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Legal Education and Heirarchy: A Reply to Duncan Kennedy

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One wants so much to like Duncan Kennedy's essay "Legal Education and the Reproduction of Hierarchy: A Polemic Against the System." [1] Anyone who has suffered through law school would be grateful to have a good polemic against the institution, and to have one written by one of the most prominent members of the critical legal studies movement raises high hopes. Furthermore, the title provides the right starting point for analysis. Law schools need to be analyzed as hierarchical institutions that play various roles in social hierarchies. But Kennedy's essay is disappointing. Kennedy's analysis fails both because it is mistaken about what happens in law schools and about how law schools are related to social hierarchies.

A response to Kennedy is of crucial importance given its wide circulation. The self-published version of the essay received four reviews in leading law reviews (exceptional for a self-published paper), and two different shorter versions have been published, one in the Journal of Legal Education and one in an anthology. [2] In its various forms, the essay has been cited over one hundred times, although, astonishingly, it has drawn no sustained theoretical response. Catharine Hantzis describes the influence

of Kennedy's critique of legal education: ". . . the critique of legal education Kennedy espouses has become, even for those of us who disagree with it, part of the shared vocabulary and symbolism with which we think and talk about our roles as law school teachers." [3] The pervasive influence of Kennedy's view is well-attested by the large number of law review references which mention in passing the subject of hierarchy or power relations in legal education and cite Kennedy's paper as the lone authority on the subject. [4]

The uncritical acceptance of Kennedy's paper by those critical of legal education is a probably not unlike similar acceptance of most polemics against education. Everyone knows that there is something wrong with law schools, and many suspect that it has something to do with hierarchy. Kennedy's essay has garnered undue persuasiveness merely because it fits in with prevailing expectations. This uncritical acceptance has only been abetted by the unwillingness to face critical scrutiny of those who disagree with Kennedy.

In the first section of the paper, I will lay out Kennedy's views. In the second, I will sketch a critique based on my experience as a law student and lawyer, and also on my theoretical reflection on that experience. This theoretical reflection is focused (in this essay) primarily on the work of the sociologist Pierre Bourdieu, but will also include (in section three) some general philosophical remarks.

I. KENNEDY'S ANALYSIS

Kennedy's most general thesis is that law school consists of "ideological training for willing service in the hierarchies of the corporate welfare state." (p. 591) According to Kennedy, "a surprisingly large number" of law students enter law school with the idea that being a lawyer is or can be a politically progressive job. [5] They leave primarily as sell-outs, taking high-paying jobs with prestigious law firms

doing corporate work. I will divide Kennedy's analysis of how this happens into two sections: (A) legal pedagogy, and (B) professors as models.

A. Legal Pedagogy

Anyone who has seen the movie *The Paper Chase* knows that the case book method is at the heart of legal pedagogy. As illustrated in the movie, this method can be used in a tyrannical way to humiliate and terrorize students. Even where not used in such an extreme way, the casebook method has a way of cowering students. One technique is the mixing of "hot" and "cold" cases. Kennedy is quite good at describing the use of "cold" and "hot" cases by law professors: "the opposition between the technical, boring, difficult, obscure legal case, and the occasional case with outrageous facts and a piggish judicial opinion endorsing or tolerating the outrage." (p. 594) "The point of the class discussion [of the hot case] will be that your initial reaction of outrage is naive, nonlegal, irrelevant to what you're supposed to be learning, and maybe substantively wrong into the bargain." (p. 594)[6]

Kennedy correctly points out that "[t]he intellectual core of the ideology is the distinction between law and policy." (p. 596) This distinction relegates students' initial reactions to the realm of "policy questions," different from and perhaps irrelevant to legal decision. The structure of the course gets this distinction across by treating cases in three different ways. The cases which "present and justify the basic rules and ideas of the field . . . are treated as cursory exercises in legal logic." (p. 597) Anomalous - - outdated or wrongly decided -- cases are used to show that "the technique of legal reasoning is at least minimally independent of the results reached by particular judges and is therefore capable of criticizing as well as legitimating. Finally, there will be an equally small number of peripheral or 'cutting edge' cases the teacher sees as raising policy issues about growth or change in the law." (p. 597) These last cases will allow for more free-wheeling discussion because they raise policy questions.

The entire curriculum also has a three-fold structure. Central are contracts, torts, property, criminal law, and civil procedure. "The rules in these courses are the ground-rules of late nineteenth century laissez-faire capitalism. . . . Then there are second- and third-year courses that expound the moderate reformist program of the New Deal . . ." (p. 597) The central courses are taught more as exercises in legal reasoning; the latter are somewhat more policy oriented, but have an ad hoc approach "which guarantees the practical impotence of the reform program." (p.597) "Finally, there are peripheral subjects, like legal philosophy or legal history, legal process, and clinical legal education. These are presented as not truly relevant to the 'hard,' objective, serious, rigorous, analytic core of law; they are a kind of playground or a finishing school for learning the social art of self-presentation as a lawyer." (pp. 597-8)[7]

Kennedy denies that the distinction between law and policy has any validity: "This whole body of implicit messages is nonsense. Teachers teach nonsense when they persuade students that legal reasoning is distinct as a method for reaching correct results from ethical and political discourse in general (i.e., from policy analysis)." (p. 598) Kennedy does recognize that students do learn something in law school. They learn to retain large numbers of rules, spot issues raised by fact situations, elementary case analysis (generating broad or narrow holdings for cases), and pro/con policy arguments in applying rules. According to Kennedy, these skills do constitute an intellectual advance:

One should neither exalt these skills nor denigrate them. By comparison with the first-year students' tendency to flip-flop between formalism and mere equitable intuition, they represent a real intellectual advance. Lawyers actually do use them in practice. And when properly, consciously mastered, they have "critical" bite. They are a help in thinking about politics, public policy, and ethical discourse in general, because they show the indeterminacy and manipulability of ideas and institutions

that are central to liberalism. (p. 596) Kennedy's criticism of the teaching of these skills is that they are taught "badly, unself-consciously, to be absorbed by osmosis as one picks up the knack of 'thinking like a lawyer'." (p. 596) This sort of teaching generates hierarchy because it "generates and then accentuates real differences and imagined differences in student capabilities.[8] But it does so in such a way that students don't know when they are learning and when they aren't and have no way of improving or even understanding their own learning process." (p. 596) Kennedy thinks that "the actual practice of legal education systematically accentuates differences in real capacities" (p. 600) and that these differences could be "leveled up" at minimal cost. (p. 600) As it is now, these differences create a hierarchy among students which is memorialized in their grades and class rank.[9]

Finally, by failing to teach practice skills, law schools preclude students (or lead students to think that they are precluded) from alternative forms of legal practice. (pp. 596, 600-601) Large firms know that they will have to train new graduates, and it seems easiest to go work for them in order to get the training one needs, even if it means accepting the hierarchical structure of the firm.[10]

B. Professors as Models

In addition to the problems of pedagogy, Kennedy claims that hierarchies within the law school act as models for the hierarchies in the broader legal and corporate world. Kennedy differentiates two ways faculty act as models for students: by example and through direct interaction. There are three ways faculty teach by example:

1. Professional status. "Students learn that law teachers are intensely preoccupied with the status rankings of their schools and show themselves willing to sacrifice to improve their status in the rankings and to prevent downward drift. They approach the appointment of colleagues in the

spirit of trying to get people who are as high up as possible in a conventionally defined hierarchy of teaching applicants, and they are notoriously hostile to affirmative action in faculty hiring . . ."

(p. 603)

2. Secretaries. "Law professors, like lawyers, have secretaries. Students deal with them off and on through law school, watch how bosses treat them, how they treat their bosses, and how 'a secretary' relates to 'a professor' even when one does not work for the other." [11] (p. 603)

3. Class/Race/Gender. "Teachers are overwhelmingly white, male, and middle class, and most (by no means all) black and women law teachers give the impression of thorough assimilation to that style or of insecurity and unhappiness." (p. 605) "[T]he indirect pressure for conformity is intense." (p. 605) Kennedy thinks that the pressure succeeds in producing conformity among students. (See footnote 8)

Direct relations between student and faculty are hierarchical, and act in two ways to train students to accept hierarchy:

1. As teachers. "The teacher/student relationship is the model for relations between junior associates and senior partners and also for the relationship between lawyers and judges. . . . In the classroom and out of it, students learn to suffer with positive cheerfulness interruption in mid-sentence, mockery, ad hominem assault, inconsequent asides, . . . abrupt dismissal . . ." (p.

604)

2. As mentors. "From among many possibilities, each student gets to choose a mentor, or several, to admire and depend on, to become sort of friends with if the mentor is a liberal, to sit at the feet of if the mentor is more 'traditional'." (p. 604)[12]

C. Proposals

Kennedy proposes specific changes in legal education within a broader strategy of radical change. The broader strategy is "that of building a left bourgeois intelligentsia that might one day join together with a mass movement for the radical transformation of American society." (p. 610) The ultimate goal is radical although not revolutionary: "we would go as far as possible toward the total dismantling of the system." (p. 611) The basic idea is to set up "left study groups" in law school. In addition to reading leftist texts, these groups could organize an "insurgent underground newspaper," organize "an act of resistance of some kind against the authoritarian classroom," propose and work for curriculum change, and work to establish a "politically sensitive legal services clinic for poor people operated by the school." (p. 612)

Kennedy also appends a "utopian proposal" for curriculum and structural change in the law school. The proposal which follows most directly from his discussion is the one which was mentioned most prominently in the text: programming instruction of case analysis. Also included are requirements for clinical experience and an inter-disciplinary course. The structural changes are designed to make the law school into "a counterhegemonic enclave." (p. 614) Of these, I'll mention only Kennedy's proposals to deal with faculty hierarchy:

4. Faculty Hierarchy: Hire most qualified women, minority, and working-class candidates until those groups occupy a reasonable number of faculty positions. Abolish the distinction between tenured and untenured faculty -- all tenured and or none tenured. Democratize hiring through an elected appointments committee with representation of all groups in the school. Develop a program to reduce existing disparities in teaching and scholarly capacity of different faculty members, analogous to the attack on disparities among students. (p. 615)

For the most part, these proposals speak for themselves and I will have little to say about them.[13] My critique will focus on Kennedy's analysis of law school and its role in hierarchies.

II. RESPONSE TO KENNEDY'S ANALYSIS

A. Legal Pedagogy

1. Interaction between internal and external hierarchy

It's true, as Kennedy points out, that law school teaches very little, and this is perhaps the fundamental aspect of one's experience in law school. I basically agree with Kennedy about what it is that law school teaches, although I have no aversion to using the phrase "legal reasoning" to describe it. (My one quibble here is that one learns not sets of rules but sets of concepts -- e.g., the elements of a tort, the elements of a contract.) Where Kennedy is wrong is in his claim that there are large differences in students' abilities to analyze cases generated by the unself-conscious nature of the casebook method. Almost everyone "gets it" by the end of the first year. This is why law school is so boring (and easy) after

the first year.[14] Almost all law students from all law schools graduate having mastered the same minimal skills and sharing the same vast ignorance. In this way, legal education is quite egalitarian.

One of the interesting, indeed paradoxical, results of the situation is that greater equality within the institution accentuates other hierarchical aspects of the institution. One would expect that the relative equality of ability of law school graduates would make the school they attended and class rank relatively unimportant in hiring for jobs. But the opposite is true. In spite of the relative homogeneity of law school graduates, as compared to college graduates, the ranking of the law school one attends is far more important for law school graduates seeking jobs than the prestige of one's college for college graduates. This is not merely a matter of snobbery on the part of law firms. Law schools hire graduates from top firms because of the prestige it gives the firm in the eyes of clients. This is quite important for a law firm given the general ignorance of beginning lawyers.[15]

This phenomena, where equality within an institution interacts in unexpected ways with hierarchies outside, is not unique to legal education. Here are four examples. First, should one call on students at random? This is clearly an authoritarian procedure. But the failure to use this tool when others do so is counterproductive. When I taught an advanced course in the philosophy of law at the University of Kentucky, I had half a dozen law students enrolled. Even though they were third year students, they were still called on and faced attendance requirements in their law classes. Because I didn't use the same authoritarian tools, their participation was non-existent in my class. No matter how much they wanted to engage, it simply didn't make sense for them on a day to day basis to keep up. Similar factors are likely to undermine other attempts to reduce hierarchy, such as Kennedy's "no-hassle pass" policy.[16]

A second example: should one correct students' writing style and grammar in their papers and exams? Doing so is highly authoritarian; it gets in the way of any attempt to put participants in a dialogue on an equal footing. On the other hand, some people's career choices are limited and career paths are stunted by their inability to write well. People get fired (by law firms) because they don't write well. Teaching people to write well is a highly ambiguous and very hierarchical act. However one resolves this ambiguity, it is important to know that failure to teach them to write well may give them fewer opportunities to achieve status later, status without which their opinions will have less influence. Decreasing hierarchy within the classroom in this case increases it outside of the classroom.

Here is a third example. One of Kennedy's proposals is to require practice skills training as part of the curriculum. (p. 614) He claims, and I entirely agree, that such skills are needed if one is going into some alternative form of practice immediately after law school. But teaching such things will generate much greater differences among law students than exist now. It will do so in many of the ways that Kennedy claims teaching legal reasoning does. Negotiating a deal, talking with a client, and interviewing a witness are all far more difficult to teach and learn than legal reasoning. They are even more contextual and more closely linked to personal characteristics of the lawyer.

Fourth: As Kennedy mentions, going to law school is for many a way of moving up the social hierarchy. Within law firms, one's status is determined by whether one is a rainmaker or not -- that is, whether one brings business into the firm. For many lawyers, and almost entirely for young lawyers, one's ability to make rain is generally a function of one's inherited wealth and contacts. If one's family has money or position, one grows up knowing people with money and position who can throw business one's way. If there is more upward mobility due to law school credentialing than due to "rainmaking," leveling differences among law school graduates will only accentuate the hierarchical differences

between rainmakers and others. What seems to be important here is less a matter of how much social mobility there is in a particular hierarchy, but how it compares with and interacts with other hierarchies within the same institutions.

2. The autonomy of the law -- is law school an intellectual advance?

Kennedy is absolutely right to point to the distinction between law and policy as the founding distinction in the "ideology" of legal reasoning. It is this distinction which sets up and delimits law as an autonomous field. And it is this distinction which depoliticizes students, as law professors systematically relegate students' "naive" opinions to the side of policy as opposed to that of law. The very terms seem designed to reach this result. The bracketing of "policy" questions can mean nothing but epoliticization. According to Kennedy, this distinction is nonsense. To repeat Kennedy's words: "Teachers teach nonsense when they persuade students that legal reasoning is distinct as a method for reaching correct results from ethical and political discourse in general (i.e., from policy analysis)." (p. 598) What this means is unclear.

Kennedy might mean that law professors mistakenly conceive of legal reasoning as differing in kind, rather than -- as it actually is -- merely continuous with, other kinds of reasoning. Read in this way, Kennedy's point is similar to a point made by W.V. Quine in "Two Dogmas of Empiricism."^[17] Quine claims that science has no special method, but is continuous with other kinds of thinking, all caught up in the larger web of beliefs. Read in this way, though, Kennedy's claim performs none of the unmasking functions which Kennedy intends. To say that legal reasoning is continuous with policy analysis does not deny that it is an intensification of it, a more rigorous application of it, in the way Quine thought science improved upon common sense. Such a point may tell against the way legal theorists conceive of their venture but it makes no claim against legal practice, in the way that Quine's claim is a criticism of

philosophers of science without making critical claims against scientific practice. False self-conceptions can lead to failures of practice, but merely to establish the former does not establish the occurrence of the latter.

Kennedy thinks that the false self-conception does have deleterious effect: it depoliticizes students, that is, it delegitimizes their own (egalitarian) value judgments, so that they then take on the (hierarchical) values implicit in the institution of law school. Kennedy's claim that legal reasoning is really just a cover for subjective preferences, and as such is equivalent to policy analysis, is designed to legitimize students' carrying their liberal agendas in their legal careers. (Whether such a self-conception would lead to more liberal advocacy, as Kennedy hopes, is a claim for which Kennedy provides no arguments or evidence.) Given this claimed equivalence between policy analysis and legal reasoning, it seems more likely that Kennedy -- in line with his use of the word "nonsense" -- is claiming that the distinction between policy and analysis is a complete mystification. If it is, then students' prelegal judgments are just as valuable as those of a trained lawyer, and the barriers to entry of the legal profession are a complete sham. All of law school, on this conception, is merely training in lucrative mystification. Law school, it would seem, constitutes no intellectual advance whatsoever.

But Kennedy is unwilling to go so far. According to Kennedy, reasoning skills taught in law school do constitute a "real intellectual advance." Again, to repeat Kennedy:

One should neither exalt these skills nor denigrate them. By comparison with the first-year students' tendency to flip-flop between formalism and mere equitable intuition, they represent a real intellectual advance. Lawyers actually use them in practice. And when properly, consciously mastered, they have "critical" bite. They are a help in thinking about politics, public policy, and ethical discourse in general, because they show the indeterminacy and manipulability of ideas and institutions that are

central to liberalism. (pp. 595-6) The problem is to see how with his other views, Kennedy can admit that legal education constitutes "a real intellectual advance," especially since the third of his claims for legal reasoning seems to undermine the first. "[W]hen properly, consciously mastered," they "show the indeterminacy and manipulability of ideas and institutions that are central to liberalism." The word "show" is crucial here. One doesn't learn anything about liberalism or politics from legal reasoning -- that is, by reasoning about the concepts.[18] Instead, supposedly, one learns (about liberalism or) the law/politics distinction through what is shown by its deployment: its deployment creates a field of argument where equally good arguments for any outcome are possible. But if this is the case, then how can the purported gain in consistency be an "intellectual advance"? The only plausible interpretation is that the move from "flip-flopping" to "manipulability" is an advance because students can do deliberately what they had previously done naively. But this seems less an intellectual advance than a repudiation of the intellect.

Here is what I think is going on in legal education. Legal reasoning is a kind of sophistry. As a lawyer one constructs arguments in order to support and reach a specific conclusion. The conclusion is given to one first, the arguments come later. Also, there is a specific audience (jury or judge) whose word has power merely because of their office. (As a judge one is supposed to be doing something quite different. But the distinction between adjudication and advocacy is covered over in law school. This is not difficult because [1] both judges and advocates must consider arguments on both sides of the question, and [2] advocates must learn the concepts specific to adjudication in order to be more effective advocates.) Plausibility counts for everything, truth is distinctly secondary. One must be able to think up these arguments quickly, and this is what one is taught to do in the law school classroom. (This picture fits in with Kennedy's claim that the "manipulability" of legal arguments is their distinguishing feature.) This is of course more than just an analogy; the sophists were primarily

teachers of rhetoric who specialized in (among other things) preparing courtroom speeches. Thinking about the sophists and the controversy they generated is thus helpful in thinking about lawyers -- and vice versa.

(To say that I think that lawyers are sophists is not necessarily to denigrate them. It is merely to say that they are not truly intellectuals.[19] Practicing law is a practical occupation, more like being an auto mechanic, than like being an intellectual. Cars break down and people need them fixed; relations with others -- individuals, businesses, the government -- give rise to problems and people need help getting them resolved. [Or such relations need to be created, and people need help structuring them.] Practicing law is thus a service occupation in which one helps people try to solve their problems. One shouldn't degrade service occupations if one wishes to overcome work hierarchy.[20] Kennedy doesn't seem to give any consideration to one possible change in the status of legal education which seems to be a reasonable reaction to his views: the reduction of law school to vocational training, thereby reducing the status of the field.[21])

Kennedy thinks (inconsistently, I believe) that legal reasoning is an intellectual advance for law students. Law school does provide for some people an intellectual advance, partly for the reason that Kennedy says. In addition to learning techniques of abstraction and generalization, which he notes, for some it is the first time that they have had to read texts closely. For some it is the first time that they have had to construct an argument. And one does learn some new concepts and ways of thinking which lawyers have taken over from other fields -- although one learns them only as they are deployed within legal analysis.

3. The autonomy of the legal ("juridical") field -- a missing level of analysis

Underlying Kennedy's analysis in "Legal Education and Hierarchy" is a view of society which he made explicit in another paper: "Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute." [22] According to Kennedy, (American) society consists of various groups based on class, gender, race and sexual orientation competing for various goods. Institutions are simply the places where this competition based on social background takes place. All politics for Kennedy is a matter of group politics. This view fails, not so much in what it says, as in what it leaves out. Kennedy fails to take into account the structure of what Bourdieu calls a "field." In order to see the importance of this concept, I will first briefly summarize Bourdieu's views.

Bourdieu explains social action and attitudes as a function of the interaction between habitus and field. [23] Habitus consists of the structures of perception, appreciation and action, which, as ingrained dispositions, are what tend to come "naturally" -- i.e., unreflectively. Fields are structured institutions which are relatively autonomous. Religion, sports, business, academia, and the law are all fields in Bourdieu's sense of the term.

Bourdieu's key insight is that one's habitus is hierarchical. One's ingrained dispositions and attitudes will reflect one's place in the social hierarchy, and one will recognize other people's attitudes, possessions, and activities as falling somewhere in the general hierarchy. Each field has its own habitus and its own hierarchy, which reflects and interacts with the general hierarchy. Where Kennedy merely sees an arena where group politics takes place, Bourdieu takes account of the specific structure of the legal field, its place in general hierarchy and its interaction with other fields and the general hierarchy.

In this scheme of habitus and field, people act within an economy of prestige. They compete for symbolic power -- the general prestige which gives one the recognition of others. Bourdieu discusses how symbolic power gained in one field (symbolic capital) can be used in others. He also discusses how

one's position in the hierarchy inevitably affects the meaning of one's utterances. For example, when those with high social status take up activities of those with lower social status ("strategies of condescension"), it has a different meaning than the same actions done by those lower in the hierarchy. Bourdieu explores the problems this creates for political activists who see themselves in solidarity with dominated classes. Bourdieu also recognizes that those lower in the hierarchy have "strategies of reversal" -- strategies whereby they reverse the generally accepted value scheme. Bourdieu points out that such strategies are limited -- they don't achieve the desired effects in those not sharing the actor's habitus. In part, this limitation results from the ambiguity of a strategy in which one is, or can always be seen as, making a virtue of necessity.

Bourdieu uses his concept of habitus to explain the ambivalence people feel when upwardly mobile -- they must leave behind to some degree the tastes and attitudes which come naturally to them for others which they value but are also less comfortable with. (They spend money on what seem to them to be luxuries.) This also explains why people who are upwardly mobile do not fit in completely with those who were born into that niche. (Hence the importance of the difference between earned money and inherited money.) But their children will.[24]

There is much that Bourdieu would agree with in Kennedy's writing. Like Kennedy, Bourdieu's analysis sets out to unmask the pretensions of the juridical field, point out its mystifications and ideologies, its class bias, and the ways in which it rationalizes domination. Like Kennedy, Bourdieu has strong egalitarian motivations. But Bourdieu's analysis of the juridical field has two advantages over Kennedy's analysis.

First, rather than merely rejecting the law/politics distinction as an intellectual sham, Bourdieu takes the autonomy of the juridical field to be a social fact to be explained.[25] This is the field which

consists of those recognized by society as capable of interpreting the corpus of legal texts -- lawyers, judges, law professors. All of these people have an interest in maintaining the relative autonomy of the field; only by doing so do they maintain the prestige which they obtain from being a lawyer. They don't need to collude in order maintain the autonomy of the field.[26] The autonomy of the field arises from the competition of the different players in the field. (p. 817)

The second advantage of Bourdieu's analysis is precisely in pointing out that competition among the different players in the field is primarily a function of the positions the players hold within the field. Law professors and judges compete with each other "for monopoly of the right to determine law." (p. 817) Kennedy sees competition within the legal field as merely an instance of competition within general social hierarchy.

This last point translates into a problem in Kennedy's discussion of the relation between his own social position and his critique. Kennedy believes that he needs to consider his own position in social hierarchies in developing his critique. He discusses his race, sex, and class, and duly notes that he is a tenured professor of law at Harvard. But he considers only general social hierarchies; he never considers his place in the juridical field and thus his interests as a professor of law as they conflict with judges and practicing lawyers (or with other disciplines within the academy).[27] Bourdieu's analysis complicates matters by showing how conflicts within the legal field are not just a matter of the competing social background of the players, but more immediately are a function of one's position within the field.

Bourdieu believes that developments within the field can be explained by considering the competition among different players in the field.[28] Bourdieu suggests that differences between

Anglo-American common law traditions and German and French legal traditions might be explained by variations in the relative symbolic power of judges and law professors.

Analyzing conflict within the juridical field is quite complex, and I can only mention a couple of relevant factors. The views of judges and law professors differ consistently in accord with their differing positions in the juridical field -- what Bourdieu calls "the division of juridical labor." Judges and law professors differ primarily in their attitude toward precedent; professors generally denigrate precedent in favor of theory.[29] Law professors also denigrate procedures in favor of substantive justice.[30] On both counts, Kennedy's views work against a judicial vision of legal practice and side with the professorial view.[31]

Of course, Kennedy's position seems to have much more radical implications; it seems to undercut the professorial vision of the law as well by undercutting the claim to legitimacy of the entire juridical field. His criticism of the law/policy distinction as a complete sham, combined with his claim that values are arbitrary, seems to undermine entirely the justification of the autonomy of the juridical field as well as the justification for theoretical work in general. If legal questions differ in no way from policy questions, then there is no need for a professional Bar, and anyone should be allowed to practice law, be a judge -- or a law professor.[32] What is at stake is the composition of and need for the law school faculty. But Kennedy steps back from advocating the elimination of all barriers into the legal field. Presumably this is because he has found a new mission for law schools -- as counter-hegemonic enclave, training lawyers to carry out an egalitarian agenda. One might see in this just a different tool for faculty to bully students with. Kennedy's belief in the arbitrariness of values leaves him open to this charge.

Kennedy does push for more practice skills to be taught in law schools to allow graduates more options and to make them more effective advocates for egalitarian social causes. This suggests that

expert practitioners will need to be brought into law faculties. Teaching practical skills would require drastic changes in legal faculties, although it is not at all clear that Kennedy supports the changes that would be necessary. The standard career path to become a law professor includes law review and a judicial clerkship. It does not include legal practice. The change needed will only happen if practical skills become a more valued part of the legal curriculum -- which requires higher pay than is now given (and tenure) for those teaching practice skills and more course credit for students taking practice skills courses. Legal faculty oppose such changes because they don't like the idea of law school being reduced in social status to that associated with a vocational school.

Another possible implication of Kennedy's view that legal analysis has no special sphere outside of policy analysis would be that law schools should hire sociologists, philosophers, and historians both for their input on policy issues and to teach the now peripheral courses of philosophy of law, sociology of law, history of law.[33] (Movement in this direction will also require more credit being given for taking these courses.) Teaching law now requires no empirical work, no interdisciplinary work, no Ph.D., no publication in peer-reviewed journals.

But Kennedy's proposal only changes law school faculty by reducing hierarchical differences among those who are currently faculty, not by transforming law schools in the ways I've suggested. And no wonder, given Kennedy's avowed egalitarian aims. Changing the composition of the faculty as I've suggested would introduce two entirely new hierarchies into law schools -- the hierarchies of status in the practicing bar and the hierarchies of other academic disciplines. Reducing hierarchy within law schools in the ways Kennedy proposes is simply incompatible with the changes needed to achieve more egalitarian societal aims.

Kennedy's aim of turning out lawyers who will provide more legal services for those who currently don't have them also has ambiguous effects on social hierarchy. The juridical field creates a hierarchy with those inside having power over those outside. This increases the general social status of those within the juridical field. As Bourdieu points out, "Another [way of increasing demand for legal services] is the work of militant groups whose effect (which does not mean whose object) is to open new markets for legal services by supporting the rights of disfavored minorities or by encouraging minorities to press for their rights." (p. 835) I am not arguing against such activities; I am merely pointing out that they interfere with and possibly preclude Kennedy's professed goals concerning the elimination of hierarchy.

B. Models

The main criticism I have of Kennedy's idea that law schools reproduce hierarchy as models is based on the points that I have already made. The relations between law schools and other social institutions are not merely those of micro to macrocosm (although they are that); they are causal and interactive as well. This is why decreasing hierarchy in one area can accentuate it in others.

A second criticism is that Kennedy drastically overestimates the influence that law professors have on students. The great majority of law students do not envision becoming law professors, and thus don't model themselves on faculty. Students don't need to see that teachers are preoccupied with ratings -- the decision to apply to law school and the application process reflects their pre-existing concerns. Students pay no attention to the way faculty treat their secretaries. Most law students have no mentor -- Kennedy's comment here is applicable at most to the few students who want to be law professors.[34] This is, of course, not to suggest that I am unconcerned about these hierarchical relationships; it is merely to suggest that changes in these areas are hardly likely to change anything outside of law school.

Nor are faculty-student relations models for relations between senior and junior lawyers in a firm, or between lawyers and judges. Absolutely nothing about law school prepares one for appearing before a judge. It's true that one has to learn a certain sort of deference in law school -- but it is a quite different sort of deference that one needs in stepping before a judge. (Nor does anything in law school prepare one for dealing with a secretary.) In addition, one learns about the way one needs to defer to senior lawyers on the job; although these experiences come while one is a law student, they take place outside of law school in summer jobs with law firms. On all of these counts one's summer experience overwhelms any influence law school might have. Practice is very different from (and in many respects, much better than) law school.[35]

A final comment might be added here with regard to tyrannical behavior in the class room. In many law schools, such behavior is supported by attendance requirements, even through the third year. It's somewhat astonishing that an institution at the graduate level has rules reminiscent of high school, and also an indication that not all is well with the institution. Much can be accomplished by simply removing attendance requirements.[36]

III. PHILOSOPHICAL REFLECTIONS

I have already mentioned that what one learns in law school is sophistry. And the sophists are best known philosophically for their relativism. The connection here is not accidental, and my feeling is that moral relativism, if not general relativism, is pervasive among legal faculty. Kennedy is best known for his claims that legal reasoning can be used to justify any outcome -- and furthermore, he draws similar conclusions with regard to judgments in general. Hence his conclusion (which we've already seen) that properly mastering legal reasoning teaches one that the concepts of liberalism are indeterminate and manipulable. He claims in "Form and Substance in Private Law Adjudication" that the same antinomies

recur at the level of values (p. 1766) and that values are arbitrary.[37] And in "Radical Intellectuals," Kennedy asserts that in working on theories, people are grouped only "according to what they experience as irreducible in themselves." (p. 33) He goes on to say in another essay that judgments of merit are paradigmdependent.[38] Kennedy's relativism thus matches the relativism of the sophists.

One of the issues raised by relativism is whether it can be consistently held. And there are plenty of indications that Kennedy doesn't consistently hold it. He makes many value judgments which he claims are objective. In the self-published version of the hierarchy essay, he says both that lawyers have more power and deference than they objectively deserve [U p. 41], and that everyone has an objective interest in overcoming hierarchy. [U, p. 97] Furthermore, he says (tentatively) that the judge "is one of the few people of whom we can demand that he represent our collective commitment to the transcendence of pluralism in the name of truth." [39] It is never made clear how these claims are to be reconciled with the supposed arbitrariness of values.

Another discrepancy involves Kennedy's claims that he is not a relativist. In a footnote to an essay on affirmative action, Kennedy cites Rorty saying that "no one is a relativist" and states that "we can problematize the operation of making judgments of value, of applying standards, without abandoning it altogether." [40] In many essays Kennedy seeks to explore and ground his claims in an imaginative description of experience which he calls "phenomenology." In an essay called "Roll Over Beethoven," he says that he is not a relativist[41] (pp. 40-41), although he does forsake philosophy. (p. 6)

Now it is easy to note these contradictions. The question is, what are we to make of them? Would it be too much of a cheap shot to point out that they seem very much like the "flip-flopping" which Kennedy notes that law students exhibit before learning legal analysis? One could just say that they show that Kennedy's work is incoherent and should be ignored. But this would be a mistake; when

faced with such a contradiction, many would simply accept the relativism, and dump the claims to truth as mistaken or as "rhetoric." For example, one reviewer noted the contradiction between claiming, as Kennedy does, that lawyers do not objectively merit the rewards they receive and that there is no "'natural' value for anyone's labor." (U, p. 35)[42] The reviewer then asked rhetorically, "How can merit be objective?" (p. 964) And this is the constant direction in which Kennedy's texts push.

A more interesting question is: in whose interest is this sort of relativism/skepticism?[43] This is a very complicated question, as one can see from current debates over issues of relativism in feminist theory.[44] But it seems to me to be in the interests of the legal field in general and of law professors in particular.[45] It protects the legal field by suggesting that judges and law professors need not be especially knowledgeable about society or moral theory or philosophical debate. Such views are arbitrary, and thus those of judges, law professors, and lawyers are just as good as anyone else's. Skepticism/relativism always works in this way to protect the autonomy and institutional privileges of the field which it would seem to attack. Thus Kennedy need not think that other forms of inquiry (philosophy, history, sociology) can teach one more than legal reasoning about politics, ethics or the law, in spite of his rejection of the distinction between law and policy which underlies legal reasoning.

Here, as elsewhere, Kennedy's views are interesting when juxtaposed with Bourdieu's. Just as Kennedy thinks that one's values are a product of the group(s) of which one is a part, Bourdieu thinks that one's values are closely tied to one's position in the social field. Reflection (Bourdieu is partial to the word "science") doesn't free one from one's position because such reflection takes place from a position within a particular field -- academia -- which has a position within the social hierarchy, and within which actors have specific interests. Bourdieu thus also has trouble motivating his egalitarian impulses which guide much of his work. This distinction between science and value is highly

problematic. How does this problem arise for Bourdieu? Consider the following quote from Bourdieu's inaugural address to the College de France: "Doomed to death, that end which cannot be taken as an end, man is a being without a reason for being." ("Lecture on the Lecture," In Other Words, p. 196.) The echo of Heidegger's analysis of "being-towards-death" is unmistakable.[46]

Just as we find a certain reading of Being and Time underlying Bourdieu's thinking about ultimate value, we find Sartre at the heart of Kennedy's thinking on value. Kennedy's project has been to find contradictions at the heart of the human condition[47] and contradictions, gaps and ambiguities in legal texts and legal thinking (recall that this is what he thinks law students should learn from mastering legal analysis). He explicitly cites Sartre as a basic influence in "Freedom and Constraint in Adjudication: A Critical Phenomenology," (fn1: "The overall conception and philosophical premises derive loosely from" Being and Nothingness and Critique of Dialectical Reason)[48] and in "Roll Over Beethoven" ("nothingness is the worm at the heart of being"; p. 17) And in "Form and Substance in Private Law Adjudication," he says:

The only kind of imagery that conveys the process by which we act and act and act in one direction, but then reach the sticking point, is that of existentialist philosophy. We make commitments, and pursue them. The moment of abandonment is no more rational than that of beginning, and equally a moment of terror. (p.1775) An analysis of the subjectivism at the heart of Kennedy's work, and which Bourdieu risks as well, would have to start with an analysis of Kierkegaard and his influence on Being and Time, and through Heidegger, on Sartre.[49] One would also have to look at interests others have (or think they have) in such a position, such as lawyers and college students. But that is not the subject of this paper.

In spite of some convergence of Kennedy's and Bourdieu's work on this point, I find three general advantages in Bourdieu's thought over Kennedy's (in addition to the more specific advantages listed in section 2).

First, at the heart of Bourdieu's project is the drive for self-knowledge, a self-knowledge which one expects will help one in making other sorts of judgments.[50] To know one's self is to know one's position in social hierarchies and in particular fields. Bourdieu's concepts of habitus and field allows us to avoid methodological individualism, even as it maintains its drive for self-knowledge.

Second, Bourdieu's view of one's habitus as intrinsically hierarchical allows one to avoid a romantic view of the self, a view which Kennedy falls into. Kennedy's view of the self and hierarchy is one-sided: hierarchy limits and maims the self. This is certainly true enough, but it leaves out the ways in which hierarchies constitute and enable the self.

Third, Bourdieu's work could serve as a basis for study of comparative hierarchy -- a study of the differing characteristics of different kinds of hierarchies and their differing effects on individuals and groups. The ultimate aim of such a project would be to explore and help one differentiate between legitimate and illegitimate hierarchies. Bourdieu himself doesn't do this; he is much more interested in exploring invariant or relatively general features of hierarchies. But nothing in his analyses precludes such a study[51], whereas Kennedy specifically rejects the notion that philosophy has anything to say on the subject -- in spite of the centrality of the distinction between legitimate and illegitimate hierarchy to any project of overcoming hierarchy.

CONCLUSION

Kennedy claims to show that the current noble ideal of the law is a sham. In response he proposes a new noble ideal. But the inconsistency of the argument and the inadequacy of the analysis undercuts his critique, leads him to systematically overrate the role of law professor in the reproduction of hierarchy, and leads him to reinforce the position of law faculties by pushing their agenda (against the judicial vision) while insulating their field from encroachment by other academics.*

ENDNOTES

[1] Duncan Kennedy, "Legal Education and the Reproduction of Hierarchy: A Polemic Against the System."

Self-published. (Afar, Cambridge, 1983). A shorter version appeared as D. Kennedy, "Legal Education and the Reproduction of Hierarchy," 32 J. Legal Educ. 591-615 (Dec. 1982). An even shorter version appeared as a chapter titled "Legal Education as Training in Hierarchy" in David Kairys, ed., *The Politics of Law – A Progressive Critique*, rev. ed. (Pantheon Books, New York, 1990), 38-58.

[2] I have tried to limit my references to the version published in the *Journal of Legal Education* because this version is likely to be more readily available to the reader. All parenthetical page references in the text are to that version unless otherwise noted. On occasion I have referred to the original which is referred to as "U" for unabridged.

[3] Catharine Hantzis, "Kingsfield and Kennedy: Reappraising the Male Models of Law School Teaching," 38 *Journal of Legal Education* 155-164, 155. Hantzis' disagreement with Kennedy is limited to solutions; she agrees with Kennedy's "description of the problem". *Id.*, p. 160.

[4] Kennedy's influence also extends beyond articles where it is explicitly cited. In at least one article where it was not cited, it was clearly very influential. Toni Pickard, "Experience as Teacher: Discovering the Politics of Law Teaching," 33 *U. of Toronto L.J.* 279 (1983).

[5] Kennedy notes that students have conflicting motives as well. Students also want to develop a "tough, hard-working, smart style" as well as to improve their social status. (p. 592)

[6] I found the game of "hide the ball" to be more oppressive than the use of "hot" and "cold" cases. This is the phrase used to refer to the student's ignorance of the intentions behind the questioning in class. I think that this results primarily from the lack of context given in the casebook for the cases. Cases are included in casebooks for many reasons -- historical value, the discussion of a leading concept, the use of a particular kind of reasoning, inclusion of an influential dissent, and various others. Casebooks don't say why the case is included.

[7] Kennedy also criticizes the manner of teaching which gets across the law/policy distinction as authoritarian, relying on arguments that "are circular, question-begging, incoherent, or so vague as to be meaningless." (p. 596) "Sometimes they are exercises in formal logic that wouldn't stand up for a minute between equals (e.g., expectations damages represent the will of the parties)." (p. 597)

[8] This claim might be in tension with Kennedy's later claim that law school "trains them in detail to look and think and act just like all of the other lawyers in the system." (p. 607)

[9] Kennedy claims both that "[s]tudents generally experience these grades as almost totally arbitrary" (p. 600) and that "[g]rading as practiced teaches the inevitability and also the justice of hierarchy . . ." (p. 600) The compatibility of these claims seems highly implausible.

[10] Kennedy actually has one more critique of legal pedagogy: "Law school, as an extension of the educational system as whole, teaches students that they are weak, lazy, incompetent and insecure." (p. 602) What about the "tough, hard-working, smart style" that law school, according to Kennedy, is supposed to cultivate? (p. 592)

[11] "Students learn that it is acceptable, even if it's not always and everywhere the norm, for faculty to treat their secretaries petulantly, condescendingly, with a perfectionism that is a matter of the bosses' face rather than of the demands of the job itself, as though they were personal body servants, utterly impersonally, or as objects of sexual harassment." (p. 603)

[12] Kennedy also says that professors explicitly tell students that public interest work "is hopelessly dull and unchallenging and the possibilities of reaching a standard of living appropriate to a lawyer are slim or nonexistent." (p. 601)

[13] I simply don't understand the juxtaposition of an affirmative action proposal with a proposal to "reduce disparities in teaching and scholarly capacity" of faculty members. Absent further clarification, this appears to be both insulting and contradictory.

[14] Hence the cliché about law school: "In the first year they scare you to death, in the second they work you to death, in the third they bore you to death."

[15] Kennedy's proposal to level law schools by admitting students randomly would circumvent this particular way of reinforcing legal hierarchy. But my general point holds: hierarchies reinforce each other through interaction, not merely through modeling.

[16] This policy would allow students to "pass" when called on without penalty.

[17] Quine, "Two Dogmas of Empiricism" in *From a Logical Point of View* 2d ed. (Harvard University Press, Cambridge, 1980), pp. 20-46.

[18] If this were Kennedy's claim, then he would have to face the problem that his conclusion undermined his argument. If the distinction between law and policy is nonsense, then legal reasoning couldn't really help us to think about politics, or ethics, or liberalism, because the "politics" or "liberalism" or "ethics" which appears within legal analysis won't be the politics or ethics or liberalism that one set out to think about. They will be the politics, liberalism, or ethics which can be discussed by the artificially delimited concepts and analytical tools on the law side of the law/politics distinction.

[19] Obviously, I am using the word "intellectual" in a sense different from the one given it by sociologists. On my view, not everyone who earns a living through the use of symbols is an intellectual.

[20] Kennedy seems to do this where he says that serving one's clients is insufficient as a career aspiration. (p. 34)

[21] Merely because I find the distinction between sophistry and philosophy to be useful doesn't mean that I think it is a simple one. Nor do I think that the distinction between sophistry and philosophy is always immediately apparent. Sophists do use the truth -- when it is in their interests. And it is very easy to slip back into rationalizing when one is trying to think.

[22] *Sexy Dressing, etc.* (Harvard University Press, Cambridge, 1993), pp. 1-33.

[23] See generally, Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, 1977), *The Logic of Practice* (Stanford University Press, 1990), *Distinction* (Harvard University Press, 1984), *Language and Symbolic Power* (Harvard University Press, 1991), and *In Other Words* (Stanford University Press, 1990).

[24] Kennedy might respond to Bourdieu by arguing that Bourdieu's analysis is suited to European societies but not to American, because different classes within a European nation share a common culture in the way Americans do not. This is a point he has made with respect to other theories. Duncan Kennedy, "Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute," in *Sexy Dressing, etc.* (Harvard University Press, 1993) pp. 1-33. Whatever the validity of this criticism, it fails to address the problems which arise in Kennedy's analysis from the missing level of analysis.

[25] Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," 38 *Hastings Law Journal* 814-853 (July 1987). All parenthetical page references which are otherwise unidentified are to this text.

[26] The habitus of the field does provide all of the members with similar dispositions. (p. 833)

[27] To the extent that students recognize themselves as practitioners or judges, their interests will differ from their teachers -- including those of Kennedy. Below I will show that, despite appearances Kennedy's agenda suits the professorial interest.

[28]"The relative power of the different kinds of juridical capital within the traditions is related to the general position of the juridical field within the broader field of power." (p. 823)

[29] The attitude toward precedent is a fascinating aspect of the juridical field and deserves extensive analysis.

[30] The distinction between substance and procedure deserves serious historical and theoretical analysis given its entrenchment in modern law, modern society and contemporary ethical thinking. Generally, I sympathize with Kennedy on this point, but wonder if courts where procedures are minimized in favor of equity are really more equitable. One could look at bankruptcy courts, just to take one example.

[31] There are other aspects of Kennedy's views which accord with the judicial vision, such as his appeal for ad hoc paternalism in "Distributive and Paternalist Motives . . ."

[32] Another possibility would be simply to eliminate a year (or 2) from law school.

[33] Kennedy does call for an interdisciplinary course in his "utopian" proposal (p. 614), but he shows no enthusiasm for, or even interest in, this proposal in the remainder of his polemic. (I italicize the "of"s above to distinguish such courses from the "Law and _____" courses which law professors are likely to advocate. Sociologists teach "Sociology of Law" while law professors teach "Law and Society." The latter title suggests that "Law" is a field of equal intellectual stature to sociology, rather than merely an area of study for the various academic disciplines. Between "of" and "and" a whole field of conflict emerges.)

[34] This point, although perhaps small, shows again how Kennedy fails to take into account how differentiation of roles within the juridical field affects legal training.

[35] My feeling is that students embrace the hierarchies of the corporate world not because they are trained to do so, as Kennedy claims, but because they are so relieved to be out of an institution as irrational as law school. Compared to law school, the service aspects of practice with its relatively straightforward means/ends relationships, seem wonderful in comparison. To the extent that (but only to the extent that) Kennedy's proposals make law schools more rational, they will help to deal with this problem. To the extent that Kennedy's proposals lessen its rationality, they will exacerbate it.

[36]In a thriving legal labor market. Now that the legal labor market is in bad shape, competition is much fiercer in law school and the existence or non-existence of such rules is less likely to make any difference.

[37] Kennedy, "Form and Substance in Private Law Adjudication," p. 1777. It might be thought that the arbitrariness of values is asserted by the individualist conception of the law -- since that is where Kennedy, rightly or wrongly, places it in his famous and later recanted "fundamental contradiction"

between individualism and altruism. But Kennedy asserts the arbitrariness of values in his own voice in his discussion of the cultural position of the judge.

[38] "A Cultural Pluralist Case for Affirmative Action in Legal Academia," *Sexy Dressing, etc.*, p. 59. This doesn't necessarily imply relativism, but it does if those paradigms are incommensurable -- as they seem to be in Kennedy's view.

[39] Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law with Special Reference to Compulsory Terms and Unequal Bargaining Power," *Maryland Law Review* 1982 Vol. 41No.4 pp. 563-658.

[40] Kennedy, *Sexy Dressing, etc.*, p. 229 n. 75.

[41] Gabel and Kennedy, "Roll Over Beethoven," 36 *Stanford Law Review* 1 (1984)

[42] Anonymous review, *Michigan Law Review*, Vol. 82, Feb '84, pp. 961-5, 964 fn 13. I don't think that these are necessarily contradictory, but the reviewer could just as well have picked any number of other examples to make the same point.

[43] I blur the distinction here because Kennedy's texts aren't clear on this point, although they lean toward relativism.

[44] Some feminist theorists think that it is in women's interest to do away with the concept of truth, whereas others think that women's interests require such a concept.

[45] After writing this, I discovered that Adorno also notes the reactionary tendency of relativism, also with reference to the sophists: "Relativism, no matter how progressive its bearing, has at all times been linked with moments of reaction, beginning with the sophists' availability to the more powerful interests." *Negative Dialectics* (trans. E.B. Ashton), Continuum Publishing Co., New York, 1973. p. 37. Adorno bluntly indicates the reactionary function of relativism: "Relativism is a popularized materialism; thought gets in the way of money-making."

[46] Martin Heidegger, *Being and Time*, translated by MacQuarrie and Robinson (Harper & Row, 1962). See Division II, chap. 1, pp. 279-311.

[47] Kennedy, "The Structure of Blackstone's Commentaries," 28 *Buffalo Law Review* 1979 205-382.

[48] Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology," 36 *J. Legal Education* 518

[49] Two aspect of Kierkegaard's project can be mentioned with profit here. The first is Kierkegaard's anti-intellectualism. Kierkegaard objected to the "intellectualist" aspect of Hegel's view of religion *Legal Education and Hierarchy:: A Reply to Duncan Kennedy ~ Ralph Sha* (philosophers understood it better than the ordinary person) and ethics (doing the right thing required than one know about the world so

one would know what world-history required of one.) Second, problems relating to politics haunt Kierkegaard's work, and through Kierkegaard, Heidegger and Sartre. Kierkegaard's nostalgia for authoritarianism can be found in *Two Ages* (trans. Hong and Hong), Princeton University Press, Princeton, 1978. Such problems must be faced by someone with Kennedy's theoretical commitments.

[50] Bourdieu started out as an anthropologist. He thought that anthropologists were making unjustified judgments about other cultures. He did not think that such judgments were in principle impossible, merely that anthropologists did not know enough about their own culture -- and themselves as members of it -- in order to make such judgments.

[51] Bourdieu is hostile to one sort of comparative analysis of hierarchies -- attempted comparisons hierarchy in pre-capitalist societies against hierarchy in capitalist societies. *The Logic of Practice*, pp. 301-2, note 9. I'm not sure that his points there can be generalized.

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