

# Ten Thousand Cases, Maybe More – An Essay on Centrism in Legal Education

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Abstract

Law school training has a certain centralizing, homogenizing, tendency . . . Centrism pulls to the center, not because the center has any particular content, but because, well . . . it is the center . . . [I]n the American law schools a particular school of jurisprudence has already won out. The triumph of this school of thought is so complete, so pervasive, that it is not even seen as a school of jurisprudence, but as “law,” pure and simple . . . [T]he school that has won out “case law positivism”. . . is an unsteady amalgam of beliefs about law . . . One would think, given the centralizing effects of law school training, that at the center of the discipline of law one would find a solid core. After all, that is one of the enduring images of case law positivism. But paradoxically, this is not the case at all . . . The tacit compact of the law professor and law student is that each will submit to case law positivism . . . because coming face to face with the infirmity of the core is just too damned scary.

“Well, yes, but no court would ever consider that.”

Anonymous East Coast  
Law Professor

Law school training has a certain centralizing, homogenizing, tendency. This tendency – I will call it centrism – can be seen in the celebration and institution of moderation, reasonableness, good judgment, avoidance of extremes, passive acquiescence, judicial minimalism, the passive virtues, balancing, and the middle of the bell curve. Centrism pulls to the center, not because the center has any particular content, but because, well . . . it is the center. Described in this way, law school centrism exerts influence on any political spectrum one might imagine as being in place (no matter how skewed to the left or the right this spectrum might be).

Centrism is not just (nor perhaps even mainly) an ideology. It is not just a constellation of beliefs that are invoked repeatedly as the prisms or templates or frames through which law is described and experienced. Centrism is also a set of practices, institutional norms and behaviors. As such, the effects of centrism are registered not only in the realm of ideological beliefs, but intellectual style, psychological orientation, the presentation of self and so on and so forth.

What follows is a brief description of a few related law school training processes that combine in various ways to yield this centralizing and homogenizing effect. Law school training, of course, has

broadening and even polarizing tendencies, but here, I wish to focus on its narrowing effects, which strike me as generally undernoticed and socially important.

### **Ten Thousand Opinions**

For the most part, law school teaching is organized around the review, dissection and assimilation of judicial opinions. For the student, this will mean reading (or at least, assuming responsibility for) approximately 10,000 cases<sup>3</sup> over a three-year period.

There are many justifications for this massive exposure to case law, some of which are even persuasive. But opening up thought processes and stimulating imagination are not among them. Those are not the ends to which judicial opinions are written. On the contrary: The *sine qua non* of the judicial opinion – one of the things that makes it an opinion as opposed to say, a poem or an essay – is that it is supposed to shut down thought. The judicial opinion is organized in terms of that crucial moment where the court declares: “It is so ordered,” or “judgment reversed” or some such thing. An opinion brings into play a whole network of canonical meanings, performances, power relations, institutional mechanisms and genuflections that lead most of the relevant readers (for instance, the parties) to actually heed the order and do something fairly close to what the opinion seems to require.

These opinions, strategic though they may be, do have moments of intellectual curiosity and imaginative openness. And indeed, upon first coming to law school, the law student may often be surprised to discover – through the reading of a judicial opinion no less – that a problem once thought simple is in fact complicated, ethically ambivalent and perhaps, even tragic. The student may learn something about the vulnerabilities and orientations of his or her own beliefs.

Some of the best judicial opinions do indeed traffic in thoughtfulness and self-reflection, and they do so in ways that are often far more sophisticated and more serious than, say, analytical moral philosophy. There is much to be learned from judicial opinions. Nonetheless, it is important to remember what these texts are designed to do and what role they play. The moment of openness and imagination is in service of the moment of closure, not the other way around. If judges seek out complexity and edification (and often they do), it is not because these things are valued for their own sake. They seek out complexity and edification, all the better to bring about a successful closure that will put the issues to rest.

In the study of law and in law school training this dialectic of openness and closure is repeated in a homologous set of well-entrenched, recurrent tensions, including:

Legal formalism v. Legal realism

Law as professional school v. Law as graduate school

Neutral decisionmaking v. Contextual decisionmaking

Theory v. Anti-theory

Law as rules v. Law as judgment  
Law as science v. Law as craft  
Formalization of law v. Deformalization of law  
Legal dogmatics v. Legal rhetoric

Law students and law professors often take explicit “stances” on these oppositions – arguing in favor of a move towards one side or the other or striving to subsume or envelop one within the other.<sup>4</sup> Indeed, a great deal of law school discussion occurs within the terms described by these oppositions. In taking stances within these oppositions, law students internalize the tension. No law student or law professor is ever fully at one end or the other. On the contrary, they are torn to varying degrees between the pull of one side and the other. Later, as lawyers and judges, the law students will become the walking-talking sites through which these tensions are mediated.

Significantly, the poles of the tensions are not accorded symmetrical value. In law school, *the ideal* of law is, by and large, associated with formalism, theory, science and neutrality. By contrast, their opposed members arrive on the scene in a supporting or critical role. Legal realism, contextualism, deformalization and anti-theory arrive on the scene of legal education as *protestant tendencies*, as efforts to moderate and reform the legal ideal.

In the law student, the tensions are reproduced as a movement from openness to closure:

- From relatively wide-ranging class discussions to the black letter issue-spotting exam;
- From reading the cases (first semester) to reading the outlines (thereafter);
- From critique of the case law to assimilation of the doctrine;
- From class participation to passive listening;
- From passive listening to solitaire;
- From open-ended job futures to interviewing with firms on campus.

These movements are in turn a mimesis of the movement from college to law school. Having learned to become open via the mushy thinking of undergraduate education, the student then learns to be closed via the hardheaded rigor of law school. In college the student has been groomed in the great humanistic texts. But in law school, this openness (mushy headed thinking/tolerance) will effectively be brought towards closure (rigor/narrowness).

The effect is to centralize and homogenize the law student’s intellectual possibilities. Once the tensions, asymmetry and all, have been internalized, the law student becomes a kind of human funnel – the medium that regulates the traffic between openness and closure. This capacity will, of course, be immensely useful in practice. Indeed, one of the crucial tasks of lawyering and judging is to organize the chaos of facts into the ordered patterns of law. Judges and lawyers often deal with intractable social

economic and political disputes. Their ability to translate these intractable and often very messy disputes into a uniform language is what enables resolution.

The movement from openness to closure is not the only tendency in law school: there are obviously broadening tendencies as well. However, it is difficult to resist the sense that the broadening effects are peripheral – affecting only a limited number of law students, and then not very profoundly.

### **Case Law Positivism<sup>5</sup>**

At many law schools, jurisprudence is a small elective course. It is often viewed by other law professors as 1) the repository for all the failed theories of law expounded in the last 2000 years (with special attention to the Hart/Dworkin debates<sup>6</sup>); and/or 2) a specialized province where some of the minor analytical kinks in the nearly perfected edifice of American law can be worked out; and/or 3) specialized provinces where certain client groups (ethnic minorities, women, analytical philosophers, and gays) are enabled to theorize their limited partial perspectives on law.

All this is by way of saying that in the American law schools a particular school of jurisprudence has already won out. The triumph of this school of thought is so complete, so pervasive, that it is not even seen as a school of jurisprudence, but as “law,” pure and simple. I will call the school that has won out “Case law positivism,” which is an unsteady amalgam of beliefs about law:

Law is principally what courts say it is. Or to put it conversely: By and large, it is law if the courts have announced it as such.

Courts find law in or construct law from artifactual forms known as doctrines, rules, policies, principles, opinions and holdings – all of which can be moderately modified by reference to each other.

Judges interpret these artifactual forms to produce a normatively right result. Sometimes they succeed. Sometimes they fail. Unless the result is normatively very, very wrong, what the judges say is law.

Law is limited in scope and substance by realpolitick considerations (e.g., the expenditure of the court’s capital) and the identity of judicial personnel (e.g., the Rehnquist Court).

In certain situations (particularly in constitutional law or in other subject matters residing in the vicinity of the *grundnorm*) it is permissible to appeal to natural law-like considerations (but only sparingly).

Law is relatively determinate at the core/center, but there is some uncertainty/vagueness/indeterminacy at the periphery/ penumbra. In the latter cases, it is politics, good judgment, common sense, realpolitick, etc. that help produce a decision.

Now, this is a very crude vision of law, and few legal professionals would admit that it is *their* view of law. Nonetheless, I think this is a fair account of the unconscious, default image of law often operative among many law students and law professors.

Among the many reasons that this crude view of law is not generally recognized is that attention is directed elsewhere. This crude vision of law is often manifested in a highly evolved, extremely intricate, complicated version – otherwise known as “court watching.” Many legal academics are court watchers. They dutifully monitor the output of the courts in a particular subject matter area: bankruptcy, first amendment, etc. Since there is so much material to learn, master and integrate, this enterprise is extremely time-consuming and difficult. If one is going to engage in court watching and try to organize/reduce the output of the courts into something that looks like a body of knowledge, it will help considerably to have a simplified understanding of the identity of law. Uniform units of analysis (doctrine, policy, principle), uniform objectives (deterrence, compensation, retribution) and uniform argument types (rule/standards, rule/exception) are extremely helpful.

If, as a law professor or law student, one is focused on mastering the growing corpus of cases, one may (helpfully) fail to notice that amidst the tremendous intricacy and variegation, the underlying jurisprudential vision is often fairly crude. Court watchers cannot be faulted for this: If one is going to engage in court watching, it is difficult to imagine how anyone could perform such an encyclopedic endeavor without a simplifying/simplified jurisprudential vision.

Still, the automatic default status of case law positivism has a centralizing and homogenizing effect – politically, ethically, psychologically and intellectually. It takes real effort for both law professor and student to realize that case law positivism is not *simply* and obviously “law” but merely one vision of law among others.

There is an important intellectual and political significance to the dominance of case law positivism. Not only does case law positivism effectively canonize a certain jurisprudential vision, but it generally marks out the boundaries within which classroom discussion will occur. For instance, given the present case law and composition of the United States Supreme Court, a constitutional law teacher might well counterpose *Roe v. Wade*<sup>7</sup> with *Planned Parenthood of Southern Pennsylvania v. Casey*.<sup>8</sup> By contrast, it is extremely unlikely that much class time will be spent criticizing the opinion in *Roe v. Wade* for curtailing the woman’s right to choose in the third trimester. The bounds of class discussion are thus often set by stereotypical devices such as:

Majority opinion v. Dissenting opinion

Present opinion v. Previous opinion

Majority rule v. Minority Rule

Rule v. Exception

The disputes before the courts – in light of their probable beliefs – largely define the intellectual, aesthetics and political spectra within which classroom arguments occur.

### **The Empty Core**

One would think, given the centralizing effects of law school training, that at the center of the discipline of law one would find a solid core. After all, that is one of the enduring images of case law positivism. But paradoxically, this is not the case at all.<sup>9</sup>

Law is not an academic discipline in ordinary senses of the term. Law does not have great learned texts, in the sense in which literature might claim to have *The Odyssey* or *Don Quixote*. Law does not have a shared method, in the sense in which economics might claim to have econometrics. Law does not have enduring problems of great significance, in the way in which philosophy might claim to address some of the enduring dilemmas of human existence.<sup>10</sup>

These observations may seem a bit harsh on law, but it is difficult to believe that any of the texts of the law (The Constitution, *The Concept of Law*,<sup>11</sup> or *Palsgraf v. The Long Island Railroad Co.*<sup>12</sup>) measure up. One is at a loss to find anything in law that could count as shared or established methods, and as for great enduring problems, it is difficult to find any particular to law that are all that great: Judicial review? The problem of legal change?

So what is this “discipline” of law? What we have are interrelated legal communities (law schools, courts, etc.) where we talk and enact ourselves into the beliefs and practices that we are. These beliefs and practices turn out to be largely ad hoc, understandably parasitic on common folk understandings and foreign domains of expertise and not particularly coherent (in any theoretical sense). These beliefs and practices are regularized through techniques of formalization, reductionism, deference, hierarchy, colonization and the like. And all of these beliefs and practices are supported through a professional cartel (lawyers) endowed with state power. These features of law amount to something. All of this is not nothing. But it does not obviously transform law into a serious “discipline.”

If we describe law in this way, it becomes difficult to discern what might be at the core – other than, well . . . a belief in “coreness.” Yet, if we press again and ask about this coreness, there does not seem to be much *there* there. The core (such as it may be) is an amalgamation of reasonableness, greatest common denominatorhoods, bits of folk wisdom, overlapping consensus, shared belief – all presented in a formal idiom that lends the whole thing the appearance of knowledge.<sup>13</sup>

Why do we – law professors and law students – put up with this? It is precisely because of the infirmity of the core. For law student and law professor, the realization that the core may well be empty is a prospect too dispiriting to behold. The tacit compact of the law professor and law student is that each

will submit to case law positivism and to the Ten Thousand Cases because coming face to face with the infirmity of the core is just too damned scary.

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<sup>3</sup> Actually, if one discounts note cases, the number assigned is, by my estimation, probably closer to 3,000. But why quibble?

<sup>4</sup> There are all sorts of rhetorical operations that can be performed here. (It would be misleading to suppose that these oppositions are hermetic or stable).

<sup>5</sup> The name and the concept is inspired by Jefferson Powell's expression "court positivism." See Jefferson Powell, *Constitutional Law as Though the Constitution Mattered*, 1986 DUKE L.J. 915, 915 (1986) (book review) ("[T]hat perception of the meaning of constitutional law leads to what might be called 'Court positivism' -- the almost automatic assumption that the Constitution is indeed 'what the judges say it is.'" (citations and footnotes omitted)).

<sup>6</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 16-39 (1977).

<sup>7</sup> 410 U.S. 113 (1973).

<sup>8</sup> 505 U.S. 833 (1992).

<sup>9</sup> For elaboration, see Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681 (1996).

<sup>10</sup> See Statement of Richard Posner at AALS Conference, Jan. 5, 1991, reprinted in Ken Myers, *At Conference, Posner Lambasts Academics for Weak Scholarship*, NAT'L L.J., Jan. 21, 1991, at 4, col 3, 4 (Criticizing judicial opinions as "mediocre texts" and legal scholarship as consisting of "analytical tools of no great power and beauty.")

<sup>11</sup> H.L.A. HART, *THE CONCEPT OF LAW* (1961).

<sup>12</sup> 248 N.Y. 339 (1928).

<sup>13</sup> For elaboration, see Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1977).