Legal Education and the Social Sciences: A Retrospective Look into George Priest's Crystal Ball

James L. Huffman[†]

Early in his career, Professor George Priest floated the idea of the law-school-as-university, in which scholars and teachers would employ the social sciences to understand how the law affects human behavior. He contended that the traditional study of doctrine was both uninteresting and of little consequence. In this essay I contend that Professor Priest's advocacy, particularly of law and economics, has contributed greatly to understanding of the law's impact on human behavior. I also contend that his prediction of an altered and expanded curriculum proved accurate, but not in the way he contemplated. Rather, law school curricula have burgeoned with clinics and courses promoting a wide array of activist causes at the expense of traditional offerings on doctrine and legal method. A consequence is a new generation of lawyers and judges dedicated to realizing favored causes rather than respecting and maintaining the rule of law.

† Professor and Dean Emeritus, Lewis & Clark Law School, B.S. Montana State University, M.A. Fletcher School of Law and Diplomacy, J.D. University of Chicago.

Introduction

It is an honor and privilege to join in this celebration of George Priest's career as a scholar and teacher. In his recent book, *The Rise of Law and Economics*, he credits the founders of law and economics as an academic discipline but gives too little credit to his own contributions, save acknowledging his service as the first president of the American Law and Economics Association.[1]

Like George, I was a student of Ronald Coase and Dick Posner, but law and economics was never my core focus. I did, however, draw heavily on the work of Coase, Posner and many others discussed in George's excellent book in teaching torts, water law, legal history, jurisprudence and even constitutional law. So, while I will not ignore George's many contributions to law and economics, my contribution to this festschrift will leave law and economics, torts, antitrust, regulated industries and other topics on which George has written to those with greater expertise. I will focus, instead, on a topic we all share and on which George had early and original thoughts—legal education and legal scholarship. I will not, however, avoid law and economics entirely, because George's views on legal education and scholarship (at least his early views) were integrally related to his interest in economics and other social sciences.

Early in his career, George forecasted that law and economics and other social sciences would transform legal education. I conclude in this paper that an embrace of interdisciplinary study in law school curricula has had a significant impact, but not what George foresaw.

I. A Fortuitous Meeting

George and I began our legal education on the same day in the same classroom at the University of Chicago. In those days there was no such thing as new student orientation. My first exposure to the law school and my fellow students occurred at 9:00 am on a Monday morning in September, two days after the long drive from Bozeman, Montana. By chance I sat down next to a tall redhead named George Priest.

Not having been properly oriented in the fashion of today, I arrived without the assigned casebook for Grant Gilmore's contracts course. George loaned me his book so I could prepare for the next class. He claimed I never returned the book. George also insisted it was a constitutional law class, but as constitutional law was not offered to Chicago's first year students in 1969, I am confident that at least on this point I am correct and George was in error. I say that with some trepidation. As any of you

1. GEORGE L. PRIEST, THE RISE OF LAW AND ECONOMICS: AN INTELLECTUAL HISTORY 100 (2020).

who have played basketball with George will know, he was a rather competitive fellow.

It should not be surprising that my thoughts on legal education and legal scholarship would differ from George's. We took very different career paths—George quickly progressing from Puget Sound to Yale, while I spent my entire career, save a few foreign visits and a semester at the University of Oregon, at Lewis & Clark Law School in Portland, Oregon. Because George was my mountain climbing partner, I was disappointed when he moved on from the Pacific Northwest. But I have been ever since grateful that our friendship endured despite a continent's separation. Another factor that would suggest differing views on legal education is that I spent thirteen years as a law school dean, a role George could not have imagined for himself.

II. Law School as University

In 1983 George published an article in the Journal of Legal Education titled *Social Science Theory and Legal Education: The Law School as University*.[2] The thrust of his argument was that we "must abandon the notion that law is a subject that can be usefully studied by persons trained only in the law" and accept that the legal system is "simply another setting for the expression of whatever are the deeper determinants of human behavior."[3] Legal scholars who entered the academy believing that "law and the legal system were subjects of intellectual importance," wrote George, were simply "wrong."[4] He declared that it was then universally accepted "that the legal system can be best understood with the methods and theories of social science."[5] Legal scholars with "true intellectual courage," wrote George, "would abandon the law and become full-time social scientists," though he acknowledged "know[ing] of none who have done so."[6]

In the spirit of competition, I would note that nine years before George's Journal of Legal Education article I published an article in the same journal asking whether the law graduate is prepared to do research.[7] My conclusion was that law school students learn to do research in the law but not about the law. Presumably unbeknownst to George, seeing no citation to my article in his, it seems we were of a similar opinion about the traditional law school curriculum. Where I observed that the law student wishing to understand how law affects human behavior would have to look

2. George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437 (1983)

3. *Id.*

4. *Id.* at 439

5. *Id.* at 437

6. *Id.* at 439

7. James Huffman, *Is the Law Graduate Prepared to Do Research*?, 26 J. LEGAL EDUC. 520 (1974)

outside the law school curriculum,[8] George foresaw the transformation of the law school into a university.

Until his dying days, George remained a legal scholar, as have most of the legal scholars with whom he interacted in his productive career. That George did not become a full-time economist, as he counseled in his Journal of Legal Education article, does not reflect a lack of intellectual courage—he displayed plenty of that in challenging his mentors and other giants of the bench and legal academy. Rather, it reflected his vision for the law-school-as-university. Along with those like George who brought economics to their study of law, he envisioned a law school in which others would employ the theories and tools of political science, sociology, anthropology, and psychology in their study of the law and legal systems. From an economic perspective, said George, law is viewed as constraints on behavior that "are taken as given," and so it would be from the perspective of the other social sciences.[9]

George thus rejected the law-as-science approach that had dominated legal education since Christopher Columbus Langdell introduced the case method of study at Harvard Law School. George insisted that the legal scholars who, for decades, had studied legal doctrine as if it existed independent from the complexities of human interactions in a world of scarce resources had wasted their time on an intellectually empty pursuit having no relation to science. In *The Rise of Law and Economics* George credits the Legal Realists with earlier having challenged the Langdellian approach to law teaching and legal scholarship. They had "succeeded in convincing the academic world of the possibility that social science could explain the deeper foundations of the law," wrote George. But he concludes that "[t]he Realist research program itself was a failure."[10] It was not until law and economics emerged as a serious discipline that the intellectual poverty of the traditional methods was fully revealed—though varying versions of the case method remain the dominant form of legal instruction in most American law schools.

A. A Functional Approach

In the introduction to his 2020 book, George describes the sort of legal education and scholarship he envisioned thirty years prior as applying a "functional approach to thinking about the role of law in society."[11] He contends that "law and economics emerged as the most powerful and most defensible method of implementing" the functional approach.[12] "Though there were surely earlier precursors," wrote George, "the beginning most

8. *Id.* at 523
9. *Id.* at 438
10. Priest, *supra* note 1, at 11.
11. *Id.* at 1-2
12. *Id.* at 2

directly related to the modern use of law functionally, to achieve identifiable economic effects, was the adoption of regulatory systems in most states."[13] Although I am something of a skeptic about the scientific merits of the other social sciences, I heartily agree with George's confidence in the contributions of economics to our understanding of the law. But I would suggest that the functional approach arose earlier than state regulatory systems and not solely from the insights of economists.

In his 1950 book *The Growth of American Law: The Law Makers* and 1956 book *Law and the Conditions of Freedom in the Nineteenth-Century United States,* James Willard Hurst parted with the traditional approach to legal history which had relied heavily on the accounts of leading jurists who saw the law much as Langdell did—an autonomous, living institution with an internal coherence.[14] Rather than explaining legal developments as logical aspects of an existing regime, Hurst looked to the interests and actions of what might be called consumers of the law. His sources were public and private records of day-to-day life, including trial court, state, city, and county records.[15]

Hurst's method assumed that law developed for instrumental reasons, an approach evident in the title to his 1956 book. Lawrence Friedman's 1973 *A History of American Law*,[16] the first comprehensive history of American law, draws on Hurst's instrumentalist approach. This instrumental approach to understanding legal history is much the same as George's functional approach to understanding current laws and their effects on human behavior.

I point this parallel out not as criticism but to underscore a close link between the work of Hurst-inspired legal historians and George's economic approach to the law. Hurst took what Douglas Whitman describes as a demand side understanding of the evolution of the common law.[17] By this view, the law developed not as pronouncements on public policy supplied by wise judges (the supply-side view) but rather in response to the changing interests and needs of consumers of the law.[18] The common law court functioned as a sort of marketplace in which judges reacted to the demands of legal consumers as evidenced by their evolving responses to existing rules.

---

13. *Id.* at 7.

14. *See, e.g.*, PERRY MILLER, THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR (1961).

15. *See, e.g.*, JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH: A LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915 (1964).

16. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973) (subsequent editions published in 1985 and 2005). *See also* LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY (2002).

17. Douglas G. Whitman, *Evolution of the Common Law and the Emergence of Compromise*, 29 J. LEGAL STUD. 753, 775-76 (2000).

18. *See* James L. Huffman, *People Made Law: Spontaneous Order, Change and the Common Law*, 11 J. L. ECON. & POL'Y 179 (2015).

George may or may not have agreed with my suggestion that the common law developed in a market-like way. If he thought judges should draw on social science in resolving disputes, he would unlikely accept that courts merely respond to the demands of self-interested litigants unsophisticated in the social sciences. But I suspect he would have agreed that at least some judges embrace the supply side view—notably George's early mentor Dick Posner, whom George quotes in his book as stating: "[T]he judge can hardly fail to consider whether . . . [a] loss was the product of wasteful, uneconomical resource use . . . [a question to which] at least an approximation to the answer is in most cases reasonably accessible to intuition and common sense."[19] Posner's confidence in judges' abilities (at least his own) to set public policy, as George has pointed out, was counter to Ronald Coase's persistent belief that markets are invariably better at allocating scarce resources than governments (of which judges are an integral part).[20]

B. A Perversion of the Scientific Method

In a 1980 article titled *The New Scientism in Legal Scholarship: A Comment on Clark and Posner*, George contended that both professors Robert Clark and Richard Posner, though purporting to apply scientific methods (biological evolution in Clark's case and economics in Posner's case) to our understanding of the law, were engaged in "a perversion of the scientific enterprise."[21] In requiring the legal scholar to "immerse himself in a field of law and progressively distill the large and detailed mass of legal rules until a small and manageable number of central features remains,"[22] Clark sought to reveal principles explaining the evolution of the law. In asserting "that common law principles serve to optimize the sum of costs and benefits for parties subject to them,"[23] Posner made the case for efficiency being the governing principle.

Although George did not suggest that Clark and Posner were seeking to supply scientific support for the Langdellian method, it seems that both Clark and Posner, like Langdell, accepted that one could discover autonomous governing principles by careful study of the law. George contended that both Clark and Posner brought "to the study of the legal system scientific methods discredited in the sciences from which their analyses

19. Priest, *supra* note 1, at 68 (quoting RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 99 (1973)). George notes that Posner did not propose an explanatory theory for why the common law is efficient.

20. In a 2010 article George wrote: "Posner's judges (perhaps like Judge Posner himself) are essentially social engineers, designing legal rules to achieve economically efficient results—entirely the contrary of Coase's and Director's condemnation of social engineering in contrast to market ordering." George L. Priest, *Michael Trebilcock and the Past and Future of Law and Economics*, 60 U. TORONTO L.J. 155, 161 (2010).

21. George L. Priest, *The New Scientism in Legal Scholarship: A Comment on Clark and Posner*, 90 YALE L.J. 1284, 1285 (1981).

22. *Id.*

23. *Id.* at 1287.

derive."[24] Properly applied, argued George, scientific method would seek not to explain the law but rather to explain human behavior in response to law.[25] In his critique of Posner he notes that "Posner does not propose an explanatory theory as to how this [efficiency in the common law] came about, although he relates it to the adversarial method of common-law adjudication . . . ,"[26] a concept earlier reflected in Hurst's instrumentalist theory of legal history. Notwithstanding the growing influence of these pseudo-scientific approaches in the legal academy, George remained confident that interdisciplinary research and teaching would be the future of legal education.

C. A Division in the Profession

Most of a decade after his Journal of Legal Education and Yale Law Journal articles, George published a short essay in the Buffalo Law Review describing what he perceived to be growing division between law practice and legal education.[27] Both, he wrote, had experienced "a tremendous increase in sophistication and specialization" over the last quarter century,[28] a trend he expected would continue. But where legal practitioners were becoming more sophisticated and specialized in legal analysis, legal education had become more sophisticated and specialized "in the application of the social sciences and social theory to criticize legal analysis and the legal system."[29] George harbored no doubt that the legal educators (at least those engaged in social scientific study of law and the legal system) were on the better course. He advised state legislators "that if a law school's curriculum does not appear heretical [by which he meant non-doctrinal], it should be denied funding." But he was little surprised "that the best prepared law teachers and the most dedicated law school administrators are the most traditional of former scholars."[30]

George envisioned a division not only between legal education and legal practice, but also between "modern theorist scholars employing the social sciences and social theory and traditionalists, or, those who have been made traditional by the advance of modern ideas."[31] He projected

24. *Id.* at 1288.

25. *Id.* at 1292-93.

26. Priest, *supra* note 1, at 68.

27. George L. Priest, *The Increasing Division Between Legal Practice and Legal Education*, 37 BUFF. L. REV. 681 (1988).

28. *Id.*

29. *Id.*

30. *Id.* at 683. When George wrote these words, I was not yet a law school dean, although I had served two years as an associate dean. To my credit, by George's evident standards, I had earlier compromised my standing with my colleagues in proposing, as curriculum committee chair, that we convert all the first-year common law courses from two semesters to one. My one success, though short-lived, was torts. An advanced, upper-division, torts class was immediately created giving the torts teachers seven rather than six credit hours.

31. *Id.*

even greater division in the future between legal education and legal practice and "the [growing] obsolescence of the [traditional] law faculty" accompanied by escalation of "battles over faculty appointments" signaling, in the views of some, "the disintegration of the academy."[32] To the contrary, argued George, the disruption would be "a sign of intellectual progress and advance."[33]

D. A Disagreement with Judge Edwards

Among those who believed they were witnessing the disintegration of legal education was Judge Harry Edwards of the United States Court of Appeals for the District of Columbia. Like George, Judge Edwards perceived a growing division between legal education and legal practice. But, unlike George, he saw neither intellectual progress nor advance. "I wholly reject the 'graduate school' model of legal education that Professor George Priest has propounded," wrote Edwards.[34] He described George's ideas as reflecting "the arrogant, antidoctrinal bias of interdisciplinarians who too much admire their graduate school counterparts and view anything but theory as 'unworthy'."[35] While not discounting the relevance of theory, Edwards wrote that law schools "should be training ethical practitioners and producing scholarship that judges, legislators and practitioners can use."[36] He suggested that George's proposals would lead to "the law school becom[ing] a haven for would-be theorists too mediocre to earn tenure in the graduate schools."[37]

In response, George acknowledged oversights in his earlier writing but did not yield on his core beliefs that social-science-rooted theories about law and the legal system are essential to the solution of ever more complex legal issues faced by judges and practitioners, and that legal education would adapt accordingly. Despite discounting the usefulness of a market metaphor, George suggested "similarities between the production of legal ideas within law schools and the production of intellectual property in more familiar industrial contexts."[38] By way of illustration, he argued that the resolution of what Judge Edwards labeled "very hard cases"—those in which competing arguments drawn from the record and pertinent

32. *Id.*

33. *Id.*

34. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 40 (1992).

35. *Id.*

36. *Id.* at 34.

37. *Id.* at 40-41.

38. George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 MICH. L. REV. 1929, 1931 (1993).

legal materials are equally strong, leaving the judge in "equipoise"[39]—is informed by interdisciplinary research addressing how the law affects realization of the values sought to be served. Rather than creating a divide between the legal academy and the professional bar, argued George, interdisciplinary research and instruction benefit both bar and bench. Edwards' very hard cases, he contended, are the dominant subject matter of both law teaching and interdisciplinary research.

George's belief in the capacity of sophisticated social science to inform law-making and judicial proceedings could suggest disagreement with the Hurstian notion of courts-as-marketplaces. Are judges simply accounting for and responding to the demands of legal consumers, or are they setting public policy based on teachings of social science? In reality, there are judges taking both approaches. But it should be clear from a constitutional separation of powers perspective (a subject never addressed in writing by George) that judges exceed their authority when they make public policy. One need not embrace judicial law-making, a la Judge Posner, to accept a demand-side understanding of the common law process. There is a difference between judicial filling of gaps in pursuit of a law's general purpose and judicial amending of laws in service to a judge's view of the public good.

E. Promoting the Public Interest

In the concluding section of his response to Edwards, George asserted that "[t]o view the law as an instrument to promote the public interest and to study how the legal system can effectuate the public interest is the essence of interdisciplinary work."[40] An implication is that the researcher will know what the public interest is, as will judges, though nowhere does George explain how either will acquire that knowledge.

In a more recent article George concluded that the most productive past achievements and future advances of law and economics "will derive from work that attempts to understand how markets operate and how they are affected by the law; what are the actual effects of legal rules and institutions on behavior; and how to design law and legal regimes to enhance the welfare of society."[41] Understanding how law and markets interrelate and what effects legal rules have on human behavior are worthy scientific questions. Indeed, they are essential inquiries to the making of effective public policy. But, again, George sets the welfare of society as a reason for legal scholars to engage in social science without explaining who will judge, and by what measure to assess, societal welfare.

---

39. *Id.* at 1934 (quoting Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 390 (1984).

40. *Id.* at 1943.

41. Priest, *supra* note 20, at 166.

Markets are said to serve the public good by maximizing the aggregation of the net benefits of individual choices in the allocation of scarce resources. In a democratic republic the public good is also determined by an aggregation of the preferences of individuals as expressed directly or through their representatives. The democratic method is significantly compromised by necessary reliance on majority rule and is prone to the hazards of political faction and majoritarian tyranny. By either method the role of social science is to inform, not dictate, the allocation of scarce resources. The uncertainty, inconstancy and lack of precision inherent in democratic governance can be frustrating and unsettling, but the alternatives allow for governance by the bad social science of Judge Posner and Professor Clark as well as the good social science that George advocated.

III. The Law School Has Not Become a University

George's vision of the law-school-as-university has not been realized, although a few law schools have employed tenure-track faculty with PhDs in the social sciences and without formal legal education. Way back when George and I were at the University of Chicago, economists Ronald Coase and Harold Demsetz and historian Stanley Katz were among our professors, though none had law degrees. At one point in his time at Chicago, Katz even taught civil procedure, a most lawyerly course. During his tenure as dean of Northwestern University School of Law, David Van Zandt sought to hire faculty with both a JD and a PhD, reflecting his agreement with George that the social sciences were critical to the study and teaching of law. But the vast majority of today's law professors across the nation's law schools are law school trained JDs with, at best, undergraduate exposure to the social sciences. With law schools having long ago abandoned the idea of pre-law education as useful preparation, a significant percentage of today's law school graduates have little or no exposure to the social sciences.

That George's vision of the law-school-as-university has not been realized does not mean that the emergence of law and economics in the 1960s was without effect on today's law schools. To the contrary. In the 1970s and 1980s there was a proliferation of the sort of 'law-and' courses to which Judge Edwards offered faint praise[42]—law and sociology, law and psychiatry, law and society, law and literature, law and medicine and so forth.[43] And many if not most law schools added a course in law and economics.

42. Edwards wrote that these law-and courses along with critical legal studies and feminist legal studies "have the potential to serve important educational functions" but objected that "the adherents of these movements have a low regard for the practice of law." Edwards, *supra* note 34, at 35.

43. When such courses were first proposed at my law school, a traditionalist colleague asked disparagingly, "what will be asking to approve next, jungle law?"

Unlike the others, the law and economics courses have generally survived, confirming George's assertion that "economic analysis emerged as the primary instrument in explicating the functional approach to legal scholarship and teaching."[44] But his claims that Posner's application of his efficiency theory to all of law "forced virtually all legal scholars to define themselves for or against this version of law and economics"[45] and that "it is difficult today to convince a student that . . . [Coase's theory of transactions costs] ever qualified as an insight"[46] vastly overestimate the influence of law and economics on modern legal scholarship and law school curricula.

I am confident that many if not most law students and professors in the vast sea of American law schools know little of Posner and Coase beyond their names and their association with something called law and economics. Indeed, those in the professoriate who define themselves opposed to Posner's version of law and economics often support the sort of judicial intervention Posner endorsed. As a longtime observer of the environmental law professors listserv, I can recall no one ever singing the praises of Posner's efficiency theory, yet the participants are generally advocates for judicial intervention where they find legislative and executive policies inadequate to the exigencies of climate change and other environmental challenges.

A. An Explosion in Course Offerings

The law school curriculum has changed dramatically over the past forty-plus years, but not in the way that George anticipated. In a recent article in the California Western Law Review, I examined the curricula of my and George's alma mater, the University of Chicago, and of the law school at which I taught for nearly a half century.[47] From 1969 to 2023 Chicago's course offerings for second and third year students increased from sixty-eight courses and seminars (of which fifteen were not offered during the 1969-1970 academic year) to 265. From 1973 (when I joined the Lewis & Clark faculty) to 2024 the distinct course and seminar offerings for upper division students increased from sixty-one (of which four were required) to 170.

The 2024 Lewis & Clark curriculum includes two 'law-and' courses (law and education and law and religion) but not law and economics or any of the other interdisciplinary courses encouraged by George.[48] The 2024

44. Priest, *supra* note 1, at 4.

45. *Id.* at 3.

46. *Id.* at 45.

47. James L. Huffman, *Legal Education and the Rule of Law*, 60 CAL. W. L. REV. 571 (2024).

48. *2024-2025 Catalog*, LEWIS & CLARK L. SCH., https://law.lclark.edu/courses/catalog/2024 [https://perma.cc/26A2-EUCJ].

Chicago curriculum includes several what might be called 'law-and' courses including Law and Anthropology, Introduction to Law and Economics, Behavioral Law and Economics, Law and Literature, Law and Political Economy, Law and Philosophy, Psychological Dimensions of Criminal Law and Racism, and Law and Social Sciences.[49] Chicago's offerings are more in line with George's vision, although they constitute a tiny portion of the curriculum. Here at Yale only three 'law-and' courses appear in the 2024-2025 offerings (Law and Psychology, Law and Sexuality, and Law, Economics and Organization).[50] (Of course, class titles do not always reveal the full range of interdisciplinary offerings.)

If only a handful of 'law-and' courses are offered at these three law schools, what accounts for the dramatic expansion of the curricula over the years since George first proposed the law-school-as-university concept? One explanation, that George anticipated, is the ever-greater specialization in law practice and legal education in response to the steady growth in laws and regulations. In 1970 Lewis & Clark introduced courses in environmental law and land use planning in response to the significant environmental regulation of the late 1960s and early 1970s. Today Lewis & Clark offers 36 courses in environmental, natural resources and energy law.[51] On its website Lewis & Clark lists nine specializations in which students can earn degrees or certifications.[52] Because of its institutional emphasis on environmental law, the Lewis & Clark example is extreme, but the curricula of most other law schools have similarly expanded with specialized courses, often at the expense of student enrollment in the traditional law subjects that George found unworthy of legal scholars' time.

B. Educating Activists

No doubt subject matter specialization in legal practice has appropriately contributed to the expansion of law school curricula. While traditional education in the doctrine and methods of the common law enables competent general practice, understanding that representation of some clients requires specialized knowledge is essential. The well-educated lawyer knows what he or she does not know.

---

49. *Complementary, Multi-Disciplinary, and Cross-Listed Courses,* U. CHI. L. SCH., https://www.law.uchicago.edu/prospective/interdisciplinarycourses [https://perma.cc/B7PK-MLG5].

50. *Courses,* YALE L. SCH., https://courses.law.yale.edu [https://perma.cc/ST26-NNBT].

51. *Environmental, Natural Resources, and Energy Law 2024-2025,* LEWIS & CLARK L. SCH., https://law.lclark.edu/courses/catalog/2024/environmental-natural-resources-and-energy-law-2024-2025/ [https://perma.cc/Q9BC-N9W9].

52. Environmental Law, Business Law, Animal Law, Criminal Law, Public Interest Law, Intellectual Property Law, Energy Law, International Law, and Tax Law. *See Programs and Degrees,* LEWIS & CLARK L. SCH., https://law.lclark.edu/academics/programs/ [https://perma.cc/T7VQ-3DBF].

But in my California Western article I suggest another explanation for burgeoning curricula, and it is not in the direction of the law-school-as-university. Law schools have undertaken a vast array of clinical education programs in the name of the public interest but largely focused on pursuit of one favored cause or another. They have also expanded their curricula with the inclusion of courses taught by, to borrow from Judge Edwards, "ivory tower dilettantes, pursuing whatever subject piques their interest . . . ."[53]

When George and I were at Chicago, there was a single clinic focused on what was then called poverty law. Since then, clinical legal education has burgeoned, and not just with a mission of training students in the practical skills of lawyering. Most law school clinics have a specific policy mission reflecting the interests of faculty and those who provide funding. While some clinics, like Chicago's original Mandell Clinic, exist to provide legal services to those unable to afford legal counsel, most are cause-driven with little regard to the wherewithal of the interests represented. The environmental clinics at Lewis & Clark are environmentalist clinics in the sense that they represent only environmentalist interests.[54] Most clinics at other law schools are similarly cause-focused.

Courses that pique the interest of faculty are sometimes reflections of simple intellectual curiosity, but more often they reflect faculty members' political and philosophical biases. Such courses start with given value conclusions and progress to examination of how the asserted values are obstructed by the laws and legal system and how the law might be employed to advance them. Such cause-inspired courses are encouraged by the now well-established practice of law schools and universities embracing political and philosophical causes in their mission statements.

Perhaps presumptive values are inherent to the teaching of any legal subject where the objective is to instruct students on the law and legal institutions of American society. Acknowledging that the law exists to serve specific values is implicit in the functional approach to study of the law. Yet George has observed that instruction on capitalism, our base economic system, receives little attention in our law schools.[55] His point was not that legal educators should sing the praises of capitalism. Rather, like studying the Constitution, capitalism ought to be a core aspect of the education of students seeking to understand how our law and the legal system function in American society.

---

53. Edwards, *supra* note 34, at 36.

54. Lewis & Clark does grant student credit for enrollment is the Western Resources Legal Center, an independent 501(c)(3) that represents natural resources users engaged in farming, ranching, timber management, mining, etc. *See* W. RES. LEGAL CTR., https://www.wrlegal.org [https://perma.cc/3Q8G-XZY6].

55. George L. Priest, *The Curious Treatment of Capitalism in Legal Education*, 49 SOC'Y 216 (2012).

George did suggest that Coase's transactions costs theory reflected a preference for market over government allocation of scarce resources,[56] but that does not mean that teaching Coase in particular, and law and economics in general, necessarily constitutes advocacy of capitalism. One could, without advocacy, instruct on capitalism as a fact of American life or in the context of a comparative analysis of alternative resource allocation systems. In inquiring into the absence of instruction on capitalism in American law schools, George was not suggesting that law schools should advocate capitalism, but rather instruct on "the foundations of . . . order of our society."[57] Much as a professor of constitutional law can instruct on the role of the Constitution in societal order without singing the praises of the Founders. Or a professor of jurisprudence can instruct on the societal function of the rule of law without insisting there is no other way to organize society.

But most of the highly specialized and sometimes esoteric courses that have swollen law school curricula do not address the core institutions of American society. Rather they embrace a philosophical or political value and instruct on how to employ the law to advance the favored cause. In my California Western article, I quote course descriptions from several such classes at my law school.[58] Course descriptions often conceal the professor's philosophical or policy agenda, but students will generally be aware of a professor's political predispositions and his or her propensity for indoctrination. Rather than employing interdisciplinary tools to understand how the law affects human behavior as George imagined,

> Today's law students learn that the law can be a tool for the advancement of causes and interests. Even before they enter law school, applicants are advised that they can improve their prospects for admission by explaining how becoming a lawyer will empower them to advance a favored cause. . . . It is the rare applicant who proclaims his or her passion for the rule of law or for a stable and prosperous society. Once in law school, aspiring lawyers come to understand the importance of learning how the law can be

56. "Coase's ambition was to deflate arguments for more intrusive government, not— as it happened—to revolutionize our understanding of the operation of the legal system." *Id.* at 220. George goes on to assert that "Posner's efficiency-of-the-law theory . . . had the effect of neutering Coase's advocacy of the market order—the capitalist order—over all forms of government regulation." *Id.* at 221-22.

57. *Id.* at 216.

58. Huffman, *supra* note 47, at 588-89. *See, e.g.*, Access to Justice ("[I]f we are honest, we notice that most of what we thought of as justice when we entered law school gets taken off the table in every discussion in favor of precedent or the judicial role or 'neutrality' or 'thinking like a lawyer.'"); Animal Law ("[S[tudents develop legal theories and litigation strategies to establish and expand legal protections and legal rights for farmed animals."); Public Trust ("The public trust doctrine has drawn widespread attention for its potential to authorize judicial oversight of legislative and executive disposition of natural resources."); Understanding Racism Dialogue Group ("The dialogue hopes to increase understanding of racism by examining our personal subconscious stereotypes, and to motivate participants to use that understanding to eliminate racism.").

> employed to advance the interests they favor and obstruct the advancement of interests they oppose.[59]

I challenge professors at any law school to review their own school's course offerings without finding more than a few explicitly activist courses. Many professors will proudly defend their role as activists, but if we are to be advocates for our favored causes, we ought to insist on some measure of viewpoint balance on our faculties. If activism is our business, law students at all but a handful of the nation's law schools will be exposed to a relatively narrow range of perspectives and causes.[60]

C. Creative Lawyering

The idea that we are educating lawyers able to represent and defend any person in need of legal counsel has become a quaint and antiquated aspiration. The traditional approach of mastering legal doctrine, an approach George sought to replace with interdisciplinary study of law's effects on human behavior, may not have been very creative or interesting. But it did train lawyers in the art of advising about the law's requirements. Of course, there are disagreements about doctrine in what Judge Edwards labeled very hard cases (which, Edwards estimated constituted an estimated 5-15% of his court's cases), but the rulings in all of these cases are finally justified by doctrine or by policy preferences dressed in the language of doctrine. The present-day focus on activist lawyering encourages creative interpretations of the law even in easy cases. We can witness creative lawyering all around us, from imaginative interpretations of long-settled common law doctrine, to creative interpretations of constitutional authority and constitutional rights, to administrative agency law-making in the name of statutory interpretation,[61] to public prosecutors' refusal to enforce laws with which they disagree.

Illustrative is a much-publicized and widely celebrated case in the Federal District Court for Oregon.[62] A 'public interest' law firm, Our Children's Trust, petitioned the federal court to declare that the federal government's policies on climate change violate the common law public trust doctrine and the Due Process Clause of the United States Constitution. The latter claim was not that the government had failed to adhere to the requirements of procedural due process, but rather that a substantive right

59. *Id.* at 579.

60. James Lindgren has found that white Democrats (male and female, Jews and nonreligious individuals make up 80 percent of law faculties while constituting only 38 percent of the population. James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 Harv. J. L. & Pub. Pol'y 89, 135 (2016).

61. The Supreme Court's recent overruling of *Chevron* deference in *Loper Bright Enterpreises v. Raimondo*, 603 U.S. 369 (2024), will serve as a new restraint on creative lawyering by federal administrative agencies.

62. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016).

to a "climate system capable of sustaining human life" is implicit in the due process rights of their youth clients.

The common law claim was based on an assertion that a common law doctrine recognizing a public right to navigate and fish on navigable waters also guarantees a public right imposing an affirmative duty on government to enact new or different policies to combat climate change. The theory—christened the atmospheric trust doctrine—emerged from the creative mind of a law professor at the University of Oregon.[63] It was the most extreme of many professorial ideas intended to facilitate judicial intervention in the resource allocation policies of the legislative and executive branches of government.[64]

The originality of both claims has attracted the favorable attention of many environmental law scholars, as well as the trial court judge in the case.[65] But as George wrote in a tribute to Henry Manne, "[t]he most legitimately original ideas are often charitably described as zany."[66] There is no plausible doctrinal precedent for either claim in the Oregon case, yet the 9th Circuit and the U.S. Supreme Court found themselves devoting significant time and energy to seemingly interminable motions and appeals before finally dismissing the case as without merit. The point is that the plaintiffs' lawyers thought nothing of bringing such claims, along with similar claims on other imaginative theories, because they have been educated to believe that their role is not to uphold the rule of law but rather to invent new theories with hopes of finding a judge somewhere to agree.

Had these lawyers and the judge been trained in George's imagined law-school-as-university they would better understand how their novel interpretations of the law might work in practice. Had they been instructed in the institutional requirements of a capitalist economy as George suggests, they might have had a better understanding of the effects the embracing of such theories would have on economic prosperity and social stability. The judiciary warrants some of the blame for occasionally embracing outlandish theories, but much of the blame goes to a legal education that leads students to understand that their role is to come up with creative interpretations no matter how clear a case is on doctrinal grounds.

If George's interdisciplinary legal theorists demonstrate that the existing doctrine is having undesirable effects—undesirable not in the

63. *See* MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE (2014).

64. An early advocate for devising legal theories to facilitate judicial intervention in natural resources and environmental law policy was Professor Joe Sax. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970)

65. *See Juliana*, *supra* note 62.

66. George L. Priest, *Henry Manne and the Market Measure of Intellectual Influence*, 50 Case W. Res. L. Rev. 325 (1999). George was not suggesting that Manne's ideas were zany. To the contrary, he argued that Manne warranted recognition above all others if one applied a "market measure of intellectual influence" on the field of law and economics. *Id.* at 331.

judgment of the theorist or of a Posnerian judge, but as revealed through markets and democratic political decisions—public officials to whom authority has been delegated can amend the offending laws or regulations to reflect the lessons taught by interdisciplinary study. Although at a few points in George's writings (as noted above[67]) he seems to assume that the public welfare is self-evident, we law professors, whether or not interdisciplinary in our scholarship and teaching, have neither the capacity nor authority to declare the public good. Nor do the judges who engage in what George has called "refined social engineering."[68]

One reason our former students ask judges to engage in social engineering is their (our students) having been instructed in the art of creative lawyering. A reason some judges take up the challenge, beyond the seductions of power, is that they, too, have been so instructed. Rather than transform into interdisciplinary universities over the course of George's and my careers in the legal academy, law schools have become training academies for creative and activist legal practice. Of course, training in traditional doctrine remains a significant part of what we do, but as much for the purpose of understanding the obstacles to be faced as to allow informed advice on what the law requires.

The roots of this activist approach to lawyering run as deep as the Legal Realists whom George acknowledges as precursors to the interdisciplinary methods of the law-school-as-university. In a review of Bruce Ackerman's Reconstructing American Law, George understands Ackerman as chronicling "a conflict that . . . has dominated legal culture since the 1930s, pitting the world view of the pre-1930's 'reactive state' against the world view of the 'activist state' inaugurated with the New Deal."[69] As George observes, Ackerman's distinction between the reactive and activist state resembles his earlier distinction between "ordinary observing" and "scientific policymaking."[70] Ackerman's activist state, employing scientific policymaking rather than the formalism of the reactive state, invites activist lawyering and creative judging, as do Hurst's instrumentalist understanding to legal history and the functional approach of law and economics.

Although the emergence of law and economics in the 1960s and 1970s has not led to the result George anticipated and advocated for, it did contribute to an opening of the law school curriculum to nondoctrinal courses. In our vastly expanded curricula, there is far more recruitment to activist causes than there is study and research about the law's effects on human behavior in service to more effective public policies. We now train, or at least invite, our students to manipulate the law to serve their clients'

67. *See supra* text accompanying notes 39-40.
68. Priest, *supra* note 55, at 217.
69. George L. Priest, *Gossiping About Ideas*, 93 YALE L.J. 1625, 1626 (1984).
70. *See* BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977)

interests with little regard to the likely consequences for the public welfare, although it is generally done in the name of the public welfare.

A second way in which law and economics has contributed to legal-education-as-activism derives from the Posnerian track of law and economics of which George was critical. If the common law is efficient because judges believed themselves to be empowered to, and capable of, rewriting the law in service to efficiency, then the job of the lawyer is to persuade the judge not of what the law requires but of what the law should require. With that frame of mind, efficiency could be, but need not be, the objective to which judges aspire. Efficiency might be said to be in the public interest, but so too might any number of other policy ambitions. In his critique of Posner, George did not suggest that Posner's efficiency-minded judges would invite activist lawyering, but he does contend "that the focus on rule efficiency has been harmful to the field of law and economics and has been a diversion from the scientific promise that brought many of us to the field."[71] That diversion, I contend, led to thinking about law as a tool unconstrained by legal doctrine.

Conclusion

My conclusion is that while George got it wrong on the future of legal education, he got it right in advocating for interdisciplinary study of law and legal institutions. He was probably a bit harsh in his judgment of those in the legal academy who take interest in the study of legal doctrine and was surely too dismissive of instruction in legal doctrine. Perhaps George's students at Yale are destined for work requiring little understanding of doctrine, but the vast majority of law students at the vast majority of law schools will spend much of their careers advising clients on legal doctrine or engaging in imaginative interpretations of doctrine. They will have little use for scientific theories about the law's influence on human behavior and little interest in anything other than a victory for their clients or the judicial imposition of their or their client's vision of the public good.

Fifty years ago, in my aforementioned article in the Journal of Legal Education, I opined that "American law schools are, first and foremost, vocational training institutions."[72] I, and I suspect George, had no interest in becoming practicing lawyers when we went to law school. As fledgling law professors with exposure to the functional approach of law and economics and the instrumentalist approach to legal history, neither George nor I were interested in careers in vocational training. Yet most of my students at Lewis & Clark, and I believe students at most other law schools, do aspire to become practicing lawyers in some capacity or another.

71. Priest, *supra* note 20, at 163.
72. Huffman, *supra* note 7, at 522.

George's vision of the law-school-as-university will never serve the needs or interests of these students, most of whom will become the lawyers and judges for whom Judge Edwards thought legal scholars should be writing. But the idea that law can be manipulated to achieve political and policy objectives does have appeal to young people who seek, as they often say in their law school applications, to change the world. While there are and have been scholars like George interested in the scientific study of law, for most of legal education doctrine remains the primary focus of teaching and scholarship. Yet the functional approach inherent in law and economics and interdisciplinary study has transformed law school curricula and scholarship. Where professors and students once sought to understand legal doctrine for the ultimate purpose of advising clients, today an understanding of legal doctrine is prerequisite to overcoming its constraints on the advancement of favored causes—too often without the understanding of law's effects on human behavior to which George sought to lead us.