

# The Social Justice Element in Legal Education in the United States

By Duncan Kennedy\*

In this lecture, I offer an intellectual historical narrative of debates about the role of social justice in legal education in the United States from around 1900 to the present. I would be surprised (not unpleasantly) if Sir Elwyn Jones had ever turned his attention to this topic. Nonetheless, my hope is that this lecture would have interested him. The struggle for social justice in which he was a deeply committed participant was, in his time and today, an international affair, and also a project that crosses the boundaries of institutions, coming to bear within the bar and in the legislature, as well as on shop floors and, emphatically, in educational institutions. But whatever Sir Elwyn would have thought about it, I hope it will be of some, however limited, use to those of you who are contemplating the creation of a law faculty at the University of Wales at Bangor.

I have some knowledge of British law faculties, although only of English ones and only relatively recent knowledge of those; I cannot claim enough knowledge to say anything about British legal education, and I can say even less about what Welsh legal education actually looks like today or might look like as developed in a new law faculty. That is the reason I have chosen a topic over which I hope I can assert confident ownership. It would be wonderful (although it seems unlikely) if in the question period, someone should say, “Well, I think you have it completely wrong about what happened in American legal education in the 1920s.”

The notion that there is a special category of justice called “social justice” is a late 19<sup>th</sup> century and early 20<sup>th</sup> century idea. People didn’t talk about social justice in the 18<sup>th</sup> century. The term is associated with the development of intense conflict between social classes all over the industrializing world at the end of the 19<sup>th</sup> century; its primary reference was originally to the idea of justice between a proletariat and “owning” classes, whether aristocratic, large land-owning, or bourgeois.

The category has expanded over time, so that today it would be very odd to restrict social justice to justice between social classes. It obviously applies also to gender justice, racial justice, justice between people of different sexual orientations, for example. These are 1960s extensions. It is also now a part of our common vocabulary of social justice that it applies to relations between rich nations and poor nations, to the first world and the rest of the world. We talk about environmental justice as an aspect of social justice, and regional linguistic and ethnic distinctions, as they develop in the world today, give rise to a conception of social justice that applies among linguistic groups or groups that

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are majorities and minorities, and so forth.

Now let me give a summary of my thesis. There have been four distinct periods of discussion about the question of social justice as it relates to legal education in the United States. In the first stage, what I am going to call positivism (in the U.S., it is usually referred to as High Formalism or Classical Legal Thought) was the dominant conception in legal education; in this period, the answer to the question what has social justice got to do with legal education was “nothing much at all.” The undisputed reign of this conception was over by 1900, but, of course, it is alive today as one of a number of embattled contenders.

What undermined it was what I am going to call “the idea of the social” in legal theory, legal education, law practice, and legislation. The idea of the social has its modern origins in the late 19<sup>th</sup> century. It emerged at the same time as social justice appeared, and it became a central descriptive as well as a normative category for understanding law. In this period, the people who believed in a social approach to law did battle with the positivists, the traditionalists. The notion of social justice was a guiding conception, but it was a non-ideological—even an anti-ideological—conception of social justice, quite aggressively distanced from straightforward political or ideological controversy, as well as from the notion of natural law. Like the positivist conception, the social conception is still present, though its dominance came to an end around 1950.

The third conception began around 1940 and dominated the post-War period. It involved the abandonment of the more ambitious claims of the social in favor of the notion of “competing considerations” as the key to understanding both the process of choosing norms and the process of interpreting them. During this period, legal educators continued to believe strongly in the relevance of social justice to legal education, and to see social justice concerns as quite different from political concerns. But they thought that what they could contribute was skill in identifying and then “balancing,” across a painstakingly identified spectrum of fact situations, the various and competing ideal elements that are generically relevant to legal ordering.

I would say that in the United States, since approximately 1970, in a large number of American law faculties, the concept of social justice is understood neither as a unitary thing nor as reducible to the balancing of conflicting considerations. There is a multiplicity of conceptions of social justice on a politicized spectrum. It is an important task of a law faculty to balance different approaches to social justice. I am going to argue that that is a substantial change from the way the situation looked in American law faculties forty years ago.

Beginning, then, with the positivist conception. For those of you who are lawyers, in your jurisprudence course the conventional definition of positivism is what I’ll begin with, but I am going to talk about a somewhat broader conception than is implicit in the claim that “law is the will of the sovereign.” The positivist conception that dominated in American legal education up until the beginning of the 20<sup>th</sup> century was that law is indeed the command of the sovereign, but that we need to add that in modern democracies—the “progressive societies,”—the sovereign is either a democratically elected legislature or the People as authors of a written Constitution.

So yes, law is the will of the sovereign, but, in the American context, not just any old sovereign, but a democratically legitimate sovereign. From that, it followed that what

lawyers and judges and law professors were all concerned with was, so to speak, a downstream activity. Social justice was relevant to law at the level of enactment. At the political level of choosing norms, the sovereign chose norms in a political process that was a democratic one based on constitutionally legitimate electoral politics.

What judges, lawyers and law professors were concerned with was the identification, interpretation, and application of democratically enacted valid legal norms. By calling it “downstream,” what I mean is that lawyers, judges, and law professors were concerned with an activity that came after the moment of ethical political choice and after the moment of conceptualizing a problem in terms of social justice. Law and politics were sharply distinguished.

It was crucial to the viability of this distinction, to the separation of law and politics, that the processes of interpretation and application of law were based on the meaning of the norms. The norms might originate in common law decisions implicitly endorsed by the legislature (endorsed indirectly by declining to overrule them); they might be statutes; they might be the clauses of a written constitution. In each case, the role of the judge, the role of the professor, and the role of the lawyer was to elucidate their meaning. Meaning-based interpretation contrasted with interpretation looking to the purposes, the functions, the ideologies behind the norms.

The idea was that the norms had meanings that could be found on their face or, when there was ambiguity, through reasoning by analogy, the great fetish of common lawyers (which, nonetheless, has a close equivalent in the civil law). So you have positively enacted norms, you have their meanings which you work hard to get at, and when the question is open, confusing, or difficult, reasoning by analogy means finding like cases or like situations and the norms that apply to them, and asking whether one ought to extend them, thereby restricting other norms, in order to solve the case at hand, and thereby develop the law.

The positivist conception yielded an approach to legal education. What legal education did was to teach valid legal norms in enormous numbers. It taught interpretive technique, which, in the United States, meant how to derive norms, or “holdings,” from cases and how to apply the norms to new cases according to their correctly identified meanings. It taught reasoning by analogy. And that was it.

It would be going too far to say that, in the positivist conception, the role of the professor was to impart “merely technical” matters, although technique was an important part of it. Both in Britain and in the United States, in the late 19<sup>th</sup> century, the notion was that law professors were appropriately part of the University because the study of the meanings of legal norms was susceptible to a scientific development in which the number of concepts out of which the norms were constructed was reduced, their meaning clarified, and their logical relations elaborated. The development of this kind of knowledge was practically useful in improving the quality both of the body of norms and of the administration of justice.

Both in Britain and in the United States, law professors had another scientific role whose importance is hard to overestimate. During this period, they produced a new treatise literature that reorganized, criticized, and rationalized the common law doctrines developed by judges over the previous century. In the U.S., the professors who quite abruptly took up this task became major players in the harmonization and development

of private law, as important as the judges themselves.

Also in the U.S. (though perhaps not in Britain), the notion of “policy” or “convenience,” which had developed earlier in the century as a tool for deciding how much of English law to “receive” after independence, remained important, though distinctly deprivileged vis-à-vis meaning-based legal reasoning. I think this helps to explain the relative openness of American legal education to the rise of the “social,” which we are about to take up.

Law was technical, it was apolitical, it was scientific, and legal education was like that too. Competence meant mastery of rules, of meaning-based interpretation, and of reasoning by analogy. Students weren’t expected to be scientists. It should make no difference inside the curriculum what anybody’s conception of social justice might be, and in no aspect of the professional life of the professor would his conception of social justice be relevant, although it might be extremely important in personal or public life.

“The social” represented a dramatic challenge to that “Classical” version of positivism. The challenge was a trans-national phenomenon, including developments in Germany, France and Italy, as well as in the United States and in Latin America. At the level of political culture, exactly the same thing happened in the United Kingdom, but I am not sure that it had much impact on legal education. I can say at least that, in U.S. legal education, the social didn’t come from Britain but from France and Germany.

The social disputed positivism beginning around 1900. It was a response to crisis. For the elites across countries, it was first the crisis of the proletariat and, second, thirty years later, the crisis of the financial markets. The crisis of the proletariat was partly a crisis of the factory and partly a crisis of the slum. The crisis of the factory was about wages, but it was also about industrial accidents and industrial illnesses—a carnage of life and limb, along with a tragic history of sickness.

The crisis of the slum was a crisis of housing conditions and of urban planning generally. It was a matter of sanitary conditions, of crime, and of social disintegration. It was a crisis of the family—not the question of divorce, but of abuse, abuse of wives by husbands, of children, of alcoholism, of prostitution. Between the factory and the slum, the “social question,” as it was called, was all-enveloping, affecting millions and millions of people living in the industrializing part of the world.

The crisis of the financial markets seems quite different, although no less significant. By 1929, there were large numbers of people directly or indirectly participating in the mobilization of small savings to finance trade and development. It was a world market composed of submarkets inter-dependently linked by the new communications media of the time. There was a serious problem of short-term instability as well as the long-run problem of the business cycle.

The financial markets were used, and run, by enterprises, ranging from individual traders to very large entities like banks, that were out of control. They reacted to each other through feedback loops dominated by areal factors, generating panics and hysterias—in short, unstable equilibria. There was also a major fraud problem. The uninformed investors ponying up their savings to fuel the world capital markets didn’t know enough, didn’t understand enough about them, to be able to control the intermediaries through classic competitive pressure. Abuse was widespread. An important slogan for the social was that fraud and instability were related.

“The idea of the social” was a particular lens for interpretation of the crisis. The interpretation was that the crisis represented a tragic failure of law to adapt to changing social conditions in a way that would facilitate social welfare. We had substantively individualist 19<sup>th</sup> century law, interpreted in a formalist way by judges and professors and lawyers. That substantive legal order, even interpreted formalistically, might have worked well in 1820, but by 1900 it was a standing invitation to disaster.

In the United States, the trouble with the old view was always described as that it presupposed a “yeoman society.” The difference between a yeoman society and a modern society in the social view was that a modern society was urban, industrial, organizational, but above all, “interdependent.” The most basic of all the slogans of the social was that society is an evolving organism composed of interdependent parts, with the success of the whole dependent on the rules coordinating the interaction of those parts. The old, bad individualist law was bad and individualist precisely because it didn’t oblige social actors to take into account their interdependence or the impact of their actions on the whole understood as an organism. Along with this substantive position went the notion that meaning-based interpretation often involved the “abuse of deduction,” meaning a false deduction designed to mask an inescapable policy choice.

Law professors in different countries played a big role in the formulation of the idea of the social, joined in the United States by a small number of famous judges. Oliver Wendell Holmes, Roscoe Pound, Louis Brandeis, and Benjamin Cardozo are classic hero figures of the social in the American context. By the end of the 1920s, a significant number of relatively prestigious law schools had at least a few professors with the social orientation, and their students were very interested in what they had to say. Until the 1940s, within law faculties, the cultural conflict between traditionalists and modernists played out through the contrast between the Classical positivist approach and the social approach.

The professors and the few judges were allied with lawyers for labor. The labor bar mediated between the relatively sophisticated theories of the professors and the development of litigation strategies, the mustering of evidence and the presentation of the case for legal transformation to the courts and to the legislatures. The drafters of the new laws were mainly lawyers, sociologists, or institutional economists. This alliance produced an enormous mass of social legislation—first for the problems of the factory and the slum and then for the problem of the financial markets.

The key thing from the point of view of the impact of the social on legal education is that the social from 1900 through the 1930s could be left or right. The ideology of the social in the United States was anti-Marxist, and Marxists generally hated it right back. They thought it was a sell out or a band-aid and could never do anything to fix capitalism. People who believed strongly in the social conception of law ranged across the political spectrum from socialists, through social Catholics and Protestant social Christians, progressives and Teddy Roosevelt Republicans, all the way to proto-fascists and early American fascists.

Many non-fascist conservatives strongly favored the social, including business interests that thought they would do much better in a regulated market than in an unregulated market. They thought that the control of the factory, the slum, and consumer sales was in their long term economic interest as high-end producers struggling with cheaters, chiselers, or low-end producers.

The social appeared simultaneously all over the world, in Western and Eastern Europe, in Canada and the U.S., in Latin America, and in the Middle East. In Brazil and Argentina, the fascist rhetoric of Vargas and Peron sounds surprisingly like Roosevelt's corporatist rhetoric during the First New Deal, as well as like the more leftist or even revolutionary rhetoric of Mexican and Colombian reformers.

For all of these reasons, professors who believed in the social weren't pigeonholed politically. Nor were they open to the charge that they rejected scientific objectivity. The social was social scientific. The legal science of the positivist was the science of legal categories. It was the science of the technique of law. The social was associated with sociology, economics, and psychology.

It was scientific in a way characteristic of the social science of that period, which was a mishmash of evolutionism, pragmatism in the Dewey tradition, and various forms of positivism (like, for example, behaviorism in psychology). You could square off against the positivist, who you would treat as a formalist dinosaur, hopelessly rigid and out of contact with reality, but you weren't doing it in the name of subjectivism or whatever your political preferences might be. You could do it in the name of your own discipline because the social was a discipline, not just a political position.

One response to the social and to social legislation, within legal education, was to assimilate them to the positivist model by adding new courses corresponding to new statutes without modifying the premises or the methods of legal education in any way. The advent of the social added many more norms and provided another field for legal science. The more common notion was that the reform effort to make law adapt to society required a massive revamping of legal education. The social reforms could not succeed without recognizing the role of lawyers, whether acting as advocates, administrators, judges, or professors, in making law.

This went far beyond the enactment of a small number of statutes in the political crises of progressivism and the New Deal. All the basic elements of the legal system, and therefore of the curriculum, needed to be reformed to make them more social. In civil procedure, the adversary system was obviously mal-adapted to a modern, interdependent, flexible complex industrial system. We needed many new types of procedures that would get us out of the typical individualist, formalist battle model. In criminal law, we needed massive reform to individualize punishment but also to make it socially effective. We needed new types of courts, juvenile courts and family courts, as well as new types of procedure.

Even contract law and commercial law needed to be reformed to meet the requirements of the new style of enterprise, particularly the fact that most transactions were between very large companies or between large enterprises and individual actors with no bargaining power at all. Company law needed to be revamped on the basis of the notion of the radical separation of ownership and control. We needed not only new laws that took that into account, but also a new way of teaching company law.

It was not just a matter of reconceptualizing, reformulating, and then reforming the maladaptive, ideologically individualist doctrinal substance that had emerged in the late 19<sup>th</sup> century. It was an important slogan of the social that not just judges but all law interpreters, including lawyers when they draft contracts, lawyers when they choose litigation and settlement strategies, or lawyers when they give advice on liability, are engaged

in law-making. What the enterprise does will be affected at every stage by interpretations made by the lawyers that will be contestable.

They will be contestable because there will be a social interpretation and an individualist or formalist or positivist interpretation. Lawyers will over and over again have to choose, as they do their fine-grain work, which way to go. Law professors are obviously engaged in this, but administrators and judges too contend with these choices. The social could be snuffed out by judicial hostility. If the judges hated it enough, they would find ways to prevent it from happening, if they didn't just bungle it. Only if lawyers understood not just the rationale, but also the technique, of reform would reform work.

This produced an entirely new idea about teaching methods and about the curriculum. The teaching idea was that you did indeed need a new course to interpret the labor law statute, but the person teaching it had to know some sociology, economics, and psychology, and it would be a good idea to have a small number of very docile, submissive, and collegially pleasant economists, sociologists and psychologists on the faculty. Ones who would never claim to know anything about law, but would be a useful resource for us in developing our interdisciplinary projects. Interdisciplinarity for the social meant the law professor as a philosopher/king whose generalist skills allow acquisition of all other disciplines without formal training.

But, as I've said already, this was not about politics. It might be true that their version of social justice could be characterized politically as more corporatist, communitarian, anti-formalist, and pluralist than the thought of their enemies in the liberal traditions of the center and right. But they didn't think that social justice put them in the danger of eroding the distinction between law and politics.

For the third phase, which might be called the Cold War phase of legal education, I am going to begin just as I began with describing the social—with crises. Then I'll discuss what American law schools are like today, although very briefly.

Beginning in the 1930s, both the American legal realists and Kelsenian neo-positivists on the Continent had attacked the social current for claiming, at the price of confusion and mystification, to derive values (supporting reform) from facts (interdependence). Then there was World War II. World War II ended fascism as a political force and also as a powerful, often very sophisticated intellectual current. Triumphant liberalism blamed the many different kinds of anti-liberal apostasy for the rise of fascism, and "the social" didn't escape the taint.

For these two reasons, by 1950, the social was dead as a coherent, worked-out, general approach to law. But it was still very much alive in the less abstract body of legal culture and discourse. There was the great mass of social legislation; there was the practice of policy analysis that the legal personnel of the new administrative state deployed to develop and make sense of that legislation; and there was the general notion of "social democracy" as an answer to communism. The social had become the ideology of the center left, one of the ideologies through which the United States fought the Cold War.

In law, the center switched from a self-consciously scientific (or we might say, today, pseudo-scientific) methodology to a more pragmatic, "conflicting considerations" mode. For this approach, it was no longer obvious that once we know the social function of a given set of rules, we know how to reform it so as to improve society. Value judgments were inevitable, no matter how much legal actors might want to deny them. Moreover,

there were always multiple values involved. It was necessary to balance conflicting interests. Attention to facts was crucial, because the same conflicting values played out differently with each modification of the fact situation.

In the most developed legal pedagogical version of this approach, say, that of Lon Fuller or Hart and Sacks, the Classical positivist late 19<sup>th</sup> century case method of classroom instruction reversed its meaning. The point of cases and hypotheticals was now that “there are no absolutes,” and every abstract formulation of a norm would turn out to have a limit, a point at which the play of conflicting policy considerations would compel the decision-maker to make an exception or adopt a counter-rule.

Law teachers taught that law reflected these endlessly shifting, situationally specific choices of a norm reflecting a policy balance. Social justice drove law, but law teaching was nonetheless apolitical because it taught the techniques of value *judging* rather than any specific value *judgment*.

The second major influence on legal education in the 1950s was the rise of civil libertarianism, first in the battle between left liberals and conservatives over McCarthyite persecution of American communists and then in the Civil Rights Movement. Along with the remnants of the social and the “conflicting considerations” approach, a new moderate left position came into existence.

Civil libertarianism is the ancestor of our current human rights consciousness, and it is most definitely neither the social nor “conflicting considerations” consciousness. It was intensely individualist, whereas the whole point about the social was that it was the opposite. Moreover, civil libertarianism was intensely legalist, even formalist, while the social and “conflicting considerations” were “pluralist” in the sense of being sympathetic to non-state sources of social order and to interpretive techniques that appeal to social context, sentiments, and needs.

Civil libertarianism was based on the idea that the Constitution or the statute required the vindication of the rights of the individual against the government, regardless of social consensus, which might well be racist or otherwise oppressive. But it did have one thing in common with the predecessor ideas, namely the deep conviction that it was apolitical—based on fundamental or universal or just Constitutional value judgments rather than on “ideology.”

The academic coexistence of residual positivism, “the social,” “conflicting considerations,” and civil libertarianism was uneasy, and also productive, in the rather repressed mode of the 1950s and early 1960s. The current situation is the sequel of what I think one can fairly call the shattering of that equilibrium in the late 1960s and 1970s. Historians are not supposed to speak about the present so I’ll be quick. The owl of Minerva takes flight only after dusk has fallen.

The crisis that defines the present was what we call “the sixties” and what Continentals call “68.” I went to law school between 1967 and 1970 and started teaching law in 1971. I have been an active participant in the changes I’m about to describe.

We student radicals thought that the center and center left versions of the social and of “conflicting considerations” that dominated American domestic and foreign policy as well as legal education were all of a piece and were all way too right wing. We attacked them as incoherent and traitorous to their social justice ideals. As we saw it, social justice required commitment to positions that were leftist, rather than apolitical either in a scien-



tific or interest-balancing way. We thought the center and left liberals who were in power were forsworn. In my (doubtless warped) vision of the time, we were right, and we very seriously demoralized the law professors who were votaries of the social or of interest balancing. We shook their confidence in their own political virtue.

It was great. But we weren't the only ones that did it. The '60s produced a powerful reaction. It split the older generation into an old left and a new right, spawned passionately ideological reactionaries within the '60s generation itself, and generated a revulsion against all forms of ideological passion in the next generation. What has emerged over the thirty years since 1970 is a new map of social justice concerns in legal education, a map on which positions are political (in the left/right sense) and also methodologically partisan, in many variants. On this map, there is a well-established anti-political position and a methodologically eclectic position, but there is no longer a viable apolitical position or a methodologically neutral position.

The situation on the left is disintegration. One element is left rights consciousness, itself internally divided along the lines of identity politics (women, blacks, gays, greens, and so on). A second is the remnants of the social orientation. A third is the remnants of "radicalism" (that's me), associated with a post-Marxist and/or a post-structuralist critique of the social, with radical feminism, with race consciousness rather than color-blindness, and so on. Then there is the left sociology of law, empirically- rather than Marxist-oriented in the U.S.

Along with the radical attack on the old center/center-left, there has been an equally devastating attack from the emergent conservative law and economics movement. They had two basic theses. First, they argued that social legislation hurt the people it was supposed to help; second, such legislation was paid for by the middle and lower-middle classes rather than by the rich corporations the social people thought they were targeting. The New Right linked their efficiency analyses with a resurgent strand of libertarianism, advocating deregulation and formal as opposed to substantive equality.

The right in law schools got an enormous boost from the electoral victories of the national political right beginning in 1980, which made possible a close alliance between academics, right wing politicians, bureaucrats and judges (some drawn from the academy—e.g. Richard Posner). This tendency in legal education is decidedly post-60s, understanding itself as oriented by an inherently political conception of social justice, in this respect just like the left.

The other thing that happened was that methodologies proliferated along with ideologies. Technical economics became more and more important in law, but so did liberal political philosophy (Rawls and then Dworkin), Marxism (one strand of early critical legal studies), and then neo-pragmatism and post-modernism (or rather, "fancy French theory," as in Derrida, Foucault, Bourdieu). All of this was caviar to the general, meaning to the people of "the social" and the "conflicting considerations" people. They found themselves boxed in, on the one hand, by a new right and, on the other hand, by a new left, but also by a multitude of fancinesses, each one more indigestible than the next.

The upshot was a spectrum of possible views on two dimensions. A gay activist law professor teaching a course on Gender and the Law will be assumed by colleagues and students to be against discrimination against gays, but it may make a big difference whether he or she is a "queer theorist" (postmodern) or a civil libertarian. You can be a

person who teaches competition law on the premise that there should be no interference with any merger unless the opponents of the merger can show that it will reduce total welfare in society. That would be a typical conservative law and economics position. But you can also be a liberal law and economics person who believes in the efficiency of anti-merger policies.

Now we've gotten to the 1990s, when, with the demise of the Soviet Union, communism and Marxism are swept off the board and simultaneous globalization and localization dominate the lives of institutions. These big events are so recent that it is embarrassing to mention them, but they are very important to what U.S. law schools are like now.

There is no possible organization of the politics of law school based on the idea of a confrontation between Marxism and capitalism, because Marxism has disappeared from the political and intellectual landscape altogether. There is the new right, which is still relatively coherent and ideologically powerful. There is a disintegrated left. The new right and the disintegrated left have the same apparatus, which is rights and social science. The left retains from the days of the social the belief in social science. They have incorporated human rights, civil rights and civil libertarianism into their position. Each left identity position musters rights and social science as best it can, ignoring the others.

The right has exactly the same apparatus. They use economic analysis, rather than sociology or psychology, and libertarian rather than socially oriented rights analysis. The rights of property and freedom of contract, as bases for efficiency and growth, confront equality rights and protective rights for weak parties. That's the political confrontation.

The demise of the Soviet Union has had another significant effect. The countries of the ex-Soviet Bloc, and many countries which had tried to split the difference between the communist and the Western capitalist model, have to decide on new legal regimes. Legal change is occurring all over the place, and this is the American Empire, so American Imperial Law Professors are traveling all over the world advising on how to create law faculties and also on how to restructure all of a given country's private and public, especially constitutional, law. This is a world in which legal creativity *ex nihilo* can be an American law professor's full time vocation, as well as the occasion for his vacation.

Globalization and localization have the same effect. Things are being devolved everywhere, and everywhere lawyers are earnestly trying to determine the limits of devolution and to coordinate the devolved units with the old centers, just as the centers are being linked and integrated at a transnational level. Lawyers, law professors, and judges all over the world are having a field day.

In American law faculties, the Classical positivist position, that legal education has nothing to do with social justice, is no longer plausible. The proliferation of ideological and methodological approaches, post-communist "transition," globalization and localization, have combined to make it hard to find any significant number of American law professors who think social justice is irrelevant to legal education.

So the social triumphed, and social justice is central to legal education. But the social has also been defeated, in two different ways. First, the idea that there is a non-ideological social, that the social wasn't political because it could be left and right, because there were communists who didn't believe in it, because there were conservatives who did believe in it—that conception of a social outside politics failed.

Second, the critiques of the social—from civil libertarians, radical leftist, and right wing law-and-economics professors—discredited the rhetoric that supported regulatory legislation and the welfare state. Any proposed reform has to confront four questions: (1) What are the actual distributive consequences (“who will pay the piper,” “there’s no such thing as a free lunch”)? (2) To what extent does the reform amount to paternalist, top-down imposition, as opposed to what the people concerned actually want? (3) What will be the impact of the reform on identity projects, for example, on how women and men understand themselves, as well as on how they divide the social pie? (4) What consequences will it have for economic growth?

We on the post-social left struggle with these questions case by case rather than having an answer that works across the board. All we are clear on is that it isn’t as simple as votaries of the social once thought it was.

In the current situation, just about every professor in a typical American law faculty is understood to have a conception of social justice. It might be a neo-liberal conception, an old-new left conception, a moderate-regulatory conception, a moderate-deregulatory conception, a women’s rights oriented conception. Everyone has a conception, and it is understood that that will influence what a person chooses to teach, how s/he teaches it, what s/he will do his or her research on, and the content of the research. There is no sense that we are scientists and there is serious doubt whether there is a clean test, outside of political contestation, that will allow us to evaluate legal scholarship.

The mode of collegial life is pluralist. The dean and the faculty, with shifting majorities, constitute themselves as somewhat representative. Some schools are more conservative, some more liberal. Some are more economics oriented, some are more human rights oriented, but all know they have to have some loose representation of the extant points of view. Social justice is everywhere, but it’s disintegrated and politicized under pluralist rules that require some of everything to be there, so that the school can maintain its reputation as a representative law faculty and avoid being treated as marginal. This can be seen as good or as bad. I’ll conclude by saying why I think it is good and why I think it is bad.

I think it is good because I believe it represents the progress of knowledge. I think the pluralization of legal education is part of the long-term de-mystification or de-reification process in which people in this particular part of the American legal elite have correctly and honestly internalized the irreducible political element in law. And I think that’s great. I don’t think it’s a tragedy. I think a pluralist organization of conflicting politically oriented law professors makes a better faculty than one in which the consensus is that it is possible to escape the political bind and just be law professors.

There is a characteristic downside to it as well, which has emerged most clearly in the last five or ten years in many different faculties. A bad thing about many law faculties today is that many younger teachers are basically bored and irritated by the endless grinding of the ideological millstones of their elders. They want to be left alone to do their social justice-oriented projects without having to debate them within a faculty collective. They especially don’t want to be forced into political discussion with other young professors, for fear of wanting to kill their peers. They want to discuss their children and what schools to send them to; they want to have a depoliticized social life that will replace the depoliticized academic life of pre-60s generations.

As a 60 year old, old '60s person, this strikes me as terrible. I am one of the endlessly grinding millstones whose sound keeps them awake at night and makes them want to change the subject to the choice among secondary schools. I sympathize. It's painful and difficult to be in a faculty setting held together by pluralism and coalition politics with the sense that every school must be roughly representative, rather than in a context of shared scientific commitment or productive intellectual conflict. But I think the present situation is an improvement, better than the Classical positivist integrated situation, and also better than the situation that my generation brutally disrupted. I think this is a case where things worked out fairly well over the long run.