AN ABSOLUTELY, POSITIVELY TRUE STORY:
SEVEN REASONS WHY WE SING

KARL JOHNSON and ANN SCALES*

This paper is intentionally brief and unavoidably ambiguous. It is not meant to be a traditional scholarly text. Rather, we try in it to recapture an experience wherein we sought to move from criticism to innovation. We have described, but not documented, the scholarly critiques which inspired us. The reader will recognize our many debts. At times we had to caricature various points of view in order to illustrate their places in our endeavors. The ambiguity (for example, in the use of the pronoun "we") is an unambiguous account of the vertigo one suffers when striking off into the dark.

This is a story about teaching jurisprudence as a required first-year law school course. Introduction to Law happened for the first time in the fall of 1984. It was taught by 103 first year students, four third year students, and the two of us. We cannot claim to have changed the world. But we changed, our students changed, and our school changed, if only in little ways. And that's how it all begins. The text for our first day of law school was this:

*Associate Professors of Law, University of New Mexico Law School. Thanks to our faculty, for giving us the opportunity to participate in Introduction to Law; to our student "co-nonteachers," David Rathgeber, Kelly Genova, Kay Bratton, and Mary Han; to William R. Bishin and Christopher D. Stone, whose profound work in Law, Language and Ethics (Foundation, 1972) made it possible for us to get going. Special thanks to Sabra Dreyer for technical assistance and to Michele Minnis for editorial and emotional support. Our deepest, most enduring gratitude to the best teachers we have ever known: the members of the U.N.M. Law School class of 1987.

1. EDITORS' NOTE: Due to the nature and content of this article and the responses to this article, the editorial staff felt that it was imperative to allow authors to freely deviate from law review form, style, and conventions. All deviations from traditional form are intentional.

2. This paper is not a description of the course, but rather an after-the-fact exploration of the justifications for teaching it and an impressionistic account of the pedagogic transformation which the course produced in us. The reader is nonetheless encouraged to examine this particular enterprise by resort to the Appendices. Appendix A is a brief chronological description of what we thought we were trying to teach. Some Introduction to Law materials, from the 1984 version of the course, are reprinted here within Appendix B. Specifically, Appendix B is a combination of materials distributed or presented to students. Integrated with the syllabus, the reader will find "Questions for Discussion" which were distributed on a weekly basis. Also included is a description of what we did for the last class of each week. Appendix C is the description of method which was distributed to students on the first day of the semester.
This Land Is Your Land
(Words and Music by Woody Guthrie)

Woody’s Words

I hate a song that makes you think that you’re not any good. I hate a song that makes you think that you are just born to lose. Bound to lose. No good to nobody. No good for nothing.

Because you are either too old or too young or too fat or too thin or too ugly or too this or too that. Songs that run you down or songs that poke fun at you on account of your bad luck or your hard traveling.

I am out to fight those kinds of songs to my very last breath of air and my last drop of blood.

I am out to sing songs that will prove to you that this is your world and that if it has hit you pretty hard and knocked you for a dozen loops, no matter how hard it’s run you down and rolled over you, no matter what color, what size you are, how you are built, I am out to sing the songs that make you take pride in yourself and in your work. And the songs I sing are made up for the most part by all sorts of folks just about like you.

Woody’s Song

This land is your land, this land is my land,
From California, to the New York island,
From the redwood forest, to the Gulf Stream waters
This land was made for you and me.

As I went walking that ribbon of highway
I saw above me that endless skyway,
I saw below me that golden valley,
This land was made for you and me.

I roamed and rambled, and I followed my footsteps,
To the sparkling sands of her diamond deserts,
All around me a voice was sounding,
This land was made for you and me.

As I went walking, all through this country
I saw a sign that said “no trespassing.”
But on the other side, it didn’t say nothin’
That side was made for you and me.
When the sun come shining, then I was strolling,
And the wheat fields waving, and the dust clouds rolling,
A voice was chanting as the fog was lifting,
This land was made for you and me.3

Everybody sang this together, standing-swaying-clapping-guitars-mandolins-ringing-Dean’s-foot-actually-tapping-rejoicing. But what, he later asked, did that have to do with education?

We couldn’t answer him then. We didn’t exactly have reasons, but we knew we had to do it. We still don’t know why we sang it. We can’t know, because the perceptions we had then are transformed—we have been transformed—by what has happened since. In this paper, we will try to give a sense of what we learned when we stopped trying to instruct. We can’t do it in studiously edited, sifted, strained, easily digestible law review prose. It would be impossible. Besides, the attempt would defy our hearts’ insistence that logical exposition can’t do service meant for tears and laughter. We’re stuck with words. They’re the only medium to hand. We use them, as best we can, to tell why we have to sing.

(a brief history)

Before we came to UNM, our faculty had agreed that first year students needed a broader understanding of the legal system, that they needed history, sociology, and philosophy.4 This agreement hit a nerve: we had been philosophy majors, and that’s exactly what we felt had been missing

3. One of our students, Craig Fretwell, told us that there was at least one more stanza to this song.

One bright sunny morning in the shadow of the steeple,
By the Relief Office, I saw my people.
As they stood hungry, I stood there wondering
If this land was made for you and me.

4. Our faculty were not, of course, the first educators to reach this conclusion. In 1910, Roscoe Pound of the Harvard Law School urged that:
the modern teacher of law should be a student of sociology, economics, and politics as well. . . . Legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to a restless world of flesh and blood.


Indeed, reading Pound and his successors, the Legal Realists, after an immersion in current “radical” legal scholarship is a mind-jarring experience in déjà vu. It’s not only that there are remarkable parallels between the intensity of emotions that swirled about the Realists in their day and the equally visceral reactions that today’s “radical” professors provoke (see, e.g., Dean Paul Carrington’s call for their resignation and the resulting firestorm, described in The National Law Journal, February 11, 1985 at 1, col. 1). It’s also that the debate is the same. Today’s arguments—about the inherent indeterminacy of legal argumentation, about the incoherence of traditional legal dichotomies (law/ethics, facts/value, public/private, process/substance, etc.), about the ideological
from our legal education. We had always felt that lawyering wasn’t much like hammering. You can learn to hammer by practicing; a philosophy of hammering is an expendable luxury. Using rules is more complicated. Using rules is architecture—a combination of technique and vision, a blend of science and art. To use rules competently, you need to know how and why they (and the language they’re communicated in) work. You need a big picture to think about why we use rules at all, and what we expect them to do for us. You need philosophy. We wanted to teach it, and when we asked, our faculty gave us permission to try.

In the summer of 1984, we set to work. We hardly knew each other. All we had was this big fat book, Bishin and Stone’s *Law, Language and Ethics*. Its contents were a mystery to us, except we knew it contained philosophy, and we were reassured by its deep Foundation blue cover. When we really read it, we found some good friends.

It is our faith that the student who has learned these lessons—who has studied law as a special but not unique effort of the human mind to make ‘reality’ comprehensible and manageable—will be able to see beyond the categories postulated by common sense and everyday life. [She] will consequently be more free, more responsible, and better able fully to exploit [her] intellectual resources in the solution of [her], and the society’s, problems.

During long summer afternoons spent trying to explain (and re-explain and reinterpret) to each other what the book was about, Bishin and Stone made us reexamine ourselves. Their inspiration made it possible for us to confide in each other how we as students were alienated, how we as lawyers had been frustrated by the solipsism of the profession, how as teachers we had attempted too little, and how little we had taught. The professional collapsed into the personal, as all the distinctions that were supposed to tell us who we were—distinctions between teaching and

---

5. BISHIN AND STONE, LAW, LANGUAGE AND ETHICS, (Foundation, 1972) (hereinafter cited as BISHIN AND STONE or LLE).
6. Id. at vii.
learning, substance and method, knowing and doing, lawyering and living—dissolved. Our blueprint had disappeared, and we realized that we were under construction without one.

By the first day of school, we were in over our heads. We had sought permission to teach a course that we knew we couldn’t teach by traditional methods. We had written an ambitious syllabus without a clear idea of what we would do with it, or even, really, what it meant. We had resolved to renounce our own authority, to try not to lecture or lead discussions or assign paper topics. We had selected third year students to be our co-non-teachers knowing that role would induce a mass identity crisis. We had decided to use emotionally-charged materials—from El Salvador to male sexual pathology to nuclear holocaust—knowing classes could end in recalcitrance instead of growth. We had decided to grade largely on group-writing experiences, wondering how we would deal with the student rebellion that was sure to come. We had decided to require students to turn in personal journals—and to put our own journals on reserve in the library—knowing that we would feel threatened by their candor and exposed by ours. We had decided to have a party for the last class of each week—a “celebration of what we’ve learned,” we said—knowing that each of them could really flop. In that first class, we told the students this course would be a little different, and to prove it, we sang:

Before I get into my feelings of moment, let me say this. I have complained quite consistently all semester—about the course—how it is taught—and anything else I could find to complain about. . . . I seldom complain unless I care. And I seldom care unless I feel those in charge are open to opinions and complaints. I don’t feel that my complaints have fallen on deaf ears, and I appreciate that. I have also seen both professors open up and wear their feelings on the outside for a change.7

1. WHEN YOU’RE DOWN, IT’S HARD TO SING AND EVEN HARDER TO LEARN.

Exposing ourselves was scary. But when we quit trying to live up to expectations (others’ and our own), we started to see more clearly what Woody meant by “songs that run you down.” Those kinds of songs work by invoking authority—holding us up to some picture of what we should be and pointing out how we fall short. As we struggled to change our roles as teachers, we were haunted by the echoes of our own voices in the songs that Woody was out to fight.

As teachers, we reproduce what we experienced as students: law school looks like the parade of missiles in Red Square, a massive show of

7. Anonymous student journal.
authority. The unquestioned ideal of hierarchy is manifested in instance after instance. The trappings of the court. The emphasis on appellate opinions, a far remove from the people. The trumping effects of constitution on statutes, statutes on common law. The authority of the professor. The relationships among faculty and staff. The competition for grades, for law review, for faculty favor, for jobs in “the good firms.”

Lost in the parade, we encourage passivity. We can’t serve up “the law” any more, for our twentieth century nominalism tells us there is no such animal. The only thing we have left to teach is a technique, and we do that by what Paulo Freire calls “the banking concept of education.” It is a pedagogy that turns students

... into “containers,” into “receptacles” to be “filled” by the teacher. The more completely [she] fills the receptacles, the better teacher [she] is. The more meekly the receptacles permit themselves to be filled, the better students they are.

Education thus becomes an act of depositing, in which students are the depositories and the teacher is the depositor. Instead of communicating, the teacher issues communiques and makes deposits which the students patiently receive, memorize, and repeat.

In the banking concept of education, knowledge is a gift bestowed by those who consider themselves knowledgeable upon those whom they consider to know nothing. . . . The teacher presents [herself] to [her] students as their necessary opposite; by considering their ignorance absolute, [she] justifies her own existence. 8

Alienation in law school—the feeling of not belonging, of seeing the power games and being disallowed to question them—is a phenomenon we see as surmountable only by thinking harder like a lawyer. Read more cases. Spend more time studying them. Lock yourself in your cubicle. Cut yourself off.

Law schools are like medieval monasteries. We seclude our novices from the world, give them the sacred texts (selected appellate cases and their approved commentaries), and close off the rest of the library. 9 We give them ritual incantations (“process”, “predictability”) to perform when their faith flags. Unlike other monasteries, however, we have no holy songs, for our faith holds that everything significant can be said. Our students take the vow to think like lawyers. As if in perpetual meditation, they must exclude from consciousness their prior lives and thoughts, their opinions, their outrage. We provide no spiritual room for their doubts. If they continue to have them, they will simply fail—in law


school, and in the profession. There is no way to impart the calling to those who are not blessed. The exam will tell whether the incantations are working or whether they are tainted by doubt.

We watched as our students covered themselves with the person they thought they had to become. It was excruciating to see them in clinic: nearly ready to leave us, dealing with their own cases for the first time, they knew nothing else to do but play dress-up. They were mortified when the costume didn’t fit. They were awkward and incompetent and they knew it. Desperately they looked for authority in rule or role to tell them what to do. They couldn’t tailor their costumes to fit because there was nobody inside they thought they could use as a model. We had gotten them to believe they could “think like lawyers.” They were disabled as humans. All of their human capacity to deal with real life was finished: they had become terrible problem-solvers. We gave them the tools to finish off their humanity.

The irony. One of us had been a legal aid lawyer who cared deeply for his clients but could do nothing for them. Everything he had learned stood in his way. The other had been a big firm lawyer who gave her clients the best that was in her and couldn’t undo the injustice. Everything she had learned stood in her way. We had each found ourselves powerless before, in practice, and here we were, this time, the agents of disempowerment. It was enough to make us want to quit, but our students wouldn’t let us. An aggressive affirmative action policy had sent us students who enabled us to see a possible way out. They were not about to accept, nor let us accept, a reality (white male western liberalism) that was not their own, nor a way of knowing (analysis) as the only path to understanding. They knew that “thinking like a lawyer” cannot supply a “neutral” access to reality, but when they had suggested this insight, they had been told to get back to work. These students were alienated—marginalized, trivialized, denied existence. We had admitted their bodies to law school but required them to check their souls at the door. When they refused, they gave us the courage to take our job seriously.

2. WE NEVER HEARD A NEUTRAL SONG, NEVER MET A NEUTRAL TEACHER

Woody Guthrie wasn’t neutral. When he sang “This Land is Your Land,” in the dustbowl refugee camps of California, no one could have mistaken his rendition for an objective description of reality. The people in his audience didn’t even have enough to eat. When he affirmed their dreams as real, he asked us to see every account of “how things are” as somebody’s dream. Some people just have the power to make their dreams come true. Pictures painted for us, Woody suggests, are excuses for monopolization of power. Hunger isn’t a fact; it’s a political decision.
We’re not neutral. We’re from Oklahoma too. We couldn’t even try to keep ourselves out of it. If we wore the robes of neutrality/objectivity, we would still be inside them and they would take our shape. And we do have a shape. Before Intro, one of us knew more about radical feminism, the other about critical Marxism. But it was Ludwig Wittgenstein who enabled us to talk with each other.

We had let philosophy torment us. We had become enslaved to its vision of a world dichotomized in various apparently irreconcilable ways. We had vowed to keep trying to reconcile those opposites even though everybody in the two thousand years or so before us had failed. It was torture, but that’s the way we were taught to see the world. Metaphysics had told us we couldn’t even know for sure if other people existed. It’s

---


11. Critical Marxism has elbowed its way into legal scholarship primarily through the work of members and fellow-travelers of the Conference on Critical Legal Studies. I think the best introduction to this body of work is a series of three articles by Robert Gordon: *New Developments in Legal Theory*, in *The Politics of Law: A Progressive Critique*, 281 (D. Kairys ed. 1982); *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); and *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). Together, these pieces provide a remarkably clear explanation and demonstration of the CLS attempt to understand the role of ideology in the justification and maintenance of power distribution; and they distinguish that “critical” enterprise from various functionalist, “scientific” strains of Marxism that treat law (and ideology generally) merely as the causal effluent of underlying relations of production. (Although more closely allied with the latter versions of Marxism, Morton J. Horwitz’s *The Transformation of American Law 1780-1860* (1977) remains the best legal history produced by the new scholarship.)

The two writers who have had the greatest impact in the development of the CLS work are Duncan Kennedy (see, e.g., *The Structure of Blackstone’s Commentaries*, 28 BUFFALO L. REV. 205 (1979); *Legal Education as Training for Hierarchy*, in *The Politics of Law: A Progressive Critique*, 40 (D. Kairys ed. 1982) (which contains a fuller critique of legal education that parallels in many ways the one we suggest in this paper); and Robert Unger, whose *Knowledge and Politics* (1975) is, for me, simply the last word on the impossibility of liberal thought solving the dilemmas it has created for itself.

As for Marx himself, the work most often cited by CLS scholars is *On the Jewish Question*, in *Early Writings* (R. Livingstone and G. Benton trans. 1975). My personal favorite is *Economic and Philosophical Manuscripts* (T. Bottomore trans. in E. Fromm, *Marx’s Concept of Man* (1961).—K. J.

12. See handy-dandy chart on page 19, infra.
a bummer, but it’s true: you just can’t prove by traditional logic that you’re not alone. In moral and political realms, there is no possibility for agreement or progress. So you might as well give up, build your fence a little higher (and make sure you have plenty of rights should it turn out that other folks exist and they are mean).

Along came Wittgenstein and said, that’s one way of understanding the world, but it’s only one out of many possible orders. To think those ideals are unshakeable is a mindless habit.

Where does this idea come from? It is like a pair of glasses on our nose through which we see whatever we look at. It never occurs to us to take them off.

When we did take our glasses off, we didn’t feel so hopeless and alone. The remedy is to look at language (“don’t think, but look!”). Don’t look at it metaphysically; look at how we actually use it. You will see that communication in all its forms is amazingly successful, and depends absolutely upon life with others. “To obey a rule, to make a report, to give an order, to play a game of chess, are customs (uses, institutions).”

The vertigo we suffer over the possibility of never understanding each other—is simply belied by real life together. “[T]o imagine a language means to imagine a form of life.” And the achievement of language tells us what life together is really like. It means, first of all, that we can decide whatever we want or need to decide about what life should be.

Further, using language tells us that we live not in a universe—a place where there is a single fixed eternal truth—but in a “multi-verse”—a place characterized by countless possibilities. Language tells us that continual change is not only possible but is implicit in existence. Permanent revolution is a fact of life.

Wittgenstein also showed us the inescapable dilemma of law teaching. Legal problems in law school are like philosophical muddles: they require a lot of running around trying to find some higher rule in order to reconcile things that are irreconcilable.

The fundamental fact here is that we lay down rules, a technique,
for a game, and that when we follow the rules, things do not turn out as we had assumed. That we are therefore as it were entangled in our own rules.\textsuperscript{21}

When we try to do "analysis" on the dichotomization of the world, we fail, and we preclude our understanding in other ways.

[W]e have a definite concept of what it means to know a process better. (The decisive movement in the conjuring trick has been made, and it was the very one that we thought quite innocent.)—And now the analogy which was to make us understand our thoughts falls to pieces.\textsuperscript{22}

You've got to bump your heads against these kinds of mistakes to discover different ways of looking at things.\textsuperscript{23} And if you're a teacher, you've got to get down in it with your students and bump your head, too. Otherwise, the interpretations we offer, dressed in professorial attire, look like authority, like that straightjacketed reality that dumps us in the muddle in the first place. "Any interpretation still hangs in the air along with what it interprets."\textsuperscript{24} We are blustering unless we investigate with our students what the law in its poignant way is supposed to interpret: the nature of coexistence in society. It may be rough, but there's no choice.

(a dialogue)

Wittgenstein: Thought is surrounded by a halo.—Its essence, logic, presents an order, in fact the a priori order of the world. . . .

The more narrowly we examine actual language, the sharper becomes the conflict between it and our requirement. (For the crystalline purity of logic was, of course, not a result of investigation: it was a requirement.)\textsuperscript{25}

Student: So we take the heart out of the law with some kind of belief that in this move we are more "true" or more encompassing—abstraction somehow is more pure.

[I] need to understand the justification for this view.\textsuperscript{26}

Wittgenstein: The conflict becomes intolerable; the requirement is now in danger of becoming empty. We have got on to slippery

\begin{footnotes}
\item[21] Id. \textsuperscript{\textsection}125.
\item[22] Id. \textsuperscript{\textsection}308.
\item[23] Id. \textsuperscript{\textsection}119.
\item[24] Id. \textsuperscript{\textsection}198.
\item[25] Id. \textsuperscript{\textsection}97, 107.
\item[26] Anonymous student journal.
\end{footnotes}
ice where there is no friction and so in a sense the conditions are ideal, but also, just because of that, we are unable to walk. We want to walk: so we need friction. Back to the rough ground!  

Tina Turner: You know, every now and then I think you might like to hear something from us nice and easy. But there's just one thing—you see—we never, ever do nothin' nice and easy. We always do it nice and rough. But we're going to take the beginning of this song and do it easy. Then we're gonna do the finish rough. That's the way we do "Proud Mary." "Rollin', rollin', rollin' on the river." Listen to the story now.  

Wittgenstein tells us we can't walk without rough ground. Woody maps it for us. Tina Turner dares us to walk on it. We play her music in class, because she's a fantastic communicator, a contemporary Wittgensteinian hero. We also use her music because she says what we don't want to, but must, hear—that law and lawyers serve very few of the people, that we and those whom we serve are spoiled, that we are arrogant when we debate the fine points as life sweeps past us.

Life is so cool  
Easy Livin' When you Make the Rules . . .

The politicians have forgotten this place  
Except for a flying visit in a black Mercedes  
On election time  
They cross the line  
And everybody runs to catch the pantomime  
If they could see what's going on around here  
So many people hanging on the edge  
Crying out for revolution  
Retribution . . .  

Sometimes I think I'm going crazy  
Sometimes I do a line  
Makes me laugh  
Makes me want to take a joyride  
On the high tide  
Sometimes I'm contemplating suicide . . .

The odds turn out even when you give up believing in the . . .

Cold law Steel claw  
Try to get on board you find the lock is on the door

27. INVESTIGATIONS, supra note 13, ¶107.
Well I say no way
Don't try to keep me out or there'll be hell to pay
I don't know who's right, who's wrong
It really doesn't matter when you're lying in the gutter
It's a see saw
A long hot battle with the cold law
Is what you get for messing with the steel claw.

No rule, no technique, no role, no "process," no calcified concept of self or reality can tell us what to do nor justify what we have done. By virtue of being born, we have to make judgments that affect everyone. For teachers, the responsibility to participate in interpreting the world is weighty. For law teachers, the obligation is particularly grave, since we are empowering people to engage in a version of reality-making backed by the force of the state. When we squeeze students to adjust to how things allegedly must be instead of urge them to imagine how things can be, we deny the contingency of any picture of "how it is" and obscure the normative presuppositions that underlie this picture. We offer a place to hide from the moral effects of acquiescence in domination. When we flee behind the smokescreen of objectivity, we dispense a narcotic that deadens us to commitment.

There is no such thing as a neutral educational process. Education either functions as an instrument which is used to facilitate the integration of the younger generation into the logic of the present system and bring about conformity to it, or it becomes the "practice of freedom," the means by which men and women deal critically and creatively with reality and discover how to participate in the transformation of their world.

Students in our grasp will be transformed. The only question is, into what? So we take a stand, for we must. The stand we take questions every authority, including our own. We cast our lot with all those who affirm that dreams, too, are part of reality.

3. SINGING IN LAW SCHOOL OPENS WINDOWS ON OTHER REALITIES

We have a picture of Woody, and his guitar is half covered by a sticker that reads, "This Machine Kills Fascists." It does. Woody Guthrie provided a medium for multitudes to question authority. His message, and the experience of singing it, cracks the brittle mantle that eventually encrusts every system of authority, including law and legal education.

Law is a human drama; it can be poignant, sweet, painful, and outrageous. It is a collage of countless stories—told in and by our courts

30. R. Shaul, Foreword of FREIRE, supra note 8 at 15.
and legislatures and school boards, through our newspapers, over coffee, and in the streets. They are stories about life together, told in the light of our dreams and in the shadows of our fears.

Law was once a great liberator. It made a place for us where we could live and create, a shelter from the omnipotence of pope and king. Under the banner of reason, law promised to vanquish authority. But faith in reason is still faith; faith when threatened becomes dogma; dogma when institutionalized becomes naked authority once again.

Captivated by dogma, law can become an apology for the powerful, and legal education a ritual indoctrination into the delusional reality that the few should rule the many. The educational process then makes that world appear to be the only world, and promotes acquiescence as virtue, vision as the vice of fuzzy thinking.

Our dreams have become nightmares. When we’re too frightened to dream, all the stories have been told. In clutching at what we have, we lose the will to create what we need. We aspire not to live, but to endure. Legal questions become life and death struggles, crucial armed conflicts between the culturally domineering and the culturally dominated. It’s Armageddon every day.

Song defies the voice of domination—the voice that affirms its version of reality as reality, its way of knowing as knowledge, its way of being in the world as human destiny.

Song is a live demonstration—an experience—that the voice deceives us.

Song takes the familiar (say, "This Land is Your Land") and makes it subversive.

Song calls back into existence what we have defined into oblivion. 
Song utters what we thought was unutterable.
Song liberates what we have repressed.
Song transforms dreams into reality.
To law’s message that we are alone, it answers in voices raised together.
To law’s message that freedom must be sought in obedience to authority, song answers in affirmation of what we have been taught to fear.
To law’s message of hierarchy, song answers with all the regenerative power of trust in human creativity.

So we sing because we want this class to be a song. We want the schoolhouse to reverberate with voices that aren’t supposed to be heard, questions that aren’t supposed to be asked, paths of imagination that aren’t supposed to be explored. We want this machine to kill the fascist in us.

---

4. YOU COULD THINK ABOUT SONGS, BUT IT'S MUCH BETTER TO SING THEM

Woody Guthrie's song is not about "thinking" like a traveler. This traveler does not deduce anything nor follow any plan. He does not collect or catalogue facts in any linear way. His strategy is to have no strategy, but to roam and ramble and be there. He opens himself to the territory, listens to its voice. He converts his perceptions into a model of the way the world is. By the end of his journey, he knows more about the territory than any rational explanation of it could have told him. He has learned it by connecting its lessons with everything within himself.

Woody's travels are examples of successful education. It is not teaching to cut the world into little pieces, distribute the data bits for storage, and retrieve them on exams. Fields of knowledge are territories. Learning is a matter not of knowing all the items in a territory, but of knowing how they relate to each other, of being empowered enough to create our own likeness of the whole territory.\(^\text{32}\)

There is nothing inherently mysterious about learning. Legal education makes it mysterious—if not impossible—by calling big pictures and experience (that is, both theory and life, amazingly enough) irrelevant. In fact, our students come to us with all the awesome intellectual tools they will ever need: perception and language. They know how to infer reality, they have complex concepts of self. All they need from us are experiences in transformation, opportunities to reexamine their internalized norms, paths along which to roam and ramble and grapple with the tough issues. They need enough nonsense to begin their travels.

The importance of nonsense hardly can be overstated. . . . This is the mark of the creative mind; in fact, this is the creative process. It is characterized by a steadfast confidence that there exists a point of view from which the 'nonsense' is not nonsense at all—in fact, from which it is obvious.\(^\text{33}\)

[The experience of Intro to Law . . . was stillness and turbulence, sunshine and rain, laughter and tears. It was a continual process of all kinds of growth. It was fun and "a pain." It was courageous. It was clearly obscure and yet obscurely clear.\(^\text{34}\)

"This Land Is Your Land" sounded great with 110 people singing it. It didn't sound logical, but it sounded beautiful, bracing, even inspirational.

As the semester progressed, I [began] to realize that this course


\(^{34}\) Anonymous student evaluation.
is actually all about me—that it is to give expression to my experiences—to make my voice heard within the legal system. What a truly marvelous realization!35

That many voices couldn’t sound logical because logic is univocal. We couldn’t make logical arguments unless we could cut everything up into uniform little pieces and make them hold still. Logic abhors flux and equivocation. Logic banishes equivocation by erecting a norm of legitimacy and branding the infinity of other possibilities as illegitimate.

The rules by which logic does that, by which it separates the legitimate from the illegitimate, by which it creates meaning, are the real engine of a culture; and in our culture, those rules revolve around a cluster of dichotomies:

<table>
<thead>
<tr>
<th>rational</th>
<th>irrational</th>
</tr>
</thead>
<tbody>
<tr>
<td>order</td>
<td>chaos</td>
</tr>
<tr>
<td>thought</td>
<td>experience</td>
</tr>
<tr>
<td>light</td>
<td>shadow</td>
</tr>
<tr>
<td>fact</td>
<td>value</td>
</tr>
<tr>
<td>culture</td>
<td>nature</td>
</tr>
<tr>
<td>objective</td>
<td>subjective</td>
</tr>
<tr>
<td>conscious</td>
<td>unconscious</td>
</tr>
<tr>
<td>harmony</td>
<td>dissonance</td>
</tr>
<tr>
<td>other</td>
<td>self</td>
</tr>
<tr>
<td>male</td>
<td>female</td>
</tr>
</tbody>
</table>

The game of Western thought is domination of the right side by the left side. The cadaverous left side always wins over the wild and wooly right. That’s the only real rule, but there are sub-rules too that tell you in every context why you must pick the left side.

1. The Rule of Ontology: everything that exists has an essential nature that places it on one (but only one) of the sides. (Because of this rule, the word “or” is the most important English word for Western thought. Didn’t Woody see that “this land belongs to O or A?”36)

2. The Rule of Psychology: “man” is essentially a knower.
3. The Rule of Epistemology: “man” can only know the left side.
4. The Rule of Morality: to achieve “his” essential nature, “man” ought to repress the right side.
5. The Rule of Politics: to achieve “our” essential nature, “man” must oppress the right side.

35. Anonymous student journal.
36. Our students saw how absurd that would be when they sang the song this way on “skit night,” their annual parody of legal education.
These are the real laws of logic. Something must be done about them, for they prescribe that we kill ourselves in order to live.

Critique is some help. It shows that what we call “reality” is made up. It demonstrates that “reality” is a way of organizing power in society, taking some meanings and blanking them out, disempowering those outsiders whose meanings they are.

Critique also displays for us how the disempowerment works. Once we have created these cultural artifacts, we objectify them in our very description of reality. We make the contingent and made up seem necessary and given, so that what we have made up blinds us from the possibilities we have marginalized. Our negative creation destroys our power of positive creation.

Finally, critique tells us that since the institutions we have created in turn create (or disintegrate) us, personal/social change can come only in changing the institutions in which we live and work.

Beyond, critique cannot take us. We can’t think our way out of our puzzles because thinking (marking off the rational from the irrational) is the reason we can’t see beyond where we are. When we try to think up a sane world, we crash into the walls of thinking. To go further, we must break the rules of logic. We must put ourselves at risk. We must dare, we must dream, we must act. We must sing.

It is of the essence of reasoning to shut us up in the circle of the given. But action breaks the circle. . . . [T]here is a kind of absurdity in trying to know otherwise than by intelligence; but if the risk be frankly accepted, action will perhaps cut the knot that reasoning has tied and will not unloose. . . . You must take things by storm: you must thrust intelligence outside itself by an act of will. 37

5. WHY CAN’T LAW CELEBRATE OUR CREATIVITY THE WAY SINGING CAN?

The risks we tried to take are not so unusual, really. Artists, like Woody, take them daily—showing us the uncoventionality of their perceptions and their understandings, thus compelling us to reconsider our own. Artists are just a dramatic illustration of our human predicament: we never “are” but are always becoming.

“[Humanity’s] true nature is that of a struggle unceasingly begun, unceasingly abolished; it requires [us] to outdo [ourselves] at every moment.” 38 Our “true nature” is that we have no true nature, but are continually transforming ourselves. We believe that creativity is what keeps us alive, is what being alive means.

But by the time one gets to legal education, creation is a phenomenon

37. H. BERGSON, CREATIVE EVOLUTION, 192-93 (1911), quoted in BISHIN & STONE at 597-98.
relegated to the mysterious world of art. Art is the realm of the subjective, law the citadel of the objective. Whatever creativity means in the first, it has no place in the second. There is an old rag that goes, "I don’t know anything about art, but I know what I like." So long as creativity is mystified in art and displaced in law, the other side of this coin is, "I know everything about law, but I don’t know what I like." This picture of art makes art meaningless, and this picture of "a life in the law" is depressing, and unfortunately, accurate.

There are vehicles of meaning besides the strings of words and logical inferences with which the law binds itself. Music is one of them. It is one of the non-linear, entirely suspect phenomena which break reason’s tight circle around the given (for if we could say it, we wouldn’t need to sing it). And such phenomena are necessary for progress—in art, in law, and in the exact sciences—because "[r]eason, reasoning on its powers, will never succeed in extending them. . . ." Once we free ourselves of the prejudice that meaning is dependent upon rationality, we can enjoy ourselves in art and in law.

Is being a good lawyer the same as being a good artist? . . . [M]anifestation of reality is the domain of both lawyer and artist. . . . [O]ur evaluation of the judge’s or lawyer’s creations extends beyond a piece of writing or a phrase in an argument. Someone, like a judge or opposing counsel, takes what we create and does something with it. Lives are changed, reality is changed. But reality isn’t confined to what’s on canvas—and the resulting difference is not in a perception. . . . [A]fter a decision is made a human problem still remains in terms of the litigants and how their reality may have been changed by the decisionmaker. Where does the artist’s/lawyer’s responsibility end?41

Plato, at his most despondent, would say that art is the third remove—a shadow of a shadow, a shoddy description of the appearance of things. Lawyers might say the same of their craft and their lives. Lawyers are hired guns, voyeurs, persons with no noble missions of their own and liars about the missions of others. But Plato was just prejudiced against shadows. Shadows for him are the unreal, the irrational side of the dichotomies.

Plato, however, is dead; art is alive. There is nothing a priori which makes us define according to highlight instead of shadow. Art disrupts our "normal" ways of seeing. Think of Escher’s ascending/descending staircase: we could construct reality around the primacy of shadow, and if we did, we would have a different world, and we might like it better.

---

39. This old rag and its flip side are paraphrased from another learning experience provided by Ingrid Stadler. “Philosophy of Art,” Wellesley College, Fall 1973.
40. BERGSON, supra note 37.
41. Anonymous student journal.
We don’t have to accept the high-handed way that Plato treats art or legal education treats lawyering.

Why not accept art as meaningful in itself, and a song like Woody’s as a self-affirming symbol for the self-creating nature of the species? Song doesn’t describe anything: it creates a reality, and changes other realities in the process. It broadens the horizons of known experience. And, in its infectiousness, it persuades. Why not accept lawyering as a lively dialectic in which all participate about the way things ought to be, as a collective process which recreates the world?

Our laws should be a reflection of our lives, and they probably are for most people. Do people change first, and then their laws, or do laws presage the path for humanity to follow? I think, now that I’ve posed it, that the question doesn’t deserve an answer.42

“Bring me a piece of art,” the despot says. To save your head, you will be tempted to raid some museum wall. Big mistake. He’s testing you. What art is changes all the time, artists are always pushing the limits further. You’d better make your own judgments, and then make the despot see what you see.43 This is law. Substitute “decisionmaker” for “despot.”

[It is plainly not enough to bring in a technically perfect case on “the law” under the authorities and some of the accepted correct techniques for their use and interpretation or “development.” Unless the judgment [appealed from] is incompetent, there is an equally perfect technical case to be made on the other side, and if your opponent is any good, [she] will make it. . . . The struggle will then be for acceptance by the tribunal of the one technically perfect view of the law as against the other. Acceptance will turn on something beyond “legal correctness.” It ought to. . . . The court is interested not in listening to any lawyer rant, but in seeing, or better, in discovering, from and in the facts, where sense and justice lie.44

Lawyering means taking the risk of self-expression. It’s impossible to be a good lawyer without singing.

I always viewed the legal system (before this class) as the system that protected the best in us from the worst in us. Now I question whether I really need to be protected from myself . . . Until the steps are taken to break this structure in my belief system as a limit on my imagination and creativity, I am my own enemy. . . .45

42. Anonymous student exam.
43. See supra note 39.
45. Anonymous student exam.
6. SINGING SONGS AND USING RULES ARE OPPORTUNITIES TO COMMUNICATE

We’ve mentioned dreams a lot in this paper. But it’s necessary to distinguish between dreams and nightmares. In about 1641, Descartes had a very bad dream. He dreamt that he was surrounded by apparitions who looked and acted like people, but they weren’t people; they were his hallucinations. He was possibly alone in the world. Loneliness is scary, but what scared him most was the uncertainty of ever knowing what was real and what illusion. What exists? Descartes’ way of putting the question and his answer to it got us all into a big mess. He looked within himself, to his own experience of consciousness. At least this I know, he concluded, I think, therefore, I am.

What follows from that is really scary, when it finds its insidious way into society. You just can’t trust anybody about anything. When you look across the room and see a table, your (possibly imaginary) friend could be seeing a purple gorilla. God forbid she should have any influence on your (possibly solitary) life. That’s why you need rights, and privacy, and as many missiles as possible. In law school, Descartes’ legacy of boundless individuality is the norm. We steep students in the view that we’ve got to have all these rules to contain individuals and protect them from each other. And that’s what makes our profession so difficult: it takes an ordained expert to make rules work when there are all these wild-eyed monads running around.

A lot has happened since 1641, but you’d never know it from the way we run things. This is a post-dustbowl, post-Wittgensteinian, post-Hiroshima world. If Descartes hadn’t been in the same boat with all of us, he couldn’t have had his dreams, couldn’t have used his language, couldn’t have written his thoughts (why would he have wanted to?), and couldn’t have obeyed the rules of logic to make his points.

Is what we call ‘obeying a rule’ something that it would be possible for only one person to do, and to do only once in her life?

This is of course a note on the grammar of the expression ‘to obey a rule.’

When we fail to unpack our dubious Cartesian inheritance, when we isolate students in all the ways we do, we deprive them of the most important asset they (and the rest of the world) will ever have: their ability to trust. Our students come to us rich in natural resources. From their vast experience in rule-governed institutions, they understand that to have

46. Investigations, supra note 13 ¶199.
a rule means that we live in a social world. They also know, whether they’ve thought about it much or not (and why should they have?), that rules are only signposts,\textsuperscript{47} devices for guidance, tools for organizing our life together the way we want it to be.

Woody Guthrie gave us an insight into Wittgensteinian reality. When he encountered the “no trespassing” sign, he didn’t say that rules were nothing, and he surely didn’t say that rules are everything. He said that rules begin the dialogue and do not end it. If there is an endless skyway and golden valley to be seen during a life in law, we have to be thinking like a person about what rules are. That, by definition, means working together.

We didn’t want to sing his song alone: it would’ve sounded ugly and defied its meaning. So we said to the class, either be passive or participate. And everybody sang along. If we give people a chance to participate in their education, they are eager to do so. It comes naturally to them.

[M]y first writers group, ugh! . . . Two particular people argued over who had the better interpretation of that week’s readings. Another went to pick up [her] child and never returned. The other only agreed when [she] felt obligated to. I think this was when I began to realize I underestimated myself. The two people arguing were really saying the same thing only with different terms. When I realized this I was able to attach my input, and finally we, as a group, were able to begin this paper. I really knew what was going on after all.\textsuperscript{48}

Woody belongs to that group of heretics who attempt to undo the damage done by Descartes. Woody’s song is about everybody, for everybody. Where Descartes got stuck on himself (might he not now proclaim “We communicate, therefore we are”?), Woody sings about a land made for “you and me.” Woody rejects the degrading view of freedom that pitting the self against society excretes: that “freedom from” each other, from anybody who might meddle in my monad, is the pinnacle of human aspiration. Instead, he envisions our “freedom to” act together, to create new meanings for ourselves and our world. He embraces our nature as social beings, grasps the world actively, and does all he can to create a society where love is possible. He claims for us a world made of our own work.

[The course performed one invaluable function for me: it gave me hope that the American Legal System is not hopeless, [not] irretrievably a tool of the powers that be, [but something] we can use in a positive sense…. This course put in my mind the possibility that law is a tool that we can use to advocate fundamentally different con-

\textsuperscript{47} Id. at 66.

\textsuperscript{48} Anonymous student journal.
ceptions of what people and their relationships to our basic institu-
tions are/should be like.\textsuperscript{49}

I must begin to act in order to hope.\textsuperscript{50}

7. \textbf{YOU DON'T HAVE TO SING SOMEONE ELSE'S SONGS; YOU CAN MAKE UP YOUR OWN}

And that's the heart of it—hope or hopelessness. Woody shows us that both roads are there, and that nothing about "reality" can tell us which one to choose: our world begins to take shape only \textit{after} we've started down one or the other. Woody also makes the choice easy for us. It's just more fun to sing than to acquiesce. And once we start to sing, there aren't only two roads anymore. When we roam and ramble and follow our footsteps, we can make all the roads we need or want.

The fog starts lifting when Woody encounters the "no trespassing" sign and asks \textbf{THE BIG QUESTION}: whose meaning counts? Are you going to buy a vision of the world that wants to keep you out, or are you going to make this land our land? Theoretically, a sign means what we have chosen it to mean. That's Wittgenstein's legacy. Practically, a sign means what a few have chosen it to mean for everyone else. That's why they call the disempowered "the disempowered." That's what Woody Guthrie says.

If we are thinking logically, we now want to know how we can best reconcile the theory and the practice. And the answer is we can't, no more than we can reconcile how Woody could have followed his footsteps where he'd never walked before. We want to get it all figured out \textit{before} we take the first step, but the harder we think, the more the contradictions overpower us.

"\textit{It is difficult to enjoy the freedom of this course.}"\textsuperscript{51}

We can't reconcile any contradiction. Life is just not like that, with answers out there waiting to be uncovered. Our futures are always under construction. Living is an asymptotal experience: we're forever approaching our limits and never reaching them, doing the best we can today. It's a matter of outdoing ourselves at every moment.

For us, it has been an experience of engagement among all of the participants in Introduction to Law. It has been learning and doing instead of teaching and being taught; it has been living in our house as we built

\textsuperscript{49} Anonymous student journal.

\textsuperscript{50} Anonymous student exam.

\textsuperscript{51} Anonymous student journal.
it around us. In the din of all the hammering and sawing, it was poignant, painful, sweet, outrageous.

That is the real story of Introduction to Law. It taught us that we need not hang over the abyss of irreconcilable contradictions. That we can come to trust each other and ourselves. That we must do the best we can to reclaim the world for sanity, for survival.

I once said in an authors group meeting that there is a time when a person has to stop depending on someone else to tell them what they know or don’t know. I think this class forced . . . [all] of us into getting to know ourselves—our limitations, our prejudices, our strengths and weaknesses. No one can ask for more.  

. . . and I ask myself and you, which of our visions will claim us which will we claim. . .

APPENDIX A:
DESCRIPTION OF THE COURSE

Introduction to Law was divided into two halves.¹ The first half might be called “The Deconstruction of Legal Method.” We began with the historic debate, in altogether conventional terms, over the separation of law and ethics (see materials for Week One, at Appendix B). That study served to highlight the pervasive dichotomies between objective and subjective decision-making, between rule- and value-based deliberation.

Assuming that the students were attracted by the positivist ideal, we moved on to the difficulty of administering it (Week Two). Here, we looked at a difficult contemporary situation (the so-called “Minneapolis Pornography Ordinance”) where the rule itself is value-charged and where the success of a First Amendment challenge to it depends upon an evaluation of the meaning in this context of the already evaluative Constitutional command. At this point, the students were counting, we surmised, on the alleged existence of easier cases. Thus, in Weeks Three and Four, we explored empiricism. There we met the strength of Realism: that choices must be made even with respect to those fundamental building blocks, “the facts.”

At this juncture we began our investigation of rules. In Week Five, we read rather traditional non-case materials on the nature of stare decisis, as well as two cases where judges (whose names they had already run across—Cardozo and Wright) changed the common law. Though not

---

52. Anonymous student journal.
1. In this division, we followed the division of Bishin and Stone’s book, but with substantial editing of the text and addition of materials of our choosing.
acting within "the rule," both judges seemed to act justifiably. But given the slippery nature of facts and concepts, how could that be? By this point, we had seen two easy answers: radical positivism and radical realism (or, in the parlance of Introduction to Law, "the rules are everything" versus "it all depends on what the judge had for breakfast"). We hoped by this time to have dissuaded students from an easy allegiance to either, and to have set them on the search for something more satisfying.

We proceeded then with the second half of the course, "The Reconstruction of Legal Method." In terms of legal rules, we next looked at statutes (Week Six). Here we assigned a healthy dose of language philosophy, including a short introduction to Wittgenstein (though, we later realized, not enough). The idea was to begin to undermine the subject/object dichotomy, to suggest through the phenomenon of language that, even if we must always act in "evaluative" ways, we begin with substantially more agreement than the traditional analysis would let us realize.

Then, with the realization that society does usually successfully get on, even if we cannot always explain how, we compared law to art and science (Weeks Seven and Eight, respectively). By looking at what are conventionally thought of as the most "subjective" and the most "objective" enterprises, we saw that the conventional idea of rationality is both over- and under-inclusive. Controversial subjects (such as art, ethics, and "justice") do proceed by respectable, rational argument (by a "logic of conversion," in W.B. Gallie's terms). Obversely, science seems to depend in its most glorious moments upon acts of faith, upon processes far removed from the syllogistic model which law hoped it could borrow from science.

Next we considered "roles" (Week Nine): a version of the process-oriented liberal response to the Realist challenge. The placement of this week was a mistake. It should have appeared as week five or six. As it was, it put one issue squarely: legal decision-makers do appear to take their jobs seriously. The materials, however, did not begin to explain how that is possible, could not explain how such a sense of obligation can arise if the world is divided between objective and subjective phenomena. Thus, the week was a low point.

The course took off in non-traditional directions in Weeks Ten through Thirteen. We began with accepting the letter but not the spirit of Realism: its true that decisionmakers have nothing in the final analysis to rely upon but themselves. But is that always a bad thing? Artists and scientists do extraordinarily well relying on their "subjective" instincts—or at least "good artists" and "good scientists" do. What accounts for that? In Week Ten we concentrated on the concept of alienation to suggest that if a

2. Bishin and Stone, Part Four.
person is unalienated, there should be no difference between “what he thinks is right” and “the best he can do.” In Week Eleven, we scrutinized the existentialist concept of “authenticity.” We wanted to raise the possibility that overcoming alienation does not depend upon “getting ourselves together” as individuals, but on working to undo the historical damage to society which keeps us mixed up.

In Week Twelve we read selections from contemporary feminism. The idea was not to endorse or destroy it, but to use it as an example of an alternative vision—a different way the world might look if we didn’t accept conventional notions of facts, concepts, rules, and roles. Insofar as it can be said that the job of the lawyer is to evaluate arguments, feminism also provided an excellent view. No easy response to feminism can be found, for its arguments are without precedent, and require us to question the distinctions which in traditional argument are taken for granted.

The last week of the course (Week Thirteen) was meant to be a challenge. Given the threat of nuclear holocaust, do we have any choice but to attempt to revise the ways we think about “sovereignty?” Here we wanted to underline the levels of responsibility in decision-making: we must consider that deciding the sovereignty of one nation over another depends upon the unexamined sovereignty of “fact” over “value,” “judgment” over “opinion,” “rule” over “justice.”

We hope this course of study demonstrated important lessons for lawyers: on the most mundane level, that there is in any argument an assumption to be challenged; on the most ethical level, that each lawyer must appreciate and take responsibility for every assumption she might make. We must emphasize that this investigation proceeded through the use of the most politically-charged materials we could find. We did that because, among other reasons, we believed it would facilitate the student-motivated model of pedagogy (see Appendix C).

APPENDIX B:
SYLLABUS

INTRODUCTION TO LAW FALL 1984

How do rules work?
How do we follow them?
How do we go about making decisions according to rules?

The textbook for the course is Bishin & Stone, *Law, Language, and Ethics* (LLE). Additional materials for each week will be handed out on the prior Friday.
I. FRAMING THE PROBLEM: OBJECTIVE FACTS AND SUBJECTIVE VALUES

If rules are to constraining individual choice, must not what a rule means be distinct from what a decision-maker under the rule believes it means? And consequently must not the rule be knowable (objective), independent of the values (the subjectivity) of the individual decision-maker?

A. The Problem of Social Order: The Use of Rules to Constrain Individual Choice

WEEK ONE: How are law and ethics related? Why would we want to remove ethics from law? Can the use of rules perform that surgery?

Reading: *LLE 1-50

Friday: This class featured a question-and-answer session with Oliver Wendell Holmes and Rudolph Carnap.

B. The Problem of Using Rules: The Dilemmas of Obligations and Communication

WEEK TWO: How can we justify “role”: doing what the rules direct instead of what we think is right? Even if we decide to follow the rules, how can we know
(a) what the rules say our role is, and
(b) what the rules say we must do?

Reading: *LLE 51-79; 92-133
*Minneapolis Pornography Ordinance

QUESTIONS FOR DISCUSSION

Imagine yourself as a member of the Minneapolis city council considering the pornography ordinance. How do you see your role? How do you make your decision? What part do other legal rules (your understanding of First Amendment freedom of speech, for instance) play in your decision-making?

Now imagine yourself as a lawyer about to talk with a potential client who wants to bring suit under the ordinance. What will you talk about? Who will make the decision about whether she has a
cause of action? Upon what grounds? Put to yourself the same questions you tried to answer when you imagined yourself a councilperson.

How is decision-making within each of these roles similar? How is it different? What role does "rule" play in each of these contexts? What role is there for "reason" in each? For "value?"

Friday: Tricia Franzen, from the U.N.M. Women's Studies Program, came to lead a discussion on "objectivity" in feminist research. The point was to make us think other-than-like-lawyers about the pornography ordinance.

II. THE DILEMMA OF COMMUNICATION: RESTRAINING DISCRETION WITH RULES

A. The World of Objectivity: What Can We Know?

1. The World Particularized: Can We Know "The Facts"?

WEEK THREE: Does the objectivity of "the facts" restrain the discretion and autonomy of the decision-maker?

Reading:

*LLE 137-70; 245-49; 262-66; 277-81; 293-99; 300-60
*C. Forche, "The Colonel"

QUESTIONS FOR DISCUSSION

Consider two assertions: (1) United States armed forces have been "introduced into hostilities" in El Salvador; (2) the government of El Salvador is engaged "in a consistent pattern of gross violations of internationally recognized human rights."

What does Judge Green mean by saying that these assertions are matters of "fact," but that a court cannot decide whether they are true? Couldn't she have determined their truth by taking eyewitness testimony of events in El Salvador? Isn't Carolyn Forche's poem (describing an actual experience in El Salvador) the sort of testimony which would establish the truth of the assertions? Is it more difficult for a court to determine the truth of these assertions than to decide what happened in an automobile accident? Why must the "facts" about El Salvador be decided by "the process of democratic decision-making in Congress" (see handout pp. 10-11) rather than by the process of fact-finding in court?

As you think, consider the suggestion in a number of the readings that "what happened" is never just *given* to us, but rather is a result of how we organize James' "blooming, buzzing confusion" (p. 151). The result of *Brown v. the Board of Education* can be viewed as a transformation of a *disputable* issue of fact (the effect of segregation
on black children) into an unreviewable “given” (see materials pp. 350-60). Could we describe Crockett as a transformation of determinable issue of fact into a disputable question of value? Focus on what Quine (pp. 326-33) would say about each of these cases. Perhaps we cannot commit ourselves to “what happened” without also committing ourselves to how a “force field” ought to be organized.

Friday: The Native American students presented a skit about a hypothetical violation of tribal law—an unauthorized witnessing of a sacred ritual. There was much debate afterwards about “what happened.”

2. The World Generalized: Can We Know “Concepts”? 

WEEK FOUR: Can our organization of reality by concepts make law objective or knowable, relieving decision-makers of the burden of choice?

Reading: *LLE 170-244; 371-87; 394-402*
*Nader, Green & Seligman, “The Collapse of State Corporation Law,” from Taming the Giant Corporations (1976)*

QUESTIONS FOR DISCUSSION

The Pluses and Minuses of Using Concepts

None of the readings dispute that “concepts” are useful. They help us to organize a multiplicity of factual configurations into categories, classes, families. On this ground, Ross suggests (pp. 202-09) that concepts are reducible to facts (but that we don’t do this because it would be too cumbersome). Is Ross making (in Ryle’s terms) a “category-mistake?” See Note 7 on p. 209. Can we talk about a concept solely by reference to the facts it groups together, without talking about the purpose for which it is used in a particular case? See Note 5 on p. 201. (Concepts organize by abstraction and generalization. Are there costs to that? See Note 1, p. 179. What are those who call the corporation “a fiction” trying to point out? What dangers are they trying to warn us of?)

"Legal" vs. "Ordinary" Concepts

Hart (pp. 210-16) argues that although ordinary concepts are definable because they have counterparts in the external world, legal concepts cannot be reduced to factual components, nor otherwise “defined” except with reference to their relations to rules. Do you buy this distinction between “legal” and “ordinary” concepts (for instance, between “corporation” and “person”)?
Law and Ethics

With regard to law, Hart also seems to say that a legal concept has no inherent content—that we can inform it as we please. What does Hart imply about the relationship between law and ethics? Recall your reading from Rawls in Week 2, pp. 104-12. Why are all these people talking about games? Are “tu-tu” and “outness” in a game of cricket the same sort of concept? In cricket we can use Hart’s method to put the player out: we specify truth conditions and show how the concept of “outness” is a conclusion from rules. Is this analogous to law? Think about how we conceptualize the issue of a case. See the Barenblatt case (p. 379) and the Oliphant article (p. 385). Is it possible to eliminate an ethical decision from the statement of the issue—from the choice of how we conceptualize a dispute? Is the level of abstraction at which we conceptualize any freer of ethical choice than the level of abstraction at which we state the facts? Recall the D’Arcy reading from Week 3 (p. 293).

Are Concepts Unethical?

Does Cohen (pp. 196-200) persuade you that the use of concepts improperly obscures ethical considerations in legal decisions? Must a concept be re-evaluated every time we use it? (Would Ralph Nader approve of such constant re-evaluation?) Must a concept have a fixed content in order to use it? Consider the concept of a “person” (pp. 219-44). How do we proceed in normal usage? Consider the Wittgenstein excerpt on p. 219.

Friday: Larry George, from the U.N.M. Political Science Department, rattled our cages by explaining the correctness of the Marxian concept of property. Tina Turner answered the question “What does this class have to do with law?” by asking “What does law have to do with real people?” “Steel Claw” on the album Private Dancer.

3. The World Communicated: Can We Know “Rules”?

a. Following Rules I

WEEK FIVE: Can the rule of a prior case dictate the outcome of the next case?

Reading: *LLE 403-20; 444-73
*Javins v. First National Realty (D.C.Cir. 1970)

QUESTIONS FOR DISCUSSION

Was it wise for Cardozo in Martin v. Herzog to make a “rule” rather than concluding that, in that case, the plaintiff had not exercised “due care?” Are the “rules” that supposedly come from common
law cases really "rules?" Suppose a rule states that it shall be followed except when it would be inappropriate to do so. Is it still a "rule?" (Consider the following: "Rule #1: Don't Follow This.") Is the "negligence per se" rule of Martin v. Herzog like the baseball rule, "three strikes and you're out?" Does the Martin rule function that way in New York? Should it?

In using precedent, what must be taken into account? What else can be taken into account? As a matter of logic, a general proposition cannot follow from a particular one. Because of that, Harari suggests that how we use precedent depends on what else we know about the law. Does that explain what's going on in Tedla v. Ellman? In Javins v. First National Realty? How would Felix Cohen analyze those cases? How would Skelley Wright analyze the question put to the court in Tedla? How would Cross react to Wright's analysis?

It seems at times, does it not, that judges "reach the result" before considering the available authority. In light of Harari's message, do you think that judges always do so? Is there anything wrong with doing so? In a situation where a judge knows a great deal about the law and about the facts, can she do otherwise? (Consider particularly the Ryle, Holt and Dewey excerpts, and the note on p. 459.)

Are there any connections, in your view, among magic, language, learning, and stare decisis?

Friday: Karl described the existential collapse he suffered when he began practicing law and discovered that the "applying the law to the facts" syllogism didn't work. Ann did an oral argument of a case from the Contracts book to demonstrate how these jurisprudential materials inform lawyering. Bette Midler performed a rap-song about the contingency of human expectations, "Fried Eggs" from the album Live at Last.

b. Following Rules II

WEEK SIX: Can the rule of a statute dictate the outcome of a case?

Reading: *LLE 476-80; 485-94; 498-518; 521-23; 526-28; 531-37
*Paragraphs 198-99 from Wittgenstein, Philosophical Investigations

QUESTIONS FOR DISCUSSION

When judges apply statutes, what are they doing? Are they, as Cardozo says (p. 485), "legislating between gaps," or are they, as Kelsen argues (p. 506), ignoring gapless laws because to apply them would be "too inexpedient or too unjust?"

H.L.A. Hart (p. 476) suggests that because statutes are clear verbal formulations, judges can, at least in some cases, subsume the facts
under the classifying statutory categories in order to reach a syllogistic legal result. In graphic terms:

\[
\text{FACTS} \rightarrow \text{STATUTORY TERM} \rightarrow \text{LEGAL RESULT}
\]

If so, we might say that the question is whether the facts of the case fall within the statutory words. Or, to put it in Langer’s terms (p. 511), the question is whether the particular situation is denoted within the connotation of the statutory language. We may build our graph as follows:

\[
\text{FACTS} \rightarrow \text{STATUTORY TERM} \rightarrow \text{LEGAL RESULT}
\]

\[
\text{CONNOTATION} \rightarrow \text{DENOTATION}
\]

Now consider this statute: “No glass in the park.” Someone is arrested for wearing sunglasses in the park. The judge must apply the statute. Graphically:

\[
\text{FACTS} \rightarrow \text{STATUTORY TERM} \rightarrow \text{LEGAL RESULT}
\]

\[
\text{CONNOTATION} \rightarrow \text{DENOTATION}
\]

The essential question for this week becomes, “is this what judges do?” When judges apply statutes, is it possible to take only the words of the statute into account? (See Langer and Wittgenstein excerpts, p. 509.) The mechanical model assumes that words used in statutes have some sort of stock connotation. Do they? Can there be fixed connotations to such words? (See Bergson excerpt, p. 526) (Think about the word “hostilities” as used in the War Powers Resolution in comparison with the word “water” as used in the Langer excerpt, p. 511.) In Langer’s parlance, is Holmes in McBoyle (p. 517) acting more like a dog or like a person?

If, in the context of statutory interpretation, the words don’t tell the judge everything, what else must she know? (See Church of the Holy Trinity, p. 502.) The “intention of the legislature?” (Have you ever observed in Santa Fe? Does the legislature have an intention?) The purposes of the legislation, seen after the fact? The context of the enactment? Social realities? How can the judge possibly ascertain these things? If ascertainable, would it be any more legitimate to take any of these things into account than “what the judge had for breakfast?”

Friday: Karl and Ann spoke about Wittgenstein’s clarification through
language of philosophical muddles, and what that means for the
supposed limitations of legal language.

B. The World of Subjectivity: How Do We "Value"?

**WEEK SEVEN:** Where do values come from? How do we know
what they are? How is it possible that we can communicate about
them?

**Reading:**
*LLE 539-47; 560-62; 587-91; 597-99; 629-39
*W.B. Gallie, "Essentially Contested Concepts," *Aristotelian
Society Proceedings*, n.s. 56 (1955-56)

**QUESTIONS FOR DISCUSSION**

Our recent weeks of study have demonstrated that there is much
in law which is inherently evaluative. Is there any way to live with
that, without falling into the depths of skepticism or blindly cleaving
to authority?

Is Justice Frankfurter's opinion in *Rochin* rational? Is the opinion
an example of the intellectual use of symbols or a discussion of
"non-existant topics" (see Langer excerpt, p. 587)? Might the dif-
ficulty be that he is addressing a non-discursive, wholistic phenom-
emon in a necessarily discursive medium (id.)?

Is Frankfurter's opinion persuasive? If so, does that suggest any-
thing about the possibility of agreement about value? What does it
mean for an argument to be persuasive? Do you agree that there is
a "logic of conversion?" (See Gallie handout; c.f. Bergson and
Koestler excerpts, pp. 597-99.) How is it possible that we can change
our minds?

Perhaps it would be helpful to think about the distinction Gallie
implies between "appraisive" concepts and "ordinary" concepts.
The former, he says, are "essentially contested," which suggests
that the latter are not only rational but settled. Given what we have
previously studied, do you believe there is such a distinction?

If persuasion is possible, is it also possible for there to be "pro-
gress" in ethical argument and decision-making? If you are a sports
fan, think about gymnastics. In some games (basketball, for example)
"winning" is measured by discrete scoring. In gymnastics, athletes
are evaluated by a panel of judges on a continuous scale from one
to ten. In the recent Olympic games, some medals were decided by
mere thousandths of points. Does that bother you? How much? Do
you think that Mary Lou Retton was "better" than most of her
competitors? Would you agree with the proposition that the last
decade has seen an enormous improvement in gymnastics generally?
Are gymnasts who score tens "perfect?" What if next year's team is better?

Mensch (handout) describes the dramatic changes in the American contest about the nature of law. Does this contest, which may be followed by examples given in any law school textbook, comport with Gallie's model? Have your studies thus far suggested what the contest might be like in the future?

Frankfurter says (p. 543) that "the absence of formal exactitude...is not an unusual or even regrettable attribute of constitutional provisions." Compare that remark to D.H. Lawrence's rather more colorful criticism of Poe (p. 565). What are the similarities, if any, between "legal reasoning" and aesthetics (see pp. 629-39)? Does Munro's description of the method of art criticism also provide an explanation of decision-making within a rule system?

Friday: The Chicano students presented a skit about how arbitrary the Law School admissions process looked from their perspective.

C. The World of Consciousness: A Social World

1. Living with Rules

WEEK EIGHT: Life with Rules: their creation, their vitality, their transformation. What is the relationship between legal and scientific endeavors? Can there be "progress" in a rule-based legal system?

Reading: *LLE 721-26; 739-42; 619-24; 753-59; 773-78; 786-89; 797-801; 624-26
*Excerpts from H. Pagels, The Cosmic Code: Quantum Physics as the Language of Nature
*Excerpts from G. Zukav, The Dancing Wu Li Masters: An Overview of the New Physics

QUESTIONS FOR DISCUSSION

In this week and the last, we are attempting to understand more about law by comparing it to other disciplines. Last week we considered art and art criticism, as a way of reexamining whether values are wholly personal and irrational, or whether values can be the subject of rational, progressive social discourse. This week, we consider science, and particularly contemporary physics, as a way of reexamining what we have learned about rules.

Our studies in weeks 5 and 6 indicated that legal rules are neither mechanically dispositive nor completely meaningless. So what are they? Can science help us? The authors of our text say that, "Science and law have in common...a very complex problem of the relation of rules to the instances of their application...[T]o solve it is to tell what rules do and how they do it." Authors' Note, LLE, p. 725.
What are scientific rules? Are they descriptions of "isness" (Dickinson, p. 774) or merely guides for further scientific inquiry (Conant excerpts, pp. 622 & 787)?

How do scientific rules (or "paradigms") operate? Do they merely "disclose the situation" (Dickinson) or do they make possible what is widely perceived as progress in "normal science" by narrowing the range of acceptable research (Kuhn, p. 753; Whitehead, p. 786)?

How do the rules of science change? Is change a result of the steady accumulation of empirical data, or is it more emotional/political/creative process (Pagels [handout]; Whitehead excerpts, pp. 786 & 797; Conant, p. 787; Kuhn, p. 624)? Can change be any easier for a scientist than for a lawyer or a judge or a judge (see handout)? What is the logic of scientific conversion?

Does this really have anything to do with law? Are law and science sufficiently analogous 1 for us to accept the scientific model of rule-influenced behavior? Along with the Conant pieces, consider the opinions expressed by Wurzel (p. 619), Llewellyn (p. 773), Dickinson (p. 774), and Fuller (p. 799).

As a legal counterpart, think of Brown v. Board of Education (p. 739). You should take into consideration several historical aspects of Brown. (1) It had the effect of reversing the "separate but equal" doctrine of Plessy v. Ferguson, announced in 1896. In the intervening six decades, the Court had heard at least six cases (in the area of public education alone) in which it could have reconsidered that doctrine, but did not (see p. 741). (2) The Brown opinion stressed the importance of education. After Brown, however, the Court ordered desegregation of many other public facilities (e.g., parks, beaches) in summary per curiam opinions. These decisions have been roundly criticized for their lack of justification (see, e.g., Learned Hand, The Bill of Rights (1958). (3) In Brown, the Court only declared racial segregation in public schools unconstitutional. Due to the complexity of the cases, a remedy had to wait until the next term. In Brown II, 349 U.S. 294 (1955), the Court remanded the cases to the lower courts to order desegregation "with all deliberate speed" and to retain jurisdiction during "the period of transition." (4) For the last twenty years (and for the foreseeable future?), the federal courts, including the Supreme Court, have ruled regarding the numerous implications of Brown. The tip of this iceberg includes

---

1. Is it possible not to recognize an essential connection between science and law, or between science and any other aspect of life? Conant suggests (p. 624) that "the children now in elementary school may in middle life feel that a picture of the universe [painted by relativity and quantum theories] that seems no picture is quite a satisfactory one." Consider in the context of the Pagels and Zukav handout: Newton's influence upon many Western lives (and certainly upon the Anglo-American legal system) has been profound. Insofar as Newtonian notions about reality may be down the drain and supplanted by quantum physical theories, what does that mean about our children's ideas, and those of generations to come? Think about the incursions already around you of "probabilistic" thinking. The twenty-first century legal system, it would seem, is bound to mirror these paradigm shifts in physics.

In light of this history, might we view Brown in Whitehead's term as a "working hypothesis" (p. 786). It might be particularly helpful to view it in Kuhn's terms as a "paradigm" (p. 753). Can some of the post-Brown decisions be seen as the exploration of a paradigm "even in the absence of rules?" c.f. Rochin v. California. Can some of the post-Brown decisions be seen as rules "derived from" the paradigm? Does such a consideration of this one legal context enhance your understanding of (and conform with) legal rules generally?

Friday: The Anglo students presented a skit—"White Culture on Trial" (the defendant looked remarkably like J.R. Ewing). The witnesses in his defense were Sir Francis Bacon, Guru Havinagoodtime Vishuverhere, Oliver Wendell Holmes, and Allen Ginsberg. The class acquitted the defendant (but not without stern warnings).

2. Living with Roles

WEEK NINE: What function does "role" play in legal method? What is the goal of role-playing? What is the limit of role-playing?

Reading: *LLE 806-08; 818-29; 865-86
*Excerpts from Woodward & Armstrong, The Brethren: Inside the Supreme Court, pp. 296-347

QUESTIONS FOR DISCUSSION

If, as Wittgenstein suggests, rules (like signposts) can "work" only because they are imbedded in customs, uses and institutions (Handout Week 6)—or in Kuhn's terms, we operate with rules within a context of "shared paradigms" that provide "coherence for normal research traditions" (p. 756)—then the next step of our inquiry ought to be an investigation into how those "customs" affect decision making.

A primary social device for embodying and activating those customs is "role" (see Note, pp. 806-08) and it is to this concept that legal thinkers turned in an attempt to respond to the realist challenge that all decisions under rules are necessarily value-laden (see Mensch, Handout Week 7, pp. 32-34). True, values are necessarily involved, came the response of the "reconstructors," but they are "selfless" rather than "personal" (see Llewellyn, p. 825; Frankfurter, p. 881; Hand, p. 885-86). The judge's (or lawyer's) immersion into role—into craft, tradition, ritual—thus supplies an impartiality that, while falling short of making rule application utterly certain and predict-
able, nevertheless insulates the process from the personal values of the decisionmaker and gives it "reckonability" (see Llewellyn, pp. 825-29). How then, and at what cost, is this reckonability achieved?

How do legal roles deal with personal feelings? What does Frankfurter mean by "submerging private feeling" and "laying aside private views" (p. 882) or Hand by "detachment" (p. 885)? Are legal decisionmakers supposed to become emotionless, devoid of feeling? Or are those feelings and emotions supposed to be "shaped" by the "office," "channeled into service of the whole" (see Llewellyn, pp. 826-27)? In Wurzel's terminology, are personal feelings to be converted into "social feelings" (pp. 883-85)?

How could such "channeling" work? How do scientists get channeled into the pursuits of "normal science?" Consider Kuhn's remarks on the nature of education as preparation for a "profession"—the "study of paradigms" to "prepare the student for membership in the particular scientific community with which he will later practice" (p. 753). Compare with Llewellyn's observations about the training of lawyers to "see things, . . . see significances, through law-spectacles" (p. 828). To what extent is learning a profession also learning a world view (see Mills, p. 819-22 and following Note; Wurzel, p. 884), adopting a political doctrine, or ideology (see Shklar, pp. 877-81)?

Of what importance is it to the effectiveness of role in governing behavior that the possibilities of personal satisfaction are themselves dictated by the role (see pp. 865-67)? What are the possibilities of satisfaction created by the roles of "normal science;" by the roles of the legal profession (see selections from Llewellyn, Kuhn and Huizinga, pp. 866-77)?

Consider whether, given the deep involvement of lawyers in the scandal, part of what Watergate was about was a questioning of the role of the lawyer as technician/gamesplayer. (Part of the fallout from Watergate was a frantic movement in legal education toward an increased emphasis on "professional responsibility" and in the bar toward inclusion of that subject in bar examinations.)

Think about all this in relation to the Supreme Court's process in the decision of the Nixon case (Handout). Does the "Reconstructors" model of how role governs decisionmaking adequately explain why the Justices acted as they did, or how they conceived of themselves or their roles? Were they "detached" from their personal feelings and emotions? Could they have been?

Was Watergate a time of "normal science?" Are we in a time of "normal science" now? Consider the connection which Shklar discusses between our paradigm of the world (or law) and how we conceive of our role. If the former is in trouble, as our investigations into the "ideology of legalism" have suggested, can the latter help but be? Can we afford to conceive of ourselves as "normal scientists?"
Finally, what do you think of the separation of "personal" from "social" feelings upon which the "Reconstructors" model rests? If thought is "conversing with this internalized organization of collective attitudes" as Mills argues (pp. 819-22) are feelings any different, any less "social?" Can custom/tradition/professionalism provide standards which are any less "arbitrary" than feelings (see Shklar); standards which are any more justifiable? Can a decisionmaker who takes her role seriously ever avoid having to depend, ultimately, upon herself? (These materials continually connect role-immersion with the metaphor of self-detachment. What would a legal role that embodied the image of "self-immersion" be like?)

Friday: We listened to a tape of Nixon’s 4-30-73 speech, about all he had done to preserve the "sacred trust of the Presidency." Then Professor Fred Harris, formerly of the U.S. Senate and now of the U.N.M. Political Science Department, gave his (pretty strong) reactions, based on life with Nixon and all the actors in the Watergate mess.

III. THE DILEMMA OF OBLIGATION

A. Great Souls

WEEK TEN: To what degree should decisionmakers "be themselves?" If they "be themselves," are their decisions likely to be better or worse justified?

Reading: *LLE 900-01; 669-720; 908-13; 914-17; 919-20; 927-28; 931-34

*Excerpts from E. Fromm, Marx’s Concept of Man

QUESTIONS FOR DISCUSSION

Our investigations thus far have been a search for authority, an inquiry into the social devices of rule and role as means for demanding objectivity and neutrality from our legal decisionmakers. What we have found, however, has been troublesome. Wherever we have looked for certainty, we have found opportunities for creativity. From facts to concepts, rules to roles—when we sought "givens" we only found occasions for interpretation (or in the language of quantum physics, we were unable to separate the observer from the observed). To the extent that social devices of control placed any restrictions upon the personality of the decisionmaker, it seemed that the result was not neutrality but conformity to the status quo—unthinking, blind acquiescence in the "customs, uses, institutions." in the "paradigm," in the "ideology" (recall Shklar in last week’s readings and the Mensch handout in Week 7, for instance).

Underlying our search, however, has been a fundamental as-
assumption about the nature of human beings that we are now ready to question. The assumption is that our individuality—our personal values, tastes, preferences—is capricious, arbitrary, productive of disorder, anti-social, lawless. The consequence of that assumption for law is to assign to rules and roles the task of keeping that arbitrariness in chains.

Does this picture of our individuality adequately account for our concept of "self?" Can it explain our need and drive for self-consistency and a coherent self-image (see Allport, pp. 908-09)?

Reflect on Darrow's argument for mercy in the Loeb-Leopold case, on his persistent "appeal to the feelings of human beings" and for an "answer from the human heart" (p. 688; see generally pp. 684-89, 693, 695-96). Is his argument an attempt to get the judge to capitulate to his emotions, illegitimate appeals, in Crowe's words, "to your heart and your sympathy and not to your mind or your conscience" (p. 712)? How could Darrow respond to Crowe's charge? Could he argue that Crowe's attempt to split heart/sympathy from mind/conscience is itself illegitimate—a denial of our human drive for "meaning" and "unification of mental life" (see Fingarette, p. 920); that the appeal to mind/conscience is itself an appeal to the "personality" of the judge, a demand that the judge "know himself" (see Frank, pp. 910-13); that the resort to self—self-analysis—is a vital and inextricable part of all decisionmaking (see Frank; Munro, pp. 914-17); that reliance on self is not anarchy—the absence of standards—but provides criteria for responsible decisionmaking (see Note pp. 909-10); that the self is not "personal" but a mode of social organization?

Is the self—personality, character, self-image, conscience—a static "entity?" Is it meaningful to talk of who Judge Caverly is independent of what the decision in this case will make him? Is the challenge of decision for Judge Caverly the challenge of self-creation? Is that the challenge for Darrow and Crowe too (and for all of us)—to see our lives as a continuous process of self-creation (see Fromm, Handout pp. 1-4)? Can Judge Caverly decide the case without deciding who he is and wants to be, without deciding who we are and want to be (see Darrow, p. 696)?

What is the process of self-creation like? Is it a matter of discerning what others expect from us, and striving to live up to those expectations (Savoy, p. 928)? Or would that be what Marx describes as passivity and alienation? What goes on in our "conversation with the generalized other" (recall Mills, week 9, pp. 819-22)? Is it a critique of our received heritage, our internalized culture (see Koesinger and Allport, pp. 919-20)? Is it a critique of idolatry (see Fromm, pp. 5-7)? If so, from what perspective? What does Allport mean by "individuation, the formation of an individual style of life that is self-aware, self-critical, and self-enhancing" (p. 920; see also Allport, pp. 927-28)?
Here we must confront dichotomous views of what it is to be an individual: "superman" vs. "species-being." Consider the Nietzschean hero described in Kaufmann, pp. 931-34: the "great-souled man" characterized by perfection and power, by self-sufficiency and self-containment, by transcendence of nature and history, by kindness to others whose weakness he justifiably despises. Can this "self" provide an adequate perspective for the critique? How would Marx describe him? Is he Marx's active, productive man who has overcome alienation? Or is he an idolator of the self he has created (compare with Fromm's remarks about the psychology of the fanatic, fn. 2, p. 5), the ultimate product of a society of "organized lovelessness" (Fromm, p. 12)? How would Marx describe his "great-souled" person? Think again of Darrow's appeal to the "feelings of human beings" and for an answer from the "human heart." Is there any difference between appealing to Judge Caverly's feelings and heart and appealing to human feelings and heart? How does Darrow's argument ask Judge Caverly to conceive of himself and his role? What does Marx mean by conceiving of ourselves as "species-beings?" Is that what Darrow is asking Judge Caverly to do?

Friday: The Honorable Woody Smith from the New Mexico District Court and the Honorable William Bivins from the New Mexico Court of Appeals came to answer student questions about what judges really do.

B. Authenticity

WEEK ELEVEN: Is there any reason to believe that the emotions tend toward beauty? Toward compassion? Toward change?

Reading: *LLE 948-61; 974-86
*Drönenburg v. Zech (D.C.Cir. 1984)
*Excerpts from R. Jacoby, Social Amnesia—A Critique of Contemporary Psychology from Adler to Laing

QUESTIONS FOR DISCUSSION

Last week's readings suggested a way around the realist challenge: it would be all right to rely upon the personalities of decisionmakers, indeed, it would be preferable to do so, so long as those persons are unalienated—in touch with themselves, self-critical and self-creative. So is this what we've come to: we can be responsible decisionmakers if we just "get ourselves together," jump in the hot tub with our clients and the judge, and get in touch with our feelings?

Would the plaintiff in Drönenburg have benefited from a sauna with Judge Bork? Assuming that there is a strong constitutional
argument for the rights of homosexuals, would you say that Judge Bork is just "being himself" within the meaning of last week's readings? Might a process of introspection on Judge Bork's part have resulted in a contrary decision? Do you think he himself joins in the historical prejudice against homosexuals? If so, would he be able to engage in the introspective process (see Sartre, p. 954; Frenkel-Brunswik, p. 949)? Wouldn't he (or anyone else who attempts to locate her prejudices) just double-back upon his defense mechanisms (Church, p. 648), his educated inability to differentiate his feelings (or even to feel them) (Fromm, p. 958)? Wouldn't he just hit upon his "second nature"—that "scar tissue" of the human history of violence which defines the individual (Jacoby handout)?

Can a decisionmaker ever think or feel his way out of alienation? Consider Bork's discussion (Dronenburg handout, p. 3) about the relative roles of the Supreme Court justice, the lower court judge, and the academic. How does that facile switching of hats reflect upon our study of role, and upon Jacoby's admonition that roles are both true and false (Jacoby handout, at p. 15)?

Suppose that the decisionmaker upon introspection concludes, "I am a bigot." Has he gotten anywhere, or has he, like Sartre's character (p. 956) who says, "I am a pederast," just erected a new self-deceptive defense—an alienated, objectified self-concept by which he can dissociate himself from himself? Sartre does not paint a very appealing choice between self-deception and sincerity (id.). Would Jacoby argue that neither of Sartre's approaches can hit the mark of human freedom? If so, would you agree with him?

The subsection of LLE from which the readings come is entitled "The Courage to Be: Resisting the Taboo Against Knowing Who You Are." What is tabooed? Is it getting in touch with our feelings, or is it realizing that we have only "pseudo-feelings," those we have been taught to feel (Fromm, p. 959)? And thus that truly "knowing who you are" requires confronting the social repression we have internalized (Brown excerpt and Jacoby handout)? What does art have to do with instinctual liberation? Why is art subversive (Brown, at p. 984-85)? What part does communication with the audience have in this process? Can overcoming alienation—in art or law—be a personal affair? Can it proceed without working together to transform consciousness and the social conditions that have created the alienation?

Friday: Three actors—Bryan Burdick, Marilyn Pittman, and Juba Clayton—presented excerpts from the works of Lanford Wilson, Gertrude Stein, Nikki Giovanni, and Donna Rushin. Then the three answered questions about what they've learned from being artists. This was a demonstration of how culture and language bring us together and make it possible to create sensible norms. Aretha Frank-
lin sang “Climbing Higher Mountains” from her album, *Amazing Grace*.

**C. Planetary Citizens**

**WEEK TWELVE:** What is “obligation?” What is its source? Is it possible that the notion has been made up for some purpose? How do people come to feel obligations and allegiances? How do you know what your obligation is?

**Reading:**
- *Adrienne Rich, “Natural Resources,” from The Dream of a Common Language*
- *Catherine MacKinnon, “Feminism, Marxism, Method, and the State,” from Signs*
- *Excerpts from Carol Gilligan, In a Different Voice*
- *“The Trial of Susan B. Anthony,” reprinted in Babcock, Freeman, Norton, and Ross, Cases and Materials on Sex Discrimination*

**QUESTIONS FOR DISCUSSION**

We have continually phrased the investigations of this course as a quest for authority—in rules, roles, selves—to bind decisionmakers. Underlying our pursuit of chains, however, has been a paradoxically deeper question: how can we be free?

The response of the Western classical tradition to that latter question is expressed in the ideal of the rule of law: order. Embodied in the image of the neutral, objective decisionmaker is a political theory about the nature of freedom: to be free is to be free from the demands of other subjective, individual human beings. The right to liberty is thus the right to be left alone (Piaget’s “paradox of egocentricism,” p. 57). Social obligation to others, consequently, arises from our consent to be ruled by law: to acquiesce in the creation of a boundary to our autonomy so that within the boundary we may be unfettered—hence the concept of legal rights as demarcations of when we can (“we have a right to . . .”) act purely for ourselves without regard to the interests of others, and when we cannot do so (“we don’t have a right to . . .”). The problems of political theory have thus been defined as insuring that the chains are properly chosen (preservation of the majoritarian process) and properly applied (preservation of the neutrality of decisions keeping the chains in place). A failure on either count would result in the evaporation of consent to, and therefore the legitimacy of, the legal order.

Many of the readings we’ve encountered, however, have suggested that neither rule nor role nor self can, in themselves or taken together,
provide the authority essential to secure the ideal of freedom. For
the price of authority—whether of rule, role or self—in each case
seemed to be the loss of neutrality: the authority emerged not from
these devices or control but from the underlying social reality (the
"scar tissue," in Jacoby's terms), the assumption that existing social
patterns and arrangements are in fact the proper ones. But the legal
order was supposed to, according to the theory, justify the social
arrangements. Now we are faced with having to justify the social
arrangements in order to justify the legal order. Whew! What a mess!

Perhaps we must go back to the beginning and rethink our concept
of freedom. Both Marx and Freud contain hints of a possible way
to proceed. What would a society look like, they ask, that sought
freedom in liberation rather than repression of our instinctual drives,
freedom to rather than freedom from, freedom to be together rather
than to be alone?

This week's readings suggest that answers to these questions may
be heard in the voices of women, but that as an historical and psy-
chological matter, we must first "notice not only the silence of women
but the difficulty in hearing what they say when they speak" (p. 57).
These materials take a feminist view of the scar tissue of human
history, drawing the connections between historical society and pa-
triarchy, between law and sexuality.

The readings pick up Fromm's and Jacoby's critique of the dis-
tinction between subject and object, suggest that objectification is
the strategy for domination, and argue for the collapse of the subject/
object split (see, e.g., MacKinnon pp. 13-17). They also argue that
our legal system, with its emphasis on "rights," is itself the product
of the pathology where aggression is mistakenly seen to be normal
(see Smith).

In light of the still familiar statements made by Susan B. Anthony
in 1873, would you agree with either of these arguments? Was the
19th Amendment (ratified in 1920) worth the trouble? Did it achieve
the elimination of the sources of Anthony's complaints? Is it possible
for our present legal system, by formal change, to achieve anything
resembling "instinctual liberation?" What else is required?

Carol Gilligan portrays a morality based not upon contests of
rights, but upon an "ethics of care," a "world that coheres through
human connection rather than through systems of rules" (p. 53).
Would a legal system based on such an ethic tend toward "a more
adequate solution" (p. 54)? Would it be possible to base a legal
system (or a life in the law) on such an ethic? Must the system be
so based?

Friday: Three law teachers (Robert Desiderio, Bertha Hernandez,
and Paul Nathanson) and a professor of education (Richard Law-
rence) spoke about their dreams for education. This was an amazing
experience in candor.
IV. THE FUTURE OF TRUST

WEEK THIRTEEN: Does the legal system encourage/discourage the best/worst in human nature? If the courts teach a "vital national seminar," what is its subject? What changes could be made in the legal system? Should any be made? (Where do you stand on "alternative dispute resolution?"") Must any be made?

Reading: *Excerpts from Jonathan Schell, The Fate of the Earth
  *Excerpts from R.P. Wolff, The Poverty of Liberalism
  *LLE 1164-67; 1264-68; 1244-45
  *Article from Albuquerque Tribune on mandatory arbitration
  *Excerpts from Richard Abel, The Politics of Informal Justice
  *Excerpts from M. Birnbach, Neo-Freudian Social Philosophy
  *Excerpts from R. Buckminster Fuller, Critical Path
  *LLE 1277-84

QUESTIONS FOR DISCUSSION

We thought of these materials as falling into four phases of inquiry. All develop aspects of last week's readings on political theory—ideas depicting different ways of seeing the relationship between law and society.

(1) We begin with the spectre of annihilation of our species and the destruction of the earth, a fate that can be avoided, Schell argues (handout), only by dismantling the institution of international sovereignty. His argument echoes Susan B. Anthony's condemnation of the sovereignty of men over women. Recall the arguments of MacKinnon, Smith and Gilligan that the system of sovereignty is itself the product and manifestation of male domination—with its separation of the public from private spheres, its ideal of formal justice and neutrality of the rule of law, its denial of perspectivity, and its image of freedom as "the right of each person, briefly, to exploit and dehumanize someone else" (MacKinnon, p. 13). If trust and care are to have a future, if we are to have a future at all, must sovereignty—international and social—be consigned to the past?

(2) The first set of readings by R.P. Wolff (handout, p. 21; LLE, pp. 1164-67, 1264-68) explores the necessity for and the contours of an alternative vision of law and society. His vision describes community as essential to individuality, rather than conceiving of the two as mutually destructive. Wolff attempts to picture the ethics of care and the end of sovereignty on a societal level; he posits the possibilities for a society that does not depend on the devices of domination and authority (symbolized by the rule of law) to achieve
social coordination. How would resolution of disputes in such a world proceed?

(3) Could international disputes be resolved other than through aggression and war? On a societal level, are there alternatives to the immense waste and destruction of litigation? Bohannan (LLE, p. 1244) presents us, through the example of the Tiv, a model of dispute resolution without rules or external authority, based on the values of community, cooperation and harmony. If we recognize the importance of those values, how could we alter our own legal system to work toward them? As you see from the newspaper (handout, p. 22), the issue is a live one in Albuquerque. Assess the city’s efforts in light of Abel’s observations (handout, p. 23). Is the proposed system likely to result in less or greater domination of the powerless? Should we give up the effort, or do it differently, or do something in addition to working to delegalize dispute resolution?

(4) How shall we unleash our minds? The quandary for Western thought and politics has been how to deal with the problem of scarce resources (Birnbach, handout p. 36). Given the assumption that there is not enough to go around, the question society has posed for itself—to which the concept of sovereignty has been the answer—is how to reconcile the competing demands of autonomy (untrammeled competition for resources) and authority (control over that competition). But the threat of annihilation demands that we refocus on what brings us together (preservation of the species) rather than what drives us apart (competition for scarce resources).

Is mass starvation (or nuclear annihilation) a fact of life over which we have no control? Or is it a symbol of our failure to see not only the allocation or resources but also the quantity of resources as an “object of decision” (Wolff, handout p. 39)—i.e., to see scarcity not as given but as a problem to be eliminated (Fuller, handout p. 36)? Is the social problem (or any social problem) one not of how to control competition but of how to foster cooperation—of how, in Wolff’s analogy, to play as a string quartet?

Think again of Marx’s concept of alienation, Freud’s of repression, MacKinnon’s of domination—all devices by which we deny our creativity, accept as given and necessary what is socially constructed. Are social and international problems products of the tenacity by which we cling to those devices, failures to see that what seems to be “real” is a matter of perspective and therefore contingent (Gordon, handout p. 44)?

Sullivan and Dodds argue (LLE, p. 1277) that determinism—faith in the “long run solution” and flight from the open society we have the power to create—is no longer an option. Mustn’t we take control—make into “objects of decision” what we have previously seen as beyond our power, as “unintended consequences?” Is there any alternative to building a society—a world—in which we can liberate our instincts rather than repress them, in which we can overcome
our fear of ourselves and each other, and in which we can trust? Can we afford to trust? Can we afford not to? What do you plan to do with your legal career?

Friday: No class.

APPENDIX C:
DESCRIPTION OF METHOD

INTRODUCTION TO LAW FALL 1984

OVERVIEW
In this course we hope to discover and learn more about the broad problems and the possible understandings that underlie legal study and life in the law. We will, for example, examine the difficulty of legal “objectivity,” work through the constructs (rule, role and self) which make legal endeavors possible, and search together for ways to make the legal system (and ourselves) more responsive and meaningful in the future.

MATERIALS AND ASSIGNMENTS
The text for the course is Bishin and Stone’s Law, Language and Ethics (Foundation Press 1972). We will also hand out supplemental materials. Between 50 and 150 pages of reading will be assigned each week. We hope that you will do the reading over the weekend; you will note (from the description of procedures below) that it is particularly critical for the “authors” to do so. Although you should familiarize yourself with all the reading, we also hope that you will use each assignment as a “library,” a group of materials from which you can choose readings that in your mind speak most forcefully to that week’s issues.

PROCEDURE
The class is scheduled to meet on Tuesdays, Thursdays and Fridays. On Tuesdays, however, only a quarter of the class (that week’s “authors”) will meet formally. The “authors” are six groups of 4 or 5 students, each group drawn from one of the six discussion sections. Each group will prepare a two-page paper assessing issues raised in that week’s readings. The author groups should draft preliminary versions of their papers prior to our Tuesday meeting, and deliver 20 copies of their final version to Kay’s carrel by 8:30 a.m. Wednesday morning. (Each student will participate in three such author groups during the semester.) Meanwhile, the rest of you non-authors-for-the-week should take it upon yourselves to
meet Monday or Tuesday in study groups to reflect upon the readings. Remember, its your education, so plan your own small group in place of the Tuesday class.

On Wednesday morning, the six papers will go on reserve at the library desk. Everyone should read them before Thursday’s class (and take notes on them so that you can refer to their specific ideas in discussion group). On Thursday, we will meet in discussion sections to consider the papers and the week’s readings. The “assistants” will participate in, but not lead, the discussion groups.

On Friday, the entire class will meet in plenary session. The format for Fridays will vary with the materials covered that week, but will include speakers, debates, media presentations, and sundry festivities.

ASSISTANTS

There are six “assistants” (or should we say “additional students”) for the course: Kay Bratton, Kelly Genova, Mary Han, Karl Johnson, David Rathgeber, and Ann Scales. These folks are to blame for organizing the course; they will also monitor its progress, help answer questions (should we run into any questions that in fact do have answers), and share in the discussion.

GRADING

Each paper will count 22% of the final grade. There will be a one-hour final examination, to be taken individually, which will also count for 22%. The remaining 12% of the grade will be assigned based upon the quality of class and discussion group participation. (Substantive note: the 12% is what may be called a “fudge factor,” leaving the decision-makers with plenty of discretion. Is the discretion less than that involved in the decision of what grade to assign each paper? Are the decision-makers bound by their roles? By rules? Should they be?)

JOURNALS

To help you keep your focus, and to help us keep ours, we will all keep journals in which we record our reactions to the entire experience (including readings, discussions, and personal impressions). The journals should be kept in some sequential form, such as in a spiral notebook. The content and length of entries will vary, but we should write in our journals at least weekly, and date our entries. The “assistants” may collect the journals from time to time during the semester and at the end of the semester—but each time we do so, we will put our journals on reserve in the library so you can read them. You need not put your name on the journal unless you wish to; otherwise collection and redistribution will
be handled by aliases. Your journal will not be graded in any way, but keeping one is a requirement of the course.

"You commit yourself—and then you see."—Napoleon