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## Fiat Flux: Evolving Purposes and Ideals of the Great American Public Law School

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*Berkeley Law*

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## Fiat Flux: Evolving Purposes and Ideals of the Great American Public Law School

Christopher Edley, Jr.\*

*This Essay describes the changing role of American law schools throughout the twentieth century and proposes a vision for the future's Great American Law School. Since the founding of Berkeley Law, the definition of the legal profession has progressed from an interior orientation, which focused predominately on trial courts and appellate advocacy, to an exterior orientation with wide consideration of other forms of lawyering. Along a second axis, legal pedagogy has progressed from a careerist orientation, which focused on case analysis and advocacy skills, to a more academic orientation that integrates questions of theory and methodology. Analyzing these trends, this Essay suggests that the next century's Great American Law School will: (1) embrace a curriculum that prepares law students for careers outside the law; (2) train cross-disciplinary societal problem solvers; and (3) contribute to a new global legal culture that will help bring nations closer together generally.*

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\* The Honorable William H. Orrick, Jr. Distinguished Chair and Dean, University of California, Berkeley, School of Law; Co-Director, The Chief Justice Earl Warren Institute on Law and Social Policy. I greatly appreciate the careful comments from several colleagues, especially former Dean Sanford Kadish and Professor Lauren Edelman. This Essay offers ideas I have not yet presented for consideration by the Berkeley Law faculty.

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## INTRODUCTION

Let us suppose that we can choose and bring about what a great law school will be decades from now. A direction is not difficult to propose, and an audience might be persuaded by verbal performance. But the cliché that past is prologue provides a better basis for choosing our direction. If we consider the earlier course of both great law schools and their accomplished graduates, I believe a rewarding path forward lies just beyond the surrounding thicket of the everyday.

To discover that path, it seems fitting in this Volume to start with the thoughts of my predecessor, the founding dean of Berkeley’s School of Jurisprudence. One hundred years ago, at the dedication of Boalt Memorial Hall, Dean William Carey Jones began his formal remarks somewhat provocatively:

The law schools of this country have never faced their problems. Like most institutions coming down from generation to generation, they have been slow to inquire into the original justification of their plans and programs, or to seek to learn whether what was once justified still retained its reason for being.<sup>1</sup>

Reviewing the preceding one hundred years, Dean Jones stated, “[T]here is only one innovation of significant and essential importance that has been introduced.” This innovation was in the method instruction and was due mainly to the initiative of one person, Professor C.C. Langdell. The application that he made of the inductive method to the study of law has been well nigh revolutionary in its effects.<sup>2</sup>

Our Dean knew Langdell’s method not only added much needed scientific rigor to legal study, but also demonstrated to students the essential lesson that

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1. Wm. Carey Jones, *The Problem of the Law School*, 1 CALIF. L. REV. 1, 1 (1912).

2. *Id.* at 1, 4.

to practice law is by its very nature to reform it: “[L]aw is a living principle, even as medicine is an advancing science. Law is in process of constant becoming. It is ever being re-created, not only through legislation, but through a sort of self-reproduction.”<sup>3</sup>

To this I would add that a school of law—especially a public one—if it is to be and remain great, must be comparably dynamic. Indeed, it should be more so if it is to be not merely an echo of what the law is, but a clarion herald and perhaps agent of progress.

Part I of this Essay illustrates the evolutionary path the American Law School took during the twentieth century, from its early apprenticeship-based model to today’s modern university institution, enriched by diverse, Ph.D.-trained faculty. Part II provides three recommendations that collectively point toward a vision for the next few decades at the Great American Law School. First, we must embrace a curriculum designed to prepare students for legal careers outside the traditional practice of law. Second, we should strive to graduate effective societal problem-solvers—both lawyers and non-lawyers—by encouraging cross-disciplinary bonds across the research university campus. Finally, we must take seriously the Great Law School’s international role, and its duty to shape a global legal culture that will promote prosperity, security, and human dignity.

## I.

### THE LAST ONE HUNDRED YEARS: FOUR “ERAS” OF LEGAL EDUCATION

Dynamism may be a stretch. I do, however, connect my hope for the Great Public Law School to a process of evolutionary change, illustrated in Figure 1 as four distinct but related eras, defined by shifting beliefs about (1) the contours of the legal profession (vertical axis) and (2) the most appropriate pedagogical methods (horizontal axis). It is important to remember that these eras build on each other—moving from one era to the next does not imply leaving the important pieces of one era behind, but instead signifies expanding on the best facets of prior models.

#### *A. Era One: Dean Jones’s Law School*

Oliver Wendell Holmes, in *The Path of the Law*, quite naturally tied legal education to the functions of the attorney in litigation and in counseling clients on how to avoid it: “The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”<sup>4</sup> The special status of lawyers is derived, first, from the special power of courts to summon the power of the state and, second, from the professionalism of

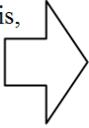
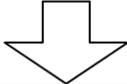
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3. *Id.*

4. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

lawyers in anticipating how courts will respond to this or that set of facts.<sup>5</sup> Dean Jones predated the contributions of legal realists like Holmes, who opened up academic aspects of the project of prediction with a broader set of observations and methods. Jones nonetheless saw the purposes, methods, and goals of legal education circa 1911 as strikingly “interior” in two complementary senses, both reflected in Figure 1 and discussed below.

**Figure 1: The Progression of Legal Training**

		<u>Pedagogical Method</u>	
		<i>Careerist: Thinking Like Graduates Must</i>	<i>Academic: Thinking Like Teachers Should</i>
<u>Definition of the Legal Profession</u>	<i>Narrow: Interior to Traditional Profession</i>	ERA 1: Dean Jones’s Law School <ul style="list-style-type: none"> <li>• Apprenticeship, Clinical Education</li> <li>• Doctrinal Exegesis, Case Method</li> </ul> 	ERA 2: Dean Jones’s Ambition <ul style="list-style-type: none"> <li>• Case Materials/Method</li> <li>• Legal Theory, History, Jurisprudence</li> <li>• Thin, Doctrinal Normativity</li> </ul> 
	<i>Broad: Exterior to Traditional Profession</i>	ERA 4: Tomorrow’s Law School <ul style="list-style-type: none"> <li>• Careers Outside Law Practice</li> <li>• Law &amp; Business/ Public Policy; Social &amp; Economic Engineering; Law &amp; Technology</li> </ul> 	ERA 3: Today’s Law School <ul style="list-style-type: none"> <li>• Ph.D.-Trained Faculty &amp; Joint-Degree Students</li> <li>• Social Sciences &amp; Humanities to Fuel Both Positive and Ambitiously Normative Thought</li> <li>• Demographic Diversity</li> </ul>

First, legal education is, of course, driven by the interior, narrow conception of the “craft” of professional work (see the vertical axis in Figure 1). The genetic line starts, perhaps, with a 1292 royal decree by Edward I. In

5. *Id.* at 457–58.

response to the complaints of his judges that ill-educated and ill-prepared parties were hampering their proceedings,<sup>6</sup> he called on judges to identify promising men and send them to London to study the business of courts. This is generally considered the start of institutionalized legal education in England.

The inheritance from that moment is evident in today's continued focus on court-centric teaching materials, long-required courses in procedural and evidentiary matters, and most clinical and skills education. Much of what remains in the curriculum is designed and executed "in the shadow of" litigation.<sup>7</sup> Indeed, this is the second meaning of interior: for Boalt's first dean the materials and methods of instruction and of research were overwhelmingly limited to court decisions, statutes, and doctrinal exegesis (see the horizontal axis in Figure 1). The student was trained to analyze, understand, and critique these objects produced by formal legal institutions. The case method is an inherently interior preparation for the traditional legal world, comprised primarily of hours in, around, and in contemplation of the courtroom.

So, I characterize early twentieth-century law schools as, initially, "interior" to a narrowly defined profession and later, still, "interior" in their intellectual perspective and academic methods.

### *B. Era Two: Dean Jones's Ambition*

Dean Jones envisioned a law school that moved beyond its focus on training practitioners of a craft. He understood the value of the legal academic in shaping the law. But even Dean Jones's *idealized* description of the Great Public Law School—from the professor's research role to the appropriate pedagogy—was inward looking. The intellectual tools he assigned professors of his era were remarkably narrow and centuries old; even the investigation of history Jones lauded is little more than an investigation of the history of doctrinal developments. Nothing about data, game theory, organizational behavior, quasi-market incentives, critical theory—or, whatever intellectual analogues would save me from anachronism. Nothing about political and policy processes, or business strategies. One hundred years later, the model described by Dean Jones still characterizes the predominant form of academic publication today—albeit not the kind of research typical of tenure track appointments at leading law schools:

Now, the professor should pursue his study of law in much the same way as the judge prepares his opinions. The former does not, indeed, take the concrete case and trace the question involved back to the

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6. Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI.-KENT L. REV. 429, 429–30 (1981).

7. The quoted phrase is borrowed from Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 *passim* (1979) (arguing family law rules and procedures should be crafted with special attention to their effects on out-of-court divorce settlements arranged by most divorcing couples).

sources of the principles on which it depends, but he takes rules announced by the court and traces them back to their fountain-head. He then justifies or rejects, academically, so to speak, the conclusion of the court. His method of investigation is substantially the same. His faculties are not sharpened by the conflict and struggle, by the drama that enacts itself before the court; but his historical horizon is larger and clearer, and, if he keeps free of the dangers of a pedantic and subjective view of his subject, he has the advantage of greater calm. He should be able to reach broader and truer generalizations. The law professor should be the complement of the judge, and should unofficially serve the community in that capacity.<sup>8</sup>

Indeed, when Dean Jones criticized legal education for being insufficiently “extensive,” he meant instruction and scholarship should give more attention to history, philosophy, and jurisprudence. He wanted these more theoretical materials in the first-year curriculum and throughout, and disagreed with a contemporary Harvard proposal to use a final, fourth (!) year of school for these purposes. Jones seems to have had what today we might term a “liberal arts” perspective on the benefits of a broader intellectual base for the study of law, and he would have liked to get most of it over within the first year so that, I surmise, students can get on to the real stuff. So, compared with the stillborn Harvard proposal, Jones got it half right. The overall curriculum today is certainly more theoretical, but theory of all sorts is not sequestered to year one (or “year four”). Interspersing theoretical materials “throughout” seems to have worked better, which is convenient because managing research-oriented faculty members toward a different approach would be a fool’s errand. As Jones launched Berkeley Law, he encouraged some academic interest in improving the law, but I would characterize the ambition as normatively thin because the most important norms were interior to law, such as consistency, functionality, and respect for expectations.

### *C. Era Three: Today’s Law School*

Developments over the past one hundred years added a new dimension. The location of most selective law schools in research universities has steadily narrowed the differences between law professors and their cross-campus colleagues with respect to academic values, styles, and culture.

It was only natural that disciplines would take note of one another and cross-pollinate. Social scientists and eventually humanists approached us from a perspective exterior to the narrow legal world, making the law and its institutions objects of their disciplinary attentions in both positive and normative analyses. Law professors responded sympathetically to the use of exterior disciplines to help explain, critique, or create the substantive logic of legal doctrine and law reform. Law professors reference every form of history,

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8. Jones, *supra* note 1, at 7.

not just doctrinal history. Social science methods and frameworks are increasingly common. Much is borrowed from the academic study of literature and the philosophy of morals. Laboratories inform intellectual property scholarship. The list is as endless as the directory of a great university.

As a result, more and more of the research the university will adjudge “good” subordinates the goal of helping a professional audience *do* the work of the law and instead helps academic audiences *understand* the work of the law in an intellectual sense familiar to other disciplines in the research university. This dyad of *doing* and *understanding* is quite clear in law schools, I believe, because the subject and purposes of law are as broad as the affairs of humanity, amenable to consideration using every conceptual tool we have developed to understand human affairs, and hence open to enormous distance between theory and practice. This dyad seems less salient for engineering, and probably even less for medicine. But law is deeply messy.

Berkeley Law was among the pioneers in this vein and remains a leading, and probably the preeminent, law school for employing an exterior perspective in both senses. There are three reasons, I believe. First, the Berkeley campus has a degree of comprehensive excellence that is, literally, unparalleled. Global surveys of research universities regularly place it second or third in the world, and the National Academies of Sciences ranks it as having more “top 10” doctoral research programs than any other university.<sup>9</sup> So, Berkeley Law faculty have an attractive set of potential dance partners. Second, there has long been a campus-wide culture comparatively welcoming and even celebratory of multidisciplinary work. I have no idea how or why, but it is extraordinary in my experience.<sup>10</sup> Finally, and most importantly, Berkeley Law created within its faculty a multidisciplinary Ph.D. program, Jurisprudence and Social Policy, in 1978, along with an undergraduate liberal arts major in Legal Studies. One result is that 43 percent of professors and assistant professors at Berkeley Law have a Ph.D., and another 6 percent a J.S.D. (admittedly, a degree usually more “interior” to law). Law professors with academic doctorates were quite rare as recently as a generation ago—an elastic measure of time referring to when I was a student.

Returning to the public American law school generally, one can compare the theoretical and scholarly impulses of professors, nowadays often exterior in orientation, with the professional needs of typical practitioners, which are by

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9. Robert Sanders, U.C. Berkeley Media Relations, *National Research Council Ranks U.C. Berkeley's Ph.D. Programs Among Nation's Best*, U.C. BERKELEY NEWS CENTER (May 10, 2011), <http://newscenter.berkeley.edu/2010/09/28/nrc-rankings>.

10. One colleague suggests that intense campus-wide faculty interactions during the Free Speech Movement and student protests of the 1960s are part of the explanation. I suspect the compelling model of E.O. Lawrence marshalling several departments to work on nuclear fission, leading to the Manhattan Project. Others have suggested the great importance at Berkeley of shared faculty-administration governance, which requires a lot of committees with campus-wide faculty membership; suffering through committee service creates enduring bonds. Really.

definition interior; it is a mistake to believe the two can be reconciled rather than balanced. Indeed, we should hope that a healthy tension between the two will tend to improve each over time, and produce better graduates along the way.

But we have difficult work ahead to reach that goal. Those law school academics who believe that our research, even the theoretical genres, can be professionally valuable have largely failed to build bridges to the realm of practicing lawyers. The career payoff for professors who do so is usually nil or negative, and it is difficult to build a bridge when you are almost clueless about the world across the chasm: extensive experience in law practice is not valued when hiring professors nearly as much as a doctoral dissertation or a couple of frame-breaking law review articles. Hence the old saw about the negative correlation between the judgments of academics and those of practitioners about the merit of a typical law review article. Practitioners generally look for useful writing not in our scholarship, but in commercial publications that are rewarded in their market for being, well, useful.

Finally, the profession and its professoriate had little diversity before mid-century, and a mere trickle for two decades more. But in the last third of the twentieth century the diversity of law school student bodies and faculties began to be intellectually meaningful. The content of courses and of the curriculum as a whole shifted to represent more of the American experience. Extracurricular public interest work, often fueled by or reflective of student diversity, became a powerful element of learning. Research agendas tackled topics made newly salient by the composition of faculties as well as social transformation in the real world. In a sense, exterior to law, the society was shifting and quite quickly those shifts affected law schools. And of course, in a few instances, law professors were noteworthy contributors to those changes in society.<sup>11</sup>

#### *D. Era Four: Tomorrow's Law School*

Today we are in the process of transitioning into the last of my four articulated “eras” in the evolution of law schools. We must apply the lessons learned in the last one hundred years about the value of exterior knowledge in the legal academy to the way we think about who “counts” as a lawyer. Just as the law school’s research methods and intellectual frameworks evolved in response to the sociology of the university community, the profession has changed; law has become a more ubiquitous and powerful influence on society, and the roles of lawyers did the same as both cause and effect. Law is, among other things, a way of ordering society. As social complexity grows—

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11. I am indebted to my Berkeley Law School colleague Professor Victoria Plaut for the insights of this paragraph. Interestingly, actually illustrating elements of my overall thesis, Professor Plaut is a Latina, with a Ph.D. in social psychology and no law degree.

geometrically? exponentially?—the role of the law will grow as both enabler and consequence of that growth.

Training in the law therefore becomes useful in countless endeavors touched by legal complexity, even for people not functioning in roles for which we have traditionally required a law degree and admission to the bar. Not just politicians, but investment bankers, community organizers, hospital administrators, journalists, and diplomats. Given this increasingly powerful and varied reality for people trained in the law, just what is the profession for which we are preparing our students? And how will it be different tomorrow?

These are critical questions for today's law school administrators. Dean Jones opined on how to steer an insulated, practice-oriented faculty toward the academy. His worries were interior to the traditional profession of law. They are still important, but today's new questions are *exterior* to what the profession has been, and to traditional training in the law (see bottom left quadrant in Figure 1).

Now I have come almost full circle. Eras Two and Three heralded exterior or external turns in both intellectual and professional aspects of the law school enterprise. As is so common, the historical evolution of legal pedagogy graciously suggests our next step in fulfilling the mission Dean Jones articulated one hundred years ago for Berkeley Law.<sup>12</sup> If my evolutionary model is plausible, then it is encouraging to think that its extrapolation to a bolder notion of a Great Public Law School can be a bit less arbitrary and revolutionary than otherwise.

This trajectory makes even more sense in certain contexts. Consider, for instance, the continuing, distinctive role for the Great *Public* Law School, despite the availability of elite private counterparts. For Dean Jones, at a western institution, the University of California, only forty-three years old in a scarcely developed state only sixty-one years old, the University of California's mission of supporting economic and social development must have been both obvious and palpable. This was very much the purpose of land grant colleges and universities under the federal Morrill Act of 1862.<sup>13</sup> So, it was probably quite uncontroversial to imagine a distinctive instantiation of that Land Grant mission in a new school of law at the University's original and then only

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12. This mission was plain in the remarks of founding Dean Jones one hundred years ago: "I pledge the combined efforts of faculty and students to cultivate, promote, elevate the law and spirit of justice, both here in these academic halls and abroad in the forum and marts of the world, with a mind and purpose directed singly to the service of society." Jones, *supra* note 1, at 10.

13. First Morrill Act, 7 U.S.C. §§ 301–309 (2006). Under the Act, states are empowered to establish

at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.

*Id.* § 304.

campus, Berkeley.<sup>14</sup> Jones noted Berkeley's programs in agriculture and education, observing that, "They accomplish . . . great service by identifying themselves with the interests of the State."<sup>15</sup> Surely, he reasoned, the same must be said of a law school and the "most transcendent interest of the State—the administration of justice, the vindication of private right."<sup>16</sup> After all, modern societies require law and legal institutions. For example, that requirement is nowhere more apparent than in the People's Republic of China, an area I hope will be a particular focus at Berkeley Law in the coming years. There we see a hothouse of economic and political development where "rule of law" is frequently on the lips of leaders, although the meaning for China remains uncertain and contested, a point to which I return later.

The relationship between our intellectual trajectory and our land grant mission comes into focus if framed as an exercise in describing the Great Law School of tomorrow, and specifically the years ahead for Berkeley Law.

## II.

### THE NEXT ONE HUNDRED YEARS: A WAY FORWARD

Hoping that hubris will be forgiven in an Essay of this sort, I supplement the above description of "Era Four" with three prescriptions for the Great Law School of tomorrow. In what follows, at times I speak of Berkeley Law—Boalt Hall to its alumni and friends—because of course I hope that our aspirations are indeed great. But at all times I am referring, at least implicitly, to our sister institutions, and especially those that join us in insisting that public institutions have distinctive responsibilities in their research and teaching.

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14. The first state constitution directed the establishment of a state "university." Following the land grant in the First Morrill Act, the University of California was established in 1868, and the surrounding townsite was named Berkeley. The University hired its first law professor, William Carey Jones, in 1882, formed a Department of Jurisprudence in 1894, and finally the School of Jurisprudence in 1912 (in Boalt Memorial Hall). The name was formally converted to the School of Law in 1951. The University of California had but one campus, at Berkeley, until 1927, when its extension in Los Angeles was granted status as a separate campus. Campuses followed at Davis (1959) and Riverside (1959). Today the original Berkeley campus is joined by nine others to create the University of California, all governed by a President and Board of Regents. For many formal purposes, it is one multicampus university; in the minds of many, however, it is a system of ten closely connected universities, each with a chancellor, but sharing a single president and governing board. (San Francisco's Hastings College of the Law, created by statute in 1878, is governed separately, is a separate entity legally, but nevertheless is nominally part of the University of California). It can all be explained, but it makes little sense to me. *See generally* CAL. CONST. of 1849, art. IX, § 4 (directing establishment of a university); THE CENTENNIAL RECORD OF THE UNIVERSITY OF CALIFORNIA, 1868–1968 (Verne A. Stadtman ed., 1967) (outlining the history of the first one hundred years of the university system); *History*, BERKELEY LAW, <http://www.law.berkeley.edu/138.htm> (describing the development of the law school).

15. Jones, *supra* note 1, at 9.

16. *Id.*

*A. Recommendation One: Train All Types of Lawyers*

First and most important, the Great Law School, whether public or private, will be intentional about preparing students not only to *practice* law, but also to *use* the law. Put differently, the Great Law School must recognize in its curriculum the many graduates who, having studied the law, go on to professional lives in which that content and those habits of mind are put to effective use outside the licensed roles associated with membership in the bar. In particular, significant numbers of law graduates move into business and public service, filling jobs for which the degree is neither required nor even expected. This is exactly what we would expect from a law school that has evolved to Era Four.

Although this is far from a new development for the profession, the law school curriculum has done remarkably little to offer students preparation more carefully tailored to these broader purposes. This omission is all the more striking given the explosion of elective offerings over the past fifty years. Every year, Berkeley Law mounts more than twenty different courses in aspects of intellectual property, but not a single course focused on legislative lobbying or business strategy. Like all leading law schools, we have scores of courses directly related to litigation or client representation in formal legal proceedings of some kind. We have no in-depth training in community organizing, valuation of investment assets, the management of innovation, nonprofit management, or public sector budgeting—although a growing number of young graduates would find these offerings professionally useful. The elective curriculum is optimized for a declining portion of our students and, I believe, a declining portion of the careers we expect and hope for our future graduates.

We prepare students quite well for a career in the law, but less comprehensively for careers *with* the law. My expansive view of what careers might make use of legal training is based in part on an empirical claim about the usefulness of what our students learn, and in part on a normative claim that leaders in many contexts will do better for their enterprise and the society if they have paid us tuition. Why so? Obviously, there is a lot of substantive content about doctrine, institutions, and processes that may come in handy—knowledge of *stuff*. But at least as important, perhaps more so, are habits of thought, intellectual sensibilities, which a good law school puts front and center. Starting with the first day of class, we train law students to probe beneath the simple or obvious answer, and to work hard at identifying the points of weakness in their analysis, and the strengths in the opposing position. We teach them about the purposes, strengths, and weaknesses of alternative procedures for making decisions; about how it often improves a decision if the competing positions are carefully presented by a motivated advocate, and if decisions are based on evidence and revealed principles. They learn that the answers to complex or important problems are often complex and

controvertible, and that simplistic and facile answers are therefore suspect on their face. They learn to anticipate confusion, conflict, and surprise, and to engineer their client's affairs accordingly. They learn the importance of integrity and ethical behavior, and how to wrestle intelligently with such issues. The value of these professional traits is obvious, and not only in courtrooms or for people who have passed a bar exam.

There is more. I often say that lawyers are so valuable as leaders and managers because we don't really know anything; much of the training is, at least implicitly, about learning by asking smart questions. By this I mean that the traditional role of lawyers as problem solvers often requires that they know how to master hitherto unfamiliar things about the client's world. It could be epidemiology or architecture, the structure of the widget industry or of a genome, the market movements of currency derivatives or the balance sheet of a landlord. An expert may be needed from another profession to help prepare for litigation or forecast the risks to be managed in a draft contract. The lawyer is often an explorer in unfamiliar territory, and often a general contractor, assembling the expertise needed to find the treasured solution to a problem.

The value of legal training in extralegal career patterns can surely be enhanced by a great law school that goes beyond implicit preparation through the inculcation of habits of mind to explicit professional preparation for these wider roles—this in addition to the foundational training for conventional, licensed practice as lawyers.

Concretely, the Great Law School will soon include curricular and co-curricular tracks for students who intend to enter the business world—not as counsel, but as client, entrepreneur, and manager.<sup>17</sup> The study of business *law* will be augmented by the study of business strategy and management. We know for a fact that some of our students plan to be real estate developers, investment bankers, or leaders in health care delivery. Our curriculum can easily do more to prepare them, and should. Much of the detail in a traditional M.B.A. curriculum can be elided, while some of the traditional legal doctrine and theory can be retooled or recalibrated to better suit the early stages of the intended career path.

The other new track that would map most naturally onto the interests of a large fraction of our students and young graduates is preparation for work in public policy and administration. Resources permitting, several other tracks could be valuable.

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17. On the role of lawyers as entrepreneur, see generally Mark C. Suchman & Mia L. Cahill, *The Hired-Gun as Facilitator: The Case of Lawyers in Silicon Valley*, 21 LAW & SOC. INQUIRY 679 (1996) (“Contrary to the popular image of lawyers as purveyors of discord, Silicon Valley attorneys see themselves (and are seen by others) as key players in an informal apparatus of socialization, coordination, and normalization that serves to avert potential disputes between members of the local business community.”). The lawyers’ managerial role is even clearer, of course, if they “cross the table” to become the client.

A principal luxury for the faculty of elite law schools is that our highly competitive admissions process gives us students so capable that we are assured of high bar passage rates almost no matter what we teach. This is liberating and especially comforting for the many professors with little firsthand knowledge of legal practice. Once the admissions committees and job placement offices have done their work, virtually all our students will have fine careers, provided the faculty does them no harm. If only a modest fraction of three years' coursework is perforce aligned with licensure, there is room for the expansive training mission I propose. Students have time to take several courses in anticipation of careers that make use of the law but do not entail the practice of law.

This curriculum in the Great Law School would reflect the reality of our students' career interests and increasingly common paths traveled by our alumni. But this broader curriculum would also signal that we believe law graduates *should* pursue a wider range of careers in which lawyerly sensibilities and expertise are useful. Put differently and bluntly, such a curriculum would reflect an ambitious—some might say imperial—view of law in which the profession in its unlicensed roles colonizes other areas of public and private endeavor. This parallels the normative proposition in the domains of research and policy; *viz.*, the truly important and complex social and economic problems almost always have a legal dimension to them.

*B. Recommendation Two: Train Lawyers and Non-Lawyers to Collaborate*

I have discussed preparation for the use of law outside of traditional practice. My second proposition is that in the Great Law School research and teaching will reflect the problem-solving orientation of the best lawyers addressing important and difficult problems facing clients and society generally. In such circumstances, the lawyer must always act in concert with other professions, and the legal scholar must often mobilize other disciplines in a collaborative fashion, but this only underscores the essential role of law in the engineering and guiding of human affairs. I believe there is a concomitant need to ensure that the school's intellectual portfolio, in research and in the disciplinary exposure given students, avoids "capture" by one or two disciplines—the danger has been over-representation of economics—thereby impoverishing the move to a more exterior enterprise.

There is a distinctive responsibility in public law schools to engage a portfolio of the most difficult and important problems of the society with an intentionality and collective effort that I consider essential to its public character. This contrasts with the typically *laissez-faire* ethos of elite private institutions, even when lightly colored by the public-regarding nature of the legal profession, or the civic leadership expected of wealthy institutions. *If this distinction is not apparent in a public law school, at least in its aspiration, then that school's only raison d'être is to be inexpensive—today an impossible*

*burden if quality is also a priority.* It would also be a strange allocation of scarce public education resources.

To fulfill this problem-solving mission, the Great Law School must forge strong alliances with other professions and disciplines within the university. The traditional silos of academic departments must be overcome to create a culture of collaboration.

As I noted earlier, this has been a particular strength of U.C. Berkeley, and in recent decades remarkably important to Berkeley Law. Boalt faculty and researchers are intellectually involved with colleagues from literally dozens of other academic units spread across the social sciences, humanities, natural sciences, engineering, and the professions. In part this is because, for fifty years, since the founding of the world-renowned Center for the Study of Law and Society, Berkeley Law has had embedded within it not merely a commitment to multidisciplinary work, but an impressive realization of it. Forty years ago, this project was further advanced through the faculty's creation within the law school of a very successful multidisciplinary Ph.D. degree program, Jurisprudence and Social Policy (J.S.P.), with the purpose of integrating a number of social science and humanities disciplines in the study of legal institutions and the law. J.S.P. remains the only Ph.D. program wholly within a law school. To this was added an undergraduate liberal arts major in Legal Studies. More recently, we have added a substantial suite of more policy-oriented multidisciplinary think tanks. These institutional features of Berkeley Law, together with mysterious beneficial qualities in the campus-wide culture, allow us to leverage the excellence of the entire zip code—the leading public research university in the world—to contribute intellectual capital to solving society's most vexing problems. The Great Law School must also leverage the benefits of the research university to solve society's problems.

This imperial conception of the law and the Great Law School has clear implications for the rest of the Great University. The Great Law School should provide service courses for other disciplines and professions for which our intellectual capital is useful. It is better for us to serve this role for programs in business, education, political science, public health, and so forth—better because that will ensure that cutting edge developments in legal research find their way as appropriate into what is offered to doctoral and professional students outside of law. It will also strengthen the connective tissue between law and other units, to the broader benefit of all. Concomitantly, of course, the Great Law School must be willing to appoint faculty with specialized subject matter interests beyond research fields familiar to the conventional conception of legal academia. It is shameful, for example, how few leading law schools have meaningful attention given by ladder faculty to the health care and health insurance issues, apart from biomedical ethics. This is despite the fact that

health care is more than 17 percent of GDP.<sup>18</sup> An ultimate expression of this support for other graduate programs would be to offer a two- or three- semester nonprofessional Master's degree for non-lawyers.

I have argued that the evolution of the law's role in society should mean broader integration of the law with other disciplines and professions. I have also argued that the distinctive intellectual and methodological dimensions of legal study are broadly useful to understanding and participating in society. It is a small step further to embrace undergraduate liberal arts study of law and legal institutions, rather than as professional or pre-professional study.

Whatever area of extralegal study we may speak of, the central lesson is the same: we must not only seek out lessons from other disciplines so that we may teach them to our law students, but offer our own expertise back to those disciplines and when necessary persuade them—it is what we do best—that we have perhaps as much to offer their programs as we seek to gain from theirs.

### *C. Recommendation Three: Think Globally*

My first two propositions are derived from my sense of what lawyers can and should do beyond our conventional profession. My final proposition concerns what the Great Law School should do if its vision extends beyond our borders—the cliché of globalization and the global university or law school. The Great Law School should not be satisfied to teach its domestic students about the laws of the United States or even the laws of the world; instead it must contribute to a new global legal culture and seek participation by foreign partners.

We know well the material benefits associated with the fact and promise of globalization in law and legality. But there is so much more that makes American legality among our most valuable exports. Put aside law's obvious importance to commercial matters. Instead, consider how law influences and is shaped by politics, security, and culture.

Science, art, language—these are components of a nation's soft power, with global consequence. We don't have multiple versions of chemistry; sculptors and musicians share and exchange vocabulary across disparate cultures in a transnational artistic community. Imagine the possibilities for improving not just economic and social relations but also political and security cooperation if there are evolving elements of deeply shared legal culture. After all, legal culture is about how we order our relationships, define and enforce mutual obligations, give content to vague commitments to fairness, establish principles of governance and accountability, write the dynamic equations that balance our personal autonomy against the claims of community and neighbor,

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18. Christopher J. Truffer et al., *Health Spending Projections Through 2019: The Recession's Impact Continues*, 29 HEALTH AFFAIRS 522, 522 (2010), available at <http://content.healthaffairs.org/content/29/3/522.full.pdf>.

provide infrastructure for commerce, protect the essential humanity of expression, spirituality and creation, encourage and reward innovation, discovery, and hence, human intelligence.<sup>19</sup>

All of this is culturally contingent, of course, and in that respect national law is culturally contingent, too. Still, we know that the law can influence social and political culture over time. In this lies the potential that elements of global legality can create better understanding and mutuality. Human rights is an obvious example, at its core an enterprise devoted to a universal conception of human dignity. Hollywood and Silicon Valley hope that intellectual property will be another, perhaps because not only our economies but also our nature is unimaginable without invention and creativity. Our legal responses to climate change must be another.

This could—but need not—be pursued as a brutal, cultural colonialism. There is substantial demand abroad for studying and selectively importing our American legality—doctrine, processes, institutions, ideology. Presumably this reflects the accurate conclusion that while our legal culture has played a part in many of our problems, it has also been critically important to America's progress and strength.

The Great Law School, to fulfill this global role, will have a concerted strategy for its teaching and research. Putting international and comparative law in the J.D. curriculum for American students is an embarrassingly modest start, but characteristically American in its self-regarding perspective. There is so much more at stake than preparing American students to practice on behalf of multinational corporations or to advance transnational public interest concerns such as human rights or climate change. The more ambitious mission, perhaps especially for public universities, is dedication to building a global legal culture. This will require difficult and important conversations about the conflicts between underlying values represented in varying systems of laws. Imagine an ascending ladder of global goals—from mutual understanding, to shared values, to security, and then prosperity. At each rung, law is the indispensable profession.

The general public and U.S. policymakers readily understand that Ph.D. and postdoctoral training in America is prized throughout the world, and is also a major part of America's contribution to the advancement of knowledge and the condition of humankind. We have created communities in the sciences and technology for which the bold lines on political maps are all but invisible. What is true in those domains can also be true, in major respects, in a global community of the law. That is the story of public interest law and the fall of apartheid in South Africa, and of American lawyers involved in drafting

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19. Philip Selznick, for example, suggests that law strives for the ideal of "legality," which he defines as the progressive reduction of arbitrariness and associates with fairness, accountability, and civility. PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 12–18 (1969).

national constitutions when the Soviet Union dissolved. It is the story of growing awareness in China of the importance of intellectual property protections, and of the introduction of a jury system in Japan. It is the story of protests for freedom of speech and against government corruption. It is the story of trade treaties, human rights conventions, cooperative multilateral crime fighting, and trustworthy international capital markets. And it must become the story of climate change, access to essential medicines and potable water, hazardous waste disposal, and the prevention of genocide.

Powerful demonstration of this phenomenon can be found in the consequences of providing graduate training in law for generations of foreign law graduates. Imagine Great American Law Schools in which perhaps half of the students are citizens of other nations, and the student experience is structured to exploit that diversity. These might be in LL.M. programs or J.D. programs or something yet to be devised. The consequences for global legal culture could be profound in a matter of just one or two decades. This is a transformation of a wholly different order than simply requiring American law students to take a basic course in some kind of international law—which, though certainly an advance, is just an intellectual tease.

I believe the exporting of American legality should be a priority in the decades immediately ahead, and an effort with lead roles for law schools will be more legitimate and effective than an effort left to multinational commercial interests. There is reason to hope that our exports will often be welcomed. I have already noted that our legality is loosely associated with our success. I believe, however, there is a deeper explanation rooted in the very origin of law.

An anthropologist visiting an unknown society and culture would expect legal rules and institutions to have a strong correspondence with utilitarian or expressive functions important to that culture. But viewed another way, legal rules, whether substantive or procedural, reflect a society's accumulated wisdom about what is "fair," "efficient," "useful," and "usual." Thus, as an academic, I think of law as the integration of what we understand about our society by viewing our cumulative experience through the intellectual lenses provided by notions made rigorous in economics, philosophy, ethics, social psychology, theology, political science, sociology, and so forth. Law expresses our effort to make sense out of human history and the unceasing struggle to create ordered, thriving communities. That struggle is a universal one, and therefore the strategies pursued by different societies are quite likely to have shared significance and recognizable similarities. The possibility of shared legal culture is created by our hope that we have a shared humanity.<sup>20</sup>

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20. Boalt Dean William Prosser selected quotations he thought would be inspiring for huge plaques on the western face of the 1951 Berkeley Law building. They remain today. While not universally loved by students and alumni, I think the Cardozo quote beautiful and true:

You will study the wisdom of the past, for in a wilderness of conflicting counsels, a trail has there has been blazed. You will study the life of mankind, for this is the life you must order,

## CONCLUSION

On the one hand, law is inherently conservative. To us in the Anglo-American tradition, it seems natural to think this is in part because of the common law method and the role of precedent. But it is a more general phenomenon because central to the rule of law is a norm of consistency, and the universal impulse to respect settled expectations because doing so is usually conducive to fairness and efficiency.

On the other hand, change in society, driven by technology and demography, seems always accelerating. Change in the law can hardly do otherwise. This presents a challenge for law teaching, and requires that law professors beware their natural tendency to focus on the past and how the law today developed from what came before. Instead, we must embolden the speculative, normative, and constructive functions of the academic mind to support the law, and the graduates we send to her service, in shaping the future that rushes toward us. The past century has witnessed much change in this and other great law schools, but very much less change than we must be prepared to make in the one hundred years to come.

I venerate the law, and especially our system of law, as one of the vastest products of the human mind. . . . But one may criticise even what one reveres. Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart.<sup>21</sup>

—Oliver Wendell Holmes, Jr.

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and, to order with wisdom, must know. You will study the precepts of justice, for these are the truths that through you shall come to their hour of triumph. Here is the high emprise, the fine endeavor, the splendid possibility of achievement, to which I summon you and bid you welcome.

Benjamin N. Cardozo, *The Game of the Law and Its Prizes*, in *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 160, 175 (1931) (address at seventy-fourth commencement of Albany Law School on June 10, 1925).

21. Holmes, *supra* note 4, at 473–74.