

## **Doctrinal Legal Method (Black-Letterism): assumptions, commitments and shortcomings.**

'You come in here with a head full of mush and you leave thinking like a lawyer.'

Professor Kingsfield, *The Paper Chase* (1973)

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### **1. Introduction**

It has always struck me when asking postgraduate law students to write research proposals in which they should work through the core elements – question, structure, methodology, originality/location in the literature – how challenging they find the process of articulating their methodologies. The issue of methodology is a difficult one for lawyers for a variety of reasons: we are not ordinarily exposed to quantitative and qualitative methods at undergraduate level, and we are often reluctant (initially at least) to push sociological, conceptual or standpoint accounts. Whilst many of these concerns are understandable given the heavy emphasis on conventionalism at undergraduate level (though this is being ameliorated in recent years), it seems clear that these gaps extend to even the most fundamental of methodologies for lawyers – doctrinal legal method. Consider, for example, the following attempts at articulating this methodology:

*'A doctrinal methodology will be applied to evaluate the evidential and criminal rules which legitimate our adversarial framework'.*

*'The project will involve doctrinal legal analysis. Various provisions of the Constitution...will be examined in order to fully understand what procedural requirements are mandated by Irish law. Furthermore, case law dealing with the rights of... criminal defendants...will be considered.'*

*'This project will...examine the legislation from a legal doctrinal point of view, consisting of an examination of the statutory provisions involved'.*

*Standard positivist methodology will be used to analyse how the regime regulating the ... has changed. Standard legal methods will be used to analyse and synthesise legal sources (case law, legislation, constitutional principles).*

Although we can argue over the details of the various representations, they are, to my mind at least, broadly accurate, capturing roughly what most of us would outline when we navigate the swampy textual lowlands of legal rules, and engage with dense institutional legal practices relating *inter alia* to craft, interpretation, and authority. The principal concern with these statements relates

not to their accuracy but to their depth. Are they sufficient? How will they look to a non-legal observer (who may be an assessor)? Do they appear rigorous? How would they compare with the methodologies offered by postgraduate students in different disciplines?

On the face of it, the explanations look thin, implicitly painting a picture of a method which is simplistic, thickly descriptive, and relatively unskilled, a join-the-dots, ‘taxonomic stock-taking’<sup>1</sup> exercise that could be undertaken by any adult with basic knowledge of the English language and some time on his or her hands. And yet, as lawyers, we know this is untrue. We know that law is technocratic, employing rigorous analytical processes, emphasising precision and inductive-deductive logic, but also fidelity to complex institutional practices. If you doubt this, try to remember the first full case you read as a first year law student. Perhaps you too struggled with the dense narrative, the strange presentation, the seemingly endless layers of substantive and procedural rules, the elusive search for the *ratio* and for ‘fit’ more generally, and with the analysing, distinguishing and synthesising skills demanded of you in interrogating its content.

Those initial struggles allowed you, in time, to pass through a portal – the threshold concept of doctrinal law – enabling you to ‘think like a lawyer’. It is the complexity of that learning journey which is not reflected in the statements outlined above. Nor should we expect that it would be captured. For the most part, doctrinal legal methodology is something which is acted upon by us as lawyers but rarely articulated in a systematised way that documents what we do when we seek to accurately posit the law on a particular issue.<sup>2</sup> We all know what doctrinal legal reasoning is (or what it is not), but we rarely examine or reflect upon its overarching principles and throughlines. What follows is a loose attempt to unpack some of the assumptions and commitments that underpin lawyers’ efforts at wading through layers of authority, its ordering, and its interpretation.

### **The properties underpinning a doctrinal legal approach.**

Doctrinal legal method emphasises coherence and unity. It involves the search for a ‘system’ of general, logically consistent principles, built up from the study of particular instances. This system is built on empirical and rational foundations. It is loosely *empirical* in that lawyers work with the raw data of cases and other legal provisions. It is *rationalist* because it presupposes that the system is logical and internally coherent. As Weinrib suggests, it is an

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<sup>1</sup> Allan C Hutchinson, ‘Beyond Black-Letterism: ethics and legal education’ (1999) 33(3) *The International Journal of Legal Education* 301, 302.

<sup>2</sup> Terry Hutchinson and Nigel Duncan, ‘Defining and Describing what we do: doctrinal legal research’ (2012) 17 *Deakin Law Review* 83, 99.

‘immanently intelligible normative practice’.<sup>3</sup> This intelligibility is rooted in logical deductions derived from *a priori* propositions, and the principles of inductive generalisation and analogous reasoning. The basic building block of deductive reasoning is the syllogism in which a conclusion is inferred from two premises.<sup>4</sup> A classic example is as follows:

*All men are mortal.*

*Socrates is a man.*

*Therefore, Socrates is mortal.*

In a legal setting the deductive syllogism – reasoning from a generalised major premise to a minor factual premise – is dependent upon the establishment of the factual pattern (minor premise) (F), the identification of the relevant legal norm (major premise) (R), and the application of the norm content to the determined fact to produce a particular legitimate conclusion (C). It can be presented as a simple formula:  $R + F = C$ .<sup>5</sup> The following would look like a syllogistic legal translation of a legal norm relating to vague terms in contract law:<sup>6</sup>

***Major Premise:*** *All contracts with vague terms are void.* (Rule)

***Minor Premise:*** *The contract in the present case has a vague term.* (Fact)

***Conclusion:*** *Therefore the contract in the present case is void.*

Analogical reasoning attempts to show that the facts of a particular case (F) are substantially similar to those in the binding precedential case (R) and should therefore have a similar outcome (C). Inductive legal logic, in contrast, involves reasoning from the particular to the general to produce a normative assertion. By observing examples of a number of particular instances, a general rule is posited. The more instances produced, the safer it is to rely upon the accuracy of the general rule. It would translate as follows:

***Premise One:*** *A High Court case held that a contract with a vague term was void.*

***Premise Two:*** *A second High Court case held that a contract with a vague term was void.*

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<sup>3</sup> Ernest Weinrib, ‘The Jurisprudence of Legal Formalism’ (1993) 16 Harvard Journal of Law and Public Policy 583.

<sup>4</sup> RJ Aldisert, S Clowney, and JD Peterson, ‘Logic for Law Students: how to think like a lawyer’ (2007-08) 69(1) University of Pittsburg Law Review 1, 3.

<sup>5</sup> Richard Posner, ‘Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution’ (1986-87) 37 Case Western Reserve Law Review 179, 182.

<sup>6</sup> Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, 1997) 19-23.

**Premise Three:** *A third high court case held that a contract with a vague term was void.*

**Conclusion** *Therefore, all contracts with vague terms are void.*

The important thing about deductive, inductive and analogous reasoning is that the validity of the argument depends purely on logical form. Provided the premises are correct and accurate – taking care to avoid flawed syllogisms or the fallacy of ‘hasty generalisations’ – and any analogies are relevant, the conclusion will be valid. Of course, in addition to its rationalist morphology, the practices inherent in doctrinal legal reasoning are also *argumentative* in that they encourage argument about the premises, the extent to which they apply, or the analogies fit.<sup>7</sup>

Doctrinal legal reasoning also emphasises law’s insulated, ‘internal point of view’.<sup>8</sup> The coherence of the discipline ‘points not outward to a transcendent ideal, but inward to the harmonious interrelationship among the constituents of the structure of justification’.<sup>9</sup> Legal reasoning is autonomous, and there is no need for recourse to non-legal reasons or justifications. Questions and solutions are founded upon distinctly legal materials, demarcated from competing normative claims to truth. In this sense, doctrinal law employs an epistemologically *internal way of knowing*.<sup>10</sup> We ‘know’ therefore that justifications based on a statutory provision or a valid precedent, for example, are legal reasons that form part of the ‘inner logic of law’, whilst appeal to the authority of Joyce’s *Ulysses* is outside of the law, and cannot form part of its conceptual coherence.

In relying on it as a method for answering a research question, one implicitly takes seriously the *institutions*<sup>11</sup> and concepts through which law expresses its structural coherence. Doctrinal legal method is, for example, premised on valid sources of law which serve to limit the scope of any legal question and its determination; in assessing conduct, legal functionaries cannot stray beyond these ontological sources, the ways in which they are coordinated to each other, and their hierarchical arrangement. This relates not only to law application but also to law creation. This institutionalisation is wholly routinised given its systematic acceptance by agencies such as courts, legislatures, police, regulatory officers, prosecutors, citizens and so on.<sup>12</sup> The properties of law –

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<sup>7</sup> Ronald Dworkin, *Law’s Empire* (Hart Publishing, 1998 repr) 130.

<sup>8</sup> Geoffrey Samuel, *Epistemology and Method in Law* (Ashgate 2003).

<sup>9</sup> Weinrib (n 3) 593.

<sup>10</sup> Niklas Luhmann, *Law as a Social System* (Oxford University Press 2004); Gunther Teubner, *Law as an Autopoietic System* (Basil Blackwell 1992).

<sup>11</sup> Joseph Raz, *Practical Reasons and Norms* (Oxford University Press 1999 repr) 132-148.

<sup>12</sup> Neil MacCormick, *Institutions of Law: an essay in legal theory* (Oxford University Press 2007) 12-13.

particularly the scheme of authority it invokes – demands that it is taking seriously. As MacCormick notes:<sup>13</sup>

[A]ll persons have reason to take seriously the requirements that law imposes. They have reason to do so whether or not they are personally inclined to endorse the law's requirements as morally desirable or morally obligatory, and whether or not willing to pursue personal preferences where these diverge from what the law requires. There are powerful reasons for conformity, and these can have a daunting reality even for someone who, on good grounds, dissents for fundamental reasons from the state's rules requiring certain conduct.

In relying upon doctrinal legal reasoning as a methodology, one accepts or assumes that law is *normative* in that it guides and provides reasons for action. It is, in this sense, a unified normative order not premised on systems of predictions, negotiations, incentives, or beliefs.<sup>14</sup> It provides the 'bad man', for example, with an anti-authoritarian, *ex ante* conception of the legal system, permitting him to conduct himself according to knowable rules? It also is a benchmark for the 'good citizen' who seeks to act in good faith by conducting his or her activity in line with a prescribed order.

It is very *comprehensive* in that it can claim authority to engage in all kinds of regulation: legal systems 'either contain norms which regulate [behaviour] or norm conferring powers to enact norms which if enacted would regulate it'.<sup>15</sup> It is also strongly *authoritative*. It is a system 'which claims supreme authority to interfere with any kind of activity'.<sup>16</sup> Out of the total complexity of a particular social problem, doctrinal legal method helps to distil what is relevant – as least what is relevant according to a legal lens – and make authoritative (and final) declarations in respect of that problem.<sup>17</sup>

Doctrinal legal reasoning is also *limiting* in that sets boundaries to the extent to which legal functionaries can intervene, and to what can be achieved. All citizens and officials have to operate within 'the rich but nevertheless insulated world of precedents and statutes'.<sup>18</sup> It is premised on a Rule of Law framework which restrains the arbitrary or coercive exercise of executive authority, where a strong state must have respect for and indeed yield to its constraints.<sup>19</sup> Anything

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<sup>13</sup> Ibid 53.

<sup>14</sup> John Gardner, *Law as a Leap of Faith* (Oxford University Press 2012) 179.

<sup>15</sup> Raz (n 11) 51.

<sup>16</sup> Ibid 154.

<sup>17</sup> John Bell, 'Legal Research and the Distinctiveness of Comparative Law' in Mark Van Hoecke, (ed) *Methodologies of Legal Research* (Hart Publishing 2011) 164.

<sup>18</sup> Gerard Quinn, *Justice and Legal Theory in Ireland* (Oak Tree Press 1995) 6.

<sup>19</sup> Cesare Beccaria, *On Crimes and Punishment* (Cambridge University Press 1995 repr).

not the subject of rules cannot be determined, but maybe in the future, and anything subject to rules must operate in ways that are compatible with them.

Doctrinal legal methodology is largely *conservative* ('formal') in that it has a strongly backward looking orientation; it respects legal institutions, and demands fidelity to existing rules. It is also *innovative* ('grand'), however, given its evaluative aspects and its potential for alteration through rules of change.<sup>20</sup> Dworkin neatly captures this conservative-innovative dynamic: 'propositions of law are not simply descriptive of legal history in a straight forward way; nor are they evaluative in some way divorced from history. Propositions of law are interpretive of legal history, which combines elements of both description and evaluation, but is different from both'.<sup>21</sup>

In relying upon the method to answer a research question, one generally accepts the rationality of the subject area, its location within an institutional context, its internal epistemology, its hierarchical and coordinated features, its encompassing and authoritative embrace, and its pragmatic utility. This acceptance helps to validate its claims to truth. Anyone relying on it is also working on relatively safe ground given that the 'the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the application of variable standards, do not require from them a fresh judgement from case to case'.<sup>22</sup>

### **So what is good about such a methodology?**

Despite the pejorative undertones associated with 'black-letterism', it has much to commend it. To begin with, it emphasises the coherence of law's institutional configuration. In specifying the criteria of legal validity and the delegated unity of the legal order, it facilitates conceptual coherency and consistency, giving integrity to law and the decision-making process. What if there were no rules and no reasoning process?<sup>23</sup> There is an important truth in it in that it reflects what lawyers and legal functionaries actually do. The derivation of legal principles generally occurs through a process of continuous testing, using hypothetical fact patterns or contrasting examples to clarify the scope of rules and reasoning being distilled. Deductive reasoning along the model of syllogism is also a characteristic feature of 'most well-done judicial opinions – that is, the conclusion can be reconstructed as following deductively from a statement of the applicable rule of law and the statement of the facts'.<sup>24</sup> Simplistic as it is, the formula  $R + F = C$  is employed in a good many instances in legal reasoning. Its

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<sup>20</sup> HLA Hart, *The Concept of Law* (Oxford University Press 1961) 63.

<sup>21</sup> Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 147.

<sup>22</sup> Hart (n.20) 132.

<sup>23</sup> Lon Fuller, *The Morality of Law* (Yale University Press 1964), 46-91; Jurgen Habermas, *Between Facts and Norms* (Polity Press 2008 repr) 143.

<sup>24</sup> Brian Leiter, 'Legal Formalism and Legal Realism: what is the issue?' (2010) 16 *Legal Theory* 111, 111.

self-referential internal process itself helps to confirm its coherence – to give it a structure of truth.

As a mode of reasoning, it has a practical, pragmatic value; it is not undertaken its own sake. In a world dominated by association and associative interaction, we need rules – to ensure compliance, to maintain order, and to regulate behaviour along some agreed lines. The uncertainty and insecurity of a more arbitrary or ad hominem decision-making process not linked to rules or stable institutional practices would, in contrast, seem unimaginable. Moreover, the rules themselves, and their application, work most of the time. They are therefore decidedly useful, permitting authoritative resolution of disputes and problem cases.<sup>25</sup> Courts and legislatures also continue to possess the possibility of being the ‘last authoritative voice’ on all attempts at dispute resolution or settlement (which can provide a practical rebuff to other social, political or moral methodological claims), and the law continues to regulate the legitimate monopolisation of coercion and violence within states.<sup>26</sup>

The ‘withering away’ of law and legal reasoning has not occurred and is unlikely to do so given the stakes at play, embedded interests, and the ontological insecurity that it would generate. We continue to argue and seek reform from within the existing paradigm of law and its ‘heavy instruments’. Nor have other alternatives to dispute resolution, truth finding, prediction and control proven more acceptable. Reducing social complexity in this way does, for example, ‘compensate for the cognitive indeterminacy, motivational insecurity, and limiting coordinating power of moral norms’.<sup>27</sup>

It is also highly technocratic and skilled. Consider, for example, whether a particular fact pattern constitutes harassment. This will involve framing the facts to fit with the institutional requirements of law; distinguishing between civil and criminal considerations; engaging with multiple substantive and procedural legal instruments; and employing skills which emphasise analysis and synthesis, the process of argumentation, the power of reasoning, and the importance of wording. The public nature of this technocracy also facilitates transparency providing a benchmark for critique, and the possibility of change.

### **What are the dangers?**

Employing doctrinal legal method to answer a research question also raises the possibility of particular types of criticism. Though you may be very confident

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<sup>25</sup> K. Llewellyn and A. Adamson Hoebel, *The Cheyenne Way* (University of Oklahoma Press, 1983 repr), 290-309.

<sup>26</sup> Raz (n 11) 158; Habermas (n 23) 326.

<sup>27</sup> Habermas (n 23) 326.

that your justifications are nailed on, you should at least be aware of the types of arguments that can be made against its use. The broadest and perhaps most obvious is a moral one – is it sufficient and morally just that a legal finding is valid simply because it follows a deductive logical form? What about the morality of the decision and its contribution to human flourishing? Whether law should be severed from morality, or can be, are difficult questions that have troubled lawyers for a long time. This is not the place to rehash previous jurisprudential attempts or offer new solutions (I am incapable of the latter). Nevertheless it seems reasonable to suggest that a doctrinal view of law as a means of social regulation provides, at best, an incomplete picture.

Moreover, some would argue that the development of a doctrinal approach can very much be seen as part of the project of modernity whose primary function was to rid the western world of local, contingent, irrational, and non-objective phenomena.<sup>28</sup> The value of cloaking legal method in a deductive garb are obvious; it will appear objective, value free, rational and fair – reinforcing law's claim to truth. This search for certainty in law has been questioned, some explaining it in psychological terms as nothing more than a childlike need for determinacy.<sup>29</sup> Students upon entering law school, for example, are told to abandon emotion and empathy, childish and naive characteristics that are out of place for anyone wanting 'to think like a lawyer'. Teachers of law encourage students 'to put away childish things'.<sup>30</sup> The coherency of law thus comes to serve the controlling force occupied by a father for a child.<sup>31</sup> Totalising thought tendencies of this kind should make us suspicious, and at least open to the possibility that situational and subjective experiences may be marginalised by the unitary impulses of such foundational claims.<sup>32</sup>

Many commentators would argue that legal decision making does not always have an intrinsic order. They 'are not the products of logical parthenogenesis born of pre-existing legal principles but are social events with social causes and consequences'.<sup>33</sup> Law is a social endeavour. This limits the extent to which certainty can be achieved. Because it is social, legal propositions are not verifiable in the same way that empirical propositions are (i.e. the boiling point of water). How, for example, can we be sure that different judges would arrive at the same deductions in any give case? How, particularly in times of rapid social and industrial change, can we guarantee that for every legal dispute there

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<sup>28</sup> Zygmunt Bauman, *Intimations of Postmodernity* (Routledge 1992) 12.

<sup>29</sup> Jerome Frank, *Law and the Modern Mind* (Princeton University Press 1949), 19.

<sup>30</sup> Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: a polemic against the system* (Afar 1983) 13.

<sup>31</sup> Frank (n 29) 19.

<sup>32</sup> Eimear Spain, *The Role of Emotions in Criminal Law Defences; Duress, Necessity and Lesser Evils* (Cambridge University Press 2011).

<sup>33</sup> Felix. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) XXXV Columbia Law Review 809, 847.

is a fixed antecedent rule already in place which will permit simple, formal syllogising?<sup>34</sup> It will also be possible to confine a particular ruling to its particular facts so as to avoid having to follow it.

The interpretation of legal rules is therefore, in part, based on the predispositions of decision-makers who are not asocial, apolitical or amoral automata. Indeed some commentators would argue that the ‘correct legal solution’ is usually nothing more than the ‘correct ethical and political solution’ at a particular point in time.<sup>35</sup> Thus doctrinal legal rationality is a process which is open to manipulation:<sup>36</sup> ‘every decision is a choice between different rules which logically fit all past decisions but logically dictate conflicting results in the instance case’.<sup>37</sup> Furthermore, whilst appeal courts mostly concern themselves with the niceties of legal particulars (substantive and procedural rules), trial courts have to contend themselves with facts, and facts by their very nature are elusive. They do not comprise the hard, objective, data of science.<sup>38</sup> Even the traditional sciences rely on particular ways of knowing and organising events and data that are not fixed and absolute,<sup>39</sup> but are influenced by power relations, shared beliefs, and subjective interpretations of collecting and interpreting data.

Law is also based on language, not algebraic concepts, and language by its very nature has an ‘open texture’ that often gives rise to a number of legitimate interpretive choices. Language is not (always) a transparent, objective medium. It is enmeshed in subjective reference points (signifiers) for the both the listener and the speaker,<sup>40</sup> that militate against the objectivity of interpretation. There will often be a choice in the rules, principles or standards to apply (and the enforceability of same), or exceptions to invoke, thereby permitting arguments which purportedly follow the logic of legal reasoning to lead in different directions with different outcomes. As Kelman notes: ‘In every dispute about the appropriate resolution of a legal controversy, rule like solutions, standard based solutions, and intermediate positions will uncomfortably co-exist, none fully dominating either day to day practice or *a fortiori* justificatory rhetoric’.<sup>41</sup> Black-letterism, therefore, relies on a form of essentialism, when it posits the view that there are essential meanings to words and laws that can be objectively understood through a process of adjudicative neutrality, rather than meanings having to be chosen through a process of interpretive construction.

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<sup>34</sup> John Dewey, ‘Logical Method and Law’ (1924) 10 Cornell Law Quarterly 17, 26.

<sup>35</sup> Kennedy (n 30) 20.

<sup>36</sup> Karl Llewellyn, *The Bramble Bush: on our law and its study* (Oceana 1960), 72-73.

<sup>37</sup> Felix Cohen, ‘The Ethical Basis of Legal Criticism’ (1931) 41 Yale Law Journal 201, 215.

<sup>38</sup> Jerome Frank, ‘A Plea for Lawyer Schools’ (1947) 56(8) Yale Law Journal 1303, 1307.

<sup>39</sup> Thomas Kuhn, *The Structure of Scientific Revolutions* (2<sup>nd</sup> edn, University of Chicago Press 1970); Michel Foucault, ‘Truth and Power’ in Paul Rainbow (ed), *The Foucault Reader* (Penguin Books 1991).

<sup>40</sup> Denis Patterson, *Law and Truth* (Oxford University Press, 1996), 151-180.

<sup>41</sup> Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press 1987), 17.

Moreover, fidelity to the *a priori* principles of the past in some instances will be unsuitable in a contemporary context having regard to changes in cultural, social, political, economic and moral contexts.<sup>42</sup> In this sense, legal rules are not hermetically sealed from broader considerations.<sup>43</sup> Law is therefore too autopoietic in not giving sufficient thought to context. Too much emphasis on black letterism and in tracing the celestial lines of development of various legal rules can also divert attention away from engaging in broader discursive analysis of the working of rules, the ideological, economic and socio-political currents running through them, the dynamics of how they change, and the policy and contextual implications for choosing one rule over another. It has also been argued that doctrinal legal reasoning is presentist, seeking to rely on the past to explain the present. This approach ‘reassures us (lawyers) that what we do now flows continuously out of our past, out of precedents, traditions, fidelity to statutory and constitutional texts and meanings’.<sup>44</sup> If the lawyer is a monist and a presentist, then the historian is a pluralist (looking for contested meanings), and a contextualist (seeking to understand the past in terms of the past).<sup>45</sup>

Doctrinal legal reasoning can also help inculcate a set of attitudes towards the legal system in society, exhorting in particular its legitimacy on the basis of its neutral nature,<sup>46</sup> whilst ignoring the underlying structural inequalities of power which are imbricated in the cross-currents of society. The ideology of objectivity, egalitarianism and the strict application of rules can mask and mystify law’s partiality, particularly its capacity to preserve and maintain the status quo for those in power. Hiding behind the ‘false consciousness’ of black letterism are the variety of hierarchical interests that it serves. As Kennedy suggests, ‘bias arises because law school teaching makes the choice of hierarchy and domination, which is implicit in the adoption of the rules of property, contract, and tort, look as though it flows from and is required by legal reasoning rather than being a matter of politics and economics’.<sup>47</sup> It also has implications for legal practice, particularly the notion that what lawyers actually do is apolitical and independent, merely following the inner technical logic of the law. This might be reassuring, but it is a denial of the political and social realities of legal practice:

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<sup>42</sup> Roscoe Pound, ‘Mechanical Jurisprudence?’ (1908) 8 Columbia Law Review 605

<sup>43</sup> G. Edward White, ‘From Sociological Jurisprudence to Realism: jurisprudence and social change in early twentieth century America’ (1972) 58 Virginia Law Review 999, 1004.

<sup>44</sup> Robert Gordon, ‘Foreword: The Arrival of Critical Historicism’ (1997) 49 Stanford Law Review 1023, 1023.

<sup>45</sup> Ibid.

<sup>46</sup> Martin Horowitz, *The Transformation of American Law, 1780-1860* (Oxford University Press, 1992), 266. William Lapaina, ‘Langdell Laughs’ (1999) 17(1) Law and History Review 141, 143.

<sup>47</sup> Duncan Kennedy, ‘Legal Education as Training for Hierarchy’ in David Kairys, (ed) *The Politics of Law* (Pantheon Books, 1990) 45.

[B]lack-letterism works as a convenient mode of denial. It enables legal academics and lawyers to engage in what is a highly political and contested arena of social life – namely, law – and to pretend that they are doing so in a largely non-political way. The main advantage of this is that they can go about their daily routines without assuming any political or personal responsibility for what happens in the legal process. However, the insistence that lawyering is a neutral exercise that does not implicate lawyers in any political process or demand from scholars a commitment to any particular ideology is as weak as it is woeful. Such an image is a profoundly conservative and crude understanding of what it is to engage in the business of courts, legislatures and the like.<sup>48</sup>

Feminists would argue, for example, that the theory and practice of law (including doctrinal legal reasoning) is not neutral but has been shaped too much by male orientated values and concerns (it ‘speaks to men’ by making ‘maleness’ the norm for the regulation of human relations). For them, the discourse of law has always been a male discourse that excludes the voice of women.<sup>49</sup> In particular, they seek to highlight the patriarchal ideas that pervade the law (often through ‘standpoint epistemology’), and to raise the ‘woman question’ by examining the variety of different ways in which the law fails to take account of the values of women and how it might disadvantage them.<sup>50</sup> Law, therefore, as a mode of social regulation, may be ‘deeply antithetical to the myriad concerns and interests of women’.<sup>51</sup> But black-letterism does not wish to engage in these kinds of debates or controversies about the rules. Rather it wishes to focus exclusively on the rules, assuming that they flow from a sterile, closed logical system that is neutral and objective. This dogmatism can close us off from the exclusionary values and stereotypes that often underpin rules and can serve to reproduce hierarchies of power.<sup>52</sup>

## Conclusion

A doctrinal legal approach is an extremely valid, purposeful methodology, which carries both a scholarly and practical currency. It has a long and established history. Its epistemic outlook emphasises the logic of law and the value of reasoning; the normative character of rules; institutional coherency; technocracy; internalism and self-referential validation; the limiting tendencies

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<sup>48</sup> Hutchinson (n 1) 307-308.

<sup>49</sup> Siobhan Mullally, ‘Feminist Jurisprudence’ in Tim Murphy (ed), *Western Jurisprudence* (Thomson Round Hall 2004), 351-385.

<sup>50</sup> Susan Leahy, ‘Bad Laws or Bad Attitudes? Assessing the Impact of Societal Attitudes upon the Conviction rates for Rape in Ireland’ (2014) 14(1) *Irish Journal of Applied Social Studies* 18.

<sup>51</sup> Carol Smart, *Feminism and the Power of Law* (Routledge 1989), 164.

<sup>52</sup> Margaret Davies, *Asking the Law Question* (Sweet and Maxwell 1994), 120.

associated with rule determinism; the ‘last authoritative voice’ positioning of law; its extensive potential range; legal craft; and the importance of being part of ‘an interpretive community’.

In employing it, however, it is important to be aware that its assumptions, commitments, and foundational claims can be challenged. Increasingly law is being viewed through a variety of lenses: history, hermeneutics, sociology, anthropology, political theory, moral philosophy, economics, feminisms, and so on. These are all legitimate standpoints and avenues of enquiry which challenge the perception of law as a unitary and neutral expression of social rules. Legal research in Ireland is altering to reflect more catholic, ‘house of intellect’, types of enquiry. This trend increasingly incorporates the use of new methods (for example, from history, philosophy, jurisprudence, sociology, English literature, psychology, and quantitative and qualitative methods); greater interdisciplinarity (law and history, law and economics, law and literature, law and sociology, law and politics); a more open embrace of theory (feminisms, critical race theory, etc.); an increased willingness to adopt standpoint perspectives (victims, women, children, persons with a disability, LGBT etc.); and the incorporation of more policy based analyses into legal curricula. All of these developments offer lawyers more and more opportunities for critical engagement with their subject matters. Thus, whilst we continue to frame subjects in terms of the relevant legal rules (as we must), this momentum opens up possibilities for new types of dialogue. ‘Thinking like a lawyer’ in the future may mean more than just being skilled at rule handling.