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Modes of Legal Education and the Social Conditions that Sustain Them

Robert W. Gordon (Yale Law School)

This paper tries to identify various modes and purposes of legal education, and then to draw on historical experience to illustrate the social conditions in which each has emerged and taken hold. More particularly, I try to speculate on the conditions under which a mode of legal education I think especially attractive -- a broad liberal legal education in law as a branch of political economy, moral philosophy, social and historical study, and practical statesmanship -- has managed to flourish. My examples are mostly, though not exclusively, taken from the legal culture I know best, that of the USA. I invite readers from other legal cultures to suggest analogues or additions to these categories in their own societies; or to suggest how my account might be amplified or revised in the light of their experience.

I'll start by making an inventory of what seem to have been the main types of legal education in modern Western societies. Here, to start with, is an outline guide to the types:

Traditional Models

1. Training of apprentice practitioners
2. Teaching of "black-letter" law
3. Teaching students to "think like a lawyer"
4. Education in "legal science"

Law as Policy

5. Policy as supplement to traditional education
6. Policy as instrumental technique
7. Policy as education for statecraft -- "liberal" and "economistic" models

Outsider Perspectives

8. The detached social-scientific study of law
9. Critical perspectives
10. Training a vanguard of social change activists

Traditional Models

1. *Training of apprentice practitioners.* This is the most elementary type of instruction -- familiarizing novices with the basic documents and procedures most frequently used in particular practice settings (pleading forms, standardized contracts or commercial instruments, property title search methods, discovery requests, motions to compel production or suppress evidence, etc.) and giving them practice in adapting the forms to suit particular client situations. This is the training that young lawyers or apprentices are most likely to receive in lawyers' offices -- and is as well as the staple business of routinized practice on behalf of individual clients. The first American law schools such as Litchfield, which saw their mission as substituting for law-office training -- i.e. supplying lawyers ready to begin practice under a senior lawyer or on their own -- adopted it (in combination with "black-letter" law teaching, below) as the core of the curriculum. The premise is that lawyering is an artisan's craft, best learned by practice and emulation in the studio of a master. The apprentice begins by helping with routine operations while watching the

master execute more complex ones, and gradually grows in skill. Even in highly specialized law practices today, of course, such craft elements and craft training predominate, perhaps especially but not exclusively in trial practice.

2. *Teaching of “black letter” law*, that is, the specific rules of the existing legal system – common law doctrines or code provisions boiled down into terse statements of rules and exceptions. The purest form of this type in the US (and many European) legal system is probably to be found in the “cram” courses taught by commercial providers to prepare law graduates for bar examinations; but it is prevalent (more than many law teachers would like to admit) in regular law school instruction as well. The picture of the lawyer who has learned law as a body of rules is of one who “looks up the law” and informs his client what the rules are applying to his situation are: a passive law-taker rather than an active shaper or imaginative interpreter of law. Even more than the craft artisan, the rule-bound lawyer would seem to be trained for fairly repetitive and routinized practice jobs.

3. *Teaching students or apprentices to “think like a lawyer”* – training in the rhetorics, reasoning and argumentative methods of the profession (or at least of some branches of it). This -- a sort of clinical education in appellate practice -- seems to have been the central aim of the American “case method” of legal education, especially in the first year; it replicated English training of apprentices at the Inns of Court by means of “moots”, practice arguments in hypothetical cases. Its aim is to acculturate graduates into the habitual logics and *topoi* of lawyers, so as to make them recognizable to other lawyers as members of the guild skilled in the craft; and most of all to teach a set of flexible and generalizable pragmatic-reasoning and problem-solving skills that can supposedly be turned onto any problem in any specialty. The great advantage of the method has been that it does not commit law schools to teaching any particular bodies of substantive law or preparing graduates for any specific sets of careers. The method can be deployed in private practice, work for the state, or public-interest law. All job-specific skills can then be left to apprentice craft training on the job, and the lawyer can switch from specialty to specialty, task to task, career to alternative career, shining upon each in turn the brilliant light of his pragmatic mind. Besides certifying that graduates have been trained in the method, the schools sort and rank novice practitioners according to their competence in it; that competence in turn is assumed to equate to innate problem-solving intelligence (“smartness”), so that high rank in law school can and should translate directly into high rank in the professional career. The law school credential is probably as close as the American educational system come to traditional European methods for certifying members of a brainy ruling elite – such as the old Classical curriculum that prepared English graduates for elite civil service careers and the generalist exams that certify French *enarques*.

4. *Education in legal science* – that is, in law as a coherent and unified system of principles, and in the ability to reason up from particular cases to the general principles that govern them, and reason and argue down from general principles to particular cases. Instruction in the science of legal dogmatics dominates the more elite law faculties in the civil law countries. For most of the nineteenth century the training of scientific lawyers was also the ambition of elite American lawyers, who had to struggle to realize it against the craft-apprenticeship and rule-bound models of journeymen practitioners. The task of developing law as a science of principles in America was to be carried out by judges, assisted by the lawyers regularly appearing before them, and

informed by the treatises and articles of specially learned lawyers.

This ideal was institutionalized in the new law schools pioneered (after 1870) by Dean C.C. Langdell of Harvard. Langdell conceived of his “case method” as a method of teaching cases that would illustrate the general principles of private law science. His aim was to educate an elite professional corps of “counselors” – appellate advocates – trained in legal science, who would in time become judges; and also, following the German model, to develop a corps of full-time legal-academic teachers and scholars, whose historical and analytic treatises would rationalize law into a truly scientific order, all for the edification of the judiciary and corps of senior advocates. (This was to be an exclusively private-law science; public law had no place in it.).

But the case method rapidly lost touch with any overall conceptions of the architecture of private law and was converted into a method for teaching “thinking like a lawyer” (as well as a -- quite remarkably inefficient -- method for imparting knowledge of “black-letter” law). During and after the dominance of “legal realism” in elite American law schools (1920-1940), the case method became something else as well -- a critical method for attacking dogmatic legal science, by showing that its “principles” were useless for deciding particular cases. “Thinking like a lawyer” came to mean, among other things, acquiring the skill of disregarding the purported dogmatic rationales for decisions expressed in legal doctrines, and looking for the “real” factors influencing decision. These factors were to be found in some subtext of (usually inarticulate and unexpressed) function or policy.

Law as Policy

This skepticism about the dogmatic basis of legal principle led naturally to a view of legal education as *Education in law as policy*, or more ambitiously as education in policy science (or sciences). This can take many and varied forms

5. *Policy as a supplement to traditional law teaching.* Virtually all American law schools since 1950 have registered the influence of legal realism by adding policy arguments to the stock of conventional argumentative and reasoning modes that teach students to “think like lawyers.” Policy enters most law teaching – as it does the conventional reasoning of judges and the lawyers who argue before them – only in discrete little snippets. It sometimes appears as vague maxims suggesting general approaches across a field of doctrine -- “the policy of our law is, that a loss should lie where it falls,” “the general policy is that men of sound mind should have full liberty to make their own contracts,” and so forth. The second appearance is as brief ad hoc functional justifications for existing established rules: that their purpose is to protect security of expectations, or offer incentives to make improvements, or facilitate ease of administration. And the final form is the expressly purposive argument offered as the tie-breaker in hard cases of conflict or ambiguity or as the deliberately innovative move in the frontier or cutting edges of doctrine perceived to be in progressive flux. In this mode however all three kinds of policy discussion must be kept short. The policies are wildly miscellaneous; there is no attempt to reconcile inconsistencies and conflicts among them; they are not synthesized into patterns or ever analyzed at length.

Some skill in ad hoc policy analysis, in short, has been included in the package of

generalist problem-solving competences – useful to lawyers no matter what jobs they are doing. Implicitly however ad hoc policy analysis – like the doctrinal analysis that it supplements – is chiefly designed for judges and lawyers arguing to judges.

“Policy” can also be taught more systematically.

6. *Policy as instrumental techniques of legal-technocratic engineering.* Perhaps the easiest path of access for instruction in not-strictly-legal policy disciplines is in the modest but obvious useful role as instrumental to already well-defined and established legal roles and tasks – the role of handmaiden. Every business lawyer should know something of accounting principles and methods, for example; and increasingly some basics of finance theory as well. Antitrust lawyers obviously need to know antitrust economics, not only just to ask the right questions and understand the answers of expert economists, but because economic theory has become incorporated into doctrine, as it has for lawyers representing regulators or regulated industries. It's at least arguable that criminal lawyers need to understand psychiatric theories of insanity and diminished capacity; family lawyers something of child psychology; environmental lawyers of a whole range of ecological sciences; employment-discrimination lawyers of statistics, etc. So the case for teaching policy is clearly smoothest when some command of these auxiliary disciplines has become a regular part of regular lawyers' jobs.

7. *Policy as the social architecture of the legal system: education of lawyers for statecraft.* The most ambitious conception of the role of policy teaching in legal education is not as a supplement or technical handmaiden to law, but as the foundations of all law. Law in this vision is not an autonomous mode of thought or social ordering, but simply a means of executing policies. Even if legal education for pragmatic reasons may take the initial form of teaching cases, rules, codes or modes of distinctively legal reasoning, its central purpose is to relate the legal materials to norms and purposes underlying them. In the Anglo-American tradition, idea of law as a policy science is first and most brilliantly developed in the eighteenth-century Scottish school of Jurisprudence, Moral and Political Economy of Adam Smith, David Hume and their colleagues -- where it's called the Science of the Legislator, or Science of Legislation. Recall that Smith's *Wealth of Nations* started out as a section in his *Lectures on Jurisprudence* on the policies to be pursued in the exercise of state police power. Law, to this school, was part of an aggressively reformist interdisciplinary enterprise of "improvement" -- a blend of moral philosophy, political economy, and the comparative historical sociology of legal practices and institutions -- designed to purge the existing legal regime of its obsolescent features and reconfigure it to the needs and ethical values of a modern commercial society.

This very broad form of legal education evidently anticipates an important social role for lawyers -- or rather, since many of the people exposed to it will probably do something other than practice law -- for people thus educated. Clearly they are expected to be active shapers of law and architects of legal policy – lawyer-statesmen.

In the early American republic engagement in statecraft was part of the accepted business of the practicing lawyer in the new world from the Revolution onward: "We are statesmen," as the leading Massachusetts trial lawyer (and U.S. Senator) Rufus Choate put it, "because we are

lawyers,"¹ -- meaning that lawyers in the early republic, far from sharply separating the functions of the lawyer and the legislator, thought of themselves in Tocqueville's terms, as an aristocracy of merit with a special social responsibility as guardians and reformers of the laws. This responsibility was to be discharged in two dimensions -- the construction, elaboration and maintenance of Constitutional frameworks, and guardianship of Constitutional norms in a liberal republic; and the conversion of English law with its "narrow, arbitrary and mystifying spirit", its dysfunctional procedural technicality, obscure vocabulary and archaic remnants of the "feudal" law to the requirements of a liberal commercial republic. This program implied an extensive "legislative" reform agenda: getting rid of "feudal" modes of inheritance, of indentured servitude, imprisonment for debt, some of the total disabilities of coverture, non-inheritability of illegitimate children, restraints on alienation, the simplifying of conveyancing and real actions; abolishing wage and price regulation and other mercantilistic "vexatious details of municipal regulation"² such as compulsory terms in the contract of employment, sumptuary laws, and interstate barriers to trade; and installing in their place a body of facilitative rules, enterprise forms, a workable bankruptcy law.

In short the lawyers of the early American republic prepared to perform several public functions as well as the private ones of advising clients. They saw themselves as expert advisors to judges, ones who would eventually become judges themselves, and thus as both (a) lawmakers, as common law judges, of private law; and (b) guardians of fundamental constitutional principles enforced by the courts, a co-equal and independent branch of government, even against the legislatures. They also saw themselves as expert advisors to executive and legislative branches of government, and as elected and appointed officials.

This set of public functions would seem to call for an education on the Scottish model; and indeed leading lawyers of the early Republic usually recommended such an education. For them the ideal image of the lawyer combined the Scottish scientific legislator with the older liberal-humanist ideal of the Ciceronian orator-statesman, the fearlessly independent spokesman for republican liberty.³ Jefferson's notes on teaching law at Virginia, for example, proposed a curriculum of the "common and statute law, that of the chancery, the laws feudal, civil, mercatorial, maritime and of nature and nations; and also the principles of government and political economy."⁴

Education in the principles of legislation -- including moral philosophy, political economy, and comparative history -- remained a general aspiration of the elite bar until the end of the 19th century. All the conditions favorable to such an education were present but one -- student demand for it. Repeated attempts to institutionalize in schools it fell flat, even where some kind of university-connected legal education was implemented. Columbia's experience

¹Rufus Choate, *The Position and Functions of the American Bar, as an Element of Conservatism in the State* [Address to Harvard Law School, 1845], in *Addresses and Orations of Rufus Choate* 133, at 154 (3d ed. 1879).

²Timothy Walker, *American Law* (1837) at 291

³See Stephen Botein, Cicero as a Role-Model for Early American Lawyers, 73 *Classical J.* 313

⁴1 Hofstadter & Smith eds., *American Higher Education: A Documentary History* 230-31.

was typical: its original 1857 plan for a Jurisprudence curriculum included Modern History, Political Economy, Natural and International Law, and Civil and Common Law; but by the following year it was clear that in order to attract any students the course would have to be pruned back "those branches of Municipal Law, usually and appropriately pursued for obtaining a license to practice," with the hope that occasional lectures in the "kindred subjects" or "superadded Studies" might be offered as an extra sweetener once the students had been drawn in.⁵

The problem seemed to be that although the elite American profession was indeed – just as it claimed to be – the preferred route of access to the elite class of elected and appointed public servants, and, both in private practice and public office, guardians and reformers of basic procedural and substantive rights and norms, there was a thin market for the type of liberal education that the elite thought appropriate training for the functions they actually exercised.. Most young men wanted a more immediately practical training for legal careers, which until the end of the nineteenth century was something combining apprenticeship and black-letter models – form-books plus Blackstone’s (or the Americanized Blackstone, Kent’s) *Commentaries*.

After 1870 Langdell and his Harvard successors instituted a new and much more demanding intellectual standard for American legal education, but they deliberately rejected the liberal Scottish model in favor of a much narrower model of law as private-law science; and they strenuously resisted any attempts to turn their school, or law schools following their example, into academies that would train graduates in public policy for public careers. They turned their backs both on the rich American traditions of public-law scholarship and statesmanship; and the emerging roles of lawyers in the new administrative state. It was partly in revolt against the narrowness of the Harvard model that there emerged a revival of interest in law as policy and policy science, and in the normative foundations of law.

In the 20th-century USA the most ambitious experiments -- too ambitious to last, as it turned out -- were those of Columbia Law School in the 1920s and Yale in the 1930s to revise the curriculum around a “functional” approach to law conceived of in social science, rather than legal science, categories and objectives (“social control”, “innovation”, “economic security”). Probably the most successful realizations of the project have come in very recent times: first, in the re-ordering of public law around norms of equal justice, equal opportunity, and equal citizenship; and most spectacularly, in the rise to dominance of several major law schools by teachers of law and economics proposing to rationalize and reform both public and private law as driven, actually or potentially, by norms of efficiency or wealth-maximization.

Education for statecraft in practice tends to take one of two major forms – liberal-humanist, or economic. The brilliant Scottish combination of the two is rarely achieved. In present-day US law schools, for example, those who aspire to broad learning as the basis for an education for legal statesmanship tend either to draw on the humanist disciplines of history, philosophy, and cultural studies; or, alternatively, on economics and its affiliated disciplines (political science public choice theory, positivist-behaviorist social science). There are faint signs of a possible rapprochement between these two intellectual cultures in subfields such as the

⁵Julius Goebel et al., *History of Columbia Law School* 27, 28.

study of social norms. But mostly their devotees work on different problems, lawyer-humanists on issues of equality and identity, race and gender; lawyer-economists on business law and the organization of the economy; and they rarely cite each other's work.

All the modes of legal education mentioned so far take the professional training of lawyers for professional tasks to be their primary goal. Some of the methods are relatively narrow and conservative, such as #1, craft training, #2, black-letter law, or #6, technical instruction. Some however are at least subtly driven by reformist purposes: #3, training in thinking like a lawyer, especially coupled with #5, training in policy argument, and #6, training in auxiliary policy sciences, has been designed to try to improve the average level of practice, by giving lawyers a more extensive, and more sophisticated vocabularies of argument, to practice their craft. And training lawyers to be #4, legal, or #7, social scientists are explicit attempts to raise lawyers' eyes from the insular worlds of normal craft practices to see their work as parts of, and ideally conducted in the service of, a wider whole and broader ends. Legal and social scientists have never hesitated to pronounce critical judgments on existing legal practices, whether judicial, legislative, or professional; indeed teachers in such traditions see it as one of their essential functions to identify the broader purposes of law and evaluate whether existing law serves them.

Still the basic standpoint of teachers of all these methods is that of the insider to the legal system, even if sometimes critical insider. Yet it is inevitable that once law teachers begins to examine the norms, principles and policies behind existing legal practices, and especially when they begin to look into other disciplines to do this, and when (I am anticipating here the next section) the norms and rewards for their work come increasingly from the academy rather than the professions, that their perspectives should begin to shift towards those of outsiders, either detached-disinterested or engaged but critical.

Outsider Perspectives

8. *Legal education as (at least partly) the disinterested and objective study of law, legal systems, and law in society* – historical, comparative, sociological, anthropological, economic, philosophical or as a branch of cultural studies (law as a repository of rhetorics and narratives). Usually legal academics have been led to this vision of law schools and their functions by an indirect route. Starting out by looking to other disciplines for insights into how law works so as to make it work more effectively, or to rationalize and explain it more persuasively, they have found that the new insights tend to undermine conventional notions of law and its effectiveness, or even to displace law as a significant category of analysis. To give an example from my own field of legal history: lawyers first turn to history to explain and rationalize current doctrines, for example to find grounding for arguments in “original meanings” of statutes or constitutions., or in progressive evolutions from early and primitive to later and more developed forms of doctrines, or in the practices of idealized legal cultures, such as those of classical Rome or pre-Norman England. But what they actually discover are societies and legal systems very different from and alien to our own; and the supposed continuities based on generations of distortion and misunderstanding. Similarly, legal sociologists undertook the investigate the “law in action” to see where it fell short of “law on the books”, so that the “gap” could be closed. What they often found was social action serving purposes wholly unrelated to, or drastically conflicting with, the

formal ends of law. Instead of learning how law could more efficiently control society, they learned of the futility of legal enactment, or of its perverse and unintended effects. Confronted with such abysses opening underneath their feet, many academic lawyers said, Our first task must to map these new worlds and simply try to understand.

This view of the law teacher as the detached observer of law and society has naturally gained adherents with the increase in the number of law schools and law teachers, and the increasingly inter-disciplinary orientation of law teaching. The models such law teachers imitate are in other departments of the university and in academic associations, not in the legal profession.

9. *Legal education as an occasion to inculcate critique and programs for reform of the current legal-social order.* In this last conception the academy, or anyway some part of it, plays a distinct role in society and the profession, that of outsider-critic, gadfly and reformer. This role, as I've already said, is implicit in several of the ordinary modes of pre-professional law teaching described above; but in this last mode the critical role is explicit and primary. The idea is that is precisely because we are not caught up in the pressures, biases and incentives of practice that we can afford to view the legal world in a critical spirit. We ought to use, and help our students learn how to use, legal and extra-legal study and analysis not just to justify practices the legal system currently favors, or to reform them incrementally, but to speak truth to power, to expose such practices to be fundamentally unjust or inefficient if they are so; and to explore alternatives, including radical alternatives. The social roles imagined for products of this training – in addition, of course, to more academics – are those of vanguard activists for public-interest groups and NGOs, of public intellectuals, and of defenders of and advocates for social movements and visionaries of social change.

10. *Legal education as a training ground for vanguard social change activists.* “Critical” law teachers may perceive their work as potentially useful to reform movements, both in sharpening their critiques of the existing legal order and helping them to imagine broad alternatives. But sometimes law teachers have aimed for a more direct effect on reform, and have seen their vocation as the formation of activist cadres prepared to engage in test-case litigation or lobbying and organizing for changes in legislation and administrative policy, or helping to organize and do the legal work for groups with a change agenda. This mode of training has never been a large part of any American law school, but one can find it in course taught by professors active in the New Deal in the 1930s and in the work of law school clinics, beginning in the late 1960s, in such fields as poverty, welfare rights, environmental and human rights law.

Conditions for Innovation, Flourishing, and Survival of New Modes

Having laid out these ten types of aims and methods of legal education, almost all of which are in active use in US law schools today⁶, I want to develop some fairly obvious points.

⁶1. The significant exceptions are #1, apprenticeship craft training, which is almost wholly absent from the US law school curriculum except in legal writing programs and extracurricular moot court activities, trial practice courses and in clinical education; and #4, legal science, which although still central to European civil law systems and legal cultures derived from them, has almost entirely vanished from US legal culture.

First, to repeat that each of the modes described has a vision in mind of the kind or kinds of lawyers (or law-observers or law-reformers or public activists or intellectuals) that it wishes to educate. Second, that the viability of each of the modes – the likelihood that it will be adopted, imitated, survive and flourish – will depend on whether conditions of the wider professional-social-ideological environment are favorable to the performance of those law-jobs or social roles. To put this another way, in order to survive a mode of legal training must have jobs and careers and institutional niches or movements to attach itself to, to which it is (or at least is perceived to be) relevant. It must meet demands for the kinds of services that the people trained by it supply. But it must also resonate, or at least not be acutely disharmonious, with the class and economic and status interests of the legal profession (or of powerful state actors) and of lawyers' principal clienteles and constituencies.

We have already seen that although leading 19th century American lawyers in fact lived out the careers of liberal-minded lawyer-statesmen, they never managed to institutionalize a liberal legal education. Similarly English lawyers and judges of the 19th century were certainly active in the construction of the British state: they served in Parliament; as judges they read and often expressly applied snippets of political economy; considerations of public policy were often alluded to in their arguments and decisions; as utilitarian public intellectuals, law reformers and social reformers, they drastically revised and simplified the procedural law and built the agencies of the new administrative state; as administrators of England's empire they practiced the Science of Legislation in the field on a grand scale as drafters of comprehensive codes of law and administration. But despite all this the professional culture of the English bar strenuously resisted any deliberate or systematic instruction in the policy bases of common law or legislation. It was more interested in protecting its autonomy as a narrow, insular, craft-based profession than in broadening its educational ambitions to turn out more of its conspicuous public exemplars. The founders of modern English law schools such as Oxford's had to struggle against an insular, ingrown, intellectually conservative profession of judges and lawyers who put no value on a scientific, or as we would now call it, a theoretical, training in law. Bright and ambitious young men entering the legal profession read classics rather than law; and got their legal educations from the course of dinners at the Inns of Court for barristers, or from crammers for the Law Society's exams for solicitors, and ultimately from apprenticeships. To validate their vocation English law teachers presented themselves as a humble corps of clerks, whose job was to synthesize and simplify the decisions of the real makers of common law, the judges, for the benefit of aspiring lawyers. Their typical work-product was the student textbook, usually published with a flattering dedication to an eminent judge; its function, as A.V. Dicey put it, being to "supply all the defects which flow directly or indirectly from a one-sided system of practical training. It is for law professors to set forth the law as a coherent whole...to reduce the mass of legal rules to an orderly series of principles...to [digest it] into a set of rules and exceptions...[A] few principles which sum up the effects of a hundred cases...can thus be understood and remembered."⁷

In America conditions for escaping the apprenticeship model into a broader model of legal education were much more favorable, precisely because the organized profession was much

⁷A.V.Dicey, Inaugural Lecture (1883), cited in David Sugarman, *Legal Theory, The Common Law Mind, and the Making of the Textbook Tradition* (1986), 26 at 30.

weaker. Democratic hostility to guilds and guild privileges in early America had almost destroyed early bar associations and formal requirements for admission to the bar. The new American law faculties were thus able to innovate free of guild or state controls -- to set their own admissions policies, eventually requiring undergraduate college degrees as a prerequisite to admission; they gave their own examinations to their students and thus were broadly free to teach what they pleased; and – a very significant innovation – they hired full-time law teachers, not partly dependent on practice incomes for their support. These were important preconditions for imitating the German model of scientific legal education and research.

But there were limits to their boldness, also conditioned by their political and social milieu. As I have already mentioned, at the time they taught an exclusively private-law science, turned their backs on public-law theory, and rejected the role of training lawyer-statesmen. Part of this caution was intellectual narrowness, part prudential. The great emerging great issues of public law – the authority of the federal government in the postwar South, the appropriate terms of capital-labor conflict, the regulation of industrial accidents, business and labor combinations, and rates and service of railroads and public utilities – were extremely controversial politically. Professors in other departments were fired for taking positions that trustees thought were too liberal on these subjects. A law dean trying to sell the practical virtues of a theoretical training to a skeptical and conservative bar might well want to avoid the swamp of interdisciplinary work and the third rail of public law and policy issues. This was true both of private schools, which were financed by alumni contributions as well as tuition payments; and of public schools, attached to state universities financed by state legislatures.

Closer to our own time, similar though less stringent and more subtle considerations have inhibited the flourishing of “outsider” perspectives. Such perspectives can, of course, only survive at all where law teaching is a full-time occupation, and where the universities, not the profession, control appointments and professional status rewards. To their good fortune so far, unlike the natural and empirical social scientists, most US legal researchers have not so far depended heavily on outside sources of research funds (though they do depend on alumni gifts as well as student tuitions). If that should change – as it is likely to do with the growing importance of empirical research in law – law teachers will depend more on funding from the government and private corporations. Corporate sponsorship is already beginning to exert some of the same pressures on scholarly independence in law as it has conspicuously done in other fields such as pharmacological research. The critical outsider, even more than the disinterested observer, needs the protection of independent universities with strongly institutionalized traditions of academic freedom and law schools relatively free of the control of the profession and the state. These protections in the US are of relatively recent origin. Conservative alumni often tried to get law teachers whom they perceived as radicals fired in the 1920s and 1930s and most aggressively in the Cold War climate of the 1950s. These efforts only occasionally succeeded, but even when they failed they made law schools cautious about hiring left-leaning colleagues.

My general point here is just that for law as either a technical or liberal science of policy to be taken seriously enough to be given an institutional home and support, some segments of the practicing profession must be sympathetic to receiving it. This is always a problem, because the science has to be incorporated into law without threatening either the lawyers’ claims to monopoly of their mystery of indigenous craft techniques or the ideology of the autonomy and

neutrality of law, of the “rule of law” as something distinct from politics. Since “policy” cannot be or be perceived to be mere “politics” it has to possess, or seem to possess, an objective or scientific character. Yet to the extent that character is imparted through close study of another discipline, it isn’t law; and to the extent that the policy sciences developed in other disciplines are contentious, borrowing from them means importing that contentiousness into the legal culture.

Thus legal professions basing their claim to status on their autonomy, deriving from their monopoly of distinctive tasks, may simply not seize every opportunity to redefine their occupational roles -- and may actively resist ventures to expand their jurisdiction and prepare them for broader and more varied careers.. Many legal professions limit their functions to appearing in court, define specialties such as tax law as simply “not law”, or classify all considerations of policy as “for the legislature” and thus outside their field. French *avocats* for most of the nineteenth century limited their functions to advocacy and “defense” of client interests, insisting on remaining independent both from the state and politics, on the one hand, and engagement in commerce on the other.

On the other hand, major changes in external conditions can and do alter professions’ definitions of their proper roles. The French *avocats* became more active in the state when the Third Republic opened opportunities for them to become lawyer-statesmen and policymakers. And they finally abandoned -- with perhaps altogether too much zeal -- their objections to commercial engagements after the 1970s, when they saw rival professions such as accountants and *conseils juridiques* (advisors) moving in on the growing and hugely profitable business of serving multinational corporations.⁸

In the US, the longstanding ambition to amplify law training into a broad-based, interdisciplinary education for statecraft was finally realized with the arrival of the New Deal expansion of government in the 1930s. The most ambitious experiments I have mentioned, the Columbia curricular reforms of the 1920s and Yale’s plans for merging law with social science in the 1930s, were disappointed. These experiments failed for several reasons. They were politically too far to the left for the comfort of some faculty, university administrators, and much of the practicing bar. They were often not thought through and sometimes dependent on existing social science theory and methods -- a primitive behaviorist positivism -- that was not useful for explicating any legal problem. They ran into heavy traditional lawyers’ resistance. But mainly, I think, the reformers failed to make entirely plausible, even to themselves, exactly what sort of practice careers the “functional approach” was training people for, at a time when, just as in our time, most of their graduates went on to big-city corporate law practice.

The New Deal seemed to help answer the question of what lawyers could do with their policy training. It provided both permanent and transient careers in the federal bureaucracy for a large number of lawyers. By 1939 there were 5368 lawyers in federal government service – and thus many more lawyers needed to represent the companies they regulated. In the 1940s and 50s a flood of articles pointed this out; and pointed out, as well, the private lawyer’s role as a practical statesman in the architecture of private ordering structures that had to serve clients’ long-run purposes and comply with regulatory statutes. The law schools, the authors argued,

⁸Lucien Karpik, *Les Avocats* (1999)

needed to prepare people to master the substantive regulatory fields, the administrative processes of their new craft and to assess long-run social effects. To put this another way, the New Deal made the case that competent lawyers needed to acquire a new form of social capital, one that went beyond knowledge of court decisions and the capacity to analyze private-law doctrine. Ex-New Dealers returned to staff the major law schools. What actual impact did they have on the Law Schools? Less than one might have predicted. New Deal statutes were brought into the curriculum, where they were rapidly assimilated to the common-law model of doctrinal analysis. The first year remained the domain of nineteenth-century baseline rules of common law, subject to some modest policy reformism (the expansion of enterprise liability in tort and contract). The upper years were reserved for the New Deal statutes. But then case law glosses on the statutes became the subjects. The law reviews of the 1940s period are still full of substantive debates on regulatory policies. By the 1950s the great controversies that had convulsed the country were forgotten. The new framework was normalized. The jobs students were being prepared for were not framework designing jobs, but -- as lawyers for business, labor or the government -- administering frameworks already in place. The big exceptions to his pattern were Antitrust and Regulated Industries -- new fields where economics had begun to colonize the field.

On the other hand, Legal Realism and the New Deal brought policy studies, policy analysis and social science into legal research and teaching. Mostly this was what I've been calling policy as supplement, rather than policy as an object of systematic study; it was "thinking like a lawyer" with some policy thrown in. It was a curriculum that in many ways pretty well fitted the role of law graduates of the elite schools in the postwar world. In this world, lawyers in private practice (which is what the great majority of graduates still went into -- argued before judges many of whom themselves practiced a modest form of legal-realist policy analysis, and increasingly before administrative agencies. Lawyers often began their careers with service in a federal agency and continued to move in and out of government. As advisors to corporations, many of them saw their job as counseling clients to comply with the basic policies and purposes of the regulatory framework. Most law professors were somewhat to the left politically of most practitioners -- more committed to regulation of industry, more sympathetic to labor, definitely more committed to civil rights and civil liberties. But the method they taught, the "thinking like a lawyer" method with some policy analysis added on, did not seem to incorporate any particular substantive or policy commitments. It was a bundle of discourses and reasoning modes that could be turned, or so it seemed, to virtually any kind of lawyer's use in any situation. It turned out adaptable smart generalist legal-social engineers, and that was adequate for the conditions of the time.

The New Deal began the process of generating the conditions for teaching law as an interdisciplinary enterprise in practical statesmanship. The Rights Revolution -- the broad legal initiatives and social movements pioneered by the U.S. Supreme Court in the 1950s and continued by social movements and public-interest groups through the 1960s and 70s -- vastly expanded those conditions. Like the New Deal, the Rights Revolution opened many new jobs and roles to lawyers -- as architects of litigation strategies, lobbyists for and drafters of legislation, designers and administrators of administrative policies, intervenors (on behalf of public-interest groups) before administrative agencies, legal advocates for social movements such as the civil rights, women's, welfare rights and environmental movements, new government and foundation-sponsored lawyers for the poor -- and, in the law schools, new

poverty and public-interest-law clinical teachers. The movements to bring hitherto marginalized and excluded groups into full citizenship found allies at the very apex of the state and legal system – the federal courts, a series of liberal Congresses, and the federal executive from 1960 to 1980, under Presidents Kennedy, Johnson, Carter and even Nixon.

At the same time, both the New Deal policies and postwar liberalism were generating a scholarly reaction, at first in the form of outsider-observer and critical positions, that was to greatly enrich the study of law as a theoretical and interdisciplinary policy science and branch of practical statesmanship. This was of course Law and Economics, especially in its conservative neo-classical schools developed at the University of Chicago. I think one has to give the credit to Chicago (along with the more liberal Yale-Calabresi versions of L&E) for freeing economic policy science in a law school setting from the enclaves of Antitrust and Regulated Industries, and extending and generalizing it to ordinary fields of private (and eventually even public) law such as property, torts, contracts, statutory interpretation and many more. Chicago L&E is all the more impressive a legal-academic achievement because for years it had to be carried on in a sort of political and intellectual isolation from the main currents both of legal-academic life and public policy-making. In 1980, with the election of Reagan, all that changed. Neo-liberal L&E, and conservative constitutional law (which spawned several new interdisciplinary enterprises such as “originalist” historical studies of the Constitution) were now allied to policymaking power. Conservative law professors became judges and appointed officials; their students joined the Federalist Society and found in its networks convenient corridors to influence and office. The conservative movement’s forging of links between theory and interdisciplinary study in the law schools, and its application in policymaking in the state and legal system, has achieved an alliance of intellect and power as impressive as, if not more so than, that of Progressive-Realist thought and the New Deal.

Rival fields of theoretical and interdisciplinary study have since emerged -- partly in reaction to, and in an effort to respond -- to the new dominance of L&E; but also because for various reasons every field of legal study in this period became more interdisciplinary from 1980 onwards. Shut out of other academic fields by job shortages, PhD’s in various fields studied law and became law teachers. Universities demanded more scholarly production from law teachers as a condition of tenure. Liberal law teachers turned their intellectual energies to trying to defend the legacies of the New State regulatory and welfare states, and the Warren Court and Rights Revolution, that were now under attack.. Liberal policy analysts still had connections to institutions and mobilized groups – new social movements (environmental, disability, gay rights, etc.), public interest groups, human rights groups, and NGOs elsewhere in the world; and with the Clinton Administration’s spell in power, 1992-2000, access to judicial and government jobs. Also left-of-center academics, having been shut out of power for much of this period, turned increasingly to outsider-observer and critical perspectives. (There has been a real boom in legal history, for example.) It seems that the broad and liberal study of law needs the prospect of power, of eventually being applied in practice and of potential jobs for those educated in it, to get going. But once established, it can benefit greatly from the relative calm of an interregnum in power -- in not having to respond to the pull of the everyday concerns of the policymakers. (The work of the Yale legal realists in the 1930s, for example, became significantly less intellectually interesting as they started to take the train every week to Washington.)

Given the setting in which this paper is presented, let me close with some remarks about the export of modes of legal training. In a fascinating book that is still very much worth reading, James Gardner describes what happened when, in the first wave of US legal-reform exports in the service of “legal development” and the “rule of law”, American lawyers brought the model of postwar American legal education to Latin America. They believed it was a universal method for producing pragmatic problem-solving reform-minded lawyers, released from bondage to reactionary formalism. Not surprisingly it was resisted by lawyers trained in the civilian positivist tradition – as well as by student radicals for whom it was insufficiently revolutionary. The program was better received among new cadres of public lawyers concerned with legal-economic policy, as well as among law teachers long dissatisfied with what they saw as the narrowness of their tradition. But the American lawyers’ big mistake was to assume that their method automatically carried with it the benignly liberal-reformist social consequences of its US origins, where it had been the method of Progressive social-democratic reformers who, in the 1930s and afterwards, had captured the state and made it the instrument of their policies. In fact legal instrumentalism set loose from its original political matrix could be turned to any set of purposes; and it turned out that the Latin American lawyers who found it most useful entered the service of repressive authoritarian states and of multinational corporations. Where lawyers and bar associations resisted the dictators, as in Brazil, Gardner points out, it was as spokesmen for traditional autonomous formalist rule-of-law norms, not policy-oriented instrumentalism.⁹

There are similar problems with the new wave (post-1990 and still continuing, under the auspices of the World Bank and US Agency for International Development) of exports of American models of the “rule of law” and of pragmatic problem-solving instrumental law practice. These new models no longer carry with them the legacy of activist social-democratic or egalitarian legal policies, directed towards bringing subordinated, marginalized and excluded elements of society into full citizenship and achieving basic minima of security against old age, disability, poverty and unemployment -- but rather the opposite, the neo-liberal program for privatizing enterprises, dismantling security-providing state functions, and replacing them with what are imagined to be the optimal legal frameworks of property-protection and contract-enforcement for free markets. Imported in tandem with neo-liberal ideology, the model of training for American corporate lawyering may have particularly toxic consequences. For that model still incorporates the instrumentalism inherited from legal-realist thinking, thinking like a (skeptical) lawyer, seeing law as a means to an end – the end in this case being what the client wants. The instrumentalist corporate lawyer has a wholly disenchanting or even cynical view of law, as simply a set of opportunities for, or obstacles in the way of, realizing his client’s desires. In this view legal constraints actually bind only to the extent they are expressed and habitually enforced as the plainest positive commands; otherwise lawyers may, and if their clients’ interests require it must, urge any arguable construction of law or fact, use any plausible strategy of delay and obstruction. Lawyers influenced by the “efficient breach” theories of legal economics go even further: “[Corporate] managers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm We put to one side laws concerning violence or other acts thought to be *malum in se*.”¹⁰ ...[M]anagers do not have an ethical duty to obey

⁹See generally James Gardner, *Legal Imperialism* (1982)

¹⁰ Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 Mich. L. Rev. 1155,1168 n.36 (1982)

economic regulatory laws just because the laws exist. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules; the idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so.”¹¹ This is a concise restatement of what Holmes called the “bad man’s” view of legal rules as prices discounted by sanctions (or, to reduce it still further, by the probability of enforcement of sanctions). In this world-view the outputs of law in the regulatory state are simply tariffs on conduct – a thicket of obstructive nuisances to their clients’ goals to be engineered around or opted out of. The zealous lawyer games the rules to work around the constraints and lower the tariffs as much as possible; if some constraints are unavoidable he “not only may but should” advise breaking the rules and paying the penalty if the client can still make a profit.

Now this instrumentalist mentality detached from its social-democratic origins has become, I think, very damaging to legal order and regulation in its American context. But it becomes really dangerous when exported into societies that do not have traditions of strong state enforcement of legal norms and rules regulating business entities and their harmful externalities. American corporate lawyers feel as free to game the legal system as they do because they take for granted that on the other side of the table there is at least a moderately strong and effective set of public prosecutors, taxing authorities, securities fraud investigators, environmental agencies, and plaintiffs ready to bring tort suits. (The recent Enron scandal shows what can happen when those conditions fail to hold.) But the techniques of aggressively evading and engineering around legal constraints, brought to bear in a society where state enforcement authority and judicial and administrative tribunals, are not strong and independent but weak, underpaid, understaffed and sometimes corrupt, can wholly swamp state capacity to establish effective frameworks for effectively functioning markets and a just distribution of social benefits and burdens.

I conclude that both in the US and elsewhere, lawyers continue to need an education in liberal statesmanship – that is, in the norms and ideal social and economic conditions that their legal sciences and techniques must serve. Social vision without technique, as has often been said, is ineffectual; but technique without vision is a menace. The questions to which this paper is a small attempt to begin to think about is: What are the social conditions under which legal training will supply such an education; and what are the social conditions under which it will flourish?

¹¹ Id. at 1177 n.57. I found these quotes in an exceptionally penetrating critique of the view of law they express, Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N Car L Rev 1265 (1998).