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Liberal Values in Legal Education

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Liberal Values in Legal Education

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Duncan Kennedy is a professor at Harvard Law School. He has taught a wide variety of subject areas, including Contracts, Torts and Property. Recent attention has focused on his involvement with the Conference on Critical Legal Studies. This is a lightly edited transcript of a talk given to a SALT conference on goals in law teaching at N.Y.U. Law School in December, 1979.

The subject of my essay is the role of liberal law teachers in legal education. I want to address a problem that seems to have emerged for people like us in the last fifteen years as legal education has gone through various changes. There's a younger generation of teachers who one might have expected would have had a significant impact on what we tend to see as the conservative character of legal education. A much more liberal younger generation of law teachers has appeared, a lot of them blacks and a lot of them women (not a lot of blacks or women by any absolute standard, but, compared to the incredibly small number before, a significant number). At the same time, many young white male teachers have come to feel that they ought to be getting their values and their politics into their educational activity. We might have expected, then, that legal education would be evolving into something quite different than it was before, with a different kind of impact.

Even if these younger people have not taken over schools, they ought to at least represent a counterforce within their institutions. There ought to be a real sense that legal education is a battle ground between conservative and more left approaches. I don't think that has really happened. I think the sad fact is that the increasing number of blacks and women on law faculties, the increasing number of young white male teachers who are oriented in their own minds to "infusing legal education with values," have actually stabilized legal education. They haven't in any way reduced its substantively conservative content and impact. What looked like a potentially politically significant event has been largely co-opted by the institutions where this kind of younger faculty are teaching. (Of course, I'm not just talking about younger faculty — I'm talking about liberal faculty of all ages.) It didn't happen. It doesn't seem to me to be happening. Let me explain why I think

that is the case.

My most basic point is that the way we have collectively gone about trying to introduce our politics into legal education has been counterproductive. In order for my argument to make any sense, I should first say something about where I'm coming from politically. My critique flows out of a fairly particular political position.

I can't describe that position in terms of a blueprint for a future society, but the general notion is that our society is constructed around illegitimate hierarchies, lots of different illegitimate hierarchies, and that it's also constructed around very complicated bureaucratic, ideological control systems which make life dead, painful, generally unpleasant, and also reinforce the hierarchies. I don't want to give much of a general definition of illegitimate hierarchy except to say that it's a person with their foot on someone else's neck.

Illegitimate hierarchy is pervasive. In our own lives, illegitimate hierarchies and these bureaucratic control systems are very heavy. For example, the tenure system that we all operate inside of seems to me an illegitimate hierarchy. There are untenured faculty members and tenured faculty members. The making of that distinction and the application of the standards for tenure are a mechanism by which people with tenure oppress people without tenure. Of course, it's not the same as the oppression of the people who are the objects of wipeout, quasi-genocidal economic destruction in the big cities. But it's nonetheless a form of illegitimate hierarchy, of oppression which is built right into our lives. The tenure process is, first of all, incredibly arbitrary; second, it's degrading. It's a way in which people with tenure communicate to people without tenure that they've got to kiss ass and toe the line and figure out what their elders and betters want, and do it, if they want to survive in the institution.

So it's not just an illegitimate hierarchy, it's an illegitimate hierarchy with a function — the function of maintaining dominance, socializing people, getting them to incorporate the values of people with tenure, getting them to submit on many different levels of their selves to this alien thing. And it has a second function as well: the tenure process sustains the hierarchy of law schools. We are organized into a hierarchy of law schools. When I was afraid that I wouldn't get tenure, a very important meaning of that for me was that I would be booted down the hierarchy. It was very frightening. People at all levels of the hierarchy coming up for tenure have to deal with the fear of status degradation that will happen to them if their colleagues get together and say, finally, "This person has to go."

They won't say, "We don't like you." What they'll say is, "You're no good." When I felt those beams of possible judgment aimed at me, at that point the meaning of the hierarchy of schools became incredibly clear. The tenure system allows each school to pretend to itself that it has a place — an achieved, justified level that might go higher. It allows everyone to say, "At all costs, we must not sink lower." The longing to rise higher and the fear of sinking lower function for the schools the way they function for the individual professors. They generate demands, norms. They make the lower schools imitate the higher schools. And they cause people to do terrible things to each other for fear if they hire this person, or let this happen within the curriculum, they'll sink. And they do terrible things to each other through the longing to scramble up the ladder to the roof.

The ladder is bullshit. The differences asserted among the schools in the hierarchy are not, from any point of view that I accept, serious, legitimate, meaningful, hierarchical differences to which I can subscribe. The hierarchy is one in which the very good people in a lower status school will have trouble ever escaping the feeling that they are worse than very bad people in a higher status school. People who are no good are able to use their hierarchical position to oppress people who are, to my view anyway, better, although lower down in the hierarchy. The second function of the tenure system — after the function of internal control of younger faculty — is to maintain this false hierarchy of schools.

These aspects of law school fit into and also help to create and legitimate the class, race and patriarchal hierarchies of the whole society. Law schools are part of a set of institutions that convey a message by their very structure. They all reinforce the legitimacy of the economic hierarchy in which some people have lots and lots of money and power and access to knowledge, and other people have none or very little. Between the bottom and the top, people are strung out in a long series, and everyone is desperately concerned with where they fit in. Everyone's behavior is invisibly, yet powerfully shaped every day by the necessities of maintaining a place — scrambling up, not being forced down.

If this picture is at all plausible for you, it's hard to deny that a law teacher's worklife has political content. Legal education at present is a not insignificant producer of ideological legitimation for the system of hierarchy. As a teacher, I see myself as having some responsibility for trying to turn that around. One way to contribute just by being a known liberal on the faculty is to protect the liberal students from be-

ing bulldozed out of their liberal values — liberal now in the most general American way — and to support them against conservative students and conservative professors. That's a liberal goal — sometimes defensive, sometimes offensive. To the extent it is successful, there will be more liberals and fewer conservatives, just because there's less one-sided ideological pressure on the liberals.

There's another goal, from my point of view, which is to try to lay the groundwork for a radical political force which would conceive of itself as distinctly to the left of moderate, reformist American liberals. And that has two aspects. One is to try to change that liberalism, to transform it by analysis, critique, and activism; the second is to build a radical movement which would be an autonomous force in its own right, which would be distinct from the traditional American liberal consensus. This radical part of the program involves not simply supporting the liberal students against conservative students and conservative professors, but trying to act on them, to push them to the left. It also involves trying to find and support, even trying to help create, networks of radical students in law school and of radical professors around the country — students and teachers who see themselves as wanting to go a lot further than most people want to go.

That notion about oneself, in the vaguest experiential sense, is what I mean when I talk about radicalism. It's not very specific. It means that over and over again, when the discussion gets around to what to do, you want to do a lot more, and everyone says, "Gee, you're crazy." That's the basic experience. The people you're dealing with just say, "That's too much." For example, I'm in favor of abolishing tenure altogether — everybody has tenure, or nobody has tenure. In general, people don't agree with that. People who are otherwise politically sympathetic think that's going too far. Building that sense of wanting to go too far is a concrete political objective of mine.

Against that background, there seemed to be a number of possible ways of approaching my life as a law professor. I don't want to claim, or give even the slight impression, that I (or anybody that I know) chose to be a professor of law as a kind of deduction from my political program. Never could I have honestly said, "I have my political program, and the right thing for me to do to maximize my forward impact on the achievement of the political program is to become a law professor." I don't think that's a real way of seeing the situation. The situation is much more like, "Here I am, I'm a law professor. I've got this political sense of things: I would like to dismantle and destroy the hierarchy. I don't have enormously precise utopian proposals, though I do

have a few and would like to talk about them. Starting from here, what might I do?"

Let me make a gross distinction between two kinds of strategies, what we might call the litigation strategy and the ideological strategy. The litigation strategy is the notion that what one ought to do in one's teaching is to try to increase the number of lawyers who are involved with the "movement," in the broadest sense — who can effectively and competently pursue liberal or radical political goals through the courts and in the other kinds of lawyer roles. That's extremely important, but for this symposium I would like to address the other strategy, which has to do with the problem of what we do in our daily teaching classroom activity and how we relate that to our left politics. This problem will arise even if we spend a lot of time involved with the litigating strategy because we've got to spend at least *some* time on the general run of students, and most of us spend most of our time on them.

Unfortunately, it has turned out to be astonishingly difficult to find ways to use our day-to-day teaching experience — just the normal classroom interaction — as an aspect of political activist practice. It's just very, very hard to do it.

Part of this is ambivalence. I don't think I have to say much about the feeling that maybe politics has no place at all in law teaching, just because law is not political — the feeling that it's just rules and analytic techniques out there which we have the job of imparting to our students, without letting ourselves get in the way. Legal education has been past that for a while. We recognize that law is a form of politics, not reducible to the other forms, but not separable either, so there is some responsibility on any teacher to help students understand that their activity just can't be neutral.

But there is another, more serious ambivalence, about whether legal education itself is necessarily a political activity implicating the personal political beliefs of the teacher. There is a basic liberal ideal, which I subscribe to, that it isn't the teacher's business to impose his or her political beliefs on students. The teacher's role is to get the truth out as best he or she can do it, and let the chips fall where they may when the students get around to choosing what to believe and what to do.

And it seems to follow that a teacher should not conceive teaching as intended to influence the politics of students, as part of a political practice that aims at results in the world to be achieved through the medium of students. That would be "indoctrination," and indoctrination is a very bad word.

My own resolution of this, at least at the moment, is that if you are serious about the proposition that law is political, then you have to accept that views of law will be different according to the political vision of the person who holds them. So your truth about law, whatever it is, will be a partial truth, rather than an absolute one; it will be a political truth. Nonetheless, you have to teach it, since it is your truth of the subject, and all you can do is alert students, constantly and carefully, to the extent of subjectivity that is inevitably involved in your interpretation of the materials.

Further, what you choose to teach is not dictated, in terms of its detailed composition, by the curriculum. There are a million ways to teach torts or property or contracts that fulfill the legitimate institutional requirement that teachers adhere to the syllabus and prepare students for the bar. Of course, you can adopt someone else's version, and pretend you are just "teaching the course." But that's a political choice. I choose to construct my own materials, and to do it so as to get across my version of the truth of law as effectively as possible, while at the same time trying to arm my students as best I can to resist me, defend themselves against me with the very stuff I'm giving them.

Having done that, I hope that the overall impact of my teaching will be to move them. My own admittedly and inevitably political version of the truth of law is that the law is implicated, deeply, in the injustices of the world, while at the same time it is a cultural reservoir of the longing for justice. If I influence my students' ideas, through the force of arguments, rather than through mere authority or by cheating, then I hope they will act on those ideas.

I've just been describing my (ill-defined) politics and my values as a law teacher. The question for me is not whether but how I should incorporate them into my day-to-day activity.

Whatever our particular political perspective, we all tend to approach the problem through the distinction between value-neutral and value-laden teaching. We begin with that distinction because almost all of us — whether liberal or radical — have a sense that our own teachers in law school wanted to be "value neutral," and that value-neutral teaching in this system is implicitly biased to the right. Teaching which sets itself up as "value neutral" is really right-wing teaching.

That's true for both the variants of value-neutral teaching which you see all over the country. There's a "doctrinal" variant, in which the content of the class is a list of rules, exercises in applying the rules, and very short formulaic policy tags that justify each rule. It's not that there's no policy. There's always policy in everything in American legal

education. There's no one left who doesn't do at least some of it. But it tends to be just a tag; every rule has a little policy all its own. "This rule is justified by security of transaction." "This rule is justified by the necessity for some equitable discretion in the application of even the strictest standards." If you look at *Prosser on Torts*, that's the way it's constructed. Every rule has a justification, but no justification is more than one sentence long.

The other value-neutral form is the upper class, snazzy, fancy-pants law school mode, which is in a sense the opposite of the one I've just described. In the fancy mode, rather than many rules, each with a one sentence policy tag, there are very few rules and many policies for each one of them. There are mainly cases, and each case falls apart into a trillion possible interpretations. No case has a meaning, and the basic value-neutral message is: "Look, kids, if you try to figure this out, I will stop you. I can stop you every time. At any moment in which you think you have a formulation of what this case meant, watch me zap it." That is value-neutral.

The implicit political message of this fancy pants variant is different from that of the doctrinalist variant. The doctrinalist is really quite conservative. The fancy-pants is centrist: "Things are so complicated. Everything can be looked at from different points of view. There can't be any right answers and there can't be any wrong answers. Your understanding as a student is so small, the system is so intricate, the skills to be mastered are so overwhelmingly difficult, that you'd better not try to master it in a critical way." All you can hope for is to be able to counterpunch the teacher once in fifty times. And if you do, the counterpunch is a triumph, although you'll then be beaten up to encourage the others.



At least in retrospect, many of us now see how heavily political both the variants of the value-neutral mode really were. The doctrinalist mode makes the system seem inevitable. The rules are just there, and they couldn't be otherwise, and it's natural for them to be what they are. The disintegrated, fancy-pants mode just leaves people feeling passive. You have to be passive because of the infinite complexity and confusingness of experience in the modern world. Anybody who proposes anything in the way of a substantial modification of any aspect of the system is going to discover that the teacher can show them that it's simplistic, knee jerk and dumb, although well-motivated. "You know, you are a person of good faith, but let's face it, you really missed the boat. I mean we couldn't possibly do anything like that because there are fifty thousand other intricate consequences that would follow."

Now, if you believe in the value-neutral/value-laden distinction, it is likely to appear that to get out of that bind we have to infuse our courses with values — our values. And that, in turn, suggests we avoid both the string of endless rules with formulaic policy justifications and also the disintegrated, fancy-pants mode. What we have tended to do is to introduce formal discussion of the assumptions and value premises of the rule. We give people a chance to explore, and we introduce our own values about how things should be organized, how the rule ought to be.

But there are two fundamental difficulties with that approach. The first is that its meaning has been controlled by the course organization of law school. If you start out to infuse your values, the first place you start out to infuse your values is not Contracts. It's not going to be Torts. It's not going to be Property. It's going to be, in general, one of the courses which everybody from the beginning has sort of recognized has a lot of "value content." Courses like Constitutional Law, or Race Relations, or Women in the Law, or a seminar on Welfare Law, or other courses which have built right into their subject matter a reference to the values that you think you're going to be promoting.

The consequence of that seems to be that rather than moving people's politics in any direction at all, what happens is we create a sort of two-tier system: the real system and the phony system; the hard system and the soft system; the system for competent, tough teachers who have something to communicate to their students to help their students, and the system for nice guy, liberal teachers-on-vacation, where everybody gets a chance to take time off from the nasty, unpleasant, hard work of becoming a lawyer and revert to the modes of their college experience. That's sort of a disaster.

One reason why it's a disaster is that it just doesn't work. You are

not going to have much impact on the actual concrete politics of students if you approach the problem of the curriculum by handing over the “real” curriculum to your opponents. There’s nothing wrong with trying to appropriate for yourself and then expand our nice, humanistic and somehow vaguely liberal curriculum. But it’s disastrous if it means giving up on the part of the curriculum that students are desperately anxious to find out about in the short term in order to save themselves within the hierarchies of the bar.

Our collaboration in that division — by handing over to them much of the core curriculum and keeping for ourselves these soft, political, value-laden courses — derives from our refusal to mount a deadly serious critique of our hierarchical society. There are good reasons those hard courses seem impervious to value injunctions.

If you take them together — property, contracts, torts, substantive criminal law as opposed to criminal procedure, corporations, administrative law — the rules that are being taught in that set of courses are the rules that define our form of hierarchical bureaucratic, welfare state capitalism. That is, those rules taken as a body are the system we would like to change. If the pattern of our efforts as teachers is that we leave that as is and spend our time teaching courses that reflect relatively weak attempts to modify that structure a little bit, by reformism, without shaking it to its foundations, then basically we just reinforce the actual system. When we use our constitutional law courses, for example, mainly as places to invent new rights, we reinforce the idea of a politics of mild reformism. Creating more rights is not a viable response to capitalism, to the existence of a hierarchy of wealth and power rooted in private law and the law of the administrative state.

If this makes sense, you may well say to yourself: “You know, I have marginalized myself. I’ve got all these nice goo goo subjects, and students come and they like me, and they really love it when I teach that stuff, and I make good friends with a lot of them. But that’s too marginal. I want to be closer to something which would have a bigger impact on their actual politics than I can have that way.” At that point, you turn to the real, the basic, the hard curriculum.

The first problem is that the hard courses are just as hard, technically hard for us as teachers as they are for students. As students, most of us adopted this very hard/soft model; we went through looking for the nice, value-laden course and endured the hard course. We didn’t learn the hard courses critically at all. We knew that the nice, soft, easy courses were for us, and we simply did time with the other courses. So we don’t know contract law in the same way that we know

constitutional law.

The second problem is that the values notion is going to get us in trouble the minute we start applying it inside the hard curriculum. The values notion is intensely subjectivist and individualistic. It has this ring: values are the most personal, the most fragile, the least hard, the least concrete, the least objective, the least in-common thing that we've got. We're taking the hardest thing in the school and the softest thing and we're going to put them together. What we get is doctrinalism most of the time and "free play period" during the rest.

Free-play-in-contracts means that there are some doctrines which occasionally we throw out to the class and say, "Knock this one around for a while, folks." The pressure on us to be hard in the hard courses is an overwhelming, constraining, though not entirely illegitimate thing. So we say to ourselves, "I'll be hard most of the time; I'll find some way to learn it from a book and somehow I'll teach them the rules, and then I will be warm, fuzzy, open, accepting, supportive, experiential, for time-out-period, and that's the way one ought to be in discussing values."

Each student, for example, will get to mouth off ad libitum — just keep on talking. It doesn't matter. No student has to respond to anything another student says because it would be inconsistent with the idea that this is a discussion of each person's personal, individual, subjective values that anyone would say, "Look, you are a windbag, enough." Anybody can say anything they want to for as long as they want to. There is no requirement that anything be responsive to anything else — a reaction which could be interpreted as saying, "My values are right and your values are wrong." The whole idea of values precludes the idea of one person's values being right and another person's values being wrong.

Yet if we adopt this attitude as teachers, we will quickly have to deal with students sanctioning each other. In the value discussion, someone will come up with a value, and say this is my value, and the class will hiss. Then we have a choice. We have to be repressive one way or the other. Either we are complicit in this smashing of the values of the minority, or we intervene, and suddenly we find ourselves clicked into a quasi-parental role in which we say something like, "Free speech precludes the use of intimidation, and, therefore, you should be more polite, and how can you really be expecting other people to sympathize with your values if you don't sympathize with their values when they express them?" Thus, we affirm process values.

This sort of neutrality is not going to get us anywhere, I don't

think. As a basic approach to giving at least some little part of legal education a counter-hegemonic, ideological content, turning it into a place where people change, giving them more ability to sustain themselves in whatever left political values they have, this isn't going to work. And, institutionally, it's incredibly dumb as well.

Those hierarchies that I mentioned before have a certain autonomy; that is, they function according to rules, and they aren't particularly focused on smashing the left. They aren't totally arbitrary. But if we do it this way, we are walking into the meat grinder. We will be identified as people who have trouble controlling our classes. Many students will be deeply annoyed at the character of the free-for-all policy/values discussion. Every instant of black letter teaching we do is going to be a payoff, on some level, to get them to tolerate the session which follows. Our status in the faculty will be identified with our softness, not our leftness, not our opposition to the existing regime in this country. We will not be regarded as fighters. Rather, our status will be rooted in the idea that there are some people who have got the toughness to function effectively in the institution, and then there are the leftists who are incompetent.

That's the basic perception: that liberals are just less competent. They are much nicer. The typical teaching problem for a liberal teacher at a teaching clinic is, "My students love me, but they clearly don't think I'm as good as the people who are less nice and do all kinds of things that I disapprove of." It's that love versus respect business again.

My own teaching history is a protracted example of trying to do it somewhat differently. I've been trying to do it differently for over a decade. I have done lots of different things, and none of them have worked. I have been in the position of the warm, loving teacher. It was wonderful at one level, and on another level it was just degrading. It was degrading to be the dump for everybody's feelings of lostness and alienation in the horrible, oppressive Harvard Law School. I sit there, and they come in, and I say, "It's all right, everything's okay, don't drop out." And they leave, and the next person comes in.

Most everyone believes that I am a good human being, and I think, "I'm a good human being or I certainly wouldn't be doing this." And then it turns out that they believe everything that they are being told about freedom of contract by their centrist or right-wing contracts teacher. He is actually convincing them that the economy would break down and that it would violate our fundamental notions of fairness if, for example, courts imposed compulsory duties in relationships between

landlords and tenants. My niceness is simply stoking the fires of the students to go and really learn the deeply ideological stuff the conservative teachers are trying to teach them. That's what I'm really doing. I'm helping them survive the problem of learning the conservative curriculum.

I have also tried to create a lot of changes in the classroom, some of which were designed to break down the hierarchical structure of the classroom. At Harvard, when I first arrived, there was no such thing as "passing" in the big first-year courses, so I could have a little impact — cultural, humanistic and political — by simply saying, "Anybody can pass when they're called on." People can identify with a no-hassle pass. Life would be nicer if there were fewer hassles in general. That is the real message I was conveying. The no-hassle pass is good because as a humanistic gesture it allows people not to have to talk when they don't want to talk. And that was it.

Another experiment illustrates some alternatives to the value-neutral versus value-laden dichotomy. This is a four-week teaching program in Torts. One goal is to give the liberal students a set of arguments that they can use effectively to defend judicial interventionism on behalf of the poor and consumers against large corporations and stronger economic parties in general. I think these arguments are effective basically because they are true. I don't see any conflict between truth and politics here.

I constructed the materials myself. They consist of cases from a series of doctrinal areas that aren't usually treated together. The first issue is the good faith obligation to settle a valid insurance claim within the limits of the policy. The second is the good faith obligation of the insurer to settle a claim by the insured against the company. The third is the good faith obligation in discharge of people under at will employment contracts. The fourth is the issue of the landlord's duty to maintain leased residential premises. The fifth is products liability, and the sixth is medical malpractice.

The whole thing is a month-long section in which we take up these doctrinal situations, all of which involve judges trying to decide whether to impose duties, on sellers to buyers, which can't be disclaimed. They all involve using tort law to violate freedom of contract, and for that reason they are very well suited to undermine the conservative message of the first-year curriculum. They introduce the students to a whole series of justificatory arguments in favor of interference with freedom of contract, and also to nasty — and also true — criticisms of right-wing arguments in support of freedom of contract.

The basic doctrinal points are very simple. You get the black letter of each doctrinal area in a lecture, and there is an argument about the justifiability of the practice, the imposition of the nondisclaimable duty in violation of freedom of contract. The same point is being made for each case, day after day. The basic point is, "You liberals don't have to be ashamed of sticking compulsory terms into contracts. When you are in favor of doing that, you have good reasons for it, better reasons according to your own values than conservatives have for not doing it."

The conservatives get absolutely equal time. I think the liberal arguments are much better. My authority as a teacher is a thumb on the scale, in spite of respecting everybody's right to their position, and their dignity as a participant, but it's a thumb that produces balance. It prevents the liberals from capitulating or getting demoralized. It reassures them that their values are not just irrational, humanistic prejudices that must wither in the cold light of the marketplace.

There is a sense in which this is a form of indoctrination. That doesn't bother me; it's indoctrination in a mode of liberal argument within law. It's indoctrination in how liberal judges actually think, and, let's face it, it's as useful — professionally useful — to conservative students as to anyone else. There are a lot of liberal judges out there.

The other goal is very different; in fact, it seems completely contradictory. The other goal is to disorient, alarm and frighten the liberals about the techniques they use in the class to explain the limits on their willingness to impose compulsory terms.

The liberal majority has an explanation of compulsory terms, which is "inequality of bargaining power." The notion is that we look at the particular bargaining situation, and if it's unequal, then it's a good thing to impose compulsory terms. That explains why compulsory terms are not socialism. It explains why compulsory terms don't represent a fundamental rejection of the status quo. It shows that compulsory terms are reformist and remedial. All we're doing with compulsory terms is rectifying the imbalance of bargaining power in that bargaining situation. This, they believe, is the basic argument in their favor.

I argue to the liberals that that makes no sense — that the idea of inequality of bargaining power as a justification for imposition of these compulsory terms doesn't work. They can't give a definition of inequality of bargaining power that doesn't ultimately have one of two flaws. Some definitions don't explain the cases. For example, imperfect competition doesn't always explain the cases. Then there are definitions that turn out to be hopelessly vague or internally contradictory. For

example, “natural” or “just” prices don’t hold up under critical analysis. All their proposals as to when there is inequality of bargaining power get attacked by me, and the conservatives love it.

That is, I join together with the conservatives, and we trash the liberals. They propose, hour after hour, how the cases can all be made sense of in terms of inequality of bargaining power. The conservatives and I agree that the real explanation is that the judges perceive the distribution of wealth and power in the society as unfair and unequal, and that they are expressing their substantive preference for redistributing income and power from social classes that have more to social classes that have less. Or that the judges are acting paternalistically because they don’t like what they see (I think often rightly) as self-destructive choices people make with their money.

The argument is that we can’t explain why we want to do this without entering into a fundamental critique. Not a critique of how in this bargain and that bargain it happened to be sort of unequal and unfair, and, gee, the law should step in to fix it up, but into a critique of the fundamental economic structures that are sustained by property rules, contract rules and tort rules.

That is not a humanistic exercise. The purpose of it is to give the liberals in the class a sense of having participated in a spectacle, one that leaves them at the end saying, “Something’s really wrong with the way I’m approaching this.” This is not me saying, “Question your assumptions.” Nothing like that. I want them to admit that something’s really wrong with the way they approach it. I want them to say to themselves, “My claim that all I care about is inequality of bargaining power doesn’t explain the results I favor.” Then, if it all worked, they’d say, “The only thing that explains it is, well . . . I guess I actually am more against the system than I really believed I was. I’m not only concerned about inequality of bargaining power. I’m concerned about class power, too.”

That is an example of trying to do substantive, ideological, political work in a law school classroom without violating anyone’s academic freedom. Two points: First, of course, it’s not very significant. It would be considerably more significant to accomplish a meaningful political victory either through the courts or through lawyers’ impact on other kinds of institutions, and that’s a crucial thing to do. But what I’m talking about is what we do most every day, what we do in class. We’ve got to do something in class, after all. The argument is that it would be better to have some of this in the class along with the other stuff.

The second point is that, at least on one occasion, I blew it at the

end. I blew it by losing my temper. This technique that I'm describing is dependent on me being very negative, not just towards the system but towards the students who want to believe that they are coherent liberals. The mistake I made, and this is an incredible danger, is this: I had been very cool in developing the arguments back and forth, but there was a point in the discussion when a liberal economist made a heavy law-and-economics argument about imperfect competition, and how that explained all the cases. He caught me off balance. I wasn't quick to deal with it. I knew that he was just wrong, but I couldn't really say why, and I lost my temper. I didn't abuse him, but I was snippy.

When I got mad, I lost about half of what I'd accomplished up to that point because I violated the norm of how the teacher can act ideologically without violating academic freedom. We shouldn't get mad, because, given our heavy institutional power, that's just unfair to the people who disagree with us. That's a basic problem with this approach because these are things we're likely to feel passionately about, and it's hard to be fair. But it's not impossible. And if we don't get mad, we can harness our own negativity, toward the system and toward aspects of legal education and student life that we don't like, in a way that allows us to get even instead.

DOONESBURY by Garry Trudeau

