INTERDISCIPLINARY LEGAL EDUCATION AND SCHOLARSHIP: THE CASE OF LAW AND PHILOSOPHY

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The University of Chicago Law School has been at the forefront of interdisciplinary legal education and scholarship, and long before that became the norm in law schools nationwide. Law and economics is only the most famous example. Developed by Aaron Director and then Ronald Coase in the 1950s and 1960s, it took over legal education beginning in the 1970s thanks to the pathbreaking work of Richard Posner, William Landes, Richard Epstein, Frank Easterbrook, Daniel Fischel, Douglas Baird, and others. Some familiarity with the economic analysis of antitrust, of corporate law, and of bankruptcy is now part of the lingua franca for all scholars and lawyers working in these fields.

Perhaps less well-known is that the University of Chicago Law School hired the first full-time PhD philosopher to a law faculty in the United States back in the 1930s (he did not even have a law degree). Karl Llewellyn, one of the two leading figures in America’s most important indigenous jurisprudential movement, Legal Realism, was a member of the faculty from 1950 until his untimely death in 1962. (The other leading Legal Realist, Jerome Frank, was a member of the class of 1912 at the Law School!) Llewellyn’s biographer and jurisprudential torchbearer, William Twining, ’58, is the Quain Professor of Jurisprudence Emeritus at University College London and a fellow of both the British Academy and the American Academy of Arts & Sciences. Today, on a full-time academic faculty of only about three dozen members, Chicago has two philosophers: my colleague Martha Nussbaum (who also does not have a JD but has written widely for law reviews) and myself (I am a JD/PhD). A recent study by researchers at Indiana University Bloomington found that Judge Posner was the ninth most-cited scholar in the world, across all fields of study. It also found that Chicago was the only law school with two faculty (myself and Nussbaum) among the 100 most-cited philosophers in the world.

Why would philosophy loom so large in law schools, and why would Chicago want to have a leadership role in this field? The explanation has partly to do with the nature of philosophy as a discipline and partly to do with the deep affinities between law and philosophy.

Law is, first and foremost, a discursive discipline, by which I mean that lawyers and judges live in the domain of reasons and meanings. We interpret statutes and cases, articulate rules to guide behavior, and then argue about their import in particular cases. Judges write opinions, in which they give reasons for their conclusions. Lawyers offer arguments to persuade judges. Even lawyers (like my wife, who is healthcare regulatory lawyer here in Chicago) who never argue cases in court still deal continuously with rules, their meanings, and entailments.

Philosophy is, however, the discursive discipline par excellence. The English philosopher John Campbell (who now teaches at Berkeley) famously and quite perceptively described philosophy as “thinking in slow motion.” Philosophers argue and reason with a sometimes excruciating attention to detail and inference. Lawyering, especially in an oral argument before an appellate court, is often “thinking in fast motion,” but the key fact is that both disciplines are concerned with rational and logical thought. Lawyering typically demands more attention to rhetoric than has philosophy, at least since the time of the Sophists in the fifth-century BC. But the pejorative connotation of “sophistry” that has come down to us from Plato’s successful defamation of the Sophistic philosophers should not mislead us: there is an art to persuasion, and that art is only partly exhausted by the rules of formal and informal logic.

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reconstruction of the ideas of American Legal Realists, who
have often been treated harshly by other legal philosophers.
But the American Realists, who were first and foremost
very accomplished lawyers, had deep insights into how law
works in the real world and how judges really decide cases.
In twenty years of teaching jurisprudence, including
American Legal Realism, I have been struck by how many
students find it to be one of the most “practical” of
courses, not because it taught them particular legal rules,
but because it helped them understand legal reasoning and
how judges decide cases, as well as bringing out into the
open the implicit jurisprudential premises of both jurists
and scholars (including their other teachers!).

The influence of philosophers on the law has also been
substantial. When the “Chicago School” of economic
analysis of law took over the legal academy starting in the
1970s, it was philosophers such as the late Ronald
Dworkin and my colleague Martha Nussbaum who
articulated an alternative to “wealth maximization” (or
efficiency) as the normative goal of legal regulation.
(Dworkin defended the idea that the goal of the law is to
protect the preexisting rights that individuals have;
Nussbaum has argued that the law should maximize the
ability of humans to realize an array of capabilities that
make for a worthwhile life.) When Britain in the 1960s
debated whether to decriminalize homosexuality, it was H.
L. A. Hart of Oxford, the greatest Anglophone legal
philosopher of the last century, who extended John Stuart
Mill’s utilitarian philosophy of the nineteenth century to
argue that the law ought not to criminalize consensual
sexual behavior—his view ultimately prevailed. The other
great figure in twentieth-century legal philosophy, the
Austrian Hans Kelsen, designed the system of “constitutional
courts”—courts charged with judicial review of all legislation
for its constitutionality—that has been adopted through
the civil-law world. Nussbaum’s work with Amartya Sen in support of the idea that the measure of economic success is not simply gross domestic product but the extent to which a society enables its citizens to realize the different capabilities central to a worthwhile life (imagination, play, feeling, reasoning about how to live) has influenced the United Nations and emerged as alternative to per capita wealth as a metric of economic success.

Law and philosophy enrich the curriculum in various ways. Each Spring, we try to make available at least one and sometimes two “law and philosophy” courses. I almost always teach the basic Jurisprudence course noted earlier, and Nussbaum usually offers a course on Feminist

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Philosophy or Emotions, Reason, and the Law. Every year, we offer a Law and Philosophy Workshop, which brings in scholars from elsewhere to discuss their work. At most law schools, unfortunately, the workshop format is basically just an opportunity for faculty to invite their friends to present their latest work. We approach it differently. Each year we select a theme, so that over the course of the year the students develop a competence with a scholarly literature and a set of ideas and arguments. We often ask speakers to present previously published work, if that is the work that will help students the most. This year, Nussbaum, with our Law and Philosophy Fellow Sarah Conly, is running a workshop on issues about Life and Death, which ranges across issues such as abortion and euthanasia and engages philosophers and lawyers. Last year, I ran the workshop on the theme Freedom and Responsibility, where we took up questions such as, Is anyone really morally responsible? Can we hold people responsible without blaming them? Is criminal punishment justified if what people do is the product of biology?

The Law School’s investment in philosophy-related offerings has, interestingly, helped with student recruitment. Five or six years ago, only about 5–6 percent of the first-year class were philosophy majors; in Fall 2013, it was almost 10 percent. Many of these students—with undergraduate and graduate degrees from the best universities in the world—have come here rather than Yale or Harvard on Rubenstein Scholarships, which provide three years of tuition for outstanding students, thanks to the transformative gift by David Rubenstein, ’73. These students have varied ambitions: some will be the law professors of tomorrow, others will be the leading lawyers and jurists of the next generation. The commitment of the University of Chicago Law School to interdisciplinary research and teaching has brought them here.

David Hills, a philosopher at Stanford, famously said that philosophy is “the ungainly attempt to tackle questions that come naturally to children, using methods that come naturally to lawyers.” His apt observation prompts a very personal observation, one offered by a philosopher/lawyer who is now fortunate to have many economist/lawyers as colleagues. I graduated from Michigan, taught at Yale and Texas and Oxford and London, and have presented my work at almost every leading law faculty in the English-speaking world. Without a doubt, the lawyer/philosophers and the lawyer/economists have a tight intellectual bond. It is not that we share the same underlying theory of human behavior or emphasize the same methodological tools. It is rather that, like real lawyers, we love an argument and are happy for that argument to be ferocious and cutting. We want to figure out what is true, even if doing so is not polite. But no one gets upset, or takes offense: arguing is what we do. We fight our battles in the domain of reason and meaning, something that unites the lawyers with the philosophers and the economists, as it does at the University of Chicago Law School. Socrates would have been pleased.