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THE UC-IRVINE EXPERIMENT:
WILL IT BE EFFECTIVE AT TEACHING CONTRACT LAW?

by

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ABSTRACT

The new law school at the University of California, Irvine is attempting to implement an innovative vision of top-tier legal education that focuses upon preparing students for the practice of law, and which emphasizes skills-based and experiential training. As part of that effort the school has restructured the traditional first-year law school curriculum so that several of the courses each focus on particular analytical methods, specifically common law analysis, statutory analysis, procedural analysis, constitutional analysis, and international legal analysis, rather than on a particular subject matter such as contracts, torts, etc. While there are some advantages to this new approach, I discuss in this brief article my concerns regarding whether this approach will be as effective in teaching first-year students basic contract law as would be a more traditional approach that attempts to simultaneously expose students to both the common law and statutory aspects of the subject in a more integrated and holistic fashion.

In a recent article the Dean of the new University of California, Irvine School of Law, Erwin Chemerinsky, discusses in a comprehensive and candid manner the recent founding of that law school and his vision for better incorporating skills training into top-tier legal education.¹ It is an ambitious project, and one certainly wishes Dean Chemerinsky and the other UC-Irvine founding faculty that are obviously strongly committed to this new vision of legal education the best in their endeavors. There are of course real questions whether such an effort at providing a truly distinctive form of legal education to top-flight students will survive the inevitable ebbing of the initial burst of enthusiasm that gave rise to the effort. There are also questions whether the new program will be able to successfully resist the financial pressures stemming from the increasingly stringent California state educational funding constraints that will probably make it impossible to continue to support student scholarship assistance at anywhere near the incredibly generous levels that were provided to the initial very small 2009-2010 and 2010-11 entering classes.² Given the relatively high annual tuition and fees charged by the UC-Irvine School of Law of over \$40,000 year for California residents, and over \$50,000/year for out-of-state residents,³ a reduction in the availability of scholarship assistance over time may prove to be a significant impediment to their ambitions.

In this short paper I will not speculate upon the long-term prospects for this interesting experiment in legal education, but instead I will offer some concerns that I have regarding whether embracing such a skills-oriented focus will actually result in better trained lawyers, given the inevitable trade-offs involved.

Specifically, I want to call into question whether their overall curricular approach will be as effective in teaching first-year students basic contract law as is the more traditional doctrinal approach that is widely followed elsewhere in legal academia.

The UC-Irvine first-year curriculum, as described by Dean Chemerinsky, is centered around various analytical methods – common law analysis, statutory analysis, procedural analysis, constitutional analysis, and international legal analysis – rather than around doctrinal subject areas.⁴ In their first fall semester students take a course titled “Common Law Analysis: Contracts” which as the name suggests is “primarily about the common law of contracts.”⁵ They also take a course titled “Statutory Analysis” which focuses on criminal law, and a course called “Procedural Analysis” which focuses on civil procedure.⁶ In the subsequent spring semester they take “Common Law Analysis: Torts,” which as the name suggests focuses upon tort law, and “Constitutional Analysis,” and “International

Legal Analysis.”⁷ The subsequent upper-level curriculum is largely elective, except for a writing requirement and a required clinical experience.⁸ This clinical requirement is perhaps their most important skills-oriented innovation.⁹

My major concern with this new approach is that while UC-Irvine’s first-year students will likely receive excellent and intensive instruction in both common law analysis and statutory analysis, both obviously essential lawyering skills, this methods-oriented approach may not provide students with an integrated, more holistic approach to any single doctrinal subject that would simultaneously expose them to both its common law and statutory aspects, and which would emphasize the connections and relationships between the case law and the statutes, and thus would arguably better prepare them for the many legal problems that require them to know both the relevant statutes and the case law and be able to effectively blend both forms of legal analysis.

My particular field of expertise is contract law, so let me use that area of law as an example of my concerns. I have been teaching a two-semester introductory contract law sequence to first-year students at Southern Methodist University’s Dedman School of Law for over 20 years. I teach what might be regarded as a

relatively conventional doctrinal course that attempts to blend together both common law and statutory principles. Let me discuss what I fear might be lost by the UC-Irvine approach of teaching contract law in a one-semester course that focuses primarily upon general principles of common law analysis and only secondarily upon contract law doctrine, and then subsequently introduces those students to statutory analysis through a course that focuses exclusively upon criminal law statutes and not upon contract-related statutes such as the provisions of the Uniform Commercial Code.

I structure my instructional approach around four major areas of contract law; contract formation, contract enforceability defenses, contract interpretation, performance and breach, and finally remedies, which topics I present in that order over the course of the year.¹⁰ In my treatment of contract formation law, I start by developing in a common law fashion the classical contract formation elements of offer, acceptance, mutual assent and consideration, and then present the more expansive modern doctrines of promissory estoppel and moral obligation, also in a common law fashion. I do, however, make use of two important statutes contained in Article 2 of the Uniform Commercial Code in presenting this contract formation material. First, I have the students study UCC S. 2-205, which abridges the

common law freedom of certain offerors to revoke their offers with regard to certain signed offers. This statute provides a first exposure to the pervasive modern statutory abridgement of common law doctrines, as well as a vehicle for introducing students to the idea of a civil code, and to the realization that most other countries have not embraced the classical Anglo-American freedom of offerors to freely revoke their offers. Second, I have the students study the well-known UCC S. 2-207 “battle of the forms” provision in some detail, and I explain the genesis of that statute in the difficulty that common law courts had in coming up with a satisfactory resolution to this problem that meshes with the core “mirror image rule” classical acceptance principle, and I also explain how S. 2-207, despite its well-known shortcomings, has since its adoption had substantial persuasive authority in the case law outside of the sale of goods context. By being exposed to S. 2-207 in their introductory contract law course, which apparently does not take place at UC-Irvine,¹¹ students are not only obviously better equipped to deal with these kinds of sale of goods disputes in practice, but they have also been introduced to the complicated interplay between common law rulings and statutes in contract law.

Moving on to enforcibility defenses, the limitations inherent in a common

law-focused instructional approach are far more severe. I am frankly at somewhat of a loss to understand how this important area of contract law could be adequately taught without reference to statutes, since many of the more important enforceability defenses are primarily or even entirely statutory. For example, both what are often referred to as the “common law” Statutes of Frauds and the UCC Statute of Frauds are statutes, after all, not common law principles. The Statute of Limitations defense, which raises important issues about whether to characterize claims as contractual or in tort, and (for UCC S. 725) an issue of how best to characterize breach of warranty claims, is entirely grounded in state or federal statutes. The modern unconscionability defense, while it has some early common law grounding, is largely the outgrowth of courts applying and extending UCC S. 2-302. The common law-based fraud and misrepresentation defenses are now very often asserted under the more permissive statutory provisions of the federal securities laws and SEC rule 10b-5. There have also been significant federal and state statutory limitations imposed on the common law sovereign immunity defense, and of course the bankruptcy defense, which is important in practice and will often will bar otherwise valid contractual claims, is wholly statutory. One simply has to address certain statutes in some detail to give students an adequate understanding of the range of and contours of the contract enforceability defenses

that are potentially available.

The portion of the contracts course relating to contract interpretation, performance and breach is perhaps a bit more amenable to a common law-focused approach than are the previously discussed areas of contract law. However, UCC Article 2 in Sections 2-601 and 2-507 substitutes a different “perfect tender rule/seller cure rights” framework for the common law material breach analysis, and students who may later be involved in sale of goods litigation need to have some familiarity with these statutory provisions. In addition, the common law authority regarding the impracticability excuse defense has been largely displaced by UCC S. 2-615, which has had significant persuasive authority outside of the UCC.

Finally, as to remedies, a student’s understanding of remedial law is certainly incomplete without at least some exposure to the various state and federal statutes that displace to a greater or lesser extent the common law rule that parties to contract litigation are responsible for their own attorney’s fees. For example, the majority of the graduates of the Dedman School of Law here at Southern Methodist University go on to engage in private practice in Texas. Now Texas has

a broad statute in force that awards attorney's fees to any person who prevails on a contract claim against an "individual or corporation."¹² A student who graduated from law school unaware of that statute, or who had heard of it in passing reference but was completely unfamiliar with the subsequent complicated case law regarding which parties qualified under the statute as an "individual or corporation," would not really be ready to practice law in Texas.

I am an economist by training and am therefore well aware of the unavoidable trade-offs that are involved in any course of action. The major trade-off that I see to be inherent in the UC-Irvine analytical methods oriented first-year instructional approach is that while the traditional doctrinal subject matter organization of the law school curriculum arguably does not adequately feature the several different analytical methods that one must master to practice effectively in any field of law, moving to their analytical methods orientation in first-year legal education so as to remedy this problem appears to me to disrupt the holistic blending of common law and statutory themes that can be achieved in a well-taught doctrinal course.

Dean Chemerinsky in his article is obviously emphasizing what is distinct

about the UC-Irvine skills-oriented approach to first-year legal instruction. I am sure that whichever faculty will be teaching the new “Common Law Analysis: Contracts” classes in coming years will be experienced contract law professors who are well aware of the points I am here making, and doubtless they will attempt to incorporate statutory references and discussions into the class where this is necessary for educational purposes. But they will clearly be limited in their ability to present and explain those statutes, and to have the students spend time working with them, by the overarching and explicit common law analysis orientation of the class. Something will have to give here, and it will likely be the time usually devoted to statutory analysis in the contracts course.¹³ The UC-Irvine analytical methods oriented approach to first-year legal education may ultimately prove to be superior to the more traditional doctrinal subject matter approach, all things considered, and particularly when it is assessed in the context of the innovative second- and third-year education that the school will be attempting to provide, but it appears to me that there may be something lost as well as something gained from pursuing that first-year approach, at least with regard to contract law instruction.

1. Erwin Chemerinsky, “The Ideal Law School for the 21st Century,” 1 *UC-Irvine L. Rev.* 1 (2011), also available at University of California-Irvine Legal Studies Research Paper No. 2011-43 (2011), <http://ssrn.com/abstract=1910049> (hereinafter “Chemerinsky”). For more discussion

of the UC-Irvine program, see generally Joseph DiMento, “UCI Law: The First Half Century, *U.C. Irvine L. Rev.* 25 (2011); Ann Southworth & Catherine Fisk, “Our Institutional Commitment to Teach about the Legal Profession,” 1 *UC-Irvine L. Rev.* 73 (2011); Christopher Tomlins, “What Would Langdell Have Thought? UC Irvine’s New Law School and the Question of History,” 1 *UC-Irvine L. Rev.* 185 (2011); Carrie Hempel & Carroll Seron, “An Innovative Approach to Legal Education and the Founding of the University of California, Irvine School of Law,” University of California, Irvine Legal Research Paper Series, No. 2011-20 (2011).

2. The initial 2009-2010 entering class of 60 students were each offered a full scholarship covering the entire three years of law school. *Id.* at 11. The second 2010-11 class of 83 students were each offered at least 50% scholarships. *Id.* The goal is to increase the class size by 20 students each year, up to a maximum size of 200 students, *id.* at 12, which would of course require very large scholarship expenditures to maintain support at even the more modest 2010-11 levels.

3. The Chronicle of Higher Education (Feb. 27, 2011 on-line edition), available at <http://chronicle.com/article/As-They-Ponder-Reforms-Law/126536/>.

4. *Id.* at 18. See also Hempel & Seron, supra n. 1, at 185-287 for more discussion of the UC-Irvine first-year curriculum.

5. *Id.* Dean Chemerinsky refers to this course in his paper as “Common Law Analysis: Private Ordering,” but according to the school’s current website it has since been renamed..

6. *Id.*

7. *Id.* Dean Chemerinsky refers to this course in his paper as “Common Law Analysis: Public Ordering,” but according to the school’s current website it has since been renamed..

8. *Id.* at 19.

9. See Hempel & Seron, supra n. 1, for extensive discussion of the UC-Irvine clinical program.

10. I also provide a two-to-three week general introduction to contract law and legal analysis and on how to be a good law student at the start of the fall semester, and provide a one-week introduction to quasi-contract principles later during the fall semester, and then a brief introduction to the international laws governing the sale of goods at the end of the two-semester course.

¹¹ My conjecture here is supported by the fact that the UC-Irvine professor that taught the initial Common Law Analysis course described the changes to his course, as compared to a more conventional contract law course, as “eliminating study of the Uniform Commercial Code and creating a stronger focus on the way law is made through judicial opinions.” Hempel & Seron,

supra n. 1, at 186, 186 n. 73 (paraphrasing from a December, 2009 interview with Christopher Leslie, the UC-Irvine professor who taught this course).

12. Texas Civil Practice & Remedies Code S. 38.001 [cite].

13. See supra n. 13.