

3-2007

Taking Law and _____ Really Seriously: Before, During and after "The Law"

Carrie Menkel-Meadow

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Recommended Citation

Carrie Menkel-Meadow, Taking Law and _____ Really Seriously: Before, During and after "The Law", 60 *Vanderbilt Law Review* 555 (2019)

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Taking Law and _____ Really Seriously: Before, During and after “The Law”

*Carrie Menkel-Meadow**

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* A.B. Chettle, Jr. Professor of Law, Dispute Resolution and Civil Procedure, Georgetown University Law Center. For useful comments and discussions about some of the ideas presented here I thank Louis Michael Seidman, Paul Horwitz, Jack Schlegel, Chris Guthrie, Ed Rubin, Nick Zeppos and other commentators at the symposium at which this paper was first presented at Vanderbilt. As always, when I think and write about legal education, I need to thank my teaching mentor, David Filvaroff, and my colleagues and friends, of several decades, in the Law and Society movement. As someone who considers herself to have participated in many attempts to reform legal education, from clinical education, Critical Legal Studies, Legal Feminism, law and literature and popular culture, to “alternative” dispute resolution, and now international and comparative law perspectives, I like to think, like my British intellectual mentor William Twining thinks, that law is a study of intellectual rigor, involving both theory and practice, that teaches “skepticism of all forms of dogma.” See, e.g., WILLIAM TWINING, LAW IN CONTEXT: ENLARGING A DISCIPLINE 8 (1997); WILLIAM TWINING, THE GREAT JURISTIC BAZAAR (2002).

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I. INTRODUCTION: THREE THOUGHT EXPERIMENTS ABOUT LAW AND LEGAL EDUCATION

A. What Is "Law" as a Field?

Any consideration of what legal education should consist of must begin with the question of what "law," as a field of study, is. Whether a study of "the law" is science, philosophy, political science, or a field unto itself, or is more like a social science study of the norms and behaviors that human beings create and enforce for their self-governance, what the field is should have something to do with how it is studied.

So, one can ask, what is the object of study when one studies "the law"? Court decisions and interpretations (doctrine) and statutes and regulations (the rules) are "the substantive law" one could study. Or, one could study law's processes ("adjectival" law): procedure; constitutionalism (as in separation of powers, limited and specified authority, and federalism); institutional competence; law-making (legislation, administrative regulation, lobbying, advocacy); or enforcement and compliance (the "law in action"). Then there are the hermeneutics, or interpretative study, of law's meaning(s). To get at more root matters, one could study why there is law and what its purpose is (or should be)—the jurisprudence or theory of law.

Even after defining the field of law one would still have to ask whether this field has a particular method of study that qualifies it to be called a discipline. Is law the study of the particular method of legal reasoning,¹ which relies on precedents and rules of cases, differentiation of facts, policy analysis, and use of analogical reason to

1. See generally EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949) (positing the theory that law is the method of legal reasoning mentioned above).

arrive at statements of what the law is? Does one treat law as the study of texts (as a humanistic discipline)? As the study of predictions or principles of social allocation (law and economics)? Or as predictions or descriptions of the actions of social institutions, legal actors, or the acted upon (socio-legal studies)?

Or is law merely a practice or activity, without any particular disciplinary or field boundaries? Law would then be simply all that lawyers *do*.² Or, in Holmesian terms, the law would be only what the law does to those who violate it—the sanctions imposed on “bad men.”³

Or, as this paper will suggest, perhaps there is no one way to see and study this elephant.⁴ Rather, the study of law is itself necessarily a multi-disciplinary enterprise, borrowing from or using the insights, methods, and canons of other fields to tell us about how we govern ourselves. As one sociologist of law has urged, when admonishing us to consider law and legal institutions from outside the categories that lawyers make: “[L]aw is to be understood in terms of social theory. Legal theory is to be seen as a particular branch or application of social theory.”⁵

Law is created by human beings to govern themselves, to create order and social control, and, at its best, to provide justice. So, in my view, to study how law is made, interpreted, complied with, enforced, or resisted, is to study how law is experienced—by those who make and interpret law, by those who use it and advise others how to use it, and by those who are acted upon by law. To study experience we need not only logic (apologies to Oliver Wendell Holmes, Jr.⁶) but also social science, including statistics (numbers), narrative (words), and empathic understanding, as well as all of their constituent disciplines. This means that law is at least partially a “derivative”

2. Despite my own background in clinical education and the practice of law, this notion of law as only practice or activity was suggested to me by a philosopher of law. Karl Llewellyn classically described the law as “what . . . officials do about disputes.” KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 3 (1951). The study of professional practice has itself become a “field.” See, e.g., PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* (1992); DONALD SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983); Herbert Kritzer, *Toward a Theorization of Craft*, (Symposium on *Judgcraft*, forthcoming).

3. ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 138-39 (2000).

4. VARIOUS SECTARIANS FROM THE UDANA: INSPIRED UTTERANCES OF THE BUDDHA (John D. Ireland trans.) (1997), available at <http://www.accesstoinsight.org/tipitaka/kn/ud/ud.6.04.irel.html> (Buddhist folktale about the description of an elephant by nine blind men, all “seeing” different parts of the animal in their descriptions of what makes an elephant.).

5. ROGER COTTERREL, *LAW'S COMMUNITY* 77 (1995).

6. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown & Co. 1990) (1881) (“The life of the law has not been logic: it has been experience.”); see also Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897); William W. Fisher III, *Interpreting Holmes*, 110 HARV. L. REV. 1010 (1997) (on the 100th anniversary of *The Path of the Law*).

field, requiring study of other disciplines that provide methods and ideas with which to understand and evaluate it.⁷

*B. What "Ideas" Has Law Generated as a Field?*⁸

If law claims to be a field, what ideas has it uniquely or originally contributed to human knowledge? Do "due process," or "rules of evidence and proof," or "the rule against perpetuities," or "American Constitutionalism" (separation of powers, judicial review, federalism), or even basic notions of fairness, constitute original insights of law as a discipline?⁹ Or are all of these ideas derivative of political philosophy? Certainly, transaction costs (the Coase theorem), efficiency, and the deterrence effects of sanctions are all derived from economics or sociology. Has law, as a field, contributed anything new to what we know? Can you think of any new ideas that are peculiarly legal?¹⁰ Does a field have to generate ideas to be a discipline?¹¹ Must it have a distinctive method of inquiry? Of validation?

If law is rather a practice or activity—a way of organizing human behavior in furtherance of some important human goals, like justice, peace, or order—has it created particular forms or ideas of practice, for example, the trial, the contract, the interrogatory? As an arena of professional practice, one can ask is law more or less a field than medicine or engineering or architecture (which are practices based on the derivative teachings of science) or ministry (which is a practice based on the derivative teachings of theology)? Is law as a practice a "creative art," like other forms of performance? Is making a good argument the equivalent of composing a symphony, or more like successfully completing a difficult *pas de deux*?

7. For another discussion of this question of whether law is a field or discipline and how it should be studied, see PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999).

8. I am not the first to ask these sorts of questions. See, e.g., WILLIAM TWINING, *LAW IN CONTEXT: ENLARGING A DISCIPLINE* 339-53 (1997).

9. For my own examples of "creative" insights and new ideas in law see Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education*, 6 HARV. NEGOT. L. REV. 97, 124-35 (2001).

10. In this symposium Ernest Weinrib argues that such concepts as liability (and "proximate causation") and contract are such particularly "legal" and original concepts and that legal thinking is a particular and distinct form of method. See Ernest Weinrib, *Can Law Survive Legal Education?*, 60 VAND. L. REV. 401, 437-38 (2007).

11. In cultural terms, we can think of ideas, like genes, as "memes" or units of transferable cultural notions and practices. See, e.g., MIHALY CSIKSZENTMIHALYI, *CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION* 7 (1996); HOWARD GARDNER, *INTELLIGENCE REFRAMED: MULTIPLE INTELLIGENCES FOR THE 21ST CENTURY* 82 (1999).

C. What is the Purpose of Legal Education in Relation to the Above?

If law does generate its own ideas and observations about human behavior and practices, then at least one purpose of legal education is the production of knowledge about law and its practice through study and research into "new" ideas about law. How should legal education be structured to bring out the best (most accurate or robust) ideas about law? How does one do "research" in the new ideas of law? How does one combine the transmittal of known ideas and practices with the development of new ones?

If law is not a discipline unto itself, but merely transmits the relevant knowledge required for its use or practice, how should that knowledge regarding law itself be transmitted: by Langdellian induction of principles through reading cases;¹² by parsing of statutes according to the canons of statutory construction; by simulated experiences of lawyers doing client advising, advocacy, negotiating, or lobbying? What forms of training or teaching are appropriate for students to learn how to "think," "act," or "do" like a lawyer, or as one sage commentator has noted, how to think about doing?¹³

Is there such a thing, in the modern world, as acting or thinking like "a" lawyer? Aren't there too many different forms of legal practice to construct a generalizable or uniform idea of "a" lawyer for educational purposes?

How is law used in modern society? Is legal education only for practicing lawyers, judges, or theorizing legal academics, or should legal education be thought of more broadly (as in many non-American settings) as basic civic knowledge or education about the rules and institutions that govern one's life? And what should would-be lawyers learn about the impact of law and legal institutions on society? What difference do law, legal institutions, and lawyers make?

However you have answered these questions or thought about these issues, I want to suggest that the modern and rigorous study of

12. Thomas Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); see also LEVI, *supra* note 1, at 27; LLEWELLYN, *supra* note 2; Bruce Kimball, *The Langdell Problem: Historicizing the Century of Historiography*, 22 LAW & HIST. REV. 277 (2004) (reviewing the distortions and inaccuracies in Langdell's legacy as described in succeeding generations of scholars and commentators); Bruce Kimball, *Warn Students That I Entertain Heretical Opinions Which They Are Not To Take as Law: The Inception of the Case Method Teaching in the Early Classrooms of the Early C.C. Langdell 1870-1883*, 17 LAW & HIST. REV. 57 (1999).

13. Or as Professor Twining so eloquently puts it, "know-what (knowledge), know-why (theory) and know-how (skills)." See TWINING, *supra* note 8, at 18. As a modern law and society scholar, legal realist and legal clinician, I would add "know-who" (the study of power and relationships in law. See, e.g., YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 63 (1996).

law and legal institutions must take seriously the ideas and empirical findings of many other disciplines outside of law, because law is not an entirely autonomous discipline. Legal doctrine is derived from policy considerations (which are in turn based on empirical claims about the condition of the world and normative claims about how it might be changed), as well as the facts of disputed individual cases. Law, in turn, affects and influences how people behave toward each other and the policies that are in turn made by both public and private parties as they deploy the law in their interactions. What law is made and how it is experienced are determined by factors exogenous to “simple” doctrinal legal logic.

In my view, good legal education must include the “before,”¹⁴ “during,” and “after” causes and effects of law and legal institutions on those whom the law seeks to influence and control. In this paper I hope to suggest some ways in which law as a multidisciplinary field might optimally be studied, in context, and with appropriate attention to what it does in the world. Part II summarizes the history of others’ attempts to make legal education more multidisciplinary, reviewing the many attempts to reform legal education since its modern creation (and remaining current formulation) in the 1870s—what I here call “Big Bang” moments in legal education. Part III outlines my own vision of what truly interdisciplinary legal education would look like—before, during, and after “the law.” In this Part, I will make some suggestions for taking seriously the redesign of a three-year curriculum that better places the law in context and gives law students more diverse tools for explanation, understanding, and practice of law. Part IV will illustrate how these suggestions might be implemented with descriptions of some current successful efforts to make rigorous the study of law embedded in society, or as Karl Llewellyn called it, “the community.”¹⁵

II. A BRIEF HISTORY OF SOME “BIG BANG” MOMENTS IN LEGAL EDUCATION

A. Langdell’s Canons of Legal Education

The more or less conventional history of American legal education has been told many times, chronicling the movement from

14. The leading interdisciplinary text for undergraduates in law and society programs is JOHN J. BONSIGNORE ET AL., *BEFORE THE LAW: AN INTRODUCTION TO THE LEGAL PROCESS* (7th ed. 2002).

15. LLEWELLYN, *supra* note 2, at 11.

apprenticeships to private proprietary law schools to universities, full time study, and increasingly academic (and some would argue more esoteric¹⁶) legal scholarship and pedagogy.¹⁷ The Langdellian "revolution" of 1870, which we still inhabit, was noted for doing several important things for legal education:

- Treating law (as a field) as a science of principles learned by induction through reading cases and systematically arranging their holdings into a coherent body of limited, general principles;
- Developing a new teaching method from the distortion of Socratic philosophical dialogue, by applying some (but not all) of the methods of teacher-directed learning through questioning;¹⁸
- Using this so-called "Socratic method" to encourage a certain form of rigorous thinking, designed to sort the relevant from the irrelevant (in facts), to whittle out the necessary and sufficient holding (which became the rule of the case) from the superfluous and unnecessary dicta, and to state with efficiency and parsimony the *ratio decidendi* of the case;¹⁹
- Facilitating the teaching of many students in one classroom (with remarkably uniform architecture for over a century), which ultimately turned out to be profitable for law schools and universities,²⁰ if not ideal for learning;
- Developing the modern "casebook" (the collection of key cases from the common law in the classic, mostly private law, subjects) from which the "principles of law" were to be derived by students with little textual

16. See Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); see also Sam Estreicher, *In Defense of Theory: Notes on the Production of Legal Scholarship*, 10 GREEN BAG 49 (2006).

17. See generally LEGAL EDUCATION (Martin Lyon Levine, ed. 1993); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983); THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES, VOLS. I AND II (Steve Sheppard, ed. 1999).

18. Socrates did not question hundreds of students at once, so even if there was some humiliation in not seeing the logical endpoint of a badly made argument, the student (or students) could learn and modify their thinking without complete shame in front of many peers.

19. For one of the classic statements of how to read and, as we would say now, "process" a case, see LLEWELLYN, *supra* note 2, at 39-57.

20. This teaching method uses very high student-teacher ratios, even with increasingly high tuition payments from students. PETER DE L. SWORDS & FRANK K. WALWER, THE COSTS AND RESOURCES OF LEGAL EDUCATION: A STUDY IN THE MANAGEMENT OF EDUCATIONAL RESOURCES 339-40 (1974).

explanation²¹ (and the virtual elimination of didactic lectures²²);

- Introducing a graded and sequenced curriculum with annual examinations;²³
- Developing the modern law library as more than a place for textbooks, encouraging scholarly research in the law;
- Creating the modern professoriate, a breed of professionally separate academic lawyers who were not expected to practice or know much about the real world of practice, but were (and are) chosen for their academic excellence as students and their presumed intellectual acuity, if not for their teaching ability or legal professional achievements, and who developed into “outsider” critics of the law as written and practiced;²⁴
- Claiming that the “experiential” or “active”²⁵ educational method of Socratic classes, where law students learned to “think” like a lawyer, by “doing” legal reasoning in the classroom in front of professor and fellow students alike, was unique compared to other disciplines, where graduate students passively attended didactic lectures;

21. In one of the first “big bangs” to challenge Langdellian formalism, the era of Legal Realism issued in a broader conception of the textbook which became “Cases and Materials on . . .” The Legal Realists added some other materials to the steady diet of cases, including some government reports, a few empirical studies, some narrative stories, a few statutes and administrative regulations. It is striking how long this basic format has lasted. Modern “textbooks” still follow mostly this format of cases, with some Notes and Questions, and hypotheticals, and some few other materials for student analysis. Texts that depart too much from this format are often seen as not “real” casebooks by students. Many efforts to radically transform teaching materials have been developed, but none have really challenged the casebook market. See, e.g., GARY BELLOW & BEATRICE MOULTON, *LAWYERING PROCESS: CLINICAL INSTRUCTION IN ADVOCACY* (1978); Girardeau Spann, with Weistart and Powell, DVD: *The Contracts Experience* (Duke University School of Law 2002).

22. Nineteenth and twentieth century Socratic teachers still wrote didactic treatises which were intended to state the law, its principles, reasons and policies for judges, practicing lawyers and other legal scholars, if not students. Some would argue that the didactic lecture has returned to legal education as modern law professors increasingly shy away from using conventional Socratic questioning techniques that are now thought to be too brutal. See generally JOHN JAY OSBORNE, JR., *THE PAPER CHASE* (1974) (classic popular culture real and fictional depictions of legal education in the 1960s and 1970s credited for diminishing the use of traditional Socratic questioning); SCOTT TUROW, *ONE L* (1977).

23. See Kimball, *supra* note 12, at 277.

24. Consider the remaining and frequently used Socratic question: “How and why was this case wrongly decided?” – still a staple in many law school classes.

25. JOHN DEWEY, *EXPERIENCE AND EDUCATION* 4 (1997).

- Placing legal professional training in the university, as graduate training,²⁶ and removed from total control by the profession (leading to ongoing debates and tensions between academic and professional conceptions of the purposes of legal education²⁷);
- Developing a relatively uniform system of legal education, eventually established on a national basis (with "national," rather than state, law being taught²⁸), as Harvard educated academic lawyers disproportionately became law professors and adopted the Langdellian method throughout the country.²⁹

In the decades that followed Langdell's deanship and the establishment of his method at Harvard, the "case method" moved into most law schools. Thousands of law students for many decades were taught essentially with the same methods and from the same casebooks, regardless of region or differing career goals. Parallel to the development of the university-academic law school, night schools and part-time schools offered a slightly different form of education. But after the Reed Report,³⁰ which documented the differences in legal education and suggested several official tracks for differentiated legal education, was rejected by the ABA in the 1920s, legal education began to look the same almost everywhere.

B. Legal Realism's Critiques of the Langdellian "Revolution"

Despite differences among the "founders" of the case method's different forms of using cases to generate principles (historicist,

26. In most nations law is studied at university or free standing schools as an undergraduate (non-specialized field of study). Increasingly students from other countries now study for LLMs in the US or European countries to add to their specialized knowledge and to get a glimpse of the famous American way of Socratic instruction.

27. See Edwards, *supra* note 16, at 34.

28. See Peter L. Strauss, *Transsystemia - Are we Approaching a New Langdellian Moment? Is McGill Leading the Way?* 56 J. LEGAL EDUC. 161(2006).

29. This did not happen as smoothly or easily as it often appears to us now. For many years Columbia, Yale and the then new University of Chicago Law School curricula were competitors, and were in fact considered "better" law schools in some circles (e.g., in New York, Wall Street lawyers came from Columbia). See, e.g., JULIUS GOEBEL, A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 297-305 (1955); LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 67-97 (1986); JOHN SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 15-20 (1995); Robert Gordon, *Legal Education and Practice: The Case for (and Against) Harvard*, 93 MICH. L. REV. 1231, 1235 (1995); Robert Maynard Hutchins, *The Autobiography of an Ex-Law Student*, 1 U. CHI. L. REV. 511 (1934) (reviewing study of social science, facts and "functionalism" in early twentieth century legal education).

30. ALFRED Z. REED, BASIC TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (The Carnegie Foundation for the Advancement of Teaching 1921).

analytic, and scientific³¹), attacks on the Langdellian teaching method, and on the jurisprudence of the *Lochner*³² era, began to challenge the conceptualism and formalism of these ideas about law.

These criticisms of a “closed” system of limited foundational principles of law and logically derived rules culminated in a movement now called “Legal Realism,” derived from the claims of “sociological jurisprudence” urged by Roscoe Pound.³³ Sociological jurisprudence sought to take account of how the law was actually experienced by both lawmakers and those upon whom the law acted, as well as to understand law as it operated in institutions other than courts. This second “big bang” in legal education, as with all such movements for educational change, had founders and adherents who actually argued for many different versions of what they thought the correctives should be.³⁴ Pound emphasized that law had many “standpoints” and could be viewed from the perspective of the lawmaker (legislator), judge, practicing lawyer, client, and the general public (or those who were expected to follow the law).³⁵

The Legal Realists, in their different ways, reacted to the rapidly changing economic, technological, and political developments of the 1920s and 1930s. Legal Realist law professors, both as teachers and as scholars, found practical influence in their belief in social engineering through purposive use of law. This belief was taken up in practice by the New Deal lawyers. Several law professors were in both groups, moving into government from academe³⁶ and, in some cases, moving back into the academy. The Realists at Columbia sought to reframe the first year of law school to study social problems and not

31. See ALSCHULER, *supra* note 3, at 98-100 (providing a clean argument about the actual differences between Langdell and Holmes' approach to the development of law). Alschuler argues that although Holmes became the hero of the Legal Realist movement, he was in fact as much of a formalist (in the historicist mode) as Langdell. *Id.* at 113-14.

32. *Lochner v. New York*, 198 U.S. 45, 64 (1905) (striking down labor-protective legislation (limited working hours in a bakery) as substantive due process violation and criticized as an overly formalist reading of workers' “freedom of contract”).

33. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922); Roscoe Pound, *The Scope and Purposes of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911). See also Roscoe Pound, *Law in Books and Law in Action*, 44 AM L. REV. 12 (1910) (discussing the “divorce” between law in books and law in action).

34. For some representations of this work see JEROME FRANK, LAW AND THE MODERN MIND (1930); FRED RODELL, WOE UNTO YOU LAWYERS (1939); WILLIAM TWINING, KARL LLEWELLYN AND THE LEGAL REALIST MOVEMENT (1973); Jerome Frank, *Realism in Jurisprudence*, 7 AM. L. SCH. REV. 1063 (1934); Karl Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1931); Max Radin, *Legal Realism*, 31 COLUM. L. REV. 824 (1931).

35. ROSCOE POUND, JURISPRUDENCE (1925).

36. RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 152 (1995).

only arid categories of private law.³⁷ They were also interested in the social structure which both formed law and affected the variability of its enforcement and compliance.

Karl Llewellyn, the intellectual founder of Legal Realism, saw the importance of law in its social context, with particular processes and particular skills being used to advance particular social ends. As drafter of the Uniform Commercial Code, he sought to develop a "realist" body of law for the operation of commerce as actually practiced by those who bought and sold goods. As a teacher, he told students they needed both theory and skills to do their work.

For the Realists, law was in constant flux and was not comprised of more or less static "concepts," as the Formalists (Langdellians) saw it. Law was seen as a means to accomplish the larger society's goals and was not an end in itself. This suggests the effect of American pragmatism on legal thought, seeing law as instrumental to achieving particular goals and not as a thing unto itself. According to the Realists, society's needs are always changing, so the law must both react to and be a helpmate in developing the appropriate public policies and uses of law to satisfy society's needs and solve society's problems. To do this work, modern lawyers needed different techniques: social science to collect data and understand problems, as well as methods of evaluating the effects of particular laws or policies. Society was not homogeneous or monolithic in its needs, and its variability required more than a few limited foundational legal principles.

Scholars of the Legal Realist movement have differed over whether the Realists shared a political vision of reforming law for "progressive" ends, or whether they were simply united in their opposition to legal formalism and the earlier generations of legal scholars and teachers. As a group many of them engaged in empirical projects, seeking to describe the industries,³⁸ cultures,³⁹ or processes⁴⁰ they were hoping to affect. Some of them, like Karl Llewellyn, argued,

37. See Brainerd Currie, *The Materials of Law Study*, 3 J. LEGAL EDUC. 331, 333 (1951).

38. See, e.g., SECURITIES AND EXCHANGE COMMISSION, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES (1937-40) (empirical work on securities markets and the SEC); WILLIAM O. DOUGLAS, GO EAST YOUNG MAN (1974); Underhill Moore & Gilbert Sussman, *Legal and Institutional Methods Applied to Debiting of Direct Discounts*, 40 YALE L.J. 381 (1931).

39. KARL LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

40. Carrie Menkel-Meadow & Bryant Garth, *Of Process and People: Empirical Studies of Civil Procedure*, in *LAW'S DISCIPLINARY ENCOUNTERS: NEW FRONTIERS IN LAW'S ENGAGEMENT WITH THE SOCIAL SCIENCES* (Terence Halliday et al. eds., forthcoming); Clark & Harry Schulman, *Jury Trial in Civil Cases: A Study of Judicial Administration*, 43 YALE L.J. 867 (1934); Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961).

though, for the separation of "is" (description) from "ought" (prescription or moral judgments), thus adhering to a different form of "objectivity." For some, like Pound, Legal Realism entailed the sociological and political study of interest groups that made the law, thus broadening the study of law outside the sphere of courts and judges. Others, like Jerome Frank,⁴¹ sought to humanize the study of law by seeing that judges were human beings and thus subject to social, political, and psychological pressures that affected how they interpreted law and resolved disputes. This was legal humanism with social psychology and sociology.

Realists were skeptical of rules and overly abstracted concepts. They added "materials" to the study of cases and hoped to have students study the real world that rules were supposed to regulate. They believed that with the right tools of analysis (and teaching) new rules and legal processes could be developed to respond to and ameliorate particular social problems, such as crime, inefficient or defective business and consumer relations, economic inequalities, unemployment, accidents, injuries, and poverty. They were interested in both public and private responsibilities for social problems, and, with the New Deal, many of them helped launch the great experiments of the administrative state that became the alphabet agencies. Law was no longer a "science" of inductive rules or principles but a "social science" of data gathering and rules-tinkering, modifiable legislation, and public regulation. Law was seen as the dependent variable, society the independent variable, and analysis and evaluation of variability was considered possible and desirable. The idea was to study law as it actually was "in action," not just "in the books," with the hope that

creative legal thought will more and more look behind the pretty array of "correct cases" to the actual facts of judicial behavior, will make increasing use of statistical methods in the scientific description and prediction of judicial behavior, will more and more seek to map the hidden springs of judicial decision and to weigh the social forces which are represented on the bench.⁴²

The Legal Realists produced a wealth of influential academic work and succeeded in influencing policymakers' and jurists' attitudes towards the New Deal, but they had a less successful impact on legal education. While casebooks now contained "materials" to go with the cases, and some students participated in large empirical projects (at Columbia, the UCC project with Karl Llewellyn, and the commercial arbitration project with Soia Mentschikoff, and later, at the University

41. Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931).

42. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 833 (1935).

of Chicago, the Jury Project with Hans Zeisel and Harry Kalven⁴³), efforts at Yale, Columbia, and Chicago to radically transform legal education, to encourage new teaching methods and new approaches to law largely failed⁴⁴. Until new forms of Legal Realism re-emerged in the modern Law and Society movement⁴⁵ and the Critical Legal Studies movement⁴⁶ in the 1960s and 1970s, Legal Realism's major contribution to legal education was its critique of formalism and of easy classification of law as rules. It actually did little to change the structure or performance of legal education.

Although Legal Realism did little to change the structure of legal education, it left, for all its diversity of scholars, several lasting impacts on what was studied in legal education. Legal Realism succeeded in challenging the view that doctrine and appellate cases were the only things that mattered. Legal "policy" science, such as it is, can trace its origins to the Realists' conceptions of what law was supposed to do. In 1943, Myres McDougal and Harold Lasswell of Yale wrote an influential law review article on legal education.⁴⁷ This article advocated transforming legal education into a "policy science"—an artful, if also unsuccessful, effort to combine Langdellian "science" with Realist social science. Policy was "the making of important decisions which affect the distribution of values"⁴⁸ and, they argued, should be taught as the "science" of making good policies and decisions,⁴⁹ with data and tools for legal and social scientific analysis, combined with political purposes and a sense of policy ethics. Another Realist, Jerome Frank, urged universities to return to apprenticeships to teach the practice of law. His article, *Why Not a Clinical Lawyer School?*,⁵⁰ later became one of the founding texts of the clinical education movement.

The Realists also focused on legal processes—how the law was made and enforced—which spawned the Legal Process school of the 1950's (and later). Thousands of law students were trained, through

43. HANS ZEISEL & HARRY KALVEN, JR., *THE AMERICAN JURY* (1966).

44. See SCHLEGEL, *supra* note 29, at 211-257; STEVENS, *supra* note 17.

45. See *infra* notes 57-62 and accompanying text.

46. See *infra* notes 62-71 and accompanying text.

47. Harold Lasswell & Myres McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943).

48. *Id.* at 207.

49. Decision science, a hybrid discipline of statistics, mathematics, logic and game theory, has returned to law schools in the teaching of some skills like negotiation, but its home has been in public policy and business schools. See, e.g., JOHN HAMMOND, RALPH L. KEENEY & HOWARD RAIFFA, *SMART CHOICES: A PRACTICAL GUIDE TO MAKING BETTER DECISIONS* (1999); WISE CHOICES: DECISIONS, GAMES AND NEGOTIATIONS (Richard J. Zeckhauser, Ralph L. Keeney & James K. Sebenius eds., 1996).

50. Jerome Frank, *Why Not a Clinical Lawyer School?*, 81 *U. PA. L. REV.* 907 (1933).

the Hart and Sacks temporary edition text,⁵¹ to consider questions of “institutional competence” in the making and enforcement of law in different settings for different purposes. Process,⁵² both for practicing lawyers (later to be institutionalized in clinical education⁵³) and for lawmakers and interpreters (the hermeneutics of Critical Legal Studies and Postmodernism⁵⁴), became as important as the substance and content of doctrinal law.

Whether the Yale policy studies of the 1940s and the Legal Process school of Hart & Sacks in the 1950s were radical enough to be called a third or fourth “big bang” in legal education, they had some influence on *what* was taught (casebooks with more “materials” outside of law), *how* it was taught (more specialty courses, after the required first- and second-year curricula, and more seminars, especially in the subject areas of scholars who looked beyond the case law), and *who* taught (more social scientists, philosophers, and others were added to faculties and even the law professors ceased, for the most part, to be engaged in practice).

C. Law and Economics and Socio-Legal Studies

The next “big bang” in legal studies was the almost simultaneous founding of two different interdisciplinary studies of law: one, Law and Economics, was largely successful; and the other, socio-legal studies or Law and Society, was less so. Richard Posner⁵⁵ and Guido Calabresi⁵⁶ wrote field-defining studies applying economics principles to the development of law in torts and contracts, which eventually spread to the application of economics principles to most areas of law. Through this work, they masterfully developed unifying concepts for study: “efficiency” (or the efficient allocation of resources), “wealth maximization,” and “risk allocation.” These evocative concepts became so omnipresent in legal discourse that scores of law teachers spent summers at Henry Manne’s “summer camp” learning economics principles so they could teach torts, contracts, insurance, and health law with new-to-law concepts like “transaction costs,” “moral hazard,” and “externalities.” It was no longer enough just to read the cases or statutes—one had to understand what aggregate impact they were

51. HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

52. See Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 558-65 (2006).

53. See *infra* notes 101-109 and accompanying text.

54. See *infra* notes 63-71 and accompanying text.

55. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 6-8 (1972).

56. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 39-40 (1970).

having on society. Law and Economics successfully infiltrated the academy in legal analysis, in new concepts taught in basic first-year courses, and in sponsored fellowship programs, like the Olin Fellowship. The influence of Law and Economics was also increased by the appointment of many of its academic adherents to the federal bench, where Law and Economics concepts could then be enshrined in decisional law.

Law and Society, as a field, was formed in the late 1960s as an informal group at the American Sociological Association to link the study of law with the sub-field of "social problems" in sociology. The Law and Society Association was formed as an intentionally multi-disciplinary group of lawyers, sociologists, anthropologists, historians, psychologists, political scientists, and economists who sought to study law and legal institutions empirically and in context.⁵⁷ Willard Hurst of the University of Wisconsin (which later became a center of socio-legal studies) authored a deeply contextual study of historical legal developments,⁵⁸ and remade scholarly legal history by demonstrating how legal history should focus on empirical facts about social factors and conditions, such as industry structures, rather than chronicling only legal doctrinal development.⁵⁹

Beginning in the 1960s, a group of positivist social scientists studied courts, crimes, dispute-processing mechanisms, and the "gap" between the law on the books and the law in action in a variety of different fields.⁶⁰ Although socio-legal scholarship spread to several different academic journals and engaged a large number of legal scholars, the hoped-for social science summer camp to match Henry

57. The story of the founding of the Law and Society Association and its scholarly project has also been told many times before. See, e.g., Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 764 (1986); Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 LAW & SOC'Y REV. 409, 417-23 (1998); Felice J. Levine, *Goose Bumps and 'The Search for Signs of Intelligent Life' in Sociological Studies: After Twenty-Five Years*, 24 LAW & SOC'Y REV. 7, 9-12 (1990); Stewart Macauley, *Law and the Behavioral Sciences: Is There Any There There?*, 6 LAW & POL'Y 149, 150-52 (1984); Carrie Menkel-Meadow, *Durkheimian Epiphanies: The Importance of Engaged Social Science in Legal Studies*, 18 FLA. ST. U. L. REV. 91, 102-04 (1990); Christopher Tomlins, *Framing the Field of Law's Disciplinary Encounters: A Historical Narrative*, 34 LAW & SOC'Y REV. 911, 953-55 (2000); David Trubeck, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 4, 46-47 (1990).

58. See JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 3-19 (1950).

59. See JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN* 93-116 (1964).

60. See, e.g., Sally Engle Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, in *THE LAW & SOCIETY READER* 36-57 (Richard L. Abel ed., 1995).

Manne's never really materialized⁶¹ and so legal education has been hardly affected.⁶² Nevertheless, the socio-legal studies movement continues to press upon legal thought, teaching, and scholarship the following basic ideas:

- Law is not autonomous; it is shaped by and shapes human interactions;
- Law exists in institutions, and thus patterns of law making and law enforcement develop outside of doctrinal texts and intentions;
- Law is manipulated by the human actors who make and enforce it, so rules and doctrines do not have a uniform, independent existence and essence;
- Law is variable; it exists in different cultural forms and is thus "plural" in composition, interpretation, compliance, and function; law is "chosen" by particular communities—it is not a universal "given";
- Those who "use" or make the law have intentions and interests which are differentially expressed in and effectuated in law;
- Groups and collectivities form social and "interpretative" communities that influence the making and enforcement of laws; laws are not always co-terminous with social norms;
- Law is not always a matter of formal enactments or institutions; law and norm enforcement is often the province of informal groups and disciplinary social forces;
- Law can be used for liberatory and expressive, or oppressive and disciplinary, purposes;
- Law's ability to accomplish its professed aims and goals is variable and subject to a variety of social forces it cannot entirely control.

61. The Law & Society Association does sponsor a one week summer program seminar in social science methods used to study legal phenomena, but the participants have generally been social science graduate students (or students from the one successful graduate program in law and social science, Berkeley's Jurisprudence and Social Policy program, with few aspiring legal academics in attendance).

62. A new "school" of legal thought called Behavioral Economics and Law attempts to study how legal phenomena are experienced and acted on, with a focus on social and cognitive psychology, as well as on sociology. In my view, this school is mostly re-inventing the socio-legal studies wheels of explanation, with a little cognitive and social psychology (and some empirical work) added to conventional Law and Economics analysis. Was anyone paying attention in the 1970s and 1980s, or are economists disproportionately credited when they speak (or analyze)? For a good review of this literature, see Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).

D. The Rise of Critical Legal Studies

While many laboring in the social science fields were collecting data, others, especially those law professors with strong ties to the rest of the academy, were influenced by one of the "big bangs" in mid-century academic life—the "interpretative turn" in literary studies. Derridian⁶³ and Lacanian⁶⁴ studies of meaning and its variability lent legal academic theory panache, if not total justification, to the growing political critique of the "determinism" of law in the 1960s in American law schools, and helped fuel the movement known as Critical Legal Studies ("CLS"). With its rabble rousing and stylish leaders, the texts and practices of CLS exposed the "indeterminacy" of Langdell's legal principles. For any set of facts, cases could be read to suggest outcomes that could go either way and be appropriately justified.⁶⁵

Critical Legal Studies turned into a rather big bang. It produced hundreds of pages of exciting and inciting scholarship, radicalized teaching in some quarters,⁶⁶ and upset the establishment so much that Paul Carrington, then Dean at Duke Law School, demanded that these "nihilists" resign from the legal academy if they didn't believe in the higher purposes and authority of law.⁶⁷ Critical Legal Studies, officially founded in 1977, was an offshoot of the Law and Society movement (some of CLS's members continued to study the political claims of economic and class subordination in the law with

63. See, e.g., JACQUES DERRIDA, *WRITING AND DIFFERENCE* (Alan Bass trans., U. Chicago 1980) (1967).

64. See JACQUES LACAN, *ÉCRITS: THE FIRST COMPLETE EDITION IN ENGLISH* (Bruce Fink trans., Norton 2006) (1966).

65. For some samples of this literature see, e.g., Mark G. Kelman, *Trashing*, 36 *STAN. L. REV.* 293, 308-10 (1984); Gary Peller, *The Metaphysics of American Law*, 73 *CAL. L. REV.* 1151, 1222 (1985); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1, 10-14 (1984); Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 *STAN. L. REV.* 623, 633 (1984). For more comprehensive bibliographies of critical legal studies and its arguments, see, e.g., MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 292-93 (David Kairys ed., 1st ed. 1982); Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 *YALE L.J.* 461 (1984). For a more recent assessment of the impact of critical legal studies, at least on American constitutional scholarship, see Louis Michael Seidman, *Critical Constitutionalism Now*, 75 *FORDHAM L. REV.* 575 (2006).

66. The leading text here is, of course, DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* (NYU Press 2004), initially self-published in 1983 as a pamphlet. Duncan Kennedy urged a class unending of law schools and for a time taught from the back (not the front) of the classroom amphitheatre to "de-center" the authority of the professor in the classroom, just as deconstructionists were "de-centering" the text and the word.

67. Paul D. Carrington, *Of Law and the River*, 34 *J. LEGAL EDUC.* 222, 227 (1984).

empirical methods⁶⁸) and the larger New Left political movements of the 1960s and 1970s. Its organizers came together to explore Marxist class analysis of the impact of legal institutions and to expose the fact that law was itself “an instrument of social, economic and political domination.”⁶⁹ The intention was to make law more of an instrument of positive social and redistributive change, to revolutionize law teaching and make it more participatory and democratic, and to encourage truly critical thinking and action.

Although Critical Legal Studies theorists aligned themselves with progressive clinicians and legal practitioners,⁷⁰ the movement was largely theoretical and was often criticized for continuing a fetishistic interest in legal doctrine and cases. Today its scholarship looks remarkably like conventional legal scholarship, though at the time it seemed radical in content for its distrust of legal certainties, if not particularly creative in form or method. Aside from about ten national conferences that engaged interested law faculty and students, there was little visible impact on legal education, except for the much reported political battles that engulfed a few elite institutions like Harvard⁷¹ and continue to make faculty appointments a political minefield (or, more accurately, gridlock).

E. Law and Cultural Studies

As a movement more of theory than of practice, Critical Legal Studies was joined to several other important intellectual movements—deconstruction in literary theory, a deeper engagement with the philosophy of law and jurisprudence (as John Rawls, a political philosopher and theorist,⁷² and Ronald Dworkin, a law

68. See, e.g., Frank Munger & Carroll Seron, *Critical Legal Studies versus Critical Legal Theory: A Comment on Method*, 6 LAW & POL'Y 257, 275 (1984) (urging that Critical Legal Studies scholars return to the empirical research methods of the Frankfurt school).

69. See KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES, *supra* note 65, at 297 n.1 (citing the initial outreach letter from the organizers of the first Conference on Critical Legal Studies, dated January 17, 1977). I was a member of CLS from the beginning. The first meeting was held in Madison, Wisconsin in 1977, and the last official meeting was held in Washington, D.C. at several participating law schools in 1995 (where the demise of class analysis as a result of “identity politics” was explored and debated by a new generation of legal scholars).

70. See, e.g., Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 370-71 (1982/1983) (“This Article is a first attempt to link the theoretical advances made by the Conference [on Critical Legal Studies] with the accumulated practical experience of creative [National Lawyers] Guild attorneys.”); David Kairys, *Introduction*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 6 (David Kairys ed., 1st ed. 1982) (“This book is an attempt to present a progressive, critical analysis of the operation and social role of the law in contemporary American society.”).

71. See Calvin Trillin, *A Reporter At Large: Harvard Law*, NEW YORKER, Mar. 26, 1984, at 75-76 (telling the stories of hiring battles and other tales of Harvard and CLS encounters).

72. JOHN RAWLS, A THEORY OF JUSTICE 118 (1971).

trained jurist⁷³ elaborated new foundational concepts like the “veil of ignorance” and “Hercules, the judge” for legal philosophers to debate), and a new effort to see law, not as a science or social science, but as a humanistic field of study.⁷⁴ Scholars like James Boyd White,⁷⁵ Robin West,⁷⁶ Richard Weisberg,⁷⁷ and Martha Nussbaum⁷⁸ focused on seeing law as a form of literature with appropriate uses of literary theory, and read fictional texts about law to uncover meanings and aspirations of law (in a generally more humanistic and positive tone than Critical Legal Studies’ critiques or Law and Economics’ mechanical transaction cost analysis). Later, this more highbrow form of legal literary analysis gave rise to a more diverse reading of law in popular culture,⁷⁹ in all its forms, to illuminate what law means to the general public, not just to lawyers.

Again, although the scholarly production was fruitful and erudite, aside from a few law and literature seminars, the core of legal education has hardly been touched by these developments, except for a more informed set of interpretative moves and principles in legal interpretation. Nevertheless, the law and literature movement has contributed its own set of basic viewpoints from which we examine law:

73. RONALD DWORKIN, *LAW'S EMPIRE* 239-40 (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105-10 (1977).

74. See James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985) (“In this paper I shall suggest that law is most usefully seen not . . . as a system of rules, but as a branch of rhetoric.”). For one of the most elegant essays exploring the turn of law and legal study to such methods in other disciplines, see Martha Minow, *Law Turning Outward*, 73 *TELOS* 79, 86-89 (1987). As an example of this form of scholarship, see David Kennedy, *The Turn to Interpretation*, 58 S. CAL. L. REV. 251, 266-74 (1985).

75. *WHEN WORDS LOSE THEIR MEANING* 231-74 (1984) (applying a literary critique to the Declaration of Independence, the Constitution, and a judicial opinion); JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 77 (1985); JAMES BOYD WHITE, *THE LEGAL IMAGINATION* 8-13 (1973) (using Mark Twain's *Life on the Mississippi* to teach “the language of the law”).

76. ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* 345 (1993) (“[L]egal theory itself contains a substantial narrative component that can be analyzed as literature.”).

77. RICHARD H. WEISBERG, *POETHICS, AND OTHER STRATEGIES OF LAW AND LITERATURE* 3 (1992) (“[L]iterature provides unique insights into the underpinnings of law and . . . stories and poems stand as sources of law.”); RICHARD H. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* (1984) (analyzing eight fictional works with lawyer protagonists).

78. MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 79-80 (1995) (reflecting on the role of a judge as a type of poet).

79. See, e.g., MICHAEL ASIMOW & PAUL BERGMAN, *REEL JUSTICE* ix (2nd ed. 2006) (analyzing courtroom movies to “enhance your understanding of our legal system while helping you think through the messages about law, lawyers, and the legal system that the films convey”); MICHAEL ASIMOW & SHANNON MADER, *LAW AND POPULAR CULTURE: A COURSE BOOK* 6-8 (2004) (examining “[t]he relationship between popular culture and the law”); DAVID PAPKE ET AL., *LAW AND POPULAR CULTURE: A TEACHING COMPANION* (forthcoming 2007).

- Law is a text;
- Law must be interpreted and different “readers” will interpret differently; thus there are “communities of interpretation”;⁸⁰
- Law produces its own language, with its own rules of grammar and structure;
- The lawyer/judge is a “creator” of language, or “literary agent,” in his use of and interpretation of words;
- We learn about law’s meanings by studying literature that depicts ordinary (and extraordinary) people engaging with the law and its institutions;
- Law, like literature, tells a narrative story, and we can use narrative structures for good (persuasion and empathy) or ill (manipulation, deception, falsity);
- Law is a humanistic discipline—it is made by humans, for human consumption and transformation; it does not exist apart from its use by human beings;
- As a humanistic enterprise, the study of law and literature can help us evaluate whether law tells good/ethical or evil/unjust stories and can help us clarify basic human values.⁸¹

F. The Addition of Ethics

While the law and literature movement sought to understand basic human ethics, the legal profession was rocked by another major “big bang” with the 1974 revelations of the break-in at the Democratic National Committee’s office at the Watergate in Washington, D.C. Following national attention on presidential succession, a little understood document from John Dean, one of President Nixon’s counsel, exposed how many lawyers were involved in the cover-up of criminal wrongdoing. As a result, one of the most major formal alterations to legal education in many years was made when the ABA required a course in professional responsibility of each graduating law student—the first such official requirement for anything beyond the first year for formal legal education accreditation.⁸² With the belief

80. STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 356-57 (1980).

81. See NUSSBAUM, *supra* note 78, at 54 (exploring the use of law and literature as a point for ethical discourse); see also Robin West, *Law and Fancy*, 95 MICH. L. REV. 1851, 1857 (1997) (reviewing POETIC JUSTICE).

82. See ABA Standards for Approval of Law Schools, Standard 302(a)(5) (2005-2006), available at <http://www.abanet.org/legaled/standards/2005-2006standardsbook.pdf> (requiring

that education really can affect moral dispositions, new scholarship, teaching methods, and a variety of different forms of ethics instruction were added to the usual diet of private and public law courses.⁸³

G. "Outsider" Jurisprudence

The law professoriate became more diverse in the 1970s and 1980s. This increased diversity affected what was studied in law schools. The growth of the numbers of women and minorities in the legal teaching profession, coupled with political and social movements outside of the academy, gave voice to what was generically called "outsider jurisprudence." Legal Feminism began by looking at how the law discriminated against and regulated women and then launched a deeper intellectual attack by focusing on how the law had been conceptualized by men, for masculine usage and domination,⁸⁴ while it had ignored or silenced women's legal needs.⁸⁵ Critical Race Theorists of all colors challenged both traditional legal orthodoxy and also the Critical Legal Studies critique of rights.⁸⁶ Feminists and race theorists both criticized and embraced law. Law, having been successfully used to expand some, if not all, civil rights, was sometimes, but not always, an effective tool for "dismantling the master's house."⁸⁷ Feminism and Critical Race Theory began with separate courses and new texts, but ultimately hoped to move into and transform the mainstream of legal education by broadening content, as well as by diversifying the participants in the lawmaking and interpreting process.

Law and Economics scholars may have added new concepts or ways of analysis, like Coase's transaction cost theorem.⁸⁸ However, feminists and race theorists created new legal causes of action, such as

"substantial instruction in . . . the history, goals, structure, values, rules, and responsibilities of the legal profession and its members").

83. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE* 200-03 (2000) (chronicling the post-Watergate rise of courses in professional responsibility); Symposium, *Teaching Legal Ethics*, 58 *LAW & CONTEMP. PROBS.* (SPECIAL ISSUE) 5 (1995).

84. See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635, 648 (1983) (examining how rape law denigrates women); Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 *PAC. L.J.* 1493, 1493 (1992).

85. See Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Theory*, 3 *WIS. WOMEN'S L.J.* 81, 84-85 (1987).

86. For a discussion of common criticisms of the Critical Legal Studies approach, see Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323, 330-62 (1987).

87. AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110, 112 (1984).

88. See Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 15-19 (1960).

sexual harassment⁸⁹ and reparations for the harms of slavery,⁹⁰ and also argued for new methods of learning and thinking.⁹¹ Indeed, in the academy at large, radical changes to pedagogy from participatory models in Women's Studies led to "consciousness raising"-like methodologies in law school seminars and even some traditional classes. This change in classroom dialogue in law schools can be traced to the practice of the women's movement as it moved itself into more formal locations in education generally.⁹²

Feminism and Critical Race Theory continued in theory what Critical Legal Studies had begun—the critique of law as "neutral" or "objective." Its scholarship challenged the making and enforcement of law as differentially beneficial and harmful, while privileging the dominant classes of whites and men. These intellectual movements mixed traditional legal argument, the use of statistics, teachings from social science and other disciplines,⁹³ and postmodern theories of identity politics.⁹⁴ In so doing, they challenged basic categories of understanding in law, just as Postmodernism challenged all basic "truth" claims in late twentieth century intellectual life.⁹⁵

H. Big Bangs of the Late Twentieth Century: The New Pragmatism

What has emerged from the intellectual ferment of the late twentieth century is alternatively called "skepticism" or "the new pragmatism."⁹⁶ While first-year class subjects look the same in title as they did over one hundred years ago, the content may be quite altered. Property texts challenge theories of conquest and ownership by juxtaposing current mainstream attitudes towards property and

89. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

90. See Charles Ogletree, Jr., *Reparations: A Fundamental Issue of Social Justice*, *THE BLACK COLLEGIAN*, Oct. 1, 2002, at 118.

91. See Katherine T. Bartlett, *Feminist Legal Methods*, 103 *HARV. L. REV.* 829 (1990).

92. See, e.g., MARY BELENKY ET AL., *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* (1986); Carrie Menkel-Meadow, *Women's Ways of "Knowing" Law: Feminist Legal Epistemology, Pedagogy, and Jurisprudence*, in *KNOWLEDGE, DIFFERENCE AND POWER: ESSAYS INSPIRED BY WOMEN'S WAYS OF KNOWING* 57 (Nancy Goldberger et al. eds., 1996).

93. See, e.g., Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987).

94. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006).

95. See JOYCE APPLEBY ET AL., *TELLING THE TRUTH ABOUT HISTORY* (1994); JEAN FRANCOIS LYOTARD, *THE POST-MODERN CONDITION: A REPORT ON KNOWLEDGE* (1984); PAULINE ROSENAU, *POST-MODERNISM AND THE SOCIAL SCIENCES: INSIGHTS, INROADS AND INTRUSIONS* (1992).

96. See, e.g., *PRAGMATISM IN LAW AND SOCIETY* (Michael Brint & William Weaver eds., 1991).

ownership with Native American communal theories of ownership.⁹⁷ Criminal law embraces philosophical concepts of guilt and responsibility. Civil procedure looks at process more broadly, including informal processes commonly called "alternative dispute resolution," and how people frequently resolve disputes informally.⁹⁸ A growing push by many scholars has re-emphasized the importance of statutory analysis in any thorough legal education.⁹⁹ And increasingly, attention in law schools has shifted from an emphasis on private law subjects to the importance of public law and regulation.¹⁰⁰

Perhaps the greatest "big bang" effect on legal education has been the growth of clinical education. Although largely still separated from traditional legal education and lacking the transformative effects its founders desired and predicted,¹⁰¹ virtually all law schools now offer students the opportunity to learn to practice law in some kind of supervised setting that is intentionally designed to focus simultaneously on both the theory and skills of lawyering. Taking up the challenge of the Legal Realists, especially Jerome Frank, we now have some form of "clinical lawyer school" in each law school, where students learn some of the basic skills of interviewing, counseling, representing, advocating, writing, negotiating, and lobbying on behalf of clients, or lawmaking in court or legislative internships. There are many organizing principles for clinical legal education. These principles include decisionmaking, whether by client¹⁰² or lawyer; competency in particular skills sets; social change and law reform;¹⁰³ civic organizing or advocacy;¹⁰⁴ and lawmaking itself (in the newer legislation clinics). Clinical education sees its mission as placing law in

97. See, e.g., JOSEPH SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* (3rd ed. 2002).

98. See, e.g., ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (2nd prtg. 2005); CARRIE MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (2004).

99. See, e.g., WILLIAM ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (3rd ed. 2001).

100. See, e.g., LISA HEINZERLING & MARK TUSHNET, *THE REGULATORY AND ADMINISTRATIVE STATE: MATERIALS, CASES, COMMENTS* (2006); CASS SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* (2002).

101. I know; I am one of them. See Carrie Menkel-Meadow, *The Legacy of Clinical Legal Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555 (1980); see also Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT 374 (Council on Legal Educ. Prof'l Dev. ed., 1973).

102. DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH* (2d ed. 2004).

103. See Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law"*, 2005 WIS. L. REV. 455.

104. See Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001).

context and teaching students to understand the theory of law as it is applied in practice, as well as creating a sufficiently self-reflective approach to lawyering that life-long self-critique and feedback will continue beyond formal education.

Although there have been many efforts by the ABA and the profession to enforce more radical change through clinical and practical approaches to legal education (e.g., the MacCrate Report¹⁰⁵), clinical education now stands beside conventional classroom and casebook legal education. In the best programs there is room for every student who wants to take a clinical course and in a few schools some clinical education is required of every student.¹⁰⁶ But formal integration of the relationship of the theory of practice to practice itself is still a dream on the horizon.¹⁰⁷ With schisms between those who see the purpose of clinical education as simply teaching lawyering skills and those who see the function of the university as promoting particular concepts of social good through lawyering, coupled with a continuing disdain or skepticism from increasingly academic law professors,¹⁰⁸ clinical education (with all of its status and legitimacy issues) is now a permanent offshoot of its own, providing minimal challenge to conventional legal education. In the better law school programs there may be some substantive-clinical collaboration, such as substantive sequenced courses required before practice or use of clinical problems or cases in seminars or substantive classes. In some schools, the first-year legal research and writing program has become more clinical, focusing on skills other than "only" writing and research, and often tied to one of the substantive courses in order to build "thinking and doing" like a lawyer simultaneously.¹⁰⁹

Just as the clinical pioneers sought to focus legal educators on the behavior of lawyers, clients, and judges for teaching purposes, the most recent "big bang" in legal education has been an effort to marry social science (putting law and economics together with social and cognitive psychology) and law in a behavioral focus on what legal decisionmakers actually do. This new "behavioral" move in legal

105. SECTION OF LEGAL ED. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) (widely known as "the MacCrate Report," named for its Chair, Robert MacCrate, a retired Sullivan & Cromwell member who advocated that legal education be reorganized according to a set of practical skills and values).

106. For example, The University of New Mexico School of Law and The City University of New York School of Law.

107. See, e.g., Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577 (1987).

108. For an early and eloquent version of this issue, see Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968).

109. For example, the New York University School of Law's "Lawyering Program."

scholarship has looked at a slightly broader set of actors—corporation board members, government decisionmakers, legislators, negotiators, judges, clients, and NGOs, as well as lawyers. The advent of this “new” scholarship,¹¹⁰ which exposes cognitive errors, bad heuristics, and the false assumptions legal decisionmakers make, is intended to instill greater self-consciousness, rigor, and empirical reality into what legal decisionmakers look at when evaluating legal choices and risks. To the extent that some of this work has already led to new texts and courses encouraging law students to study statistics, decision sciences, and other quantitative, as well as qualitative, methods¹¹¹ of legal analysis, there is some evidence that legal education may, in fact, finally take the “dismal science” and its relatives seriously.

This is a very much abbreviated *tour d’horizon* of the important twists and turns in legal education. Despite my use of the phrase “big bang,” the truth is that the only really big bang has been Langdell’s. If one looked at the schoolroom, the hospital, the police station, the prison, or the business office of the nineteenth century, and then compared it to today’s institutions, one would see more change in each of these than in the law school classroom.

To the extent that change has been desired by some in legal education, it has succeeded only with heavily funded initiatives from outside of the legal academy. The most successful of these has been the Ford Foundation’s massive infusion of millions of dollars to law schools for clinical education (“CLEPR”),¹¹² followed closely by the Olin Foundation’s support of Law and Economics scholarship and other initiatives. Efforts by the Russell Sage Foundation to seed law and social science¹¹³ approaches to legal study were more modest (and took root in only a few schools—Wisconsin, Denver, Buffalo, and, for some time, Yale and Chicago). Efforts by the Keck Foundation in the 1990s to make legal ethics more core to legal education were largely abandoned after a short five year effort. Outside sources of research funds (like the National Science Foundation in the public sphere and RAND and private corporations in the private sphere) have supported

110. As I have argued above, for me, this work is somewhat repetitive of early law and society work, just applied in different places, but I guess every generation has to have a new project. See Symposium, *New Legal Realism*, 2005 WIS. L. REV. 335.

111. See, e.g., LOUIS KAPLOW ET AL., *ANALYTICAL METHODS FOR LAWYERS* (Howell E. Jackson ed., 2003).

112. The Council of Legal Education for Professional Responsibility, itself funded by the Ford Foundation, funded clinical education in American law schools for over twenty years.

113. However, there has been a lot of ink spilled on the issue over the years, including in the pages of the *Journal of Legal Education*, the reports of various ABA Task Forces, and in Association of American Law Schools mini-workshops. See also HERBERT L. PACKER & THOMAS EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* (1973).

and helped redirect some legal scholarship and there has even been some governmental support of pedagogical change (FIPSE's¹¹⁴ funding of initiatives in alternative dispute resolution at Missouri-Columbia,¹¹⁵ and first-year interdisciplinary study at Georgetown¹¹⁶). However, a major rethinking of legal education has not occurred, really, in over one hundred years.

So, what kind of "big bang" would I propose? In my view, legal education should take very seriously, through formal inclusion and within current structures, the interdisciplinary study of law, recognizing that there are social causes and effects on law and legal institutions, before, during, and after "the law" as doctrine.

III. TRUE INTERDISCIPLINARITY: BEFORE, DURING AND AFTER "THE LAW"

In my ideal legal curriculum the study of law could be organized around a "holy trinity"¹¹⁷ of temporal approaches to law—before, during, and after "the law" as doctrine,¹¹⁸ which would situate law and its functions in a broader human context. Traditional law study would be preceded, in the first year (or "before" the law), by study of those fields whose knowledge base informs how and why law is made—sociology, history, political philosophy, political science, and anthropology—so law students could learn about the historical and cultural variations in how human beings create and enforce norms for their coexistence (which has been both peaceful and not!). In the first-year of study, a beginning law student should also encounter (as many medical students do now) a real or simulated "client" (whether individual or group) to understand how legal problems present themselves. Thus, students would learn simultaneously about how law came about and what it can and cannot do to solve social and human problems. Such teaching would ask, as its central themes, what

114. The Fund for the Improvement of Post-Secondary Education, a funding program within the U.S. Department of Education.

115. See LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* ix n.1 (3d ed. 2005).

116. See *infra* Part IV.A-B.

117. I guess almost fifteen years at a Catholic institution has affected my metaphors! But, it is also convenient here since I do not revisit the number of years of an optimal legal education and instead keep to the current three year program offered at virtually all law schools.

118. This of course makes it easier to construct a new curriculum within the current three year program, though over the years there have been many proposals for both shorter (two year) and longer (four year) programs of law study, such as SCALE (two-year program at Southwestern Law School) and the University of Michigan's two-and-a-half year program, among others. Southwestern Law School, SCALE - Two-Year J.D. Program, <http://www.swlaw.edu/academics/jd/scale>; The University of Michigan Law School, Frequently Asked Questions: Summer Starters, <http://www.law.umich.edu/prospectivestudents/admissions/faq.htm#summer>; see PACKER & EHRLICH, *supra* note 113, at 37-46.

produces the norms by which people live and guide themselves and others, how do those norms vary in different cultural and social settings, and what predispositions or patterns occur in different social groupings.

Students would study basic anthropology, sociology, and history of legal systems with some comparative focus (Roman law, Anglo-American "common" law, and some introduction to civil law in Europe and South America or Japan). In this first-year, students would also be introduced to one or more basic private law subjects (contracts, property), one public law subject (Constitutional law), as well as basic adjectival or procedural law (see description of Process and Society course at Georgetown in Part IV.B below).

In addition, students would encounter a client, learn about interviewing (to discover basic facts, the individual context of every legal problem), and then begin to learn about legal research and writing in the context of a concrete problem.¹¹⁹ In a first-year seminar, small groups of students would grapple with beginning jurisprudential questions such as whether law serves as a constraint on human behavior or is enabling or empowering, what social purposes are served by formal norms and their enforcement, and whether law and morality can be separated (the Hart-Fuller-Dworkin¹²⁰ basic jurisprudential questions). A separate skills seminar could focus on the beginning tools that lawyers need to develop their legal competency—briefing cases, learning statutory construction and interpretation principles, basic argumentation in oral and written forms, and basic legal interviewing and counseling skills.

The second year, "during" the law, would look most like present conventional legal education, with study of particular subject fields of law (torts, corporations, taxation, estate law, administrative law, international law, environmental law, family law, criminal law), taught with cases, statutes, regulations, and secondary commentaries. In addition, each student would be exposed to a course on legal institutions and how they function (courses on federal courts (including the structure and administration of justice, as well as doctrine), legislation, administrative regulation, local government law

119. This model replicates what has been going on in problem-based education in medical school in Canada and the United States. See, e.g., Harvard Medical School, Department of Social Medicine, Academic Programs, <http://www.hms.harvard.edu/dsm/WorkFiles/html/academics/academics.html> ("Members of the Department move systematically between social research and clinical application and teaching through the Department's Clinical Programs.")

120. DWORKIN, *LAW'S EMPIRE*, *supra* note 73, at 96-98; LON L. FULLER, *THE MORALITY OF LAW* 168-86 (rev. ed. 1969); H.L.A. HART, *THE CONCEPT OF LAW* 6-13 (2d ed. 1994).

and procedure), like the Hart & Sacks Legal Process course.¹²¹ Students would also take a basic course on the legal profession (combining ethics and the sociology of the profession they are about to enter, with a focus on critical issues in legal professionalism). The second year would have some required elements (as my own second year in law school did¹²²), including some form of organization law (corporations and non-profits, with some organizational development learning from sociology and business disciplines), accounting, statistics, economics, and other quantitative disciplines needed to understand and evaluate what law aims to accomplish in regulation.

In addition, students might specialize in particular aspects of using law (international law, judging, lawmaking through legislative advocacy) and study particular subject areas through different experiential formats (in class, through simulation, in externships or internships, and some clinical experience). In the second year all students should have more advanced exposure to legal concepts, skills (simulated courses in negotiation, trial skills, client counseling, legislative drafting), and a comparative understanding of law (as "chosen" by different peoples, rather than "given" and uniform). They should be ready to test their knowledge in actual practice in summer clerkships that would have some academic reporting and reflection requirement.

In this curriculum, all basic legal skills would be honed in simulated form in the second year—interviewing, fact investigating, counseling, negotiating, questioning, and various forms of legal writing, such as motions, opinion letters, briefs, transaction documents, and planning documents. Students would also write more scholarly research papers on particular issues to gain some sense of academic mastery and competence.

In the third year, after some practical experience in summer clerkships or internships, the "after" portion of the law curriculum would involve student specialization or concentration in a particular field of law, a course in social science methods for evaluation (to help assess the efficacy of and compliance with the law so that each student might begin to answer the questions of whether law and legal

121. In my own legal education this course was called Judicial Process (though it treated much more than court processes), was required of all first-year students, and used the Hart & Sacks Legal Process materials. HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* iii (Tentative ed. 1958); see William N. Eskridge, Jr. & Philip P. Frickey, *Introduction to HART & SACKS*, *supra*, at li.

122. My second year of law school (1972) at the University of Pennsylvania required study of Corporations, Taxation, Accounting, Evidence and Constitutional Law. By the time I began teaching at Penn in 1975 only the first year was required (and included a regulatory course, either Labor Law or Social Welfare, called Income Security (the latter a brainchild of the now-deceased Edward Sparer and my long-time friend, mentor and colleague, Howard Lesnick).

institutions actually deliver what they promise in terms of rights, social order, and justice), live clinical experience in a desired area of law (with rigorous feedback and reflection components), and a capstone seminar to deal with a final jurisprudential reflection for students who will primarily be practicing lawyers. This third year should also provide opportunities for different tracks of study for those who wish to study more deeply and specialize substantively or procedurally (such as those students who want to train for academic positions, permanent judicial clerkships or judicial administration work, business or government leadership, mediation, or legislative activity).

This tri-partite legal education would have less doctrinal and substantive law in it. It also might cut too broadly across too many different fields for many of today's professors and students. But, in my view, such a broader, more "liberal" education in law would better prepare students who will both need to specialize and know how to "re-tool" in the face of technological, economic, social, and international developments that will radically change most of what they learn in a three year program at the beginning of their careers.

In my view, this form of legal study would be "nested" in a variety of core and hybrid disciplines that affect how law is made, interpreted, practiced, and enforced. Those disciplines should be explicitly studied. The disciplines and the questions they present for contextualized legal study are:

- *Political philosophy.* Why do we need laws, constitutions, governance? What forms of governance are appropriate to different polities—for example, democracy, republicanism, separation of powers, parliamentary systems, monarchy, dictatorships, or planned (socialist) systems? How should we evaluate the legitimacy of a particular legal system—self-determination, fair distribution of resources and opportunity, power relations between the governing and the governed? What stories of origin inform legal institutions (Hobbes' Leviathan and social contract, Rousseau's "natural contract")?
- *Moral philosophy.* How should human beings deal with each other? What are they actually capable of (behavioral moral philosophy)? Are there moral universals?¹²³ What responsibilities do we owe to each

123. LAWRENCE KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT VOLUME 1 THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* 68-69, 274-75 (1981); Matthias Mahlmann & John Mikhail, *Cognitive Science, Ethics and Law*, in *EPISTEMOLOGY AND*

other (and to others outside of our own legal systems) to create a just world?¹²⁴ How do we effectuate ethical or “norming” behavior?

- *Cultural anthropology*. What human variations are there in norm creation and compliance and enforcement?¹²⁵ What are the methods of social control in any given society? How do we study and make sense of legal pluralism, the many different and variable approaches to legal problems? What cultural “dispositions” to the rule of law or resistance to law can we observe? What incentives and disincentives to law work in different cultural settings?
- *History*. (legal, American, and comparative). What are the foundational events in American law—Constitution framing, slavery, the Civil War, the New Deal, the Civil Rights movement?¹²⁶ What are the sources of our legal heritage (British legal history)? How do we explain regime changes, the differential “uptake” and diffusion of legal ideas (e.g., equality) at different points in time? How are legal ideas transmitted and diffused (federal/state relations; international influences, e.g., the United Nations Charter of Human Rights)?
- *Economics*. How do we measure the worth and value of legal rules? When are they efficient? How should we employ cost-benefit analysis?¹²⁷ What are the incentives and disincentives that affect human and institutional choices? What are economically optimal ways of structuring legal rules? For what purposes? Wealth maximization? Redistribution? What is optimal social welfare?¹²⁸

ONTOLOGY 95 (Zenon Bankowski ed., 2005); John Mikhail, *Moral Heuristics or Moral Competence?*, 28 BEHAV. & BRAIN SCI. 531, 540 (2005).

124. This is a question now discussed in much legal scholarship on international human rights and morality. See, e.g., MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 167-70 (2004); MICHAEL IGNATIEFF, *THE NEEDS OF STRANGERS* 9-23 (1984); JOHN RAWLS, *THE LAW OF PEOPLES* 3-10 (1999); David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L LAW 85 137-39 (2004).

125. Some of this work is now part of modern legal scholarship on social norms, from both law and economics and behavioral psychology perspectives. See, e.g., ERIC POSNER, *LAW AND SOCIAL NORMS* 11-35 (2000).

126. These are Bruce Ackerman’s “constitutional moments.” See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: VOLUME 2: TRANSFORMATIONS* 7-10, 346 (1998).

127. For a critique of cost-benefit analysis see FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 35-40 (2004).

128. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 18-28 (2002).

- *Sociology*. How do human beings form groups and patterns of behavior? How are legal institutions structured for effectiveness? What social forces affect compliance or resistance to law?¹²⁹
- *Psychology*. What are the influences on human action?¹³⁰ How do we act, with what motivations, intentions, heuristics? What are the rewards and sanctions that affect our behavior or our cognitions? What are the relationships between feeling, thinking, and acting?
- *Game Theory and strategic behavior*. How do we plan for and act in situations of strategic interaction with others, with and without formal communication?¹³¹
- *Decision Sciences*. How are good predictions made for making decisions about courses of action in the face of uncertainty?¹³² What data do we need? What tools of data analysis do we need? How do we assess risk aversion and preferences? How do we assess different value structures (satisficing¹³³ or optimizing)? What legal and non-legal factors go into good decisionmaking? What expertise do we need to call on for good decisionmaking and problem solving?¹³⁴
- *Conflict resolution and process studies*. What are the appropriate processes to solve legal and social problems and to design systems for effective dispute resolution, transaction planning, and organizational effectiveness? How do we diagnose conflict? When do we "intervene" in conflict? When do we transcend particular legal systems

129. See, e.g., JACK KATZ, *SEDUCTIONS OF CRIME* 4-10 (1988) (describing the thrill of law violation among criminals which reduces the effectiveness of "rationally" based deterrence theories of criminal law).

130. See, e.g., ROBERT CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* xiii-xiv (1993).

131. See, e.g., DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 1, 6-7, 79-80 (1994); AVINASH K. DIXIT & BARRY J. NALEBUFF, *THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE* 31-55 (1991); THOMAS C. SCHELLING., *THE STRATEGY OF CONFLICT* 53-80 (1960).

132. See, e.g., HAMMOND ET AL., *supra* note 49, at 109-25 (1999); R. DUNCAN LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY* 275-78 (1989). For some effort to import some of this work into the legal curriculum that has already occurred, see also KAPLOW ET AL., *supra* note 111, at 8-11.

133. See HUNTER CROWTHER-HEYCK, HERBERT A. SIMON: *THE BOUNDS OF REASON IN MODERN AMERICA* 192 (2005); JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* 4 (2d ed. 1993); HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR* 118-20 (4th ed. 1997).

134. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 *J. LEGAL EDUC.* 313, 329-32 (1995).

(international dispute resolution)? How do we assess the effectiveness of conflict resolution?¹³⁵

Others might well add other inter- or transdisciplinary fields of study, either for method (e.g., literary criticism and close textual analysis; scientific methods) or content (e.g., religion for natural law studies), but in my view, the fields listed above, whether core or discrete fields or more hybrid or applied fields (game theory, decision sciences, conflict resolution), are essential to any full understanding of modern legal institutions.

IV. SOME EXAMPLES OF INTERDISCIPLINARITY IN CURRENT LEGAL EDUCATION

To illustrate how true interdisciplinarity can be achieved in legal education, I will briefly describe three currently existing applications. I have had personal involvement in all of these programs; two are from my own school, Georgetown University Law Center. I will describe them in order of ambition, beginning with the most modest and incremental and concluding with an effort to radically transform all of legal education in a new and completely innovative law school in Mexico City.

A. Week One: Law in a Global Context at Georgetown Law Center

Within the last five years most legal educators have observed the need for our legal education to broaden its scope to consider “transnational” legal problems.¹³⁶ So much of what our students will be dealing with will involve transactions and litigation that cross borders, as international trade and commerce becomes the ordinary way of doing business in an increasingly “globalized” world.

After a year of committee study, Georgetown Law Center created a new program called Week One: Law in a Global Context, which was piloted in the spring 2006 semester. Week One involved a multidimensional introduction to problems of transnational legal significance using a variety of teaching methods and introduction to lawyering skills. In the first week of their second semester of law school, the entire first-year class (including our evening division)

135. See, e.g., MORTON DEUTSCH, PETER T. COLEMAN & ERIC C. MARCUS, *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* 22-39 (2000); CARRIE MENKEL-MEADOW ET AL., *supra* note 98, at 34-40; MICHAEL L. MOFFITT & ROBERT C. BORDONE, *THE HANDBOOK OF DISPUTE RESOLUTION* 386-404 (2005).

136. NYU School of Law, Hauser Global Law School Program, <http://www.nyulawglobal.org>; see Catherine Valcke, *Global Law Teaching*, 54 J. LEGAL EDUC. 160, 160-62 (2004).

engaged in a week-long problem set which drew from several different subject areas. (First-year "regular" courses began a week later.)

A group of faculty drafted three separate problems, each containing a complex fact situation and readings which consisted of cases, relevant statutes, law review articles, treaties, treatises, social science studies, and other materials. We aimed for no more than about 120 pages of reading for the entire week and planned fifteen to eighteen hours of classes for the week (with students completing several homework assignments outside of class time). One problem involved constitutional and criminal law issues with an international human rights treaty (the extradition to the United States of a charged terrorist being held in a country that adhered to a no extradition policy where the death penalty might be ordered). A second problem focused on an international defamation on the internet, which involved issues of international jurisdiction, international and cultural variations in defamation law, and dispute resolution in transnational settings (the dispute at issue culminated in an arbitration hearing). The third problem involved a major economic development project for the construction of a dam in Laos, and contracts between American and French contractors who failed to specify choice of law or choice of forum clauses in their multi-national contracts. Students explored how each nation would rule on contract disputes substantively, whether the Convention on the International Sale of Goods could specify an answer to a difficult question of potential contract breach, and what forms of dispute resolution would be most appropriate here (international litigation and enforcement of a foreign judgment, or arbitration and enforcement of a foreign arbitral award). These three problems were chosen to extend the curriculum already studied by each of five first-year sections (two sections focused on the constitutional and criminal law problem; two on the contracts and procedure for international dispute resolution problem; and one on the torts and dispute resolution problem). This year we will create more problems and will have different section assignments of problems.

During Week One each student read a variety of materials beyond traditional cases and doctrine and engaged in several skills-based exercises. Classes ranged from large plenary sessions to smaller discussion groups led by faculty and a group of "Global Teaching Fellows" (a selected group of international LLM students and third-year students with international law interests¹³⁷). Every first-year student engaged in at least one lawyering "performance" activity.

137. Georgetown has a special Global Law Scholars program for a small group of selected JD students. Georgetown Law, Global Legal Scholars, <http://www.law.georgetown.edu/gls> (describing the program and Week One).

Students negotiated contract clauses (for dispute resolution choices), argued motions for criminal extradition, arbitral, or judgment enforcement, and/or conducted portions of arbitration hearings. They worked individually and in small working groups and prepared several short written assignments as well. Week One is, thus far, a Pass/No-Credit (attendance mandatory) one-unit course, now required of all first-year students at Georgetown. Each Week One segment concluded with a panel of practicing lawyers and scholars who discussed the legal, political, diplomatic, and practice issues implicated in the problems. Some of the panels also discussed career issues for those seeking to work as “transnational” lawyers.

The evaluations of this program were overwhelmingly positive (both for the transnational content and the experiential-problem based teaching method) and the experiment will be continued. The pedagogical purposes of introducing students to modern “out-of-the-legal-category” problem solving, with a deeper understanding of the layers of legal pluralism (international law, transnational law, treaty law, national law, conflicts of law, and enforcement outside of particular jurisdictions, as well as cultural legal differences—e.g., civil vs. common law differences in substance and procedure), were largely achieved, though we still consider this a work-in-progress for improvement and refinement.

Week One represented an enormous effort on the part of participating faculty. Ten of us, led by then-Associate Dean and comparative constitutionalist Professor Vicki Jackson, were the principal teachers and problem drafters. Another forty-plus faculty participated in leading small group discussions, along with about fifty Global Teaching Fellows. The Registrar’s Office administered the structuring of the exercises, production of readings, and management of class schedules and rooms. This enormous effort presents a relatively small, incremental change in the first-year curriculum with a great deal of impact. Some schools have similar “bridge week” exercises, in which a topic is taught without being tied to a particular doctrinal course and multiple faculty members participate. The model is easily adaptable to accomplish a variety of legal education innovations. For example, the “bridge week” can be used to introduce students to international law, lawyering practice, law and social science and economics, jurisprudence, or legal ethics. Such programs can be used to demonstrate the “nested” nature of legal studies in other fields and to make learning a more active, and less passive, activity. Bridge weeks like this depend on dedicated and interdisciplinary (and multi-skilled) faculty, a commitment to institutionalize changes in law school structures, and a flexible, large, and dedicated administrative staff.

B. Curriculum B: An "Integrated" First-year Curriculum at Georgetown Law Center

Fifteen years earlier, a group of interdisciplinary law professors and scholars developed an even more ambitious effort to reframe the first-year curriculum. Called alternately "Curriculum B" or "Section 3" (for the number of the first-year section that has come to house this curriculum; there are three other "traditional" first-year sections and a fifth evening division first-year section at Georgetown), one whole section of the first-year class now studies all of its first-year subjects within an interdisciplinary focus. With the assistance of a Fund for the Improvement of Postsecondary Education ("FIPSE") grant from the Department of Education in 1990, six Georgetown faculty were released from teaching for one year to create an alternative first-year program. The courses were completely recrafted, to include new and separate materials (including cases and materials from other disciplines), and a gifted group of teachers taught the program for the first few years. Two keys to the success of Section 3 have been the size and depth of participation of the Georgetown faculty. We are now at least three or four deep in faculty members who are willing to teach each class, so that although each professor may leave his or her footprint on the course, we have depth and continuity of coverage, as well as firm commitment to the program.

The new "integrated" program of legal study was intended to: "1) reconceive separate subject matters in terms of common problems such as incentives, distribution and social control; 2) fully take into account the emergence of the regulatory state and pervasive legislation in most common law areas; 3) invoke other academic disciplines as they bear on law and 4) teach theory, as well as doctrinal analysis of law."¹³⁸ The courses consist of:

- *Property in Time*. A four-unit, one-semester course in legal history, law and economics, and traditional property concepts;
- *Legal Process and Society*. A five-unit, two-semester course in legal procedure, dispute resolution, and socio-legal study of legal processes, both formal and informal, civil and criminal, judicial, regulatory, and legislative (with court visits and other experiential exercises, including complaint drafting and discovery);

138. Louis M. Seidman, Georgetown University Law Center, Proposal for Reform of First Year Curriculum for U.S. Law Schools (1989) (submitted to Fund for the Improvement of Postsecondary Education) (on file with author).

- *Bargain, Exchange and Liability*. A six-unit, two-semester course in contracts, torts, law and economics, risk analysis, and legal policy, focusing on relations between strangers and relations between those who know each other, when creating legal relationships;
- *Democracy and Coercion*. A four-unit, one-semester course in constitutional law and political theory with special attention to both criminal law and civil liberties, exploring the powers of the state, theories of democratic participation and limitations on state power, and the tensions between democracy and individualism;
- *Government Processes*. A four-unit, one-semester, problem-based course on the regulatory state, with a focus on a particular area of regulation, such as workplace safety, environmental hazards, and related problems;
- *Legal Justice*. A three-unit, one-semester, small group seminar and lecture series intended to introduce students to jurisprudence, legal theory, and the chronological progression of several schools of legal thought (Legal Formalism, Legal Realism, Critical Legal Studies, Law and Economics, Jurisprudence, Legal Feminism, Critical Race Theory, Postmodernism, Pragmatism, and the New Behaviorism), and to provide a place for discussion for integrating all of these courses.
- *Legal Practice: Analysis and Writing*. A three-unit, two-semester course with all Section 3 students taught by the same set of Legal Research and Writing instructors, who coordinate exercises (and pro bono activities) with the substantive curriculum. Students learn analytic and rhetorical skills, and legal research, planning, writing, and oral argument.

Teaching methodologies vary by instructor, and all classes but the Legal Justice seminar are taught in large groups, but some instructors use writing exercises, take-home exams, and field trips to alter the conventional pedagogical diet. This program has been operational for over fifteen years and has been evaluated both internally and externally. Students self-select for this section (which is the same size as the traditional sections). They know they might have more diverse reading assignments than their peers, but they also are more likely to be committed to public interest, or to international or non-conventional legal practice. Students in this section often feel as if they have had an enriched legal education and they fare well in the job market (e.g., judicial clerkships, as well as conventional law firm

jobs), where they enjoy explaining the content of their "renamed" courses to lawyers who have had more conventional legal educations.

C. The Problem-Based Law School: CIDE in Mexico City

For the most ambitious-to-date effort to create an entirely interdisciplinary and problem-based law school, one has to leave our country. A little over five years ago, a dedicated and brilliant group of Mexican legal educators, working with a core group of Stanford Law faculty, and supported by both the Mexican government and the American William and Flora Hewlett Foundation, set out to create a whole new law school to challenge the traditional civil law, five-year undergraduate lecture method of instruction. This law school was placed at CIDE (Centro de Investigacion y Docencia Economicas), a public university in Mexico City for political science, economics, and public administration study. It was created out of whole-cloth, to begin anew, with an interdisciplinary, problem-based, and experiential pedagogy.¹³⁹ Its "small" ambition has been to revamp Mexican legal education and the Mexican legal system, and to perhaps have an influence on legal education in the rest of South America. (I would be thrilled to see a little influence en El Norte myself!)

CIDE's goals are to create a legal education that is interdisciplinary (including courses in economics, history, and social science methods); practical (all learning is problem-based and students are expected to actively participate in each class); diverse (students are drawn from traditionally underrepresented states, like Oaxaca, as well as from Mexico City and Monterrey); international (students are not only studying international law subjects, but are using common law methods of case reading in a civil law code system); and innovative (all course texts were written especially for the school by full-time professors and leading lawyers and judges in each area). All of these new texts include problem sets for each class, and readings that include cases, statutes, newspaper articles, law review articles, social science studies, and other materials. All of the teaching at CIDE involves active problem solving and presentation by students. Courses are devoted to simultaneous study of theory, practical problem solving, policy analysis, skills development, and doctrinal study. Classes are small enough for personal attention (the first few classes ranged from thirty to no more than forty-five students for each

139. See Diego Galer, *The CIDE Experiment in Legal Education*, J. LEGAL EDUC. (forthcoming); <http://www.cide.edu/presentation.htm> (providing a fuller description of the CIDE program); Carrie Menkel-Meadow, Evaluation of Problem-Based Legal Education at CIDE (Jan. 6, 2004) (Hewlett Foundation, on file with author).

year). All students also learn a second language (English, or another language if English is already known) and engage in clinical experiences in their later years. Many take part in international study for one semester in another law school.

The CIDE program is five years of undergraduate law study and its general program involves the following courses:

First-year

- Problems in Modern Jurisprudence (a problem-based seminar of discussion of modern legal problems, such as environmental and community confrontations with developers, taken from real cases and current events);
- Introduction to Political Science
- Economics I and II
- World History I and II
- Writing and Exposition
- Legal Theory I
- Family Law and Personal Rights
- Mexican History I
- Seminar in Rights/Injuries/Torts

Second Year

- Obligations I and II (Contracts)
- Processes and Procedures
- Quantitative Methods Applied to Law
- Mexican History II
- Logic and Analysis of Norms
- Business and Commercial Law
- Constitutional Law
- Law and Economics
- Legal Interpretation and Argument

Third Year

- Constitutional Law II
- Sociology of Law
- Philosophy of Law
- Business and Commercial Law II
- The Law of Amparo (special writs)
- International Law
- Criminal Law
- Property Law (personal and real)

Fourth Year

- Criminal Procedure

- Corporate Finance
- Practicum I
- International Business and Negotiations
- One semester of international study in another law school (optional)
- Ethics and Professional Responsibility

Fifth Year

- Fiscal and Tax Law I and II
- Administrative Law I and II
- International Law II
- Thesis seminar
- Practicum II
- Public Administration Law
- Labor Law
- Practicum III

It is difficult on the printed page to convey the full innovation of this program, but take for example the course in Quantitative Methods Applied to Law taught by Professor Marcelo Bergman (an Argentinean with an American Ph.D. in political science, who has taught in at least four countries and is a well-published law and social science scholar). In this course, Professor Bergman teaches second-year law students (who are for the most part under twenty years old) regression analysis, basic Bayesian statistics, correlation coefficients, and other quantitative methods, and has his students read and critique current studies of legal phenomena (such as studies of public satisfaction with judicial systems correlated with expenditures on judicial systems¹⁴⁰). His students then design research programs to evaluate particular laws or developments in legal institutions and predict what data might show, depending on the appropriate methods chosen to study a particular phenomenon. Finally, students are expected to work as research assistants on some empirical project being conducted by CIDE faculty (examples include prison condition documentation, family court reform, and public attitude surveys).

All of CIDE's classes have an experiential component. In a class I attended on civil procedure, students presented the different powers of judges at different levels of the system (as authorized by the formal Mexican Procedural Code, and informed by actual student observations of judicial officers), rather than listening to lectures by their professors or passively reading long and tedious code sections.

The faculty at CIDE consists of a mix of full-time academics who teach, research, write, and engage in empirical projects and law and institutional reform efforts, and a group of leading lawyers in

140. There is no direct correlation!

Mexico City serving as Adjunct Professors (who are jointly writing the new casebooks being created for this school). Professors describe themselves as “guides” to the students’ learning. Teaching is interactive, intensive, and personalized. It also is exhausting and time consuming and performed with the incredible dedication of a cohort of law professors and lawyers who hope (like the early Legal Realists and New Dealers) that they are remaking the world.

What I observed as an outside evaluator of this program was nothing short of revolutionary. If I had ever envisioned an ideal interdisciplinary law school—here it was, being reinvented everyday, as students and faculty shared and collaborated on new ideas and evaluated their current practices. CIDE won the 2004 Center for Public Resources Award for Problem Solving in Legal Education¹⁴¹ and hopes to transmit its teaching philosophy and methods to other collaborating schools in Mexico and South America. Could it be that CIDE will succeed in creating the first truly interdisciplinary law school where we have failed for so many decades? Much depends on how CIDE’s first graduates (the first class of which just graduated in 2006) are received in the legal community—both in private practice (many students had internships in Mexico’s most prestigious law firms) and in the public sphere (many other students aspire to political and public office or to judgeships)—and whether they will disperse to all regions of the country or remain disproportionately in Mexico City.

IV. CONCLUSION: WILL WE EVER TAKE LAW AND _____ SERIOUSLY?

I have outlined the historical efforts to broaden the study of law to include the various disciplines that inform it and some current efforts at curricular reform to realize the potential of true interdisciplinary study. The arguments for studying law in context have been with us for well over a hundred years, yet legal education remains remarkably unchanged. As medical schools, business schools, and public policy schools, among other professional schools, have reinvented curricula in recent decades, it is a continuing paradox to understand why legal education has been so conservative, rigid, and relatively unchanging. We continue to build new buildings with the same amphitheatre architecture, designed for large classes where students cannot see each other. We continue to teach primarily through appellate cases and a steady diet of “legal reasoning.” Much ink has been spilled on why this is so. In returning to the thought

141. CPR: International Institute for Conflict Prevention & Resolution, Problem Solving in Legal Education Award, <http://www.cpradr.org>.

experiments with which I began this paper, one might say that law is a field, because as a field, it has been remarkably and uniformly impermeable to other fields and developments in higher education.

Yet experiments in legal education continue to be proposed and curriculum committees at many schools continue to ask how both major and minor revisions to the curriculum might be affected. After my own thirty years of participation in at least six different legal education reform "movements" (clinical education, legal feminism and pedagogy, socio-legal studies, law and literature, alternative dispute resolution, and comparative and international or "transnational" law), I remain both hopeful and skeptical that we might finally create whole schools or whole programs that take seriously the notion that law is not autonomous and must be studied in its contexts—before, during and after the law as doctrine.

The proposed recrafting of the legal education curriculum by the Vanderbilt University Law School,¹⁴² which spawned this Symposium, is the latest effort to rethink the entire law school curriculum. I wish this latest effort well and hope that Vanderbilt will not be alone in recognizing that we need ideas and methods from outside of the law to understand its origins, meaning and effects.

142. See generally Edward L. Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609 (2007).
