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Enlarging Legal Education: Berkeley's Jurisprudence and Social Policy Program

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Enlarging Legal Education: Berkeley's Jurisprudence and Social Policy Program

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The call of this Symposium has been for provocative ideas aimed at transforming legal education. In his comment on page 547, Justice Grodin bemoans "the lack of guidance we receive from litigants concerning . . . policy choices," a failing which he partially attributes to "the almost exclusive emphasis in most law schools upon 'legal' materials, to the exclusion of relevant materials from the social sciences. . . ." Other commentators, within this Symposium and elsewhere, have raised similar concerns.

We believe that our Jurisprudence and Social Policy Program (JSP) at Boalt Hall directly responds to this very legitimate critique. JSP is, at once, an alternative to and an enlargement of the traditional law school program. We are committed to "getting the word out" about what we are doing here at JSP — to legal educators as well as to

1. We have borrowed extensively from materials by Sanford Kadish and Philip Selznick in Volume sixty-eight of the California Law Review. See Kadish, *Forward — Symposium: The Jurisprudence and Social Policy Program*, 68 CAL. L. REV. 202 (1980); Selznick, *Jurisprudence and Social Policy: Aspirations and Perspectives*, 68 CAL. L. REV. 206 (1980).

those in other disciplines.² This paper tells our story.

I. Origins

The desire among some members of university law school faculties to change or supplement their basically professional curriculum appears to have been born with the curriculum itself. As early as 1887, Yale Law School established an alternative course of study "for those not intending to enter any active business or professional career, but who wish to acquire an enlarged acquaintance with our political and legal systems, and the rules by which they are governed."³ By 1916, only nine students had completed the program and it was abolished, although not without an effort to produce a substitute with emphasis, among other things, on "Historical Comparative Analytical and Functional Jurisprudence."⁴ At Columbia Law School in the late 1920's, it was proposed to take account of the new sociological jurisprudence by teaching law as a part of the social sciences.⁵ When the plan was defeated due to the prevailing judgment that it tilted the balance too far toward scholarly and away from professional education, its faculty supporters departed to form the Johns Hopkins Institute for the Study of Law. Devoted "primarily to the nonprofessional study of law, in order that the function of law may be comprehended, its results evaluated, and its development kept more nearly in step with the complex developments of modern life," the Institute was a casualty of the depression.⁶ Similar efforts have followed with more or less the same results.

Boalt Hall's Jurisprudence and Social Policy Program — "JSP" — is in the tradition of these attempts to open the boundaries of legal education and scholarship. We trust that their failure is not a necessary outcome. In any case, their "failure" was relative, not absolute; each appears to have succeeded in enlarging the intellectual content of the research and teaching in the school where it took place and in American law schools generally. Even if JSP does not accomplish all of its goals, it would be worthwhile to do this much. Further, the JSP pro-

2. Recognizing that law reviews are not normal reading fare for those outside legal circles, we also have presented this material for a dialogue at the Center for the Study of Democratic Institutions in Santa Barbara, California.

3. STEVENS, *Two Cheers for 1870: The American Law School*, in *LAW IN AMERICAN HISTORY* (1971).

4. *Id.* at 470-71.

5. *Id.* at 474.

6. Currie, *The Materials of Law Study*, 8 *J. LEGAL EDUC.* 1, 65 n. 302 (1955).

gram, unlike some of the others, does not contemplate any diminution of Boalt Hall's role in the preparation of professional lawyers. The program is supported by an augmentation of the resources of the school and will enhance the offerings available to students enrolled in the professional curriculum. Still another reason for being hopeful, and perhaps most important, JSP is the product of a movement that draws initiative and support from many sources, outside as well as inside the law school. Since the 1950's, there has been renewed concern among officials and private citizens about the role of law in society, and increased scholarly interest in the study of legal institutions. Many disciplines — anthropology, economics, history, philosophy, political science, psychology, sociology — share this interest and have expanded research and teaching about law and society. JSP is a response to this interest and depends upon it.

At least since 1961, a group of Berkeley scholars from the social sciences, humanities and law have engaged in collaborative research and teaching about law and legal institutions, in part through the Center for the Study of Law and Society. Although they shared an interest in developing an integrated, multidisciplinary curriculum, and there was considerable indication of student interest, no major effort to do anything about it was made or in prospect.

In the early 1970's, however, a new opportunity arose when a campus decision was made to phase out the School of Criminology. A planning group established to consider a replacement recommended creation of an interdisciplinary, research-oriented program in which criminal justice would be a strong but not dominant part. It also recommended that the new program have a strong humanist component and a place in the undergraduate as well as graduate curriculum. A concern for social policy, it was suggested, might serve as an integrating focus for a variety of relevant disciplines.

It is this program, relatively unchanged, that the law school faculty agreed to house and nourish, beginning in 1977. As it now exists, JSP is a multidisciplinary program of teaching and research at both the graduate and undergraduate levels. These activities are the responsibility of the Boalt Hall faculty, especially but not exclusively the new faculty members added in connection with the program. The graduate component, supervised by Berkeley's Graduate Division, leads to the M.A. and Ph.D. degrees. Graduate students may or may not have, or simultaneously pursue, a professional law degree but as JSP students they are officially members of the Boalt Hall community. The undergraduate component, leading to a bachelor's degree in Legal

Studies, is an integral part of the College of Letters and Science. Undergraduates are members of the Legal Studies "major" within the College and are not Boalt students, even though the Boalt faculty is responsible for the curriculum.

As of 1985, JSP has added nine full-time, permanent members to the law faculty whose primary responsibility is to develop and operate the JSP program. Some transferred from other campus units, including the School of Criminology; most have been recruited from the outside. The new additions include two economists, two historians, two political scientists, and three sociologists; search for a philosopher continues. Of the nine already on the faculty, only one has a law degree, previously acquired in Europe. Two lawyers from the Boalt Hall faculty, who were among the program's founders, as well as a third appointed more recently who is heavily involved in empirical studies, are also generally considered part of the core JSP faculty.

II. Perspectives

From its inception, it was asserted that JSP should encourage humanist as well as social science perspectives. This emphasis distinguishes what we are about from recent precursors of JSP, including the "law and society" movement. For most of this century, "progressive" jurisprudence has stressed the potential contribution of the social sciences. This may have had more to do with concern over social policy than with confidence in these disciplines. Nevertheless, there were some who found considerable enlightenment in social science theory, and perhaps even more who were attracted by the promise of empirical research. JSP shares these interests, but is wider in scope.

The 1974 committee report proposing the new program called for it to incorporate a revitalized jurisprudence, one that would make a difference for how law is studied, taught, and practiced. In the broad meaning intended, jurisprudence includes not only legal theory and philosophy but the whole range of intellectual resources that contribute to an understanding of law, including social, cultural, and institutional history, comparative study, psychology, and social science. For this reason we thought it would be well to signal our commitment by including "jurisprudence" in the title of the program. We knew this was a risk, because in this country the word is not exactly user-friendly. This choice was perhaps balanced by another, equally strong concern for empirical inquiry and social policy. "A concern for policy," the committee argued, "can bring focus to social science research, historical

investigation, and philosophical analysis. These in turn can insure that policy studies will be truly basic and critical, not confined by existing assumptions and perspectives.”⁷ Hence the title “Jurisprudence and Social Policy.”

This combination presents us with a difficult but exciting challenge. It is all too easy for students of jurisprudence to become absorbed by technical puzzles, or by arcane issues in the history of thought, with little connection to questions of fact and policy. Much of the same may be said of other disciplines, such as political science and sociology, which have strong theoretical as well as empirical interests. We respect the need for close analysis of key ideas, and for autonomy in scholarship, but we think it is not too much to ask, at appropriate times, *what difference does it make for legal policy* if you have one or another conception of obligation, discretion, right or responsibility. It will take sustained awareness on the parts of faculty and students to keep asking that question.

We think philosophy and history are central to the program because the main objective of all legal scholarship is, or should be, the clarification of fundamental values. If we are to be wise about social policy we need to be as clear as we can about what is at stake in legal ordering — what ends are sought, what means are used, what assumptions are made, how multiple purposes clash or are accommodated. For this we must rely heavily on the analytical rigor modern philosophy can bring to the study of received ideas and premises; and on historical and comparative inquiry to help make us aware of the nature, as well as the roots, of our traditions and institutions.

This concern for fundamental values deepens our commitment, as a school of law, to justice as a governing ideal. The connection between law and justice is sometimes obscured and even broken. Learning to “think like a lawyer” may be thought to mean giving one’s whole attention to positive law — how to find it, how to reconcile its elements, how to criticize it from within, how to apply it in particular “fact situations.” In some beginning courses, the law student’s first task is to distinguish his or her own sense of justice from the kind of argument that will carry weight in court. As a result, many students come to believe that justice and law are more or less equivalent or, on the other hand, that justice is a distant, ineffable ideal whose relation to law is tenuous at best.

7. Report to Sanford Elberg, Dean of the Graduate Division, University of California, Berkeley (Aug. 23, 1974).

Most of us take for granted that law is an imperfect embodiment of the moral ideal we call justice, even if that ideal is very narrowly conceived as the faithful realization of existing law. Justice may be elusive and protean, yet few would deny that the aspiration to do justice is an important source of creativity and criticism in the way we deal with positive law. Although much is unsettled, we know enough about justice to make it a proximate and practical resource for criticizing rules and developing principles.

On the other hand, there is more to law than a concern for justice or for moral and cultural ideals. The legal system is also a practical instrument of social organization. The call for law reform, and for new perspectives in jurisprudence, often has less to do with justice than with social utility. The dominant aspiration has been for a more effective, more flexible, more fully purposive system. The idea is to devise institutions that will mobilize and direct social energies while minimizing costs. The United States Constitution is a legal document, but its framers sought order, prosperity, and effective government at least as much as freedom and justice. Most of private law and a great deal of public law is a way of using authority to serve utilitarian ends. Law stabilizes expectations, allocates risks, compensates harm, facilitates association, settles disputes, regulates conduct, and authorizes officials to tax and spend. Put another way, law is largely an instrument of social policy and to that extent must be judged in light of social utility. Justice is never absent as a legal concern, but it is not necessarily in the foreground or at the cutting edge for those who use or are affected by it.

Nor will it necessarily be in the foreground of all the studies of law pursued by JSP students and faculty. Many issues of social policy turn on the interplay of moral ideals and proximate utilities. In studies of criminal justice, environmental policy, economic regulation, corporate responsibility, and many other topics, it is naive to focus on abstract ideals without considering the practical jobs that must be done. If we do not take account of social reality we are not likely to be successful in setting standards or realizing ideals. We may want to change that reality, if we can, but ignoring it is no help. It follows that empirical study of law in context and in action must have a high priority in the JSP program. This is not a way of divorcing law from values. On the contrary, it is a way of asking what these values amount to and how they may be made good.

Despite considerable research in recent years, there is still relatively little factual knowledge about patterns and contexts of legal deci-

sions, especially research that is cumulative enough, and sound enough, to justify conclusions for policy. We want to know how the systems work at every level and, if need be, in exacting detail. Studies of *law in action* take us into a world of pressure, constraint and opportunity. Here principles, policies and rules form only a part of the environment of decision. The exigencies of power and the scarcity of resources dominate the scene. As we explore this realm, it is easy to draw an always chastening and sometimes pitiless contrast between the legal ideal and the human or organizational reality. This form of analysis can degenerate into debunking, but it is a valid part of the social scene of legal ordering if it reveals an underlying process or identifies a persistent dilemma.

The perspective of action strikes an antiformalist note, which may encourage skepticism about rules and purposes, if it is true that an excess of formalism in reasoning or in procedure is often pernicious in that it undermines substantive justice. But the answer is not to embrace a radical antiformalism. We try to cure defects by revising rules and inventing procedures. Indeed, law in action is, to a large extent, the proliferation of institutional forms. The problem is to bring about a better fit between law and values on the one hand, law and reality on the other. This is not accomplished by indiscriminating skepticism about the worth of rules or the integrity of decisions.



Faculty from other disciplines

The study of *law in context* is a very large part of law and social science. Standard topics include the interplay of legal rules and eco-

conomic activity, law and public opinion, law and the distribution of power, law and politics, patterns of criminality. Historical, sociological, economic, political, and psychological foundations of legal rules and policies are explored. Much of this has to do with incipient law and with the obsolescence of law. Social change is a central concern, especially the response of law to altered values, new forms of organization, and technological development. At its best, this approach goes beyond viewing legal institutions as dependent variables, subject to the influence of economic, political or social contingencies. Rather, it suggests that rule-making, sanctioning and adjudication are pervasive aspects of social life and not only of formal government.

JSP also encourages concern with the interplay of law and social policy. From the point of view of social policy, the continuity of legal and social phenomena poses a major dilemma. On the one hand, there are strong reasons for minimizing the role of state law insofar as it involves coercion, close surveillance, centralized decision, or other techniques of domination. On the other hand, the idea of bringing law closer to society, thereby reducing alienation and domination, is an invitation to democratize the legal system. In theory, democratic law enlarges participation, stimulates new forms of advocacy, and may rely on devices close to the people, such as tenant associations and other community groups. It may also proliferate rights, make people more litigious, and extend the reach of legal authority. As a result, there is a persistent search for alternative forms of legal ordering, including new ways of settling disputes.

The dominant trend in American legal scholarship has managed to combine a reformist spirit with a comfortable sense of identity and a deeply felt acceptance of the worth of law. JSP is bound to encourage a more restive, less complacent outlook. This is so because a multidisciplinary faculty will not have the same commitment to legal professionalism; because we want to give an even more important role to jurisprudence, and a jurisprudence worthy of the name demands sustained reflection on basic premises and fundamental dilemmas; and because a social science standpoint takes its departure from theories of society, economics and policy, not from law alone.

But if JSP is a critical enterprise, as it must be, we do not expect it to be a source of alienation. We have reason to suppose that a spirit of "critical affirmation" — looking to the promise of law as well as its limits — will prevail. We hope for an enterprise that will be as attractive as it is unsettling.

III. The Graduate Program

JSP prepares graduate students for careers in research and teaching, and for legal practice broadly conceived. Some students expect to teach in humanities or social science departments as specialists in legal ideas or institutions, and to participate in undergraduate legal studies programs; others may prefer law school teaching, to which they can bring special skills and knowledge. Still others hope for careers in research, for example, designing systems for collection and analysis of data required by a court, a prosecutor's office, a corrections department, or a legislative committee. The reality of these expectations cannot yet be fully assessed, but experience so far suggests that they make sense.

Completion of the program leads to the Ph.D. degree. During the first year, all students participate in a seminar jointly taught by several faculty, bringing a variety of perspectives to bear on selected problems. Currently the theme of the seminar is legal change. Students who have not had prior legal training (we annually admit a few students who already have the J.D.) are also required to begin the study of law by taking at least one traditional first-year course such as Contracts or Torts, plus a course in Legal Research and Writing. Additional law study is arranged in consultation with an advisor.

In addition to gaining general familiarity with the broad field of jurisprudence and social policy, students prepare two special "fields" or areas of concentration. The list of fields recognized by the program is long. Representative examples are law and regulation, the judicial process, criminal justice, legal history, legal philosophy, and social and legal theory. By the end of the third year, JSP students are expected to submit written work testifying to their preparation and then to take an oral examination administered by a five-person faculty committee appointed by the Graduate Division upon recommendation of the program. At least one of the committee members must be from outside the law school.

Some students pursue the J.D. as well as the Ph.D. Such students will typically take more courses offered by the JSP faculty, as well as courses outside the law school, than will other J.D. students. With good planning, at the end of the third year students concurrently in the JSP and J.D. programs will typically have completed the J.D. degree and be almost ready to submit papers and take the oral examination. Most have taken an additional six months or a year to be fully prepared.

There are now about forty JSP students at one or another stage of

graduate study. They have a wide variety of intellectual interests, as indicated by the topics chosen for dissertation research. A word first about the three who have thus far completed their dissertations. Lloyd Burton studied water rights disputes in the Southwest between American Indian tribes and major users of water, such as farmers and municipal water districts. An important theme is how parties to complex environmental disputes decide whether to seek litigated or negotiated settlements. George Wright, who came with a strong background in classics as well as a law degree, explored the concepts of sovereignty and rule of law in the works of Hobbes and Occam. And Joseph Rees studied the operation of a new program for voluntary self-regulation in occupational safety.

A similar diversity of interests is reflected in the dissertations in progress. These include two studies of law and philosophy, one centering on the implications of non-utilitarian theory in moral philosophy for constitutional adjudication, the other on the relation between legal reasoning and coherence theories of truth. Several doctoral candidates are doing research abroad. One is in Indonesia studying the role of law in forestry conservation and development; another is comparing police in Japan and the United States; a third is doing an historical analysis of the transition in Australia from a penal colony to a constitutional republic.

Finally, let us note that several of the students have taken teaching positions. Two currently teach in political science departments at major universities, one in California, one in Texas. Another has recently joined a law school faculty in Iowa and still another has been teaching in a law school in Illinois. Three others have foreign law school appointments, two in Australia, the other in Japan. So far, at least, those who have completed the Ph.D. or are close to completing it have all opted for academic posts.

IV. Undergraduate Legal Studies

A major responsibility of JSP, and therefore of the School of Law, is the design and staffing of an undergraduate curriculum within the College of Letters and Science. The main objective of Legal Studies is to provide students with an opportunity for sustained reflection on key ideas such as freedom, privacy, equality, and justice; for close and realistic examination of how the legal system works; and for historical and comparative study. It is not meant to be preparation for law school, nor does it provide paralegal training. It is based firmly on the view that

law is part of a rich humanist tradition and the study of legal ideas and institutions should be an option for contemporary undergraduates.

From its inception, the undergraduate component was understood to be a major part of the new enterprise. In part, this was due to the administrative expectation that the faculty resources assigned to the graduate program would be partially justified, as usual, by a significant contribution to undergraduate education. In addition, undergraduate teaching is very valuable to graduate students as a source of employment and, not less important, of teaching experience and learning. But these considerations were not central in planning JSP. Instead the concern has been and remains to offer a curriculum that speaks to the nonprofessional, is genuinely multidisciplinary, and deals with fundamental ideas and values.

In 1980, after a few years as a limited set of courses, Legal Studies became an upper division "major." At Berkeley, this means that students may make the subject their main focus of interest during their junior and senior years. During the past several years, approximately 125 students have chosen to do so at any given time, about the number contemplated at the beginning. Of course, many students who are not majors take Legal Studies courses. The major requires everyone to take a Foundations course, which provides an overview of the legal process and of basic issues in the study of law. Students must also take at least one course within each of four rubrics: legal and social theory; historical and comparative perspectives; principles and problems of substantive law; and administration of justice. Since approximately nine Legal Studies courses are required for graduation, a modest amount of specialization is permitted. Students are also encouraged to take related courses in other departments.

About 200 students have graduated from Berkeley with degrees in Legal Studies. We have not kept close track of their careers, but our impression is that a sizable proportion has gone on to law school, or plans to do so at some point. On the other hand, those with whom we have discussed the matter believe the program provided no special preparation for law school. Like others who have chosen other careers, they seem to appreciate the program for its contribution to their general education.

V. JSP and Boalt Hall

The policy of the program and of the law faculty as a whole is to make JSP an integral part of teaching and scholarship at Boalt Hall.

For the time being JSP does not play a major role in the activities of most J.D. students, but it does expand their educational opportunities. Some participate in courses designed primarily for JSP students, such as the course on 19th century social and legal theorists. In addition, some JSP faculty teach courses designed as much for J.D. as for JSP students; examples include Administrative Law, American Legal History, and Constitutional Law. These are attended mainly by students in the J.D. program. There has also been joint teaching by the lawyer and nonlawyer faculty in such courses as Contracts and Civil Procedure.

An important road to integration is the development of sustained collegial relations, and this has occurred to a substantial degree. Communication has steadily increased, and joint activities have been arranged including a faculty seminar devoted to law and economics, another presenting selected social science methods, and a third dealing with modern theories of textual interpretation. Boalt's traditional Friday afternoon faculty colloquia, given over to the presentation of papers by faculty and visitors, are other sites of intensive communication. There is every reason to believe that this will have a long-term effect on legal education as perspectives are enlarged and as new materials are made available for enriching the basic curriculum. Nor is this a one-way process from humanists and social scientists to lawyers. Both the teaching and research of the nonlawyer faculty are clearly enriched by their increasing familiarity with legal materials and ideas. In time, a foundation may be laid for redesigning the curriculum so that at least a significant number of future lawyers will have a broader understanding of what they are about, especially the values that are at stake in legal practice.

JSP was not begun as an effort to change Boalt Hall. Rather, the law school setting was perceived as a congenial home and a major resource for a program that would be mainly concerned with humane scholarship, liberal education, empirical research, and policy studies. The Boalt faculty already included many eminent scholars, some of whom were doing "jurisprudence and social policy" before the name was invented. And it was believed that a strong base in the major campus institution concerned with law would offer the best promise of success.

Still, whatever the primary intent of JSP, it *does* expand the role of the law school in the educational activities of the university in the ways we have discussed. It invites *all* Boalt faculty to participate in a curriculum designed for advanced students concerned with the law but who do not plan to become conventional practitioners. It also invites

them to participate in undergraduate instruction and thereby to consider new subject matters as well as new ways of organizing old ones. To the extent that faculty members accept this challenge, they are bound to be affected.

Will they accept it? Experience so far suggests that law school faculty members will do so unevenly. Clearly, some faculty who had taught only J.D. students find the experience of dealing with undergraduates rewarding. It seems fair to assume that this means that more college graduates are entering the world with a more sophisticated appreciation of law and the legal process than would otherwise be the case. Whether such students will become better law students (which many of them choose to do and would probably have done in the absence of the program) we do not know. Whether they will become better practitioners is even more uncertain.

Something similar can be said about participation in the education of the graduate students, although in this case there is literally no way of faculty avoiding contact: JSP students are "Boalt Hall students" and ever more routinely participate in all of the activities open to other Boalt Hall students. So far we perceive no dramatic changes in the "bar courses," although, as noted, some are now taught occasionally by the new faculty or by lawyer/nonlawyer colleagues. Further, a substantial number of the faculty have engaged in designing and teaching courses, often with a nonlawyer colleague, that take into account the interest beyond and behind "the law" that is associated with JSP. Courses on libel and on the relations between law and technology are examples. They are also considering and attempting to design course sequences — for example, in law and technological development, and on financial instruments and institutions — that may bring more order to offerings beyond the first year.

It would be wrong to believe that such courses and plans for ordered sequences are the result *only* of JSP — at the better law schools, at least, such developments are common. JSP students and the new, nonlawyer faculty accelerate a trend that is already present. Part of this trend, also represented by JSP, is the effort to further incorporate "external" perspectives into law school teaching and research. This trend is based on more than the desire to make law a truly "learned" profession. It also reflects changes in what lawyers do and what they must know. The reality today is that history, philosophy and social sciences are an integral part of legal argument. Beginning J.D. students are often skeptical about the relevance of such materials. After some experience working for law firms part-time or during the summer,

many report that what they learned about regression analysis or polyarchy or decision theory or Paretan optimality has been a concrete and direct part of what they have had to read and write about on the job.

Challenges remain. It is not apparent, for example, that JSP has satisfactory curricula at either the graduate or undergraduate levels. At the graduate level, no clearly interdisciplinary perspective has emerged to frame our effort; instead, to a considerable extent, individual faculty members teach and do research from within the perspectives of their own disciplines. Some, indeed, think this is not only inevitable but desirable. Whatever one's stand on this matter, it clearly poses a dilemma for graduate students attracted by the promise of a more integrated curriculum. A related problem is that there is no clear agreement about what all JSP students *must* know, although we seem to be making some progress in identifying the common "core" of "jurisprudence and social policy."

At the undergraduate level, the lack of a unified framework is less troubling. Undergraduates hopefully gain understanding of a variety of approaches to the law and legal institutions from which they can later choose — should they decide to go further. More troubling is our relative failure, so far, to agree on a fixed content to which all Legal Studies majors should be exposed. Not all faculty, it should be noted, would label this "troubling."

Seen in relation to the broader law school enterprise, questions remain as well. JSP seems neither to have disrupted nor diluted the efforts of Boalt faculty to engage in the education of practicing attorneys. Arguably, it has enhanced these efforts. At the same time, JSP does and should make one consider afresh the role law schools should play in the larger world of university education. JSP implicitly asserts that it should be extended beyond graduate education for practicing attorneys. To what ends? We have tried to provide some tentative answers, but we could use assistance in both culling and expanding them. And then some might believe that law schools should stick to the traditional last. Should they?