Legal Education and the Reproduction of Hierarchy: A Polemic Against the System

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LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A
POLEMIC AGAINST THE SYSTEM. By Duncan Kennedy. Cambridge,

While many law students and lawyers complain about law school
and law firms, few try to do anything about them. Conditioned to
passivity and ideologically incapable of imagining sweeping change,
each new generation entering the bar attempts no more than incre-
mental reform of the "system." According to Harvard Law School
Professor Duncan Kennedy, a leader in the Critical Legal Studies
movement, law school does its part to ensure the reproduction of
the system by providing subtle but powerful "ideological training for
willing service in the hierarchies of the corporate welfare state" (p.
1). Kennedy's polemic argues that American legal education, osten-
sibly non-ideological, perpetuates hierarchy by justifying it as the re-
sult of a supposedly logical and neutral process called "legal
reasoning." Kennedy acknowledges that there is a particular set of
"legal reasoning" skills, but denies that there can be a "correct legal
solution" distinct from a "correct ethical and political solution" (p.
20).

The first-year law student learns time and again that value-neu-
tral, logical "legal reasoning" leads to liberal capitalist results. The
student concludes that "[t]here are good reasons for the awful result,
when you take a legal and logical view, as opposed to a knee-jerk
passionate view" (p. 7). As a result, the student who comes to law
school a committed leftist learns to put away her "childish" emotions
and to accept the capitalist results that follow from "legal reasoning"
(pp. 12-13).

By focusing heavily on teaching particular rules and applications,
professors are able to skirt the policy assumptions upon which those
rules are based. "[F]undamental questioning . . . is relegated to the
periphery of history or philosophy" (p. 21). Professors pretend that

1. See, e.g., Stewart, Third and Fourth Year Associates Rate Their Firms, AM. LAWYER,
Mar. 1982, at 37, 43 (quoting an associate at Weil, Gotshal & Manges of New York City):
I now realize that associates are commodities, readily used and, when necessary, replaced.
The adage that big firms give better training now strikes me as a myth. I am somewhat
disappointed, almost bitter that my personal development as an attorney has been stunted
and that I am held in the same regard as any other appliance; namely, use him until we
either don't need him any more or until he burns out.

2. Some students and associates are of course more willing than others. Many believe
what they are told, and "behave in ways that fulfill the prophecies the system makes." P. ii.
Others may just dissociate their professional and "private" selves. Pp. 73-74.

3. Including, among others, remembering rules organized into categorical systems, spotting
issues, arguing for a broad or narrow holding of a case, and making pro and con policy argu-
ments. P. 15.
certain mushy fields of law (such as environmental law) involve policy considerations, while other fields (such as contracts) do not. In fact, argues Kennedy, all law is intensely ideological and policy-oriented. Because professors almost never discuss the relationship among the first-year subjects, the students are unable to develop a unifying vision of the law, and can thus never imagine radical change in its entire structure.  

Legal reasoning itself is taught obliquely (p. 16). Professors never explain exactly what students should be trying to learn and offer little feedback. By using the case method to teach legal reasoning so indirectly, professors mystify legal reasoning, thus serving a variety of hierarchical interests. The mystification justifies the law school faculty's position at the top of the legal hierarchy, justifies the six-figure salaries students come to expect for work that is "mainly elementary or mindless" (p. 40) and justifies the legal profession's position near the top of America's social structure. 

The preparation for hierarchy, contends Kennedy, pervades the law school. "[O]ne cannot grasp the political significance of legal education without understanding that the future is present within every moment of a student's experience" (p. 44). The Socratic method produces a "Kafka-like riddle state" (p. 3), in which the student learns to stifle his emotions, and to smile graciously when martinets and curmudgeons win their points by pronouncing that the absurd is dispositive.  

By interacting with professors and by watching professors interact with other people (such as law school secretaries), students learn how to "show the appropriate form of deference to those above [them] and condescension to those below" (p. 31). In peer relations, the student acquires the combination of "camaraderie and distrust" that will mark his relations with his law firm age cohort (p. 65). And, of course, law school is also finishing school, where students learn the appropriate styles and tastes for their rung on the ladder (p. 38).

4. As Erwin Griswold observed about the same phenomena:

But again and again we stress logic as the ultimate objective, though we may be rather unaware that we are doing so. We encourage imagination — in small ways, and perhaps in analogical reasoning. But do we encourage imagination in the broad sense? Do we encourage our students to devise new premises, to start out on whole new lines of reasoning, to come up with new solutions?


For details on Kennedy's approach in his own Contracts class, where he aims to "debunk claims to certainty and rationality in the law," and to move the class into "a critique of the fundamental economic structures sustained by the rules of property, contracts, and torts," see Kelso, *The 1981 AALS Conference on Teaching Contracts: A Summary and Appraisal*, 32 J. Legal Educ. 616, 626-629 (1982).

5. An example is the conclusion that expectation damages represent the will of the parties. P. 18. Similarly, professors pronounce policy arguments (such as the need for business certainty) as conclusive in some cases and ignore the same arguments when they want another case to turn out differently. P. 18.
Kennedy recognizes that law school’s hierarchies are analogous to the hierarchies of the legal profession in particular and American society in general: “Individuals are to firms as firms are to the bar as the bar is to society” (p. 43). As he explains, “the ideology of legal hierarchy is no more than a specialized application of the general meritocratic ideology of American society” (p. 84). Kennedy despises the American capitalist hierarchy partly because one’s position in it correlates mostly with one’s position at birth (p. 38); but Kennedy’s basic position is that, regardless of any benefits to society, and regardless of any relation to merit, hierarchy is in itself a “social perversion” (p. 79).

Recognizing that radical change in America is unrealistic as a short-term goal, Kennedy offers his student readers some suggestions for taking the first steps to making law school more humane: Stand up to authoritarian teachers, lobby for a less corporate curriculum and placement process, and demand a strong, political legal services clinic (p. 112).6

Kennedy’s long-term goals are considerably more ambitious. His law school would put less energy into circular Socratic dialogues and more into direct skills teaching (p. 28), so that graduates would not need to seek training in corporate apprenticeships (p. 30). Instead of ranking students, Kennedy’s utopian law school would work at “level[ing] up” students (pp. 27-28) and disadvantaged professors (p. 123). Kennedy contends that shifting resources from the more to the less advantaged would not lower the abilities of those at the top (p. 53).7 At the Kennedy law school, everyone would be paid the same salary. Professors would spend one month a year doing non-professorial work, and every other employee would participate in “some version of the faculty’s unscheduled work experience” (p. 123).

Kennedy’s impressionistic, polemical style is long on general theory but short on specific evidence. While Kennedy did not aim to write a treatise, his broad assertions will not convince readers who are not already somewhat sympathetic to his argument.8 His overgeneralizations sometimes give the impression that Professor Kings-
field is Dean of every law school in the country. Despite Kennedy's
assertions, students do not consistently prefer more “rigorous” tradi-
tional professors to those who are more policy-oriented (pp. 4-5).9
Nor is the curriculum as piggishly capitalistic as Kennedy claims.
Although contracts students learn the lesson of Peevyhouse v. Gar-
land Coal & Mining Co.,10 where a corporation succeeds in breaking
its promise to restore a farm family's strip-mined land (pp. 6-7), they
also learn about Emery v. Caledonia Sand & Gravel Co.,11 where the
farm family wins on almost identical facts.12 Kennedy's exaggera-
tion of the capitalist orientation of the curriculum perhaps results from
his attempt to explain to himself why so many law students reject the
policies he sees as so clearly correct.

For the most part, Kennedy does not let his radicalism rot in the
intellectual crypt of pedantic Marxism. He recognizes that the
causes of hierarchy are far too complex to be explained as merely
determined products of a capitalist socio-economic structure. But he
does occasionally let himself lapse into conspiracy theory, as when
he claims that one way students are made to toe the line “is to ar-
range things so that almost all students get good jobs, but most stu-
dents get their good job through twenty interviews yielding only two
offers” (p. 70). One doubts that anyone has deliberately “arranged”
the interviewing process at all; in any case, law firms seem to dislike
the superficiality and waste of the process as much as the students
do.

While many of Kennedy's arguments are quite valid, his claim
that there can be no truly legitimate view but his own is offensive.
Although Kennedy is probably right in saying that corporate lawyers
are overpaid, his announcement that they are rewarded beyond their
“objective merit” (p. 41) proves too much. How can merit be objec-
tive?13 Similarly, the conclusion that everyone has an “objective in-
terest” in liberation from hierarchy (p. 97) is “neutrally” derived
from Kennedy's own prior policy choices — choices that derive no

9. While some popular professors at the University of Michigan Law School, such as J.J.
White, are rigorous and arguably non-policy-oriented, other equally popular professors, such
as Yale Kamisar, focus heavily on policy. And professors like Francis Allen make one ques-
tion Kennedy's observation that the more “rigorous” and “traditional” professors shun policy
discussion.

12. See D. Vernon, CONTRACTS: THEORY AND PRACTICE 6-73 to 6-90 (1980) (juxtapos-
ing Peevyhouse and Emery).
13. In fact, the point about objectivity is undermined by Kennedy's own observation (in
another context) that “there is no ‘natural’ value for anyone's labor.” P. 92.
more from objective analysis than do the free-market policy choices of other professors. And by stating that “[t]he denial of hierarchy is false consciousness” (p. 77), Kennedy makes a claim to true enlightenment as self-righteous and closed-minded as any capitalist ever made.¹⁴

Most readers will get off Kennedy’s “existential-Marxist, anarcho-syndicalist, modernist” (p. 84) bus before the end of the trip. But one need not accept all of Kennedy’s claims in order to profit from *Legal Education and the Reproduction of Hierarchy*. In spite of a tendency to overstatement, Kennedy has written much that is true about law school’s subtle ideological indoctrination. Students can learn more from a few hours with this book than they can by spending a week with the Restatements.

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¹⁴. Cf. I. Balbus, Marxism and Domination 56 (1982) (emphasis in original): If we did not assume that there were compelling reasons for the proletariat to define its interest as the interest in transcending capitalist alienation, then there would be no warrant for characterizing its failure to so define its interests as false, and we should rather perhaps conclude that Marx’s theory is false. The entire problematic of false consciousness is based on a search for the causes of an absence. That this absence should be a problem worth pursuing, however, rather than a nonproblem, assumes that it is an absence of a presence that is reasonable to expect. But this is precisely what Marx has been unable to demonstrate. This suggests, once again, that it is Marx’s theory, rather than working-class consciousness, that must be called into question.