12-14-2004

Conversations in Legal Education: Carl A. Auerbach, December 14, 2004

Carl A. Auerbach
University of San Diego School of Law

University of San Diego

Legal Research Center

CONVERSATIONS IN LEGAL EDUCATION:

ORAL HISTORIES OF THE FIRST HALF–CENTURY OF THE UNIVERSITY OF SAN DIEGO SCHOOL OF LAW

Narrator: Professor Carl Auerbach

Interviewer: Dean Daniel Rodriguez

Recorder: Ruth Levor

Date: December 14, 2004

Accession No.:OH-LRC-Auerbach-2004-4

TAPE 4 : SIDE A

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RL: This is an interview of Professor Carl Auerbach for the project: Conversations in Legal Education: Oral Histories of the First Half-Century of the University of San Diego School of Law. The interview is being conducted by Dean Daniel Rodriguez at the University of San Diego School of Law Legal Research Center on December 14, 2004. This is the fourth session of this set of interviews. Tapes and transcripts of this interview will be archived at the University of San Diego's Copley Library.

DR: Good morning, Carl.

CA: Good morning.

DR: I'm interested in talking with you about your beginnings in legal education, your arrival at the University of Wisconsin, your time there through your service at Minnesota, and perhaps anything we pick up along the way. Let me begin by asking you what brought you to the University of Wisconsin, where I understand you began your teaching career in 1947.

CA: It was purely accidental. Towards the end of 1947, I was winding up the Office of Price Administration, and I had not yet begun to look for a new job. I had intended to go to see Clark Clifford and find out what, if anything, he had in mind that I might do. Just at that time, I got a telephone call from Willard Hurst, and he asked me whether I had ever considered teaching, and I said, "Hell, no [laughter]!" And he said, "Would you like to come out and talk to us about it?"

And I didn't see any harm in doing that, so I went out there to talk to him about it and stayed 14 years [laughter].

DR: Willard Hurst is, of course, the great J. Willard Hurst, the eminent legal historian, I assume eminent at that time and, of course, for many many years thereafter. I'm curious from your perspective what you might think was his interest in you. How do you think he came to know you and be interested in you?

CA: Well, I had made his acquaintance during the War while I was still in Washington, so I knew him slightly, but what had happened, I think, as I resurrected it later, Wisconsin was looking for people. The GIs were coming back, and the enrollments were very high, and Willard called Joe Rauh and asked him whether he could recommend people, and I think Joe told him to try to get me, and I think that's how it happened.

DR: Could you talk a bit about the University of Wisconsin in 1947 and thereabouts, the size of the faculty, what might have been its interests?

CA: Well, it was a small faculty. Lloyd Garrison had just finished being Dean and quit academic life. He had wanted very much to be President of the University of Wisconsin, and when that was not open to him, as it should have been, he just left academic life and went back and founded a New York law firm, which may still bear his name. I don't know, does it? Weiss Rifkind Garrison?

DR: Oh, the Paul Weiss firm.

CA: Yes.

DR: Oh, I didn't know that Garrison was the, Lloyd Garrison.

CA: Yeah, yeah, that was what Garrison did when he quit academic life.

DR: Interesting. Speaking of Lloyd Garrison, let me actually move back before you arrived on the Wisconsin faculty and ask you about this: My understanding is that Professor Lloyd Garrison, along with Professor Hurst, had begun, even as early as the 1930s and into the 1940s, teaching a course at the University of Wisconsin on Law and Society. I don't recall whether that was the exact title of the course.

CA: Right, right. Sam Mermin and I inherited that course. We changed it from Law and Society, which was an overly ambitious title, to the Legal Process, but it was basically based on the ideas of Willard and Lloyd Garrison.

DR: Mm-hmm, so you saw your course with Professor Mermin as a direct outgrowth …

CA: There wasn't any question about it.

DR: The reason I mention that is, to turn the clock forward to today for a moment, certainly, we see in legal education the so-called Law and Society movement, which, in no small part thanks to you and your colleagues, is a major movement, as being quite distinct from what many scholars would describe as the Legal Process movement, so …

CA: Right, right.

DR: … there does not seem to be an acknowledgement of that evolution.

CA: Right. It depended on what sort of claims you wanted to make for the work, and I thought it was not broad enough to really be called Law and Society.

DR: Mm-hmm. Could you describe just some of the key elements or themes of the Legal Process course that you began teaching at Wisconsin?

CA: Yeah, the legal process was a dominant theme, not only in our course but in Administrative Law as well, because you could look at Administrative Law as having the objective of creating a rational decisionmaking process that respects democratic values, and essentially we wanted to show what a rational decisionmaking process could look like and how you would test it, and the beauty that the Garrison and Hurst materials had was that it picked a single story that had been handled by all of the lawmaking agencies in society, so you could take an historical view and see the law's development in the context of a subject which went through first the judicial process, then the legislative process, and finally the administrative process, so you could evaluate the comparative merits and demerits of the handling of this same problem by the respective lawmaking agencies in society.

DR: Was there, either in your approach to the materials or your colleagues' or Professors Garrison or Hurst, a bias in favor of one of those institutions over another that you wanted the students to see?

CA: Well, that's a very interesting question. Marvin Frankel reviewed our book in the Columbia Law Review. He used it in teaching courses at Columbia before he became a judge. He said he had one objection, which he made very strongly in his review. We never showed the judges doing anything right [laughter]. Well, that's the way it was, you know [laughter]. We couldn't change the history, but he was correct. You see, in pedagogical terms, I suppose that is a weakness of the materials, if you're teaching students, and you never show judges to be doing anything right [laughter]. they might get a skewed idea of what the judicial process was all about.

DR: What role, if any, did legal history play in the analysis in the materials? I think of Professor Hurst, of course, as being such an eminent legal historian. Was there a role that legal history played in …?

CA: Oh, it was completely an historical approach. Actually, we had considered, and it wasn't a good idea, calling our work "An Historical Introduction to Jurisprudence." One person

reviewed our work and said it was the best book on torts, so [laughter] you could have called it anything you wished.

DR: What was the reaction from some of your colleagues who indeed taught the basic courses at the time, Torts, Property, Contracts, etcetera?

CA: Well, this was rather sad, because I think, generally, that most members of the faculty who weren't actually teaching from these materials disliked the course immensely and were very hostile towards it. The reason basically was that each instructor, particularly in the first year, claimed to be doing process, so you didn't need a special course in it. It just really wasn't so in a basic way, but there was this hostility towards the course that persisted throughout the period that it was used.

DR: Now, of course, in the late 1940s and into the 1950s, as we know, law professors at Harvard, most prominently Professors Henry Hart and Albert Sacks, were working on a set of materials that came to be known as "The Legal Process: Basic Problems in the Making and Application of Law."

CA: Right.

DR: Were you aware of that …?

CA: Well, you know, if you read Bill Eskridge's introduction to the Foundation Press edition of that work, we anticipated the use of the term, "the legal process," by many years, and indeed, an embarrassing incident resulted. I was at the Behavioral Sciences Center when Sam Mermin discovered that Henry was using the "Legal Process" title, and he wrote him a very nasty letter [laughter], saying he couldn't use that title, because we had preempted it. I was very very upset, because Henry was a dear friend and my former boss [laughter], so I tried to cool off Mermin and wrote Henry that he could go ahead and use the title if he wished.

DR: What was your sense then, and from the vantage point, actually, of many years of history, what is your sense now, of the relationship between the work that you were pioneering with your colleagues at Wisconsin and what Professors Hart and Sacks were doing with their materials?

CA: Well, I talked to Henry about it many times. In the first place, Hart and Sacks, never envisaged their Legal Process materials to be used in the first year, and we thought it was essential to give students a kind of introduction to the legal system that we thought our book was capable of, and we also thought it would be able to be used in college courses, and indeed, it was used in college courses with success. Bill Beaney, particularly, at Northwestern and later at Denver, used it with great success and reviewed it very favorably. Abe Chayes's wife also used our book.

DR: Antonia.

CA: Antonia used our book in teaching undergraduate courses.

DR: Can I ask you, just as an aside on that point, since you mentioned undergraduate, did you perceive at the time that the work that you were doing would actually influence how political scientists and other social scientists might think about law? Was that anything that was of interest to you?

CA: Oh, very definitely, very definitely.

DR: And, in reverse, in the 1940s and the 1950s, as you were really developing your approach, were you influenced by what social scientists at the time were thinking about and writing about law?

CA: Oh, yes, actually I was reading decisionmaking literature outside of the law, and that's how I got this process idea.

DR: Now, from those who are interested in developments in legal theory and legal education right now these days, you mentioned Professor Bill Eskridge of Yale and, along with Phil Frickey, they've put together, as you know, collected the Hart and Sacks legal materials and have written about the legal process, and many others have. Do you think that the writings about the legal process movement in the '50s and'60s captures anything important that was happening then? Do you really believe there was a Legal Process movement during an era of time that could really be investigated?

CA: That's a very excellent question, because I've always been perplexed by some criticisms of the legal process movement. I knew Henry Hart very well, and I knew that process, in its narrow sense, was not what interested him. He was interested in policy and in values, and the charge that the Legal Process school was valueless always seemed to me a very strange criticism, because there's nothing, and there was never, anything, inconsistent between the approach that Hart and Sacks used and an effort to ascertain the values underlying the legal system or a particular branch of the law.

DR: But do you agree with scholars who have argued that there is an essential conflict between what the legal process scholars were writing about and the legal realists of a generation before, Karl Llewellyn, and many others?

CA: No, I don't think so.

DR: You see more continuity, then.

CA: Yes. You can't get too much of a sense of his issue from the Hart and Sacks materials. I taught from these materials for a number of years just to try them. They are disconnected in many ways, you know, and you have to jump from one problem to another, and you don't see the connection between the problems, which makes it very difficult to get a theoretical understanding of what they're after, except here's one problem and there's another [laughter].

The students had a hell of a time with Hart and Sacks just for that reason, and our materials, the Garrison-Hurst materials essentially, told a story which was easily understood.

DR: Well, as a first-year student at the Harvard Law School who took Professor Al Sacks and used the materials, I can echo exactly your description. Just one other small question about the Hart and Sacks materials I'm interested in your reaction to, at the end of the materials, as you recall, there's a series of synthetic principles …

CA: Right.

DR: … trying to capture the themes from before. One of the principles that's always struck me as provocative is about its assumptions about legislation, and there is a line where Professors Hart and Sacks say: "For the purposes of the analysis in these materials, we will assume the legislature is made up of reasonable persons pursuing reasonable aims reasonably." I'm curious your reaction to that.

CA: [laughter] Well, you know, I think that Henry Hart made an enormous contribution to an understanding of statutory interpretation, and it always surprised me that it was so little known, even in the administrative law area, and I've often been tempted to write on this subject, but then I read what Henry wrote, and I have really nothing to add. So theirs was a remarkable piece of work, and it really didn't depend on the assumptions you describe [laughter]. You could knock out these assumptions and what Henry had to say about how you should go about interpreting statutes, particularly in the judicial review of administrative interpretations, was still salient and innovative.

DR: Let's return back to Wisconsin in the late 1940s and 1950s when you were there. You talked a bit about Professors Hurst and Garrison. I'd be interested in your reactions about some of your colleagues at the time. Who do you remember, and who were particularly memorable as colleagues during those years?

CA: Well, there was quite a split on the Wisconsin faculty. The Dean who succeeded Garrison was Oliver Rundell, who was an old-fashioned property teacher, you know, and who believed that each member of the faculty should teach around the curriculum, preferably different courses every year [laughter], and had no sense of facilitating legal research whatsoever. But Willard set the example for the younger people, and unfortunately, it was an example that nobody could really follow. It's impossible to duplicate what Willard did, and in many ways, his work was probably over-researched and discouraged people from trying [laughter] to undertake similar tasks. There was Jake Beuscher, who is the founder, I believe, of environmental law as a topic for legal research and teaching. Jake helped the Democratic governors of Wisconsin to become aware of environmental problems, particularly Gaylord Nelson. He went to see Gaylord Nelson one day and said, "What would you like to be remembered for when you stop being Governor?" And Gaylord couldn't answer that at all, and Jake got him interested in the environment and the Earth movement and all that.

And then, there was Nate Feinsinger in labor law, who was, of course, interested basically in law as policy, and Charles Bunn, who was George Bunn's father. George later became Dean at Wisconsin, after teaching at Columbia. Those were my principal friends.

DR: Just to go back to something you said, you mentioned the Governor, and that prompts me to ask, with Wisconsin being such a legendary place for progressive politics of LaFollette and the whole movement, what was the relationship then between the law school and the university and the politics of Wisconsin, either at the local or the state-wide level? Was there any?

CA: Yes, there was a great deal, because of the tradition that the university would serve government in terms of its research, and indeed, our Legal Process materials emphasize the way that the university helped to solve the problem of handling industrial accidents by doing all of the basic work on worker's comp. We illustrated the relationship between the university and the state in these materials. The state Legislative Reference Bureau would always call upon faculty members who were familiar with the particular problems that the Reference Bureau faced.

DR: Wisconsin, as you know, is the only state in the Union that has a so-called waive-in requirement for graduates of their law school …

CA: Right.

DR: Although that innovation has been in place many years, no state has copied it, which makes one curious about whether Wisconsin just has a much better relationship with its legislature than any other public law school in the nation.

CA: Well, you know, Wisconsin came to pay a heavy price for the privilege, and I'm not sure it was worth it.

DR: How so?

CA: What happened was that the legislature, in answering the criticism of a minority in the Bar that thought the waiver ought to be eliminated, began to legislate the nature of the courses that students had to take to graduate, and the number of these courses started to increase [laughter]. I would rather have the Bar exam than give the legislature control of the curriculum, so the privilege to this day, was a mixed blessing.

DR: Interesting. We started out talking a bit about the Law and Society movement and your interests in their … You and I have spoken about it previously, and you have written about it a great deal. Did your interest in law and society, in the Law and Society movement, begin in your years in Wisconsin, and how did that move on in the course of your career?

CA: Well, it really began when I saw it in action in government service. As a lawyer in government service, you are dependent on social scientists--the economists, the accountants, the political scientists, working in that area. I worked with economists on a very intimate basis and realized that law was not autonomous. Indeed, one of the great problems to this day in interdisciplinary work is trying to delineate precisely what is the knowledge that academic

lawyers have [laughter] to contribute. What are they specialists in exactly? And this isn't an easy question to answer.

DR: Do you believe they are specialists?

CA: What do we have to contribute? In 1959, when I got back from the Behavioral Sciences Center filled with interdisciplinary hopes and dreams, I set up a roundtable at an AALS meeting on the question of what the social sciences have to contribute to administrative law, if anything. We had all the eminent administrative law teachers at this meeting. Helen Goulding, a sociologist, spoke on the contributions of sociology, as I recall, and Vic Rosenblum on political science, and I delivered a paper setting out my ideas on what the collaboration could be like. At the end of the meeting, to my utter horror, Ken Davis got up and said that he had read all the social science literature dealing with administrative law, and he could assert it had absolutely nothing to contribute to his understanding of administrative law. To make matters worse, Walter Gellhorn got up, to my utter astonishment, and said that when he needed a social scientist, he knew where to hire one. Alvin Goulding, another noted sociologist, who was the husband of Helen was present [laughter], and he took all this as an insult to his wife, so he got up and berated the law teachers. He said we were parasites on the knowledge of others, and how dare we cast doubts about these other sciences, which were standing on their own feet and making contributions, whereas we had absolutely nothing to offer. So this meeting, which started out with great hopes, ended up in the worst fiasco [laughter] that I could ever remember, contributed to by Ken Davis and Walter Gellhorn, of all people [laughter].

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DR: Why don't you continue right there, Carl. You said you had a …

CA: Well, just because, for some reason, I don't know what, I think things are better now in that regard, but we accomplished nothing really in our efforts to create interdisciplinary relations between various branches of law and social sciences. One of the last efforts, and I'll indicate how we finally came out, one of the last efforts concerned P.P.B.S. Did you ever hear of that?

DR: P.P.B.S?

CA: Yeah.

DR: No.

CA: That was the system used by McNamara …

DR: Okay.

CA: … and the smart boys, the wizards, of McNamara in the Department of Defense. It was really a sophisticated cost-benefit analysis.

DR: Under the Kennedy Administration?

CA: Under the Kennedy Administration.

DR: Wasn't James Landis involved in that? Didn't he …?

CA: No.

DR: No.

CA: No. Well, let me see if I could … [papers rustling] I took some notes on that. Yeah, here it is: Planning Programming Budgeting System. Well, again, with my interest in decisionmaking processes, I thought it would be of great interest to the AALS to have this system presented, so law teachers there could see whether they could use that in an analysis of the legal process. So I got Henry Rowen, a very famous guy who had initiated this stuff, to present the basic system. He was at the time President of the Rand Corporation, and he agreed to come and deliver this talk, and then I had somebody from the Justice Department, who talked about the implications of P.P.B.S. for the government lawyer, and the meeting was an absolute dud [laughter]! None of the law teachers there really thought that it had any place in the AALS program. They wondered what all this nonsense was about.

DR: Did they have any substantive criticism of the analysis?

CA: No, they just didn't react. I mean it was worse than that; it was just a dud, absolutely no reaction whatsoever. I was the moderator, and I couldn't get anybody to react in any way whatsoever to the presentation. The only saving grace was that Louie Mayo, who then was, I think, a Vice President of GW, wrote me and said, "Don't be upset. I think this was the most innovative [laughter] program in the AALS this year," but he was a single person. It was a dud!

DR: Well, let me ask you about this period of time and get your reactions to this. It's interesting you describe the administrative law panel in 1959. In the 1960s, particularly

beginning in the early ‘60s and throughout that decade, as you well know, there was a burst of activity in the application of economic theory to law.

CA: Right.

DR: A lot of it grew out of the University of Chicago, not exclusively but so much so that it became associated with the Chicago school. There are a number of stories of the influence of individuals like Aaron Director, who co-taught a course with Ed Levi, and …

CA: Ronald Coase.

DR: … Ronald Coase was an important figure, but even in the law community, individuals like Robert Bork and Frank Easterbrook, and Ed Kitch, Richard Posner, so many others talk about the revelatory influence of economics in so many areas of law in the 1960s. Do you think that that maybe met the demand, as it were, for interdisciplinary approaches, or did it instead narrow the interdisciplinary movement for that period? Just want to get your reactions to the impact of law and economics during that period.

CA: I would say the latter. The efforts that I recounted were mainly, of course, in the field of administrative law, and we tried to get primarily sociologists and political scientists, but also economists, interested in the field. I have always believed that all branches of knowledge can contribute to an understanding of the legal process, which is fundamental to society, and I never thought that interdisciplinary work should be limited to economics. I mean, why not sociology, political science, history, psychology [laughter], you know, and now, the natural sciences are beginning to have enormous importance, so there really is no field of knowledge that can’t, on its own, make some contribution to an understanding of law. I’ve often used the analogy that, as law teachers, in many ways we are engineers of the other sciences. Just like an engineer takes physics and chemistry and all other knowledge-based disciplines into account in creating physical structures, lawyers are similarly engineers of the social sciences to create social structures.

DR: Given that, do you think that Professor Goulding was on to something in his hyperbole in 1959 when he observed that lawyers are parasites on other disciplines?

CA: Yeah.

DR: Is there a line between a parasite and an engineer?

CA: Well, that's true, that's true, but nevertheless, by parasite he meant academic lawyers were of no use.

DR: Mm-hmm.

CA: … whereas an engineer obviously has use. A physicist doesn't go around trying to build a skyscraper. You know, it takes an engineer knowing something about physics and chemistry and materials to build a building. In a sense, this, too, is one of Henry Hart's insights—that the unique contributions law-trained people can make, is to create frameworks within which the private order can operate. This is a unique contribution. So there's no field that ought to be closed to academic lawyers. It's unfortunate that economics has such an imperialist bent that it claims to be the explanation of everything, you know.

DR: You have, over the course of your career in legal education, not only extensive time as a law professor, certainly also involved in getting law professors to join you, but also as a law dean, so you've had a chance to think about the issue of what makes a distinguished law faculty, and just on this last point, what do you think the role of interdisciplinary work and training should be in composing a law faculty? Should a law faculty have one historian, one economist, one trained political scientist, in order to be comprehensive?

CA: Well, I've had views that would not represent the majority thought as I see what's happening. I've always thought that the best way to promote interdisciplinary work is to see that

the individual who is a law teacher has a Ph.D. in some related discipline. I got a Russell Sage Foundation grant for Barry Feld to get a Ph.D. in sociology at Harvard.

DR: When was that?

CA: … criminology.

DR: At what time? What year?

CA: It was about ’74, between ’72 and ’74, and then, we got, I forget his name now, he was a prominent criminologist. What I have never liked was for law schools to hire people in other disciplines, certainly on a full-time basis.

DR: Mm-hmm.

CA: What bothers me about that, number one, is the problem of indoctrination. Take Chicago. You hire Aaron Director, you’re only going to get one version [laughter] of economics, and generations of law students are trained to believe that’s the only version of economics that there is. So I don’t think pedagogically that’s a good idea. Even if the economist represented my views, I don’t think that that is good for the law students.

DR: Mm-hmm.

CA: The second problem is that it cuts off the social scientist from his or her peers, and you begin to wonder how up this person is that’s now on a law faculty for ten or fifteen years. How much does he know about what’s going on in his field?

DR: That’s an interesting point and not a small one, particularly as law schools do hire more with Ph.D.’s.

CA: Right.

DR: But do you think you can solve that a bit through the device of joint appointments, which has become more common in recent years, where at a research university, they're appointed in law and in …?

CA: Joint appointments are certainly much better than full-time appointments. I remember advising Jerry Skolnick about this. I understand he's now at NYU.

DR: Right, and was a colleague of mine before that.

CA: I told him to get out of Yale, because he would never get tenure. Who's going to judge him for tenure and on what basis? You get young people on the law faculty. So I've never thought it was a good idea for law schools to go out and hire a miniature social science faculty in the law school.

DR: Let me ask you, just pursue on this interdisciplinary point, get your reactions to a couple of fields we haven't talked about at all. One is humanities. Obviously there's a lot of interest in …

CA: Philosophy.

DR: … philosophy, …

CA: Sure.

DR: … history, to the extent it's in the humanities, but particularly, philosophy and theoretical. Do you think they contribute as much to the modern law school as a field as the social scientists that we've been discussing?

CA: Yes, sure, sure.

DR: And the other is, you said in passing, the natural sciences, and I agree with you that, if there's a wave of the future, it is the growing number of scientists, so-called hard scientists, who are becoming more interested in law and are working with lawyers.

CA: Sure.

DR: Do you see a day where law schools really are expected to have substantial representation of scientists who are studying …?

CA: Well, let me say what I think the ideal would be. Since law's so pervasive and so important to society, the ideal would be that every department in a university would be concerned with the legal order in some way--the political science department would have people who are concerned about the legal system. The economics department would have people concerned about law. So would the history department. We're short of the ideal. I think that law teachers, law scholars, could do more to show people in other disciplines that the legal order is a subject matter about which they can theorize, using their own methodologies. The legal order also affords a means of testing different theories in other fields, because you come up against reality in the legal order, and you can test and evaluate theories advanced in other disciplines.

DR: We've talked a lot about the role of research and faculty. I want to ask you about the teaching function, and again, bringing you back to your early years at Wisconsin, how have you seen law students change over the years? Have they come in differentially trained? What have been the issues that have really been involved in teaching over the years in which you've taught?

CA: You do get, occasionally law students who have Ph.D.'s in some other field, but there aren't very many of them. An interdisciplinary perspective creates pedagogical problems. If you're going to try to bring other disciplines into legal teaching and research, how do you get your students prepared to deal with what you have to offer? This is a very serious problem.

DR: Do you see that problem being better addressed outside the United States where, as you know, most legal education is nested in the liberal arts tradition formally, so that you study law alongside your liberal arts, and we do something very different in our legal education, as a much more professional model? Do you see one more superior than the other?

CA: Well, do you think the European model, which really handles law as an undergraduate major in effect, do you think those students really are adept in handling other disciplines? I doubt it.

DR: It may be the worst of both worlds, because of its focus on undergraduate, although that raises a question that has been bounced around certainly in thinking quite a number of years, both in the United States and in Europe, which is moving in a third direction, is how the law, a graduate discipline, that is not professionally narrowing, but that is expected to be built on a foundation of other disciplines as well …

CA: Right. That would be interesting.

DR: The market doesn't seem to reward that though, because it takes a good deal longer to get out and practice law and make money [laughter].

CA: We may someday face that problem. For example, there are a lot of people who believe that, and I know you hear that from some faculty people, if you seriously want to integrate other disciplines into legal teaching and research, should you be in a professional school? Go out and work in the other discipline, you know.

DR: Mm-hmm.

CA: Teach and work in the other disciplines, and don't come and mar the intensity of professional education by bringing in all this stuff, which is not going to have very great relevance to the practice of law. This attitude is a real problem.

DR: What's your answer to that?

CA: [laughter] Well, I hope that won't happen. But if legal research begins to be farther and farther away from the center of interest of the legal profession, the law school that we know today may break up.

DR: On that point, Judge Harry Edwards began a conversation, or maybe more accurately, continued a conversation …

CA: Right.

DR: … a number of years ago by really underscoring what he perceived as the disconnect between what we were doing in law school in our research and our teaching and what the legal profession needed and expected. What's your reaction to that?

CA: Well, I think he definitely had a point. The problem is that there's also shortsightedness in the legal profession. The legal profession, and this goes back to the training of law students, the legal profession doesn't understand how this stuff could be of help toit in the practice of law. For example, I mean, there isn't a single case in the development of common law, and certainly nothing in substantive administrative law or constitutional law or any other field of law, which doesn't depend on what Ken Davis called "legislative facts." The better term is "policy facts," which was coined earlier by Walter Nelles. Now, policy facts are the stuff with which social science deals. Lawyers have not been trained to this day to handle this kind of data. They don't know how to do investigations of this kind of stuff. They don't know how to do analyses of this kind of material. If the legal profession appreciated why they needed these other disciplines, then of course, the law school as we know it now would continue to exist.

DR: Mm-hmm. Let me ask you about the other side of the coin, and that is the role of doctrinal work. Justice Stephen Breyer made this comment a few years ago at a faculty meeting I was at. He said, "We've lost the tradition of the great legal treatises." That is, we've lost in the law faculty members [unintelligible] in their pursuit of developing new theories …

CA: Right.

DR: … just the contribution made by a full-time academic engaged in a field as William Prosser did in torts and as so many others did, to really investigate a field and provide information of benefit to the profession. Do you agree with that?

CA: Yeah, you know, it's not inconsistent. There's no reason why you couldn't do that and at the same time use other disciplines to enrich what you have to offer. If you're writing a treatise, how do you evaluate what you say? If you're being critical, and you have ideas, how do you evaluate whether you're justified in making certain points? You have to come to grips with what is happening in the society as a whole. What are the consequences of these various doctrines, including common law doctrines, for the society as a whole? I remember once, and I'm very sorry I ever did it, Jim Casner was finishing one of his innumerable Restatements that we were getting at the ALI in various areas of estate tax and estate planning. When he was finished, I asked for the floor and said, "Jim, what are all your changes going to do to distribution of wealth in the United States." He thought I was crazy [laughter], but why not take this factor into consideration?

DR: Did you seriously expect him to answer that?

CA: No, I never should have done it. He was a wonderful, kind person, and I should never have done it, but I couldn't resist.

DR: I'm reminded of a comment that Professor Mark Tushnet, a noted critical legal studies scholar, said that he got in a great deal of trouble for, when he observed in a law review article that the measure of any change in a legal rule should be whether and to what extent it advances the cause of socialism …

CA: [laughter]

DR: …. in America. Whether that was [unintelligible] or not, that became a notorious comment. Well, let me ask you this broad question. How would you judge whether a law professor, in his or her academic work, particularly the research and writing they do, has been successful? You talk about the ambitions to change the world or change how we think of legal problems. That's an awfully tall order, but in the trenches, when we're measuring law professors' productivity, we're considering them for tenure, we considering appointing them to our faculty, and just more generally, we're measuring their contributions in some way qualitatively and quantitatively, how are we best to judge whether they've been successful in their work?

CA: I never had a chance to put an answer to your question into effect at Minnesota, although I was thinking very seriously about it. It seems to me that we're not flexible enough in this evaluation process, and I always thought that the Dean should and could sit down with each faculty member and say, "What is your program for next year? What do you hope to accomplish next year? Do you have a long range program?" Now, if that faculty member says he has no writing objectives in mind, no long term writing objectives in mind, there's no reason why that individual's teaching load shouldn't increase, and then that individual would be judged by how well he teaches. I'm assuming now these are all tenured people, you see. Those people who have ambitious writing projects would have their teaching load decreased to permit them to continue with their scholarly pursuits, and then they should be judged based on their research and writing. So it would sort of be a contract with each individual, and how well the contract is being performed would be the criterion of advancement. Now, when you get to the granting of tenure,

I would not follow this. I would not give tenure to somebody who says, “All I intend to do is teach. I’m not going to do any writing or research.” I would not do that.