In the Matter of Green v. Recht

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I

Now social science has established itself within law. In our studies and our conversations, in briefs, judgments, and statutes alike, in debate and in deliberation, the language of Law has given way to that of law and . . . .

Let us ask ourselves: What is the significance of this historic event? The answer lies in a few words, the meaning of which we can barely begin to understand. The words are: “The last bastion has fallen.” The walls of the city have at last been overrun. The walls of the city were its shelter: they kept out of the city what did not belong in it. With its walls overrun, with its walls no longer serving as walls, wall-less, the city has lost its power to exclude and expel what does not belong. It has dissolved into what had surrounded it. The city no longer is, and we whose home it was have become homeless. We also have ceased to be as the people we were. Now remember what the Greek poet knew: The walls of the city are its laws.1

If the invasion of law by social sciences means that “the last bastion has fallen,” law and . . . announces our lawlessness, our having been thrown into the anonymous mass of the “stateless people,” “displaced persons,” that roam across the surface of the earth. How can that be?

Let us first clear a few small obstacles that may stand on our way to that thought. First, what is the social science that has invaded the law? It consists of all the academic disciplines that not so long ago, in their still unbroken unity, bore the name of “social physics,” or “moral science”: Economics above all, history, political science, psychology, sociology, even academic philosophy. Yes, even philosophy has lent itself to the task of managing the masses of mankind adrift. Let us not allow ourselves to be deceived by the masks of “pure” intellect, or “knowledge

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I should like to thank David Kirp and the Institute for Research on Educational Finance and Governance of Stanford University for enabling me in 1979-1980 to participate in a seminar that gathered Stanford and Berkeley professors of law and . . ., and inspired me to write the story of Green v. Recht. I thank also Bruce Ackerman and Owen Fiss for letting me have the benefit of presenting the story at the Yale Law School Legal Theory Workshop.

1. HERACLITUS, Frag. 44.
for its own sake." At bottom, all scholars are machine-makers. Of those who concern us, the most lucid and honest have themselves called “social engineers.”

Second, how did our scientists invade the guarded grounds of Law? Surely by no glorious assault. Such peaceful scholars would never have found the courage for war. The last bastion fell to treason. Some lawyers, well intentioned, indeed like most traitors overflowing with good intentions, let the engineers in. The story of that high treason, by comparison with which _la trahison des clercs_² belongs to _la petite histoire_, may be told along with that of the word “policy.” In the beginning, the Law was that certain things be done. Then it became the policy of the law to require that certain things be done. Soon, all rules were gone, and policies moved in their stead, raising “policy questions,” requiring “policy analysis,” and calling for “techniques” of social engineering. One cannot but marvel at the cunning—or was this a case of enormous _niaiserie_, equally admirable in its own way?—that went into the use of that word.

Third, the thought of a last bastion intimates a prior history of defeat. What of that past? Well, first was the death of God.³ Second, spirit expired, to be buried by historians in museums of “culture.” Third, George Orwell lost the fight against Newspeak. But never mind chronology. The last bastion fell last because it was destined to last, and be the last to fall. There the walls of the city were thickest and highest and guarded by the most wall-like of our people, towers of strength, high-minded, thick-headed, unbending, utterly exclusive, off-fenders true to the word. All our nobility kept that bastion. Even after withstanding centuries of siege, nearing exhaustion, tired of resisting ceaseless clamor and gnawing pettifoggery, it was still strong enough that only treason made it fall.

Lo and behold. We have just peered into the entrails of law and . . . . If Law, the walls, is the care and home of noble men, if the city exists as a House of Lords, then law and . . . , the absence of laws, the walls overrun, is . . . . Do not recoil. Law and . . . is ignoble. Social science speaks the rabble’s mind. Nothing but what is common, equal, undistinguished among us—the weak, base, petty, mean stuff in ourselves; a soul possessed first and foremost of envy, of rage against the great, of an urge to violate the sacred, to reduce all things divine to the rank of disposable object—only that finds words in the jargons of social engineering. Then, is “moral science” a profanity (as well as an oxymoron)?

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². _J. Benda, La Trahison des Clercs_ (1927).
³. _Nietzsche, Die Fröhliche Wissenschaft_ §§ 108, 125, 343 (1882).
Are we ready to understand? Perhaps we have moved too fast, too far ahead of ourselves. Meditation on such frightful thoughts requires a slow pace. Let us retreat and try again with a more cautious first step. The following story may help us take that step.

Imagine:

II

Scene one. (A seminar room at the Law School.) Professor Green, a young social science Ph.D. recently appointed to the Law Faculty, has been invited to present a paper at our Faculty Seminar. In his doctoral dissertation, following the path of earlier jury studies, he attempted to measure the effects of different classes of "prejudicial" evidence on the "regret matrices" of a sample of Alameda County jurors. At the seminar, he argues that the accuracy of judicial rulings on issues of prejudice would greatly improve if every court made it a practice periodically to have a social scientist like himself conduct such a study of jurors in its district, and inform the judges of his findings.

His senior colleague, Professor Recht, an authority on evidence, has sat through this presentation, though she has manifested increasing restlessness. Given the floor, she explodes. The argument, she claims, misconstrues the legal and moral meaning of Rule 403, mischaracterizes the relation between judge and jury, and generally presupposes a radically false conception of the nature of trials. Her point, put shortly and by way of examples, is that a statement is inflammatory not because it causes jurors to let their emotions determine the verdict, but because it invites them to do so. Knowledge of how the jury would respond to the invitation is immaterial. We should not think that offering a bribe is less improper when the offer is made to an incorruptible judge than when it is made to a judge on the take. We should think only that it is more foolish.

There follows a spirited debate, in which the names of Kant and Bentham figure prominently, along with arguments about "category mis-

4. The reason why this obscure sentence is not explained in the text will become apparent on p. 366. The "regret matrix" of a juror indicates the intensity with which he would regret each of the alternative "errors" he can make: finding an innocent party guilty, or finding a guilty party innocent. Following modern authority, see Lempert, Modeling Relevance, 75 Mich. L. Rev. 1021 (1977) and Kaplan, Decision Theory and the Factfinding Process, 20 Stan. L. Rev. 1065 (1968), Green thinks that the law expects a juror to regret finding the innocent guilty ten times more intensely than the opposite error. Evidence is prejudicial if it lowers that ratio, as for example when knowledge of a defendant's prior record induces the juror to feel no great harm would be done in letting the fellow serve some more time, even if he is innocent in the instant case.

5. Federal Rule of Evidence 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
Professor Sitten, an anthropologist who is gathering data for a projected monograph on “Dynamics of Interaction in Interdisciplinary Programs,” had received permission to join the seminar as a nonparticipating observer. The story told in the preceding paragraphs is also a slight abbreviation of the notes he took.

Scene two. (The same seminar room, several days later.) We have met again as a metaseminar to discuss Professor Sitten’s report of our seminar on Green’s paper. Sitten had asked for our help in making sense of his project, about which he is still groping in the dark. At his request, Green and Recht have not been invited.

Sitten’s account, we point out, is remarkable more for what it omits than for what it says. For example, it does not explain, even summarily, what arguments were presented on either side of the issue in dispute, nor does it state any judgment on their merits. Perhaps Sitten did not understand them, or he did not care; after all he is not a lawyer. But, as we soon discover, our anthropologist does remember Kant, has read Lempert and Saltzburg, and is deeply concerned about the quality of our courts. Why then should he seem so uninterested? Sitten explains: the point of his notes was to record that we focused on a specific issue and proceeded to exchange “proofs and reasoned arguments” on the matter. Can he tell that arguments are “reasoned” without passing judgment on their merits? Well, Sitten thinks that he can recognize a reasoned argument from its “form,” even when he does not quite understand what it says; he did so once while observing an interdisciplinary seminar on probability theory, though he could not fathom any mathematics above high school algebra.

Furthermore, Sitten observes, at the seminar we who are ourselves experts on the issues did not pass judgments on the merits: when one thought an argument defective, his move was to make specific objections, not to reach a “conclusive determination” of the issue, much less to call for such a determination by others individually, or by the chair, or by the group as a body. The seminar left all issues unsettled. No one told anyone else what, from then on, one ought to think of anything. Everyone was and remained, in the matter of his thoughts, a “sovereign” who

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6. Another example: The report omits mention of the fact that Green's name used to be Macht, and was changed by his parents, at the urging of a benign Immigration and Naturalization Service officer, when the family immigrated to this country.


“obeys no law except that which he himself also gives.”10 If we would permit Sitten to use an old and obscure phrase, he should suggest that we constituted a “realm of ends.”11

To Sitten’s great surprise, these remarks precipitate a torrent of objections. The empirically minded among us are especially troubled by the evidence against the anthropologist’s assertions. The fact is, they claim, many of us did pass judgments on the merits of various arguments. Often speakers said, “I think this argument is fallacious,” and only then offered specific objections; others who did not speak would, if asked, acknowledge that they also formed such judgments; indeed, almost all participants came out of the meeting convinced that Recht was right; finally, all who were there, including the few who remained uncertain, came because they wanted to find the right—if not the best, at least the better—construction of Rule 403.

Those of us with normative concerns are equally disturbed. If Sitten’s description were true, they think, we should have to conclude that the seminar as a group, and each member individually, behaved very badly. First, a seminar that did not solve problems (advance knowledge or, in this case perhaps, improve the law) would be deemed a failure by its own standards and purpose, and participants who contributed to such failure would be thought ineffective. If, moreover, they had chosen not even to try for success, we should think they had betrayed an institutional responsibility. Second, it is an academic duty to tell the good from the bad arguments, and to allow oneself to be moved only by the former; persons who think themselves free from this duty, or who are regularly unable to carry it out, are in principle thought unfit to serve on the faculty (of course, we make mistakes, as the Green case may prove again; but we repent for such mistakes, and try to correct them). Third, the notion of a realm of ends is patent nonsense, at least in the instant case: in a seminar we deliberately treat each other as means to improve our own minds and to benefit the collective wisdom of Science, or of the Law, as indeed we should. How could there be seminars if academics did not think they should periodically be used in this way?

Sitten is at first startled by the number and force of our objections, but soon recovers. After a cryptic remark—to the effect that, despite our apparent agreement with Professor Recht, our analysis of the seminar rather bears the imprint of Green’s jurisprudence—he speaks as follows:

“I should like to begin by questioning a claim of the empiricists among you. Suppose that I assert, at the seminar, ‘I think your argument is fallacious,’ and make some objections. I say so with confidence,

10. KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN *435.
11. Id. at *433.
indeed with undertones of impatience at you. Have I made a conclusive
determination that, at least insofar as I am concerned, your argument is
fallacious? Not at all. My confidence in the assertion is qualified by the
reasons—the specific counterarguments—I offer. My impatience is
denied by my invitation to argue the reasons. Whatever one may feel
while uttering it, the assertion 'I think, etc.' used in that context proposes
only a tentative (and ironically apologetic) description of a state of one's
thoughts. Its equivalent in Oxford usage is more accurate, though per-
haps a bit lengthy: 'Pardon me if I'm wrong, but aren't you overlooking
that . . . ,' followed by specific objections. Of course this account does
not describe what some of you actually thought, at times, when they dis-
agreed with Professor Green. They rather meant, 'This argument is fal-
lacious (period),' and wished the discussion would quickly move on to
the next point. But, in fact, those who thought so remained silent. If we
inquire into the reason for their silence, we shall discover that they, and
for that matter all of you, thought then, and think now, that it would be
unduly abrupt at a seminar to speak one's mind in such manner.
Abruptness of that sort is 'bad form' in reasoned discourse.

At this point Sitten is interrupted: When he speaks of “bad form,”
is he using “form” in the same sense as when he spoke earlier of the
“form” of reasoned arguments? (There is mockery in the question, but
Sitten chooses not to notice.)

"All I am prepared to say now is this: there is a strong connection
between form and manners, in that both consist of norms of propriety.
Allow me to give an example. Green might have spoken to Recht in this
way: 'I am presently applying at the National Institute of Justice for a
huge grant to pursue my jury studies; your endorsement would double
my chances of getting the grant; if you endorse my project, I shall see
that the budget includes substantial consulting fees for you.' Or Recht
might have told Green: 'Unless you retract your thesis, I will do my very
best to block your promotion to tenure.' Of course, neither Green nor
Recht did say anything of the sort at the seminar, even though (as I
happen to know from separate interviews I later conducted with each) at
times during the discussion both entertained thoughts along those lines,
each knew the other harbored such thoughts, and Green's apprehensions
about tenure figured prominently in his decision to make some concilia-
tory remarks at the end of the session (remember when he thanked Recht
for her comments). Both knew that certain rules of propriety require
participants in a seminar to appeal to Reason (whatever that means).
Statements that propose a motive for changing one's mind (such as con-
siderations of power and interest) do not meet the formal criteria of what
counts as a reasoned argument. Perhaps they have a place in 'informal'
conversations held in the dark corners of a bar. But no one thinks that such conversations would qualify as instances of reasoned discourse.

"Consider the matter from another point of view. A minisummary of my account of your seminar would read like this: 'A small group of legal scholars had a lively discussion of Rule 403.' Suppose that instead I had produced an account, the minisummary of which read: 'A senior law professor threatened a junior colleague that she would block his promotion to tenure if he did not agree with her construction of Rule 403.' I suspect that you would object: Green may have felt threatened by Recht, but it does not follow that she threatened him. There was not the faintest trace of a threat, or indeed any impropriety, in her conduct. True, she came to the seminar partly for the purpose of reaching a more informed judgment on the question of Green’s tenure; such is her duty as a member of the body that must decide the question. Nevertheless, she never allowed her role on that body to interfere with the performance of her role as participant in the seminar. The effect of her actions on Green is irrelevant to the moral characterization of these actions. Remember how Recht showed that the effects of a statement on the jurors are not relevant to the issue of prejudice. That issue, like the present one, is an issue of propriety.

"Let me try from yet another angle. Suppose I tell you the following story: G. and R. (whose identity will not be disclosed) disagree on a question of evidence law; G. offers R. a substantial fee if R. will change her position; R. counters by promising G. a better job if G. will move to her side; G. yields and modifies his position. Then I ask you to tell me what sort of people you think would have such an exchange, and in what sort of place. Your answer (let me guess) is this: two crooked attorneys in the dark corner of a downtown bar. Whereupon, with a triumphant smile, and speaking like my fellow social scientists, I reveal: ‘Well, the very same exchange occurred at your seminar on Rule 403; you may have thought you were arguing jurisprudential issues, but all that talk was mere noise—an epiphenomenon, as we say—the function of which was to distract you from what really went on.’ To this, I should expect you to respond: ‘Yes, and we were also breathing and causing each other influenza, a reality from which Green, Recht, and all of us were distracted by both jurisprudential concerns and financial worries, not to mention all kinds of fantasies. And why were you, Sitten, distracted from that?’ The point is that a student of seminars, as distinguished from deals-under-the-table or flu-causing-interaction, should find his first criterion of relevance in what constitutes a seminar: the practice of a certain form of discourse. He should not be concerned with the effects of smoke or meretricious motives. Of course, Green bowed to Recht and thanked
her at the end. This shows only that he knew the relevant rules of good form, and graciously followed them.”

Now Sitten is interrupted again. We all are prepared to accept that norms forbidding briberies and threats, and moderating aggression, govern conduct at seminars (though we find that observation rather trivial). But some of us, including those with strong normative concerns, cannot agree with Sitten’s apparent contention that participants in a seminar have a duty to refrain from passing judgments on the merits of the arguments presented. Sitten may have shown that academics prefer to be gentle in their criticism of each others’ views, even if the price is diminished candor or a measure of hypocrisy. Perhaps it is nice of them to feel this way. The fact remains, however, that we go to seminars in order to find the “right answer” to “hard” problems of legal or empirical research, and that we are not only permitted but also required to seek and find such answers. Furthermore, we think, the very suggestion that rules of propriety should govern a seminar is profoundly disturbing. Manners should not be allowed to interfere with the conduct of inquiry; only canons of reasoning are pertinent in that context. Applied to seminars, even the rules against briberies and threats are better conceived as requirements of truth seeking; they are like rules of relevance in evidence law. Considerations of harm or benefit simply must be set aside in the quest for right answers. Science is blind to such matters.

After gathering himself, Sitten resolves to try again. “First, I want to dispel a misunderstanding I may have caused. When I noted that abruptness is bad form in seminar discussions, I was not referring to the informal practice, prevalent in some academic circles, of ‘being nice’ in commenting on others’ views. I rather think that this peculiar manifestation of regard for others’ feelings is an affront to propriety, a thinly disguised species of psychic bribery. Full and vigorous debate is the norm. The abrupt modes of speech that we think improper are so judged because they mark, not an excess of vigor, but a rupture of debate, a withdrawal from reasoned discourse. Such is the meaning of conclusive judgments like ‘this argument is fallacious (period)’; they translate, ‘I refuse further to argue this point,’ and that is bad form.

“Consider also the rule forbidding the introduction in seminar of evidence regarding the character or past conduct of a speaker for the purpose of discrediting his thesis. (I am aware that violence is often done to this rule, especially in discussions of race, sex, and politics; but the basic idea has survived and does rather well in law schools.) You may

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justify it as a relevance rule, much as you have defended the rules against briberies and threats: ‘The purpose of the seminar is to resolve an intellectual issue, not to judge the character or past of the person who happens to raise the issue; only what the speaker says matters (even an idiot may, by luck, stumble upon a good idea).’ If you do so you will find yourself in trouble whenever an aspect of past or character becomes unimpeachably pertinent. Suppose Recht discovers that Green scored 499 on the LSAT (that is why he did not study law in law school); reliable studies have shown that no one with a score below 500 can understand a single idea of the law of evidence, even after years of study. Or: Recht notices that in the first page of his paper Green has managed not to make a single clear and true assertion; scientific tests have confirmed that there is a perfect correlation between the impressions intelligent readers gain from the first page of a paper and the conclusions they reach after reading the whole paper (a fact all experienced examiners have known for ages). On such evidence you should conclude that hearing Green's paper could not help, and would perhaps even damage, the quest for right answers (and right questions, for that matter), which you think is the purpose of the seminar and the duty of its members. If you knew these facts before the seminar, you would have reason not to attend it. But if Recht introduced them at the seminar, just after it began, you would have reason for dismay, and talk of inadmissibility would occupy the faculty for days.

“You say that, because everything else is irrelevant to the intellectual issue, you focus on the speaker's words. The truth, I believe, is rather that you focus on the issue because you respect the speaker's words. By making him a member of the seminar, you have conferred upon him the privilege of speaking and appealing to Reason. In other words, the seminar constitutes a forum in which each member is guaranteed 'the relevance of speech,' and guarantees it to others in return, within agreed limits defined in part by an issue of shared interest. Whenever this guarantee is abridged, you point to a broken rule. That is why you object to briberies and threats, as well as to character evidence or conclusive judgments. The fact is that incentives do help win people's acceptance of, or devotion to seeking, right answers. You do give better jobs to those who learn or find better answers, and fire those who fail. At a seminar, however, you may not even allude to such practices. To threaten, or offer a bribe, is to say, 'I don't care to hear what you think on this matter; just refrain from disagreeing with me (and I'll reward you) (or else I'll hurt you).’ In offering others reasons (instead of incentives) to agree with you, you affirm your own readiness to hear and be

moved by their arguments. You continue the debate. One might say that by entering a seminar you have put yourself under a rule of mutual respect for each other as autonomous reason-endowed persons, in that limited context.

"The source of your disagreements with my account is, I think, that you now conceive of the seminar in purely instrumental terms, as a means of advancing knowledge. Allow me again to draw upon an analogy in the law of evidence. According to Green, and most modern authority, an overarching purpose of that law is to make jurors think straight, within the limits of the possible. Suppose B.F. Skinner invented a Matrix Modification Machine (MMM). By a quick and cheap process of 'averse conditioning' (otherwise known as bribing and threatening) MMM can render any subject color-blind, sex-blind, or blind to any other sort of 'prejudicial' evidence. Applying it to jurors would save countless hours of voir dire, objections, rulings, exceptions, briefs, decisions, and law review comments. Should courts use it? Recht and nearly all of you would say: No. You do not truly agree with modern authority. Your theory, implicitly, is that the law presumes jurors think straight, and tells lawyers to treat them accordingly. Prejudicial evidence is inadmissible, not to prevent jurors from weighing it, but because admitting it, like subjecting the jurors to MMM, would violate our respectful presumption that 'the jury will disregard it.' Similarly, seminars and their rules are not meant to make us know more or think better; they affirm that we know how to think."

One of us objects. Clearly, at our seminar, Recht did not presume Green thought well. As the distinguished anthropologist himself acknowledges, she came precisely for the purpose of determining whether he thought well enough to qualify for tenure. If so, Sitten must think that she was guilty of conduct unbecoming a seminar member, despite his earlier statement that she was not. Can he cure his account of that contradiction?

Sitten thinks he can. "There is no contradiction. My understanding is that Recht did not fail to honor the respectful presumption she owed to Green in her capacity as seminar member. When she questioned Green's competence, she did so silently and qua member of the body that reviews promotions to tenure. (Even in this latter capacity she and other members of this body address the question only with reluctance, express diffidence in their answers, and vow not to allow their judgments to become

15. In passing, notice what happened to these words as the walls of our city were falling. Now "mutual respect for each other as autonomous reason-endowed persons" means something like "leaving each other alone, each free to choose as he pleases." Before the fall, the same words evoked the thought of "honoring the greatness in ourselves, we who have united ourselves to one another and vowed unbending fidelity to the law of our union." Sitten's language betrays the age of his soul.
public and authoritative, except for the bottom line conclusion to appoint or not to appoint. Were it not necessary to make appointments, they should prefer to speak always as seminar members.)

"Perhaps I should generalize my last point. We academics think of seminars from two different standpoints, from within and from without. Among the many occasions on which we take 'the external point of view' are the times when we ask ourselves: 'Shall I join this seminar?' or 'Shall I continue to attend it?' We are then outsiders examining the seminar and pondering whether to become or remain members. In that situation we consider what, if any, reasons we may have to join. (For the sake of discretion, allow me to ignore other considerations that might incline one to attend, such as one's longing for a less lonely life.) For example, Recht's duty to reach an informed judgment about Green's qualifications for tenure counted as a reason for joining your seminar. Perhaps academics also have a general duty to search for right answers to hard questions. It is a purpose of seminars to help us fulfill this duty. Notice that, from this external standpoint, (1) we presuppose there exist right answers for us to 'find'; (2) we think of seminars, and prospective seminar members, as means serving the purpose of finding those answers (the more effective a seminar is expected to be, the more reason we have to join); and (3) we assume a power, and indeed accept a duty, to determine whether or not the answers proposed at seminars are right (without such a power, we should be unable to identify the good seminars at which we have reason to stay).

"When we have joined a seminar, however, we are able to think of it also from the 'internal standpoint' (even though we may never stop silently asking external questions, such as 'what am I doing here?'). Having assumed the responsibilities and privileges of membership, we think of ourselves as participants in the public staging of a reasoned discourse on the matter at issue. The 'reasons' why we came lose their legitimacy, and continue to operate only as 'motives,' of no public concern, for participating. The purpose in the seminar (as against the purpose of it) is only to be what a seminar is; our purpose in it (as against in going to it) is only to act as members act: ἔστι γὰρ ἄριστη ἡ ἐπιστρατεύων τέλος.18 Such is the way we think when, at a seminar, we ask ourselves, 'What shall I say?' in response to a statement with which we disagree. In reflecting upon that question, we discover that (1) our only power, and duty, is to

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16. H.L.A. Hart, supra note 9, at 86.
17. H.L.A. Hart writes "point of view," as though there were a "view" to be seen from the internal standpoint, as there is from the external. Id.
18. Aristotle, Nichomachean Ethics, VI, v, 4. Please forgive Professor Sitten's displays of learning. Esti gar autê hè euvpraxia telos means something like: "Good action is an end in itself."
present 'proofs and reasoned arguments' in rebuttal (and not to determine the merits); (2) we hold ourselves open to persuasion by the speaker (without regard for the odds that he will say anything worthwhile, or for his or the discussion's usefulness as a 'means' of finding right answers); and indeed (3) we presuppose that, insofar as we know and shall know, there exists no 'right answer,' and hence no 'settled' question of either fact or law. Needless to say, there is no true contradiction between the negation at this moment, and the affirmation at an earlier moment, of the 'existence' of right answers, for the assertions are made in response to different questions and use the same phrase in two different senses. I might add that the metaphysics of academic thought—thought devoted to 'searching for (and hence not having found) right answers'—would suggest that the negation may be inferred from the affirmation.

"In short, I suspect your objections to my account stem from the fact that now, looking back at your seminar, you see it from an external standpoint, whereas then, during the seminar, when I observed you, you spoke and acted from within."

This statement brings up a new question: From what point of view does Sitten think he saw our seminar. Clearly he was not a member, since he sat in as a nonparticipating observer. Yet, from this external standpoint, he seems to describe our conduct at the seminar just as we should understand it from our standpoint as members. Where does he stand?

This, Sitten acknowledges, is a terribly complex issue. "It would take us far afield. But I may be able to offer a couple of remarks. First, an anthropologist like myself often observes that members of a group adopt the internal standpoint, without himself assuming that standpoint; he will even describe how members understand their actions in that role, and sometimes indeed he thinks he must do so either for scientific reasons (I do not wish here to reopen the debate on Verstehen-Soziologie) or on account of ethical duties he owes to his subjects. In this case, however, I should be disingenuous if I did not add a second point. While observing your seminar from without, I was also thinking as a member of the academic community to which we all belong. In that capacity, I share with you a responsibility for the integrity and vitality of reasoned discourse, and for the special institutions that sustain such discourse. Hence my interest in and my understanding of interdisciplinary seminars

19. R. Dworkin, supra note 13, at 81-130. There being no "settled law," there is no "easy" case.
cannot be only that of an aloof observer."

Sitten begins to speak as if he were dreaming aloud. He compares the modern university to a Tower of Babel; he sees interdisciplinary seminars as heroic efforts to restore meaningful speech in that environment; he fears for them and wishes he could help. He thought the prospects for our seminar were especially dark because we were inducting a new member, young and vulnerable. He wonders why, despite the odds, we were so successful. Perhaps, he speculates, we owe this achievement to the discipline of our legal minds, which are committed by profession to the practice of respectful speech. Suddenly, he stops and apologizes for having become incoherent. We are all exhausted, and a motion to adjourn is passed by acclamation.

III

The story of Green v. Recht is written to schoolmen, to the students or professors that almost all of us were, once upon a time. It expects us to recall our intimate knowledge of the school world, particularly the etiquette of seminars. That etiquette stood to scholarly activities in the same relation that Law, before the last bastion fell, had to the bustling life of the city. The parallel is intimated by allusions to an old understanding of the law of evidence, so old indeed that it was already forgotten when Jeremy Bentham began to throw his Anglo-French lights on the matter.

Insofar as we can remember the etiquette of seminars, we may be able to grasp something of the essence of law and...: law and... is to Law what at the seminar Green was to Recht (in their respective understandings of Rule 403), and what we at the metaseminar were to Sitten, or to ourselves as the seminar members Sitten described (in our respective understandings of seminar ethics). If we acted at seminars as we told Sitten we did, we should think we were abusing each other, and not engaging in reasoned discourse. Actually, as Sitten knew, the etiquette of seminars had ennobled us, made us for a moment Peers of a Realm to which we did not belong in the ordinary course of academic things: a Realm of Ends-in-Themselves.

So did Law ennoble our people when it enclosed them in the city. If the point is by now obvious, let your thoughts linger on it, without reading further. The story of Green v. Recht stands by itself, and leaves far more unsaid than further comments can add. In case the point is not quite yet under clear light, go to the Law Library, pick a few Law books—law books that law and... , with its characteristic irreverence,

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dismisses for being "traditional"—and read a little, no more. Actually, good old Law books are so dull they will not let you read more of them than a little at a time. They move ever so slowly, in such a stiff and formal style. Their writers sound so straight, so steady, so utterly lacking in wit and sophistication. There is so little cleverness in them. Indeed, good Law, like all nobility, requires a certain dulling of the mind; an instinctive distaste for and dismay at displays of quickness, learning, or "culture"; a trained (or is it feigned?) incapacity to understand any sentence that smacks of Jesuitical quibbling, word stretching, hair splitting, astute analysis, or logical scaffolding, or any other product of the tartufferie and ill-disguised bad faith we scholars find exciting. (Even Sitten, and perhaps Recht herself, have not yet shed enough of their scholastic baggage to become truly good at Law.)

Stay with your Law books long enough to breathe the pure air that inspired them. Listen to the quiet confidence with which everything in them is thought and spoken. Theirs is the language of authority and respect. Our old Lawyers knew how and what to revere, honor, hallow. Noble souls, they peopled the world with the likes of themselves, persons in and through whose bodies the spirit of mankind showed a godlike splendor, free and playful beings who willed, acted, assumed and granted powers, constituted, undertook, gave, made commitments, formed friendships, punished and forgave, obeyed, thanked, and celebrated, and died in fidelity. In and through Law—which in its most primordial sense is the ground where one rests, hence one's home, the place where one lies and dwells, and thus the thought that renders just, upon which one stands—these creatures had found their essential mode of being, which was to transcend.

Now move to the busiest desk of the Library, where the latest and most urgently sought works of law and... are being frenetically checked out and returned. (Under law and..., people ceaselessly seek the new as such, never to find it.) Again pick up a few books and read. With that stuff you must learn to stay, for there is your world, and you have no escape. Be brave. If your nose is at all sensitive, follow Nietzsche's advice: Pinch it, because the odors of law and... are among the foulest. 22 If you have musical ears, plug them: 23 the whining and the howling would tear them. But keep your eyes open. Look at the people with whom law and... has populated the earth. Look at that swarming mass of busy, hurried, restless, racing, ratlike humanity. Do you notice the lack of poise, the oblivion to form, the absence of any solemnity or decorum? See what and how these beings are: wanting and needing, being deficient, crippled, hence dependent, eager recipients, sufferers,

23. Contra id.
motivated, acted upon, subjected to forces alien to them, behaving as they are caused, caused causes of further effects, means to ends that are means, never responsible, never punishable, never deserving, only able to have their future predicted, therefore also superstitiously crawling at the feet of fortunetellers in abject fear of pain and death. Those people live a life of unrelenting, unrelieved necessity. Is it life, the “life” of beings whose only mode of being is that of conditioned objects? Do such beings think? They seem utterly thoughtless, as though for “minds” they had been equipped with adding machines. What has become of the human spirit?

In law and . . ., though not by it, humanity is defiled. In law and . . ., humanity defiles itself. And this self-abasement consists in humanity letting the rabble within itself determine the essence of man, humanity making itself see the world with the eyes of a spiteful, vulgar, tasteless, impotent, rancorous brute, who cannot stand the sight of any being out of the reach of his destructive hands, and will not relent until he has debased and violated all that comes on his way. Should we then say homo brutum bestiale? No. Let us not slander the animal kingdom. Homo bruta ratio. Only a rational animal could fall into such an abyss of baseness.

“The last bastion has fallen.” A dark age has come. Welcome it. Be grateful that your fate was to live in a time when the absence of spirit would demand so much thought. Learn to be in the world of law and . . ., not that you should master its “facts,” jargons, and techniques—those may only be endured with dignity, and given the pity they deserve—but so that you may think what law and . . . portends. Perhaps the light will shine more brightly when it rises in darkness. Then have the wisdom of taking law and . . . cheerfully, in any event not seriously.

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25. Contra I can’t seem to remember.