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The Place of Law and Social Science in the Structure of Legal Education

David M. Trubek and Sheldon Jay Plager

David M. Trubek

My presentation is divided into two parts. One is a general overview analysis of the problems of support and development of what I call "legal studies." I think we ought not to limit our subject to something called "law and social science." I should like to go beyond the social science category. Part of my presentation deals with general analysis and part with the particular way we have handled it at Wisconsin. I shall focus on the latter hoping to use it to illustrate the former.

Two things are true, two apparently contradictory premises. One is that George Priest is absolutely right when he said that you can do it whoever you are, with or without formal training, with or without help from your dean. You can do it if you really want to. There is no magic. There is no secret. I do not like the formula "law and social science," and for two reasons. First, it leaves out such fields as history and some others that I should like to see connected with legal studies. But that is not the main reason. I do not like it because it implies there is some magic and that magic is off there somewhere across the hall in the sociology department. I am a great believer in having people who have PhDs working on questions of law, and I am a great believer in law professors getting all sorts of training, but you can do it without it. Because what are we doing? We are trying to find out what is going on. We are trying to find out how things work. Sometimes it is helpful to have a lot of theoretical materials and methodological sophistication. Sometimes it is not necessary. Sometimes they even get in the way. For those of you who do not have access to fancy institutes, colleagues, grants, and the like, the last thing you should take away is the notion that Oh my God, until we have an institute for legal studies and forty-three PhDs and I go back to Yale and get my PhD or whatever, forget it I'm going to write about rule 19! George is absolutely right. You can do it if you really want to because legal studies means finding out what is going on, and there are many ways to do that. Stewart Macaulay,

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1. David M. Trubek, *A Strategy for Legal Studies: Getting Bok to Work*, 34 *J. Legal Educ.* 586 (1984).

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who is one of the big names in law and social science, goes out and talks to lawyers and writes it up. Occasionally, he puts together something that appears like a survey, but might not always be recognized as a survey by a survey researcher. He simply finds out what is going on and interprets it, and people cite him like crazy.

On the other hand, I want to support the apparently contradictory position that in order to have research on the history, meaning, and impact of law in society—what I mean by legal studies—we need immense amounts of money, tremendous sophistication, complete transformation of the law schools—in short, a major revolution. On the one hand, it takes nothing at all except wanting to do it and on the other hand, everything has to be changed. How can that conceivably be anything other than a total and utter contradiction? There is a Brazilian expression that “the enemy of the possible is the ideal.” I think that this applies here. My entry into the field was similar to George Priest’s. I got out of law school and went to Brazil and worked as a lawyer there. I saw laws being passed and things happening and things changing or not changing and I said, “Gee, I ought to be able to explain this and show how laws are making a difference in Brazil.” I got some money and went down to Brazil after I had gone into teaching. I ended up getting a lot of information and I worked on it for a while and I put out a little study and one thing led to another. Like George, I am a self-taught law and social science person. It appears to me from our informal sessions that many of you are in the same position. It is very important that you recognize that you do not have to get a PhD or know all the ins and outs of statistics to get started.

Once you start doing this kind of research, on the other hand, you will come to learn more about the ideal ways of carrying it out and see the full potential of such research and investigation. Getting started is easy, therefore, continuing along is quite possible, especially if you get support from other people in your own school and elsewhere who are similarly situated and think as you do. But once you see what might be done, fully realizing the idea is going to take enormous resources. I want to encourage people who may feel isolated and alone in schools where the faculty refers to any course involving law and social science as “law and bananas.” I want to encourage you to hang in there and not give up. But I also want to discuss making the situation more hospitable, supportive, and truly productive. For that reason I am not principally concerned with the place of legal studies in *legal education*. The law and society movement has had an aspiration, mission, or ideal to develop cumulative knowledge about what a legal system is and does, how it operates, whom it does and does not affect, the likelihoods that change x will lead to imagined result y and so on. This aspiration goes beyond and speaks to a much broader concern than the education of people who are going to be members of the legal profession. I am interested in the promotion of research that should not and cannot belong to the legal profession as such nor will its utility necessarily be exhausted by educating people to be lawyers. Indeed at times it may go beyond factors that are easily compatible with the education of lawyers.

If you look at the history of the legal studies movement, the law schools

have been the problem, not the solution. There have been tensions and conflicts between law schools—which are primarily institutions for the education in the practice of a profession—and the dream of a legal studies enterprise that can provide to the entire community information about the history, meaning, and impact of law. The point is that until we think about this activity as going beyond the mission of legal education we will not realize the full potential of the legal studies movement.

At Wisconsin, I have been pushing in two directions. First, to deepen the relationship between legal education and legal studies, that is, to make legal studies more important to legal education. Second, and at the same time, to create ways of making legal studies part of the university's mission while maintaining the independence of the J.D. educational mission.¹

Teachers in our law schools feel either threatened by legal studies or totally unable to comprehend it. There is a feeling that this work is not really very practical. If we thought of legal education as teaching lawyers about what happens, how things work, what works and does not work, then the legal studies approach would fit more easily into the curriculum. It is important to discuss pretrial conferences as I do in my civil procedure class, for example. In so doing, it is necessary to draw attention to the studies done by Maurice Rosenberg. This research addresses questions about the difference it makes when you have a pretrial conference, and what actually goes on if you do. We should do what Stewart Macaulay has done in the contracts course and ask the questions—what is contracts law actually about in the world? What difference, for example, does the law make in all types of relationships? Then to teach students we want to look at the empirical studies that examine these questions. If we think of it that way, then the alleged tension between the teaching of law as the body of doctrinal rules and the study of law in action will be partially reduced. Part of the reason law schools have been the problem has been the definition of the curriculum as the teaching of rules, not their social meaning. Many people have gone a long way toward solving that problem and you can do it if you want to. But, realizing the full potential of what I refer to as legal studies, requires more than can be supported by the law school as it now exists, i.e., as an institution primarily aimed at the education of lawyers. Even if we redefine the curriculum to include legal studies in the lawyer training program, we still have the problem of how to pay for research. Supporting legal studies with law school budgets goes beyond curricular reform. Legal studies research requires us to stand aside from the reproduction of practitioners, to stand aside from the way things are at the moment, free to question and to criticize. This is difficult in the day-to-day context of socializing and educating people to be lawyers. I do not mean to say it cannot be done, I mean to emphasize that doing it creates tensions and pressures that can be destructive rather than creative. There needs to be an alternative institution within the university, supported by the law school and the university, with the mission of producing knowledge about law. It should not be tied to the budget or the day-to-day mission of education of people for the profession. Therefore, I have pushed for a university-wide commitment to legal studies as well as for law schools to bring into their staffs people with training in

many disciplines. We have both at Wisconsin. We have on our faculty six people with J.D.s and Ph.D.s. That does not include people such as myself, Stewart Macaulay, Marc Galanter, Bill Whitford, and Joel Handler, who are self-taught law and society people, and have acquired some of these skills and backgrounds. We also have a large group of people, many of whom are well known: Joel Grossman, Jack Ladinsky, and Stan Kutler, for example, who are in other departments, who form part of our large interdisciplinary legal studies community. We managed in one way or another to see legal studies as a university responsibility, not exclusively that of the law school. We were able to create a critical mass of people, enough to break out of the primary educational idea and add the additional dimension of legal studies research to the whole enterprise. Our legal studies community represents people who had this additional aspiration and who could work with each other. We were able to break down some of the departmental barriers that exist in a big university like ours, where you never see a person who has his office across the mall without making a tremendous effort over time to build relations. Most recently we have created a new institution, called the Institute for Legal Studies. The institute will sponsor an interdisciplinary colloquium, which we actually have been running for years. Indeed, this institute is mostly taking over existing programs, and we are simply packaging them to continue the research-oriented activities in law at the University of Wisconsin-Madison. The institute should have an important role as an institutionalized voice for legal studies in the university. It is located in the Law School but slightly outside the center of the school's activities and linked to other departments. It will assume the roles of advocate, developer, and supporter of legal studies activities.

How did we manage to get the institute off the ground? It has a long history at Wisconsin of course. The move from where we were when I was the law school's associate dean for research to where we are now that my title changed to director of the Institute for Legal Studies is not immense, but has great symbolic importance. The person I can thank the most for this is Aric Press, the law reporter for *Newsweek* magazine who discovered the Civil Litigation Research Project I ran with a number of other people at Madison and other schools. Press wrote an article in *Newsweek* about a year ago in which he not only took our research seriously, but treated it as a major contribution to the debate over the litigation explosion. His article came to the attention of the chancellor of the Madison campus, and also spawned a series of further articles. Once *Newsweek* said that social science research on the law was news, then *Time* thought it was news, the *New York Times* thought it was news. All the news clippings counted when we went to ask the chancellor for money for the institute; they may have been as important as what was said about our research by professors in other universities or by federal judges. Our favorable coverage portrayed us as serious actors in an important policy debate. We had a body of empirical research which was widely accepted and considered to be significant by a broad spectrum of people, but especially by figures visible nationally and by the national media. This influenced the university's decision to take law and social science at Wisconsin seriously and to agree to set up the institute. My

recommendation, therefore, is get your articles written, get them published, and then get Aric Press to write about them.

Sheldon J. Plager

As a contrast I shall describe what another institution, without the law and social science tradition and history of Wisconsin, has been doing the last few years. I agree entirely that what we are after in legal research generally is not merely useful material for a legal education audience or even for legal institutions, but studies addressed to more fundamental questions of law and society.

As a law school dean, however, my goals and efforts at Indiana have been more modest in scope—to put in place a critical mass of activity within the school which would focus on law and society concerns. I sought to establish three elements that I think are available to any law school.

One element was the addition of faculty with interests and competencies in law and social science research. At the time I became dean at Indiana we had several faculty vacancies, so we had opportunity to make some appointments. The school now has seven law professors with PhDs. It is surprising how many people are in the market these days with those double degrees. I thought it would be a much more difficult job to find them. And we did not have to compromise on other values; as it turned out, in many cases the person we thought had the best credentials for law teaching, independent of the second degree, had that second degree as well.

When you look for double-degree people, you have to decide whether you are looking for law trained and experienced people with a social science degree (or with some training in social science methodology), or whether you are looking for an experienced social scientist who also happens to have gone to law school. They can be very different people. It is rare to find someone with substantial credentials in law *and* substantial credentials as a social scientist, with years of training and research. To a very large extent it is a trade-off. In our hiring we have gone both ways, although more often we have taken people whose primary interest and experience is in law and who have acquired a PhD along the way in one or another social science.

To balance the law-oriented people, we have added to the faculty a full-time social scientist, an outstanding methodologist whose background and experience and years of research have been as a social scientist. That person has served as our director of Research and Development, working closely with individual members of the faculty, those with and without social science training, in developing empirical dimensions for what would otherwise be traditional research. With a little encouragement and support, you can take a basically traditional research topic and enrich it tremendously by adding an empirical dimension. This person is responsible also for our lectures program. As a result, the program involves bringing in people from a variety of disciplines who address issues that broaden our thinking and the way we look at problems. The addition of such a full-time social scientist was the second element of which I spoke.

The third element was to introduce into the first-year J.D. curriculum a required course on the insights provided by social science disciplines into problems of law. That course is really three courses, or four, depending upon the dean's imagination and ability to staff it. Currently the students can elect either a course in legal history, or in law and economics, or in social science as applied to problems in law. All three are available options to fulfill the first-year requirement in what we call our perspectives course.

In the long run I would hope to see us building a major center with outside financing and giving support to crossing disciplinary boundaries within the university. But for a beginning, we can do many things within the law school itself simply by using our resources differently.