THE POLITICAL SIGNIFICANCE OF THE STRUCTURE OF THE LAW SCHOOL CURRICULUM

*Duncan Kennedy**

This is an attempt to theorize the daily life of law teachers and law students, rather than a more formal "study."[1] It is also an example of a kind of work I've been trying to do for a number of years. The notion is to make explicit the political content of everyday life in the law—the implicit or unconscious political meanings that are programmed into the "personal" and the "professional." Part of this is trying to produce word pictures of what things are like, to evoke them vividly. But the picture is also an interpretation. It selects some things, rejects others, and relates the things selected outward to other realms.

In this article, I will try to relate the curriculum of a typical law school to past events in legal education. I think I could probably produce a footnote to back up each of my factual and historical assertions, but I am by no means sure of it, and haven't made the attempt. I've tried to relate the present to the past not by undertaking research designed to answer a question about origins, but just by rearranging in a new pattern a lot of our common knowledge (some of it certainly false) about the way things are and were.

This piece also tries to get at the implicit politics of everyday experience by relating law school ideas and practices to the commonplace categories of public life. I've applied terms like center-left and center-right, liberal and conservative, to things like clinical legal education and contracts. This may seem odd. It usually doesn't even occur to us to analyze things like curricular practice in political terms. It may seem that we have apolitical, neutral, professional concepts, like "educational effectiveness," that are more useful. But I'm working from the intuition that we often have quite strong agreement about political content, but don't talk about it because it's embarrassing, or seems likely to lead to conflict, or because we couldn't be "rigorous" about it. It is sometimes useful to bring this stuff to the surface rather than burying it.

Yet another aspect of this kind of work is that it tries to use in concrete, familiar settings the exotic concepts of structure and contra-

---

* Professor of Law, Harvard Law School.

[1] I presented an earlier version of this paper to a faculty seminar at the University of Victoria School of Law, Victoria, British Columbia, in February, 1980. I was at Victoria as a Lansdowne Visitor. I've left the examples intended for a Canadian audience. I am grateful for the comments offered by friends and acquaintances at Victoria.

diction, both derived from Western European "fancy theory" (structuralism, phenomenology, neo-Marxism, hermeneutics, and the like). This is problematic because concepts from these European enterprises usually get deployed as part of a high-flown, mystificatory *Dance of the Big Words* designed more to establish the choreographer's prestige than to communicate with the audience. I'm nonetheless convinced that some fancy theory is just plain essential to understanding even the most mundane details of my own life; I'd like to incorporate it into my work, and I don't exclude the possibility that a person doing this kind of microstudy might make a valuable contribution to that larger theoretical enterprise.

These preoccupations make this piece representative of one of the strands of the intellectual movement called Critical Legal Studies. Since the mid-seventies, there has been a small but rapidly growing group of law teachers, students, practitioners and social scientists writing about the American legal system from a committed left perspective, using methodologies that had previously been more familiar to literary critics and continental social philosophers than to legal academicians. Much of the critical legal work has been historical—tracing the way elites have consciously used law to their advantage, and, at the same time, the less conscious way legal thought works as a whole world view in itself, reconciling people to the status quo by making it look somehow natural and fair as well as just plain powerful. There is also a great deal of work on current doctrine that shows the internally contradictory character of our law (*e.g.*, civil rights law, labor law, contract law, or torts), and how internally contradictory doctrine can passivize people by offering justice and yet denying it at the same time.

Specifically, this piece is about the political significance of the structure of the law school curriculum. My claim is an extremely simple one: the private law doctrinal component of the curriculum is politically center-right. It is balanced against a center-left part. The center-left part lacks the monolithic character of the private law doctrinal element. It is a collection of disparate curricular elements, including public law (as opposed to private law), legal process, clincal legal education, interdisciplinary studies and policy. Below is a diagram of these elements:

Policy orientation — Public law

Private law doctrine

Interdisciplinary studies — Clinical education

Legal process orientation

Doctrine, in its box, is at the center, a very real concrete thing. Around it are policy, legal process, interdisciplinary studies, clinical legal education and public law. I've drawn it this way, rather than in an array from center-left to center-right, because a basic characteristic of the politics of legal education is the priority or primacy of doctrine. Doctrine was there first. The other things were there afterwards. There were doctrinally oriented law teachers before there were public law, clinical, interdisciplinary, legal process or policy oriented law teachers. Those who identify themselves as doctrinal, as opposed to any of the other things, usually also see themselves as traditional rather than innovative. It's not as though there are two positions which are equally balanced and symmetrical. Center-left versus center-right also represents change versus continuity.

Now I am going to support my crude model by giving a description of the political content of the nondoctrinal curricular components. I will leave doctrine for last, although doctrine is temporally first, and first in everyone's mind. I don't mean to suggest that the nondoctrinal elements represent radicalism, or far-out leftism, as opposed to doctrine seen as reactionary. I don't see it as that kind of opposition. I see it more nuanced—a difference within the center rather than a polarity of political extremes. What I'll do for each component is to give a description of it that is bifurcated, suggesting both its centerness *and* its leftness. In this context, I probably represent the political extreme, since I think of myself as a socialist, and as such, I don't situate myself anywhere on the diagram: we extremists don't believe in it.

I am going to generalize from my experience as a student in a law school which was profoundly committed to some of these center-left curricular elements, and from my experience as a teacher at a school committed to others of them. I was a student at the Yale Law School, which was, when I was there in the late sixties, completely dominated by the policy, interdisciplinary and public law components. Clinical legal education was the wave of the future at the moment that I left Yale, and Harvard Law School, where I teach now, is significantly influenced by the clinical movement and by the legal process approach, although it has a much more significant core of teachers who identify themselves with private law doctrine than the Yale Law School does.

To begin, a public law orientation is center-left. Public law consists of constitutional law, the law of taxation, criminal law, the set of regulatory disciplines, and administrative law. Now, regulatory and administrative law came into existence as a result of the creation of the regulatory welfare state. There was no meaningful body of administrative law in any of the English-speaking countries until the

creation of the welfare state, with its public assistance programs and its manifold different modes of intervention in economic life. That body of law is inseparably connected with nineteenth and twentieth century left-wing, or center-left, or Disraeli right-wing proposals to reform the laissez-faire state.

If you take administrative law, labor law, antitrust law, the law of public utilities and taxation together, those bodies of law directly embody the goal of changing the status quo through legislative programs. The same cannot be said for constitutional law. But if you look at the history of that discipline, you'll find that it came into existence—*in academia*—as part of the critique of right-wing invalidation of leftist social legislation, and is sustained today by nostalgia for the Warren Court.

Of course, the way I've just described it puts too much emphasis on the left and not enough on the center character of public law scholarship and the public law focus. That might have been accurate for the United States in the 1930's. There weren't any courses in taxation in American law schools until after the First World War. There certainly were no courses in labor law, no courses in antitrust, no courses in administrative law. Those courses were made part of the curriculum, between about 1930 and about 1950, openly and explicitly by young liberal faculty members who thought that they were an enormously important part of the curriculum for the simple reason that they embodied the new wave of social legislation.

By now, that's different. Now, a large number of the people teaching those courses, who are responsible for the vitality of the public law curriculum, are people who see the regulatory and redistributive programs of the welfare state as having gone plenty far enough. They accept them, but are now concerned with how to constrict them. That's the center, as opposed to the left component of the program. For example, very few people in the United States teach labor law who believe that the National Labor Relations Act should be repealed. In fact, I don't think there are any. You never read an article by a labor lawyer advocating rolling back to the situation of American labor legislation in 1929, before the Depression. On the other hand, there are now many labor law teachers who see the expansive interpretation of the Act up to, say, 1955 as having been the appropriate high water mark, and regard everything that has happened since then as going too far. They would advocate a marginal cutting back, and certainly oppose further expansion.

The same thing is true for antitrust. You will not find antitrust professors who believe in the repeal of the Sherman Act, though there are many antitrust professors today who believe that the interpreta-

tion of antitrust law should be constricted rather than expanded. That's what I would call a center position, as opposed to the position of a clean conservative, who would argue that that stuff should be done away with immediately, that we ought to go back to an unregulated market system.

So public law is both center and left; it has a distinct political connotation. There is an association between belief in this kind of orientation for legal education and a particular kind of political vision. The same is true of the notion of interdisciplinary studies.

The interdisciplinary focus is associated with two kinds of critiques. In the history of the interdisciplinary approach, a crucial initial activity was demonstrating that the law in action was different from the law in books. The notion was to do a study, using social science techniques, showing that the picture of the economic and social world presented by doctrine, say freedom of contract, was very different from the way things were in real life, where poor people had no freedom of contract and had to take what they could get. Again, the historical origins of law-and-*x* are impeccably left wing. There were no law-and-*x* interdisciplinary studies in the United States, at least before the First World War, which were not motivated by a populist or progressive or reform legislative spirit.

Moreover, during the whole period of development of law-and-*x*, new law-and-*x* stuff was constantly produced by liberal reformers attempting to justify the implementation of the public law program I've already described. Law in action versus law in books was one thing, and the other was the legislative feasibility or implementation kind of study. Law-and-*x* meant that after demonstrating that the real world was not like the picture of doctrine, you did a study to show which particular legislative program of reform ought to be instituted. It was an appeal to social science to justify the public law reform program.

Now, again, what was initially left is now often center. The interdisciplinary movement long since achieved a kind of ideological balance, so that within it there is now a conservative form of law and economics which is actually stronger than liberal law and economics. There is a conservative law and sociology for dealing with criminology and sentencing, for example. The old deterrence theory is back in the form of law and social science. Whereas once law-and-*x* was unmistakably a left of center phenomenon, now it is sometimes a right of center phenomenon. Moreover, many of the post-1945 generation of interdisciplinary scholars have gradually drifted from the left into the center, and no new left generation has arisen to take their place. It has balanced out. But it still has a pedigree. It still has an historical origin.

With the exception of the University of Chicago, law faculties putting a lot of emphasis on interdisciplinary stuff tend to be liberal in political orientation.

The legal process orientation emphasizes the distinct roles and the interaction of different kinds of legal institutions, and the actual behavior (as opposed to formal prescriptions) of officials and private parties within a given institution. That's a rough definition. The best known formulation is the Hart & Sacks *Legal Process Materials*,[2] published in 1958. Hart was working on it in the late thirties, as was Willard Hurst, who put out a similar set of materials with Wisconsin colleagues.[3]

The initial motive of the legal process orientation was to show that courts, legislatures, administrative agencies and executive officers, along with private parties, all had appropriate roles to play in a global scheme of organizing state policy to maximize social welfare. That's the historical origin of the approach. It was a way of counteracting the notion that courts were completely different from legislatures and administrative agencies, the notion that administrative agencies were basically no good and that the judges ought to hold out against and sabotage the New Deal reform legislation because it was incompatible with the rule of law.

So the legal process orientation was initially designed to show that there is a role for each legal institution in a global overall plan to maximize welfare through reform, and that the courts should cooperate with rather than obstruct that program. That idea was once really quite left. But it has long since become totally centrist. It is much more likely today, in the United States, that the legal process approach will be invoked in order to justify a court not doing something left-wing, on the grounds that to do the left-wing thing would be to disregard the appropriate limits on the judicial role. The argument will be that, if we look at the legal process as a whole, we will see that the left-wing thing should be done by some nonjudicial institution, if it should be done at all. The separation of powers has been reborn inside the legal process orientation in the United States.

Clinical education is easier because it's more recent. It has a specific political origin in the late sixties, when it was supposed to

---

[2] H. HART & A. SACKS, THE LEGAL PROCESS (tent. ed. 1958).

[3] C. AUERBACH, L. GARRISON, W. HURST & S. MERMIN, THE LEGAL PROCESS: AN INTRODUCTION TO DECISION-MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE AND ADMINISTRATIVE AGENCIES (1961).

promote two explicitly left of center experiences. One was direct experience by middle-class professional students of the actual life of the poor. The organization of clinical legal education in the form of delivery of legal services to low-income clients was meant to and did produce a very striking political discontinuity in the lives of middle-class law students. The other aspect was that the programs were designed to and did expose middle-class law students to aspects of the structure of their profession, and of the hypocrisy of the bar, that they would not otherwise experience, at least in law school.

The idea was to take the students out of the idealized law school context, where they couldn't possibly understand what life is like, and expose them to life at the bottom. This was supposed to teach them that they were in danger of being sucked into a conservative and profoundly immoral structure of delivery of legal services, biased in favor of the rich and against the poor, and shot through with ethical bad stuff.

Now that aspect of the clinical program is beginning to dissipate. In just ten or twelve years, a centrist version of clinical legal education has emerged which is purged of almost all those aspects. As it becomes skills training and deemphasizes the legal clinic in favor of simulation, it is moving towards a politically more moderate, calm, and centrist picture of what it can do and what it ought to do. It's drawn back from the political implications of the way that it was initially set up. So there is a center-left aspect of that as well.

Finally, there is what I called the policy orientation. It's a different kind of thing than the others because it operates not as an alternative to the private law doctrinal curriculum, but as an alternative *within* the doctrinal areas. It's different from the straight doctrinal orientation in two ways. First, it constantly and critically asks the purposes of rules: what are these rules good for? It usually asks that in terms of some general utilitarian or social welfare perspective. What social purpose is served by this rule?

Again, the origins of the policy approach were by no means neutral. The policy approach was invented by people looking at the rules of the laissez-faire state, the late nineteenth century structure of rules, and saying, "These rules are being accepted as just, inevitable and necessary and good, when in fact they are none of those things." If we start questioning why they are there, and what they are good for, we are quickly going to come to the conclusion that many of them are not nearly as good as they look.

The other aspect of the policy approach is disintegration. Every rule is looked at in terms of the total complex of factors that might

make it a good rule or a bad rule. It's against doctrinal integration and in favor of "every tub on its own bottom"—the localized policy calculus in which every aspect that might be relevant is brought to bear. That was also originally a left-wing notion. It was the notion that rather than a single monolithic structure of legal rules that were necessary, logical, and just, there were thousands of discrete, particular policy choices. The belief was that administrative agencies and legislatures should look at social problems as they arose, and deal with each one pragmatically, with no regard to general ideological principles like "no government intervention."

It was not socialism that was behind policy. It was moderate, center-left, ad hoc reformism, and both its utilitarianism and its disintegrated, ad hoc quality were connected to that political program. But it has lost even that political orientation. There is now policy analysis of every possible stripe, and it has gradually become clear that a skillful person using the policy approach can generate a resoundingly convincing policy rationale for any rule. There is no existing rule that cannot be legitimated by reference to some set of social policies.

If you're good at this kind of analysis you can actually feel your own ambivalent, switch hitting, go-any-direction capacity. Policy can be used to show that every rule is necessary, should be the way it is, has been the way it is for a good reason, or it can be used to show that any part or even the whole system should be junked. The feeling that policy analysis is highly determinate is gone, so now it's available to everyone rather than being left in any meaningful sense.

Now that's a set of claims about the political character of public law, interdisciplinary study, legal process, clinical education and policy orientation. But what about the political character of doctrine? The reason why I identify doctrine as the center-right is this: The basic notion about doctrine among law teachers seems to be that doctrine is, in essence, contracts, property, and torts, and that to teach doctrine is to show that contracts, property, and torts have a deep logical coherence as common law subjects. That they are highly rational. Now, remember that the rules of contract, property, and tort do not include administrative law, municipal law, welfare law, environmental law, labor law, antitrust law, securities regulation law. All those have been spun out—consumer protection, the law of the health system—all have been spun out into public law.

What's left of doctrine, what we think of *as* doctrine, is the common law as it existed in 1890. What is doctrine? Doctrine consists of notions like: "The institution of private property is a good, necessary, reflection of our rights." If you have a private property system

you have to have some rules about particular aspects of private property. Those are rules about what is a trespass, about conveying things. You have rules of freedom of contract; you have tort rules emphasizing that people should not have to pay if they aren't negligent, and emphasizing defenses within tort.

That body of rules is, in fact, not doctrine in any abstract sense. It is what is left, on its last legs, of the specific body of doctrines that defined nineteenth century laissez-faire capitalism. So doctrine has a political connotation in the simplest possible way. The doctrines that we talk about when we talk about doctrine are basically the doctrines of freedom of contract, sanctity of private property, limitation of tort liability, and the existence of many tort excuses. So it's not surprising that doctrine is understood to be center-right as opposed to center-left. The very process of the growth of public law, interdisciplinary study, legal process, clinical, and policy stuff confirms the conservative character of doctrine. They are kept separate in part because they are seen as politically incompatible with doctrine.

Of course, doctrine was once everything. What has happened is that doctrine has shrunk from being everything to being the little block in the middle of my diagram. One can see it either as the addition of a periphery to the doctrinal core, or as the spinning off of elements of the core to form the periphery. But it's very important that belief in doctrine as rational and coherent is tantamount to belief in the basic institutions of capitalism as rational and coherent. To assert that property, contract and torts are rational is to assert that you can understand capitalism as rational, that you can understand as rational a system which is based strictly on private property, free exchange, and the sharp limitation of all kinds of collective or communal duties of people vis-à-vis one another.

As long as it doesn't claim to englobe everything, doctrine is not extreme right. People who teach doctrine usually begin by saying, "Well, I completely accept that the labor contract is not part of contracts, and I completely accept that landlord/tenant is not part of contracts." There is a thorough acceptance that the core of doctrine is not a blueprint for a return to 1850. There is no clock-rolling-back program implicit in teaching doctrine. It's just the affirmance that in essence we have a capitalist system. The system is modified and softened by all the stuff in the periphery.

My basic argument is that this political conflict, the conflict between doctrine as center-right, and the periphery as center-left, is rendered unreal, and its outcome distorted, by the way in which we tend to construct the opposition. We construct this opposition between the doctrinal core and the periphery. We don't do it as center-

left versus center-right, we do it as core versus periphery. Implicit in choosing to do it this way is a structure of feelings about the two opposed domains.

Here is how I'd characterize the structure of feelings. The core is hard, the periphery is soft. The core is law, the periphery is politics. The core is reason, the periphery is emotion. The core is based on the clean, anti-emotional logic of doctrine, whereas the clinical, interdisciplinary, legal process, policy, and public law approaches are all based on altruistic passion. Logic versus subjectivity. The core equals reality. It is the way things really are, whereas the periphery is the ideal, the way we would like things to be. There is a sense in which the core is our real self and the periphery is our fantasy self, our ethical fantasy self. The core is law.

There are lots of other characterizations. The core is cold, the periphery is warm. The core is individualist, the periphery is collective or communal. The core is based on the notion that "it is my property and if I don't want to give you any of it, I'm not going to give you any of it. You can starve in the snow, and I will not raise a hand, because there is no duty to act in Anglo-Commonwealth tort law, at least in the absence of a special relationship. And that means I can let you die." Maybe this perspective has been tempered by statute, but if so, the change has been effected through the legislative process, and what was once a part of the doctrinal core now belongs out in the periphery. It's become an aspect of public law.

Significantly, the core of doctrine is unitary. There is a deep coherence to contracts, property and torts, whereas the periphery, as the name suggests, is dispersed, disintegrated, and chaotic. It's even true that each element of the periphery is internally dispersed, disintegrated and chaotic. What is the unity to public law? There is none. I asked a friend, what is public law? He said, "If the state is a party, it's public law." Some definition! A purely formal definition. What's private law? Private law is property, contract and tort. It's capitalism. It is unitary. What is policy? Policy is just what's relevant to whatever decision you happen to be making. Every tub is on its own bottom. So it's also utterly disintegrated.

Finally, doctrine is the domain of necessity. When you are within the logic of contract or the logic of the negligence system, you are in a domain in which there are premises and principles. There is a reasoning process which is *legal.* There is an outcome, and that outcome is correct legally, irrespective of whether it is right or wrong ethically. Viewed from this perspective, law becomes a necessity machine. Being good at law is being good at operating the machine. If you are a

student, you constantly make mistakes and are corrected by a person who operates it better than you do. That's natural, within the domain of necessity.

The periphery, of course, is the domain of choice, of pluralism. Anybody can believe what they want to. It would be totalitarian and dictatorial to try to teach people what our public law programs ought to be, what policy is best. The periphery is the area of open texture, of freedom as opposed to necessity. Because it's "inherently subjective," it *can't* be necessary.

Now, if that's the way you construct the opposition, it's obvious who is going to win at every level. The center-right beats the center-left every time, when the politics of legal education are constructed in this fashion. It may be that that's good. As an outsider to the quarrel, I take no sides as between the center-left and the center-right. But I would like to point out that the game is stacked when it is constructed in this way. If it's constructed this way, it's impossible for the center-left to maintain its initial head start, based on its correspondence to many lay attitudes, from the first year into the second and thid years. It is a natural and virtually inevitable consequence that students drift from the periphery into the core.

A second kind of consequence is that the center-left position, because it is dispersed, disintegrated, disorganized, because it has no theme and denies its own political character, has nothing except the vaguest kind of critique of the core. The core has a very specific and bureaucratically appropriate thing to say to the periphery, which is, "What are you doing? I mean, we are a law school. We are trying to train people to do things. We have some concrete social goals to accomplish. And you are just blithering around the periphery."

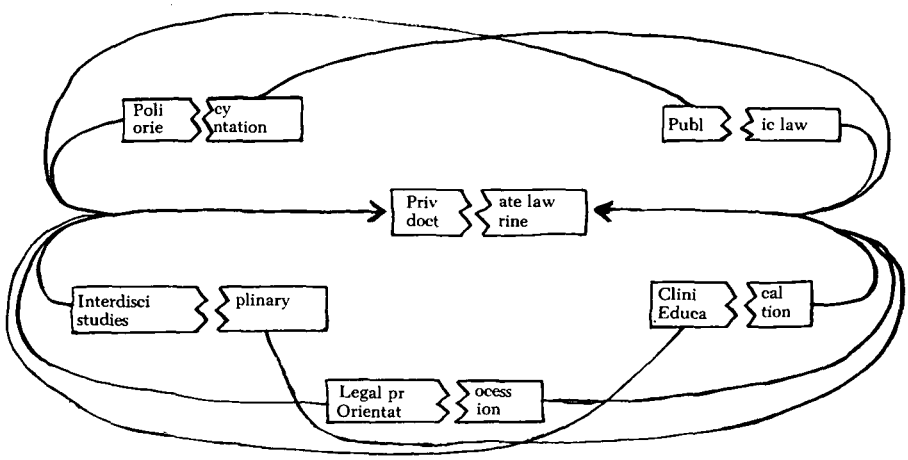
The periphery responds to the core, "But there is something irrelevant about doctrine." So the response comes back, "What do you mean there is something irrelevant about doctrine? The bar lives on doctrine. It doesn't live on public law. It lives on doctrine." The attitude toward clinical legal education is similar; "It's fine if it's skills oriented, but the last thing we are geared to do is to train people to believe that the social system is unjust to the poor and that the bar is hypocritical. That's not our role."

There is no equivalent attack on the doctrinal core. It seems to be mildly conservative. It seems to be associated with people who are mildly conservative. But there is a distinct imbalance, because the periphery looks nonneutral, political, crazy, ineffective and unfunded. It doesn't fare well against the core. The last straw is that, given the way everyone agrees to construct the situation, the advo-

cates of the periphery are full of second thoughts and insecurities. Almost everyone teaching in the periphery believes that doctrine is terribly important, but people who are deeply involved in doctrine often feel that the periphery is unimportant. It's only the center-left that feels profoundly ambivalent about its own role.

The ambivalence is related to the characteristics of doctrine as we construct it. Doctrine is rigorous. Doctrine is analytically sound. Doctrine is careful. Doctrine requires sharp insight, the control of one's emotions, enormous intellectual depth, and effectiveness. The periphery requires a warm heart, a certain amount of gushy willingness to take risks, and general niceness. It is associated with woolyheadedness and general intellectual incompetence, let's face it, in the minds of the very people who do it. And also in the minds of people who do doctrine.

I want to argue that this is all wrong, that this is a wrong construction of the legal universe. It really doesn't look like my first diagram, but rather like this:



The two important aspects of this second diagram are the internal contradictions of doctrine and the total fusion of the periphery with the core. The notion is that there are two flaws in my initial diagram. The first is that doctrine is not in fact unitary, coherent, or rational. Doctrine does not have the qualities ascribed to it. Second, the periphery is not disintegrated, open-textured, radically less necessitarian and more pluralistic than the core; indeed, the distinction between the core and the periphery is an illusion.

Let me start with the claim that doctrine is unitary. Until now I have given no real description of doctrine except to say that its essence

is contracts, property and torts. When one says that doctrine is unitary, necessary, rigorous, logical, rational, and then considers doctrinal teaching as actually practiced, it's at first quite difficult to put the image together with reality. A classroom everyone identifies as overtly doctrinal seems to differ from a peripheral classroom in only three ways.

First, such a classroom puts more emphasis than a peripheral classroom on the memorization of a list of rules. That is, the total number of rule units the student absorbs is greater. Second, a doctrinal class spends more time than a peripheral class testing the verbal limitations of the rule form. The teacher puts a rule out for examination, and then formulates a series of hypotheticals whose purpose is to demonstrate that there is a naive and a sophisticated reading of the rule.

A naive reading of the rule will lead the student to apply it where it shouldn't be applied and not to apply it where it should be applied. A sophisticated understanding, after examining these hypotheticals, leads one to the conclusion, "Gee, they can't quite mean that. You have to apply the rules *this* way to make any sense at all. *That* application is just crazy." This is done by the Socratic method. That's the second aspect of a doctrinal classroom. The irony is that the naive reading generally turns out to be "formalistic," and the sophisticated reading generally turns out to be "guided by policy." The contrast with the peripheral classroom turns out to be ephemeral, if we look only at the intellectual content of what's happening.

The third aspect is the most complicated and important, yet the least explicit. It's hard to get at. A well run doctrinal classroom offers a one or two sentence, tag-like, formulaic justification for every rule, and never, except for anomalies, rejects a rule. In a well run doctrinal classroom, eighty percent of the rules come with a simple label attached: "This rule is necessary for security of transaction" or, "This rule is necessary to guarantee commercial flexibility."

Now you might think that those two rules, with their apparently opposite justifications, each of which is, of course, a "policy," are going to contradict each other. But no. One rule is necessary for security of transaction, the other for flexibility. Then there will be some rules that are historical anomalies. "This rule is bad because it is an historical anomaly." That's one kind of anomaly. The other kind of anomaly is the borderline of policy. "We have finished our hard discussion," says the teacher. "Now we've gotten to *this* rule, and some people say one thing about it, some people say another thing. Your view is as good as mine. Let's discuss it in an open-textured way." Those are also anomalies. Rules that are on the cutting edge are anomalous and historical artifacts are anomalous.

That's the structure of the rule system. Eighty percent one-sentence tag, ten percent bad historical anomalies, ten percent open to discussion as the law of the future, about which you can think anything you want. That structure is incredibly, powerfully legitimating. It doesn't say all the rules are right. Just eighty percent. There is a reason for every rule, and the reasons flow along. You get used to picking them up. You write them down. They are very short. They are never looked at in too great depth. One rule is never compared to another rule except as a way of showing that it's consistent with another rule. Except again for the few anomalies. The formulaic, brief character of the justificatory tags for the rules gives you a sense that it has all been decided long, long ago; it's all incredibly well worked out; everyone agrees that it's all basically sewn together.

My argument is simply that this appearance of rationality is pure illusion. I'm making a direct attack on doctrine as it is taught. Teachers give a phony impression of logical coherence, not on purpose, but out of the tradition of teaching. The tradition of teaching sets the teacher up with a tag for every rule, and the succession of tags gives the teacher and the students the sense of necessity, the sense of logic, the sense of unfolding rationality that then distinguishes the doctrinal core from the periphery.

My claim is that in reality there are two streams of doctrine within the doctrinal core, that the two streams are contradictory, and that we all know it. Lord Denning[4] is a walking symbol of doctrinal fractiousness, the very spirit of contradiction. The only reason he isn't seen as challenging the whole Anglo-Commonwealth conception of doctrine is that he is so flip. He comes across as disorganized, vague, offhand, rather than as theoretically challenging. He gives so few reasons. For example, in one case he explained a fundamental change in contract damage rules by saying that any other views than his were out of date. That's all he said.

I would say that the reason why someone like Lord Denning doesn't develop a picture of doctrine as internally contradictory is obvious. It's not in his interest as a law reformer to develop systemic contradiction as the core of the private law system. He doesn't want to delegitimate the system. He wants to change it while preserving its legitimacy. He obviously understands it completely. It's implicit in his activity that there aren't any principles of the type that you come to believe there are when you sit in a doctrinal classroom listening to the tags flow one after the other.

---

[4] Lord Denning is The Master of the Rolls, English Court of Appeal.

And Lord Denning is right. There aren't any such principles. In contract law, for example, there are *two* principles: there is a reliance, solidarity, joint enterprise concept, and there is a hands-off, arms length, expectancy-oriented, "no flexibility and no excuses" orientation. They can be developed very coherently, but only if one accepts that they are inconsistent. There are fifteen or twenty contract doctrines about which there is a conflict. There are two sides.

It isn't random. You can predict from a person's position on one issue what his position is likely (not certain) to be on the next. People who favor liberalization of excuses in contract law also tend to favor relaxing obstacles to contract formation. They want to make it easier to get in and easier to get out. They oppose the behavior of the person who says, "Who, me? No contract, never saw you, never heard of you before," after elaborate reliance. And they also oppose the person who says, "My pound of flesh." There is a common communal, collectivist, ethical, altruist notion that animates both notions: that you don't simply back out of an agreement, and that you don't exact the pound of flesh. On the other side, there is an individualist, autonomy-oriented notion of self-reliance, that people should look out for themselves, an anti-sloppiness notion. It is a powerful ethical counter-ideal *within* doctrine.

That is the structure of contract doctrine, and it's typical. Doctrine is not consistent or coherent. The outcomes of these conflicts form a patchwork, rather than following straight lines. There is no coherence to either contracts or property or torts. Sometimes one approach pushes all the way so that the armies get to a certain point . . . and then there will be a case in which the opposing armies make it all the way back in their counterattack. It's a battle between contradictory world views which are inside each person as well as embodied in the litigants.

The conventional concept of doctrine is just wrong, and the minute one recognizes that, by splitting doctrine down the middle, the distinction between core and periphery dissolves. The reason for this is that the only way to understand what links together fifteen Lord Denning contract opinions and fifteen of his tort opinions is to go out to interdisciplinary studies, legal process, public law, policy and clinical perspectives. The opposition within doctrine is simply incomprehensible and unintelligible without reference to those things that are supposed to be on the periphery.

You can't teach the contradictions of private law theory without teaching that there are two opposed "interdisciplinary" economic theories—theories of economic growth. There is a theory that empha-

sizes utter deregulation of everything, and a theory that urges people to take externalities into account as much as possible, and therefore leads to the rapid collectivization of investment. There are two opposed economicses. Legal process is the same thing. There are opposed legal process theories. One emphasizes the allocation to each institution of its role, and keeping each institution within its role at all costs, so that the rationality of the system becomes the rationality of separate parts doing the right thing. Then there is an opposing process concept of coordination of roles, in which the parts are trained to and ought to respond to each other's failings, as opposed to continuing mechanically to do what they were supposed to do before.

We could go through a similar exercise for policy, public law, and clinical. The point is that each is internally divided. Each can be seen as a locus of conflict. This means that the impression of freedom, subjectivity, open-texture, looseness or arbitrariness—all these characterizations of the periphery—are also false. The doctrinal core is not unitary, and the periphery is not diffuse. They have the same, essentially dualistic structure, the structure of contradiction.

In this picture there is neither unity nor chaos; only violent contradiction. There are no overall unifying principles of law which make legal reasoning different from other kinds of reasoning and give the subject an internal necessity. There is none of that. On the other hand, legal reasoning is not just sprayed all over the map. There is a deep level of order and structure to the oppositions between competing conceptions of doctrine and of policy and of everything else. The task of doctrinal teaching in the first year should be to make these underlying structures accessible to students, while at the same time confronting them with the inescapable necessity to choose for themselves how to resolve the contradictions as they arise in their own lives.