

A Worthy Object of Passion

Seana Valentine Shiffrin



ABSTRACT

Each year, the UCLA School of Law presents the Rutter Award for Excellence in Teaching to an outstanding law professor. On April 20, 2016, this honor was given to Professor Seana Shiffrin. *UCLA Law Review Discourse* is proud to continue its tradition of publishing a modified version of the ceremony speech delivered by the award recipient.

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I'm grateful to the Dean, to the Rutter committee, and, most of all, to the students who are my partners in the teaching endeavor. It is a privilege to strive with all of you toward a better understanding of the law, this powerful moral and social institution we share and generate together. I'd also like to offer special thanks to the Rutter family whose admirable generosity provides this yearly occasion to celebrate the importance of teaching and to reflect on this central mission of ours.

I am palpably aware that the sort of teaching I do is only possible at a research university like this one—that cherishes academic freedom, that takes research and teaching to be mutually enriching, and that supports my dual interdisciplinary life in this great law school and in our superb Philosophy Department next door. It's only possible at a law school like this one that values not only the legal profession and its responsibilities but also the law school's intellectual role in the university as the center of thoughtful study about this vital social institution. It's only possible in an environment composed of extraordinarily skilled and patient staff, stimulating colleagues, and open-minded and eager students. Teaching at UCLA in particular is especially gratifying because the faculty and students not only have razor-sharp intellects and high standards, but are also kind and mutually supportive.

That brings me to my nervousness about my role today. I have no idea why you are giving me this award. I'm humbled when I think of the terrific talent, inventiveness, and zeal of my colleagues. The only thing I am confident about is my earnestness: I care a great deal about teaching and my students.

My law teaching is driven in part by a handful of insights I have gathered from watching and talking to exceptional teachers and friends. I had the exceptional fortune of having two superb teachers for parents. They made their offices and their classes perform double duty as day care throughout my childhood. It's wonderful to have the opportunity to thank them, publicly, for how much I learned about teaching by including me in their classrooms. My mother, Mary Valentine, was the first person in the United States to teach women's studies at a high school. She also taught women's studies, human sexuality, sociology, statistics, and writing at the collegiate level. Somehow she also fit in consumer advocacy, which inspired my life-long interest in consumer issues. In the 70s, I went to her night classes and watched her teach skeptical students about the history and future of feminism and saw her elicit candid thoughts from them about gender stereotypes, same-sex relationships, monogamy, asexuality, and transsexuality. Among the many important things she taught me were that: Both delicate and difficult subjects can be aired in a classroom in a straightforward, respectful way; people can survive and evolve from disagreement, awkward revelations, and

candid exchanges; and, to achieve social equality, inequality has to be discussed, equality has to be interpreted, and progress can be made night after night through listening, talking, and reflecting.

My father, Steve Shiffrin, as many of you know, was on the faculty here when I was a child. One of his great gifts to me was introducing me to this law school for which I have endless affection. I was in his second floor office for many weekends of my childhood and in classrooms for many weekday afternoons after school; at the time, I thought the major advantage of this arrangement was his free and nonjudgmental hand with quarters and the dizzying array of vending machines that used to be right below the clinical wing. In retrospect, I'm grateful for the experience because I met so many brilliant people coming in and out of his office, happily bandying ideas, and because I learned early on from Fran Olsen what a 'tort' was before I knew to panic that I didn't know. What I gleaned from watching him teach was that complete focus and immersion in the subject matter will draw in students and they will overlook your wrinkled shirt and mismatched shoes, that argumentation can be fun, that humor and laughing at yourself matters, that you should never be satisfied with an answer (whether your own or a student's), and that there is always more to refine and to plumb from any case.

My parents' patient recaps of their classes afterward in the car and their pushing me to say what I thought drove home their unswerving conviction that any idea is capable of being explained to anyone, but you just have to figure out the entry point. Moreover, a good teacher understands that anyone may teach you something about what you think you already know. Each student is capable of far more than they may expect of themselves. Trying and failing is an important way to learn, so asking more of your students than they feel comfortable doing is a service even if it isn't welcome in the moment.

I've also learned more than I can detail from many other teachers, friends, and colleagues but I want to mention three further lessons. First, my brothers, Jacob and Benjamin, are both phenomenal teachers, one professional and one as a lay citizen. They seem reflexively to know how to break down complicated concepts into digestible pieces that emerge from a conversational narrative, usually one with some hilarity. I am always trying to emulate that. And Ben supplies the literal action figures that are essential to a true Battle of the Forms.¹

Second, in college and in law school, I learned the most from the teachers to whom I had a strong personal response—whether positive or negative—

1. The disputes between Monsieur Tofu and Mr. Bacon range beyond contract interpretation. See Michael Schwartz, *The Bacon-Tofu Wars!*, YOUTUBE (June 14, 2011), https://www.youtube.com/watch?v=2Z-uM_AywBM.

irrespective of my prior love or disdain for the subject. Learning occurs not just through transmission of facts and arguments, but is refracted through the psychodynamics between teachers and students. This idea lies at the root of my reservations about online learning and my sense that it can supplement but not substitute for the classroom experience. Teaching is a personal relationship, so to do it well involves getting to know your students and sharing some of your personality, your beliefs, and your quirks. This includes sharing, what for some, is my goofy attachment to Elton John's albums of the 1970s. Reminding myself how much I learned from a professor I could not stand about a subject I did not initially warm to *just because his arrogance and seemingly unreachable standards provoked me* makes me feel better about the inevitability that some students won't like me. Mutual appreciation is the gold standard. Still, friction also works, at least for some students. What matters most is they are not indifferent to me.

Third, learning how to teach is a collaborative and perpetual process. Mostly, that collaboration is with students. What works changes with each class and its dynamics. I also take courses in things that don't come naturally to me so I can watch to see how the teacher made me learn; one consequence is that I produce many more problem sets than I used to. And, I talk a lot with friends who are tirelessly willing to talk through hard doctrines, classroom exchanges, and why a joke sings or fails. I'm particularly grateful to Bill Rubenstein, my former colleague, and my partner, Amirvala Tavakoli, who spend countless hours helping me craft examples, illustrative stories, and locating the tinder that may lead students to spark the epiphany for themselves.

My approach to teaching is infused by those attitudes and ideas but also by some substantive aims. My major substantive goal is simple. I love the law as an intellectual discipline. Like any enthusiast, I want others to share my passion. The back-aching weight of the books and convoluted doctrines like the parole evidence rule may not always make law an easy sell, but I am a true believer: Despite its sometimes dusty façade, law is a worthy object of passion. Law is the quintessential interdisciplinary subject. Like literature, there are characters, compelling narratives, metaphors, vindication, and tragedy. There are interpretative puzzles and drafting problems about how to use language and institutions together to solve a social problem while keeping an eye open for the new problem one will have created. Within any case, there are lessons to glean about history, politics, sociology, and economics.

Take *Fairmount Glass Works v. Crunden-Martin Woodenware Co.*² It's an 1899 case about whether a price quotation for Mason jars sent in 1895 is an offer

2. 51 S.W. 196 (Ky. 1899).

or a mere invitation to bargain. Usually it's only an offer but when you say 'for immediate acceptance,' those three words can make a big difference. From a legal perspective, the case is not particularly remarkable or stirring. What I love about this case is what else you learn. The case is reported in 1899 but the controversy began in 1895, suggesting that the wheels of justice turned slowly and that delays are not a modern development. The Mason quart jars in contention were \$5/dozen in 1895. That's equivalent to about \$146 in 2015 or \$12.25 a jar; you can buy a dozen now for under \$12.³ So, buried in this case is a nub that, if you probe it, tells you a lot about how expensive daily life was in the 1890s, in a time before refrigeration when preserving food in jars was very important, as well as what strides we must have made in the last century in glass production and transportation costs.

What gave rise to and what's embedded within *Fairmount Glass* are interesting, even revealing, details of quotidian affairs. Often enough, what catalyzes a case is more monumental; even so, the cataclysm may have receded from popular memory. One of the benefits of studying law is that even when your attention is elsewhere, you cannot help but be reminded of and schooled in (one version of) the significant national controversies and conflicts that have led us to our current circumstances. I was in Federal Courts, grappling with the political question doctrine, when I first learned with fascination that there had been a civil war and martial law in Rhode Island in the mid-nineteenth century.⁴ That conflict is familiar to avid historians and perhaps to those who grew up on the Eastern Seaboard, but it didn't make the U.S. history curriculum in California that I encountered.

For other cases, the historical lessons are not entirely on the surface. But, if you allow the case to stimulate your curiosity and you pull that thread, what lies in the background can be as instructive as the case itself. Take the Supreme Court's reversal of position on the mandatory pledge of allegiance from *Minersville School District v. Gobitis*,⁵ which held, by a vote of 8 to 1, that the mandatory pledge did not violate the Constitution.⁶ Justice Frankfurter's majority opinion celebrated the flag as "the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution."⁷ Three years later, in

3. *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount—1774 to Present*, MEASURING WORTH, <https://www.measuringworth.com/uscompare> [<https://perma.cc/EZH8-Y2YD>] (enter "1895" in "Initial Year"; enter "5" in "Initial Amount"; then enter "2015" in "Desired Year" and select "Calculate").

4. *Luther v. Borden*, 48 U.S. 1 (1849).

5. 310 U.S. 586 (1940).

6. *Id.*

7. *Id.* at 596.

West Virginia Board of Education v. Barnette,⁸ by a vote of 6 to 3, the Court held that mandating that children recite the pledge of allegiance did in fact violate the freedom of speech guarantee of the First Amendment.⁹ Justice Jackson's classic opinion contains one of the most eloquent passages in all of the U.S. Reports: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."¹⁰

The substantive conflict between *Gobitis*'s and *Barnette*'s competing conceptions of the state and what expressions of loyalty and obedience it may demand, consistent with the First Amendment, are gripping enough to occupy a law student's full-time attention. Nonetheless, one might start to wonder why the Court changed its mind within three short years, during wartime, and against the strong will of popular groups dedicated to overt expressions of patriotism such as the American Legion, the Daughters of the American Revolution, and the Veterans of Foreign Wars. *Barnette* surely represents the far better view, but the Court does not regularly correct its errors on a dime. The Court had lost two members of the majority and gained two new members; but even putting aside principles of *stare decisis*, that shift in personnel alone would not suffice to explain the abrupt about-face.

The riveting and deeply distressing historical background behind the scenes of *Barnette* may supply some answers.¹¹ The litigants in *Gobitis* (like the litigants in *Barnette*) were Jehovah's Witnesses who, along with many other Witness children around the country, refused to recite the mandated pledge of allegiance at school on the grounds that its recitation would contravene a biblical stricture against serving other gods than God. In light of their refusals to recite the pledge and their general criticisms of government and war, many Americans distrusted Jehovah's Witnesses and suspected them of disloyalty. The horrific summer in 1940 after the Court upheld the expulsion of the *Gobitis*¹² children from school was filled with an explosion of episodes of violence toward Jehovah's Witnesses around the country, numbering in the three hundreds. Witnesses were

8. 319 U.S. 624 (1943).

9. *Id.*

10. *Id.* at 642.

11. Vincent Blasi and I discuss the history and the legal arguments in *Gobitis* and *Barnette* in greater detail in *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in CONSTITUTIONAL LAW STORIES 409, 443 (Michael Dorf ed., 2d ed. 2009).

12. The Court documents misspelled their family name.

roped together and paraded, beaten up, shot, tarred and feathered, kidnapped, and castrated. Their homes, their meeting places, and cars were vandalized and burned. These assaults were often punctuated by efforts to force Witnesses to pledge allegiance to the flag or to salute or kiss the flag or a flag pin. As two attorneys for the Justice Department concluded, “Almost without exception, the flag and the flag salute can be found as the percussion cap that sets off these acts.”¹³ Local government officials often participated in the assaults. In at least one episode of assault, the Supreme Court’s opinion in *Gobitis* was cited by a sheriff as a justification: “They’re traitors—the Supreme Court says so. Ain’t you heard?”¹⁴ Over two thousand Witness children were expelled from schools across the country for refusing to say the pledge; once expelled, unless their parents found alternate schooling, their parents might lose custody because their children were truant and the families might be broken apart.

Whether these awful events explain the sudden shift of the Court or not, this history surely illuminates the fervency evident in Justice Jackson’s opinion and, arguably, the Court’s steadfast refusal ever since to countenance punishments for disrespecting the flag.¹⁵ It is, of course, a sobering reminder of our capacity to scapegoat minority populations in times of heightened tension and anxiety.

Obviously, one cannot investigate the details and the historical context of every case or statute one encounters. Nonetheless, part of why I find law so riveting is that each case holds the possibility that it could offer a glimpse into our deeper history. Each case could offer an entry point to a greater understanding of a wider range of social forces that gave rise to this particular dispute and others. In that light, the case and its resolution offer the opportunity to evaluate a concrete effort to solve the conflict and make progress together.

Importantly, the law also fascinates me because it is moral and political philosophy in action. Legal opinions are efforts to resolve conflicts through reasons and not just the exertion of power. The cases, the doctrines, the statutes, our Constitution, and all that is missing from them offer a representation of what justice requires, however flawed, inconsistent, and incomplete. That moral vision is sometimes inspiring (here I think about the First Amendment and the Civil Rights Acts) and it is sometimes dispiriting when our mutual failures to do justice are palpably revealed and repeated over time.

13. Victor W. Rotnem & F.G. Folsom, Jr., *Recent Restrictions Upon Religious Liberty*, 36 AM. POL. SCI. REV. 1053, 1061 (1942).

14. See Blasi & Shiffrin, *supra* note 11, at 445.

15. See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

As I said, I am an enthusiast but I am not merely attempting to make my enthusiasm infectious so I'll have comrades to gossip with about why the UCC revisions failed to catch on, or how interesting it is that Idaho rejects liability for negligent misrepresentation,¹⁶ or whether we'll ever see another California Supreme Court justice as compelling as Justice Traynor. I want my students to love the law for two reasons.

First, I want them to find their careers intellectually and emotionally rewarding and not only because they are powerful, lucrative, or prestigious jobs. I want their involvement in the law to be intellectually exciting and perpetually fascinating, despite some of its drudgeries and frustrations. So part of my teaching mission is to show students my perpetual wonder by showing them some of the hidden intellectual treasures in the law and to promise them that there are more such troves if you dig. So, I try, during the course of the term, to show how the law might be thought about from all of these perspectives. To get the most out of legal education, you need to focus closely on the details—the text, the facts, the jurisdiction, the holding, the strategy for next time, and the strategy for ten years hence—but also zoom out and consider the context, the larger arguments, the paths not taken, the economics, the history, the sociology, the politics, the philosophy, and how any one case, argument, or doctrine fits into the whole or whether it represents the beginning of an entirely new approach.

I also hope my students will love the law because of its importance. Legal cases and their analysis permit you to witness how real lives are framed and transformed as social forces, ideologies, and incomplete moral visions collide. To understand the legal system is to understand the hidden structure that makes our social lives, our social achievements, and our social injustices possible—from small things like understanding how the law makes it safe to casually pick up an orange juice at Lu Valle and drink it though you don't know who grew the oranges, squeezed them, or packaged the juice, to the large things—such as coming to an understanding of how our cities came to be residentially segregated. Those who have access to this special education have a heightened responsibility to think hard about what the law achieves, where it is justified, where it is flawed, and how each of us could contribute to the law's achieving its potential to deliver justice. My aim in the classroom, largely, is to convey the intricacy and potential of the law so students feel inspired to assume this responsibility.

Associated with this substantive conception of my aim as a law teacher are some views about methodology that dovetail with my research in contracts and free speech—which is focused on power of communication and speech acts and

16. *Duffin v. Idaho Crop Improvement Ass'n*, 895 P.2d 1195 (Idaho 1995).

the principles that should govern them. Through language, we can craft commitments and relationships, develop and reveal ourselves as individuals and collectives, settle conflicts through articulate reasons, persuade, inspire anger and, as I am afraid may happen soon, boredom. As a contracts and free speech scholar, I have argued for freedom of speech and freedom of association on the grounds that free communication helps people grow as thinkers and people formulate ideas in free, collaborative communicative settings.¹⁷ Unsurprisingly, then, I think the perfect class is the one in which every student talks, partly so we can learn what each other has to offer but perhaps more important, because you learn an idea more thoroughly when you have to figure out how to convey it to someone else.

It's not easy for most people to do this when the ideas are challenging and especially when the class is large. So, I try to share with shy students what I have learned as a shy person who regularly speaks in public: that you can't wait to talk until you feel confident because confidence follows but does not precede practice; that raising your hand early in a session is a way to beat the anxiety; that writing down questions in advance is not a weakness but, rather, marshals all the strengths and security of preparation that typify the good lawyer; and, that no one remembers a wobbly question or a wobbly answer—they are too busy worrying about themselves. As long as you aren't rude, you can stumble with impunity.

My interest in successful methods of dialogue infuses the Legal Theory Workshop Course in which scholars from around the country come to discuss works in progress with our students. Seven different papers arrive on subjects as varied as the theoretical underpinnings of estoppel, thought crimes, dynasty trusts, and the internal morality of law. In addition to practicing writing, abstract thought, and critical argumentation, this class compels students to come up to speed within a week on a new topic—much like the work of young lawyers who are cast into the throes of this and that varied litigation. The main thrust of the course, however, is to identify and learn to craft a good question, by which I mean a searching yet respectful question that could elicit an interesting answer from which both parties could enjoyably learn in the process of answering and receiving it. We talk about the paper in advance, draft and rewrite questions, and after the workshop, we try to figure out which questions worked and which failed and why. Thinking about why some questions provoke revelations and others provoke reticence, why some conversations are exciting and invigorating, but others are just pedestrian, is an important exercise for lawyers who ask questions for a living and for whom conversational relationships are the lifeblood of their work.

17. See, e.g., Seana Valentine Shffrin, *SPEECH MATTERS* (2014).

To return to my love of teaching and of the law—teaching, contracts, free speech, and the entire practice of democratic law share these special qualities: They are all institutions through which we talk to each other, ask each other probing questions about what to do and what we and others have said and why, and offer each other reasons. Through these practices, we come to better understand and express ourselves and our collective mission together as a nation.