

Legal Education as Training for Hierarchy in 2015

Matthew Titolo

I encountered *Legal Education as Training for Hierarchy*, appropriately enough, in my first year of law school. I was reading a good deal of material on legal education at the time, trying to puzzle out what was distinct about it. *Legal Education* is among the best of the lot. For starters, *Legal Education* sports the most arresting first sentence in the genre: “Law schools are intensely political places despite the fact that they seem intellectually unpretentious, barren of theoretical ambition or practical vision of what social life might be.”¹ The essay goes on to show that law school is training for deference, conformism and hierarchy.² I admired the way Kennedy’s essay tore apart the self-satisfied myth of law’s neutrality; the way it showed the doctrinaire side of law school; the way it showed how law school could stifle authentic commitments, as it relentlessly recast all debates as fights between “pedagogical conservatism against moderate, disintegrated liberalism.”³ Radical stuff, to be sure. But nothing about the essay’s antinomian sensibility surprised me at the time: I had just finished a humanities PhD program with a steady diet of Bourdieu, Foucault and CLR James. If someone had said “Law is power. Law is ideology” in my last semester of graduate school, I wouldn’t have noticed. What else could it be? The culture of critique that Kennedy was hoping to build in law schools had done quite well for itself across the quad in the humanities and social sciences, even as it has largely disappeared from the law schools. But something had changed at the end of the first year of law school. I was less at ease with “cynical” views of the law. Wouldn’t it be better to take law seriously on its own terms? To reason from the inside out? At the very least, one needed to take the claims of legal liberalism seriously, in a non-symptomatic way, something one hadn’t had to do in graduate school. In other words, the *déformation professionnelle* that Kennedy exposes in *Legal Education* was already at work. Looking back on it now, after law school, law practice and now law teaching, it is amazing that a law professor wrote this essay in 1982, or at any time. And at Harvard no less, the ground zero of elite liberal legalism. Law professors are exemplars of a reasonable and measured ambivalence. What are the narrow interests at stake? What does the law require in its own terms? On the one hand, on the other hand. Kennedy’s essay, his entire career, really, explodes all this. What strikes you when you read *Legal Education* with fresh eyes is the unyielding anger that animates it.

How does *Legal Education* stand up today? Very well in some respects. Consider Kennedy’s piece as an attack on the prestige and authority of law school. While these were already under pressure from Watergate and the radical critique of the establishment in the 1970s, there was still a residual halo around the enterprise in 1982. This has all but evaporated in the years since *Legal Education*. And it wasn’t

· Professor of Law, West Virginia University College of Law.

¹ DUNCAN KENNEDY, *LEGAL EDUCATION AS TRAINING FOR HIERARCHY* (1982).

² *Id.*

³ *Id.*

postmodern theory or leftwing mumbo jumbo that did it, either. The Supreme Court didn't need Derrida to deconstruct its own mystique. They did that to themselves with *Bush v. Gore* and *Citizens United*.⁴ As for law schools, the original target of *Legal Education*, things aren't looking so good. The great recession, the automation of legal practice and steep decline in enrollments portend major shifts in the status of law schools and the profession at large.⁵ The popular and lurid "law school scam" movement paints law school as a giant ponzi scheme designed to enrich the professoriate at the expense of students and taxpayers.⁶ An ironic and sarcastic attitude toward authority, legal and otherwise, prevails today. Everyone is in the know and wised up.⁷ The patriarchs are dead, cashiered, or simply in on the joke. Meanwhile, a generational shift has softened the style of the law professoriate, with more humane teaching approaches, "modified" Socratic methods and PowerPoint displacing the famously brutal and humiliating *Paper Chase* interrogations. Clinical and experiential education is now taken seriously everywhere, even if there remains an unfortunate hierarchy between doctrinal and clinical faculty.

How has this played out in the intellectual life of law schools? Largely in an ambivalent way. The competing grand theories have disappeared or been absorbed into countless smaller projects. Law schools are governed by a pluralistic theory of justice. Law and economics is first among equals, to be sure, but legal scholarship is truly diverse: empirical legal studies, positivism, traditional doctrinal work, liberal legalism and rights theory, analytical jurisprudence and moral philosophy⁸ share space with sociological and historical analysis, critical race theory, feminism and other radical social justice projects (although often without having much to say about class as an analytical category).⁹ As Kennedy himself has acknowledged, "social justice is everywhere" and it is now widely accepted that law is political.¹⁰ But the death of legal formalism has not had the radicalizing effect that the legal realists and their CLS heirs had hoped for. The irony is that law schools are still "intensely political places." But we all tend our own gardens now. Perhaps this is due in part to diminished expectations and learned helplessness under neoliberalism. Consider the larger political trends in the US since *Legal Education* was published: in 1982, one might have hoped Reaganism to be a temporary, if devastating, setback for the American left. We now know that it was an epochal shift, with neoliberalism routing the left as a political force in the United States. In the Age of Obama, the prospects for a genuine left alternative

⁴ *Bush v. Gore*, 531 U.S. 98 (2000); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

⁵ Elizabeth Olson and David Segal, *A Steep Slide in Law School Enrollment Accelerates*, NYT DEALBOOK, Dec. 17, 2014; see also Farhad Manjoo, *Software Could Kill Lawyers. Why That's Good for Everyone Else*, SLATE.COM, Sept. 29, 2011.

⁶ Paul Campos, *The Law School Scam*, THE ATLANTIC, September 2014.

⁷ See, e.g., *Above the Law* for a constant stream of snarky commentary on the law school experience.

⁸ Duncan Kennedy, *The Social Justice Element in Legal Education in the United States*, 1 UNBOUND 93; see also Tor Krever, *A Journal of the Legal Left?*, 9 UNBOUND 1 (2015).

⁹ Kennedy, *supra* note 8 (Marxism has disappeared from the American law school).

¹⁰ Kennedy, *supra* note 8.

in the US often seem remote. On questions of political economy, neoliberals and conservatives (i.e., the center and the center right) in the US are largely in agreement on the legitimacy of capitalism, the market, incrementalism, no doubt with important disagreements around the edges, which can have very large effects on the ground. The personnel manning the infrastructure and institutions of capitalism are more diverse than ever before, which is a very good thing, while the hopes for reconfiguring the shape of those institutions in a more radical way seems ever more unattainable. If we have a grand theory, it is the neoliberal consensus, largely unshaken even by the events of 2008. I still believe that at its best, law school can sharpen analytical thinking and teach practical reasoning in a way that other types of graduate education often don't. Law schools are better places than they were in 1982. But law schools remain an important site for the dissemination of neoliberal ideas, both in form and function. Law schools set the outer bounds of reasonable liberal opinion about issues upon which the law touches. They channel broader hopes for social change in careerist directions and continue to mystify power relationships. This much is as true now as it was in 1982. But it needn't be this way. Kennedy's radical attack on the ideological effect of law school is thus as salient as ever.