FOUR (OF MANY) WAYS
OF THINKING ABOUT THE NATURE OF LAW

It will be useful for us to keep in mind that law always seems to partake of elements of both force (or threat of force) and shared belief (or ideology). Take away the force that puts "teeth" in the rule of law, and you have something like religion. Take away the shared beliefs that make law legitimate (make power into authority) in the eyes of the people, and you have something like dictatorship or fascism. We should also try to focus on the ways in which law is a process for defining and dealing with conflict rather than merely a set of rules meant to govern human conduct.

We may consider whether the law has been successful in dealing with the conflicts in which it is brought to bear. To answer such a question, we need some idea of what standard to use in judging the success or failure of law. How we understand the purposes and nature of law will have a great deal to do with our judgment about how well or poorly it accomplishes its tasks.

Let us assume therefore, without claiming that this assumption exhausts all possibilities, that there are four general perspectives from which to understand the nature and functions of law. These four perspectives on the function of law are described in a tentative form below. The material describing four functions of law is presented early in the course so that you can refer to it and work with it during the semester.

At the beginning of the semester you will probably find these ideas about the nature of law to be too abstract. But if you use these pages as a kind of worksheet to try to increase your understanding of each function during the semester, you will find the generalizations not only more understandable but useful tools in thinking about what is really going on in the relationship between law and society. So please try to revise the descriptions where appropriate and add references to readings and to discussions during the course. Note that there is space provided at the end of each description for you to jot down the names and locations of readings, cases, conflicts, or films that help you to expand your understanding or that might serve as examples. Use this space also for your own ideas or conclusions from class or conversations to deepen your understanding or extend the questions that arise in relation to the four functions of law.

At the end of the semester you will find that one of the final essay questions asks you to apply these ideas about the nature and functions of law to one or more of the conflicts (legal artifacts) we have studied during the course.
The four functions of law might be stated as follows:

1. **Law as Community**—law is a process by which a culture (or any group) defines, clarifies, creates, or reinforces its shared beliefs and values, or ideology. The “boundaries” of the culture’s belief structure can therefore be found by interpreting the legal process, and the culture can be said to “use” the law as a means of continuously defining and redefining itself and keeping the group more or less whole. In this process, defining the nature of a conflict (what is this conflict about?) is as important as the handling of that conflict. Law is obeyed and is legitimate primarily because it embodies and applies the values and beliefs of most of the culture most of the time.

   This process is participatory, i.e. ordinary persons have a significant role in the process of defining their own culture through legal process. Some cultures [such as the Cheyenne in the story of “Two Twists”] do not have institutionalized roles for people who do law jobs or deal with conflict; and participation in conflict handling is informal and spread broadly. Other cultures, such as the U.S., have institutionalized roles for law jobs [judges, lawyers, legislators, police, etc.]; and participation by ordinary citizens is also expressed through formal institutions such as the jury and an elected legislature, and by alternative dispute mechanisms such as mediation. Tensions arise as to what the proper roles of various institutional players are when there is a separation of institutional powers in law [e.g. judges v. legislature, or jurors v. judge].

   The culture may be said to “lead the law”, in that law is a process used by the culture for self-definition. The beliefs underlying the legal process and its decisions come *from* the culture rather than from the legal institutions. The culture’s values are enforced by the legal institutions. Tensions around institutional roles in law arise here too, as might be the case if a legislature or a court were alleged to act repressively in imposing “injustices” upon the people. A question also arises as to whether law can function as a community-defining process when the underlying culture is in great turmoil, as in cultural collapse, revolutionary change or what some have called “the culture wars” in our own society.

   Articles, conflicts, ideas or cases that help understand this idea, raise questions about it, or are examples of it during the course:
2. **Law as Power**—law is a means of preserving (or, on some occasions, altering) the distribution of power within a culture (or within any group). It is **distribution** or **allocation** of power that is the focus of this concept, not simply who wins a particular legal contest. For example, during the Nineteenth Century, a husband might be found not guilty of spousal abuse in a particular case. But this would be much less significant for the allocation of power than the possibility that the courts might decide not even to hear a case of spousal abuse unless the injury to the wife were severe. In the latter situation, the courts have in effect allocated the power to control marriage relations to every husband unless he inflicts a severe injury upon his wife (see BTL sections 1.2-1.6). This is a kind of “constitutional” issue in the sense that the bottom line question is “how is power legally constituted in the society?”

Looked at cynically, the function of law-as-power may suggest that those who hold the power within a culture or group can in part maintain their power through the use of law. Those in power might seek to retain their power by manipulating either the **substantive rules** of law [e.g. whether smoking marijuana for medicinal purposes is a crime or not], or the **structure of litigation** [for example, by refusing to permit litigation by a large group of consumers against excessive profit-making in the pharmaceutical industry—see BTL section 4.1].

Those who have power might also try to maintain that power by using law to manipulate **beliefs** within the culture, so that the established allocation of power seems natural and legitimate to ordinary people [as in establishing the belief that slaves are property]. In all these cases, law is the servant of power, a tool by which the powerful retain their power. There may also be instances in which the law is used to re-allocate power to the formerly powerless, as in amending the U. S. Constitution to give women the right to vote or to end slavery or in a court case establishing a constitutional right of reproductive freedom for women. There may be a shift of ideology or belief accompanying the reallocation of power. In almost all cases of the use of law-as-power we are pointed to the question, “Whose beliefs or ideology is legitimized by a particular legal decision?”

From the point of view of “law as power,” the ideology or beliefs that are a necessary part of all law may thus become mainly utilitarian. That is, the process of defining or redefining community beliefs can become more manipulative than genuinely participatory. “Law as community” may thus be manipulated by power-seekers to retain their power or (on some occasions) to redistribute power more equitably. Here law may be said to “lead the culture” in that those who are allocated power by law use the law to try to control the beliefs, values, or ideology of those with less legal power.

**Articles, conflicts**, ideas or cases that help understand this idea, raise questions about it, or are examples of it during the course:
3. Law as an Autonomous Institution—law has a life of its own as a formal, often adversarial system of order, rules (positive law), thought-patterns (legal reasoning, values and habits of mind of lawyers), and legal institutions. Law’s main function is simply to preserve itself. This concept suggests that the most important function of law’s defining and handling of human conflict is to manage disputes in a way that does not weaken the power of the formal institution of law itself. This may require bending toward the powerful or adhering to the community’s ideas of justice on occasion, or it may simply depend on public apathy or alienation from a complex legal system. When the legal system becomes particularly rigid, a-historical, and separated from the context of life in the culture (and when people only obey and respect law because they fear it), law is often pejoratively labeled “legal formalism.”

There is a “culture of law” (all the aspects of formal law) that may seek to preserve its dominance over conflict-handling in the culture. The nature of this legal culture [e.g. instrumentalist, formalistic, paternalistic—see BTL section 11.1] and of the challenges to it [e.g. legal realism, critical legal studies, feminist jurisprudence—see BTL 17.1] may change over time, but the goal of maintaining and justifying law’s institutional role as vital in society seems to stay in place.

In contests about whether law is or should be an autonomous institution, some scholars contend that it would be desirable (and possible) to reduce the power of legal institutions considerably, or at least to increase mediation and other participatory forms of conflict handling while reducing the dominance of conflict management by adversarial institutions of law. Others believe that without a formal and fairly rigid legal system, people would cease to respect and obey law, society would become chaotic and anarchy would reign. Still others contend that even the most formalistic legal system is not really an autonomous institution, but the servant of power or politics. Others claim that there is an internal morality of law—a set of characteristics that must be part of formal law for it to be legitimate under any circumstances—called due process. The inquiry as to what the nature and effects of legal culture are upon society in general has been going on for centuries.

Articles, conflicts, ideas or cases that help understand this idea, raise questions about it, or are examples of it during the course:
4. **Law as Justice**—law is a means by which justice, transcendent values, or a “higher law” may be injected into the life of the community. These transcendent values may be anchored in religion, conscience, universal human rights, absolute moral truths, natural law, or elsewhere. But they are matters of principle, rather than mere power, self-interest or community-defined norms; and they may form a basis for judging and changing (perhaps through civil disobedience) even the beliefs, values, and power allocations by which law and culture operate [see, e.g., BTL section 9.2].

The idea of transcending is an important part of the idea of justice. “Transcendence” suggests that justice is defined from beyond daily expedience and beyond culturally accepted beliefs. Thus, the ‘higher law’ may be in conflict with positive law; and the duty of the citizen to obey law may become problematic, leading to contests over what are just and unjust laws. The problem thus arises as to how to find the contents of transcendent justice; and perhaps more importantly, how to resolve disputes in which the disputants hold widely varying ideas of what constitutes justice [e.g. in the conflict over women’s reproductive rights and the right to life, or over capital punishment].

There is also the problem of whether law should even aspire to do justice in the transcendent sense. Perhaps law should be more technical and mundane, providing practical and predictable solutions to human conflicts so that life can go on, even if not in a just or ideal way. Perhaps that is the lesson to be learned from those cultures (theocracies, dictatorships) that have harnessed the power of state law to a particular religion or to some allegedly transcendent ideology that permits no deviation from the “one right way.” If you were absolutely convinced that you could recognize “the devil” in any aspect of modern life, would you give the devil benefit of law (due process)?

Or perhaps the lesson of history is that a legal system that does not aspire to do justice, or that is structured to avoid the struggle over law and justice, is not law at all but merely repression.

*Articles, conflicts, ideas or cases* that help understand this idea, raise questions about it, or are examples of it during the course: