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Phenomenology, Tina Turner and the Law

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Why would a law professor be interested in rock and roll? Why might law students find rock music helpful for law study? Professors Johnson and Scales offer at least seven reasons why they believe rock music can be useful in teaching jurisprudence as a required first-year law school course. The story that they tell in their article, *An Absolutely, Positively True Story: Seven Reasons Why We Sing*, is important in providing an interesting example of how a characteristically non legal medium of communication, rock and roll, might be useful for explaining and analyzing law. The truth is that more and more legal educators are beginning to realize that the traditional methods of legal education have failed and that new methods of instruction are needed to make law schools work.[1]

But why rock and roll? Johnson and Scales suggest that the medium of rock and roll music may provide an interesting and perhaps powerful means for understanding aspects of law and society which are ignored by the abstractions of traditional legal analysis.[2] They claim that rock music can provide useful information about alternative conceptions of social life which may run counter to the traditional conceptions prevailing in legal theory. A basic objective of their paper is to illustrate how the experiences of everyday life presented in the music of popular songs

*Professor of Law, Brooklyn Law School. This essay was inspired by Jerry Frug. *See, e.g.*, J. Frug, *Henry James, Lee Marvin and the Law*, New York Times Book Review Mag., Feb. 16, 1986. I am also indebted to James Boyle for having written *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 UNIV. PA. L. REV. 685 (1985).

1. In the last few years there has been a number of ideologically diverse articles arguing that the traditional methods of legal education are no longer working. *See, e.g.*, Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982); Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983); Feinman, *The Failure of Legal Education and The Promise of Critical Legal Studies*, 6 CARDOZO L. REV. 739 (1985); *see also*, Minda, *Of Law, the River and Legal Education*, 10 NOVA L. REV. 705 (1986).

2. The idea that art forms might be useful for analyzing and explaining the nature of society is not new. *See, e.g.*, BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 46–54 (1976). *See also* Boyle, *Politics of Reason, supra*, at 707. More recently, Tony Chase and Jennifer Jaff have developed the thesis that music and other art forms of popular culture can be useful for understanding the everyday experiences of law, lawyers and the legal system shared by ordinary persons in modern American Culture. *See* Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527 (1986); Jaff, *Law and Lawyer in Pop Music: A Reason for Self-Reflection*, 40 UNIV. MIAMI L. REV. 659 (1986). Professor Chase demonstrates how rock music communicates information and images of the legal system which can serve to shape attitudes and beliefs about the law in popular culture. *Id.* Professor Jaff, in turn, illustrates how unflattering those attitudes and beliefs about the legal profession can be. *Id.*

might be relevant for illuminating hidden meanings and normative presuppositions of traditional legal analysis. In this essay I will attempt to contribute to their effort by describing in a preliminary way what I believe to be the pedagogical basis for developing a *consciousness-based* approach to law teaching.[3]

I.

In law school, we tell stories which reflect particular beliefs and attitudes about law and the nature of society.[4] In music, similar stories are told but with striking contrasts and differences.[5] In comparing legal stories with those told in popular music, Johnson and Scales claim that we may come to learn how legal interpretations of the social world are conditioned by contestable political and social premises. If Johnson and Scales are correct in their claims, then maybe the medium of music, and perhaps other art forms such as literature and film,[6] can be pedagogically useful for understanding the ideological foundations of legal interpretations.

The truth is that legal interpretations of the real world are never complete because legal descriptions are dependent upon a language of professional discourse which can conceal, minimize and even distort aspects

3. By a *consciousness-based* approach to law teaching, I mean an approach which seeks to expose and explain the ideological content of traditional legal analysis and doctrine. The consciousness-based approach I seek to describe should be distinguished from the approach of legal educators associated with the *Project for the Study and Application of Humanistic Education in Law. See* Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U.L. REV. 514 (1978).

4. In law school, students learn legal doctrine and the nature of legal argument by reading *stories* in legal opinions, usually appellate court decisions. On a factual level, the stories told in legal cases, like the stories told in popular songs, capture a rich variety of everyday experiences involving real world situations. The legal interpretations drawn from "real world" contexts, however, depend upon simplistic abstractions and common argumentative structures which create and perpetuate particular conceptions of social relationships.

5. Sometimes the stories told in popular songs are tragic, other times they can be depressing or inspiring. Yet, never are they neutral. Bruce Springsteen sings about factories closing down in the heartland of America or the killing of the "yellow man" in Viet Nam. The ex-Police vocalist, Sting, reminds us that "In Europe and America, there's a growing feeling of Hysteria." The late Bob Marley proclaims that "We free the people with music, sweet music." Sade sings about "smooth operators" and betrayal. Sometimes popular songs can be crude and just plain silly. Cyndi Lauper reminds us that sometimes "[g]irls just want to have fun." But even when the song is about just having fun there is still an underlying message with a special meaning.

6. Professor Anthony Chase has recently provided us with a useful and highly interesting study illustrating how movies and novels can be helpful for understanding how the legal profession is perceived by mass culture. *See* A. Chase, *American Lawyers and Popular Culture: A Stylization*, ___ AM. BAR J. ___ (1986). His study illustrates how such mediums might be useful for understanding norms and attitudes within popular culture. My essay, in contrast, suggests that information about how law is perceived in popular culture can also be useful for learning something about the way legal culture establishes its own unique set of norms and attitudes about the social order.

of reality. Like other professional discourses, legal discourse is merely a form of serious "conversation" between professionals who share common beliefs about the political and moral nature of their discipline and society.[7] In creating an "official" language for talking about legal problems, lawyers establish boundaries for their professional conversations which exclude the everyday conversations of laypersons.

While the development of a professional language is necessary for discourse and the accumulation of knowledge, the language of professionals can also create power and justify privilege by defining "truth" in terms of a "normal" or "official" conversation for interpreting reality.[8] The danger presented by "official" conversations is that they can have the effect of cutting off alternative conversations which may be necessary for presenting new and contrary perceptions of the world.[9] A consciousness-based approach to professional training would seek to expose the exclusionary effect of professional discourse by revealing the artificial and contingent nature of particular conceptions of reality projected by the "normal discourse" within the profession.

In reading legal stories, for example, law students learn that legal interpretations of reality are drawn from abstractions of legal doctrine and nature of legal argument.[10] In learning legal doctrine, law students discover that the world of the law is structured by a way of thinking that either entails radical separation between spheres of activity such as public versus private, substance versus procedure, common law versus statutory law *or* which attempts to define legal rules and categories in terms of contradictory values or opposing polarities such as freedom versus se-

7. The idea of knowledge as "conversation" is developed by the philosopher, Richard Rorty. *See* R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (Univ. Press 1979) ("If we see knowing not as having an essence, to be described by scientists or philosophers, but rather as a right, current standards, to believe, then we are well on the way to seeing *conversation* as the ultimate context within which knowledge is to be understood." *Id.*, at 389).

8. *See* R. Rorty, *supra* at 388–89. *See also*, FRUG, THE LANGUAGE OF POWER, *infra* at 1892. ("Language is a mechanism through which the power to define truth is exercised and a device that generates power through the ability to define truth." *Id.*) (citing M. FOUCAULT, POWER/KNOWLEDGE 93 (1980)).

9. Richard Rorty argues that the danger presented by the technocratic discourse of professionals is that "it cuts off the possibility of something new under the sun, of human life as poetic rather than merely contemplative." R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, *supra* at 389. The danger of exclusion is particularly relevant in the case of the pseudo-scientific language put forward by the law and economics movement. *See* Boyle, *Politics of Reason*, *supra* at 697–702, 751–3. The fear of scientific or technocratic language is that "the empirical—analytic form of knowledge [will be] expanded beyond its appropriate sphere, reducing debates about values to equations about methods." *Id.*, 751.

10. For an excellent description of the standard argumentative structures utilized in the law of torts, *see* Boyle, *The Anatomy of A Torts Class*, 34 AM. U. L. REV. 1003 (1985).

curity, efficiency versus equity, subjective versus objective and so forth.[11] Students learn that, instead of providing a determinant solution for legal decisions, legal doctrine simply presents an abstract structure which lawyers can utilize for formulating various pro and con arguments.[12]

By linking legal doctrine and argumentation to the structure of dualities, legal training becomes dependent upon a form of professional language or "conversation" which presumes that it is possible for legal decisionmakers to make neutral and objective choices about sharply divided alternatives.[13] This vision of legal decisionmaking creates what others have called a structure of *legal consciousness*—the shared perception that the "real world" of social life is *really like* the dualistic "legal world" of the law.[14] This vision of social life is, in turn, rendered meaningful by a *language of neutrality* which proclaims that it is possible to make legal choices about contradictory values in an objective and neutral manner.

Let me attempt to illustrate this with an example drawn from general employment law. In the last decade there has been a sharp legal debate over the continuing validity of the common law doctrine of employment at-will. This doctrine simply provides that if an employee is hired for an indefinite period of employment, "it is presumed to be a hiring at-will which may be freely terminated by either party at any time for any reason or even for no reason."[15] Those who believe that the employer has an

11. *See, e.g.*, Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982) (public versus private); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (substance versus procedure); Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985) (common law versus statutory law); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (freedom versus security); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. UNIV. L. REV. 939 (1985) (efficiency versus equity); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277 (1984) (subjective versus objective).

12. For a description of this in the context of administrative and corporation law, *see* Frug, *The Ideology of Bureaucracy, supra*, at 1292–93. For a description of this in the context of the special treatment—equal treatment debate involving maternity and the workplace, *see* Finley, *The Maternity and the Workplace: Transcending Equality Theory* 86 Colum. L. Rev. 1118 (1986).

13. Legal interpretations are frequently presented as if *the* choice to be made requires the selection of sharply divided alternatives. In law school, students learn to "balance interests," to recognize "zones of privacy," to locate "public policies," and to make a host of fine line legal and factual distinctions in the context of a background regime of legal "rights" and "duties." The underlying message to be gleaned from such training is that the legal profession has divised objective methods of mediation for *privileging* particular outcomes when making choices about the basic trade-offs in the law. In structuring legal discourse in this way, law students are encouraged to think and act in terms of a *binary* world which excludes human experiences which do not fit neatly into the binary models of the law. This way of thinking can reduce the options available and thus prevent new ways of thinking and being from being discovered or imagined.

14. *See e.g.*, Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498 (1983).

15. Murphy v. American Home Products Corp., 58 N.Y. 2d 293, 300, 448 N.E.2d 86, 89, 461 N.Y.S. 2d 232, 235 (1983). *See* Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939 (1985); Minda, *Commentary: Employment At-Will in the Second Circuit*, 52 BROOKLYN L. REV. 913 (1986).

"unfettered right" to discharge at-will employees for any reason argue that the employment relation is in essence a *private* relation freely created by contract and self-motivating interests. Those who argue the contrary position argue that at-will employees should be protected against wrongful discharge whenever the employer's decision to terminate the relation has affected the *public* interest.[16]

The public/private distinction has thus permitted judges to decide employment at-will issues on the basis of a legal doctrine which is conditioned upon a set of contradictory views about the "publicness" or "privateness" of employment relations.[17] This way of thinking can either justify an employer's right to wrongfully discharge an at-will employee (employment contract is purely a *private* relation subject to *private* contract law principles)[18] or legitimate state intervention by limiting the power of the employer to discharge for certain proscribed reasons (employment relation becomes *public* in character whenever "rights" and "obligations" are found to affect the *public* interests).[19] The notion that it is even possible to think about employment relations in this way serves to legitimate legal outcomes which are essentially the consequence of contestable premises about the moral and political desirability or nondesirability of allowing employers to have absolute control over the employment relation.[20]

In the vast majority of cases, however, the common law of employment at-will has developed under a particular vision of employment relationships which has had the effect of *privileging* outcomes which favor the

16. This is known as the *public policy* exception to the employment at-will rule. *See generally,* Note, *Protecting Employees At-Will Against Wrongful Discharge: The Public Policy Exception,* 96 HARV. L. REV. 1931 (1983). This exception denies the employer the "right" to terminate an at-will employee when it has been established that the discharge would contravene some clear, specific and well-articulated public policy. The most frequently cited instance involves public health and safety, although the exception has been applied in a variety of contexts.

17. *See* Klare, *The Public/Private Distinction in Labor Law,* 130 U. PENN. L. REV. 1358, 1363, (1982). *See also* Casebeer, *Teaching an Old Dog Old Tricks:* Coppage v. Kansas *and At-Will Employment Revisited,* 6 CARDOZO L. REV. 765 (1985).

18. In New York, for example, the judiciary has interpreted the employment at-will as exclusively a private relation subject to "free contract" principles. *See* Minda, *The Common Law of Employment At-Will in New York, supra,* at 990–1017. In so doing, New York law now provides less protection to discharge at-will employees than almost any other state.

19. *See, e.g.,* Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). *See also* Note, *The Employment-At-Will Doctrine: Providing A Public Policy Exception to Improve Worker Safety,* 16 U. MICH. J. L. REV. 435 (1983).

20. In my state, New York, this way of thinking has lead to the curious result that the judiciary has refused to modify its own common law rule of employment at-will on the ground that substantive changes in the *private* character of employment obligations must be made by the legislature because only the legislature is competent to decide whether *public policy* warrants changes in the existing common law regime. In New York, the public/private distinction has thus created a legal justification for the judiciary's refusal to acknowledge it's responsibility for modifying it's own rule even though the New York Court of Appeals has recognize that its own rule is out-of-date and in need of reform. As a consequence, New York's common law of employment at-will has been placed in a "legislative deep freeze." *See,* Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine, see supra* note 15.

interests of employers over the contrary interests of employees.[21] The image of employment at-will contracts as exclusively a *private* relation favorable to the interests of employers has tended to dominate or block out the *public* image of relation favorable to employee interests. In deciding wrongful discharge issues, for example, judges have analyzed the event of employment termination as if it were a *discrete transaction* involving a purchase and sale between two complete strangers. The subject matter of contract termination is thus "transactionalized" or "commodified" in the sense that the employment relationship is perceived as being a short-term contract involving the exchange of goods.[22] Viewing the employment relation in this way leads one to conclude that the relationship between the employer and employee is controlled exclusively by voluntary exchange and contract defined promises.[23]

This way of thinking has led formalistic judges to conclude that the "unfettered right" of the employer to wrongfully discharge an at-will employee is the logical consequence of the principle of "free contract."[24] The injustice of the employer's wrongful conduct is thus "explained" as being the "natural" and "just" consequence of the "free will" of contract parties.[25] Instrumentalist judges, on the other hand, have concluded that the employer's right to discharge can be defended by the efficient market analysis of law and economics.[26] The employer's absolute right to terminate is seen as being essential to orderly and efficient market trans-

21. *See, e.g.*, Blades, *Employment At-Will vs. Individual Freedom: On Limiting The Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); *see also*, Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939 (1985).

22. *Id.*, at 977. *See also* I. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 863 (1978).

23. The right of contract termination is thus determined exclusively in terms of contractually defined promises; voluntary consent becomes a crucial factor and reliance and expectation interests are either ignored or found to be irrelevant to the analysis of contract promises.

24. "Legal reasoning is formalistic when the mere invocation of rules, and the deduction of conclusions from them is believed sufficient for every authoritative legal choice." R. UNGER, LAW IN MODERN SOCIETY 194 (1976). As a method of legal analysis, formalism pursues truth through a process of logical deductions derived from abstract conceptions of reality.

25. *See generally* Minda, *The Common Law of Employment At-Will in New York*, *supra*, at 1018.

26. *See, e.g.*, Wakefield v. Northern Telecom, Inc., 769 F.2d 109 (2d Cir. 1985) (J. Winter). *See also* Minda, *Commentary: Employment At-Will in the Second Circuit*, 52 BROOKLYN L. REV. 913, 930–32 (1986).

Instrumentalism in law is premised on the notion that the legal system can be manipulated to accomplish certain objectives in a coherent and objective manner. According to the instrumentalist view, the law is merely a process to be bent and manipulated for the purpose of accomplishing some end result. *See* R. UNGER, KNOWLEDGE AND POLITICS 69, 152–54 (1975); Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 CORNELL L. REV. 949 (1981). In many law schools, students learn to apply pseudo-scientific approaches of law and economics as well as other "high tech" approaches of the social sciences in developing instrumental rationales for legal analysis. The efficiency calculus of law and economics or the empirical methods of statistics are used to demonstrate the plausibility of how the legal system can maximize some aggregate satisfaction or accomplish an underlying goal or end-state with neutrality and objectivity.

actions.[27] The general underlying message of the relevant caselaw is that the legal profession has devised objective methods of mediation for *privileging* particular outcomes when making choices about the basic employer/employee trade-off. The plausibility of such claims, however, depend upon the questionable validity of the underlying legal vision of the employer-employee relation.

The danger presented by the dominant legal vision of employment at-will contracts is that by establishing rules of law which sanction a particular legal conception of the employment relation, other competing conceptions are ignored and rendered beyond the realm of offical legal discourse. A particular vision of social relations thus becomes *the* only vision acceptable for "lawyer" talk. What is ideological about such language is that it fails to recognize that at-will employees may have important relational and expectation interests independent of contractually defined promises created by the initial transaction of employment.

In treating the event of contract termination as a *discrete transaction*, disparities in economic power; superior information advantages, and reasonable expectation and reliance interests, become largely irrelevant because questions of justice and fairness become defined in terms of a market analysis which is insensitive to the specific relational context of the parties. This way of thinking thus denies the possibility that at-will employees have a contractual or property interest to be protected against wrongful and arbitrary discharge. In so doing, the prevailing legal conception of the employment relation has served to persuade us that what is illogical and unjust is inevitable, logical and fair.

A consciousness-based approach to employment at-will problems would seek to reveal the contingent and artificial nature of traditional legal discourse by exposing the inconsistent and contestable premises of the prevailing legal conception of employment at-will relations. Instead of seeking to locate a "correct" or more "authoritative" legal interpretation, a consciousness-based critique would seek to explain how "legal truth" is created and legitimated by an interpretative process which is committed to a false and artificial way of telling stories about social life. In the case of employment at-will, the goal would be to explain how the *public/private distinction* and the *discrete transaction* model of classical contract law has been utilized by judges to perform essentially a *rhetorical* function in sustaining "a set of imageries and metaphors" which are "designed to organize judicial thinking according to recurrent, value-laden patterns."[28] The underlying goal would be to demonstrate the feasibility of

27. This way of thinking has, in turn, allowed commentators (such as Professor Richard Epstein of the University of Chicago) to proclaim that the common law rule makes sense because the law of market transactions should permit free terminability in order to facilitate efficient market transactions. Epstein, *In Defense of the Contract At-Will*, 51 CHI. L. REV. 1404 (1984).

28. K. Klare, *The Public/Private Distinction in Labor Law*, *130* U. PA. L. REV. 1358, 1361 (1982).

alternative conceptions of employment at-will relations (such as a *relational contract analysis*[29]) which may have different distributive consequences.

If we want to train law students to understand the uses and abuses of legal analysis as well as to learn the lawyer-like craft of legal argumentation, then it seems only reasonable that at least one dimension of legal education should be devoted to a critical examination of the hidden premises and assumptions of traditional legal analysis.[30] If we expect law students to "think like lawyers," then why shouldn't we expect law students to spend at least some of their legal training learning about the actual structure of *legal consciousness* which informs much of lawyer thought? In my opinion, the pedagogical basis for a consciousness-based approach to legal training can be premised on the simple idea that it is necessary and helpful for understanding how "legal truths" are created and perpetuated in the profession.[31]

Assuming it is pedagogically relevant, how might one actually practice a consciousness-based approach to law teaching? One way would be to develop a critique of legal texts which could be used to deconstruct or unravel the hidden premises and normative presuppositions contained

29. *See* I. MACNEIL, THE NEW SOCIAL CONTRACT (1980); Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOODE HALL L. J. 5 (1984); Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974). *See also* Minda, *The Common Law of Employment At-Will*, *supra*.

30. *See also* Atleson, *The Implicit Assumptions of Labor Law Scholarship*, 35 J. LEGAL EDUC. 395 (1985); Lesnick, *Legal Education's Concern With Justice: A Conversation With a Critic*, 35 J. LEGAL EDUC. 414 (1985).

31. Recently, a group of legal scholars and educators associated with the Conference of Critical Legal Studies (CLS) have argued that the structure of legal consciousness created by traditional legal discourse is based upon false and inconsistent premises of the nature of law and social life. A central theme of the Critical Legal Studies movement is devoted to the task of demonstrating the artificiality and contingency of traditional forms of legal interpretation. In creating a makeshift "toolkit" of various theoretical approaches (including feminism, structuralism, deconstruction, literary criticism and others), these legal scholars and educators seek to apply a consciousness-based critique to legal analysis. For a general introduction to the critiques of Critical Legal Studies *see* THE POLITICS OF LAW (D. Kairys ed. 1982).

For a review of CLS literature which I have found to be helpful for developing a *consciousness-based* legal pedagogy *see* Boyle, *Politics of Reason*, *supra*; Boyle, *The Anatomy of a Torts Class*, 34 AM. UNIV. L. REV. 1003 (1985); David Kennedy, *The Turn to Interpretation*, 58 S. CALIF. L. REV. 251 (1985); Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Frug, (Book Review), *The Language of Power*, 84 COLUM. L. REV. 1881 (1984); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277 (1984); Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MARYLAND L. REV. 563, 638–42 (1982); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 Research in Law & Sociology 3 (S. Spitzer ed. 1980); Klare, *Law-Making as Praxis*, 40 Telos 123 (1979).

within the offical readings offered by traditional legal interpretations.[32] In theory, the pedogogical objective would be to develop a methodology for reading legal texts which could evoke equally plausible contra-interpretations in the mind of the reader. Rather than seeking to locate "correct" or more "authoritative" legal interpretations, the objective would be to explain and expose the process by which "legal truth" is created and legitimated by an interpretive process which is committed to false and artificial ways of telling stories about social life. The reader's subjective experience thus becomes an *ally* for testing the validity of the particular views and beliefs of social life projected by traditional legal interpretations of reality.[33] By drawing attention to possible alternative story tellings, a consciousness-based critique of legal analysis would thus seek to reveal the artificial and contingent nature of legal interpretations of reality.[34]

I believe that it is the idea of a consciousness-based critique which informs the experimental teaching project described by Johnson and Scales in their article. By drawing attention to possible alternative story tellings in popular music *as well as* the overall experience of listening to the music, Johnson and Scales describe how they have encouraged their students to construct alternative readings of legal texts based upon their own reflective knowledge and experience of social life. By encouraging students to record their thoughts and experiences in journals, and to reflect on their thoughts periodically throughout the course, Johnson and Scales sought to facilitate the process of developing the ability of their students to tell alternative stories in the law. In this way, the reader's (student's) subjective experience becomes an *ally* for testing the validity of the

32. In my view, this *the* central goal of the intellectual project of the law teachers and practitioners associated with the Conference on Critical Legal Studies.

33. *See* Jerry Frug's point about the tyranny of experts, *Language of Power*.

34. For example, recently a group of legal scholars and educators associated with the *Critical Legal Movement* have turned to literary theory for developing a new methodogy for reading legal texts. These legal educators claim that law can be studied in the same way that one reads literature or a poem. In turning to the study of interpretation, Critical theorists have challenged the notion that legal texts contain meanings which can be "correctly" discovered by utilizing "authoratitive" interpretive methods. *See e.g.*, G. Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1171–81 (1985); David Kennedy, *The Turn to Interpretation*, 58 SO. CALIF. L. REV. 251 (1985); Frug, *Henry James, Lee Marvin and the Law*, New York Times Book Rev. Mag., (Feb. 16, 1986). *See also* Martha Minow, *Law Turning Outward*, (unpublished speech presented to the Law and Society Association Conference, June 2–5, 1983) (copy on file). By deconstructing legal texts into equally plausible counter-meanings, these educators have sought to illustrate how a community of legal interpreters have served an ideological function by creating legal meanings which fail to perceive honest differences and alternative ways of being. In developing a consciousness-based methodology, these legal educators have turned to literary theory and other non-legal methods of interpretation in order to emphasize the *openness* and *contingency* within legal interpretation. Their goal is to empower the reader so that she can evaluate the inescapably ideological character of legal thought.

particular views and beliefs of social life perfected by traditional legal analysis. The whole point of their enterprise is to explode the illusion of legal objectivity by revealing how contestable readings of legal texts have become frozen in the legal consciousness of legal actors.

II.

The idea of a consciousness-based critique is not new. Indeed, philosophers have a fancy name for argumentative critiques of this sort—*phenomenology.*[35] A phenomenological approach to legal interpretation stresses the importance of the individual's subjective experience in developing descriptions and critiques of law based upon everyday experiences of social life. A phenomenological description of legal interpretation seeks to capture the feelings of contradiction or "flash of denial" that is present in the moment when one realized that the felt necessity of categorizing the world in a particular way "could-be-otherwise." The phenomenological descriptions of everyday experiences of social life—personal accounts of what it was like to be at a faculty cocktail party at the moment a famous judge arrived;[36] descriptions of feelings of alienation and oppression at the workplace,[37] and even the experience of being snubbed by the cold stare of a friend or colleague,[38] can be potentially powerful examples for evoking the constraining nature of abstract social roles and practices. The descriptions of everyday experience can also contain the seeds for considering vast possibilities for reimagining alternative conceptions of social life and other ways of being.[39]

Maybe it was their desire to evoke phenomenological descriptions of everyday experience which explains why Professors Johnson and Scales

35. Phenomenology is the study of knowledge as thought as it is revealed to consciousness. *See* Gabel, *Phenomenology of Rights-Consciousness, supra,* at 1564, n.2. "Its theory of knowledge is based on an essential distinction between being and thought. . . . Phenomenology pursues truth . . . through a process of 'unveiling descriptions' rather than through explanations or rational analysis, and it seeks to be evocative rather than logical." *Id. See also* Boyle, *Politics of Reason, supra,* at 741, 741, n.164, 742.

36. *See* Gabel & Kennedy, *Roll Over Beethoven,* 36 STAN. L. REV. 1, 43 (1984). *See also* Peller, *Cultural Terrorism and the Faculty Cocktail Party,* 2 Lizard 3 (1984) (copy on file).

37. *See* Gabel, *supra* at 1569, n. 14.

38. D. Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685 (1976).

39. "Phenomenology thus links up our experiences of constraint or bad faith so as to negate them in the act of liberation. And this philosophical depiction of liberation is in turn only meaningful insofar as it manages to evoke the actual experience of freedom, the feeling of the transcendence of constraint—not in its ethereal idealist form, but as a minor flash of empowerment in a factory, or a hospital, or a law school." Boyle, *Politics of Reason, supra,* at 742.

Critical legal theorists argue that the experience of contradiction evoked by the subjective awareness that things could be otherwise creates an "intersubjective zap"—a sudden, immediate moment of awareness which contains within itself the knowledge of alternatives and possibilities for transforming and overcoming false ways of perceiving reality. *See* Gabel & Kennedy, *Roll Over Beethoven, supra,* at 4, 54.

have turned to rock and roll as a medium for talking about the law. Perhaps this is why they also find the effervescent rock 'n' roller, Tina Turner, to be "a fantastic communicator, a contemporary Wittgensteinian hero."[40] Tina Turner is important to their work because she sings about everyday experiences which run counter to the experiences of social life discussed in law. In the song "Steel Claw," for example, she evokes an especially strong description of everyday experiences which are potentially important for revealing the ideological underpinnings of a legal consciousness which demands obedience to legal authority.[41]

In the "story about the Steel Claw," Tina Turner sings about the way obedience to law has a concealed everyday meaning for certain people within society. In the song, Tina Turner sings: "Life is so cool/Easy Livin' When you make the Rules". . . . "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/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 seesaw/A long hot battle with the cold law/Is what you get for messing with the steel claw."[42] By evoking the image of law as "steel claw," Tina Turner presents us with a subjective description of what it might feel like to be oppressed and dominated by a system of abstract legal justice which ignores existing social injustices and inequities.

On one level, the phenomenological description presented by the words of the song may be helpful for communicating the idea that law can have a negative dimension (law as oppressor), and even more importantly, how claims of legal neutrality and abstract justice can make it difficult to confront certain moral and ethical dilemmas. In presenting us with the dark side of the law (law as steel claw, law as oppressor), she invites us to consider the way claims of legal authority can be experienced as a new and frightening form of oppression. The song may thus provide an

40. A. Scales and K. Johnson, *An Absolutely, Positively True Story: Seven Reasons Why We Sing*, 16 N.M. L. REV. 433, 443 (1986).

41. It is common to think of law as something which protects us from oppression of government or interference of others. According to the standard view, law is necessary to make society function in a peaceful and orderly manner. Without law we would all be placed in jeopardy because there would always be some person or combination of persons who would possess superior power or ability to oppress or dominate the exercise of our individual freedoms. But while law may be necessary to society, it also can be dangerous to society. Law can be utilized by law makers to impose their will on others for their own purposes—law can be a new form of oppression. The relationship between law and society contains what Jerry Frug has called the *"dangerous supplement"*—the idea that "[s]ociety is constituted, in part, by law, and law is constituted, in part by society." Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277, 1288–89 (1984). The idea of the dangerous supplement serves to remind us of the futility of devising a neutral concept of law—one which fails to acknowledge the subjective normative choices in establishing a particular society through law.

42. *Id.*

interesting and unique way to evoke an experience which reveals how inarticulate beliefs and views of legal authority can block certain experiences (feelings of alienation) and topics (distributive inequalities) by placing them beyond the realm of "official" legal discourse. In this way, the lyrics of the song presents the listener with a form of discourse which relies upon the aesthetic medium of music to communicate a message.

Yet, at another level, the true phenomenological power of the song may be understood only when considered in light of the overall experience of listening to the music. Knowing the words, singing along and having your body rhythmically in tune with the music can create an experience which goes beyond the abstract, analytical descriptions of what the song "Steel Claw" can mean when considered alone on a printed page.[43] The intersubjective feelings evoked by listening to the music, in a classroom or at a rock concert, can be a way for experiencing *counterculture*—an experience of social relations which is different from the everyday experiences captured by one's "professional" life as a lawyer, law student or law professor. I think it is the *thrill* of being unconventional, the freedom which comes from acknowledging the legitimacy of *differences* that can explain the true phenomenological power of listening to rock and roll music.

But why should law professors care about *counterculture*? The experience of alternative social relations might be useful for giving future lawyers an opportunity for understanding perspectives and differences which are not currently presented by the images of social relations projected by the law. This could be important in training lawyers how to better represent clients who may have interests, needs and values which do not neatly fit into the traditional conceptions of social relations found within legal interpretations of society. If we ignore alternative conceptions of social relations; if we refuse to acknowledge our differences, then how can we expect to train lawyers to effectively represent the interests of their clients? How can we hope to teach law students to be professionally responsible when the mode of analysis we utilize to talk about legal problems requires divorcing ourselves from the experience of real world problems? The danger of not talking about such things in law school is that we may fail to train future lawyers to exercise the elements of choice and moral judgment which are intrinsic to professional practice. What is needed is a form of professional discourse which legitimates the *play of differences* existing within society.

The *play of differences* evoked by counterculture can also be important for releasing creative imagination for theorizing about new legal theories

43. I would like to thank Jerry Frug for reminding me of the phenomenological importance of *listening* to the music.

and doctrines. It may be useful for developing new understanding about the underlying relationship between legal doctrine/legal practice and the basic beliefs and values of various social and political theories. The phenomenological experiences of listening to rock music may be useful then for presenting a new way for revealing how particular cognitive forms of knowledge and communication reproduce particular forms of social relations and practices.[44] I think that such knowledge can be highly relevant for law study not only for critiquing the "grand theories" of the law but also for engendering a learning perspective which encourages law students (and hopefully future lawyers) to develop the critical ability for discovering new legal solutions for future legal problems.

It does seem highly unlikely that the traditional discourse of legal analysis could ever evoke the nature and character of authentic human experiences similar to those that can be evoked by even the simple everyday experience of listening to music. The idea that it may be possible to describe everyday experiences of social relations by using the professional language of lawyers does seem rather remote in light of the constraints of "objectivity" and "neutrality" imposed by positivistic conceptions of law which now dominate legal education. The danger of the "official" professional language of the law is that it can conceal and minimize the political and social premises of law and legal practice. What is needed is a form of legal discourse which will permit future lawyers to better understand how their language can defeat effective lawyering by foreclosing discussion and consideration about the most basic beliefs and values at stake in legal decisionmaking. The promise of a consciousness-based approach to legal education is that it may facilitate such discussions by bringing these questions out in the open for reflection and analysis.

Johnson and Scales write, "We never heard a neutral song, never met a neutral teacher." To them, rock and roll can be useful for understanding the ideology of neutrality practiced in law—something which is never really talked about in law school. To them, 'thinking like a lawyer' can mask and hide aspects of reality which are important for effective lawyering. For them, rock music can provide poignant descriptions of reality that are missing in the analytical descriptions of legal analysis.[45]

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44. The fact that the phenomenological experience cannot be verified empirically by formulating and testing a hypothesis does not mean that the experience is not useful for learning something useful and important about the nature of legal knowledge. The intersubjective experience as a form of knowledge can be even more real and reliable than the traditional forms of knowledge which can be verified in a positivist sense. *See* D. Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MARYLAND L. REV. 563, 639 (1982).

45. Of course, some may claim that the "poignant descriptions of reality" presented by rock and roll songs are actually counterproductive to learning by encouraging some students not to be serious about their law studies or by encouraging the formation of hostile attitudes about law and legal

III.

Of course, rock and roll is distinctive from *law* (and other music forms) in that the boundary between "art" and "politics" or "life" has been obliterated. Ever since the "Beatles" revolution of the 1960's, and probably even before then, rock and roll has served as a basis for capturing the political temper and feelings of the times. While the anger and mood of the 1960's has been (somewhat) displayed with the "cooler" styles of the late 1970's, and 1980's, rock continues to have a political content. Today the songs are different because attitudes and views prevailing within society have changed. The music continues to provoke its listeners by confronting them with a message with a special meaning.

The fact that music, especially rock music, is provocative may be a reason why popular music has been regulated and even banned in some societies. It is common knowledge that totalitarian societies like the USSR have sought (unsuccessfully) to ban the playing of Western Rock. Even in this country there have been instances of local restrictions (most of which are the result of religious intolerances) prohibiting dancing and certain forms of music playing. More recently, the federal government has sought to regulate the content of the songs by encouraging the music industry to regulate itself. The various forms of governmental regulation in this or other countries cannot be explained solely on the ground that rock is "Western," "capitalistic," "irreligious," "profane" or "immoral." Rather, I think at least some of the hostility toward Rock is at least partly a reaction to the potentially subversive message in the songs—the anti-conformist attitudes and the overall *thrill* of unconventionality that Rock evokes.

Rock does evoke strong anti-conformist feelings—of release and let go. The music is called rock 'n' roll for a reason. The music is about freedom from restraint, the youthful yearning for self-expression, and individuality. In this respect, it is understandable while some may find that rock is contrary to the voice of authority which is after all *the* dominant voice of the law[46] it is important to acknowledge that rock and roll also cries out for understanding and love. When the ex-Police vocalist, Sting,

education. It's not clear to me whether fears of this sort are real since I have never experimented with the use of music in the courses I teach. Johnson and Scales's experience, however, seems to refute these fears. In any event my own preliminary hunch is that the "unsettling" effect of music playing may actually be useful in breaking-up the hierarchical structure of the classroom, leading to active as opposed to passive student participation, which can be conducive to a consciousness-based form of legal pedogogy. I suspect that ultimately the success or failure of the use of non-legal mediums in legal education will depend on a host of factors including class bias, age of the student body, and personal ability of students and the teacher.

46. Does this mean that rock and roll *should* be kept out of *law* schools *because* it may have an anti-authoritarian tendency? It is interesting to note that some legal educators have recently argued that Critical Legal Scholars should leave the law school because, they have similar anti-authoritarian

sings: "I hope the Russians love their children too," he captures something which we all hope to be true—that differences between East and West, straight and gay, right and left—can be tolerated if for no other reason than self-survival. Maybe, the alternative voice found in some popular songs can also be useful in providing us with an opportunity for understanding our differences. Hopefully, then we can learn to be more effective in using the law to build and preserve relationships necessary for a peaceful world. Instead of learning how to crush an opponent, maybe we can then learn how to focus our energy in discovering new ways to use the law to build and preserve working alliances and trust. At the very least, songs can be helpful in reminding us that we live in a world where law can be used for good and evil, and where all of us have a role to play in determining which of the two roles predominate.

attitudes in that they *allegedly* embrace "nihilistic" beliefs of the law. *See* Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); Martin, *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985). *See also* Minda, *Of Law, the River and Legal Education*, 10 NOVA L. REV. 705 (1986). I believe that such questions are themselves the product of a fundamental misconception of the nature of law in American society. A commitment to the ideals of American law should require more, not less, discussion of the unstated and hidden social and political premises of our legal system. *See* Minda, *Of Law, The River and Legal Education*, *supra*.