ZEN, LAW AND LANGUAGE: OF POWER AND PARADIGMS

WILLIAMSON B.C. CHANG*

This symposium on jurisprudence is an important and necessary opportunity to discuss nontraditional methods for the study and teaching of jurisprudence. The New Mexico Law Review is to be commended for providing this forum. Professors Johnson and Scales should also be highly praised for the courage and initiative they have demonstrated in their unique approach to jurisprudence. Nontraditional approaches to jurisprudence should not be viewed merely as different, more hip means of packaging the traditional corpus of jurisprudential materials, but as analytical programs in themselves.

The purpose of this article is to describe how a comparative philosophical methodology, specifically the application of the philosophical premises of Zen, may be useful in illuminating the nature of problems in legal philosophy. Moreover, this article describes how transcending the legal paradigm may empower students by demonstrating that internal linguistic choices may actually dictate the seemingly objective reality about law.

The purpose of the practice of Zen is to reach an experiential state of enlightenment characterized as the direct experience of reality.[1] The koan is used in Zen practice as the primary methodological vehicle for achieving enlightenment. Often paradoxical in nature, the koan is a heuristic device designed to attack the structure of normal conceptual thinking. One of the most famous koans, for example, is "Joshu's Dog" which is told in the form of a story:[2]

> "A monk asked Joshu, a Chinese Zen master, 'Has a dog a Buddha-nature or not?' Joshu answered, 'Mu.'" [Mu is the relative symbol in Chinese, meaning "No thing" or "Nay"]

*Associate Professor of Law, University of Hawaii School of Law. A.B. 1972 Princeton University, J.D. 1975, University of California, Berkeley. The author wishes to thank the students who have participated in the author's jurisprudence classes. In particular, the author wishes to acknowledge the financial assistance of the American Bar Foundation, through the U.S.-Japan Friendship Commission, which enabled the author to conduct research in Japan.

1. T. KASULIS, ZEN ACTION/ZEN PERSON 55–64 (1981) [hereinafter cited as KASULIS].
2. ZEN FLESH, ZEN BONES 89–90 (P. Reps ed. 1930) [hereinafter cited as ZEN FLESH].

Joshu's answer "mu" is not "the answer" to the koan.[3] Koans do not have answers in a traditional sense. Moreover, koans do not seem to have a logical structure.

> Another well-known koan is "Nansen Cuts the Cat in Two:"[4]
>
> Nansen saw the monks of the eastern and western halls fighting over a cat. He seized the cat and told the monks: "If any of you say a good word, you can save the cat."
>
> No one answered. So Nansen boldly cut the cat in two pieces.
>
> That evening Joshu returned and Nansen told him about this. Joshu removed his sandals and, placing them on his head, walked out.
>
> Nansen said, "If you had been there, you could have saved the cat."

Such stories are dependent on a nonordinary sense of reality. They are used as the focus of the student's meditation. The student offers explanations of the koan to his master. The goal of "understanding" the koan is satori or enlightenment. Satori is characterized by a complete shift in the student's perception of the world.[5] For the student experiencing satori, the context or paradigm in which the objects and events of reality exist change completely. The paradoxical nature of the koan is designed to challenge the student's pre-enlightenment paradigm of the world—a paradigm structured by language and conceptual thinking.

The koan is intended to create a sort of intellectual "hall of mirrors" manifesting the traps of conceptual thinking. An example is the koan which asks the student to contemplate his face before his parents were born.[6] In answering this koan (like the attempt in western philosophy to define the self) one experiences the problem of self-reference. Who, or what "self" is formulating that concept of the self? To look at oneself, requires one to be outside of oneself. In order to watch one's self watching oneself requires another self to watch that self, and so forth.

---

3. Koans do not have answers in a traditional sense. In another text, Joshu's answer of "mu" was described as follows:

> Let us put aside for the time being historical studies of the koan. "Mu" as a koan is to open our spiritual eye to Reality, to "Mu," that is, to Joshu's Zen—this is the sole task of this koan, and everything else is just complementary and not of primary importance. We may simply read it for our information.

Z. SHIBAYAMA, ZEN COMMENTS ON THE MUMONKAN 24 (1974).

4. ZEN FLESH/ZEN BONES 101 (P. Reps ed. 1930).

5. "Satori" has been defined as: "[E]nlightenment, that is Self-realization, opening the Mind's eye, awakening to one's true nature and hence of the nature of all existence." P. KAPLEAU, THE THREE PILLARS OF ZEN 377 (1980).

6. "Not thinking of good, not thinking of evil, just this moment, what is your original face before your mother and father were born." P. YAMPLOSKY, THE PLATFORM SUTRA OF THE SIXTH PATRIARCH 110 (1967).

Koans such as the above cannot be resolved by the normal problem solving methods of the paradigm in which they exist. Koans are like paradoxes which exist at the seams of paradigms, where the logical processes that would generate answers within the paradigm break down. Koans are like the anomalous scientific results discussed in Kuhn's *The Structure of Scientific Revolutions*.[7] They can either be dismissed as aberrations, or if treated seriously, they often prepare the ground for a paradigmatic shift.[8] The Zen initiate, however, has no choice and must take the koan seriously. In order to make "sense" of the koan, the student is then compelled to give up the old paradigm in favor of a new non-ordinary one.

I. THE TRANSMITTAL OF PARADIGMS IN LAW AND ZEN

Law and Zen use similar methodology in conveying the essence of their paradigms. Law students face koan-like problems posed in the form of questions such as "Do corporations have a first amendment right of speech" or assertions such as "the knowledge of an agent is imputed to his principal" or concepts such as "piercing the corporate veil" or "constructive notice." Such legal koans would not make sense in the law student's prelaw school paradigm.[9] Acceptance of such questions as "logical" requires acceptance of a paradigm or context in which they make sense. A student's success in law school is measured by her speed in accepting such paradigm—a paradigm she will come to refer to as "doctrine."[10] The paradigm is reinforced by proving to the student that the

7. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

8. *Id.* at 77–110.

9. The law school paradigm emphasizes reason over emotions or declarations of values and faith. This has been noted frequently:

> In general we emphasize the ability to analyze and advocate, placing a high value on the capacity to be precise, logical and objective. Law students learn that because the legal system is proof-oriented, they should make statements that can be detended through objective criteria. . . .
>
> We become accultured to an unnecessarily limited way of seeing and experiencing law and lawyering, a way which can separate lawyers (as well as other actors in the legal system) from their sense of humanity and their own values.

DWORKIN, HIMMELSTEIN AND LESNICK, BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM 1, 2 (1981).

> All of our teachers tried to impress upon us that you do not sway a judge with emotional declarations of faith. Nicky Morris often derided responses as "sentimental goo," and Perini on more than one occasion quickly dispatched students who tried to argue by asserting supposedly irreducible principles.

S. TUROW, ONE L 91 (1977).

10. *Id.*

> Yet with relative speed, we all seemed to gain skill in reconciling and justifying our positions. In the fourth week of school, Professor Mann promoted a class debate on various schemes for regulating prostitution, and I noticed the differences

paradigm solves the normal problems posed by law. Eventually, the student experiences the paradigm as a systematic way of thinking. The acceptance of the legal paradigm requires the student to relinquish the previously held paradigm. The prelaw school paradigm is characterized by the absence of fictions or reified devices and an unwillingness to exalt the "rule of law" over an intuitive sense of fairness.[11]

In law school, the student is persuaded to adopt the legal paradigm because of its apparent intellectual rigor and its replacement of intuitive judgments with seemingly neutral principles. Moreover, acceptance of the paradigm is necessary for entrance into the profession and is perceived as a means to protect oneself and assert one's rights within the system.

As in Zen, the paradigm in law is transmitted by giving the student problems which implicitly undermine the premise of earlier paradigms. First year cases are designed to emphasize the importance of the "rule of law" and the dominance of rule utilitarianism. In order to uphold the importance of the "rule of law," experience and emotions are deemed irrelevant.[12] Moreover, by simply speaking of "corporations," "constructive notice" and other fictions and reifications as if they were as real as tables and chairs, the use of such devices to generate results is accepted implicitly.[13]

By use of the Socratic method, the student is relentlessly immersed in the new paradigm. The Socratic method installs a paradigm in which process is more important than result and skill at manipulating analogies

---

in style of argument from similar sessions we'd had earlier in the year. Students now spoke about crime statistics and patterns of violence in areas where prostitution occurred. They pointed to evidence and avoided emotional appeals and arguments based on the depth and duration of their feelings.

11. *Id.* at 93.

Thinking like a lawyer involved being suspicious and distrustful. You reevaluated statements, inferred from silences, looked for loopholes and ambiguities. You did everything but take a statement at face value.

So on one hand you believed nothing. And on the other, for the sake of logical consistency, and to preserve long-established rules, you would accept the most ridiculous fictions—that a corporation was a person, that an apartment tenant was renting land and not a dwelling.

12. *Id.* at 92.

About the same time from three or four others, people I respected, I heard similar comments, all to the effect that they were being limited, harmed by the education, forced to substitute dry reason for emotion, to cultivate opinions which were "rational" but which had no roots in experience, the life they'd had before. They were being cut away from themselves.

13. Lon Fuller discusses the utility of the "as if" thinking in L. FULLER, LEGAL FICTIONS 118, n. 49 (1967):

The "as if" attitude must be preserved, and, indeed, becomes particularly appropriate, when one is dealing with the phenomena of internal mental experience. We can imperfectly and metaphorically describe thinking by supposing that it consists of a comparison of a series of "pictures," or that it consists of talking to one's self—as Vaihinger does—that it consists of a series of mutually opposed errors. None of these descriptions is completely "true"; it is a question merely of which is the most useful.

is prized. "Truth" or "justice" is deemed indefinable and thus irrelevant in light of the perfection of process.[14] The necessity of "finality" in the system, explained as the need to make a decision "no matter what," is often used to explain the unfair or unjust case.[15]

Finally, utilitarian balancing replaces normative notions of the good. In light of the inability to squarely resolve and address fundamental ethical problems, the legal paradigm purports to resolve such issues by "balancing," which is assertedly neutral. The paradigm conveys an implicit message that the characterization of interests to be weighed and the act of balancing are objective tasks. Supposedly the results of such balancing would be replicated if performed by any reasonable person. Part of the core of the paradigm is that the world would be perfectly run if left to reasonable men applying "neutral" principles. The allure of the paradigm lies in its promise to teach the student "reasonableness." What is "reasonable," however, depends on one's starting place in society. Any nonprivileged member of society generally has greater difficulty adopting the paradigm. Thus, for the resistant, law uses Zenlike methods.

In law and Zen, resistance is broken down by putting the student in a "double bind" where she is never allowed to be "correct."[16] In Zen, each answer is deemed wrong.[17] In law, each answer is met by further

14. In the legal paradigm, for example, guilt does not necessarily correspond with facts regarding a person's factual guilt. Rather, "guilt" is a determination of a process.

> But once it has been determined that due process was satisfied, further inquiry is meaningless. Such an inquiry would be an attempt to ascertain the "Facts as They Really Are," an attempt that cannot succeed.

Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164, 188 (1967).

15. The importance of finality, of having a final judgment somewhere and at some time, is expressed in preclusion theory. The result is that the system does not guarantee ultimate fairness, but rather seeks to perfect procedural fairness.

> The philosophical basis of preclusion theory is a recognition that human beings have not been granted awareness of ultimate truth. The judicial system is designed to arrive at answers by a certain process, and there is no meaningful way it can check the correctness of those answers by the same process. . . . The philosophical basis recognizes that an opinion as to the correctness of a result cannot affect the legitimacy of the result's existence. Finality must be a function of procedural fairness, not background fairness.

16. In the first strategy, the Zen Master devises an intellectual "double bind" situation; that is, the disciple is placed in a predicament where one can neither affirm nor deny, at least in any intellectual manner. (Citation omitted). T. Kasulis, *Zen Action/ Zen Person* 117 (1981).

17. Every answer is "wrong" in the sense that every premeditated or consciously chosen response will not satisfy the Zen master. Consider the following story about the Chinese Zen Master Hogen.

> To the question "What is Buddha?" one of the disciples responded, "Hei-tei-doji Rai-gu-ka" ("the deity of fire seeks fire"). Hogen rebuked the disciple for this reply, calling him a fake. Offended, the monk started to leave the monastery. But a Zen Master of Hogen's reputation must have had a reason for such a strong reaction, so the monk returned to Hogen, putting to him the question: "What is Buddha?" Without hesitation, he replied, "Hei-tei-doji Rai-gu-ka!" The monk was suddenly enlightened.
>
> The crux of the story is that although the literal statement remained the same,

questions, or a change of the facts of the hypothetical. For the law student, any resort to other paradigms, such as "feelings," "experience," "cross-cultural examples" or "empirical data" are quickly invalidated. In both Zen and law, there are no "right answers."

Thus, deprived of positive reinforcement and anxious to succeed, the student unconsciously adopts the belief that the only way out of the double bind is to become exactly like her teacher—in dress, manner of thinking, habit and style. This is similar to the conversion that hostages often undergo when they eventually adopt the belief system of their captors.[18] With no way to escape, given the invalidation of the prior paradigm that represents her "self," the only hope of survival for the prisoner is to please her captors by mimicking them.[19] As recent studies in behavioral psychology suggest, the exact copying of the mental syntax and physiology of the captor produces a replication of the belief system in the hostage.[20] The same process occurs in Zen and legal education.

> the quality of consciousness making the utterance was different. The student's response had been conceptually filtered and premeditated, however subtly—it rose out of thinking. But Hogan's response was spontaneous and prereflective, rising out of without-thinking. . . . Through his own practice and realization, the Zen Master can distinguish between genuinely spontaneous without-thinking and meditated forgery.

T. KASULIS, ZEN ACTION/ZEN PERSON 120 (1980). Thus, the answer to a Koan is a "without-thinking" response.

> Therefore, one must be completely responsive to whatever might happen. Any tinge of premeditated or conceptually oriented behavior will be discerned and rebuked by the master.

Id.

18. *See generally,* United States v. Hearst, 412 F. Supp. 863 (N.D.Ca.1975) (defense based on brainwashing).

19. Although theorists disagree to some extent over the model that should be used to explain the changes observed in these settings . . . there is general agreement that the following techniques are used: isolation of the victim from outside influences and former friends; control over the channels of communication and information; physical and physiological depletion through overwork, insufficient hours of sleep, and an inadequate diet; instillation and magnification of guilt and anxiety; threats of physical or spiritual annihilation if the individual does not join the group. . . .

Delgado, *When Religious Exercise is not Free: Deprogramming and the Constitutional Status of Coercively Induced Belief,* 37 VANDERBILT L. REV. 1071, 1074 n.9 (1984).

20. One of the principles of neurolinguistic programming is that by one's modeling of the behavior of another, that is duplicating that person's mental syntax, physiology and belief system, one can replicate that person's immediate experience. Pacing is one of the techniques used in neurolinguistic programming to achieve this type of rapport.

> Pacing is the essence of what is needed to establish rapport (Charny, 1966). It involves meeting the client at his model of the world and establishing a conscious and, more importantly, unconscious affinity with him. There are many ways to do this as your sensory experience will permit; to the extent that you can match another person's verbal and non-verbal behavior, you will be pacing his experience. In essence, this means that a therapist makes himself into a biofeedback mechanism, a mirror for the client. It is another of the most fundamental and powerful techniques highlighted by NLP for influencing behavior.

S. LANKTON, PRACTICAL MAGIC 59 (1979).

Such shifts can be so strong that the converted person may not remember life under the prior paradigm. She will brand any other way of thinking other than the new paradigm as absurd. Once fully grasped, the new paradigm will be deemed "obvious"—the only possible way the world could be.[21]

Thus, the three primary methods of effecting the paradigm conversion in Zen and legal education are deprivation and denial of access to the old paradigm, total immersion in the new paradigm and the calculated use of confusion. The use of koans in Zen and cases in law creates a paradigmatic confusion which provides for the transference of a new paradigm. Both the koan and the "case" present a problem that is confusing or paradoxical unless the new paradigm is accepted.[22] The critical moment occurs when the student ceases to challenge the troubling or paradoxical nature of the case or koan. At this moment the student accepts the koan or case as correct and invalidates prior conflicting experiences rooted in the previous paradigm.

This occurs, for example, when a law student no longer unconsciously "blocks" or challenges the implicit assumptions and reifications involved in a legal question such as "Can a corporation assert the fifth amendment as a defense?" She has, at that moment, unconsciously accepted the context or "world" in which such a question could be meaningful. She is then ready to accept and to generate an answer which would have conflicted with values she held under a prior paradigm. Her prior paradigm, for example, may have not allowed the logic where individuals escape moral responsibility on the basis that they somehow acted as a "corporation," a nonsensical fictitious entity under her prior paradigm.

Persons who have experienced "thought reform" report similar transformations when they have been forced to listen repeatedly to nonsensical propaganda.[23] The victim is presented with statements that are nonsensical in the logic of the victim's old paradigm. Such statements are completely logical to the persons effectuating the thought reform and are transmitted in a manner which demonstrates the speaker's complete belief in such statements. Thought reform succeeds when the resistance to this new logic ends. Thus, where the goal is to achieve paradigmatic changes in

21. T. Kuhn, *The Structure of Scientific Revolutions* 111–135 (1962).

22. The paradoxical nature of koans is illustrated by the following koan.

> In the following example, the double bind is patent:
> Master Shuzan held up his staff, and showing it to the assembled disciples said, "You monks, if you call this a staff, you are committed to the name. If you call it not-a-staff, you negate the fact. Tell me, monks, what do you call it?"
>
> On a more fundamental level, however, the double bind is illusory, from Shuzan's standpoint, there is really no conflict at all; he is calling for a without-thinking response, one that takes no positing stance whatsoever.

T. KASULIS, ZEN ACTION/ZEN PERSON 117 (1981).

23. *See generally,* R. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM (1961) (many descriptions of the effective use of repetition).

a person's thinking, repetition of the axioms of the new paradigm, simply "as if" they were true, is often a successful means of effecting conversion.[24] The techniques used in the conveyance of paradigms, rather than any objective truth about the paradigm, is the more important element in acceptance.

Thus, in Zen and the law, the "double bind" is so effective because to effectuate her escape the student must implicitly destroy the earlier paradigm. In law, the student must often accept results with which she would not ordinarily agree. In Zen, the paradoxical koans force the abandonment of conceptual, logical thinking.[25] A physical double bind is created by increasing the student's level of frustration. In Zen, any student "answer" to a koan is wrong and treated as the persistence of the old paradigm. Some Zen masters actually slap their student with a bamboo branch in hopes of "blasting" the student out of her "stuckness" in the old paradigm.[26] This is not unlike the process of continuous questioning, not "letting a student off the hook," that law professors administer in order to accelerate the acceptance of the new paradigm.

If some degree of severity is present in Zen and legal education, it is because both are designed to effect profound transformations. The purpose is more than just to convey a body of knowledge. Zen training teaches a complete way of looking at the world, a complete way of living. This is also the traditional goal of legal education—a philosophy expressed by the notion that legal education is designed to train people to "think like a lawyer."[27]

II. USING ZEN AS A MEANS OF DELINEATING THE PARADIGM OF LAW

Comparing Zen and law allows the context of law to be examined. It is difficult to analyze the paradigm of law in isolation. If the observer, a

24. Thus, the use of the "as if" technique is based on the instrumental value of viewing these things as true, not on an inherent truth about the matter. See footnote 13, *supra*.

25. Koans are designed to force the student into the without-thinking state by closing off access to reflective thinking.

> . . . [t]he Zen position explicitly recognizes three modes of response (affirmation, negation, neutrality) only two of which have been closed off. From the viewpoint of the confused and frustrated Zen student, though, the two situations might appear comparable, that is, accustomed to resolving problems with reflective analysis, the student may believe that the master is demanding the impossible.

T. KASULIS, ZEN ACTION/ZEN PERSON 117–18 (1981).

26. Striking may be used in various ways, but the underlying purpose is usually the same: a summons to abandon thought and return to without-thinking. . . . In other words, by catching the disciple off guard, he verifies that the student was thinking about what just happened or what will happen next—instead of being centered in the koan or genjokoan. Sometimes the student may attempt to strike the master (there are no fixed rules once sanzen begins), but the master would know if this attempt were premeditated or emotional rather than spontaneous.

T. KASULIS, ZEN ACTION/ZEN PERSON 121 (1981).

27. Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 40 (D. Kairys, ed. 1982) (Thinking like a lawyer includes acceptance of certain hierarchies).

lawyer, is conducting the examination, she is so embedded in the paradigm that she cannot see its distinctive features. Only from another paradigm or perspective can she differentiate the characteristics of the legal paradigm. Given the difficulty of experiencing both the Zen and law paradigms at the same time, the next best method is to conduct a "thought experiment."[28]

Thus, it is not being urged here that jurisprudence courses practice Zen to uncover the legal paradigm. Such a project would have destabilizing consequences as to the student's entrance into the legal profession. Rather, Zen should be used as a "thought experiment." In such a "thought experiment," one creates a hypothetical Zen priest/law professor. How would such a person discuss, analyze, and resolve the problems of legal philosophy such as the nature of rules, or the meaning and interpretation of text?[29] Zen analysis is used as a tool to dissect legal concepts. Zen's major premises—on language, causation, truth and free will are so vastly different from the premises of western legal thinking that they serve as a background by which the dominant characteristics of the legal paradigm emerges.

A. The Three Premises of Zen

While Zen should be considered a complete philosophy, this article will only focus on three philosophical premises of Zen. These premises are deduced from a reading of Zen texts and commentaries. There is a danger in attempting to interpret Zen texts because Zen philosophy avoids any notion of "text."[30] Yet, for the purposes of this article, it is necessary to disregard this fundamental tenet of Zen.[31] Thus, the text and com-

28. The use of thought experiments is common in physics. G. ZUKAV, THE DANCING WU-LI MASTERS 145–46 (1979) (describing one of Einstein's thought experiments). Indeed, the use of hypotheticals in the Socratic method is a form of thought experiment.

29. The use of Zen principles to critique the problems of western philosophy is a form of intellectualization of Zen. Such a practice conflicts with the fundamental tenets of Zen that seek to overcome conceptualization. Thus, the analytical, as opposed to the experiential assertions suggested in this article cannot be viewed as true to the tradition of Zen. The author argues, nevertheless, that such analysis is instrumental in elucidating and understanding the paradigm of law.

30. For example, one of the most famous koans is Joshu's Dog, set forth at the beginning of this article. Yet, this story should not be viewed as a crucial text in Zen from which the proper interpretation could arguably be derived. Mumon, a Chinese master advises not to attempt nihilistic or dualistic interpretations.

> The warning about "nihilistic or dualistic interpretations" is more than mere rhetoric. We must resist the temptation to think of mu either as an indeterminate void or as something relative and completely open to conceptual analysis. Mumon exhorts the Zen student to work at mu, to become it, rather than to understand it. . . . If mu or nothingness is the context within which Zen persons find their identity, it is clear that Zen Buddhists should not try to stand outside that context in order to understand it. As Mumon advises, one must be mu, not think about it.

T. KASULIS, ZEN ACTION/ZEN PERSON 11 (1981).

31. Since this article is structured in the form of a critique of the paradigm of law in view of the paradigm of Zen, the characteristics of Zen must be set forth as if they were philosophical assertions.

mentaries of Zen can be used to support the following analytical statements important for this article. The textual exegesis for these statements will be set forth in the footnotes.[32] The premises to be used are the following:

1) As to truth, the only truth is experience.
2) Language is incomplete and inadequate to describe experience.[33]
3) The use of language leads to false dualisms and false consciousness.[34]

Given the narrow ambitions of this article, these three premises will be applied to a single legal paradox in an attempt to illustrate how Zen may delineate the attributes of the paradigm in which law exists.[35] A paradox in law is chosen since a paradox represents an anomalous case—

32. In order to save space, discussion of these premises will be avoided in the text.

33. Two principles arise from further analysis of "mu":

> In short, Joshu's single word answer [mu] has a dual significance, functioning at once as a criticism of conceptual distinctions and as reference to an ineffable, quasi-ontological source of experience. Although the effectiveness of Joshu's response is such that the two principles cannot be considered separate and unrelated, it is useful for us to distinguish them in order to isolate two philosophical theses:
>
> 1. Linguistic distinctions (and the concepts formulated through them) cannot be the medium of an adequate description of reality.
>
> 2. Experience (or alternatively, reality) arises out of a source that cannot be described as either Being or Nonbeing, form or no form.

T. KASULIS, ZEN ACTION/ZEN PERSON 14 (1981). In the two chapters following this passage in his book Professor Kasulis unravels the basis for these two main strands of thinking.

34. *Id.* at 55–64.

> The Zen Buddhist view is that intellectualizations, concepts, even language itself are inadequate for expressing our experience as it is experienced. We go through life thinking that our words and ideas mirror what we experience, but repeatedly we discover that the distinctions taken to be true are merely mental constructs. In verbalizing something, we may have a lingering sense of having compromised part of our experience, but we continue to devise new categories, new names for new things, more distinctions when a moment before there were no distinctions. When we first learned the word philodendron, for example, we gained a new communication skill: we could call a florist on the phone, order a philodendron, and expect a delivery meeting our specifications. From Zen perspective, however, a subtle price is paid for this new facility—namely the uniqueness of each philodendron plant.

T. KASULIS, ZEN ACTION/ZEN PERSON 55–56 (1981).

In short, Zen views the meanings of words as "in the head." It is important to contrast this viewpoint with the emerging views of scientific realists who would argue that names such as "Cicero" or "natural kind" categories such as "philodendrons" are not simply in the head, but "rigidly designate" objects which truly fall into certain categories based on their ultimate structure. For a collection of articles expressing this view *see* S. SCHWARTZ, NAMING, NECESSITY AND NATURAL KINDS (1977).

35. The paradox chosen here is one concerning the nature of rules. Other paradoxes which might have been used include the debate over the separation of law and morality as expressed in the famous Hart-Fuller debate. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) and Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV.

a situation generated by possible internal inconsistencies in the legal paradigm.[36] A comparison of an ordinary problem of law against the Zen framework would not prove very enlightening. A paradox, however, exists in the seams or creases of a paradigm and thus, may be more illustrative of the nature of the paradigm.[37]

B. The Legal Paradox: Rules and Rule Skepticism

The example that will be the sole focus of this article is the paradoxical nature of rules. It has been often asserted that law is a system of rules.[38] It would be difficult to comprehend or visualize law without having a concept of rules. Questions as to the real nature of these rules, however, have generated such significant controversy that various forms of rule skepticism have arisen as serious schools of thought.[39] Rule skeptics take the position that rules do not exist or that if they do exist, they merely constitute predictions as to how officials will act.[40] As predictions, rules lose the essence of a rule—the basis to force officials to act in certain ways. Moreover, the version of rule skepticism that holds that rules are merely predictions has practical consequences. Such a view squarely conflicts with the doctrine of stare decisis and holds that, at best, stare decisis is a self-imposed notion. Stare decisis is the principle that judges have an obligation to apply the "rule of the case" as set forth by earlier precedents. Stare decisis is based on a concept of rules. The idea of

630 (1958) (Zen analysis would explore whether the dichotomy is a false one). Another paradox suitable for such analysis is the "positivists' circle" or the problem of determining what constitutes the core "property, liberty and contract" interests which the Constitution protects. In this paradox, the Constitution protects "property" but leaves such an interest to be defined by the states. Could a state redefine a core property interest such that it is not "property"? See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 522–539 (1978).

36. The paradox in law can serve as a sort of Michaelson-Morley experiment to test the adequacy of a paradigm. *See generally,* G. ZUKAV, THE DANCING WU LI MASTERS 128–131 (1979) (description of the Michaelson-Morley experiment).

37. Godel's Theorem demonstrating the incompleteness of mathematical systems is such a "seam" or "crease." For a discussion of Godel's Theorem in lay language see D. HOFSTADTER, GODEL, ESCHER, BACH, AN ETERNAL GOLDEN BRAID 438–460 (1979).

38. *See* H. HART, THE CONCEPT OF LAW 97–150 (1961) and R. DWORKIN, TAKING RIGHTS SERIOUSLY 14–80 (1977).

39. *See* H. HART, THE CONCEPT OF LAW 131–36 (1961). *See also* E. BODENHEIMER, JURISPRUDENCE 128–133 (1962) (describing Scandinavian rule skepticism).

40. K. LLEWLLYN, THE BRAMBLE BUSH 12 (1930):

> This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.* (Emphasis in the original).

Kessler, *Theoretic Bases of Law,* 9 U. CHI L. REV. 98, 109 (1941).

> Realism introduced a sharp distinction between what courts say and what they actually do. Only the latter counts. . . . Law became the behavior pattern of judges and similar officials. Fortunately legal realism did not stop at this empiricism. It developed and perfected the functional approach.

precedent which is the core of stare decisis inheres in a concept of binding rules.[41]

It is a paradox for a person to hold both views at the same time. If courts have complete freedom to overrule earlier precedents, in the sense that no other institution can force such courts to apply such rules, then, as the skeptics suggest, rules are merely "conveniences." From the skeptics' point of view, courts which conform their decisions to an earlier rule do not do so because of the existence of the rule and the obligation to be bound, but rather because the court chose to do so. From this perspective, adherence to an earlier decision is self imposed, not the effect of "external rules."[42] "Rules" are thus predictions of how officials may act.[43]

But this kind of rule skepticism is inconsistent with other core ideas in the legal paradigm. Law consists of rights, duties and obligations of individuals. "Rights" are based on the notion that courts are obligated to decide in certain ways.[44] Persons rely on rights, and thus when one speaks of a right, one speaks of a person's justifiable expectation that a rule will be applied. Thus, law depends on the existence of rights. Rights are no more than the justifiable expectation of the application of a rule. People conform their conduct in reliance on such rights—not on a prediction that a right will be enforced. Without rights, the concept of law is meaningless. Thus, the concept of law presents a paradox if we accept the freedom of courts to change law and the notion that rights must be "vested" to some degree.

The traditional Blackstonian explanation of the paradox was to invent the notion of overruling. Thus, there is no paradox because when the law changes, it is not the rule which has changed but merely the judge's interpretation of the rule. It was said that the earlier decision was not the

41. R. CROSS, PRECEDENT IN ENGLISH LAW 104–04 (1961):
> The orthodox interpretaton of stare decisis . . . is stare rationibus decidendis ("Keep the rationes decidendi of past cases"), but a narrower and more literal interpretation is sometimes employed."

42. H. HART, THE CONCEPT OF LAW 135 (1961):
> Rule skepticism has a serioius claim on our attention, but only as a theory of the function of rules in judicial decision. In this form, while conceding all the objections to which we have drawn attention, it amounts to the contention that, so far as the courts are concerned, there is nothing to circumscribe the area of open texture: so that it is false, if not senseless, to regard judges as themselves subject to rules or "bound" to decide cases as they do. They may act with sufficient predictable regularity and uniformity to enable others, over long periods, to live by courts' decisions as rules.

43. *Id.* (quoting Llewellyn).
> These facts are stressed to show that rules are important so far as they help you to predict what judges will do. That is all their importance except as pretty playthings. (Citation omitted.)

44. R. DWORKIN, TAKING RIGHTS SERIOUSLY 81–130 (1977).

rule itself, but merely evidence of the rule. The new judge, based on a better view of the rule, reaches a decision which represents better "evidence."[45] Thus, there was no paradox since rules and changes could coexist. The explanation, however, was premised on a strange notion of rules. One could never know the real rule and judicial decisions were always merely "evidence" of the rule. One acted "as if" rules really existed.[46]

This attempt to explain the paradox was not acceptable to many. Rather, it fueled support for the rule skeptics. Rule skepticism seemed a better manner of explaining the paradox: there were no rules at all and judges simply decided cases as they went along. To the skeptic, judicial decisions were not evidence of the theoretical but unknowable "rule" but evidence of what judges did about legal conflicts.[47]

To the legal realist, the real description of the process of change was that judges had no real obligation to follow rules at all. No one could force them to do so. If the obligation to follow rules was purely self imposed, then rules did not exist at all since a crucial element of such a concept, that a judge could be compelled to treat them as binding, did not exist.

Yet rule skepticism never fully replaced the old rule-based paradigm. Judges purported to rely on rules and claimed to be doing so despite the skeptics' assertion. Rule skeptics were dismissed as "disappointed absolutists" because they believed that no outside force or institution could compel a judge to follow rules.[48] Rule skeptics were criticized for failing to understand the proper social and linguistic use of the term "rules."[49] It was good enough to demonstrate that judges act "as if" rules exist.

45. Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2 (1960).

46. See L. FULLER, LEGAL FICTIONS 118 n.40 (1967) (discussing Vaihinger's philosophy of "as if") *See* note 13, *supra*.

47. Levy, "Realist Jurisprudence and Prospective Overruling," 109 U. PA. L. REV. 1, 2 (1960): "The judge merely finds the preexisting law; he then merely declares what he finds. A prior judicial decision is not the law itself but only evidence of what the law is."

48. H. HART THE CONCEPT OF LAW 133 (1961):

> The rule-sceptic is sometimes a disappointed absolutist; he has found that rules are not all they would be in a formalist's heaven, or in a world where men were like gods and could anticipate all possible combinations of fact, so that open-texture was not a necessary feature of rules.

49. *Id.* at 134:

> Yet, even if we suppose the denial that there are rules and the asseration that what are called rules are merely predictions of the decisions of courts to be limited in this way, there is one sense, at least, in which it is obviously false. For it cannot be doubted that at any rate in relation to some spheres of conduct in a modern state individuals do exhibit the whole range of conduct and attitudes which we have called the internal point of view. Laws function in their lives not merely as habits or the basis for predicting the decisions of courts or the actions of other officials, but as accepted legal standards of behavior.

After all, it was argued, other theoretical entities such as "protons" have no more of a claim to existence. Similarly, the only proof of the existence of such subatomic particles was the evidence they left behind—the tracks in cloud chambers.[50]

For the most part, the debate between the rule believers and the rule skeptics became a philosophical debate over what it means to assert that concepts like rules exist. Given the fact that no one could force the highest court to apply earlier rules,[51] the rule believers clung to the position that even if no one could force a judge to apply a rule, rules existed because the internal obligation to apply the rule was present in the judge.[52] The rule skeptics argued that if rules depended upon internal experience then we could no longer speak of them objectively as if they were fact. Rather they were "feelings" of some sort or another.[53] As in the question of whether or not humans have "free will" or arguments over the existence of God, there seemed to be no experiment that could be devised to prove the existence of rules.

Cases arose, however, where this theoretical dispute became focused

---

50. G. ZUKAV, THE DANCING WU-LI MASTERS 198 (1979).

> When an electron, for example, passes through a photographic plate it leaves a visible "track" behind it. This "track" under close examination, is actually a series of dots. Each dot is a grain of silver formed by the electron's interaction with atoms in the photographic plate. When we look at the track under a microscope, it looks something like this [illustration].
>
> Ordinarily, we would assume that one and the same electron, like a little baseball, went streaking through the photographic plat and left this trail of silver grains behind it. This is a mistake. Quantum mechanics tells us the same thing that Tantric Buddhists have been saying for a millenium. The connection between the dots (the "moving object") is a product of our minds and it is not really there. In rigorous quantum mechanical terms, the moving object—the particle with an independent existence—is an unprovable assumption.

51. Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), *Petition for cert. filed*, 54 U.S.L.W. 3279 (U.S. Sept. 10, 1985) (No. 8-406) is one of the few cases where it has been urged that the Constitution requires a state court to apply a rule established by a prior precedent. For a recent discussion of this case see Chang, *Missing the Boat: The Ninth Circuit, Hawaiian Water Rights and the Constitutionality of Retroactive Overruling*, 16 GOLDEN GATE 123 (1986) and Chang, *Unravelling Robinson v. Ariyoshi: Can Courts "Take" Property?*, 2 U. HAWAII L. REV. 57 (1979).

52. *See* note 49, *supra*.

53. This notion was expressed by the Scandinavian Legal Realists:

> The fight against traditional legal concepts was sharpened by Lundstedt and extended to other fundamental legal notions, such as duty, wrongfulness, guilt, liability and the like. Such concepts, Lundstedt maintained, were operative only in the "subjective conscience" and could have no objective meaning. To say, for instance, that the defendant acted wrongfully was merely a semantic circumlocution for the fact that he may be adjudged to pay damages. To contend that the defendant had violated a duty was a judgment of value and thus an expression of mere feeling. (Citations omitted.)

E. BODENHEIMER, JURISPRUDENCE 130 (1962).

54. Cases of this nature usually involve the decision of a state supreme court which overrules a prior state decision to the detriment of one of the parties. That party alleges that it had "vested rights" based on the earlier rule. To change the rule arguably constitutes a taking of its property in

as a practical problem.[54] Such cases did seem to constitute "experiments" which could prove or disprove the existence of rules. These cases involved the constitutionality of retroactive overruling. One prominent contemporary case is *Robinson v. Ariyoshi,* currently before the U.S. Supreme Court.[55]

The essence of this case is simple: earlier Hawaiian cases allegedly established a rule that private parties could own the water in streams.[56] In 1974 the Hawaii Supreme Court in *McBryde v. Robinson* overruled these precedents and held that the state was the owner of water.[57] Review was sought in the U.S. Supreme Court and review was denied.[58] The parties who lost their water rights, however, brought an original action in a federal district court, *Robinson v. Ariyoshi,* alleging that the *McBryde* decision was unconstitutional.[59] They argued that the Constitution re-

violation of the Constitution. See for example, Muhlker v. New York & Harlem Railroads, 197 U.S. 544 (1905), where the Supreme Court seemed to vindicate this theory. Muhlker, however, was overruled by later cases where the Supreme Court held that there were no property rights in judicial decisions. Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924); Dunbar v. City of New York, 251 U.S. 516 (1920); Patterson v. Colorado, 205 U.S. 454 (1907) and Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930). These cases are discussed in Chang, *Unravelling Robinson v. Ariyoshi: Can Courts "Take" Property?,* 2 U. HAWAII L. REV. 57, 68–71 (1979).

55. *See* note 51, *supra.* Other contemporary cases which involve this issue are National Audubon Society v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, *cert. denied,* 466 U.S. 977 (1983) (Mono Lake) and City of Berkeley v. Superior Court, 26 Cal.3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied,* 449 U.S. 840 (1980).

56. Territory v. Gay, 31 Hawaii 356 (1931) *cited by* the Ninth Circuit in Robinson v. Ariyoshi at 753 F.2d at 1473.

57. 54 Hawaii 174, 504 P.2d 1330 (1973), *cert. denied,* 417 U.S. 976, *cert. denied and appeal dimissed sub nom.,* McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974).

58. 417 U.S. 962 (1974).

59. The new action was assertedly original in that the sugar companies that had apparently lost vested rights by the change in the *McBryde* decision joined as plaintiffs in the federal action and sued state officials who would have been responsible for enforcing the *McBryde* decision. In actuality the new action was a continuation of the appeal in *McBryde* which should have ended when the U.S. Supreme Court denied review. It was an appeal and not an original action since the essence of the new action was the same as that of the *McBryde* proceeding: a determination of rights to the surface waters. For a more elaborate discussion *see* Chan*Unraveling Robinson v. Ariyoshi: Can Courts "Take" Property?,* 2 U. HAWAII L. REV. 57, 89–90 (1979):

> The fallacy which creates this circularity of reasoning (that a new original action can be brought in federal court) is the misconception that a decision creates a new claim. The correctness of a decision (and the constitutionality of a decision is only one aspect of its correctness) is not a new claim but only an aspect of the original claim, which is properly reviewed only on appeal.

See also Chang, *Rediscovering the Rooker Doctrine: Section 1983: Res Judicata and the Federal Courts,* 31 HASTINGS L. J. 1331, 1334 (1980):

> In determining the attributes of an "appeal," the threshold step is to compare the nature of an "appeal" with the characteristics of an "original" action. Essentially, an appeal is any claim that could not be brought as an original action because it is barred by a previous judgment. The action is barred because it is founded upon the same claim set forth in the original action. Since it cannot be refiled as an orginal action, the proper procedure for seeking relief is to take an appeal.

quired the Hawaii Supreme Court to apply the earlier rule.[60] In essence, they asserted that the obligation to apply rules was not merely a self-imposed obligation. The federal district court agreed, the Court of Appeals affirmed, and the case is now before the U.S. Supreme Court.[61]

Robinson v. Ariyoshi represents a constitutional attack on rule skepticism. The opinion of the federal courts implies that a state supreme court (which is final on issues of state property law) can be externally compelled to apply rules created by prior decisions. Only a person who believes in rules could coherently take such a position. Thus, *Robinson* presents the potential experiment that tests whether rules are "real" in the sense that they have the capability of being externally enforced.[62] If the Supreme Court affirms the lower federal decision, that decision supports a position that rules constitute obligations that are externally binding. If the Supreme Court reverses the lower federal courts, that decision can be interpreted as permitting the status quo to continue, a status quo which allows the current forms of rule skepticism to exist.

Thus, the *Robinson* case can be viewed as an experimental apparatus designed to verify either the rule affirmers' or rule skeptics' theses about rules. Framed in this manner, both sides might expect that its resolution may determine whether rules exist. In this manner, it is much like an experiment in physics, posed at the right moment in history, to verify either the wave or particle nature of light.

Actually, the wave/particle paradox is an illuminating example of how *Robinson* may not give us information about the real nature of law. As in the case of the wave/particle debate, the rule/rule skeptic debate may present, in Zen terminology, a false duality.[63] It might illustrate merely

60. The sugar companies argued that their rights allegedly vested on the basis of prior decisions. As such, any later decision which overruled the earlier decision constituted state action which took property without the payment of just compensation. *See* the district court opinion in *Robinson:* "The two basic grounds of relief urged by the plaintiffs are that they were deprived of their property and their water rights—property rights of great financial value—without either procedural or substantive due process in violation of the fourteenth amendment." 441 F. Supp. at 580.

61. *See* note 49, *supra.*

62. Note that *Robinson* involves the question of whether the Constitution requires state supreme courts to apply prior rules created by earlier decisions. The external institution which can enforce such consistency on the state supreme courts is the U.S. Supreme Court. *Robinson* would not decide whether the U.S. Supreme Court can be forced to uphold prior rules. Thus, rule-scepticism could still exist as to the decisions of the Supreme Court, despite a decision in *Robinson* affirming the notion of vested rights.

63. From Zen teaching it can be inferred that Zen would view the question of binding/non-binding as a distinction which is false in the sense that it is a mental construct:

> In summation, Zen criticizes our ordinary, unenlightened existence by refusing to accept a retrospective reconstruction of reality. Ordinary experience is retrospective in that we try to understand experience through previously learned categories. By allowing these categories to color our present experience and restrict our immediacy, we determine our everyday experience by distinctions such as student/teacher, man/woman, white/black, natural resources/organic food. Our common understanding of experience is therefore a reconstruction in that it im-

the inadequacy of the paradigm upon which the experiment is constructed.[64]

C. *Dualism and the Problem of Paradox*

The problem in *Robinson* is paradoxical in that both sides seem to be right. In *Robinson*, those parties who lost their water rights under the new decision seem to be correct when they assert that this was a taking without just compensation.[65] On the other hand, it is at least equally correct to assert that the highest court of a state may overrule earlier decisions as to state law.[66]

The uses of paradoxical koans in Zen teaching is to show that paradoxes are a product of our mind—a result of conceptual thinking.[67] For example,

---

poses categories that were not present in that experience when it originally occurred.

T. KASULIS, ZEN ACTION/ZEN PERSON 60 (1981).

64. For example, the wave/particle debate was based on an incorrect paradigm that asserted that light was either wave or a particle. Evidence that proved it was both forced the acceptance of a new paradigm, that of quantum theory.

> The wave-particle duality was (is) one of the thorniest problems in quantum mechanics. Physicists like to have tidy theories which explain everything, and if they are not able to do that, they like to have tidy theories about why they can't. The wave-particle duality is not a tidy situation. In fact, its untidiness has forced physicists into radical new ways of perceiving physical reality. These new perceptual frames are considerably more compatible with the nature of personal experience than were the old.
>
> For most of us, life is seldom black and white. The wave-particle duality marked the end of the "Either-Or" way of looking at the world. Physicists no longer could accept the proposition that light is either a particle or a wave because they had "proved" to themselves that it was both, depending on how they looked at it.

G. ZUKAV, THE DANCING WU-LI MASTERS 65 (1979).

65. See the discussion of the "Laymen's" view of a taking in Chang, *Unraveling Robinson v. Ariyoshi: Can Courts "Take" Property?* 2 U. HAWAII L. REV. 57, 63–67 (1979) and Chang, *Missing the Boat: The Ninth Circuit, Hawaiian Water Rights and the Constitutionality of Retroactive Overruling*, 16 Golden Gate 123 (1986).

66. In upholding the technique of prospective overruling the U.S. Supreme Court implicity reaffirmed the principle that state supreme courts were free to overrule earlier decisions, as long as procedural due process was respected:

> The common law as administered by her [the State of Montana] judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them.
>
> . . . . We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.

Great Northern Ry. v. Sunburst Co., 287 U.S. at 364 (1932).

As to the requirement that the process of overruling must be accompanied by adequate procedural due process see Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930).

67. The koan cannot be successfully mastered by conceptual thinking. The following passage describes the futility of attempting to answer the famous koan "what is the sound of one hand clapping?" by conceptualization.

> For hours, days and weeks the pupil meditates on his task. Sunk in profound concentration, he thinks the problem through in all possible directions. One thing

consider the well-known paradox: "What happens when the immovable object meets the irresistible force?"[68] Such a paradox can only exist in our minds.[69] There are no paradoxes in reality. In the real world the "joints" of the world fit perfectly.[70] The contradictions that seem to exist in paradoxes are mental constructions imposed on the "real world."[71]

For example, the wave/particle debate concerning the nature of light turned on the paradigm that light was viewed as either wave or particle. As to the world "out there" where light exists, light does not have a paradoxical nature.[72] What might be asserted, is that since experiments confirmed both characteristics, light has both a wave and particle nature. By compelling a choice between a wave nature or particle nature, it was the paradigm "of either, but not both" that created the paradox. That paradigm was initially established by the mental and linguistic distinctions imposed by the interpretive community, the scientists.

Zen teaches that the existence of a paradox signals internal inconsistencies of a paradigm. Moreover, false conflicts are created by false distinctions that are inherent in language.[73] Thus, the false conflicts between

---

> is clear; since only two hands striking together can produce a sound, the answer can only be: No one, with the best will in the world, can hear the sound of one hand. But the solution cannot be as simple as that. Would it not be more cautious to say: A single hand does not emit a sound that is perceptible to the human ear.

E. HERRIGEL, THE METHOD OF ZEN 40 (1974). Finding an "answer" the student reports to his master who sends him back to meditate.

> Once more he goes to the Master, who dismisses him again, this time with evident disapproval. But again the pupil fails to discover where he has gone wrong. . . . It is a matter of life and death! With passionate energy he throws himself on the problem, not with the discriminating intellect, but with the confined forces of body, soul, and spirit, so that it never lets him alone. . . .
>
> So now he sets about it a different way. It is no longer necessary to analyze the problem and think it out: he has done enough of that already. . . .
>
> In this state of spiritual tension, it may happen that the solution will suddenly come to him, quite unexpectedly. Or else a shout, a loud noise, or, in obstinate cases—as used to be done in earlier times—a painful blow will bring the tension to bursting point . . . He now sees clearly where everything was a tangle before; he can see the woods in spite of the trees . . . The moment is brief, like a flash of lightning, yet profoundly impressive. No wonder he cannot grasp it.

Id. at 42–43.

68. It would be impossible to have a real world in which there could be both an immovable object and an irresistable force. The conditions which would create the possibility of one would eliminate the possibility of the other. In other words, what we mean (analytically) by "immovable object" is an immovable object in a world where there are no irresistable forces.

69. Clearly, there are things which may appear to be paradoxical, such as the manner in which hummingbirds fly. What we mean, by "paradoxical," however, is something that one cannot explain within our conceptual framework. In real life, the hummingbird flies, whether one understands how it does so.

70. In other words, if we were to examine a chair in a room: the end of the foot of the chair constitutes the beginning of the floor. The end of the floor constitutes the beginning of the wall. The end of the wall constitutes the beginning of ceiling, and so forth. It is not the case that the chair and the floor occupy the same space.

71. See note 63, *supra*.

72. See note 64, *supra*.

73. See note 61, *supra*.

the wave version and the particle version of light stemmed from a universe which became semantically, but not naturally, split by particular uses of the word "particle" (meaning nonwave) and "wave" (meaning nonparticle).[74]

In the same vein, the paradox over rules is indicative of a false duality. As in the case of light, we have semantically chosen the word "binding" to describe some aspect of rules. Zen tells us that language is inherently incomplete and inadequate to describe reality. Thus, "binding" could not possibly describe "rule" completely. Like the terms "wave" or "particle," the term "binding" could have been chosen more out of convenience than accuracy. Some person who initially made the choice may have been intending to say that law was "bindinglike," rather than intending to render a complete and exclusive description. Whales, for example, were once called "fish." Subsequently, that description has proven false. Similarly, "binding" may be an initial marker that must be reevaluated later.[75]

If binding/nonbinding is a false duality, then it is not the case that rules are either binding or nonbinding. Rules are in a sense, both. In other words, the words "binding" and "nonbinding" (terms borrowed again from another context) are like the description of whales as "fish." They are good for some purposes, but are not intended to be a complete description of "rules."[76] Words such as "wave," "particle," or "rule" can be useful descriptions for the purpose of solving the normal problems posed within a paradigm. Ultimately, however, anomalistic cases like

74. For a brief discussion of the history of the wave/particle debate and how it led to quantum theory, *see* G. ZUKAV, THE DANCING WU-LI MASTERS 48–88 (1979).

75. There are similarites with this assertion and the causal theory of names proposed by Kripke and others.

> Kripke, Donnellan, Putnam and others do have a general answer to the question of how reference is determined but do not have a fully worked out theory . . . Reference is determined in many cases by causal chains. For example, one way in which a name might be connected to a referent is the following: a name is given to a person in a "baptism" or an initial use with the referent present. It is then handed on from speaker to speaker. As long as we have the right sort of casual chain, that is, as long as the later speakers in the chain intend to use the name with the same reference as the earlier, reference to the person "baptized" is accomplished by use of the name . . . I may not know anything more about Abdul Jabbar than he is a great basketball player from California, but I can still refer to him because there is a casual chain leading back from my use to Jabbar himself.

NAMING, NECESSITY AND NATURAL KINDS 32 (S. Schwartz ed., 1977).

76. Zen teaches that language cannot adequately describe reality. *See* T. KASULIS, ZEN ACTION/ZEN PERSON 55 (1981). The causal theory of names, as described in footnote 73, has been extended to natural kind words such as "lemon" or "tiger." The causal theorists distinguish between "fixing a reference" and giving a definition. When using words to fix a reference, as in using "fish" or "whales," we may not be intending to describe the essential definition of the term but merely using the term to help the listener "pick it out."

> When we fix the reference of a term, we give a description that helps the hearer pick out what we have in mind. Thus, for example, when teaching someone the meaning of color words, I may say: "By green we mean the color of that car over there." The description "the color of that car over there" is meant to fix the

Robinson illustrate the contradictions in the use of such terms.[77] In Zen theory the use of original markers, like "fish," for whales or "binding" for rules, inevitably show the inadequacy of a language-based paradigm in describing the world "out there."[78]

Thus, as in the case of the wave/particle debate, the binding and nonbinding qualities of rules may be different aspects of the same phenomena. Zen teaches that language creates false distinctions.[79] False distinctions lead to false theoretical frameworks. Such false frameworks are exposed in the anomalistic case like *Robinson*. When confronted by an anomaly the "scientists" can attempt to force the anomaly into the mold of the paradigm. Such a task, however, often leads to awkward compromises which are not satisfactory to the paradigm's criteria for neat and simple solutions. At the price of compromise, the system can be forced to generate a "result" although it is not an elegant or satisfactory one.[80]

The second possibility is that the anomaly may create a paradigm shift.

> reference of "green" but not to give its meaning in the sense of supplying a synonym for "green" . . . whatever color that car over there happens to be. If I had meant this, then if someone painted the car a different color, say red, then "green" would refer to red, since that happened, then, to be the color of the car. When I fix the reference of a term, I give a description that is to be taken as giving the referent of the term, not the meaning in the traditional sense.

NAMING, NECESSITY AND NATURAL KINDS 29 (S. Schwartz ed. 1977).

Thus, the causal theorists and Zen philosophers seem to be saying something very similar: words, like "fish," "green," or "rule," can be used to "fix a reference" or serve as a marker, but should not be taken as giving the meaning or structure of an object in a traditional sense.

Another factor which bears upon this analysis is whether words like "rule" should be considered separately from words like "lemon" or "tiger." The latter have been called "natural kind" terms and the former "artifactual." "Artifactual" terms refer to man-made items and concepts. Thus, there is a different kind of difference between lions and tigers and between stereo preamplifiers and stereo tuners. Linguistically, there should be a difference as well. *See* note 94, *infra*.

77. The contradiction in *Robinson* between the notion of vested rights and the absolute power of courts to overrule earlier precedents indicates that our present definition or understanding of "rules" and what it means for them to be binding does not fit with our experience. Experience seems to indicate that the notion of vested rights (at least vested to some degree) and the freedom of state supreme courts to overrule earlier precedents are both absolute.

This situation is analogous to the experience that light was both wave and particle, a possibility that was not included in the manner in which light was defined at the time: as either wave or particle.

78. One Zen saying which illustrates Zen's view of language is the phrase "do not mistake the finger pointing at the moon for the moon."

79. *See* note 61, *supra*.

80. For example, the *Robinson* case can be decided, one way or the other. In the same manner, physicists could have decided that light was particle-like and modified their theories to explain its wave-like phenomena. In the case of physics the elegance and simplicity of the paradigm would have been undermined by the forced incorporation of awkward explanations. In the same manner Newton's paradigm was modified in such a manner to explain the results which were later better understood under relativity.

In the case of the *Robinson* decision, a careful analysis of the Ninth Circuit's decision in *Robinson* shows that the Court avoided the important questions. This author has proposed grounds for resolving the case within the normal problem solving processes of the legal paradigm.

Other parties would strongly disagree with the author's position. This disagreement indicates that we do not have a clear theory of rules. This article asserts that this failure is a paradox of the legal paradigm.

That possibility exists with *Robinson*—it has the potential for delineating a new paradigm about rules and law. The anomalous case like *Robinson* can serve as a koan. As in the case of real koans, to understand the case fully, in a rational as well as non-rational manner, one must be willing to relinquish the old paradigm for the possibility of a different one. From such a new perspective the Blackstonian and rule skeptic explanations are seen as "mu"—not right, not wrong. The human experience associated with "rules" appears, albeit for an instant, in the simple reality that it truly is.[81]

The experiential state of transcending the intellectual structure around *Robinson* is conveyed in the Zen assertion that the truth is the experience. Within the new paradigm the truth about *Robinson,* and thus about "rules," emerges in a single wholeness. As Zen predicts, that wholeness cannot be described in language. *Robinson* cannot be described as a case involving res judicata, sovereign immunity or the just compensation clause. Its truth cannot be described, but it can be grasped.[82]

A process focusing on experiential enlightenment in law is not as absurd

81. If one treats *Robinson* as a koan and meditates upon it for a length of time, one realizes that it revolves around the concept of change. That is, while law must admittedly change to meet the needs of society, the plaintiffs in *Robinson* are claiming that too much change, a change from private ownership of surface water rights to state ownership, is unconstitutional. Thus, to understand *Robinson,* one must contemplate "change." One must be ready to answer the question, "when a rule has changed, is it the rule or the society which has changed?" To answer that, one must contemplate an even more basic paradox: for there to be "change" there must be a reference or frame which is not changing. Yet, what in this universe is not perpetually in a state of change? If everything is changing (no framework of non-change) there can be neither change nor non-change. This is not to say that "everything is changing"—this is to say that change and non-change are mental constructs that have been imposed on the outside world. The world just "is." For there to be "change" one must mentally "hold" part of the world still, that is, impose our concept on the outside world.

An analogous example is that of the "no-win" situation. We usually associate being in a no-win situation with "losing." If one were in a "no-win" situation, however, one could not "lose" because if one cannot "win," one cannot "lose." Thus, if one were in a "no-win" situation, winning and losing are both "mu" not true and not false.

Similarly, for there to be change, there must be a framework of no-change. Since one does not exist in reality (non-changing frame) the other cannot exist in reality. Thus, change and even time (a concept based on change) are "mu."

The point of this article is that there are two ways of approaching the argument made in this footnote and in this article: intellectually and experientially. It is one thing to understand the arguments made about false dualism on an intellectual level. It is a completely different matter to experience these assertions. If one experiences that there is no "change or non-change" (the Koan as posed by *Robinson*), one should "see" *Robinson*, clearly, if only for an instant. This experience is the paradigmatic shift that is discussed in this article. On the other hand, if one intellectually understands the point made above—there is no paradigm shift, then one is still operating in the paradigm of conceptualization.

82. This Zen story seems the closest to the problem posed in *Robinson:*

> 29. Not the Wind, Not the Flag
>
> Two monks were arguing about a flag. One said: "The flag is moving."
>
> The other said: "The wind is moving."
>
> The sixth patriarch happened to be passing by. He told them: "Not the wind, not the flag; mind is moving."
>
> Mumon's comment: The sixth patriarch said: "The wind is not moving, the flag

as it sounds. Indeed, much of our jurisprudence lies in the belief that the life of the law is some sort of experience, not logic.[83] Judges often refer to experience when justifying their results. Moreover, the philosophical debate over the meaning of terms like "rule" or "justice" focuses on how to use such words correctly. Knowledge of correct social use can only be possible by reference to experience.[84]

Yet, despite the parallels, Zen experiential reality is somewhat different. It offers the possibility of grasping the whole in a single stroke—yet it denies the ability to describe that experience. This incapability of expression makes the experience seem of limited value. Paradigms that do not offer a normal process of problem solving seem to be merely aesthetic experiences and inappropriate in an arena as pragmatically selfconscious as law. Yet, the experiential leap accompanied by "seeing" *Robinson* directly can have profoundly empowering consequences.

D. After the Quantum Jump: The New Paradigm

Anyone who successfully makes the paradigm shift posed by a koan or an anomalistic case like *Robinson,* begins to "live," in the words of Thomas Kuhn, in a "new world."[85] Everything in the world seems to be the same, but the new post-paradigm scientist holds all the old phenomena

---

is not moving, mind is moving." What did he mean? If you understand this intimately, you will see the two monks there trying to buy iron and gaining gold. The sixth partiarch could not bear to see those two dull heads, so he made such a bargain.

Wind, flag, mind moves,
The same understanding.
When the mouth opens
All are wrong.

ZEN FLESH/ZEN BONES 114 (P. Reps ed. 1930).

83. O. HOLMES, THE COMMON LAW 1 (1930): "The life of the law has not been logic: it has been experience."

84. *See* Snare, *The Concept of Property,* 9 AM. PHIL. Q 200, 201 (1972) (expressing the view that to know the meaning of a word is to know how to use it in its proper social context):

> We began by discussing the concept of property and now we seem to be discussing the meaning of certain sentences in English. Have we changed the subject? Not really. It is, of course, possible for a person who doesn't speak English to have the concept of property. But we shall never know whether what he is talking about is property rather than something else such as "being to the left of" until we discover whether his sentences can be adequately translated by anything like sentences (a) through (e) in English. And thus we inevitably end up asking, "Just what do sentences (a) through (e) mean?"

85. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 111 (2d ed. 1970):

> Examining the record of past research from the vantage of contemporary historiography, the historian of science may be tempted to exclaim that when paradigms change, the world itself changes with them. . . . paradigm changes cause scientists to see the world of their research-engagement differently. In so far as their only recourse to that world is through what they see and do, we may want to say that after a revolution scientists are responding to a different world.

in a different context. These new arrivals have profound problems in explaining the new paradigm to those who live in other paradigms. Indeed, the inhabitants of the new paradigm see a different world and speak a different language. For example, Zen initiates who arrive in the new paradigm share the paradigm's fundamental distrust of language and can only leave us with bare linguistic traces of what that world is like.[86]

One might wonder about persons who make the paradigmatic leap by "grasping directly" *Robinson*. Is it possible to describe how their new world might appear? Since this shift is Zenlike and therefore cannot be expressed, the same difficulties associated with a description of Zen experience appear. In parablelike fashion we might imagine how one of these persons might comment, in the Zen tradition, on the story that is *Robinson*.[87] For her, the question would not be what is the law?—but where is the law?

E. Where is the Law?

This seems to be an odd question.[88] Generally we believe that law is "out there" somewhere—in the statutes, in the case reporters, in Lexis, or at least in the official actions of judges and sheriffs.[89] But a postparadigmatic person tends to see these entities as "evidence" of the law—not really the law, in much the same way that tracks in a cloud chamber are evidence of the "theoretical entities" called "protons" and not the

---

86. What has happened? The pupil has not found any new interpretation, any new thought. Rather, in a flash of enlightenment, he has come to the solution as if a new, spiritual eye had been let into his head. The things he sees are no different from before, he just sees them differently. His vision—as well as perhaps he himself—has changed.

Hence there is no direct way from the ordinary mode of seeing and apprehending to this new vision conditioned by satori. It is more like jumping into a new dimension. Accordingly this new vision cannot be compared to anything and is, strictly speaking, indescribable.

E. HERRIGEL, THE METHOD OF ZEN 44–45 (1974).

87. See note 82, *supra*.

88. This question is also posed by physics. *See* P. Davis, *Reality exists outside us?* in THE ENCYCLOPEDIA OF DELUSIONS 158 (Duncan and Weston-Smith eds., 1979):

> . . . it would appear that the concept of an independent reality "out there" has been discredited. . . . The central conclusion is that if reality has any meaning at all, it is only in the context of the observer and the observation itself. There is a kind of continuous creation—a new world every moment—brought into being by our own conscious awareness. Or so it seems. In a world full of uncertainty, who can be sure.

89. The legal positivists considered the law to be in the statutes, the rules themselves. *See* H. HART, THE CONCEPT OF LAW (1961). John Chipman Gray argued that statutes became law only when interpreted by judges. J. GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1921). In Civil Law countries legislation and custom are the sources of law. E. BODENHEIMER, JURISPRUDENCE 324 (1962). To the legal realists, the actions of judges, sheriffs and other officials was the law. K. LLEWELLYN, THE BRAMBLE BUSH 12 (1930).

entities themselves.[90] There may be law in an "external" sense that drifts through society like an invisible ether, a concept around which all things associated with law can be tied together coherently.[91] On the other hand, however, our postparadigm person is likely to experience law as internal.[92]

---

90. *See* note 48, *supra*. Professor Lyons, in discussing scientific beliefs, as opposed to moral beliefs makes the argument that moral beliefs are not any less true or false than scientific beliefs. While moral beliefs allegedly "prescribe and evaluate," assertions in science extrapolate and evaluate as well.

> The feature of scientific beliefs that is usually taken to be relevant is their "testability": they make a reasonable claim to objectivity because they are capable of being tested against experience. This makes scientific judgments capable of being true or false. Moral judgments are sometimes said to be different: . . . They do not state what is supposed to be the case but go beyond the facts. They are not testable by observation or experience.
>
> The argument assumes, however, too simple a view of both scientific and moral judgment. Scientific claims of any importance typically go beyond observation in significant ways . . . Scientific laws necessarily exceed actual observations—a fact about them that explains their utility as well as their theoretical fascination. . . .
>
> The same is true of claims about so-called "theoretical entities," such as subatomic particles and DNA molecues. The very existence of such entities, which play a major role in natural science is not directly or conclusively established by observation. Proofs of their existence and their properties rely on complex techniques, such as particle acceleration and X-ray diffraction, and extrapolate well beyond observable facts.

D. LYONS, ETHICS AND THE RULE OF LAW 13 (1984).

91. If the "connection between the dots" (*see* note 48, *supra*) is supplied by the observer, then the subatomic particle is "created" by the observer. In a similar way, if one only experiences law in the form of its "evidence," e.g. the cases, the courtrooms, the legal education seminars, then the "law" is something created by the observer. In other words, law becomes the mental economy which ties together all the evidence associated with law. Consider the following thought experiment: a highly intelligent extraterrestrial being is sent from another part of the universe to study what is "law" on the planet earth. He collects all the possible evidence of "law": videotapes of courtroom proceedings, books, pictures of law schools and recordings of judges and lawyers making statements such as "This is what the law requires" or "To do X would be against the law." When he reports back to his superiors he will say that law is a concept, that is, an internal notion that unifies the evidence that he has collected about law. Indeed, this concept is so pervasive that one would misunderstand much of human conduct without this concept. For example, one would fail to understand that people drive on the right side of the road because of law and not habit or custom. On the other hand, some kinds of uniform behavior, like taking one's hat off in church, are based on habit or tradition. If our visitor simply observed human conduct—he would not understand the distinction between habit and law. However, if he grasps the meaning of these sentences, he will report back that "law" is an internal concept that is used to explain, justify or refer to certain conduct or results.

For the use of a similar thought experiment in the discussion of the term "property," *see* Snare, *The Concept of Property*, 9 AM. PHIL. Q. 200 (1972).

92. The person who makes the experiential paradigmatic shift suggested in 81, *supra*, is likely to experience the world of law as constructed from numerous fictions. Not only would entities such as a "corporation" appear to be a fiction (mental construct) but notions such as "jurisdiction" and even "law" would have the same quality. (The Scandinavian legal realists also engaged in an attempt to purge law of fictions. *See* E. BODENHEIMER, JURISPRUDENCE 130 (1962)). In such a way, our post-shift observer will engage in a process of progressive deconstruction until law is essentially the set of his own human experiences associated with the concept of law. For example, those experiences would be, "the smell of coffee while sitting in the library at Boalt Hall while studying for a property exam," or "the nervous feeling just before one's first trial." In other words, in the post-shift experience, the "evidence" becomes the reality. This evidence consists of experience. Even physical

The paradigm shift associated with a sudden awareness of a false duality is often accompanied by an experience that reality is internally generated.[93] Take as an example the wave/particle debate over the nature of light. Some scientists were convinced that light was wavelike and their experiments proved them right. Some scientists believed that light was a particle and their experiments produced the proper result. Repetition of each set of experiments bore out the same result. Perform a wave experiment—get a wave result. Perform a particle experiment—get a particle result.[94] Now, if both camps believe that light is either wave or particle and believe that their experiments are demonstrating attributes about the real world, then, it is the choice of the experiment that determines "reality." In other words, it's the scientist's choice which determines reality and reality becomes something created by the scientist.[95]

---

objects are deconstructed into experiences—the law book becomes "the experience of reading a law book with the attendant experience that this book purports to have the authority of law—that is to decide real cases."

The deconstruction of law into experience has been the goal of some authors in showing law as it "really is." *See* C. REICH, THE SORCERER OF BOLINAS REEF (1976) (experiential account of one person's experience in law), S. TUROW, ONE L. (1977) (the law school experience). For others, focusing on experience has been the central theme in developing a humanistic approach to law and legal education. *See,* DWORKIN, HIMMELSTEIN AND LESNICK, BECOMING A LAWYER (1981). For an example of experiential writing *see also* M. HERR, DISPATCHES (1968).

93. The wave/particle paradox as to the nature of light paved the way for quantum theory. One of the plausible interpretations of quantum mechanics is that there is no possible description of reality. This idea is embodied in the Copenhagen Interpretation of quantum mechanics.

> The extraordinary importance of the Copenhagen Interpretation lies in the fact that for first time, scientists attempting to formulate a consistent physics were forced by their own findings to acknowledge that a complete understanding of reality lies beyond the capabilities of rational thought. . . .
>
> The mind is such that it deals only with ideas. It is not possible for the mind to relate to anything other than ideas. Therefore, it is not correct to think that the mind actually can ponder reality. All that the mind can ponder is its ideas about reality. (Whether or not that is the way reality actually is, is a metaphysical issue.) Therefore, whether or not something is true is not a matter of how closely it corresponds to the absolute truth, but of how consistent it is with our experience.

G. ZUKAV, THE DANCING WU-LI MASTERS 38 (1979).

94. For a description of the history of the wave/particle debate *see* G. ZUKAV, THE DANCING WU-LI MASTERS 48–88 (1979).

95. Quantum theory and the Copenhagen Interpretation led to the view that the notion of an outside reality was a fallacy:

> According to the Newtonian mechanistic view, the experimenter is undeniably part of the world, but his whims cannot affect which world, for there is only one, and the observer is simply there for the ride. In contrast, the quantum observer seems almost to create his own world with him by choice. There are many potential worlds, existing with various probabilities. The experimenter has no actual control over the probabilities themselves (he cannot load the dice) but he can decide what are the alternatives (choose the game).
>
> The purpose of this article is to refute the fallacy that reality exists outside us. So far I appear to have shown that the observer plays an essential role in determining what the reality might be, but once the observation is made, then the reality exists nonetheless. I shall now argue that even this position is untenable.

P. Davis, *Reality exists outside of us?* in THE ENCYCLOPEDIA OF DELUSIONS 156 (Duncan and Weston-Smith eds., 1979).

To resolve this impasse, the two camps approach a third party to design an experiment that would prove once and for all whether light has a wave or particle nature. The neutral scientist designs such an experiment. Both sides seem pleased. She runs the experiment and the experiment indicates that light is of a particle nature. This makes the particle camp happy. What has she proven? She has proven, (again), that reality is subjective, and a product of the scientist's will imposed on the world.

If the wave/particle duality is a false distinction—and previous experiments bear out that fact—a new experiment will fall into the same trap. The neutral scientist thinks she is being neutral when she creates a new experiment. But her choice of experimental apparatus predetermines the result. Thus, as long as she and both camps cling to the false distinction, then the "reality" produced by an experimental result is not descriptive about the world "out there." It merely reflects a choice made by a community of observers. It would be analogous to a debate over whether panda bears are actually bears or raccoons. Giant pandas, however, are really a subgroup of the bear family. Experiments or observations which "prove" that pandas are raccoons do not describe reality but rather extend the consequences of choosing a false duality.[96]

The extension to law is not obvious. From a Zen perspective, all of the distinctions in law would be considered "false" dualities in the sense that they are "mu"—not true, not false.[97] The paradigm of law requires

96. Giant pandas are probably members of the bear family. Lesser pandas are members of the procyonids—of which raccoons are a member.

> The question is whether giant pandas should belong to either of the families (bear or raccoon) or if they should have a family of their own. . .
>
> Giant pandas, according [to] Stephen J. O'Brien, a research associate at the zoo, have been grouped with bears since their discovery by the Western world in the 1860s.

However, they have un-bear like characteristics. Giant pandas are vegetarians, consuming mostly bamboo. Their forequarters are huge, rear quarters relatively small. In bears, although some have huge forequarters, rears are generally not as reduced.

> "Finally, the giant panda does not behave like a bear," O'Brien and colleagues wrote in the scientific journal NATURE. "Most bears hibernate, the giant panda does not; bears roar whereas the giant panda bleats."
>
> The raccoon faction has argued that because of its skull and tooth structure, markings and other characteristics, the giant panda belongs in the same family from which raccoons and the lesser or red panda, which really does look like a raccoon, diverged millions of years ago.

Genetic testing showed that pandas were more similar to bears than to raccoons. *Lovable pandas are un-bearable mistake*, The Sunday Star Bulletin and Advertiser (Honolulu), December 1, 1985, p. E-10, c. 1.

97. *See* note 61, *supra*. The artifactual distinctions in law (distinction between a corporation and a partnership) are clearly the product of conceptual thinking. As between "artifactual" and "natural kind" terms, it is clearer that the distinctions in "artifactual" terms are man-made.

> "Artifactual terms" are terms such as "table," or "television set." These refer to objects whose nature we know completely because they are invented and designed by us; we can give sets of necessary and sufficient conditions for belonging to the extension of such a term, according to Wiggins.

H. Putnam, *Reference and Truth*, in H. PUTNAM, REALISM AND REASON: PHILOSOPHICAL PAPERS Vol. 3, 74-75 (1983).

one to cling to such false dualities as if they were truths in order to maintain the normal problem solving processes of the paradigm.[98] One then creates legal tests. When the test is applied in conjunction with the false distinction our legal scientists act as if the test experimentally verifies "something out there." But the situation is no different from the wave/particle experiment. If one is dealing with a false dualism, whether in law or in science, the experimental results do not necessarily describe the outside world.[99]

Thus, as long as one clings to the "false" distinctions,[100] the law is "out there." Once we see the distinctions in law as deliberately chosen and ultimately "mu" (neither true nor false), then law is an internal experience. The law is "in here."[101]

---

98. We can find sensible answers to questions such as "May a corporation assert the fifth amendment as a defense?" because in contructing the legal paradigm over time we have created the rules and conditions in which such statements make sense. For example, one of these conditions is that a corporation is a "person." In this sense the legal paradigm is a complex and evolving language. Yet, like other languages, such as mathematics, there are instances or "seams" where contradictions emerge. For mathematics, Godel's theorem was such a "seam" for it proved the existence of formally undecidable propositions in any formal system of arithmetic (first incompleteness theorem). *See* A. FLEW, A DICTIONARY OF PHILOSOPHY 123 (1979) (discussing Godel's theorem).

It should be noted that the author believes that the legal paradigm serves a very useful purpose, like Newtonian physics, for answering certain varieties of questions. Indeed, the author has devoted himself to the "normal science" of the law in the past. See Chang, *Meaning, Reference and Reification in the Definition of a Security,* 19 U.C.D. L. REV. 403 (1986) and Chang, *Rediscovering the* Rooker *Doctrine: Section 1983: Res Judicata and the Federal Courts,* 31 HASTINGS L. J. 1337 (1980). The scholarship of "normal science" serves a very valid and important purpose in answering the ordinary problems posed within the paradigm. The term "normal science" is from T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10–42 (1962). *See* note 107, *infra.*

99. For example, the appropriate legal test might provide a means of distinguishing between a debtor-creditor relationship and a relationship between partners. The distinction between debtor-creditor and partnership is artifactual (*see* note 94, *supra*) and we have the power to define the necessary and sufficient conditions which make a relationship debtor-creditor or one of partnership. Hence, if someone asserts that "A and B have a debtor/creditor relationship" as a true statement, then, what we mean by "true" is that it is correct within the rules and conditions that we have created. Such a statement does not have any truth in a correspondence sense with the world "outside." We may choose to act "as if" such statements correspond to an outside reality because such "acting" may make it easier to play the game and understand the paradigm. But it is not necessary to act "as if" such statements refer to an outside reality for such statements to be operative. This article suggests that as long as there exists a choice, there is an instrumental value in acting "as if" such statements correspond to an "inside world." In other words, the individual has greater "power" if she stops pretending that such statements are necessarily true, but only true within a chosen paradigm. Thus, it is the choice of the paradigm (and its artifactual distinctions) which makes this statement true and therefore "real," rather than material conditions in the outside world.

The term "false" as used in the text is used in the sense of "mu"—not true, not false.

100. Again, "false" is used in the sense of "mu," not true/not false.

101. Thus, the law is what we, as individuals choose it to be. If we adhere to certain artifactual distinctions or legal fictions as if they were truths about an outside world, then, we force ourselves to act "as if" an external reality commanded certain results.

On the other hand, if law is seen as both a case of individuals and communities of people "buying in" to an intellectual system, then, it is our individual choice to recreate law that gives "law" its very existence.

If one refuses to recreate particular legal distinctions, the "law" as to those particular distinctions will not exist for that individual. The consequences of the law may still exist, of course. Moreover, others may claim the existence of the law. The critical ingredient, however, which gives law much

The "out there" paradigm of law reifies a Hobbesian view of the world that views men as bad and in need of social corralling.[102] When one realizes, however, that one has control over what was formerly an "outside" reality—one becomes aware of one's own personal power.[103] By refusing to adhere to false distinctions individuals can shape their own reality.

Undoubtedly, political systems have sought to impose false consciousness and false distinctions on the populace.[104] Such efforts succeed so long as the people believe the distinctions are real and constitute descriptions of an external reality. On the other hand, it is a different case where there is the imposition of a false reality on people who are aware of such false distinctions. As history shows, the use of power in an oppressive manner

---

of its legitimacy, namely that it represents some truth about an "outside world," will not be present.

In other words, within the present legal paradigm, the power behind the statement that "A and B are partners and not debtor/creditor" is the belief that this statement represents a truth about the outside world, and does not simply constitute convention or agreement. In a similar vein, the power behind the statement "A is guilty of murder" is that it represents a truth or approximation of truth about the outside world, not simply an agreement about the proper use of the word "guilty." Once we stop acting "as if" these statements are truths about an external reality, we realize that it is our personal choice to "buy into" law which creates the manner in which it exists.

There has been much discussion in physics concerning the similar implication in quantum theory that the observer creates the reality. *See generally,* G. ZUKAV, THE DANCING WU-LI MASTERS 67–114 (1979) (discussion of various interpretations of quantum theory) and P. Davis, *Reality exists outside us?* THE ENCYCLOPEDIA OF DELUSIONS 143 (Duncan and Weston-Smith eds., 1979).

102. The concept of the "rule of law, not men" is an important force for social order. It is a powerful doctrine for coercing conformance because it implies that laws are like natural or scientific laws and must be followed as a matter of natural order. Moreover, the movement in history towards the "rule of law" and away from the rule of men is indicative of a committment that it is an objective, externally discernable law which determines the results in cases and not the whims of judges. The concept is external and thus we think of law (and the authorities) as "out there" waiting to be applied if the law is broken. This view is Hobbesian in the sense that it views law as an important force for controlling behavior.

103. If one experiences the paradigmatic shift that law is internal, it is not necessarily so that one's behavior will change dramatically. After such an experience it is not likely that people would not obey the law or even act as if law did not exist. The reader might have expected the paradigmatic change to produce people completely out of touch with reality, like those who sincerely believe that they are superman and are about to prove it by jumping off a building.

The paradigm shift will not produce people who act as if there is no law, but, such persons will "hold" law in a completely different manner. The best way to describe this is by analogy to those who have achieved enlightenment in Zen.

> We must bear in mind that the master's original face—his primordial person, his true self—is not schizophrenically detached from the historical situation. The Zen Master does not speak in tongues, he speaks Japanese. He does not cease to eat—he eats the same food as the other monks. He does not transcend the world—he is firmly implanted in it. The Zen Master does not undo his conditionality; rather he understands its nature and limits. As already noted, to an outside observer a Zen Master seems to be working within many of the same categorties as unenlightened people. He knows how to chop wood efficiently, how to plant a garden, how to prepare food. A common expression is the enlightened person appears "extraordinarily ordinary."

T. KASULIS, ZEN ACTION/ZEN PERSON 134 (1981).

104. An example of the political use of false distinctions was the Nazi philosophy during World War II of a supreme Aryan race and the necessity of exterminating the Jews.

can never ultimately succeed where there is a failure to define for the oppressed a reality that justifies their own self-oppression.[105]

Thus, the *Robinson* type of paradigm shift has an impact on the law student in vindicating her power to define "reality." This realization can be revolutionary. Or, it may manifest itself simply as the refusal to accept the law as fixed by external forces.[106] The student in the postparadigmatic period sees that the legal system is a product of the distinctions that she and her "interpretive community" chooses.[107] Moreover, the awareness of a new paradigm allows one to see how false distinctions can be used in a repressive manner. Primarily, false distinctions generate the experience that one is essentially powerless in the face of a fixed external reality.[108] Such repression, however, is as unjustifiable as a direct and materialistic repression. Communities have instinctively organized around false distinctions because they fear the potential anarchy if each individual realized her potential personal power over reality. Such a fear is self-reinforcing because it is the very existence of false distinctions themselves which has created the characteristics that communities come to fear in people.[109]

III. CONCLUSION

Paradigm shifts represent powerful ideological tools. Koans or cases such as *Robinson v. Ariyoshi*, have the potential for delineating the paradigm and effectuating major or minor paradigm shifts. The potential good of a paradigmatic shift lies in its ability to re-arm people with the personal power that they have lost by unconscious acceptance of an objective reality that fails to empower people.

There are, however, practical and theoretical difficulties in effectuating paradigmatic shifts. Primarily, there is the continued resistance of the "scientists" of the old paradigms. Secondly, we are basically unwilling

105. The Chinese Communist revolution is an important example of the role of ideology in revolution.

106. The post-shift student may simply be more aware of the importance of creating new theories and new rights to win cases instead of relying on existing precedent or the law "out there." Another alternative is that the post-shift student may appear to be extraordinarily ordinary. *See* note 103, *supra*.

107. The phrase is used by Professor Fiss in Fiss, *Objectivity and Interpretation*, 34 STAN L. REV. 739, 746 (1982).

108. *See* Edward Greer, *Antonio Gramsci and Legal Hegemony*, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 304 (D. Kairys ed., 1982). Gramsci believed that by "hegemony" a ruling class convinces the ruled to consent to their ongoing exploitation and oppression.

109. False distinctions create false experiences. Take for example the distinction between good and evil. From a Zen perspective this is clearly an example of a false distinction. If such a belief is imbedded in people they will actually experience the world in terms of good and evil. This community experience of evil will lead to actions which verify and reinforce these experiences. For example, mentally retarded people may have been deemed evil and incarcerated or "witches" burned at the stake. Later evidence may show that there were no witches at all and mental retardation is a genetic and not moral characteristic.

to take personal responsibility for our own reality. It is easier to understand the world from the perspective of a victim of the circumstances than to accept that one has consented to such circumstances. What we often fail to see, however, is that with responsibility would also come the power to change reality. We do not accept this as possible because we have no experience of such power. The thought experiment proposed in this article with the *Robinson* case is a means of experiencing that power.

Law schools are often unsupportive and unsympathetic environments to attempt such a transformation.[110] Such institutions are creatures of a particular paradigm. Hence, symposiums such as this deserve much support. Experiments in theory, such as these, mark the beginning of new paradigms and new worlds.

This article does not assert that Zen presents a more truthful paradigm about the world. Rather, it argues that moving beyond the present paradigm of law as being "out there" is an instrumental means of empowering people. The present legal paradigm, presented in the form of "mu" distinctions allows people to become the instruments of "false" distinctions. This article argues that it is possible to choose between the two paradigms. As such, we should explore choosing the paradigm that has the capability of empowering individuals in a manner consistent with the best humanitarian values.

Moreover, one must not think that this article is urging a kind of individual anarchy created by having each individual choose her own kind of reality. Zen monastic communities are not anarchies. The paradigm shift accompanied by overcoming the world of the conceptual does not lead to anarchy and nihilism. Rather, the experience of satori in Zen would lead one to conclude that a postshift person would see law in its conceptual nature clearly. In such a state there is a potential for self-actualization and the opportunity to experience power over one's experience in life. Law, then, would not be the force that dictates results. Rather, law would simply be the frame or context, like an empty baseball field, in which one's chosen experiences were about to take place.

110. Law schools are committed to the "normal science" of law and thus are uninterested in challenges to the ongoing paradigm. *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 24 (1962):

> Mopping-up operations are what engage most scientists throughout their careers. They constitute what I am here calling normal science. Closely examined, whether historically or in the contemporary laboratory, that enterprise seems an attempt to force nature into the preformed and relatively inflexible box that the paradigm supplies. No part of the aim of normal science is to call forth new sorts of phenomena; indeed those that will not fit the box are often not seen at all. Nor do scientists normally aim to invent new theories, and they are often intolerant of those invented by others. Instead, normal-scientific research is directed to the articulation of those phenomena and theories that the paradigm already supplies. (Citations omitted.)