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Kingsfield and Kennedy: Reappraising the Male Models of Law School Teaching

Catharine W. Hantzis

Many of us have struggled with the difficult and complex question of how best to teach our students. On one level, we ask: What are the best ways to convey information and skills to our students? How can we do it effectively in classes of fifty, eighty, one hundred, or more? On another level, we ask: What do our students need to know in order to become good lawyers? On yet a deeper level, the issue is political. Do we as women teachers make law school productive and rewarding for our women students? Do we promote nonsexist values that make it harder for the lawyers we train to dismiss the achievements of their female colleagues? Do we lead students to thoughtful questions about the larger society or are we simply one cog in a wheel that transforms a group of idealistic young people into fodder for large firms?

There is nothing inherently gendered about aspiring to good teaching. The same problems trouble many of our male colleagues. Nevertheless, the prevailing styles of classroom teaching and the sexism of many law students create special problems for us as women teachers. Sexism in the classroom is real, and it poses a genuine obstacle to the realization of educational goals. Sexism will not disappear from the classroom as long as it is pervasive in the surrounding society. It will create dilemmas for women teachers as long as our institutions remain only weakly committed to confronting it. Despite the unfairness of a gender handicap, our commitment as teachers requires that we creatively seek ways to prevent sexism from interfering with effective communication and effective teaching. This article seeks to further the analysis of gender in the law classroom by directly confronting and reappraising two paradigms of legal instruction that have had an influential role in constructing the classroom experience. The first is the popular image of Professor Kingsfield as the ultimate first-year law teacher.¹ The second is Duncan Kennedy's image of the law teacher as social revolutionary.² It is my hope that the reappraisal of both images will lead to further debate about classroom issues and that it will facilitate a distinctively feminist approach to these issues.

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1. John J. Osborne, *The Paper Chase* (Boston, 1971).
2. This image stems from Kennedy's critique of legal education in *Legal Education and the Reproduction of Hierarchy*, *infra* note 3.

I. Kingsfield

Law students learn about law school teaching long before they enter their first law school class. Books, movies, and even television shows have shaped their expectations of what should occur in their classes. Typically such sources portray the professor as a rather distinguished-looking older gentleman who stands at the center of a large amphitheater armed only with his trusted casebook. He begins the class by calling on a student to recite the facts of the day's case. If the student can manage an adequate response, the professor proceeds with a series of questions about the reasoning of the case that inevitably leads the student towards a question to which there is no possible answer. At this point, the professor tries another student (usually one who has volunteered), who resolves the problem by rejecting one or more of the first student's assumptions. As the semester progresses, the competition intensifies as aggressive students actively seek the ultimate prize—the public esteem (or, for some, the lack of public disdain) of the eminent professor himself.

Notably lacking from these fictional accounts of the law school classroom are women professors or even women law students. While female students sit passively in the classroom in substantial numbers, their contribution to the plot mostly consists of hesitant, frightened answers when (infrequently) they are called upon, and supportive statements to their fellow male students who have been humiliated publicly by the “brilliant” professor.

The Kingsfield image is, one hopes, frightfully out of date. It is not just that the picture is exclusively male but that his classroom is awash with silent tension. Kingsfield is both boorish and pompous. He repeatedly affirms values of the highest intellectual excellence, yet he accepts from his students as correct the most question-begging doctrinal responses. Surely legal education has better teachers than Kingsfield—teachers who favor humor over tension, policy over doctrine, and encouragement and instruction over competition and ridicule.

Although Kingsfield is most certainly not the norm of law school teaching, he is, even in his absence, a dominant figure in student expectations. For many students, his central place in the popular conception of legal education legitimates his classroom style and renders marginal and suspect efforts by others to adopt different instructional techniques. The problem this poses for many thoughtful law school teachers is especially acute for women because the Kingsfield image is so exclusively male. If a man who resembles Kingsfield leaves a student confused and suffering from low self-esteem, *that* is to be expected. If, on the other hand, a woman teacher fails to make confusing material crystal clear, the student's confusion is the result of *her* bad teaching. The Kingsfield image excuses and legitimates failures of communication and instruction for any law school teacher who has enough in common with Kingsfield to be perceived as Kingsfield. It places a heavy burden on the non-Kingsfields among us to insure that our teaching is effective, since our failures may be seen *as failures* precisely because we have deviated from the perceived norm.

It is true that many of our students are grateful for the deviation. They are happy not to be bored or scared; they like experimenting with new ideas in an atmosphere in which the price of failure is not too high. Yet some part of them will feel that this is not the *real* law school experience, that they are not receiving sufficiently rigorous instruction, and that their desire to compete for the professor's esteem cannot be sufficiently rewarded by a teacher who has not enhanced the value of praise by humiliating other students. With these grumblings and dissatisfactions on the periphery of our classrooms, it is often difficult to focus on the instructional task as we ourselves have defined it.

Although many of us would be happy if Kingsfield had never been invented, we should not skip too quickly over the educational advantages his form of instruction offers. It is probably the fear of Kingsfield—real or imagined—that makes first-year law students among the most highly motivated students in the university. The kinds of effort that command respect from Kingsfield are clear. Students know that cases must be read carefully, that the “gist” of the legal rule is never sufficient, and that all the details must be mastered. The court's decision can never be taken at face value; it must be compared with other cases in the book and even with cases the student must invent. To the extent that good lawyering involves such skills, teachers who reject the Kingsfield approach must find an acceptable alternative.

I make this point because there is a tendency for beginning women teachers to be a sort of “Kingsfield in a Different Voice.” In the process we may replicate all the bad parts of Kingsfield—the unvaried case method, the rigid classroom style—and lose all the things Kingsfield does right. Thus we may not tell students they are wrong. We may be reluctant and uncertain in revealing our own point of view. We may try to run the class democratically by putting important matters up to a vote. We may fail to give a clear message to students about what is expected and to encourage them to extra effort. This halfway approach is certainly not an improvement on the original. Nor is it sound educational technique.

II. Kennedy

The Kennedy paradigm of law school teaching does not arise out of popular culture, but instead finds its home specifically within the legal educational community. Kennedy's views on the law school classroom and its effect on students are described in several versions of his essay “Legal Education and the Reproduction of Hierarchy.”³ In addition, some version of this paradigm has been taught in his first-year classes at Harvard Law School since the early seventies. Because many of the younger generation of law school teachers encountered Kennedy or someone similar in their first year, the critique of legal education Kennedy espouses has become, even for those of us who do not agree with it, part of the shared vocabulary and symbolism with which we think and talk about our roles as law school teachers. Thus, Kennedy's paradigm is part of the raw material from which we construct our vision of the possibilities and limitations of our professional role.

3. I am relying on the text in 32 J. Legal Educ. 591 (1982).

Kennedy's critique has three main points. First, the law school classroom is marked by a disparity of power (a "hierarchy") between teacher and students. The law professor uses ineffective and even needlessly mystifying educational techniques that, when combined with the professor's gratuitous aggression and didactic assaultiveness, produce an oppressive atmosphere. Second, the oppression and mystification in the classroom are not random, but are aimed at influencing or coercing students to accept their place in the real-world hierarchy and at teaching proper hierarchical behavior. Finally, piecemeal reform of legal education will never do. The only appropriate response is to organize against hierarchy in the law school community and to form a left-wing bourgeois intellectual community that might ally itself with a mass movement aimed at liberating all people from oppression.

There is a great deal of common sense at the heart of Kennedy's vision. Kingsfield is not a good teacher nor is there much in his teaching style that encourages students to develop independent minds or make sensitive ethical choices. There is, however, much in Kennedy's critique of legal education that is not just false but disempowering (indeed silencing and coercive) to law students and faculty alike.

A. Kennedy's Descriptive Claims

Much of what Kennedy describes in his "typical" law school classroom does not resonate with my experiences either as a student or as a teacher. I do not teach cold cases (boring legalistic cases) and hot cases (cases in which "overriding" legal reasons lead to a grossly unfair result) in the way he describes.⁴ I believe that courts should always strive to do justice between the parties. I do not teach what Kennedy terms the "intellectual core of the ideology"⁵—that there is a split between law and policy. Indeed, it is necessary to remind students frequently that law and policy are not distinct and that traditional examples of "legal" arguments are really appeals to policy. Students, Kennedy charges, are bullied into accepting bad arguments:

Teachers convince students that legal reasoning exists, and is different from policy analysis, by bullying them into accepting as valid in particular cases arguments about legal correctness that are circular, question begging, incoherent, or so vague as to be meaningless. Sometimes these are just arguments from authority, with the validity of the authoritative premise put outside discussion by professorial fiat. Sometimes they are policy arguments (e.g. security of transactions, business certainty) that are treated in a particular situation as though they were rules that everyone accepts but that will be ignored in the next case when they would suggest that the decision was wrong. Sometimes they are exercises in formal logic that wouldn't stand up for a minute between equals.⁶

I am certain that I have occasionally fallen into errors of this kind. I regard such practices as intellectually lazy and poor teaching and strive in my class preparation to eliminate them. Although I am willing to acknowl-

4. *Id.* at 594.

5. *Id.* at 596.

6. *Id.* at 596-7.

edge that these things do happen in my classroom, I regard them not as the central and legitimate practice but rather as mistakes in urgent need of improvement.

I do not want to overstate the importance of the factual discrepancies between Kennedy's experience and my own. Theories of oppression and social change do not necessarily have to be based upon descriptive claims that are accurate for everyone or even statistically accurate for the oppressed group. All social theories, to some degree, center attention upon certain kinds of experience and marginalize the remainder. This does not mean that such theories are immune from questions concerning their factual bases. If the elimination of oppression is the aim, certainly some deference must be paid to the experience of oppressed persons. A theory of racism based entirely upon the experience of white people would be woefully incomplete. Similarly, a description of classroom oppression that fails to take seriously the experience of students within the classroom will not provide a meaningful foundation either for educational reform or for radical change. Perhaps for this reason, Kennedy attempts to describe legal education from the perspective of two "left" students.

The first such student is a liberal idealist who came to law school believing that social justice can be obtained by "guaranteeing people their rights and bringing about the triumph of human rights over mere property rights."⁷ This student is entirely confused and defused by the law school experience. Once (s)he believed that the assertion of rights could remedy oppression. Now (s)he sadly realizes that the enforcement of rights will not transform society. It is not just that "rights" talk is ineffective, it is that rights are an inherent part of the legal reality that oppresses. Rights discourse contributes to the problem by legitimating irrational choices and by silencing certain demands for social reform. As Kennedy puts it: "Because [rights discourse] is logically incoherent and manipulable; traditionally individualist, and willfully blind to the realities of substantive inequality, rights discourse is a trap."⁸ Thus, the liberal idealist confronts a depressing choice: either flounder in the rights discourse trap or give up his or her social agenda.

A second kind of student does not fare much better, even though equipped with Marxist ideology. This student adopts either "a conspiracy theory, in which judges deliberately subordinate 'justice' (usually just a left liberal-rights theory) to the short run financial interests of the ruling class, or a much more subtle thesis about the 'logic' or 'needs' or 'structural perquisites' of a particular 'stage of monopoly capitalism.'"⁹ The difficulties the Marxist student faces in reinterpreting the law to fit this particular model are two-fold. First, there is too much law, too much doctrine (or—as Kennedy puts it—"too much drek") to be subsumed into the general theory. Second, such theories treat legal rules and doctrine as "window dressing" produced by the power alignments in a capitalist system, rather than acknowledging that the legal order is itself an integral part of the

7. *Id.* at 598.

8. *Id.*

9. *Id.* at 599.

“equation of power” in a capitalist system.¹⁰ The Marxist student is stopped dead in the tracks of social revolution by the need to debunk and destroy the formal rules of capitalism. Since this is a task that can never be completed, the student becomes but one more paralyzed victim of the law school and the legal ideology it deploys.

The problem with these students, Kennedy argues, is that they possess “no base for the mastery of ambivalence”; their theories “provide no more than an emotional stance against the system.”¹¹ Indeed it takes an “extraordinary student” to achieve the “theoretically critical attitude” necessary to avoid being paralyzed by the law school experience.¹² Common sense might suggest that it would be qualities such as maturity and a healthy sense of proportion that would save this student from the snare of legal ideology. Students who have some experience of the outside world and understand that formal law is but one element of social change should not be ideologically hogtied by the law school experience. But Kennedy’s “extraordinary student” is not such a person. The “extraordinary” student must “know enough to figure out where the teacher is fudging, misrepresenting or otherwise distorting legal thinking and legal reality.”¹³ Such a student achieves what other more ordinary students do not— intellectual mastery of the entire legal system. By contrast, ordinary students possess only an emotional reaction against the system; they lack an objective intellectual position from which to speak their critique.

From a feminist perspective, Kennedy’s vision contains some important kernels of truth. His description of the problem rings true. Idealistic students do experience much of what Kennedy describes. What is wrong is his purported solution. Liberation is not achieved by knowing everything or by obtaining an objective and exhaustive intellectual stance. Defending one’s idealism means having the courage of one’s convictions—listening to the intellect but understanding that questions of right and wrong are often questions of feeling and experience. The “extraordinary” student is elitist and male.¹⁴ He represents the false hope that we can understand oppression from the point of view of a neutral observer and, in so doing, think our way out of it at last.

B. Kennedy’s Normative Vision

One way to see what is wrong with Kennedy’s vision is to look at who it marginalizes and who it centralizes, who speaks and who is silenced. Looking through Kennedy’s glasses, we can see clearly only one kind of teacher: Kingsfield. We recognize him not only from his pomposity and brutality but also from his slavish devotion to doctrine and his rigid reluctance to engage in discussions of method or theory. The non-

10. *Id.*

11. *Id.* at 599.

12. *Id.* at 598.

13. *Id.*

14. Literally. When Kennedy speaks of the liberal idealist and Marxist students, the pronouns are female. With the “exceptional” student, however, the pronouns are male. See, e.g., *id.* at 598.

Kingsfields are totally marginalized. The “softies,” with their “mushy” niceness and willingness to discuss policy, are dismissed as unpopular and ineffective teachers.¹⁵ Minority professors and female professors are similarly marginalized: “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.”¹⁶ Thus, despite the presence of minorities, women, and “softies,” Kingsfield is still the only member of the law school faculty who counts. It is no wonder that he dominates not only the classroom but also the students growing understanding of the professional world they are about to encounter.

The theory is not only marginalizing to nonwhite male faculty, it is also disempowering to students. At the CLS conference on racism, several minority scholars criticized the CLS critique of rights for failing to describe their experience.¹⁷ To call rights talk empty rhetoric and to blame it for legitimating an oppressive ideology is to belittle the experience of people for whom rights have played an important role both in the transformation of their own consciousness and in their assertion of claims upon the system. I agree with this criticism and I also suggest that the critique of rights does not adequately describe my experience. In addition, it seems to me that students could make a similar point about Kennedy’s vision of the classroom. In his vision, students have no right to good teaching, not just because they have no rights under the critique of rights but also because there is no such thing as good teaching because of the classroom hierarchy. Clearly, there is no surer way to disempower people than to tell them that nothing can improve their present situation short of total reorganization of the social structure.

Finally, Kennedy’s essay is what I shall call “studentist.” If professors oppress students in ways that are analogous to gender or racial oppression, then it should not surprise us that a professor writing about students should engage in a certain amount of negative stereotyping. The essay is replete with references to what “most students” believe, think, or feel. There are apparently no individual students in Kennedy’s classroom. Kennedy can know what “most students” are feeling because he presumes that they are dominated by the oppression in the classroom. In fact, my own experience with students suggests an incredible diversity in how they experience law school. True, some students find it oppressive, but a significant number do not. Respect for students means that we should not so easily dismiss their actual thoughts and feelings as false consciousness.

15. *Id.* at 593.

16. *Id.* at 605.

17. Some of the papers from the January 7, 1987, conference are reprinted in 22 *Harv. C.R.-C.L. L. Rev.* 297–447 (1987): Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*; Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*; Patricia J. Williams, *Alchemical Notes: Reconstructed Ideals from Deconstructed Rights*; Harlon L. Dalton, *The Clouded Prism*.

III. A Female Model of a Law School Teacher

It should be obvious that I believe that women are well advised to discard both Kingsfield and Kennedy as classroom role models. Beyond Kingsfield's intellectual rigidity and Kennedy's jeering cynicism lies a largely uncharted territory for feminist teachers, the outlines of which I would like to sketch. While it is true that too few of us have had the experience of being taught by women law teachers, most of us have had ample opportunities to observe both excellent women lawyers and excellent women teachers. My suggestion is that we draw a new and female picture of the law school teacher from these two images. The result is a teacher who is both practical and student centered. Her classes are aimed at teaching students and not at placing her own brilliance on display. She wants students to learn the material and to become mature, responsible, and reasonably happy human beings. While many of the details of her presence remain unclear, I think I see her well enough to know what she might suggest by way of practical advice.¹⁸

A. Spend Time with Your Students

Like Kennedy, many of us engage in "studentist" stereotyping. Discussions of teaching are frequently punctuated with such phrases as "students aren't interested in . . ." or "students want to be spoon fed." Such talk distances us from our students and distorts communication. Do not assume that you know what your students think or want. If you ask them, you may be surprised by the range of attitudes. Spending time with students does not mean that you must become best friends or an *ex officio* member of the student-hangout gang. Arriving in class a few minutes early and talking about the day's material is one way to find out where to pitch the class discussion. Having lunch with a colleague or friend in the student lunchroom also makes it possible to talk to students informally. Such conversations help you to replace names and faces with personalities and backgrounds, thus making communication more effective. By revealing how much students have understood and what they find difficult or confusing, informed conversations can also help you assess the class more accurately.

B. Show Your Students That You Care

If you ask students what they dislike about law school, many will say that it is the impersonal atmosphere generated by large classes and the traditional manner of instruction. Extra class-preparation hours spent mastering cases and law review articles may not be as helpful to students as a few extra hours spent on more direct methods of instruction. It is possible

18. The following suggestions are not original with me. They have arisen from many conversations with colleagues. Some of the suggestions come from a teaching workshop held on September 12, 1987, in San Francisco by West Coast Femcrits that featured presentations by Herma Hill Kay and Barbara Babcock. Others come from many sources, but I would particularly like to acknowledge Taunya Banks, Pat Cain, Tom Griffith, Jean Love, Chris Littleton, Frances Raday, Peggy Radin, and Judi Resnik.

to divide a large class into small sections of twenty for some of its meetings.¹⁹ Written handouts are also useful. It takes very little time to convert a section of your class notes into a simple handout that will make the class discussion clearer to students in addition to giving them a format for recording the results. Written exercises and practice exams can demonstrate to students that you care and help you assess how the class is doing and where you need to focus your attention.

C. Find a New Experience for Your Students

Many legal issues require not only mastering the legal materials but also coming to an understanding of other people's viewpoints. Since many law students are somewhat inured to political rhetoric, no amount of mere talking will convey this understanding. Nothing moves students more effectively than a new experience or experiencing a familiar thing from a new perspective. For example, Taunya Banks requires her students in disability law to spend several hours at the law school trying to take care of business in a wheelchair. In my Women and the Law class, students play a game called "Starpower"²⁰ that teaches a powerful lesson about discrimination and oppression. It is worth considering for every class whether there are any experiences that would help your students understand not just the legal theory but the way in which that theory affects people's lives. Field trips for a large class may be hard to arrange, but the educational benefits are likely to outweigh the practical difficulties.

Conclusion

I am well aware of (and not entirely comfortable with) the reformist spirit that pervades this essay. There is real oppression in the world and, on balance, the American legal system works to further that oppression. All of us who participate in the world in a reformist way must continually ask ourselves whether we are making conditions less oppressive for some people at the expense of perpetuating and legitimating institutions that are truly the source of the problem. I am not always sanguine about the answer to this question, but neither am I able to come up with an acceptable alternative.

Kennedy's own suggested alternatives are hardly radical in nature. He suggests that we organize around issues of hierarchy in the workplace and that we build a "left bourgeois intelligentsia that might one day join with a mass movement for the radical transformation of American society."²¹ What separates these proposals from reformist ones in Kennedy's opinion is that they are to be executed in a "rebellious" and "risk-taking" mode. In

19. One year, I did this once a week in my corporations class. The quality of the resulting discussions about corporate responsibility and the ethics of corporate life more than repaid the extra effort.

20. The game is distributed by Simile, P.O. Box 910, Del Mar, California 92014.

21. Kennedy, *supra* note 2, at 610.

general, I am skeptical about the modes of action he suggests and doubt that they effectively distinguish his proposals from reformism. With respect to teaching, I cannot agree with his analysis. I teach because I believe that human beings can learn things that will help them flourish and grow. I want my students to become strong enough to make their own way in an increasingly confusing world. It follows, for me, that there is good teaching and bad teaching despite the classroom hierarchy, and that a good teacher will stress the possibilities of social growth and change rather than the relentless character of oppression.