

“I’d Like to Thank the Academy”: Eminem, Duncan Kennedy, and the Limits of Critique

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May I have your attention please?
May I have your attention please?
Will the real Slim Shady please stand up?
I repeat, will the real Slim Shady please stand up?
We’re gonna have a problem here . . .

Marshall Mathers (Eminem), *The Real Slim Shady*¹

I am not usually a rap fan, but when I first viewed the video for *The Real Slim Shady* late at night during my second year of law school, I was immediately intrigued. The rapper Eminem—g-name: Marshall Mathers—appears before a chorus line of runty young white men with blonde gladiator haircuts decked out in superhero costumes. As his doppelgangers dance behind him, Eminem derides his rap industry imitators and gives the finger (literally and figuratively) to cultural critics who dismiss his music as inauthentic and focused on the bottom line. In the end, Eminem asserts his authenticity and embraces his own duality: he is a businessman *and* an artist. In so doing, he takes his position before his doppelgangers as the *real* Slim Shady.

When I settled in to write this review of the 2004 reissue of Duncan Kennedy’s *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*,² I again thought of Eminem and his chorus line of Eminem clones. In the music video playing in my mind, Duncan Kennedy replaced Marshall Mathers as the complicated, brilliant auteur. Behind him was a phalanx of denim-jacketed white middle-aged men with beards and dark glasses. As befits a professor who is known for being irreverently hip, my Kennedy clones were remarkably rhythmic.

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1. MTV Networks.
2. (A Critical Edition) (New York, 2004). Page references to the reissue will appear in parentheses in the text.

At first blush comparisons between a perpetually disgruntled rap musician and a legal scholar of Kennedy's stature seem misguided. But the comparison is not inapt. Like Eminem in the rap industry, Kennedy as a charter member of the Conference on Critical Legal Studies has been giving the finger to the liberal legal establishment for years. Just as Eminem has received a measure of acceptance from mainstream audiences, as evidenced by his collection of Grammys and (inexplicably) an Academy Award, Kennedy has received similar recognition from the liberal legal elite: currently he is the Carter professor of general jurisprudence at Harvard Law School.

But mainstream acceptance is only one of the many similarities between Eminem and Duncan Kennedy. In reading the reissue of Kennedy's *Legal Education and the Reproduction of Hierarchy*, I am reminded of Eminem's duality. When Eminem "stands up" as the real Slim Shady, it is to acknowledge that he is both an avant-garde rapper with mainstream ties (he is white) and a successful businessman who does not see (or refuses to acknowledge) any contradiction between the iconoclasm of his art and the trappings of mainstream success.

Duncan Kennedy grapples with a similar duality in his oeuvre. Since his arrival in the academy Kennedy has straddled the line between "academic guerrilla,"³ with a radical vision for transforming the academy and the profession, and member of the elite, whose strategies for initiating and implementing change are transacted in the standard currency of the academy—legal scholarship.

In presenting Kennedy's 1983 work to a new generation of law students and legal scholars, the reissue functions as a Duncan Kennedy retrospective. It focuses on the way in which CLS has been neutralized from a rogue movement, poised to bring down the academy from the inside, to a mildly irritating but ultimately nonthreatening strain of legal thought.⁴ The reissue itself is testament to this transformation. The mere fact that a pamphlet that was once self-published and distributed in the manner of an underground counterculture manifesto is being republished by an academic press illustrates the degree to which CLS and Kennedy have become entrenched in the mainstream academy.⁵

3. Peter Goodrich, *Duncan Kennedy as I Imagine Him: The Man, the Work, His Scholarship, and the Polity*, 22 *Cardozo L. Rev.* 971, 974 (2001).
4. For a more detailed discussion of the struggle between CLS and the mainstream academy in the 1980s, see Calvin Trillin, *A Reporter at Large*, *The New Yorker*, Mar. 26, 1984, at 54.
5. Some will argue that it is a fundamental error to conflate Duncan Kennedy with CLS. Although I recognize that CLS was—and is—an autonomous movement including a vast constellation of luminaries, Kennedy is arguably the person most closely identified with CLS and often has acted as a spokesman for the Crits. See, e.g., Marc Granetz, *Duncan the Doughnut*, *The New Republic*, Mar. 17, 1986, at 22; Owen Fiss, *The Death of the Law?* 72 *Cornell L. Rev.* 1, 10 (1986) (noting that Kennedy is "generally thought of as the Abbie Hoffman of the [CLS] movement"). Moreover, the reissue essentially subsumes CLS into the Kennedy oeuvre (or vice versa) by using *Legal Education and the Reproduction of Hierarchy* as a fulcrum from which to consider the contentious battles between CLS and the mainstream academy in the 1980s, the diminution of CLS as a possible change agent in the academy, and the entrenchment of CLS as a viable but nonthreatening strain of legal theory.

What the reissue does not acknowledge, however, is the degree to which Kennedy has *always* been mainstream *and* radical at the same time.⁶ Kennedy has always presented a vision of institutional change in mainstream vehicles recognized and accepted by the academy. In so doing, he has relegated the issue of educational change to academic debate, and has hindered his ability to effect broad-based institutional transformation. Moreover, Kennedy's formula for institutional change is uncomfortably dependent on student activism. The role of institutional players like Kennedy is limited to critique and the identification of systemic problems. In failing to acknowledge the paradox of Kennedy's radical agenda for change and his mainstream methods of implementation, and the shortcomings of his proposal for reform (and the method of critique), the reissue leaves open some important questions. Is Kennedy the radical he purports to be? Or is he a mainstream academic insider? Is Kennedy's agenda the most effective way to initiate and sustain institutional change? Can an institution like the legal academy ever change from within?

In evaluating Kennedy's stance, and in answering these questions, I turn to three of Kennedy's proposals for reforming the academy: "How the Law School Fails: A Polemic," written while Kennedy was a student at Yale Law School; the original *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*; and his Introduction and Afterword to the 2004 reissue.⁷

As I examine these three proposals for changing the academy, I note that Kennedy's prescriptions for transformation are the quintessential wolf in

6. In making this claim, I wish to note the distinction between Duncan Kennedy the scholar and Duncan Kennedy the provocateur. As a scholar, Kennedy necessarily has become established in the mainstream academy. As a provocateur, however—or, as others have noted, "a missionary" or "a recruiting agency" for CLS—Kennedy has always presented himself as far to the left of liberalism. See John Henry Schlegel, Of Duncan, Peter, and Thomas Kuhn, 22 *Cardozo L. Rev.* 1061, 1061 (2001); Paul Bator, Harvard Society for Law & Public Policy and The Federalist Society for Law & Public Policy Studies, *A Discussion of Critical Legal Studies 11* (Cambridge, Mass., 1985) (noting that "CLS is a program of radical politics"). I argue that even as a provocateur Kennedy is closer to the mainstream than is generally acknowledged.
7. At this juncture, it seems particularly pertinent to note how the nature of legal scholarship has evolved under CLS's considerable influence. Thirty years ago it would have been unheard of, and certainly frowned upon, for an author to frame a piece intended for publication in a law review by referring to a pop culture figure. Now such references are increasingly common in legal scholarship.

Nevertheless, the dichotomy between the radical and the mainstream persists. Even as the genre of legal scholarship has expanded to include alternative influences, generic conventions still hold sway. For example, although I refer to Eminem, I also include the obligatory roadmap paragraph—a standard in legal writing. The conflict between these two impulses—to be iconoclastic and to be conventional—is, I believe, at the heart of the questions presented by the 2004 reissue. Although pioneers like the Crits and their submovements may have expanded the array of voices and styles presented in the academy, the conventions—indeed, the hierarchies and hegemonies—are still rooted in the common understanding of what it means to be a legal scholar. Even Crit leaders are not immune to these two impulses. Although much of Kennedy's scholarly product was avant-garde in its substance and style, it often was presented in the conventional vehicles of the academy—the lecture, the law review article, the anthology. See, e.g., Duncan Kennedy, *A Critique of Adjudication, Fin de Siècle* (Cambridge, Mass., 1997); Duncan Kennedy, *The Structure of Blackstone's Commentaries, in Critical Legal Studies*, ed. Alan C. Hutchinson, 139, 142 (Totowa, 1989); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 *U. Penn. L. Rev.* 1349 (1982). Indeed, even his works presented in a less conventional form—e.g., the pamphlet—were later recast in more conventional formats. The reissue under review is, of course, the prime example.

sheep's clothing. That is, Kennedy envisions sweeping institutional changes but does not advance his vision beyond the confines of an academic inquiry. Moreover, I argue that in not acknowledging or challenging the contradiction of Kennedy's position, the reissue—indeed, the academy—compromises the ongoing debate on transforming legal education and limits the opportunity to effect meaningful change.

The 2004 Reissue: Time Heals All Wounds

By Kennedy's own admission, part of the reissue's purpose is to bring *Legal Education and the Reproduction of Hierarchy* to a new audience of contemporary law students. It does so by reproducing, in much the same 7-by-7-inch format, the pamphlet's original content. But clearly the reissue, its editors, and Kennedy himself have other goals in mind. As Kennedy notes, the reissue, in its commentary and in Kennedy's Introduction and Afterword, provides a forum for discussing the context in which CLS waxed and waned in the 1980s and 1990s (page 1). Although one of the purported goals of the reissue is to introduce *Legal Education and the Reproduction of Hierarchy* to a new audience, another and perhaps more pressing goal is to launch and structure the terms of a new dialog on the influence of CLS in the academy.

For the most part, the tone of the reissue alternates between celebratory and elegiac. On the one hand, there are essays from Peter Gabel and Janet Halley that describe how *Legal Education and the Reproduction of Hierarchy* exemplifies CLS's unfulfilled potential to dismantle and reorganize the legal system into a more egalitarian and socially useful enterprise. There is also a revealing essay by Angela Harris and Donna Maeda chronicling student use of leftist organizing techniques—of the sort described in *Legal Education and the Reproduction of Hierarchy*—to agitate for changes in the law review election procedures at Boalt Hall. In all, these essays seem almost like wistful glimpses into a past where the promise of change was imminent but ultimately unrealized, a sort of “CLS, we hardly knew ye.”

The other essays in the reissue are bit more positive, focusing less on CLS's once heralded potential for generating massive institutional changes and more on CLS's own changes over time. Perhaps not coincidentally, the first essay in the reissue is written by Paul D. Carrington, the former Duke law school dean who, at the height of the discord between Crits and the mainstream, famously argued that the Crits had a moral imperative to depart the academy, lest they corrupt impressionable students with the “nihilistic” view that “legal principle[s] do[] not matter.”⁸ In his essay, “Reproducing the Right Sort of Hierarchy,” Carrington's view of CLS seems more tempered. Although he continues to assert the benefits of hierarchy, he also appears resigned to (and perhaps satisfied with) CLS's more limited role within the academy. This is in sharp contrast to his position in 1984, when he decried CLS—and, one suspects, Kennedy in particular—for using the classroom lectern as a bully pulpit from which to indoctrinate students into a particular (leftist) strain of legal and political thought. Instead, Carrington argued, the academy should

8. Paul D. Carrington, *Of Law and the River*, 34 *J. Legal Educ.* 222, 227 (1984).

arm students with the tools to ask the kinds of questions that would allow them to sort out their political agendas independently, not provide them with an ideological crib sheet.

Although Carrington's view of the academy's role in educating students remains consistent with his position in 1984, the context of the debate has changed. CLS no longer appears to be a force with the potential to dismantle the structure of the academy through the indoctrination of supple young minds. Instead, the modern enemy poised to destroy the moral and ethical fiber of young lawyers is a vast network of corporate clients that enlist legal assistance to circumvent accepted business and accounting practices. Saddled with crushing educational debt and hostage to the financial trappings of corporate practice, young lawyers are ill equipped to resist the directives issued by unscrupulous partners and clients.⁹ In such a climate, Carrington contends, the hierarchy of the academy (indeed, the right sort of hierarchy) is more necessary than ever—not because it is being challenged by left-wing Crits, but because the economics of law school life and the realities of legal practice require that students be armed with the moral fiber, tenacity, and analytical horsepower to stand up to these pressures.

In the reissue Carrington is concerned about the recent spate of corporate malfeasance scandals, but he does not suggest that, as he predicted in 1984, CLS's nihilism was responsible for graduating more "crooks than radicals."¹⁰ In short, Carrington still insists upon the pedagogical benefits of hierarchy, but his position is not necessarily intended as a foil for the CLS agenda.

In fact, Carrington's essay reveals the degree to which the divide between CLS and the mainstream academy has grown narrower. Over time the radicals and their mainstream detractors have approached something resembling detente. This uneasy peace may have been aided, in part, by external politics and the advent of alternative viewpoints. As Owen Fiss observed in 1989, the Burger and Rehnquist Courts' retrenchment from the jurisprudence of the 1960s resulted in "a body of doctrine that inspires no one and instead invites . . . the hermeneutic of suspicion."¹¹ The emergence and increasing prominence of the law and economics movement within the academy underscored the rightward shift in law and politics. More than this, the ascendancy of the right in the academy appeared to be, in part, a response to the emergence of CLS as an important force within academe. With conservatism making tremendous inroads inside and outside the academy, mainstream liberals may have seen the Crits as necessary to balance the ascendancy of the right.¹²

9. Carrington and Kennedy actually may be in agreement about the relative dangers of corporate practice. Like Carrington, Kennedy believes that corporate practice at larger law firms entails supplicating—indeed, being a "lackey" to large corporate clients. Moreover, Kennedy insists, large law firms are the apotheosis of hierarchy, crushing the souls of young lawyers and silencing individualism until they all fall into lockstep. See Duncan Kennedy, *Rebels from Principle: Changing the Corporate Law Firm from Within*, 33 *Harv. L. Bull.* 36 (1981).

10. Carrington, *supra* note 8, at 227.

11. *The Law Regained*, 74 *Cornell L. Rev.* 245, 246 (1989).

12. *Id.* (acknowledging that CLS had "grown and matured," so that it was "not a threat, but an important supplement to the law").

Moreover, over time, the Crits and the mainstream began to speak a similar language. Nowhere is this more evident than in Carrington's proposal for reforming legal education. Worried about the capacity of newly trained lawyers to stand up for ethics in the face of high salaries and corporate pressure to look the other way, Carrington proposes a tuition-free law school: law students could undertake legal study for its own sake and enter practice independent and uncorruptible. Conceding that such a law school would fare poorly in the *U.S. News and World Report* rankings, Carrington nonetheless believes that it would be attractive to those "seriously committed to their own moral values and able to manage their own intellectual affairs" (151).

Like Kennedy's own agenda for academic reform, Carrington's tuition-free law school is creative and inspiring but ultimately unrealistic. Indeed the hierarchies of the academy (and those generated by *U.S. News and World Report*) would doom the enterprise to failure. Carrington would be hard pressed to find students who would spend three years at an unaccredited law school without the career services or alumni resources generally used for securing employment. Carrington's essay nonetheless suggests the degree to which the participants in the acrimonious "struggle for the soul"¹³ of the academy have softened their hardline positions. Carrington's proposed "Utopian Law School," unrestrained by the banalities of ranking or funding, is certainly evocative of Kennedy's "Utopian Proposal" to reorganize the academy along more critical lines. Indeed, it is likely that Duncan Kennedy—circa 1983 or circa 2004—would respond with a hearty "Right on!" to Carrington's proposal. Whether Kennedy actually would have attended such a school is another question.

Despite past tensions, Carrington seems resigned to CLS's new position in the academy. In the face of alternative extremes, the Crits reinforce the academy's liberal tilt. And even though they continue to advocate a more critical approach to the law, the approach is no longer so deeply feared or perceived as inherently destructive. In short, the mainstream has made room for the Crits.

Duncan Kennedy's Introduction and Afterword further illustrate the extent to which the Crits and the mainstream have moved closer. Like the other contributors, Kennedy considers the reissue as a sort of retrospective of his own work in CLS, but he makes it clear that this is not an elegy. It is a call to a new age of radical lawyering and radical law teaching.

In truth, Kennedy is a bit like Napoleon—the Elba version, a diminished leader who, despite the travails of recent history, is convinced of the correctness of his cause and the possibility of future success.¹⁴ Conceding that CLS fractured

13. Trillin, *supra* note 4, at 54.

14. In 1815 Napoleon escaped from Elba to make one last attempt to regain his empire. He was defeated, of course, at Waterloo and died in exile on St. Helena in 1821.

under the pressure of “identity politics,”¹⁵ Kennedy argues that the movement, though diminished, still has something to offer those who wish to combat the ongoing hegemony of the system. And there is much to fight, he insists. Although his own position has softened—he concedes that working at a law firm is not tantamount to eating babies—he still maintains the radicalism of his vision and, more important, believes that his vision can be achieved through the commitment and perseverance of a new generation of law students.

The question raised by Carrington’s essay and Kennedy’s own contribution to the reissue is, like the reissue itself, retrospective. If the space between the Crits and the mainstream has been minimized over time, how far apart could they have been? Were Kennedy and CLS radical to begin with? As with all Kennedy-related questions, the answer is complicated. Although Kennedy insists his proposals are still radical and the reissue insists that these ideas are a nonthreatening part of the academic canon, neither side will acknowledge that these ideas have always been radical *and* mainstream. Kennedy puts forth a sweeping vision for a radical transformation of the academy, the profession, and society. But he presents this vision as an academic debate memorialized in the literature of academic institutions. In the end, the proposal of radical changes in mainstream academic vehicles presages CLS’s eventual position within mainstream academia.

How the Law School Fails: An Insider Steps Out

Kennedy’s first polemic, “How the Law School Fails: A Polemic,” is further evidence of his radical vision and his mainstream methods of implementation. In it he addressed the sense of malaise and discontent that, in his view, pervaded the law school community.¹⁶ A primary factor in creating this culture of discontent was the students’ perception of hostility in their interactions with faculty. Kennedy also looked to his fellow students and their role in creating the overarching sense of malaise and disappointment. Students, he posited, responded to their teachers’ intellectual barrage in two ways. Some retreated to the sidelines, tails between their legs, intent on disengaging from the intellectual give-and-take of legal pedagogy. Others successfully parried with professors, mastered the intricacies of law school, and learned to stifle their own creative impulses in order to “think like a lawyer.”

The content of “How the Law School Fails” was mainstream to the extent that Kennedy insisted he was a “liberal” and made clear that his “motives

15. Truthfully, I am not sure that Kennedy’s acknowledgment of “identity politics” is much of a concession at all. In many ways, it might be considered an attempt to finger the FemCrits and critical race theory as accomplices in CLS’s demise. Indeed, the history between CLS and its progeny is far more complicated than Kennedy suggests. As Kimberlé Williams Crenshaw has noted, CLS was uncharacteristically hostile to the growth of identity-focused submovements within its confines. See *The First Decade: Critical Reflections*, or “A Foot in the Closing Door,” in *Crossroads, Directions, and a New Critical Race Theory*, eds. Francisco Valdes et al., 9, 16 (Philadelphia, 2002).

16. 1 *Yale Rev. L. & Soc. Action* 71 (1970).

[were] anything but destructive.”¹⁷ He asserted that he was not intent on destroying the system of legal pedagogy at Yale or elsewhere: his purposes were purely ameliorative. Indeed, he noted that he was “very glad to be a member of the community of the [Yale] Law School” and only wished to “improve our lives as people living together.”¹⁸ Even though Kennedy criticized legal pedagogy’s reliance on a culture of fear in teaching students, he did not object to training students for future service in government or a corporate law firm. Although he admitted to being a “legal hippie,”¹⁹ he insisted that he was not a revolutionary.

Despite Kennedy’s assertions to the contrary, “How the Law School Fails” can be considered radical in a number of critical ways. First, it was radical because, long before *One L* or *The Paper Chase*, it chronicled law school life exclusively from the perspective of a student.²⁰

Moreover, despite Kennedy’s disclaimer that he wished only to improve the law school community, his proposal for reforming the academy from within was nonetheless radical in its vision. True to his word, Kennedy did not advocate a ritual slaughter of all of the law school’s institutions. Instead, he suggested a seemingly minor change, which, he insisted, would reap enormous gains. He asked that faculty and students be kind to one another. He implored faculty to demonstrate an interest in students and their well-being inside and outside the classroom. And he insisted the students could assist the reform effort by becoming actively engaged in their legal education.

Although couched in the nonthreatening language of community and civility, Kennedy’s proposal was revolutionary. Kennedy was advocating the softening of an essential aspect of the traditional model of legal pedagogy—the ideal of the professor (or the judge, or, in society at large, the lawyer) as the purveyor of legal knowledge to an audience of eager but unprepared acolytes. In disrupting this model and urging faculty and students to be civil to one another, Kennedy was proposing the dismantling of the observed hierarchy that separated students from faculty and created a culture of fear and detachment. Instead students and teachers would see themselves as venturing together on an intellectual journey. In many ways Kennedy’s prescription in “How the Law School Fails” anticipated *Legal Education and the Reproduction of Hierarchy*’s own critique of the hierarchies of legal education.

17. *Id.* at 71. It should be noted that Kennedy first drafted “How the Law School Fails” in 1968. Two years later—after substantial institutional reforms had been made at Yale and elsewhere—it was republished in the inaugural issue of the *Yale Review of Law and Social Action*. To the 1970 version Kennedy added a postscript, noting that in the two-year period between drafting the polemic and its republication, “students at just about every ‘national’ law school in the country have begun agitating—often successfully—for various kinds of changes in school structure.” *Id.* at 86. Pleased with the nature of these changes and the attendant institutional response, Kennedy (circa 1970) seemed more inclined toward revolution than is evidenced by his tone in the 1968 version of the polemic.

18. *Id.* at 71.

19. *Id.* at 81.

20. Interestingly, Kennedy’s visceral accounts of student life in “How the Law School Fails” brilliantly prefigured the use of narrative, storytelling, and alternative perspectives in CLS and its offspring, critical race theory.

But Kennedy's prescription for change was inherently difficult to fill. In asking students and professors to alter the tenor of their relationship with one another, Kennedy, as *Legal Education and the Reproduction of Hierarchy* would later state explicitly, was asking for a reevaluation of the entire model of faculty-student relations. More than thirty years after Kennedy presented it, his prescription seems largely unrealized. Indeed, when I first encountered "How the Law School Fails," as a second-year student at Yale Law School, I felt a shock of recognition. Despite the thirty-year difference in time and substantial institutional changes, the law school of Kennedy's polemic seemed to me quite similar to the law school I attended. In a 2002 study sponsored by the Yale Law Women, many students, in particular women and minorities, characterized the classroom environment as one fraught with uneasiness, trepidation, and in rare cases hostility. Others remarked that faculty seemed perpetually detached and aloof.²¹

The similarities between the law school that Kennedy described and the one I experienced thirty years later attest to the elusiveness of Kennedy's agenda for change. Although future generations of Yale law students benefited from changes made after the distribution of "How the Law School Fails"²²—the grading system was changed to Credit/Fail in the first semester, and Honors/Pass/Low Pass/Fail thereafter; a clinical training program was implemented; greater numbers of women and minorities were admitted; and the faculty began the slow process of diversifying its ranks—the hierarchy that Kennedy identified persists and continues to shape student-faculty relations.²³ Institutional changes have made student life more tolerable, but students and faculty are not the coventurers Kennedy contemplated.

The entrenchment of hierarchy in the face of profound institutional changes prompts another question. Why did some institutional changes succeed while others failed to take root? In particular, what accounts for the persistence of hierarchy?

Some—like Carrington—might argue that hierarchy persists because it has pedagogical benefits that endure beyond one's academic career. Others might find that an explicit hierarchy promotes transparency and efficiency in academe. Both of these are fair points. But I would also argue that one reason Kennedy's radical vision failed to take root is that, as an academic critique, it did not have the urgency of other reform initiatives. The difference is underscored by the media in which these proposals were presented. The shift in Yale's grading system, for example, was the product of extensive student agitation—much of which took place during Kennedy's tenure at Yale, and in

21. Yale Law Women, Yale Law School Faculty and Students Speak About Gender: A Report on Faculty-Student Relations at Yale Law School 13–15, 41 (New Haven, 2002), available at <www.yale.edu/ylw/finalreportv4.pdf>.

22. To be clear, I do not mean to imply that "How the Law School Fails" was solely responsible for any of the changes that I describe. See Laura Kalman, *The Dark Ages*, in *History of the Yale Law School: The Tercentennial Lectures*, ed. Anthony T. Kronman, 154, 164 (New Haven, 2004).

23. See generally Yale Law Women, *supra* note 21.

which he participated.²⁴ In contrast, Kennedy's critique and reform proposal were rooted in the traditional academic discourse of the law school. Essentially, the revolutionary quality of his critique and proposal were framed and presented as traditional academic inquiries. Kennedy's proposal may have gotten faculty attention—indeed, Kennedy gave a copy of the paper to Yale president Kingman Brewster at a family gathering—but it was not necessarily understood as the sort of student agitation that warranted some affirmative institutional response.

Moreover, despite its visceral quality, Kennedy's criticisms of law school life were not the product of his own frustrations and humiliations as a student. He makes it plain that, despite his best efforts, he was often one of the students who joined the teacher in laughing at a struggling classmate.²⁵ Instead of chronicling his own law school experience, Kennedy simply identified a broader problem and devised a solution. Although he was able to describe the law school climate with sensitivity and perception, it is clear that *he* was not the frightened, cowed, disengaged student he described. Instead his account is almost anthropological—further underscoring the academic nature of his inquiry. Although his proposal was refreshingly innovative, it was decidedly mainstream, especially when compared with contemporaneous student-led reforms and the reform efforts Kennedy would later champion.

Legal Education and the Reproduction of Hierarchy: I Can See Clearly Now?

Roughly fifteen years after he wrote and distributed "How the Law School Fails," Kennedy self-published another critique of legal education, this time from the perspective of a teacher and consummate insider. If "How the Law School Fails" downplayed the revolutionary quality of Kennedy's proposal, *Legal Education and the Reproduction of Hierarchy* was refreshingly transparent in its aims. There Kennedy made explicit what he had merely hinted at in his student polemic: the legal academy was constructed of artificial hierarchies that were exported, through graduates, to the legal profession and to society. In the same way, Kennedy was much more open in proposing wholesale changes for the academy and society. Now a tenured professor, he essentially looked to law students, whom he deemed the most autonomous actors in the academy, to "resist" the system and its inherent—and illegitimate—hierarchies. The path to resistance, as he outlined it in his "Utopian Proposal," required students to form "leftist study groups" where they would use CLS theories to deconstruct the traditional legal curriculum and expose the inherent biases undergirding purportedly neutral legal principles. Moreover, Kennedy encouraged students to resist the temptation to sell out to corporate

24. For a more detailed description of student agitation at Yale, see generally Kalman, *supra* note 22.

25. Kennedy, *supra* note 16, at 75. Indeed, it is hard to imagine Kennedy struggling to decipher the vagaries of law school. He was selected for the *Yale Law Journal* and, as a third year student, served as a Notes and Comments editor. Following a clerkship for Justice Potter Stewart, himself a Yale Law alumnus, he was offered teaching positions at both Harvard and Yale law schools.

law firms and, if they could not, to resist by refusing to participate in the hierarchies present within those institutions.²⁶

More than twenty years later it is easy to see why *Legal Education and the Reproduction of Hierarchy* provoked such a vehement response from the academy. By placing the onus of reform on students—arguably the lowest people on the academic totem pole—Kennedy was essentially calling for a proletarian revolution within the academy. Even today the prospect of a wholesale student-led transformation of the academy is radical in its vision and scope.

Nevertheless, Kennedy's proposal was unrealistically abstract and, in its presentation, deeply rooted in mainstream academic conventions. It was unlikely to achieve the broad-based results he envisioned. Faced with the dangers of illegitimate hierarchies in the academy and society, Kennedy did not propose widespread, sweeping changes. Instead, he proposed incremental changes that would be student-led. Working in cell-like leftist study groups, students would be the change agents responsible for reconceptualizing the traditional curriculum and pedagogy. The fact that Kennedy's proposal required incremental cell-by-cell action made it unlikely to be effective. Instead of a coordinated effort, each cell was required to initiate and sustain reform impulses, and then coordinate its work with that of other cells.

The improbability of such a scheme underscores the most problematic aspect of the Utopian Proposal—that it was primarily an abstract, theoretical, and unrealistic exercise. The idea that student-led study groups would, cell by cell, succeed in dismantling the basic structure of the academy seems—even to the most visionary—a pipedream.

Perhaps the most unrealistic aspect of the proposal is that it was so completely dependent on student participation and investment.²⁷ Although students may be relatively immune from the political machinations and academic responsibilities that burden faculty, they are not the independent actors Kennedy envisioned. Even if students are nominally autonomous within the academy, I sincerely doubt that many of them understand the power such independence affords. In my view—based on my experiences as a student and a first-year teacher—most students are merely trying to survive and get the hang of law school. Very few are actively engaged in inciting revolution.²⁸

This is not to say that students are immune from activist impulses. Indeed, as I noted earlier, student activism at Yale in the 1960s resulted in a number of

26. Duncan Kennedy, *Rebels from Principle: Changing the Corporate Law from Within*, Harvard Law School Bulletin, Fall 1981.

27. Kennedy's dependence on students as agents of change in *Legal Education and the Reproduction of Hierarchy* should be compared to the change agents he identifies in his earlier polemic, "How the Law School Fails." There he called on faculty to alter the tone of their interactions with students and called on students, many of whom he deemed apathetic and uninterested, to become reengaged with legal study. What is striking about both proposals is that Kennedy consistently places the primary responsibility for change on the group to which he does not belong. In all, one must wonder, although Kennedy astutely identifies and critiques the problems of the academy, does he have any interest in actively seeking a solution?

28. To be fair, today's political climate, though charged, seems less incendiary than the political climate that fueled the student activism of the 1960s.

institutional changes that endure to this day. Student activism at Harvard Law School and at Boalt Hall has been documented widely in the popular press. In one of the comments in the reissue, Angela Harris and Donna Maeda discuss the student use of resistance methods outlined in *Legal Education and the Reproduction of Hierarchy* to agitate for new law review election procedures (168). Harris and Maeda acknowledge that the efficacy of student-driven reform efforts is often fleeting because the student body changes from year to year. Often, they suggest, reform efforts are not maintained; and absent institutional commitment to reform, continued progress is limited.

Although I recognize that student activism can yield important reforms, I agree with Harris and Maeda that there are limits to the success of student efforts if those efforts are not coupled with an institutional—i.e., faculty—commitment to achieve and maintain the reforms sought. Although Kennedy's "Utopian Proposal" is premised on the idea of students and CLS faculty working together to reveal the inherent contradictions of the traditional curriculum, his proposal offers precious little in the way of an affirmative faculty commitment to achieve and maintain institutional reforms. In many ways Kennedy has identified the problem, but he casts the solution in a way that absolves teachers of any obligation to lead the charge for reform.

This is not to suggest that Kennedy has *never* taken on the responsibility of agitating for reforms within the academy. As has been documented in the reissue and elsewhere, Kennedy has, for years, led the charge to reform the standard legal curriculum along more critical lines. He has taught standard black letter doctrine from the outsider perspective, so students see how much external forces shape the seemingly neutral legal rule.²⁹ In addition to his classroom tactics, he has written extensively on the need to reassess traditional legal doctrine through the CLS lens.³⁰ Beyond these doctrinal elements, he has also pressed for less rigidity and adherence to traditional criteria in the faculty hiring process.³¹

Yet despite his radical impulses Kennedy has agitated for change within the normal confines of the academy. He has written law review articles about dismantling the system and looking beyond the traditional hiring criteria, but for the most part his proposals for transforming legal education are abstract, academic, and confined to traditional academic discussions. Certainly there is something intrinsically radical about bringing down an institution from the inside. But I would argue that, in confining his objections to standard aca-

29. See generally Duncan Kennedy, *Politicizing the Classroom*, 4 S. Cal. Rev. L. & Women's Stud. 81 (1994); Duncan Kennedy, *Liberal Values in Legal Education*, 10 Nova. L.J. 603 (1986); Duncan Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 Seton Hall L. Rev. 1 (1983); Duncan Kennedy, *First Year Law Teaching as Political Action*, 1 Law & Soc. Probs. 47 (1980).

30. Duncan Kennedy, *Legal Formalism in The International Encyclopedia of the Social and Behavioral Sciences*, 8634 (Amsterdam, 2001); Duncan Kennedy, *Law and Economics from the Perspective of Critical Legal Studies*, in 2 *The New Palgrave Dictionary of Economics and the Law*, ed. P. Newman, 465 (New York, 1998); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205 (1979); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976).

31. See generally Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 Duke L.J. 705.

democratic discourse, Kennedy limits the long-term possibilities of broad-based institutional transformation.

Kennedy's response to other efforts to promote change further underscores his mainstream inclinations. In *Legal Education and the Reproduction of Hierarchy*, in the context of faculty hiring, Kennedy denounced the academy's "notorious[] hostile[ity]" to affirmative action and preoccupation with "trying to get people who are as high up as possible in a conventionally defined hierarchy of teaching applicants" (75). Given that searing criticism, one would expect Kennedy to embrace any efforts to diversify the ranks of the Harvard Law faculty. His response, however, was more complicated and far from radical, as he himself used the term.

In 1990 Derrick Bell, one of Kennedy's Harvard colleagues, took an unpaid leave of absence to protest Harvard's failure to offer an African-American woman a tenured position on the faculty. Bell has often characterized his decision as a means of supporting students, many of whom had been agitating for more inclusiveness in the curriculum and for faculty diversity.³² Despite his advocacy of student-led reforms, Kennedy was unreceptive to Bell's efforts to assist the students and to bring about change in the faculty hiring process. Although Kennedy respected Bell's motives, the method was "not his [Kennedy's] way of bringing about change."³³

Despite Kennedy's misgivings, Bell's protest—which lasted over three years and resulted in his departure from the Harvard faculty—engendered the sort of heightened student activism that Kennedy contemplated in *Legal Education and the Reproduction of Hierarchy* and Harris and Maeda observed at Boalt Hall. Students complemented Bell's efforts by conducting sit-ins of faculty offices,³⁴ compiling lists of minority scholars³⁵ to refute the administration's claim that the pool of qualified minority candidates was limited, and supplementing the Harvard curriculum with an Alternative Course of critical readings on the intersection of law and race.³⁶

I do not mean to suggest that Bell's protest, with the attendant student response, is or should be the model for initiating institutional transformation. I mean only to point to the inherent contradiction between Kennedy's radical proposals and the nature of his own protest. Although Kennedy's vision of students working in concert with like-minded professors to dismantle the hierarchies of the academy and society is radical, it is only so in the abstract. Some might argue that it is actually traditional. By confining his radical impulses to academic scholarship, Kennedy is quite traditional in his agenda for change.

32. Derrick Bell, *Confronting Authority* 60–64 (Boston, 1994).

33. *Id.* at 104; see also Eleanor Kerlow, *Poisoned Ivy: How Egos, Ideology, and Power Politics Almost Ruined Harvard Law School* 127 (New York, 1994) (noting that students "felt personally betrayed" by Kennedy's refusal to support the diversity cause in a critical tenure vote).

34. Kerlow, *supra* note 33, at 159–62.

35. Crenshaw, *supra* note 15, at 12.

36. *Id.* at 13.

The Reissue: Back to the Future?

The dichotomy between Kennedy's proposals and his chosen means of initiating change illustrates the inherent difficulty of initiating and achieving institutional changes from within. In overlooking the contradiction between Kennedy's vision of transformation and his traditional (and, I would argue, unrealistic) methods of implementation, the reissue misses a critical opportunity to reflect on the institutional changes in the academy since the 1980s. Although the reissue focuses on the way in which CLS has become an accepted strain of legal thought, it does not consider how much, if at all, the influence of CLS has affected the academy as an institution or any of the institution's players.

In truth, the academy in 2004 is very different from what it was in 1983. Both the student body and the faculty are more diverse. The complexion of the academy has expanded to include greater numbers of women and minority scholars. Classroom pedagogy is no longer limited to the use of the case method and the Socratic method. In many ways CLS has played an enormous role in effecting these changes. The nature of academic discourse has broadened to include a variety of perspectives and academic styles. Despite these changes—and they are not insignificant—quite a lot remains the same. If Kennedy is correct and hierarchy and hegemony are alive and well in the academy, perhaps the changes that have been wrought are more cosmetic than some might wish and do not address the greater ills that continue to plague the legal academy. If the tumult of student protest and academic debates about the role and obligations of the faculty cannot remedy these institutional problems, what can?

This, I think, is the crucial question that the reissue avoids answering in a direct way. If CLS in its first incarnation could not remedy these institutional ills, why would a second effort succeed? Perhaps the success of a second incarnation is immaterial. From Kennedy's perspective, even if it did not lead to broad-based institutional reform, a second CLS effort would be successful because *it would legitimize the first incarnation*. Instead of being relegated to wistful retrospectives, the first CLS attempt at institutional change would be seen as successful because it managed to spawn a successor movement.

However, cultivating a patina of legitimacy for the original CLS movement is only part of Kennedy's aim. At his core, he is an idealist and his musings in the reissue illustrate the degree to which he wholeheartedly *believes* in the correctness of his mission. Kennedy suggests that future critical scholars can achieve the sort of institutional changes he envisioned by simply avoiding the "identity politics" and balkanization that fractured CLS at its apex. Even today he insists that the methodology of critique remains sound.

I am not so convinced. Kennedy's vision is remarkable in its clarity, its confidence, and its optimism. Where it fails is in the application. If, as Kennedy suggests, hierarchy is at the root of the academy's problems, how can a revolution staffed primarily by students—the lowest rung of the hierarchical ladder—be the answer? I am not suggesting that students cannot play a

transformative role, I am merely asserting that the agenda must be a cooperative one, drawing on the strength and commitment of students and faculty alike.

Again, I am reminded of Eminem and rap music. A subject of ongoing debate in the rap community is the phenomenon of the “studio gangsta”—a rap artist who claims “street cred” only in the studio and in his rap persona, meanwhile maintaining in his private life a decidedly mainstream outlook. Throughout his career Eminem has been derided as the consummate studio gangsta, boasting about the authenticity of his life and upbringing but making music aimed at commercial success in the mainstream. Another issue of contention is the trend toward hyperproduction, that is, the use of studio production teams to engineer the artist’s work. The artist, it is said, abdicates all responsibility for the development of his work and places it in the hands of the producer, thereby diminishing the work’s artistic integrity.

Kennedy’s reissue has elements of both the studio gangsta and hyperproduction. Kennedy can be seen as an academic studio gangsta: his prescriptions for change are bold and radical, but he is a member of the mainstream, packaging his proposals for a mainstream academic audience. In terms of hyperproduction, Kennedy is widely acknowledged as a mouthpiece for change, but he puts responsibility in the hands of law students.

These rap metaphors underscore the limitations of Kennedy’s critique in effecting the sort of institutional transformation he contemplates. Large-scale change in an institution like the legal academy requires more than the reissue—and critique—offers. Kennedy has done an admirable job of identifying problems in the academy and pointing out the dangers of hierarchy. But if institutional change is to be accomplished, we must answer more difficult questions. Are there benefits to hierarchy? Are these benefits subverted by the dangers inherent in promoting a hierarchal institution? If institutional changes are required, who are the people best equipped to be change agents? Answering these questions requires more than law review articles and student-led initiatives. As Kennedy’s student polemic suggested, faculty-led changes are essential.

In the end, students will continue to graduate each year. Many of them will forgo Kennedy’s revolution in favor of an associate position at a corporate law firm—a respectable path, and one that is often necessary given the high costs of a legal education. In the end, the legal academy and all of its attendant hierarchies will remain intact. What can change, as Kennedy advocated in 1968, is the role of each teacher within the overarching structure. Instead of student-led cell-by-cell change, each teacher could, independently, alter the experience of legal education for each of her students. It is not the sweeping change that Kennedy envisioned, but it is a meaningful change nonetheless.

While the reissue provides an excellent retrospective on CLS and the changes in the academy since its arrival, it does not go far enough in exploring why CLS failed to achieve the sweeping institutional changes Kennedy proposed. In failing to grapple with this shortcoming, the reissue suggests how Kennedy and CLS have failed to shift the debate about institutional change from mere critiques into real-world practices.