TAKING A CHANCE ON LAW, UCLA STYLE

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According to Tolstoy's famous opening of *Anna Karenina*, all happy families resemble one another. I doubt if that is true of happy families, but to a large extent it is true of American law schools, happy or otherwise. No matter where you go to law school, you will study Property, Contracts, Torts, Crimes, Constitutional Law, and a variety of other subjects, probably believing that your task is to figure out the rules in each subject and memorize them as best you can. You will be subjected to a barrage of questions intended to help you with your real task, figuring out how to solve problems and accomplish goals within the framework of clear and unclear rules. You will hone your skills at practical reason and, nowadays, be subjected to large doses of what is called legal theory, much of it claptrap. If all goes well, when you finish you will be prepared to pass the bar examination and, although

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not quite prepared to practice law well, you will be prepared to be prepared for practice. Meanwhile, your professors will devote a portion of their ingenuity to figuring out ways to reduce their teaching loads and spend as much of their time as possible writing books and law review articles that once in a while will contain something useful.

Although the big picture is much the same at all law schools, an omniscient observer would find that each law school has its own particular personality, helping to shape the experience of its students and, especially, its faculty members. In this essay, I'd like to emphasize three features I believe contribute to UCLA's particular quality. A confirmed Tolstoian might jump to the conclusion that if these qualities create differences from other schools, they must tend toward making our school an unhappy one. But whatever validity Tolstoy's claim about happy and unhappy families may have, experience at UCLA suggests (I am happy to say) that the claim cannot be extrapolated to law schools.

The first feature is the mutual supportiveness that exists in the law school. This is the one my colleagues and I like most to talk about, and the possibility has to be allowed that we exaggerate its magnitude, both absolutely and relative to other law schools. But most of my colleagues and others who have visited the law school in one capacity or another have believed it is real. Perhaps the most important manifestation of supportiveness is also, fortunately, the least frequent. That is, when a faculty member finds himself in the middle of a controversy or in some comparable difficulty, his colleagues are likely to rally 'round, and quickly. More routinely, faculty members are generous with their time in reading and commenting on drafts of articles and in discussing problems that occasionally arise in teaching.

One of the things university faculty members do is present papers, often to their own faculties but also by invitation at other schools. This is also done by candidates for faculty positions. My experience at law schools, both when I was a job candidate in 1979 and since then, is that law school faculties tend to fall into two categories. Some are very aggressive when someone is presenting a paper, peppering him or her with questions, often rather hostile and of a "gotcha" nature. Other faculties tend to be quite passive. They ask few questions and the questions they ask tend to be general and even bland. Usually, the UCLA law faculty does not fall into either of

these categories. The questions are just as frequent and possibly even more probing than the first category, but they are not hostile. Rather, they are designed to help the presenter improve the paper and to get at the truth. I don't think I've ever been more proud to be a member of our faculty as at some of these sessions.

The supportive environment of the law school in particular and UCLA in general makes it a very good place to work. I do not mean to suggest that it is a utopia. For example, early in my UCLA career I learned that when the towel dispenser breaks in the bathroom on your corridor, you are in for a six-month war. But drying your hands on your trousers is worth it for colleagues and an administration (well, sometimes an administration) that will both challenge you and stand behind you.

The remaining two features can be put under one heading, "Taking a Chance,"[1] but they are distinct and I will discuss them separately. The first refers to chances the law school takes, especially in faculty hiring. The second refers to encouragement or, at least, toleration of chances taken by faculty members.

I believe UCLA stands out among leading law schools for its adventurous spirit in hiring faculty members whose records depart from the standard. I will give four examples. The first is Steve Shiffrin, who joined the faculty a couple of years before I did and was an expert on the First Amendment. Shiffrin had spent ten years teaching and coaching the debate team at CSU Northridge and during that period went to law school at night at Loyola. Things have changed, somewhat, but in those days a candidate for a leading law school was supposed to have gone to one of the half dozen or so top schools. Beyond the leading twenty or so was pretty much unheard of. But UCLA took a chance on Shiffrin, who was one of the most brilliant members of our faculty until, after ten years, family considerations caused him to move to Cornell.

I myself am the second example. My educational background more or less fit the standard mold, but equally important, especially in those days, was some combination of a prestigious federal court clerkship, employment in elite federal government offices such as the Justice Department Office of

[1] The learned reader has probably noticed that my title for this essay is taken from the song, "Taking a Chance on Love," by Vernon Duke with lyrics by John La Touche and Ted Fetter, introduced in the Broadway musical (later a movie) *Cabin in the Sky*.

Legal Counsel, and employment in a large corporate law firm. Typically, a candidate would have been out of law school three to five years. I had been out of law school twelve years, which I spent traveling around the world (one year), working for California Rural Legal Assistance, a federally-funded legal services agency (three years), working for Jerry Brown when he was California secretary of state (four years), and serving as the first chairman of the California Fair Political Practices Commission (four years). So far as most leading law schools were concerned, I might as well have spent those years in a Bowery flophouse. But UCLA took a chance. Okay, the thing about taking a chance is that it doesn't always work out so well!

The third example is Gary Blasi. Blasi went to college at the University of Oklahoma and never went to law school at all. Rather, he qualified to take the California bar exam the old-fashioned way, by apprenticeship. He took and passed the exam in 1976 and our law school took a chance on him in 1991. He has had a distinguished career and helped to found the David J. Epstein Program in Public Interest Law and Policy, as well as contributing to the law school in countless other ways.

The final example is Sam Bray, whose record, while mostly as blue-chip as you could ask for, included an undergraduate degree from Bob Jones University. About ten years ago I spent three weeks in a seminar with a woman who was an expert in eighteenth-century English literature at Bob Jones and I learned (to my surprise, I am embarrassed to say) that there was some first-rate intellectual activity going on in that place. Nevertheless, I am pretty sure that Bray's *curriculum vitae* caused some lips to curl at other law schools. UCLA took a chance, and once again hit the jackpot. Bray, whose interests are wide-ranging but has concentrated particularly on remedies, is off to a great start in his career and was awarded tenure not too long ago. Among many other things, he is the author of what might be the only published law review article on the hendiadys — and it is a gem.[2]

UCLA — and this is a trait of the campus generally, not simply the law school — encourages or tolerates chance-taking by faculty members. One example is the latitude faculty members have in extending their teaching and research in unconventional directions. A typical example from early

[2] Samuel L. Bray, "'Necessary AND Proper' and 'Cruel AND Unusual': Hendiadys in the Constitution," 102 *Virginia Law Review* 687 (2016).

in my own career at UCLA is that in my first year, I taught an existing course entitled Legislation. By my second year, I had decided the course I wanted to teach was on election law, so a new course was created with the title "Law and the Political Process." At the same time, I devoted my research to election law and began, for starters, with a couple of articles on the California initiative process. At the time, no other law professor in the United States was specializing in election law and, even after Proposition 13, the initiative was about as obscure a subject in academe as you could find. Neither UCLA nor I could know that for a wide variety of reasons, election law would eventually become an important subject both in the legal–political world and in law school curricula. Around the same time, faculty members were extending the bounds of courses and research to "Law and —— ," with the blank filled by a bewildering variety of subjects, such as economics, psychology, history, philosophy, political science, literature, and many, many others.

But although this latitude in teaching and research is real and important, it is not in itself distinctive to UCLA in general or the law school in particular. Most law schools and universities, especially the better ones with reasonably ample resources, are similarly permissive. Furthermore, the latitude can be abused. In a history department, a faculty member offers a seminar entitled, "Working Conditions for Women in the Textile Industry in Lynn, Massachusetts, from 1820 to 1840." Can you guess what that faculty member's current research project is on? For better and for worse, flexibility in teaching and research is inevitable in a higher educational system in which the academic departments reflect disciplinary divisions established well over a century ago.

What, then, is distinctive about UCLA? I would say it is a relatively high degree of pluralism. The attentive reader probably figured, when I referred in my opening paragraph to a high percentage of legal theory as claptrap, that whatever else may be true of the author of this essay, he is — for better or for worse depending on your taste — pretty cynical. Not so fast, for here is the point: many if not all of my colleagues would probably agree that much legal theory is claptrap. The question on which we would disagree is, which parts? One of the subjects I teach is statutory interpretation. I believe some of the theoretical debates in statutory interpretation — for example, textualism vs. intentionalism vs. purposivism — can be

quite illuminating and of unusual practical importance, given that some of the leading theorists are or have been prominent judges. No doubt, many of my colleagues regard these theoretical disputes as nonsense or, to stick with the technical term I've been using, claptrap — terms I would readily apply to some of their pet legal theories.

Such differences do not prevent us from being happy colleagues. At UCLA — and I repeat that this is not at all limited to the law school — there is a wide and deep norm of laissez-faire. I may think what you are doing is nonsense, but I won't try to interfere, and I don't expect you to try to interfere with my preferred brand of nonsense. In the law school, UCLA's strong observance of pluralism has both reinforced and been nourished by the supportiveness and the willingness to take a chance in hiring that I have described. It also gives a particular quality to the latitude in teaching and research that, as I have mentioned, is not in itself unique to UCLA.

The laissez-faire norm is widespread at UCLA and I have seen much evidence of it. I will conclude with one example, again drawn from my own experience. Eleven or twelve years ago a friend interested in higher education reform suggested I try to start a center for the study of the foundations of free institutions similar to centers being created at a number of prestigious colleges and universities. I thought such centers could serve a good purpose, but I had a broader interest. During my law school career I had sadly observed what seemed to me a steady marginalization at UCLA and other universities of study of the history and achievements of Western civilization, a subject that had once been regarded as the core of a liberal education. My friend's suggestion was the catalyst for me to work with such allies as I could recruit to create what we eventually called the Center for the Liberal Arts and Free Institutions, or CLAFI.

The reasons for the marginalization of Western civilization were many and complex. Some were bureaucratic; some reflected a broad tendency in universities away from the humanities in favor of supposedly more economically relevant areas such as STEM; some reflected changing fashions; and some — oddly in my opinion — were ideological. These and other seeming barriers were what made me think success in creating CLAFI was a long shot.

Developing a group of supportive faculty members took time but was not difficult. What very pleasantly surprised me was the positive response

of the administration. I spoke to a number of UCLA officials, who ranged from cordial to enthusiastic. When a tentative decision was made to house the new center in the Humanities Division, the then-dean of Humanities, Tim Stowell, wisely decided to take on getting the opinions of a number of faculty members within the division. I had a very good meeting with him in which he made a comment that I believe was crucial to his agreement and very relevant to this essay. Many of the faculty members he spoke to had no interest in what CLAFI proposed to do and, in some cases, may even have been somewhat hostile. But they nevertheless recognized that CLAFI would serve a number of people at UCLA who were interested in its goals, and for that reason they supported (or at least did not oppose) its creation. That is laissez-faire in action. CLAFI has never encountered the resistance and controversy that has befallen somewhat comparable centers at other institutions.

When CLAFI was approved, I wanted to be able to devote most of my time to it. I therefore retired from the law school, though with emeritus status I have been able to continue teaching there each year. The law school administration was cooperative in my switch and where appropriate has continued to support me in my new venture.

Had I been inclined to do so, I could have filled an essay of at least this length with complaints and criticisms of UCLA and the law school. But in the ways that matter most, UCLA is a splendid place to work and, more importantly, facilitates the faculty's teaching and research that, at their best, serve the people of California.

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