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NOTE ON THE SCALES/JOHNSON SYLLABUS

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Responding to this paper is difficult, not only because of my ignorance of jurisprudence, but because of my basic unease at the syllabus' self-conscious challenge to fundamental assumptions about teaching and learning, and the responsibility of a professional school to train its students in the skills of their trade. The intention of this course, as I understand it, to provide a first-class legal education relevant to a new constituency, and changed conditions, is laudable; nor do I scorn whatever methods, or madness, seem required to present or clarify material. The richness of the sources here—literary, philosophical, legal historical—can only bring rewards in kind; the high degree of student involvement in preparing class discussions, writing journals, submitting critiques, creates the optimum condition for learning. Issues of style are personal, idiosyncratic: some people like to sing and hold hands while studying jurisprudence, others prefer the rolling cadences of a more formal, declaratory rhetoric. But this is not the central issue unless and until form displaces content.

If I had the capacity to define a course in jurisprudence I might be able to speak substantively to the issue of content. As it is, I can only bark shrilly from the sidelines. And my perspective is limited in other ways, as well. I have never had the opportunity to teach students of such diverse ethnic and cultural backgrounds; with some exception, my experience as student and teacher has been limited to private institutions in the northeast serving, essentially, the upper middle class. But, like anyone with any sense, I take account of the level of student preparation. Beyond that, I concentrate attention on the only thing I have to offer, critical analysis of the data (in this case, history), a mode of rational scientific inquiry rooted in the western tradition of scholarship and discourse. The body of "facts," the text and documents, the tables and works of art and literature, these are the raw materials, examined, reexamined and reinterpreted in each generation. Assigning Wittgenstein in the Jurisprudence course mandates that reinterpretation and analysis are not only of materials but of the very categories of thought and language. All to the good. I feel my responsibility lies in helping the students to hone the tools with which to do the work; the minimum requirements for my task being intellectual capacity and human integrity. All this is so obvious that I blush for having

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said it. Still, as the syllabus makes much of the ethnic/gender issue, and of the alienation of the student in the classroom and from the material, I feel it necessary to indicate my presuppositions.

Equality I do not take to be an issue; in fact, I think it is something of a false issue in the paper. If my knowledge, skill and experience do not justify my teaching, then I should not be in the classroom. If I do not know more about the subject than my students, they should not be my students. In this realm, then, we are not equals; in every other way we certainly are—as human beings meeting with respect and enthusiasm in a task and venture from which both ought to learn and profit. Hierarchy may be a term of opprobrium, but all relationships are not created equal at every level. I speak, of course, about the enterprise at its highest professional and ethical level, not about the misuses of power, position or knowledge. I cannot, therefore, understand why Scales and Johnson “renounced their authority” except with the exemplary intention of substituting discussion for lecture.

More crucial even than this feeling that fruitful teaching requires equality is the problem of substance. Here I shout, once again, from the sidelines, but I have a loud and clear message. Law school, as I understand it, unlike the liberal arts context in which my life has been spent, trains students for the profession. This profession plays a large, complex, many sided role in a political culture which is inadequate, unfair, corrupt, neither just, egalitarian nor bias free. Agreed; society is very imperfect, its members no less so. Those who wish to destroy the system have clearly stated revolutionary goals. Other would-be practitioners must work within the system to *serve their clients*. Change, for most, will be of the incremental variety. To serve, the lawyer must be trained in the most rigorous possible way, and even if the law of torts seems unjust, or the law of property the tool of the ruling class, both must be learned, no matter what the ethnic or cultural background the student brings to the classroom.

This is not to suggest that the course in question does not teach what is required. I do not know and could not judge, although I make profound assumptions that the ethical and moral requirements of the profession are being met. The question that must be answered clearly, however, is whether the students are being prepared for the society, rotten though it be, in which they must operate. It is clear that any insight gained into the structure and meaning of rules, decision making processes, language, role playing—the whole effort of the syllabus to isolate the icons and take them apart for close analysis—is a momentous step in breadth, demystification and understanding. I am told by young lawyers of my acquaintance that the syllabus is brilliant, and they wish they had had such a course in law school. All of this is immensely exciting, intellectually. What is not clear to me is whether the students who profit from

this rich and unusual fare are being offered on the one hand, tools to do their job and, at the same time, a sub-text which will constrain their commitment to the profession.

I feel most handicapped in not being able to cite chapter and verse. My historian's sensibility invests me with a sense of awe for the western legal tradition, particularly in its Anglo-American form. The very particularity and detail of the common law has always seemed to be a protection against the invasion of generality and arbitrariness characteristic, for instance, of the undefined power of the state in Russia in the 19th and 20th centuries. If those rules are now characterized chiefly as a projection of white/male/hierarchical/dominance and, thereby, worthy only of being scrapped, I am concerned about what will take their place. If the menu of philosophy, literary and social criticism is intended for more purposes than expanding the intellectual horizons, I am apprehensive about what those insufficiently defined ends might be.

The law has always been notorious for its conservatism, that is a byword in the profession and in the society at large. And the need for social change has, in the eyes of many, outstripped the capacity of the law to keep up with it. If this is the case, and the new form of critical legal studies means to narrow that gap, it is imperative that the new social goals be articulated along with the rules and structures which will sustain them. Establishing a community of trust is a necessary but insufficient condition. It has to be there, of course, as no community of any kind, even among unequals, can exist without some level of trust; and, among equals, if trust does not outweigh mistrust, then we are all doomed. And if, as is stated on page 13 of the syllabus, "law and lawyers serve very few of the people . . . we and those whom we serve are spoiled," I do not believe it necessarily follows that "we are arrogant when we debate the fine points as life sweeps past us." Indeed, the responsibilities for all human beings are grave, and for those who are teachers—of the law and other things—the burden and the privilege of their tutorship impose heavy obligations. I thoroughly agree with the quotation from Richard Shaull¹ that "education . . . becomes (or should become, my insert) 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." I do not know what he means by 'transformation'; just as I do not know what Scales and Johnson mean to substitute for what they designate as the present 'dominance'. I do know that no educator should aim for less than the goal of helping "men and women deal critically and creatively with reality . . .," and in that process life

1. A. Scales and K. Johnson, *An Absolutely, Positively True Story: Seven Reasons Why We Sing*, 16 N.M.L. REV. 433 (1986).

need not "sweep us by as we debate the fine points". On the contrary, it is in the very debate on the fine points that we engage with life.

Have not Scales and Johnson demonstrated this, despite themselves, in the rich, provocative, stimulating and merciless questions that they and their students have addressed?