

Langdell's Prodigal Grandsons: On Duncan Kennedy's Critique of American Legal Education

By Viktor Winkler*

A. The '60s, Marx and A Little Red Book

At a stage of life when German law students habitually prepare to finish their studies by intravenously absorbing law at commercial preparation courses, American law student Duncan Kennedy had a somewhat different notion. In a law review article he virtually pulled to pieces what he had experienced as Ivy League education at Yale Law School.¹ In 1983, meanwhile a member of an Ivy League law school faculty, Kennedy resumed his critique in a self-published pamphlet widely known as the Little Red Book. Although being available only at the Harvard bookstore or via mail order from the author, Kennedy's statement has gained quite remarkable fame. It has been reviewed by the most esteemed law reviews, and has been quoted and widely discussed among legal scholars. Now the Little Red Book has even formally arrived in the ivory tower of legal academia: handsomely published, equipped with a fore- and afterword by the author, encompassed by thoughtful essays and, yes, gold letters engraved on the spine. The typescript of the original book however, once consciously produced in a semi-professional manner with a circulation of around 3000 copies, has been preserved. Thus readers do hold the original text in their hands, despite gold gravure.

The book has made its author famous and, perhaps, a little infamous, too. While this has done no damage to the author, it has somewhat to his book: Readers tend to equate the book with the role of its author. Kennedy is well-known today (and

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¹ Duncan Kennedy, *How the Law School fails – A Polemic*, 1 YALE LAW REVIEW OF LAW AND SOCIAL ACTION 71 (1970).

back then) as one (and perhaps the) head of the Critical Legal Studies (CLS) movement, that anything but monolithic group of leftist and/or Marxist legal scholars who, since their “founding” in 1977, have defied the ruling jurisprudence of America.² CLS’ main goal was to unmask “Law as Politics”, law’s autonomy being a mere masquerade for its essentially socio-political function. Kennedy’s polemic against law schools as (re)producers of social hierarchy became a CLS manifesto and one is quick to subsume the book under such a political background. Neil Duxbury, in his seminal depiction of American jurisprudence, has done that and labelled it “a classic piece of campus Marxism”³. At first glance the Little Red Book appears to conform to such a classification. The pamphlet’s lay out is reminiscent of Mao’s “bible”, yet one with a good dose of irony supplied by Kennedy (210). Still the “hierarchies” Kennedy deals with are those of the bourgeois society – not only those of the legal sphere – and they are “illegitimate” (15), a presumption that Kennedy does not substantiate but takes for granted. In any case, the function of legal education lies within the “ideological training for willing service in the hierarchies of the corporate welfare state” (15). Law school prepares for the following exploitations within the realm of corporate law firms (49ff.) and the courts (55) by representing the oligarchic structures of those systems (61ff.), providing them with ideological justifications (63ff.), and making the requisite selections among students according to established requirements (65ff.). *This is all about the System*. The grading system (43ff., 71), the dominant cultural patterns in law school⁴, the curriculum (35ff.) – only because all of these serve the conservation of the system do they seem to be the target of Kennedy’s critique of legal education.

Even today, to Kennedy the book is a critique of essentially nothing but ‘the whole thing’, in his irresistible words: “[A]n analysis of how legal education participates in the production of what sucks about the system” (1). This system, being “rotten through and through” (121), needs to be abolished instead of merely reinterpreting its juristic tools (22-24). Aptly, the foreword of the 1982 original thus ends with the succinctness of the Street Fighting Man: “Resist!” (16). Indeed: ‘Think the time is right for a palace revolution / ‘Cause where I live the game to play is compromise solution’ (*Jagger/Richards*). Kennedy seems to be making no compromise and calls

² see Günter Frankenberg, *Partisanen der Rechtskritik: Critical Legal Studies etc.*, in *Neue Theorien des Rechts* 97 (Sonja Buckel/Ralph Christensen/Andreas Fischer-Lescano eds., 2006). For the earlier works see Duncan Kennedy and Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 *YALE L.J.* 461 (1984).

³ NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 493 (1995).

⁴ “[S]tudent culture is relentlessly upper middle class” (Kennedy, *Legal Education and The Reproduction of Hierarchy* (2004) [hereinafter *Kennedy, Reproduction*], at 38), “[t]he teachers are overwhelmingly white, male and deadingly straight and middle class in manner” (*ibid.*, at 19)

for nothing less than a “a new society” (121), forged by a new “organized left bourgeois intelligentsia”, that one day, by merging with a mass movement, is supposed to initiate “the radical transformation of American society” (117). The critique of law school seems to be no more than the Marxist critique on the ruling relations of production: “[R]emember, you saw it first in law school” (87). Thus it seems fitting that the book asks for equal payment for both professors and law school janitors (95), that students are supposed to gather in left study groups where they were to read Marx (123ff., 141), that Kennedy’s early critique from 1970 saluted the left “radicals” at the nation’s law schools– and, after all, it seems to fit the context from which this critique once emerged: 1968 had just “happened”, the New Left had long formed at universities in the United States, the student-led Free Speech Movement had turned into the student anti-Vietnam movement, theory-laden civil obedience debates had turned into activist Sit-ins und Teach-ins, critique of President Johnson into open resistance against Nixon, and, last but not least, the hipsters had turned into the hippies. This context leaves one to ask: A mere change of hierarchies from “right” to “left”, is that was Kennedy’s Little Red Book is all about? Was his condemnation only a political polemic forged by a ‘68 leftist uproar, his book being nothing more than the document of contingent radicalization, including the ghost of Marx?

B. A Freudian Perspective

Readers who interpret Kennedy’s book in this manner miss something. In fact Kennedy’s book is about something else. It is about the *cri du coeur* of a sensitive law student who experiences law school not only as intellectually poor but also as *emotionally strangulating*. It is all about what is not written in the books but what happens in class, on the corridors, in talking to professors, in the conversational tones, the conventions in language and manner that dominate and pervade the atmosphere. It is all about a psychological dimension of legal education.

Indeed Kennedy’s book starts off with an analysis of 1L (17ff.), which is dominated by surrender to the professor’s mercy. Surrender leads to fear, and this relationship between professor and student is underpinned by the dominance of cultural attitudes. Students are subjected to these attitudes with no chance of evading them (19). And so it is the psychic balance of law students that is ultimately at stake. Learning juristic techniques includes abandoning emotion and empathy. They are now prohibited as being naive, childish, as conflicting with the very adult character that “thinking-like-a-lawyer” stands for (23). Thus, it is not surprising that the student-university / professor-disciple conflict obtains a particularly Freudian character in Kennedy’s book. Law school professors teach “to put away childish things” (13) in an arrangement that resembles the “patriarchal family” (19). The

professor may later become a mentor, but the relationship remains ambiguous and precariously driven by submission to the “father” (62). In Kennedy’s earlier critique from 1970, the Freudian perspective had been even more explicit: There he declared to be reporting nothing but “a child’s tortured dream”, suffering from the “oppressive emotional atmosphere”, the “atmosphere of collective terror (...) of ice-cold indifference”, futilely seeking to “overcome your fear and revulsion at the spectacle of the professor smiling quietly to himself as he prepares to lay your guts out on the floor yet once again, paternally”⁵. Looking back Kennedy put it very clear: “These authoritarian older men really scared everybody to death; (...) it was very difficult not to experience them as the avenging father type”⁶. In the very same interview Kennedy stressed he was “very influenced” by Freud. And indeed the book presents a typology of psychological student profiles as did his article from 1970 (81-84, 89-91).

C. The Operation of the Machine

Against this background, the context of “1968” gets a different scope. The New Left has, especially in the US, turned away from the “old” issues of labour and production to look at everyday life, at the interpersonal and psychological aspects of capitalist society. Freud and Sartre had changed Marx. Various “German” influences along Heidegger-Adorno-Marcuse were in no small way responsible for this transformation.⁷ ‘One-dimensional Man’, ‘Great Refusal’ – particularly in America these have become emblematic for a new consciousness, a way of both thinking and feeling that significantly differed from the old left. In 1964, the very year Kennedy graduated from Harvard College, Mario Savio, the figurehead of ‘60s student activism, from the steps of Berkeley’s Sproul Hall, cried those now legendary words, that, it seems to me, echo not only this new consciousness but also Kennedy’s book like no other:

“We don't mean to be made into any product, don't mean to end up being bought by some clients of the University, be they the government, be they industry, be they organized labor, be they anyone! We're human beings! There is a time when the

⁵ Kennedy, *supra* note 1, at 76, 80. And so one would, eventually, ask oneself: “Why am I taking this shit from them?” (*ibid.*, at 75).

⁶ Interview with Duncan Kennedy, 24 THE ADVOCATE No. 2 (1994) at 60.

⁷ “In Heidegger we saw (...) a new beginning (...). A philosophy that cared for the human existence, for human conditions and not only for abstract ideas and principles.” Herbert Marcuse, *Interview*, in BEFREIUNG DENKEN – EIN POLITISCHER IMPERATIV. EIN MATERIALIENBAND ZU HERBERT MARCUSE 99 (Peter-Erwin Jansen ed., 1989). Translation by the author.

operation of the machine becomes so odious, makes you so sick at heart, that you can't take part; you can't even passively take part, and you've got to put your bodies upon the gears and upon the wheels, upon the levers, upon all the apparatus, and you've got to make it stop. And you've got to indicate to the people who run it, to the people who own it, that unless you're free, the machine will be prevented from working at all!"⁸

"Existence" instead of institution, estrangement instead of exploitation, emancipation instead of world revolution – this deferral of the topoi is important for the book in its entirety. Young Duncan Kennedy, after all, read the early Marx (141).⁹ The Little Red Book, reputedly driven by a longing for world revolution, does not in fact want it. Instead Kennedy declines "general principles" (98), stating the left should not claim to have an overall institutional solution (108). Universal theories are clearly rejected, as well as the ruling of the proletarian class. The term "hierarchies" is explicitly preferred by Kennedy because of its "vagueness" that makes it unemployable to "hard-edged theory" (96). After all, as Kennedy says very un-"objective" but very '60s: "[N]o one really knows what's going on anyway" (60).

It is part of this state of mind that the book has little to offer with respect to concrete activism and institutional alternatives apart from founding leftist study groups. To criticize that means to overlook the willfully non-concluded character that was (also) part of "'68" – the childishness, the fondness of the non-construed, non-completed, the aversion to the frameworks and the answers of the adults, the refusal to "grow up" and the commitment to "naive" dream-like approaches that do not necessarily provide an answer right away. It is important to take this side of the '60s movement seriously.¹⁰ If you deal with the subtle elements of every day life (and the patterns of domination that sometimes not very bleakly glimmer in them), "clean" institutional solution alone will not help. In 1970 Kennedy put this very straight: "If there is 'revolution' in the air, it is not primarily institutional, but

⁸ For Mario Savio see the many contributions (especially that by Lynne Hollander Savio) in *THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S* (Robert Cohen and Reginald Zelnik eds., 2002). See also the substantial reminiscence by JO FREEMAN, *AT BERKELEY IN THE SIXTIES: THE EDUCATION OF AN ACTIVIST, 1961-1965* (2003).

⁹ For Kennedy's socialization see the biographical sketch provided by ELEANOR KERLOW, *POISONED IVY. HOW EGOS, IDEOLOGY AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL* 39 (1994). In Germany, too, scholars aimed at a renaissance of Marx' early writings opposite to institutionalized Marxism. See, Wolf Paul, *Der aktuelle Begriff marxistischer Rechtstheorie*, in *PROBLEME MARXISTISCHER RECHTSTHEORIE* 72 (Hubert Rottleuthner ed., 1975).

¹⁰ Wolfgang Kraushaar, *Denkmodelle der 68er-Bewegung*, *AUS POLITIK UND ZEITGESCHICHTE* (B 22-23) 14 (2001).

psychic territory which is at stake, or the whole thing is a waste of time.”¹¹ Demands for alternative proposals should not be able to quieten this critique.¹² The latter is all about playfully, at least associatively, locating power relations that are difficult to grasp because they are mapped out on a “mental” terrain in the first place.

Deconstruction is insofar practised aimlessly and with childish joy, too (“Trashing is fun”).¹³ Kennedy learned the method from the French philosophers. It is not by chance that none other than Bourdieu wrote the sentence that might figure as a condensed summary of Kennedy’s book: “The education system – an instrument of reproduction with a special ability to veil its own actual function.”¹⁴ Even the young Kennedy was aware that the polemic against the system does not always meet scientific standards: “All this is ‘curbstone psycho-analysis’ run wild, I freely admit.”¹⁵ But behind it there is a pattern of utopian thinking, the latter having a history of its own that deserves to be taken seriously, too.¹⁶ It provides a standpoint from which radical critique is made possible in the first place.

D. The Grinding Millstone

Of course critics may point out that even against this background the critique becomes neither sufficiently radical nor concrete. Kennedy suggests “to perform an act of resistance of some kind in the authoritarian classroom” (125). Such acts are supposed to consist of refusal, a formal request to stop with a certain discriminating practices etc. But: “You shouldn’t do it in a way that will get you thrown out” (126). Critics will also note that Kennedy meanwhile has withdrawn from some of the old radicalism, perhaps most importantly by conceding a higher determinacy of law – and thereby a higher ability to teach law – than he did in 1983.¹⁷ Given that, it

¹¹ Kennedy, *supra*, note 1, at 85.

¹² See, however, Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 LAW & SOCIAL INQUIRY 779 (1992); see Kennedy today: “The refusal to formulate an alternative vision was what allowed CLS to exist as a “location” for exhilarating encounters” (Kennedy, *Reproduction*, at 217).

¹³ Alan D. Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1230 (1981).

¹⁴ PIERRE BOURDIEU, *DIE VERBORGENEN MECHANISMEN DER MACHT* 75 (1992). Translation by the author.

¹⁵ Kennedy, *supra*, note 1, at 75.

¹⁶ RICHARD SAAGE, *UTOPIEFORSCHUNG – EINE BILANZ* (1997).

¹⁷ See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE]* (1997), and the review by Oliver Lepsius, 63 RABELS ZEITSCHRIFT 378 (1999). For the earlier radicalism see the in-depth analysis by Alexander Somek, *Haben Sie heute schon dekonstruiert? Zur Bedeutung der Dekonstruktion in der neueren*

seems easy to proceed with the old fashion of charging "'68" people with their abandonment of old tenets and to deride this as an act of conventional conformity. And, naturally, the success of a movement may always be turned against it, critics pointing with malicious joy to the establishment insignnia that these one-time rebels now willingly or unwillingly carry around with them.¹⁸ The critique of the critique, however, seldom offers much more than a vague discomfort about these scholars wearing ties¹⁹ or Kennedy pursuing allegedly bourgeois hobbies (squash!).²⁰ "When you make your peace with authority, you become an authority" said Jim Morrison in the '60s. But Kennedy has not made his peace. Recently he mocked the young academic generation for its non-political and joyously quiet disposition: They preferred talking about picking a school for their offspring to discussing the political condition of legal education or anything else that involved theory, critique or making a defiant statement – not to mention rebellion. "As a 60 year old, old '60s person, this strikes me as terrible. I am one of the endlessly grinding millstones whose sound keeps them awake at night and makes them want to change the subject to the choice among secondary schools."²¹

E. Langdell's Rebellious Grandsons

Indeed it is doubtful whether Kennedy's forceful critique will keep today's young generation awake at night. As far as German law students are concerned, they want to make their state exam, not revolution. Of course, there are genuine differences making attempts to apply Kennedy's Little Red Book in the German context difficult. Kennedy's critique is closely knit with legal education in the United States, with its Socratic method, the elite law school system, its rigid application process, astronomical tuition fees, the atmosphere of competitiveness etc. At the very core of

amerikanischen Rechtslehre, 27 RECHTSTHEORIE 201 (1995). An unagitated critique of the indeterminacy thesis was given by Lawrence Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 UNIV. OF CHICAGO L. REV. 462 (1987). The famous apology came from Joseph W. Singer, *The Player and the Cards*, 94 YALE L. J. 1 (1984). (describing "why traditional legal theory has failed us, and how, in light of that failure, we can imagine new ways to live together", *ibid.* at 9).

¹⁸ As done by Peter Goodrich, *Duncan Kennedy as I imagine him: The Man, the Work, his Scholarship, and the Polity*, 22 CARDOZO L. REV. 971, 978-980 (2001).

¹⁹ See the thoughtful remarks by Ivana Mikesic, *Die Kritik der Kritik der Kritik*, Kritische Justiz 132 (1999).

²⁰ Richard D. Kahlenberg, *Broken Contract. A Memoir of Harvard Law School* 84 (2nd ed.; 1999).

²¹ Duncan Kennedy, *The Social Justice Element in Legal Education in the United States*, 1 Unbound 93, 104 (2005). Nevertheless, when Kennedy talks about the diversity within law school faculties today, readers will find a mildness of age here, too: "I think this is a case where things worked out fairly well over the long run." (*ibid.*, at 104).

this system, however, lies what was shaped by legendary Harvard Dean Christopher Langdell (1826-1906) in the last third of the nineteenth century. Langdell's reform of Harvard Law School, later followed by the rest of the nation's law schools, turned American legal education into what it is today, making him both the "father" of the current system and the target of any critique of that system ever since.²²

Langdell's reform consisted of many elements, such as a tighter three-year curriculum, admission tests, college requirement, and now full-time faculty. It is important to note, however, what the essence was in which Langdell's sons and grandsons sought to overcome the legacy of this super-father. It was, it seems to me, a concept of law deriving from a European source and being widely unfamiliar to the very nature of the American tradition in both legal education and legal reasoning: An autonomous, formalist²³ jurisprudence that sought to highlight principles within the legal system, firmly believing in the a priori existence of such patterns in law with scholars only having to extract them. This was the idea behind the case method. And it was an approach mainly established by German legal thinkers of the nineteenth century, such as Savigny, Puchta and the early Jhering.²⁴ Moreover, the approach was unfamiliar to American legal discourse because it stood for a concept of "Law as a Science".²⁵ American legal education before Langdell was provided on the job and not via academic teaching. And that, I believe, helped to establish a deep and formative aversion of abstract, formalist, "scientific" approaches in favour of those "concrete", organic and experience-based. Legal education is therefore one major background for the ongoing antagonism between logic and experience that perhaps has been *the leitmotif* of debates within American legal scholarship for the last 130 years.²⁶ It is not by chance that the most famous words ever written by an American lawyer, Holmes'

²² For an example of that critique, see Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 14 (1983).

²³ Morton Horwitz, *The Rise of Legal Formalism in American Law*, 19 AMERICAN JOURNAL OF LEGAL HISTORY 215 (1975).

²⁴ D.S. Clark, *Tracing the Roots of American Legal Education – A Nineteenth Century German Connection*, 51 RABELS ZEITSCHRIFT 313 (1987). See also Laura Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship and Legal Reform Shaped Our System of Legal Education*, 39 NEW ENGLAND L. REV. 251 (2005).

²⁵ For an overview see JAN SCHRÖDER, RECHT ALS WISSENSCHAFT (2001).

²⁶ See the standard enquiry by WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE. THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994).

“the life of the law has not been logic, it has been experience”²⁷, were first phrased in a review of Langdell’s work.²⁸

Holmes avowal to experience began a long history of trying to escape the concept of law as a science – and it is remarkable that the very same critics who fought the “scientific” systems of Savigny and his disciples in Germany were the ones to enhance the very parallel criticism in the United States: Holmesian anti-formalism, sociological jurisprudence and legal realism were all widely influenced by German scholars Jhering, Kantorowicz and Fuchs.²⁹ CLS may be seen as the last radical resumption of this criticism. Of course, “Law as a Science”, as propagated by Langdell, in many ways differed significantly from its continental counterpart, particularly by borrowing more strongly from natural sciences such as botany and zoology.³⁰ But the similarities (and the reciprocal character of these approaches) may pave a way for applying Kennedy’s critique of Langdellian education to German discourses.³¹ Langdell’s grandsons who fought his heritage of “scientific” and autonomous legal reasoning, of law as an autonomous “science” and body of coherent principles, have been unsuccessful in changing the system but have pretty much prevailed in discussions on legal education, as far as including political, economic and social reasoning into legal analysis, instead of clinging to a “pure” theory of law of a kind that Pound called “mechanical jurisprudence”.³² German scholars might note, however, that for some time now, a lot has been done to

²⁷ OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

²⁸ Oliver Wendell Holmes, *Review of Langdell, A Selection of Cases on the Law of Contracts, et al.*, 14 AM. U. L. REV. 234 (1880). Holmes’s treatment is by no means an altogether negative account of Langdell’s scholarship. Attacks on Langdell regarding the case method, however, can be found in Oliver Wendell Holmes, *Book Notices*, 5 AM. U. L. REV. 539 (1871).

²⁹ See James E. Herget and Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VIRGINIA L. REV. 399 (1987).

³⁰ For an in-depth analysis see Howard Schweber, *The “Science” of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421 (1999). Naturally, here the differences between “Wissenschaft” and “Science” are significant.

³¹ An important difference, however, lies in the very contrary assessment of metaphysics in law: Germany has yet maintained what I like to call a ‘metaphysical craving’, which is widely lacking from American discourses. I have tried to further outline this thesis in Viktor Winkler, *Some Realism about Rationalism: Economic Analysis of Law in Germany*, 6 GERMAN LAW JOURNAL 1033 (2005).

³² Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). Pound, of course, stands for the *apology* of American legal formalism, too. I have tried to make a case for the ‘formalist’ Pound in Viktor Winkler, *The Great Protector. Roscoe Pound (1870-1964) zum 40. Todestag*, 24 NEWSLETTER OF THE GERMAN-AMERICAN LAWYERS-ASSOCIATION 104 (2004). Also see the author’s *In Memoriam Roscoe Pound*, 13 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 105 (2005).

rehabilitate Langdell as a historical figure.³³ In recent years it was Bruce Kimball who made considerable efforts to defend Langdell against his prodigal grandsons.³⁴

German readers, however, might also consider Kennedy's proximity to "German" legal thinking. Putting "German" in quotation marks here seems more apt than ever, of course, since the general connection of CLS to the Frankfurt School of Philosophy—a connection that has been noted many times³⁵—is one to a group of thinkers that have been persecuted and expelled by Germans. My point here is merely that the theory transfer that took place led to an eminently theoretical approach to law that potentially interfered with the experiential approach in American legal scholarship. CLS has not only been criticized for its "Law as Politics" concept but also for its theory-laden jurisprudence, allegedly excluding the "life of the law". Thus it is important to note for the German reader that a different "German" connection with Kennedy's book places Kennedy onto the other side of the debate on "logic" and "experience".³⁶

F. Time For Something New Here, Too

What seems to me the most important learning experience for German readers, however, is independent of Langdell and his controversial legacy. Struggling with this legacy has indeed produced numerous bitter assessments of law school education in the US, with Kennedy's book at first sight being a part of this disenchantment and repudiation. Here, too, it is Ivy League education that has been

³³ See Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Antiformalism in American Legal Theory*, 5 Vermont Law Rev. 1 (1980), and more in-depth Burlette Carter, *Reconstructing Langdell*, 32 Georgia Law Review 81 (1997).

³⁴ See particularly Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906-2000s*, 22 Law & Hist. Rev. 277 (2004), as well as *Young Christopher Langdell: The Formation of an Educational Reformer 1826-1854*, 52 Journal of Legal Education 189 (2002), "Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law": *The Inception of Case Method Teaching in the Classrooms of the Early C. C. Langdell, 1870-1883*, 17 Law & Hist. Rev. 57 (1999).

³⁵ For the many other influences (French (post)structuralism, existentialism, feminism, left Weberianism etc.) see Günter Frankenberg, *Down by Law: Irony, Seriousness, and Reason*, 83 Northwestern University Law Review 360 (1988). A case for "returning" to the Frankfurt school roots was made by Jason Whitehead, *From Criticism to Critique: Preserving the Radical Potential of Critical Legal Studies Through a Re-examination of Frankfurt School Critical Theory*, 26 Florida State University Law Review 701 (1999).

³⁶ See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992) (blaming today's law schools for too much theory and not enough "practice", especially in "quixotic" Ivy League education). See also Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 Mich. L. Rev. 2191 (1993).

attacked, with Harvard Law School bearing the brunt of criticism, starting with John Jay Osborne's autobiographical classic published in 1971, *The Paper Chase*³⁷, introducing the fictional character of frightening super-father-figure Professor Kingsfield, and appearing the year after Kennedy's law school graduation from Yale. Having been turned into an Academy-award-winning movie in 1973, Osborne's entertaining piece has had a lasting influence on the (slightly negative) popular image of legal education in the United States. But whether one reads Scott Turows bestseller, a tale of woe from his first law school semester,³⁸ Joel Seligman's milder, more sober critique of the curriculum, the admission process and faculty promotion³⁹ or Richard Kahlenberg's indictment of turning idealist students into greedy *corporate lawyers*⁴⁰, the reader will note missing from all of them is what Kennedy's book has and what is not possible without "'68". It is a sensitivity for subtle power relations and the conviction of both the right and the ability of resisting them. For that, the young should dare to be thankful to the "old '60s persons" (no bow required, of course). Because *this* impetus has *not* been outdated in four decades – particularly not within legal education, and particularly not in Germany. Do we not have a system that teaches law students to be powerless against the lack of self-determination (regarding timing, organisation of assigned work, rebel against teachers etc.)? Do law students, while in the state exam period, not experience the system as one that obliges teachers to, as John Lennon said, "smile as they kill"? Is there no system of commercial preparatory courses reproducing nothing but social conformity?⁴¹ Does German legal education really provide space for some unadapted, unprecedented, "weird" thinking, too?⁴² Are not the young still "highly dependent (...) of the benevolence of the old"⁴³? Is the academic offspring really always being more than "little darlings" of their patrons, trained "to savor crumbs, while picking from the air the indications of the master's

³⁷ Osborn graduated from Harvard Law School in 1970.

³⁸ ONE L. THE TURBULENT TRUE STORY OF A FIRST YEAR AT HARVARD LAW SCHOOL (1977) [HLS class of '78].

³⁹ THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL (1978) [HLS class of '74].

⁴⁰ Kahlenberg, *supra*, note 20. [HLS class of '89].

⁴¹ Klaus-Henning Hansen, Mario Nitsche, and Manfred Walther, *Repetitorbesuch als Strategie sozialer Anpassung*, 4 ZEITSCHRIFT FÜR SOZIOLOGIE 234 (1975).

⁴² "[T]he health of any (...) law school rests in departure from normality and deadly sanity. Freak persons and freak policies are needed." (Karl N. Llewellyn, *On What Is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 651 [1935]).

⁴³ Michael Stolleis, *Das Zögern beim Blick in den Spiegel, Die deutsche Rechtswissenschaft nach 1933 und nach 1945 in 1 NATIONALSOZIALISMUS IN DEN KULTURWISSENSCHAFTEN* 11, 29 (Hartmut Lehmann & Otto Gerhard Oexle eds., 2004) (referring to the first years after 1945).

mood that can mean the difference between a good day and misery" (77), coined by the demands of an academic career "too vague to master except by a commitment to please at any cost"? Such questions should be posed at the very least. But would they be heard? Today's law students do not suffer under oppressive hierarchies but fear not to be let into them. Perhaps they do so only because they are not asked such questions any more. So this is about role-models, too. After all, who teaches today that "unrest is our first civic duty"?⁴⁴ Kennedy himself concludes his epilogue from 2004 by calling for a new movement at law schools: "It's time for something new here, too" (221). He believes firmly in the arrival of this new wave: "It seems as certain as anything can ever be that the time of analysis and protest will come around again" (7). Of course one can ask, "But against whom, and to what end?" And then that's that. As an instructor looking at today's first-year law students I feel tempted to pose a different question: have we totally forgotten how to be rebellious?

⁴⁴ RUDOLF WIETHÖLTER, RECHTSWISSENSCHAFT 9 (1968). Translation by author.