Legal Realist Innovation in the Wisconsin Law School Curriculum 1950-1970: Four Influential Introductory Courses

Bill Clune, December, 2018

This paper is about four courses developed by faculty of the Wisconsin Law School from about 1950-1970 that reflected the law-in-action instructional goals of American legal realism:

- Legal history by Willard Hurst
- Criminal Justice Administration by Frank Remington, Herman Goldstein and colleagues
- The Wisconsin contracts course by Stewart Macaulay, Bill Whitford and colleagues
- Legal Process by Willard Hurst, Lloyd Garrison, Carl Auerbach and colleagues.[1]

All four courses continued as offerings in the Wisconsin curriculum for many years, in two instances up to the present time (contracts and criminal justice) and have had widespread national influence.

It has been said that each new generation of children is an arrival by (adorable) little barbarians who must be civilized before it is too late. The same could be said of law professors. When I arrived as a new law professor in 1971, having come from the Russell Sage supported J.D. and Ph.D. programs at Northwestern, I was more familiar with some of the teacher/ scholars discussed here than others, and I definitely felt well placed in a supportive environment sympathetic to law and social science. But I had little sense of how the institution I was joining was built – not the achievements of Willard Hurst (never having had a course in legal history), nor of Frank Remington's pathbreaking role in criminal justice, nor how a contracts course could be shaped by empirical legal studies. I knew vaguely of legal realism, having been assigned but barely understanding Karl Llewellyn's Bramble Bush[2] as a summer reading before law school (the importance of facts I still remember). To that extent, I was a highly educated barbarian. Doing the research for this article as an Emeritus Professor so long after arrival has been a pleasure, a revelation, and a source of appreciation. Not for nothing do educators speak of lifelong learning.

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[1] Course books used by the authors at various dates of publication are: Frank Remington, Donald Newman, Edward Kimball, Herman Goldstein & Walter Dickey, Criminal Justice Administration (1982)(1st edition, was 1969, preceded by materials); Herman Goldstein, Problem-Oriented Policing (1990); James Willard Hurst, The Growth of American Law (1950), Law and the Conditions of Freedom in the 19th Century United States (1956); Carl Auerbach, Lloyd Garrison, Willard Hurst, Samuel Mermin, The Legal Process, An Introduction to Decision-making by Judicial, Legislative, Executive, and Administrative Agencies (1961). The edition of the Remington course currently being taught at Wisconsin is Cecelia Klingele & Keith Findley, Criminal Justice Administration; Stewart Macaulay, William Whitford, Kathryn Hendley, Jonathan Lipson, Contracts: Law in Action (4th ed., Carolina Academic Press, 2016). Macaulay, John Kidwell, and Whitford were coeditors of three editions. Marc Galanter was a coeditor of the first edition, before his retirement. Jean Braucher, of Arizona Law School, was added as a coeditor of the third edition. Both Kidwell and Braucher have since passed away. Kathryn Hendley (Wisconsin) and Jonathan Lipson (Temple) have been added as editors for the fourth edition. Both have used the casebook for many years. The first edition of the casebook was published in 1995. The Wisconsin Supplement which preceded the casebook began in the late 1960's. See Macaulay & Whitford, The Development of Contracts Law in Action, 47 Temple L. Rev. 793 (2015).

[2] A recent edition is Karl N. Llewellyn, The Bramble Bush, On Our Law and Its Study, Forward by Stewart Macaulay (Quid Pro Quo Books, 2012)

The wide-ranging scope of this paper has understandingly raised questions about its boundaries, e.g., why seemingly related things are not included. It is about the four courses as curriculum and instruction and not about the universe of related socio legal research. The focus is the period 1950-1970 when the courses were created and not about faculty, research, and other developments post 1970.[3]

The paper is organized as follows: 1) a contrast between legal realist and traditional goals for legal instruction, 2) examples of the legal realist goals from the Wisconsin courses, 3) how Wisconsin became a realist-friendly environment, and 4) a conclusion about the extent of legal realist influence on the modern law school curriculum and the importance of legal history as a law school subject.

The contrast between legal realist and traditional goals for legal instruction

The traditional course and casebook that have been the mainstay of legal education from the time of Dean Langdell of the Harvard Law School around 1900 consist in pure form of appellate judicial cases that are analyzed doctrinally through the logic of legal reasoning aimed at understanding prevailing and alternative interpretations of legal rules. In the first half of the 20th century, legal realists mounted a vigorous critique of the traditional casebook and doctrinal teaching.[4] Legal concepts and doctrines taught from appellate cases were seen as providing incomplete or misleading guidance about the situations actually encountered by lawyers, clients, and citizens. Doctrinal courses were seen as "law on the books," legal realism as "law in action." In an earlier blog, I said that law in action can be thought of as empirical study of the full range of legal and law-related decisions, appellate cases, trial cases, lawyers' strategies, clients' decisions, police conduct, corporate managers' decisions about litigation, lawyers' decisions about commercial transactions, and so forth.[5] Empirical analysis examines the decisions and their consequences and the full range of influences motivating and constraining them, such as more or less reliance on legal precedent and text, pragmatic assessment of facts, subjective values, cultural and organizational influences, economic incentives, and disparities in power and resources. Realism also had a normative element, the evaluation of decisions against policy goals, standards of justice, and social welfare, as when Roscoe Pound called upon

[3] Exceptions technically beyond this scope but integral to the thesis are: descriptions of more recent versions of the four courses and their instructors up to the present time; in the case of legal history, references to the kind of research that changed the focus of that course over time; references needed to clarify the relevance of legal realism to the four courses; and a few other closely related topics. For example, Professors David Trubek, Howard Erlanger and Mitra Sharafi on the Institute for Legal Studies and Hurst Summer Institute, Malcolm Feeley on discretionary decision making in the criminal justice system. See notes 14, 41 below.

[4] Llewellyn, A Realistic Jurisprudence -- The Next Step, Columbia Law Review, Vol. 30, No. 4 (Apr., 1930), pp. 431-465, stable URL: http://www.jstor.org/stable/1114548; Schlegel, J.H. (1995), American Legal Realism and Empirical Social Science (University of North Carolina Press, Chapel Hill & London); Kalman, Laura, Legal Realism at Yale (University of North Carolina Press, 1986).

[5] http://newlegalrealism.org/2013/06/12/law-in-action-and-law-on-the-books-a-primer/

law to meet social needs in his coining of the term law in action[6] and when Llewellyn said that contract law should promote security of transactions.[7]

The practical irrelevance of traditional casebooks can be overstated. Jerome Frank quipped that teaching legal practice from appellate cases was like teaching dog training using stuffed dogs, but traditional casebooks would not have survived if they had no practical value. Doctrinal law courses are introductory surveys of areas of law that facilitate explanations of the policy objectives, purposes, and intent underlying the law and its sub-parts. The knowledge acquired can be thought of as a set of tools applicable in different situations. Many situations that arise in practice require an understanding of how different aspects of the same body of law interrelate in a coordinated fashion. One basic skill taught in law classes is the ability to distinguish the precise holding of a case as judicial precedent based on its facts from more expansive dicta on its significance for similar cases. A related skill is alternative interpretations of cases and statutes as applied to different fact patterns. In addition to these advantages, traditional courses have survived for pragmatic reasons such as that they are suitable for large classes (e.g., economical compared to medical education), offer a structured narrative amenable for group discussion, and support a sense of shared professional identity among law professors and students.[8] As Professor Dirk Hartog said in his interview with me, appellate decisions may be an important part of legal history (e.g., Brown and other civil rights cases).

The sharp contrast between traditional and realist instruction has been further blurred in contemporary times because many of the original realist goals have been absorbed and adopted. It is sometimes said that "we are all realists now." Realist skepticism about the formal autonomy of legal rules began quite early, for example, in the practice of counting votes on the Supreme Court rather than seeking overarching logical consistency.[9] Deconstruction of legal reasoning originally pioneered by legal realists as "cognitive relativism" was enormously extended by critical legal studies and has become one of the basic tools of legal analysis.[10] An

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[6] Pound, Law in Books and Law in Action , 44 Am. L. Rev. 12 (1910)

[7] "I would not be understood thereby to deny that those three words are highly useful, or that they refer to very significant aspects of our life. But I am very eager to be understood as questioning how much is accomplished, for any given specific problem, by resting merely on the magic of those words." Llewellyn, op. cit. at 445.

[8] The Wisconsin approach to contracts taught over a 25 year period gives due consideration to the traditional approach by including leading cases, rules and policy considerations conventionally assigned for the rules, and economic efficiency as a policy consideration. Justifications for knowing traditional legal content (law on the books) include that it teaches the language and culture of the field and has some weight in resolving disputes and litigation. This and other information about the course is taken from Macaulay & Whitford, The Development of Contracts Law in Action, 47 Temple L. Rev. 793 (2015) or from my interview with them.

[9] According to Kalman, op. cit., Thomas Reed Powell, who was teaching at Columbia and Harvard Law Schools in the 1920's, said that judicial decisions in cases like minimum wages were the result of economic biases and that there was no such thing as constitutional law, only split decisions of the Supreme Court.

[10] Morton J. Horwitz, The Transformation of American Law, 1870-1960, The Crisis of Legal Orthodoxy. A fundamental legal realist critique was that property is itself a creation of law, a bundle of different rights with no resemblance to the simple concept of natural law. Yale law professor Wesley Hohfeld was influential in developing the foundations of cognitive relativism with his 1913 article on jural opposites. https://en.wikipedia.org/wiki/Corelative His analysis of the opposing elements of legal rights was an exercise of "cognitive relativism" used to deconstruct the idea of property as a monolithic right rooted in natural law (which

emphasis on statutory and administrative law pervades the second and third year curriculum. The first year of law school still mostly emphasizes judge-made common law with exceptions, such as the Uniform Commercial Code in contracts, statutory definitions of crimes in criminal law, and administrative rules governing police conduct in criminal procedure courses that take the Remington approach. Instructional innovations such as those pioneered at Wisconsin have become more common in other schools, for example legal history and varieties of legal process. Most of the policies championed by the realists in their advocacy of progressive legislation have become regular parts of the curriculum (income tax, antitrust, labor law, administrative law, etc.). Law school today is not exactly like the "Euclidean Geometry" experienced by Willard Hurst in Harvard Law School.[11]

Despite a shared relevance for practice, the presence of legal realism is stronger in some courses than others and especially so in the four Wisconsin courses.

The instructional goals of legal realism and examples from the Wisconsin courses

The instructional goals of legal realism can be summarized as embodying eight themes:[12]

1. Major flaws in the legal reasoning of appellate decisions (e.g., as internally incoherent, un-predictive of later results, politically biased under the guise of formal reasoning)
2, The importance of practical remedies over theoretical rights
3. The importance of legal agencies and law practice beyond appellate and other court decisions (e.g., legislation, administrative law)
4. The importance and impact of discretionary decisions of lower level public officials (for lawyers and citizens)
5, How private actors react to law and influence outcomes (and the role of lawyers in advising them)
6. Growth of legal policies over time in relationship to the wider society & economy (legal history)

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was an important aspect of 19th century conservative jurisprudence). E.g., the privilege to employ non-union labor did not imply a right to prevent unionization. Legal realist Yale contracts professor Arthur Corbin was supposedly greatly excited by the implication of Hohfeld's work for contracts law. http://www.kentlaw.edu/perritt/courses/property/Hohfeld.htm (link is to an article in the Wis. L. Rev.)

[11] Hurst graduated in 1935 at the top of his class, clerked for Justice Brandeis, and spent another year assisting Felix Frankfurter with a set of lectures. A courteous, contrarian, innovative, empirically oriented Midwesterner with regal law school credentials.

[12] A longer list from which this list was distilled was: (1) texts v. behavior (2) judicial decisions v. all interactions between government officials and citizens (3) rights v. remedies (4) rules v. application (5) logic v. empiricism (6) predictability of judicial decisions v. unpredictability based on facts, judicial preference, logic of countervailing precedents, etc. (7) single areas of law v. transactions involving multiple areas (8) law as controlling factor v. law with variable impact depending on context (9) policy intent v. implementation (10) regulation nominally applicable to all v. regulation mainly impacting specific groups (11) formal equality of law v. large differences in wealth, power, and access (12) isolated precedent v. continuous legal process (13) existing law v. law reform (14) current law v. historical change (15) library research v. field research and knowledge from practice (16) law professors only v. also professors from other disciplines (e.g., social sciences) (17) law degree only v. joint, specialized, and advanced degrees (18) classroom instruction v. clinical and simulation.

7. The gap between social needs and justice and real legal outcomes and workable legal reforms (political progressivism)
8. The importance of empirical research on law, interdisciplinary research and social scientists on law school faculties or in collaboration with law faculty members

Examples of legal realist goals in the four Wisconsin courses

Here are examples of the eight themes from the four Wisconsin courses.

1. Major flaws in appellate court reasoning

Anti-formalism is one of the main purposes of the Wisconsin contracts course which, while it pays close to attention to doctrine, also informs students that the most brilliant legal argument is only one factor in successful litigation.[13] The course includes examples of doctrine and counter doctrine, such as that the words of the agreement must be honored vs. frustration of purpose. Many cases are "contextualized" by including background on the practical origins and ultimate outcomes of the litigation. In the area of legal history, teachers of legal history at Wisconsin following Hurst, such as Bob Gordon and Dirk Hartog, became national leaders in critical legal studies and critical race and gender research which strongly emphasized the covert policy bias of appellate and trial decisions and the real lived experience of excluded groups.

2. Remedies v. rights

Emphasis on remedies as a limitation of rights is a major aspect of the Wisconsin contracts course. The focus on remedies is a legacy of Lon Fuller's legal realist-oriented research and course book that was the one first taught by Macaulay at Wisconsin (because it had already been adopted when he arrived).

Factors that may limit remedies include:

- Influence of long term relationships in deterring litigation, encouraging informal bargaining, and providing opportunities for favorable settlements
- Cost and uncertainty of litigation compared with damages expected from winning a case, making litigation a poor investment and hence unlikely
- Considerations of economic efficiency and fairness that typically inform contract remedies and make results unpredictable before individual judges
- Qualitative doctrines common in contract law allowing for a wide range of possible outcomes before an individual judge (e.g., substantial impairment of contract, lack of good faith, basic or less basic conditions, requested damages more or less reasonable)

[13] See Macaulay and Whitford op. cit. note 8 above.

- Strength of losing parties' position and arguments often not acknowledged by majority opinions on appeal (hence importance of understanding context and history of cases)
- Standardized form contracts written by powerful parties that nullify or modify legal precedents when formally agreed to by less powerful parties

In criminal justice administration, avoidance of coercion, arrest, prosecution, and conviction is the "remedy" of greatest concerns to most people.[14] The low visibility discretion characteristic of all phases of criminal justice administration discussed below in #4 means that the letter of the law is an uncertain guide. Legal representation and financial resources are so important partly because of this pervasive empirical uncertainty. Professors Klingele and Findley say that they tell their students that even if they do not practice criminal law, they likely will receive worried calls from relatives and friends saying that someone has been justly or unjustly arrested (or harmed by police intervention). The statement "no one is above the law," is, as expected by legal realism, simultaneously an ideal of justice, a standard that can be evaded through improper influence, and when flouted a frightening reminder of arbitrary power. For Klingele and Findley, a primary teaching objective for their students is how to make discretionary decisions guided by appropriate legal standards in every role (judge, prosecutor, defense lawyer, etc.).

3. Lawmaking beyond courts

The Hurst legal process course traces the development of workers' compensation from common law, where recovery was sometimes difficult under doctrines such as the fellow servant rule, through the enactment of workers' compensation legislation and administration. The book is credited by Peter Strauss in his law review article on Langdell and the Public Law Curriculum[15] with being among the few early examples, along with Hart and Sacks, of texts that included extensive non-judicial materials such as statutory law and administrative regulations. Strauss maintains that legislation, administrative rules, and administrative adjudications in their original form, not viewed through the lens of courts and appellate cases, are the bread and butter of legal practice for most lawyers. The Hurst tradition of legal process at Wisconsin was succeeded by another legal process book and course taught and co-authored by George Bunn.[16] Professor Mark Tushnet taught legal process while he was at Wisconsin and has co-authored a policy-oriented book offered at Harvard Law School.[17]

4. Discretionary decisions of public officials

[14] See Malcolm Feeley, The Process is the Punishment (Russell Sage Foundation, 1992). The greatest punishment for those accused of lesser crimes is not fines and imprisonment but pretrial costs like lost wages, commissions to bail bondsmen, and attorney's fees. Therefore, the most important goal of the accused is to minimize the time and money spent dealing with criminal justice administration before trial.

[15] Peter L. Strauss, Review Essay: Christopher Columbus Langdell and the Public Law Curriculum, Journal of Legal Education, vol. 66, no. 1 (2016), 157-185

[16] Hans A. Linde and George Bunn, Legislative and Administrative Process (Foundation Press, 1976).

[17] Lisa Heinzerling & Mark Tushnet, The Regulatory and Administrative State (2006)

The importance and impact of discretionary decisions of lower level public officials was virtually the main theme of the innovative Remington course in Criminal Justice Administration and remains so to this day in the course as presently taught by Professors Klingele and Findley. The Remington book and course, coauthored and taught by Professor Herman Goldstein, became the foundation of the closely related and immensely influential fields of problem-oriented and community policing which deal with how police and other public officials can reduce the occurrence of crime through problem solving rather than relying exclusively on law enforcement, and was, like the administration course itself, influential in both academic instruction and the real world of policy and practice.[18] A fundamental premise of the Criminal Justice Administration course is that the vast majority of encounters of the average person with the criminal justice system occur with police and prosecutors prior to trial, and the vast majority of formal charges that are brought end with a plea bargain. Only a tiny fraction go to trial. Topics include the decision to investigate, investigative methods, use of force by the police, plea bargaining, and the role of the lawyer in the decision to charge and plea negotiations. Like its predecessors, the current course explores "the many low visibility points at which discretion is exercised, a characteristic of the system at virtually every important decision-making point" and the critical role of lawyers in assuring the principled rather than untethered exercise of discretion.[19] Leading Supreme Court cases are included, but more attention is paid to other legal sources such as administrative rules governing police behavior. So great has been the impact of the Remington approach that it was the source of rules governing police discretion in law enforcement.

5. Private actors and the law

Private actors reactions to law and lawyers' advising them is a major topic of the Wisconsin contracts course with its emphasis on relational contracting. Stewart Macaulay's pathbreaking research on this topic[20] led to its inclusion in the Wisconsin Supplement that eventually evolved into the contracts course book.[21] Relational contracts, which are formed and performed in a context in which the contract is only one aspect of the relationship between the parties, typically involve non-legal norms and sanctions that are respected by the parties, rarely lead to litigation, do not specify details which might undermine trust and interfere with subsequent flexible problem solving, and present many implicit understandings not stated in writing (presenting problems for interpretation). Relational contracts appear everywhere in business world, for example, long term supply contracts dominated by either sellers or buyers. In his article on the new legal realism, Macaulay seems correct in saying that private actors' responses to law represent an additional "tier" of legal realism beyond the actions of public

[18] Herman Goldstein, Problem-Oriented Policing (McGraw-Hill, 1990); Herman Goldstein, Policing a Free Society (Ballinger Publishing, 1977).
[19] Cecelia Klingele & Keith Findley, Introduction to Criminal Procedure, Preface (E-book at University of Wisconsin Law School)
[20] Macaulay, S. (1963), Non-contractual Relations in Business: a Preliminary Study, American Sociological Review, volume 28, no. 1
[21] Macaulay, S. & Whitford, W., The Development Of Contracts: Law In Action**,** 87 Temple L. Rev. 793

officials (part of Ehrlich's "living law").[22] That insight applies far beyond contracts, for example, in virtually every business transaction, which often implicate multiple areas of law (tax, antitrust, banking, sales, bankruptcy, etc.), but which are guided and governed as much by custom and context as by law. It also applies to the just mentioned universe of low visibility discretionary decisions made by parties and lawyers as the paramount characteristic of the criminal justice system. Hence, contrary to the idea that this "living law tier of legal realism" does not involve lawyers, lawyers play an important role at least where citizens can afford legal representation. On the other hand, vast areas of both contract and criminal law involve clients who are unrepresented and face powerful opposing parties, in the case of contracts of adhesion, or the intimidating power of the state in law enforcement. All of us participate in such contracts when we click "agree" online or sign long boilerplate forms that bind us to all sorts of things we barely understand like waivers of liability, non-disclosure and non-compete clauses, and mandatory arbitration of disputes. Like The Matrix, the third tier of living law is everywhere.

6. Growth of legal policies over time

Legal history is a field virtually invented by Willard Hurst.[23] The relatively small number of legal historians prior to Hurst focused mainly on Supreme Court decisions. Hurst's wide-ranging interest on the growth of multiple legal institutions (federal and state legislatures, federal, state, and local courts, the executive branch, the Bar) and the relationship of law and the economy became a model for his many successors (who greatly expanded the scope of the field). Equally influential was his meticulous empirical research method based on painstaking examination of original legal sources. Hurst's great interest was the relationship between law and the economy, specifically the formative period of 19th century capitalism. His first major work in this field was on the history of workers' compensation law that led to the Legal Process course (originally titled Law in Society), coauthored with Dean Lloyd Garrison who had just hired him and encouraged him to do innovative work. Hurst considered the course to be a work of legal history as well as a trend setter in legal process. He then wrote a history of the major American legal institutions called The Growth of American Law.[24] Two other major works were his magnum opus on the lumber industry[25] and the best-selling and highly influential Law and the Conditions of Freedom in the 19th century.[26] The lumber book remained his favorite because of it so perfectly matched his goals for economic legal history, a meticulous study of the role of business and law in the beginnings and expansion of the lumber industry as it

[22] Macaulay, S., The New Versus the Old Legal Realism: "Things Ain't What They Used To Be," Wisconsin Law Review, Vol. 2005, No. 2, pp. 365-403 (2005).

23 Hurst published over three dozen books and articles plus numerous book reviews. See https://law.wisc.edu/ils/works_by_hurst.html

[24] Hurst, J.W., The Growth of American Law, The Lawmakers (Little Brown, 1950)

[25] Hurst, J. W., Law and Economic Growth. The Legal History of the Lumber Industry in Wisconsin, 1836-1915. Madison: University of Wisconsin Press, 1984 (orig. pub. Cambridge, Mass.: Belknap Press of Harvard University Press, 1964).

[26] Hurst, J. W., Law and the Conditions of Freedom in the Nineteenth-Century United States. Madison: University of Wisconsin Press, 1956.

became the largest economic enterprise in Wisconsin then completely disappeared having effectuated the complete destruction of the northern forest. A tension between capitalism and its limits can be seen in this work, no doubt discussed in Hurst's regular lunches with Aldo Leopold and later explored in Conditions (which both Dirk Hartog and Bob Gordon report as their first experience of being drawn to legal history).

Hurst's relevance to legal realism and instruction is perhaps best expressed in Dirk Hartog's comment in his interview with me that the law cannot be fully understood case by case and one doctrinal area after another (property, torts, contracts, etc.). Major legal developments usually occur in a coordinated fashion across multiple areas of law over a period of time. Or as Hurst said in his oral history with typical understatement, sometimes it would be good if law students understood how we got here. Another close connection with legal realism was the overwhelming emphasis in his research on empirical facts about law and its impacts. After Hurst the field of legal history became well established in many law schools, and research expanded greatly and evolved. As I learned from my interview with Dirk Hartog, Hurst's original focus on economic history declined as an interest of the field replaced by such topics as excluded groups, slavery, and immigration (but more recently has had a resurgence in the form of interest in colonialism and Atlantic studies).

7. Social needs, justice, and political progressivism

According to Horwitz,[27] social progressivism was an integral part of legal realism from the beginning despite some academic squabbles.[28] One of the disputes concerned a distinction between legal realism as an empirical positivist description of what law does and normative legal realism as a moral and political critique. In fact, both perspectives are essential to progressivism because an empirically realistic description of law in action is the foundation of progressive thought. Law in action is factual, progressivism is counter factual. With the success of progressivism the counter factual became the factual. Some scholars see Hurst's work on economic legal history as infused with a narrative of progressive problem solving leading up the New Deal.[29] Progressive research in legal history after Hurst, critical race and gender studies,

[27] Horwitz op. cit.

[28] One notable example was about who belonged in which school of thought (e.g., Llewellyn's realism or Pound's sociological jurisprudence). For Horwitz the movement considered more broadly had various intertwined threads such as the critique of 18th century common law reasoning as a formalist defense of property rights against redistribution, the work of progressive institutional economists who saw a role for government in relief of misery and regulation of corporations, and advocacy of the administrative state as an only institution with sufficient expertise and capacity to deal with problems of the industrial revolution and large corporations.[28] Among the last group was Felix Frankfurter, a primary mentor of Willard Hurst. After Harvard law school, where he took Frankfurter's seminar in administrative law, Hurst spent a year with Frankfurter working on lectures to be delivered by Frankfurter on the Commerce Clause.

[29] Daniel Ernst, Willard Hurst and the Administrative State: from Williams to Wisconsin, 18 Law & Hist. Rev. 1-36 (2000). Ernst reports that while in Harvard Law School, Hurst prescribed for himself a course of readings on the legal realists and was particularly impressed with Llewellyn's work on sales because it was close to economic reality. As Note editor of the Law Review, Hurst worked with students, virtually as a co-author, on administrative law topics that were of interest to Frankfurter.

for example, focused on new areas of law in action. Most generally, the very idea of critical theory rests on an understanding of how the institutional structures function to block social liberation.[30] That said, legal realism and law in action are not limited to progressive movements. Lawyers in ordinary practice experience law in action every day, law and economics as a field of research can be thought of as a realm of law in action guided by considerations of efficiency.

Progressive elements in the four Wisconsin courses. The four innovative courses at Wisconsin are a combination of positivist and progressive legal realism (what is and what ought to be). A strong reformist element can be seen in every course.

Contracts. The Wisconsin contracts course deals with the problem of power in civil society, for example, contracts of adhesion imposed by large organizations on suppliers, customers, employees, and even hospital patients, under which one side knows that the other side has not read or fully understood the contract and has no power to change it. Consumer protection measures are sometimes enacted, e.g., on disclaimers of liability and pre-nuptial agreements, but just as often evaded by legal counter measures, like compulsory arbitration before "kangaroo courts," or blunted by subsequent legislation obtained by lobbyists or by restrictive court interpretations.[31]

Criminal Justice Administration. Sensitivity to problems of justice pervades the course in Criminal Justice Administration from the sweeping effort to identify and regulate unbridled discretion of the police to recommendation of less coercive methods for protecting public safety, such as problem oriented and community policing. Police ride-alongs were an important source of data in the research leading up to the course. As a young social scientist,[32] Herman Goldstein was shocked at the rousting of gay people in bathrooms by police. Ride-alongs for students are part of the course to this very day. Today's course is refreshed with new problems of justice such as wrongful convictions and mass incarceration, and the current professors Klingele and Findley are active in many public service activities.

Legal History. Willard Hurst's research on economic legal history was built on a vision of the public interest and the state as its rightful guardian.[33] Hurst held any number of realist progressive positions such as that since the state has granted corporations the charter to do

[30] Raymond Geuss, The Idea Of A Critical Theory: Habermas and the Frankfurt School (Cambridge University Press, 1981)(a reflective theory, both descriptive and critical, which gives its agents a kind of knowledge productive of enlightenment and emancipation from often unsuspected forms of external and internal coercion).
[31] "Nonetheless, looked at over time, in Galanter's words, "the haves come out ahead." Even if someone does obtain more favorable rules, "frequently the well organized can change the game back again." Macaulay & Whitford, op. cit., citing Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).
[32] "As an undergraduate at the University of Connecticut, Goldstein majored in political science and government. After graduating in 1953, he went on to earn a master's degree in governmental administration from the Wharton School at the University of Pennsylvania." Herman Goldstein, How I Got Here, The Gargolyle (University of Wisconsin Law School, 2008). https://media.law.wisc.edu/m/zmjgx/gargoyle_33_2_5.pdf
[33] Daniel Ernst op. cit.

business, it has unlimited power to regulate, and that interpretations of constitutional provisions like the dormant commerce clause should respond to practical necessities rather than relying on conceptual theories. He described his research and courses as dealing with development of public policy in the dimension of time and maintained that administrative agencies often are the only institution with the competence to deal with complex economic problems. When he was hired at Wisconsin, he conceived of his most important mission as protecting the freedom of state regulation, such as the efforts of Elizabeth and Paul Raushenbush in workers compensation.[34] Professors of legal history who followed Hurst at Wisconsin moved even more strongly in the direction of social critique and reform, for example, Robert Gordon and critical legal studies, Dirk Hartog and gender discrimination, and Mark Tushnet and the law of slavery,

Legal Process. The Legal Process course and book authored by Auerbach, Garrison, Hurst & Mermin embodies its own narrative of the evolution of justice well represented by a long excerpt reprinted in the book from an 1969 article by Carl Auerbach on law and social change in the United States.[35] In the spirit of Hurst,[36] Auerbach presents the role of law in the 19th and first half of the 20th century as a gradual march toward a "combination of public and private rights ordering necessary to protect liberty and prosperity." Law in the 19th century encouraged industrialization through freedom of contract, protection of property, limits on discrimination by states against interstate commerce, generous grants of power to corporations, and sale of good government land in small pieces to encourage agriculture and business enterprises (note the realist reconceptualization of property as a state policy). This expansion diffusion of property, individual freedom and general prosperity were important achievements in their own right, but the social costs were also high. Social unrest, riots, strikes, and bitter elections led to legislative curbs on economic power, such as the Interstate Commerce and Sherman Antitrust Acts, which reduced the number of monopolies but left oligopolies in place.

In the 20th century Auerbach endorsed the full range of New Deal and post new Deal reforms such as 1) Galbraith-like legislation that created centers of countervailing power, e.g., farmers associations and coops, coop grocery stores, and trade unions, 2) the Clayton Act regulating economic concentration, 3) social welfare legislation, such as minimum wages, maximum hours, public schools, child labor restrictions, public health measures, farm price supports, and unemployment insurance, 4) rights of citizenship like women's property and marriage rights

[34] https://workforcesecurity.doleta.gov/unemploy/pdf/Raushenbushes.pdf
Paul and Elizabeth Raushenbush were instrumental in the creation and adoption of the Groves Bill, which established the first unemployment compensation program in the nation. Elizabeth Brandeis Raushenbush was the daughter of Supreme Court Louis Brandeis (of Brandeis Brief fame). Willard Hurst was Brandeis' clerk, and Elizabeth recommended Hurst to UW Law School Dean Lloyd Garrison. Walter Brandeis Raushenbush was the son of Elizabeth and Paul and a faculty member of the law school until 1995.

[35] Carl Auerbach, Law and Social Change in the United States, 6 UCLA L. Rev. 516-532 (1959). The excerpt is in a section of the legal process book called "scope and objectives of legislative intervention and the public interest" introduced by a short reminder that while law is influenced by society it also has a social impact on behavior, the environment, and attitudes (citing school desegregation). This conception of law as both a dependent and independent variable is widely shared in the sociology of law.

[36] E.g., Law and the Conditions of Freedom, op. cit.

and civil rights for African-Americans, 5) consumer protections, e.g., in insurance and banking law and against false advertising, and, 6) economic policy supporting full employment.

The result for Auerbach was that "a tolerable measure of social justice and individual freedom has been achieved in our society as a result not of the pursuit of a vision of an ideal economic system but of the political struggle which individuals and groups have waged, according to the rules of democracy, to satisfy their claims."[37] This enthusiastic defense of progressive legislation and democracy, taken from the Hurst Legal Process book, is a good example of the normative perspective on historical trends typical of legal realism in the tradition of Pound's sociological jurisprudence (which maintained that law should be reformed when it is out of step with social needs and justice).[38]

8. The importance of empirical research and social scientists on law school faculties or collaborating with law faculty members

Early realism. Social science research was important for the early legal realists in the 1920's and 30's.[39] Social surveys were part of a widespread progressive reform movement which held that if social problems were discovered good government could correct them.[40] A survey of civil cases by Charles Clark and Robert Hutchinson discovered the largely administrative nature of state court proceedings, for example, uncontested divorces and foreclosures, settled auto claims, and simple debt collections. Clark, William O. Douglas, and Charles Samerow basically discovered modern criminal procedure (e.g., the fact that 70% of defendants plead guilty and only 1% went to trial). These studies, which were staffed by professional social scientists who collaborated with the law professors, were funded by Yale Law School and grants from the Rockefeller Foundation and other agencies. As a young Dean, Hutchinson created an Institute for Human Relations at Yale to house the research. Douglas did a study of bankruptcy cases. Another research institute that focused on the empirical effects of law was founded at Johns Hopkins (which then as now did not have a law school) by Herman Oliphant, Walter Cook, and Underhill Moore, after they resigned from Columbia Law School in 1928 in protest over the refusal of Columbia University's president to appoint Oliphant dean of the law school. The Hopkins Institute obtained funding from various sources and conducted a number of interesting studies but was discontinued in the early 1930's due to disagreements among its faculty and patrons about its mission and purpose. These early attempts to establish institutional homes for studies of law in action are interesting in light of such long running enterprises as the Institute for Legal Studies at Wisconsin and the JSP program at Berkeley[41]

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[37] Legal Process book, op cit., at 645, 652-56

[38] R. Pound (1912) "The Scope and Purpose of Sociological Jurisprudence" 25 Harvard Law Review p. 489.

[39] John Schlegel's book American Legal Realism and Empirical Social Science op. cit. is an excellent source generally and the source of the information mentioned here.

[40] Schlegel, 80-81.

[41] Emeritus Professor David Trubek's role in creating the ISL is notable. This 1980 issue of the UW Law School magazine The Gargoyle features reports on the Institute and other law school centers and an interview with Willard Hurst on the importance of research and the Institute.
http://gargoyle.law.wisc.edu/wp-uploads/2014/02/volume12issue1.pdf

Similar influences can be seen in the development of the Wisconsin courses.

Willard Hurst. Besides being a world class scholar, Willard Hurst was a leader in promoting research through fund raising, advocacy, and mentoring. Hurst returned to the faculty after WWII on funding from an SSRC/ Rockefeller Grant.[42] He then was granted 8 years half time released from teaching from the Rockefeller Foundation on recommendation from SSRC (who were so impressed with him that they also put him on their own Board). During this long period of funding he wrote several of his early canonical books. The Rockefeller grant also provided him a full-time research assistant for the entire period of the grant. Hurst's research assistants included Lawrence Friedman who went on to write his own History of American Law[43] and collaborate with Stewart Macaulay on their book Law and the Behavioral Sciences. Within the law school and university, Hurst advocated relentlessly for the importance of research and research funding as necessary for the development of the faculty and the reputation of the school. The research function, he believed, was too easily pushed aside for other priorities but was essential for keeping faculty refreshed and current in their teaching. In his view, faculty competence and reputation would decline in about five years without research support. In addition to this regular funding, Hurst obtained a long series of commissioned papers which led to the publication of other books and articles (among them from the Rosenthal Foundation at Northwestern Law School which led to his best-selling Law and the Conditions of Freedom). Later in his career, in response to numerous offers from other schools, he was awarded the University's Vilas Professorship which allowed him to continue with half time teaching and provided a budget for research assistance. Hurst's reputation nationally and within the university presaged the many university grants and awards held over the years by law school faculty up to the present time. Hurst himself did not have a degree in social sciences (nor did Bob Gordon), but today most professors of legal history have Ph.D.'s

Remington and Goldstein. Frank Remington and Herman Goldstein and colleagues also had considerable success combining empirical and interdisciplinary research and external funding with law school instruction in the field of criminal justice, a field that Remington virtually invented (just as Hurst did for legal history). Remington started teaching at UW in 1949 and immediately became involved in rewriting the state's substantive criminal statutes, which led to his participation in revisions of the Model Penal Code, which then led to work with Wisconsin state judges on uniform jury instructions for offenses defined in the new Wisconsin code.[44] On the research side, he became the field research director of American Bar Foundation survey of the administration of criminal justice in the United States. The purpose of ABF study was collection of reliable data on the criminal law in action and recommending remedial measures in the four areas of police, prosecution, criminal courts, and sentencing, probation, and

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Howard Erlanger served as director of ILS for 15 years and developed the Hurst Summer Institute, which provides an institutional home for Hurst's strong commitment to mentoring. Professor Mitra Sharafi is the current director. https://law.wisc.edu/ils/hurst_institute.html

[42] These facts from Hurst's oral history on file with UW Law School library

[43] Lawrence Friedman, A History of American Law (3d. edition 2005, Touchstone)

[44] Edward L. Kimball, Frank J. Remington, Contributions to Criminal Justice (University of Wisconsin Law School and Board of Regents, 1994)

parole.[45] Herman Goldstein joined the ABF staff as a young social scientist gathering data in various cities and in 1964 was hired as a professor at Wisconsin, supported by grants from the ABF, the Ford Foundation, and the Russell Sage Foundation. Those grants also supported a series of summer seminars held at Wisconsin for law professors from around the country to study the findings of the ABF study (one of whom was Joe Goldstein of Yale). According to Herman Goldstein, the seminars and the report had a revolutionary impact on the thinking of law professors about criminal justice system because of findings such as the large number of citizens who experienced discretionary interventions by the police.

Social scientists on or working with the law faculty. The presence of social scientists on the law school faculty during this period was notable. On the criminal justice side were Herman Goldstein and Don Newman. Don Newman received his Ph.D. in sociology from the University of Wisconsin and was Professor of Social Work at Wisconsin, with a joint appointment to the Law School. He was often identified as a criminologist. Newman occupied an office opposite Goldstein in the Law School. He coauthored the first edition of the criminal justice administration course book and co-taught with Remington for several years. Remington drew him into analyzing the ABA survey's results on plea bargaining -- and that became his specialty for several years. He wrote one of the several books coming out of the ABA study surfacing what was -- up to then -- the informal "plea bargaining" practice -- resulting ultimately in legislation and court practices that introduced protections for the defendant.[46]

When Macaulay came to Wisconsin in 1957 as an assistant professor (in the same year as Gordon Baldwin), Henry Manne, a specialist in law and economics from the University of Chicago, came as a visiting assistant professor. Harry Ball was a sociologist on Frank Remington's projects and worked with Richard Schwartz and others to create the Law and Society Association. Friedman and sociologist Jack Ladinsky did a case study of the legal history of employer liability for industrial accidents. They used it to challenge the idea that the law necessarily lags behind the society and that legal change can be explained by the influence of great men.[47]

How Wisconsin Law School became a realist-friendly environment (and persisted over time)

Before concluding, it is informative to reflect on how the law school became an environment friendly to legal realism when almost all other schools were wedded to the traditional model. One link is the connection of legal realism with progressivism as a political movement. Legal realism had a strong progressive element reflected in advocacy for government intervention to mitigate harms flowing from the vast economic and social changes of the industrial revolution (e.g., the fight for workers' compensation). Wisconsin played a central role, serving as the

[45] http://www.americanbarfoundation.org/uploads/cms/documents/1955_-_1956_abf_annual_report.pdf https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=4383&context=jclc

[46] Newman information from an email by Herman Goldstein to Clune

[47] Friedman & Ladinsky, Social Change and the Law of Industrial Accidents, 67 Columbia L. Rev. 50 (1967).

laboratory of progressivism.[48] Influenced by its German immigrants, progressive reforms in Wisconsin included workers compensation, regulation of railroads, progressive income taxation, direct election of senators, primary elections, and the legislative reference library or bureau (which helped expand legislative capacity to develop comprehensive social and regulatory programs, rather than only responding to constituents, in ways later admired by historian Willard Hurst). Almost all of these reforms were later adopted as amendments to the U.S. Constitution, expansion of capacity of the executive branch, or national legislation. Wisconsin professors were active in developing the reforms under what came to be known as The Wisconsin Idea, "the belief that efficient government should be controlled by voters rather than businesses and lobbyists, and that help from specialists in law, economics and the social and natural sciences would produce the most effective government possible." UW faculty helped draft laws and served as expert consultants.[49] A prime example was John R. Commons who came to Wisconsin in 1904 to accept a position in labor economics at the University.[50]

> "As part of the Wisconsin Idea, Commons worked closely with Robert M. La Follette to draft the Wisconsin Civil Service Law in 1905 and the Public Utilities Law in 1907. Commons researched and wrote policy for the regulation of workplace safety and for unemployment compensation. His students, Edwin Witte and Arthur Altmeyer, went on to create the Social Security program in the 1930s. Recognized for his scholarship in labor history and economics, Commons advocated collective bargaining and pragmatic compromise over rigid, uncompromising views."[51]

By the time Willard Hurst was hired by Dean Llloyd Garrison in 1937, the Law School was full of New Dealers. Nathan Feinsinger joined the faculty at the University of Wisconsin School of Law in 1929. Feinsinger was appointed general counsel to the Wisconsin Labor Relations Board in 1937. In 1942, President Franklin D. Roosevelt appointed Feinsinger associate general counsel of the War Labor Board. He was promoted to Director of National Disputes in 1943, overseeing labor problems of a national nature, and became famous for his role in mediating a series of high profile labor disputes and strikes. Professor Jake Beuscher had spent time with Office of Price Administration during the war period, and after coming to the Wisconsin faculty in 1935, taught a course in land use regulation which, in its emphasis on natural resources and water quality prefigured modern environmental law. From the 1930's, Beuscher worked with the Wisconsin legislature on practically every major development in environmental law over a period of decades.[52] Beuscher was instrumental in the creation of the internationally oriented Land Tenure Center at UW-Madison the activities of which drew in other Wisconsin law

[48] https://www.wisconsinhistory.org/turningpoints/tp-036/ (books, articles, manuscripts on Progressivism and the Wisconsin Idea).
[49] https://www.wisconsinhistory.org/Records/Article/CS417
[50] https://www.wisconsinhistory.org/Records/Article/CS507
[51] https://www.wisconsinhistory.org/turningpoints/search.asp?id=1003 (on the Wisconsin professors who authored the Social Security Act)
[52] Statement of Professor Arlen Christensen on nomination of Beuscher to the Wisconsin Conservation Hall of Fame https://media.law.wisc.edu/m/jb4nz/gargoyle_25_3_5.pdf

professors like Joseph Thome.[53] Hurst particularly admired Beuscher for his social activism and was disappointed when he was not appointed Dean to succeed Lloyd Garrison (Hurst oral history). Carl Auerbach, co-author with Hurst of the Legal Process book, served as a government attorney in various government agencies, including the Office of Economic Stabilization and General Counsel of the Office of Price Administration. A second co-author, Samuel Mermin, represented the Bituminous Coal Consumers' Counsel in extensive administrative hearings, briefs, and oral arguments under the 1937 Bituminous Coal Act. With the onset of World War II, Mermin spent five-years in the Office of Price Administration's Enforcement Department and its successor agency, the Office of Temporary Controls. He served in various capacities, including chief of the Briefing Branch, special appellate attorney, and solicitor of the Litigation Division.[54]

Frank Remington was a student of Hurst's at the law school. Hurst functioned as a mentor of the next generation of empirical legal scholars like Lawrence Friedman and Stewart Macaulay. While Macaulay was a Bigelow Fellow at the University of Chicago Law School, he was mentored by Professor Malcolm Sharp, co-author of the realist-oriented contracts casebook, Kessler and Sharp. Sharp encouraged him to undertake the empirical research that led to his pathbreaking article on non-contractual relations in business. The summer before he was hired at Wisconsin, Macaulay audited and taught a week of classes of a contracts class taught by Professor Nick Katzenbach using the Kessler and Sharp book. At Wisconsin, Macaulay adopted the Kessler and Sharp book when he became senior contracts professor and later named his own Hilldale Professorship after Sharp. He then partnered with Bill Whitford on their contracts course and book. Macaulay and Friedman coauthored the first version of their Law and Behavioral Sciences book while they were together at Stanford, an arrangement that continued when both returned to Wisconsin and after Friedman subsequently joined the Stanford faculty.[55] When Beth Mertz joined the faculty as a joint J.D./Ph.D. (Anthropology), she became co-editor of the 4th and last edition of the book (and an active member of the law and society community).[56]

Walter Dickey was a student of Remington who went on to teach the criminal justice administration course after he was hired as a faculty member. Dickey also directed major related clinical programs (Legal Assistance to Inmates, Public Defender Project, Prosecution Project). At one point in his career Dickey took leave from the faculty to become Director of the Wisconsin Department of Corrections. The introduction to the current version of the course includes an article by Dickey and professors Cecelia Klingele and Michael Scott, Reimaging Criminal Justice.[57] Michael Scott, now a Professor and Director of the Center for Problem

[53] https://www.nelson.wisc.edu/ltc/ The Land Tenure Center was closed in 2003. https://news.wisc.edu/uw-madison-to-close-land-tenure-center/

[54] In this period (1943–47) he prepared 19 briefs of his own and presented 19 oral arguments in appellate courts, both federal (including the U.S. Supreme Court) and state; and he supervised the preparation of 37 other briefs. https://media.law.wisc.edu/s/c_695/rdfgz/mermin.pdf

[55] Friedman & Macaulay, Law and the Behavioral Sciences (Bobbs-Merrill Pub. Co., 1969)

[56] Macaulay, Friedman & Mertz, Law in Action: a Socio-Legal Reader (Foundation Press, 2007).

[57] Introduction to Criminal Procedure, 32-50

Oriented Policing at Arizona State University, was a protégé of Herman Goldstein and longtime director of the POP Center at Wisconsin (also a former Madison police officer and graduate of Harvard Law School).[58]

Then arrived the next wave of socio-legally educated professors whose many outstanding accomplishments in teaching and research are beyond the scope of this article.[59]

Conclusion

First, how should we assess a common opinion of scholars that legal realism had some but modest lasting influence on legal instruction and research? The Langdellian case method is still the dominant method of instruction, it is said, and empirical research on law is rare relative to library research on appellate cases and other legal texts. The first year curriculum has not changed substantially in 50, or 75, or 100 years, it is argued, with some justification.[60] That would not be a fair conclusion looking at the four innovative courses at Wisconsin reviewed in this article, their national impact, and the many professors who have followed in the same tradition. But what about the broader impact? My sense is that the movement toward realism is broader both in this school and elsewhere in ways that permeate rather than replace traditional instruction and in non-traditional courses.

To be sure, the traditional case method and teaching of black letter law is still the prevalent if not dominant method of instruction especially in more traditional law schools (and Bar exams). Textual interpretation remains the core of law and legal expertise. Law schools do not grant social science degrees or train social scientists. Contract, tort, and property though morphed over time are still the foundation of a liberal legal order along with regulation of the economy. Commercial transactions and informal decision making must account for legal considerations even when no legal authority is invoked. Legislation and administrative rules must be drafted, and decisions are adjudicated in courts and administrative agencies. Rule skepticism (or sophistication) is more common than the naïve classical legal reasoning of Langdell and the Restatements of law, but interpretation still begins with legal texts.

Beyond the core, the influence of legal realism is more evident. Policy perspectives on appellate cases are at least as common as legal logic. Clinical instruction, strong at Wisconsin and virtually all other law schools, is in the spirit of legal realism if not prominent among its original

[58] https://publicservice.asu.edu/content/michael-scott

[59] A randomly selective list of just those arriving starting in 1971 would include myself, Tom Heller, Neil Komesar, Len Kaplan, Don Large (who taught the course on the new EPA), Mark Tushnet, Bob Gordon, Ted Schneyer, David Trubek, Howard Erlanger, Marc Galanter, Joel Rogers. See Schlegel, 249-50. "By any account the Wisconsin program has been a success as well, whether one measures by looking at a list of the alumni of the program, the amount of research produced, or the continuance of work both in the Department of Sociology and the Law School that is identifiably law and social science."

[60] "The contributions of Jerry Mashaw, William Eskridge and other Yale instructors to our understanding of the real world of law notwithstanding, the curriculum at Yale remains essentially what it was when I became its student 54 years ago—and long before that." Strauss, op. cit, at 185

goals. Simulation courses abound. Law and economics, based on models of legal impact, has experienced explosive growth in the legal academy and is a common policy perspective on the law. Statutory and administrative law in areas advocated for by the realists now densely populate the second and third years of law school (recall that Langdell and the original realists experienced the progressive movement but not the New Deal). Law professors with social science degrees dot the landscape, especially in elite law schools. Interdisciplinary degrees and collaborations have grown with the complexity of social problem solving. Interdisciplinary research between law professors and professors in other departments abounds. Lawyers involved in policymaking inevitably interact with technical experts. Administrative rules proposed by regulated industries are the product of collaboration between legal and technical experts. Policies advancing environmental sustainability are invariably built on a combination of economic, technological, and legal expertise. Antitrust cannot be done without economics. Bio ethics requires bio-ethical collaboration. Empirical research on legal policy has exploded outside law schools in social science departments and think tanks, and this research is readily available to interested law professors (e.g., in my own field of educational policy, the empirical research base is deep and informative). Lawsuits challenging gerrymandering like our own Gill v. Whitford[61] are an interesting example of the intertwining of law and social science. Not only are political scientists and mathematicians deeply involved in the litigation, statistical models and computer simulations helped create the legislative gerrymandering. One step away from law school undergraduate courses in empirical legal studies and criminology have flourished.

To sum up with a metaphor, perhaps it is fair to say that the original design of the House of Law is recognizable, but the interior has been extensively remodeled, new wings have been added, and guest houses have been built on the same property.

Second, in schools that offer legal history students can learn that long run consequential trends in the law continue to the present time. The 19th century struggle between social welfare vs. business deregulation and resistance to income redistribution continues with new legal and political tools. Corporate monopolies that helped trigger the progressive movement are once more a matter of heightened public concern. The power of organized labor always a contentious subject has dwindled under decades of attack but may be gaining new life. The 150-year-old struggle over voting rights continues amidst a high level of partisan activity, e.g., voter suppression, gerrymandering, money in politics, and a Supreme Court that has taken mixed positions. Disputes over immigration policy follow in a tradition at least 125 years old, not even counting slavery and its aftermath as the product of involuntary immigration. The movement for equal rights continues and has expanded beyond race and sex. Criminal justice across the full range of discretionary decisions has been with us for all of our history and has never been more important than with such issues as mass incarceration, police misconduct, and electronic surveillance. Environmental regulation always contested has acquired existential importance. The seemingly vaporous words “rule of law,” referring to honest government and

[61] Gill v Whitford, https://www.supremecourt.gov/opinions/17pdf/16-1161_dc8f.pdf
https://www.vox.com/2018/6/18/17474912/supreme-court-gerrymandering-gill-whitford-wisconsin

the constitutional order, have sprung suddenly vividly to life in real decisions leading to tangible and momentous consequences.

In my view, the importance of legal history for understanding the law in depth is a strong justification for offering that course especially for the many students like myself with a strong interest in social and legal policy.

And so like rock 'n roll, law and action can never die.[62]

[62] Neil Young https://www.lyricsfreak.com/n/neil+young/hey+hey+my+my_10191111.html https://www.youtube.com/watch?v=cMs3PCDM8Eg

Appendix
Methodology and sources

For me this project began with a blog written for the New Realism Project, Law in Action, Law on the Books: A Primer (June, 2013),[63] an essay that relied heavily on Macaulay's 1963 article on non-contractual relations,[64] Jack Schlegel's book on realism and empirical social science,[65] and a team of informal advisors (Howie Erlanger, Beth Mertz, Stewart Macaulay, Bill Whitford, Jack Schlegel).

For this project honoring the four course innovators, again relying informal advice from law school colleagues, I used these research methods:

1. Expanded readings on legal realism
2. Reading and taking notes on the original books.
3. Recording and transcribing six interviews[66]:

a) for criminal law, 1) Professors Herman Goldstein, 2) Walter Dickey, 3) Cecelia Klingele & Keith Findley;
b) for Legal History, 4) Professor Dirk Hartog
c) for contracts, 5) Professors Stewart Macaulay and Bill Whitford
d) regarding Jake Beuscher and environmentalism, 6) Professor Arlen Christenson

4. For legal process, none of the authors is still alive for interview, but I found Peter Strauss's overview of the history of Langdellism and legal process extremely helpful[67]
5. Reading additional sources in legal history including Hurst, Horwitz, and Hartog
6. Reading the oral histories of Willard Hurst and Herman Goldstein on file with the University of Wisconsin Law Library
7. Collecting data on when various courses were offered and who taught them from the UW Law Library. Many thanks to the whole staff and especially Kristopher Turner.

[63] http://newlegalrealism.org/2013/06/12/law-in-action-and-law-on-the-books-a-primer/
[64] Macaulay, S. (1963), Non-contractual Relations in Business: a Preliminary Study, American Sociological Review, volume 28, no. 1.
[65] Schlegel, J.H. (1995), American Legal Realism and Empirical Social Science, University of North Carolina Press, Chapel Hill & London.
[66] I would like to make edited versions of the interviews available to the Law Library.
[67] Peter L. Strauss, Review Essay: Christopher Columbus Langdell and the Public Law Curriculum, Journal of Legal Education, vol. 66, no. 1 (2016), 157-185

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