Michigan Law Review

Volume 100 | Issue 6

2002

Foreword: Interdisciplinarity

Kathleen M. Sullivan
Stanford Law School

FOREWORD: INTERDISCIPLINARITY

*Kathleen M. Sullivan**

In the beginning, there was law. Then came law-and. Law and society, law and economics, law and history, law and literature, law and philosophy, law and finance, statistics, game theory, psychology, anthropology, linguistics, critical theory, cultural studies, political theory, political science, organizational behavior, to name a few. The variety of extralegal disciplines represented in the books reviewed in this issue attests to this explosion of perspectives on the law in legal scholarship.

This development makes clear that the vocation of the legal scholar has shifted from that of priest to theologian. No longer is a law professor successful by virtue of well-informed and detached normative prescription directed to those toiling at practice, policymaking and adjudication. No longer is the highest aspiration of the law professor to restate the law or lead the bar. Instead, legal knowledge is perceived to advance through techniques of measurement, explanation and interpretation, the positive and analytic tools of the social sciences and the humanities.

And yet we continue to owe our jobs as law professors, with our special place and privileges within the university, to teaching lawyers the tools of practice. We still publish casebooks and respond to requests from judges, legislators, and businesses for advice. The analytic techniques of the law school classroom continue to follow the ancient professional folkways of taxonomy and synthesis, analogy and distinction, even as enhanced by power-point slides and quantitative techniques. The life cycle of many legal theorists includes a period of policy-oriented prescription, offered in op-eds, public testimony, or consulting memoranda. We thus live a curiously bifocal existence, viewing law close up by day, and from an external vantage point by night, both insiders and outsiders to our profession.

To some of those who practice and apply law, this development represents decline and fall. A decade ago, in the pages of this law review, Judge Harry Edwards famously lamented that "many law schools . . . have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy," thus dissociating the legal academy from the legal profession in a

* Dean, Richard E. Lang Professor and Stanley Morrison Professor, Stanford Law School. B.A. 1976, Cornell; B.A. 1978, Oxford (Marshall Scholar); J.D. 1981, Harvard. — Ed.

centrifugal spiral.[1] In his view, law professors no longer spoke sufficiently directly to judges, litigators or legal policymakers from a shared internal perspective in a language that was intelligible or useful. In his view, the article or book that truly concerned *law* was a rare occasion for celebration.

To others, especially non-legal academics who toil in the underpaid precincts of university disciplines outside the basic sciences, this development represents an unjust windfall. In their view, law professors who do interdisciplinary work are practicing social science and humanism without a proper professional license, acting as are historians, economists, or political theorists manquées, but nevertheless reaping high salaries and lavish worldly opportunities (at least by university standards) merely by virtue of having obtained a law degree. In their view, our erstwhile interdisciplinary articles in the peculiar venue of student-edited journals represent law office history, noisy regressions, synthetic social science, or adulterated critique, all freighted with unnecessary references and footnotes that could sink a thousand ships. The accompanying emotions of contempt and envy are tempered only by the nervous suspicion that there may be mysteries to the legal priesthood inaccessible to the uninitiated, and mysterious power in the legal sacraments capable of actually affecting events in the outside world.

I reject both these critiques, and argue here that current trends toward interdisciplinarity in legal scholarship are cause for excitement, not lament. The extreme implication of the first critique is that law schools ought be increasingly partitioned from the rest of the university, specializing in practical education with little affinity for other disciplines; the extreme implication of the second critique is that law schools ought be dissolved as distinct entities and absorbed into the university's various other departments. The far better third alternative, in my view, is to retain the distinctive institutional place of law schools as post-graduate professional schools within the university, while continuing to lower the barriers to exchange between scholars of law and other disciplines university-wide. On this third view, the rise of law-and scholarship has elevated both our knowledge of how law works *and* our teaching of how to practice it. Hence the importance and justified influence of this annual, interdisciplinary book review issue of this law review.

The argument proceeds in three steps. First, I briefly reiterate the sometimes overlooked point that law is itself a discipline, not simply a hologram or pastiche of other disciplines. This feature supports the institutional autonomy and distinctiveness of law schools. Second, I note that this discipline, the discipline of law, is itself multidisciplinary,

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

built upon if not reducible into elements of the humanities and social sciences. Thus, attempts to fragment law teaching, law professors, or legal scholarship into the "practical" on the one hand and the "theoretical" on the other are artificial and misleading. Third, I conclude that interdisciplinarity in legal scholarship is not just an exercise in consumption by law professors, but has productive utility both for the university and — as is sometimes overlooked — for legal practitioners and the many political, corporate and bureaucratic actors who provide services to society built in some part upon their legal training.

To begin with, law is itself a discipline. Organizational charts of the disciplines often focus on content, or the taxonomy of subject matters studied. Of course, law is a discipline in this sense. Legal rules, documents and judgments comprise a rich and complicated body of texts distinct from novels, equations, or musical scores. And law involves a rich and complicated body of institutional arrangements that structure and regulate social order, distinct from the institutional structures of markets, cultures, and religions.

But a discipline, as the term itself suggests, also represents a technique, a method of analysis, a way of working. Here too, law is distinctive. It is a branch of rhetoric that gives normative force to interpretation and analysis. It is a set of interpretive techniques of problem-solving that disaggregate and order the messy jumble of facts through which conflict presents itself. And it is an amalgam of argumentative and decisional conventions, engrained through repetition, teachable only through reiterated practice and critique, as with etiquette, musical performance, or sport.

If you have any doubt that legal method is distinctive, try reading a non-lawyer's attempt to state the holding of a judicial opinion. With rare and brilliant exception (Linda Greenhouse, Nancy Rosenblum, Austin Sarat come to mind), even the cleverest non-lawyers routinely garble such summaries, seeing holdings in cert. denials, constitutional rules in statutory constructions, substantive shifts in remedial rulings, big swings in molecular motions. Legal journalism routinely commits political mapping fallacies, announcing that the Supreme Court is "turning right" only to recant a term later to say that "the center holds." The equivalent in etiquette is the *faux pas*; in music, singing off pitch; in sport, the duff, the dink, the mulligan. Lawyers know better because of our immersion and internalization of our discipline, a social practice that turns out to be a lot harder than it looks.

But law, though a discipline, is not and never has been an *autonomous* discipline. The regulation of social order through a variety of authoritative texts necessarily interacts in complex and dialectical fashion with the content and techniques of the social sciences and the humanities. To take a few familiar examples, criminal law, in its classification of crimes and its hierarchy of punishment,

reflects a mixture of deontological and utilitarian theories of blameworthiness and deterrence. Constitutional law enforces a set of institutional design mechanisms rooted in liberal political theory about how to constrain government tyranny. Contract law reflects theories of personality, will and agency on the one hand and of allocative efficiency on the other. These theories are often incompletely articulated in legal materials, and they are sometimes conjoined in ways a pure humanist or social scientist would deem inconsistent, as if, for example, philosophers as deeply different as Kant and Mill could be cited for the same proposition in the alternative. But however incompletely or inconsistently, legal rules and opinions are always implicitly theorized. To teach law necessitates fluency in, if not specialization in, the disciplines that underlie the law in more or less articulate fashion.

This would be so even if no interdisciplinary books or articles existed to elaborate the connections. It simply is not possible to explain a decision limiting the power of the federal government over the states, for example, without implying a political theory of the comparative advantages of centralized and decentralized government. Nor is it possible to explain shifts from individualized tort liability to social insurance or from the law of landlord-tenant to the regulatory devices of rent control or land use controls without implying economic theories of market failure or philosophical theories of distributive justice. Even without explicit footnotes or cross-references to other disciplines, such legal rules represent a reflective equilibrium between particular fact situations and general theories that are necessarily extralegal. Law is a social practice that embodies a complex intersection of theories; it is not a theory unto itself.

This much is intuitive to American law students who, unlike those law students in Anglo- or continental educational systems who specialize in law as undergraduates, arrive at law school as post-graduates, already steeped when they arrive in the disciplines of the humanities or social sciences (although basic scientists are usually a bit flummoxed by what we do). They can see implicit economic theory in contract remedies and implicit political theory in the law of state and local initiatives and referenda. Such applications of theory are likely to appear mid-level, neither as pure as high theory nor as nitty-gritty as legal or judicial war stories. But it is precisely at that middle level of generality that law school arbitrages the multiple disciplines underlying it with the practical problems its teachings are meant to help solve. Law school training is in large part an exercise in imparting nimbleness at negotiating disciplinary divides in particular settings.

For these reasons, even work that some would describe as "doctrinal" in today's legal literature is rarely simply that. The attempt to explain or rationalize patterns of judicial or administrative decision-making necessarily draws upon implicit theories in order to make

interpretations, assessments and predictions. To describe Rehnquist Court decisions in the areas of federalism, voting law and associational liberty as expressing an overall tendency to favor decentralized decisionmaking whether by state agencies, political parties, or boy scout troops is implicitly to draw upon political or social theory, whether or not Madison or Tocqueville is expressly invoked. To taxonomize the modes of dispute resolution employed in response to mass injuries ranging from asbestos inhalation to tobacco use to the September 11 World Trade Center deaths is implicitly to draw upon conceptions of distributive justice, whether or not Rawls or Sen is explicitly referenced. Even student law review notes that chronicle unresolved issues in lower court litigation, which might seem the last bastion of pure doctrinalism, implicitly articulate tensions in social theory, such as the tension between normative pluralism and uniform human rights norms embodied in the seemingly technical question whether race discrimination by a charter school constitutes state action. Legal doctrine interacts dialectically with social practices in a way that always and everywhere implicates theoretical debates. That the fluent lawyer might use case names as shorthand for describing our legal system's provisional resolutions of these debates hardly purges "doctrine" of its theoretical components.

If law is a discipline, that itself draws upon multiple disciplines, then what is the role of the self-consciously interdisciplinary work in law that increasingly characterizes the work of the legal academy? There are three possibilities: first, that the application of the tools of other disciplines will improve knowledge about the law and institutions governed by law; second, that the application of the tools of other disciplines will improve the practice of law and the quality of legal rules and institutions; and third, that viewing the law through the lens of other disciplines will add understanding and knowledge to the other disciplines.

Before canvassing these possibilities, let me stress at the outset that each possibility depends upon the work being done knowledgeably and well across disciplinary boundaries. Just as non-lawyers are capable of being ham-handed in describing law, legal academics are capable of being ham-handed in recounting or applying economic, social and political theory. The optimistic view sees both sides handling the other's tools with precision and care, free as much as possible from the exclusionary effects of local jargon, and in a spirit of mutual collegiality and respect.

The first proposition is perhaps the easiest to establish. Both positive and interpretive interdisciplinary work adds to legal knowledge. Positive research looks at the "is" rather than the "ought" of law, or how the law actually works in practice. Expertise from economics, social theory, or political theory enables legal scholars to describe, measure and assess how well legal rules, practices and

institutions perform at the functions expected of or ascribed to them, such as the achievement of justice, fairness, equal treatment, social welfare, or international harmony. Through such research, the external perspective illuminates the success or failure of those working within the internal perspective.

The rise of positive research and thus the increasingly empirical study of law is one of the most dramatic trends in recent legal scholarship. Do independent directors constrain management? Do takeover defenses prevent deadweight loss? Do shareholder class action suits deter management error, confer windfalls on plaintiffs, or none of the above? Does alternative dispute resolution save transaction costs? Do concealed handgun laws save lives? Does the legalization of abortion lower crime rates? Does recession increase the number of employment discrimination claims? Does affirmative action increase black income and wealth? Is venture capital a substitute for bank financing? Does the expansion of state sovereign immunity shift relative power from the federal government to the states? Do tax shelters increase productivity? Do judges deprived of sentencing discretion use charging discretion as a substitute? Does the death penalty deter crime? Does race determine the allocation of the death penalty?

Answering each of these questions increases our knowledge of how law works, whether well or badly along the axis of a function defined in advance. Such research does not assert normative premises but takes them as given. This branch of interdisciplinary scholarship comes closest to the mores of the basic sciences, which test explanatory hypotheses against observed data. Research in this vein is often an equal opportunity ideological offender, offputting to trial lawyers, ADR lobbies, civil rights advocates, and the like, whenever it puts doubt to conventional wisdom or tendentious assertion.

Interpretive scholarship, drawing on the techniques of philosophy, literary analysis, history and cultural theory, in contrast, does not measure legal outcomes against a pre-assigned function, so much as seek to articulate the function, including the expressive function or social meaning, implicit in legal materials. Does the presumption against unconstitutional conditions reflect a philosophical conception of coercion or a political theory of governmental incentives to overreach in relation to private ordering? Does a preference for bright-line rules over flexible standards reflect tacit assumptions about the trustworthiness of the implementers' exercise of discretion? Did *Brown v. Board of Education* help end the racial segregation of public education? Do racial gerrymanders preserve divisive race consciousness? Is the effective articulation of universal human rights possible in a world of fragmented and mutually exclusive local belief systems? Does the law of the free exercise clause presuppose that

religious faith is or is not prior to government in the view of its adherents?

Notice that there is nothing mutually exclusive about pursuing these two kinds of interdisciplinary work. A single article might well seek to examine, for example, whether the creation of majority-minority voting districts advantages Republicans in the ensuing electoral cycle, and whether such gerrymandering conveys a socially undesirable message of apartheid (or vice versa). The point is that both the positive and the interpretive strands of legal scholarship take a stance outside legal rules, decisions and institutions in order to describe, explicate, and assess their social role. Such scholarship starts from the irreverent proposition that nothing in law need be as it is, and that critical rationality can illuminate whether it's doing what it claims, and if not, how it got that way, whether through cognitive bias, ideological skew, factional dominance, path dependency, or cultural norms.

The question might be asked why law professors need do such work; why not simply leave all this to scholars in the humanities and the social sciences? The answer is that legal expertise enables positive and interpretive legal research to depict institutional reality in all its complexity, without overly simplifying assumptions. Specialization in the internal structures and rhetoric of law improves the quality of this research in both its positive and interpretive dimensions. A scholar concerned only about the efficiency of intellectual property monopolies in conserving incentives to create might not take account of the administrative difficulties of case-by-case adjudication of infringements. A scholar concerned only about the magnitude of money flows in international crime might not take account of the nuances of prosecutorial practice in charging money laundering in addition to the underlying crime. Internal knowledge of how lawyers behave improves the external analysis of legal behavior.

Nor does the practice of the external perspective by law professors necessarily diminish skill at teaching students the internalist skills of performance. Sometimes external and internal skills simply converge; many a great composer has been likewise a great musicologist. In my observation over nearly a decade each teaching at Harvard and Stanford Law Schools, I have observed many a proud and non-practicing legal theorist revealed as a closet lawyer when, for example, mooting a colleague's upcoming oral argument or predicting an awaited decision. Likewise, teaching internalist skills does not necessarily depend on having them; many a great music teacher or athletic coach have been less than stellar performers in their own right. Thus the gains to legal knowledge offered by the increased interdisciplinarity of legal scholarship pose no danger to the quality of professional legal education.

Indeed I would go farther, and assert, as a second proposition, that increased interdisciplinarity in legal knowledge affirmatively improves the teaching of law, and thus improves the professional preparation of lawyers whether they enter legal practice or business or public policymaking positions. Thus the outpouring of scholarship represented in this issue, extending the methods of history, philosophy, literary analysis, political science, psychology, economics, and so forth to law, can improve rather than derogate from legal pedagogy. Of course, this depends on keeping the law school tethered to the production function of its graduates, not the consumption function of its professors. The application of historical analysis to the federal rules of civil procedure or literary analysis to the federal sentencing guidelines is a far cry from abandoning courses on procedure for seminars on myth, language and law.

Interdisciplinary scholarship can improve the production of lawyers for the betterment of society in at least three ways. First, and most straightforwardly, some techniques of other disciplines that may be taught in law schools provide law students with skills that are directly useful and applicable in legal settings. A law professor fluent in the language of the other disciplines for scholarly purposes will likely convey useful interdisciplinary knowledge in the classroom as well. Because legal decisionmakers rarely confront problems as strictly legal ones, labeled with a T for torts or B for bankruptcy, but rather as messy jumbles of legal, scientific, financial, ethical and institutional challenges, interdisciplinary expertise in this straightforward, utilitarian sense is desirable preparation for practice and policymaking.

For example, a knowledge of statistics enables a litigator to cross-examine expert witnesses or a government lawyer to analyze departmental data. A knowledge of finance theory enables a transactional lawyer to better structure debt and equity instruments. A knowledge of marine biology enables an environmental lawyer to assess the damage to an aquatic ecosystem for purposes of seeking administrative or judicial relief. And it would be downright perilous to teach advanced courses in intellectual property without some advanced knowledge of the computer science that constructs the Internet or the structure of the human genome, knowledge that students in turn will need in practice.

Interdisciplinary knowledge improves the teaching of law in a second sense as well: it illuminates the tacit theories underlying the mix of statutes, regulations and judicial precedents that comprise the law. For example, the first-year curriculum still contains a course in contracts, as it did a century ago, but law professors steeped in the literature of law and economics, libertarian social theory, or distributive justice will teach the architecture of the doctrine in a more structured and organized way than a professor who simply points out

that contract cases leaning respectively toward objective and subjective interpretations of contract formation are mutually inconsistent. The effective lawyer may still need to employ multiple theories in pursuing particular outcomes, but it cannot but be helpful to know which one you're deploying, just as it is useful to know when you're speaking German and when French.

More subtly, interdisciplinary knowledge that is explicitly conveyed in legal teaching helps students to absorb, as part of the social practice of law, the deep structure of the ideological and institutional tensions that law helps to resolve. Private law subjects are illuminated as playing out deeper tensions between allocative and distributive concerns in the operation of markets. Public law subjects are situated in broader debates about which topics are, and are not, better decided by majoritarian political processes rather than by private ordering or specialized expertise. The student with an architectonic understanding of the larger debates will subsequently better see how the same tensions reappear in miniature, as smaller oppositions nested within the larger ones.

Third, the interdisciplinary law professor can elevate the quality of public debate over any number of topics, from gun control to cloning to the enforceability of international human rights. Interdisciplinary legal scholarship gives lawyers better bases for suggesting or assessing potential law reform, regulatory regimes or shifts in judicial decision-making. Law professors have no superior claim to normative insight over many other contributors to public policymaking, but are experts in the mutual translation of legal into social, economic and political concepts, and vice versa. Deeper immersion in the tools of economics, history, statistical analysis, and political science can help enhance the persuasiveness of any policy prescriptions legal scholars do tender to the public. And legal scholars, by virtue of being lawyers (or in the case of non-lawyer law professors, steeped by osmosis in legal folkways like Jane Goodall among the chimps), are more likely than straight economists or historians to leaven theoretical advice with concerns about institutional design and practical administrability.

Finally, increased interdisciplinarity in law offers gains not only to law, but also to the other disciplines within the university. Too often, the non-legal disciplines see law as a planet unto itself, impervious to contemporary trends in thought, or slow to awaken to them after a considerable lag time. But law offers rich material for analysis and reflection by non-lawyers. The continued lowering of walls erected between law and other disciplines out of institutional turf battles, or misguided mutual isolationism, is sure to produce better thought and analysis on both sides.

Interdisciplinary research is increasingly the touchstone in the basic sciences; universities such as Stanford, for example, have ambitious plans to bring biologists, medical researchers and engineers

together to pioneer new insights and techniques in "bioengineering." No one thinks these three departments ought to merge, nor their specialized disciplinary standards be diluted. But the potential gains from collaboration are evident to members of each of these three intellectual communities.

Similar gains from collaboration are evident to the scholars who attend law school workshops in law and economics, law and humanities, law and history, law and environmental science, law and philosophy and the like. The law professors at these workshops are as often as not also great lawyers and teachers of legal practice. The non-lawyers in attendance are as often as not well attuned to the particular structures and nuances of law. Legal scholars need not choose between practical and theoretical destinies, nor non-legal scholars be exiled from the precincts of law. To the contrary, interdisciplinarity promotes synergy and enlightenment, as the editors of the issue that follows have so richly and commendably demonstrated.