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### Statutory Analysis: Criminal Law and an Ever-Evolving Law School

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# Statutory Analysis: Criminal Law and an Ever-Evolving Law School

Jonathan D. Glater\*

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## INTRODUCTION

When I first taught Statutory Analysis: Criminal Law, almost ten years ago, it was not just a new class for me. It was also a new course for the new curriculum of our new law school. The class had been taught only once before: to our inaugural class of students. Statutory Analysis was ambitious in its goals, seeking to cover the same core concepts and basic crimes as a criminal law class—like the one I had taken about fifteen years earlier—and to introduce students to techniques of statutory interpretation.<sup>1</sup> Not only was I to teach students the elements of crime in the abstract and the definitions of specific crimes, I was also to teach them how to develop their own arguments about what the words in criminal statutes should mean in the context of a case. The idea was to equip students with the tools to analyze any provision of law and to begin to construct an argument about how it should be interpreted.

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\*Professor of Law, University of California, Irvine. The author is grateful to Rachel Croskery-Roberts, Alexandra Natapoff, and Ken Simons, who provided critical suggestions and commentary on an early version of this essay, and to the careful and thoughtful students who edited this essay for the Law Review.

1. See Jennifer M. Chacón, *Statutory Analysis: Using Criminal Law to Highlight Issues in Statutory Interpretation*, 1 U.C. IRVINE L. REV. 131, 137 (2011).

Achieving this goal would necessarily take into account students' background, their experiences as well as their expectations, so that the class design and materials met them where they were. Because our students came from all over and from all manner of undergraduate institutions, this first semester was particularly educational for me as much as for the students: they taught me what they needed and what they wanted, which were not always the same thing. At the same time, Statutory Analysis formed part of the first-year curriculum at this new law school that sought to meet multiple sets of lofty expectations: excelling under conventional and longstanding measures of excellence, satisfying demands for innovation often predicated on criticism of those same criteria, and making students' sizeable financial investment worthwhile. This last goal was critical to the long-term financial well-being of the University of California, Irvine School of Law ("Law School").

Teaching, in short, required multiple levels of situational awareness, encompassing the subject matter to be taught, the diversity of the students in the classroom, and the implications of the financial model of legal education. It was a lot.

As I developed the syllabus, revising a version of one used by Professor Jennifer M. Chacón, who had taught the class that first year, I kept thinking of exercises for the students. I could ask them to draft a statute, so that they could see the difficulty of writing the law in such a way that it produces desirable outcomes consistently when applied to different sets of facts. I could ask them to prepare arguments for the defense or the prosecution on how a provision of the California Penal Code should be interpreted. Eventually I would use these exercises and others, unlike anything I experienced in my criminal law class. However, my methods of assessment, a midterm and a final examination, would likely have been familiar at any law school in the country, and this nagged at me. Before I started teaching law, I briefly served as the director of academic skills at the Law School. In that role, I explored the broad literature on, and often critical of, traditional law school pedagogy. Meetings with students also reminded me of the ways in which legal education is challenging and of questions I'd asked as a law student myself, about why certain subjects were taught and tested in certain ways. I wanted to bring the lessons of those meetings to bear in class, to try to demystify and to clarify.

Yet law school is also challenging, even mysterious, by design. Socratic dialogue aims to develop in students the ability to recognize and analyze issues; the questions put by the professor should help the student to understand what matters to a lawyer and why. This is not the most effective way to reach all students, and research on effective teaching has suggested a number of different approaches that are more likely to work well with a diverse classroom population.<sup>2</sup> Group exercises

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2. Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. LEGAL EDUC. 402, 404 (1998) ("To reduce alienation and enhance learning for all students, law schools must create a culture and climate in which diverse students can flourish. That means

and more frequent, low-stakes assessments, which are not always used in law schools, are more effective tools; lecturing, which is still frequently used in law teaching, is a less effective tool.<sup>3</sup> This was another example of tension between innovation and convention, relating not just to what was taught but how it was taught. Such tension was evident throughout my first semester of Statutory Analysis. And when I later read the essay about the founding of the Law School by our first dean, Erwin Chemerinsky, I recognized that it was a tension confronting the Law School as a whole. Dean Chemerinsky wrote the following about the early days of law faculty debates over the curriculum: “Our central challenge was to be sufficiently traditional to be credible, but sufficiently innovative to justify why we exist.”<sup>4</sup>

Deliberately, then, UCI Law settled on the brink, straddling convention and innovation. The founding faculty considered what they thought a law school should offer, picking and choosing from models offered by other institutions and sometimes adopting them, other times modifying them or abandoning them outright. The challenge of maintaining what is good about legal education and jettisoning what is not is not itself new.<sup>5</sup> Legal scholars have criticized legal education for a variety of reasons, including for instituting changes, for as long as there have been law schools.<sup>6</sup> And law schools have engaged in overhaul of their curricula before, though it is likely that a time-traveling law student from a century or more in the past would recognize most of the courses on offer today, especially in the first year program. It is newsworthy when law schools make any changes; legal education in a common law nation that fundamentally prizes adherence to the past is understandably slow to change and may be loath to deviate from the well-established and successful format dictated by tradition.

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increasing the diversity of the students, staff, and faculty, and modifying both curriculum and pedagogy to provide greater context.”).

3. See Paula Lustbader, *Good Practice Respects Diverse Talents and Ways of Learning*, 49 J. LEGAL EDUC. 448, 450 (1999) (“Teachers can foster a more effective classroom climate if they treat students with respect; combine the Socratic method with other teaching methods, especially cooperative learning exercises; incorporate different experiences that allow students to display their knowledge in a variety of ways; state their expectations explicitly; give students written questions and hypothetical problems before class; teach students to prepare for class; and evaluate student performance in a variety of ways.”).

4. Erwin Chemerinsky, *The Ideal Law School for the 21st Century*, 1 U.C. IRVINE L. REV. 1, 17 (2011); see also Bryant G. Garth, *Having it Both Ways. The Challenge of Legal Education Innovation and Reform at UCI and Elsewhere: Against the Grain and/or Aspiring to Be Elite*, 10 U.C. IRVINE L. REV. 373 (2020).

5. See, e.g., Jonathan D. Glater, *Harvard Law Decides to Steep Students in 21st-Century Issues*, N.Y. TIMES, Oct. 7, 2006, at A10 (describing Harvard’s “broadest overhaul in more than 100 years” to its law curriculum); see also Jonathan D. Glater, *Training Law Students for Real-Life Careers*, N.Y. TIMES, Oct. 31, 2007, at B9 (surveying changes at several law schools in response to concerns that legal education does not prepare law students for law practice).

6. See Bryant G. Garth, *Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, 24 STAN. L. & POLY REV. 503, 507 (2013) (describing attacks on legal education and the legal profession in the 1930s).

When this law school launched, there were good reasons to be cautious. The lingering effects of the financial crisis, which began in fall 2008 and led to the worst contraction since the Great Depression, prompted questions about who would want to go to law school and whether anyone who went would get a job. At the same time, legal education was beset by a public image crisis, as a series of articles in *The New York Times*,<sup>7</sup> law review articles,<sup>8</sup> and entire books<sup>9</sup> fired broadsides against law schools. Critics questioned the need for as many law schools as the nation had and, consequently, the particular need for a new one in the University of California system. Critics questioned the tuition charged, raised concerns about graduates' earnings, and warned that students were not ready for practice because the law school curriculum had not kept pace with the changing needs of the profession.<sup>10</sup> All in all, this was not an auspicious moment for a new law school, and the somewhat unfocused miasma of criticism, however inapplicable or misguided,<sup>11</sup> hovered even over my thinking about course design and coverage.

UCI Law has been successful; in the fall of 2018, the institution welcomed its largest first-year class ever. Indeed, it was a class nearly 50% larger than intended, as we attracted more students than anticipated. This is a reflection of outside recognition of what the Law School offers, as well as high placement in rankings. UCI Law was a player. By such measures, the Law School has achieved one of its goals: we are elite. This progress should be vindication and also liberation, creating space for the pursuit of creative, novel law teaching as our founding dean described. Of course, as long as the accolades continue, perhaps no one will ask about innovation.

When I walk into the classroom to teach Statutory Analysis now, nearly ten years later, I am still very focused on the need for balance between innovation and satisfying the expectations of students and others out there evaluating me and us. I still worry about the concrete effects of the cost of legal education on our students and the importance of justifying that cost. In short, I still have that sense of

7. See, e.g., David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, at BU1.

8. See, e.g., Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177 (2012).

9. See generally BRIAN Z. TAMANABA, *FAILING LAW SCHOOLS* (2012).

10. *Id.* at 182–83. Members of UCI Law's founding faculty knew of these criticisms and certainly had them in mind when designing this institution's curriculum. See, e.g., Ann Southworth & Catherine L. Fisk, *Our Institutional Commitment to Teach About the Legal Profession*, 1 U.C. IRVINE L. REV. 73, 73 (2011) (describing the goal of the founding faculty "to create a first-year curriculum that captures the latest wisdom about what knowledge, skills, and values law schools should impart to their students").

11. There were, of course, critical responses to law schools' critics. See, e.g., Lucille A. Jewel, *Tales of a Fourth Tier Nothing, A Response to Brian Tamanaha's Failing Law Schools*, 38 J. LEGAL PROF. 125 (2013); Michael A. Olivas, *Ask Not for Whom the Law School Bell Tolls: Professor Tamanaha, Failing Law Schools, and (Mis)Diagnosing the Problem*, 41 WASH. U. J.L. & POL'Y 101 (2013). While legal education has undergone consolidation, with a few institutions closing their doors, Sonali Kohli, Rosanna Xia & Teresa Watanabe, *Whittier Law School Is Closing, Due in Part to Low Student Achievement*, L.A. TIMES (Apr. 20, 2017), at <https://www.latimes.com/local/education/la-me-edu-whittier-law-school-closing-20170420-story.html> [<https://perma.cc/R2N2-WQRL>], the basic model has not changed significantly at the vast majority of schools.

performing a balancing act, of walking along a tightrope. But I have come to believe that the prospect of constant change, along with the absence of complacency, and a readiness to continue to question what we do and how we do it, are core attributes of UCI Law.

Statutory Analysis, like the other classes that make up the first-year curriculum at the Law School, is a microcosm of the institution as a whole. In designing our courses, in drafting and modifying the syllabi, we, professors, must resolve the same questions that the founding faculty faced and find a way to balance comfortably the same competing goals that they pursued. Of course, each of us does this differently, spending more or less time on specific topics and skills, incorporating different kinds of exercises and assessments more or less often. This Essay is animated by the conviction that sharing an explanation of Statutory Analysis will aid in turn in explanation and analysis of the Law School as an institution, both its singular achievements and its ongoing challenges.

Accordingly, the discussion that follows will begin with the course, then step back to consider the opportunity and challenge posed by the population of students who take it, and then step back further to consider the critical challenge of cost, which confronts legal education more generally. These three areas I anticipate will continue to be in flux as the Law School moves into its second decade. In the first Part, I will describe the development of teaching methods I have used in Statutory Analysis over time and possible changes I anticipate in the future, building on the substantive explanation of the course provided by Professor Chacón, who helped create the class. The second Part steps back to address the importance of effectively teaching and otherwise supporting our increasingly diverse and sophisticated students, many of whom arrive having undergone life-changing experiences already and many of whom have well-formed, normative beliefs about the nature of injustice and about the uses to which law should be put. Part III turns to the financing of legal education, an area I have written about in other contexts, and a challenge confronting all law schools. A brief conclusion follows.

#### I. PEDAGOGY AND STATUTORY ANALYSIS

In designing Statutory Analysis, those of us who teach it face three basic challenges. First, the class should help introduce first-year students to the methods and purposes of legal education and, ideally, relate those methods and purposes to the practice of law. This challenge is itself one consequence of the Law School's innovative curriculum, in that many institutions do not require students to take criminal law in the first semester of the first year; I took the class in my third year. Second, it should introduce students to basic tools of statutory interpretation. Third, it should introduce students to core concepts of criminal law and to the elements of a specific set of crimes (typically including at least homicide, sexual assault, theft, attempt, and conspiracy) and defenses (justifications, like self-defense, and excuses, like mistake). There is currently no criminal law casebook that attempts to achieve all three of these goals and as a result, the class uses a supplemental reading packet

that includes nearly all the cases and background readings related to statutory construction. Over the years, I have also included in this supplement optional readings to help students with more difficult issues that arise in the class, including provisions of the California Penal Code and the state's model jury instructions. Students seem to appreciate reading real-world documents that provide the basis of judges' instructions to juries. I have advised students to consult these additional sources if they are not satisfied with a judicial opinion's explanation or definition. After all, the model jury instructions represent a group effort to distill and convey the elements of crimes for a lay audience of jurors, and this can be very helpful for students working both to learn to identify elements of crimes generally and elements of specific crimes.

#### *A. Teaching Goals*

A more traditional criminal law class might begin with explicit discussion of theories of punishment that explain why we criminalize what we do, or else identification of the core elements of crime—an evil act that causes harm, an evil thought animating the evil act, and the proper relationship in time and place between the act and the intent. But this class approaches these topics somewhat obliquely because in the first weeks, we focus on statutory construction, on theories of interpretation, and the different sources of meaning that each prioritizes. These interpretive theories, rules, and practices may reflect and reinforce ideas about punishment.

All but one of the judicial opinions assigned for this first month or so of the class resolve criminal cases, but the crimes at issue are not selected because they are likely to be tested on the bar examination or otherwise have special, substantive significance in criminal law doctrine. This is one of the most challenging aspects of the class, in part because in other first-semester courses, students are learning to pull the definition—the answer—from the opinion. At this stage of this course, the conclusion the court reaches is far less important than the path that the court took to reach that answer. It is of no moment whether students remember, for example, the definition of the defense to perjury provided in 18 U.S.C. §1623(d),<sup>12</sup> but the reasoning of the court in determining that definition matters greatly.

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12. “Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.” *United States v. Sherman*, 150 F.3d 306, 311 (1998). The provision is at issue in a case that is sometimes assigned in Statutory Analysis in which the defendant is charged with perjury and essentially argues that although it had “become manifest that such falsity . . . [had been] exposed,” he should still be able to use the recantation defense because the falsehood had “not substantially affected the proceeding.” *Id.* at 313. The appellate court concluded that in this provision, the word “or” should be read as “and.” *Id.* at 317.

*B. Substance: Perspectives on Legal Doctrine*

Through the five or six statutory interpretation cases in the first three weeks of the class, students are exposed to canons of construction, such as the “plain meaning” rule; substantive rules, such as the rule of lenity; the role of legislative history; and finally, to constitutional constraints on potential meanings of statutes. This last subject provides the bridge from the packet of supplementary materials to the casebook that I use, *Criminal Law Cases and Materials* by Cynthia Lee and Angela P. Harris (hereinafter “Lee & Harris”), which has a section on the limitations placed on criminal law by the due process requirements of the Fifth and Fourteenth Amendments; the Eighth Amendment’s prohibition on cruel and unusual punishment; and the prohibition on discrimination in the Equal Protection Clause of the Fourteenth Amendment.<sup>13</sup>

Every year I weigh whether to include one civil case in the course supplement, and every year I end up deciding it is worthwhile. The case introduces to students the concept of “*Chevron* deference,” the deference of courts to executive agencies’ reasonable interpretations of statutes.<sup>14</sup> I consider this sufficiently important that it merits a detour from criminal cases. Nearly every year that I have taught Statutory Analysis, at least one student from the prior year’s class has told me that at her or his summer job, no one else had already been exposed to the concept of *Chevron* deference. Invariably, the student’s knowledge proved useful. In light of this, I anticipate that I will continue to include the case.

Although the casebook I use does not include extensive discussion of statutory interpretation, it does make significant use of secondary materials that complement and provide various perspectives on the issues in the judicial opinions. Excerpts of essays addressing bias, either on the part of particular actors in the criminal law enforcement regime or in the substance of law itself, serve a number of important course goals. For those students who arrive with critical concerns about the criminal law, some of these materials offer some vindication: they are not alone in their concerns. For students who do not, these materials may open their eyes to ways in which law is deeply contextual, reflecting beliefs and values of particular people at a particular time.

The ways in which context can change and views evolve become especially apparent when we discuss sexual assault, an area in which the law has evolved over the past few decades.<sup>15</sup> For those students who arrive viewing law as a neutral, objective, even natural, ordering force, these materials should help them to appreciate different perspectives that view law as an instrument of power that may

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13. U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

14. *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003).

15. See CYNTHIA LEE & ANGELA P. HARRIS, *CRIMINAL LAW CASES & MATERIALS* 432 (3d ed. 2014) [hereinafter LEE & HARRIS].



protect the interests of the privileged and undermine those of the marginal. For example, in our discussion of the risk of discriminatory enforcement of laws that are too loosely written or too “vague,” an excerpt of an essay by Paul Butler should make vivid the frustrating experience of unwanted police attention on the basis of race.<sup>16</sup> I do not expect that at the end of the semester every student will have adopted any particular perspective—and indeed, not all of the scholars whose views we discuss agree with each other—but I do expect that the students will understand various critiques.

### C. Teaching Methods

Inclusion of varied perspectives on law is only one tactic, albeit a very important one, for educating law students to be the empathetic and perceptive advocates I hope they will become. The class also should use diverse teaching methods to help these students to learn; imparting knowledge using the format of the stand-up lecture in which the professor speaks and students listen is not always the most effective. Education scholars have found many other, often more effective tools that promote understanding and the ability to use new information. Group exercises,<sup>17</sup> flipped classrooms,<sup>18</sup> and other relatively<sup>19</sup> innovative practices can both reduce the stress level in a law school classroom and improve students’ understanding and retention.<sup>20</sup> Adopting these methods and adapting them to legal education are broader challenges confronting law schools.<sup>21</sup>

In an effort to make it easier for students to focus on the reasoning process, I have used different techniques, aimed at different kinds of learners. Typically for at least one of the early cases, we develop a graphical representation of the reasoning, and the students help me draft a flow chart on the classroom’s whiteboard. We do this for both the majority opinion and the dissent, which enables us to match up the arguments against each other visually and have a group discussion of which arguments in each opinion are more or less persuasive, and why. We also list the

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16. See generally Paul Butler, *Walking While Black: Encounters with the Police on My Street*, LEGAL TIMES, Nov. 10, 1997, at 23, as excerpted in LEE & HARRIS, *supra* note 15, at 86–91.

17. Lustbader, *supra* note 2, at 409.

18. Anne E. Mullins, *The Flipped Classroom: Fad or Innovation?*, 92 OR. L. REV. ONLINE 27, 27–28 (describing the virtues of flipped classrooms appreciated by legal writing faculty for years).

19. For law schools, that is. Many of my students have already experienced these methods in the course of their undergraduate and high school educations.

20. Lustbader, *supra* note 2, at 408 (providing a safe space for students to discuss concepts covered can help students develop methods to cope with stress); see also Lustbader, *supra* note 3, at 450 (“To create a more effective learning climate, law schools could adopt a pedagogy that connects content to student experience, incorporates students’ values, and promotes collaboration.”).

21. WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 4, 9 (2007), [http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary\\_pdf\\_632.pdf](http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary_pdf_632.pdf) [<https://perma.cc/6Q5Y-LWT2>] (“Although the ways of teaching appropriate to develop professional identity and purpose range from classroom didactics to reflective practice in clinical situations, the key challenge in supporting students’ ethical-social development is to keep each of these emphases in active communication with each other.”).

tools of statutory construction used to support each argument, to help the students see that sometimes courts rely on canons of construction implicitly. This process helps students to appreciate the choices that will be available to them as advocates about what to focus on first in making an argument about statutory meaning: perhaps the text, the intent, the purpose, the consequences.

The other technique that I present to the students is making a reverse outline of the opinion, distilling each paragraph to a phrase and so building a concise representation of the reasoning on a single sheet of paper. Students can use the distillation both to help remember the case generally and also to see at once all the steps in the reasoning of the judge(s). With a short case, like the one touching on *Chevron* deference, I will ask the class to take a few minutes to attempt this, then solicit volunteers to read out the phrases that they came up with to summarize each paragraph or group of paragraphs in the opinion. This approach has an added benefit: it reaches students who might be uncomfortable being cold-called in class, because this exercise gives students time to prepare their responses on paper or on screen, and they simply have to read and perhaps explain them. I will return to the issue of cold-calling below.

Every time I teach Statutory Analysis, I try to incorporate more innovative tactics, often after consultation with colleagues who have studied pedagogy, both in the Law School and in the larger university. And every time that I teach the class, I try to reduce the anxiety provoked by cold-calling, both by specifying beforehand a core set of questions I will always ask and spending less time questioning any one student. In the future I am debating shifting away from the most demanding form of cold-calling by instead requiring students to sign up to be on call for a certain number of class sessions, so that at least they have some agency in the process. My aim is to lower their levels of anxiety.

Group assignments would also reduce student stress, I am sure, because using groups would mean that students would not be alone in responding to questions. Yet group assignments, especially in a large, first-year class, create some risks. First, students know that they are graded on a hard curve and so may not want the poor performance of a classmate to affect their grade. Second, based on casual conversations with students over the years, I have concluded that they arrive at the Law School with certain expectations, and one of them is that they will be assessed individually. Third, to the extent that not all members of the faculty use group work, those professors who do run the risk of suffering student criticism on end-of-term evaluations. In other words, innovation may earn punishment. These hurdles make clear the extent to which pedagogy is tied up with institutional culture and expectations, which in turn are shaped by methods of faculty evaluation, a subject to which I return below.<sup>22</sup>

The complex and multifaceted challenge of improving pedagogy clearly cannot be a reason for avoiding it. Each of those challenges can be addressed.

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22. See *infra* Part II.

Indeed, the American Bar Association increasingly is demanding that law schools take this task on by, for example, developing learning objectives at the level of the institution and the individual class.<sup>23</sup> Increasingly, technology offers means of helping students to consolidate their learning outside the classroom, enabling low-stakes quizzes, podcasts, interactive exercises, and other tools. It takes time to incorporate these methods of engagement into a class. Furthermore, how they are presented matters, because students may not appreciate a syllabus that seems simply to add more work for them. So, in Statutory Analysis I strive for transparency in teaching to help students understand why they are being asked to do the work assigned. Over the course of the semester, I also address stress explicitly and suggest management tricks that they can use when taking tests.

Making transparency a priority reflects my conviction that the best way to prepare our students for practice is not to simulate its most difficult and stressful moments in the hope that they will build up some kind of mental calluses that will protect them. When we observe a video recording of a Ninth Circuit oral argument that led to a judicial opinion that students have read, the students can appreciate what the lawyers had to do to prepare. We discuss how difficult the task is and we share ideas on how best to manage stress. These discussions matter because although law school can cause anxiety, causing anxiety makes students anxious but does not necessarily enable students to cope more easily with stress in the future.

When the class turns to reading judicial opinions to learn substantive criminal law, after focusing on techniques of interpretation, I try to point out those moments in decisions we are reading to learn substantive criminal law when judges are using canons of construction that students should know. Ideally, the judicial opinions unpacking the law of homicide, sexual assault, and other crimes will also help students to recall and to see how to apply all the tools covered in the first weeks of the semester. The efficacy of this pedagogy is something that I continuously think about; the class evolves every year.

Beyond effective presentation of the substance of the law and methods of interpretation, in Statutory Analysis I also try to help students see the essential role of discretion in criminal law enforcement—and the risks that such discretion necessarily creates. Usually this comes up when the class discusses drafting a statute and I offer a series of hypothetical situations that, were the statute applied precisely as written, would lead to outcomes that students do not desire. For example, one year, students prepared a prohibition on jaywalking, and I asked the drafters whether it would be enforced against a person who rushes to save a stroller that has rolled into the middle of a busy street. Of course, they said no. But they quickly also saw

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23. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH., Standard 302 (AM. BAR ASS'N 2018-2019), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2018-2019ABAStandardsforApprovalOfLawSchools/2018-2019-aba-standards-chapter3.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalOfLawSchools/2018-2019-aba-standards-chapter3.pdf) [<https://perma.cc/AAG3-ZH2K>].

that redrafting to address every eventuality ahead of time would be impossible. Adopting rules of interpretation and allowing for some discretion in enforcement attempt to deal with this problem.

A good casebook will juxtapose appellate opinions describing either (a) *different* facts but reaching the *same* outcome, or (b) nearly *identical* facts but *different* outcomes. These contrasts open up space for conversations about what drives courts to view different fact patterns as sufficiently similar to justify the same application of law, and what drives courts to view similar fact patterns as sufficiently distinct to justify different applications of the law. Much can turn on the ways in which facts are similar and ways in which they differ. The law also can differ in different jurisdictions, provoking conversations about why one state defines a crime in one way and another in a different way.

One of the troubling cases that we read in Statutory Analysis, *People v. Berry*,<sup>24</sup> describes a man who waits in his wife's empty apartment for approximately twenty hours and, when she arrives, strangles her.<sup>25</sup> We read the case in part to understand the differences between first degree and second degree murder: one possible reason to convict a defendant of first degree murder is if prior to the killing, the defendant was "lying in wait," which suggests that the defendant had made a plan, or acted in a "willful, deliberate, and premeditated" manner.<sup>26</sup> The reviewing court concluded that on the facts, the jury should have been given the opportunity to convict the defendant of voluntary manslaughter for committing a killing that was provoked. Voluntary manslaughter would be a lesser charge than either first- or second-degree murder. The state Supreme Court's opinion forces the class to grapple with the reasons the justices thought that the defendant's conduct might have been provoked, notwithstanding a course of conduct that certainly looked like lying in wait.

When we discuss how and why the California Supreme Court reached the conclusion that it did, we invariably also talk about the justices' apparent view of domestic violence, in particular violence against women. This in turn invites discussion of how the law, as interpreted by judges who are still disproportionately men, treats the interests of women. Bringing these critical perspectives into the classroom may rile some students; what evidence there is of sexism in the *Berry* opinion is subtle and indirect.<sup>27</sup> Yet ignoring the question of the law's differential interpretation and application for people historically excluded from power, including the power to draft and interpret laws, would and should also rile students.

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24. See *People v. Berry*, 556 P.2d 777 (Cal. 1976).

25. *Id.* at 778–79. There are more facts than this abbreviated description provides, but they are not relevant to the point of this Article.

26. CAL. PENAL CODE § 189.

27. For example, the opinion refers to the victim, a twenty-year-old woman, as a "girl." *Berry*, 556 P.2d at 778.

Our discussion of *Berry* challenges the presumption that the law as written, as handed down, and as applied is somehow neutral and objective.<sup>28</sup>

Not only do I hope that students appreciate the difficulty of law functioning perfectly because of the myriad, unpredictable factual situations to which it will be applied, but I also hope that they will understand diverse analytical perspectives, some of which emphasize the unequal division of power between those legislating and interpreting the law, and those subject to it. As Professor Amna Akbar put it,

[W]e must have the courage to investigate law's relationship to race, gender, sex, and capitalism through inquiries grounded in our now and our past. We must study the dialectic between social structures, ideologies, and political commitments that motivate and constitute the law. We must uncover law's assumptions and ask if they are fair to make.<sup>29</sup>

Meeting this challenge requires giving up on an idealized notion of law that consistently conflates legislation and justice. Students should appreciate that laws are the products of particular historical moments and the values shared among the law-making community in those moments. To the extent that students share those animating values, they will likely be more willing to endorse the laws. Thus, one project of the class is to make those values, which may be assumed and go unstated by those who draft legislation and by judges who interpret it, explicit. Then students can decide and discuss whether they share them or not.

The ways in which shared beliefs affect the drafting of legislation probably belongs in a separate class on that subject. The details of the legislative process are beyond the scope of Statutory Analysis. But given the attempt to contextualize criminal law, I find leaving out the legislative process frustrating. A question to grapple with, perhaps over the next decade in the life of the Law School, is whether a full course on legislation should be added to the first-year curriculum, thus resolving the tension between coverage of substantive criminal law and presentation of statutory analysis. As conceived and as taught, Statutory Analysis represents a compromise intended to give students basic tools that they can use across the curriculum and across practice areas, while retaining coverage of the substantive doctrine that lawyers traditionally have learned. Whether the current formulation is the optimal balancing of these goals remains an open question.

It is important to ensure that discussions throughout the class go beyond the text, if I may analogize to statutory interpretation. We should take into account social and historical context. For example, the class discussion of theories of punishment—which comes later in the class than it likely would, were this a more typical criminal law class—must extend beyond essential, but abstract, justifications

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28. See, e.g., Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 368 (2015) (“[D]ecisions about what or how we teach are not neutral, objective, or apolitical.”). Professor Akbar’s essay is only a recent example and in her work she cites to many others, dating back decades. *Id.* at 367 n.63.

29. *Id.* at 367.

including deterrence, retribution, incapacitation, and rehabilitation.<sup>30</sup> There are now numerous scholars who have argued that study of how criminal law is actually enforced and against whom will suggest very different theories. Critical scholars have noted that crime can justify invasive government regulation of institutions from schools to the workplace.<sup>31</sup> Others have argued that how criminal law is enforced, where it is enforced, and against whom it is enforced all subject particular segments of the population to greater social control—and that this is no accident.<sup>32</sup> This perspective is not confined to the academy; for years now, some students have arrived familiar with the analogy encapsulated in the title of Professor Michelle Alexander's book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.<sup>33</sup> These students are eager to study and talk about the ways in which law can produce, enforce, and reproduce social hierarchy.

The more varied the experiences and perspectives students bring with them into the classroom and share with their classmates, the more diverse their points of view are and the more diverse the demands they make of a class on criminal law. Fortunately, student diversity also makes it easier to identify and discuss multiple perspectives both on methods of interpretation and on criminal law. As the next Part details, students are indeed bringing more varied experiences and perspectives into the Law School.

## II. A DYNAMIC STUDENT POPULATION: THE DEMANDS OF DIVERSITY

This Part flips the classroom to focus on the students and so see more of the ways in which this one course is representative of the larger institution. The diversity of the student body at the Law School creates a welcome opportunity in the Statutory Analysis course to explore both statutory construction and substantive criminal law with fresh eyes. Students bring experiences from all over the country, although most continue to come from California. Of course, even within California, there is incredible diversity. Some of my students have direct experience with criminal law enforcement, others have already spent time working with people who are affected by it. In the fall of 2018, when I was asked to write this Essay, nearly half of the students in the first year class were people of color.<sup>34</sup> This has been the

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30. See LEE & HARRIS, *supra* note 15, at 11.

31. See, e.g., JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 4 (2007) (describing how the state may use the “category of crime to legitimate interventions that have other motivations,” such as enabling state imposition of punishment in pursuit of political gain).

32. See, e.g., Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016) (arguing that “many of the problems identified by critics [of criminal law enforcement in the United States] are not actually problems, but are instead integral features of policing and punishment in the United States. They are how the system is supposed to work.”).

33. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012).

34. To be precise, 44.5 percent (102 out of 229). U.C. IRVINE SCH. OF LAW, STANDARD 509 INFORMATION REPORT (2018), <https://www.law.uci.edu/about/consumer-info/Std509Report.pdf>

case for a couple of years now. The class includes students who attended large, often public universities and who as undergraduates may not have received extensive individualized feedback on their work in small classes. It includes students who majored in a very broad range of fields, some of whom have had to complete extensive writing projects and others who have not. Some students are children of lawyers and are very savvy about law school, while others are the first in their families to go to law school, or perhaps to have completed college, and are not sure at all what to expect when they walk into that first class.

Students arrive with distinct learning experiences and learning styles. Some of them have thought about how they most effectively absorb information and others have not. One of the important goals of the class extends beyond the subject matter of criminal law to encompass figuring this out. For this reason, I encourage students to experiment with different techniques, from the research-based recommendation that they forego using a laptop to take notes<sup>35</sup> to reading their notes aloud into their phones and then listening to the audio to reinforce their recollection. I also encourage them to keep track of the different tactics they use and to consider what seems to work best for them. When they move on to the practice of law, they will be well-served if they have already learned how they best absorb new information.

What are the implications of welcoming such a diverse and increasingly sophisticated and demanding student population, and in an increasingly and openly combative political environment? Certainly, members of the faculty face considerable likelihood of disagreement over fundamental issues in their classrooms, such as the impact and proper role of government in society and the extent to which identity characteristics like race, gender, and class shape or limit opportunity, to name only two sets of hot-button issues. Many students are also very aware of their own identities and, consequently, are attentive to perceived attacks on aspects of those identities in the form of statements heard as racist, xenophobic, homophobic, sexist, misogynist, classist, or just clueless. This is a recipe for tension and conflict within the classroom, certainly in courses that, like Statutory Analysis, invite discussion of inequity in the law, but also in classes that may seem far removed from such controversy. For example, in Business Associations, a class that I also teach, it would be difficult to avoid discussion of the financial crisis that preceded the Great Recession and the racially disparate effects of home lending and subsequent foreclosure. Socioeconomic inequality in

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[<https://perma.cc/7DBX-S8D7>]. This calculation excludes nonresident alien students and students who declined to provide demographic information, and defines a person of color as a person who indicated that s/he was not white or a person who indicated that s/he belonged to two or more races, one of which was not white. *Fall 2018 Incoming J.D. Class Profile*, U.C. IRVINE SCH. L., <https://www.law.uci.edu/admission/class-profile.html> [<https://perma.cc/3JXS-HJYE>] (last updated Oct. 5, 2018).

35. There are too many sources on this now to cite but the one that I share with students showed that students who did not use laptops to take notes performed better on assessments. See Pam A. Mueller & Daniel M. Oppenheimer, *The Pen Is Mightier Than the Keyboard: Advantages of Longhand Over Laptop Note Taking*, 25 *PSYCHOL. SCI.* 1159, 1166 (2014).

general and along lines of race in particular thus become part of the discussion ostensibly focused on the costs and benefits of the publicly traded, corporate form.

One reason for greater tension in the classroom is greater tension in the national, political culture. With the election of 2016, political leaders have made or embraced statements associated with racist, xenophobic, nationalistic worldviews.<sup>36</sup> Not surprisingly, both on- and off-campus, young people who share those views are more comfortable expressing them. At the same time the ubiquity of mobile phones equipped with cameras and the diffuse reach of social media have meant that those offensive statements can find their way to the national stage, embroiling members of a college fraternity in controversy after video surfaced of their enthusiastic rendition of an openly racist song, for example.<sup>37</sup> Whether our politics and culture are more polarized than a decade before, I cannot say, but it does seem clear that the costs of expressing views previously viewed as extreme have fallen.<sup>38</sup>

These developments put two significant pressures on us as teachers. First, we must be ready to have difficult conversations about potentially controversial topics. In many cases, we should probably start those conversations ourselves, and we should come prepared with facts that our students want or need. But substantive preparation will not be enough on its own. In addition, we must be ready for student discomfort and vociferous disagreement. Given the lack of formal training of most law professors in teaching, this may be a challenge. In part for this reason, faculty at UCI Law regularly discuss classroom dynamics and we have held workshops on managing difficult discussions because high quality pedagogy is a priority here. Members of the faculty value teaching highly, and in part for this reason, students sit in on presentations by potential hires and share their views of candidates' teaching ability.

Attention to teaching is important in this polarized moment. In the past, law professors may have learned on the job—from teaching—how to improve our methods and promote student understanding. In the past, the costs of this traditional approach to training of teachers might have been modest. But most of us likely have not had the experience of trying to manage a classroom in which one student's uninformed comment has led to an accusation of offensive insensitivity that has in turn set the room on a knife's edge. The costs of handling that moment badly can be considerable. Students who view themselves as vulnerable will look to

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36. See, e.g., Trip Gabriel, *Steve King's White Supremacy Remark Is Rebuked by Iowa's Republican Senators*, N.Y. TIMES, Jan. 11, 2019, at A14 (reporting on fallout from remarks by Iowa Republican congressman Steve King, who in a prior interview "said at one point: 'White nationalist, white supremacist, Western civilization — how did that language become offensive?'").

37. See Manny Fernandez & Richard Pérez-Peña, *Fraternity Vows Broader Look Into Use of Racist Chant*, N.Y. TIMES, Mar. 10, 2015, at A14.

38. See Thomas B. Edsall, *No Hate Left Behind*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/opinion/hate-politics.html> [<https://perma.cc/N5VK-T8ET>], (analyzing a poll-based study that "found that nearly one out of five Republicans and Democrats agree with the statement that their political adversaries 'lack the traits to be considered fully human — they behave like animals.'").



the professor for affirmation and defense, while students who view themselves as truth-tellers or who aspire to be provocateurs will look for protection of their right to speak.

Not least because the Law School from its inception has emphasized its support of public service and commitment to innovation, even students who might have had little exposure to the legal profession before starting law school have some expectations about what this law school will offer. UCI Law promises an “innovative and comprehensive curriculum, and prioritizes public service and a commitment to diversity within the legal profession,” according to materials on the Law School’s website.<sup>39</sup> Many students in this millennial generation have studied what behaviors constitute microaggressions<sup>40</sup> and have thought about their own intersectional<sup>41</sup> identities; they expect an institution that bills itself as “commit[ed] to diversity” to be sensitive and supportive.<sup>42</sup>

This cannot mean, and no student yet has suggested to me that this should mean, that the class avoids sensitive topics in class. Students often are eager to delve into the social implications of the caselaw they read, interested in exploring which groups in society might be consistently advantaged or disadvantaged by the interpretation of a definition of a crime. Even were it possible to put aside questions of identity and subordination, many of the judicial opinions assigned in Statutory Analysis still describe acts of horrific violence. These cases are difficult to read. Nearly every class session would require a trigger warning, advising students that difficult material awaits—and in the first days of the semester, I do advise students of this. I also advise them that I cannot be sure which cases will be more difficult for individual students to read, because for some, based on personal experiences, the crime of theft may be especially upsetting, while for others, the facts of a case of attempted murder may be more disturbing.

The awful facts of the typical cases assigned in a criminal law class pose a challenge for the instructor. Students may have a hard time analyzing and talking about the facts of the case for reasons that I do not know. Like each of them, I must weigh words with care, avoid appearing to take cases lightly. This can be difficult, especially because repeated exposure to these disturbing facts can inure one to their impact. A conversation about *how* to talk about difficult subjects, from the facts of homicide cases to the role of race in sentencing of defendants to the death penalty, is an important part of our early discussions in Statutory Analysis. In the first weeks, when we are still exploring the cases involving interpretation of

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39. *We Are UCI Law*, U.C. IRVINE SCH. L., <https://www.law.uci.edu/about/> [https://perma.cc/VE6N-6XB7] (last visited Oct. 23, 2019).

40. See Tanzina Vega, *Students See Many Sights as Racial ‘Microaggressions,’* N.Y. TIMES, Mar. 21, 2014, at A1.

41. See Dan Levin, *Generation Z: Who They Are, in Their Own Words*, N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/2019/03/28/us/gen-z-in-their-words.html> [https://perma.cc/H34N-V9TF] (describing characteristics of “Generation Z,” a “postmillennial group of Americans for whom words like ‘intersectionality’ feel as natural as applying filters to photos on Instagram”).

42. *We Are UCI Law*, *supra* note 39.

statutory language rather than the later cases involving crimes of extreme violence, I remind students to be thoughtful about their words and also to feel free to speak with me individually if they have concerns about particular topics on the syllabus.

Teaching this dynamic, thoughtful, diverse, and ever-changing group of students is a constant challenge. Every year, interactions over the course of the semester prompt me to rethink how Statutory Analysis is organized and taught. In this respect, too, the class is a microcosm of the larger law school, requiring constant re-balancing to achieve different goals. These goals extend beyond the substance of basic criminal law and statutory construction to encompass effective teaching to reach all students.

### III. A PUBLICLY INTERESTED LAW SCHOOL'S LOOMING CHALLENGE: TUITION, AID, FORGIVENESS

This Part continues to expand the scope of discussion to encompass a tremendous challenge facing our increasingly diverse students: paying for their legal education. The issue is not new, nor is it unique to this law school. The paragraphs that follow first address criticism of the financial model implemented by this law school, then turn to concerns over the cost of obtaining a law degree generally.

When the Law School opened its doors in the depths of the Great Recession, a few commentators on legal education were quick to criticize not its mission but its price. Brian Tamanaha took the Law School to task in his book, *Failing Law Schools*, warning that high tuition would mean high student debt loads, which would direct students not into public interest careers but into corporate law. Professor Tamanaha lamented, "Where [UCI Law] went wrong was in setting out to create an *elite* law school."<sup>43</sup> In his view, "This goal condemned the project. Affordability and elite status are mutually exclusive under current circumstances."<sup>44</sup> Charging lower tuition, offering students only need-based financial aid, requiring faculty to teach more courses each year, and paying them less would have enabled students to graduate carrying less debt and consequently more financially able to pursue whatever career path they liked, Professor Tamanaha wrote.<sup>45</sup> The path that the Law School pursued was, he contended, in "economic terms . . . nothing new."<sup>46</sup>

This would have been a very different law school, had Professor Tamanaha's vision been implemented, and our founding dean penned a strong defense of the decision not to pursue that competing vision.<sup>47</sup> UCI Law committed itself to public service and to making public service careers possible for students while also spending the money needed to achieve elite status, the goals that Professor

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43. TAMANAHA, *supra* note 9, at 182–83.

44. *Id.*

45. *Id.*

46. *Id.*

47. Erwin Chemerinsky, *A Response to Brian Tamanaha*, BALKIN (Aug. 28, 2012), <https://balkin.blogspot.com/2012/08/a-response-to-brian-tamanaha.html> [https://perma.cc/YP72-UPMC].

Tamanaha derided as “mutually exclusive.” But the level of activity of members of the faculty who serve as public intellectuals speaking out for social justice,<sup>48</sup> the level of activity of our students who log impressive numbers of hours working pro bono over their three-year sojourns here,<sup>49</sup> and the accolades bestowed on the institution all suggest that our balancing act works.<sup>50</sup>

The Law School has taken its place among the ranks of elite institutions. This is no small achievement. As for students’ postgraduate choices, annual data on the Law School’s graduates suggests that the majority begin their legal careers at law firms, but nearly 12% go to clerkships, another 13% take public interest jobs, and 12% land in government.<sup>51</sup> Time will tell whether these shares will shift as the class profile changes, with more students choosing to enroll at UCI Law because of its ranking and regardless of its public interest emphasis. Time will also tell whether students who begin their careers in law firms move in different directions over time, as they gain experience and shed their debt.

Impressive career outcomes do not alone address Professor Tamanaha’s criticism of high tuition—though lofty pricing is a crime of which most law schools are guilty and which any single institution would be hard-pressed to avoid committing. Whether graduates choose corporate practice under the pressure of debt may be tough to say; the numbers do not reveal motivation. But it is difficult

48. There are too many examples of this to cite. As of this writing, one of my colleagues has addressed Congress on the subject of student indebtedness, *Oversight of Bankruptcy Law and Legislative Proposals: Hearing Before H. Judiciary Subcomm. On Antitrust, Commercial, and Admin. Law* (2019), <https://www.law.uci.edu/news/in-the-news/2019/Jimenez-testimony.pdf> [<https://perma.cc/YBC6-P92D>] (statement of Dalé Jiménez, Professor of Law, University of California, Irvine School of Law); another has been quoted on the horrible practice of shackling of pregnant women in custody, Ashley Southall, *She Was Forced to Give Birth in Handcuffs. Now Her Case Is Changing Police Rules.*, N.Y. TIMES (July 3, 2019), <https://www.nytimes.com/2019/07/03/nyregion/nypd-pregnant-women-handcuffs.html> [<https://perma.cc/27CG-F742>]; while another who is one of, if not the, nation’s expert on election law has spoken out against the Supreme Court’s abdication of federal authority to rein in gerrymandering, Richard L. Hasen, *The Gerrymandering Decision Drags the Supreme Court Further Into the Mud*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/opinion/gerrymandering-rucho-supreme-court.html> [<https://perma.cc/E4VR-PDRV>].

49. *Enriching Our Community*, U.C. IRVINE SCH. L., <https://www.law.uci.edu/about/public-service/public-interest/public-service-overview.html> [<https://perma.cc/H3GW-JEB2>] (last visited Sept. 26, 2019) (noting that “[d]uring the 2017–18 academic year, students provided more than 9,000 hours of pro bono service,” and “[m]ore than 90 percent of UCI Law students participate in pro bono work.”).

50. See, e.g., *Accolades*, U.C. IRVINE SCH. L., <https://www.law.uci.edu/about/accolades/> [<https://perma.cc/HV3N-W32P>] (last visited Sept. 26, 2019).

51. U.C. IRVINE SCH. OF LAW, EMPLOYMENT SUMMARY FOR 2017 GRADUATES, <https://www.law.uci.edu/careers/student/employment-info/statistics/employment-summary-2017.html> [<https://perma.cc/Q4NP-KKRK>] (last visited Nov. 5, 2019). By way of comparison, UCLA School of Law reported that for the class of 2018, slightly more than five percent of graduates went to clerkships, about nine percent went into public interest jobs, and slightly more than seven percent went to work in government. UCLA SCH. L., EMPLOYMENT SUMMARY FOR 2018 GRADUATES, [https://law.ucla.edu/~media/Assets/Careers/Documents/Employment%20Statistics/Class\\_of\\_2018\\_ABA\\_Employment\\_Summary\\_040519.ashx](https://law.ucla.edu/~media/Assets/Careers/Documents/Employment%20Statistics/Class_of_2018_ABA_Employment_Summary_040519.ashx) [<https://perma.cc/Q8KP-XWBX>] (last visited Oct. 27, 2019).

to argue that student loans do not affect students' career plans, especially loans of the magnitude that law graduates often have. The most comprehensive study to date on lawyers' earning potential suggests that law school remains a very wise investment from a financial perspective,<sup>52</sup> but another study also finds that the prospect of debt does affect law students' career choices.<sup>53</sup>

Throughout the legal academy, cost is a sensitive topic. Members of the faculty of the Law School are well-compensated and tuition is an important source of revenue enabling that compensation.<sup>54</sup> Competitive salaries were one of the reasons that the Law School was able to establish itself so quickly as a prestigious institution, because such salaries made up for the risk that established, successful professors took in joining a startup. Another reason was the fact that the remarkable legal education offered here was free for the first class of students and half-price for the second. Now, however, students are paying market rates, on paper reaching nearly \$50,000 in tuition and assorted fees.<sup>55</sup> The other law schools in the University of California system charge comparable prices.<sup>56</sup> All of them also provide financial aid, of course—much of it on the basis of grades and LSAT scores, which affect each institution's placement in various publications' rankings of academic excellence.

Elsewhere I've been critical of such so-called merit aid,<sup>57</sup> which can result in awards of precious financial support to students who do not need it and greater debt burdens for those who do.<sup>58</sup> This is a collective action problem for law

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52. See Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249, 249 (2014) (finding that over a lifetime, a law degree is worth about \$1 million).

53. Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, 1 AM. ECON. J.: APPLIED ECON. 1, 17 (2009) (finding that "psychological responses to debt can have a large influence on high stakes decisions" about career choice).

54. Law faculty like to argue that they could have made considerably larger amounts in private practice and this is likely the case for many of us. Yet at risk of alienating fellow law professors, I note that we also *choose* not to pursue private practice, suggesting that other, intangible forms of compensation – the chance to engage with students and with scholars – also matter. Law schools are not competing with elite law firms for faculty.

55. And excluding room and board costs. See *School of Law Fees 2018-19*, U.C. IRVINE SCH. L., (August 10, 2018), <http://www.reg.uci.edu/fees/2018-2019/law.html> [<https://perma.cc/K9AH-LNZN>].

56. See, e.g., *Tuition and Fees*, UCLA SCH. L., <https://law.ucla.edu/admissions/tuition-fees> [<https://perma.cc/UCG8-HP4T>] (2019–20 tuition and insurance totaling \$52,308) (last visited Sept. 26, 2019).

57. Jonathan D. Glater, *To the Rich Go the Spoils: Merit, Money, and Access to Higher Education*, 43 J. C. & U. L. 195, 206–07 (2017) (criticizing increasing use of non-need-based financial aid because "students from higher-income families disproportionately earn higher grades and perform better on standardized tests, using such measures of academic performance almost certainly diverts aid dollars from students with financial need and/or students who have historically been underrepresented or excluded outright from colleges and universities").

58. See AARON N. TAYLOR ET AL., LAW SCHOOL SCHOLARSHIP POLICIES: ENGINES OF INEQUITY 12 (2017), <http://lssse.indiana.edu/wp-content/uploads/2016/01/LSSSE-2016-Annual-Report.pdf> [<https://perma.cc/TJQ7-Q8GS>] (reporting that students "expecting higher law school debts were less likely to have receive[d] merit scholarships").

schools,<sup>59</sup> because few institutions are prepared to risk losing high-scoring students critical to competitive placement in rankings, in order to allocate financial aid differently. It would be one thing for all University of California law schools to cease offering merit aid, for example, and another, riskier thing for any one of them alone to take such a step. In the absence of a broader effort to address the pernicious effects of non-need-based aid, it is unreasonable to expect individual law schools to tilt at the rankings windmill.

Which is not to say that there are not steps that should be taken to respond to concern about law student indebtedness. After all, if the cost of going to law school increases at the same pace as the cost of going to college, between 3% and 4% at public institutions,<sup>60</sup> then in twenty years, each year of law school will cost more than \$100,000. Such a price tag, unmitigated, will materially affect who chooses to pursue legal education and more tightly constrain the postgraduate decisions of indebted graduates. The cost to law schools of cushioning the blow with financial aid will continue to increase, but the incentive to use aid to bolster the academic profile of the entering class will not abate on its own. Thus, a looming crisis for law schools committed to promoting students' interest in public service careers will be making such choices financially possible. This challenge confronts all law schools, not just UCI Law.

For now, the federal Public Service Loan Forgiveness<sup>61</sup> program still holds out the promise that student borrowers who work in public service will have their federal student loans wiped out after ten years. But the Trump Administration has indicated its interest in ending this benefit and critics have pointed to the financial impact that this debt forgiveness could have, depending on how many students choose to take advantage of it; the two types of attack make the survival of the program uncertain. Fortunately, this is an area where law schools can act on their own, notwithstanding the imperative of buying high scores with non-need-based aid, in the form of institutional loan forgiveness: instead of providing grant aid in the form of scholarships to students upon enrollment, institutions can offer repayment assistance *ex post*, contingent on students' career choices and wages. Many schools, especially those with more financial resources, offer such programs. In the absence of state action to fund loan forgiveness, institutional loan repayment assistance presents a critical fundraising challenge for law school development offices. Yet more than offering a wide array of classes, more than addressing multiple areas of law in the Law School's clinics, more than hiring particular faculty members, it is offering loan forgiveness to graduates who pursue public interest careers that may be the single most important step any law school can take to

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59. And for undergraduate institutions, too.

60. COLL. BD., TRENDS IN COLLEGE PRICING 2018, at 13 fig. 4A (2018), <https://research.collegeboard.org/pdf/trends-college-pricing-2018-full-report.pdf> [<https://perma.cc/9S5P-7PKD>].

61. 34 C.F.R. § 685.219.

demonstrate its commitment to public service and to preserve access to justice generally.

After all, the consequences of failure to take such steps to cushion the impact of rising tuition will not only manifest in who chooses to obtain a legal education. If very few students can afford to work in large swaths of the public sector or in low-pay, public interest jobs, the cost of law school will further<sup>62</sup> limit the number of lawyers who can afford to take on clients of modest means, let alone those who are poor and potentially most in need of representation.

Loan repayment assistance programs, or LRAPs, are not a panacea. The prospect of repayment assistance will not necessarily overcome some potential law students' fear of taking on massive debt. As I have noted elsewhere, there is also evidence that aversion to borrowing is not evenly distributed across the student population: students from immigrant families, for example, may be particularly reluctant to borrow.<sup>63</sup> Thus debt not only hinders efforts to enable students to pursue careers in the public interest but may hamper the ability to recruit a class of students that is racially, ethnically, and socioeconomically diverse. In turn, lack of diversity among law students inevitably leads to lack of diversity in the legal profession. In an increasingly pluralistic society, the importance of constructing law school classes that reflect diverse experiences and perspectives becomes ever more important. The importance of including members of historically subordinated groups is especially great in the legal profession, which is singularly concerned with equity.

It is not surprising that tuition and debt did not figure in the articles written on the founding of the Law School, perhaps because the first student cohorts received such generous grant aid.<sup>64</sup> As the institution matures and must confront the same challenges that face other law schools, though, attention to cost and to the most effective forms of aid matters more. As the cost goes up, it will become ever more difficult for members of the faculty to recommend that students pursue their dreams, as the feasibility of doing so declines. With grades assuming yet greater financial significance, more students who perform poorly in the first year may choose to avoid additional financial risk and drop out. If they borrowed for that first year, these students will be in a poor position, indebted and without a credential that would increase their earning potential. Failure to complete a course of study has always been a tremendous financial risk, but the downside is greater than ever because the dollar amounts borrowed are larger than ever.

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62. Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, 1 AM. ECON. J.: APPLIED ECON. 1, 2–3 (2009) (analyzing a natural experiment suggesting that even the appearance of increased debt deters students from pursuing public interest careers).

63. Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CAL. L. REV., 1561, 1590 (2015).

64. See TAMANAHA, *supra* note 55 and accompanying text.

To be sure, law schools will continue to discount in the ways discussed above; more than 90% of this law school's students receive some amount of financial aid.<sup>65</sup> The publicly reported tuition, or sticker price, is not what most students pay, and the median aid award amounts to a discount of about 50% of that amount.<sup>66</sup> The widespread practice of tuition discounting has its own effects, encouraging students to haggle with financial aid offices and to pit law schools against each other, as if a legal education were equivalent to a used car. The commodification of education generally and of higher education in particular is a pernicious phenomenon yet as the price rises, it is difficult for the prospective student to think of it in any other way. A law degree is an investment and the wise investor gets the maximum return for the smallest outlay; the pressure is really on the outlay because any law school's offered return, a J.D., is the same regardless. I have noted elsewhere the prevalence of this consumer paradigm.<sup>67</sup> While it would be naïve to contend that law students should pursue their professional education in pursuit of learning for its own sake, it would also be naïve to dismiss concern that they view it purely as a consumer good. Viewing a law school as only a vendor of a credential debases the educational experience, likely discourages student engagement with the material taught, and may produce graduates with a stunted understanding of the lawyer's role in society.

The current cost structure of legal education puts this law school, and all law schools, in an awkward position. Accepting the status quo means that students will continue to be forced to borrow ever-larger amounts in order to finance their legal education. For all but the wealthiest institutions—which notably have not responded by cutting their sticker price—extensive, widely available loan forgiveness is prohibitively expensive. The difficulty of individual institution action cries out for a broader solution, like Public Service Loan Forgiveness,<sup>68</sup> or new, creative programs with the same goal at the state level. A challenge for the Law School is undertaking advocacy for greater public support of accessibility of legal education, at a time that progressive politicians have widely embraced the same goal with respect to undergraduate education.<sup>69</sup>

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65. U.C. IRVINE SCH. OF LAW, STANDARD 509 INFORMATION REPORT (2018), <https://www.law.uci.edu/about/consumer-info/Std509Report.pdf> [<https://perma.cc/NKL3-97G7>] (Grants and Scholarships 2017–18).

66. See U.C. IRVINE SCH. OF LAW, STANDARD 509 INFORMATION REPORT (2018), <https://www.law.uci.edu/about/consumer-info/Std509Report.pdf> [<https://perma.cc/VDY2-JHC9>].

67. See Jonathan D. Glater, *The Narrative and Rhetoric of Student Debt*, 2018 UTAH L. REV. 885, 887 (2018) (recognizing and endorsing the criticism that “too many students pursue education for the wrong reasons, seeking lucre rather than learning”).

68. Although this program has been plagued with problems and many graduates who thought themselves eligible have sued after encountering difficulty taking advantage of its benefits. Ron Lieber, *3 Borrowers Win Case on Eligibility for Public Service Loan Forgiveness*, N.Y. TIMES, Feb. 23, 2019, at A21.

69. See Andrew Kreighbaum, *Free College Goes Mainstream*, INSIDE HIGHER EDUC. (Sep. 26, 2018), <https://www.insidehighered.com/news/2018/09/26/growing-number-democrats-run-free-college-pushing-issue-mainstream> [<https://perma.cc/FKB7-62H2>].

Taking on such a role likely requires a change in mindset of the leadership of many universities, who for years before the law school downturn<sup>70</sup> learned to expect legal education to serve as a cash cows for their campuses and no doubt hope that those halcyon days will soon return. With applications up in fall 2017 and fall 2018, those expectations may be met, but given the longer-term problem of rising costs, complacency would amount to complicity. Law schools and the education they provide should be recognized as a public, as well as private, good, because their graduates perform a crucial role in a society governed by law. Law schools consequently may be worthy of subsidy as are other fields of study, like literature or philosophy, that a university maintains not only because they generate revenue but because they are critical to a liberal curriculum. For this law school, which was protected by the University of California, Irvine from the law school downturn, endorsing this vision of legal education may be easier.

This law school has also assumed a more active role already, thanks to an innovative relationship with an organization led by the former student loan ombudsman at the federal Consumer Financial Protection Bureau (CFPB) in Washington, D.C., dedicated to the study of student borrowing and advocacy to address education debt as a societal problem. In the fall, the Law School partnered with the new Student Borrower Protection Center, the nonprofit organization founded by former regulators at the CFPB, to create the Student Loan Law Initiative (the “Initiative”).<sup>71</sup> The Initiative is committed to the study of the effects of student borrowing and to informing advocacy for changes in policy to reduce the adverse impact of debt. Through the Consumer Law Clinic at the Law School, the Initiative will also help individual borrowers and familiarize students, many of whom may themselves be student borrowers, with the complex legal framework around student debt.

The Initiative was not publicized as an effort to help law students, today or in the future, but it could have been. Research on education debt and the advocacy informed by that research will benefit students. Prioritizing higher education finance is also a political issue, because if student debt is a problem and the price of law school (and college) continues to rise as it has for many decades, then the only long-term solution is reallocation of that cost away from students and families and back to state and federal governments. This is not wild-eyed idealism: through the 1970s, federal grant aid covered nearly all the cost of attending a public, four-year university.<sup>72</sup> As federal aid to students languished and state support of higher

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70. See Elizabeth Olson & David Segal, *A Steep Slide in Law School Enrollments Accelerates*, N.Y. TIMES, Dec. 18, 2014, at B3 (reporting that “[e]nrollment numbers of first-year law students have sunk to levels not seen since 1973”).

71. U.C. IRVINE, SCH. OF LAW, *Press Release: Former CFPB Student Loan Watchdog Launches New Organization to Protect Student Borrowers* (Nov. 28, 2018), <https://www.law.uci.edu/news/press-releases/Student-Loan-Law-Initiative.html> [<https://perma.cc/W7KJ-H7Z9>].

72. Glater, *supra* note 63, at 1577 n.76 (citing to SUZANNE METTLER, *DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM* 66–67 (2014)).



education failed to keep pace with rising prices growing demand, more of the cost shifted to students and families. At one level this is a success story, because the availability of federal loans has put higher education within reach. But at another level it is a cautionary tale, because the sheer magnitude of borrowing harms indebted students and limits the opportunities that access was intended to enable.

Law schools rely on the availability of student debt and on a population of students willing to incur it in pursuit of a law degree. As the rising cost and concurrently rising levels of indebtedness affect who chooses to enroll and what they choose to do after graduating, it is incumbent on law schools to explore creative ways to preserve accessibility of the JD degree. I anticipate that this will be a continuing challenge for the Law School, which is still just one institution among many, and I hope that others will also participate in efforts to support affordability, whether through need-based grants upon matriculation or debt forgiveness upon graduation. Each approach is costly, but the need will only grow.

#### CONCLUSION

UCI Law began at a time of great uncertainty. This looked like a highly risky endeavor. That the Law School has done extraordinarily well in its first decade does not mean we have succeeded or that it will soon succeed; in fact, if we conclude that we have succeeded, I suspect that we will have started down the road to mediocrity. Continual reevaluation and a willingness to change have been essential to institutions that last as the world around them evolves, and will be critical for the Law School, too. In part this is about what the Law School teaches, in part it is about how members of the faculty teach, but it is also about the role that the Law School plays in the lives of our students. As Part III of this Essay outlined, as the price our students pay to attend the law school continues to increase, we cannot ignore the implications for them, for the profession, and for the public service ideals which this institution is pledged to pursue. For now at least, enough students are willing and able to enroll and there are enough high-paying jobs to enable indebted graduates to repay their loans and lead highly productive lives. There is no immediate risk, in other words, that the current economic model of legal education is unstable. It is that it is quite stable—but will have consequences, for us and for the legal profession, that we should oppose.

In this Essay I have described Statutory Analysis: Criminal Law, a first-year course at the law school, and identified the multiple goals that the course seeks to achieve. I have suggested that this class strikes a balance between two of those goals, teaching students basic tools of statutory interpretation, on the one hand, and teaching them basic criminal law concepts and the elements of core crimes, on the other. I have suggested that this balancing act is akin to that undertaken by this law

school as a whole, as it delicately navigates between tradition and innovation.<sup>73</sup> The changing composition of the law school's student body will continue to push the institution as it develops in its next decade, as each group of aspiring lawyers brings its own expectations, ambitions, and most importantly, knowledge and experience. I have every expectation that they will continue to challenge us to be better, as a faculty and as an institution, for decades to come, just as they have done so far.

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73. See generally Bryant G. Garth, *Having it Both Ways. The Challenge of Legal Education Innovation and Reform at UCI and Elsewhere: Against the Grain and/or Aspiring to Be Elite*, 10 U.C. IRVINE L. REV. 373 (2020).

