Law, Language and Values

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Readings for first class meeting:
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Introduction to Law, Language and Values

1. Central learning goals

The University of Southern California Law School’s first-year course, Law, Language and Values (LL&V), pursues three central learning goals.

1. Students learn how to identify issues that arise in statutory interpretation cases, distinguish issues whose answers are relatively straightforward (“easy cases”) from issues on which reasonable minds can differ (“hard cases”), and make arguments responsive to the sources of difficulty in hard cases. These skills are foundational to study of courses—such as Criminal Law, Business Organization, and Environmental Law—that you will take next semester or in subsequent years, because these courses feature arguments about the meaning of state and federal statutes. Training in statutory interpretation will also be very helpful this semester in Civil Procedure, because the Federal Rules of Civil Procedure, while not technically a statute, are often interpreted like one. Moreover, familiarity with interpretive methods such as textualism, intentionalism, and purposivism, supports students’ subsequent encounter with constitutional interpretation, because to decide whether a statute is constitutional, it is first necessary to interpret it. In summary: upon completing LL&V, students have acquired basic skills in statutory interpretation which they will exercise further in much of their subsequent studies.

2. Students learn to identify ways in which the structure of a legal argument includes moral or policy reasons. Moral or policy reasons, and normative reasons generally, may be made relevant by words or phrases in the legal text (“cruel punishments,” “unreasonable searches and seizures”), or by doctrine (“best interests of the child,” “reasonable precautions”), or by failure to resolve the issue on other grounds. Students also identify and gain experience in articulating normative reasons for giving a text one interpretation rather than another, for construing the holding or holdings in previously decided cases, and for setting the boundaries and goals of institutional roles such as those of the trial court, jury, and appellate court. Even seemingly unremarkable things, such as perceptions and reports of observations, may harbor or reflect values and appraisals. In summary: upon completing LL&V, students have acquired basic skills in noticing and revealing points at which a legal argument depends on a stated or unstated normative premise or belief.

3. Students learn how to articulate normative reasons as part of the structure of a legal argument, and to evaluate such reasons with a critical eye. To this end, LL&V provides an introduction to law and economics, which is one of
the most prominent and influential frameworks for legal policy analysis. Upon completing LL&V, students are able to make and respond to arguments framed in terms of efficiency, cost-benefit analysis, and incentives. LL&V introduces the functions of markets and ways in which legal policy structures or mimics markets, while also introducing concepts such as externalities and information costs that explain why the free unregulated exchange of goods and services does not always advance efficiency. LL&V also introduces students to some of the main lines of criticism of law-and-economics approaches to legal policy analysis and to normative frameworks organized around the principle of equal concern and respect for the rights of persons. Finally, LL&V introduces storytelling or narrative-based reasoning, which lays its emphasis on character and community identity rather than on formalized policies or principles. In summary: upon completing LL&V, students have acquired an introductory familiarity with some of the leading economic and non-economic concepts in contemporary legal argument, and a corresponding capacity to advance normative reasons for legal outcomes whenever legal reasoning makes such reasons relevant.

All of these central learning goals, and especially the second and third, also address the “real-time” experience in the first semester of law school of learning the law. LL&V operates not only vertically (as a foundation for later studies) but also horizontally (as an intensifier of current studies). In that respect, all three of the learning goals share a common mission of enabling or empowering the student to bring his or her full faculties to bear on problems and themes that recur across the curriculum. Among these problems and themes, the need to articulate, calibrate, and choose among values—whether one’s own values, or what one takes to be the political community’s, or the client’s, or principles and social goals that make sense of rules and doctrine—stands out as worthy of special attention. Thus, if “L” for “Language” is especially prominent in the first central learning goal, about statutory interpretation, the “V” for “Values” is prominent across all three goals and brings all three into common focus.

2. Method and materials

LL&V employs the case method of instruction. The cases, whether real or hypothetical, are meant to represent a range or spectrum, including both hard issues and easy issues, questions of law and questions of fact (as well as questions that seem to resist easy sorting into “law” and “fact”), trial and appellate cases, common law and statutory cases (with brief occasional notices of constitutional cases), notorious or famous cases (ones that made or could make headlines) and everyday cases. If the coursebook included only “great” or landmark cases decided by the Supreme Court, it would be all too easy to identify the moral or policy side of the question presented, and to offer normative reasons responsive to the question. Students come away from LL&V able to identify points at which normative questions and questions about values arise, even in ordinary cases, and
able to mobilize normative reasons and supporting evidence responsive to such questions.

Materials in the LL&V coursebook make use of concepts and theories in fields as diverse as economics, political science, philosophy, psychology, and history. Such fields provide a valuable source of insight into the core problems of textual interpretation, legal reasoning, and the place of normative reasoning within the law. Not uncommonly, beginning law students are surprised to discover that such fields are prominent not only in a liberal arts college but also in professional school. Many decades ago, in a speech to entering law students, Prof. Karl Llewellyn commented on this phenomenon.

It has seemed to some students in the past that they had come to law school to “learn the law”, and that the law was made up of legal rules and nothing more, and that all other matter was irrelevant, was an arbitrary interference with their proper training for their profession. I have been told by some that social science was for social scientists, in the graduate school; that what law students wanted was the law. I have met with resentment, sometimes bitter, at the so-called cluttering up of our law curriculum with so-called non-legal material. . . . [But] your faculty offers . . . no apology for “cluttering” up the curriculum with such useful data as it can discover as to what law means to those whom it affects. Your faculty knows no other way of making law mean anything. Your faculty welcomes you into a study of law which deals not with words, but with practice, not with paper theory, but with living fact. And if that be treason, make the most of it.1

The interdisciplinarity “treason” of 1930 has long since become orthodoxy at major university law schools.

3. The LL&V tradition at USC

The LL&V tradition began at USC in 1965, when Professor Christopher Stone joined the faculty and together with Prof. William Bishin taught Law, Language and Ethics to first-year students. Their coursebook, Law, Language and Ethics: An Introduction to Law and Legal Method,2 is the spring from which the LL&V tradition flows. Students will find several cases and materials in the LL&V coursebook that were first introduced by Bishin and Stone. But the connections between LL&V and the course created by Bishin and Stone run much deeper than a few shared readings might suggest.

The Bishin and Stone casebook is deeply attentive to questions of integrity and authenticity. How does acting in a role, whether that of friend or lawyer, bear on what I should do? What can or should I do when my roles are in conflict? Is

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2 New York: Foundation Press (1972). The Bishin and Stone coursebook is available in the law library as one of the sources on the LL&V course reserve shelf.
there an ultimate I or me, accountable for the decisions I make in whatever role? Such questions are prominent in the lives, minds and hearts of students newly undertaking the study of law. Such questions get answered, if only tacitly, as students develop habits and dispositions in their everyday study, conversation with classmates, and participation (or non-participation) in class discussion. LL&V, in the tradition of Bishin and Stone, rests on the conviction that it is better to bring these questions into the open and discuss them thoughtfully and critically together in the classroom.

In this respect, Bishin and Stone pressed deeper than did Llewellyn a generation earlier, and touched on more sensitive issues. What are the reasons, perceptions, and judgments that make me what I am today; which of these (say, my capacity for moral reasoning) are engaged as I reason my way through a case contesting parenting rights, employment discrimination, or voting rights; what if my legal reasoning exposes weak points or nerve points in the very reasons and judgments and expectations that make me what I am?

In the first weeks and months of law school, new students are asked challenging questions. Sometimes there are ways to respond to such questions without placing the web of selfhood at risk. Sometimes there is no such line of escape. Often, regardless of how (or whether) one answers the question, doubts and anxious feelings gnaw away at the tender growths of professional identity. Why does the case make me so sad that I find myself in tears? Why am I outraged that the judge could say what he said? I was hurt once just like this plaintiff was hurt. How can they laugh so in class, aren’t they hurting inside too? Why does no one notice or care to mention that the defendant had no education and lived in a trailer, just like my father? Is it really OK for me to become a lawyer, or am I becoming the legislators and the prosecutors and the judges who put my brother in prison?

The challenge for entering law students does not arise from any failure to appreciate that because law is about life and society, all of the disciplines for the study of life and society are highly relevant to law’s study and practice. Whatever may have been the case in Llewellyn’s time, today’s students are ready and eager enough to see how economics, semantics, history, or psychology, can contribute to their growing skills as lawyers. Where they are in crisis, and where they most need and deserve attention and support, is buried deeper in subduction zones where tectonic plates of the personal and professional grind away at one another. The LL&V tradition responds to that friction, sometimes triggering a little seismic event to release the pressure, more often honoring the worth and the tragedy of human existence simply by recognizing how the maturation of life and thought draws us into choices fateful for ourselves and others, choices we can be strong enough to own.
Now, it would be possible to try to isolate these dynamics and speak to them in a way that is wholly unrelated to learning any actual substantive law or lawyering skills. But this would be to deny the terms of the problem. If we are talking about integrity and fulfillment, but are not teaching law, then we are not meeting the problem and the promise where they actually exist. If we are learning law, but not trying to walk together on a path of integrity and fulfillment, then we are not yet really meeting LL&V’s mission and message.

4. Acknowledgments

William Kessler, Daniel Amato, Nicole Creamer and Kevin Crow provided diligent and rigorous research assistance. Christopher Schnieders integrated and formatted the text. Like every product of the academic life of the USC Law School, this course and coursebook reflect the skill and support of the law library and its wonderful research librarians.

The authors of the LL&V coursebook are grateful to Chris Stone, creator and steward, and to Scott Bice, Daria Roithmayr, and Tom Griffith, whose guidance and partnership in the enterprise are deeply appreciated. Over the four and a half decades of the LL&V tradition, many colleagues, including Scott Bice, Ruth Gavison, Michael Moore, Peggy Radin, Catharine Wells, Nomi Stolzenberg, Andrei Marmor, and Gideon Yaffe, have shared in the common work of interpreting that tradition and teaching within it. The authors of the LL&V coursebook are indebted to all of them, and to the students and faculty of the USC Law School. Their suggestions, patience and trust are deeply felt and most gratefully acknowledged.
Exercise Nine: Walk a Mile in My Shoes

Lucy Beatty receives from the government a monthly $300.00 welfare stipend for her family, which includes herself and her five children. The welfare office sent her an overpayment notice, telling her to repay to the county an amount equal to an insurance settlement for $592.00 she had received for injuries she and her oldest daughter had suffered in a minor car accident. The notice explained that the insurance settlement check counted as “income” that should have been subtracted from Mrs. Beatty’s stipends, and warned that this amount would be subtracted from her next two stipends unless repaid.

Because Mrs. Beatty felt that it was unfair for the government to reduce her welfare stipends to reflect the amount of her insurance settlement, she sought help from Dale Starr, a legal aid lawyer. Mrs. Beatty told Starr that her case worker had given her the OK to spend the insurance money. She explained that after talking with the case worker, she had cashed the insurance settlement check and taken her family on a shopping trip. They bought some things at the drug store. They also bought shoes, dresses for school, and some frozen food. Then Mrs. Beatty made two payments on her furniture bill (for mattresses and a kitchen table). After a couple of wonderful days, the insurance settlement money was gone.

Starr explained to Mrs. Beatty that they would have to ask for a hearing. The hearing would be much like a trial, subject to rules of evidence, with testimony by sworn witnesses subject to cross-examination. The burden would be on Mrs. Beatty, as the party contesting the overpayment notice, to prove that she was under no legal obligation to repay the money.

Starr told Mrs. Beatty that at a hearing her chances of getting the overpayment notice rescinded would be reasonably good. But Mrs. Beatty explained that she had been in court a few times to get child support and to defend against evictions. Her experience taught her that it was not a good idea to get involved in hearings. A hearing might embarrass the county and cause trouble for her case worker. If so, the county and case worker might become annoyed at Mrs. Beatty and her family, and make life harder for them in the future. Nonetheless, Starr reiterated firmly that without a hearing, it would not be possible to stop the county from charging Mrs. Beatty for an overpayment. Mrs. Beatty reluctantly agreed to ask for a hearing.

Starr prepared to argue two different theories at the hearing: a “reasonable reliance” theory and a “life necessities” theory.

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Reasonable reliance theory. Starr’s “reasonable reliance” theory was based on the applicable welfare statute, which provided in §103: “Overpayment; reasonable reliance. The government is precluded from demanding repayment of welfare overpayments, when the recipient has reasonably relied [Y1] on the case worker’s authorization to spend the amount overpaid [Y2].”

Starr’s argument under the “reasonable reliance” theory would be that the county was precluded from demanding repayment (or from withholding the next two months’ $300.00 stipends) since the case worker had approved Mrs. Beatty’s spending the insurance check, and it was reasonable for Mrs. Beatty to spend the money in light of that authorization. In talking with Starr, Mrs. Beatty expressed some discomfort with this approach, because it would seem that she was pointing a finger at the county – blaming the welfare office, making it absorb the overpayment out of its own funds (or run the risk of sanction from higher authorities for its error).

Life necessities theory. The applicable statute, in §101, provided that money spent on “life necessities” [Y3] was not to be counted as “income.” Thus, if a welfare recipient obtained money (as from an insurance settlement), this money would not be offset against the monthly welfare stipends, so long as the money was spent on “life necessities.” Starr’s second theory was that Mrs. Beatty’s expenditures were for “life necessities.”

Starr explained to Mrs. Beatty that the hearing would be a bench trial, with the judge deciding both law and fact. Starr also explained that Judge Fernandez, who would preside at the bench trial, had two promising traits. First, Fernandez had worked for the county in several capacities for many years before he was elevated to the bench, and probably had a soft spot in his heart for county employees. Starr hoped that Fernandez would be willing to construe §103’s “life necessities” concept [Y3] broadly, if only to save the county from embarrassment at having to admit that the caseworker mistakenly gave Mrs. Beatty the OK to spend the insurance settlement money. Accordingly, to take advantage of Fernandez’ desire to protect the morale of the caseworkers, Starr decided to stress the “life necessities” theory more than the “reasonable reliance” theory.

Second, Starr’s prior experience with Fernandez suggested that Fernandez would feel more comfortable with the role in which the “life necessities” story would cast both himself and Mrs. Beatty. Fernandez was someone who responded better to pleas for mercy and compassion than to demands for justice. Starr thought that Mrs. Beatty’s chances of winning would be greatest if the hearing could be framed as an opportunity for Fernandez to indulge his inclination to condescend to the needy. Starr explained to Mrs. Beatty that this strategy required framing her as a needy woman, on her knees, asking for pity as she
described how hard she was struggling to make ends meet. Mrs. Beatty did not seem entirely comfortable in this role, though Starr did not understand why.

Starr carefully rehearsed Mrs. Beatty’s testimony, and tried to get her to see it as part of a good strategy. Following Starr’s suggestion, Mrs. Beatty brought to the hearing five boxes of her children’s old, worn-out shoes. This would help Mrs. Beatty explain how other children had laughed at her daughters because their shoes were so worn out. That, in turn, would surely elicit Fernandez’s pity.

Examining Mrs. Beatty at the hearing, Starr asked her if she had shown her insurance check to her case worker. Mrs. Beatty stammered and said that she may have, but wasn’t sure. Maybe she had brought it but hadn’t gotten a chance to talk about it; her case worker was always real busy. Starr then introduced into evidence an entry from the case worker’s case file for Mrs. Beatty. This entry, dated after Mrs. Beatty received the insurance check but before she spent it, read “Mrs. Beatty may spend the insurance check.” Mrs. Beatty then acknowledged that she and her case worker had discussed the insurance check. She testified that when she asked her case worker whether it was OK to spend the insurance check, the case worker had nodded her head.

Called to testify at the hearing, Mrs. Beatty’s case worker recalled seeing the insurance check, but denied approving spending the insurance money. Starr then drew attention to the notation, already referred to, in Mrs. Beatty’s case file. The case worker explained this notation as speculating that Mrs. Beatty might spend the money.

Starr then shifted to the “life necessities” theory, and asked Mrs. Beatty to recount exactly how she had spent the insurance money. Mrs. Beatty answered by describing her purchases and payments, and showed some receipts. Choosing words carefully, Starr asked why Mrs. Beatty needed to buy the new shoes.

Mrs. Beatty looked at Starr for a moment with a look that her lawyer couldn’t read. Then she said, quite emphatically, that they were Sunday shoes that she had bought with the money. The girls already had everyday shoes to wear to school, but she had wanted them to have nice shoes to wear to church too. She said no more than two or three sentences, but her voice sounded different – stronger, more composed – than before. Starr didn’t ask Mrs. Beatty to pull out the children’s old shoes, as they had rehearsed.

After the hearing, Mrs. Beatty seemed elated. She asked Starr how she had done at the hearing, and Starr said “great.” But Starr also warned her that it was never possible, in this game, to be sure who was winning, or even what side anybody was on. Privately, Starr wondered why Mrs. Beatty departed from the script they had planned and rehearsed; why Mrs. Beatty was so shy about telling what her case worker had said about the insurance check; why Mrs. Beatty started
talking about Sunday shoes. Starr had warned Mrs. Beatty to play the victim if she wanted to win.

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**Question 1.** Considering both of Dale Starr’s legal theories (the §103 reasonable reliance theory and the §101 life necessities theory) and the testimony and other evidence offered at the hearing, identify and state the issues that the judge must decide in order to determine whether to rescind the overpayment notice. **Note:** the question of whether an insurance settlement check counts as “income” that is offset against welfare stipends is not raised at the hearing; do not include that question among the issues that you identify.

**Question 2.** Propose an approach to analysis of the issues that would enable the judge to decide them with integrity. If you find it helpful, in setting out your favored analytical approach to the issues, you may indicate the decisions that result from adopting that approach.

**Question 3.** Assess the ways in which Mrs. Beatty and her lawyer Dale Starr approached and handled the questions they faced in their consultation together, in preparing for the hearing, and at the hearing. Did Mrs. Beatty and Dale Starr act with integrity in their respective roles? Should the same conception of integrity apply to the lawyer and the client as to the judge? Should either Mrs. Beatty or Dale Starr have done anything differently, and if so, what and why?

**Note on integrity**

As you think through questions two and three, consider the California State Bar Oath, which you will take after graduation should you decide to become a member of the California Bar. You will say: “I solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my knowledge and ability.”

What are you promising when you promise to faithfully discharge the duties of a lawyer? (What does the word “faithfully” add to the promise? Is there any difference between doing a lawyer’s duty and doing that duty faithfully? Did Dale Starr do a lawyer’s duty faithfully?)

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2 [http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=_bnxE8Qu9Kc%3D&tabid=268](http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=_bnxE8Qu9Kc%3D&tabid=268). See also the California State Bar Act (Cal. Bus. & Prof. Code, div. 3, ch. 4) § 6067, which provides: “Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability. A certificate of the oath shall be indorsed upon his license.”