

Why Lawyers Need a Broad Social Education

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When German Jewish immigrant Ernst Freund was asked by University of Chicago's president William Rainey Harper to design a law school for the new university, he made a radical proposal. Freund was a lawyer and political scientist who used his broad knowledge of American society and its flaws in his own legal work and social activism. He told Harper that if lawyers studied only black-letter law, as was the prevailing custom (under the influence of Harvard), they would be incapable of being more than tools of the status quo. Instead they ought to study law in a way infused by an awareness of political science, history, economics, sociology, and political philosophy – not in order to become academics, but in order to become lawyers who could think critically about society and guide it productively. The new law school, which opened its doors in 1902, followed Freund's ideas, inaugurating a new era in legal education.

Today, the interdisciplinary curriculum is dominant in every major U. S. law school, and in many law schools in other nations. The broad conception of legal education is, however, under attack. Numerous experts seek to return law to its narrow and relatively subservient origins. The buzzword is cost; but powerful social forces seek lawyers who are pliant and not boldly independent of convention.

In this lecture I shall describe Freund's vision and the arguments with which he supported it. I'll then examine its contemporary legacy in legal practice, before turning to the recent assault on the ambitious Freund-style curriculum. This assault, largely unsuccessful so far, needs to be monitored. We live in an era of threatening populism, in which lawyers urgently need to think critically about some of the very issues that preoccupied Freund (immigration, marriage and divorce, race, the limits of the police power, the free speech of dissidents). Freund, who spoke out boldly against the conviction of socialist Eugene Debs for "sedition" and who zealously defended the innocence of Nicola Sacco and Bartolomeo Vanzetti, two Italian immigrants wrongly

convicted of murder, knew that a docile legal system could destroy democracy, He thought, as I do, that alert and broadly educated lawyers might help to preserve and strengthen it.

After describing the recent assault on interdisciplinary legal education and dealing with the arguments of the assailants, I'll then turn to Australia, saying a few things about your current trends, informed by an excellent recent article by Michael Kirby, but more opening the floor for all of you.

Freund, Law, and Social Change

Freund, one of the greatest legal minds in U. S. history, is seldom discussed today.¹ And yet in his lifetime and for several decades after his death he was acknowledged as a giant. At his memorial service in 1932, Jane Addams, the legendary social activist for the poor, spoke of his role in “projects of fundamental social research which would in the end develop cooperation between legal scholars and those most cognizant of life where it presses hardest and most unfairly upon those at the bottom (K 148). She concluded:

He was probably the finest exponent in all Chicago of the conviction that as our sense of justice widens it must be applied to new areas of human relationships or it will become stifled and corrupt. A man possessing this passion for justice, this appetite for its new applications, is a great asset to any community, but when this passion is combined, as in the case of Professor Freund, with a scholar's legal knowledge and with a mind sensitive to social growth and change, we may indeed be grateful, and consider his loss irreparable. (K 148)

Leo Wormser, a leading Chicago lawyer, spoke of Freund's role as an activist philosopher, saying: “A philosopher may peer into other worlds but must not fail to honor his own” (K 149).

And he went on to describe as Freund's central conviction the idea:

that educated citizenship has an obligation to enrich human welfare and enlarge human liberty...While many good men sit at home not knowing that there is anything to be done, nor caring to know, cultivating the feeling that politics are dirty and that government is ruled by vulgar politicians, Ernst Freund remembered that, if the government is not to be mastered by ignorance, it must be served by intelligence. He deemed no sophistry more poisonous to the state and no folly more demoralizing than the notion that education is incompatible with public service. (K 149)

¹ Much of the material in this section is grounded in the fine intellectual biography of Freund by Oskar Kraines, The World and Ideas of Ernst Freund: The Search for General Principles of Legislation and Administrative Law (University, Alabama: University of Alabama Press, 1973), which will hereafter be cited simply as K. The book includes a comprehensive bibliography of Freund's voluminous publications. Two other valuable historical sources on which I draw are Frank L. Ellsworth, Law on the Midway: The Founding of the University of Chicago Law School (Chicago: University of Chicago Press, 1977), hereafter E, and The University of Chicago Law School 1902-2002: A Century of Ideas and Action (University of Chicago Law School, 2003), hereafter UC.

Leading law and social science journals described him as a great scholar, a first-rate analytical mind (K 150-2).

Felix Frankfurter knew Freund well and viewed him as a mentor and a “pioneer” in the study of administrative law, a cherished area of his own scholarship (K 1). On a visit to Chicago in 1954 to inaugurate a lecture series in Freund’s honor, Frankfurter spoke of the “pious gratitude” with which he viewed Freund’s life and work (K 152), and summarized:

His deep insight that law draws upon the forces of society and does not exist outside them; that law is an endeavor to accommodate these forces of society, to express them, to further them, to thwart them, more or less, in some ways, I think could easily be demonstrated by a reading of his important and influential book on the Police Power, published in 1904...It is well worth recalling that he was one of those voices crying in the wilderness about things that we now take for granted as though they had fallen like manna from heaven..(K 153)

Ernst Freund was born in New York City on January 30, 1864, while his German parents were visiting the U. S. Thus he was an American citizen from birth. But he grew up in Dresden in what his biographer describes as a “middle-class Jewish environment” (K 2). (I corresponded with Freund’s daughter before her death, and she told me that he was not an observant Jew in later life, but was always proud of his Jewish identity.) He attended Gymnasium in Frankfurt and the universities of Berlin and Heidelberg, receiving a law degree from the latter. But he soon decided to take advantage of his U. S. citizenship to pursue his education further in the U. S. He practiced law in New York for eight years while also teaching at Columbia and doing a Political Science Ph.D. (He always spoke with a German accent.) In 1894 he accepted an offer to join the faculty of the department of Political Science at the new University of Chicago, which opened in 1892. Thus it was as a relatively young scholar, age thirty-eight, and as a Jew at a time when there were extremely few tenured Jews anywhere in the U. S. academy, that Freund became the chief architect of the new Law School, which opened in 1902.

Freund’s academic achievements include twenty books and several hundred articles. But numbers do not do justice to his contribution. Above all, he is known as the primary founder of administrative law. At a time when administrative agencies were just beginning to play an important role in government, he saw that there was a lot to be said about their scope, their powers and limits, and, particularly important, their relationship to individual liberty. This topic had never been taught in law schools, nor had legislation, his other favorite part of the teaching

curriculum. But his interests were as broad as the problems of the nation, so let me just give a list of some of his primary contributions:

Immigration. At a time when immigrants were flooding into the U. S., but were also meeting with great suspicion and hostility, Freund saw that law needed to step in to prevent mass deportations without due process, which had been influentially proposed. He wrote copiously on this question, both academically and in the press. And when injustice was done, as in the infamous frame-up of Italian anarchists Sacco and Vanzetti, he raised his voice loudly – despite the fact that as a Jew and quasi-immigrant in a very anti-Semitic nation, and an even more anti-Semitic legal profession, he was not out of danger himself. He opposed all systematic restriction of immigration, and was particularly vehement in opposition to deportation legislation, proposed in 1926 (K 140). With Julius Rosenwald, the legendary anti-racist, philanthropist, and civil rights activist, and with fellow law academic and federal judge Julian Mack (also the founder of the American Jewish Committee), Freund founded the Immigrants' Protective League in 1908 (K 5).

Police Power. One of Freund's most famous contributions is his massive book of that name,² 1904, eight hundred nineteen pages of very small print, an exhaustive analysis of the proper use of governmental coercion and the proper role of individual liberty.

Free Speech and Dissent. One of Freund's most famous achievements, at least in hindsight, was his argument that the First Amendment covers the speech rights of dissenters in wartime.³ He wrote apropos of the conviction and imprisonment of socialist Eugene Debs, at a time when leading members of the judiciary, including the great Holmes, had denied that the First Amendment could be so interpreted. His argument persuaded Learned Hand, and, soon, other leading figures. By now Freund's view is commonplace, the very core of what the First Amendment is understood to protect.

Illegitimacy, Divorce. Freund always sympathized with the underdog, and he saw the hardships visited upon illegitimate children by laws that were both harsh and confused. He

² Chicago: Callaghan and Co., 1904.

³ Freund, "The Debs Case and Freedom of Speech," The New Republic 19 (May 3, 1919), 13-15. I discuss this case apropos of India's crackdown on dissenting students at Jawaharlal Nehru University in my "JNU Row: Ekla cholo re," Indian Express March 8, 2016, see <http://indianexpress.com/article/opinion/columns/jnu-row-freedom-of-speech-ekla-cholo-re>. (Ekla cholo re is

argued for an end to legal disabilities for illegitimacy, and for uniform laws of marriage and divorce across the nation. He represented Illinois on the National Conference of Commissioners on Uniform State Laws and served as its president in 1920, framing model statutes relating to marriage, divorce, guardianship, illegitimacy, and child labor.

Labor Law and Workmen's Compensation. Freund wrote copiously on this topic. With Louis Brandeis, he served as an officer of the American Association for Labor Legislation. He organized an Illinois branch of the Association and was appointed by the Governor of Illinois to study and recommend legislation for workmen's compensation in 1905. (K 5)

Race. There was no prospect of doing away with Jim Crow laws in his lifetime, but Freund always energetically raised the issue of racial injustice. He was a prophet in the wilderness: in The Police Power, he wrote, "It is extremely difficult to reconcile race distinctions with the principles of our constitutional law."⁴ And in 1916 he wrote: "Race remains a sinister distinction which the law has not fully overcome" (K 143).⁵

Legislation. This area of public law, like administrative law, had not really been studied by the legal academy, and Freund took the lead here again. One salient aspect of his work was the argument that legislatures should protect personal liberties against government attacks, spelling out clearly what incursions were permissible and what not (K 141). Arguing that the common law was too vague and malleable to offer appropriate protections for liberty in difficult times, he urged the legal profession to press legislatures to do the job (141). As we'll see, his seminar on "Statutes" was an inspiration to influential politicians.

International Law and World Peace. Freund was not a pacifist, but he was a liberal internationalist, gravely disturbed by the rise of aggressive nationalism in his time. But he was a realist: he was skeptical about the prospects of the League of Nations, and, interestingly, a prescient defender of greater economic unity among nations. While he supported the Weimar Constitution, he feared that conservative Germans would not accept it (144). He did not teach International Law himself, but he insisted that it was key to the law curriculum.

the title of a song by Rabindranath Tagore in praise of political dissent; the song was a favorite with Mohandas Gandhi, who used to urge his marchers to sing it during the Great Salt March.)

⁴ Police Power, 721.

⁵ Citing Freund, "Tendencies of Legislative Policy and Modern Social Legislation."

Criminal Law and Criminology. Freund characteristically found the criminal law disorderly and out of touch with expert in sociology and criminology. He favored a written penal code over piecemeal legislation. His writings in this area had great influence on criminal law reformers (145).

Local Government. Never too busy to pay attention to his own city, Freund deplored the messiness and inefficiency of the Constitution of Illinois, and the way in which many of its provisions hampered the city of Chicago. Evidently there was a war between Springfield (the state capital) and Chicago even then! He took a leading role in drafting a new Constitution for Illinois that included home rule provisions for Chicago (K 131-2).

Law and Economics. Freund was not an economist, but he understood that the Industrial Revolution had created new challenges for law, and that economists were badly needed to help lawyers make progress. The new role of corporations, the ascendancy of the railroad barons, the new need for commercial law and bankruptcy law – all these topics, absent in other law schools, were at the center of where law needed to go (E Intro and ch. 1). Even standard subjects like torts and contracts would have to move with the times. I put this area last, despite its prominence in the curriculum Freund created, since it was not an area in which he did original work. But his keen eye foresaw its rise.

I have spent time on these achievements not simply to acquaint you with Freund's extraordinary career, although I do think it needs to be better known, but above all to give you a sense of his political context, his ideas about the roles for law in a time of rapid social change, and the large social problems that motivated his ideas about the law school curriculum. We too are living in times when governments are likely to trample on individual liberty; when proposals for mass deportations of immigrants have political traction; when marriage equality and dignity still are a struggle for many; when criminal law reform is urgently needed. So the remarkable parallel between Freund's struggles and our own – whether in Australia or in the U. S. – gives us reason to attend seriously to his curricular ideas.

Freund and the Radical Chicago Law Curriculum

The University of Chicago opened its doors in 1892, admitting, from the very start, both men and women — and in roughly equal proportions. African-Americans were also present from the start: Cora B. Jackson graduated in 1896, and a steady stream followed thereafter, including, in 1901, the young Richard Wright, soon to rank among the nation's most celebrated writers. Seven African-Americans earned Ph.D. degrees in the first fifteen years of the university, and by 1943, at least forty-five African-Americans had earned Ph.D. degrees, more than from any other university in the country.⁶ So the university that Ernst Freund joined, as one of the very rare Jews to be appointed to any tenured academic position in the U. S.,⁷ was already conspicuous for its inclusiveness, radical for its time.⁸ It was in this context that President William Rainey Harper entrusted the design of the new Law School to a young Jewish political scientist with a foreign education. (Needless to say, women and African-Americans were admitted from the start in the Law School too.⁹)

⁶ See

<https://www.lib.uchicago.edu/e/webexhibits/IntegratingTheLifeOfTheMind/WhoWereFirstAfAmOldQuestion.html>.

⁷ It might be said that Freund was the first Jewish law professor in the U. S. — in the sense that 1894, the date of his appointment in Chicago, precedes the appointment of the other contender, Julian Mack, as Professor at Northwestern Law School in 1895. But Mack was technically the first, in that he was appointed in a Law School from the beginning, whereas Freund had no law school to teach in until 1902. Both Freund and Mack were part of the original U of C Law School faculty.

It isn't easy to gather data about Jews across the academy, but I present data for Jews in law in my article "Jewish Men, Jewish Lawyers: Roth's "Eli, the Fanatic" and the Triumph of Jewish Masculinity in American Law," in Saul Levmore and Martha C. Nussbaum, eds., American Guy: Masculinity in American Law and Literature (New York: Oxford University Press, 2014). When I was in graduate school (1969-75), Jews were still rare, at least at Harvard, particularly in clubby fields such as Classics and English Literature. Two anecdotes show what the previous generation endured. When both Geoffrey Hartman (1929-2016) and E. D. Hirsch, Jr. (b. 1928) were appointed as Assistant Professors in the Yale English Department, Hirsch was told by a senior colleague that Yale would never tenure both of them, because both were Jews. And when Morton Bloomfield (1913-87), the great scholar of Renaissance literature, went on the job market he was told that one of his letters of recommendation said, "Although he is a Jew, he has none of the odious characteristics of his race." (My source for both anecdotes is personal conversation with Hirsch and Bloomfield.)

⁸ Nancy Weiss Malkiel's "Keep the Damned Women Out": The Struggle for Coeducation (Princeton: Princeton University Press, 2016), p. 4, points out a blip in the inclusiveness: when by 1902 women were outnumbering men 52/48, and 56 percent of the new inductees into the academic honor society Phi Beta Kappa were female, Harper, worried that donors would see the University as a female school and decrease their financial support, floated a plan for separate introductory classes for women and men. The scheme was never fully implemented and lapsed on Harper's death in 1906.

⁹ The first class had two women, including Sophonisba Breckenridge, a pioneer in social welfare administration, who became a primary founder, along with Freund, of the University's School of Social Service Administration (E 127). By 1915, Chicago had more women enrolled than any other law school (E 128). Harvard, by contrast, did not admit women until 1950 and graduated its first woman in 1957 (E 127). Harper addressed the topic with characteristic panache: "The Spirit which opens the doors of educational institutions to women as well as men is, one may safely say, splendidly modern and higher than the older spirit of the monastery or the convent. It is more purely American" (E 129). African-Americans were

Harper initially thought not of a law school, but of a research department of Jurisprudence. He feared that a genuine professional school would be too intellectually thin to contribute to ongoing debates about the goals of our society and the nature of social justice. And indeed, as practiced at that time at Harvard and elsewhere, legal education was both thin and narrow. It had little to say about broader social questions. The dominant method of study was the “case method,” pioneered by Harvard’s Christopher Columbus Langdell (1826-1906, and Law School Dean from 1870 to 1895), in which cases were conceived as Baconian data from which the legal expert could work up to universal first principles, eventually constructing a deductive science of law. That method deliberately abstracted from social and historical context. Langdell felt that it was necessary to do so, if law was to be respected as a science, rather than a mere experiential apprenticeship. Unacquainted with the budding social science disciplines, he clung to the natural sciences as his disciplinary model. The case method was more flexible in practice than in theory, since the hoped-for first principles never turned up; so it gradually made room for experience and historical judgment, long understood to be great strengths of the common law. As is the way of the common law, however, judgments were reached in an unsystematic and sometimes ad hoc way, and forms of study that would have permitted a deeper analysis were absent.

Freund was interested in social progress and social rationality in a very general way, but he thought that lawyers held the key to rational and responsible policy-making. In 1921 he wrote: “Our legislatures...cannot be expected to act intelligently, unless there is abroad among the legal profession a sense of what both liberty and justice demand in the matter of political legislation.”

Contacted by Harper about the future of law in the University,¹⁰ Freund argued that the University of Chicago should not content itself with creating a research department of jurisprudence. Instead, it should think of a new and richer way of training lawyers for the profession. Our country, he argued, needs lawyers who can think broadly about social issues, and what they need from their education includes both excellent technical legal instruction and also the input of social science and political philosophy. He emphasized the importance of public

welcome in principle from the start, but the first black graduate of the Law School was Earl Dickerson, who graduated in 1920. He argued before the US Supreme Court the case, Hansberry v. Lee, that invalidated racially restrictive covenants in Chicago (see UC 84).

law, which was at that time not taught in major law schools. This type of study was not just for researchers, but for practitioners themselves, so that they could serve the public good with a widely informed and critical perspective. Looking back in 1932, he summarized his advice to President Harper as follows:

Unless...a university law school explores all the resources of law, learns from history, and inspires itself by university ideals, it does not do its full duty to the legal profession; but if, inspired by these ideals, it succeeds in broadening and deepening the law-consciousness of the legal profession, and indirectly thereby of the community, that will...be the most valuable contribution that a university can make to law and to legal science. (K 3)

He also told Harper that if the new professional school had the highest standards, an emphasis on research would also naturally develop.

Harper felt that in a time of rapid social change, law had a valuable role to play. But it could play that role only if law aspired higher than it had in the other so-called law schools, really apprenticeship factories, that had existed previously in the Midwest (see E, Introduction and ch. 1). He therefore quickly agreed with Freund, with the result that the first curricular proposal for the new law school, drafted by Freund, included a good deal of constitutional law and administrative law, along with criminology, experimental psychology, comparative politics, and the history of political ethics. Interestingly, both constitutional and international law were required in the first year – although they were later moved to the second-third years as a result of the conflict to be described shortly (UC 43). Freund himself continued to teach in both the Political Science Department and the Law School. (He helped form the American Political Science Association and was elected its president in 1916.) His courses on constitutional law, administrative law, and legislation were pillars of the curriculum. Concerning legislation, this comment was made in 2003 by one of Chicago's most eminent legislators, Leon Despres (1908-2009), long-time liberal alderman representing Hyde Park, and a major force in racial integration:

Of all the members of the faculty seventy-five years ago, Ernst Freund made the deepest impression on me. He gave a course on Statutes to a small, highly select group of students...In his teaching, Ernst Freund was always in touch with a reality that often escaped us elsewhere. In our first class session he announced the textbook for the course – the current Daily News Almanac cost 50 c. It contained the recent statute on radio broadcasting, which we studied all quarter. Gracious toward students, debonair, learned, and witty, Ernst Freund taught through conversation with us. (UC 51)

¹⁰ Ellsworth suggests that Harper hired Freund in the first place with the idea of entrusting the design of the law school to him (E ch. 1).

There were hiccups along the way. As his first Dean, Harper hired Joseph Henry Beale, Jr., a scholar trained at Harvard, and who continued to teach there, simply visiting Chicago for half of the new school's first two years (K 84). Harper was very keen to have the imprimatur of Harvard on his new Law School. Freund thought highly of Beale as a criminal law scholar and suggested him enthusiastically for the faculty (E 39, 55), but it was Harper's idea that Beale would be "loaned" to Chicago as Dean to help set up the school (E 56-7).

A conflict soon emerged. The Harvard Corporation voted Beale have a two-year leave to set up Chicago only "provided that the School to be established at Chicago is to have ideals and methods similar to those of the Harvard Law School" (E 61). When Beale arrived and understood Freund's ideas, he did not like them. He insisted that if he were to accept the offer he would have to insist on the strict replication of the Harvard/Langdell curriculum. In particular, every single faculty member hired would have to agree to teach by the "case method," and no non-lawyers would be allowed to teach. (Freund was actually a lawyer as well as a political scientist, albeit with a German law degree; but another chosen faculty member, Henry Pratt Judson, a legal historian and future President of the University of Chicago, was not.) Beale did not like Freund or his idea of linking law to the humanities and social sciences, which he referred to as "heretical" (E 74), apparently alluding with particular dislike to Freund's sympathy with German methods of legal education. It's certainly possible that his animosity to Freund – which persisted long after they arrived at a curricular compromise (E 76), had something to do with anti-Semitism, then the norm across the U. S. and especially on the East Coast. It must have surprised the Harvard man that the very first faculty of the Law School included two Jews (Freund and Mack). So the Harvard man initially sought to sideline Freund (and also Mack), and came to Chicago with a guarantee that he, not Freund, would run the show.

In the end, the conflict evaporated with surprising rapidity. Beale told Freund that the conditions imposed on him were more Harvard's ideas than his own (E 74), and Freund apparently agreed amicably to transfer administrative law, constitutional law, and international law into the second-third years. Nobody seems to have paid any attention to the Harvard Corporation's requirement that all faculty teach by the case method; nor did Beale try to stop non-lawyers such as Judson from teaching. The two men agreed in requiring the highest intellectual

standards in the new school, and this coincided with what Harper had demanded from the beginning (E 76-7). At the end of the day, when the new school opened in 1902, its curriculum was basically the plan that Freund had designed, and Freund was firmly ensconced as a leading faculty member (see K 86). As Kraines summarizes, “Freund looked to the law school to train lawyers and legislators to study and understand history, sociology, and politics and to help develop principles of administrative law and legislation based on fairness and tolerance as well as on efficiency and effectiveness” (86),

At the first convocation, President Harper defended Freund’s ideas in Freund’s characteristic language, saying that legal training is incomplete unless it includes related studies in the humanities and the social sciences:

A University School of Law is far more than a training institute for admission to the bar. It implies a scientific knowledge of law and of legal and juristic methods. But these...cannot be understood in their entirety without a clear comprehension of the historic forces of which [laws] are the product, and of the social environment with which they are in living contact. A scientific study of law involves the related science of history, economics, philosophy – the whole field of man as a social being.”¹¹

In his own courses, Freund continually emphasized that sound legislation must be based on social science research (85). And of course he continued to teach political science courses. How did he envisage the relationship between the two disciplines? Freund seems to have wrestled with this question throughout his life, not least in a 1932 speech entitled “The Law School and the University.” Lawyers don’t need to know everything that expert political scientists and economists know, but they also should not be too superficial. In the end, he concluded, the two sorts of experts will just have to work things out. Law is a “working compromise.” “When jurist and social scientist meet on boundary-line problems, as nowadays they often fortunately do, each will soon learn where the other has superior equipment, and sensible men will avoid quarrels over jurisdiction” (K 85).

There are two things I wish I knew more about. The first is how much cross-listing of courses and how much mingling of students went on between the Law School and other departments of the university. Did Freund teach two completely separate sets of courses, or did

¹¹ E 93, see also <http://www.law.uchicago.edu/school/history>,

he admit political science graduate students into some of his law courses, and vice versa? What did he think about the advisability of this mingling?

Second, how did he deal with political differences in his teaching? Freund put his cards on the table politically speaking. He was publicly known for a set of left-liberal positions. How did he deal with the presence of ethical and political dissent in the classroom? Described as modest and soft-spoken (see e.g. K 160-1), he was nonetheless firm in his views. Did students feel free to disagree? Leon Despres suggests an atmosphere of open exchange (see above), but his views were to Freund's left, and it would be useful to know how views on the right, and debate between left and right, were treated.

The Radical Idea Today

Let's now fast-forward to the present time. Freund's notion of how to run a law school is the dominant one in all major U. S. law schools today. Freund's ideas spread gradually, attracting imitators around the country. His model explains why philosophers, psychologists, economists, political scientists, and other scholars from "outside" fields, or with dual degrees, now teach in law schools and why many law schools encourage law students to take courses outside the law school. -- though ours much more successfully than others because of our low quotient of bureaucracy and our uniform calendar.

All major U. S. law schools have, or have had, at least a few faculty who don't even have a law degree (me for example), and an increasing proportion of the faculties of all of these schools have advanced training in another discipline. Just to use our own law school as an example: we have thirty-nine full voting faculty, among whom are three Ph.D.'s in Political Science, two in Philosophy, three in History, one in Anthropology, and seven in Economics, for a total of sixteen, nearly half. Besides me there is one other (Dhammika Dharmapala, an economist Ph.D. tax expert) who lacks a law degree. We are probably at the high end for Ph.D.'s, but not totally atypical. At this point I don't see a trend toward even more Ph.D.'s: our last two tenure cases (both positive) included one scholar with a Ph.D. and one without, and our current junior faculty, interestingly, includes only one scholar with a Ph.D. and four without. In general it seems safe to

say that for legal historians and legal philosophers a Ph.D. is de rigueur, but plenty of people work in a way informed by economics and political science without having an advanced degree.

Some of the interdisciplinary faculty have fully shared appointments. I am an example, and we have in the past had others. Most of our economics Ph.D.s, by contrast, typically are not jointly appointed in our Economics Department, which frowns on joint appointments. Numerous other members of our faculty have Associate appointments in the related discipline, which allows cross-listing and participation on dissertation committees, but does not impose duties, such as regular attendance at department meetings or participation on department committees. (Our university strongly encourages such appointments: In addition to my full voting membership in Philosophy, I have Associate appointments in Political Science, Classics, and Divinity.) And since Ph.D. candidates in our university can have one outside member on their committees, and that person can be anyone at all, including someone without a Ph.D., quite a few of our law faculty take part in dissertation committees, all over the university.

In most universities, the person with the fully dual appointment must teach, basically, two sets of classes. That is what I would have had to do had I accepted a recent offer from Harvard -- although, with a lot of red tape, courses could sometimes be cross-listed. At Yale things were worse, since the large differences in the calendar make cross-listing impossible. Cross-field interdisciplinarity thrives when a university has all units on the same physical campus and the same calendar; when it has a minimum of bureaucracy about course offerings; and when both faculty and students are used to, and value, interdisciplinarity. Some law schools where the ethos is right are doomed by separate campuses (Georgetown, Northwestern); in others, calendar differences are a huge obstacle (Yale, and Harvard to a lesser extent); in still others, sheer size prevents a cooperative ethos from taking hold (Harvard, to some extent Columbia); in some, promising in all the other ways, there is bureaucratic resistance to joint appointments (Cornell). I have surveyed the options and concluded that there is no place else where the Freund idea really thrives, not fully, though things could easily be fixed.

The full joint appointment is not for everyone. I love directing dissertations, and I don't mind sitting on philosophy hiring and promotion committees. But since I go to all law school meetings, discussion lunches, and workshops (I love them, and, after all, Law pays 100 percent

of my salary) I do skip some of the regular weekly meetings of the Philosophy Department, and I never serve as department Chair or graduate advisor. Some people end up totally neglecting one or the other: we've had some bad experiences with Law School joint appointments in this regard.

In most U. S. law schools, though, there is a Freund ethos at least within the law school itself. This ethos is fostered greatly by our liberal arts system of undergraduate education. Law in the U. S. has never been a first degree, and has always required a B. A. or B. S. as a prerequisite. (The degree itself used to be called LL.B. in some places, J. D. in others, but to clarify the fact that the LL.B. is actually a postgraduate degree, schools retroactively changed the degrees of their graduates. Thus my father became a J. D. at the age of around fifty-five.) What this means is that we can rely on the fact that our students are reasonably mature intellectually, and most have studied at least some history, philosophy, and political science. A large number have studied some economics. This system doesn't mean that there is any one thing all our students know, but it does mean that in any class there is a lot of expertise that one can elicit. And a more advanced course offering in one interdisciplinary field will surely have a constituency.

Now I need to say something about the particular role of philosophy, my own discipline. The role of philosophy in our law school, from the beginning, has not been limited to analytic jurisprudence, although that is important and is ably taught. Freund already favored a broader study of normative theories of political ethics and social justice. So in our law school Brian Leiter focuses on analytic jurisprudence, and I on normative theories of social justice.

Here's how I handle the joint appointment issue about which I'd like to ask Ernst Freund. My main aim is to have no class that is just for one group or just for the other, but different mixtures appropriate to different levels and backgrounds. The system makes it easy for me: every single class I teach automatically gets numbers under Law, Philosophy, Political Science, and Religious Ethics, also Classics if the subject matter is right. Then I go to work crafting the prerequisites for each class. The shared understanding is that every year I teach one graduate-level philosophy seminar. But a law student who has an undergraduate philosophy major can join such a class, and such students often excel. I then teach every year one large lecture course intended primarily for law students, in the sense that no law student will be turned away. But such

courses typically include about 1/3 from various graduate programs, including Philosophy, Public Policy, Political Science, Anthropology, and English. Examples of such courses are “Feminist Philosophy,” “Emotions, Reason, and Law,” and “Religion and the State.” Every second year I teach the Law-Philosophy Workshop with a postdoc; this includes students from Law, Philosophy, Political Science, and various M. A. programs, and they interact with us and with a series of visiting speakers. In the years when I don’t do that, I teach a seminar whose primary home is the Law School, but which admits other Ph.D. and some M. A. students. Examples are “Global Inequality,” co-taught by me and legal economist David Weisbach, and “Public Morality and Legal Conservatism,” co-taught by me and constitutional law scholar Will Baude. Finally, every second year I teach a Greek or Latin course, because it’s important to me to keep my language honed, and that part of my own background is precious to me. Usually it is Latin, given my great interest in Roman political thought: Cicero, Seneca, etc. My most recent such course was “Roman Philosophers on the Fear of Death,” mixing Lucretius’ poetry with the prose of other philosophers. Students translate aloud each time, and they have to have at least two years of Latin to enroll. But that’s the only requirement: if any law student knows that much Latin, he or she can take it as a full credit Law course. Usually this course is a mix of undergraduates and graduates.

Many of my colleagues have similarly mixed classes, though perhaps not as systematically so. All of our law students, even before thinking about electives, can count for full law credit any class taught by any member of our Law School faculty, even if that class is on Cicero, or John Rawls, or Nietzsche. When we add to this the electives they can choose from any part of the university, it is a wonderful set of opportunities. Law students can, and some do, study Indian law with the great scholar of Hinduism, Wendy Doniger; investigate Buddhist ideas of the self with Steve Collins; consider under what conditions monkeys abuse their offspring, under the guidance of primatologist Dario Maestripieri; delve into the neuroscience of empathy under the tutelage of neuropsychologist Jean Decety; join Nobel Laureate James Heckman’s projects involving intervention in early childhood education; study Roman drama with the daring classicist Shadi Bartsch; or investigate many different areas of world history with the resources of our rich history department.

I believe that this flexible approach to cross-listing and Freund's boundary question is the right one for our own institution, given that anyone who comes here has an excellent liberal arts background. Our law students like being challenged by the best Ph.D. students from Philosophy and Political Science, and the feeling is mutual. Recently I've helped set up a student prize for work toward a publishable interdisciplinary paper in law and philosophy, thus deepening our connections.

As to the other question I've mentally posed to Ernst Freund: when experts are few in number in a given area, I think it is extremely important that their political opinions don't silence students. Like Freund, I'm an outspoken left liberal, and I worry that people may avoid my classes for fear of disagreeing with me, or may feel silenced once there. The solution I've found is to co-teach with a faculty member who has a very different perspective. Sometimes the difference is disciplinary, as in my co-teaching with economist David Weisbach. And sometimes it is political, as with William Baude, a stellar young conservative. By teaching together, we got students from both viewpoints into the same classroom, talking about such hot-button issues as sex laws, marriage laws, and drug laws. The truth was that Will and I disagree little in these areas, since he is a member of the younger generation where gay rights are concerned, and a libertarian more than a conservative; indeed I think I'm to his right on drug laws, since I do not favor the complete legalization of heroin and cocaine. But what counted was that we attracted to the class some very conservative religious students, and then they really spoke frankly with students from perspectives more like my own. We had to give a lot of thought to how we would both create an atmosphere of low-key warmth and civility, encouraging dialogue by showing respect for everyone. Sometimes I suspect that Freund, who greatly admired Jeremy Bentham, thought that there was one correct answer to every question, and would have been impatient with open-ended debate. I certainly have my arguments and conclusions, but humility should be the watchword of us heirs of Socrates, and in any case, it's the only good posture for teaching, in a nation riven by political extremism.

The Idea Under Assault: The Rise and Fall of the Two-Year J. D.

Recently the Freund idea has come under attack. What's in the air is the idea that we cannot afford the old three-year curriculum, with its invitations to elective courses and hence to interdisciplinarity. We must gradually replace it with a stripped-down curriculum, aimed directly at legal practice. Some have proposed a two-year J. D., some a third year devoted to externships and the beginnings of legal practice.

Given the general courses that a legal education must include to satisfy bar requirements, dropping the third year offers no time for interdisciplinary electives, but the new "wisdom" is that this would be no loss. In an op ed in the New York Times, Daniel Rodriguez, Dean of Northwestern Law School (now renamed Pritzker School of Law as the result of a substantial gift from that family, owners of Hyatt Hotels) and Samuel Estreicher, Professor of Law at NYU, call that year "the third year, those famous semesters in which, as the saying goes, law schools 'bore you to death'."¹² (They don't offer a source for this "saying," thus conjuring support out of thin air.) Proponents of the stripped-down curriculum, quoted in an earlier New York Times article, singled out "Nietzsche and the Law" as a particularly boring and useless exercise – apparently without having read Nietzsche, whose ideas of ressentiment and the creation of alternative values by the dispossessed are extremely germane to our current political crisis. (In fact neither I nor my colleague Brian Leiter, a Nietzsche scholar, knows of any such course in any law school, so it was probably made up as a putative example of something useless. How short-sighted that very example shows the stripping-down to be.

The attack began to gather steam. The New York Times kept running stories taking the side of the two-year J. D.,¹³ and frankly acknowledged that they were not interested in running arguments on the other side.¹⁴ Even President Obama spoke out in favor of the two-year J. D.¹⁵

¹² <http://www.nytimes.com/2013/01/18/opinion/practicing-law-should-not-mean-living-in-bankruptcy.html>. See also <http://www.businessweek.com/articles/2013-04-01/the-case-against-law-school>, <https://www.nytimes.com/2014/02/12/nyregion/top-judge-allows-for-early-bar-exam-in-return-for-pro-bono-work.html>.

¹³ See the previous note, and also, their earliest sally, <http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html>.

¹⁴ Personal exchanges with Times editors, apropos of a piece that practicing lawyer Charles B. Wolf of Vedder, Price, and I eventually published on Bloomberg View, after the Times had sat on it for weeks. See our "Two-Year Law School? Don't Rush the Paper Chase," <https://bloomberg.com/view/articles/2013-06-16/two-year-degrees-would-impoverish-legal-education>.

¹⁵ <https://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three>.

His intervention was hailed by Estreicher, who said, romanticizing the fight into a heroic crusade, “We academics toil in the wilderness. It is great to have the president join the cause.”¹⁶

Numerous institutions began offering what was called “three plus three,” a system under which one could get a B. A. and a law degree in six rather than seven years. A smaller number of institutions, including Northwestern, introduced a two-year track and many considered going over to that system entirely.¹⁷ Legal pundit David Lat sided firmly with the attackers.¹⁸ And a Bar Association task force recommended two years of class work plus a third year of “skill-based experience.”¹⁹

The leading factor cited was cost. The idea was that undergraduates today graduate with more debt than in the past; meanwhile, law jobs are less certain than they were formerly on account of the economic downturn that began in 2008. The risk of double debt is a real problem.²⁰ Part of this is not the fault of law schools: the costs of undergraduate tuition, even at public universities, have risen rapidly, and financial aid has not always kept pace. But part of the problem seems to me a lack of foresight on the part of the law schools themselves.

Undergraduate institutions, private and public, have been offering massive scholarship aid for ages. High-quality institutions typically attain what is called “need-blind admissions,” meaning that all admitted students are supported up to the level of need. Law schools have never bothered to raise funds for this purpose. Students take out loans. Schools sometimes offered loan forgiveness for students choosing a career in public service, but never outright scholarships. Now that is changing, with all law schools offering a lot of financial aid; but it will take time to make up the lag so that everyone gets enough.

¹⁶ *Ibid.*

¹⁷ The Northwestern “two years” included two summers, and was thus not as different as it seems. The required summer study precluded summer jobs and thus very likely damaged students’ employment prospects.

¹⁸

https://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_webonly_webonly08091.html.

¹⁹ See <https://www.nytimes.com/2014/08/03/education/edlife/evaluating-that-third-boring-year.html>.

²⁰ This issue was raised at the very founding of the UC Law School, when Julian Mack made a personal donation to create a student loan fund (UC 19). There were discussions of a “three plus three” plan then too, but the decision was to admit only students who had covered all the requirements of the B. A. degree, however rapidly (E 118-24).

The issue of cost is huge, and I do not mean to brush it aside. But means follow ends, and we must first get clear about whether, and why, our traditional goals are valuable – as the experts from NYU and Northwestern say they are not.

I believe we should answer today's attackers in just the way Freund and Harper answered their critics. Our societies are not perfect, to put it mildly. Nor are its laws perfect. Lawyers should not just be instruments of the status quo, obeying its norms without reflection. (That's basically what I think the two-year curriculum too often produces.) They should be independent and critical participants, who work to shape a future that is better than the past. Far more than many nations, the U. S. has in fact realized broad social objectives through lawyering. Both the Civil Rights movement and the feminist movement offer stirring examples of how lawyers who think outside the box can do something major that benefits us all. When I work with the women's movement in other countries, it is striking that there is not always the same confidence in lawyers and law. Today lawyers working with immigrants have been a major social force, challenging President Trump's executive order, and meanwhile working with individuals and families facing deportation. We've done something fine, and we've done it because of interdisciplinarity, and the inclusion, I'd say, of philosophy within that interdisciplinarity. But nothing is really "done," it is all vulnerable efforts in progress, easily set back. So I believe we need to fight to preserve the interdisciplinary legal education that the University of Chicago basically created, and fight to keep it in a form in which the philosophical study of justice, equality, liberty, race, gender, and much more will play a central role.

I harbor an unfriendly suspicion that big corporate money plays a part in the thinking of those experts who believe that they can get rid of those courses that teach critical social thought. How lucky I feel we are at the University of Chicago to have a Dean who is an interdisciplinary scholar of race and immigration, with a Ph.D. in economics, whose rigorous work shows that racial diversity on judicial panels improves the quality of deliberation. Naturally we all want to raise money to support what we do. But I can have full confidence that fund-raising won't be done in a way that shortchanges key educational values.

It was in 2013 that practicing lawyer Charles Wolf and I published our defense of the Freund curriculum against its assailants. In the mean time, I am glad to see, the two-year J. D.

has slunk away. It survives at only a few schools of low prestige. Interestingly, the late Justice Scalia quickly joined “our side”, in a commencement address at William and Mary Law School in 2014. Discussing the Bar Association report, he said, as he so often said on the Court: “I vigorously dissent!” “It seems to me that the law-school-in-two-years proposal rests on the premise that law school is, or ought to be, a trade school. It is not that. It is a school preparing men and women not for a trade but for a profession – the profession of law.”²¹ Although Justice Scalia got his law degree from Harvard, his deeper affiliation was always with the University of Chicago, where he taught for five years.

By now, even the New York Times acknowledges that the two-year law degree has failed to catch on.²² Northwestern canceled its program in 2015. Dean Rodriguez, speaking of the defunct program as a “holy grail” and as “like ‘Field of Dreams’” -- an odd sort of hype for a cheap and diminished version of law school! -- admits that it has failed to attract enough applicants. Why? The Times story blames costs – an interesting irony, given that the whole idea was supposed to be to lessen costs. Rodriguez alludes obscurely to “economic and regulatory forces,” and then says, falsely, that the program (which opened in 2010 and was heavily hyped in 2013) predated the economic downturn – which, of course, began in 2008! The Times story does not mention the economic recovery. Nor, more important, does it point out that mature young people are capable of evaluating for themselves the richness or poverty of the education that is on offer –and so are firms seeking to hire well-educated lawyers. The two-year degree survives at some schools of low prestige, such as the University of Kansas, the University of Dayton, and Southwestern Law School in Los Angeles. Other law schools are making the third year more applied and pre-professional, but even those are not the top schools, and some of them should simply close rather than peddling an inferior product.

We still have to fight an uphill battle, in an era where the humanities and social sciences themselves are increasingly under attack, and the very idea of liberal education is in jeopardy. But we can do so by pointing with pride to the work of our graduates as engaged participants in our diverse and troubled society.

²¹ See above n. 18,

²² <https://www.nytimes.com/2015/12/26/business/dealbook/the-2-year-law-education-fails-to-take-off.html>

Australia and the U. S.: Emerging Trends

How does this argument speak to trends in Australia? Following Michael Kirby's helpful guidance,²³ I want to mention two trends, both promising, but both raising problems of different sorts. The first trend is that toward parallel tracks of LL.B. degree and J. D. degrees. In some outstanding law schools, including ANU and UNSW, students may still enter as undergraduates to pursue the four-year LL.B., and thereafter, having satisfied the practice requirement, may be admitted to the bar; or, having done a B. A. in some other subject, they may enter to pursue a three-year J. D. degree, thereafter, similarly, gaining admission to the bar. Justice Kirby welcomes this development, as do I. It is a step in the direction of moving Australia into the group of countries (the U. S. and S. Korea, mainly) that require a solid liberal arts education prior to law school, and that can only enrich the interdisciplinary offerings available in legal education itself.

I worry, like Justice Kirby, about the issue of cost: in a system not geared to supporting students through scholarship aid, one must beware lest the richer track becomes a track for the rich. So financial aid should be a top priority.

I have educational worries as well. The prior B. A. can be in anything at all, and Australian universities don't really operate on a liberal arts model. So the person who comes with a B. A. in political science has a background truly pertinent to enriching her J. D. experience, whereas the physics or computer science B. A. does not. And I also worry about the fact that the two streams, so potentially different in their educational richness, are flowing ultimately into a single channel. It seems like a good idea to think how much interdisciplinary study legal education as a whole should include (and presuppose before it starts), and how these goals can be accomplished in both LL.B. and J. D. streams.

The other trend Justice Kirby discusses is online legal education. He considers the example of Central Queensland University. I agree with Justice Kirby that such programs have great potential to enhance "outreach to regional and rural communities, offshore needs and

²³ <https://www.michaelkirby.com.au/images/stories/speeches/2000s/2011/2548-ARTICLE-AUST-BAR-REVIEW-ONLINE-LEGAL-EDUCATION.pdf>.

opportunities for ethnic communities and other groups who have not so far been attracted to study law.” My worry is that, given that the CQU course is shorter and is “potentially confined to core subjects,” it will have the same educational deficits as the two-year curriculum in the U. S. – and more, since not preceded by a B. A. degree. It seems to me a good thing to attract disadvantaged groups to the study of law – but not to shortchange them in ingredients highly and even especially pertinent to their own role in law. Disadvantaged groups even more than others need the tools to think broadly and critically about the way law functions in society. Again: fund-raising and financial aid would be my preferred solution, not abridgment.

Law is not simply a trade. It is a noble profession with a large role in guiding society. A broad interdisciplinary education is crucial if lawyers are to play their role with independence, critical reflection, and a sense of what justice demands.