciplinary legal landscape”).
At this point, we can report only on our first steps toward the goal we should all share: educating law students to become knowledgeable and reflective about the profession they are preparing to enter and their places within it. As we have shown, a Legal Profession course can and should introduce students to lawyers’ norms and institutions through an approach that is neither cynical nor naïve. It should pay close attention to how practice contexts influence individual lawyer conduct without denying that individual lawyers remain morally accountable for their behavior. It should provide illuminating portrayals of lawyers’ norms, practices and organizations, while also offering critical perspectives from which to evaluate them. The course should survey the many career paths available to lawyers and give students opportunities to assess whether those careers measure up to their own aspirations. It should alert students to some of the most glaring failures of the American legal system, including the difficulties faced by all but the wealthy in finding competent legal representation. It should show that the unequal distribution of legal talent affects how law is enforced and used throughout society. The entire curriculum of any law school will benefit if students appreciate that the skewed availability of legal services, as well as lawyers’ decisions about what clients to serve, what tactics to use and ends to pursue, and what advice to dispense to clients, have powerful implications for the administration of justice.60 A legal profession course should also make students aware of the enormous changes facing the legal profession in the United States and around the world, and it should prepare them to assume leadership roles in efforts to improve our legal system. Our course advances UCI School of Law’s commitment to preparing students to practice competently and ethically. It also reflects our commitment to join with colleagues at law schools across the country to engage with the bench and bar in developing meaningful conceptions of professionalism for the twenty-first century.

Why and How to Study “Transnational” Law*

Carrie Menkel-Meadow**

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* I dedicate this article to my late friend and personal mentor, Professor Rhonda Copelon, a role model for transnational legal justice. Beginning as a domestic women’s rights advocate in the United States, Rhonda litigated the path-breaking international human rights case of Filártiga v. Peña-Irala, 630 F. 2d 876 (2d Cir. 1980), which recognized the right, under the Alien Tort Claims Act, 28 U.S.C. § 1350, of foreign nationals to litigate human rights claims in United States courts. Rhonda then went on to be a champion of women’s rights (particularly in the area of domestic violence) around the world, participating in many international conferences, conventions for treaty drafting, and litigation in international tribunals. She founded an international women’s human rights clinic at CUNY School of Law. Always committed to social justice, Rhonda Copelon exemplified what all justice seekers should learn—justice may be struggled for, sought, and achieved in many different forums throughout the world. With multiple jurisdictions we can achieve multiple legal rights. Dennis Hevesi, Rhonda Copelon, Lawyer in Groundbreaking Rights Cases, Dies at 65, N.Y. TIMES, May 8, 2010, at A25; see also Law Professor, Rights Activist, L.A. TIMES, May 16, 2010, at A45. Rhonda and I were Fulbright Scholars together in Chile in 2007 where, as always, she challenged my work in conflict resolution and mediation to achieve the justice she sought through advocacy and litigation. Her work shall continue to inspire many for years to come.

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A child is injured in California by a product manufactured in Germany.

A British citizen conspires to blow up a plane destined for New York.

A multi-national corporation discharges a high-level employee, who is based in three countries, when he holds a press conference to denounce his company’s environmental and labor law violations.

A Japanese company with manufacturing plants in California seeks counsel from its Japanese lawyers in Orange County.

An American commits a murder and flees to a European country which prohibits extradition to any nation with the death penalty.

A movie star and noted political activist brings a libel claim in the United Kingdom, seeking damages and an injunction to prevent publication of an article, written in the United States, which describes her childhood in less than flattering terms.

A foreign government announces it will turn off Internet access to a particular browser, owned and managed by an American company.

Three major corporations from different countries agree on a joint venture to construct a major public works project in a developing nation (with financing supported by private investment and a grant from the World Bank) and then have several disputes about the payment schedules and quality of goods in the contract.

The United States incarcerates and “mistreats” (tortures) detainees captured during the post-September 11th period in various offshore locations and claims neither American law nor international law (the Geneva Conventions) applies to either procedural rights or substantive claims about their treatment.

A woman, fearing domestic violence from her military officer husband in another country, seeks political asylum in the United States.

A charitable benefactor seeks to establish schools for young girls in thirteen different Asian and Middle Eastern countries and recruits teachers in thirty different countries.
An American member of a political group posts a racist and hateful comment on his blog, which is blocked by the French government.

A Swiss pharmaceutical company perfects a pill to prevent implantation of a fertilized egg which is legally sold in Canada and made available to Americans through mail or Internet ordering, though it is not available for sale in the United States.

Fearing a military coup by a violent group of “insurgents” or “freedom fighters,” thousands of citizens of a Central American country flee from their country into both neighboring countries and also attempt to head north to Mexico, the United States, and Canada, where they are followed by armed members of their own country.

A ballet company from one country travels to another and is told by representatives of the host country that its female dancers may not wear their sheer costumes at the scheduled performance.

American and Mexican fishermen dispute tuna fishing rights off the coast of San Diego and Tijuana, as the American and Mexican governments seek to cooperate by building water and waste treatment plants on both sides of the border that will serve the larger bi-national “metropolitan” area.

A gay American couple, married in Spain (or Canada or Argentina), seeks marital benefits in the United States.

I. WHY WE MUST STUDY TRANSNATIONAL LAW AND LEGAL INSTITUTIONS

All of these scenarios are based on events which have actually occurred in recent years. Some directly involve American citizens (whether individuals, corporations, or other entities) and some do not. Some are situations or problems that affect only private parties; others include state actors or affect the implementation of government policies or laws of various nations. Some of these situations involve individual or group efforts, across borders, to engage in profit-seeking activities. Others involve poverty reduction, economic aid, or other improvement of the human condition, whether material or cultural. Some of this activity involves economic and business interests (formerly thought of as primarily “private” interests). Others of these situations involve human rights claims derived from legal undertakings or treaties that transcend national boundaries but are initially often a matter of “state” action (e.g., signing an international or regional treaty). Some of these situations involve both state and private action on the same issue or site. Many of these situations involve multiple legal jurisdictions including local, federal (state or provincial), national, regional, and international levels of possible regulation or dispute resolution. Some involve cultural differences, but violations of cultural norms or taboos may also have legal implications. All of these situations invoke legal issues that transcend legal (or sovereign) boundaries. This is the modern world of human activity, facilitated, regulated, sometimes
thwarted, and often affected, by laws that “cross borders” in order to effectuate their purposes.

The modern law student, even at a public state law school, like the University of California, Irvine School of Law (UCI), must engage in what we have termed “international legal analysis” (in our required first-year curriculum) in order to be an effective lawyer in the twenty-first century, regardless of where that student might ultimately practice law (or not!). Goods, services, ideas, and people cross legal borders and boundaries in the millions each day during modern human commerce and communication. When and how transfers of goods, services, people, and ideas should occur are the subject of much rulemaking and policy consideration at a variety of different levels of regulation. How these transfers actually occur may or may not conform to national, regional, or international rules and regulations.

Lawyers of the twenty-first century must come to understand that, with respect to most of what we do or want to do, we are now in an interdependent world of manufacturing, distribution, consumption, and promotion of creative action, as well as, sometimes sadly, destructive sites of interaction. Even if national legal systems wanted to control and cabin all that happened within their borders, it is now true, as the poet W.B. Yeats said, “the centre cannot hold.” Goods, services, people, and ideas migrate and actors may attempt to choose their intended sites of action but not their points of impact (with varying degrees of legal liability).

This recognition of our legally “migratory” society, or “globalization” as others controversially label it, requires some reorientation of conventional legal education. In this essay I review some of the leading issues in studying law that is not “primarily” American law, whether federal or state, local or international, and discuss how these issues will be taught at our new law school.3

As Professor Peter Strauss of Columbia Law School has noted, with respect to McGill University Faculty of Law’s new program to teach “transsystemically”

3. Of course UCI is not the first law school to consider these issues. In the last few years several law schools, including Harvard and Georgetown (where I came from), have put international law in the first-year curriculum, see infra Section III, as many other law schools have done or are doing. See Symposium, Integrating Transnational Legal Perspectives Into the First Year Curriculum, 24 PENN. ST. INT'L L. REV. 735 (2006).
(by teaching both common and civil law concepts together), we may be in a “new Langdellian moment” in legal education. At some point shortly after the Civil War, study in American law schools moved from the study of local (state) law to the more “national” law, use of the Socratic method, which focused on legal concepts, and inductive case study, rather than jurisdiction-specific laws and didactic lectures. Harvard, and then Columbia and Yale graduates who were taught in this “transsystemic” (beyond states) national law were considered better trained to be lawyers in the newly industrial society in which railroads and goods crossed state lines (even before federal agencies were created to deal with both federal and inter-state commerce issues). This new national legal education changed both substantive teaching and the method of instruction (generalized conceptual learning of the Socratic method). Strauss suggests (and I agree) that we are now in a similar “moment” of change as we recognize that law may be even more “transsystemic” (beyond national boundaries), requiring knowledge of law and general principles beyond domestic/national law, and beyond our own (common law vs. civil law) system. I hope this will also be a moment that unleashes new methods of teaching as well. For me, the “transnational” focus, linked to experiential and multi-disciplinary methods of study, provides the promise of teaching the modern lawyer how to be a creative legal problem solver, learning how to use lawyering skills, and a great possible variety of legal (and non-legal!) solutions to different kinds of social, legal, and economic problems.

The study of law that is not primarily “American” falls into different categories, even as those categories are themselves dynamically changing. Traditional conceptions of international law most often contemplate treaties (formal signed documents and obligations) or customary practices (less formal but recognized by courts and other bodies) that bind states or sovereigns and are often known as public international law (or the relations between post-Westphalian states). Another recognized conventional category is private international law which contemplates that private entities and individuals will make contracts, deals, and transactions with each other across borders that may then require legal enforcement and have complex issues of conflicts or choices of laws (whose law applies if several different jurisdictions are affected by the transaction or dispute).


6. Modern conceptions of the State are said to date to the Treaty of Westphalia of 1648 (ending the Thirty Years War and creating legal conceptions of sovereign States) even though most modern states, including the United States, Italy and Germany, did not emerge until sometime later.

7. See generally BARRY CARTER ET AL., INTERNATIONAL LAW (5th ed. 2007).
Public law is enforced by formal institutional bodies (like the International Court of Justice at The Hague) or, more often, by diplomatic, political, and negotiated processes. Private law is enforced by formal international litigation in domestic national courts, and now, most often, by private (international commercial arbitration panels) or hybrid (the International Centre for Settlement of Investment Disputes) arbitral fora. Thus, conventional international law has both complex substantive and procedural dimensions.

Private international law is probably even older than public international law in the earliest acts of trade and commerce across “political” and legal boundaries, and its earliest regulation in Roman, medieval and other forms of “transsystemic” regulation of commerce and trade. Much formal public international law has been enacted following the end of World War II. This modern public international law includes the Charter of the United Nations (UN), many international treaties, the Bretton Woods agreements, and the many modern international and supranational institutions created by these agreements, including the International Court of Justice (ICJ) (in The Hague), the World Bank, the International Monetary Fund, the World Trade Organization (WTO) and most recently, the International Criminal Court (ICC). Other “transnational” bodies of legal action include regional organs such as the European Council, the European Union, the Organization of American States, Mercosur, NAFTA, ASEAN, ANZUS and the African Union, which vary in their attempts to regulate, on a regional basis, economic and trade relations, or more “thickly” developed regulations for more social legislation (as the European Union has accomplished in a variety of areas including employment, consumer, and health matters). Separate from economic relations, both international and regional treaties and regulations on a variety of human rights issues have led to new regional, multi-national tribunals and institutions, like the European Court of Human Rights in Strasbourg (separate from the European Court of Justice in Luxembourg) and the Inter-American Court of Human Rights, and have led to new and overlapping jurisdictions for adjudicatory purposes. In traditional legal terms, questions about the relations of these tribunals to each other and to the courts of nation-states are complex and have been characterized as both “dialectic” and “dialogic” if not

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8. This term “transsystemic,” now used by McGill Law School to describe its own “transsystemic” legal education program (both civil and common law studied together, see Peter Strauss, supra note 4), may be a bit anachronistic for older legal history. Roman law was not really transsystemic—it transcended physical and cultural borders, but, like more modern colonial legal systems, when “imposed,” it becomes “the” legal system.


12. Association of Southeast Asian Nations.

WHY AND HOW TO STUDY “TRANSNATIONAL” LAW

“determinative.”

A. What is “Transnational” Law?

Beyond these more conventional understandings of “international” (internation) law are newer conceptions of lawmakers that cross borders. We speak now of “globalization” studies, “transnational” law (law that transcends or crosses borders but may not be formally enacted by states) and comparative law, which seek to trace how laws have influence, if not total power, in places other than those where they are initially enacted. Beyond formal law enacted by states are a variety of more “informal” forms of legal activity, including “private” tribunals, like the International Chamber of Commerce in Paris, that administer private international commercial arbitration proceedings; the International Centre for Settlement of Investment Disputes (ICSID), a hybrid arbitration body which decides disputes between private investors and nation-states; and the thousands of informal “networks” that have developed among both intergovernmental and non-governmental (NGO) bodies to deal with specific legal and social issues, including global terrorism, national security, environmental and climate change, monetary and banking policy, women’s and children’s rights, health, Internet, intellectual property, labor, food and drug safety, migration policies, and a host of other “transnational” issues. Scholars now talk of a network of “global governance” as distinguished from global government of more formal international institutions.

Thus, international or transnational law might not even be formal “law,” as enacted by a state or formal governmental body. Transnational law, like formal international law, has customary practices, norms, and patterns of behavioral regulation that are broader than, and perhaps, even more complex than formal law. Indeed, several scholars have made the claim that most of what is meant by “globalization” actually occurs at “sub-national” levels, such as religious rules and laws that affect millions of people across national borders, sub-national governmental groups of policy making, political affinity and activist groups (including environmentalists and many “anti-globalists”), and reform groups that

17. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).
18. TWINING, supra note 2, at 3; SLAUGHTER, supra note 17.
19. See DAVID HELD & ANTHONY MCGREW, GLOBALIZATION/ANTI-GLOBALIZATION:
seek to effectuate laws and practices that are not only “national.” In our modern age, alliances for security and military purposes, including both formal public alliances, and the private undertakings of large multi-national security corporations also blur the lines of the nation-state as the principal (or legal) actor.20 And many critics of modern globalization developments claim that the most powerful transnational actors are private multi-national corporations who attempt to avoid regulation (at national, supranational or international levels).21

Transnational law (or legal movements, such as the “anti-globalization” movement)22 is the study of legal phenomena, including lawmaking processes, rules, and legal institutions, that affect or have the power to affect behaviors beyond a single state border. In California that definition applies to a great deal of our ordinary behavior—consumption of products made all over the globe, business contracts, leisure activities, communication (Internet, cell phones and other electronic devices), technology, medical treatment and research, entertainment (international intellectual property), and in many cases, health, employment, education, and criminal issues as well, not to mention the obvious immigration and migration issues that are particularly prominent in the region.

As a thought experiment, take a look at the front page of any “local” newspaper and see how many stories invoke “transnational legal issues.” In today’s (August 4, 2010) Los Angeles Times, for example, there are stories about the British Petroleum oil spill in the Gulf of Mexico (involving a British company in U.S. waters with environmental, economic, employment and energy liability issues involving many American states, and corporate headquarters in the United Kingdom that affect Mexico and the Caribbean), multi-national jockeying for power (and jobs and influence) in Iraq following an announcement that the United States military withdrawal would soon be accomplished, and a proposed pit-mine (owned by a multi-national partnership involving the United States, Canada and the United Kingdom) in Alaska threatening salmon fishing boat interests (affecting both American and Canadian commercial fishing interests, as well as indigenous peoples protected by national, tribal, and international laws) and multi-national environmental interests, as well as employment interests for locals and indigenous people.23 Modern law students, who will most likely specialize in practice, cannot learn about such regular legal staples as contracts, torts, employment law, intellectual property and technology law, environmental law, banking, commercial, corporate, or even constitutional law, without studying

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"transnational" aspects of the legal issues they will likely face in practice. Indeed, with all of the immigration and migration into the United States (and increasingly, back out again), even such "local" subjects as family law (child custody, as well as spousal support), trusts and estates (inheritance), tax and property ownership often have "multi-national" dimensions.

The older study of comparative law has asked both scholars and practitioners of law to look at patterns or families of legal solutions to common legal problems and to note both differences and similarities. While the old families of civil, common, socialist, and "Other" systems of law (read as Asian, African, or colonial, indigenous, or hybrid) may be "converging" (or not) or further disaggregating (e.g., Islamic, Shar’ia, or religious law, as well as sub-national legal systems of semi-independence), tracing the different treatments of common legal problems provides at least one useful methodological point of entry for understanding and describing the more modern reality of "legal pluralism." While scholars debate whether there can be legal transplants from one legal system to another or what the cultural and legal effects are of "copy-paste" lawmaking, the rigors of comparative law, as both legal and cultural analysis, has come into its own as various bodies debate whether the unification of law across legal and cultural systems is necessary, desirable, or possible. Other scholars have suggested that in comparative studies it is not enough to look only at formal law. How law is used or "assimilated" in a culture will depend on political, historical, social and cultural factors. Professor Victor Ramraj, for example, has argued that


26. Although Shar’ia law is derived from the text of the Qur’an (with multiple schools of interpretation), its enactment into positive law varies in the fifty-seven countries that are formally Muslim. See, e.g., WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW (2005).

27. Consider the devolution of legal authority over such matters as taxation or education in such regions of the world as the Basque and Catalonia regions of Spain, Scotland and Wales in the UK, or language policy in Canadian provinces, see, e.g., W. KYMLICKA & A. PATTEN, LANGUAGE RIGHTS AND POLITICAL THEORY (2003); Wallonia and Flanders in Belgium, see, e.g., R. Mnookin & A. Verbeke, Persistent Nonviolent Conflict with No Reconciliation: The Flemish and Walloons in Belgium, 72 LAW & CONTEMP. PROBLEMS 151 (2009).


even if constitutional provisions look the same in different constitutions they will not have the same meaning in societies where “constitutional values” (such as true separation of powers or checks and balances) are not yet truly “embedded” in the political, not only legal, culture.30

B. The Importance of Studying Transnational Law

Below I explore the importance of understanding the terminological differences in these forms of “transnational” law, and the “international” and cultural legal analysis that distinguishes this form of law study from domestic law study. At the outset, however, it is important to point out why we should study these complex forms of legal regulation and action, even as they may complexify the meaning of law for neophytes to the profession.

First, studying transnational law is necessary. As more fully elaborated below, few transactions or disputes remain totally domestic in their effects and regulation.31

Second, studying transnational law, or what we at UCI are calling “international legal analysis,” is a more sophisticated form of the old saw “learning to think like a lawyer.” Law is enacted in many ways, including court decisions (doctrine and precedent), legislation, resolutions (e.g., of the UN Security Council) and rulemaking. It can be enacted privately in law offices, in private arbitration hearings, in private contracts, and in meetings of international bodies, whether public and formal, or private and informal. The objectives of law in an international or transnational system may be broader, deeper, and more ambitious, but their enforcement is strikingly different from—both weaker (no final court) and stronger (the use of force)—the enforcement of domestic law.32 Layers of analysis of the various processes of lawmaking and enforcement broaden the scope of what law students (and lawyers) study and need to know. There are a greater variety of laws (cases, codes, statutes, directives, administrative rulings, resolutions, awards, judgments, compromis), legal materials, documents, and procedural rules to learn in international analysis, but there are also more interpretive tools, forms and metrics of analysis to learn, including cultural, sociological, historical, and linguistic,33 as well as legal. Thus, international legal

31. See Laurel S. Terry et al., Transnational Legal Practice, 43 THE INTERNATIONAL LAWYER 943 (2009); See also Laurel S. Terry, supra note 24.
33. Pierre Legrand, “Il n’ya pas de hors-texte;” Intimations of Jacques Derrida as Comparativist-at-Law in DERRIDA AND LEGAL PHILOSOPHY (P. Goodrich, F. Hoffman, Michel Rosenfeld and C. Vismann eds., 2008). How appropriate it is here to cite Derrida at UC Irvine, which was his sometime home in the study of literary theory and comparative literature. Jacques Derrida was a Professor of Humanities at UC Irvine from 1986 until his death and has donated his archives to the University.
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analysis teaches the importance of pluralism and multi-disciplinarity in legal analysis and multiple interpretative strategies.

Legal pluralism in international analysis is itself plural. There is doctrinal (substantive) legal pluralism in the different outcomes that different legal systems use to solve legal problems (e.g., what constitutes an enforceable contract, what losses are compensable in various forms of torts, who is an heir?). There is methodological pluralism in the different ways that law is itself generated (code or common law, legislative or decisional) and interpreted. And finally, there is procedural or processual pluralism in the different processes and institutions that are created within and between systems to make, interpret, and enforce law. The study of international analysis requires a broadening, expanding, and flexibility of mind to simultaneously consider and learn multiple forms of legal analysis. Thus, while it has been said that the study of law sharpens one’s mind by narrowing it,³⁴ the study of transnational law may actually open one’s mind by widening it.

Third, learning about the pluralism of international legal analysis, including different solutions to the same legal problem (e.g., what makes a contract legally binding, what damages are appropriate for physical, emotional, and monetary losses), different methods of analysis (code reasoning, common law reasoning), as well as understanding different legal processes (courts vs. tribunals, arbitration vs. mediation, consensual vs. commanded solutions), teaches us that law is chosen, not given. Different legal cultures and societies may choose different legal solutions and mechanisms for the regulation of human conduct. That first-year law students should learn early (and often) about the contingency (historical, political and social) of law is, for me, an essential part of any rigorous legal education.³⁷ Law is, as one legal theorist has called it, “plastic”³⁸ and flexible enough to be tailored to the needs of particular societies, as goals, enactments, and enforcement mechanisms change and vary with human needs as socially constructed by different social units over time.

Fourth, students of international legal analysis will learn what domestic lawyers must learn—the relation of different levels of authority to each other. International law is both horizontal and vertical in authority, different from the strictly hierarchical form of authority of courts in both our federal and state systems of justice. There are no “higher authorities” in international law with the authority of the United States Supreme Court (the International Court of Justice has mostly

³⁵. Not consideration in civil law!
³⁶. ZWEIGERT & KÖTZ, supra note 25, ch. 18, at 7.
³⁸. ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS (1976); ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY (1977).
consensual, not compulsory, jurisdiction), but there are international institutions with appellate structures (e.g., the World Trade Organization Dispute Settlement Body), and there are many legal issues about which there are both intra-systemic (the European Court of Human Rights and its effects on national law within Europe) and inter-systemic decisions and rulings (e.g., WTO, ICSID, and international commercial arbitration effects on national courts, government, private policy, and contracting) that have to be interpreted, assimilated and synchronized (or not!). As one of the currently contested issues of international analysis, scholars and practitioners debate whether there are too many new international tribunals, which are fractionating and dispersing international legal authority, or whether more international tribunals will increase the amount of international law and its overall efficacy in promoting world peace, economic well-being, and human rights. In my field of specialization, international dispute resolution, we look at dispersed and differentiated legal processes in the forms of both formal institutions for prosecution or legal enforcement (e.g., the international criminal tribunals such as Nuremberg, Former Yugoslavia, Rwanda and now the International Criminal Court) and newer forms of tribunals, such as Truth and Reconciliation Commissions (e.g., South Africa, Argentina, and Chile) that offer both different goals (reconciliation) and outcomes (apologies and restorative justice). How these multiple processes and institutions, often working within the same jurisdictions at different levels, may be coordinated or reconciled (or not) is one of the cutting edge issues in our field.

Finally, for me, a modern cosmopolitan, international legal analysis teaches
legal humility. With all the emphasis on American exceptionalism in studies of the Constitution, the Uniform Commercial Code, or any of the American Law Institute’s Restatements, international analysis shows us how others have thought differently about legal problems and what kinds of rights and remedies we might enact to achieve our various goals. We learn when we can do things on our own and when we need others, whether human beings or legal entities. Thus, international and transnational law also teach us about our human interdependence. At a normative level, international analysis shows us how we might act together to make a better and fairer world for as many of our fellow humans as possible. Justice is not “just for us” (Americans) but for the whole world.45

II. WHAT WE MUST STUDY IN TRANSNATIONAL LAW

A. Formal Law and Interpretation

Traditional study of international (inter-state) law focuses on the formal legal study of treaties and customary law (legal norms so pervasive they become binding on even non-signatory states). Conventional legal documents will be studied including international treaties, international tribunal regulations, policies and procedures, and the judgments, decisions, awards, decisions or “cases” of international tribunals. Study of cases from international tribunals immediately raises questions of systemic interpretation. Are decided cases of international tribunals to be treated as common law case precedent or as civil law non-precedential awards or “simple” judgments?46 And what are the effects of international treaties or cases on domestic tribunals?47 Thus, increasingly, almost any study of law which crosses “systems” compels a comparative analysis—whose form of legal reasoning will be used? A common law analysis of case precedent and stare decisis? A civil law perspective on the codified text? Or some new


46. Under international law interpretation principles (and the statute of the International Court of Justice), cases are not precedential in the Anglo-American conception of stare decisis. Nevertheless, increasingly international tribunals of all kinds, including courts and private arbitration panels, read, cite, and use the reasoning, judgments, awards, and opinions of other cases so that what has full precedential authority is itself increasingly variable.

47. In recent years, there has been extensive debate about what role the use and interpretation of “foreign” or international law should have in American constitutional jurisprudence. See, e.g., VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010); Medellín v. Texas, 552 U.S. 491 (2008); Roper v. Simmons, 543 U.S. 551 (2005); Avena & Other Mexican Nationals, 2004 I.C.J.12 (2004); Lawrence v. Texas, 539 U.S. 558 (2003); See also Editorial, A Respect for World Opinion, N.Y. TIMES, Aug. 2, 2010, at A22 (commenting on Republican criticisms of Supreme Court nominee Elena Kagan and the use of foreign law in American jurisprudence).
hybridized understanding of what “international” or transnational law is? And, how much should any interpretation of law look at similar laws or legal issues from other systems (whether horizontal—another sovereign—or vertical—an international or regional tribunal)?

All these questions are now complicated by both private international law (literally thousands of private arbitral decisions decided yearly in transnational commercial disputes) and more hybridized forms of justice from tribunals that decide matters involving both states and private parties, such as ICSID, where decisions are published and can be readily seen by interested parties (and used for argument). The proliferation of bodies deciding issues that transcend state borders (including the online arbitration system employed by The Internet Corporation for Assigned Names and Number (ICANN) to adjudicate domain name disputes, which is also “public” as published decisions online) makes the very definition of what is “transnational law” increasingly open-ended.

B. Definitional Issues: How Does International Law Differ from Transnational Law?

Modern teachers of transnational or international law begin with several definitional and conceptual debates. What is transnational law and how does this concept differ from the more conventional notion of “international” (inter-state) law? Former Dean of Yale Law School and current Legal Advisor to the State Department, Harold Hongju Koh, considers “transnational” law to be a hybrid of international and domestic law; as others describe, it is the law that governs the “gaps” between formal international law and domestic law. In our modern era, transnational law is law that moves back and forth from the international to the domestic and often back again, such as when one nation’s legal solutions are “copy-pasted” or “downloaded or uploaded” to the law of another nation or to the international system. Examples include human rights concepts (such as torture, as well as

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49. See Philip Jessup, Transnational Law 136 (1956) for the classic definition of transnational law which is “all law which regulates actions or events that transcend national frontiers, [including] public and private international law . . . [as well as] other rules which do not wholly fit into such standard categories.” For a more modern discussion of the definitional issues see, for example, Graff-Peter Calliess, Transnational, in THE ENCYCLOPEDIA OF GLOBAL STUDIES (Mark Juergensmeyer, Helmut Anheier & Victor Faessel, eds., forthcoming 2011); Peer Zumbansen, Transnational Law, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 738–54 (Jan M. Smits, ed. 2006); Craig Scott, “Transnational Law” as Proto-Concept: Three Conceptions, 10 GERMAN L. J. 877 (2009); Simon Chesterman, The Evolution of Legal Education: Internationalization, Transnationalization, Globalization, 10 GERMAN L. J. 877 (2009); Harry W. Arthurs, Law and Learning in an Era of Globalization, 10 GERMAN L. J. 629 (2009) all in the special issue TRANSNATIONALIZING LEGAL EDUCATION (Nadia Chiesa, Adam de Luca & Bernadette Maheandiran, eds.). See also Roger Cotterrell, Transnational Communities and the Concept of Law, 21 RATIO JURIS 1 (2008).

discrimination), definitions of fairness in contracting (e.g., unconscionability), definitions of due process in all procedures, both civil and criminal, as well as trade and business concepts, intellectual property, and corporate governance principles. Especially in “newer” areas of law, such as environmental, consumer, trade, intellectual property, refugee and migration, and labor and employment law, where “standards” are important, measures of acceptable behavior (and legal concepts like balancing and proportionality) migrate back and forth from domestic to “global” standards as regulations, best practices, and case decisions are written by a variety of levels of legal tribunals. Dean Koh has described “transnational legal process” as “a blend of domestic and international legal process [which] internalizes norms” from the interaction of international and domestic lawmaking authority. Even private law and rulemaking are increasingly transnational, as multi-national corporations develop codes of conduct or best practice codes by which they promise to be governed. These new forms of less formal regulations, often expressed in aspirational terms, include statements of best practices from international bodies, sub-national governmental agencies, industry-wide codes, and corporate entity codes.

C. Convergences or Divergences?

Perhaps the leading question in the study of transnational and international law and their differences from each other is whether we are observing convergences of legal systems in the similarity of treatment of common legal issues of our need to specify legal standards that can travel and govern global activity like the Internet, health, and travel, or whether we are observing great divergences in legal treatment of issues marking strong cultural differences between systems (e.g., cross-national family law issues). Related to this issue, and a significant one in modern American constitutional jurisprudence, is to what extent different legal systems look at the law of other systems as binding, instructive, or irrelevant to


53. See, e.g., SLAUGHTER, supra note 17, at 53.

54. The CEO of Hewlett Packard resigned on August 7, 2010, because he had failed to observe corporate best practice standards even though he claimed no formal legal violations after accusations of sexual harassment and misreporting of business expenses. Other CEOs have resigned for similar (corporate best practices or codes of conduct) reasons in recent years (e.g., Boeing) or because non-legal public relations concerns have had stronger “policing” effects than formal law (e.g., recent removal of CEO of British Petroleum after Gulf of Mexico oil spill).
legal decision-making.55

Legal historians, focusing on the *jus commune* or Roman law, philosophers focusing on natural law, and international lawyers focusing on *jus cogens*56 may all claim a “universal” understanding of basic legal principles that are essential to all human beings or states that do or should govern behavior even before we accede to positive law (the law of formally and legitimately adopted rules). Such “universalists” believe we can uncover essential or fundamental principles of justice or right behavior to which we can all adhere. Such theorists might begin with the excavation of what those universal human understandings might be. Whether framed as imperatives such as “thou shall not kill” or “promises should be kept,” modern universalists or “legal harmonizers” look for the commonality in laws that transcend boundaries as they seek to explicate and advocate for rules and norms of human behavior that can govern across national boundaries and physical locations. Such universalists may be cosmopolitan human rights lawyers, legal and political philosophers, or private law experts seeking to develop universal contract and tort principles to govern modern international transactions.

Comparativists, anthropologists, sociologists, and more culturally skeptical legal scholars57 instead may focus on the great variations that exist across and between legal systems, either to question the possibility of legal harmonization or “legal transplants” and borrowings, or to urge more rigor in the adoption of international compacts, treaties, and other forms of transnational regulation. If legal systems (or “families” or traditions58 of law) are quite different from each other, then attempts to regulate among, between, and across legal systems will, in fact, be far more complex in their enactment, interpretation, and enforcement.

**D. Enforcement Issues: “Hard” vs. “Soft” Law?**

We must confront both theoretical and practical concerns. Do we share an understanding of what law is, what it should regulate (both permissively and prohibitively), and how it should be enforced? Even if we agreed on universal (or consensual) legal principles, who enforces these understandings? To put it most directly, does law require the state (and its enforcement mechanisms, still largely

55. Harold Koh calls this the conflict between the “transnationalists” and the “nationalists” on the federal bench, Koh, supra note 50, at 748–50, while Vicki Jackson describes this as a choice about resistance, convergence, or engagement with “foreign” law. Jackson, supra note 47.

56. *Jus cogens* is a normative concept of universal acceptance of particular principles, recognized by the international community, as fundamental understandings, such as “the right to be free from official torture.” See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992).

57. See UGO MATTEI & LAURA NADER, PLUNDER (2008) (analyzing attempts at globalization or harmonization of law as a product of domineering and dominating illegitimate political and economic forces of global capitalism and American hegemony).

58. See GLENN, supra note 25.
non-existent in the international arena) to be law. In modern treatments of such issues, distinctions are made between “hard” law (state enacted, enforced, and sanctioned law) and “soft” law (non-legally enforceable normative regulation and enforcement by non-governmental organizations or through such social and political processes as economic sanctions, “shaming,” and reputational effects). International lawyers and political scientists now speak of “global governance,” which is a hybrid of hard and soft law as global networks of governmental officials (including regulators, judges, ministers and heads of state) make and enforce international and regional policy through both formal and informal networks that operate parallel to both domestic and international governmental institutions.

Enforcement of standards of various kinds may entail formal legal proceedings, but also less formal modes of regulation, including self-regulation and reputational effects, which present incentives for adherence to legal and other norms beyond those of formal law enforcement. Those who are more cynical in terms of formal law enforcement see the perhaps greater power of the coordinated actions of private multi-national corporations and industry-wide “conspiracies.” These aspects of differing incentives and variable enforcement may be particularly significant in the transnational arena and should be studied by modern law students.

Conventional studies of international law often begin with the question of whether international law is really “law” at all since what international law does (treaties, customary law, etc.) depends on consent and has no formal and efficacious governance structure at all—there is no international legislature, general and final authoritative court, nor an executive or army to enforce rulings.

59. The efficacy of world government, in the form of its principal institution, the United Nations, remains quite controversial. See, e.g., STROMSETH ET AL., supra note 43.


62. SLAUGHTER, supra note 17.


64. UN Peacekeeping “armies” have, in fact, very little power to enforce laws generally. See BUILDING PEACE: PRACTICAL REFLECTIONS FROM THE FIELD (Craig Zelizer & Robert A.
Separate from questions of the structure and effectiveness of the UN, treaties allow reservations and countries (such as the United States) to withdraw from or renounce international undertakings that turn ultimately on power, not rule of law.

The status of international law as binding within a nation is also complex. In what is in reality a more complicated dynamic, nations are considered “monist” if their domestic legal regimes fully incorporate international obligations (such as the Argentinean Constitution which now fully incorporates international and regional human rights conventions in its text) or “dualist” if domestic law and international law are not automatically linked. Treaties in the United States must be ratified by the Senate, and there are distinctions in the American Constitution between self-executing and other forms of treaties. Thus, international law, such as it is, has “existential” issues at both international and domestic levels of regulation. In the United States, international law and the study of treaties and other international obligations are now important components of constitutional law study.

E. Sources of International or Transnational Law

The sources of international law are many and varied. The often cited source on sources is Article 38 of the Statute of the International Court of Justice, which provides that sources of international law include formal law and international agreements, such as treaties or conventions, international customs, general principles of law as recognized by civilized nations (jus cogens) and “other” legal materials (including cases of other courts), and “teachings of the most highly qualified publicists of various nations” (scholars and others). Increasingly, however, sources of international law also include arbitral decisions (from a variety of private, but formal, tribunals that manage selection of private individuals to arbitrate international commercial, investment, and even formal governmental disputes) which may or may not be published, drafted, and adopted “restatements” of law including joint efforts of private organizations like the American Law Institute, UNIDROIT, and the Trento Commission; decisions of regional legal bodies like the European Court of Justice or the Inter-American Court of Human Rights; as well as formal enactments of regional bodies, such as the Directives and Regulations of the European Union. As noted above,
international law sources also include the domestic constitutions of every nation as one must learn what authority international law does or does not have on domestic citizens (and non-citizens, as well, as both domestic and international “rights” affect non-citizens in any particular domestic state). The International Law Commission (a “voluntary” internationally representative body of the UN) writes “laws” in draft treaties, conventions and other international documents, and many UN subject matter commissions, whether “permanent” or “ad hoc,” such as the UN Commission on International Trade Law (UNCITRAL), the World Health Organization, or the UN Conference(s) on the Law of the Sea, draft model laws and conventions, some of which are adopted as international treaties by consent or as domestic law (as enacted by domestic legislatures). UNCITRAL’s Model Arbitration Law, for example, has served as the model for domestic arbitration legislation in many countries in Latin America and Eastern Europe.70

Thus, students studying modern international law will learn from a wide range of legal materials and will have the difficult task of analyzing not only complex meanings (in documents often drafted in many languages) but also what the relationships of different kinds and sources of law are to each other. This is the problem of pluralistic legal authority.

F. Parties in International Law

As conventionally conceived, international law was meant to apply to state actors. Today international law clearly includes international organizations,71 as well as individuals.72 Perhaps the greatest contribution of modern post World War II lawmaking (sadly necessitated by grievous harms and wrongs committed during that war and for decades afterward) was the recognition of international human rights for individuals in international and regional charters, conventions, and treaties, which now provide tribunals and venues for rights vindication, such as the European Court of Human Rights in Strasbourg and the Inter-American Court of Human Rights, as well as many domestic courts. Many nations now incorporate these international human rights in their own domestic law. Like the ever-expanding inclusion of different groups and individuals in American equality jurisprudence, the study of international law demonstrates the growing recognition of claims to basic human rights of survival, freedom from torture, discrimination

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70. CHRISTIAN LEATHLEY, INTERNATIONAL DISPUTE RESOLUTION IN LATIN AMERICA: AN INSTITUTIONAL OVERVIEW (2007).


72. HUMAN RIGHTS ADVOCACY STORIES (Deena Hurwitz et al. eds., 2009); INTERNATIONAL LAW STORIES 45–77 (John E. Noyes et al. eds., 2007).
and in some cases, more positive rights of humans, flourishing in economic, social, cultural and political rights. As the number of people who can assert legal claims continues to grow, the study of international law, like domestic law, will continue to grow, and rights and legal claims will continue to expand. Recognition and enforcement of those claims is another issue.

G. Jurisdiction and Power—Choice of Law, Choice of Forum, and Choice of Process

Modern international law study is also a study of jurisdiction and power. With plural sources of law and many locations and types of institutions to enforce those laws and legal rights, students and international lawyers must learn the rigors of choice of law (what law applies to a dispute or transaction) and the strategies of choice of forum (what tribunal is most likely to have the power to give a party what it needs, both in terms of legal power, and the power to execute on assets in a jurisdiction or make an order that can be executed). And with multiple parties to a dispute or transaction making similar choices, there will be issues of res judicata, double jeopardy, the effects of multiple rulings or judgments in the same case in different locations, and other issues of international litigation and dispute settlement.

In international dispute resolution, a modern international lawyer will also have to choose form of process—should an international matter be taken to a court for legal treatment, diplomatic or private negotiation or mediation, or political formal or informal action. International dispute settlement or process, like substantive international law, has expanded from consideration of state-only avenues of redress, like diplomacy, war (use of force), and formal adjudication, to recognition of an increasingly plural set of process options, ranging from the formal and public to the private and informal, and involving a broader range of possible parties, including state representatives, organizations, groups, and individuals.

While learning substantive law, modern students of international law will also learn to choose among a range of processes including negotiation, inquiry, fact-finding, conciliation, mediation, arbitration, diplomacy, adjudication, and use of force. In addition to the older formal institutions in international law, there are now a wide variety of hybrid and new kinds of tribunals and institutions that


handle matters involving more than one state or the aftermath of conflicts, whether inter-state or intra-state (civil wars, genocides, and transitions from dictatorships or other illegitimate regimes). A study of the new courts in Cambodia and East Timor, which combine elements of the older international criminal tribunals for the former Yugoslavia and Rwanda with efforts to build capacity in new domestic legal regimes, demonstrates that international legal ordering is an iterative process—we learn something for institutional change and development from each new national or world crisis. And while conventional international law has focused on situations of conflict, modern international processes are also forward looking and seek to build on international cooperation, as much as or more than on older notions of sovereign competition. Disaster aid, environmental crises, and future planning have produced an increase in international meetings, negotiations, and cooperative efforts requiring management and governance and providing many more sites of lawmaking.

H. Beyond the State in Transnational Law: Legitimacy, Democracy, Private Law and Transnational Justice

The recent turn to the term “transnational,” rather than international, law connotes a conceptual change in how we look at what we are studying in law (as well as in political science and economics). Ideas, people, services, and goods cross borders so “international” law is no longer a subject for only the regulation of inter-state activities. From the beginning of the twentieth century when there was a huge increase in transnational trade and commerce, organizations, like the International Chamber of Commerce, were founded (in 1919 in Paris) to provide services to international businesses, even if their home nations had not yet quite figured out “how to get along.” Private, cross-national bodies developed both rules of engagement and processes for dispute resolution. International commercial arbitration stands as a model of what “transnational” law is. As private administering bodies (the International Chamber of Commerce, the London Court of International Arbitration, the International Centre for Dispute Resolution (the American Arbitration Association’s international arm), the International Institute for Conflict Prevention and Resolution) developed formal procedures to provide a legal framework for these activities, a legal system emerged.

76. As exemplified in the classic advice of Machiavelli’s The Prince. Nicholas Machiavelli, Nicholas Machiavelli’s Prince (1640).
77. For one view of how the discipline of international law has changed its orientation and intellectual constructs, see David Kennedy, My Talk at the ASIL: What is New Thinking in International Law? 94 AM. SOC. INT’L L. 104 (2000).
rules of procedure, and then formal legal recognition for “foreign” arbitral awards became formal law by adoption (by over 140 countries) of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, international commercial arbitration has become the most common form of adjudication of disputes between parties of different nations in commercial (and increasingly in other) matters. The international commercial arbitration “community” of lawyers, businesspeople, and arbitrators has created a modern “lex mercatoria” of substantive law (and procedures through arbitral procedural rules) that “transcend” the law of any one nation. Whether these thousands of private arbitral decisions have, in fact, created an international “common law” of commercial or even industry-wide rules and precedents, there is no doubt that commercial disputes involving multi-national corporations and multi-national citizens are most often resolved “outside” of formal state institutions. The operation of the quite successful international commercial arbitration regime (over ninety-five percent of arbitral awards are complied with) demonstrates the existence of a legal regime that “transcends” conventional sovereign understandings of legal power.

On the other hand, as we arbitration scholars often point out to practitioners, the New York Convention actually makes national courts the ultimate enforcement agent. Scholars debate whether this means that international arbitration is dependent on national court sovereignty and enforcement or whether (since few courts overturn arbitral awards) national courts have become the agents of a new form of transnational law enforcement. Some fear that national state policy is submerged in this form of state-less (and often, private) adjudication; others suggest that this form of dispute settlement encourages more practical problem solving that facilitates economic activity.

Whether there should be public accountability for such private regimes (and who that “public” is) is one of the leading issues in transnational legal study at the moment. Practitioners in this elite form of transnational legal practice like to report they are successfully resolving cases more effectively than are more public and rigid state forms of justice. Critics claim that there should be more transparency and accountability to labor, environmental, and other social interests,
as well as representation of more than the immediate parties. Critics also suggest that as citizens of the world, we are responsible for making sure there is “international justice”—equality of justice for all world citizens and our political responsibility to advocate for “global justice.”

In addition to the responsibility and accountability issues, many worry that both conventional international law and the “newer” transnational law suffer from democracy deficits—who “elects” both the private law makers of arbitration panels, the professors engaged in legal harmonization projects, or even the foreign ministers or technocrats who populate the growing number of transnational networks. While Professor Anne-Marie Slaughter argues that at least domestically elected officials are now “dually” responsible for both their domestic and international agendas in domestic elections, we might still worry about both the sources of legitimacy of international law (e.g., natural law, *jus cogens*) when it is “made” and what democratic controls there are on its interpretation and enforcement. This remains a crucial question in the legitimacy and acceptability of all levels of transnational law and governance.

I do not aim to resolve these issues here, but I suggest that the issue of what constitutes “transnational justice” in these increasingly plural locations of legal activity is precisely the kind of question that the modern law student should be prepared to confront. What are the criteria of a just legal proceeding that involves private or public actors from different legal regimes? Who should participate in convention drafting, transaction planning, and dispute settlement? Who should decide disputes between people or entities of different countries? By what rules or principles should the wide variety of modern dealings be governed? How should “non-parties” (but those affected by cross-national disputes) be represented in transnational legal proceedings?

As these questions of transnational justice are pursued more generally, transnational legal scholars and practitioners are also engaged in efforts to create substantive laws which are truly transnational. As the American Law Institute has “restated” and “harmonized” the law of contracts, torts, property, trusts, and now employment and criminal law, similar organizations in Europe seek to harmonize or make more “uniform” the law of contract, torts and employment across national, not just state, lines. Whether vast differences in civil and common law understandings of key legal principles can in fact be reconciled in the Draft Common Frame of Reference (Codification of European Private Law) is one of

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84. SLAUGHTER, supra note 17, at 216–60.
85. For my treatment of some of these issues in the domestic context, see Carrie Menkel-Meadow, Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases), 83 Geo. L. J. 2663 (1995). For some of the issues of public transparency in an international context, see THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006).
86. See also Pascal Pichonnaz, Codification of European Private Law: Has Europe Forgotten
the most contested topics among comparative law scholars and lawyers in Europe. This brief review of some of the key issues in both more traditional international law study and more modern “transnational” law suggests some important themes and questions for how transnational law will be taught at UCI School of Law:

- What is “transnational” law, both in its jurisdictional sweep, and in the meaning of “law”?
- What legitimates the making, interpretation and enforcement of transnational law? If not direct democracy, then what? Universal principles? Natural law? From where are these principles derived?
- Who are the principal actors in transnational law—states, organizations, groups, businesses, or individuals? Are they multinational actors (e.g., corporations, NGOs) or single sovereign actors?
- What are the issues that bring transactions and disputes to the attention of law? Facilitative, building, cooperative issues? Competitive, conflicting issues?
- What processes do parties use to form international cooperative/trade/human rights enhancing activities? What processes do parties use to resolve disputes that cross borders?
- What rules of engagement or regulation do parties (states, groups, and individuals) appeal to?
- What enforcement mechanisms are there for agreements that are reached or judgments that are issued?
- What goals do actors in the world of transnational dealings aim for? Economic profit, world peace, human flourishing, or political power and aggrandizement or harm?
- What means will best accomplish those goals?
- Whether pluralism or diffusion of legal authority is advantageous for an international legal order?
- How do “transnational” legal issues affect seemingly (or actual) domestic legal issues?

III. HOW WE SHOULD STUDY TRANSNATIONAL LAW

It would be conventional legal education to study these questions through a variety of cases, legal documents, treatises, and scholarly debates about these contested issues in transnational and international law. Many law schools have now incorporated the teaching of international or transnational law in a variety of different ways. A few have begun, as has UCI, to require international law or analysis, as we call it,87 in the first-year curriculum;88 others use the “pervasive” method, urging all first-year courses to add a “transnational” component to Contracts (multi-national ventures), Torts (mass disasters), Civil Procedure (Alien Torts Claim Act rules and procedure, transnational jurisdiction and discovery, enforcement of foreign judgments, and international commercial arbitration as transnational legal process), Criminal Law (international criminal law, law of torture, terrorism, drug and human trafficking), Property (international intellectual property issues, multi-national ownership issues, international environmental law) and Constitutional Law (treaty law, use of foreign law, comparative constitutional law).89 Still others (probably most law schools) continue to leave the treatment of international issues to the upper-level curriculum with general courses in Public or Private International Law or now, more specialized courses in International Trade Law, International Intellectual Property, Comparative Law, National Security Law, International Criminal Law, Comparative Constitutional Law, International Human Rights Law and the like.

But, as I have never taught conventionally,90 and UCI was founded to be an

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87. This is an important distinction for me. Conventional international law in the first-year curriculum may add to the conception of learning law as learning a lot of substantive details. I am more interested in having students learn that international or transnational analysis means a different way of thinking about law, in its variability, as well as about researching and looking for different legal treatments of the same issue. The lessons I hope to impart are about legal pluralism and choices (which should inspire attention to reasoning about legal variability, rather than learning (or memorizing) a lot of legal rules, which in my view, can always be researched when necessary for a particular problem).

88. One interesting way to study the changes and developments in legal education is to trace the few areas in which first-year courses have been added to the steady diet of private common law subjects that have dominated legal education since the time of Christopher Columbus Langdell in the late nineteenth century. Constitutional law is now required in many law schools, some schools have added statutory analysis, regulatory, or administrative analysis and, in the past, some schools have required different forms of lawyering process, dispute resolution, or other substantive courses. A growing trend is also to allow first-year students at least one elective course in their first year. For the most part, however, legal education has not changed much, in the first year, from 1870. See WILLIAM SULLIVAN ET. AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

89. See, e.g., VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (2d ed. 2006).

90. As a legal educator for the last thirty-five years, I have always taught with experiential methods (from my early days as a clinical and legal research and writing instructor to a professor of conventional legal subjects including civil procedure, labor law, employment discrimination, jurisprudence, feminist theory, legal ethics, and the legal profession, to all forms of dispute resolution, and now international law and globalization subjects). I have always used role-plays, simulations,
innovative school for lawyers of the twenty-first century, I am interested in how this material can be taught differently, meaning both substantively and experientially. How then to teach first-year law students about complex, multi-jurisdictional, multi-cultural, and interdisciplinary legal problems? For me, the answer, as always, is a good combination of theory and substantive problem-oriented content which stimulates questions about how and what to think, with experiential learning which situates and contextualizes difficult intellectual issues in their real-world concreteness for real-world legal problem solving about what to do and what needs to be learned to solve legal problems.

Here I describe how transnational law will be taught (by me) at UCI. In my view, students learn transnational law best when they are put in the role of a lawyer who must advise a client, perform a lawyering task, or otherwise “solve” a transnational legal problem from being in the middle of it. To paraphrase one of my intellectual mentors, Donald Schön, in The Reflective Practitioner, professional students learn best from being “inside” a problem or in “the valley” of the problem, as contrasted with standing on the mountain and seeking abstract answers “from the sky.” To this end, I have developed a variety of experiential problems for teaching transnational legal analysis, which draw on international law, the law of multiple jurisdictions, “soft” or private law, and a variety of problems, collaborative activities, class exercises, writing assignments, journals, real cases, and student facilitated learning and client representation in my courses (not all at once of course!). As an old Indian saying has it, “Tell me and I will forget, show me and I may remember, involve me and I will understand.” That is my theory of pedagogy. I thank, as always, my mentor in this, Professor David Filvaroff, who taught the Hart & Sacks based Legal Process course at the University of Pennsylvania Law School. See HENRY M. HART & ALBERT M. SACKS, LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, (W. Eskridge, Jr. and Philip Frickey eds., 1994) (focusing on different legal processes, beyond appellate cases). We learned about legal process by enacting the roles, sequentially, of a court, a legislature and an administrative agency as the class tried to “enact” and “enforce” a law, making slumlordism a tort. (Thanks also to Joseph Sax, whose substantive writings, see e.g., Sax, Slumlordism as a Tort, 65 Mich. L. Rev. 869 (1967), were the source of this exercise, long remembered from a distance of almost forty years). In the last fifteen years I have applied these pedagogies to teaching law, ethics, dispute resolution, and globalization subjects in twenty different countries on five continents to undergraduate and graduate law students, lawyers, judges, politicians, diplomats, government officials, and business professionals.

91. This essay focuses on my own approaches to the teaching of transnational law experientially. Two preliminary points are important. First, these descriptions are based on my own previous experience teaching transnational law experientially in other programs at Georgetown University Law Center and at the Center for Transnational Legal Studies in London, as well as at various other law schools at which I have taught throughout the world in the last fifteen years and which inform my course at UCI. Second, there are and will be other teachers of transnational law at UCI who will and are using different approaches to teaching international analysis. See syllabi for Professor Joseph F.C. DiMento (International Legal Analysis, spring 2010, Law 505), Associate Dean Beatrice Tice (International Legal Analysis, spring 2010, Law 505), and Professor Christopher Whytock (International Legal Analysis, spring 2011, Law 505) (on file with the UC Irvine Law Review).

possible legal processes for legal problem solving which I will briefly describe here. For the last fifteen years I have been teaching a variety of law-related subjects in a variety of transnational settings (with mixed student groups from a variety of nations and legal systems), which informs how I think students may learn most effectively.

For the last five years I have been teaching and developing problems for a new and required program at Georgetown Law Center called Law in a Global Context. In this program all first-year students work for a concentrated week (the first week of the second semester) on a complex legal problem that transcends legal jurisdictions. The students are placed in roles, including counsel, judge, mediators, arbitrators, and other legal professionals, and asked to perform lawyering tasks that require them to make sense of legal materials that come from different legal jurisdictions and cross traditional substantive boundaries. For example, the problem I developed (with Georgetown colleagues Professors Michael Gottesman and Richard Diamond) involves a venture to buy special ships to navigate a river in Southeast Asia for the building of a dam. Materials for the shipbuilding came from one group of countries, the ship was to be manufactured by a French company, and purchased by an American contractor for use in Southeast Asia. When world conditions (including environmental, fuel shortages, and pricing changes) interrupt parts of the performance of the contracts students must confront how the parties should resolve their many disputes. At the beginning the various contracts have no choice-of-forum clauses and ambiguous choice-of-law clauses. Students then must study the different laws (domestic French, American, Chinese, and Laotian contract remedies and international (CISG) provisions) for determination of substantive legal rights. They must also study what (national) courts would have jurisdiction over such disputes and where each party (students are assigned roles on each “side” of the dispute) would be

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93. This includes courses on globalization generally and in Latin America (Argentina), international commercial arbitration and international dispute resolution (UK, Switzerland, France, Italy, Paraguay, Argentina, Brazil, Chile, Australia, Japan, and China), legal ethics and professional responsibility (Australia, Canada, France, the UK, Israel, the Netherlands, and Belgium), feminist theory and women’s rights (UK, Canada, Mexico, and Switzerland) skills courses in conflict resolution including mediation, negotiation, consensus building, and arbitration (Norway, Belgium, the Netherlands, Italy, Argentina, Brazil, Paraguay, Chile, Canada, Israel, Costa Rica, Nicaragua, Japan, France, Mexico and China) and courses and training sessions in experiential legal pedagogy in China, Israel, Canada, Mexico, Australia and the UK. Legal educator, Richard Wilson, gives his thoughts about why Europe is so late to come to experiential and clinical learning. See Richard Wilson, Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Education, 10 GERMAN L. J. 823 (2009), available at http://www.germanlawjournal.com/index.php?pageID=11&artID=1124.


95. The problem is called “Hoosier v. Seabarge.” Professor Gottesman teaches, among many other subjects, contracts; Professor Diamond is an international law expert; and I am a dispute resolution expert. Thus, this complex experiential exercise, consisting of about 150 pages of case, statutory, factual, article, and role-play materials, was created with multiple sources of legal expertise and collegial collaboration.
best served in a legal claim of force majeure or impossibility of performance. When the solutions to these dilemmas prove complex (and surprising)\(^{96}\) the students realize the importance of good drafting of contracts. And so, we turn to negotiation of a dispute resolution or choice-of-forum clause, armed with the knowledge of what will happen if the parties don’t consider this at the beginning of their relationship. Thus, there are choices of law, forum, and consideration of substantive law, legal strategy and problem-solving issues (e.g., do the parties want to try to preserve their relationships for future deals or will this be a “one-off” piece of international litigation, and what are the corporate goals of the respective parties?). During the full week of the program (in which students attend plenary class sessions, small group discussions of substantive law and legal strategy issues, as well as perform lawyering roles, like negotiation, drafting, and legal arguments, and receive feedback on their performances), students perform several different transnational legal tasks—they analyze statutes and cases, write strategy memos, interview clients, get instructions for legal actions, conduct a negotiation session, draft contract clauses, and then argue in a court for enforcement or vacatur of an arbitral award (using the formal law of the UN New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards and its case law in a variety of potential sites of litigation). In a short period of time students are exposed to a variety of transnational legal issues from inside the role of a legal professional, including:

- What law applies to a transnational transaction/contract/dispute?
- What are the appropriate jurisdictions or who are the best (strategic) decision-makers for resolving a transnational dispute?
- What are the best processes for resolving transnational legal disputes (litigation, negotiation, arbitration, informal, or formal proceedings)?
- How do different legal systems (civil and common law) process claims (differences in procedural rules, e.g., discovery and use of experts, as well as in substantive issues, e.g., remedies for breach)?
- Where can awards, judgments, contracts, and decrees affecting different national parties be enforced?
- What is the relation of international law (the New York Convention) to domestic law and policy (Article V of the New York Convention allows national policy to affect the enforcement of a foreign arbitral award)?
- What legal skills are necessary for transnational practice?\(^{97}\)

\(^{96}\) The “home” nation of each disputant is not necessarily the most favorable to litigate in. (I won’t say more because I am still teaching with this problem.)

\(^{97}\) For first-year students this kind of problem prepares them to read, analyze, negotiate, think strategically, and make formal legal arguments. I have not discussed in this essay the importance of competence in other languages which I also regard as essential for those who will actually be
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How do lawyers collaborate across national, legal, and cultural divides?98

How can transnational transactions be designed to minimize unproductive conflict or disruption? What legal problems can be anticipated in advance and drafted for in documents which create transnational relationships?

Regardless of what might be remembered substantively, students learn from such intensive engagement with actual legal problems and materials what kinds of questions they will need to ask and research with respect to other transnational legal problems they might encounter. The learning is, as I like to pun, “Meadow-learning” (meta-learning). It is not the substance of the law that matters (alone) but the reflection on how one learns it—the law and procedure and how to use them to further particular (client or social) objectives. The sessions for this intensive learning are taught by core faculty, participating full-time and adjunct faculty (practicing lawyers from relevant fields), and each year a group of rising 2Ls has served as teaching assistants to provide feedback and close instruction for each student. Thus, the learning is multi-layered and participatory; students learn from each other, from senior professors, and from practitioners with experience in the relevant fields. We end the problem with a career panel of lawyers who work in international transactions and disputes to advise students about work opportunities in transnational legal work.

In addition to the problem described above, other problems have involved international criminal issues (extradition for capital crimes, involving the European Convention on Human Rights), cross-national defamation issues (defamatory commercial remarks posted on websites involving California and French winemakers), cross-national drug testing standards (different drug safety standards in the US and Europe), and international environmental problems.99 For the Center for Transnational Legal Studies (CTLS) in London (a consortium of fourteen law schools), I wrote and taught a problem, called the Global Practice Exercise100 (loosely based on a real situation), in which a corporate executive of a multi-national corporation was dismissed from his job after holding a press conference to protest the environmental, labor and corrupt practices of his engaged in global or transnational legal practice.

98. Aside from the values of teaching transnational law, one of the key goals of such exercises is to teach students to work collaboratively, not always an explicit goal in conventional legal education.

99. All of the Week One problems at Georgetown were developed collaboratively with groups of professors from different fields and are taught by at least half of the total faculty each year, as faculty members volunteer to assist in the small group and experiential components of the program.

company, where his employment contract required arbitration of any and all disputes. The discharged employee justifies his actions based on both international and corporate codes of conduct to which his employer is a signatory and he seeks damages and reinstatement through the arbitration processes provided for in his employment contract. To highlight the differences in legal treatment of common issues, students learn that most nations, outside of the United States, prohibit the use of arbitration for employment claims, and thus both international arbitral bodies and courts in which enforcement of an arbitral award might be sought have to deal with and reconcile competing legal policies. In addition, because of the multi-national nature of the students at the Center for Transnational Legal Studies (CTLS), students learn from each other about the differences in both substantive and procedural law from their respective legal systems, providing short courses in comparative law and collaboration at the same time.

At CTLS I also co-taught a core course, required of all students, called Transnational Legal Issues and Theories of Comparative Law, with my co-director Franz Werro of Switzerland (a civil law country) and an expert in private and comparative law, which surveyed the panoply of issues reviewed in this essay. We developed several exercises for the students to work on in nationally diverse groups (drafting international privacy standards for the Internet, developing a language policy for the multi-national CTLS program, describing elements of legal systems and descriptions of different forms of legal education throughout the world, among others). In any ideal form of transnational legal education, the teaching would be done by a multi-national (and multi-legal system) faculty. I have taught this way in several other venues as well, including a course in international arbitration in France and Switzerland (with students from over ten countries), a course in globalization studies in Argentina (with French and American instructors and students from the United States, Argentina, and

102. In my favorite example of informal student learning, a group of students and I were in an elevator in our building in London where the American students complained about having to pay a few pence for their ketchup and mayonnaise for their sandwiches. As a transnational, comparative law professor, seeing a “teaching moment,” I asked them if they would rather pay for health care (free in the National Health Service in the UK) or ketchup. To which the Canadian student in the elevator responded, “In Canada, both the ketchup and the health care are free.” Different strokes for different folks (national legal and economic policies)!
103. Where possible, courses at CTLS are co-taught with law professors from different legal systems (e.g., civil and common law, European and Asian). For example, one course in Global Governance was co-taught by Canadian and Singaporean professors to students from several different continents who could critically explore together the issues in transnationalism from the differing perspectives of hegemons and former colonies.
104. See Menkel-Meadow, supra note 42.
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Brazil),\textsuperscript{105} and a course in international dispute resolution that I teach every other year in a transnational university (INCAE)\textsuperscript{106} in Central America that draws its graduate law students from all over Central America (and parts of South America) with faculty from the region and the United States.

In recent years I have taught International Dispute Resolution in a variety of countries, either with a colleague from the region (as in Israel)\textsuperscript{107} or alone, but always with role-plays and simulations. In a multi-national setting it is especially interesting to teach problems with multiple parties and multiple forms of interaction (diplomatic negotiations,\textsuperscript{108} legal transactions and lawsuits, or simulated intergovernmental policy meetings, e.g. environmental, security, and cultural) to explore multiple legal and cultural issues.\textsuperscript{109} Whatever the concrete substantive or procedural issues, students always report they remember what they have learned (including their thinking processes, their assumptions, and their “new” learning) from these exercises, more than they remember from more traditional classes.

As another model of experiential transnational learning, I was fortunate to participate in a specially organized comparative law seminar hosted by two Swiss law schools (University of Fribourg and the University of Basel).\textsuperscript{110} Advanced students from both schools (with multi-lingual competence in German, French, and English) studied a variety of topics in comparative law to learn how different jurisdictions treated similar legal problems of public and private relations, ranging from human rights violations, privatization, governmental regulation and funding of religious activities, freedom of contract and state protection of private contractual relations, and terrorism. Each student was required to research

\textsuperscript{105} In 2007, Dean Bryant Garth, French sociologist of law Yves Dezalay, and I were faculty for the Southwestern Summer Program in Argentina. See generally Summer Abroad: Buenos Aires, Argentina, SOUTHWESTERN LAW SCHOOL, http://www.swlaw.edu/academics/international/summer/argentina (last visited Sept. 27, 2010).

\textsuperscript{106} INCAE is an international school of business founded by a consortium, including Harvard Business School and now Georgetown University, during President Kennedy’s Alliance for Progress initiatives. It now offers courses in business and law in executive and other formats on two campuses, Managua, Nicaragua, and San José, Costa Rica. Much of the teaching at INCAE is based on Harvard Business School case methods and law school simulation and role-plays in a wide variety of subjects. See INCAE BUSINESS SCHOOL, http://www.incae.edu (last visited Sept. 20, 2010).


\textsuperscript{109} Simulations and case studies for such problems are available with many casebooks in relevant areas. See, e.g., CARRIE MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL, TEACHER’S MANUAL (2006); MARY ELLEN O’CONNELL, INTERNATIONAL DISPUTE RESOLUTION: CASES AND MATERIALS, TEACHER’S MANUAL (2006). Additionally, there are many casebooks and other websites maintained by the international law and political science teaching communities.

different treatments of particular issues (e.g., state restrictions on freedom of contract through such doctrines as unconscionability) and present to other students (usually in a second or third or fourth language of competence). Thus, students, not professors, were the teachers, treated as professionals presenting to each other on both convergences and divergences in legal treatment of current issues of legal regulation and demarcation of the lines between public regulation and private action.

So, I will teach transnational, international, and comparative law through a series of problems that students will work on experientially. Whether as a lawyer advising a client, whether individual or organizational, or serving as a delegate to an international convention on the drafting of a treaty, or advising a governmental official, or lobbying an international body to change its rules, or forming a new NGO to deal with a new transnational issue, students in International Analysis will not only study transnational law—they will do it! From these experiences I hope they will learn that law is plural, governing law is chosen (both by states and by private contracting parties), and that law may still be an important tool for making the world a more just place for all of its inhabitants. With our already quite diverse student body and faculty, and our location in the Pacific Rim and the American hemisphere, I have no doubt that we will be able to use transnational legal analysis to focus on how we might solve some social and legal problems that are not cabined by national boundaries. As Merlin taught the young King Arthur (by changing him into a bird so he could see the earth from the sky) and John Lennon taught us all, you can’t see national boundaries

111. A group of delegates in The Hague has been working for years on a convention for mutual recognition of foreign judgments, parallel to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The United States has not signed this convention. There are many legal issues, including reciprocity (many nations will not give full faith and credit to United States judgments because of our punitive damages practices, while the United States disputes the standards of due process in other countries), American constitutional issues of supremacy and state rights to recognize judgments in their own courts, and policy issues in recognition of other legal systems’ judgments in our courts. This will make an ideal in-class experiential exercise with students taking the roles of delegates from different countries. See, e.g., AMERICAN LAW INSTITUTE PROJECT ON RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (Proposed Final Draft 2005); Convention on Jurisdiction and the Recognition of Foreign Judgments (1971) (since 1993, thirty-five countries have been negotiating for a revised convention).

112. Currently hot topics here include expanding participation rights (class actions, amici) and appellate processes in a variety of international tribunals.


114. “Imagine there’s no Heaven / It’s easy if you try / No hell below us / Above us only sky / Imagine all the people / Living for today / Imagine there’s no countries / It isn’t hard to do / Nothing to kill or die for / And no religion too / Imagine all the people / Living life in peace / You may say that I’m a dreamer / But I’m not the only one / I hope someday you’ll join us / And the world will be as one / Imagine no possessions / I wonder if you can / No need for greed or hunger / A brotherhood of man / Imagine all the people / Sharing all the world / You may say that I’m a dreamer / But I’m not the only one / I hope someday you’ll join us / And the world will live as one.”
from above—a lesson the law is beginning to learn.

Statutory Analysis: Using Criminal Law to Highlight Issues in Statutory Interpretation

Jennifer M. Chacón*

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In the fall semester of 2009, I taught a course called Statutory Analysis to half of the students in the inaugural first-year class at the University of California, Irvine, School of Law. I had never taught the course before. The idea for the course arose out of a series of meetings that took place among the law school’s founding faculty members in the 2008–2009 academic year, before I joined the faculty.1 Although I had not been a part of these discussions, when I joined the faculty in July 2009, I was asked to teach the newly conceived Statutory Analysis class. I understood that the founding faculty had envisioned the course as one that I could implement as a variation on the traditional criminal law course: one that would place an emphasis on statutory interpretation. For the next two months, I worked to put together a course that would meet the ambitious dual goals of teaching substantive criminal law and statutory analysis. This essay is a tale of my adventures.

Perhaps more precisely, what follows is my attempt to dissect and analyze the Statutory Analysis class that I created, and to make some preliminary assessments of its strengths and weaknesses. Part I offers an explanation of the ambitions and intentions of the founding faculty members who decided to include

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1. The UC Irvine School of Law’s founding faculty were Dean Erwin Chemerinsky, Associate Dean Carrie Hempel, Associate Dean Beatrice Tice, Associate Dean Grace Tonner, Dan Burk, Linda Cohen, Joseph DiMento, Catherine Fisk, Trina Jones, Elizabeth Loftus, Carrie Menkel-Meadow, Rachel Moran, Ann Southworth, Kerry Vandell, and Henry Weinstein. Faculty, UC IRVINE SCH. LAW, http://law.uci.edu/faculty/index.html (last visited Sept. 25, 2010).
the course in the first-year curriculum and who settled on the basic parameters of the course. Succinctly put, the founding faculty of UC Irvine made a decision to emphasize the development of a set of analytical skills, largely in the context of traditional first-year subject areas. One result of this decision was that my traditional criminal law class was converted into “Statutory Analysis.” The goal of this class is to provide students with an introduction to the tools of statutory analysis within the context of a substantive criminal law course.

Having explained the intentions of the founding faculty members, I then turn to my own efforts to put those intentions into practice. Part II of this essay sets forth the basic parameters of my Statutory Analysis class. In this section, I describe the coverage choices that I made and I highlight the many trade-offs involved in the process of designing this course. The charge to create a Statutory Analysis class prompted me to design a class that introduces students to theories of statutory interpretation and basic canons of construction early in the course, and then uses those concepts to frame discussions about the substantive criminal law provisions examined throughout the class.

In Part III of the essay, I explore the benefits and limitations of this particular Statutory Analysis course. The primary advantage to this course design is that it exposes students to the basic doctrines and tools of statutory interpretation in their first semester. As a result, I believe that my students are now much more focused on the criminal law statutes that lie at the heart of modern criminal law, have a bit more knowledge about competing theories of statutory interpretation, and are much better equipped to read and interpret statutes than were the students completing my traditional criminal law course. They spend a lot less time asking “What is the rule?” and a lot more time asking “What does the statute say?” and “How did (and how should) the court interpret the statute?” Presumably, the skills of statutory analysis acquired in the first semester will follow these students into their other courses and throughout their legal careers.

However, there are also a number of drawbacks to this course design. Perhaps this is unsurprising, since the design of my course reflects a compromise between offering a course on statutes in the first year and offering students all of the coverage of a traditional criminal law course. As a result of this compromise, certain aspects of both substantive criminal law and statutory analysis are missing from my course syllabus. Therefore, I spend the bulk of Part III analyzing what I view as the two main drawbacks of this course design. In Part III, Section A, I discuss the compromises I made in terms of the coverage of criminal law. Part III,

2. The law school offered two sections of Statutory Analysis during the fall of 2009. I taught one section; the other section was taught by Professor Mario Barnes. Because we each had our own syllabus and used different textbooks, I do not purport to speak for Professor Barnes in describing the specific parameters of my course, although I believe that we were generally in agreement regarding our overall approach to the course structure.
Section B focuses on the cost this course design exacts from efforts to teach the history, theories, and tools of statutory interpretation. The course, by necessity, treats statutory analysis more as a skill to be learned than as a substantive area to be mastered. It does not fully develop discussions concerning legislative and administrative context. In short, it does not provide a substitute for a full course on legislation or regulation.

Ultimately, I believe that the course I designed has expanded first-year students’ understanding of and attention to issues of statutory interpretation without exacting a significant cost in terms of their knowledge of substantive criminal law. In that sense, the course is a success. However, I believe that the faculty ultimately will need to revisit the question of whether this is the best vehicle for teaching statutory analysis, or whether such efforts would benefit from bolder experimentation in the first-year curriculum, including the inclusion of a first-year course on legislation or regulation.3

PART I. RETHINKING THE FIRST-YEAR CURRICULUM

Dean Erwin Chemerinsky frequently has stated that the new law school at UC Irvine must be “sufficiently traditional to be credible, and sufficiently innovative to justify its existence.”4 The first-year curriculum at UC Irvine reflects this notion of blending tradition with innovation. The traditional first-year subjects of criminal law, civil procedure, contracts, torts and constitutional law all have their place in UC Irvine’s first-year curriculum.5 Even though a number of law schools have undertaken high-profile redesigns of the first-year curriculum,6 most of these courses still remain at the core of the redesigned first-year


5. Curriculum, UC IRVINE SCH. LAW, http://www.law.uci.edu/registrar/curriculum.html (last visited Sept. 17, 2010) (presenting first-year course listings, which include coverage of criminal law, civil procedure, contracts, torts, and constitutional law, in addition to innovative course offerings such as a rigorous, year-long lawyering skills course, a year-long course on the legal profession, and a course on international law).

programs. They constitute a sort of general education for lawyers. Not only do these courses give law school graduates a common language, but they also provide a background for a great deal of subject matter covered on most bar exams.

The founding faculty was fully aware of the strong tradition behind these first-year course offerings. At the same time, however, the faculty was cognizant of the ongoing law reform dialogue that has raised questions about the adequacy of the traditional law school curriculum. The Carnegie Report on Educating Lawyers, for example, cautioned that “the dramatic results of the first year of law school’s emphasis on well-honed skills of legal analysis should be matched by similarly strong skills in serving clients and a solid ethical grounding.” This call for greater skills and ethics training is hardly a new one; it is at the root of earlier calls for law school reform.

The faculty therefore sought to marry traditional substantive analysis with curricular components that would emphasize practice skills; designed a rigorous first-year “Lawyering Skills” program to develop students’ drafting, interviewing, and counseling skills; and added a year-long Legal Profession course to the

7. See Glater, supra note 6 (recording Professor Martha Minow’s statement that attention to the traditional courses would shrink); Pistor, supra note 6 (describing the traditional first-year courses as a significant part of the revised first-year curriculum).

8. Arguably, this is the product of inertia rather than the result of a pedagogical decision-making. See, e.g., Judith Welch Wegner, Reframing Legal Education’s “Wicked Problems,” 61 Rutgers L. Rev. 867, 943 (2009) (“Reforms to the first-year curriculum have proved challenging, often because schools are hesitant to depart from national norms and because faculty members teaching in first-year subjects tend to resist reductions in the hours assigned to foundational courses that involve both content instruction and development of critical thinking”); Rena I. Steinzor & Alan D. Hornstein, The Unplanned Obsolescence of American Legal Education, 75 Temp. L. Rev. 447, 447 (2002) (“For most law schools, curricular reform is tortuous, disruptive, and occurs roughly on the schedule of a 50-year flood”).

9. Indeed, some law professors have posited that the outdated bar exam structure poses an impediment to law school reform. See, e.g., Kristen Booth Glen, Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession, 23 Pace L. Rev. 343, 359–60 (2003) (“[A]lthough the faculty may design and determine the curriculum, the decision by bar examiners as to which subjects to test has a huge impact upon the choices made by students in their course selection.”); Joan Howarth, Teaching in the Shadow of the Bar, 31 U.S.F. L. Rev. 927 (1997). But see John Henry Schelgel, A Damn Hard Thing to Do, 60 Vand. L. Rev. 371, 372 (2007) (“One might argue that the primary obstacle to curricular change is the bar exam, though I suspect the bar examiners would jump on board were the bar supportive of a significant change.”).


curriculum to better educate students about ethical and professional issues related to the practice of law.\textsuperscript{13} The latter two developments are addressed elsewhere in this issue.\textsuperscript{14} My focus here is on my own effort to integrate a particular set of skills into the traditional criminal law course.

The founding faculty felt that the first-year curriculum ought to do more than simply teach the substantive law in traditional first-year courses. Instead, they envisioned that substantive law courses could also be vehicles for developing certain skills that are necessary for the practice of law. The faculty brainstormed ways in which traditional first-year subject matter could be used to emphasize a set of skills that would complement but transcend areas of substantive law. The decision most relevant to me was the founders’ decision to replace first-year criminal law—a course that I taught for five years at UC Davis prior to my arrival at Irvine—with Statutory Analysis.

One of the founders’ visions for the Statutory Analysis course was that the instructor could create a course that would convey traditional substantive law materials in a context that would emphasize the skill of statutory analysis. The course description I received at the outset of my time at UC Irvine explained to me, and to the incoming students, that the three-unit course would “use criminal law as a basis for teaching students the methods employed in all areas of law for analyzing statutes.”\textsuperscript{15} Similar decisions were made with regard to other courses, resulting in a constellation of courses that was unique in emphasis but familiar in its general parameters. In fall 2009, the incoming students took five courses. In addition to the Lawyering Skills and Legal Profession courses previously mentioned, the curriculum included a four-unit course entitled “Common Law Analysis: Private Ordering,” which focused primarily on contracts to teach methods of common law analysis; a four-unit course entitled “Procedural Analysis,” which used civil procedure as the foundation for teaching students about the analysis of procedural rules; and the three-unit Statutory Analysis course.\textsuperscript{16} In the spring, students continued the Lawyering Skills and Legal Profession courses and also took courses on “Constitutional Analysis,” “International Legal Analysis,”\textsuperscript{17} and “Common Law Analysis: Public Ordering.”

\textsuperscript{13} Id. For a discussion of the need for this type of innovation in the first-year curriculum, see, for example, Deborah L. Rhode, The Professional Responsibilities of Professional Schools, 49 J. LEGAL EDUC. 24, 30 (1999).

\textsuperscript{14} See Ann Southworth & Catherine Fisk, Our Institutional Commitment to Teach about the Legal Profession, 1 U.C. IRVINE L. REV. 73 (2011).


\textsuperscript{16} Id.

\textsuperscript{17} As with many other curricular reform efforts, the decision to include an international law course among the mandatory first-year offerings was perhaps the most controversial of the choices made. E.g., Leib, supra note 3, at 169, n. 13 (noting that Harvard’s inclusion of an international law component in their first-year curriculum was controversial and criticized as motivated by politics rather than pedagogy). For a discussion of the merits and methods of incorporating international and
which covers the substantive law of torts.18

The founders intended this reorienting of the curriculum to better prepare students to apply the theoretical components of the first-year curriculum to the tasks that they would face as lawyers in the field. Rather than foregrounding the subject matter, these course titles reflect an emphasis on forms and methods of legal reasoning. The substantive law serves as a vehicle for conveying this knowledge. Yet, while the addition of the Legal Profession and Lawyering Skills courses marks an important reorienting of the law school curriculum toward the outside world, so far the rethinking of the remainder of the first-year curriculum has reflected less of a break with tradition than a conscientious effort to integrate new practices into a traditional framework. Teachers of first-year courses have the opportunity to use their courses to actually achieve in practice one of the long-stated theoretical goals of the first year of law school: training students to “think like lawyers.”19 Each individual classroom teacher therefore faced the question of the degree to which he or she wanted to restructure his or her courses to address the skill set that the founders hoped to have these courses convey. I opted to implement some fairly significant changes to my syllabus.

PART II. STATUTORY ANALYSIS: COURSE DESIGN

For five years prior to teaching my Statutory Analysis class last fall, I taught a first-year, three-unit criminal law course. The primary textbook for my criminal law course was Joshua Dressler’s Criminal Law textbook, which is currently in its fifth edition.20 I have supplemented that text with readings from Cynthia Lee and Angela Harris’s Criminal Law textbook21 and with a series of articles and cases that highlight current developments in the criminal law, particularly in the State of California where I teach (and where the vast majority of my students go on to practice).

The trajectory of my criminal law course closely followed the sequence of the materials in the Dressler casebook.22 The course began with a general introduction to the sources, distinguishing features and procedural context of the criminal law, followed by a lengthy discussion on punishment in theory and

19. See, e.g., Susan Sturm & Lani Guinier, The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity, 60 VAND. L. REV. 515, 516 (2007) (identifying the goal of most recent legal reform efforts as “updating how law schools prepare students to think like a lawyer”); see also CARNEGIE REPORT SUMMARY, supra note 10, at 5 (observing that most law schools are good at teaching students to “think like lawyers”).
20. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW (5th ed. 2009).
22. See generally, DRESSLER, supra note 20.
After a brief segment on the modern role of the criminal statutes, including a brief statutory analysis discussion that focused primarily on due process issues, the course would segue into the elements of a crime, and then deal with specific substantive offenses under the headings of homicide, rape, and sexual assault. The course then included a unit on general defenses to crimes and one on inchoate offenses (attempt, assault, solicitation, and conspiracy) and related defenses. The course briefly forayed into a segment on accomplice liability before concluding with a relatively straightforward section on theft and related offenses.23

The course discussion was framed by and often reverted to the introductory literature concerning theories of punishment. Throughout the course, discussions of specific offenses—not to mention the discussions concerning the outcomes in particular cases—were tethered to a broader discussion of the ends that are served (or not served) by the imposition of criminal punishment upon certain actors for certain acts. This discussion was frequently enriched and enlivened by critical perspectives that explore the role of race and culture in creating paradigms of crime and punishment.24 Although I have relied upon scaffolding provided by Dressler25 and Harris and Lee26 to structure my own classroom discussions, the same general topics are covered in many of the leading criminal law casebooks.27 The order of the presentation sometimes varies, but these texts also tend to lead off with discussions on what makes the criminal law unique and why (and how) society determines the appropriate criminal punishment for wrongdoers.28

The challenge for me in creating a Statutory Analysis class was that I was still expected to convey the basic substantive doctrines of criminal law in the same three units I had always had, while adding a component that emphasized statutory analysis. To achieve this goal, I had to sacrifice certain elements of the traditional criminal law class and integrate some (arguably excessively rudimentary) introductory materials on statutory interpretation. The course that I designed represented a compromise, one that is ongoing as I redesign the course for future classes.

I began by rethinking the traditional introductory materials for the criminal law class. In keeping with what I took to be the intention of the founding faculty, I decided to foreground materials on the interpretation of statutes, with the idea

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23. In some years, I taught the unit on theft immediately after the unit on rape and sexual assault rather than at the end of class.
24. See, e.g., LEE & HARRIS, supra note 21, at 897–984.
26. LEE & HARRIS, supra note 21, at 1–36.
that I could use this framework throughout the course. The first challenge I
encountered was that of finding materials on statutory interpretation that would
be well-suited to first-year, first-semester law students. Some of the finest
materials that appear in casebooks on legislation and statutory interpretation are
clearly geared toward an audience that has already acquired some familiarity with
the law.29 This makes sense since most such courses are taught in the second and
third year, and even in schools that include a first-year legislation course, such
courses are generally offered in the second semester.30 Nevertheless, a large
quantity of high-quality materials does exist, and these materials can be delivered
in ways that are completely comprehensible even to the uninitiated.

Last year, to provide the students with a rudimentary introduction to issues
in statutory interpretation, I relied primarily on excerpted materials in chapter 8 of
Eskridge, Frickey, and Garrett’s textbook on legislation.31 This chapter provides a
concise overview of doctrines of statutory interpretation. The first section of the
chapter introduces students to the rules, presumptions, and canons of statutory
interpretation.32 This includes explanations of textual canons;33 a brief
introductory overview of the multiplicity of substantive canons employed by
courts (with particular attention to the rule of lenity and the avoidance of
constitutional problems);34 and an introduction to the various extrinsic sources
that can be used in interpreting statutes (including legislative history and the
common law).35 The materials also highlight controversies surrounding various
methods of statutory analysis.

Having introduced these concepts, we turned to the substantive criminal law.
Using the same textbook I have always used, I found a host of opportunities to
deploy and discuss previously introduced concepts over the remainder of the
course. Textual canons came into play many times in interpreting provisions of
the California Penal Code, as did the doctrine of giving traditional meaning to
common law terms. The Model Penal Code (and Commentary) provides a useful
tool for discussing plain meaning, the proper interpretation of the whole act, and
some lessons in reading “legislative history,” which the Commentary provides,
albeit in very simplified form. With regard to substantive canons, the rule of lenity

29. See, e.g., WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY, & ELIZABETH GARRETT,
LEGISLATION: STATES AND THE CREATION OF PUBLIC POLICY (4th ed. 2007); ABNER J. MIKVA &
ERIC LANE, LEGISLATIVE PROCESS (3d ed. 2009).
30. See, e.g., Required First Year Courses, NYU SCH. LAW, http://www.law.nyu.edu/academics
/courses/requiredfirstyearcourses/index.htm (last visited Sept. 18, 2010) (listing the Administrative
and Regulatory State Course as offered in the spring semester).
31. See ESKRIDGE ET AL., supra note 29.
32. Id. at 847–941.
33. Id. at 849–856.
34. Id. at 880–941.
35. Id. at 955–1100. Unfortunately, very little of this material was covered in detail in my first
syllabus, which only allowed the class to skim the surface of these concepts.
obviously receives the bulk of the attention. Cases arising in states that have adopted modified versions of the Model Penal Code provide for particularly interesting discussions of legislative intent. All of this is to say that once the students become familiar with the basic doctrines of statutory analysis, an understanding of those doctrines becomes an integral part of the discussion of almost every case that follows. I actually found this framing device just as useful as the traditional scaffolding created by the literature on theories of punishment, although it accomplished a different set of goals.

In preparation for teaching the course a second year, I wanted to expand on this very basic introduction to doctrines of statutory interpretation. My second syllabus tried to introduce the students more systematically to theories of statutory interpretation, because I was concerned that my first set of students may have come away with a hodgepodge of doctrines and no theoretical or historical framework in which to contextualize them. Theories of statutory interpretation are covered beautifully in chapter 7 of the Eskridge, Frickey, and Garrett materials. The materials on statutory analysis compiled by Linda Jellum and Charles Hricik in their Modern Statutory Interpretation book cover some of the same ground at a slower pace and with more simplified explanations and exercises, so I have drawn from some of their materials in my second version of the course. The scope of Jellum and Hricik’s book is much smaller than that of the Legislation text by Eskridge, Frickey and Garrett. Indeed, most of the book is dedicated to materials that are covered in chapters 7 and 8 of the Eskridge materials. The slower pacing has made the materials more accessible to my first-year students. I also continue to include some of the Eskridge, Frickey, and Garrett materials that I relied upon last year.

As a whole, the materials on statutory analysis that I have offered to my first-year students provide them with an overview of various theories of statutory interpretation and an introduction to the doctrines of statutory interpretation. Once the students begin to work their way through the substantive criminal law materials, these issues are reinforced and refined. I supplement the criminal law text with statutory material from the California Penal Code. I spend a significant amount of time pointing to structural and historical differences between that code and codes based on the Model Penal Code, and highlighting the different analytical tools that are brought to bear by the courts interpreting specific provisions of criminal codes. California law also gives me the opportunity to

36. The rule of lenity receives treatment in the traditional criminal law texts and is a staple of any criminal law course. See, e.g., DRESSLER, supra note 20, at 119–126.
37. There are some important drawbacks to losing this scaffolding. See infra Part III.A.
38. ESKRIDGE ET AL., supra note 29, at 689–846.
40. Compare generally JELLUMS & HRICIK, supra note 42, with ESKRIDGE ET AL., supra note 29.
explore the mixed blessing of statutes enacted by popular initiative.\textsuperscript{41} The overall result is a criminal law course that provides students with a context in which to understand the cases that they read and a much more complete set of tools for analyzing the statutes that they confront.

But already I can feel the disapproval of many readers. There are those who will find the reorientation of the criminal law course utterly disorienting. Perhaps even more disapproving will be the reader who would like to see the introduction of legislation courses in the first year of law school.\textsuperscript{42} It is clear to that reader—and to me—that my course is not such a course. Indeed, I think the course has several important drawbacks and limitations that are worthy of discussion.

\textbf{PART III. MAKING DO WITH STATUTORY ANALYSIS}

The changes that I have made to my former criminal law syllabus have produced some tangible benefits. The foregrounding of materials on statutory interpretation highlights for the students the centrality of the criminal code in any discussion of the substantive criminal law. Students are much better attuned to the relationship between common law criminal doctrines and modern criminal statutes. The California Penal Code provides particularly fruitful ground for exploring the legislative intent behind the written criminal code, since it is an amalgam of codified common law doctrines, modern statutory crimes crafted by the legislature, and popularly enacted statutory provisions. The Model Penal Code, a coherent statutory scheme with a clear “legislative history” of sorts provides a framework for discussion concerning defined terms and the proper application of law in light of the whole act. Last year, for the first time in my six years of teaching the criminal law, I did not sense that students were frustrated by the time spent on the Model Penal Code. Instead of viewing it as a pointless, academic approach to learning the criminal law, they approached it as an example of a criminal statute upon which to practice their newly acquired skills.

Nevertheless, the Statutory Analysis/Criminal Law hybrid has important limitations and deficiencies. First, there are costs to the teaching of substantive criminal law. Second, this course cannot hope to operate as a comprehensive course on legislation and it offers virtually no insight into the regulatory process. I think these two drawbacks are worthy of elaboration.

\textit{Shrinking the Criminal Law}

The changes in my syllabus did no harm to my ability to impart the basic


\textsuperscript{42} See generally Leib, supra note 3.
doctrines of substantive criminal law. Even after adding materials on statutory
analysis, I was still able to cover all of the introductory materials concerning the
elements of a crime, and I also covered the same substantive crimes and defenses
that I had covered in previous criminal law classes. In short, I do not think that
my students lost out on the “black letter” criminal law, and I think they are
equally, if not better, prepared for the criminal law section of the bar exam than
my previous criminal law students.

This is not to say, however, that nothing has been lost. As I mentioned at the
outset, I have replaced the traditional introductory materials of criminal law with
introductory materials on statutory interpretation. The large section on theories of
punishment contained in Dressler’s introductory chapter (and that of many other
criminal law texts) is a casualty of this approach. I do not spend more than a few
minutes discussing consequentialist and deontological theories of punishment.
I do not spend any time reading cases on proportionality—whether in capital or
noncapital cases—or on sentencing theory. I do not spend any time on the rich
literature, now available even in casebooks, on the culture of crime and
punishment. And I spend very little time talking about the current realities of
mass incarceration and the historical forces that gave rise to these modern
realities.

Intellectually, I can justify some of these shortcuts. It seems to me, for
example, that discussions on “how much to punish” and on constitutional
questions of proportionality, not to mention sentencing theory, are perhaps more
properly contextualized in an upper-division course on sentencing. All of the
materials I have listed among my omissions are also the subject of upper-division
seminars on punishment. But many students will not take such upper-division
courses. For some students, my course is the first and last opportunity to think
about the philosophical and social issues raised by the laws governing crime and
punishment. Although I certainly discuss these issues throughout the course,
passing references are not a substitute for lengthy and substantial reading

43. Some of this may be due to the fact that, for the past two years, UC Irvine requires an
unusually high number of minutes per credit hour; 795 at UC Irvine, compared to the 700 minutes
per credit hour required by the ABA. ABA REPORT OF THE AD HOC COMMITTEE ON MINUTES,
HOURS, DAYS, AND WEEKS (June 11, 2010) (on file with the author).
44. See supra notes 25–27 (identifying sections on theories of punishment in several of the
leading criminal law textbooks).
45. See, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND
46. See, e.g., IMMANUEL KANT, THE PHILOSOPHY OF LAW (W. Hastie trans., T. & T. Clark
1887) (1796).
49. See, e.g., LEE & HARRIS, supra note 21, at 897–984.
50. See generally MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David
assignments. One of the most significant challenges to course design that I have confronted is trying to figure out how to keep these aspects of the discussion vibrant when the syllabus fails to lead off with them, and the reading fails to cover them in any significant way.

**Shrinking Legislation and Regulation**

As previously mentioned, the statutory analysis class that I teach also is not, nor can it be, a legislation course.\(^{51}\) There is, of course, no consensus on what the contents of a first-year legislation course ought to be. In recent years, a few scholars have ventured to identify the various forms that such a class might take, and these descriptions include the following six course structures (or combinations thereof):\(^{52}\)

1. A statutory interpretation course focusing on theories, canons, and practice of statutory interpretation, including related political theory.\(^{53}\)
2. An introductory course focusing particular attention on administrative law, which would present an overview of the administrative state, the procedures of agencies and the oversight of agencies by the legislature and the judiciary.\(^ {54}\)
3. A regulation course that uses an area of substantive law—such as labor law or anti-discrimination law—to examine the making and implementing of laws.\(^ {55}\)
4. A legal methods skills course that focuses on the interpretation of statutes in introducing the principles of legal reasoning.\(^ {56}\)

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51. Indeed, in discussing NYU’s Legislation and Regulation course, Professor Richard B. Stewart lamented that “[t]he excruciating problem, of course, is how, within the context of a four-credit course, to cover all [the necessary legislation and regulation] material without being too superficial and too general.” Stewart, supra note 3, at 40. If it is difficult in a four-unit course, it goes without saying that it is absolutely impossible in a three-unit course that shares the stage with substantive criminal law.

52. In his article on first-year legislation courses, Ethan Leib broke the courses down into five categories. Leib, supra note 3, at 182–187. In an earlier article, William Eskridge identified seven different variants. William N. Eskridge, Teaching Legislation: A Conversation: The Three Ages of Legislation Pedagogy, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 3, 7–9 (2003). This list represents an amalgamation and revision of these two lists.

53. This is perhaps the most useful model for a first-year legislation course. See, e.g., Leib, supra note 3, at 182–183 (endorsing the use of this model in the first-year curriculum).

54. Such a course is offered at NYU, for example. My thanks to Cristina Rodriguez for sharing this insight—and her syllabus—with me.

55. ESKRIDGE ET AL., supra note 29, at 8 (listing examples of such courses).

56. Id.
5. A political and legislative process course that focuses on the political process, including issues such as election laws, lobbying and its regulation, the legislative drafting and budgeting processes, and legislation by popular initiative.57

6. A legislation course focused on state or local government legislation and regulation.58

While consensus may be lacking on the appropriate parameters of a first-year legislation course, it should be obvious from the description of my own course that it does not qualify as one. The closest model for my class is the brand of legislation courses that teach statutory interpretation. In a recent article, Ethan Leib laid out a statutory interpretation course that would be, in his view, the most suitable form of legislation course for the first-year curriculum. He writes:

This version of the course focuses student attention on the mechanics of statutory interpretation, introducing them to linguistic and substantive canons in varied legal contexts. It usually involves substantial exposure to theoretical debates about intentionalism, textualism, the “legal process” family of theories, and dynamic or purposive statutory interpretation. Ultimately, these theories and their viability simply cannot be understood without some sensitivity to separation of powers concerns; and the course is generally rounded out with some basic details about administrative law and deference to agency interpretations of statutes.59

Having given this matter a great deal of thought over the past year (and, admittedly, having given the matter insufficient thought before that), I have come to see the potential value of including a legislation course in the first-year curriculum. A statutory interpretation course, structured as suggested above, probably would be the “best candidate[] for inclusion as a first-year requirement” at many law schools.60

However, as Part II of this article makes abundantly clear, the course that I teach is not such a course. Rather, my course represents an effort to teach the canons of interpretation with some theoretical framework to assist the students in applying those canons. It does not provide students with an opportunity to engage deeply with the theories of statutory interpretation.61 Nor does it offer students a guide to the political and constitutional contexts in which these theories often play

57. Leib, supra note 3, at 183–184.
58. ESKRIDGE ET AL., supra note 29, at 9.
59. Leib, supra note 3, at 182.
60. Id. at 182.
61. Id.
Not only do I not have very little space in my very crowded syllabus to tackle issues of administrative law and judicial deference to agency interpretations, but the criminal statutes that form the backbone of the substantive criminal law class often do not provide a robust context for exploring those issues. Finally, although it clearly emphasized the role of the legislature in shaping the modern criminal law, my course is still somewhat judge-centric in its approach, ultimately asking how judges have interpreted or should interpret particular criminal statutes. In this sense, it fails to deliver what Professor Garrett has identified as one of the primary benefits of a statutory analysis course: introducing students to the reality that law on the ground is shaped much more by legislators, regulators, and agency actors (at all levels of government) than by judges.

**PART IV. CONCLUSIONS**

The UC Irvine School of Law has a class of fifty-nine second-year students and eighty-three first-year students. The most pressing curricular challenge for the faculty at the moment is to find ways to provide a meaningful and useful set of upper-division courses for these students. In addition to a mandatory clinical requirement, this may also include developing problem-based third-year courses that are co-taught by faculty members who can help students synthesize subjects (such as tax, antitrust, and corporations; or immigration, criminal procedure, and national security law) that are often taught in isolation, but that frequently interact in practice.

Nevertheless, at some point in the near future, the faculty will revisit its redesigned first-year curriculum and the question will be raised as to whether the Statutory Analysis class is a good innovation. Although my course is still a work in progress, at this point in time I think that my Statutory Analysis class is a good innovation, but perhaps not the best possible innovation.

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62. *Id.*
63. *Id.*
64. See Garrett, *supra* note 3, at 11 (noting that offering legislation classes in the first year is an antidote to what is otherwise an excessively judicially focused curriculum).
65. In some ways, this will likely prove even more daunting than first-year curricular reform. See Wegner, supra note 8, at 941–1006 (discussing the difficulties of reforming the upper-division curriculum). See also Gerald E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 238 (2003) (“Somehow, despite a general consensus that the most unsatisfying part of the law school program is in the latter years, curricular reform discussions bog down in yet another revision of the part of the curriculum that works best.”). Nevertheless, many schools have at least tried to revise the upper-division curriculum in recent years. Stanford Law School recently implemented one of the most high-profile sets of reforms to the upper-division curriculum. See A “3D” JD: Stanford Law School Announces New Model for Legal Education, STANFORD LAW SCH. (Nov. 28, 2006), available at http://www.law.stanford.edu/news/pr/47/ (noting that the revisions to the first-year curriculum followed and “complement[ed] a reform of the upper-level curriculum adopted by the faculty [the previous] spring”).
I have concluded that offering this course improves upon the traditional first-year curriculum—which generally offers no instruction on the substance and theories of statutory interpretation—and it does so in a way that does not diminish the students’ exposure to substantive criminal law issues that they will encounter on the bar exam. If there is general satisfaction with the content and structure of the first-year curriculum, I would not be averse to leaving things as they are.

But if asked whether this is the best possible structure for the first-year curriculum, I think that my answer might be “no.” Perhaps a first-year course dedicated entirely to the substantive study of statutory interpretation is desirable for students in a twenty-first century law school. Alternatively, subject matter other than criminal law might provide a more robust vehicle for teaching students about statutory interpretation. This raises the question: would I support cutting criminal law out of the first year curriculum in favor of another vehicle for statutory analysis? Or would I propose cutting another course? Rather than risk the wrath of any of my colleagues who teach first-year courses, I will leave this problem for another day.

Writing on a Blank Slate: Creating a Blueprint for Experiential Learning at the University of California, Irvine School of Law

Carrie Hempel*

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From its founding, the University of California, Irvine School of Law (UCI Law or “the Law School”), articulated its most important mission as preparing students for the practice of law at the highest levels of the profession. Fulfilling this mission necessarily requires providing every UCI Law student ample opportunities to learn, as part of their formal legal training, what it means to be a lawyer by actually practicing law. The most important of these opportunities is a student’s participation in a substantial clinical course, in which the student, under the close supervision of a supervising attorney, represents real clients, addressing their legal problems in an environment that includes continual feedback, skills practice, and time for learning and reflection. In most, if not all instances, the supervising attorney will be a UCI law professor, and the student will be evaluated on the basis of her work on behalf of her clients.1 In the first year of the Law

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1. What is appropriately termed “experiential learning” or a “clinical course” within a law
School’s existence, UCI Law took several important steps toward achieving this mission by creating a blueprint for the development of a well-coordinated and complimentary experiential learning program that begins in the first year and continues through all three years of the Law School’s curriculum.

The existence of a “blank slate” on which to draft this integrated blueprint for experiential learning, combined with excellent recent scholarly research on legal education, outstanding models of experiential learning programs at many other law schools, and the resources of the greater University of California, Irvine (“the University”), provide the Law School with a unique opportunity to create an educational environment in which each student can gain substantial and well-sequenced experiential learning in all three years of law school. Throughout the history of legal education, legal scholars have repeatedly called for a greater role for experiential learning, and in particular, clinical education, in the law school curriculum. In recent years, this call has been forcefully renewed in *Educating Lawyers: Preparation for the Profession of Law* and *Best Practices for Legal Education*, invaluable resources to a new law school endeavoring to create the best possible curriculum. Throughout the United States, superb clinical and experiential learning programs exist at many other law schools; we have drawn ideas from those programs and our colleagues who teach in them. Colleagues and administrators throughout the University have made the creation of an outstanding law school a high priority, including providing the financial resources to insure a clinical course for every law student, and offering to collaborate in the creation of interdisciplinary clinical courses in numerous subject matter areas. Each of these factors is instrumental to the planning and initial implementation of the school curriculum has long been the subject of debate within the legal academy and among those law professors who identify the courses they teach as experiential or clinical. It is beyond the scope of this paper to address these questions. I use the term “experiential learning” to refer to any activity, whether for academic credit or not, in which a law student performs legal tasks on behalf of a real client, including supervised pro bono work, externship courses in which the supervising attorney has no formal relationship with the Law School, and clinical courses in which the supervising attorney is also a UCI law professor. This essay sets out specific goals thus far developed for the Law School courses that will satisfy the clinical requirement.


experiential learning program at UCI Law.

This essay begins with a discussion of the first necessary step in creating a law school with experiential learning as a central goal: the selection of a dean who believes in and understands its importance. The essay next discusses the aspects of the first-year curriculum that build a foundation for this type of learning throughout law school: the emphasis placed on the teaching of lawyering skills and professional responsibility, and in the second semester, extensive pro bono opportunities and an experiential learning component within the lawyering skills course. The essay then describes the experiential learning aspects of the second year curriculum: the existing externship program, and the plans to add clinical courses taught by adjunct professors and an experiential learning component to numerous non-clinical courses. Finally, the essay describes the plans for and goals of the clinical requirement courses, and concludes with some thoughts about the challenges ahead.

I. A NECESSARY BEGINNING: THE SELECTION OF A DEAN WHO TRULY BELIEVES IN EXPERIENTIAL LEARNING

The University’s selection of Erwin Chemerinsky as the Law School’s founding dean set the stage to create a vibrant experiential learning program. Dean Chemerinsky has throughout his legal career advocated that experiential learning, and in particular clinical coursework, be a central focus of any law school curriculum.5 When offered the deanship at UCI Law, one of his requirements for accepting the position was that the Law School create a system that insured parity between clinical and non-clinical faculty.6 Another requirement was the ability to hire a sufficient number of clinical faculty to provide each student with at least

5. For a more in-depth discussion of Dean Chemerinsky’s views on the importance of clinical courses in legal education, see Erwin Chemerinsky, Why Not Clinical Education?, 16 CLINICAL L. REV. 35 (2009).

6. Dean Chemerinsky believes that parity among all law school faculty, to the greatest extent possible, is necessary in order to provide a legal education of the highest quality. In particular, such parity is necessary for the development of an outstanding experiential learning program, and to send the correct signal to students and others of the importance of practice-based learning. Interview with Erwin Chemerinsky, Dean UC Irvine School of Law, in Irvine, Cal. (Sept. 4, 2009). Faculty whose primary teaching responsibility is in a law school clinic may be hired into a clinical tenure track, clinical tenure, academic tenure track, or academic tenure position, depending on the individual's interest and productivity in scholarship. The University of California requires significant traditional scholarship for academic tenure. Many outstanding clinical faculty at law schools throughout the United States, for reasons of time and/or inclination, choose not to devote substantial time to producing publications sufficient for academic tenure under such a standard. The Law School has developed a promotion and tenure system for clinical faculty that allows outstanding clinical teachers to enjoy equal status and benefits within the law school, whether or not they choose to devote substantial time to this type of scholarship. UCI law professors with clinical tenure enjoy the same job security as faculty with academic tenure, and have the right to vote on all matters with the exception of the tenure of academic faculty.
one substantial clinical course taught by one or more full-time law professors. In recruiting faculty for the Law School, Dean Chemerinsky expressed his commitment to making experiential learning a central part of the curriculum.

II. THE CREATION OF A STRONG FOUNDATION IN THE FIRST-YEAR CURRICULUM

In the 2008–2009 academic year, the Law School’s founding faculty designed a first-year curriculum that emphasizes courses that create a strong foundation for experiential learning during law school. The course with the heaviest credit load in the first-year curriculum is entitled “Lawyering Skills.” In this year-long six-credit course, students not only learn facility with legal research and expository and advocacy writing, skills typically taught in a first-semester legal writing course, but additionally are introduced to the skills of oral advocacy, interviewing, fact investigation, negotiation, and document drafting.

UCI Law’s Lawyering Skills course also incorporates experiential learning into the teaching of interviewing skills. In the first year, three Orange County legal service organizations—the Legal Aid Society of Orange County, the Public Law Center, and the Orange County Public Defender’s Office—collaborated with Lawyering Skills faculty to create a project in which each first-year student conducted an intake interview of a new or potential client of the organization. Each organization provided a two- to three-hour training session for the students working with that organization, and then permitted each student to observe one or more intake interviews and conduct at least one interview. After conducting the interview, the student prepared a report of the information obtained and presented this information in writing and orally to one or more supervising attorneys of the organization. Several students continued to work with the organizations for the remainder of the semester and the following summer. Thus, through this interviewing project, first-year students began the critical process of learning what it means to be a lawyer by actually practicing law, while gaining exposure to the work of legal service organizations and the pro bono clients they represent. As the Law School accepts more students in its first-year classes, it will increase the number of organizations participating in the program, and may also expand the program to allow first-year students to conduct intake interviews of potential clients for the Law School’s various clinics.

The first-year curriculum also includes a year-long four-credit course entitled “Legal Profession” that focuses on the importance of beginning to develop professional identity, including professional responsibility. Concepts such as an attorney’s duty of confidentiality and conflicts of interest are taught by various methods, including the use of simulation exercises and bringing into the classroom speakers from different practice settings to introduce students to the professional

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7. I define a substantial clinical course as one taken for at least six units of credit.
and ethical challenges of various career choices. Placing this course in the first year not only sends the important message that a sound understanding of professional identity and legal ethics is crucial for all attorneys, but also provides an early and solid foundation for further development of both through subsequent participation in other experiential learning and doctrinal courses.8

The Law School has devoted both time and resources to creating a pro bono program that provides high-quality experiential learning opportunities for students. In September 2009, the faculty adopted a pro bono policy that encourages all students, including second-semester first-year students, to provide volunteer legal services to underserved members of the community. The UCI Law Pro Bono Policy states an expectation that both students and faculty will regularly engage in public service work throughout their careers, and encourages them to set yearly public service goals similar to those expected of practicing attorneys.9 Pursuant to the American Bar Association’s suggestion that practicing attorneys complete at least fifty hours of pro bono work annually, and recognizing the challenges that the first year of law school presents, the Law School encourages first-year students to complete twenty hours of pro bono service, and encourages second- and third-year students to complete fifty hours each year.

To assist students in attaining their goals for pro bono work, in 2010 UCI hired a Director of Pro Bono Services to create a vibrant pro bono program. The Pro Bono Services Director is supervised by and works closely with the Associate Dean for Clinical Education and Service Learning. The Law School created this structure to better insure a coordinated approach to all components of experiential learning, and to formally recognize that engaging in pro bono work can provide an excellent practice opportunity for law students. In the first semester of its existence, the program offered fifteen projects that continued throughout the spring semester and three “alternative” spring break opportunities. Ninety-five percent of the Law School’s first-year class engaged in pro bono work during their first year.

During the first year of the pro bono program, all students were being supervised by attorneys at legal service organizations and private law firms; in future years, UCI Law intends to develop additional pro bono projects in coordination with some or all of the Law School clinics. Students then will be able to participate in the work of a clinic on a limited basis, gaining exposure to the type of legal work done there before committing to a substantial clinical course for a semester or year. Such projects may provide UCI Law’s clinics with valuable additional resources. For example, beginning in 2011, the Law School will have an environmental law clinic. A group of second-semester first-year students,

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supervised by the clinic professor, may have the opportunity to provide pro bono legal services working on environmental projects, such as conducting preliminary fact or legal research into potential legal claims.

III. DEVELOPING SECOND-YEAR EXPERIENCES THAT BUILD A BRIDGE TO CLINICAL WORK

The Law School plans to provide second-year students with a variety of opportunities for experiential learning, including externship courses in which students receive academic credit for supervised legal work in a government or non-profit organization, numerous classroom courses that provide an experiential learning component, and clinical courses taught by adjunct faculty. Second-year students also will take any necessary prerequisite courses required to participate in their selected third-year clinic.

In common with many other law schools, UCI Law has created three different types of externships for academic credit: full-time summer externships, part-time externships during the academic year, and in exceptional circumstances, full-time externships during the academic year. The Law School defines an externship course as a field placement in which a student is either engaged in legal work on behalf of clients of an organization other than UCI Law and is primarily supervised by an attorney who is not also a Law School professor, or legal work under the supervision of a judge. Students enrolled in externship courses also participate in a one-unit classroom seminar designed to provide opportunities for contemporaneous reflection and learning. The faculty’s decision to offer academic credit for full-time summer externships was motivated, in part, by the recognition that a judicial externship is a very attractive option for many rising second-year students, and one for which they cannot receive any kind of financial compensation.10

The Law School also plans, in future years, to offer an experiential learning component for numerous upper-division classroom courses. For example, students enrolled in a seminar on copyright law might provide legal assistance addressing copyright questions for clients such as the University. Students enrolled in family law may have the option of working with an adjunct professor on family violence and/or custody cases. Students taking property may represent pro bono clients in unlawful detainer actions under the supervision of volunteer attorneys from a local private firm.11 Faculty are encouraged to consider ways in which they can incorporate both simulated skills exercises and experiential learning into their classroom courses, and the Law School administration is very willing to assist

10. UCI Law students who worked at a non-profit organization or government agency during Summer 2010 were given the choice of receiving a summer stipend from the Law School or academic credit for the work through enrollment in the summer externship course.

11. Property is an upper-division elective course at UCI Law.
interested faculty in finding any needed resources, including supervising attorneys or otherwise, to make such learning opportunities a reality.

UCI Law also plans to capitalize upon the wealth of legal expertise in Orange County and the legal community’s outpouring of interest in the Law School by facilitating the creation of clinical courses taught by adjuncts. One such course, envisioned by two partners in the Orange County office of a major international law firm, is a real estate law course in which a group of eight to ten students would work in several teams on various components of an actual development project for a non-profit or low-income client. Issues that students might address include: assessment of the project’s environmental impact; research and analysis of governmental processes; drafting of transactional documents; and community outreach designed to insure the project’s success.

The second-year curriculum also will include a series of substantive classes that will serve as prerequisites for the third-year clinical course offerings. These classes will provide students with a foundation in the substantive law most relevant to their anticipated clinical course. This substantive background is crucial, as a number of the clinical offerings that will satisfy the clinical requirement will be one-semester, as opposed to year-long, clinics in order to optimize student enrollment. This structure will allow students to better “hit the ground running” at the beginning of the clinic semester, and thus learn more and achieve more for clinic clients in that semester. In addition, many, if not most clinic students will need to either have successfully completed or be concurrently enrolled in evidence in order to act as the primary legal representative of their client in court and other formal legal settings.

III. THE THIRD-YEAR CLINICAL REQUIREMENT: KEEPING STUDENTS ENGAGED THROUGH THE PRACTICE OF LAW

In the 2008–2009 academic year, the faculty voted to require a substantial clinical course for all UCI Law students. Initially, students will enroll in one of

12. The Law School anticipates that these courses would provide an interested student with the opportunity to participate in a second or even third clinical course in addition to the required clinical courses taught by full-time faculty.

13. Cal. R. Cr. 9.42(c) (“To be eligible to become a certified law student, an applicant must . . . (3) Have either successfully completed or be currently enrolled in and attending academic courses in evidence and civil procedure.”). All UCI students complete a course in civil procedure in their first semester of law school.

14. UCI Law has joined a relatively small, but growing group of law schools requiring a clinical course. Twelve (less than ten percent) of the 145 schools that participated in a recent national study of clinical education reported requiring students to complete an experiential learning course (either an in-house, live client clinic, or field placement program) before graduating. See DAVID A. SANTACROCE & ROBERT R. KUEHN, CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION, REPORT ON THE 2007–2008 SURVEY (2008) [hereinafter CSALE Report], available at http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf. They are City University of New York, Northeastern University, St. Thomas University, Thomas M. Cooley Law School, University of
the clinical courses designated as fulfilling the clinical course requirement in their third year of law school. Reserving these clinical courses for third-year students may be revisited in future years, but a persuasive argument can be made that participation in a substantial clinical experience in the last year of law school will better engage students in the learning process for all three years of their formal legal education.

Although the blueprint for the Law School’s clinical program is still very much a work in progress, and will no doubt be revised as more clinical professors join the faculty, certain aspects of the program are foundational. In each clinical course, students will practice law under the close supervision of an experienced attorney. Each clinical course will involve opportunities for simulated practice, feedback on performance, and reflection. Each clinical course also will provide the student with the opportunity to develop some of the specific skills they will use in their chosen practice, whether that choice is to become, for example, a transactional lawyer or litigator in private practice, a government trial attorney, or a legal aid lawyer practicing in the area of community economic development. Each course will also provide the students with opportunities to consider

Detroit, University of Florida, University of Maryland, University of Montana, University of New Mexico, University of Puerto Rico, University of Washington, and Yeshiva University Cardozo School of Law. Email from David A. Santacroce, Clinical Professor of Law, University of Michigan Law School, to author (Aug. 12, 2009) (on file with author). Since the publication of the CSALE Report, at least one other law school, Washington and Lee University School of Law, also has adopted an experiential learning requirement for graduation as a component of the law school’s new comprehensive program for all third-year students. See The Third Year at a Glance, WASH. & LEE UNIV. SCH. LAW, http://law.wlu.edu/thirdyear/page.asp?pageid=650 (last visited Jan. 8, 2010).

15. In order to be certified under Rule 9.42, students must attend a law school at least provisionally certified by the American Bar Association. Cal. R. Ct. 9.42(c) (“To be eligible to become a certified law student, an applicant must: (1) Have successfully completed one full year of studies (minimum of 270 hours) at a law school accredited by the American Bar Association or the State Bar of California, or both, or have passed the first year law students’ examination.”). The Law School anticipates provisional certification sometime in spring 2011, which will permit students to become certified by the beginning of fall semester 2011. ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2009–2010, Interpretation 102–04 (“A student at a provisionally approved law school and an individual who graduates while the school is provisionally approved are entitled to the same recognition given to students and graduates of fully approved law schools.”). The Law School recognizes that requiring each student to complete at least one clinical course involves a substantial resource investment, but also potentially places limitations on the clinical experience opportunities of some UCI Law students who would like to take several clinical courses while in law school. At a law school with great financial resources, such a choice might not be necessary; hopefully UCI Law will grow into such an institution.

16. See THE CARNEGIE REPORT, supra note 3 at 194–95, noting that one of the problems with the current structure of legal education is students’ lack of focus during the third year of law school.

17. For a more in-depth summary of the Law School’s initial efforts with respect to innovating its curriculum, including the historical context of resistance to these innovations, see generally Carrie Hempel & Carroll Seron, An Innovative Approach to Legal Education and the Founding of the University of California, Irvine School of Law, in AN UNFINISHED PROJECT: LAW AND THE POSSIBILITY OF JUSTICE (Scott L. Cummings ed., 2011).
questions of professional responsibility and identity in the context of the legal problems of a real client, and will instill the importance of regularly providing pro bono legal assistance as an essential responsibility of bar membership. Finally, each clinic should provide an opportunity for students to play an integral role in addressing broader social justice concerns through the legal problems it addresses.18

Other aspects of the clinical program will depend on both the preferences of the clinical faculty hired and the resources available. As discussed above, the Law School is committed to providing a substantial clinical course to every law student. For most, if not all law students, this will be in the form of a one- or two-semester in-house clinic. In the first several years of the program, the Law School plans to offer an in-house clinical experience to 80%–100% of its students.19 A few students may wish to satisfy the requirement through placement with a government or non-profit legal services organization in Southern California; to the extent that such organizations will allow students, with close supervision, to act as the primary representative of the client in court or other relevant settings, this will be permitted. For example, a student desiring to become a prosecutor may be permitted to satisfy the clinical requirement by working in a district attorney's office, provided the student will have the opportunity to appear in court in the capacity of a certified law student intern.

As the size of each third-year class grows over the next several years, the Law School intends to hire clinical faculty at a rate that will allow it to meet the goal of enrolling most students in an in-house clinic. Thus, the Law School plans to hire one or two faculty members each year over the next several years until there are at least ten faculty members whose primary teaching responsibility is in a clinic. The law school plans to supplement the teaching in its live client in-house clinics with some adjunct faculty members, other full-time faculty members who wish to teach in the clinical program, and perhaps with some clinical fellows.20 For example, three to five faculty members whose primary teaching responsibilities are non-clinical courses intend to supervise students in the Appellate Litigation Clinic to be offered in fall 2011.

18. For a thoughtful discussion of the potential pedagogical challenges to professors and benefits to students of a clinic that combines representation of individual clients in smaller cases and work on larger projects that seek to address broad social justice concerns, see Jayashri Srikantiah & Jennifer Lee Koh, Teaching Individual Representation Alongside Institutional Advocacy: Pedagogical Implications of a Combined Advocacy Clinic, 16 CLINICAL L. REV. 451 (2010).

19. The Law School hopes to have four clinics in place for the first class of fifty-nine third-year students: an appellate litigation clinic, a community economic development clinic, an environmental law clinic, and an immigrant’s rights clinic.

20. The decision of whether to hire any clinical fellows will depend on a number of factors, including the interest of a particular faculty member in working with a fellow and the ability to incorporate the mentoring necessary to develop marketable skills and/or time for scholarship into the fellowship opportunity.
Several general criteria are being used to help determine the best types and combinations of clinical offerings for the Law School. First, a clinical course must provide each student the opportunity to serve as a primary advocate for a client in whatever context the legal problems addressed by the clinic arise. For example, if the clinic represents clients in litigation, the students will be the legal representatives who argue in court on behalf of the client. Second, the clinic must provide sufficient intellectual challenges for the student, ideally both in the substantive legal issues involved and in the skills being developed. Third, the substantive law and skills learned in the clinic should, to the extent possible, be those that the student will use in her chosen area of practice. In order to address this criterion, the Law School plans to have roughly an equal number of transactional and litigation clinics. As clinics are created, the career interests of students will be continually assessed and reassessed to determine whether the substantive law and skills learned in the clinical courses are sufficiently broad to meet the needs of the growing student body.21

Fourth, to the extent possible, the Law School intends to develop clinical courses that will complement areas of expertise and scholarship of non-clinical faculty. For example, the Law School currently has two non-clinical faculty members with expertise in environmental law, two with expertise in immigration law, and two with expertise in intellectual property law. In 2010, the Law School hired a professor to create an environmental law clinic; in the 2010–11 academic year, the Law School hired a professor to create an immigrant’s rights clinic, and a second professor to create an community economic development clinic. In 2011, the Law School hopes to hire a clinical professor to develop a clinic that focuses on the transactional problems of emerging small businesses and/or non-profit organizations and another to develop a human rights clinic. Developing clinics in these subject matter areas will allow for potential collaboration with non-clinical faculty, ranging from providing expertise to some supervision of student practice.

Fifth, the clinic should, when possible, provide opportunities for students to work with professionals and graduate students in other disciplines, to prepare them for the interdisciplinary nature of a twenty-first century legal practice. Dean Chemerinsky and Law School faculty members are currently exploring areas in which collaboration with other academic disciplines would enhance the overall educational experience for students as well as the service provided to clients. Clinics that may provide opportunity for engaged interdisciplinary collaboration include: small business transactions, community economic development, criminal justice, environmental law, immigration law, international human rights, law and medicine, and law and technology.

21. Toward the end of the first year, the Law School surveyed the clinical course priorities of the first class and has used this information in planning the subject matter of the initial in-house clinics.
Finally, the clinics must provide their services pro bono to clients who otherwise would not be able to obtain legal representation. In this respect, the Law School intends to structure the clinical program in a manner that will help to address some of the greatest unmet needs for legal services in Orange County. To this end, faculty and staff are meeting with numerous legal service attorneys in the Orange County community to gather information on this subject. These meetings also provide the opportunity for UCI Law to explore the potential for field placements and/or teaching collaborations with interested legal services attorneys. The Law School intends to utilize the wide-ranging expertise in the Southern California community through the creation of advisory boards to assist the initial clinical faculty in the creation and development of the various clinics.

The Law School prioritizes developing clinics that can both help to address an unmet need for legal services and satisfy the broad pedagogical goals outlined above.

V. CONCLUSION

The founding of a new law school at the University of California, Irvine has created an opportune moment for implementing the recent Carnegie Report’s call for full integration of experiential learning into the law school curriculum. The University of California, Irvine has committed substantial resources to the UCI Law School to make this vision a reality. The Law School has taken this call for reform to heart by drafting a blueprint that incorporates best practices and innovations at other law schools, and will offer a sequenced infusion of skills and professional values training.

Without doubt, UCI Law will face several challenges as it pursues its plan to fully implement its blueprint for experiential learning at the Law School. At a pragmatic level, as the size of the Law School grows, the coordination and administration of the program will become more complicated. Implementation of particular components of the program, such as the first-year interviewing project, pro bono and externship components, greatly depend on continual and increasing voluntary collaborations with outside legal organizations. Implementation of a truly interdisciplinary clinical program will depend not only on the resources of the Law School, but also on the willingness of other departments within the University to dedicate resources to collaboration with the Law School. The integration of experiential learning components into courses such as family law or property will ultimately depend on the willingness of non-clinical faculty to include such components in their courses. Additionally, it may prove challenging to concretely evaluate the benefits of a strong focus on experiential learning in law school.

Although the slate is no longer blank, UCI Law has only begun building from the blueprint it has created. It is thus far too soon to evaluate the long term success of these efforts to fully incorporate experiential learning into all three
years of law school. Nonetheless, the Law School has, in its first few years, taken important steps toward implementing its mission of preparing students to be outstanding lawyers by engaging them, while in law school, in the practice of law.
The Academic Law Library in the 21st Century: Still the Heart of the Law School

Beatrice A. Tice*

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"It is a basic principle of legal education that the law library is the heart of the law school . . . ."¹

Soon after accepting the challenge of creating the law library at the new University of California, Irvine School of Law (UC Irvine Law), I was asked my opinion of a proposal to delay construction of the library until 2010, one year after the opening of the School. To me this was an inconceivable notion and, joined by the Dean, I firmly objected. The law library is the heart of a law school, we argued. So integral is the law library to the function of a law school that, without a proper law library, the Law School should not open at all. Needless to say, construction of the UC Irvine Law Library went forward and the Library was ready for the arrival of the inaugural class.

This vision of the academic law library as the vital core of its institution was first articulated by Charles Eliot, president of Harvard University from 1869 to 1909, who proclaimed in his annual report of 1872–73 that “the library is the very heart of the [Law] School.”² Although President Eliot’s conception was not immediately adopted by other law schools of the day, the image of the law library as the nucleus of the law school enterprise insinuated itself into the collective consciousness of the American legal academy over the ensuing century. By 1940,

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the concept had become so deeply engrained that the American Bar Association, in its *Factors Bearing on the Approval of Law Schools*, cited the notion as a settled precept: “It is a basic principle of legal education that the library is the heart of a law school and is a most important factor in training law students and in providing faculty members with materials for research and study.”

Today the description of the law library as the “heart of the law school” has become a standard phrase in the rhetoric of legal education. Many law libraries confidently refer to themselves on their websites as the ‘heart,’ ‘intellectual heart,’ or even ‘heart and soul’ of their law schools, without offering any further explanation. Perhaps it is assumed none is needed, or perhaps the phrase has become so disengaged from its past associations and weighty implications that it has devolved into a mere cliché.

Yet the very existence of the cliché is an indication of its universal truth. No one doubts that the academic law library occupies a unique and important place in the law school community, or that its mission of providing comprehensive support for the research and educational endeavors of faculty and students is crucial to the success of the school. But the law library’s accepted status as the heart of its institution exists independently of these resources and services that the library provides. Were it otherwise, any loosely related combination of access to legal information, instruction, technology, and study space that otherwise met the American Bar Association’s accreditation requirements would, at a minimum, serve. Given the fact that every law school in America today provides its constituents with an authentic law library, such is clearly not the case.

What, then, is this archetypal understanding of the law library as the embodiment of its law school’s essential core? And why, even in the twenty-first century, does the law library remain the heart of the law school? The answer lies in the elemental nature of law itself, as information.

I. THE INFORMATION-KNOWLEDGE-ACTION PARADIGM

*Information* may be generally defined for our purposes as data that are presented in a readily comprehensible pattern to which meaning attaches within the context of its use. In contrast, *knowledge* may be understood as information that has been comprehended and evaluated by the knower in light of her experience and intellectual understanding. Information is thus both a necessary prerequisite to and an inevitable component of knowledge. *Action* as seen from this perspective is the conversion of knowledge from a passive to an active state, which has social consequences. In other words, information provides human beings with the ordered intelligence that is necessary for comprehension and consequent informed

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3. Ahlers, supra note 1, at 91. This principle remained a part of the factors from 1940 until 1957.
social activity to occur. Without information, there can be no knowledge; without knowledge, there can be no informed action.

Law may be loosely defined as a collection of binding rules of conduct set by a human society to maintain order throughout the range of its endeavors. The function of law in this context is to coerce those behaviors—either actions or non-actions—that the promulgating authority has determined are in the best interests of the society. In order for this function to be realized, members of the society need to be aware of what these rules of conduct are so that they may choose whether to model their behaviors accordingly. The meaningful patterns of data comprising the individual rules that constitute law—information—must therefore be disseminated so that humans can understand and evaluate the social conduct expected of them and the consequences of failure to comply—knowledge—in order that they may determine how to act with respect to the promulgated rules—action. In other words, in its most elemental state, law is information that must be made accessible to individuals before they may take informed action with respect to the law itself. Without being processed and published as information, law simply exists without inherent meaning or comprehension and is thus useless for any purpose.

In order to carry out its broad mission of legal education, scholarship and experiential learning, the law school is inevitably grounded in this information-knowledge-action paradigm. All research, instructional, and service endeavors of a law school involve the conversion of primary and secondary sources of legal information into knowledge and action, or the furtherance of those activities. Teaching a class in international law, for example, requires that a professor identify, understand, and analyze relevant primary and secondary sources of legal information and then communicate that material to the class in the most effective way. Students prepare for class by doing assigned readings of legal information, and then participate in class by discussing and analyzing what they have read. Writing a scholarly law review article requires that a faculty member read and evaluate relevant scholarship and other sources of legal information, and then draft a piece that reflects her own intellectual understanding of the subject. Running a pro bono program requires that an administrator identify suitable volunteer projects—those in which students will have an opportunity to convert legal information to knowledge and action in a real-world setting, such as legal clinical programs and policy advocacy centers. Every undertaking of a law school may at some level be traced back to the information-knowledge-action paradigm.

The law school, then, is fundamentally dependent on access to law, embodied as legal information, in order to perform its functions. However, legal information does not naturally exist in a state of ready accessibility to law schools (or anyone else). Before it can be accessed for conversion to knowledge and action, legal information must be collected, organized, preserved, and disseminated. These are specialized activities that require training in information
science as well as in legal bibliography. The law school’s ability to effectively access legal information—which it must do, in order to function within the information-knowledge-action paradigm—therefore depends on the existence of a go-between, an institutional facilitator that is as familiar with the effective management of information as it is with the particular information needs of law schools. In other words, the law school is dependent on the law library.

The law library brings law, as legal information, to the law school. No other unit in the law school is charged with, or trained to, perform this essential function; without it, the law school could not engage in any informed action in furtherance of its mission and so would not survive. The academic law library is likewise dependent on the law school for its own survival. Because an academic law library is embedded within the school it serves, the law library obviously could not continue without its law school. Indeed, the law school provides the reason and focus of the library’s existence, in both the legal academy and the greater university setting. Yet the law school remains the primary dependent; law libraries readily exist outside of the academic context, but no law school can exist without a law library.

In addition to its pure information function—and indeed because of it—the law library also brings to the law school a series of important intangibles that enables the school to establish and develop its identity within the greater legal academy and the outside world. Credibility, order, permanence, currency, relevance, intellectual community—these and other characteristics of information and information access, which are founded in the library, come to be identified with the law school overall. A small, cluttered, uncomfortable, and unattractive library, for example, sends a very different signal about the quality of scholarship and education of a law school than does an organized, well-designed, and tastefully decorated library, even if it too is small. This blending of institutional personalities is another indication of the mutual dependence between law library and law school.

Such profound interdependence on so many levels has caused these two institutions to forge a relationship of symbiotic mutualism based on the information-knowledge-action paradigm of law as essential information, with the library serving as information facilitator. This relationship, driven by the dynamic and ongoing development of law, legal publishing and legal pedagogy, has shaped both institutions throughout the course of American legal education. But whatever the era, the law library has inevitably been found at the heart of the law school enterprise.4

4. For a comprehensive discussion of the history of law libraries, see Christine A. Brock, Law Librarians: A Revisionist History; or More than You Ever Wanted to Know, 67 LAW LIBR. J. 325 (1974); AHLERS, supra note 1. For further reading on the history of legal education in America, see ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES (1953).
II. HEART OF THE LAW SCHOOL, 1783 TO 2000

The first American law schools of the eighteenth and nineteenth centuries were built around law libraries as repositories of legal information. During the earlier years of the eighteenth century, students prepared for the legal profession by contracting to “read law”—quite literally—as an apprentice with an experienced lawyer. Would-be lawyers naturally gravitated to those practitioners who owned a substantial library that could provide plenty of law to read. Beginning in the late eighteenth century, prominent lawyers—those with large libraries—found it both expedient and profitable to open private law “schools” in their offices in order to train multiple students at a time. During the era of national growth and economic expansion following the War of 1812, law schools at colleges and universities prospered and quickly became the norm. By 1875, over thirty college- or university-affiliated law schools were in place; by the end of the century, over eighty-seven law schools had been formed.5 Private practitioner-based law schools faded away, as their proprietors died or the schools were assimilated by newer university law departments.

Access to a significant law library was always recognized as essential for a functional law school; as Joseph Story of Harvard wrote in 1829, “[i]t is indispensable that the students have ready access to an ample law library which shall of itself afford a complete apparatus for study and consultation. . . .”6 The legal bibliography was limited during this era, and most libraries also included works of great literature from which principles of law or points of argument might be gleaned. Private law schools made use of their proprietors’ collections, which obviously pre-dated the opening of the office school; university law schools, however, were required to assemble a law library of their own prior to opening for business. Virtually all of the initial university law school libraries consisted of established collections purchased from practitioners, including in some cases those of local private law schools that merged into university schools.

The primary function of the law library as information facilitator during most of the eighteenth and nineteenth centuries was to serve as a repository of legal information and, to a lesser extent, a place to access that repository. The various pedagogical methodologies in use during the period did not contemplate the library in a more active or profound role. Private law schools used a lecture method augmented by supplemental readings from books available in the school’s—i.e., the practitioner’s—law library. To the practitioner-based law school, the library was simply a collection of (important) books. University-based law schools, with their larger student bodies and number of courses, typically used the “text-and-recitation method.” Under this approach, students memorized assigned portions of treatises—densely written secondary sources that describe and

5. See AHLERS, supra note 1, at 13.
summarize the law—then attended ‘recitation’—a series of in-class oral examinations to test their memorization and understanding. The law schools purchased multiple copies of the required treatises and lent them to students to use for class preparation. To the university-based law school, the law library was thus also a collection of books. In addition, because of the physical surroundings of a formal school as opposed to a law office, the library was a space dedicated to access and use of the collection. However, the text-and-recitation method did not require students to spend a great deal of time using the library or its materials; the students, provided with copies of the treatises necessary for class, were under no obligation to seek further for knowledge of the law.

Apart from its functional role as information facilitator, the existence of a law library was critical to a law school’s credibility and stature. Inasmuch as the law libraries of the period were actually practitioners’ libraries, the prestige and aura of success associated with private ownership of a large collection of law books was seen as carrying over to become attached to the school itself.7 The mere fact that a school provided access to ‘an extensive law library,’ even if the library was not heavily used, was deemed sufficient to lend both status and authority to the enterprise.

So, throughout the first two centuries of legal education in America, law libraries were seen as requisite to training students for the legal profession. The law library’s role as facilitator of the information-knowledge-action paradigm in this era, shaped as it was by the pedagogical methods and limited scope of legal publishing, was a passive one, serving as a simple repository of legal information. Yet, because it provided all-important access to the law, the law library was the functional heart of both the private and university-based law school.

In 1870, Christopher Columbus Langdell joined Harvard Law School as professor of law and then dean, and the American law school experience was changed forever. Langdell introduced the case method, a new and revolutionary process for learning law. Under the case method, students read only primary sources—published appellate court opinions—and thereby discovered the rules and principles of law on their own, with assistance from professors who taught using the interrogatory ‘Socratic method.’ Rather than memorizing what others thought about the law, for the first time since legal education began in America, law students were expected to think for themselves and draw their own conclusions.

Langdell’s pedagogical philosophy was firmly rooted in the information-knowledge-action paradigm: “[P]rinted books are the ultimate sources of all legal knowledge . . . every student who would obtain any mastery of law as a science

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must resort to these ultimate sources . . . .” To Langdell, the law library served as the primary environment within the university for learning law: “The law library is to us all that the laboratories of the university are to the chemists and the physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.” Unlike his peers of the day, Langdell saw the law library as playing an active role of central importance in the process of legal education:

The most essential feature of the School, that which distinguishes it most widely from all other schools of which I have any knowledge, is the library. I do not refer to the mere fact of our having a library, nor even to the more important fact of its being very extensive and complete; I refer rather to the library as an institution, including the relation in which it stands to all the exercises of the School, the influence which it exerts directly and indirectly, and the kind and extent of use that is made of it by teachers and students. Everything else will admit of a substitute, or may be dispensed with; but without the library the School would lose its most important characteristics, indeed its identity.10

Langdell thus viewed the academic law library as an institution of its own, independent of, yet inseparable from, the law school and playing a pivotal role in all of the school’s endeavors. In so doing, he affirmed the fundamental necessity to a law school of access to legal information. But he also assigned significant responsibilities to the law library that it had never before been considered to hold. In addition to serving as a passive repository of legal information, the library was now called upon actively to assume a broad and influential relationship with its student and faculty patrons and with the school itself. As the “most essential feature” of the law school, the library was also implicitly expected to study and perfect those functions.

Needless to say, these new expectations demanded significant changes in the administration, resources, and physical space of the standard nineteenth-century law library, as was seen in the major alterations that took place at Harvard. For example, in the first year of Langdell’s deanship, spending on library collections increased by over six hundred percent and continued to increase in subsequent years. By 1895, at the end of his tenure, the collection had grown from fewer than 10,000 to more than 37,000 volumes.11

10. Id. at 100.
11. WARREN, supra note 8, at 489, 491–92. Even so, no books of statutes were purchased, as in Langdell’s view these were not law books “properly so called” and did not belong in a law library.
But the “most important and radical reform” introduced by Langdell was the hiring of a permanent librarian, whose sole responsibility was oversight of the law library. Prior to this time, janitors and law students had variously shared some duties with respect to the library, but performed no supervisory role. Now the Librarian or his assistant was to be “in the Library during all the hours that it was open.” Except for a duplicate “working library” of heavily used materials, the library’s entire collection was moved to shelves behind a railing (known as “the bar”); “and when books from the latter are wanted, they are given out by the Librarian and his assistant, the names of the books being entered on a slip of paper, which is retained until the books are returned.”

These circulation policies and practices were enforced at the Harvard Law Library, to the chagrin of students who had been used to browsing (and pillaging) the stacks at will. At one point the intervention of President Eliot was necessary to confirm that students were expected to comply with the new rules. Nevertheless, because students were now expected to prepare for class by reading and researching cases (rather than memorizing treatises), use of the library increased at an overwhelming rate. Langdell reported in 1874:

Notwithstanding the facilities for study in the Library were materially increased during the year 1873–74 it not infrequently happens that there are more men in the Library than can find places at the tables; and on no day in the week is the Library so crowded as on that which has always been a holiday in the school, viz., Saturday.

Langdell’s concept of the law library thus moved the estimation of its worth well beyond a simple collection of volumes. In proclaiming the law library to be “the laboratory of the law school,” Langdell also elevated the status of activities performed there to a level of intellectual elitism achievable only by those select few—the students and faculty of the (Harvard) legal academy—who were trained

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12. Id. at 483–85.
13. Id. at 484.
14. Id.
15. Id. at 485–87.
16. Librarian William A. Everett recalled a Mr. “K___,” an upper class law student who continually defied the new rules. Everett spoke to Dean Langdell about it, who advised him to “write to the President.” Everett did, and “[i]n a few hours a sealed letter was laid on my desk by the College Secretary addressed to K____. I watched him quietly while he read it, and I think I never saw a person more astounded. I had no difficulty with K___ thereafter.” Quoted in id. at 486.
18. WARREN, supra note 8, at 488.
in the proper use of the law library: “The work done in the Library is what the scientific men call original investigation.”19 To an outsider, even those from other law schools, this “original investigation” simply looked like reading books; there could therefore be nothing but the library itself—the ‘law research laboratory’—that transformed this common pursuit into something more significant. The prestige associated with this scholarly intellectual community, combined with Langdell’s emphatic support, gave the institution of the law library a considerable measure of respect that it had not previously enjoyed, and that also adhered to its law school.

To Langdell, then, the mere fact of offering access even to an extensive law library was insufficient to implement the information-knowledge-action paradigm. In his view, an academic law library was expected to continue its passive function as a repository of legal information, but that information was to be provided in a structured and professionally supervised setting with an ambience of scholarly erudition that garnered respect. As such, the library was also expected to play an influential part in all of the activities of the law school.

As a practical matter, it is not obvious exactly what Harvard’s law library did in its enhanced position which differed significantly from what was being offered at the other university law libraries of the period. True, the Harvard Law Library provided a growing collection of books in increasingly larger spaces, but the same was true at other libraries, all of which responded to the general growth in legal publications that began in the mid-nineteenth century. The hiring of full-time library staff at Harvard was a genuine innovation (most law schools did not hire permanent librarians until the twentieth century), but this staff was primarily concerned with administration of the library as a repository of legal information, not with any other aspect of the law school. Yet student use of the law library arising from the case method, which should have been at least somewhat moderated by the eventual introduction of case books, continued to grow, while other schools’ libraries remained underutilized.20 The positive sensation of working in the ‘laboratory of the law school’ with its stimulating, scholarly atmosphere created a new reality of the law library that transcended the traditional functions it actually performed.

The law library under Langdell thus served as the heart of his law school as he envisioned it. As other law schools came to adopt modified versions of his case method of instruction, which by 1920 had become the standard legal pedagogical

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20. As Thomas Fenton Taylor, member of Columbia Law’s Class of 1877, pointed out with respect to the “new” Columbia Law Library in 1893: “[T]here were, last year, five hundred and eight students and a very well furnished library of fourteen thousand volumes. A liberal average of these five hundred and eight students using the library at any time would be twenty-five, and these habitues, the same persons from day to day.” Thomas Fenton Taylor, The “Dwight Method,” 7 HARV. L. REV. 203, 206 (1893).
method in America, his ideas provided a model for other law libraries to emulate. However, the full scope of Langdell’s vision of a centrally influential academic law library had yet to be realized.

The turn of the twentieth century heralded an era of increasingly rapid expansion in social movements, global awareness, economic development, scientific discovery and the evolution of technology. This heady climate of innovation and social upheaval had a profound influence on legal education in the United States. The first half of the century saw the growth of legal realism, as the legal academy came to understand law not as an isolated collection of deep-seated principles à la Langdell, but rather as a human-made institution that both reflects and reacts to the human condition. The strict formalism of the case method began to break down as law professors and students engaged in inquiry reaching far beyond the scope of the published appellate opinions that had been the sum total of Langdell’s pedagogical world. As information facilitator, the law library was naturally expected to expand its scope in order to furnish the information resources required by the legal realists and their new, broader approach.

But as the twentieth century moved forward, the difficulty of providing access to all of the intellectual materials necessary to sustain a vibrant law school became increasingly clear. The scope of American legal publishing had exploded, and academic law libraries were expected to keep current with all contemporary developments. New states, new government agencies, new fields of law, new reporters, new finding tools and search aids: All led to an ever-growing increase in the already huge corpus of the American legal bibliography. The two world wars and the resulting position of global prominence achieved by the United States gave rise to an entirely new inquiry into law from a transnational perspective, and academic law libraries were called upon to provide collections of international and foreign legal materials, many of which were difficult to obtain in the domestic market. The study of law from a historical perspective also grew during this period, requiring libraries to develop new collections of historical materials. The acceptance of interdisciplinarity as a method of legal analysis likewise required significant expansion of the collection; as the study of law was now contemplated to include study of the related social sciences, books and materials of a non-legal nature were suddenly a necessary part of the law library collection. Yale Law Librarian Frederick C. Hicks noted in 1926, “[l]ast year, a course in Trade Regulation required students to read parts of 15 books on business, 9 on combinations, and 16 on marketing. Only 1 or 2 of these books would, a few years ago, have been thought to be suitable for a law school library.”21

Not surprisingly, the volume count of academic law libraries—even modest libraries—shot up during at least the first half of the century. To take just one example, in 1898 the Yale Law Library contained 12,000 volumes; by 1908,

21. Frederick C. Hicks, The Widening Scope of Law Librarianship, 19 LAW LIBR. J. 61, 64 (1926).
the collection had increased to 30,000 volumes.\textsuperscript{22} In 1915, when Hicks began his tenure as Law Librarian, the Library held 56,427 volumes; when he retired in 1928, the collection totaled 142,268 volumes.\textsuperscript{23} Though other law libraries may not have shared Yale’s large percentage increases in volume count, a substantial expansionist trend could be seen in every academic law library across the country.

The impact of this trend on both law libraries and the law schools that supported them was significant. Law libraries staggered under the sheer volume of printed material that they were expected to house, as facilities built to accommodate earlier, smaller collections were quickly outgrown. The fact that libraries were required to maintain and preserve these collections as well as add current publications only compounded the problem. Usage of the law library by both students and faculty doing broad-based research reached a high level and remained constant, requiring that space also be made available for a significant number of patrons.

The growing size of the collections required that full-time staff be employed to administer the libraries; the growing complexity of the collections required that this staff be specially trained. As law schools slowly began to seek out librarians trained in the legal bibliography, law librarianship in turn developed as a profession of its own. The acknowledged experts in legal resources and research techniques, librarians were relied upon to play an expanding role within the law school community that reflected the law library’s facilitator role in implementing the information-knowledge-action paradigm: “[T]he law librarian, with a background of general, technical, and legal education enabling him to appreciate the breadth of the problems involved, . . . knows how to present and use the material once it is on the library shelves. In his triple role of bibliographer, administrator, and teacher he can be of immense service to the faculty, students, and alumni.”\textsuperscript{24}

Not only was the collection and organization of the newly immense legal bibliography a complex task, it was also expensive. Law deans were dismayed by the ever-increasing cost of providing the staff, collections, and facilities that were required to maintain, much less expand, the law library; on the other hand, the functionality and credibility of the school were still connected with the size and quality of the library. The legal education standards introduced in 1900 by the American Association of Law Schools and in 1921 by the American Bar Association offered the deans little guidance. Though both associations mandated that a law school provide a law library, the minimum standards of adequacy required were well below the level of collection strength and library service that was possible to offer, and that the most prestigious law libraries did indeed offer, at the time. In fact, not until 1940 did either association require that a law school

\begin{footnotesize}
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\item \textsuperscript{22} \textit{AHLERS, supra note 1.}
\item \textsuperscript{23} A. Hays Butler, \textit{Frederick Hicks’ Strategic Vision for Law Librarianship}, 98 LAW LIBR. J. 367, 368 (2006).
\item \textsuperscript{24} Miles O. Price, \textit{The Law School Librarian}, 1 J. LEG. EDUC. 268 (1948).
\end{itemize}
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hire a “qualified librarian, whose principal activities are devoted to the development and maintenance of an effective library service.”

When faced with the fundamental question presented by the twentieth-century law library—‘to grow, or not to grow’—different deans made significantly different choices. As a result, by the middle of the century, the legal academy experienced a fundamental divide in law schools’ vision of their mission and goals. Some law deans maintained Langdellian notions about the central role of the library, believing that the ability of a law school to develop as a vital, intellectual force was entirely dependent on the library; such schools aspired to be distinguished centers of learning and scholarship, and their libraries accordingly evolved to serve as research centers whose main purpose was to support the scholarly activities of faculty. Many other law deans maintained the traditional mission of the law school as existing primarily to prepare students for the practice of law. In such schools, the expansion of the library and of legal resources in general was seen as an expense of limited utility beyond what was absolutely required by the curriculum and the educational standards.

The results of this divide among law schools are obvious under the information-knowledge-action paradigm: Those law schools that aspired to become primarily research centers focused on creating an environment that would foster a wide scope of sophisticated faculty research. The information needs of such an environment were correspondingly greater and more sophisticated than were those in schools that remained focused on training new lawyers, and so too were their libraries. Most of these became the great research libraries of today’s most prestigious law schools, which continue to garner their reputation, at least in part, from their extensive libraries.

The information-knowledge-action paradigm demanded that law libraries on both sides of the divide play both an active and passive role to fulfill their function as information facilitators. The ever-expanding complexity and amount of law as information in the twentieth century required more from a law library than simple access to a collection of books; in order to address the expanding knowledge needs of the law school, multifaceted intermediation of legal information by professional law librarians was now also a necessity. Law libraries—even those in schools that did not see themselves as research centers—responded to the situation by becoming increasingly well-organized and comprehensive as repositories of legal information. Law librarians became professional as well, bringing to the law school specialized knowledge and skills regarding legal information, including teaching legal research, that were essential to providing access to the information contained in the complex collection. As the number and complexity of legal information resources grew, the law school’s dependence on the library to provide access to that information grew likewise. The law library in

25. AHLER, supra note 1, at 52.
the twentieth century thus served more clearly as the heart of the law school than in any preceding century.

III. THE ACADEMIC LAW LIBRARY IN THE 21ST CENTURY

The explosion of information technology in the late twentieth and early twenty-first centuries flooded the world with information, causing significant and permanent change. The development of the electronic format forever altered not only the information characteristics of law, but also methods of engagement with legal information. After centuries of print and print-reduction formats (such as microfiche and microfilm) serving as the only access points to legal resources, the sudden advent of electronic information meant that information facilitation could take place in ways that could not have been imagined in the pre-technology eras. To name some obvious examples, legal information presented in electronic format offered new functionalities, such as full-text searchability, which could greatly enhance efficient research. Subscriptions to databases meant that vast numbers of new titles could be added to library collections without taking up shelf space. Most importantly, electronic materials offered a breadth of access to information that had not been possible before, as no longer did one have to be physically present in the law library to use many of its materials.

The new information frontier has given rise to a fundamental reevaluation of the information-knowledge-action paradigm, including the status of the law library as information facilitator. Although law librarians generally saw the rise of information technology as offering many exciting possibilities for the expansion of information facilitation, others in the legal academy and elsewhere began to ask what has become an all-too-familiar question: Why do we need law libraries when “everything is available online?” In other words, in information-knowledge-action terms, why is intermediation by the library still necessary to provide access to the information that makes possible knowledge and action? The digital environment has empowered information-seekers to make such connections on their own, essentially whenever and from wherever they choose. Surely—it is argued—this represents a positive development in legal information management that should be supported, encouraging legal researchers to work independently of intermediation, regardless of what that might mean to the status of the library.

The economic crisis of the early twenty-first century, which as of this writing is recovering only sluggishly, has forced law schools’ hands in this regard. As the largest overall non-salary budget item, law libraries have offered seemingly obvious sources of significant savings in law school operations. Loosening of the bright-line volume count, title count, seat count, and other factors of the American Bar Association and American Association of Law Schools’ standards has made it easier to contemplate a reduced physical presence for the library, with resulting reductions in collections and staff. Though the law library remains a requirement for accreditation, its place in the hierarchy of competing law school
budget priorities is far from settled.

Indeed, as ever more sophisticated ways of engaging with information continue to be developed in this time of economic uncertainty, a more profound question is raised: Is the tradition-based concept of the law library as the heart of the law school still relevant in the information age?

Yes. Now more than ever—and inevitably so—the academic law library of the twenty-first century continues to serve as the heart of the law school.

The symbiotic relationship between the law school and its law library remains as fundamental to the overall enterprise as it has ever been. The information-knowledge-action paradigm, upon which that relationship is based, operates independently of the form that any of its components takes. The availability of legal information that may be accessed by the information-seeker as an electronic file, rather than a book on the shelf, has not changed the fact that the information must still be collected, organized, preserved, and disseminated by an intermediary before it can be used effectively by the researcher. Moreover, the assumption that all relevant legal information is available online is overstated at best. There is a substantial body of legal material, including scholarly monographs and treatises, that remains available only in print. Other materials, such as legal encyclopedias and the *American Law Reports*, are available online but nevertheless frequently collected in print for purposes of legal research training. Still other materials, such as statutes and compiled legislative histories, are often maintained in print because of the ease of use in that format as compared to the online versions. On the other hand, certain electronic iterations of resources, such as periodicals indices and updating tools, are far superior to their print counterparts in terms of currency and ease of use. As a practical matter, therefore, the addition of the electronic format has not rendered print resources obsolete; rather, the availability of online information has increased the range of options available to libraries as information facilitators in order to provide access to legal information content. Confirmation of this may be seen in the fact that the tasks and functions performed by law librarians over the last several centuries have only increased. The new information formats have not resulted in any significant reduction of intermediation based on older formats—for example, law librarians still collect, teach and engage with print resources—but have instead required librarians to add intermediation based on new formats.

As the amount and types of legal information and information formats continue to grow, the importance of law libraries and law librarians as collectors, organizers, preservers, and disseminators of information will only grow as well. The “information overload” syndrome that followed quickly on the heels of the worldwide information explosion also affected the legal information environment. Ironically, although the growth of online legal resources may have increased general ease of individual access to electronically available legal information, this development has also served at times as an impediment to successful access. The
The vast number of legal resources suddenly available in multiple formats has given rise to many choices for achieving the same research goal, a situation that can result in general inefficiency, ineffectiveness and downright bewilderment on the part of the untrained or unassisted information-seeker. The information-knowledge-action paradigm resolves this problem of information access as it always has done, by reliance on intermediation by an information facilitator which can evaluate, systematically organize and provide ordered access to information so that effective research may occur. In the context of the legal academy, that information facilitator is, as it always has been, the law library. Because academic law libraries in the twenty-first century remain the only unit in the law school that is professionally equipped to handle law as information in any format, law schools remain dependent on law libraries, as they always have been.

While the pure information aspects of the law library represent the core of its existence, its enduring position as the heart of the law school consists of intangible aspects as well. The academic law library as a physical space remains vitally important to the law school as a communal gathering place for research, study, reflection, and learning. The indefinable ambience of the law library as an environment for work of great consequence—as the ‘laboratory of the law school’—is felt and understood by those who use the library, even in the information age. Were it otherwise, use of the law library would have rapidly diminished once technology made it unnecessary to be physically present in the library in order to use many of its resources. On the contrary, current law students continue to guard their library against incursion by ‘outsiders,’ even if there is plenty of seating space and access to most resources is limited to law students only. Prospective faculty dutifully tour the law library, even though most of them will generally work in their offices and access the library remotely via services provided by librarians and staff. Moreover, in many law schools the law library is considered its showplace, and the library is routinely shown to all who visit, whether they request a tour or not. The key role that continues to be played by the library as physical space is abundantly clear.

An affirmation of the enduring relevance of the academic law library is the fact that the Dean of the new UC Irvine School of Law—‘the law school of twenty-first century’—refused to open the school without an outstanding law library at its heart. From the beginning, the UCI Law Library has served as the nucleus of the Law School, differentiating it from any other law-related enterprise and at the same time connecting the School to the university academy in the greater sense. In its multiple roles as information facilitator, educator, learning environment and signature showplace, the Law Library serves as the physical and intellectual embodiment of the distinctive identity to which the Law School aspires—that of an intellectually impactful, pedagogically sound yet innovative, and public service-oriented academic community.
IV. STILL—AND ALWAYS—THE HEART

From the earliest private office instruction to the most recent start-up academy, every law school throughout history has relied on a law library to serve at its fundamental core. As long as the process of legal education, scholarly research and experiential learning demands ready access to the law, the nature of law as information requires that the process be governed by the information-knowledge-action paradigm; the paradigm will ordain that there be an institutional intermediary for that information—the law library. As such, the law library itself has become emblematic of everything that a law school represents. It is the quintessence of the past, present, and future, not only of a particular law school, but of the continuing tradition of the study of law as a learned profession.

Human beings are transient, physical surroundings change, but the institution of the law library remains, lives on, and transcends. Whether it is accessed online from a nearby coffeehouse or visited in the building itself, the academic law library is the physical and virtual manifestation of the very essence of the law school. As Langdell observed, “Everything else will admit of a substitute, or may be dispensed with; but without the library the School would lose its most important characteristics, indeed its identity.”

Simply put, the law library is—and will always remain—the heart of the law school.

26. HARVARD LAW SCH. ASS’N, supra note 9, at 100.
Collaborating to Deter Potential Public Enemies: Social Science and the Law

Elizabeth F. Loftus* and Gilbert Geis**

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I. INTRODUCTION

Supreme Court Justice Louis Brandeis in 1935, during the throes of an economic depression that constantly has been revisited in discussions of the current financial meltdown, expressed in dramatic terms the need for lawyers to extend their embrace beyond parochial jurisprudential boundaries: “A lawyer who has not studied economics and sociology,” Brandeis wrote, “is very apt to become a public enemy.”1 The future Justice, hired as outside counsel by the state of Oregon, would be celebrated for his pioneering submission to the United States Supreme Court of the results of a social scientific inquiry. What became generically known as the “Brandeis Brief” was a 113-page analysis of the consequences of long working hours on the health of women. The brief strongly influenced the Supreme Court to uphold an Oregon law that mandated that “no female [shall] be employed in any mechanical establishment, or factory, or laundry in the State more than ten hours in one day.”2

Two writers subsequently would gloss the Brandeis “public enemy” theme with interpretative observations. David Riesman, a Harvard professor trained in law who also had a doctorate in sociology, noted that lawyers “are very apt to be

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scornful of the findings of social science,” and suggested that the main reason for this was that the social sciences tend to introduce novel insights and uncertainty into the comparatively rigid legal system, thereby presenting something of a threat to legal practitioners. On the other hand, A. Delafield Smith, who had spent twenty years as a counsel for federal agencies administering social legislation, charged that the social sciences largely muddied the rather pristine realm of legal business, that they had demonstrated “a grievous absence of understanding of the law’s objectives . . . a resulting failure to apply legal methods, and little awareness of the contributions of legal philosophy to social objectives.”

There is, of course, no simple resolution of the accuracy of any of these three viewpoints and it seems evident that, with numerous caveats and qualifications, each has some degree of truth on its side. But it appears unquestionable that, in the three quarters of a century since Brandeis called for greater legal attention to social science, there have been many serious attempts to respond to his challenge. The most notable infusion (or, perhaps, “invasion” is the better term) of social science into court decision-making was the Supreme Court’s reliance in the famous footnote 11 of the unanimous landmark school desegregation ruling Brown v. Board of Education on the research findings of psychologists Kenneth Clark and Mamie Clark. This was not an unreservedly blessed event, since it also ignited a considerable debate about the scientific rigor of the evidence that the Court had accepted.

There has been a slow but steady incorporation of social scientists into law school faculties, a movement that has as yet not been adequately examined and interpreted by social scientists—or by lawyers. For a time, the University of Denver College of Law had a large group of distinguished social scientists on its

5. The most significant attempt by his contemporaries was a collaboration between law professor Roscoe Pound and sociologist Edward A. Ross, both members of the faculty of the University of Nebraska, to fashion what they labeled “sociological jurisprudence.” See Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence (pts. 1 & 2), 24 Harv. L. Rev. 591 (1911), 25 Harv. L. Rev. 140, 489 (1912). See also Ernest K. Braybrooke, The Sociological Jurisprudence of Roscoe Pound, 5 U.W. Aust. L. Rev. 288, 309 (1961) (“It is some indication of the weight and influence of Pound’s philosophy that there has been relatively little criticism of his approach, and such criticism has generally been directed toward complementing it rather than supplanting it.”); Gilbert Geis, Sociology and Sociological Jurisprudence: Admixture of Lore and Law, 52 Ky. L.J. 267 (1964).
faculty—sociologist Gresham Sykes and political scientist William M. Beane,
among others. Sociologist Stanton Wheeler spent thirty-four years (from 1968
until his retirement in 2002) on the Yale Law School faculty9 while psychologist
John Monahan has been a long-time member of the University of Virginia School
of Law faculty and the compiler of a multi-edition text on law and social science.10
Particularly noteworthy was the move of sociologist Richard Schwartz from the
Yale Law faculty to become dean of the University at Buffalo Law School. The
novelty and the later more routine recruitment of social scientists by law faculties
was pointed out in Wheeler's obituary by political scientist Austin Sarat of
Amherst College. “He was so far ahead of his time in bringing to law schools the
perspectives of disciplines beyond the realm of law,” Sarat observed. “What today
is taken for granted in law schools, that they have faculty people with degrees in
sociology, history, economics, philosophy, was very rare when Stan was appointed
at Yale.”11 The current influx of social scientists onto law faculties is exemplified
by the recent movement of penologist Joan Petersilia from the University of
California, Irvine (UC Irvine) to Stanford Law School and psychologist Valerie
Hans from the University of Delaware to Cornell Law School.

In the following pages, we detail in question-and-answer format the
experiences and reactions of Elizabeth Loftus, a cognitive psychologist and the
first author of this essay, who does not teach traditional law school courses, but
will be offering a graduate seminar that will enroll law students, and has been very
involved in the activities of the fledgling UC Irvine School of Law. She has served
as an expert witness in numerous criminal and civil cases, typically testifying on
her empirical work concerning the accuracy of eyewitness testimony, the (lack of)
evidence for repressed memories, and other memory issues.12

In the question-and-answer format, the second author posed the questions.
We followed the practice of the U.S. Congress that allows participants in hearings
and debates the opportunity to examine and recast their responses if they so
desire.

9. The story is told of a Yale law school faculty meeting at which the discussion focused on
anti-Semitism. Wheeler joined in, only to be told that he was in no position to contribute on the
subject since he was not Jewish. He responded: “But I am a sociologist on a law faculty.” See
Dennis Hevesi, Stanton Wheeler, 77, a Yale Law Professor, N.Y. TIMES, Dec. 11, 2007, at C12 (describing
Wheeler's tenure on the law faculty).
10. See John Monahan & Lauren Walker, Social Science in Law (7th ed. 2010).
11. Hevesi, supra note 9 at C12.
12. See Elizabeth Loftus & Katherine Ketcham, Witness for the Defense: The
Accused, the Eyewitness, and the Expert Who Put Memory on Trial (1991); Elizabeth
II. A COGNITIVE PSYCHOLOGIST’S COGNITIONS ON THE LAW AND SOCIAL SCIENCE AND UC IRVINE’S NEW SCHOOL OF LAW

Q. Over four decades now you have testified in almost three hundred trials. On the basis of that experience, what are your thoughts on the relationship between the law and social science?

A. Inherently, there is an element of tension, a disjunction, between the ethos of social science and the practice of law. Ideally (and what actually transpires is often far from the ideal), lawyers start with a conclusion (e.g., the accused is innocent, the defendant is liable) and muster evidence that supports this position and arguments that seek to destroy or at least dilute contrary evidence. New York University Professor Stephen Gillers, an expert in legal ethics, expressed the matter well. He told an interviewer that lawyers can be at particular risk of pushing the boundaries of acceptable spinning because legal training and practice reinforce the notion that “a fact become[s] true if a jury or opponent can be persuaded to think that it is true—even if it is false.” Lawyers, Gillers claimed, “work this alchemy through performance.”

Social and natural scientists start with a hypothesis and attempt to demonstrate its accuracy, falsity, or need for reformulation. They, of course, sometimes become so committed to a conclusion that they unwittingly or otherwise distort what they learn in order to have it fit their presuppositions. The disparate ideals of law practice and the vocation of social science can create collaborative discomfort.

Attorneys in the courtroom tend toward confrontational “I’m right” stances. Contrast this posture to the statement of Richard Feynman, a Nobel laureate, who observed that “[d]etails that could throw doubt upon your interpretation must be given.” Of Robert Dicke, an esteemed physicist, it was said: “That’s why he was such a hero. When the data said the theory was wrong, then for him his theory was wrong. It was as simple as that.”

The matter of standing (in the sense of status, not as a jurisprudential issue) offers an interesting insight into consideration of the disparities between law and social science. Expert witnesses typically enter a case bolstered by a record of achievements that are lovingly detailed by “their” attorney. This cloak of authority has at times been employed by courts to refuse to allow expert testimony. In United States v. Fosher, for instance, there is an unmistakable verbal sneer in the judge’s decision to reject expert testimony about eyewitness memory regarding the identification of the defendant by two witnesses that apparently was crucial to his conviction for bank robbery and the assault of bank employees. The judge noted

16. United States v. Fosher, 590 F.2d 381 (1st Cir. 1979).
the proffer of “purportedly” expert testimony and declared that it would carry an “aura of special reliability and trustworthiness.” This preference for Luddite wisdom in place of research evidence is a disconcerting element in law-science relationships.

It is not surprising that status would make an impression on those who are told about it. Lawyers understand that there is more acceptance of precisely the same information when it is offered by a person who is identified as a leading authority than when the same person is presented as an amateur. Lawyers and judges may have equally or more striking accomplishments and backgrounds compared to the expert witnesses, but these will not be entered into the record: they must perform then and there in order to persuade. Perhaps this is what irked the Fosher judge who sought to tuck the purported eyewitness authorities into their proper place, which he deemed to be some distance from a courtroom.

Fifteen years later another court echoed the Fosher ruling in another bank robbery case. “Given the powerful nature of expert testimony, coupled with its potential to mislead the jury,” the judge ruled, “we cannot say the district court erred in concluding that the proffered evidence would not assist the trier of facts and that it was likely to mislead the jury.” Cynics might find farcical the use of the word “fact” in the quoted opinion since it is combined with the rejection of empirical evidence and is employed in reference to a drama in which regard for the truth often is an irksome and irrelevant consideration for the adversarial parties.

It has intrigued me, in this regard, that beginning in the 1960s law schools (Yale was a laggard) altered the first degree they offered from LL.B., a bachelor of law, to J.D., a juris doctorate. Those who earn the degree have the imprimatur of the American Bar Association to call themselves “Doctor.” Yet no lawyer that I know of has had the temerity to self-identify as a “Doctor.” I wonder why this is so in a society such as ours and with a group that often is not hesitant to engage in acts of self-aggrandizement. In Italy many lawyers call themselves “Doctor,” and are authorized by law to do so.

Q. Let’s follow up on this point for a moment. How do you see status issues playing out in legal cases?

A. The most obvious point is that when I am involved in a case as a social scientist I do not have home field advantage and, as every sports fan appreciates, that can be a considerable disadvantage. (Perhaps I should have said I do not have home court advantage!)

A court is attorney territory and the judge is from the same tribal unit. While

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17. Id. at 383.
18. United States v. Rincon, 28 F.3d 921, 926 (9th Cir. 1994).
the courts allow some extra leeway to expert witnesses, the setting, the laws, and the evidentiary and other rules are the product of legal sources and inevitably have some self-serving elements. The judge sits majestically above the plebes, and opposing counsel, unlike witnesses, need not take an oath to tell the truth and only the truth.

Q. How about the matter of the law going astray in trying to regulate social science testimony?

A. For me personally, the most glaring example is the standard that must be met for expert testimony to be admitted into court under Daubert21 and Frye.22 Essentially, a core consideration, implicitly in Daubert and explicitly in Frye, is that if the cadre of specialists in a field grant the legitimacy of the material then the court will allow it to be entered into the proceedings.23

It is understandable that judges prefer to abdicate judgment in matters in which they typically have little or no training despite the Daubert court’s dicta that it was “confident that federal judges possess the capacity to undertake this [kind of] review.”24 The judges can fall into the trap of allowing what might disparagingly be called “junk science” to prevail. If the relevant scientific group is deemed to be, say, professionals who subscribe to the Journal of Traumatic Stress the court undoubtedly would endorse the validity of the concept of “repressed memory” while most cognitive scientists such as myself and many health professionals would dispute this belief. We believe that there is virtually no credible scientific support for this concept. Psychologist Richard McNally of Harvard put it aptly: “The notion that the mind protects itself by repressing or dissociating memories of trauma, rendering them inaccessible to awareness, is a piece of psychiatric folklore devoid of convincing empirical support.”25 Yet under Daubert, courts would entertain such suspect testimony. Other writers have noted this same kind of perceived judicial naïveté or bias, particularly in cases involving workplace sexual harassment26 and what are known as the Battered Woman Syndrome and the Rape Trauma Syndrome.27

Q. Let’s move back in time for a moment. How did you initially form an interest in the law?

A. In my first position as an assistant professor in New York City, I was conducting research on semantic memory. Semantic memory involves memory for words, concepts, and general knowledge rather than memory for the personal

23. See Daubert, 509 U.S. at 594; Frye, 293 F. at 1014.
24. Daubert, 509 U.S. at 593.
experience in life. My focus was on how general knowledge is stored in the human mind and how it can be retrieved when needed.

I was having lunch one day with a cousin who was a lawyer. She said: “So you’re an experimental psychologist. Have you made any discoveries?” “Yes,” I replied proudly, “I’ve discovered that people are faster to give you the name of a bird that you say is yellow than they are if you asked for the name of a yellow bird. They’re 250 milliseconds faster or about a quarter of a second.”

My cousin looked at me with an expression that might best be described as incredulity with a slight touch of disdain. She had but one question: “How much did we pay for that bit of information?”—referring, I suppose, to the fact that my work may have been supported by a grant of federal funds.

My finding was important in my field because it demonstrated that humans tend to organize information according to categories, in this instance the category of birds, rather than by attributes, such as yellow. The conclusion was that an individual’s self-search for information can get underway sooner if the category cue is presented first.

But my cousin’s reaction was unnerving and made me want to study something that had more practical relevance, something that would be interesting not only to me and a rather limited number of fellow scholars who studied long-term memory. My concern set me thinking that a natural intersection for someone who had training in the area of memory and a considerable fascination with legal issues would be to study the memories of witnesses to crimes and accidents and similar matters. I thought it would be interesting, for instance, to try to figure out whether the structure of questions posed to witnesses by the police, investigators, or lawyers affected what people remembered and what they said. So I undertook a series of experiments using films of accidents or simulated crimes and studied how people recalled what they were shown. I have ever since, for the past four decades, sought to discover the correct way for the law to be applied to a very large array of matters concerning memory. It has led me to testify in some 270 trials as an expert witness and to provide depositions in hundreds of other cases.

Q. Obviously, the ideal and idealized in science becomes cluttered with other considerations in a courtroom drama. Can you give me some examples of some of the issues that arise?

A. At the heart of the matter are marketplace constraints. How much does or can an expert witness insist on saying things that he or she believes need expressing from a scientific perspective but that might reduce the likelihood that the side who hired you will prevail? Sometimes science and law dictate the same outcome, albeit for different reasons. I once testified that impeccable research


29. For an early illustration, see Elizabeth F. Loftus, Reconstructing Memory: The Incredible Eyewitness, 8 PSYCHOL. TODAY 116 (1974).
demonstrated that people have greater difficulty identifying the faces of people of a different race than people of their own race. In that case the eyewitness who testified was a white Anglo, the defendant a Latino. I was asked by the defendant’s attorney whether reported studies included subjects of the races involved in the case being tried. I said that they did not (at least not at that time). The attorney was asking a question that he presumed the prosecution would ask and he believed it a good strategy to put my answer on record in the direct examination. But suppose it seemed likely that the prosecutor might not be skilled or informed enough to probe that issue. Should, under those circumstances, the expert witness insist on pointing out this particular gap in the research?30

Or, to take another real-life scenario, should an expert witness allow the hiring side to ask the expert witness whether the defendant who has a tear-jerking history of serious personal and family problems would have his memory impaired by these circumstances? The question is put not to elicit a scientific answer but to get before the court information that it is hoped will gain sympathy and a favorable verdict for the accused.31

Q. In terms of the considerations you’ve discussed, in what way has the arrival of a law school at UC Irvine added to or otherwise altered the ideas you formed from your courtroom or scholarly experiences?

A. Being an expert witness in adversarial proceedings often is not the most pleasant stroll in the park. One has to be extremely wary during the cross-examination. Shrewd cross-examiners have tactics that can make the most obvious point appear dubious. They can be bullying (although this may not go down well with jurors or judges) and condescending, and their tone of voice and gestures, conditions that will not be included in the trial transcript, can be disconcerting. I enjoy the challenge; otherwise I would long since have abandoned participating in trials.

The new law school has proven to be an invigorating and refreshing experience for me. At symposia, workshops, and other presentations, which I always look forward to, I am exposed to some of the best minds, dealing with some of the most difficult jurisprudential problems, and doing so not as advocates but as analysts.

Q. You may have set something of a world record for dutifully attending faculty meetings in three academic units—in the School of Social Ecology, Departments of Psychology and Social Behavior, and Criminology, Law and Society as well as the law school faculty. Have you noticed any particular difference between the first two and the law school?

A. In some regards the difference has been striking. In part, of course, the law school has been challenged by the need to get a new and very ambitious


31. Id. at 70.
endeavor off the ground. But what struck me was the strong focus on creating
guidelines. There was, for instance, considerable debate in law faculty meetings
about the desirable distribution of grades. This is a matter that likely never would
be raised in a social science department. The law faculty tends toward uniform,
mandatory rules and seems more comfortable with guidelines than with laissez-
faire flexibility. Things were more regimented, which, I would imagine, would
make life more predictable and in many regards less worrisome for participants. I
do not know the extent of differing behavioral and personality characteristics of
lawyers and social scientists, if any, but it would be a fascinating area of inquiry,
especially with a longitudinal design that would determine whether distinctions
prevailed when law schooling is chosen, or whether, again if they exist at all, the
differences arise subsequently.

Q. Can you describe the course that you will be teaching to graduate students and law
students?

The course is called Memory and the Law. My syllabus tells students that
they will read book chapters and articles on a special topic dealing with memory of
real-world events and their legal implications. But I can convey a better sense of
the course by saying something about my philosophy of teaching. If a friend were
to have suggested that I read a book about the history, geography, and politics of
Chile, I would have probably responded, “Gee, not sure I really have time for that
right now.” But then I discovered the book Missing: The Execution of Charles Horman
by Thomas Hauser,\(^{32}\) that tells the true story of an American journalist who
disappeared after the Chilean coup of 1973. The book chronicles the efforts by
the father of the missing journalist to find his son. It is gripping. And while
immersed in the story, I learned an enormous amount about the history,
geography, and politics of Chile. I got educated without even trying.

I can’t write like Thomas Hauser, but I have constructed a course that tries
to immerse students in a significant contemporary controversy, one involving
claims of repressed memory. Nadean Cool, a 44-year-old nurse’s aid from
Wisconsin, is a prime exhibit.\(^{33}\) Nadean sought therapy in the late 1980s to help
her cope with her reaction to a traumatic event that her daughter had experienced.
During therapy, her psychiatrist used hypnosis and other methods to dig out
allegedly buried memories of abuse. In the process his patient became convinced
that she had repressed memories of being in a satanic cult, of eating babies, of
being raped, and of having sex with animals. She came to believe she had over 120
separate personalities—children, adults, angels, and even a duck—all because, she
was told, she had experienced severe childhood abuse. When Nadean came to
realize that false memories had been planted, she sued for malpractice. Her case

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\(^{32}\) THOMAS HAUSER, MISSING: THE EXECUTION OF CHARLES HORMAN, AN AMERICAN
SACRIFICE (1978).

settled in early 1997 for $2.4 million. Nadean was one of thousands of people who
developed memories in therapy of extensive brutalization that they claimed had
been repressed. Many sued their alleged abusers or initiated criminal charges. Laws were changed to extend the statute of limitations to permit these cases to go
forward. Nadean was also a member of the subset of those accusers who later
retracted these memories.

The repressed memory controversy leads us to ask many questions. How did
it begin? What is the evidence for repression? Is the evidence credible? If the
memories are not real, where could they come from? How is it possible for people
to develop such elaborate and confident false memories? How are jurors and
judges reacting to claims of repressed memory? How has the legal system handled
claims of repressed memory? Students who become immersed in this sensational
contemporary controversy seem eager to want to know as much as they can about
the underlying issues—both psychological and legal. They learn, as I did about
Chile, effortlessly. And they leave my course with a deep appreciation for the
importance of reading the footnotes.

Q. I understand from some of our earlier talks together that you have been especially
impressed with many of the speakers who have given presentations at the law school. Could you
provide me with further details?

A. Well, for one thing, law-trained people tend to be particularly articulate
and organized in their thoughts. They are trained to make a living by being
persuasive. Law faculty, compared to practitioners at work, usually are not
doctrinaire. I have benefited both academically and intellectually listening to good
minds grapple with difficult issues, often presenting ideas that I never otherwise
would have been exposed to because, like most academics, I move in a relatively
parochial intellectual world.

Let me give you one example of how a fascinating law school presentation
that I attended fed into my general and professional interests. Burt Neuborne of
the New York University School of Law discussed his decade-long litigation on
behalf of Holocaust victims whose assets were being secreted by Swiss banks. Neuborne posed issues of standing: How could he bring these actions in
American courts when the behavior occurred in Europe half a century earlier and
none of the surviving victims lived in the United States. “Why,” he asked, “should

34. See T.W. Campbell, Smoke and Mirrors: The Devastating Effect of False
35. See id. at 154–58.
36. See Joel J. Finer, Therapists’ Liability to the Falsely Accused for Inducing Illusory Memories of
Childhood Sexual Abuse—Current Remedies and a Proposed Statute, 11 J.L. & HEALTH 45, 50 (1996); see also
Gary M. Emsdorff & Elizabeth F. Loftus, Let Sleeping Memories Lie: Words of Caution About Telling the
37. See generally Leonard Orland, A Final Accounting: Holocaust Survivors and
Swiss Banks (2010); Itamar Levin, The Last Deposit: Swiss Banks and Holocaust Victims
(1999); Gregg J. Rickman, Swiss Banks and Jewish Souls (1989).
a U.S. judge be empowered to resolve [these claims]?\footnote{38}

I found these intriguing puzzles that, like the core of many of the presentations, set me thinking, always a bountiful reward for an academic. But they also made me wonder about the role of memory in a situation such as this. The plaintiffs usually had no idea or documentation regarding which bank held their funds. The banks wanted proof that the deposit existed and that it had not been paid out: they invoked privacy rules to resist a search of their own records. When they finally yielded it was learned that millions of records for the relevant time period had been destroyed. For me the case posed fascinating research challenges: Would it be possible to establish which claims were credible and which were not? Could a fair process be formulated for the allocation of funds when the documents no longer existed? How much reliance could be placed on memories that are now more than half a century old? Perhaps we could design a study in which we asked people about the banking and financial habits of their parents or other relatives from decades ago. We might be able to compare the people’s memories to official documents and gain information about how reliable memories for this sort of insight might be expected to be.

This was but one of the series of talks that I attended that sent me home with my brain spinning with ideas about scientific research that could shed light on questions that lie in the intersection between law and cognitive psychology.

Q. In what other ways has the law school had an influence on you, or how do you believe the law school is likely to prove to be of importance to you?

A. One thing, relating to my court experiences, immediately comes to mind. I am sometimes confronted by ethical questions. Defense attorneys may press me toward making categorical statements that go beyond the limits of what I am comfortable in concluding. In the realm of repressed memories I sometimes have to hedge with “I think” or “it is possible” or with words like “perhaps” and “probably.” The opposition might rely on a psychiatrist or a clinical psychologist who often is much less tentative about such matters, and who might well insist that his or her experience and insight is sufficient to support a conclusion that the matter in controversy is exactly what the prosecutor has maintained that it is.

Let me expand on this with an example. In any number of cases that I’ve been involved in the accuser is accusing someone of a sexual assault based on her (it is most often a her) recovery of a repressed memory of earlier incidents. The accuser has a therapist who will testify: “I believe her memories are real and she was abused.” If pressed, the therapist-expert might say that the accuser’s emotions while describing the memory clearly demonstrated the memory’s accuracy.

But I know from my research that false memories can be expressed with a great pouring out of emotion and that such expressions are no guarantee of

authenticity, and yet I am unwilling to say that such recollections are false since I can't be certain without independent corroboration. So I am blindsided by a plaintiff who relies on what I believe is an unwarranted and unethical conclusion.

Sometimes the ethical boundaries that I deal with are not altogether set in concrete and the fact that I can (and will) take advantage of first-rate legal minds at the new law school to discuss matters such as these is a strong plus for me.

Q. Are there other potential law school ventures that coincide with your experiences and that you find exhilarating prospects?

A. Very much so. We are living in an "age of innocents"—ever-growing awareness among the public that there exists a sizeable population of incarcerated persons who in fact did not commit the crime for which they were convicted and imprisoned. For several decades now, I have regularly received letters from prison inmates proclaiming their innocence. "I am truly innocent," Steven Slutzer wrote to me from his cell in Pennsylvania. "I was falsely convicted of rape," J.B. Pease wrote from the McAlester penitentiary in Oklahoma. I am well aware that all those who contact me are not necessarily innocent but a few, at least, might well be.

I respond to each plea, but as a lone social scientist there is very little that I can accomplish for my correspondents. At UC Irvine we wanted to start an Innocence Project based on the work in New York City of attorneys Barry Scheck and Peter Neufeld, and the Center on Wrongful Convictions launched by the Northwestern University Law School. We were stymied by a lack of legal expertise and personnel. Now we can move forward. I've already discussed the idea with some enthusiastic law students.

Q. Finally, how would you summarize your reaction to the inauguration of a law school on the Irvine campus?

A. It's a blessing.

What Would Langdell Have Thought?
UC Irvine’s New Law School and the Question of History

Christopher Tomlins*

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In 1895, on the occasion of his retirement as Harvard Law School’s first dean,¹ Christopher Columbus Langdell might have claimed—had he been an adept sloganeer—that he had overseen the creation of the first modern American law school, a law school for the twentieth century. The claim would have been eminently justified, but the prototypically reticent Langdell declined to make it.² Our days, however, are different: we live in a branded world in which we all perforce wear labels. Required to define its difference, the country’s 200th law

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2. Id. at 310.
school\(^3\) has declared that its goal is to be the ideal law school for the twenty-first century, and has named public service and interdisciplinarity the core elements of its vision.\(^4\) In part as earnest on the second of those commitments, it has identified history as a sufficiently important component of the ideal law school's intellectual equipment to include the hiring of a historian among its earliest faculty priorities. And one without a law degree.\(^5\) At times during my first year in Southern California I have found myself wondering, “What would Langdell have thought?”

In the world of legal education, we tend to remember Langdell as the progenitor of all that is regrettable. We trace law schools’ obsession with hierocratic credentialing to Langdell’s original installation at Harvard of a high standard, high cost regime of professional education in place of the low standard, low cost “commercial” regime that had prevailed thereto.\(^6\) Methods of instruction devoted to the inculcation of disciplinary technique rather than passionate commitments to republican virtue or social justice supposedly have their origins in Langdellian case method.\(^7\) Above all, Langdell is excoriated for dressing up doctrinaire legal formalism as a novel theory of law—a self-sufficient “science” of legal principles.\(^8\) Although it embraced Langdell’s model, the legal academy has always preferred to idolize rebel intellects who spurned the inheritance: Langdell’s near contemporary, Oliver Wendell Holmes, Jr., who famously derided the second edition of *Cases on Contracts* as the work of “the greatest living legal theologian”.\(^9\)

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4. First-Year Curriculum Overview, U.C. Irvine Sch. Law, http://www.law.uci.edu/registrar/curriculum.html (last visited Sept. 17, 2010) (presenting first-year course listings, which include coverage of criminal law, civil procedure, contracts, torts and constitutional law, in addition to offering innovative course offerings such as a rigorous, year-long lawyering skills course, a year-long course on the legal profession, and international law).

5. As far as I am aware, very few non-J.D. history professors have had full-time appointments at U.S. law schools. They include Stanley N. Katz at the University of Chicago Law School (1971–78), Harry N. Scheiber at the University of California, Berkeley (1980– ), Paul Finkelman (University of Tulsa College of Law, 1999–2006, and currently Albany Law School, 2006– ) and William J. Novak (University of Michigan Law School (2009– ).


7. Carrington, supra note 6, at 693–95.

8. Id. at 692.

Roscoe Pound, who distinguished the formal unreality of law “in books” from the social vitality of law “in action”; 10 Realists such as Felix Cohen, for whom legal science “as traditionally conceived” was nothing other than “transcendental nonsense”; 11 Realism’s progeny, all the way from Grant Gilmore 12 to Duncan Kennedy. 13

Clearly the cartoon Langdell of law school lore would not find much to admire in the new UC Irvine School of Law, or its vision of legal education for the current century. What of the man himself?

Langdell was not, admittedly, a known devotee of public service. During the early 1870s, for example, Langdell served as secretary of a “committee on jurisprudence” 14 created by the American Social Science Association (ASSA), a reformist organization dedicated to inquiry into pressing social issues in the realms of education, public health, and social economy. 15 To the ASSA (as we shall see), law was an instrument of social reform, and “jurisprudence” was law’s proper expression as such. To that end the ASSA created a “Department of Jurisprudence” charged with translating the Association’s deliberations into concrete legal action. 16 The particular responsibility of Langdell’s committee was to inquire into the present state of “the science of jurisprudence” in the country’s universities and determine whether “jurisprudence” could actually fulfill the role the ASSA had assigned it. 17 Langdell was profoundly skeptical. The ASSA’s attempt to use jurisprudence to link law to reform would not work because jurisprudence did not “specially concern lawyers” at all. It was for “those aiming at public life” (or, he added, archly, “a high order of journalism”). A lawyer’s concern was “the law as it is” not the law as it “ought to be.” The one was likely to generate “distaste” for the other. 18

Nor, if we went looking, would we discover in Langdell’s era any prescient buds of interdisciplinarity. Rather the reverse. In the professionalizing academic world of the later-nineteenth century, emphasis lay on the production of disciplinarity, not overcoming it. In establishing the terms of law’s professional
and methodological differentiation from other subject areas and modes of inquiry, in creating a distinctively credentialed expertise, the Langdellian law school was on precisely the same track as every other sector of the modern university. Indeed, it was in the vanguard—so much so that Langdell has recently won recognition as one of the founders of modern professional (not just legal) education. He had begun his reform of Harvard Law School, after all, a good six years in advance of the appearance of the country’s first German-model graduate school at Johns Hopkins, the mother-church of Arts and Sciences disciplinarity.19

All that granted, still the obloquy thrust upon Langdell is undeserved. As Bruce Kimball’s recent biography cogently observes, the Langdell who pioneered the case book and made original contributions to contract jurisprudence and equity jurisdiction did so in furtherance of a substantially more refined method of legal analysis than his critics have ever acknowledged, “a comprehensive yet contradictory integration of induction from authority, deduction from principle, and analysis of acceptability, which includes justice and policy.”20 Langell’s method actually led him to a subtle appreciation of the manner of common law reasoning that Holmes would later famously enunciate as the “paradox of form and substance”—accounting, perhaps, for Holmes’ constant struggle to create greater intellectual separation between them than actually existed.21 As classroom teacher, meanwhile, Langdell developed modes of instruction that rejected the prevailing tradition of recitation (memorization and regurgitation) and encouraged students to engage in active intellectual exchange.22 As educator, finally, Langdell’s innovations—from curriculum to hiring to academic administration—grounded legal professionalism on an abiding commitment to meritocracy.23 That commitment came accompanied by its own hypocrisies and blind spots: Langdell’s meritocratic sensibility did not extend to the admission of women to Harvard Law School or the graduates of Catholic colleges.24 Still, his model was sufficiently novel—both in expression and implications—that twenty-five years of struggle were required before it became fully sedimented as the standard for twentieth-century legal education.25

To comprehend fully the significance of Langdell’s model law school, one must assess it on its own decidedly innovative terms—just as the significance of Irvine’s attempt at a distinct model, and the mode of its implementation, must be assessed on its own terms. C.C. Langdell created modern American legal education’s disciplinary consciousness and point of institutional departure, but

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19. KIMBALL, supra note 1, at 2–3.
20. Id. at 124.
22. See generally id. at 140–60.
23. See generally id. at 167–232.
24. See generally id. at 271–308.
25. Id. at 264.
professional legal education has journeyed far from its originary moment. Its development cannot be explained (or regretted) as the unfolding of some immanent logic inscribed upon it by a now-mythic founder. What then do Langdell’s Harvard and Chemerinsky’s Irvine share, other than the appellation “law school”? How should we understand the development of American legal education and of the legal scholarship it produces?

Based on work that I have undertaken at various points during the last ten years, and which I am using as the evidentiary and argumentative basis for much of this article, I shall argue here that legal education is best understood as one of the most important processes contributing to the development of the modern American juridical field, which I define as the infrastructural ensemble of personnel and institutions (lawyers, judges, and legal academics; courts, state agencies, professional associations, and law schools) individually and collectively engaged in the systematic and continuous reinvention of “law” as a process of rule production controlled by professionalized juridical institutions and practices. In this field, juridical institutions and professional and academic disciplines (principally law and the social sciences), together with a variety of outside actors, collude and compete to influence the substance of the rules (the legal technology) produced to govern state, economic, and social practices.26

The process of rule production is not static because its environment is continuously changing. As its environment changes, the process must continuously produce itself and its rules anew. The dynamic of continuous reproduction is also influenced by extrinsic rule regimes. For example, processes of knowledge production—the creation and evolution of the various forms of expertise that compete to inform the substance of the law—have their own rules of formation, also undergoing continuous change, dating to the professional and organizational revolution that brought about the advent of “the disciplines” in the late nineteenth century.27 Processes of influence production involving outside actors—for example, investment in personal relations (cronyism), investment in politics (lobbying), and investment in legal/social scientific research—have their own rules of formation too, generally responsive to the social, political, and economic context within which outsiders, such as capitalists, labor unions, NGOs, and other organized social groups compete for influence in rule formation processes. Rule production, in short, has an extrastructure as well as an


The production of legal rules, however, is most particularly determined in the complex of juridical-legal ideologies, behaviors, discourses, and institutions that collectively comprise “the world of the law” (the juridical field). As a rule of law regime, the nineteenth- and twentieth-century United States privileges law rule. That is, the U.S. identifies “law” as its preferred structural and discursive modality of rule. Hence law and its institutions occupy a position of advantage that sets the terms and limits of discussion—“the key terms of legitimacy”—in interactions with other modalities and ideologies of action over the substance of the rules. The production of rules, in short, takes place within an established structure of legal practices—discursive, institutional, organizational—that continuously and actively reinforce the U.S.’s inertial political-cultural tendency toward the privileging of law in rule production. Although periodically contested by competing disciplinary complexes, rule production has never been captured or transformed by them.

As a historian, I am interested in understanding the history of the process of rule production and of the distinctive legal practices that structure it in the U.S. case. But I also have a particular interest in delineating the role—and fate—of “history” itself as an activity, both professional and ideational, relevant to the determination of the contours of the modern American juridical field, and to the legitimation of its rule production processes.

In the case of law, history has been more than a source of “perspective,” an observational standpoint. In the nineteenth century, first in Germany and subsequently in the Anglophone common law tradition, history—in the form of “historical legal science” (geschichtliche Rechtswissenschaft)—furnished the first grand theory of legal development. By the last years of the century, however, the organic-evolutionary premises of this so-called “historical school” of law had been seriously eroded by the era’s sudden, massive, and transformational political, social, and economic shifts. Simultaneously, the historical school’s claims to have developed a “science” of law were challenged by, on the one hand, the emerging social sciences, with their self-announced superior grasp on theorized social

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29. For the concept of law as a “modality of rule,” see CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 19–34 (1993).


31. See Tomlins, History, supra note 26, 325–27, and generally Tomlins, Framing, supra note 26 (discussing disciplinary competition between law and social science disciplines).

32. See generally Tomlins, History, supra note 26 (discussing the history of “history in the American juridical field”).

33. Id. at 348–59.
knowledge; and, on the other, by law’s parallel disciplinary turn toward reinvention and redefinition as a distinct and self-contained scientific expertise of its own. Like all other disciplines, law turned inward, claiming to be able to explain itself, exhibiting only occasional interest in theories of itself grounded in other domains of knowledge. The remnants of the historical school that remained within this increasingly autonomous legal sphere turned into “legal history”—a desiccated intellectual activity that had shriveled from a once expansive theory of legal evolution to a merely descriptive account of how law had always been the autonomous discipline it had only recently become. This legal history had little in common with the formerly related but now diverging disciplinary practices of professional history and political science. It had no particular reason for being, other than as an antiquarian hobby that validated what the field had turned into.34

Legal history did not manifest a clear sense of purpose again until the 1960s, largely as a result of the influential “new” socio-legal perspective pioneered by James Willard Hurst.35 In the half century since then, growing numbers of legal historians located both within and outside the juridical field have developed a variety of modes of analysis and explanatory archetypes (functionalism, instrumentalism, social construction, different varieties of the “constitutive” trope) but no overarching conceptual-organizational narrative for their field. Rather the reverse. Like historical (and social scientific) practice at large, legal history has become deeply enmeshed in the conflicts over generalization and causation that pit truth-claims about substance against theories of meaning and interpretation that emphasize the contingency of all relational phenomena and identify “complication” of received understandings as the task of scholarship.

In the remainder of this article, Part I offers an abbreviated account of the development of the juridical field in the U.S. case. Part II offers an appraisal of the role played by legal history inside and outside the juridical field, focusing in particular on its successes and failures in constructing a coherent theory of history of and for that field through the early 1970s. Part III concentrates on the particular significance of “Critical Legal History” and “Critical Historicism,” the development of which between the 1970s and the turn of the twenty-first century coincided with the rapid growth of legal history as a field of practice.

In unpacking first the development of the juridical field and then the varieties of American legal history, my goal is to establish grounds for a

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35. See generally Robert W. Gordon, Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography, 10 LAW & SOCY REV. 9 (1975–76) (providing a broad overview of the field of legal history since the 1880s and an assessment of Hurst’s impact).
conceptualization of legal history as a “structural history of the creation and production of national legal practices.”

This is described in Part 4. By this I mean a form of history that approaches law neither as an organic or evolutionary phenomenon, nor as one to be understood functionally or instrumentally, nor as one that is socially constructed or mutually constituted, but rather identifies law as the product of the juridical field’s processes of rule production and as the source of the rules by which the process of rule production itself is governed. In Part 5, I will conclude by returning to where I began—the interdisciplinary/public service turn that UC Irvine’s School of Law has embraced—to offer a series of speculations on the reasons for UCI’s choices informed by the article’s account of the American juridical field and of the place of history in the field’s research agenda.

I. LAW: THE AMERICAN JURIDICAL FIELD

Law in the contemporary United States has achieved a largely unchallenged ascendancy as the principal arena and discourse of decision making in social and political affairs. Law’s ascendancy is rooted generally in a historically supportive political (“rule-of-law”) culture, and particularly in continuous processes of institutional and ideological self-renewal, the purpose of which is to maintain law’s ascendancy in rulemaking processes through innovations in legal education and professional structure, while simultaneously generating popular confidence in the legitimacy and efficacy of the rules that are produced. Legitimacy at large is grounded upon repeated invocation over time of foundational values embodied in national legal-cultural practices associated with the juridical form—that the law is objective in application (no one is above the law), universal in implementation (one law for all), neutral in outcome (the law does not take sides) and supremely authoritative (a government of law, not men). Together, these values compose law’s aesthetic meta-character—the normative idealization of the workings of law in the social world—that in turn sets the discursive conditions for processes of rulemaking. The actual process of rulemaking thus occurs within the frame of national legal practices, institutional and ideological, that constitute the world of the law itself. Generally true since the creation of the original republic in 1787, this has been particularly the case since the crystallization of those practices in their modern form in the half century after 1870.

As resort to law has proliferated over the last 150 years, however, actual “legalities”—the prevailing legal conditions of social life—have been produced not through the polite elaboration of holistic juridical narratives but far more often in another set of practices: collusive or competitive struggles, adversarial or bureaucratic, to achieve specific outcomes that serve the interests of specific clienteles. Individuals, agencies, interest groups, corporations and social

36. Dezalay and Garth, supra note 28, at 311.
movements (including, of course, legal professionals themselves) make particular self-serving investments in law, and mobilize a vast range of resources—material, ideological, disciplinary—to that end. The availability of law for such widespread use furnishes practical quotidian arguments for law’s social efficacy, but by its very nature resort to law is necessarily subjective, selective, and partial. Resort to law is generally indifferent to, and may even contradict, law’s meta-character.

Law’s aesthetic meta-character—and thus its overall social authority—is endangered when daily piecemeal legality is produced in competitive, self-serving processes. How does law avoid undermining itself, or being undermined, by its own practices?

Maintenance of law’s overall social authority in this environment is the principal concern of the complex of institutions, actors, and ideologies that collectively comprise “the world of the law,” or in Pierre Bourdieu’s terms “the juridical field.”37 The major actors in the field are organized in the juridical professions—bench, bar, and academy. Here lies the greatest interest in sustaining both the practical authority of law’s place in rulemaking in the face of the particularism and fragmentation bred by fissiparous social and state usage and the ideological legitimacy of law’s claim to a unique discursive authority to set the terms on which rules are made. That is, the field works at two levels. First, within the actuality and effects of instrumental usages that their members’ dedication to particular clients, or outcomes, or ideas produces, the juridical professions perform a crucial managerial role in the American rule-of-law state formation by taking responsibility for the maintenance of a representation of law that can sustain its claims to ascendency in rulemaking. Second, above the level of instrumental usage, the juridical professions act to validate law’s proclamations of objectivity, neutrality, and universality by discursively working law pure, whether by endorsement, reform, or critique.

I use the term “juridical field” to encapsulate what might otherwise be termed “the world of the law” because talk of “law,” or “the law,” or “the rule of law” or “the world of the law” always evinces a certain vagueness. Precisely what do these terms encompass? “Juridical field” answers that question by concentrating our attention on the intersection of discourse, behavior, and institutions. “Field” means an area of “structured, socially patterned activity or ‘practice’” that is defined “disciplinarily, and professionally.”38 Organizationally and conceptually, a field is centered on “a body of internal protocols and assumptions, characteristic behaviors and self-sustaining values” that unite materiality with ideation, ceremonial with outcome, action with ideology.39 In law’s case, the juridical field is responsible both for the production and

38. Id. at 805.
39. Id. at 806.
reproduction of national legal practices, particular and general, and for their overall effectivity.

Specifically how has this task been performed? What resources have been used? Here I explore these questions schematically, concentrating in particular on the period from 1870 onward. I present the component elements of the juridical field in their early unorganized configurations during the first century of U.S. history; the social, intellectual, and institutional conditions that prompted the crystallization of the field in its modern configuration in the late nineteenth century; the reasons for its formation; the legal aesthetic and practices that crystallized with it; and its later manifestations. The exploration as a whole is organized in three chronological phases—the phase of revelation, the years prior to 1870; the phase of production (1870–1940); and the phase (since 1940) of serial attempts at innovation in light of production’s increasingly obvious insufficiency.

A. Revelation

Revelation is the key to the world of law’s antebellum intellectual and organizational configuration, persisting through the 1870s. Prior to the professionalization of legal education, lawyers acquired specifically legal knowledge by rote learning and by observation and repetition of legal practice, overwhelmingly through apprenticeship. Both proprietary and university law schools attempted systematic training in legal principles by mounting courses of lectures and by promoting directed study of key texts, but there too absorption and regurgitation of detail was emphasized. At the level of general intellectual inquiry, however, law and lawyers shared in the organization of knowledge through the contemporary conjunction of naïve Baconian empiricism (“science”) with evangelical Protestantism. What emerged was a mode of discourse in which law knowledge could harmonize institutionally with other modes of “scientific” inquiry in undifferentiated and localized organizations, such as lyceums. Culturally, law was an integral component of local and regional networks of respectability and gentility—“communities of the competent.”

The formation of the American Social Science Association (ASSA) in 1865 signified both the climax and endpoint of this mode of intellectual organization.


41. Id. at 45–48; Alfred S. Konefsky, The Legal Profession: From the Revolution to the Civil War, in THE CAMBRIDGE HISTORY OF LAW IN AMERICA, supra note 40, at 78–83; KIMBALL, supra note 1, at 34.


Informed by the example of the U.S. Sanitary Commission, which had been created during the Civil War by northeastern philanthropic elites, the ASSA was established to address the mounting crises of U.S. urban-industrial development by providing a translocal forum for the production and dissemination of socially-useful knowledge that could inform national state practice across a wide range of reformist activity, specifically “the Sanitary Condition of the People, the Relief, Employment, and Education of the Poor, the Prevention of Crime, the Amelioration of the Criminal Law, the Discipline of Prisons, [and] the Remedial Treatment of the Insane.” Responsibility for investigation was divided substantively among three departments—Education, Public Health, and Social Economy. The ASSA’s departmental organization did not embody particularist commitments to distinct investigative or analytic methods; its founders and members were gentleman amateurs whose curiosity touched upon the “numerous matters of statistical and philanthropic interest which are included under the general head of ‘Social Science,’” and whose authority lay in their elite status and their demonstrations of “sound opinion.” Straightforward fact gathering and topical discussion would enable each department to transcend the incapacities of traditional state structures in responding to social problems.

Singular in this structure was the role accorded the ASSA’s fourth department, the Department of Jurisprudence. Its mission was to consider both “the absolute science of Right,” and “the Amendment of laws.” The former embraced a general meta-character for law entirely in harmony with the normative scientism of the ASSA’s general project; the latter identified law’s specific role as the point of final resort for implementation of the solutions envisaged by the ASSA’s other departments. That is, once specific departmental investigations had fully ascertained “the laws of Education, of Public Health, and Social Economy,” the task of the Department of Jurisprudence was to oversee the translation of these social and human laws into “the law of the land.” Governments were expected to yield to the sound opinion of the most competent in the definition and resolution of social problems as a matter of course; the Department of Jurisprudence would register the results of their deliberations in national law, creating social harmony as an instantiation of the “absolute science of Right.”

B. Production

If revelation stands for the conception of law as a naïvely empiricist science of social laws that emerged from the genteel intellectual tradition of the antebellum

45. Haskell, supra note 15, at 98 (quoting Franklin B. Sanborn).
46. Id. at vi, 87.
47. Id. at 105.
48. Id. at 105–06.
nineteenth century, production stands for what succeeded it, the phase of formation of the juridical field in its first, recognizably modern, configuration. By the end of the century, the organization of intellectual discourse was driven by disciplines, modes of specialized academic inquiry and professional self-identification defined in universities rather than in the public pronouncements and commonsense beliefs of gentlemanly elites. The social sciences became "university-based, research-oriented" enterprises, each with its own community of full-time practitioners developing new methods of inquiry and conceptions of causation, each seeking equal stature for their particular domains of expertise.49 Beginning in the 1880s, the creation of disciplinary associations—the Modern Language Association (1883), the American Historical Association (1884), the American Economic Association (1885), the American Political Science Association (1903), the American Sociological Association (1905)—signified serial acceptance of this differentiated model of expertise.50 Law’s classical antebellum claims to ascendancy—the “characteristic references to legal knowledge as the product of a gradual, incremental process of discovering and perfecting natural laws” embedded in the ASSA’s conception of “jurisprudence”—were increasingly at odds with modes of inquiry that “understood theory as provisional, relative to the current economic and technological order,” and that “defined rights, law and state forms as cultural creations, shaped by the conditions and needs of a particular historical context and subject to experimentation, growth and change.”51 In place of an “absolute science of right,” the disciplines reimagined law as the instrumental output of legislatures. Legislatures were themselves reimagined as sites for the inculcation and application of disciplinary knowledge. 52

This elevation of non-juridical state structures and accompanying re-theorization of law as the product of legislative mechanics informed by expertise in social knowledges was a major challenge to law.53 Hence the phase of production, succeeding revelation, describing law’s encounter with and adoption of specialized ideologies of investigation and training that would hold sway for most of the next century, the century of American modernism and industrialism. Production stands for the breakdown of a generalized and naïve ideology of science; the reconstitution and reorganization of professional social expertise as related but distinct discourses—“law” and “the disciplines”—with separated self-defined

49. Id. at 166, 234.
50. BENDER, supra note 27, at 43.
53. Id. at vol. II, 501, 502; Michael J. Lacey, The World of the Bureaucratic Government and the Positivist Project in the Late Nineteenth-Century, in THE STATE AND SOCIAL INVESTIGATION IN BRITAIN AND THE UNITED STATES, supra note 51, at 142–43, 152.
purposes; the beginnings of the critical encounter between them; the revolution in practices that resulted; and the spaces—institutional and ideological, educational and governmental—in which that encounter occurred.

Langdell’s Harvard stands as the first attempt at, and lasting influence on, the reconstitution of the juridical field in modern form during this period. Though it required twenty-five years of hard academic labor, Langdell professionalized legal education by reworking it as the elaboration of a specific case- and court-centered knowledge, attained through explicit and defined methods of inquiry, defended by exacting institutional standards, and applicable in any locale.54 He was to the reconstitution of legal education and the production of law what his younger contemporary, Frederick Winslow Taylor, was to the reconstitution of industrial work and the production of manufactured goods. Each in his distinct sphere was a transformational influence on the half century after 1870, each a pioneer innovator who attempted to reinvent the institutional and the conceptual apparatus of a field of endeavor by creating new protocols and behaviors at its center. At the heart of his innovations, each located “an attitude of questioning, of research, of careful investigation . . . of seeking for exact knowledge and then shaping action on discovered facts.”55 Each experimented with methods of systematic “case” study to gain purchase on his core subject, using discrete instances to pick apart and examine accepted practices, strip them to their constituent details, and reconstitute them in new ways that suggested reorganized institutions and reorganized people. Each identified education and training as such as a central avenue of response to contemporary industrial society’s transforming demands. Each saw education and training as deliberately conceived and deliberately managed processes that inculcated appropriate and useful “skills.”56

The Langdellian revolution in legal education and training, and the reimagination of law as a technical expertise that the revolution championed, established the groundwork for widespread transformation in U.S. national legal practices. It created new “rules for the production of the rules.”57 In elite eastern law schools, countermovements—notably sociological jurisprudence and legal realism—signified discontent with Langdell’s legal “formalism” but not with the underlying logic of the new juridical field’s hermetic structure. Neither would furnish a clear intellectual basis for an alternative structural regime. Instead each ended up furthering the process of innovation that had created the new field.

Roscoe Pound’s sociological jurisprudence came closest to disrupting the

54. See generally KIMBALL, supra note 1.


57. Dezalay and Garth, supra note 28, at 311.
shape of the new field. In advocating the “socialization” and “organization” of law—that is, attention to the social context and consequences of juridical decision making and administrative reform of juridical institutions in order to deliver systematic “social justice”—sociological jurisprudence stood as a practice precisely at the strategic nexus between Langdell’s insistence on the maintenance of judicial ascendancy in lawmaking and the discipline-based social knowledges that were competing with court-centered law to furnish the state’s policymaking discourse.58

During his pre-Harvard career in Chicago, Pound had founded the American Institute of Criminal Law and Criminology at Northwestern University to explore that nexus. He used the Institute’s Journal of Criminal Law and Criminology to put lawyers and judges in mutually beneficial contact with “experts in the disciplines of social science, medicine, psychiatry, psychology, and social work.”59 Chicago’s new Municipal Court system, established in 1906, provided a concrete example of Pound’s nexus in action—a centralized and bureaucratized administration of criminal law animated both by discipline-based therapeutic ideologies of social intervention and “treatment” of individuals, and by eugenic strategies of population management.60

Chicago’s example suggests that, in the state, pressure on law from the new social knowledges resulted in accommodations of discipline-based social science in concrete juridical practice long before the late 1920s, when legal realists announced legal academia’s realization of the possibilities inherent in the encounter. Examined closely, however, these apparently novel state practices also demonstrate the institutional and ideological resilience of law when confronted by the progressives’ policy sciences. When “law” as a discourse of rule production came under pressure from social scientists’ proposals to create alternative venues for the application of specialized knowledges, law’s essential court-centeredness remained intact precisely because Langdellian technicality had affirmed the primacy of the law made by the judge, and of the court as the place where law was made. Embodied in the Chicago case, that is, one may see that the Progressive Era’s therapeutic ideal of “socialized law” was in fact as much a demonstration of the juridical field’s capacity to maintain law’s ascendancy over the disciplines in rule production as it was a recognition of the disciplines.

Nor, at least in Pound’s sociological jurisprudence, can one detect any desire to alter that ascendancy. Sociological jurisprudence recognized the divergence between textual law and law’s actual social expression. Law, crystallized in text, was forever left behind by the ceaseless wash of change that was social life. As Pound saw it, after lively innovation for most of the nineteenth century (the “formative era” as he would later dub it), American juridical thought by the end of

59. Id. at 106.
60. Id. at 104–15.
the century was no longer attuned to “meeting new situations of vital importance to present day life.” While the new social sciences had successfully grounded themselves on “the economic and social interpretation” of life, law was adrift in a sea of formalist self-referentiality, committed to ideas and patterns of thought that had long “ceased to be vital,” no longer catching up to action.  

Sociological jurisprudence proposed to interrupt law’s self-referentiality by counterposing law to society rather than to itself. How was this new exterior social world to be apprehended? Pound proposed to look the facts of human conduct in the face, but his way of doing so was actually to look to expertises that would tell one what “the facts” were and what they meant: “Let us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient.” And once the facts of human conduct had been discovered by resort to the expertises that revealed them, the juridical sphere would take over, acting by resort to law, its own expertise, to regulate them. “It is the work of lawyers to make the law in action conform to the law in the books, not by . . . eloquent exhortations to obedience of the written law, but by making the law in the books such that the law in action can conform to it.” Making “the law in the books such that the law in action can conform to it” was work that only lawyers could do. Indeed, Pound’s entire career was actually dedicated to maintaining and defending the autonomy of the juridical sphere in its relations with the social. Never was this clearer than in his deep antagonism during the 1930s to the emergence of the modern administrative state, or in his celebratory history of “the formative era” of American law, written in 1936 as a series of lectures, which stressed that American law possessed its own fountain of historical continuity, a “taught legal tradition” immune from generalized social influence that produced adaptive alteration under the wise direction of experienced jurists. Law was a function of a particular expertise wielding a closed discourse. Its considerable potency inhered precisely in its capacity to seize upon the best available social knowledge without diluting its own juristic authority.

Even realists inspired by progressive state-building, though they would disdain Pound as conservative and timid, held on to the idea of law’s distinctiveness. As much as they migrated toward strategies endowing the state with distinct forms of regulatory capacity, they identified courts as crucial agencies “of social integration and social reform.” Realism itself was split over the influence to accord social science. In the state, it is true, the era of

62. Id. at 35–36.
63. Id. at 36.
“Progressivism,” and particularly the later era of the New Deal, seemed ideal environments in which broadly conceived strategies of social inquiry, allied with legal-administrative regulatory processes, might provide a platform for fundamental departures in social organization. Robert S. Lynd, for example, wrote in 1935 of the opportunity “to open up wide, at this time of national re-appraisal, the question as to how modern democratic government may best function in relation to . . . a socially guided economy.” But Lynd wrote as a hopeful sociologist, not a lawyer. The legal mandarinate trained in elite schools who entered the federal government’s new administrative agencies proved quite capable of confining embodiments and modalities of state purpose that competed with the fundamental authority of law.

Some did try to blur the juridical field’s boundaries. The attempts were clearest in legal scholarship and education. Felix Cohen, for example, dedicated his “functional approach” to “cleansing legal rules, concepts, and institutions of the compulsive flavors of legal logic or metaphysics” by bathing them in positivist sciences of social events. Indeed, Cohen’s goal was not simply to blur the distinction between law and social science but to transcend it by moving beyond positivism’s “clear, objective” descriptions to an independent appraisal of the law and legal institutions it revealed by reference to a distinct “critical” theory of social values. “It is through the union of objective legal science and a critical theory of social values that our understanding of the human significance of law will be enriched.” But pedagogical innovation never succeeded in creating the conditions for Cohen’s ultimate move. At neither of realism’s twin bastions—Columbia in the 1920s, Yale in the 1930s—did reorganizations of law instruction and legal research according to “functional” criteria ever move beyond Cohen’s first step—the attempt to relate legal principles to factual situations parsed by resort to positivist social science. Nor, in either case, was even that first step sustained for very long. At Columbia the core group of realists abandoned the law school in 1928 in the face of mounting opposition to their attempts to bring social science to bear on law. At Yale, likewise, law and “empirical” research and instruction failed to mesh. By the end of the 1930s legal education at Yale had reverted to “entirely standard exercises in case law.”

Overall, the transforming conjunction of law and social science for which realism had appeared to stand did not take hold. In the vast majority of law schools the disciplines were simply too remote from the essential institutional imperatives of legal education and training. And realism itself, for all its liberal

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67. Cohen, supra note 11, at 847.
68. Id. at 847, 849.
advocacy of social change, remained focused primarily on the possibilities for a peculiarly legal liberalism.70

C. Insufficiency

If revelation stands for the genteel empiricism of law’s antebellum epistemology, and production for the successful reconfiguration of law in the form of a deliberative and technocratic juridical field, insufficiency stands for the struggles, from the 1940s onward, to maintain the juridical field’s configuration in the face of growing challenges.

Legal realism’s efforts to reform legal education during the 1920s and 1930s were, in retrospect, its most significant achievement. They underline the capacity in American legal education and scholarship to recognize moments of “slippage” in law’s status and influence and to respond, as had Langdell (and Pound), by innovating. But realism’s particular curricular innovations lacked staying power. Nor did they have anything like the national impact of the Langdellian model so thoroughly disseminated only a generation previously. Once the law schools had completed their replacement of office apprenticeship as the effective point of production, early in the twentieth century, the goal in legal education became a general raising of standards of entrance, instruction, performance, and output. “[F]or most schools outside the narrow elite, these were years when changes or innovations in curriculum and teaching methods paled into insignificance when compared with the energy needed to cope with the national efforts to ‘raise standards.’” By the 1940s “standardized” schools were becoming the norm in the law-teaching world at large, designed to train a homogeneous profession in a single career.71

It is at this point that the phase of production in the juridical field’s development is succeeded by that of insufficiency. Insufficiency stands, first, for the perceived inadequacy of law teaching in providing a generalized education appropriate for anything but law practice. Second, it stands for law’s inability, despite its ascendancy during the postwar period, to develop a robust capacity for intellectual self-explanation beyond internalist doctrinalism and vapid normativity. The result was a sense of crisis in the process of production of state elites, and a much more extensive turn to social science expertise in the 1950s and 1960s, sparking new struggles to sustain the hegemony of law that have continued into the twenty-first century.


71. STEVENS, supra note 56, at 209–10.
The standardized law school provided no education capable of equipping lawyers with the capacity to govern the state. With perhaps the exception of the most elite eastern schools, post-World War II American law schools did not confer upon their graduates the equivalent of Oxford “Greats” or the French Grandes Écoles—the essential mandarin qualification for state elites. Law had prevailed in the modern regulatory state created by the New Deal and war. But in the state’s Cold War configuration, social science once more became a potent rival tool of state service. Indeed, by the 1960s, state sponsorship of social science as a policy resource encouraged the development of systematic study of law as a social and material phenomenon, to the point where wholly new sites for law study were developing beyond the existing boundaries of the juridical field. 72

Successively, policy science, process jurisprudence, Law & Society, and Critical Legal Studies—accompanied throughout by continuous development in Law & Economics—articulated alternative sites for encounters between law and developing public and private demand for trained technocratic elites. Each was influenced, in one form or another, by the earlier realist interest in the conjunction between law and social science. Each might also be termed a “constructed” site, in that the disciplinary encounter was deliberately planned and created rather than—as in the case of realism—its advantages generally invoked but only haphazardly realized. In the 1960s, for example, the Russell Sage Foundation systematically underwrote attempts to create disciplinary interaction between law and social science by funding four university centers—at Berkeley (1960), Wisconsin (1962), Denver (1964), and Northwestern (1964)—and by sponsoring the establishment of the Law and Society Association and the Law and Society Review. These moves ensured that an apparatus of institutions appeared to sustain Law & Society as a field of study and expertise outside the juridical field. 73

The emergence of Law & Society beyond the networks of the law school, the investment in it of public and private money, and the involvement of scholars whose research and careers were located not in law but in the social sciences (notably sociology and political science) in positions of institutional leadership all underscore the considerable potential represented in the Law & Society idea for radical innovation in the definition of juridical expertise. Having established its distinct scholarly locale, however, Law & Society followed a trajectory that fell back into, and was thus limited by, a legal orbit. Rather than blurring and ultimately transcending disciplinary boundaries in the fashion Felix Cohen had advocated, Law & Society (as its prototypically conjunctive self-description, “law

and . . .” suggests) remained stuck at the “pre-critical” first step of the functional approach, in which the objective was to explain distinctively “legal” outcomes by locating law in explanatory social and economic contexts. As a domain of knowledge, that is, Law & Society was focused on explaining the legal. David Trubek has explained how its law-centeredness accounts for both Law & Society’s successes and its failures.

[From the beginning, the interests of the legal academy strongly influenced the law and society idea. While the law and society movement succeeded in creating a new object of study and a new domain of knowledge, it did so within a ‘legally-constructed’ domain. Thus, law and society knowledge, while different from the traditional knowledges produced in the legal academy, necessarily reflects the needs and interests of legal elites.]

Notwithstanding Law & Society’s location at a remove from the juridical field, its characteristic law-centeredness gave the juridical field’s institutions control over the flow of socio-legal knowledge into the realms of state and social decision-making. As Willard Hurst had put it in the mid-1950s, “Lawyers continue to be a key policy-making and high policy-executing group in our society; the law schools are, therefore, one of the truly strategic points for moving social science knowledge, and philosophy about society into the currents of decision in the community.”

So powerful was the gravitational pull of the juridical field that even the most radical of the postwar sites of disciplinary encounter, Critical Legal Studies (CLS), would find it impossible to escape its orbit. Politically left wing, CLS originated as a critical reaction to Law & Society, particularly to its dominant research practice, the ascription of objective meaning through empiricist social scientific inquiry. But though determined, like Felix Cohen, to blur the law/society divide and ultimately transcend it altogether through resort to critical theory, Critical Legal Studies too would end up instead casting itself primarily in law-centric terms.

Part of the explanation is institutional: CLS was, far more than Law & Society, a phenomenon of the legal academy, founded and largely led by legal scholars trained and in many cases based at elite law schools. But the explanation

is also intellectual. CLS’s critique of Law & Society scholarship was in large part aimed at the latter’s excessive reflexivity. In 1985, for example, Robert Gordon could be found writing of CLS’s prevailing understanding that law’s “norms, rules, procedures, reasoning processes, etc. have an autonomous content, have an independent influence upon the actions of legal officials and ordinary persons in society” and that legal ideas “are immensely powerful influences in the formation of social purposes and in the ways such purposes are acted upon.” 77 No less important was CLS’s emphatic denial of the core assumption upon which Law & Society’s field of encounter between social science and law had been founded in the first place; namely, that resort to social science to undertake empirical mapping of “exogenous forces” would produce systematic and objective results. In the mature CLS project of the 1980s, law’s virtual autonomy as institutional formation, profession, discipline, and discourse became established as the point of departure, and internal critique the strategy. Hence, while CLS aspired to transcend the law/society distinction, what it in fact achieved was more a reversal of social science’s received causal polarities. In the functionalist tradition, “the fundamental operations of the world originate before law and go forward independently of it; they fashion in general outline (if not in tiny detail) the agendas and limits of legal systems and are beyond the power of law to alter.” 78 CLS produced the opposite: “the notion of the fundamentally constitutive character of legal relations in social life.” 79 Indeed, it produced the claim that law was constitutive not merely of social life but of all life. For law was constitutive of consciousness itself—of human imagination in all its artifactitious potency. 80

The rise of CLS and its centrality in the juridical field’s intellectual debates throughout the 1980s confirmed that the field’s center of gravity lay with the institutions from whose network Law & Society at its inception had attempted to depart. It is perhaps surprising that such an avowedly radical and transformative politics of law as Critical Legal Studies would find itself following an agenda largely reflective of the internal doctrinal preoccupations of law and law schools, an outcome that, by the mid-1990s, had apparently run CLS out of steam and out of influence. 81 One explanation is provided simply by adapting Trubek’s

77. Robert W. Gordon, “Of Law and the River,” and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1, 14 (1985). See G. Edward White, From Realism to Critical Legal Studies: A Truncated Intellectual History, 40 SW. L.J. 819, 835 (1986), for his observation that the work of the most notable of the early CLS scholars—Horwitz, Kennedy, Unger and Tushnet—was “qualitative and even doctrinal” in methodology, and emphasized interest in “legal doctrine, legal consciousness, and the ideological structures in which legal rules were embedded.”


79. Id. at 104.

80. The contrast between CLS and Law & Economics on this point is marked. It was the most zealous proselytizer of the latter who would announce “the decline of law as an autonomous discipline.” See Richard A. Posner, The Decline of Law as an Autonomous Discipline, 100 HARV. L. REV. 761 (1987).

81. GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT
observations on the fate of Law & Society to include CLS. Far more than Law & Society, we have seen, Critical Legal Studies was configured within “a legally-constructed domain.” From the beginning of its formation in the half century after 1870, the modern juridical field had pursued institutional and discursive innovation in scholarship, teaching, and professional practices whenever law appeared to be losing intellectual authority or strategic state influence. CLS knowledge, although obviously “different from the traditional knowledges produced in the legal academy,” was created in accordance with the field’s terms for innovation, and hence, one might conclude, necessarily “reflects the needs and interests of legal elites” in maintaining law’s resilience.82

A different explanation would grant CLS’s law-centeredness an independent rationality and would allow CLS its initial radical integrity. Bryant Garth and Joyce Sterling have argued that Law & Society’s move back to law following its development as a spatially distinct endeavor signifies law’s success in reestablishing itself as a discourse of state expertise and governance after a period of uncertainty in which other expertises—sociology, political science—demonstrated their capacity to compete with it to guide state projects. “Law as the traditional language of the state appeared to be falling behind in the competition to define social problems and produce legitimate solutions.”83 But, as in the past, law regrouped, appropriated the social science that it needed, and reaffirmed its ascendancy in the state. We might then acknowledge CLS as a radical critique developed within law and professing a transformative legal politics that confronted resurgent law on its own ground and sought to redirect its ascendancy along different paths.84


82. Trubek, supra note 74, at 8. Although at first sight this might seem far-fetched, Minda provides a telling commentary on how non-mainstream legal knowledges can serve the elite ideological purpose of maintaining law’s resilience:

It is a critical time for jurisprudential studies in America. It is a time for self-reflection and reevaluation of methodological and theoretical legacies in the law. At stake is not only the status of modern jurisprudence, but also the validity of the Rule of Law itself. In the current era of academic diversity and disagreement, the time has come to seriously consider the transformative changes now unfolding in American legal thought. The challenge for the next century will certainly involve new ways of understanding how the legal system can preserve the authority of the Rule of Law while responding to the different perspectives and interests of multicultural communities. . . . The proliferation of new forms of competing jurisprudential discourses, the willingness of some to try new methods, and the expression of discontent and resistance signify the end of neither professional discourse nor law as we have known it—all may simply be symptomatic of change from the old to the new.

Id. at 256–57.

83. Garth and Sterling, supra note 73, at 456.

84. This is one of Robert Gordon’s strongest themes in his debate with Paul Carrington over the meaning of CLS. See Gordon, supra note 77, at 1–9, 13–16.
D. Conclusion to Part One

Writing the history of the juridical field shows us both why “[l]aw in the United States historically has been able . . . to gain the position of setting the key terms of legitimacy,” 85 and how. Culturally and politically, law has occupied a position of advantage in discussions over the substance of rules compared with other modalities and ideologies of action. It has solidified that position of advantage in a structure of national legal practices—discursive, institutional, and organizational—that continuously and actively reinforce the United States’ inertial political-cultural tendency toward the ascendancy of law in rule production.

In noting that the history of the juridical field has been very much a history of the management of encounters between law and other disciplines, however, we can also see that the history of law, at least in the twentieth century, has been a history of law’s difficulties when it comes to the necessities of adequate self-explanation. Debates over the appropriateness, terms, and likely outcomes of rules occur in two realms, not one: the realm of law as a locale of rule production, and the realm of law as a locale of juristic and scholarly explanation, or legitimation, of the form and expression of rule production.

A 1997 article by Edward Rubin assists in illustrating the relationship between these two realms. 86 According to Rubin, in the realm of rule production, law-trained state decision makers are fully possessed of a distinctive methodology and practice that render their activities “epistemologically coherent.” 87 Law-trained scholars seek to improve the quality of these activities through prescriptive intervention “according to the scholar’s own views about law or public policy.” 88 They “instruct[] judges.” 89 They articulate arguments that conceivably can affect decision making. They are, that is, “inevitably and intensely involved with the subject matter of their research.” 90 In this incarnation, legal scholarship is not a descriptive or a critical, but a prescriptive practice. Legal scholars “are not trying to describe the causes of observed phenomena, but to evaluate a series of events, to express values, and to prescribe alternatives.” 91 They are actively participating in the production of rules. In this realm law is a discipline sufficient unto itself. It grants a role to other disciplines only insofar as they service its primacy. 92

87. Id. at 541.
88. Id. at 525.
89. Id. at 529.
90. Id.
91. Id. at 527.
92. In Bourdieu’s analysis, “[P]ractices within the legal universe are strongly patterned by tradition, education and the daily experience of legal custom and professional usage. They operate as learned yet deep structures of behavior within the juridical field—as . . . habitus. They are significantly unlike the practices of any other social universe. And they are specific to the juridical field; they do not derive in any substantial way from the practices which structure other social
In the realm of legitimation, however, law seeks the aid of other disciplines “in characterizing various interactions between law and external phenomena.”93 No more here than in the process of rule production does law propose to yield to the disciplines, for “the prescriptive stance of law is not only an effort to influence public decision-makers” but is also itself “a mode of understanding.”94 But that mode of understanding is quite insufficient when it comes to coping with “reality,” with the “intense relationships” between law and the “external forces . . . [and] events” to which legal scholars must react, or with “the effects on such events that their recommendations to legal decision makers will produce.”95 A self-referential, internally generated legal discourse might be entirely sufficient for legal scholars to communicate with judges or practitioners, but not if rules are to be explained and their legitimacy confirmed to other decision-makers (legislators, administrators) and to wider audiences—particularly public opinion and the interests to which public opinion responds. Even as it “must continue to develop its own methodology for framing its characteristic prescriptions to legal decision-makers,” legal scholarship “must rely on other disciplines to characterize external events and effects.”96 Here, in what Rubin denotes as “structured debate about social norms,” is where social science properly appears, not to resolve issues of “proper choice of purpose,” but to inform them and explain them.97 In this field of encounter, the disciplines are drawn in to play an essential (though still subordinate) role in rule production.

By distinguishing law’s self-sufficiency as a modality of deployment of power and authority from its inadequacy as a modality of explanation and legitimation of the results, we can see that law has been more receptive to encounters with disciplines in which law’s terms are accepted and its capacity to explain or refine or legitimate its performance in rulemaking interactions with external phenomena improved, than to encounters in which the disciplines attempt to intrude upon law’s terms for deployment of determinative power and authority over rulemaking. The question that faces an “interdisciplinary” law school, therefore, is whether to enable law’s future disciplinary encounters simply to reproduce this pattern, or instead to permit the disciplines to probe law’s “rules for the production of the rules” and systematically unpack the structure of national legal practices that supports them. Without answering this question at this point, let us now proceed

Richard Terdiman, Introduction to Bourdieu, supra note 26, at 807.

93. Rubin, supra note 86, at 541.
94. Id. at 546.
95. Id. at 543, 550.
96. Id. at 553.
97. Id. at 555.
to examine how one discipline in particular—history—has fared in its encounters with law.

II. HISTORY AND LEGAL HISTORY

Descriptions of recent research in legal history as the work that “may well be the most exciting . . . currently being done on law,” 98 and of virtually all modern history as “critical” when brought into conjunction with the realm of law, 99 might encourage one to believe that of all the disciplines disposed to probe the juridical field, none has greater capacity to bring about a dramatic exposure of “the rules for the production of the rules”100 than history. The specific claims require examination.101 But so does the general record of history’s disciplinary encounter with law. Though there are clear grounds for belief in the critical potential of history, the history of legal history suggests that critique has not been uppermost in the field’s twentieth-century agenda.

A. What History Is

Some 140 years ago, Friedrich Nietzsche wrote an “untimely meditation” on the relationship between consciousness of the past and what it means to be human. “Consider the cattle, grazing as they pass you by: they do not know what is meant by yesterday or today, they leap about, eat, rest, digest, leap about again, and so from morn till night and from day to day, fettered to the moment and its pleasure or displeasure, and thus neither melancholy or bored.”102 Nietzsche’s cattle lived unhistorically, contained wholly by the present, unaware of any past, unaware indeed of anything but the moment. To be human by contrast meant to possess an awareness of the historical, and as a consequence, to live a life braced “against the great and ever greater pressure of what is past.”103 To be human meant, no less, to live in envy of the cattle, to seek relief from the pressure of the past by forgetting it, in order to begin to think anew. For history was a “dark, invisible burden,” a “consuming fever,” a “mighty . . . movement” that always threatened to sweep all before it, against which Nietzsche stood to speak—”untimely”—of the importance of evading history’s coercive embrace.104

Forgetting, Nietzsche argued, was essential to action. Yet it was neither possible, nor necessarily desirable, wholly to escape the historical. Humanity

99. Id. at 1029.
100. Dezalay and Garth, supra note 28, at 311.
101. See text accompanying notes 166–219 infra.
103. Id. at 61.
104. Id. at 59, 60, 61.
needed history in order to be human rather than cattle. “The unhistorical and the historical are necessary in equal measure for the health of an individual, of a people and of a culture.” But history was needed to serve specific purposes; not the purposes of “the idler in the garden of knowledge,” but purposes that were “rough and charmless.” Humanity needed history “for the sake of life and action” and for no other reason.

B. Lessons of History

Everyone can claim some sort of relationship to the past. Everyone is his/her own historian, by dint of personal awareness of the trivia of life circumstance that have produced them as they are, or as they appear to themselves to be. Everyone can be some sort of historian also in the larger, necessarily collective, sense of associating in acts of remembrance or awareness that evoke the past and speculate about its meaning.

“History” as an evocation of the past is etymologically indistinguishable from history as practice or discipline, but the two—history the past and history the disciplinary practice—are quite distinct. In 1968, in the introduction to a book on the consciousness and practices of a group of American historians eminent in the early years of the discipline, Richard Hofstadter observed, “Memory is the thread of personal identity, history of public identity.” In naming the construction of public identity as the job of historical practice, Hofstadter identified the formative purpose of the discipline, but also the context that constantly challenges it. For history as discipline lives within a broader civic discourse of “history” that, in invoking the past, makes its own potent claims to historical awareness and knowledge. Indeed, civic discourse crafts “lessons of history” from among the totality of acts of evocation of the past, from which—as Nietzsche warned—escape is difficult.

When invoked to dispense civic lessons, history takes on a purposeful, coercive appearance. Take, as an example, an editorial entitled “The Right Side of History in Iraq” published in the Chicago Tribune at the height of armed Shi’ite opposition led by Muqtada al-Sadr’s Mahdi Army to the Coalition Provisional Authority. History, in that editorial, is at once an invisible undertow in human affairs, “an unsentimental progression of events,” and a didactic field of force with a consciousness all of its own. In this particular case, history was “determined to leave the insurgents behind.” History would teach even the most intractable insurgent the necessity of staying on “the right side of history.” And in teaching

105. Id. at 63.
106. Id. at 59.
109. Id.
that lesson “history’s outline begins to grow clear.”\textsuperscript{110} History, here, is not a
discipline; it is the elemental power that dictates the course of human affairs,
against which Nietzsche wrote.\textsuperscript{111} It is an objective, dispassionate force—
unsentimental; it has both direction and substance—a progression of events; its
progression is linear, and its linearity embodies movement away—it would leave
the insurgents behind; and its linearity also expresses a guiding consciousness
capable of moral judgment—it was determined to leave the insurgents behind. By
recognizing history’s will to progress, and by obeying its directives for action,
humanity would find itself in a better place, on history’s right side, in conformity
with its outline. Nonconforming recalcitrants would be left in its wake, behind.\textsuperscript{112} To
fail to bow to history is to place oneself in a future outside history—irrelevant,
invisible, despicable, and disposable.

Might one claim that this editorial is an illustration of the deployment of
history to serve “life”? Every trope employed suggests the opposite. When
Nietzsche wrote his “untimely meditation” he did so precisely to reject such
totalized representations of human action because they rendered the past inertial,
the determinant (gravedigger) of the present; because they denied humanity
plasticity, the capacity for transcendence, “to develop out of oneself in one’s own
way,” to think and act unhistorically.\textsuperscript{113} Simultaneously, however, Nietzsche
recognized the impossibility of avoiding history altogether. The objective was to
make history serve life. But how?

\textbf{C. Archetypes of History}

Nietzsche wrote of the existence of three modalities (social scientists might
be tempted to call them ideal types) of history—the monumental, the antiquarian,
and the critical—each of which came complete with its particular liability.\textsuperscript{114}
History in the monumental mode was history as action in the service of
greatness—the proud narration of exemplary deeds, of inspiring events, of
triumph over pettiness. As classic exponents one need think no further than the
Whig historians of the nineteenth century, like Macaulay and Bancroft, or their
successors, like Churchill.\textsuperscript{115} The \textit{Chicago Tribune}'s Iraq editorial is a convenient

\textsuperscript{110} Id.

\textsuperscript{111} One does not encounter civic leaders enjoining us to place ourselves on “the right side”
of political science. One does not read of anthropology’s determined judgments in the editorial pages
of newspapers, or of its outline for mankind. There is no Sociology Channel on cable TV. Economies
provide perhaps the only close parallel.

\textsuperscript{112} For similar attributions of will to history, this time from a professional historian, see
(quoting Sean Wilentz, Professor at Princeton University, on the impeachment of President
William Jefferson Clinton: “[H]istory will track you down and condemn you for your craveness.”).

\textsuperscript{113} \textit{NIETZSCHE, supra} note 102, at 62.

\textsuperscript{114} Id. at 67–77.

\textsuperscript{115} \textit{See, e.g., THOMAS BABINGTON MACAULAY, THE HISTORY OF ENGLAND FROM THE
exemplar of monumental history in a contemporary setting. The liability of the monumental mode, of course, is all that’s omitted: “the past itself suffers harm: whole segments of it are forgotten, despised, and flow away in an uninterrupted colourless flood, and only individual embellished facts rise out of it like islands.” Monumental history appropriates elements of the past to serve particular current or future outcomes. In its course, personalities become exaggerated and deformed; narratives become means to indoctrinate; causation is lost in the power attributed to the demands of history, to ineffable purposes, to “historical ‘effects in themselves.’”

History in the antiquarian mode means, superficially, mere collection of past facts. Somewhat more subtly it means reverence for what was: the present is but the tip of an iceberg of accumulated validity. Put into action—theorized—it means history pursued not as appropriation and validation but as continuation and reassurance: the Burkean creation of stable identities through seamless connection of now to then. But just as the liability of the monumental lies in its overweening discrimination, the liability of the antiquarian lies in its inability to discriminate. Veneration accords an equal validity to all that is recovered. Committed to stability and reassurance, the antiquarian cannot see change or difference that is not in accord with its own incrementalist theory of causation. History in critical mode is the antidote to both the monumental and the antiquarian. Instead of the past appropriated to the extent that it enables the construction of an exemplary guide to particular futures, or revered in its wholeness to preserve contemporary life, it is the past interrogated, judged, and condemned in order to free life from the oppressive present to which that past stands prior. To Nietzsche, critical history might have been a means to throw off the suffocating restraint of all pasts: “Every past . . . is worthy to be condemned—for that is the nature of human things: human violence and weakness have always played a mighty role in them.” All might be better forgotten. But critical history’s purpose was not to enable the past to be ignored; rather it lay in the formation of its own kind of remembrance, so that the past that made a particular present worthy of destruction might be fully known. This was no exercise in inclusion of the innocent, a redress of the grievances of losers, a gathering in of “paths not taken”: all were the product of that past; none could dissociate themselves from its “aberrations, passions and errors, and . . . crimes.” All being implicated, “the best we can do is to confront our inherited and hereditary nature


117. Id.
118. Id. at 72–75.
119. Id. at 76.
with our knowledge of it, and though a new, stern, discipline combat our inborn
heritage and implant in ourselves a new habit, a new instinct, a second nature, so
that our first nature withers away.”¹²₀

The recognition of the totality of implication renders critical history as
tragedy. In the struggle for transcendence, the chance of success is modest. “The
reconciliations that occur at the end of Tragedy . . . are somber; they are more in
the nature of resignations of men to the conditions under which they must labor
in the world.”¹²¹ But struggle is the measure of living. It is in this sense that critical
history serves life. Hence the liability of the critical is the intellectual’s effete
passivity, ennui, lack of purpose; or worse, irresponsibility; or worst of all, mere
scholasticism: “instruction without invigoration . . . knowledge not attended by
action . . . history as a costly superfluity and luxury.”¹²²

The modalities of nineteenth- and twentieth-century historical practice have
reproduced the essentials of Nietzsche’s typology. The monumental and the
antiquarian are the ideal types of modernist historical practice, represented both in
Whig, Marxist, Progressive, Liberal, and other forms of generalizing, determinist
or reductionist historical metanarrative that attribute a developmental “direction”
to history, and in history’s resolute empiricism, its facticity centered on the
recovery of past events whether unique and serendipitous or recurrent. These
archetypes are well represented in the contrast between the prototypes of
modernist historiography: faith in objectivity through abstraction, in the discovery
of truth through research on the past guided by the future-oriented touchstone of
human progress; and reliance on systematic empiricism, avoidance of future-
oriented universals or law-like statements, embrace of study of the past “for its
own sake” and on its own terms.¹²³

Modernist history’s prototypes have coexisted and interacted within an
overall appreciation of historical practice as a mode of scientific inquiry, although
with very different emphases on what “science” means. Modernist metanarrative
history embraced the language of scientific theorizing in proposing determinist
laws of historical development to guide empirical investigation of the past.
Modernist common sense empiricism eschewed law-like scientism but not
scientific technique: systematicity, trained expertise in discovery and observation
of archived sources, the metaphor of the laboratory. Antiquarianism is supposedly
that which professional modernist historical practice defined itself against, yet it is
what professional historical practice in its early days came closest to reproducing
(and indeed continues unconsciously to encourage, albeit in ways that are not

¹²₀. Id.
¹²¹. HAYDEN WHITE, METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH
¹²². N IETZSCHE, supra note 102, at 59.
¹²³. For a critical account of the prototypes of modernist history, see KEITH JENKINS, ON
consciously “antiquarian”). The initial professionalization of history in late nineteenth-century America created a self-referential and internalized disciplinary discourse, in which norms of value-neutrality and factualism reigned. The standardization of practice assured the interchangeability of the products—“the [laid-up] stores of well-sifted materials,” the small groups of facts “properly classified and logically dealt with”—that the discipline’s empiricist division of labor accumulated. James Franklin Jameson wrote in 1910 of the historian as an honest artisan fashioning mounds of knowledge-bricks “without much idea of how the architects will use them, but believing that the best architect that ever was cannot get along without bricks.” Edward Cheyney offered a more expansive rendition of the same metaphor:

The scientific writer of history . . . builds a classic temple: simple, severe, symmetrical in its lines, surrounded by the clear bright light of truth, pervaded by the spirit of moderation. Every historical fact is a stone hewn from the quarry of past records; it must be solid and square and even-hued—an ascertained fact. . . . His design already exists, the events have actually occurred, the past has really been—his task is to approach as near to the design as he possibly can.

How reassuring it was, that the past should accumulate so cleanly, prove so uniformly reproducible, to an inherent design of its own. The aesthetic of collective cumulative endeavor survived throughout the twentieth century in professional history’s monograph tradition, and its rite of “making a contribution” to the accumulation of knowledge.

D. History in the Juridical Field: The Historical School

In nineteenth-century Europe, in the German historical school established through the intellectual leadership of Friedrich Karl von Savigny, law found its first theory of development in just such a modernist scientific conception of history. To the historical school, history was a repository of exemplary prior instances of action or ideas, but also much more—a “living connection, which links the present to the past,” that explained law not as a natural or formal rule system but as an embodiment of Volkgeist (spirit of the people) with whose total historical development it was “inseparably interwoven.” Savigny conceived of

125. Id. (quoting James Franklin Jameson).
126. Id. (quoting Edward Cheyney).
127. GEORGE G. IGERS, THE GERMAN CONCEPTION OF HISTORY: THE NATIONAL
law not as something consciously created but as the accumulation “of a people’s historical and cultural experience, as a silently growing body, expressing itself in the community’s convictions.” Savigny’s conception of national legal practices as granular instances of Volksgeist was intended to forestall contemporary attempts to create law consciously through codification or legislation. In place of legislation, Savigny exalted the capacity of jurists, to whom fell responsibility for “the more technical parts of law,” whose life’s work it was to trace and render explicit the rules immanent in the customs and practices of the Volk, thereby revealing a path of “complete undisturbed, national (einheimische) development.” Tracing jurists’ ideas historically traced the organic development of law. Here was a potent example of the “history”-induced inevitability (paralysis) against which Nietzsche raged.

Law’s historical theory of its own development began to circulate in the U.S. juridical field in the second half of the century, particularly after the Civil War. In important respects—tracing legal evolution through the ideas of jurists, emphasizing the determinative authority of jurists over the expression of law in rule systems—aspects of German legal science became incorporated in the Langdellian transformation of the juridical field. But as a theory of law, “historical legal science,” or more generally “historism,” fell apart at the end of the nineteenth century in the face of law’s own self-reconstitution as an autonomous discipline. Insistence on the sufficiency of explanations that simply invoked the sheer organic weight of the past were no longer convincing in an era of rapid social transformation. Indeed, it was the philosophical disintegration of history in its broadly Hegelian, nineteenth-century sense—the unfolding of Spirit in time—in the face of the critique of Nietzsche and others that helped to constitute the first explicitly “critical” approaches to the law/history relationship. The German jurist Rudolf von Jhering, for example, rejected the Historical School’s emphasis on law’s national spirit and unconscious growth for a “practical jurisprudence” that sought to locate law much more explicitly in time and social experience, and above all in conscious action and agency. Law’s development was not “merely the result of unconscious growth, conditioned by innate popular character” and hence reducible to a system of concepts designed and manipulated by scholar experts. Rather, law lay “in actual social life,” where it was begotten by social necessity—“conscious struggles to achieve certain ends through law.”

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129. PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA 60, 62 (1980).
131. Munroe Smith, Four German Jurists, 10 POL. SCI. Q. 664, 682 (1895).
132. STEIN, supra note 129, at 66, 67. In DER GEIST DES RÖMICHEN RECHTS (1852– ),
For Jhering, such a clear articulation of Nietzsche’s critical modality of history would actually be the salvation of history as a means to the development of a theory of the law. History would be released from inevitabilist accounts of the unfolding of legal development and forced to address uncertainties—change and causation.\footnote{Jhering sounds this theme in the opening pages of THE STRUGGLE FOR LAW (John J. Lalor trans., Callaghan & Company 2d ed. 1915) (1872), where he writes, at 1–2, that “The life of the law is a struggle—a struggle of nations, of the state power, of classes, of individuals. All the law in the world has been obtained by strife. . . . The entire life of the law, embraced in one glance, presents us with the same spectacle of restless striving and working of a whole nation, afforded by its activity in the domain of economic and intellectual production.”} “It should not content itself with telling what happened, what changes occurred; it should discover the reason, the ‘why,’ of the facts described, and the forces that underlie and determine the changes. Nor should legal history content itself with this alone: it should show the causal relationship between antecedent and subsequent facts, how changes begot other changes.” To do so, Jhering argued, legal history had to emancipate itself from law. It should “exist for itself, as an independent science.”\footnote{Jhering’s reflections on legal history were contained in one of his last works, a fragment on legal historiography published two years after his death as an essay in a collection entitled ENTWICKLUNGSGESCHICHTE DES RÖMISCHEN RECHTS (1894) [History of the Evolution of the Roman Law], and remarked on by Munroe Smith in Four German Jurists. III. Bruns, Windscheid, Jhering, Gneist, 12 POL. SCI. Q. 21, 32 (1897).}

This did not happen; at least, not in America. In their response to the late nineteenth century’s disciplinary reconstitution of knowledge, American historians certainly attempted to establish history as an independent science, but they eschewed explicit purposiveness as so much “philosophy.” As we have seen, their history would be narrowly empirical, a mode of inquiry that would produce factualist bricks to an implicit, naturally-occurring design. Most American historians abjured any broad architectonic role to the social sciences, notably sociology and political science.\footnote{See generally NOVICK, supra note 124, at 61–108.} In the juridical field, Oliver Wendell Holmes, Jr. ventured toward the critical Nietzschian standpoint embraced by Jhering, identifying history not simply as a means to understand law on its own terms but to demystify it, to show that law’s life was revealed by context—“the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men”—not by any self-referential “logic.”\footnote{OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).} But Holmes’ skepticism would later lead him in a different direction than the experiential, wondering in The Path of the Law whether it would not be a gain “if every word of moral significance could be banished from the law altogether, and other words adopted
which should convey legal ideas uncolored by anything outside the law.” 137

Holmes’ modernist skepticism helped to kill the nineteenth century’s historical school in the American juridical field, in other words, but unlike Jhering Holmes did not point the field toward any new “emancipated” replacement. As a result, though legal history continued to be written in the juridical field after the turn of the century, it lost the centrality enjoyed by the historical school, becoming a fringe activity that tended to normalize whatever law’s current state of affairs might be.

**E. Roscoe Pound’s History**

Musing, in the early 1920s, on the historical school’s significance, Roscoe Pound characterized its adherents as participants in a general attempt to resolve a central problem of nineteenth-century legal thought, the problem of reconciling the universalist impulse of the Enlightenment with human circumstance:

> [T]he social interest in the general security had led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security. 138

Nineteenth-century historical jurisprudence had attempted to join stability with adjustment in an organic and incrementalist theory of origins and adaptation that afforded little room for self-conscious rationalizing interventions.

It did not think of a law which had always been the same but of a law which had grown. It sought stability through establishment of principles of growth, finding the lines along which growth had proceeded and would continue to proceed. . . . Law was not declaratory of morals or of the nature of man as a moral entity or reasoning creature. It was declaratory of principles of progress discovered by human experience of administering justice and of human experience of intercourse in civilized society; and these principles were not principles of natural law revealed

137. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 464 (1897). History, Holmes wrote, must be a part of “the rational study of law” for “without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules” (469). Thereafter, the study of history should be writ small. “I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them” (474).

by reason, they were realizations of an idea, unfolding in human experience and in the development of institutions—an idea to be demonstrated metaphysically and verified by history.139

Pound accepted that historical jurisprudence had been an advance on natural law reasoning in its attempts to accommodate social change. But it was flawed by its own vulnerability to change. Historical jurisprudence lodged legitimacy in custom and recognized that custom could change over time, but controlled change by privileging the organic continuity of the Volk, the homogenous people, over the “current speculation” that motivated reformers and legislatures. Too much change, and historical jurisprudence lost its explanatory capacities; heterogeneity thinned the credibility of shared custom. In the U.S. case, the influence of historical jurisprudence had waned decisively in the late nineteenth and early twentieth century for precisely this reason. Its ideology of custom in common could not cope with the massive transformations of industrialization, immigration, and urbanization, with all their attendant demographic dislocations, cultural diversifications, class formation, and conflict, or with the new social knowledges whose development these changes sharply accelerated. Historical jurisprudence was too conservative, too dogmatic, too impervious to anything other than the slow grind of organic evolution. “It assumed progress as something for which a basis could be found within itself. . . . It assumed that a single causal factor was at work in legal history and that some one idea would suffice to give a complete account of all legal phenomena.”140

Like Jhering, thirty years before, Pound called for a new legal history to replace the old—“for a sociological legal history, a study of the social effects which the doctrines of the law have produced in the past and of how they have produced them,” a history that would not “deal with rules and doctrines apart from the economic and social history of their time.”141 But Pound’s words proved cheap. When some years later he turned to history to expound at length upon the course of American law, in his lectures on The Formative Era, Pound completely repudiated his earlier interest in a new legal historiography. The hermetically sealed “taught legal tradition” he celebrated in his lectures—received from England, transmitted through successive generations of lawyers and judges tempered by training and practice, resistant to dramatic conflictual change—was, he now declared, “much more significant in our legal history than the economic conditions of time and place.”142

Robert Gordon has written that failure “to develop an extensive external historiography of law” during the first half of the twentieth century represented “a

139. Id. at 9.
140. Id. at 19 (emphasis added).
142. POUND, supra note 64, at 82–83.
loss of nerve” brought about by “an anxious solicitude” for the fate of the U.S. juridical field’s common law tradition amid circumstances (wrenching social and economic change) that threatened it.143 Pound’s volte-face between 1921 and 1936 illustrates that loss of nerve, if indeed that is what it was. But there is another way to understand Pound’s dismissal of the standpoint—extrinsic causality—he had seemed earlier to embrace. Amid the crisis of the New Deal’s administrative law revolution, the “taught tradition” put rule production away in a safe preserve, under the control of an expertise the construction and transmission of which was organized from within the juridical field itself—precisely where Pound had located it at the beginning of his career.144

F. James Willard Hurst’s History

As the only scholar in the first half of the century to attempt a general history of American law, Roscoe Pound became, inevitably, a principal point of orientation for those—first Willard Hurst, after him Morton Horwitz—whose work would dominate the century’s second half. Judged by the conventions of contemporary historical practice, better historians than Pound slowly gathered at Columbia, where Charles Beard (Political Science) and James Harvey Robinson (History) had earlier presided: Pound’s near contemporary, the acerbic Julius Goebel, was joined somewhat later in the law school by Joseph Henry Smith and, in the History Department (no doubt to Goebel’s dismay), by Richard B. Morris.145 A few others outside the legal academy could also be found engaged in historical research on American law, notably John R. Commons in the 1920s, Perry Miller much later.146 None was more original than Commons, none more

144. See text accompanying notes 58–64 supra. See also JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 221–34 (2007) (describing Pound’s alienation from the New Deal revolution in administrative law).
145. All are best known for their work in the legal history of the colonial and early national periods. For representative work see Goebel’s early essay, King’s Law and Local Custom in Seventeenth Century New England, 31 Colum. L. Rev. 416 (1931), and his much later History of the Supreme Court of the United States: Antecedents and Beginnings to 1801 (1971). Joseph H. Smith is best known for his classic Appeals to the Privy Council from the American Plantations (1950), for The Law Practice of Alexander Hamilton: Documents and Commentary (1964), undertaken in collaboration with Goebel, and—also in collaboration with Goebel—for the production of numerous volumes of Cases and Materials on early American law and on the development of legal institutions. Morris’s later career was almost entirely taken up with the framing of the American Constitution and its subsequent history, but his early career produced two books on early American law remembered among legal historians: Studies in the History of American Law: With Special Reference to the Seventeenth and Eighteenth Centuries (1930), and Government and Labor in Early America (1946). Both attracted criticism, the latter mainly for its rather indiscriminate empiricism, the former, much more spectacularly, for ill-informed intrusions upon matters of law. See Karl Llewellyn, Book Review, 31 Colum. L. Rev. 729 (1931), and infra, text at note 190.
146. See JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924); PERRY MILLER, THE LIFE OF THE MIND IN AMERICA, FROM THE REVOLUTION TO THE CIVIL WAR (1965).
fluent than Miller. Still, in so tiny a field—in 1931 Karl Llewellyn described American legal history as “substantially unoccupied” and “near-empty”—Pound cast a long shadow. None challenged his “formative era” synthesis before Hurst in the 1950s and Horwitz, in very different fashion, in the 1970s. Their distinct breakouts twice altered the trajectory of American legal history, decisively in Hurst’s case, dramatically in Horwitz’s.

Hurst had encountered Pound when he was a law student at Harvard in the early 1930s; he thought Pound dogmatic and arrogant. Influenced by the Realism that Pound was increasingly driven to reject, Hurst would set out actually to achieve what Pound had done no more than talk about: an externalist sociology of juridical action and institutions. Hurst, writes William Novak, stressed the “living interplay of law and social growth” and “law’s operational ties to other components of social order.” He “strove to underwrite his work with a systematic and elaborate conceptual framework designed to link his close empirical investigations of nineteenth-century American law to perennial questions about ‘the general course of social experience.’” Indeed, Hurst’s empirical research revealed a causality that undermined Pound’s careful discriminations among spheres of expertise, and reversed his post-Progressive taught tradition. Theorizing law as the expression of social purpose arising concretely from struggles among interests, Hurst observed, “[i]n the interaction of law and American life the law was passive, acted upon by other social forces, more often than acting upon them.” This was the first resolutely externalist conceptualization of causality in the U.S. field.

The use of law to further self-interest is, of course, the leitmotiv of Law and the Conditions of Freedom, Hurst’s own account of American law’s formative era. Still a phenomenon of the first half of the nineteenth century, but otherwise

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147. Llewellyn, supra note 145, at 730, 732. In 1993, Willard Hurst observed that it was “literally true” that, as of the mid-1930s, “there were probably only three or four practicing legal historians in the United States.” Hendrik Hartog, Snakes in Ireland: A Conversation with Willard Hurst, 12 LAW & HIST. REV. 370, 385 (1994).

148. Hartog, supra note 147, at 374.


150. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAWMAKERS 4 (1950). The second sentence of the book reads, “Men wanted national independence largely for economic reasons, but they said they wanted it because their legal rights were invaded”(3).
completely distinct from Pound’s taught transatlantic common law tradition, Hurst’s American law sprouted from rich democratic Midwestern sod, immanent in the actions of ordinary citizens who contrived institutions to lend legality to the pre-existing facts (settlements) they had created on the ground. For Hurst, ordinary Americans—not juridical elites—were makers of law. They did so “primarily by action,” hardly pausing to construct any lasting framework “except in areas which we saw most directly contributing to the release of private energy and the increase of private options.”\textsuperscript{151} Multiple egotistic struggles to realize self-interest generated functional socio-legal structures. With constitution-making out of the way, “the nineteenth century was prepared to treat law more casually, as an instrument to be used wherever it looked as if it would be useful.”\textsuperscript{152}

Hurst is famous for the instrumentalism immanent in this vision of American law. Instrumentalism, however, was but a surface phenomenon. As producers of outcomes, the structures it spawned reached no further than the short-term calculus that Hurst called “bastard pragmatism.”\textsuperscript{153} Below instrumentalism lay consensus, something altogether different. For Hurst, the deep underlying structure of consensus was a necessary condition of his jurisprudence of self-interest: social consensus, conscious and conditioned, supplied law’s meta-character, allowing interests to fight for relative advantage without risking systemic rupture. Consensus mediated the fight.\textsuperscript{154}

In the prolegomenon to his entire scholarly project, written in the late 1940s, Hurst underscored the production and reproduction of consensus as a basic function, foundational to the social order. The job was law’s to perform. Political argument over the meaning of gain, or its distribution, was no more than a “vent for emotion.”\textsuperscript{155} The real work was done in the juridical field, whose agencies,

\begin{itemize}
  \item \textsuperscript{151} JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 5, 10 (1956).
  \item \textsuperscript{152} Id. at 10. See also JAMES WILLARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 23–24 (1977).
  \item \textsuperscript{153} See, e.g., JAMES WILLARD HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY 147 (1972).
  \item \textsuperscript{154} Hurst saw consensus (custom) as a condition of law production: The most creative, driving, and powerful pressures upon our law emerged from the social setting. Social environment has two aspects. First, it is what men think: how they size up the universe and their place in it; what things they value, and how much; what they believe to be the relations between cause and effect, and the way these ideas affect their notions of how to go about getting the things that they value. Second, it is what men do: their habits, their institutions.
  \item \textsuperscript{155} HURST, supra note 150, at 11. In Social Science on a Lawyer’s Bookshelf: Willard Hurst’s Law and the Conditions of Freedom in the Nineteenth-Century United States, 18 LAW & HIST. REV. 59, 80–81 (2000), Carl Landauer notes that Hurst portrayed the nineteenth century as “a fully articulated cultural structure” and “a carefully structured intellectual system in which the parts work perfectly together.” Fundamentally, Landauer concludes, “Hurst was describing the working of a value system. ‘The tone of this society,’ he stated about early nineteenth-century America, ‘was set by men for whom life’s meaning lay in striving, creation, change, and mobility.’ All had ‘the same life goals and values’.”
\end{itemize}

HURST, supra note 150, at 442.
protocols and personnel—legislatures, courts, executive and administrative bodies, lawyers—were handed the “ideal function” of “ordering social relations . . . protecting the individual on the one hand, and the community on the other.”

The job for the juridical field, hence, was to be both functional and objective—find facts, make policy, and see to its execution “with substantial neutrality toward special interests.” But the field’s capacities for neutrality were hampered by Americans’ preoccupation “with the economy as a field for private adventure,” which bred a historic indifference to the creation of efficient public institutions and left law open to the influence of special interests. The supposedly hermetic juridical field of earlier legal historiography was in fact only too vulnerable to externalities:

Main currents in the history of all the principal agencies of lawmaking showed this in one fashion or another. The late-nineteenth-century courts yielded uncritically. . . . The bar fell so far into the governing temper of the time as to be content with the role either of technician or partisan, and forfeited much of its public standing as spokesman of the general interest.

The legislature showed no more capacity to identify and defend a public interest. Only the executive showed any potential. The argument was devastating to Pound’s celebratory Formative Era. Hurst could agree that law should perform “as mediator of the general interest” but not that it had succeeded in doing so over time. History’s job was not to participate in mythmaking but to assess law’s performance, “to trace the manner in which legal institutions had dealt with the resulting tensions in one field of public policy after another.”

One can legitimately identify Hurst’s history as the first systematic attempt to write a history of the creation and production of national legal practices. Given its predecessors, the question is why this history began to come about at this time: Why was Hurst successful in influencing legal-historical inquiry to move away from complaisant descriptions of “the production of the rules” in the juridical field to probe for the circumstances of rule production—the “rules for the production of the rules”? And how deeply, in fact, did Hurst’s new history probe?

The answer is organizational rather than intellectual. Hurst’s genre of legal

156. Id. at 439.
157. Id. at 443.
158. Id. at 444.
159. Id. at 445.
160. Id. at 446.
161. In 1956 Hurst identified his project as “a long-term program of research in the history of the interplay of law and other social institutions in the growth of the United States.” HURST, supra note 151, at vii.
history did not become paradigmatic until more than twenty years after Hurst began writing, and more than ten years after the circle of those whom he had influenced and supported began to produce their own “externalist” historical scholarship.162 Paradigm status came about through the exercise of considerable entrepreneurial capacities to build his genre, through calculated professional choice and strategy, rather than through some spontaneous shift in historical imagination. Examining that effort at paradigm construction, moreover, indicates that Hurst’s historiography was but one manifestation (and not the most important) of a more general critique that served far more than scholarly-analytic purposes. History was Hurst’s personal métier and vehicle, but the fundamental purpose of Hurst’s activities is better understood if placed outside any framework of scholarly ambition for history in law per se. Rather, Hurst’s professional goal, as had been Langdell’s (and the young Pound’s), was to stimulate the process of writing new rules for the production of rules so as to maintain law’s ascendancy within the juridical field.

To appreciate this, three aspects of Hurst’s effort must be highlighted. Most obvious, its location: professionally, Hurst was firmly situated within the juridical field, and he wrote for its attention. Second, its position: a half-century’s tenure at Wisconsin defined Hurst’s orientation to the juridical field as one decisively outside the orbit of the traditional centers of influence in the field—the eastern elite schools that had to that point produced the field’s dominant accounts of itself. Finally, standpoint: the strategic intellectual stance Hurst espoused was not that of history per se but, much more broadly, of “social science”—always, in the twentieth century, the disciplinary genre most clearly associated (as history was not), with innovation in the juridical field.

The call for innovation that Hurst answered arose from the combination of circumstances charted earlier in this article:163 the failure of legal realism to achieve a decisive alteration in legal pedagogy, the resultant complacency in the postwar legal profession stemming from the continued narrowness of the training offered by traditional centers of influence, and, consequently, the sense of crisis arising from the profession’s difficulties in asserting capacities for political leadership in the postwar period.164 Added to professional crisis was a perception that the social

162. Mark Tushnet noted in 1972 that, at the time of its publication in 1964, Hurst’s most ambitious empirical study (on which he had spent some seventeen years) LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN (1964) “received little attention” and, until the early 1970s, had been “largely ignored.” See Mark Tushnet, Lumber and the Legal Process, 1972 Wis. L. Rev. 114 (1972). Robert Gordon also traces the rise of the Hurstian perspective to the early 1970s. Gordon, supra note 35, at 55. Lawrence M. Friedman, probably the most important disseminator and exemplar of Hurstian legal history, published the first edition of his A HISTORY OF AMERICAN LAW in 1973. Harry Scheiber was instrumental in introducing historians at large to Hurst’s work at about the same time. See his 1970 review article, At the Borderland of Law and Economic History: The Contributions of Willard Hurst, 75 Am. Hist. Rev. 744 (1970).
163. See text accompanying notes 65–75 supra.
164. Garth, supra note 75, at 38, 54.
science disciplines were once more forging ahead (as they had in the 1890s and again in the 1920s) in the competition to furnish the key epistemological site for authoritative state decision making. Hurst’s answer—his stress on the necessity that “empirical research and social science” be brought fully into the juridical field—was his answer both to law’s crisis and the social sciences’ challenge. It envisaged innovation as a broadening of the juridical field’s capacities through reform controlled from within. Like Pound at the turn of the century, Hurst sought to renew the legal-academic establishment by appropriating expertise from outside. Also like Pound, law was to remain on top.165

III. CRITICAL LEGAL HISTORY

Willard Hurst’s campaign to renovate American legal pedagogy was successful in both its major aspects: promoting innovation in, while retaining initiative for, the juridical field. Socio-legal teaching and research was launched, but as we have seen its ambit was successfully contained within a legally constructed domain. New rules for the production of rules within the field were written, and the prior rule-formation paradigm (the taught tradition) declared obsolete. No less an observer than Supreme Court Justice Byron White acknowledged the change in 1971, praising the turn in legal research from “narrow study of judicial doctrine” to “dealing with the ties between law and society.”166

White’s comments mark the early 1970s as a pivotal moment for Law & Society within the juridical field, but also for the spread of socio-legal history beyond it. As an entrepreneur for Law & Society, Hurst had recommended a general externalism, and since the early 1960s it had been coming on line.167 But it is indisputable that by the early 1970s Hurst’s legal history had also gained an appreciative audience among American historians. Symbolically, Hurst was invited to write the keynote essay for the volume *Law in American History*, published in 1971 by Harvard’s impeccably establishment Charles Warren Center for Studies in American History. It is in that volume’s introduction that Justice White can be found endorsing Hurst’s “law and society” perspective over “doctrine.”168

It is noteworthy, then, that it was precisely at this ceremonial moment celebrating the triumph of externality throughout the juridical field, and of socio-legal history’s admission to the canon of “American History,” that we should encounter Morton Horwitz, then a young Assistant Professor at Harvard Law

165. In *Willard Hurst and the Administrative State: From Williams to Wisconsin*, 18 LAW & HIST. REV. 1, 14 (2000), Daniel Ernst notes that Hurst “agreed with [Felix] Frankfurter that ‘the expert should be on tap, but not on top’—unless that expert was a lawyer.”


168. White, *supra* note 166.
School, entering upon a new and distinct struggle to define the proper ambit for legal studies, one that named not society but legal doctrine—the real meaning of the rules—as the essential terrain.\(^{169}\) Like Hurst, Horwitz embraced a standpoint wider than history per se, being a prime mover in the Critical Legal Studies movement. Also like Hurst, Horwitz’s preferred \textit{métier} was legal history. Thereafter their sensibilities parted company.

In America, Horwitz observed quite appropriately, legal history had been written almost exclusively by lawyers. Horwitz speculated that scholars from outside the juridical field had absented themselves because writing legal history “inevitably involves mastery of technical legal doctrine,” which always left the outsider “paralyzed with fear.”\(^{170}\) But what kept historians untutored in law from writing legal history did not really interest Horwitz; like all the law-trained legal historians before him, Horwitz was writing to gain attention within the juridical field. His particular objective was to expose the reality of what his predecessors had created—a history of continuities and intact traditions and doctrinal necessities, all of which was “to pervert the real function of history by reducing it to the pathetic role of justifying the world as it is”—and to overthrow it.\(^{171}\)

Horwitz’s target here was Roscoe Pound’s celebration of law’s internalized constancy under the tutelage of heroic judges and sympathetic legal intellectuals. He spoke out for “the real function of history”—corrosive critique—against Pound’s “dominant form of legal history.”\(^{172}\) Pound’s form, of course, was no longer dominant. Had not Hurst and his acolytes been pounding Pound for more than twenty years? Yet Horwitz was no less critical of Hurst’s approach, as his immensely influential \textit{The Transformation of American Law} (1977) would demonstrate. Hurst measured outcomes by process—how effectively the goals of a presumptively shared national consciousness and national purpose were realized. But social process did not acknowledge social struggle. Asymmetric distributions of wealth and power left Horwitz skeptical of histories that could represent legal innovations as instrumental responses to consensual “social needs.” The disproportionate accrual of benefits to entrepreneurial and commercial groups during the “formative era” signified that legal action was guided by conscious politics of “expropriation of wealth,” of “subsidies to growth” coerced from others. Once redistribution had been achieved, the dynamic legal innovation that had achieved it was replaced by “a scientific, objective, professional and apolitical conception of law,” late nineteenth-century formalism, which camouflaged law’s “political and redistributive functions.”\(^{173}\)


\(^{170}\) \textit{Id}. at 275.

\(^{171}\) \textit{Id}. at 281.

\(^{172}\) \textit{Id}. at 278, 283.

\(^{173}\) Morton J. Horwitz, \textit{The Transformation of American Law}: 1780–1860, at xvi,
Horwitz’s assault on lawyers’ perversions of history was the first in a line of more elaborated analyses that would coalesce in the early 1980s as “Critical Legal History” (CLH), the most productive and sustained expression of Critical Legal Studies (CLS). Written largely from within the elite eastern establishment that Hurst had targeted, the defining characteristic of the genre would be its rejection of Hurst’s externalism, its preoccupation with doctrine in particular, and the law’s internalities in general.174

As it developed over the decade following Horwitz’s assault on “the conservative tradition,” CLH’s form and expression evolved. Initially, its adherents identified CLH as a socio-legal genre, albeit with a “new left” bite. Much as Hurst’s earliest thoughts on legal history had been influenced by reading Charles and Mary Beard, CLH flirted with the English radical historians, E.P. Thompson and Douglas Hay. Its earliest manifestations demonstrated some affinity with Nietzsche’s sense of the critical—fighting with the present’s structures of authorization and limitation through remembrance of the past of suffering and violence that underwrites it; and simultaneously recognizing that those structures were very deeply embedded and very difficult to alter. It was obvious, wrote the genre’s leading historiographer, Robert Gordon, in the first comprehensive statement theorizing CLH, published in 1982, that there exist “many constraints on human social activity—scarcities of desired things, finite resources of bodies and minds, production possibilities of existing and perhaps all future technologies, perhaps even ineradicable propensities for evil—that any society will have to face.”175 What Gordon wanted to emphasize, however, was that material conditions did not of themselves dictate a specific set of social arrangements “in history or in our own time.”176 And he wanted to show that this realization could be beneficial to political action. Recognition that there were no objective laws of social change operating automatically in closed causal systems independent of, or despite, human imagination, was at one level, Gordon noted, deeply depressing, one might say tragic. It meant that history, as the Tribune’s cliché had it, was not on “our” side. But it was also liberating, for it led on to the conclusion that history was not on any side, and that “the real enemy”—and hence solution—“is us . . . the structures we carry around in our heads, the limits on our imagination.” Change was difficult. People had to “break out of their accustomed ways.” This was rare. Success was rarer. Nevertheless the point was to stress the underdetermination of material constraints visible in “concrete histories of particular societies” in order to relocate the potential for social change in “our”

266 (1977).

174. The trend was given decisive definition, meaning, and a name in Robert W. Gordon’s famous 1984 article, Critical Legal Histories, supra note 78.


176. Id.
recognition of our own responsibility for the way things were. By the early 1980s, in other words, CLH had given up on Horwitz’s attempt in *Transformation* to show that determinable relationships existed in historical time between legal doctrines and asymmetric socio-economic outcomes. Critical legal historians continued to accept Horwitz’s emphasis on the intellectual history of legal doctrine, but switched to “subversive” exposure of the politics of legal knowledge. The objective became not to reveal law’s implication in particular social and economic outcomes but rather its plasticity and indeterminacy.

So far so good. People had a capacity to act; the trick was first to make them aware of it, and then persuade them of the necessity. Critical legal historians made the study of “legal consciousness” their point of entry. But as they did so, CLH became less and less concerned with the consciousness of masses—the field-level socio-legal domain—and more and more caught up in investigation of the legal consciousness of elites and the constructions of formal mandarin legality. As Horwitz’s reversion to doctrine at the very outset of the CLS era suggested, CLH’s reason for being lay in the realm of struggles *within* the juridical field over the meaning of the rules that the field produced.178 Excavating doctrine—“taking dominant legal ideologies at their own estimation and trying to see how their components are assembled”—was more exciting, and more important to the CLS project, than reporting on “the grimy details” of how ruling classes attained and used power.179 Amid the excitement, Gordon had noted that “we’ll never understand the power that legal forms hold over our minds unless we see them at work up close in the most ordinary settings.”180 Nevertheless, grime would get the shorter shrift.

The choice of focus was important. Hurst’s socio-legal paradigm had been responsible for sparking the first sustained efforts at professional historical research on law; it would remain highly influential among the growing numbers of scholars who for the first time were being trained in legal history as historians.181

177. *Id.* at 290, 291.
178. See text accompanying notes 76–84 supra.
“The Horwitz thesis,” as Transformation’s argument came to be known, was equally influential among historians. Legal scholars would spend years excoriating the book. John Phillip Reid of New York University School of Law, for example, denounced Horwitz as a “conspiratorial materialist,” and called upon the legal academy to rally to protect the gullible from the seductive manipulations of iconoclasts intent on sacking “the temple of legal history.” Historians treated Transformation with considerably greater respect, awarding it the 1978 Bancroft Prize. Most dwelt less on the “complex and technical” details of its argument than on its account of law’s socio-economic effects, which enabled them to assimilate Transformation to the now well-established socio-legal paradigm. Not many historians would follow CLH’s subsequent turn away from what Robert Gordon would term “evolutionary functionalism” (a breathtakingly wide category in which Gordon included literally every form of social-historical theorizing, from Marx and Weber to Hurst, and also Horwitz prior to CLS) to the indeterminacy thesis. These remained largely a preoccupation of law-based academics.

The more CLH favored the mandarin domain of doctrinal disputation, the more its exponents found reason to depart from their early recognition of the durability of “accustomed ways” in favor of representations of structures of thought as ever more plastic, contradictory, contested, and plural. Deconstruction of doctrine taught that there were no “necessary consequences of the adoption of [any] given regime of rules.” As Gordon put it, “if the legal rules and processes that in part constitute the workings of a liberal-capitalist society are contradictory at the core, there must always be alternative arrangements—already built in, as it were—to those that a society at any given time happens to privilege.” By the mid-1990s, CLH had produced so indeterminate a world that—to restate Gordon’s words—privilege had become a matter of happenstance. In its maturity, that is, CLH moved to examine the rules for the production of the rules, only to conclude that there were none.

To CLS/CLH, indeterminacy was a move in an intellectual-analytic game. Springing from an initial confrontation with instrumentalism, indeterminacy confronted and undermined dogma. Indeterminacy rendered structures perpetually malleable, legal traditions perpetually multiple. Every form of legality, and every historical statement, became a constructed artifact. By turning critical history into a field of play, however, critical legal historians risked turning their practice into the realization of critical history’s preeminent liability—purposelessness, irresponsibility, scholasticism. There is, to use Francis Barker’s word, a fundamental “impertinence” in the elite intellectual’s account of the liberating promise of contingency and indeterminacy, the call to recognize

184. Id. at 101, 125; see also Gordon, supra note 179, at 358–63.
opportunity in plasticity, that undermines its moral integrity. The vast majority of
the world needs no instruction in indeterminacy. Its “normal experience . . . has
been for centuries that of unstable turbulent uncertainty.”186 This is an uncertainty
inflicted not desired, to be escaped not sought.

The intellectual’s claim that plasticity is to be embraced as liberation, rather
than feared as simply another effect of power, does not accord with any sensible
understanding of the current conjuncture. Gordon, to his great credit, eventually
recognized the problem. “The notion that every form of legality [indeed of
consciousness] is a constructed artifact . . . tends . . . to deprive people of any
strong basis for confidence in transcendent standpoints for critique of the present
order.”187 But in 1995, at least, he had no answer. Critical Legal History was at a
dead end.

A. Critical Historicism

In the later 1990s the impasse besetting CLH seemed temporarily to abate as
Robert Gordon announced (somewhat in the manner of a preacher at a revival
meeting) the arrival of a new iteration of the genre, “critical historicism.”
Proclaiming its products perhaps “the most exciting work currently being done on
law,”188 Gordon underlined the sense of occasion by resort to a rather exotic
metaphor. The arrival of critical historicism represented nothing less than the
presentation of credentials by “an accredited envoy from Other Genres to the City
of Law,” and recognition of the envoy “as a category of intellectual practice
relevant to law.”189

As Gordon’s metaphor suggests, the key characteristic of critical historicism
was its apparent transfiguration of “legal history” by transcending the conceptual
tension between its disciplinary components—“law” and “history.” Legal history
had had few practitioners between the demise of the historical school at the turn
of the twentieth century and the efflorescence of Hurst’s socio-legal paradigm fifty
years later, but that had not prevented self-appointed guardians from policing the
juridical field’s borders. In 1931, for example, Karl Llewellyn took to the
*Columbia Law Review* to ridicule the young Richard Brandon Morris for his “depressing and
grotesque” intrusions upon matters of law. Morris should have had “a careful
professional go over his manuscript” to eliminate his “curious errors.”190 Twenty
years later, Hurst himself echoed Llewellyn in observing that scholars without
legal training who entered legal terrain would require “lawmen” to guide their

186. Francis Barker, *The Culture of Violence: Essays on Tragedy and History*
188. Gordon, supra note 98, at 1023, 1029.
189. Id. at 1023.
190. Llewellyn, supra note 145, at 729, 731.
expeditions clear of facile error born in ignorance.\textsuperscript{191} As more non-lawyer historians entered the field in the 1970s, John Reid took up the refrain, fearing, in 1978, that innocents abroad in law would be gullled by Horwitz’s \textit{Transformation}.\textsuperscript{192} Another New York lawyer, Robert A. Ferguson, offered his own variation to greet the early twenty-first century.\textsuperscript{193} Whether it was the 1930s, the 1950s, the 1970s, or the 1990s the observation was the same: legal history might indeed benefit from the participation of outsiders—but only under the guidance of those trained in “the law.” Even CLS’s iconoclasts had voiced a certain ambivalence. We have already encountered the young Horwitz’s provocative observation that historians avoided encounters with legal history because of their fear of its technicalities.\textsuperscript{194} \textit{Sotto voce}, Robert Gordon had implied the same himself in downplaying the significance of history written at the field level of the socio-legal domain in favor of investigation of the legal consciousness of elites and their elaborated constructions of formal mandarin legality.\textsuperscript{195} Critical historicism, however, threw open the gates of the juridical field to all comers: “any approach to the past . . . that inverts or scrambles familiar narratives of stasis, recovery or progress; anything that advances rival perspectives . . . or that posits alternative trajectories that might have produced a very different present,” was admissible.\textsuperscript{196} When it came to law, history’s capacity to up-end had become limitless: “virtually all history as practiced by modern historians” bore critically upon law.\textsuperscript{197}

The exoticism of his metaphor notwithstanding, Gordon was unable to demonstrate that critical historicism actually represented any real break in the relationship between CLH and the “legally constructed domain” from which it sprang. Critical historicism’s “arrival” is announced to a legal audience in one of law’s elite spaces (the pages of the \textit{Stanford Law Review}). Its desire for admission—recognition of its “relevance”—is palpable. The encounter itself occurs within a closed system—hermetic, circular. By whom is the envoy received? One part of the juridical field. By whom accredited? Another part. For these best and brightest critical historicists are not really from “other genres” at all. The envoy is actually a delegation of five law professors (if we include Gordon) and a single constitutional historian—to lawyers, always the most tolerable breed of

\textsuperscript{191} Garth, supra note 75, at 48.  
\textsuperscript{192} Reid, supra note 182, at 1321.  
\textsuperscript{193} Robert A. Ferguson, Reviews of Books, 59 WM. & MARY Q. 481 (2002). The best legal history, Ferguson argued, was that which paid proper attention to “hard-edged peculiarities and concrete particularities of legal doctrine and legal procedure.” \textit{Id.} at 482. Nothing was to be gained from attempts by historians to seek an independent standpoint on law; even when the move was worthwhile they would find that legal scholars had always already anticipated in their own work the critique that the move implied. \textit{Id.} at 483.  
\textsuperscript{194} \textit{See} Horwitz, supra note 169.  
\textsuperscript{195} Gordon, supra note 179.  
\textsuperscript{196} Gordon, supra note 98, at 1024.  
\textsuperscript{197} \textit{Id.}
historian. They have traveled from their various law schools to “City Central” to have their craft formally certified as an appropriate “category of intellectual practice” for law professors to pursue. Solemnly, the City has granted membership.

Critical historicism’s arrival as savior to the project of writing CLH was a subtext to Gordon’s main claim, maintained consistently throughout his career as CLH’s historiographer, that CLH has always been subversive because it disrupts the mainstream modes of relationship between law and history—what I have here called the monumental, the antiquarian—that serve to reassure us “that what we do now flows continuously out of our past, out of precedents, traditions, fidelity to statutory and Constitutional texts and meanings.” CLH’s project had been temporarily derailed by the deviant doctrinalism preached during CLS’s playful heyday. Hence the subtext of escape: The new critical historicism that the Stanford Law Review symposium celebrated was no longer confined to doctrinal history. It was “any approach that unsettles the familiar strategies that we use to tame the past in order to normalize the present.”

On the reading so far, the “arrival” of critical historicism powerfully suggests that the history of law practiced and recognized within the juridical field remains a closed loop. Lawyers write history for their own purposes, whether critical or conventional. The most obvious of those purposes is to use history as a vehicle to commend, defend, reform, replace, or simply argue about, the rules. Within the juridical field, that is, history always ends up, ultimately, as a modality of jurisprudential debate. And jurisprudence, we have seen, is prescriptive. “When it is not pursuing the analytic question of the conditions of legal validity, contemporary jurisprudence is telling us how judges should rule or how regulatory regimes should work.”

Another reading allows a more generous conclusion. Legitimizing “any approach to the past” as long as it unsettles routines, Gordon argues, brings “virtually all history as practiced by modern historians” to bear on law. As such, critical historicism is a break in the trajectory of critical legal-historical scholarship, a departure from its former practices. It opens the juridical field to the whole range of disciplinary practices developed by professional historians, practices noted but as quickly forgotten in CLH’s rapid early 1980s slide from the social to the doctrinal.

But how does “virtually all history”—the monumental? the antiquarian?—

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198. See, e.g., HORWITZ, supra note 169, at 275.
199. Gordon, supra note 98, at 1023.
200. Id. at 1024 (emphasis added).
201. See text at note 18 supra.
203. Gordon, supra note 98, at 1024.
suddenly become critical history? Gordon’s claim for historical practice’s
immanent criticality in the domain of law is founded on the proposition that
professional historians’ purposes and working assumptions are in basic conflict
with those of lawyers. History and law are distinct forms of expertise; historians
and lawyers are distinct breeds of trained intellect. “Lawyers are monists,
historians are pluralists.” That is, “lawyers want to recover a single authoritative
meaning from a past act or practice while historians look for plural, contested, or
ambiguous meanings.” Second, “Lawyers are overtly presentist: they want to bring
past practices into the present to serve present purposes.” Historians are not
interested in presentism, but difference—the dead past, the pastness of the past,
the disparity between past and present, the breaks and “great epistemic shifts” that
render past and present irreducibly discontinuous.\textsuperscript{204}

Both propositions are, I think, open to dispute. It is not difficult to think of
monist histories, nor are they necessarily bad history nor necessarily “uncritical”
because of it. (Can one think of a more monist history than Charles Beard’s
decidedly critical \textit{Economic Interpretation of the Constitution of the United States}?\textsuperscript{205} Nor
is the identification of “history” with “the past” and its “difference” all that
helpful. First, the very idea of a separated “past” is problematic. As Keith Jenkins
observes, following Hayden White, the past as such has no accessible reality, no
rhyme nor rhythm of its own. It is sublime—incomprehensible, uncontrollable,
uncontrolled, disorderly. The past leaves only fragments or remnants that are
already historicized in the very act of their preservation; that is, the remnants exist
only because they are texts—archaeological, documentary, visual—from which
“data” can be extracted and organized into other texts—chronicles and
chronologies and narratives—which impose order and sequence on events and
ideas using theories or assumptions or literary forms or common sense. From this
perspective the past furnishes not history but only material “waiting to be
appropriated with reference to the social formation wherein the appropriations are
being variously legitimated.”\textsuperscript{206} Second, a sizeable proportion of modern history
has in fact been composed in the course of present-minded searches for “usable
pasts.”\textsuperscript{207} Indeed, the creation of histories that purport to explain a current present
is, one assumes, a prime motivation for critical historians. Nor, finally, can the

\textsuperscript{204} Id. at 1024–25.
\textsuperscript{205} \textsc{Charles A. Beard}, \textit{An Economic Interpretation of the Constitution of the United States} (1913).
\textsuperscript{206} \textsc{Jenkins}, supra note 123, at 175–76.
\textsuperscript{207} The concept originated with Van Wyck Brooks. See Van Wyck Brooks, \textit{On Creating a Usable Past}, 64 \textsc{The Dial} 337 (1918). For recent uses see, e.g., \textsc{Toward a Usable Past: Liberty Under State Constitutions} (Paul Finkelman and Stephen E. Gottlieb eds., 2009); \textsc{Restoration and History: The Search for a Usable Environmental Past} (Marcus Hall ed., 2009); Carnegie Council Conference, \textit{The Search for a Usable Past}, http://www.cceia.org/resources/articles_papers_reports/716.html (last visited Sept. 19, 2010). Other examples can be
found at Tomlins, \textit{History}, supra note 26, at 393, note 340.
temporality of history be confined to what’s done with, as if it could be contained. “The past can be seized only as an image which flashes up at the instant it can be recognized. . . . To articulate the past historically . . . means to seize hold of a memory as it flashes up at a moment of danger.”\textsuperscript{208} As Barker has put it, history is the seizure of “that disturbing, critical irruption into the present.”\textsuperscript{209}

So the idea that “virtually all history as practiced by modern historians” is critical when mixed with law seems to me based on a dubious assumption of essentialist—as opposed to political, or strategic, or disciplinary (or all three together)—distinctions between lawyers and historians. History might well have the desired up-ending effect when introduced into legal discourse because to place distinct expertises in apposition will produce dissonance. But dissonance is not critique. History simply produces narratives of stasis and progress that are different from those produced by the expertise of law.

More to the point, how in fact does modernity’s pluralist history, sensible of the past’s pastness, ambiguity, contingency, and so forth actually enliven the project of CLH? After all, the history practiced by virtually all modern historians embraces no expressly critical philosophical purpose: it does not put itself, for example, in the service of “life and action.” Indeed, the opposite. History’s current default definition of its own practice is entirely conventional: sequentialist in time, contextualist in method, and separatist in philosophy. “[I]t is the people of the 1780s, not the people of 2006, that the historian is interested in.”\textsuperscript{210} The expertise of history sequesters past phenomena within a realm of context on the far side of a temporal \textit{cæsura} where—“butterflies on pins”\textsuperscript{211}—they serve no particular purpose at all. There is, that is, nothing necessarily “critical” that history introduces into the legal realm. Far more likely, at the beginning of the twenty-first century, one will simply reproduce professional history’s current preoccupation with complexity\textsuperscript{212}—the production of an infinity of outcomes that will enable one to provide whatever “past” for law one desires, critical or apologetic, antiquarian or heroic.

In fact, Gordon argues that the critical contribution of history is precisely plurality itself. “What is common to many of these approaches is that they treat law—meaning not just legal texts but legal instruments, processes, rituals, interactions, discourses—as cultural artifacts, imaginative constructs, historically contingent and perpetually contested and renegotiated.”\textsuperscript{213} But perpetual

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{208} Walter Benjamin, \textit{Theses on the Philosophy of History}, in \textsc{Walter Benjamin, Illuminations} 253, 255 (Hannah Arendt ed., 1969).
\item\textsuperscript{209} Barker, \textit{infra} note 186, at 108.
\item\textsuperscript{211} Constantin Fasolt, \textit{The Limits of History} 151 (2004).
\item\textsuperscript{212} See text accompanying notes 248–50 \textit{infra}.
\item\textsuperscript{213} Gordon, \textit{infra} note 98, at 1029.
\end{enumerate}
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contingency is really of interest only to the intellectual, the “host of pure thinkers who only look on at life, of knowledge-thirsty individuals whom knowledge alone will satisfy and to whom the accumulation of knowledge is itself the goal.”

What the infinite plurality of modern (post-modern?) historical practice conveys is nothing so much as a new form of burial in the past. Once more “all that has ever been rushes upon mankind”—this time, not as “a science of universal becoming” but as a blizzard of atomized narratives that, all together, create a chaos of relativized possibilities, of happy/unhappy individualities.

Modern (post-modern) historians’ desire to complexify is convivial to critical historicism precisely insofar as it reproduces and spreads wide the totalized contingency prized by the mandarin mode of critical doctrinal history. But unfortunately history that is infinitely interpretable, a history of niches that grants everyone their own history, is not critical history at all, but history dispersed, atomized, neutralized. “Virtually all history” is not a compelling conceptual-organizational structure for the subject. It is an evasion of responsibility, both moral and political, to advance hypotheses, assign priorities, make causal statements, explain outcomes.

Above all, critical history cannot be enlivened by history that is infinitely interpretable because infinite interpretation is a convenient means to overall indifference and forgetfulness. The critical historian’s job is remembrance and explanation. After alternative possibilities have been uncovered, lost voices allowed to speak, contingencies explored and so on, things still come out a certain way. We need to know why. “In ultimate epistemological senses it may [be necessary] to exercise some scepticism about [one’s] own groundedness, but this is quite different from beginning in a programmatic way from that lack of foundation.” Nor should we fear “general statements about the structure and transformation of history which are not rooted for their ‘truth’ . . . in a single and particular historical moment.” The point of such a metanarrative is to disembody ourselves of “the dead weight of the apparent past in order that [we] may remember.”

When at the end of the nineteenth century, shortly before his death, Rudolf von Jhering wrote that legal history “should not content itself with telling what happened, what changes occurred” but that it should discover “the reason, the ‘why,’ of the facts described, and the forces that underlie and determine the changes,” and also the causal relationships “between antecedent and subsequent facts,” between changes and other changes, he was describing a form of history grounded upon explanation. Like Pound, whom he influenced, Jhering wrote as a critic of nineteenth-century historical jurisprudence who was informed by

214. *Nietzsche*, supra note 102, at 77.
215. *Id.*
developments in the kindred disciplines (social science). Unlike Pound, he proposed not a new jurisprudence but a legal history emancipated from law, an independent explanatory discipline of its own. If the energy so evident in the second half of the twentieth century in the substantive conjunction between history and law is to be sustained into the twenty-first century, and especially if the conjunction is to provide the interpretive edge for study of law that CLH sought, an independent explanatory legal history seems essential. There is no need to adopt Jhering’s terms, positing underlying determinative forces, in order to achieve that objective. The world may indeed be “socially constructed” rather than materially “determined.” But that does not make it any the more malleable or objective causal explanation any the less consequential. Social constructions can prove immensely durable.218

If, however, we are to seek an explanatory legal history, we must seek emancipation from the conventions of contemporary history as well as of law. When Nietzsche wrote of humanity’s need for a “rough and charmless” history he meant precisely a history that was not dedicated to the service of pure knowledge. “The superfluous is the enemy of the necessary.”219 At the beginning of the twenty-first century we can justifiably claim that both law and history encompass a great deal more knowledge than a hundred years ago. It is far less clear whether the “more” that is known stands in the service of life.

IV. TOWARD A STRUCTURAL HISTORY OF NATIONAL LEGAL PRACTICES

In Parts 2 and 3 of this article, I have tried to demonstrate that the century of the historical school was followed by a half century of essential irrelevance for history vis-à-vis law, followed by a half century of resurgence, led first by the “externalist” scholarship of Willard Hurst, then by the revived doctrinalism of the Critical Legal Historians. Because these phases coincide roughly with those canvassed in Part I’s synoptic history of the juridical field it makes sense to ask what role history has played as a resource (a practice, a discourse) available for deployment as the juridical field has constituted and reconstituted itself. What does the form of history’s mobilization in the explanatory practices that have sustained or criticized law’s identity and effectivity tell us about each phase of the American juridical field’s development?

History within the juridical field is history within a field of power that sets “the key terms of legitimacy.”220 When Willard Hurst invented modern American legal history, he did so by opening the discipline outward. Robert Gordon first employed his urban metaphor at the Hurstian peak, when he congratulated Hurst

218. As we have seen, CLS/CLH acknowledged this in its early days. See, e.g., Gordon, supra note 79. Later statements, however, placed ever greater stress on the contingency of all social (and historical) phenomena.
219. N IETZSCHE, supra note 102, at 59.
for lowering the drawbridge and “throw[ing] open the gates” of the city to traffic from general historiography. But Hurst, we saw, always thought the tourists needed an official guide, once inside, lest they wander into places they did not belong. Non-lawyers, Hurst said, would be “hampered chiefly by their ignorance, first, of the law’s jargon, and, secondly, of the techniques of reading between the lines so that one does not take more seriously than he should what the law declares.” The phrase “techniques of reading between the lines” is a particularly useful indicator that, for all its openings to the outside, the emphasis in Hurst’s historiography lay on maintaining the whip hand within the field. Such a reading is necessarily entirely subjective—not in other words a matter of technique at all, but art. And so it has remained. Law’s encounters with history reproduce the history of law’s disciplinary encounters in general. Law is receptive to encounters with disciplines that improve its capacity to explain itself, or refine its performance in setting the key terms of legitimacy. Law has shown far less interest in encounters with disciplines that instead intrude upon law’s terms for deployment of power and authority, reading not between the lines but anywhere they like, treating law as a subject, like any other.

Investigation of the uses made of history within the juridical field refines our understanding of the ways in which the American juridical field composes and maintains law, and how in the process it ensures that its actions are perceived as effective and legitimate. In addition, investigation permits self-conscious refinement of history as a critical practice deployable in the enterprise identified by Dezalay and Garth as “explain[ing] the ‘rules for the production of the rules’” which I have embraced as the framework for this article. As Dezalay and Garth put it, “the content and the scope of rules produced to govern the state and the economy cannot be separated from the circumstances of their creation and production.” In America, rules of governance emerge in the course of interaction among distinct discourses, disciplines, and professions, but the interaction is one in which law, besides being a participant, also sets “the key terms of legitimacy.” All those who seek to influence the production of the rules (the process of formation and reformation of the rules that govern state and social action) assume the juridical field’s foundational character as a given. “[T]here is very little effort to explain the ‘rules for the production of the rules.’ Instead, the discourses within the disciplines tend to proceed in a quasi-legalistic mode, describing what the rules should be.” They do not discuss “what makes

221. Gordon, supra note 35, at 54, 55.
222. Garth, supra note 75, at 48 (quoting James Willard Hurst).
223. Dezalay and Garth, supra note 28, at 311.
224. Id. at 307.
225. Id.
226. Id. at 311.
the credibility of law” or “how the law is made.”  They buy into law’s prescriptive discourse and, insofar as they try to do it one better, simply reproduce it.

A different approach is necessary if we are to understand the rules that are produced. It is even more necessary if we are to understand how they are produced—“the production and legitimation of law itself”—for as we have already established, the production of rules is necessarily a process with formative rules of its own. “[T]he circumstances of production shape the range of possibilities that are likely to be contemplated and implemented—or ignored.”

To understand the rules produced, Dezalay and Garth argue, one must “examine their genesis—where they come from, what material was used to create them, and what conflicts were present at the time.” As they acknowledge, this means writing history. It is of course a truism that the law is historical, that current rules are a product of the past, recent or remote—“some ancient statute, or old writing of a court, or in the exposition by one of the old writers, from Glanvil or Bracton to Coke, Hale or Blackstone.” CLH, whatever its failings, successfully debunked that smooth, irreversible, linear temporality. But the history described here is different: inquiry into the rules for the production of the rules is nothing less than inquiry “into the structural history of the creation and production of national legal practices.” The subjects of that inquiry are “national histories and disciplinary evolutions”—the institutional structures within which the production of rules occurs, the methods of research and theories of formation embraced by those who are engaged in rule production, and the networks through which their output becomes influence.

To write this history of the juridical field necessarily includes writing the history of the field’s own legal-historical practices. The history of law has been an intellectual practice largely contained within the boundaries of the juridical field. But history, just like law and the social sciences, is also a mode of research and a theory of formation. History is rarely capable of producing specific rules of governance itself, but it certainly produces discourses of causation that powerfully contextualize the production of rules by others, and thus helps to define the terrain of rule production. History is a particularly powerful resource in the hands of the state and its agents, for it allows them to create broad narratives of necessity and progress to explain their actions, and thereby create a context within which more instrumentalist discourses can safely nest their recommendations.

227. Id. at 311, 312.
228. Id. at 307, 312.
229. Id. at 307.
231. Dezalay and Garth, supra note 28, at 311.
232. Id.
233. As Thomas Bender has written: [I]t was in the nineteenth century that history, as a professional discipline, and the nation,
considering the construction of the rules for the production of the rules, then, it is crucial to pay attention to past uses made of history—legal and general—both as a modality of inquiry into law, and as a resource to which participants in the juridical field have turned to sustain the security and authority—maintain the meta-character—of the juridical field itself.

For the most part in the U.S. case, history written within the juridical field has provided justification for each successive iteration of the field. This was the role played by historical jurisprudence before Langdell, as it was in the case of later nineteenth-century histories of the Anglo-American common law tradition, Pound’s taught legal tradition, Hurst’s socio-legal empiricism, and even Critical Legal Studies’ new doctrinalism. Critical historicism’s embrace of “virtually all” history might, I have conceded, represent a departure, or it might be thought of as just another form of cooptation, or confinement, simply part of the general drift to methodological pluralism that has been the juridical field’s latest (though not uncontested) self-reinvention. Assuredly, history within the juridical field is not merely dutiful in its performances. Multiple perspectives have existed within its overall trajectory. Even those modes of scholarship that have mobilized history for purposes of critique within the juridical field—Hurst’s external paradigm, Critical Legal History—have tended, however, to channel its forms to ensure that they serve internally defined prescriptive purposes.

On the evidence of recent years, legal history outside the juridical field has become more fully attuned to critique than prescription, to the dismantling of processes of rule production so as to reveal “the rules for the production of the rules.” One can argue that this has occurred solely by default. Historians are only rarely members of the community of rule recommenders, although they can of course be found occasionally in the ranks of public intellectuals propagandizing for particular outcomes. The late nineteenth-century reorganization of inquiry did not constitute history as an instrumental social knowledge as it did the social sciences, and little has occurred since to alter that state of affairs. Dezalay and Garth note, following Wallerstein, that “the division of the roles of the disciplines is the product mainly of the nineteenth-century state. Political science thus focuses on national government . . . anthropology focuses on colonial relationships.”

History enjoys no similarly demarcated role. Unable, despite its best efforts, to

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Thomas Bender, *Historians, the Nation and the Plenitude of Narratives, in Rethinking American History in a Global Age* 16 (Thomas Bender ed., 2002).

234. In justifying each successive iteration, each mode of history, of course, is subversive of the previous iteration.

235. See text accompanying note 241 infra.

236. Dezalay and Garth, supra note 28, at 311.
develop a systematic (positivist) prescriptivism of its own, history has been left to choose among mythmaking, sheer description, and interpretation.\(^{237}\) It is perhaps not surprising that, even if only by default, attempts to understand “why law is what it is,” discussion of “what makes the credibility of law,” scrutiny of “the black box that produces the law and more generally the rules of the game for governance,” have an opportunity to creep onto its agenda.\(^{238}\)

V. CONCLUSION: INTERDISCIPLINARITY AND IRVINE’S NEW LAW SCHOOL


delicious. Rough winds do shake the darling buds of May
And summer’s lease hath all too short a date.\(^{239}\)

It remains, finally, to return to the question raised at the end of Part I; that is, to consider what bearing the examination undertaken in this article—of the development of the American juridical field and of the relationship of history to the juridical field—has on the country’s 200th law school and its interdisciplinary project.

One way to understand the UC Irvine School of Law’s definition of its agenda is that it is nothing more than an expression of the most recent set of moves by which law seeks to maintain disciplinary and professional ascendancy vis-à-vis competing forms of expertise over the production of rules, and over the rules for the production of the rules. In the service of maintaining ascendancy, law as discipline has continuously oscillated between seeking modes of intellectual commonality with other disciplines, perceived as useful sources of intellectual and social capital, and fending them off. “Interdisciplinarity” can thus be understood as simply the latest in a set of relationships that over time has facilitated the absorption into the juridical field’s domain of as much disciplinary expertise from outside itself as necessary to sustain law’s overall purpose. Historically, we have seen, the juridical field has always appropriated whatever expertise it needs to survive and regenerate. As Pierre Schlag writes of CLS, for example:

> [P]art of [its] legacy . . . was to broaden the range of intellectual authorities and perspectives consulted in legal education and legal scholarship. Working alongside other tendencies, such as law and literature, law and economics, law and society, feminist jurisprudence, and postmodernism, CLS participated, for a time at least, in a broadening of the intellectual life of American law schools.\(^{240}\)

\(^{237}\) These three genres accord with Nietzsche’s division—the monumental, the antiquarian, and the critical. See NIETZSCHE, supra note 102, and text accompanying notes 114–122 supra.

\(^{238}\) Dezalay and Garth, supra note 28, at 312–13.

\(^{239}\) SHAKESPEARE’S SONNETS 56 (William J. Rolfe ed., 1884).

The interdisciplinary turn, we might conclude, exemplifies simply the adaptation of an old strategy to current conditions.

That interdisciplinarity excites intense opposition within the juridical field—witness, for instance, Robert Ferguson’s leaden contempt for the contemporary academy’s “cant about interdisciplinarity”—does nothing to negate this analysis. Innovators in the field, from Langdell through the realists, through Law & Society, Law & Economics, and CLS, have always aroused vituperation. All have left deep imprints. To cite Schlag once more, the “anti-intellectual regression” of recent years notwithstanding, the various “broadening” tendencies of the past half-century have meant that the American legal academy has become “less parochial and more theoretically sophisticated” than it was in the 1960s and 1970s. “Law and . . .” scholarship has proliferated. So have “dual degree” (J.D./Ph.D.) academics and degree programs, particularly at elite law schools. The result has been “a professionalization of legal scholarship—yielding work of greater methodological rigor.” In other words the juridical field has once again successfully invested in non-juridical expertise, enhanced its professional claims, improved the quality of its product (both scholarly and pedagogical) and, thereby, maintained its rulemaking ascendancy.

When UC Irvine Law articulates its interdisciplinary and public service vision of “the ideal law school for the twenty-first century” it speaks quite precisely the language of legal-professional innovation through investment in expertise and in new areas of rule production for the juridical field to enter. Its claim is that it will do “the best job in the country of training lawyers for the practice of law at the highest levels of the profession” and that it is “uniquely positioned to build a new school that is relevant to law practice and legal scholarship in the twenty-first century and that pushes the frontiers of the profession.” These professional-technocratic claims are married to a very traditional (since Langdell) regime of standards and selectivity:

Drawn from top law schools across the country, UCI Law’s faculty has been ranked ninth in the nation in a recent study of scholarly impact. The law school’s high selectivity enabled it to field an inaugural class of 60 students with a median grade point average and LSAT scores that put it on par with classes at law schools rated in the top twenty in the nation by *U.S. News & World Report*. The 84-member second class, the Class of 2013, has comparable grades and test scores and is equally as impressive. Currently, students enjoy a faculty-to-student ratio of 6 to 1, which

241. Ferguson, *supra* note 193, at 482.
243. *Id.*
ensures small classes and easy access to professors outside the classroom.245

A second, potentially more interesting, way to understand the UCI Law phenomenon is to see it as something more than simply an expression of the juridical field’s passion for the latest in extrinsic \textit{technē} to blend with its intrastructural \textit{poiesis}, and instead situate it at the beginning of the next wave of innovation—which, as a beginning, necessarily has a certain ragged uncertainty to its eventual outcome. To return one more time to Schlag, this time on the distaff side, the past half-century’s “broadening” has excited reactive “regression”—“a return, even in elite institutions, to a prescriptive, largely doctrinal scholarship” that, though methodologically more sophisticated than in the past as a result of law schools’ widened intellectual horizons, nevertheless manifests “a kind of return to ‘scholastic’ irrelevance.”246 UCI Law’s desire to be “relevant to law practice and legal scholarship in the twenty-first century” might hint at a push back against the threat of regression to an irrelevant scholastic mean.247

If so, what direction might that push take? One possibility is simply a redoubled effort to maintain the momentum of indiscriminate “broadening” in the face of “regression.” And indeed, that is more than likely, given the early twenty-first century academy’s preoccupation with “complexity.” Complexity is the current aesthetic not simply in history but across a whole array of fields of study. Its emphases—complete contingency, perpetual contest and continuous renegotiation248—are entirely at one with CLS’s indeterminacy thesis, which is perhaps why Schlag thinks reports of CLS’s death are somewhat exaggerated. “Its ideas . . . remain—an unfinished project, a dissident strain, ready to be activated.”249 Why, though, would one want to reactivate this particular strain? I have already argued that as an intellectual practice, complexity/indeterminacy produces nothing other than more of itself. As a professional legal-academic practice, meanwhile, CLS assisted the juridical field’s self-renewal—which, though it might have been an outcome unintended, does not exactly count as dissidence.250

246. Schlag, supra note 240, at 298.
247. U.C. IRVINE SCH. LAW, supra note 244.
248. See, e.g., Gordon, supra note 98, at 1029.
249. Schlag, supra note 240, at 298.
250. As Robert Gordon wrote in response to Paul Carrington’s polemic against the “nihilism” that CLS represented, “On the whole, CLS people have declined to reduce law to the status simply of an instrument of class or state domination. They believe that the law does contain doctrines and processes that facilitate domination, but also that it contains rules that restrain, and utopian norms and possibilities for argument and action that can liberate people,” and that “[t]he colossal irony of your article is its labeling as ‘nihilists’ the members of this group, who are actually among the most hopeful people around—people who think things really can change for the better and are committed
I have argued that the alternative to complexity is the production of explanation. The default setting for “explanation” in legal studies is actually the original positivist version of “law and . . .” popularized by the early Law & Society movement during the movement’s initial phase outside the juridical field. “Law and . . .” relies on empirical context to situate law as a domain of activity. First mooted at the turn of the twentieth century, encouraged by the realists, “law and . . .” considers law’s most important determinative context to be the social, and the social to be empirically verifiable, such that law is held to be an empirical and social phenomenon. Hence it explains law and legal outcomes through their relations to cognate but distinct domains of action—society, polity, economy, human behavior, and motivation—by parsing the interactions among them.

Though shaken by the era of “critique” that substituted complexity for causal explanation, “law and . . .” was never laid to rest, and in recent years has taken on renewed vigor in the form of two variations on the theme, Empirical Legal Studies (ELS) and New Legal Realism (NLR). ELS and NLR manifest significant differences. According to a recent and authoritative assessment, “ELS's methodological vision is more quantitative than qualitative, more confirmatory than exploratory, and more contemporary than historical.” NLR is eclectic—open “to a wide range of social science methods and theories,” rather than ordaining any particular methodology, and favoring “a ‘ground level up’ perspective” that “embraces qualitative as well as quantitative work.” Where ELS favors “quantitative technique, topical immediacy, and definitive hypothesis testing,” NLR attempts to “balance formal law and context, combine multiple methods, and eschew oversimplifying assumptions.” Their differences notwithstanding, ELS and NLR are united by a common emphasis on empirical research and common claims to a heritage in legal realism and “law and . . .” Though it is perhaps unnecessary to make the point, given the argument of this article, both “are best understood as efforts to legitimate empirical research within the legal academy itself.”

In its Hurstian (pre-critique) mode, legal history also exhibited the influence of “law and . . .” through its resort to synchronic relational metaphors of conjunction/disjunction, to which it added diachronic temporality as a further and essential relational index. Methodologically, legal history in this mode approached phenomena by situating them in temporally discrete empirical contexts (for example, periods), and attempted to reveal the effect of law, or to explain the reality of law, by assessing change over time in law vis-à-vis the contextualizing to changing them!” See Gordon, supra note 77, at 4, 9.

251. Elizabeth Mertz and Mark Suchman, Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism, 6 ANN. REV. LAW SOC. SCI. 555, 558 (2010).
252. Id. at 561–62.
253. Id. at 562–63.
254. Id. at 556.
domain (whether society, polity, or economy) from which it was held relationally distinct. As a participant in the practice of “law and . . .”, legal historical scholarship has broadly relied for its animating problematics upon the same relational hypotheses that at successive moments over the last half-century preoccupied “law and . . .” theory: the autonomy/instrumentalism opposition; the relative autonomy compromise; and more recently the varieties of “constitutive” theorizing, notably legal constitutiveness (law constitutes social processes) and mutual constitutiveness (law is at one and the same time constitutive of and constituted by social processes). Legal history also drew on “law and . . .” scholarship’s matching range of relational characterizations (functionalism, managed conflict, coercion-resistance, legitimation-disruption, agency-disempowerment) and distributive effects (plurality, equilibrium, efficiency, utility). When it comes to the most recent innovations in “law and . . .”—ELS and NLR—legal history generally has more in common with NLR. It exhibits the same methodological eclecticism and the same “emergent style of inquiry, consonant with pragmatism, in which investigators move between theory and empirical research with each informing the other,” and embraces the same “recursive” (mutually influential) relationship between law and society. It is not difficult, however, to imagine legal historical research in conformity with the quantitative, confirmatory emphases of ELS.

Participation in “law and . . .” theorizing has been highly productive in legal-historical scholarship. Still, even though the turn to complexity that resulted from CLS’s critique of “law and . . .” has proven barren, the critique itself was nonetheless devastating. In its default mode, “law and . . .” produced a causally functional and empirical account of law. CLS showed that whatever the realm of action in relation to which law is situated, the outcome was the same—indeterminacy marked by complexity and contingency. Critique did not dispense with the components of the default account (“law” and “society”): that is, it did not produce a new account. It simply made any and every expression of the received account inexpressible in causal or functional terms. The turn away from critique to empiricism represented by ELS and NLR has not resolved this problem, but instead has elided it: essentially, ELS’s “quantitative technique, topical immediacy, and definitive hypothesis testing” reproduce the functionalism of the original default mode; NLR’s attempts to “balance formal law and context, combine multiple methods, and eschew oversimplifying assumptions,” meanwhile, situate NLR not in contradistinction to the fetishization of complexity but actually as a revised expression of it.

Empiricism, in short, will not of itself help us steer past “law and . . .” while

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255. These problematics and relational characterizations are discussed at greater length in Tomlins, How Autonomous, supra note 26.

256. Mertz and Suchman, supra note 251, at 562.
simultaneously avoiding steering into the complexity fetish. An attempt at new theorizing might. Suppose we try dispensing with theory built from the conjunctive metaphors of the relational approach and its (broken) conception of causality and instead reach for different metaphors and the explanatory possibilities they imply. What would they be? One possibility is optical metaphors—that is, metaphors of seeing, of “looking like” (or unlike), of focal length (blurring), of “scope.” Instead of parsing relations between distinct domains of activity, between law and what is extrinsic to it, the objective of optical theory would be to imagine them as the same domain: what do we get if we imagine law and economy (for example) as the same phenomenon—that is, law as economy, or economy as law?257 It is noticeable that we seem to have no difficulty in thinking of law optically in some domains but not in others: for example, law as expertise seems to pose less current conceptual dissonance than law as society.

Complementing theory that starts from optical conceptions is theory that starts from conceptions of scale. As Annelise Riles has written, “an implicit notion of scale—of the difference between large and small—is a crucial foundation for the effect of perspective.”258 Perspective is “a way of looking”259 that both actors and observers can vary according to the results they desire to produce. But, Riles observes, modern knowledge tends to assume that whatever the perspective (for example the global, the local) scale is a constant. What, then, should one make of “movement between levels of scale that itself sometimes collapses scale and sometimes reconstructs it”?260 How does placing scale at the center of our problematic, instead of assuming its constancy, rebound on perspective? Perspective, from the standpoint of modern knowledge, whether conventional or critical, is taken “to be perspective on something, something that itself is not a perspective but rather a kind of raw material for observation,” but once one notes the inconstancy of scale, perspective becomes “its own subject matter . . . the act of viewing and the material that is viewed are one and the same.”261

For purposes of investigation resulting in explanation, finally, scope and scale must be made elements of the same theoretical conjuncture. How? By turning to a revived conception of structure. I have already had resort to structuralist concepts in embracing Bourdieu’s theory of the juridical field and recommending the possibilities inherent in “a structural history of national legal practices.” How, though, avoid the criticism of structuralist theory as merely a static model of motion reliant upon “underlying social forces”?262 By resort to an

257. For one suggestive set of examples, see JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED (1999).
259. Id. at 48.
260. Id. at 50.
261. Id. at 54.
262. See Mariana Valverde, The Sociology of Law as a ‘Means against Struggle Itself,’ 15 SOC. &
older structuralism, notably Walter Benjamin’s notion of constellation which, by allowing us to comprehend structure both imagistically and temporally, inserts history at the very center of theory. Constellation stands for the synchronicity not of objects in time but of objects with time and with their observer, who (as Riles has emphasized) stands at a point of particularity. The point is made in Benjamin’s essay on Eduard Fuchs: “[A]ny consideration of history worthy of being called dialectical . . . [requires the researcher] to abandon the calm, contemplative attitude toward his object in order to become conscious of the critical constellation in which precisely this fragment of the past finds itself with precisely this present.”

Benjamin’s dialectics were devoted not to theoretical mediation of relations among underlying forces but to surfaces and to the construction of representation—“the thread of [allegorical] expression” that created images by conjoining moments. Benjamin’s historical materialism was, hence, “a given experience”—the past in the experience of now:

Every present is determined by those images which are synchronic with it: every now is the moment of a specific recognition. . . . It isn’t that the past casts its light on the present or the present casts its light on the past; rather an image is that in which the past and the present moment flash into a constellation. In other words, image is dialectic at a standstill.

Dialectic at a standstill is the constellation of scope and scale in structure, a non-relational (monadic) theory of representation that creates a distinct and historical account of relationality. That account beckons legal studies in two directions. First, the very tenacity of the conjunctive conceptualizations that underpin both modernity’s “law and . . . ” theorization and its postmodern apothecosis—complexity—lead one to the question, why did differeniation of appearance (of economy, polity) come about? How did they become so powerful? By examining the production of differentiation we are led to questions of purpose and effect. As law came to be distinguished in its appearance from cognate phenomena, what optics, aesthetics, functions, or claims did it take up to further its project, and why? How was its own differentiation represented within or explained by law? Such an agenda suggests that the objective is not to “get rid” of relationality or to challenge the familiar domains of polity, society, and economy, but to discuss whether current relational theorizations have indeed become


265. Benjamin, supra note 263, at 262.

266. BENJAMIN, supra note 264, at 463 para. N3, 1.
insufficient for the purposes of legal history and to explore what other theorizations might offer.

But the legal theorist might also take this theory of representation further, to the point where one imagines law as a system of allegorical representation that completely displaces (renders inaccessible) what is being represented. What would “law and . . .” become if relationality were foreclosed? How would our perspectives on familiar domains change if the economic, the social, the political could be imagined only from and in law? How would law’s familiar cognates appear?

Traveling via critique, we have arrived at an intellectual moment in which, a century after its invention, wide cracks have appeared in the relational perspective on law. Interdisciplinarity stands for a number of possible outcomes in response: simply more of the same (the indiscriminate “broadening”/complexity strand); a refined empiricism (the ELS/NLR strand); or an effort to develop new theory (the “scope/scale/structure” strand). Though the different strands have different implications, whichever strand one follows one is more or less fated to play some kind of role in the perennial quest of the juridical field for self-renewal.

There is a place for history in the development of each of these three strands. It will be clear that I think the third “theorizing” strand has the most to offer. At the turn of the twentieth century, Oliver Wendell Holmes, Jr. and Roscoe Pound substituted society for history as law’s principal signifier as a matter, so to speak, of policy. They fated legal history to become what, in due course, it has indeed become—an account of relationality. Perhaps we have arrived at a juncture at which history can once again undertake to do something more substantial. Perhaps that is why, here at Irvine, history was identified as a central component of the ideal interdisciplinary law school’s intellectual equipment. Or so I like to think.
Orange County Human Rights Association: A New Law Student Group for a New Era

Denisha P. McKenzie and David Rodwin*

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BACKGROUND: THE EXPERIENCES THAT LED THE AUTHORS TO FOUND OCHRA

Denisha P. McKenzie

I was born and raised in South Los Angeles. Growing up, what was happening around me seemed normal: drugs and gangs on every street corner, impoverished families living week to week on welfare checks, decaying schools that did not provide their students with a decent shot at opportunity. Although this was my reality, I somehow managed to see beyond it. I was the first of my mother’s five children to graduate from high school. Four years later, I graduated from one of the top schools in the nation, Tufts University. Though the education I received was invaluable, it was disheartening for me to be the only black student in most of my classes. I soon developed a passion for helping children from similar backgrounds graduate from high school and move on to college.

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During my senior year, I volunteered at an underperforming inner city public school with some of the lowest test scores in the district. I wanted to tell my story to these children so that the environment in which they lived would not lead them to develop the same sense of hopelessness I saw in so many of my friends and peers in South Los Angeles. Looking at their gleaming black faces inside that elementary school auditorium, I saw myself when I was their age. Although we shared similar backgrounds and probably very similar experiences growing up poor and black in the inner city, there was something I had at their age that I would soon learn they did not: I had hopes of attending college, and was determined to surpass my mother’s limited high school education. When I asked the group of fourth and fifth grade students if they thought they could go to college, they all shouted together, “No!” My next question to them was, “Why not?” They shouted back: “It’s too expensive.” “We’re not smart enough.” “My mom didn’t go.” “It’s hard.” “We can’t!”

Despite their youth, these children had settled on expectations of failure. At the end of the day, most people expected them to fail and be siphoned off into the welfare and prison systems that had trapped many of their parents. These children knew it, and no single story could change such a deeply ingrained resignation. I realized then that my own story is an anomaly. This country’s public education system is not set up for poor students to graduate from high school and college, like I did. It is set up for most to fail or barely make it out. Only a small minority will be able to break the chain of intergenerational poverty through higher education. Though I had always wanted to be a teacher, after my experience with those children, I changed course and set my eyes on law school. I wanted to learn more about how and why the public education system came to be structured this way. More than anything, I wanted to give myself the tools to change it.

David Rodwin

After college, I spent about fifteen months volunteering in India. I worked at a vocational training center run by Navsarjan, a Dalit human rights organization. Dalits are India’s “untouchable” castes, and even today they face terrible discrimination, particularly in rural areas. As I watched the graduates of Navsarjan’s training center gain skills that helped to move them from day labor jobs to starting their own businesses, I became interested in the intersection between education and human rights. In order to learn more, I interviewed some of the students at the center about their experiences in primary and secondary school.

The most dramatic story belonged to a young man named Yogesh, who was in the middle of his automobile mechanic course. When I asked Yogesh what he remembered about his village’s primary school, he said, “I didn’t like it. The teachers made me and my friends sit in the back of the classroom because we were Dalits, and the upper-caste students always sat in front. If I was thirsty I had
to walk one-and-a-half kilometers home because the water pot was only for the upper castes. The teachers told the other kids not to touch us because we would pollute them.” And so at the age of eight Yogesh dropped out of the second grade and immediately began to work as a day laborer in construction. His story was not uncommon among Dalit youth. All of the students I interviewed had gone to government schools. Many reported that their teachers were frequently absent, leaving classes of sixty students to play in the schoolyard or try to learn on their own. Because of the poor quality of their education most had failed their standardized high school exams and were forced to drop out and find work.

Navsarjan describes itself as taking a rights-based approach, and that theme is present throughout its work. The organization’s philosophy is based in part on a redefinition of Dalit. Literally meaning oppressed or broken, Dalit is considered a less offensive way to refer to the “untouchable” castes. Navsarjan redefined Dalit as a person who believes in equality, practices equality with all, and fights against inequality. It took several months of thinking about this redefinition before I began to understand its power. Most people would say they believe in equality, but what does it mean to practice equality? How could I really say that I fought inequality? The more broadly I applied the philosophy to myself, the less I seemed to fulfill it. I made several promises to myself then, vowing to alter my attitudes, behaviors, and financial decisions in ways that would make me more of a Dalit. One promise was to dedicate my career to the pursuit of human rights. I looked to Navsarjan as a model, and saw how they combined community education with legal action to foster real social change. I came home determined to follow that model, and saw law school as the next step in building my ability to work for similar change here.

INTRODUCTION

Our paths converged in the first few weeks of school at the University of California, Irvine School of Law. After class one day, a conversation about the privatization of the prison system led to a broader discussion of social justice issues, and our experiences in India and Boston. The discussion revealed a persistent irony: why is something a human rights issue if it happens in India, but a local or domestic issue if it happens in Boston or Los Angeles? We decided to start a law student group dedicated to addressing domestic issues from a larger perspective that would recognize the connections between domestic and international human rights issues.

Unlike civil rights, human rights stem not from the U.S. Constitution—a very old and arguably incomplete document—but from our existence as humans.\(^1\) Now, a decade into the twenty-first century, there is a growing movement to view

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domestic social issues through the prism of human rights. Though the movement has recently gained momentum, its central idea is not a new one. It has been more than forty years, for example, since Dr. Martin Luther King Jr. implored us to broaden our view of rights. “I think it is necessary,” Dr. King said in 1967, “to recognize that we have moved from the era of civil rights to the era of human rights.” In the last years of his life, having witnessed the passage of the 1964 Civil Rights Act, Dr. King shifted his focus from racial segregation to the rights of the poor generally. “If one does not have a job or an income,” he said, “he’s deprived of life; he’s deprived of liberty; and he’s deprived of the pursuit of happiness.” Without a job—without a recognized right to work and without decent wages—one cannot take advantage of desegregated lunch counters. Economic and social rights support civil and political rights, and vice versa; when one is lacking, the other suffers.

We founded the Orange County Human Rights Association (OCHRA) to reflect this larger perspective on domestic social issues. We never considered calling the group the Orange County Civil Rights Association, not just because OCCRA is a more difficult acronym to pronounce, but because many of the social issues we care about—education, affordable housing, fair wages and employment opportunities—transcend civil rights. Law student groups concerned with social and legal change often focus exclusively either on constitutional rights or on a discrete social issue. In contrast, OCHRA addresses both under an interrelated framework of domestic human rights. OCHRA’s strategy is to learn about social issues and their human rights implications, broaden our view of the law to include international sources and insights, and promote student community action.

The purpose of this article is to demonstrate how OCHRA seeks to achieve these goals within the context of a growing domestic human rights movement. In Part I, we discuss how OCHRA reconceives rights in the United States. First, we provide a brief background of human rights in the United States and the recent trend to view domestic issues as human rights issues. Second, we examine how a human rights model could better address educational inequity in this country. In Part II, we focus more specifically on our group and describe what OCHRA has achieved in its infancy by using a domestic human rights model. Finally, in Part III we conclude with a plea for partnership and cooperation in the struggle to achieve Dr. King’s goal of a just and equal society.

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I. RECONCEIVING RIGHTS IN THE UNITED STATES

Our very different life experiences brought us to think about domestic social issues from a human rights perspective. These experiences inspired us to re-imagine what legal education could be for those who want to engage in social transformation. In some ways, OCHRA’s focus on human rights represents a generational shift. Most law professors were educated in a way that divides civil rights law, constitutional law, and international human rights law.  

Given the historic focus of the civil rights movement on domestic strategies and domestic legislation, these divisions are not surprising. Even an innovative law school curriculum can be conventional in some ways, and can limit law students’ understanding of rights. Nevertheless, we believe that legal education should no longer divide the law in this way.

Civil rights law, a mix of statutory and constitutional law, typically comprises its own law school course. The same goes for constitutional law, which necessarily focuses only on the United States. International human rights law is often derided as unenforceable or irrelevant to domestic issues, and is also typically offered as its own course. Though these bodies of law are traditionally fragmented because of the structure of law school curricula, a fuller, more comprehensive perspective on rights would link them together. OCHRA aims to harmonize civil rights law, constitutional law, and international human rights law, supplementing the legal education students receive in the classroom with a human rights perspective on domestic issues. This broader perspective recognizes the legitimacy of positive rights such as education, enlarges “local” issues to issues of international relevance, emphasizes commonalities instead of division, and inspires new strategies of activism.

A. Understanding Human Rights and the Growing Domestic Human Rights Movement

As leaders of OCHRA, we have spent a great deal of time researching and discussing the meaning of human rights, the status of human rights in the United States and internationally, and how OCHRA could use a domestic human rights framework in its approach to addressing social issues. We found that some “law schools have become important incubators of domestic human rights practice, exposing students to the theoretical and practical dimensions of human rights law and connecting domestic students to efforts by foreign counterparts around the world.”

UC Irvine School of Law, which requires all students to take a course on international legal analysis during the spring semester of their first year, is an


6. Id.

7. Scott L. Cummings, The Internationalization of Public Interest Law, 57 DUKE L.J. 891, 975 (2008).
example of such a law school. For legal education to continue to evolve and transcend the insularity of the past, it must begin to synthesize civil rights, constitutional rights, and international human rights.

Today, the term “human rights” has entered the mainstream discourse of rights in the United States, and is referenced by both local community activists and the U.S. Supreme Court. In order to fully explain OCHRA’s philosophy and approach, and to demonstrate more clearly how human rights can serve as an organizing principle for legal education and social activism, it is worth providing some context on the development of rights in the United States and internationally, and the growing movement to view domestic social issues through the lens of human rights.

People tend to speak of human rights with a general sense of the term’s power but without a concrete or common definition. Louis Henkin, the great international law scholar often referred to as “the father of human rights,” provided what is perhaps the clearest and most complete definition:

> Every human being has, or is entitled to have, ‘rights’—legitimate, valid, justified claims—upon his or her society; claims to various ‘goods’ and benefits. Human rights are not some abstract, inchoate ‘good’; they are defined, particular claims listed in international instruments such as the Universal Declaration of Human Rights and other major conventions. They are those benefits deemed essential for individual well-being, dignity, and fulfillment, and that reflect a common sense of justice, fairness, and decency.

This definition provides the basis for our discussion.

The United States, with France, maintains the distinction of having “launched the idea of rights.” However, although the Bill of Rights was revolutionary in the civil and political protections it recognized, it is hardly a complete enumeration of rights. Further, the Constitution’s conception of rights is limited to restrictions on government action, and therefore ignores economic and social rights. In American constitutional jurisprudence, individual rights are traditionally conceived of only as “immunities,” as limitations on what government might do to the individual. Human rights, on the other hand, include

10. HENKIN, supra note 1, at 2.
11. Id. at 1.
12. Id. at 111.
13. Id. at 2.
14. Though the economic and social protections brought about by Franklin Delano
not only these negative “immunity claims” but also positive “resource claims” that
speak to what society is deemed required to do for the individual. They include
liberties such as freedom from (for example, detention, torture), and freedom to
(speak, assemble); they include also the right to food, housing, and other basic
human needs. These negative immunity claims and positive resource claims are
often referred to simply as negative rights and positive rights. Because of the
Constitution’s focus on negative rights, law school education generally frames its
conception of rights as restrictions instead of obligations.

One definition of civil rights is “the guarantees contained in constitutional or
statutory provisions designed to prevent discrimination in the treatment of a
person by reason of his race, color, religion, or previous condition of servitude.”
A more expansive understanding of civil and political rights would include, among
other things, freedoms of speech and worship, and rights to vote and to due
process of law. However, human rights extend beyond political guarantees and
prevention of discrimination into the realm of positive rights and affirmative
duties: to educate, to provide decent wages, and to guarantee housing and food.
The civil rights discourse is therefore inherently limited by the reach of civil rights.

Social activists have long struggled to incorporate a human rights framework
in addressing domestic social issues. In the last ten to twenty years, however, a
number of activists and non-profits have shifted their discourse and strategies to
the United States in recognition that a human rights perspective can advance
social justice domestically, not just internationally. This “new politics of social
justice” is “one that favors multi- over single-issue work; that understands

Roosevelt’s New Deal were significant and have “near Constitutional sturdiness,” they have not
tentered the Constitution. CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED
REVOLUTION AND WHY WE NEED IT MORE THAN EVER 63 (2004).

15. HENKIN, supra note 1, at 2.

16. Steven J. Heyman, Topics in Jurisprudence: Positive and Negative Liberty, 68 CHI.-KENT L. REV.

17. BALLENTINE’S LAW DICTIONARY, 204 (3d ed. 1969).


19. The U.S. has been hesitant to ratify international human rights conventions, and attaches
very restrictive Reservations, Understandings and Declarations (RUDs) to those conventions it does
ratify. If RUDs have made it difficult to enforce international human rights law in U.S. and
international courts, cries of treason during the Cold War era made it difficult to use human rights in
appeals to morality and conscience. Due in part to the inclusion of economic and social rights under
the umbrella of human rights, many in the U.S. attempted, with a great degree of success, to “depict
human rights as communist, Soviet-inspired, and treasonous.” CAROL ANDERSON, EYES OFF THE
PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS,
1944–1955 273 (2003). As a result, activists felt compelled to “retreat to the haven of civil rights,”
rather than risk losing all popular support. Id. Such hostility towards human rights partially explains
why Dr. King's push to move into the era of human rights was not embraced by the civil rights
movement as a whole. Unfortunately, the “poisonous effect of these attempts to equate
internationalism with subversion or treason lingers to this day.” CLOSE TO HOME, supra note 2 at 8.

20. See generally CLOSE TO HOME, supra note 2.
discrimination in terms of compound rather than singular identities; that conceives of rights holistically rather than in terms of outmoded hierarchies; and, finally, that situates those most affected at the center of advocacy.  

Significantly, the human rights framework provides a common, accessible vocabulary and perspective to lawyers and community activists.

In the United States, human rights strategies are entering what used to be purely domestic movements focused on purely domestic tactics. In contrast to the “insularity of public interest law during the civil rights era, [human rights] movements suggest that American lawyers now perceive that the rest of the world has political lessons to teach and legal models to emulate.” Though this strategic shift “represents the optimism of the international human rights movement,” it is “also a pragmatic acknowledgment of the limits of domestic law to produce political change at home.”

Slowly, the U.S. Supreme Court has begun to include international human rights law in its analysis, particularly in Eighth Amendment cases. In Atkins v. Virginia, the 2002 decision that outlawed execution of mentally retarded criminals, the Court referred in a footnote to the overwhelming international disapproval of the practice. A year later, the Court struck down a criminal sodomy statute in Lawrence v. Texas, citing a decision by the European Court of Human Rights as evidence of wider acceptance of the right of homosexual adults to engage in “intimate, consensual conduct.” With Lawrence, international human rights moved from a footnote to the body of the majority opinion. In the 2005 case of Roper v. Simmons, the Court prohibited the execution of individuals who were younger than eighteen at the time of their capital offense. In its decision, the Court included a longer discussion of human rights law, even referencing the Convention on the Rights of the Child. The Court justified this discussion by asserting that, “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.” Most recently, the Court concluded in Graham v. Florida that for juvenile non-homicide offenders, life sentences without the possibility of parole violate the Eighth Amendment.

21. Id. at 7.
22. Cummings, supra note 7, at 1035.
23. Id. at 970.
24. Not all members of the Court have embraced this change. Justice Scalia has been particularly vociferous in his displeasure. See Roper v. Simmons, 543 U.S. 551, 622–623 (2005) (Scalia, J., dissenting).
28. Id. at 578.
Graham, the Court again referenced the Convention on the Rights of the Child, along with other international law, as evidence that the United States was an outlier in allowing such sentences. Perhaps the Supreme Court, despite its current status as “the most conservative Court since the mid-1930s,” has recognized the inevitable influence of human rights on our domestic laws.

In addition, some local jurisdictions have implemented major human rights conventions even in the absence of U.S. ratification or federal implementation. San Francisco, for example, was the first city in the United States to implement, by local ordinance, the Convention on the Elimination of All Forms of Discrimination Against Women in 1998; a number of other cities, counties, and states have followed suit.

Further, legal scholars have taken to questioning the consistency of U.S. human rights policy with increasing frequency and volume. Among many observations, they have criticized the hypocrisy of applying human rights standards abroad and refusing to apply them domestically. They have argued against the crippling Reservations, Understandings, and Declarations (RUDs) that the United States attaches to the human rights treaties it does ratify. And they have pointed out the irony that the Alien Tort Statute permits aliens to bring actions in U.S. courts under international human rights law, whereas U.S. nationals have no such recourse. Perhaps the growth of a human rights movement in the United States is evidence that it is no longer considered treasonous to link domestic social issues to human rights norms.

B. The Example of Education

Though international law understands education to be a human right, the...
U.S. Supreme Court does not view it as a constitutional right.\textsuperscript{39} It seems clear that a shift from a civil rights context to a human rights framework could change the concept of education and the quality of public education in the United States. This human rights approach to education could allow students to see beyond the Supreme Court’s interpretation of a right to education, and would provide a more expansive perspective on what the right to education includes and what strategies are best to achieve that right. Solidifying the status of education in the United States as a human right would, for example, “raise it above discretionary consideration” so that it is not “subject to partisan shifts and political whims,”\textsuperscript{40} and allow activists a more effective legal tool to challenge substandard education.

The Supreme Court’s treatment of equality in education has been relatively weak; initial strides were promptly followed by crippling retreats.\textsuperscript{41} Perhaps most significantly, the Court held in \textit{San Antonio Independent School District v. Rodriguez} that a school-financing system based on local property taxes—one that funded schools based on the value of property in the school district—was not a violation of the equal protection clause of the Fourteenth Amendment, essentially declaring that the Constitution provides no fundamental right to an adequate education.\textsuperscript{42} This decision has proven so influential and expansive that it has been called the “death knell for the idea that the Constitution protects social and economic rights.”\textsuperscript{43} In \textit{Plyler v. Doe}, the Court struck down a Texas statute banning public education for undocumented immigrant children.\textsuperscript{44} Though \textit{Plyler} makes clear that once the government undertakes to provide education it cannot discriminate regarding overall admission, we are left with the irony that the Constitution prevents schools from denying undocumented children access to education, but does not ensure that the education provided is adequate.

Today, constitutional jurisprudence has moved from an era of “separate but

\begin{itemize}
  \item \textsuperscript{41} See, e.g., Milliken v. Bradley, 433 U.S. 267 (1977) (undermining the Court’s decision in Brown v. Board of Education, 347 U.S. 483 (1954), which held that “separate but equal” is unconstitutional and inherently unfair because it promotes a sense of inferiority and diminishes a child’s motivation to learn and that inter-school district remedies to eradicate segregation are impermissible); Bd. of Ed. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237 (1991) (undermining the Court’s decision in \textit{Brown} even further, by concluding that minimal attempts to desegregate were sufficient to meet the “all deliberate speed” requirement); Gratz v. Bollinger, 539 U.S. 244 (2003) (undermining the Court’s acknowledgment in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), that diversity in the classroom is a compelling interest, thus severely limiting the ability of higher education institutions to effectively promote a racially diverse classroom and provide disadvantaged students with the opportunity to attend college).
  \item \textsuperscript{42} San Antonio Indep. Sch. Dist., 411 U.S. 1.
  \item \textsuperscript{43} SUNSTEIN, supra note 14, at 165.
  \item \textsuperscript{44} Plyler v. Doe, 457 U.S. 202 (1982).
\end{itemize}
equal”45 to an era where diversity is embraced, yet separate and unequal conditions persist. A number of scholars have argued that the Supreme Court’s treatment of education over the past several decades tends to reinforce the status quo instead of embodying the true equal citizenship envisioned by the post-Civil War Amendments.46 In The Conservative Assault on the Constitution, Dean Erwin Chemerinsky demonstrates that our nation’s public education system is even more segregated now than it was during the era before Brown v. Board of Education.47 Schools in Washington, D.C. and Detroit, for example, have large populations of Black and Hispanic students: ninety-four percent and ninety-six percent, respectively.48 In the absence of a federal right to education, startling inequality has persisted.49 Clearly, neither the Constitution nor the laws enforcing civil rights have adequately addressed the structural inequalities in our educational system.

Human rights law, specifically the International Covenant on Economic, Social and Cultural Rights (ICESCR), could provide a way forward. The ICESCR is a multilateral treaty adopted by the United Nations General Assembly in December 1966, and in force since January 1976.50 The purpose of the ICESCR, which is monitored by the UN Committee on Economic, Social and Cultural Rights, is to provide for the gradual realization of rights to health, work, an adequate standard of living and education.51 Because countries are at different

49. A 2010 study by the National Center for Education Statistics demonstrates that students who attend high-poverty schools are more likely to do poorly in math and reading and less likely to attend a four-year college. ROBERT STILLWELL, NATIONAL CENTER FOR EDUCATION STATISTICS, PUBLIC SCHOOL GRADUATES AND DROPOUTS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2007–2008 (2010). The National Center for Education Statistics is the statistical center of the Institute of Education Sciences in the U.S. Department of Education). African American and Latino children are more likely to attend high-poverty schools, because more African Americans and Latinos in the U.S. live in poverty. For instance, in California, a state with one of the highest childhood poverty rates, twenty-seven percent of Black and Latino children live in poverty compared to the statewide average of nineteen percent. LOIS M. DAVIS ET AL., RAND HEALTH, REPARABLE HARM: ASSESSING AND ADDRESSING DISPARITIES FACED BY BOYS AND MEN OF COLOR IN CALIFORNIA, 13 (2009). Consequently, African Americans in California above the age of twenty-five are now twice as likely as Whites to be without a high school diploma. Id. at 18. The effects are even more drastic for Latinos, who, as a group, are seven times more likely to be without a high school diploma. Id. Further, instead of graduating from high school and moving on to college, African Americans and Latinos face incarceration at an increasingly alarming rate. Id.
50. ICESCR, supra note 38.
51. Id.
stages of development and the ability to fulfill many of the rights in the ICESCR depends on available financial resources, fulfillment of the treaty’s goals will necessarily vary by country. Nevertheless, unlike many international treaties, the ICESCR allows for progressive realization of its provisions based on each nation’s financial resources.

In sharp contrast to the U.S. Supreme Court’s holding in *San Antonio*, Article 13 of the ICESCR recognizes a universal right to education. Under the treaty, education should serve as a means to promote “the full development of the human personality and the sense of its dignity, and . . . strengthen the respect for human rights and fundamental freedoms.” The treaty further recognizes that education is essential to enable full participation in a free society, promoting understanding, tolerance, and friendship among all nations for the maintenance of peace.

The ICESCR provides a list of provisions necessary to realize the right to education. The nation should provide compulsory and free primary education, or develop a plan within two years to provide this right if primary education is unavailable at the time a nation becomes a party. The nation should guarantee “the right to a generally available secondary education in all its forms, including technical and vocational training,” as well as accessible higher education. Parties are encouraged to aim for the progressive introduction of free secondary and higher education. Parents also have a right to choose schools for their children, outside of public institutions, which match their own religious and moral convictions. Although the United States does provide free primary and secondary education, U.S. policy has failed to remedy severe, longstanding educational inequality, much of which results from funding schemes that reward students in wealthier areas with better-funded public schools.

In General Comment 13, the U.N. Committee on Economic, Social and Cultural Rights interpreted the right to education in ways that could eradicate historically discriminatory educational policies in the United States. There, the committee stated that Article 13 obligated, first, the prohibition of discrimination

52. *Id.*
53. *Id.* at 7.
54. *Id.*
55. *Id.*
56. *Id.* at 8.
57. *Id.* at 7.
58. *Id.*
59. *Id.*
60. *Id.*
in all aspects of education;\textsuperscript{62} second, the promotion of de facto equality in education through temporary remedial measures, not to be construed as a violation of the right of non-discrimination so long as the measures taken are not continued beyond the period necessary to effectuate equality;\textsuperscript{63} third, a mandate to monitor educational policies, institutions, programs, spending patterns, and other practices in order to identify and redress de facto discrimination;\textsuperscript{64} fourth, the provision of culturally appropriate and good quality curricula, teaching, and educational objectives;\textsuperscript{65} and fifth, the responsibility to enhance equality of educational access for individuals from disadvantaged groups.\textsuperscript{66}

In these comments, the Committee enshrined principles that many civil rights advocates in the U.S. have been fighting to achieve for decades. The comments make clear some of the ways in which the U.S. would benefit from adherence to the ICESCR. For example, the U.S. would likely be responsible for remedying de facto discrimination that results from unequal spending patterns, such as the funding of public schools based on district property taxes. Although it is obvious that inequitable school funding leads to inequitable education, the funding of schools based on local property taxes has persisted.\textsuperscript{67} Under the ICESCR, such funding practices are unacceptable.

The ICESCR directly confronts a number of laws and policies that have allowed social inequities in education and in other areas to continue for generations. OCHRA strives to educate students about such international sources of law to provide a broader understanding of potential domestic strategies. Even if the United States does not ratify the ICESCR and other international treaties, studying them as a model can provide domestic activists with additional tools and strategies. A curriculum that treats international human rights law as an essential part of understanding rights would allow students to access these tools and strategies.

II. OCHRA’S APPLICATION OF A DOMESTIC HUMAN RIGHTS MODEL

OCHRA is a student group dedicated to addressing social issues from a human rights perspective. A student group using this model must be able to demonstrate why a particular social issue impacts human dignity and, thus, should be protected as a human right. The group must also give students the opportunity to learn about the domestic and human rights laws that relate to a particular social


\textsuperscript{63} Id. at ¶ 32.

\textsuperscript{64} Id. at ¶ 37.

\textsuperscript{65} Id. at ¶ 6(c).

\textsuperscript{66} Id. at ¶ 26.

issue. Finally, the group must provide a way for students to engage with the issue through direct service and activism. In this section, we intend to demonstrate specifically how OCHRA has tried to achieve these goals in its first year at UCI School of Law.

OCHRA focuses on three components to every issue we address: the issue itself, its connection to human rights, and how we can engage with the issue in our community. OCHRA holds issue-based events to educate ourselves and others about specific domestic issues, and how they can be viewed through a prism of human rights. Students choose the topics for each OCHRA event. From there, the proposed topic, such as education, immigration, or criminal justice, is narrowed down to a discrete issue within that topic, such as the school-to-prison pipeline, prospects for immigration reform during the Obama administration, or disparities in criminal sentencing. OCHRA then researches the relevant human rights law and provides students with a summary of that information at the event. Lastly, OCHRA strives to get students involved within the communities affected by the social issue to further our understanding. This community engagement has the added benefit of countering the isolation typical of law students focused solely on their studies.

OCHRA’s final event of its first year, “Police Misconduct and Community Strategies for Justice,” serves as a case study of this philosophy in action. The event focused on the killing of Oscar Grant by Bay Area Rapid Transit officer Johannes Mehserle while Grant was lying face down on a train platform. Though Mehserle was recently found guilty of involuntary manslaughter and has been sentenced to two years in prison, at the time, his trial had yet to begin.68 The event consisted of a panel discussion attended by Wanda Johnson, mother of Oscar Grant; Minister Keith Muhammad, a family spokesperson and community activist; Jack Bryson, father of Nigel and Jacky Bryson (two of Mr. Grant’s friends who were with him the night he was killed); and Jamon Hicks, an attorney at the Cochran Firm with extensive experience in police misconduct litigation. After this event, a number of people contacted us to describe how they became involved in the efforts to ensure that Oscar Grant’s murderer was brought to justice. In addition, UC Irvine students increased awareness by speaking to friends and family members who were not aware of this particular case and the issues underlying the tragedy. Finally, students and others affected by this event further increased community awareness and broadened the impact of this event by participating in rallies on behalf of the Grant family, and making a commitment to serve on juries to ensure that legal decisions include their new perspectives.

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Though OCHRA organized the event, we sought out diverse co-sponsors, including the Black Law Society, the Radical Student Union, the Black Student Union, Flying Sams, the Public Health Law Brigades, and SAGE Scholars. None of these organizations view police misconduct, or the Oscar Grant tragedy, in precisely the same way. Because the issue was framed as a human rights issue, however, these organizations could come together with the shared recognition that nobody deserves Oscar Grant’s fate.

So far, the main source of our community engagement component has come from working with two extremely vulnerable populations: children and the homeless. Following an OCHRA event entitled “Homeless in Los Angeles,” OCHRA partnered with the Medical Initiative Against Homelessness, a student organization run by UCI medical students, to tutor homeless children temporarily staying with their families at a local motor inn. These tutoring sessions connect UCI law students to the community while teaching us about homelessness and poverty in ways that scholarly articles cannot. Future plans include touring the Los Angeles County Jail and developing relationships with local schools.

An added benefit of a human rights framework is that it allows OCHRA to address multiple social issues while avoiding the divisiveness of identity politics. From the beginning, OCHRA aspired to be a student group that welcomed all students regardless of background or ideology. Because OCHRA is not based on a particular identity, it allows individuals to bring together their perspectives and experiences on common ground.

OCHRA focuses on a variety of social justice issues because the issues connect to each other. Domestic violence can relate to immigration, which can relate to education, which can relate to voting rights, poverty, and employment. As OCHRA organized and co-sponsored events throughout the year on topics ranging from criminal sentencing to immigration to California’s ban on gay marriage, we collaborated with a number of different graduate and undergraduate student groups, each of which had its own agenda and identity. Identity-based groups can advance a movement around a particular social issue by organizing and galvanizing affected individuals. However, such groups tend to fall short of having a larger, sustained impact because they frequently divide. OCHRA recognizes that social change is simply more probable and more sustainable when individuals beyond just those most directly affected by a particular social issue can understand the problems and participate in the solution.

III. Conclusion

Dr. King declared, “true compassion is more than flinging a coin to a beggar; it comes [when we are able] to see that an edifice which produces beggars needs restructuring.” Indeed, many of the social problems in the United States are a

69. Martin Luther King, Jr., Beyond Vietnam—A Time to Break Silence, AMERICAN RHETORIC
result of systematic inequities. We believe that looking at these problems from a human rights perspective can help us see and combat those inequities. We are all human, and as human beings we all have a stake in ensuring that every individual receives the rights to which he or she is entitled. When one speaks of something as a human rights issue, it becomes more difficult to dismiss it as merely a local issue of local concern. A human rights perspective exposes local issues as symptoms of a larger human rights violation common across identity-based and geographic borders. The discrimination the Dalits face in India, for example, has been compared to the discrimination African Americans face in the United States.\textsuperscript{70} The comparison is not perfect; caste is not race, and India is not the United States. Nevertheless, such comparisons are useful because they enlarge the issue from something singular and domestic to something widespread and international. This larger view allows us to see local issues in a new light. Learning about India’s underfunded and notoriously poor-quality public schools—and the students whose poverty leaves them with no choice but to attend them—can make us think differently about our own public school system.

Our hope is that OCHRA will help law students and others see that a local issue can be more than just a local problem, and indeed can be a human rights violation. We want OCHRA to complement UC Irvine School of Law’s curriculum by providing a view of the law’s effect on the poor and vulnerable. In the process, we hope to challenge the ignorance and change the institutions that perpetuate societal inequality. We welcome ideas and proposals for collaboration from any who are interested in pushing for the change envisioned by Dr. King. The age of human rights is here, and we must work together to make sure those rights are truly a reality for all.