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Revisiting a Classic: Duncan Kennedy's Legal Education and the Reproduction of Hierarchy The Ghost in the Law School: How Duncan Kennedy Caught the Hierarchy Zeitgeist but Missed the Point

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The Ghost in the Law School: How Duncan Kennedy Caught the Hierarchy Zeitgeist but Missed the Point

Steve Sheppard

Twenty years ago Duncan Kennedy quietly self-published his manifesto *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System.* The quiet did not last long and, in the years since, Kennedy's polemic has been a persistent lightning rod of not just crit lit, but law school lit generally. Decades later, we are still appraising Kennedy's work, whether with applause or catcalls.

Polemics might seem easy to write, but the truth is that they are hard work. A polemic is no mere exercise of passion. It must be an argument against an orthodoxy.[1] As we who learned law in the crit-laden 1980s should say, we cannot just trash; we must also map. *A Polemic Against the System* does both in captivating style. The purpose of the present article is to explore one source of that captivation, the notion of hierarchy Kennedy tapped, and then to assess the conclusions drawn from it—his call for active resistance to hierarchy.

Kennedy's argument is well known, and a symposium considering the manifesto is hardly the place for a long-winded recitation. Still, a brief summary will help those readers who haven't read the other symposium pieces in this issue or the lovely commemorative edition with critiques from NYU Press, but are just hitting this essay through some mischance of a computer search engine. The rest of you might as well just skip (the short) part I and go to part II, where the path of Kennedy's law is less heavily trod. There we encounter the background to the polemic, the tools for the assault, by considering the state of the theory of hierarchies, particularly at the time Kennedy wrote.

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1. The notion of the polemic as a device in rhetoric is ancient, most closely associated with the Socratic school of Megara founded by Euclid, known as Eristics (and sometimes called the Megarians). The Eristics synthesized Eleatic metaphysics with Socratic principles, supporting a claim that there is no division between the actual and the possible, and so the good is the only form of being. See James Mark Baldwin, Dictionary of Philosophy and Psychology 496 (New York, 1901). The second edition of the *Oxford English Dictionary* supplies an example of the earliest English usage of *polemic* apropos of Kennedy's purposes. "Unhappy we, amidst our many and diverse contentions, furious polemicks, endless variances, . . . debates and quarrels!" William Drummond of Hawthornden, Irene, a Remonstrance for Concord Amongst His Majesty's Subjects (1638).

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There we find a domain of hierarchical theory grown suddenly not only rich but also famous at just the time Kennedy tapped into it.

From this domain is grounded, in part III, a different argument of hierarchy, one that accepts Kennedy's most trenchant observations of the injustice of the hierarchies of the law but reaches the opposite conclusion, no matter how unfashionable. A law student who would pursue justice need not reject the hierarchies of the law. A law student who would pursue justice must—and can—conquer the hierarchies of the law.

I. The Polemic: Law School as Breeder of Hierarchy

The essence of Kennedy's polemic resounds in his opening salvo. His essay describes "the ways in which legal education contributes to the reproduction of illegitimate hierarchy in the bar and in society" as well as ways students and teachers can become part of a "left activist practice of social transformation." He hopes students as well as professors will reject what they learn about law (other than its most basic skills). What teachers teach about the law and lawyering is biased nonsense. The only valid response is to destroy these hierarchies.[2] Thus Kennedy's call: "Resist!"

The hierarchies Kennedy categorizes have entered the lore of the law. He presents at least four hierarchies within law schools, and four more, nurtured in the law schools but manifested in the legal profession and the law itself.

A. Kennedy's Hierarchies

Each of Kennedy's hierarchies exhibits four essential features, three of which he identifies, and one of which he implies. The implication is that each hierarchy exists in some discernible organization—some unit or relationship that makes it distinct from others (such as a unit comprising a lawyer and client, or a single law firm, or the bar as a whole, or the profession as it regards its clients or as it regards society). Each organization or relationship is hierarchical, and each hierarchy exists either in an organic unit of people or among people in specific relationships. Kennedy describes three aspects of all of his hierarchies. First, each organization differentiates various roles, with specializations allocated to each role. There is an unequal distribution of rewards among roles, with shares better for some than others. Second, each hierarchy is located within a cultural framework that gives significance to the various roles and rewards. And third, hierarchies are functionally related, incorporating smaller hierarchies within larger and sharing certain values and rewards among one another (42–43).[3]

2. Duncan Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic Against the System (A Critical Edition) i–ii (New York, 2004). Hereafter page references will be in parentheses in the text.

3. Kennedy goes further in his theory of hierarchies, depicting them not as pyramids but as diamond shapes, with their population greatest in the middle rather than the bottom. Any given hierarchy has variances in tastes, capacities, and values among people in the same stratum. Hierarchies are organized in small operational cells, each crossing various strata of the larger hierarchy, and each cell mirroring the larger hierarchy in organization. The cells are coherently and analogously organized, and the whole is organized complexly and fundamentally supported by the threat of violence to support its ideology (84–97).

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It helps in reading Kennedy's theory to know of his caveats from the outset. In chapter 7 Kennedy notes that one of the reasons he likes "hierarchy" is that it is a vague concept, open to great theoretical play but useless in "hard-edged theory." That vagueness brings problems, though, embracing some relationships that are evil, some that are not, and some that are ambiguous. Kennedy does not believe that hierarchy is the root of all evil.[4] No matter the impression one is given throughout the first half of the book, as he develops it, Kennedy is *not* opposed to all hierarchies, just illegitimate hierarchies, particularly the legal hierarchy as it exists (79–81).

B. Law Schools and Hierarchy

The first third of the polemic is a series of case studies, or at least Kennedy's observations on cases. The law schools, the faculty, the faculty and students, and the students themselves form the hierarchies of legal education.

A hierarchy ranks the schools, with some schools more powerful and influential, wealthier, and more desirable than others. That hierarchy "firmly establishes that law schools exist on a scale of rank," admittedly ambiguous as to some but clearly rejecting most from the elite (35).

The law professors' hierarchy among themselves is at first subtle but still quite influential. In a ranking that might surprise some professors, Kennedy describes the ranking with "rigorous" and less policy-oriented professors, whose teaching is valuable on the bar exam, more popular and valuable than the "softies" and "mushy centrists" (4–7).

The hierarchy most fundamental, though, is of faculty over students. This hierarchy, in which the students accept without question the teachers' views as truth, makes possible many others (7–13).

The dominance of the faculty over the students enables the creation of a hierarchy among the law school's student body, based on grades and other merit badges, especially law review membership (27, 58–71). This student hierarchy is created and maintained by brainwashing far beyond the effects of grades alone. Students, as Kennedy sees them, are both indoctrinated to the internal hierarchies of the law school and prepared for the external hierarchies of the law, through the personal modeling of faculty obsessed with their own status and fostering a culture of deference and acceptance (59–64) that is furthered by the students themselves (61–69, 73–75). The professorial oligarchs foist as essential education what is an oblique exposure to a formal curriculum of legal rules and reasoning, shot through with an ideological inculcation of arbitrarily "right" and "wrong" answers that may be identified only through acceptance of misleading professorial opinion (27–28, 47–49). These answers must be parroted in a scheme of examinations that are useless for any purposes other than reinforcing hierarchical values: those students most ably embracing the teachers' opinions are the most rewarded (27–28).

4. His example of an evil not seemingly based on hierarchy is sexual jealousy (81). But most animal behaviorists argue that access to sex is often determined by hierarchies. See, e.g., Frans de Waal, Chimpanzee Politics: Power and Sex Among Apes (Baltimore, 1998). Are we really so different?

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Further, the curriculum fails to give any real skills in legal practice, and so schools only prepare students to enter one form of practice, the large institutions (14–32).

C. The Hierarchies of the Law

Kennedy sees that hierarchies within legal education are more than invidious in themselves. They embrace and enable a range of hierarchies beyond their walls, and ideologies essential to professional hierarchies—the agenda of center-liberal laws; the best and worst forms of professional fulfillment; the acceptable and unacceptable methods of professional behavior. All are enabled by the arbitrary choices of faculty and by the manipulation of students to accept them while still in law school.[5]

The agenda of center-liberal laws arises from the errors of legal education. These errors—the ideas that cases have a right analysis or agreement of criticism, that the important courses are the hard courses, not the playground courses of legal philosophy or legal history, or clinical legal education, even the idea that contract law is distinct in the curriculum from environmental law—"these errors have a bias in favor of the central-liberal program" (21). This bias is, for Kennedy, the apparently inevitable result of hierarchy and domination "which is implicit in the adoption of rules of property, contract, and tort" appearing to be the result of legal reasoning, rather than politics and economics. This resulting program is legal education supporting a "limited reform of the market economy and pro forma gestures toward racial and sexual equality." The message is that "the system is 'OK,'" with all debate limited to only further change and improvement, rather than any fundamental criticism of the system of property, or human equality, or the perversion of human rights into a tame discourse of acceptance of an inegalitarian world (17–28).

The best and worst forms of professional fulfillment are both heralded and channeled according to the hierarchy the school establishes among the students. The best students, particularly those selected from the best schools, are sent to the best jobs; the worst students, and those who went to the worst schools, are sent to the worst jobs. As Kennedy sees it, the process both reinforces the strengths and downplays the weaknesses of the law school curriculum, by hyping the benefits of a career in a large firm and ignoring the benefits of a career in neighborhood law practice or legal services (29). But best and worst are ranked through the industry of legal education not only by how a student did in law school, but also by social background and by law school (35–37).

Thus, among the elect, the most exalted beneficiaries of legal education are prepared both professionally and emotionally only for one of the large

5. Kennedy describes three means by which law schools contribute to legal hierarchy (or to use my word, the "enablement") in chapters 4 and 5. Law schools train students to accept hierarchies in school that mirror those of the profession, indoctrinate students to a legal ideology, and rank students into groups for professional recruitment. That ranking of students he calls "structuring," and he goes to some rather interesting extremes to show that it is ultimately based on violence (55–57).

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firms, which will provide the training omitted from the law school curriculum, as well as provide security in return for obedience (30–32). These firms will offer a position "providing marginally important services to businesses in their dealings among themselves and with consumers and stray victims" (33–34). Firms, though, are subject to a hierarchy, within which each is "ranked just as law schools are." The lawyers in the best firms accrue the most power, money, and prestige, and they appear to have the top clients, courts, and offices, and they do the most challenging work (36). So they "lord it over those below them, and so forth to the bottom" (35).

The lesser strata of legal employment follow. The jobs remaining after the firms have skimmed the cream are either plaintiff's work or "arranging the private affairs" of the middle or upper classes (presumably wills and trusts) (34).

The acceptable and unacceptable methods of professional behavior taught to students commenced, for Kennedy, in grade school.[6] Since then, education has badgered students for their failings, preparing them to accept dependence on large institutions, which will give them tasks limited enough for their paltry talents, in return for loyalty to education's own hierarchies: of senior over junior staff (31, 49),[7] judges over lawyers (38–39), lawyers over clients (40). In exchange for money and security, the lawyer will surrender control over work and affections, agreeing "to show the appropriate form of deference to those above . . . and condescension to those below" (31). This work itself is "drudge work" solving puzzles in a macho battle of wills in which winning is all. The only fulfillment comes in achieving the goals of other people. And although Kennedy admits that the lawyer also exercises skill, makes money, and gains the respect of others, he reminds us that this is far less than any dream of pursuing a career of unambiguous goodness (34–35).[8]

Most fundamental is the final hierarchy, the social arrangement in which lawyers are treated as "the elite of the nation." Such a perception is based on not even a mote of service to the public or to the truth, boot-strapped by lawyers out of all proportion into a "massive edifice of prestige and material over-reward" (41).

D. Kennedy's Resistance

It might go without saying at this stage that Kennedy thinks legal hierarchies are bad things. It is essential to his project to see why he thinks so. It is not just that the contingent valuations of organizations are irrational or self-

6. This might exaggerate his point, but only slightly. He says, "Law school, as an extension of the educational system as a whole, teaches students they are weak, lazy, incompetent, and insecure" (31).

7. The internal hierarchy of partners over associates, over secretaries, over messengers is described at 38–39.

8. Having set out this dystopian view of law practice, Kennedy admits to its slight exaggeration, even allowing that a student who is determined to find a meaningful job, by which he means one that is politically progressive, can indeed do so, so long as the student is willing to relocate and to wait. He also admits that some lawyers, apparently in the most pernicious roles in the hierarchy writ large, have meaningful jobs that benefit others (43–44).

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serving or that they perpetuate other injustices in society (78). The legal hierarchy he has encountered is worse: it is an unneccesary evil (80).

Kennedy argues more deeply that hierarchy itself is to be hated, even in any aspect that is necessary owing to the divisions of labor in a complex task. "We should attack the spirit of hierarchy as it manifests itself in ideology and in all the details of expressive behavior" he has identified (79). As we have seen, Kennedy realizes that "hierarchy" is vague, including some relationships that are perverse and some that are not, and some that are ambiguous. So he is in fact not against all possible hierarchies, just the legal hierarchy as it exists. This distinction leads him to his definition of the best students (and presumably the best lawyers and professors).

Kennedy's choice is a radical, defined as one who is not against all hierarchy, "since sometimes we accept it," nor against only illegitimate hierarchies, "since we're against that." The radical is one who wants immediately "to dismantle existing structures of hierarchy that look evil" and subvert "the forces that keep them in place" (61). The radical should attempt to transform the hierarchy "cell by cell, until we reach the critical point at which the interconnectedness of the system makes it possible to develop it as a whole toward a new unity" (98). The resistance necessary to transform the unity is therefore appropriate everywhere from welfare offices to law school classrooms to dinner parties. This resistance, motivated not only by the traditional liberal desire to help the less fortunate but also by the solidarity with others maimed by hierarchies' alienation from their inherent powers, is best served (in the absence of a leftist mass movement) by organizing "a left intelligentsia in the workplace" to attack essentialist and generational and meritocratic stratifications and the discipline necessary to enforce such hierarchy (101–02).

Such rebellions in law school ought to begin with Kennedy's left (not leftist) study group. These groups are to inflame their members to act up in authoritarian classes, to demand curricular reforms, and to engage in utopian thinking about an ideal form of social arrangement that puts an end to the hidden ideology of institutions (108–12, 118).[9] In wonderful fashion Kennedy argues that leadership in such study groups is not an office but a function of task, which can be rotated among members and diffused, although "when someone is doing something well and no one feels they threaten to turn their performance into illegitimate power, it makes sense to reap the benefit of [that person's] expertise" (117).

E. The Anticlimax

Rereading Kennedy's polemic for this article, I was struck anew at the power of its argument compared to the restraint of its conclusions. Again and again, the hierarchies of the law are mapped and trashed, but the strategy for their demise is jarringly pragmatic. The romance of the prose lambasting the

9. The tactics for forming a left study group and its functions are dealt with throughout chapter 9; a utopian proposal for law schools is presented at 120–23.

unearned rewards of the hierarchs threatens to overwhelm the calls for staff equality (127). There are careful limitations on whom the students are to oppose, not all faculty but specially those who use sexist jokes or abuse the Socratic dialog (109–10). This is precision rebellion against specific targets meaningful to Kennedy's audience and reachable by their action.

The impression formed by the book as a whole is, though, much closer to the romantic sweep of the initial condemnations of the legal hierarchy than to the careful roadmap to rebellion at its end. The first six chapters are rife with vigorous attacks on hierarchies within hierarchies and their unearned and irrational benefits, which thwart the potential for more radical reforms of the underlying social inequity. Given even the caveats and qualifications that peek out from the ends of chapters, it is to answer the call of these attacks that Kennedy calls us to examine the power of the hierarchy.

II. Hierarchy: From Culture in Theory to Theory in Culture

The concept of hierarchy is ancient, although the word is ecclesiastical. The concept of a system of higher orders is already at least as old as Aristotelian biology and politics.[10] The word *hierarchia* (ιεραρχία), from the word for bishop (ἀρχή), was used initially to describe the office of bishops and later the pope.[11] The first employment of *hierarchy* in its current sense appears to be in the fifth-century writings of the pseudo-Dionysius, who built on Jewish traditions to present the angels in a sacred arrangement of order and ranks, according to perfection and nearness to God, which he then applied to the organization of the church.[12] It entered English usage early, used by John Wycliffe in the fourteenth century to describe the angelic bureaucracy.[13]

The theological implications of hierarchy led, quite directly, to a biological fascination with it, inspiring the great taxonomy of Linnaeus.[14] With post-Darwinian biology, a new form of hierarchy, the ecosystem, has become the

10. Aristotle presented numerous theories that are hierarchical in their structure, none so profound for the nature of organization as his hierarchy for the organism. His logos, or psyche, of all living entities consisted of six functions—nutrition, perception, desire, locomotion, imagery, and reason—each of which is a predicate for the others. (In this, Aristotle's theory presages Maslow's twentieth-century "hierarchy of needs.") See Aristotle, *On the Soul,* and chapters 1 and 14 of the *Politics,* which in turn support hierarchies of beings and of goods.

11. The word *hierarcha* or *hierarchia* is not found in classic texts. It appears to be prominently found in ecclesiastical texts in the tenth century to describe the papal court. See Leo F. Stelten, Dictionary of Ecclesiastical Latin 308 *q.v.* in Appendix (Peabody, 1995).

12. See The Celestial Hierarchy and The Ecclesiastical Hierarchy *in* Pseudo-Dionysius the Areopagite, The Complete Works, trans. Colm Luibheid (New York, 1987). The pseudo-Dionysius is an obvious influence on Aquinas's hierarchies of angels. See Thomas Aquinas, 1 Summa Theologica 528–39 (part I, question 108), trans. English Dominican Fathers (New York, 1948).

13. See the pseudo-Dionysian reference of the father of Lollardry, John Wycliffe, in Sermones II:338 *in* The English Works of John Wyclif, ed. F. D. Matthew (London, 1880). "[Th]er ben [th]ree ierarchies," representing the three orders of angels in the psuedo-Dionysus.

14. The theological and biological overlap of these conceptions has been long debated through the metaphor of the great chain of being. See Arthur O. Lovejoy, The Great Chain of Being: A Study of the History of an Idea (New York, 1965).

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conceptual framework of the field.[15] Other fields of the sciences, particularly chemistry and thermodynamics, have also embraced hierarchy as a fundamental scheme of organization.[16]

A. Theories of Hierarchies in Human Cultures

The notion of hierarchy in social science was famously established in the critiques of Hegel's theory of the hierarchical bureaucracy made by Karl Marx, who argued that the domination of the hierarchy substitutes for the humanity of the civil servant.[17] That argument fits well with the broader thrust of Marx's critique, that capitalists' parasitism of workers' labor is the fundamental evil in society.[18]

Yet the Marxian argument that hierarchy is illegitimate is countered in social science by Max Weber's observations of hierarchy as essential, particularly in bureaucracy. Weber asserts that hierarchy is the only efficient means for state administration. A bureaucracy's "principles of office hierarchy and of levels of graded authority mean a firmly ordered system of super- and subordination in which there is a supervision of the lower offices by the higher ones."[19] Therefore, a bureaucracy is the most efficient means of rational management of a state.[20]

The study of human hierarchies developed rapidly in the twentieth century, particularly in its second half. The academic studies in many disciplines—particularly anthropology, sociology, political science, and manage-

15. The ecological literature of hierarchies is vast and growing. See, e.g., T. F. H. Allen & Thomas B. Starr, Hierarchy: Perspectives for Ecological Complexity (Chicago, 1982). A wonderful example of this literature is Paul Colinvaux, Why Big Fierce Animals Are Rare: An Ecologist's Perspective (Princeton, 1978).

16. Hierarchy is only one form of organization of physical systems, others being heterarchy and, of course, chaos. The fundamental question is how chaotic systems become stable, and hierarchy is frequently the result. Among the most influential writings in this often contested field is Grégoire Nicolis & Ilya Prigogine, Self-Organization in Nonequilibrium Systems: From Dissipative Structures to Order Through Fluctuations (New York, 1977), discussed in Valerie Ahl & T. F. H. Allen, Hierarchy Theory (New York, 1996).

17. Karl Marx, Critique of Hegel's "Philosophy of Right" 51–54, trans. Annette Jolin & Joseph O'Malley (critiquing Hegel §§ 254–56) (Cambridge, 1970). The most complete discussion of Marx's view of hierarchy in bureaucracy appears to be Pierre Naville, De L'aliénation à la jouissance, la genèse de la sociologie du travail chez Marx et Engels (Paris, 1957), *cited in* Nicos P. Mouzelis, Organisation and Bureaucracy: An Analysis of Modern Theories 9 n.183 (New York, 1967).

18. Karl Marx, Capital: A Critique of Political Economy, trans. Ben Fowkes (New York, 1992).

19. Max Weber, Bureaucracy, *in* From Max Weber: Essays in Sociology 197, eds. & trans. H. H. Gerth & C. Wright Mills (New York, 1946).

20. See, e.g., *id.* at 223. Weber's discussion of bureaucracy is a theme in many of his writings. See particularly his essays Domination and Political Communities, *in* Max Weber on Law in Economy and Society, ed. Max Rheinstein, trans. Edward Shils & Max Rheinstein, 334 (New York, 1954). Weber was not alone in reaching these conclusions; Durkheim did so more critically. See Emile Durkheim, Individualism and the Intellectuals, *in* Durkheim, On Morality and Society: Selected Writings, ed. Robert N. Bellah (Chicago, 1973); Emile Durkheim, The Division of Labour in Society, trans. G. Simpson (1893) (Basingstoke, 1984).

ment—tend to divide along the fault lines between Marx and Weber.[21] Some authors emphasize the efficiency and inevitability of hierarchy, and others merely accept them as facts of organizational life and describe the usual—or attempt to model the best—behaviors within a hierarchy. Still others emphasize the alienation and injustice it can cause.

The model of hierarchy as a tool of corporate efficiency is dear to the heart of industrial management. As well as management studies in the tradition of time-and-motion efficiency studies, anthropologists have added theoretical dimensions of the relationship of elites to non-elite.[22] One of the most frequent assertions in the field is that leaders are always, or nearly always, inclined to take a greater proportion of rewards than they will offer to followers.[23] Many studies therefore take hierarchy for granted but then attempt to model best behaviors within it, such as an ideal distribution of rewards for those at the top of the pyramid.[24]

Perhaps the most influential book of theory to emphasize the illegitimacy of hierarchy was Louis Dumont's *Homo Hierarchicus*.[25] Dumont, a French structural sociologist, studied the caste system of India, comparing Indian cultural commitments to hierarchical strata to American commitments to equality. He contrasted "natural hierarchies," in which the individual's identity was wholly dependent on hierarchical value, with "rational societies" in which the individual has mobility in society as a whole, albeit subject to commands in contingent hierarchical situations. Although Dumont was more concerned with distinguishing the caste system, effectively a hierarchy in which no mobility is possible, from systems in which value is more malleable, he still recognized the "iron law" of Talcott Parsons and noted every society is a system of systems, some of which, such as the then-prevalent American discrimination based on race, are iniquitous.[26]

Through the 1960s to the present, the theoretical literature of hierarchy has grown steadily wider, both as earlier writings were criticized and refined,[27] and as new models were developed and applied to more diverse populations

21. Certain fields in social science use the concept of hierarchy in ways that do not reflect the Marx/Weber dichotomy, using hierarchy as an organizing device in a manner more akin to the physical or biological sciences. One example of this is the hierarchy of grammar, associated with a then-young Noam Chomsky. See Noam Chomsky, Three Models for the Description of Language, 2 IRE Transactions on Information Theory 113 (1956).

22. See, e.g., Arnold S. Tennenbaum et al., Hierarchy in Organizations (San Fransisco, 1974).

23. See, e.g., Robert Michels, Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy, trans. Eden Paul & Cedar Paul (New York, 1959); Melvin M. Tumin, Social Stratification, Forms and Functions of Inequality (Englewood Cliffs, 1969).

24. See, e.g., Herbert A. Simon, The Compensation of Executives, 20 Sociometry 30 (1957).

25. Homo Hierarchicus: The Caste System and Its Implications, trans. Mike Sainsbury, 2d rev. ed. (Chicago, 1980).

26. *Id.* at 235–59.

27. See, e.g., Chris Smaje, Natural Hierarchies: The Historical Sociology of Race and Caste (Malden, 2000).

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for study.[28] Interdisciplinary models proliferated, in which particularly biological (especially ecological) models of hierarchy have been increasingly considered interchangeably with models from human culture.[29] And while the law is still concerned with its effects on social hierarchy,[30] business marches onward.[31]

B. Theories of Hierarchies in American Pop Culture

In 1967 flakes from the dry tomes of social science were brought into the public eye through an unusual book by Arthur Koestler, a Hungarian living in England. Koestler had achieved international recognition for his 1940 novel *Darkness at Noon,* which exposed the evils of Stalinist Russia. A quarter-century later he wrote *The Ghost in the Machine,*[32] a book that achieved a mass audience outside the academy. In it Koestler presented and developed the biological and linguistic evidence for the inevitability of hierarchy as an organizing principle, as well as a variety of arguments from human experience. He coined the term *holon* for the Janus-like place of a single unit in a hierarchy, in which the holon has both singular and corporate aspects at the same time. Most compellingly, he depicted ways in which corrupt hierarchies in human society had developed technology far beyond the moral compass of individuals to manage its dangers. He saw the only hope for mankind in the potential for altruism by the members of hierarchies to allow for a regeneration of their holons, in essence seeking to improve the lot of both the individual and the hierarchy.[33]

In the 1980s, even as the cultural influence of Koestler's book might have begun to fade, at least outside the precincts of university sociology departments, a sudden surge in awareness of his theories came from a most unpredictable source: rock music. The Police, a British trio of some fame, released *The Ghost in the Machine,* their fourth album, in 1981. It comprised nine songs with lyrics drawn largely from Koestler's work, expressed in dark and evocative melodies against tense, sometimes threatening backgrounds.[34] The album

28. See, e.g., the writings collected in Hierarchical Structures: Proceedings, ed. Lancelot L. Whyte (New York, 1969), and in Hierarchy Theory: The Challenge of Complex Systems, ed. Howard H. Pattee (New York, 1973).

29. T. F. H. Allen & Thomas W. Hoekstra, Toward a Unified Ecology (New York, 1992).

30. See J. M. Balkin, The Constitution of Status, 106 Yale L.J. 2313 (1997).

31. See, e.g., Jan W. Rivkin & Nicholaj Siggelkow, Balancing Search and Stability: Interdependencies Among Elements of Organizational Design (Boston, 2003); Oliver D. Hart, On the Design of Hierarchies: Coordination Versus Specialization (Olin Foundation Paper, Cambridge, Mass.: Harvard Law School, 1999).

32. Chicago, 1967. The title riffed on a famous line of Gilbert Ryle's on the Cartesian mind-body distinction, that to separate them was "a dogma of a Ghost in a Machine." The Concept of Mind 23 (New York, 1949).

33. *The Ghost in the Machine* is written with great style, and it rewards careful reading. To quickly locate these and other component arguments, Koestler did the reader a rare service by a modern author, in outlining his arguments. See *id.* at 341–48.

34. Not that every song did. "Every Little Thing She Does Is Magic" was a nice pop number destined to top the singles chart.

went platinum in three months.[35] While the lyrics sometimes consisted of mantra-like repetition, their presentation of Koestler's central themes—of hierarchy as a crippling danger, of the ineffectiveness of political solutions, of the risks of hierarchically managed technology—was hard to miss.[36]

C. Kennedy and the Zeitgeist in 1983

Kennedy's book—finished in 1983, privately printed, and distributed through the Harvard Coop and from hand to hand—captured nicely the spirit of the moment. Written for highly educated students, many of whose readings had included assignments and research in the social sciences, and for faculty who were deeply invested in the theory of social science, Kennedy's argument about hierarchy tacitly embraced much of the core of the literature, easily placing itself within a well-established field. Moreover, his obvious use of the Marxist criticism of hierarchy resonated well with his underlying agenda, to criticize the superstructures of the law.

Kennedy's genius was to seize at the same time on one of the few concepts of social theory that would be already seen by students, at that moment, as relevant, important, and dangerous. The authority of cultural icons, coupled with the power of the mass market, had made a fertile field in which Kennedy planted a well-timed seed. In this light, it is little wonder that his polemic found such wide acceptance with such a theoretical argument.

III. Resistance: Missing the Point of Hierarchy in Law and Society

Despite the heat of Kennedy's premises, his conclusions are tepid in comparison. One can hardly argue against the idea that students are enmeshed in hierarchy, that law schools prepare them to become lawyers, or that lawyers work in a legal hierarchy, with some judges at the top, and lawyers and scholars of various stripes scaling down. Nor can anyone doubt that this hierarchy is enmeshed in the hierarchies of society as a whole. Indeed, it is difficult to reject the view that some of the powerful abuse their power in all of these hierarchies, as when law teachers tell sexist jokes in class or law firm partners abuse associates' talents. And one would be foolish not to see that the law often supports unjust arrangements in society. Yet the conclusion that Kennedy draws from this—his solution to resist, even in merely attacking

35. See the chronology at <http://www.rockonthenet.com/artists-p/police.htm>.

36. The first track, "Spirits in the Material World," opens with the following, by Sting:

> There is no political solution
> To our troubled evolution
> Have no faith in constitution
> There is no bloody revolution
> Refrain [repeat four times]:
> We are spirits in the material world

The lyrics, all by Sting or Andy Summers, of "Invisible Sun," "Demolition Man," "Too Much Information," "Rehumanize Yourself," "One World (Not Three)," and "Omegaman" similarly follow Koestlerian lines.

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those hierarchies that "feel" illegitimate—is much weaker than these premises might support.[37]

It might be that one source of this weakness derives from his comparatively unexamined implication that a leftist ethic is either the best answer to illegitimate hierarchy or, at least, the only possibly effective answer. That would be a pat, if political, objection, but it is probably irrelevant.

A more interesting question is whether Kennedy could more sufficiently balance his Marxist view of hierarchical criticism with caveats of Weberian acceptance. If some forms of hierarchy are inevitable, what work must a student or lawyer do to distinguish those that are good from those that are illegitimate? Are feelings and appearance really sufficient?

With that question, another look at Kennedy's depiction of the fundamental hierarchies of the law is in order. In drawing his dystopian picture of the law schools, the practice of law, and the society enabled by lawyers, Kennedy admittedly skewed the perspective. But one skew he never admitted: his view that the law taught in law schools, indeed the law itself, is nothing more than simple rules and techniques cloaked in policies chosen arbitrarily by law professors.

If the law is more than that, if it is indeed a hierarchy in which membership requires a dedication to particular ethics and obligations, then criticism of that hierarchy must take two forms that Kennedy did not really confront: what those ethics and obligations are, and how well the hierarchy instills their respect and compliance. In other words, if the enterprise of the law requires an aspect of justice, or if there is an inner logic of protecting the corporate concerns of lawyers, then Kennedy's critique is misdirected.

To be sure, he feels the tug in this direction, but he rejects it as naive. In his first chapter, he considers two stories that a hapless student might accept on the eve of law school: in the first, the student hopes for a Brandeisian role of public service in a noble profession; in the second, the student recognizes the profession's venal servitude to "established interests" of social "dominators" but sees law as a tool of social transformation (1–3). Both stories share views of the law that could be held not only by the law student but also by many lawyers, judges, legislators, and law teachers. So why did Kennedy somehow lose the thread of that second story? What happened to the student who saw herself "as part technician, part judo expert, able to turn the tables exactly because she never lets herself be mystified by the rhetoric that is so important to other students" (2)? Kennedy lost that thread by accepting a view of legal education, of the law itself, in which everything taught in law school—except for the formal rules themselves and the argumentative techniques for manipulating them—is policy and nothing more.

37. Two arguments recently considered the significance of law both as a hierarchy in itself and as an influence on wider social hierarchies, reflecting new twists in this model. Gunther Teubner considers the first real threat to law's hierarchical authority to be the integration of competing national conceptions of law as a result of globalization. See The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy, 31 Law & Soc'y Rev. 763 (1997). Jack Balkin has argued strongly for an obligation of law to the democratic enterprise to pursue and destroy hierarchies that perpetuate cultural bias. See Balkin, *supra* note 30.

When the law is seen as a tradition that has demanded adherence to particular values, even if these values are contingent and changing, and even if they are in some degree arbitrary, then the law is more than tools for the benefit of lawyers' clientele, which perpetuate an unjust society. When law is seen from that perspective, there is room to see it as one of the few tools sufficiently powerful to effect change in the illegitimate and unjust hierarchies of society as a whole. It is precisely this power, dedicated to aspects of justice that law alone may bring to bear on social issues, that has made the legal hierarchy capable of limiting tyranny and ending slavery. The integration of women into the workplace and the ongoing transformation of culture to end discrimination are the results of transformations implemented and promoted by lawyers using the tools of law.

Which is more likely to refine the hierarchy of law and sharpen its pursuit of justice—to charge students to resist hierarchies they think illegitimate, or to charge them to promote hierarchies they can believe, with reason, promote justice in society?

Kennedy's answer is to reject the center-liberal agenda, which rests on an undue acceptance of illegitimate laws. By that reasoning, efforts by law schools and other legal institutions to promote a constructive agenda for justice must be thwarted because they imply a defense of outmoded and unfair conceptions of property or contract.

At its furthest extent, such a response prefers a radical rejection of the law to the employment of law as a barrier to injustices. It prefers a model of laws as arbitrary to a model of laws that bind lawyers to reasoned bases for action to which they must advise their clients. It is to prefer no ideological framework over one contingent on selection by lawyers, even if such selections would then serve as barriers to immoral or illegitimate conduct by those bound to obey the law.

At its heart, Kennedy's notion of law shears away the notion that the lawyer must serve the law before the client. By removing a substantive aspect of the rules of law, he leaves no substantive obligations for the lawyer, freeing the lawyer to do exactly what Kennedy complains most about: serve the hierarchs.

There are, of course, all too many examples of this behavior in the law already. A recent example of lawyers giving the bosses what they want is the awful specter of government lawyers advising the president and members of the cabinet that they were unconstrained by law in their treatment of foreign prisoners seized in combat or foreign occupations. Worse, they advised their governmental hierarchies to accept the least possible constraints of the law in torturing their prisoners, and advised them of tactics to thwart attempts by others to enforce the law as written.[38]

38. See Jay S. Bybee, Assistant Attorney General, Memorandum from the Office of the Assistant Attorney General, Office of Legal Counsel, to White House Counsel Alberto Gonzales, Aug. 1, 2002. Bybee concluded that the statute, 18 U.S.C. 2340, 2340A, and the Torture Convention to which the United States is a party prevent only extreme cruelty, and that "certain acts may be cruel, inhuman, or degrading, but still not produce suffering of the requisite intensity to fall within Section 2340A's proscription against torture." The memo asserts that the statute only forbids "pain equivalent in intensity to pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death." These limitations do not

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If one needs proof of Kennedy's argument of the danger of hierarchy, its holons prepared by law schools to serve unjust ends, this would be a fine exhibit, if but one in a long line that includes all too many lawyers in American and human history who have dismantled the law to serve their master's whims. Yet this was not an inevitable result of the law, and it was certainly contrary to what these lawyers might have done had they been more subordinate to a hierarchy in the law than to one in the government. Indeed these memoranda provoked outrage among the higher reaches of the legal hierarchy.[39]

The question that must then be asked is whether the lawyers who gave such counsel would probably have been better prepared to act justly (or legitimately) if they had followed Kennedy's advice, or better prepared in some other manner. The history of legal education, its ability to produce and support the lawyers who work for justice, indeed Louis Brandeis, the very example in Kennedy's allusion, suggests that mere resistance cannot achieve what a dedication to a substantive conception of the law can achieve.[40] As Paul Carrington suggested in his contribution to the Kennedy republication, the question is not whether there will be legal hierarchy but whether anyone can reproduce hierarchies of the right sort (145).

appear in the statue itself, which forbids acts "specifically intended to inflict severe physical or mental pain or suffering," including threats to do so. The memo failed to address the broader limitations that United States accepted under the treaty.

See also John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel & Robert J. Delahunty, Special Counsel, Memorandum for William Haynes II, General Counsel, Department of Defense, Jan. 9, 2002, regarding the Application of Treaties and Laws to al Quaeda and Taliban Detainees. The authors concluded that neither the War Crimes Act, 28 U.S.C. § 2441, nor the Geneva Conventions, nor the customary laws of war "bind the President or restrict the actions of the United States military." *Id.* at 2. These conclusions were based on both the express criticism of 100 years of U.S. case law and rejection of the express language of article 2 of the Geneva Convention of 1949.

Since writing these memoranda, Bybee has been made a federal judge, Haynes has been nominated for another judgeship, and Yoo has become a Berkeley law professor. Yoo defends his actions, claiming that the job of the lawyer is to provide legal options to a client without regard to their implications for morality or policy, in John Yoo, A Crucial Look at Torture Law, L.A. Times, July 6, 2004, available at <http://www.aei.org/news/filter.all,newsID.20846/news_detail.asp>. Perhaps it is obvious, but I think this is a warped and incomplete view of the role of a government lawyer.

39. See Resolution of the American Bar Association House of Delegates, Aug. 9, 2004, condemning not only torture but also "any endorsement or authorization of such measures by government lawyers, officials and agents." This resolution followed an open letter to the president from more than 100 lawyers, law teachers, and judges, condemning the memoranda of Bybee and Yoo. See Scott Higham, Law Experts Condemn U.S. Memos on Torture, Wash. Post, Aug. 5, 2004, at A4.

40. For a more detailed treatment of one model of this concept, wait for my The Moral Obligations of Legal Officials, which will, one hopes, be published in 2007.