Money Well Spent?

By Stephen Bainbridge

The University of California's budget problems are well documented. The system has to cut $813 million. The administration and regents have decided to do so by a draconian combination of faculty and staff furloughs, programs cuts and so.

A group of UC San Diego department chairs had a radical alternative: "Every state system of public education save California manages to sustain (at best) one flagship campus. Many, including such states as New York, New Jersey and Massachusetts, do not manage even that. We pretend we have ten such campuses. In better times, there were in reality four flagships (Berkeley, UCLA, UCSD, and — in its highly specialized way, UCSF). Rather than destroying the distinctiveness and excellence at Berkeley, UCLA and UCSD by hiring temporary lecturers to do most of the teaching (and contribute nothing to original research, nothing to our reputation, nothing to the engine of economic growth a first rate research university represents), we propose that you urge the President and Regents to acknowledge that UCSC, UCR, and UC Merced are in substantial measure teaching institutions (with some exceptions — programs that have genuinely achieved national and international excellence and thus deserve separate treatment), whose funding levels and budgets should be reorganized to match that reality.

We suggest, more generally, that in discussions systemwide, you drop the pretense that all campuses are equal, and argue for a selective reallocation of funds to preserve excellence, not the current disastrous blunderbuss policy of even, across the board cuts. Or, if that is too hard, we suggest that what ought to be done is to shut one or more of these campuses down, in whole or in part. We have suffered more than a 30 per cent cut in our funding from the state, and we can thus no longer afford to be a ten campus system — only a nine, or an eight (and a half) campus system. Corporations faced with similar problems eliminate or sell off their least profitable, least promising divisions. Even General Motors, which for decades resisted this logic, to its near-fatal cost, is lopping off Hummer, Buick, GMC, Opel, Saab and who knows what else."

In 2006, California did not need a fifth public law school. We certainly didn't need one in Irvine, when much of the growth in UC admissions is in places like Riverside.

If closing campuses makes sense, and I think it does for the reasons they identified, why not consider closing schools? Or, perhaps, not letting new ones open?

I have in mind an obvious target: the new law school at UC Irvine.

The California Postsecondary Education Commission did an exhaustive review of the proposal to open the UCI law school. It concluded that a law school at Irvine was not necessary because: The occupational and industry projections of the California Labor Market Information Division indicate that the current growth in the number of Bar-certified lawyers will keep pace with or exceed legal demand between now and 2014; the state's knowledge needs in the domain of legal education can be met by existing public and independent law schools; and the projected public costs are questionable because the need for a new public law school has not been demonstrated by the evidence contained in the proposal.

Unfortunately, the proposal was nevertheless approved back in 2006 by the regents and the legislature. Former UC Regent Velma Montoya slammed the decision, and rightly so: "UCSB's success demonstrates that Irvine law school proponents, such as Joan Irvine Smith, are simply wrong in believing that Irvine must 'have a law school in addition to medical, business, and engineering schools in order for the campus to advance as a major university.' And Irvine Chancellor Michael Drake is wrong in diverting scarce student enrollment growth funds to hire a law school dean to add graduates specializing in public interest law. California does not face a shortage of public interest lawyers. Indeed, notable public law interest offices have closed their doors.

Drake is mistaken in drawing an analogy between medically underserved Latino populations and the market for lawyers. And Drake is wrong to lead the Irvine campus down the slippery slope of entering the 'arms race' to hire 'star' faculty lawyers so as to raise the proposed law school's prestige.

With state revenue estimates falling by the day, the Regents would be wise to encourage the Irvine campus to address current problems rather than spend precious enrollment growth funds on a law school the California Postsecondary Education Commission finds unnecessary-because California has no shortage of lawyers."

In 2006, California did not need a fifth public law school. We certainly didn't need one in Irvine, when much of the growth in UC admissions is in places like Riverside.

Today, with state revenues having plummeted faster and further than Montoya might have expected, we simply can't afford Irvine's law school. Odds are, with the California economy doing even worse than the nation as a whole, we have even less need for extra lawyers than we did when the commission rejected the Irvine proposal back in 2006.

I'm firmly convinced that UC Berkeley and UCLA will come out of the current troubles in excellent shape. We have great alumni whose support continues to grow despite the economy.

But I see no reason for the state to spend a dime on Irvine. Kill it now and put the money to better use, such as helping reverse some of the cuts to undergraduate education.

Stephen Bainbridge is the William D. Warren Professor of Law at UCLA. This piece originally appeared on his blog, www.professorbainbridge.com.

Daily Journal file photo

The first classes at UC Irvine School of Law, shown in an artist's rendering, begin in late August.

Judges Shouldn't Have to Pretend Their Process Is Mechanical

By Leslie Carothers

An eavesdropper from Mars on the confirmation hearings of Chief Justice John Roberts and Judge Sonia Sotomayor might wonder why any attorney of lively intelligence would aspire to serve on the U.S. Supreme Court. Roberts' metaphor of an umpire calling balls and strikes metaphor and Sotomayor's portrait of a dispassionate technician doggedly applying law to facts make the process of judicial decision-making seem simple and dull. Both know that cases where the law is clear, the facts are unambiguous and reasonable minds agree on the right result seldom reach the Supreme Court, or for that matter, any appellate court, for decision. Sotomayor actually made this point, stating, "If the law was always clear, we wouldn't have judges. It's because there is indefiniteness not in what the law is, but its application to new facts that people sometimes feel it's unpredictable." But both jurists sidestepped the fact that judges make law in the process of interpreting and applying it and that personal life histories and beliefs influence decision-making.

More revealing than Sotomayor's testimony was her naming Justice Benjamin Cardozo as the justice she admired most. She stressed his respect for precedent, his deference to other branches of government, and his careful application of law to facts. There is more to Cardozo's jurisprudence than that. Judge Richard Posner describes Cardozo's 1921 essay, "The Nature of the Judicial Process," as the first attempt by a judge to offer a realistic description of the judicial process, and calls it "as good as any we have had since." Like Justice Oliver Wendell Holmes, Cardozo saw judges as legislating in the "interstices" to fill the "open spaces in the law." Depending on the size of the spaces, judicial lawmaking can be important indeed, especially in constitutional cases. Posner notes Cardozo's skepticism about Chief Justice John Marshall's statement that judicial power is only exercised to give effect to the will of the legislator or to the will of the law. Cardozo wrote: "Marshall's own career is a conspicuous illustration of the fact that the ideal is beyond the reach of human faculties to attain. He gave to the Constitution of the U.S. the impression of his own mind; and the form of our constitutional law is what it is, because he moulded it while it was still plastic and malleable in the fire of his own intense convictions." Marshall, of course, had opportunities and capabilities to make law that few judges have. Still, every judge applying common law principles or construing statutes has to make judgments informed by a grasp of the intent and outcome of the rules.

It is not clear whether Cardozo's literary style also appealed to Sotomayor. Posner attributes much of Cardozo's reputation and influence to his rhetoric and "the power of the verve and brevity of the justice's legal discussions. The three most recent Supreme Court nominees, including Sotomayor, well may be incapable of Cardozo's rhetorical flair. In any case, today's confirmation process seems to discourage nominees from offering a fresh or quotable turn of phrase that might provoke a more intense encounter between the questioners and the nominee.

Members of the Senate and the public are rightly interested in how a judge's personal experience and philosophy affect decisions. Sotomayor repeatedly stressed that judges make decisions within the confines of precedent and tradition. True enough. But she was reluctant to acknowledge the influence of a judge's life experience in interpreting both. She abandoned not only her "wise Latina" remark but also President Obama's use of the word "empathy" to express his preference for Supreme Court justices with the "heart" to understand the interests of litigants and the real world impacts of judicial decisions. Cardozo's words sound more like the president's, pointing to "inherited instincts, traditional beliefs, [and] acquired convictions" that influence all judges' decisions. In considering whether judges should sympathize with the spirit of their time, he wrote that such a spirit "as it is revealed to each of us, is too often only the spirit of the group in which accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these unconscious loyalties."

The impact of having judges with different life histories, especially in appellate cases decided by panels, is hard to quantify; but there are abundant examples where it has mattered. Most recently, some Supreme Court watchers were surprised that the court rejected school employees' intrusive search of a 13-year-old girl accused of hiding prescription drugs after hearing some of the banter at the oral argument among several male justices. Justice Ruth Bader Ginsburg's view of the embarrassment factor making such a search especially problematic for young girls seems to have been influential in the end. Another example might be the record of now retired Justice David Souter in decisions in environmental cases. Of all the justices in recent years, he has seemed to be the most sympathetic to the values involved in environmental law and litigation underlying the technocratic terms of the statutes usually in play. This may well reflect his roots in rural New Hampshire in the shadow of the White Mountains.

To avoid being labeled "activists," today's judicial nominees have to pretend judging is a mechanical process and that their life histories and personal convictions have no bearing on their thought processes as judges. Following Cardozo, Sotomayor might have admitted that judges do have "loyalties" and that we depend on their training and temperament to emancipate them from "the suggestive power of individual dislikes and prepossessions."

Leslie Carothers is president of the Environmental Law Institute.

Letters to the Editor

Despite Trial Lawyers' Complaints, MICRA Has Been Affirmed

At every level of California's judiciary, California's Medical Insurance Compensation Reform Act (MICRA) has been affirmed and reaffirmed.

The story, "Plotting a Fresh Attack on Damage Caps," (Aug. 4) recounts personal injury lawyers' attempts to once again use the courts to overturn MICRA. It is easy to see from the story that the Consumer Attorneys of California and Consumer Watchdog, a personal injury lawyer-funded group, are in "plaintiff-shopping mode" and using the legal press to reach out to as many lawyers as possible to identify the perfect case to challenge MICRA.

The lawyers quoted in the story suggest their current approach, alleging the $250,000 MICRA cap on non-economic damages amounts to plaintiffs' violation of a fair jury trial, is new and untested. They are wrong.

Every provision of the MICRA law has been challenged and upheld by the California courts. The California Supreme Court upheld the MICRA law and the $250,000 cap in 1985. After 24 years, personal injury lawyers tried again in May 2009, using this supposed "new" argument. However, the 5th District Court of Appeal recognized that this issue had already been decided, and they rejected it.

MICRA has been successful in California at fairly compensating legitimately injured patients while keeping health care costs lower overall and ensuring doctors remain in practice treating patients. MICRA reforms give injured victims unlimited compensation for any and all economic and punitive damages, only non-economic damages are capped at $250,000.

Prior to the reasonable restrictions in MICRA doctors' medical liability rates were skyrocketing, forcing them out of practice. Today the system has stabilized. To understand why MICRA is so important, look at New York state. New York does not have medical liability reforms, and eight counties are without obstetricians, according to the Center for Health Workforce Studies. The center also found that 18 of New York's counties have fewer than five practicing OBGYNs.

MICRA has stood the test of time because it works. That is why health care providers, local governments, hospitals and many others support MICRA.

Lisa Maas,
Executive director
Californians Allied for Patient Protection
Sacramento

A Moment of Clarity on Reasonable Doubt Rules

Thank you for publishing U.S. District Judge Dean Pregerson's thoughtful piece on clarifying the "reasonable doubt" jury instruction ("Reasonable Doubt on Reasonable Doubt," Aug. 4). Whether or not one agrees with his particular proposed wording, there can be little dispute that we can do a better job of explaining reasonable doubt to jurors. California criminal jury instructions were overhauled in recent years to make them easier to understand, but CALCRIM 220 retains Penal Code Section 1096's archaic phrase "abiding conviction of the truth of the charge." We need a definition that uses words and concepts familiar to contemporary jurors. There is little trial court judges can do on their own, since appellate courts strongly discourage any tinkering with the approved language. See *People v. Freeman*, 8 Cal.4th 450 (1994). I hope Pregerson's article will encourage the California Judicial Council Advisory Committee on Criminal Jury Instructions to revisit CALCRIM 220.

Judge Albert Harutunian III,
San Diego Superior Court