Taking State Law Seriously: A Re-Assessment of Our Obsession with All Things Federal

Peter Nicolas, Jeffrey and Susan Brotman Professor of Law
May 8, 2008

Dean Hicks: Good afternoon everyone and a very welcome. This is our last in a series of installations of endowed professorships here at the Law School. Each one of these has been very, very festive and has been very well attended. Thanks to you all, our colleagues, our friends from our extended Law School community, students, everyone for being here.

Just to recognize one particularly distinguished guest among us, Bill Gates. Sr., the Class of 1950, Bill has served as a Regent since 1997 and was a partner in the firm of Shidler McBrew Gates & Lucas that after some mergers with the old Seattle law firm of Preston Thorginson now Ellis produced the current firm of K & L Gates. Mr. Gates, it is always wonderful to have you here. And just to recognize distinguished members of our Alumni Board and Law School Foundation Board as well.

As we have said on each of these occasions, the importance of these endowed professorships simply can't be overstated. It's just a wonderful way of providing some material support to our colleagues whose achievements in their career make them meritorious of having a professorship. But, also just the life of these professorships as institutions is very important to us.

In this case, the first holder of this professorship, the Jeffrey & Susan Brotman Professorship, was our late colleague, Joan Fitzpatrick, and now with Peter Nicolas being installed in this professorship we see that we have two wonderful incumbents who are already adding luster to this professorship. As it goes forward and the work that gets done in a sense it will become deeper and fuller because of the association of the work of everyone who has held this professorship. Providing support for our colleagues' research, research assistants and just the very fact of having a named professorship after your name is a nice thing, and it is one of those things that just helps to raise our profile in all of the scholarly and professional communities that we are members of.

Without more, I will just introduce Susan Brotman who will be saying a few words about the Brotman Professorship, its origins and its intentions. Again, it is a wonderful thing that the Brotmans have done. I want to especially recognize Dean Hjorth who worked very closely with Susan and Jeffrey back in 1997 and really put wind in the sails of this idea to create this professorship. His friendship with the Brotmans and leading them to recognize this is a
wonderful way of achieving their purposes is so appreciated.

Susan has served on the University of Washington Foundation Board from 1992 to 2005 and was the Chairman of the Foundation Board from '95 to '96. She and Jeff were just enormously important friends to the effort to create this building where we are now so gloriously installed, especially when prices were going up and the project had to be deferred holding major fund raising events at their home and being real champions of this project to see it through to successful completion. It is so appreciated; a great friend of this University, a great friend of the arts community here in Seattle serving on the Board of the Pacific Northwest Ballet and also the Seattle Art Museum and, again, very important in major fund raising efforts for those two important cultural organizations.

Her husband, Jeff, is one of our graduates, a Founder and Chairman of Costco, a Regent of the University since 1998 and a 1967 graduate of the Law School and their nephew, Adam, also one of our graduates. A lot of ties and it just adds a sense of additional pleasure to the day.

So, Susan, I will turn the podium over to you.

[audience applause]

Susan Brotman: Thank you, Dean Hicks. Hello, everyone. Jeff sends his regrets and is very sorry that he was unable to be here today, but he joins me in congratulating Professor Nicolas. We would like you to know that Jeff views his intellectual training as a foundation for his success. He developed self-confidence, friendships and the necessary skill sets for success. Critical thinking was the key, and I hear him say that to students who are thinking about going to Law School.

In '91 we established the Alternative Dispute Resolution in honor of Jeff's parents because Jeff felt that that was their style of resolving conflict, and he wanted to do something to honor them. In 1999 the University was focusing on recruitment and retention of faculty, and it was then when we, knowing Dean Hjorth and having conversations about what we might do, we set out to establish this endowed professorship. I am so happy that Dean Hjorth is here and his wife and Bill Gates as well because they are instrumental for our involvement in the Law School recently in our contributions both in this professorship as well as this building.

I love the stories Dean Hjorth tells about Jeff and Law School. They have been quite entertaining for me. In the Socratic method of teaching in Dean Hjorth's federal tax class, my understanding is that he would ask questions, provide no information and hammer away at the student until the student either came up with the answer or left the room.
[audience laughter]

**Susan:** As I understand, Jeff frequently did not know the answer and did leave the room. At the end of that term Professor Hjorth asked Jeff how he did on the final, and when learning that Jeff was one of the top scorers in that final he was so exasperated, he just left.

[audience laughter]

**Susan:** They often joke about the fact that even though Jeff was not prepared in class he did manage to make it in life.

[audience laughter]

**Susan:** And I know, Ron, that he does owe a lot of gratitude to you and did appreciate so much how much dedication you gave to the Law School and was so pleased to have had the opportunity to learn from you and then work with you later on.

The endowed professorships like ours can attract nationally recognized scholars to the faculty, like Professor Nicolas. Jeff and I know that these professorships enable the Law School to honor and recognize the accomplishments of faculty members who have been here for many years and/or whose teachings and scholarship have enriched the lives of the students and enhanced the reputation of the Law School, both regionally and nationally.

This Law School is the cornerstone of great legal minds and legal education. Jeff and I feel that it is so important to do what we can to help the University School of Law be successful, and this was the way we felt we could make a difference. Professor Peter Nicolas is a prime example of why we created this endowment. We thank you all for being here to celebrate this day with us, and we are honored to be able to install the second Jeff and Susan Brotman Professor of Law today, Peter Nicolas.

And now, it is my pleasure to introduce Professor Mary Hotchkiss who will be speaking about and introduce Professor Nicolas. Mary Hotchkiss is a Senior Lecturer and Director of Academic Advising at the University of Washington School of Law. Professor Hotchkiss teaches Advanced Legal Research, Information Policy, and Employment Law.

She received a BA from Duke University, an MS from Catholic University and a JD and LLM from George Washington University. She is very active in a variety of professional and community associations. Professor...
[audience applause]

Mary Hotchkiss: Thank you Susan. It is my pleasure to introduce our honoree, my colleague and friend, Peter Nicholas, The Jeffrey and Susan Brotman Professor of Law.

I first met Peter Nicholas when he came to interview in January 2000 for a full time teaching position. I attended his colloquium, his topic was, "The Use of Preclusion Doctrine, Anti-suit Injunctions and 409 convenience, His Missiles in Trans-national Intellectual, Property Litigation"

[audience laughing]

Mary: Now, I don't know about you. But when I write the title of his talk before he arrived, I had just the foggiest of notions what he would be talking about. I was pretty sure that it would deal with federal court jurisdiction but that's about it.

When he began his presentation, Peter opened with the basic framework that laid out his primary points. He managed to take a topic that was a complete mystery to me and make the material totally accessible. After the presentation, Peter offered reprints of his article on the topic. I took one and I was pleasantly surprised to find his writing every bit as clear as his lecture. Indeed I could hear his voice in his writing. My instinct from this first exposure to Peter was that he would excel at teaching.

In February 2000, we hired both Peter Nicholas and Steve Calendrella. I had been hired the year before. As junior faculty members, Peter, Steve, and I were side offices of the 6th floor of Condon Hall, the charming, concrete, edifice, on Campus Parkway. As new kids on the block, we spent many hours at Condon preparing for class, talking about teaching, talking about writing projects and getting to know each other.

One thing I remember from Peter's first office was a news clipping that was mounted and hanging on his wall. It was a story about Peter when he served on the Ann Arbor City Council. I was intrigued that Peter found the time to run for city council while working on his master's degree in Public Policy and serving as a teaching assistant.

He won that first race and then served the second term as well. Talk about putting course work into action. Why just learn about Public Policy when you be in a position to make public policy? Reading about his service on the city council clued me in. Peter is also going to have an impact in faculty governance.
Now as a side note, my mom grew up in Anne Arbor. She was quite impressed when I told her that my new colleague had served on the city council. Actually more impressed than by my appointment to teach at the law school.

[audience laughing]

**Mary:** I recently asked Peter when he became interested in the law. He said that while he enjoyed studying Economics and Public Policy as an undergraduate and graduate student, he did not find other either sufficiently interesting to pursue a PhD. On the other hand, during his tenure at the city council, he was exposed to law as a discipline. He became intrigued by the interplay of law, the legislative process, and public policy.

Peter went to Harvard Law School where he excelled in the classroom and in extracurricular activities such as the Law Review and Duke court competitions. I was not surprise to learn that he received both best oralist and best brief in the Ames Duke Court competitions.

While many students developed strengths in either writing or oral advocacy, Peter was the ultimate double threat, an exceptional writer and a brilliant oral advocate. After law school, Peter clerked for Judge Michael Bourdain, on the US Court of Appeals for the first circuit in Boston. As a program notes, Judge Bourdain who had been a law professor encouraged Peter to pursue a career in legal education. I thank the judge greatly.

In preparing this introduction, I asked Peter when he became interested in teaching. He shared that his interest in teaching was actually long standing. In early elementary school, he used to set up a classroom and teach his younger brother whatever he had learned that day.

Can't you see, Peter Nicholas, a young Peter Nicholas earnestly explaining addition or subtraction to a somewhat bewildered pre-schooler.

[audience laughter]

**Mary:** Peter is an exceptional teacher; this was the word on the street even before he won the Philippe A Trautmann Professor of the Year Award in 2003, his third year of teaching. He has been nominated for the award almost every year he has taught here.

His lectures are known to be exceptionally clear and well-organized. Peter is a demanding professor who challenges students to think critically whether in evidence, conflict of laws, federal courts, international civil litigation or gay rights and the constitution.
These courses have conflict concepts and require close reading of statutes and rules. So Peter is constantly thinking about ways to make the material more accessible. One technique he employs involves the use of a large, pink, stuffed bunny.

At some point, during the quarter that Peter teaches evidence class, he brings the bunny to class and he places it on a table near the podium. He then begins the lecture, as he delves into material asking students questions and responding to their inquiries, he never refers to the bunny. The topic of the day is "Testimonial Evidence".

At some point when the class is examining a case, where the judge instructs the jury to disregard testimony or evidence that has been stricken from the record, Peter tells the students, "Pay no attention to the bunny. Pay no attention to the bunny." The lesson is, "Disregarding Testimonial Evidence" is just as challenging as disregarding a large pink bunny that is sitting there in front of you.

When Peter did not find any of the evidence casebooks on the market work just right for his class, he wrote his own. His casebook published in 2005 has been adopted by a number of schools. In 2006, he published his second book, one that focused on Federal and Florida Evidence Rules. This was the first in a series of handbooks that organized the federal and state evidence rules with editorial commentary for quick consultation in the classroom or the courtroom.

He has since published handbooks for Texas and New York as well. Peter has served the Law School with distinction. Over the past eight years, he has served on many committees. He has chaired the Executive Council, the Leadership Group, then advised the Dean on governance issues and chaired the Academic Standards Committee.

Both groups have a heavy workload and both face challenging politically sensitive situations. While he has strong opinions and shares them freely, he also excels at listing and looking for carefully crafted solutions.

Peter and I don't always agree [speaker pauses] but he listens carefully and he comments thoughtfully. I admire him for his principles and integrity. He is true to himself even if that truth places him in a minority. But what about the personal side? Where is the dirt?

Peter has a wonderful collection of ties and specially shirts. He has a fondness for Charlie Brown. Perhaps they are brothers separated at birth. I am always delighted to see a tiny Charlie Brown embroidered on his Oxford shirt and there is one today or the Peanuts character on a favorite tie.
Peter also has a fondness for Snoopy collectibles again, this is perhaps the Charlie Brown in him, or maybe like Snoopy he imagines himself as a World War I flying ace eroically triumphing over evil.

Peter is also fond of heirloom China including Bunnykins figures, figurines, I had to look it up, I...

[audience laughing]

Mary: He loves a good auction. And as we heard at Pat Cousler's installation, he can make impulse purchases that have nothing to do with China or Snoopy collectibles. It is absolutely true that he bought a piano before he had even taken a lesson. He learned to play though and he learned to play within a short period of time.

Peter loves to travel; born in Beirut, Lebanon he spent most of his childhood in Rochester, New York. My sense is, as soon as he could afford to explore beyond New York, he did. Within the past few years he has traveled to Australia, Thailand, Hong Kong, Tanzania, South Africa, England, and many cities in Europe.

Most of these recent trips had been with his partner, Mike who shares Peter's love for travel. Peter hopes to travel to more exotic locations such as Antarctica someday. But in the short term, he will settle for a trip to Cleveland next month for a conference on "Teaching Evidence".

Peter is a man of many talents. He is a gifted teacher, a superb scholar, a dedicated leader at the law school, a thoughtful colleague, an inspiration, and a cherished friend. I am delighted that he has been recognized today by both the Brotman's and the Law School community.

Students, faculty, staff, and honored guest, it is my privilege to introduce my friend and colleague, Peter Nicolas.

[audience applause]

Dean Hicks: Thank you Mary, that was just really, really wonderful and as with all our wonderful introductions that we have had of our new professors. It is so easy to see and recognize the person in the introduction. So the heart and energy that has gone into this Mary, thank you and Peter, our colleague our cherished colleague.
What a treat this is. And I have a medal here that is just an emblem of the Professorship of that is being awarded and it simply says, "Jeffrey and Susan Brotman Professor of Law." So, please join me in congratulating Peter at this moment.

[audience applause]

**Peter Nicolas:** Well, good afternoon everyone and thank you so much for taking the time out of your day to share this moment with all of us. I was snickering up here, I apologize. I have been watching this series of receptions now for the past year. And for some reason, every time I see Dean Hicks put this medal on someone's neck I immediately think of the victory ceremony at the end of Star Wars for those of you are star wars...

[audience laughing]

**Peter:** And here we have Princess Lea played by our fearlessly 13 Greg Hicks hanging the medal around Hans Solo or Luke Skywalker. And at first I was like, "No, no, no, I am not going to do this. This is crazy. Why am I getting a medal, it's not like I save the galactic republic or anything like that. Unlike Jackie and McMurtry I have not been able to save anyone who is innocent from being imprisoned. I just do my job. I teach, I write some articles. I write some books, I said, I am not going to take the medal. That is crazy."

And I said, "OK, I probably should not do that. I probably should think about it and see if there is any reason that I should earn a medal." And I said, "Wait, wait I remember that I had to go, not only I have to go, I have to chair some really long, very difficult faculty meeting several times ago." And you know what? "That's it. I deserve a medal. I will accept and will wear the medal, so thank you Dean Hicks for that.

I want to thank Mary for the introduction she managed in fewer than eight minutes to tear down the tough guy reputation eight years in the making. It is a good thing I did not tell her about my Hello Kitty collection, that would be terrible...

[audience laughing]

**Peter:** I of course want to thank the Brotmans, Jeff, and Susan for their generosity in donating money for creating this Professorship as well as their history of generosity to the law school and to the University of Washington, as well as the greater Seattle community.

And I feel a very close connection and it feels as if I am to be installed as a professor that the Brotman won is very appropriate. When I first move to Seattle, Dean York had a party at his
house to celebrate all of the new hires and as I was meeting different people, a very energetic individual that I think many of you know came up to me and after introducing ourselves. She immediately asked me if I have ever been to Costco and I have no idea what she was talking about.

[audience laughing]

Peter: And she kept at it and every time I saw her, she would mention Costco. And I think, "Who is this crazy woman who every word out of her mouth is Costco and the Brotman's and things like that." She told all these wonderful things about the Brotman's and for those who don't know, Mary York is that individual, here in today. And by in short order was able to confirm two things. Costco indeed is as amazing as Mary suggested it was and Mary is as crazy as I understood...

For those of you who are not familiar with Costco and I doubt that there are that many people on the audience but as you may know, it is somewhere where you can go and get things at really, really inexpensive prices. In fact, I have no idea how you were able to donate money for this professorship with some of the margins that you guys have at Costco.

But you do not go in to Costco and buy a roll of paper towels. You buy 16-rolls of paper towels. And you don't buy a couple of packages of toilet paper, you buy 36 rolls. And so, everything is done in bulk and that is how I think they were able to pass along the savings to the rest of us. And you may not know that you can actually get fine jewelry at Costco as well. You can find it on the East side I know this... [audience laughing] I saw this $90,000 diamond ring there. I said, "Wow, someone is going to come in at Costco and find a $90,000 dollar ring." They also sell wedding rings and at first. As I just stand there, I don't think that their business was doing fairly well. They only found that they were able to get sales in places like El Dorado, Texas and Colorado City, Arizona and few cities scattered throughout Utah. And they said, "Oh, gosh maybe we can't follow our regular business model. I guess we are not going to sell them in four packs anymore." So instead they are individual.

By the way in case you go in at Costco, that was a joke. They never sold them in four packs but that is the thing about Costco, right, if I did not tell you it was a joke, you might have thought that they really did sell that stuff.

All right, so many people to thank, the Law School's Development and External Relations staff have done a wonderful job of putting this together. There are several people involved: Laura Paskin, Sheri Ireton, Stephanie Cox, Anna Houston, David Sieber, Cheryl Wilson, Yoshiko Sahiki, Cay Yen and Beth Sanders. There are so many staff people here today and throughout the
building who have really made it possible for me to get my work done. Lenny Con, I'm sure you're somewhere back there. You're the one who keeps these classrooms running on a daily basis. Our secretarial staff: my former secretary, Wendy Condiotti, and Hannah Lee, who's my current secretary.

And the library staff; the library staff here is unbelievable. I will be lying on the couch at night and I will be working on something and I'll just shoot off an email. Like, I understand George Washington wrote a letter to someone, sometime in the 1700s, about the Supreme Court and I'd like to read it. Within two hours, I get an email with a PDF file that has the letter. It's just unbelievable and in particular there have been several individuals I want to recognize for their assistance: Judy Davis, Ann Hemmins, Nancy McMurer, Cheryl Niperg, Ripa Turnquist and Mary Wisner. I want to thank the CLE staff, and in particular Cathy Kline, for making sure that anyone who comes today gets a half a CLE credit.

To thank my current and former students, some of whom are here today for inspiring me to teach and for helping me as research assistants. To thank my colleagues, my senior ones, for voting to hire me and for putting up with me since then. And then to thank a couple of former deans, Former Dean Yorthbess was already recognized for working with the Rottmans to create this professorship. Former Dean Knight for naming me to this professorship, and then finally to thank my family for their love and support: my parents, my brother, and my partner Mike, who's here today.

And now, I actually have to give you some laws and talk about substance.

[audience laughter]

Peter: So no more jokes, I think we're done with that for now. The title of today's talk is "Taking State Law Seriously: A Re-Assessment of our Session with All Things Federal."

Now, who do I mean by "our"? By "our," I'm referring to those of us who teach law primarily. Of course our obsession has an impact on how our students learn and practice law and ultimately on the clients that they represent. And by "our" I do include myself. I have found myself to be guilty in the past of this offense of obsessing about federal law in my teaching and research. Many of my early articles are essentially how to make anything a federal case.

[audience laughter]

Peter: So I've certainly been guilty of what I'm talking about. So I want to do two things. First, to address why I think faculty at US law schools focus primarily on federal law. And then, to discuss three virtues of providing students with greater exposure to state law. I'll state those
briefly. First, state law as a form of comparative law. Second, state law as a greater protector of individual rights. And finally, state law as a check on federal power.

Now, this first question I need to clarify, when I say faculty don't pay much attention to state law. Obviously faculty who teach areas that are dominated by state law, areas like contracts towards property and family law, do certainly spend a great deal of time dealing with state law. My question really has to do with those areas in which neither federal nor state law predominates, -- areas such as constitutional law, criminal procedure, civil procedure, evidence, and employment law as examples.

I can think of about five reasons why it may be that we focus on federal law. First, that's what our professors did when we were students, right? So, monkey see, monkey do.

[audience laughter]

**Peter:** We are engaged in inertia based on what we experience.

Second, there's a perception that state law lacks prestige. That somehow it doesn't have the gravitas that federal law or international or intergalactic law may have.

[audience laughter]

**Peter:** We tend to associate state law with lesser law schools, so we shy away from it.

Third, it's not as easy to determine. Most textbooks don't put state law in their books, and so if you want to talk about state law, you've got to go look for something to supplement your books with.

Fourth, there are too many states, right? It's easy if you focus on federal law - one level of government, one set of case law to look to. If you look at states, now you've got at least 50. If you want to add territories in, there are a couple more things to look at. So that's a practical concern.

Finally, and I think this is probably the biggest reason why, it is a belief that state law is essentially meaningless. In other words, to the extent you're interested in, let's say, civil rights, or the rights of the criminally accused, there's this belief which was perpetuated by our teachers, and I think to some extent that we may continue to perpetuate, that state law is at best neutral towards, and in many instances hostile towards those rights. It's only federal law that provides
any sort of meaningful protection. OK?

So, I'm going to now go over those three reasons I think looking at state law is a virtue, and hopefully in the course of doing so respond to all of those objections, or at least reasons why we might be reluctant to teach state law.

The first one, I said state law as comparative law. What I'll say here is even if you don't care at all about state law, you don't have any interest in teaching it or learning it, and all you really care about is making sure you teach or learn federal law. There's none the less virtue to studying state law as a form of comparative law.

When you're talking about comparative law, that's international. Indeed we have many, many excellent scholars in this building who engage in comparative law, comparing the US legal system with those of various Asian, Islamic, European, and African countries. Yet, I would argue that some of the reasons for what I would call "international comparative law", which is what many of my colleagues do, applies with equal force to what I would call "intra-national comparative law".

I can identify at least two values that comparative law generally has. One, which is to attain a deeper knowledge of the legal systems that you're comparing. And second is to perfect the legal systems that you're comparing. And so, again, even if all you care about is US federal law, I believe you can use state law to achieve three purposes. One, learn federal law. Two, interpret federal law. Three, improve federal law.

As an example, I will talk about what I've done in my evidence course and in some of my evidence research over the years. So, of those three methods within state law as a form of comparative law, let's start with state law as a tool for learning federal law.

Most of us who teach evidence focus on the federal rules of evidence, and it makes good sense. No matter what state our students might practice in, as long as they're in federal court, it's a common set of rules that they're going to use in any federal court in the country. Most state evidence codes are similar to the federal rules of evidence, and so if students master the federal rules, it's not that hard for them to pick up the differences in their particular state.

Nonetheless, although I focus on the federal rules, I require my students each year to do some research and writing assignments where I ask them to take a particular federal rule of evidence and compare it to a given state rule. Sometimes I'll give everyone in the class the same state rule; sometimes we'll divvy it up and everyone becomes an expert on a particular state. And every once in a while I got pushed back, a student says, "Hey, why do I, I have come to school in
Washington. I don't care about North Dakota or Wyoming evidence law. I am never going to practice in those states." And I then, "One..." I told them. "...you never know what you are going to do." Right, like one student once, she even said, "Don't even dare teach me the federal rules of evidence. I am only going to practice in state court in Washington." And I was really puzzled, I said, "So you are going to check the citizenship of your party and his opponents and make sure that...and you are going to withdraw if they will move the case to federal court."

It was really interesting but students are sometimes so certain about what they are going to do but the truth of course is it does not really matter because I can just as well make up a state law and give it to them and ask them to compare it. And the point is, that there is no way they can prove they can show me the way that North Dakota's law or Wyoming's law is different from the federal rule if they don't first master what the federal rules says.

And one of the things I found is that by requiring students to engage in this exercise, they tend to become much more careful readers of law. It enhances their mastery of reading because when you are just asked to read something, you kind of sometimes give it a once over. If you actually have to sit down and compare it to something else, you have to do kind of word-by-word comparison looking at the punctuation, word choice and the like.

And so I found it is a way to get students to master what I ultimately want them to learn which is the federal rule, OK, so one of the virtues of state laws compared of law.

Another is using state laws a tool for interpreting federal law. Any area of law that involves the interpretation of text and it could be a constitution, it could be a statute, it could be a rule presents all sorts of conceptual ambiguities, word choices used and when I ask, "What does equal protection mean in the constitution or the phrase prosecution for homicide in the heresy exception for dying declarations. What exactly did they mean by that phrase?"

Now, sometimes you have a well-developed body of case law at whatever level it is that you are interpreting in which case you can simply turn to the case law but sometimes you can not. For example, you may have a newly enacted federal rule which has borrowed language from pre-existing state rules and there is not yet a well-developed body of law. It may be that just certain types of cases do not come up that often in the federal courts.

For example, run of the mill murder and sexual assault cases do not come up that often. And so, if you want to interpret one of the federal evidence rules that deal specifically with those types of cases you may have the difficulty.

Well, one of the things that often occurs that I said, "Two is that the federal and state rules may
be worded very similarly and you can use the pre-existing state decision or law as a tool for trying to interpret the similar terms that are used in the federal rules.

So, again something that could be persuasive to a court if you are trying to interpret ambiguous federal law. And finally, state law can be used as a tool for improving federal law. And as I said, one of the goals of comparative law is to perfect the legal systems that you are comparing. And I would view the rules of evidences as one area that is certainly like many areas of law right for improvement.

The federal rules themselves were developed by actually studying pre-existing common law, both the federal and state level and also looking at pre-existing state evidence codes that were in existence at the time. And since the federal rules were codified, most of the state have followed suit those that did not have codified rules. And they have modeled their codes after the federal rules but have made improvements. One, of eliminating ambiguities that were created by the drafters of the federal rules of evidence and two, I think improving some of the perceived unfairness that some people have found with the federal rules of evidence.

One of the things that surprised me as I have done some of my research on state evidence laws, is that even what you might term law and order types of states like Texas and Florida, the first two that I wrote books about, when I looked at their evidence codes and I compared them to what I knew about the federal rules. I said, "Gosh, if I were on trial for crime I might actually prefer to have my case governed by the Texas or Florida rules than the federal rules."

And I think that is surprising to a lot of people. I think that is not something that would jump out. And so a third reason to study state evidence laws is to discover ways in which you might improve the federal laws in which they are modeled. After all, things like evidence rules are nothing more than policy and logic. And the frameworks of the federal rules did not have a monopoly on either of those commodities. And so looking to the wisdom of the drafters of the state rules can be enlightening. And it makes really an endless loop, right, because the federal rules were drafted on some state evidence codes and then in turn, state evidence codes were drafted on the federal rules again, making improvements on pre-existing code. And so yes to keep the loop continuously spinning.

So, again, as a form of comparative laws, state law can be very valuable if you want to learn federal law, if you want to interpret it, or if you want to improve it, so my first, first virtue of state law.

The second virtue that I see to studying state law is that it can be a source of greater protection for individual rights. And at most law schools, when you take a course that involves vindicating civil rights or the rights of the criminally accused, the focus is typically primarily, or exclusively
on federal sources of law. Habeas corpus relate for example, for those who are in state custody.

I have taught federal courts for a number of years and we teach students how to navigate the new ones as a federal habeas law but not state habeas law. Similarly, courses in criminal procedure typically study the fourth, fifth, and sixth amendments of the US Constitution but typically do not spend time looking at analogous provisions in state constitutions. Constitutional law courses looking at individual rights claims such as reproductive rights, the right to die, sex discrimination, sexual orientation discrimination, and the like again, focus on 14th Amendment of the federal constitution but not much attention paid to state constitutions.

And so why do we do this? Well, again we do this because our textbooks do this in part, right. But then the question is why do our textbooks do this, the textbooks, which might have been written by our professors or our professor's professor. There are some reasons that this focus on federal law has been perpetuated. And I think there are really two phenomena that account for that focus. I think a lot of it has to do with the experience during the civil rights era. And I will say between the 50's and the 70's when two things really were taking place. One, many particularly southern states were denying citizens of civil rights and many state courts were complicit in that denial of rights particularly in the case of African-Americans that was one trend that was occurring.

And second, the federal bench was particularly receptive to rights-based claims. The Supreme Court as well as the lower federal courts were staffed with justices and judges who broadly interpreted the scope of various federal constitutional provisions as well as things like the federal habeas corpus statutes.

And so, this led to the belief as I said that state law was essentially meaningless. And that if you want to further civil rights or the rights of the criminally accused, you better learn and master federal law.

Now to large extents those underlying facts were in fact, a sound basis for a focus on federal law at that time. But I would argue that two trends have emerged make those assumptions no longer accurate. And these trends started on I say, somewhere in the 1980's.

First, the federal bench has become, I would say, hostiler at least not terribly friendly towards rights-based claims. And it is demonstrated this in various ways including narrow interpretations of the court's own jurisdiction for example. Say we are not going to hear those cases or creating abstention doctrines that allow them simply to not exercise jurisdiction even though they admit they have it, a broad interpretation of the scope of sovereign immunity, a narrow interpretation of federal constitutional provisions which is the 4th, 5th, 6th amendments, the equal protection clause, the due process clause, and the laws of reason or probable reason is there has been a trend
to conservative appointments and that simply change the face of the federal bench over the last several decades.

So that is one trend that occurred. The same time a second trend has emerged which is that state courts in many cases, not only are not hostile toward rights-based claims but indeed are proving to be more receptive to them than are the federal courts, largely by breathing new life into their own constitutions by interpreting equivalent provisions in their constitutions more broadly than the federal courts have interpreted the analogous federal provisions.

And I will give you two examples of where I think a failure to take state law into account harms our students and their clients. First with respect to the crim hypothetics because those things are truly complicated. But in all honesty it is almost completely useless to most individuals between the changes made to the federal habeas statutes in the 1990's as well as the Supreme Court's interpretation of the same. You get an interesting intellectual exercise. But by the end of it, you either arrive at one or two conclusions. One, no jurisdiction or two, no relief but right either way your client is out of luck.

And while certainly worth teaching the federal habeas corpus statutes, it might be of some utility to add to the set of things that students learn something about state habeas corpus focus review. State habeas regimes are sometimes broader than the federal habeas regime. They are more willing to do things like interpreting claims for such things as "near innocence" something that the U.S. Supreme Court has said is not a sufficient basis for obtaining habeas corpus relief.

So, there is one are where I think looking to state law can be instructive. Criminal procedure, again, over the past several decades I would say that the federal courts have taken much narrower where interpretation of the Fourth, Fifth, and Sixth Amendments. And for those of you who follow the Supreme Court's decisions that had a recent case just a couple of weeks ago, Virginia versus Moore which involve a reversal of a decision by the Supreme Court of Virginia. The Supreme Court of Virginia held that a conviction at a lower trial court had to be reversed on the ground that evidence used in that prosecution violated the Fourth Amendment. The U.S. Supreme court said, "No it did not."

I went and I look carefully at the Supreme Court's decision. I looked at the lower court decisions and I tried to see whatever briefs I could find. And it seems like at no point in the litigation did anyone whether on the court or on behalf of the defense, nobody thought to try to argue that maybe the Independent Virginia Constitution ought to be invoked and might in fact provide
relief independently of any federal constitutional claims.

It seems obvious if you look at the decision that the Virginia high court felt that this was violative of this individual's constitutional rights. And they are certainly the last word on the Virginia constitution but I think because so often the focus is on federal constitutional rights. There was not really much of an effort to try to persuade the court. Maybe they ought to make an alternative voting, "This violates the Fourth Amendment of the constitution of the United States. And if it does not we find independently that it violates our own analogous provision in our constitution."

Just a couple of examples of places where one can more effectively advocate for your clients. In the field of gay rights which is an area as Mary mentioned, that I teach in research in. That is a prime example of an area in which a focus on federal law by attorneys which again is based no doubt on their own education work to the detriment of their clients unfortunately.

Some of you may have studied the case of Bowers vs. Hardwick. That was a federal constitutional decision upholding Georgia's law banning sodomy and the case was upheld by the U.S. Supreme Court in a civil rights action filed in a federal court asserting federal constitutional claims which followed in the footsteps of movements brought by other social groups such as women, and African-Americans who historically relied on federal courts' way to challenge state laws that were viewed as discriminatory.

And it was a harsh lesson, right, because this decision gets enacted. It is invoked by courts and government says it means for discriminating against gays and lesbians. But through these experience gay rights advocates learned a lesson that they did not learn at law school but I think is something that we ought to teach people in law school which is that states have independent constitutions that can be more protective of individual rights.

After Bowers kind of closed off the federal constitutional claims, at least for awhile, a variety of challenges were brought in state courts. And they were largely successful. Many high courts struck down their own sodomy laws based on an independent interpretation of their own due process clauses in their constitutions.

Indeed the very law in Bowers versus Hardwick was struck down as unconstitutional by the Georgia Supreme Court based on the Georgia Constitution about 12 years after Bowers was decided. And so, the state courts by raising this claims essentially, people found another avenue in which to advocate on behalf of their clients.

Moreover, my other point about state laws tool for improving federal law ultimately came to pass
in 2003 when the U.S. Supreme Court took the rare step of reversing its prior decision in Bowers versus Harwick, and in doing so it in part relied on the fact that it said, "Wait a minute. All these state courts have been interpreting language in their constitutions that looks very much like our constitution, and they all came out differently than we did." Maybe, that suggested that there is something that we did wrong in that earlier decision.

Now, having being stung once, gay rights advocates have been more careful in dealing with the issue of same-sex marriage and had a number of successes in state courts challenging laws that ban same-sex marriage. It is hardly unanimous, but there have been positive decisions in states like Hawaii, Vermont, New Jersey and Massachusetts. Of course, there have been setbacks, some by constitutional amendment, and there is our own Supreme Court in Washington, but nonetheless it is an independent avenue for trying to develop these rights.

It is also worth remembering that in the heyday of federal courts as a font of individual rights they were really followers rather than leaders. After all, by the time the Supreme Court in Loving versus Virginia struck down Virginia's law making it a crime for white and blacks to intermarry that was old news. The California Supreme Court had struck down such a law 30 years before so even at that time the federal courts were followers rather than leaders in the area of individual rights. And I would argue more so today.

So, final point, state law as a check on federal power and that sounds strange to a lot of people. They say, "No, no, I've learned about checks and balances". It is the other way around. It is the federal law and the federal courts serving as a check on state power, and that's what we learned in federal courts in civil rights in common law and criminal procedure.

Many students are surprised when I tell them that actually the U. S. Constitution as originally designed wasn't really that concerned with what state governments were doing. The big fear was the federal government and what risk it may pose to individual rights and freedoms. That was the initial focus of, for example, the enactment of the Bill of Rights. Now, to be sure the enactment of the 14th Amendment changed the calculus in that it also expressed a concern for restraining abuses of power by the states, but that didn't mean that the constitution was no longer concerned with abuses of power by the federal government.

Today, when people think about trying to vindicate federal rights, whether it is being invoked against the federal government or the states, they think well, naturally you pursue these claims in federal rather than in state courts. There really is nothing natural about that intuition because it assumes that federal courts will exist and that they will entertain your claims, but if you read the constitution carefully there is nothing in the constitution that requires any federal courts to exist other than the U. S. Supreme Court.
You are familiar with the Western District of Washington, the Ninth Circuit. None of those have

to be there. Even if they are there, Congress can selectively strip them of jurisdiction. The U. S.

Supreme Court, the only court that has to exist, has limited jurisdiction to begin with, primarily

appellate jurisdiction, and Congress even has the power to limit that. In recent years Congress

has elected to try to exercise its power in these regards, attempting to strip the federal courts of

jurisdiction over discreet categories of cases and in particular stripping the courts of the power to

issue writs of habeas corpus for those who are in custody of the federal government, for example,

people being held indefinitely without a trial.

Now, to some extent they have been thwarted in that regard because the federal courts have

avoided reaching some tough constitutional issues involving the suspension clause, the clause of

the constitution that generally prevents the writ of habeas corpus from being suspended by

simply interpreting it as that wasn't really what Congress intended to do even though the title of

these laws is usually "Stripping the federal court from jurisdiction to issue writs of habeas

corpus". And while there is a debate about what the suspension clause covers, almost everybody

agrees that at the very least it covers those who have been detained without having had an

opportunity to have a judicial proceeding, in other words, those extra traditionally detained by

the federal government.

So, what if they do? What if they finally say they have gotten rid of the power of the federal
courts to issue writs of habeas corpus? Does that mean the writ has been suspended? I would
argue that if you study history, the answer is no and you should be looking to state courts. The

state courts, in fact, should resume their historical role and intended role of being able to issue

writs of habeas corpus for those in federal custody.

Remember, there is nothing in the constitution that envisions federal courts existing in the first

place. Because of the limits on what the Supreme Court can do, it really only has what is known

as appellate jurisdiction, and they are not really able to issue original writs of habeas corpus for

those who haven't had a judicial proceeding at first. And so, in fact, what the constitutional

structure envisions is that the state courts will be there to resume their power to issue writs of

habeas corpus. Of course, that means if that possibility occurs it is important to be looking to

state courts and also to state law to determine what the potential scope of that writ of habeas

corpus would be because ultimately that is for them to define under state law.

Time to wrap up; go back to those reasons that people don't teach state law. Hopefully, as to that

one reason, the belief that state law is essentially meaningless, I hope with the examples I have
given today I have been able to persuade you otherwise.

In terms of some of the other objections, perceived lack of prestige, I think that tends to only be a

problem if you focus exclusively on your own state's law, and I would argue there is no need to

focus on just your state's law. More interesting is to just pick a few random states that have
interesting, different provisions in their constitutions or different interpretations and use those as examples. In terms of too many states, you can do what I do. Enlist your students to each take on a state, and that makes it a heck of a lot easier or you don't have to cover all of the states, just enough to remind students that there is this other body of law.

Then, some of those other reasons, our own professors did it; it is hard to determine state law. Again, hopefully, the presentation has shown you that it is worth breaking out of the existing mold.

In conclusion, I would be lying to you if I said that state courts and state law are a panacea and that resorting to them will guarantee success because it won't, but I guess the point is that if you ignore state law it's like driving a car with one eye shut. You may still get into a car accident even if you keep both eyes open, but you do stand a better chance of avoiding one if you keep them both open while you're driving.

Thank you very much again. I appreciate you all coming, and I think now it's time for chow, if I am correct.