

TURNER:

Hello and welcome back to Wisconsin Law in Action, a podcast where we discussed new and forthcoming scholarship with University of Wisconsin Law School Professors. I'm your host Kris Turner and my guest today is Emeritus Prof. William Clune. Prof. Clune's research is focused on among other areas, school finance, school law, special education and systemic educational policy. Today, Prof. Clune is here to discuss his new book, *Legal Realism to Law in Action: Innovative Law Courses at UW-Madison*, published by Quick Pro Books in December 2021. The book compiles articles and interviews focusing on four groundbreaking classes conceived and taught at the University of Wisconsin Law School and the faculty responsible for both their creation and their ongoing legacy. Thank you for joining the podcast today Prof. Clune.

PROF. CLUNE:

Well, thank you very much Kris. It's great to be here as an Emeritus and it's very exciting to see these Law in Action podcasts take place. I think that's a very good innovation for the Law School and a different and effective way to get the word out.

TURNER:

Well thank you. I've had a great time talking with all the different professors and I've learned a lot reading all these different articles and books here. I hope people have learned a lot listening to them as well. To dive in, we usually start our podcast by asking our guest background, specifically the research and scholarly writing interests. What led you to researching UW law classes and legal education?

PROF. CLUNE:

So the Law in Action aspect was natural for me. I was part of a Russell Sage program and law and social science and both in the law school and the graduate school in sociology at Northwestern. In my third year of law school we did a major study, a school finance, myself along with another classmate and a professor which led to a book that had a national impact. Wisconsin Law School was a natural destination for a Law in Action type person. And the hiring faculty at that time were receptive to my work and my background. Then while on the faculty I became interested in and involved with Critical Legal Studies. CLS follows legal realism and deconstructing policy bias in judicial cases and reasoning and documenting repressive historical trends. What Bob Gordon then on our faculty at the time called critical... Or at my time later on, called Critical Legal Histories.

PROF. CLUNE:

Oddly enough, Willer Hurst was a predecessor of Critical Legal History because he explained the role of property and contract in the economy, along with restraints on exercise of those rights in a realistic and understandable way. For example, the lumber industry in Wisconsin. He did not have rose colored glasses. I would also say I had a lingering puzzlement about law school courses, especially in the first year and this clicked with legal realism. There were all these rules but I couldn't figure out what they were for or what significance they had out there in the world. They were floating up there in the air. If you read the interview with Stuart McAuley and Bill Whitford in the book, you'll understand the real world of contracts much better. Second and third year courses were easier to understand because the law studied by them was created with a purpose in mind courses like antitrust, securities, regulation and so forth.

TURNER:

Right. The first year of law classes, you're just thrown in the deep end of very esoteric topics like contracts. That's a very vague term for people to understand and I agree the interview with Stewart and with Bill really sheds a light on why it's taught very differently here. We'll get to that in a little while though but it's nice to have someone that wrote a book about Law in Action on our Law in Action podcast, so thanks again for joining us. In the preface to your book, you discuss Legal Realism and Law in Action. So before we get to that other content, let's explain these two terms in a little bit more detail and why they're important to the education.

PROF. CLUNE:

Sure. Legal realism was a movement of law professors in the 1920s who criticized the emphasis in law school on appellate cases and legal logic. They wanted to know about how law was actually practiced and its impact on people. Willard Hurst himself complained about his courses at Harvard Law School, although he did extremely well in them as resembling euclidean geometry. This quest of the realist was the beginning of law in action. How is law experienced at the ground level and what practical impact does it have? That beginning with the [inaudible 00:05:03] was greatly expanded at Wisconsin during the formative period that the book looks at and then led to empirical research and courses and other departments as well as time went on.

TURNER:

I love that comparison to euclidean geometry and I feared it when I first looked at law schools like is this what it's going to be? And it turned out not to be so because of the professors that I had. So what inspired you to focus on these four particular courses at UW Law?

PROF. CLUNE:

The immediate stimulus was a law school event honoring the late great Herman Goldstein. You couldn't study Goldstein without considering Frank Remington because they worked together on the monumental American Bar Foundation study of the exercise of discretion and criminal law from investigation all the way through to sentencing and parole. The idea of discretion everywhere was revolutionary at that time. And then equally important for the law school at that time was the pivotal influence of Willard Hurst and the parallel revolution of his course in legal history and legal process. The last thread and equally innovative was contracts law in action pioneered by Stuart McAuley and Bill Whitford because contracts is such a key course in the first year curriculum. Many of the most influential legal realists were contracts, teachers and scholars, notably Carl Lien. And looking backward all of these courses were taught at Wisconsin from that early time to the present day. So it is a lasting formative tradition.

TURNER:

I just have to reemphasize the great part that you mentioned for Prof. Herman Goldstein. I was lucky enough to work with him pretty closely in a couple different aspects of getting his book published back out there and he was a gentleman and a scholar. No other way to put it. So it was just really great to work with him and it was really great to see his class along with Prof. Remington's had a spotlight shone on it here. So thank you for that.

PROF. CLUNE:

He was a special person, he really was.

TURNER:

So we've danced around this a little bit. What are those four courses you focus on and when were they developed?

PROF. CLUNE:

So here they are by name and I say there were I developed from 1950 to 1970 and in different additions at different times, but that's a good time period. And it was Legal History by Willard Hurst, Criminal Justice Administration by Frank Remington, Herman Goldstein and colleagues, the Wisconsin Contracts Course by Stewart Macaulay, Bill Whitford and colleagues and Legal Process by Willard Hurst, Lloyd Garrison, Carl Auerbach and colleagues. Willard Hurst book on... Which his first book was called Law and Society, and he conceived of it as both a book in legal history and legal process. And so this last one that I mentioned Legal Process was the updated Legal Process version of that. A switch hitter you could say. And then all four courses continued at Wisconsin or nationally from that early time to the present.

TURNER:

Let's dive into each one of these individually to really get a good sense for them. So let's start with Willard Hurst. How did Hurst and the Legal History Course he created affect legal education?

PROF. CLUNE:

Well it's hard to overstate Hurst's influence at Wisconsin and nationally. He virtually invented the modern field, the legal history, and was one of the early pioneers of a legal process course along with Hart and Sacks. He had a powerful role in obtaining funding for others on the faculty. He had a prodigious publication record, almost unbelievable when you look at it. He studied the rise and fall of the lumber industry in Wisconsin, along with the destruction of the Northern forest. He turned down offers from Harvard and Yale as did Remington at Harvard. His book Law and the Conditions of Freedom was a bestseller and inspired others to pursue legal history as a field.

TURNER:

We also at the law library here are in the process of migrating a Hurst collection that we have digitally created to our repository, where we have a lot of his lectures and some of his correspondence digitized and a lot of his publications in one spot and it is as you said, a prestigious collection to review because he was just an amazing writer that really changed the outlook of legal history. Also we have his typewriter, it's fun to see.

PROF. CLUNE:

Anyone who was around Willard knew of this typewriter because he would sit in his office with natural light only. He never turned down the lights and you would hear him click-clacking away at a rapid pace. And I think that goes all the way back to when he did his different clerkships. And we the faculty would get concise little reviews and comments on the work we were doing... Always very helpful, typed out on that typewriter. So that's a great artifact that you have.

TURNER:

Well, however he worked in natural light or otherwise it worked very well to say the least, to give a little bit of understatement here. Well thank you for that one. Let's turn next to Prof. Herman Goldstein and

Prof. Frank Remington's Criminal Justice Administration course. What impact did this course have on legal education?

PROF. CLUNE:

Well, again it's hard to overstate the influence. The courses grew out... As I said of this enormous research study by the American Bar Foundation which looked at the exercise of discretion from the earliest encounters of people with the legal system straight through to the end of the process. Professors from other law schools Yale among them, took part in study groups held at Wisconsin and went home and wrote tenure articles. Walter Dickey told me that he attended one of those and it was probably the greatest intellectual experience of his life and that's something coming from Walter. The Criminal Procedure Course created by Remington is still taught today at Wisconsin by professors Keith Findley and Cecilia Klingele. And I consider that to be the jewel of the first year curriculum perhaps because I'm biased, but I do think very highly of it.

PROF. CLUNE:

Goldstein wrote books on policing in a free society and problem oriented policing. He came to have enormous national and international influence and received a very distinguished international prize sometimes called the Nobel Prize in his field although it wasn't a Nobel Prize technically. I told him, "Well, it's the greatest prize in your field so..." I got to interview him not too long before he died and that'll be a lasting memory as well. And professor Michael Scott was a protege of Goldstein who taught his courses at Wisconsin and now heads an amazing center on problem oriented policy at Arizona State. Scott has an article in the book which is really well worth reading about Goldstein's work and his relevance to policing issues today.

TURNER:

We also hold here at the Law Library right below Willard Hurst's is typewriter, a partial collection of the American Bar Foundation papers that Herman and Frank Remington worked on and a complete collection is the Wisconsin Historical Society right across the hill here. So if anyone's ever interested in reviewing these papers they are available to be reviewed. And this is just an amazing massive collection as professor Clune said, the show from the street level writing in the police car to how these people were first interacting with the discretion all the way up to sentencing. It's an amazing collection.

PROF. CLUNE:

When I went to interview Herman at his apartment, he said, "Will I'm so excited, I just got a call from this researcher at Harvard who was interested in the American Bar Foundation Study and wanted to know some sources and things to read." And he said, "I almost felt sorry for having to dig through all of it again." But she was either a young professor or graduate student and I can't remember so all those years later it still had vitality. So maybe she went and looked in your library sources.

TURNER:

Yep. We worked with her actually and she... We haven't had her here yet because of COVID but we still are working with her to get her to see them eventually.

PROF. CLUNE:

Oh really? OK, good.

TURNER:

Yeah, but still being worked on be... I wish she had been here but COVID interrupted travel plans unfortunately, but it will happen. Okay. Let's turn to the third course that you discussed in your book and that's the Wisconsin Contracts Class that was largely created by Stewart Macaulay and Bill Whitford. How was it different than previous contracts classes?

PROF. CLUNE:

Well, I think the departure of this course from traditional contracts courses was profound. Instead of teaching appellate cases about such topics as contract formation, offer and acceptance, this course focused on the other end of the spectrum. Contract remedies, which determine whether recovery is possible and on the multiple obstacles in the way of recovery of damages, it also featured the multiple conflicting doctrines that make prediction of results difficult. I would say interestingly including after an appellate case where one side wins, they have to go back down to the trial court and face arguments that weren't made before but are relevant to the outcome in the new trial and it brought attention to how most contracts are made and enforced.

PROF. CLUNE:

On the one hand, relational contracts... Which is a specialty of Prof. Macaulay and something he's really internationally famous for, they're based on trust and disputes are resolved informally outside of courts. And this type of contract is extremely common in the real world for example, long run supply contracts. And so on the other hand, a great portion of contracts are made between parties of vastly different power with one party dictating all the terms and remedies. You just click agree and you've given your consent. That's the so-called meeting of the minds right there. Click agree, minds are met.

TURNER:

I was lucky enough to have Stewart on the Law in Action podcast last December and it was very interesting to hear about his stories developing the course and about the publication of his selected writing as well. And so I'm going to plug in our previous pod to say go and check that out. It's really wonderful to talk with Stewart anytime. And finally we returned back to Willard Hurst and the Legal Process Course that he created. How did this class change legal education?

PROF. CLUNE:

This was with Lloyd Garrison and Carl Auerbach. It was an updated version of his original book which I said was Law Society and it was Hurst, Auerbach, Garrison and Sam Merman who authored this updated version and taught the course. I think it was a required first year course for a while. I think Walter Dickey took it when it was a required course as a student. So we have a generational transfer here through the ages. I just mentioned Sam Merman was a colleague when I first joined the law school and always a thoughtful, warm and friendly person, he's passed now. The late Carl Auerbach was another of several prominent new dealers who were on the faculty at that time and took part in these innovations. Jake Boisher is another one that I'm now getting a chance to talk to but is in my article in the book.

PROF. CLUNE:

And so Auerbach later became Dean of the Minnesota Law School and he became known for his normative vision of progressive social democracy. I just thought I would mention a quote. He said that as a result of the new deal, "A tolerable measure of social justice and individual freedom has been

achieved in our society as a result not of the pursuit of a vision of an ideal economic system, but a political struggle which individuals and groups have waged according to the rules of democracy to satisfy their claims." So this enthusiastic defense of progressive legislation and democracy taken from the legal process book is a good example of the normative perspective on historical trends, typical of legal realism in the tradition of pound sociological jurisprudence. Pound maintained that the law should be reformed when I was out of step with social needs and justice.

TURNER:

Right. It draws a line about how the law develops through time to adhere to what is the demands of the time from society?

PROF. CLUNE:

Right. And with that progressive slant, because when I got here there were many new dealers on the faculty and I did not realize that they were actually Nate Feinsinger and Hurst himself worked for the Navy on the Law of Treason. And by the way then in typical fashion, he published three articles in Harvard Law Review in a book on Law of Treason and Jake Boisher and Sam Merman and others. And so Hurst's study of worker's compensation really was a study of how the common law was not adequate to meet the accidents caused by the industrial age. It was difficult to bring suits and there were odd defenses and things like the at and so our workers Comp. Law was passed along with a compensation scheme and funding and regulation of workplace safety. That was an innovation at the State of Wisconsin.

PROF. CLUNE:

He had this idea that... Some people would call it functionalism I guess and also progressivism, that there was a need that had to be met. It was a recurring social need. The idea of it required administrative law rather than courts and that was another big step from common law and the 19th century to late 19th century and the 20th century. And then in the new deal, there were many agencies and regulatory regimes.

TURNER:

Right. It laid the groundwork for a lot of the administrative state that is still functioning today in some areas at least.

PROF. CLUNE:

Oh, absolutely. It's functioning all over the place. It's contested up and down in every hearing and every new amendment that's proposed and the Supreme Court backtracking on what is in the discretion of administrative agencies, but it's still there and chugging away.

TURNER:

But another great element of this book are the interviews that you conducted and collected which you've been discussing and alluding to throughout our discussion so far. What were some of your favorite moments from these interviews?

PROF. CLUNE:

I say in the book that I first hesitated whether to include the interviews. We had articles and I thought, well, that's good scholarly stuff and what am I going to throw these interviews in? They are chatty and they wander around a bit, but it was really a delight to do all of them. Every single one of them I learned something even about areas that I already knew pretty well. I got a pretty deep familiarity for someone who wasn't in the field, a problem oriented policing and Goldstein and the other interview and the interviews of Klingele and Finley were very informative about that. The interviews with Dirk Hartog his paper and his interview on legal history and the small dispute between Lawrence Friedman and Dirk. I probably put them was time on email with Dirk Hartog going back and forth on conceptions of what legal history is and I learned a tremendous amount.

PROF. CLUNE:

There is a disciplinary gap to be bridged because historians look at things in a different way. And one of the things that's discussed in his paper is not only how the subject matter changed from law on the economy which first did, but to what you call subaltern populations. Native Americans, African Americans, so on colonialism [inaudible 00:22:07] studies and all that stuff. But also conceptions of history itself and how, where, what is legal history? Just the way of humanizing law, does it stand on its own? And Hartog eventually comes up with the idea that it's not accompaniment by which I think he meant running on parallel tracks next to the war or something. That would be a crude way of putting it but it's a real workout. And Hurst was his mentor when he was on the faculty here. A very warm host for him. Then he went to Princeton in the History Department, and also Bob Gordon who was doing legal history, left for Yale and Stanford.

PROF. CLUNE:

And the book has a little bit of a split in the ranks there between [inaudible 00:23:01] 19th century economic history and the new history that was more about things like slavery and colonialism and I would say Mark Tushnet who wrote his book on the Law of Slavery was part of that whole shift to the left. And it's in 1960 where everything changed. The focus of people's attention changed too and that was reflected in legal history. So those interviews were fascinating to me and then [inaudible 00:23:35] and Whitford, I understood maybe... Bill Whitford is a close friend of mine and I frequently do zooms with [inaudible 00:23:46] and Whitford. And so I was able to... Even before doing that interview, understand a lot of things but I only understood maybe 25% of the things they did in that course and why. And there were things that I had hanging in my mind all the way from my own course on contracts in law school that they answered and I understood for the first time. And what the basic economic purpose of contracts is, which is protecting expectations and that's included in the interviews.

PROF. CLUNE:

So anyway, long way round of saying, I think the interviews really add something important and distinctive to the articles. I'll just mention since people might as well know, there's a forward by Lawrence Friedman, which his days at Wisconsin and his days he wrote many additions of the history of American Law and also a law and sociology book with [inaudible 00:24:58]. They were close colleagues but he takes a little exception to Dirk Hartog's view about Hurst that maybe he was a little bit rigid and not accepting these new historical movements of the sixties and things like that. I wouldn't want to overdo the disagreements but I think it spices the book a little bit to identify these different points of view.

TURNER:

But it adds more new odds and it allows you to shed light from different angles on Prof. Hurst's work. And it sounds like anyone could learn from this. If you as an Emeritus law school professor and sociology professor can learn different aspects of Contract Law from the interview, a first year law student or someone that's been in law for 40, 50 years could also learn something by reading these interviews.

PROF. CLUNE:

Yeah. I hope that some incoming law students read it. You mentioned before when you come into law school you're thrown into the deep end and you are doing things and wondering what they're going to amount to and exactly what you're learning. And so it's like a deep end with blindfolds on instead of swimming goggles and that's a common experience for all those law students I think. But I think if they breeze through that, at least they'd get some interesting thoughts and ideas for example for the contracts courses and other courses.

TURNER:

Let me go back. You had mentioned the introduction by Prof. Lawrence Friedman. I'd like to excerpt from that if I may. "When I read the interview with Cecilia Klingele and Keith Findley in this book, I couldn't help thinking what a wonderful course they teach, what a wonderful experience for the students. Do they realize how different this course is? How rich and experiential learning?" This really affected me because I happen to have both professors Klingele and Findley for these two courses when I was in law school and I learned a lot from both of them. Do you see more at law and action or experiential learning elements being integrated into other law school classes?

PROF. CLUNE:

On the one hand, many law schools... I suppose we could talk about law school at Wisconsin or law school everywhere, but in many law schools they still teach traditional bar review oriented doctrinal courses, which probably haven't changed much in a hundred years. I guess you graduated from Wisconsin so you didn't have to take a bar review course.

TURNER:

Yes. With great relief to me.

PROF. CLUNE:

The bar review course I took in Illinois was... It was so archaic. It almost had spiderwebs on it, but anyway a lot of law schools are very traditional, a lot of courses are very traditional, but on the other hand there's been enormous growth in clinical education since I graduated from law school. It was barely beginning and now both at I think Wisconsin it's been a very strong part, wonderful part of the curriculum and elsewhere wealthy law schools teach courses in legal history and law and economics.

PROF. CLUNE:

I say wealthy law schools because you're having to hire special faculty to teach these courses and offer students who want to take them. And so I think it's just a fact that they're in the so-called elite law schools. Also I would add the policy oriented courses in the second and third year curriculum built around legislation and administrative rules. We talked about that before. And these have a strong affinity for law in action. And I'm talking about bankruptcy for example, especially if they are taught in a policy framework. I remember Elizabeth Warren... This is a story that... Oh no, this was in... I think

Elizabeth Warren has a tribute to Bill Whitford actually somewhere but I don't know if you have that. You could pick up on your library archive. And I think in that is where she talks about when she first started teaching bankruptcy, she would take each section and say, "What problem was Congress trying to solve here? What's the nature of the problem? How successfully does the statute and its application meet the problem.?"

PROF. CLUNE:

And so that's a law in action perspective on a course which was an area of law. Bankruptcy code was actually enacted after the new deal and that had a purpose. And of course it's always been contested. So the reason you can't get a discharge of student loans is because of the influence of banks. And so all of these areas of law have... Are a quilt comprised of a different opposing forces knitting them so to speak. But it very much makes sense from a law in action point of view and can be taught that way. I think income tax can be taught very much with a strong policy framework. And then I would add lastly that, quite a few law schools offer interdisciplinary courses in areas such as bioethics and intellectual property is another one.

PROF. CLUNE:

I know when I was chairman of admissions, I used to regret... This is really inside admissions base below. Law School ranks are based on grade point and LSAT scores. Sometimes we would get applicants with the extremely good scientific degrees who had lower averages because science gives lower averages than the humanities and maybe they didn't have an astronomical LSAT, but they would've been a perfect addition for many of the interdisciplinary fields where law touches areas involving science are all over the place in the modern world. I wish we could have fit more of them and admitted more of them. We did make an effort as many as possible. So didn't think I would get off on admissions, but I spent a lot of time actually right down the hall from you. So.

TURNER:

Yeah, and I think they have been admitting more people with science backgrounds lately. At least when I'm speaking with students now I see a lot more engineering or biology or what have you which I think is great, because as you said bioethics, that's an important and growing field that people with the scientific background with legal expertise can really affect and Law in Action plays a huge role there.

PROF. CLUNE:

Yeah. And we do have joint degrees and programs. I mean business always seemed to me like another obvious one. I was a literature major and one thing I had a hard time understanding was the way business fit into the business courses. And that's a legendary problem for a lot of people in law school. All of these things are good avenues to pursue and they probably are being pursued, not so visibly in the headlines but quietly in small developments.

TURNER:

Right. Here and there it's being developed and addressed, I think you're right. How else do you see law school curriculums changing the future if at all?

PROF. CLUNE:

Lawrence Friedman mentions that it's been... it's not been typical for law and sociology... law and social science, law and political science to work its way into law school courses and into research, although it does occur and there's tremendous amounts of law related research in other departments. I did most of my work in my life and education had an office over in Wisconsin Center for Education Research and I got fairly deeply into a lot of education research and a lot of it is very empirical based on data. And for example, what works in education and my field was implementation. What happens you start something at the top? What happens when you get to the bottom? And the bottom sometimes controls the top and all that.

PROF. CLUNE:

There's the followed Institute of Political Science Sociology, all kinds of people are studying law and Malcolm fueling his article mentions that was a result of this innovation in those four courses because even at that time, Hurst was working with people in other departments and Goldstein was not a lawyer. And some of the people on the American Bar Foundation who were teaching at... Newman for example was not a lawyer. So it began then and I think a recent interesting example was Thomas Mitchell's work on longstanding doctrines that have deprived black and other disadvantaged American families of their property and real estate wealth.

PROF. CLUNE:

And he received a MacArthur Fellowship for this and that research is taught in some first year property courses. So property was an area that was just very conceptual when I was in law school and that's pretty much of a one action thing. And as you know, Mitchell was a long time faculty member here and he is now at Texas A&M Law School. So again there's things going on but on the other hand, I think the doctrinal method is still dominant. Wisconsin is still a bit of an outlier, so it's a mixed bag.

TURNER:

What you most hope readers take away from your book?

PROF. CLUNE:

Well, I would say obviously a wider understanding of the distinct achievements of the Wisconsin Law School over many decades. And then also the long gradual evolution of law and action going back more than 100 years. I think that's a good capstone for it.

TURNER:

I agree and I think people are going to get that in spades from this book. I've really enjoyed what I've read so far. We'll link Prof. Clune's scholarship on our podcast page. Thank you very much for joining the podcast today Prof. Clune

PROF. CLUNE:

Well, thank you. It's been a very good experience. I think I hope people enjoy it and learn something from it.

TURNER:

I'm certain they will. We've been discussing Prof. Clune's recently published book *Legal Realism to Law in Action: Innovative Law Courses at UW-Madison*, published by Quid Pro Books in December 2021. The

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SSRN link and a link to purchase the book are both on the podcast page for a complete listing of Prof. Clune's Work visit the University of Wisconsin Law School Repository. This link could be found along with this podcast at wilawinaction.law.wisc.edu.

TURNER:

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