THE NATURE OF LEGAL AUTHORITY

Class activities*

Class 1

Introduction

Listen to the song: Metallica and discuss the following questions

- What is law?
- Are there different conceptions of law? Which ones?

- What is the role of judges?
- How do judges make decisions?
- Are there any theories that can help explain how judges make decisions?
- Discuss the following cartoons:

"The prisons are all full, so I'm going to *knock* some sense into you!"

Class 2

Legal Positivism

1) Brief the following case according to Legal Positivism

R. v. Chase, [1987] 2 SCR 293, 1987 CanLII 23 (SCC)

APPEAL from a judgment of the New Brunswick Court of Appeal (1984), 13 C.C.C. (3d) 187, 40 C.R. (3d) 282, 55 N.B.R. (2d) 97, 144 A.P.R. 97, dismissing the accused's appeal from his conviction on a charge of sexual assault and substituting a verdict of guilty of common assault. Appeal allowed.

1. MCINTYRE J.--This appeal concerns the meaning of the term `sexual assault', as it is used in ss. 244 and 246.1 of the *Criminal Code*. For ease of reference, the sections are reproduced hereunder:

244. (1) A person commits an assault when

(*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(*b*) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or

(*c*) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(*a*) the application of force to the complainant or to a person other than the complainant;

(*b*) threats or fear of the application of force to the complainant or to a person other than the complainant;

(*c*) fraud; or

(*d*) the exercise of authority.

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

246.1 (1) Every one who commits a sexual assault is guilty of

(*a*) an indictable offence and is liable to imprisonment for ten years; or

(*b*) an offence punishable on summary conviction.

(2) Where an accused is charged with an offence under subsection (1) or section 246.2 or 246.3 in respect of a person under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused is less than three years older than the complainant.

2. The facts may be briefly described. The respondent, Chase, was a neighbour of the complainant, a fifteen-year-old girl. They lived in a small hamlet near Fredericton, New Brunswick. On October 22, 1983, Chase entered the home of the complainant without invitation. The complainant and her eleven-year-old brother were in the downstairs portion of the house, playing pool. Their eighty-three-year-old grandfather was upstairs sleeping. Their parents were absent. The respondent seized the complainant around the shoulders and arms and grabbed her breasts. When she fought back, he said: "Come on dear, don't hit me, I know you want it." The complainant said at trial that: "He tried to grab for my private, but he didn't succeed because my hands were too fast." Eventually, the complainant and her brother were able to make a telephone call to a neighbour and the respondent left. Prior to leaving, he said that he was going to tell everybody that she had raped him. The whole episode lasted little more than half an hour. The respondent was charged with the offence of sexual assault and was found guilty after trial in the Provincial Court. He appealed to the Court of Appeal for New Brunswick where his appeal was dismissed, a verdict of guilty of the included offence of common assault under s. 245(1) of the *Criminal Code* was substituted, and a sentence of six months' imprisonment was imposed: (1984), 13 C.C.C. (3d) 187, 40 C.R. (3d) 282, 55 N.B.R. (2d) 97, 144 A.P.R. 97.

3. In the Court of Appeal, Angers J.A., speaking for a unanimous court (Stratton C.J.N.B., Ryan and Angers JJ.A.), expressed the view that the principles developed with respect to rape and indecent assault were of little assistance in approaching the question of sexual assault. In his view, the modifier "sexual" should be taken to refer to parts of the body, particularly the genitalia. He considered that a broader definition of the term could lead to absurd results if it encompassed other portions of the human anatomy described as having "secondary sexual characteristics". He also expressed the view that sexual assault did not require or involve a specific intent. Because there was no contact with the complainant's genitals, the conviction at trial was set aside and a conviction for common assault substituted. It becomes evident from the recital of these facts that the only question arising on the appeal is that of the definition of the offence of sexual assault.

4. The new sexual assault provisions of the *Criminal Code* were enacted in the *Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125. They replace the previous offences of rape, attempted rape, sexual intercourse with the feeble-minded, and indecent assault on a female or male. It is now for the courts to endeavour to develop a realistic and workable approach to the construction of the new sections. The key sections are 244 and 246.1, *supra*. Section 246.1 creates the offence of sexual assault, an expression nowhere defined in the *Criminal Code*. To determine its nature, we must first turn to the assault section, 244(1), where an assault is defined in terms similar, if not identical, to the concept of assault at

common law. Section 244(2) provides that the section applies to sexual assaults. It was suggested in argument by the respondent that paras. (*a*), (*b*) and (*c*) of s. 244(1) are to be read disjunctively so that only para. (*a*) could be applicable to the offence of sexual assault. This, it was said, must have been the position taken by the New Brunswick Court of Appeal because, in its consideration of s. 244, it dealt only with para. (*a*), apparently considering that contact was necessary to complete a sexual assault. I would dispose of this argument by simply referring to the specific words of s. 244(2) which make the section applicable to sexual assaults. In my view, however sexual assault may be defined, its definition cannot be limited to the provisions of s. 244(1)(*a*).

5. Since judgment was given in this case in the New Brunswick Court of Appeal, other appellate courts have dealt with the problem. As far as I am able to determine, none has followed the approach of the Court of Appeal in this case. In *R. v. Alderton* (1985), 1985 CanLII 1955 (ON CA), 49 O.R. (2d) 257, the matter was presented to the Ontario Court of Appeal. In that case, the accused gained entry to an apartment building at night, wearing a face mask. He entered the apartment of the complainant who was alone and asleep in her bedroom. He seized her and forced her back upon the pillows but after a struggle she managed to escape. The Court of Appeal dismissed an appeal from a conviction of sexual assault made at trial. Martin J.A., speaking for a unanimous court (Martin, Lacourcière and Finlayson JJ.A.), said at p. 263:

> We are, with the greatest deference, unable to accept the views of the court expressed in that case [*Chase*]. Without in any way attempting to give a comprehensive definition of a "sexual assault" we are all satisfied that it *includes* an assault with the intention of having sexual intercourse with the victim without her consent, or an assault made upon a victim for the purpose of sexual gratification.
>
> We are all of the view that in the circumstances of the present case, there was ample evidence upon which the jury could find that the appellant committed a sexual assault upon the complainant and, indeed, we think the evidence did not permit of any other conclusion.

As he said, in these words, Martin J.A. was not attempting a comprehensive definition of sexual assault, nor was he saying that the concept of sexual assault was limited to an assault with the intention of having sexual intercourse or for the purposes of sexual gratification. His view was that, where these elements were present, it would be sufficient to categorize the assault as sexual. They do not constitute the sole basis for a finding of sexual assault, nor may this reference to them be taken as a finding that a specific intent is required for the completion of the offence.

6. In *R. v. Taylor* (1985), 1985 ABCA 51 (CanLII), 44 C.R. (3d) 263, the matter was considered in the Alberta Court of Appeal. The accused, in seeking to discipline a teenage girl placed in his care, tied the girl's wrists to an overhead metal support and made her stand naked for periods of ten to fifteen minutes and, on one occasion, administered several blows with a wooden paddle on the buttocks. There were no other acts which could have been described as sexual in nature. The accused was acquitted at trial. The Crown's appeal was allowed and a new trial was ordered. Laycraft C.J.A., for a unanimous court (Laycraft C.J.A., Haddad and Belzil JJ.A.), said, at p. 268:

> The new provisions do not define "sexual assault". However, "assault" is defined and thus

the new offences are an assault with some additional meaning required by the modifier "sexual". In the offences which were replaced this was also true of "indecent assault", a term which gave no difficulty in judicial interpretation. For decades, juries were charged that indecent assault was an assault in circumstances of indecency (*R. v. Louie Chong* (1914), 32 O.L.R. 66, 23 C.C.C. 250 (C.A.); *R. v. Quinton*, 1947 CanLII 3 (SCC), [1947] S.C.R. 234, 3 C.R. 6, 88 C.C.C. 231). Though this approach was susceptible to the comment that it was simply an assertion that an assault is indecent if it is indecent, it was nevertheless an approach perfectly understandable by generations of juries, and eminently practicable in the administration of the criminal law.

He then went on to discuss various authorities and rejected the *Chase* approach with its reliance on the specific involvement of areas of the body and the dictionary definitions of the term "sexual". He noted that all the decisions he discussed rejected the *Chase* approach and he spoke approvingly of the position of Martin J.A. in the Ontario Court of Appeal in *Alderton*, *supra*, saying, at p. 269:

> Without joining a battle of dictionaries, it is my view that these words were intended to comprehend a wide range of forcible acts within the definition of "assault" to which, in the circumstances disclosed by the evidence, there is a carnal aspect. "Sexual assault" is therefore an act of force in circumstances of sexuality as that can be seen in the circumstances. Like Martin J.A. I would not attempt a comprehensive definition of "sexual assault". The term includes, however, an act which is intended to degrade or demean another person for sexual gratification. Nothing in the new sections of the Code in my view restricts the carnal or sexual aspect only to acts of force involving the sexual organs and I respectfully disagree with the restricted meaning expressed in *R. v. Chase*, *supra.*

It was his view that the carnal aspect was to be judged objectively: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?"

7. In the British Columbia Court of Appeal, the matter was considered in *R. v. Cook* (1985), 1985 CanLII 641 (BC CA), 20 C.C.C. (3d) 18. In this case, on facts which clearly revealed conduct which would qualify as sexual assaults, the *Chase* approach was again rejected. Lambert J.A. did not attempt to give a precise definition of sexual assault where Parliament had declined to do so, but he did consider that the characteristic which made a simple assault into a sexual assault was not solely a matter of anatomy. He considered that a real affront to sexual integrity and sexual dignity may be sufficient.

8. It will be seen from this brief review of the cases that the approach taken by the New Brunswick Court of Appeal in the case at bar has found little, if any, support. All the cases cited have recognized the need for a broader approach and all have recognized the difficulty in formulating one. While I would agree that it is difficult and probably unwise to attempt to develop a precise and all-inclusive definition of the new offence of sexual assault at this stage in its development, it seems to me to be necessary to attempt to settle upon certain considerations which may be of assistance to the courts in developing on a case-to-case basis a workable definition of the offence.

9. To begin with, I agree, as I have indicated, that the test for the recognition of sexual assault does not depend solely on contact with specific areas of the human anatomy. I am also of the

view that sexual assault need not involve an attack by a member of one sex upon a member of the other; it could be perpetrated upon one of the same sex. I agree as well with those who say that the new offence is truly new and does not merely duplicate the offences it replaces. Accordingly, the definition of the term "sexual assault" and the reach of the offence it describes is not necessarily limited to the scope of its predecessors. I would consider as well that the test for its recognition should be objective.

10. While it is clear that the concept of a sexual assault differs from that of the former indecent assault, it is nevertheless equally clear that the terms overlap in many respects and sexual assault in many cases will involve the same sort of conduct that formerly would have justified a conviction for an indecent assault. The definitional approach to indecent assault, also an offence not defined in the *Criminal Code*, therefore offers a guide in our approach to the new offence, as recognized by Laycraft C.J.A. After many years of dealing with the concept of indecent assault, the courts developed the definition, "an assault in circumstances of indecency". This, of course, was an imprecise definition but everyone knew what an indecent assault was. The law in that respect was reasonably clear and there was little difficulty with its enforcement. In my view then, a similar approach may be adopted in formulating a definition of sexual assault.

11. Applying these principles and the authorities cited, I would make the following observations. Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) of the *Criminal Code* which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer" (*Taylor*, *supra*, *per* Laycraft C.J.A., at p. 269). The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant (see S. J. Usprich, "A New Crime in Old Battles: Definitional Problems with Sexual Assault" (1987), 29 *Crim. L.Q.* 200, at p. 204.) The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

12. Implicit in this view of sexual assault is the notion that the offence is one requiring a general intent only. This is consistent with the approach adopted by this Court in cases such as *Leary v. The Queen*, [1978] l S.C.R. 29, and *Swietlinski v. The Queen*, 1980 CanLII 53 (SCC), [1980] 2 S.C.R. 956, where it was held that rape and indecent assault were offences of general intent. I am unable to see any reason why the same approach should not be taken with respect to sexual assault. The factors which could motivate sexual assault are said to be many and varied (see C. Boyle, *Sexual Assault* (1984), at p. 74). To put upon the Crown the burden of proving a specific intent would go a long way toward defeating the obvious purpose of the enactment. Moreover, there are strong reasons in social policy which would support this view. To import an added element of specific intent in such offences, would be to hamper unreasonably the enforcement process. It

would open the question of the defence of drunkenness, one which has always been related to the capacity to form a specific intent and which has generally been excluded by law and policy from offences requiring only the minimal intent to apply force (see *R. v. Bernard* (1985), 18 C.C.C. (3d) 574 (Ont. C.A., *per* Dubin J.A.)) For these reasons, I would say that the offence will be one of general rather than specific intent.

13. Turning to the case at bar I have no difficulty in concluding, on the basis of the principles I have discussed above, that there was ample evidence before the trial judge upon which he could find that sexual assault was committed. Viewed objectively in the light of all the circumstances, it is clear that the conduct of the respondent in grabbing the complainant's breasts constituted an assault of a sexual nature. I would therefore allow the appeal, set aside the conviction of common assault recorded by the Court of Appeal and restore the conviction of sexual assault made at trial. The sentence of six months should stand.

Appeal allowed.

2) Read the following US Supreme Court cases and discuss the questions below.

US SUPREME COURT FCC *v.* FOX TELEVISION STATIONS, INC., et al. April 28, 2009

Federal law bans the broadcasting of "any … indecent … language," 18 U. S. C. §1464, which includes references to sexual or excretory activity or organs, see *FCC* v. *Pacifica Foundation*, 438 U. S. 726 . Having first defined the prohibited speech in 1975, the Federal Communications Commission (FCC) took a cautious, but gradually expanding, approach to enforcing the statutory prohibition. In 2004, the FCC's *Golden Globes Order* declared for the first time that an expletive (nonliteral) use of the F-Word or the S-Word could be actionably indecent, even when the word is used only once. This case concerns isolated utterances of the F- and S-Words during two live broadcasts aired by Fox Television Stations, Inc. In its order upholding the indecency findings, the FCC, *inter alia*, stated that the *Golden Globes Order* eliminated any doubt that fleeting expletives could be actionable; declared that under the new policy, a lack of repetition weighs against a finding of indecency, but is not a safe harbor; and held that both broadcasts met the new test because one involved a literal description of excrement and both invoked the F-Word. The order did not impose sanctions for either broadcast. The Second Circuit set aside the agency action, declining to address the constitutionality of the FCC's action but finding the FCC's reasoning inadequate under the Administrative Procedure Act (APA). *Held:* The judgment is reversed, and the case is remanded.

1. The FCC's orders are neither "arbitrary" nor "capricious" within the meaning of the APA, 5 U. S. C. §706(2)(A). Pp. 9–19. (a) Under the APA standard, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 . In overturning the FCC's judgment, the Second Circuit relied in part on its precedent interpreting the APA and *State Farm* to require a more substantial explanation for agency action that changes prior policy. There is, however, no basis in the Act or this Court's opinions for a requirement that all agency change be subjected to more searching review. Although an agency must ordinarily display

awareness that it *is* changing position, see *United States* v. *Nixon*, 418 U. S. 683 , and may sometimes need to account for prior factfinding or certain reliance interests created by a prior policy, it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one. It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change adequately indicates. Pp. 9–12. (b) Under these standards, the FCC's new policy and its order finding the broadcasts at issue actionably indecent were neither arbitrary nor capricious. First, the FCC forthrightly acknowledged that its recent actions have broken new ground, taking account of inconsistent prior FCC and staff actions, and explicitly disavowing them as no longer good law. The agency's reasons for expanding its enforcement activity, moreover, were entirely rational. Even when used as an expletive, the F-Word's power to insult and offend derives from its sexual meaning. And the decision to look at the patent offensiveness of even isolated uses of sexual and excretory words fits with *Pacifica*'s context-based approach. Because the FCC's prior safe-harbor-for-single-words approach would likely lead to more widespread use, and in light of technological advances reducing the costs of bleeping offending words, it was rational for the agency to step away from its old regime. The FCC's decision not to impose sanctions precludes any argument that it is arbitrarily punishing parties without notice of their actions' potential consequences. Pp. 13–15. (c) None of the Second Circuit's grounds for finding the FCC's action arbitrary and capricious is valid. First, the FCC did not need empirical evidence proving that fleeting expletives constitute harmful "first blows" to children; it suffices to know that children mimic behavior they observe. Second, the court of appeals' finding that fidelity to the FCC's "first blow" theory would require a categorical ban on *all* broadcasts of expletives is not responsive to the actual policy under review since the FCC has always evaluated the patent offensiveness of words and statements in relation to the context in which they were broadcast. The FCC's decision to retain some discretion in less egregious cases does not invalidate its regulation of the broadcasts under review. Third, the FCC's prediction that a *per se* exemption for fleeting expletives would lead to their increased use merits deference and makes entire sense. Pp. 15–18. (d) Fox's additional arguments are not tenable grounds for affirmance. Fox misconstrues the agency's orders when it argues that that the new policy is a presumption of indecency for certain words. It reads more into *Pacifica* than is there by arguing that the FCC failed adequately to explain how this regulation is consistent with that case. And Fox's argument that the FCC's repeated appeal to "context" is a smokescreen for a standardless regime of unbridled discretion ignores the fact that the opinion in *Pacifica* endorsed a context-based approach. Pp. 18–19.

2. Absent a lower court opinion on the matter, this Court declines to address the FCC orders' constitutionality.

FCC v. PACIFICA FOUNDATION, 438 U.S. 726 (1978)

During a mid-afternoon weekly broadcast, a New York radio station aired George Carlin's monologue, "Filthy Words." Carlin spoke of the words that could not be said on the public airwaves. The station warned listeners that the monologue included "sensitive language which might be regarded as offensive to some." The FCC received a complaint from a man who stated that he had heard the broadcast while driving with his young son. The Court held that limited civil sanctions could constitutionally be invoked against a radio broadcast of patently offensive words dealing with sex and execration. The words need not be obscene to warrant sanctions. Audience, medium, time of day, and method of transmission are relevant factors in determining whether to invoke sanctions. "The Court held "We have not decided that an occasional expletive would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a "nuisance may be merely a right thing in the wrong place,--like a pig in the parlor instead of the barnyard." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388. We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

Discussion Questions

1) What is the issue in the Fox case? What is the rule in the Fox case?
2) What is the holding of the Fox case?
3) Explain the Supreme Court's following assertion that "the FCC's prediction that [an] exemption for fleeting expletives would lead to their increased use merits deference and makes entire sense." Are there any flaws in this assertion?
4) Analyze the Supreme Court's discussion of the first-blow theory? What are the legal foundations for this theory?
5) How does the Supreme Court analyze the Fox case? Focus on the logical structure, if any, of the analysis. Are there any flaws in the analysis?
6) What is the conclusion of the Supreme Court? How does the Supreme Court reach this conclusion? What, if any, is the logical structure of the conclusion?
7) Analyze the analogy used by the Supreme Court in Fox? (Pacifica and Fox)
8) What is the issue in Pacifica? How did the court rule? Discuss the pig in the parlor metaphor.

9) Read the entry for legal positivism from Wikipedia. It does not clearly explain the notion of law for positivism. The explanation of the relationship between legal positivism and natural law is not clear. Write a very good entry for Wikipedia.

Class 3

Legal Realism

Read the following article and discuss these questions

1) Who is Justice Sonia Sotomayor?
2) Read "A Latina Judge's Voice" by Sotomayor published in Berkeley La Raza Law Journal (2002). How does Justice Sotomayor discuss her background? How do you think her background affects her decisions?
3) "A Latina Judge's Voice" was widely reproduced in the United States and abroad. Do you think it is important for judges to disclose their backgrounds? Or should judges keep their backgrounds and ideas private?
4) Do an online search and write a brief summary of Sotomayor's A "My Beloved World".
5) What is the main thesis of Posner's book "How Judges Think"? Do an online search.
6) Sotomayor recognizes that being a Latina in America means speaking English correctly and it does not necessarily mean speaking Spanish. How do you think this affects her decisions? Draw a parallel between being a Latina in the United States and being aboriginal or French Canadian in Canada.
7) Think of a Canadian judge or someone who you would like to be a judge in Canada (including yourself). Write a brief note about his/her/your own background following Sotomayor's style.
8) What is her notion of law? How do judges make law according to Justice Sotomayor?
9) Justice Sandra Day O'Connor argues that a "wise man" and a "wise woman" should necessarily reach the same verdict. Do you agree with this argument? Why or why not?
10) What is Justice Sotomayor's view about Justice Day O'Connor's famous quote?
11) Does increasing diversity in the courts improve the administration of justice? Why or why not?

Legal Realism Informs Judge's Views

By Jess Bravin
Updated May 28, 2009 11:59 p.m. ET

WASHINGTON -- In a lecture at a Boston law school in 1996, Judge Sonia Sotomayor cited Judge Jerome Frank, the author of the 1930 book that turned American legal thinking upside down. Judge Frank argued in "Law and the Modern Mind" that the law was less a science than people supposed -- that, in reality, it reflected the personal characteristics of those applying it. The idea he helped advance, still taught if not always endorsed in law schools today, was called legal realism. Judge Sotomayor agreed -- and that perspective is riling conservatives opposed to her nomination.

Judge Sonia Sotomayor receives an honorary degree at Northeastern University in 2007. In law-school lectures, she has argued that the law reflects the experiences of those applying it. "The law that lawyers practice and judges declare is not a definitive, capital 'L' law that many would like to think exists," Judge Sotomayor said in her 1996 lecture at Suffolk University Law School, summarizing Judge Frank's work.

Confidence in the legal system falters, she said, because the public "expects the law to be static and predictable" when in fact courts and lawyers are "constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions."

That view runs counter to the originalism propounded by conservatives such as Supreme Court Justice Antonin Scalia, which seeks to apply the Constitution the same way 18th-century Americans would have understood it.

Judge Frank, who served on the same federal appeals court in New York where Judge Sotomayor sits today, argued that the law changed along with the circumstances and concerns of the people applying it.

The idea of legal realism came back in the now-famous 2001 lecture Judge Sotomayor delivered at the University of California, Berkeley, titled "A Latina Judge's Voice." There she disputed the argument by former Supreme Court Justice Sandra Day O'Connor that a "wise man" and a "wise woman" should necessarily reach the same verdict.

Judge Sotomayor said her belief in the need for diversity in the court is rooted in her view that a judge's experiences and background inevitably color how that judge rules. "There is a real and continuing need for Latino and Latina organizations and community groups" to promote "women and men of all colors in their pursuit of equality in the justice system," she said, according to a version of the lecture published in the Berkeley La Raza Law Journal.

Judge Sotomayor contrasted her views with those of Judge Miriam Cedarbaum, a Reagan appointee to the federal bench. Judge Cedarbaum "sees danger in presuming that judging should be gender- or anything else-based," Judge Sotomayor said. "Judge Cedarbaum believes that

judges must transcend their personal sympathies and prejudices."

WSJ reporters Jess Bravin and Jonathan Weisman discuss the start of the battle over Supreme Court nominee Sonia Sotomayor.

Judge Sotomayor questioned whether that was possible, and added, "I wonder whether ignoring our differences as women or men of color we do a disservice both to the law and society."

She cited a case in which a state supreme court voted 3-2 "to grant a protective order against a father's visitation rights when the father abused his child." Three female justices formed the majority, she said, while the two male justices dissented.

"Our experiences as women and people of color affect our decisions," Judge Sotomayor said. "The aspiration to impartiality is just that—it's an aspiration because it denies the fact that we are by our experiences making different choices than others."

In an interview Wednesday, Judge Cedarbaum declined to comment on the debate, but said: "I think that Judge Sotomayor will be a superb addition to the Supreme Court."

Brian Leiter, a law professor at the University of Chicago, said Judge Sotomayor had described the way judges really operate.

"The idea that appellate judges never make law, and only apply the law as written, is a fiction, as every American lawyer knows. The American legal realists made the case famously in the 1920s and 1930s," Prof. Leiter said, adding that judges ranging from the late Justice Benjamin Cardozo to Judge Richard Posner, an influential conservative on the federal appeals court in Chicago, have written persuasively on the topic.

Prof. Leiter said Judge Sotomayor could be the first legal realist to join the court since the late Justice William O. Douglas, who retired from the court in 1975.

However, Judge Sotomayor's critics on the right, including those in the originalist camp, fear that her approach may lead different parties in cases to get different results depending on the ethnic makeup of the court; which would contradict the idea that everyone is entitled to equal justice under the law.

Class 4

Sociological Jurisprudence

Sociology of the Case

- What is Sociological Jurisprudence?
- Give examples of the main issues and concerns of Sociological Jurisprudence.

- Give an example not mentioned in the assigned article of the way a judge would solve a case following Sociological Jurisprudence.

Positivism vs. Sociology of the Case: Analyze the following cases from both a Positivist and Sociology of the case perspectives:

1) **Medellin v. Dretke** (2005): A Texas trial court sentenced Medellin, a Mexican citizen, to death for participating in the gang rape and murder of two girls in 1993. A state appeals court affirmed the conviction. Medellin then filed a state habeas corpus action, claiming that Texas failed to notify him of his right to counsel under the Vienna Convention. The Vienna Convention clearly states that if the person detained or arrested is a foreign national, they must, in addition, be promptly informed of their right to communicate with their embassy or consular post. The Vienna Convention on Consular Relations requires that an arrested, detained or imprisoned person be informed of this right without delay. Failure to comply with these rights should result that any conviction rendered should be declared invalid. The case was appealed to the US Supreme Court.

2) **Scales v. United States**. Junius Scales was criminally charged with membership in the Communist Party of the United States under the Smith Act. Challenging his felony charge, Scales claimed that the Free Speech clause of the US Constitution has been interpreted as to protect membership in any organization. In other words, membership in any organization may not constitute a per se violation of any criminal statute. The case reached the US Supreme Court, which had to decide the constitutionality of the Smith Act.
3) **MGM Studios v. Grokster.** Grokster and other companies distributed free software that allowed computer users to share electronic files through peer-to-peer networks. In such networks, users can share digital files directly between their computers, without the use of a central server. Users employed the software primarily to download copyrighted files, file-sharing which the software companies knew about and encouraged. The companies profited from advertising revenue, since they streamed ads to the software users. A group of movie studios and other copyright holders sued and alleged that Grokster and the other

companies violated the Copyright Act by intentionally distributing software to enable users to infringe copyrighted works. The district court ruled for Grokster, reasoning that the software distribution companies were not liable for copyright violations stemming from their software, which could have been used lawfully. The Ninth Circuit affirmed. In a unanimous opinion delivered by Justice David Souter, the Court held that companies that distributed software, and promoted that software to infringe copyrights, were liable for the resulting acts of infringement. The Court argued that although the Copyright Act did not expressly make anyone liable for another's infringement, secondary liability doctrines applied here. The software in this case was used so widely to infringe copyrights that it would have been immensely difficult to deal with each individual infringer. The "only practical alternative" was to go against the software distributor for secondary liability. Here the software companies were liable for encouraging and profiting from direct infringement.

4) **DALE VS. BOY SCOUTS.** The first major challenge to the Boy Scouts of America's right of expressive association was levied by Rutgers student James Dale. The young Dale joined the Boy Scouts of America in 1978 and reached the rank of Eagle Scout ten years later. When he applied to be an assistant scoutmaster in 1989, he was accepted immediately. But when Dale arrived at college, he acknowledged that he was gay. A newspaper published a picture of him at a meeting of the Lesbian and Gay Alliance, and one month later his membership in the Scouts was revoked. Dale asked the Scouts why he had been ejected, and they confirmed it was because of his sexual orientation. He sued the Boy Scouts for violating New Jersey's anti-discrimination law, which prohibits discrimination on the basis of sexual orientation in places of public accommodation. The Boy Scouts answered that their Free Speech rights (expressive association) to bar homosexuals from serving as troop leaders would be affected if the New Jersey anti-discrimination law were applied. Definition of Place of Public Accommodation. Each of the following establishments which serves the public is a place of public accommodation: (i) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than 5 rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; (ii) any restaurant, cafeteria, lunchroom, lunch counter,

soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; and (iii) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment.

5) **US v. Alvarez-Machain** (US S.Ct. 1992). Dr. Alvarez-Machain, a citizen and resident of Mexico, was indicted in the US as an accessory to the kidnapping and murder of a US Drug Enforcement Administration special agent (Dr. A-M allegedly medicated the agent to allow the kidnappers to torture and interrogate the agent further). Unable to gain Dr. Alvarez's presence in the US through negotiations with Mexico, DEA officials arranged for the kidnapping of Dr. Alvarez from Mexico to stand trial in the US. Dr. Alvarez claimed that the US courts lacked jurisdiction to try him because his abduction violated the US-Mexico extradition treaty.

US-Mexico extradition treaty:

EXTRADITION

Article I
OBLIGATION TO EXTRADITE

The High Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in the following articles, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.

Article 2
EXTRADITABLE OFFENCES

1. Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least six months or by a more severe

sentence or order. **Article 11**

THE REQUEST AND SUPPORTING DOCUMENTS

The request for extradition shall be addressed in writing by the Minister of justice of the requesting Party to the Minister of justice of the requested Party. The request shall be supported by: The original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party; A statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; A copy of the relevant enactments and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.

6) **Lopez-Mendoza**. Adan Lopez-Mendoza and Elias Sandoval-Sanchez, both Mexican citizens, were ordered deported by an immigration judge in separate proceedings. The orders were issued based upon the INS' arrest without any cause after which each respondent admitted to Immigration and Naturalization Service (INS) officials that they had entered the country unlawfully. Lopez-Mendoza and Sandoval-Sanchez challenged the orders on grounds that their respective arrests by INS officials were illegal and in violation of the Fourth Amendment. The Fourth Amendment guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. According to the Fourth Amendment, if there is an illegal arrest, the fruit of that illegal arrest should be excluded.
7) **United States v. Flores-Montano**. When Manuel Flores-Montano approached the U.S.-Mexico border, U.S. Customs inspectors noticed his hand shaking; an inspector tapped Flores-Montano's gas tank with a screwdriver and noticed that the tank

sounded solid; a drug-sniffing dog alerted to the vehicle. After a mechanic began disassembling the car's fuel tank, inspectors found 37 kilograms of marijuana bricks in the tank. Flores-Montano was charged in federal district court in California for importing and possessing marijuana with intent to distribute. Flores-Montano moved to suppress the marijuana finding on Fourth Amendment grounds. He argued that the search that yielded the marijuana finding was intrusive and non-routine and therefore required reasonable suspicion (which, he argued, was not present in his case). Please note that under similar circumstances, the district court agreed that the search was non-routine and thus required reasonable suspicion. The government, the court held, failed to prove that reasonable suspicion prompted its search.

8) **South Florida Water Management District v. Miccosukee Tribe**. The Miccosukee Tribe of Indians and the Friends of the Everglades sued the South Florida Water Management District under the Clean Water Act (CWA) in federal district court. The suit alleged that the water district violated the Clean Water Act by releasing pollutants from a pump system without a discharge elimination system permit. The Clean Water Act prohibits the "addition of any pollutant... from any point source" without a specific permit. The water district defended its action by claiming that it was not actually adding pollutants to the water, but merely transporting polluted water from one body of water to another, less polluted, body.

Class 5

Feminist Jurisprudence

Legal Postmodernism

Do a gender analysis (Feminist Jurisprudence) of the following criminal laws:

RUSSIA: DEATH PENALTY

A woman may not be sentenced to the death penalty (Article 59 of the RF Criminal Code).

CANADA: PROSTITUTION

Section 213 of the Canadian Criminal Code asserts that any person who in a public place stops or attempts to stop any vehicular or pedestrian traffic, or communicates or attempts to communicate with any person for the purpose of engaging in prostitution, is guilty of an offence.

Applying CLS deconstruction method, what value position is repressed (silenced) in the following norms? Remember that deconstructing involves the identification of hierarchical opposition, followed by a temporary reversal of the hierarchy.

- 233. A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed
- 16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.
- 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.
- 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
- Amendment II. A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.
- 51. Every inscription on a product, on its container or on its wrapping, or on a document or object supplied with it, including the directions for use and the warranty certificates, must be drafted in French. This rule applies also to menus and wine lists. The French inscription may be accompanied with a translation or translations, but no inscription in another language may be given greater prominence than that in French. 52. Catalogues, brochures, folders, commercial directories and any similar publications must be drawn up in French. 52.1. All computer software, including game software and operating systems,

whether installed or uninstalled, must be available in French unless no French version exists. Software can also be available in languages other than French, provided that the French version can be obtained on terms, except price where it reflects higher production or distribution costs, that are no less favourable and that it has technical characteristics that are at least equivalent.

- (1) Every citizen of Canada has the right to enter, remain in and leave Canada. (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right (*a*) to move to and take up residence in any province; and (*b*) to pursue the gaining of a livelihood in any province.
- Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
- Art 1 – Each person has the right to live in a balanced environment which shows due respect for health. Art 2 – Each person has a duty to participate in preserving and enhancing the environment. Art 3 – Each person shall, in the conditions provided for by law, foresee and avoid the occurrence of any damage which he or she may cause to the environment or, failing that, limit the consequences of such damage. Art 4 – Each person shall be required, in the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment.
- 26. No person may be confined in a health or social services institution for a psychiatric assessment or following a psychiatric assessment concluding that confinement is necessary, without the person's consent or without authorization by law or the court. Consent may be given by the person having parental authority or, in the case of a person of full age unable to express his wishes, by his mandatary, tutor or curator. Such consent may be given by the representative only if the person concerned does not object.
- 21. The civil administration shall use only French in signs and posters, except where reasons of health or public safety require the use of another language as well. In the case of traffic signs, the French inscription may be complemented or replaced by symbols or pictographs, and another language may be used where no symbol or pictograph exists that satisfies the requirements of health or public safety. The Government may, however,

determine by regulation the cases, conditions or circumstances in which the civil administration may use French and another language in signs and posters.

Class 6

Natural Law

Read the following scene from Sophocles' Antigone and analyze it from a Natural Law perspective:

- Summarize the scene.
- What are the two legal theories that predominate in the scene? What is the relation between these two legal theories?
- What is Antigone's conception of law?
- What is Creon's conception of law?
- Discuss the tension between law and justice in the play.
- Do you think there should be a limit to the lawmaker's power to legislate? If so, what is that limit?
- Suppose that Antigone hires you to challenge the King's decision in the courts. Write the legal challenge.

CREON:
The details: come, tell me quickly!
SENTRY:
It was like this:
After those terrible threats of yours King.
We went back and brushed the dust away from the body.
The flesh was soft by now, and stinking,
So we sat on a hill to windward and kept guard.
No napping happened until the white round sun
Whirled in the center of the round sky over us:
Then, suddenly,
A storm of dust roared up from the earth, and the sky
Went out, the plain vanished with all its trees
In the stinging dark. We closed our eyes and endured it.
The whirlwind lasted a long time, but it passed;
And then we looked, and there was Antigone!
I have seen
A mother bird come back to a stripped nest, heard
Her crying bitterly a broken note or two

For the young ones stolen. Just so, when this girl
Found the bare corpse, and all her love's work wasted,
She wept, and cried on heaven to damn the hands
That had done this thing
And then she brought more dust
And sprinkled wine three times for her brother's ghost.
We ran and took her at once. She was not afraid,
Not even when we charged her with what she had done.
She denied nothing.
And this was a comfort to me,
And some uneasiness: for it is a good thing
To escape from death, but it is no great pleasure
To bring death to a friend.
Yet I always say
There is nothing so comfortable as your own safe skin!
CREON: {*Slowly, dangerously*.]
And you, Antigone,
You with your head hanging—do you confess this thing?
ANTIGONE:
I do. I deny nothing.
CREON: [*To* SENTRY:]
You may go.
{*Exit* SENTRY. *To* ANTIGONE:]
Tell me, tell me briefly:
Had you heard my proclamation touching this matter?
ANTIGONE:
It was public. Could I help hearing it?
CREON:
And yet you dared defy the law.
ANTIGONE:
I dared.
It was not God's proclamation. That final Justice
That rules the world below makes no such laws.
Your edict, King, was strong,
But all your strength is weakness itself against
The immortal unrecorded laws of God.
They are not merely now: they were, and shall be,
Operative for ever, beyond man utterly.
I knew I must die, even without your decree:
I am only mortal. And if I must die
Now, before it is my time to die,
Surely this is no hardship: can anyone
Living, as I live, with evil all about me,
Think Death less than a friend? This death of mine
Is of no importance; but if I had left my brother
Lying in death unburied, I should have suffered.

Now I do not.
You smile at me. Ah Creon,
Think me a fool, if you like; but it may well be
That a fool convicts me of folly.
CHORAGOS:
Like father, like daughter: both headstrong, deaf to reason!
She has never learned to yield.
She has much to learn.
The inflexible heart breaks first, the toughest iron
Cracks first, and the wildest horses bend their necks
At the pull of the smallest curb.
Pride? In a slave?
This girl is guilty of a double insolence,
Breaking the given laws and boasting of it.
Who is the man here,
She or I, if this crime goes unpunished?
Sister's child, or more than sister's child,
Or closer yet in blood—she and her sister
Win bitter death for this!
[*To servants:*]
Go, some of you,
Arrest Ismene. I accuse her equally.
Bring her: you will find her sniffling in the house there.
Her mind's a traitor: crimes kept in the dark
Cry for light, and the guardian brain shudders:
But now much worse than this
Is brazen boasting of barefaced anarchy!
ANTIGONE:
Creon, what more do you want than my death?
CREON:
Nothing.
That gives me everything.
ANTIGONE:
Then I beg you: kill me.
This talking is a great weariness: your words
Are distasteful to me, and I am sure that mine
Seem so to you. And yet they should not seem so:
I should have praise and honor for what I have done.
All these men here would praise me
Were their lips not frozen shut with fear of you.
[*Bitterly.*]
Ah the good fortune of kings,
Licensed to say and do whatever they please!
CREON:
You are alone here in that opinion.
ANTIGONE:

No, they are with me. But they keep their tongues in leash.
CREON:
Maybe. But you are guilty, and they are not. 405
ANTIGONE:
There is no guilt in reverence for the dead.

ANTIGONE:
Thebes, and you my fathers' gods,
And rulers of Thebes, you see me now, the last
Unhappy daughter of a line of kings,
Your kings, led away to death. You will remember
What things I suffer, and at what men's hands, 735
Because I would not transgress the laws of heaven.

Read the following excerpts from Arthur Miller's A View from the Bridge and analyze it from a Natural Law perspective:

- Summarize the scene.
- What are the two legal theories that predominate in the scene? What is the relation between these two legal theories?
- What is Alfieri's conception of law?
- What is Eddie Carbone's conception of law?
- Discuss the tension between law and justice in the play.
- Suppose that Eddie Carbone hires you to write a brief against Rodolpho from a Natural Law perspective.

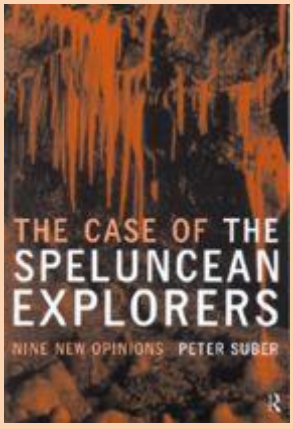
Alfieri Eddie, I want you to listen to me. (*Pause.*) You know, sometimes God mixes up the people. We all love somebody, the wife, the kids – every man's got somebody that he loves, heh? But sometimes . . . there's too much. You know? There's too much, and it goes where it mustn't. A man works hard, he brings up a child, sometimes it's a niece, sometimes even a daughter, and he never realizes it, but through the years – there is too much love for the daughter, there is too much love for the niece. Do you understand what I'm saying to you?
Eddie (*sardonically*) What do you mean, I shouldn't look out for her good?
Alfieri Yes, but these things have to end, Eddie, that's all. The child has to grow up and go away, and the man has to

learn to forget. Because after all, Eddie – what other way can it end? (*Pause.*) Let her go. That's my advice. You did your job, now it's her life; wish her luck, and let her go. (*Pause.*) Will you do that? Because there's no law, Eddie; make up your mind to it; the law is not interested in this.
Eddie You mean to tell me, even if he's a punk? If he's –
Alfieri There's nothing you can do.

Alfieri To promise not to kill is not dishonorable.
Marco (*looking at* **Alfieri**) No?
Alfieri No.
Marco (*gesturing with his head – this is a new idea*) Then what is done with such a man?'
Alfieri Nothing. If he obeys the law, he lives. That's all.
Marco (*rises, turns to* **Alfieri**) The law? All the law is not in a book.
Alfieri Yes. In a book. There is no other law.
Marco (*his anger rising*) He degraded my brother. My blood. He robbed my children, he mocks my work. I work to come here, mister!
Alfieri I know, Marco –
Marco There is no law for that? Where is the law for that?
Alfieri There is none.
Marco (*shaking his head, sitting*) I don't understand this country.

Class 7

The Speluncean Explorers



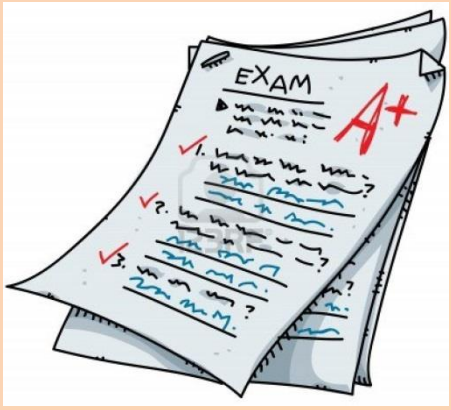
Read the case of the Speluncean Explorers: http://www.nullapoena.de/stud/explorers.html

Discussion questions

1) What is the legal rule at issue?
2) How is it possible that the judges in this case came to different conclusions about what the legal result should be?
3) What were the facts or issues that preoccupied the judges in determining their decisions?
4) Which schools of jurisprudential thought did the different judges ascribe to?
5) Which judge's opinion did you find the most persuasive? Why?
6) What argument made by a judge whose opinion you ultimately disagree with did you find the most persuasive?
7) Suppose that you are a judge in this case. You are the swing vote. Write your judicial opinion based on the facts and law in the case (not on current Canadian Law). Address whether the defendants should be convicted of murder and if so if they should be executed. For your opinion, choose one of the theories analyzed in class not followed in the case, and write your opinion from this legal theory's perspective.

Class 8

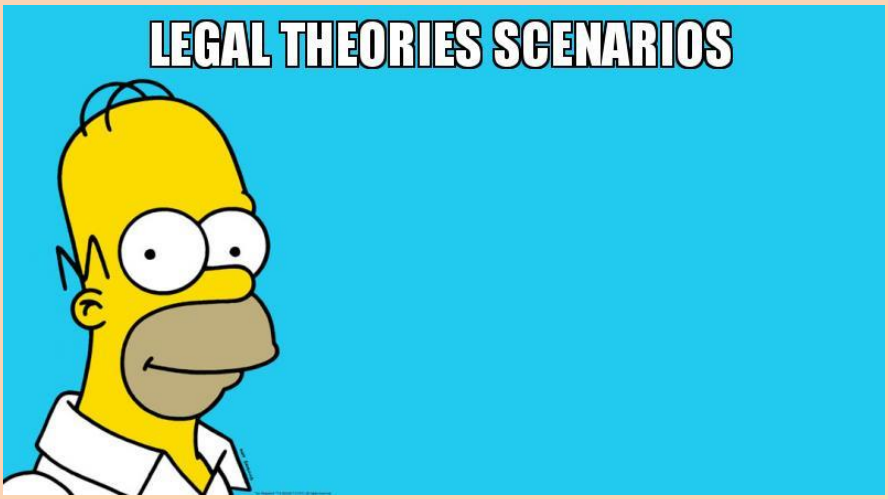
Midterm



Class 9

Legal theories

Scenarios



Scenarios: Identify the predominant theory of law

1) Law is a lot more than words you put in a book. It's everything people ever have found out about justice and what's right and wrong. It's the very conscience of humanity (The Ox-Bow Incident, 1943).

2) Nay, whoever hath an absolute authority to interpret any written or spoken laws it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spoke them (Bishop Benjamin Hoadly, 1676-1761).

3) Courtroom films set up a tension between two sorts of law: immutable natural law or justice, on the one hand, and fallible man-made law, on the other. They let us know what justice would consist of in the current case and then use that ideal as a template for what should happen.

4) Americans at the founding of the United States well-accepted the idea that the world, including worldly governments, is governed by laws or principles that dictate how society ought to be structured, in the very same way that such natural laws dictate how buildings ought to be built or how crops ought to be planted.

5) Our Lord is delivering his Sermon on the Mount –Jesus addresses the question of His relationship to the Law of Moses. "Jesus does not want to erase the commandments that the Lord gave through Moses," explained Pope Francis.

“Rather,” he continued, “He desires to bring them to their fulfilment – and He immediately adds that this ‘fulfillment’ of the Law requires a higher justice, a more authentic observance. The Holy Father went on to note the words of Jesus to His disciples: “Unless your righteousness exceeds that of the scribes and Pharisees, you will never enter the kingdom of heaven.” The Pope explained that Jesus does not give importance to rote observance and outward conduct. “He goes to the root of the law, focusing above all on the intention and therefore on the human heart,” which is the source of our actions for good and for evil. Pope Francis said that profound motivations, the expression of a hidden wisdom, of God’s wisdom, are needed in order for us to act well – not merely good rules and legal norms. “The Wisdom of God,” he said, “can be received through the Holy Spirit: and we, through faith in Christ, open ourselves to the action of the Spirit, which enables us to live God's love.” The Holy Father concluded, saying, “In light of this teaching of Christ, every precept reveals its full meaning as a requirement of love, and all [precepts] come together in the greatest commandment: love God with all your heart and love your neighbor as yourself.”

6) Former Supreme Court Justice Sandra Day O'Connor that a "wise man" and a "wise woman" should necessarily reach the same verdict.
7) The law should focus more on how law develops due to the link between law and society rather than an analysis and interpretation of statutes and cases.
8) The principles of society are the laws, which Almighty God has established in the moral world, and made necessary to be observed by mankind; in order to promote their true happiness, in their transactions and intercourse. These laws may be considered as principles, in respect of their fixedness and operation; and as maxims, since by the knowledge of them, we discover those rules of conduct, which direct mankind to the highest perfection, and supreme happiness of their nature. They are as fixed and unchangeable as the laws which operate in the natural world.

9) Austin’s model of law is referred to as "command theory:" Law, Austin reasons, has the status of command. Austin then defines 'command" as any signification of a desire by the sovereign. He then defines the sovereign as "the determinate rational being or body that the other rational beings are in the habit of obeying." Each of these further definitions is an attempt to substitute a descriptive analysis of some prescriptive concept. The notion of a 'command', for example, includes a normative element of authority and imperative (as distinct from a presumptive request). Similarly 'sovereign' has a normative element of legitimacy. He tries to define these both away through the notion of shared habits. The rest of the definition of 'command' is important. Austin's analysis of a law is different from a normal command in the sense that a law must be *logically* general. The court makes particular judgments, but the legislation is always general in form. A direct, one-time command to an official is not law. Law is a command to "forbear a whole *class* of acts." There is a further element that Austin thinks is inherent in the notion of law-namely that of punishment. However, 'punishment' also has a normative connotation, namely, of a harm that is "deserved" or results from violation of a valid law. This Austin tries to define away with the words "accompanied by the threat of evil in case he does not."
10) The science of law always generates predictable results.
11) Law is defined as an aggregate or system of norms, as a normative order. Now, what is a norm? A norm is a specific meaning, the meaning that something ought to be, or ought to be done, although actually it may not be done. There are different kinds of norms, norms of thinking, that is, logical norms, and norms of acting, that is, moral and legal norms. According to a legal norm, men ought to behave under certain conditions in a certain way. That a man ought to behave in a certain way means that this behavior is prescribed or permitted or authorization. Such a norm may be the meaning of an act of will of one individual intentionally directed at the behavior of another individual.
12) There seems to have been a consensus over the past century that law is an important component of culture. Law seeks to illuminate the ordering of human society.
13) The focus of law is less on sanctions and enforcement than on the substance of the rule.

14) This school of thought is committed to a core descriptive claim about adjudication (judges respond primarily to the underlying facts of the cases, rather than to legal rules and reasons). This school is also committed to rule-skepticism.
15) What the judge ate for breakfast determines the decision.
16) This school of thought concentrates on external events. According to this school, law is the order that is experienced. It cannot, however, be simply equated with ordinary human activity, which would deny its normativity. Rather, what matters is the reaction of society to behavior which deviates from the norm. The role of the courts is to restore this order when such a deviation from the norm takes place.
17) This book is a study of the construction and workings of the law from perspectives which foreground the implications of the law for women and women's lives. This study includes law as a theoretical enterprise as well its practical and concrete effects in women's lives. Further, it includes law as an academic discipline, and thus incorporates concerns regarding pedagogy and the influence of teachers. On all these levels, the authors raise questions about the meaning and the impact of law on women's lives. They seek to analyze and redress more traditional legal theory and practice. It focuses on the ways in which law has been structured (sometimes unwittingly) that deny women's' experiences and needs.
18) Law is principally what courts say it is. Or to put it conversely: By and large, it is law if the courts have announced it as such.
19) Courts construct law from artifactual forms known as doctrines, rules, policies, principles, opinions and holdings—all of which can be moderately modified by reference to each other in approved ways. Judges interpret these artifactual forms to produce a normatively right result. Sometimes the judges succeed. Sometimes they fail. Unless the result is normatively very, very wrong, what the judges say is law.
20) Law is limited in scope and substance by realpolitick considerations, e.g., the expenditure of the court's capital) and the identity of judicial personnel (e.g., the Rehnquist Court).
21) In certain situations (particularly in constitutional law or in other subject matters residing in the vicinity of the grundnorm) it is permissible to appeal to natural law-like considerations, but only sparingly.

22) The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law (Oliver Wendell Holmes)
23) Law is relatively determinate at the core/center, but there is some uncertainty/vagueness/indeterminacy at the periphery/penumbra. In the latter cases, it is politics, good judgment, common sense, realpolitick, etc. that help produce a decision.

Class 10

Law and Economics

Franz Kafka's Before the Law.

- Who is Franz Kafka?
- What is the story about? What does the author want to show with this story? What purpose does he seek?
- What is your interpretation of the story?
- What is the notion of rights, if any, in the story? What is the notion of law, if any, in the story?
- What are the main symbols in the story? What do the gate, the gatekeeper, and the man symbolize?
- What would you have done if you were the man before the law?
- Suppose you are lawyer representing the man's heirs. You file a lawsuit against the gatekeeper for having denied you the right to access to the law. Outline your legal arguments. Be as specific as possible.

- Suppose you are a lawyer representing the man's heirs. You file a lawsuit against the gatekeeper for having denied access to the law. Outline your legal arguments. Be as specific as possible.

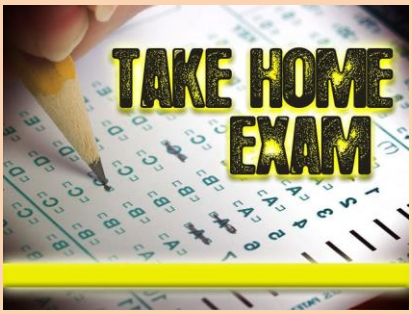
Before the Law By Frank Kafka

BEFORE THE LAW stands a doorkeeper on guard. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. "It is possible," says the doorkeeper, "but not at the moment." Since the gate stands open, as usual, and the doorkeeper steps to one side, the man stoops to peer through the gateway into the interior. Observing that, the doorkeeper laughs and says: "If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him." These are difficulties the man from the country has not expected; the Law, he thinks, should surely be accessible at all times and to everyone, but as he now takes a closer look at the doorkeeper in his fur coat, with his big sharp nose and long, thin, black Tartar beard, he decides that it is better to wait until he gets permission to enter. The doorkeeper gives him a stool and lets him sit down at one side of the door. There he sits for days and years. He makes many attempts to be admitted, and wearies the doorkeeper by his importunity. The doorkeeper frequently has little interviews with him, asking him questions about his home and many other things, but the questions are put indifferently, as great lords put them, and always finish with the statement that he cannot be let in yet. The man, who has furnished himself with many things for his journey, sacrifices all he has, however valuable, to bribe the doorkeeper. The doorkeeper accepts everything, but always with the remark: "I am only taking it to keep you from thinking you have omitted anything." During these many years the man fixes his attention almost continuously on the doorkeeper. He forgets the other doorkeepers, and this first one seems to him the sole obstacle preventing access to the Law. He curses his bad luck, in his early years boldly and loudly; later, as he grows old,

he only grumbles to himself. He becomes childish, and since in his yearlong contemplation of the doorkeeper he has come to know even the fleas in his fur collar, he begs the fleas as well to help him and to change the doorkeeper's mind. At length his eyesight begins to fail, and he does not know whether the world is really darker or whether his eyes are only deceiving him. Yet in his darkness, he is now aware of a radiance that streams inextinguishably from the gateway of the Law. Now he has not very long to live. Before he dies, all his experiences in these long years gather themselves in his head to one point, a question he has not yet asked the doorkeeper. He waves him nearer, since he can no longer raise his stiffening body. The doorkeeper has to bend low towards him, for the difference in height between them has altered much to the man's disadvantage. "What do you want to know now?" asks the doorkeeper; "you are insatiable." "Everyone strives to reach the Law," says the man, "so how does it happen that for all these many years no one but myself has ever begged for admittance?" The doorkeeper recognizes that the man has reached his end, and to let his failing senses catch the words, roars in his ear: "No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it."

Class 11

Distribution of final take-home exam



Class 12

Feedback and Consultation

Submission of final take-home

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