IT COULD HAVE BEEN OTHERWISE: EMPHASISING STUDENT EMPOWERMENT (VOICE, AGENCY AND NEEDS) IN MODERN LEGAL EDUCATION

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Introduction

Richard D Kahlenberg, Harvard law student: “My hatred for Harvard Law only grew as I realised that this school didn't have to put people through this hell, that there were other, more effective teaching methods. In my own timid way, I had, as Dunc [Kennedy] urged, resisted!”

Scott Turow, Harvard law student: “It was really wrong. A teacher shouldn’t treat a student that way…It was agreed that a letter of protest would be written.”

The law students’ accounts above capture the intensity of legal education. International empirical research supports students’ stories of law school, indicating that the experience of legal education is frequently “psychologically distressing,” “hell,” alienating, competitive

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2 Scott Turow One L (G P Putman’s Sons, New York, 1977) 152.
4 Kahlenberg, above n 1, 128.
and “actually makes students sick.” This literature also depicts legal education as a far more dissatisfying experience for students who are female, homosexual or from minority ethnic groups. As Whiu explains, bicultural legal education is safer than the current dominant legal educational system for Maori law students.

Kennedy’s critique of legal education lacks an empirically grounded student voice, even though much of the discussion purports to analyse their experiences. He concedes that it is “hard” for him to “know whether [he] even understands the attitudes toward hierarchy of women and blacks, for example, or of children of working-class parents.” Despite this concession, Kennedy fails to remedy the limitations of his analysis by including students’ own voices. This essay critiques Kennedy’s analysis of legal education. Given that Kennedy is a United States law professor, I focus on the experiences of United States law students. However, as I have indicated, the international literature suggests that the experiences of law students in many other countries are similar.

My critique of Kennedy’s non-empirical discussion highlights the broader debate about the limitations of Critical Legal Studies method and, particularly, the marginal position of empirical research in many law schools. The consequence of Kennedy’s failure to include empirical evidence is that law students become “absent presences.”

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3 Ibid.
5 Ibid, 61.
6 Ibid.
8 Anne Wirtz “Whose Body Matters? Feminist Sociology and the Corporeal Turn in Sociology and Feminism” (2000) 6 Body and Society 1, 3. Kennedy’s interpretation of law students’ experiences is at the centre of his analysis (thus students are present), but the inclusion of students’ own voices is noticeably absent.
9 Ibid, 61.
10 Ibid.
12 Ibid, 61.
My point is not that Kennedy lacks authority to discuss legal education; he was a law student and he is a law professor. However, researchers question writing which is based on limited samples.  

Kennedy’s polemic creates a hierarchy in the conceptualisation of student behaviour: students either (and typically according to Kennedy) reproduce legal hierarchies, or they resist. His focus on the “passivizing” effects of hierarchical legal education, combined with the absence of students’ own voices, produces an analysis that demands resistance from students but constructs an image of students who are powerless to resist.

Inclusion of students’ voices would have revealed a more complicated picture. As Kahlenberg and Turow’s accounts above illustrate, students can, and do, resist and even write protest letters. While not denying that law students are subjected to the pacifying exploitation of legal education, subordination is not a fixed feature of law students’ subjectivities.

This essay began with students’ own voices in order to inject some empiricism into the discussion of legal education. I explore Kennedy’s critique of legal education by analysing my own, and other law students’, experiences of law school primarily through the lenses of (legal and non-legal) feminist poststructuralism and critical race theory.

Exploring students’ experiences highlights that the way law is taught is not an inevitable outcome: “it could have been otherwise,” there are “other, more effective teaching methods” that could have been, and could be, constructed as right. Such an analysis reveals that the status quo is a constructed achievement and that there are alternatives such as “bicultural” and student-centred legal education.

Aspects of Kennedy’s analysis of legal pedagogy are more convincing than his descriptive claims about law students and teachers.
Kennedy’s argument that students can do “little or nothing”19 to change legal hierarchies fits uneasily with his admonition to: “Resist!”20 By excluding student voice from his analysis, Kennedy (ironically) reproduces a central legal hierarchy whereby experience is subordinated in favour of abstract theorising.

I disrupt Kennedy’s hierarchy by placing ‘experience’ (examined from a critical poststructural perspective)21 centre-stage alongside theorising. I also take seriously Delgado’s “plea for narrative.”22 I interrupt the traditional essay structure with stories about my experiences of legal education. In keeping with critical race theorists’ use of stories, fiction, poetry and narrative,23 this essay also uses a poem to convey my message. Following feminist legal scholars and critical race theorists, I disrupt Kennedy’s hierarchy by emphasising an alternative approach where experience (examined critically), narrative, and different (often active) images of students take centre-stage alongside theorising. My narrative critiques of legal education should not be interpreted as evidence that I do not enjoy studying law.

I find law a stimulating challenge. My critiques do not mean that there are few good law school teachers.

A. “Chatterbox” Counter-Narrative

The Victoria University lecturer was at the front of the classroom. The students sat quietly in rows of seats facing the teacher. The physical layout of the room emphasised the hierarchical lecturer-student relationship. An Australian law student notes how the physical spaces of her law school accentuate hierarchies. She describes the fourteen-storey building which houses the law school as “intimidating”, “non-student friendly” and “hierarchical.”

I interrupted with questions during the lecture. My water bottle made faint cracking noises as I squeezed the bottle to sip the water. The lecturer said the drink bottle was too noisy. At the end of the class, I asked another question. The lecturer said “This is unacceptable. You’ve asked enough questions. I have a lot of material that I have to teach you. You’re too much of a chatterbox.”

Rather than pacifying me, or turning me into a “docile” law student, the experience had the opposite effect: I felt indignant. Surely there was nothing wrong with being a “chatterbox”, which I preferred to translate as ‘communicative extrovert’. I thought I was engaging in ‘Socratic dialogue’.

In the Israeli Hebrew University classroom, there was leftover challah on a table in the centre of the classroom. The circular layout of the room contrasted with the classroom at Victoria University. Rather than reflecting hierarchies, the classroom environment in Israel signified collaborative teacher-student interaction.

24 Turow, Kahlenberg and Kimes (all of whom have critiqued their legal educations) make similar disclaimers and insist that they enjoyed law school despite the challenges. Martha Kimes Ivy Briefs: True Tales of a Neurotic Law Student (Atria, New York, 2007); Turow, above n 2; Kahlenberg, above n 1.


26 Kennedy, above n 8, 43.


28 Challah is bread eaten on Shabbat, the Jewish Sabbath from Friday sundown to Saturday sundown.
relationships. When the teacher arrived he said: “Nu!”[35] Multiple students, simultaneously, started making comments about Jewish law. The lecturer was not the source of all the knowledge. Rather, he acted like a learning coach. Teaching and learning were merged, much like the Maori concept of āko and their approach that “everyone is a teacher and everyone is a learner.”[31]

My experiences at Hebrew University and as a teacher taught me that it “could have been otherwise”[32] and, indeed, that it actually was otherwise in some classrooms. My insistence on speaking up at Victoria University represented, for me, a micro, daily effort to destabilise the traditional teacher/student hierarchy. I constructed a counter-narrative: I am a learner and teacher with an inquiring disposition, who comes from a cultural background in which questioning, interrupting, and eating or drinking while learning is acceptable.

Constructing an essential Jewish or New Zealand identity would be inaccurate. My subjectivity is on the “border lands,”[33] an intricate interlacing of multiple parts such as: Jewish woman, (dis)abled, wife, student, middle class, gymnast, teacher, researcher, community activist, wife, student, middle class, gymnast, teacher, researcher, community activist. When the teacher arrived he said: “Nu!”[35] Multiple students, simultaneously, started making comments about Jewish law. The lecturer was not the source of all the knowledge. Rather, he acted like a learning coach. Teaching and learning were merged, much like the Maori concept of āko and their approach that “everyone is a teacher and everyone is a learner.”[31]

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member. Nevertheless, some feminist legal theorists speak of woman as though she is a fixed, essential category. The assumption is that just because I am a woman, I must experience law school as unsafe in the same way as other women. For example, one of the main complaints which female law students make is that legal education “silences” women. For me, the questioner role adopted in Pesach each year would not stand by, quietly, and allow me to be silenced. Differences between women and students make essentialism dangerous.

B. Kennedy’s Hierarchies

Kennedy’s central polemic is that legal education contributes to illegitimate hierarchies in society and the bar. The dominance of law lecturers over students is the most fundamental hierarchy. Aggressive pedagogy in legal education creates an oppressive atmosphere. The best response is a large-scale movement aimed at liberating students and staff from hierarchies.

Aspects of Kennedy’s analysis ring true. There are poor teachers and students who become frightened and apathetic. However, Kennedy’s description of legal education is not the complete picture. The structuralism underlying his analysis leads to an image of an entrenched hierarchical legal education system. While hierarchies do exist in legal education, they are not immune to disruptions and destabilisation. By focusing on macro-structures, Kennedy fails to notice micro resistance.

Kennedy simplifies power to those who have it and those who do not. In contrast, Foucault reconceptualises power as circulating and diffuse, rather than as fixed, so that wherever power is located, it

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35 During Pesach (Passover) someone is asked to be the questioner for the evening. His/her role is to probe other members around the dinner table about the festival. Questions and interruptions are encouraged.

36 Kennedy, above n 17; Kennedy, above n 20.

37 I realise that Critical Legal Scholars, such as Kennedy, draw from poststructuralism and postmodernism, but I am arguing that in his critique of legal education, there is an underlying structuralism to the analysis.
invites resistance and destabilises conventional notions of authority.38 At first glance, Kennedy’s construction of the docile law student appears similar to Foucault’s notion of docile and disciplined bodies.39 However, the difference between the two approaches to docility is that Foucault emphasises the interconnection of power and resistance, whereas, Kennedy does not. Many feminist writers have been attracted to Foucault’s approach to power because he recognises that power should not only be understood in terms of a structural, institutional centre but also that there are capillaries or micro sites of power.40 This essay focuses on micro sites of resistance, including “small, everyday actions of seeming insignificance that can nevertheless validate the actor’s sense of dignity.”41 Using a Foucauldian approach to power avoids the trap (into which Kennedy falls) of constructing students as powerless victims paralysed in a powerful institution.

1. Kennedy’s construction of the passive law student

Kennedy’s construction of the passive law student is not only reductive, but also disempowering. His claim that the experience of law students is “double surrender: to a passivizing classroom experience and to a passive attitude toward the content of the legal system.”42 Kennedy should not assume that docility is an essential, fixed element of all students’ subjectivities. Had he actually spoken to students, he may have been surprised by the range of experiences and attitudes.43 For example, Cole describes a confrontation with one of her teachers:44

38 Michel Foucault Power/Knowledge: Selected Interviews and Other Writings C. Gordon (ed) (Harvester Wheatsheaf, New York, 1977).
42 Kennedy, above n 8, 43.
43 Kennedy’s section entitled “the student response to hierarchy” suggests that students’ voices will be central. But, the section is disappointingly devoid of actual students’ comments. His analysis is arguably based on a pseudo participant-observation which involves “looking around” and observing students in a less than systematic fashion.
44 Cole, above n 34, 323.

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According to Kennedy, when a teacher makes sexist or racist remarks it is “unlikely that [students] will do anything in the classroom setting itself, however much [they] gripe to friends.”45 Kennedy’s observation may be true for some students. However, Cole’s example illustrates that some students do respond to sexist remarks in the classroom setting.

It is significant that Cole explains her ongoing confrontations with her law teachers as a “fight.” Radical legal feminists, such as Catharine MacKinnon, typically focus on the sexualisation of oppression and dominance.46 This approach, while influential, has been criticised as being disempowering for women and one-dimensional.47 To counter the disabling effects of theorising women as subjugated, some feminists have sought to present positive, empowering images of women as resisters.48 For instance, Arwood urges women to resist “victim positions.”49 Similarly, Marcus’s discussion of rape displaces the dominant narrative of female rape victim as passive and, instead,

45 Kennedy, above n 8, 63-64.
49 Margaret Arwood Survival: A Thematic Guide To Canadian Literature (Anansi, Toronto, 1972). In Survival, Arwood identifies different victim positions and then divides Canadian literature according to which victim position is articulated. Arwood’s novel Surfacing (Virago Press, London, 1972) is arguably an example of her victim position number four: the “creative non-victim”. Also, for discussion of oral contraceptive users’ resistance to the media’s depiction of them as victims, see Jennifer Hester-Moore “Bricolage and Bodies of Knowledge: Exploring Consumer Responses to Controversy about the Third Generation Oral Contraceptive Pill” (2005) 11 Body and Society 77.

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emphasises women’s capacity for retaliation, their “fighting bodies, fighting words.”50 Cole also “fights” back. She is not paralysed by the classroom experience.

I am not suggesting that the experiences of rape and a dissatisfying legal education are analogous. My intention is to highlight the importance of reconfiguring students as active agents. Kennedy is bound to disempower students and staff by telling them that law school cannot be improved except by total structural reorganisation. Thankfully many feminist writers have not taken such a disenabling approach.

In addition to feminists, some critical race theorists have also criticised portrayals of, for example, African Americans as passive victims. For instance, the term “Uncle Tom” (and its connotations of passivity) was resisted during the American civil rights movement.51 In terms of legal education, not all African American students do “little or nothing”52 when confronted with racism in law school. At Harvard Law School in 1981 there was a student boycott and an alternative course organised.53 The students’ agency challenges Kennedy’s claim that all students have “passive attitude[s] toward the content of the legal system.”54 These students did not “surrender”55 themselves to a legal curriculum that failed to be responsive to their needs as ethnic minorities.

Some students also challenge Kennedy’s contention that they will passively accept their subordinated places in law firm hierarchies. Kimes describes her resistance during her first law job after graduation. She is unhappy working under a partner (Jerome) in the firm. Once Kimes realises that she is “entitled”, she decides to confront Jerome:56

50 Marcus, above n 48.
52 Kennedy, above n 8, 50.
54 Kennedy, above n 8, 43.
55 Ibid.
56 Kimes, above n 24, 208.
Kimes’s epiphany about her “entitlement” suggests that law students are not necessarily inherently or essentially docile. As Kimes asserts, “self-doubt is for losers” and such traits need not determine students’/lawyers’ subjectivities. An alternative interpretation of Kimes’s experience is that students are neither essentially docile nor active. Rather, subjectivities are fluid and comprise complicated mixtures of “subservience” and agency.

My intention in presenting proactive, resistant students’ voices is to emphasise student empowerment. Kennedy shows little inclination to testing his observations of docile students against possible alternatives such as active students. My critique of the lack of empiricism in Kennedy’s work does not mean that the use of narrative is unproblematic. The difference is that the narrative style is a discussion of the scholar’s own experiences, whereas Kennedy’s analysis purports to be speaking for other people without asking them to speak for themselves.

2. Kennedy’s construction of the law professor as Kingsfield

Kennedy’s polemic about law school also showcases a law professor stock character. One kind of teacher, Kingsfield, dominates Kennedy’s discussion. My contention is that Kennedy’s vision of legal education centralises some characters and marginalises others. Kingsfield speaks through Kennedy via the frequent references to brutal teaching techniques such as the “incapacitating device” of teaching doctrine and the “fear” shrouding the Socratic classroom. To be sure, there are teachers at law school who appear to model themselves on Kingsfield. However, legal education does have better teachers than Kingsfield. There are law teachers who favour relaxed rather than tense classrooms, encouragement and nurturing over competition, and theory and policy over doctrine. I recall being engrossed by one contract

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57 Professor Kingsfield is the contract professor in the movie The Paper Chase (Boston, 1971).
58 Kennedy, above n 20, 30.
59 Kennedy, above n 8, 42.
lecturer’s use of theory to help us to understand the development of undue influence. Her approach generated interesting classes and a deep understanding of the concept. I have also experienced the joy of fun learning spaces. One lecturer, for example, used bingo in order to assist us to revise for exams. Students who answered questions correctly and called “bingo” were then presented with sweets as prizes. The classroom atmosphere was relaxed and students engaged in active learning.

Good teaching encourages and inspires students to learn. Kahlenberg describes feeling “energized” by his adviser Alan Dershowitz because of this teacher’s engagement in the student’s research project. Dershowitz’s attention and interest encourages Kahlenberg to “work very hard on [his] paper.” Likewise, I have felt stimulated to improve my legal opinion writing by attentive teachers who have provided thorough and constructive feedback on my papers. My experience suggests that Kennedy’s contention that students “receive no feedback at all except a grade on a single examination at the end of the course” is now inaccurate. In most law schools today this is (thankfully) no longer the approach to assessment. Educationalists report that exams are a poor way to measure students’ grasp of the material.

Recognising that changes have occurred is not to deny that some inappropriate assessment techniques persist in legal academia. For instance, I have received marked law assignments which provided no individualised feedback whatsoever. I have studied in a range of departments where all teachers have provided individualised feedback on marked assignments. Teachers have a responsibility and duty to provide feedback based on students’ needs. While generic feedback is helpful, it is limited.

Teachers who invoke the Kingsfield-style Socratic Method may be under the false impression that this technique enables active learning. Forcing frightened students to speak is not active learning. As

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60 Kahlenberg, above n 1, 210.
61 Ibid.
62 Kennedy, above n 8, 51.
64 For example, see J. Gilbert, Catching the Knowledge Wave? The Knowledge Society and The Future of Education (NZCER, Wellington, 2005).
Kennedy rightly points out, the humiliating, nerve-wracking version of the Socratic Method is merely “pseudo-participation.”65 Indeed, complaints have been made about the Socratic Method by multiple authors for many years.66

The Socratic Method can be a useful way to teach law, provided it is not invoked Kingsfield-style. In one course, discussion questions are posed to students. If there are no volunteers, the lecturer calls on students, but there is no desperate struggle to “read a [teacher’s] mind determined to elude you.”67 On the contrary, this lecturer is genuinely interested in students’ answers to the discussion questions.

Regrettably, alternatives to Kingsfield are marginalised in Kennedy’s discussion. Lecturers who are “softer,”68 “mushy”69 and teach policy, are sidelined as ineffective teachers:70

Teachers are overwhelmingly white, male, and middle class, and most (by no means all) black and women law teachers give the impression of thorough assimilation to that style, or of insecurity and unhappiness.

Despite the presence of women, “softies” and ethnic minorities, Kingsfield appears to be the pedagogical yardstick. Those teachers who do not assimilate to this style apparently experience “insecurity and unhappiness.” The Kingsfield measure is dismissive of alternative pedagogies and disempowering to non-Kingsfield teachers. Kennedy’s configuration of “mushy”, female and minority teachers meshes with

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65 Kennedy, above n 8, 42.
67 Kennedy, above n 8, 42.
68 Ibid.
69 Ibid, 43.
70 Kennedy, above n 20, 62.
his approach to rights. Blaming rights for legitimising an oppressive ideology fails to recognise the experiences of those for whom rights have been important, empowering devices. Williams, for example, argues that for the “historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity.” Adoption of Kennedy’s approach to rights could lead to the depressing conclusion that students have no rights to good teaching. Kennedy’s vision might also lead readers to believe that good teaching is nonexistent because of classroom hierarchy. Kennedy could have unpacked the notion of hierarchy further. For instance, Kennedy’s analysis of hierarchy pays less attention to hierarchies in legal thought.

B. Hierarchies in Western Legal Thought

Western thought is organised around a series of dualisms such as mind/body. The first term is privileged over the second. Feminists argue that dualisms are gendered. Derrida, the chief figure of poststructuralism, argues that this dominant system of thought gains meaning from relations of difference. Cornell, a legal poststructuralist feminist, builds on Derrida’s work. Her focus on the boundaries between dualisms is similar to Derrida’s notion of ‘undecidables.’ Undecidables disrupt oppositional logic. People of mixed ethnicities, for example, destabilise the white/black hierarchy. My contention in this essay, that individual law students can be both active and passive, follows the undecidability tradition by contesting binary oppositions.

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52 For example, see Drucilla Cornell Beyond Accommodation: Ethical Feminism, Deconstruction and the Law (Routledge, New York and London, 1991); Frances Olsen “The Sex of the Law” in The Politics of Law: A Progressive Critique David Kairys (ed) (Pantheon Books, New York, 1990) 453. According to Olsen, the law is identified with the hierarchically superior masculine side of binaries. The law purports to be “rational, objective, abstract and principled, as men claim they are.” The law is not supposed to be “irrational, subjective, contextualised, or personalised” as per the alleged construction of women.
54 Cornell, above n 40.
1. Unpacking the Rationalism/Empiricism dualism

In the Western tradition there are two basic philosophies of knowledge. In the first, rationalism, knowledge is developed through logical thinking. In the other, empiricism, knowledge is developed through experience and observation. These two approaches can be put together in, for example, social sciences. However, the rational (thinking) model is more highly valued.

Learning to “think like a lawyer” involves the first model of knowledge: rationalism. Although there are some law academics who conduct socio-legal research (combining rationalism and empiricism), such an approach is on the margins of law schools. The dominant model of knowledge is non-empirical rationalism. Rogers explains that legal rationalism makes her feel “assaulted” because there is no acknowledgment that she “feels and experiences.” Similarly, MacKinnon has commented that becoming a lawyer means to “forget your feelings, forget your community” and “forget your experience.”

Given that it is important for legal thinkers to be rational, it is perhaps unsurprising that Kennedy’s analysis privileges abstract theorising. According to Kennedy, law students become paralysed victims of legal education because they possess “no base for the mastery of ambivalence.” Only an “extraordinary” student can achieve the “theoretically critical attitude” necessary to avoid becoming docile. This student achieves an objective, rational, intellectual “mastery” of the legal system. By contrast, ordinary students possess only “an emotional stance against the system.”

But does resistance to the “ideological content of legal

76 Kurt Saunders and Linda Levine “Learning to Think Like A Lawyer” (1994) 29 USFL Review 121.
78 Ibid.
80 Ibid.
81 Kennedy, above n 20, 22.
82 Ibid.
83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid.
87 Ibid.
88 Ibid.
89 Ibid.
90 Ibid.
91 Ibid.
education" necessarily require the objective, theoretically critical attitude which Kennedy suggests? Students who wish to avoid having their idealism crushed by the system may need to invoke their experiences and feelings of right and wrong.

When I started law school at Canterbury University in 1995, I remember feeling much like Rogers, "assaulted" by legal reasoning. The writing style struck me as hypocritical. The use of the obligatory "back-handed passive" ("it is submitted that...") appeared false. Given that people write legal opinions it seemed obvious to me that their "social fingerprints" would leave their mark on the legal research process and production of the written text. Legal writers demonstrated little recognition that their analyses were influenced by the epistemological and ontological assumptions that they brought to their work. I felt frustrated by a system of thought which hid behind the cloak of objectivity. When one of my first assignments was returned with a red circle around 'I' and "avoid!" scrawled in red ink, I decided that it would be best to drop law.

Over ten years later, I returned to law school. I no longer feel as disconcerted about legal written expression. Several writers have suggested that increasing the age of law students may protect students against the potentially disturbing experience of legal education. A strong sense of self, a clear sense of purpose (attributes which are more likely to be present in older students) can mitigate the ideology of legal education. I do not think that I have managed to become a non-victim of legal education by becoming Kennedy's "extraordinary" student. Rather, it is my recognition that law is but one system of knowledge and my belief that empathy does make good lawyers, which rescues me from the snare of becoming a docile student.

66 Ibid, 14.
68 Sandra Harding "Is there a Feminist Method?" in Feminism and Methodology (Milton Keynes, Bloomington, 1987) 1, 9.
69 For example, see Anon, above n 27, 2043.
70 Some feminist scholars have identified the importance of injecting empathy into legality. West proposes the "literary woman" as a promising option for lawyers who wish to understand others. According to "fem-crits", it is this attention to experience and empathy which differentiates Critical Legal Scholars from feminists. Robin West "Economic Man and Literary Woman: One Contrast" 39 Mercer Law Review (1988) 39 867; Carrie Menkel-Meadow "Feminist Legal Theory, Critical Legal Studies, and Legal Education or The Fem-Crits Go To Law School" (1999) 39 Journal of Legal Education
71 Ibid, 14.
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2. Critiquing the treatment of experience as unmediated truth

Although I stress the importance of empiricism in this essay, I do not treat students’ experiences as if they are “waiting outside the violations of language and culture.”91 The quest for access to the ‘authentic’ meaning of experience has been called into question by several legal theorists.92 Cornell’s critique of MacKinnon,93 for example, involves identifying a theoretical mistake whereby MacKinnon reinstates the “absolute dichotomy between reality and fiction.”94 According to Cornell, MacKinnon fails to recognise that “we see through the world presented in language.”95

Similarly, Harris is arguably trying to inject scepticism into school girls’ claims that a woman’s account of rape “should always be believed!”96 The girls’ treatment of experience as ‘truth’ sits uncomfortably with (feminist) poststructuralists. A naïve positivism underlies assumptions that people’s ‘real’ thoughts are ‘out’ there in ‘reality’ waiting to be discovered. ‘Reality’, as a problematic notion, is explored by Curnow in the following poem:97

It is not what you say,
It is not the way you say it,
It is not the words in a certain order.
Look out the window
Examine the page
Knuckle the cool pane
Why is the mud glassed?

With mangroves

61; Lynne Henderson “Legality and Empathy” in Patricia Smith Feminist Jurisprudence (Oxford University Press, New York, 1993) 244.
91 Haraway, above n 21, 109-113.
93 Cornell, above n 40, 129 describes MacKinnon as a “realist.”
94 Ibid, 131.
95 Ibid.
96 Harris, above n 92, 295.
Bedded in the glass?  
Inverted in the glass?  
In the Gulf stained blue  
Interior lighting  
By Hoyte?  
Why is the cloud  
Why are the islands  
Grained green with  
Why not?

The narrator is involved in the ‘framing’ of ‘reality’ outside the window. When he sees Hoyte colours instead of the ‘real’ scene, he realises that art has formed his perceptions. I also recognise that students’ accounts (including my own) of law school experiences involve framing of the events through memories and dominant discourses about legal education.

3. Mind/Body or (dis)embodiment and (dis)ability

In contrast to the poststructural subject, the traditional legal subject has a neutral perspective and he98 is objective and disembodied. The legal subject is the quintessential humanist subject. The traditional legal subject privileges the mind over the body. For instance, the standard of the reason/able person is a disembodied entity, “everywhere and nowhere.”99 This standard generally does not involve viewing acts in light of what the particular individual might do.100 This test is supposedly objective. The reasonable person becomes the “unmarked”101 category. An investigation into the assumptions that underpin the reasonable person reveals that this subject is made from a very specific set of epistemological and ontological tools. He is the product of discourse, constructed from readily available, familiar and enduring narratives from Western logocentrism.

98 I have deliberately used ‘he’ here because, as feminist legal scholars have pointed out, the legal subject has traditionally been male.
99 Haraway, above n 21, 163.
101 Haraway, above n 21, 17.
I remember feeling troubled by Gustav v Macfield\(^{102}\) because our analysis of the case did not unpack the obvious mind/body dualism which was operating in the decision. This case concerned a claim of unconscionable dealing in a commercial land transaction. Mr Parkinson had terminal cancer at the time of the bargain. The Court held that Mr Parkinson did not have a disability. This finding was made despite expert oncological evidence that Mr Parkinson’s ability to preserve his interests would have been severely diminished as a result of the cancer and the effect of the drugs. The Court held that although the effects of Mr Parkinson’s illness were “clearly apparent in physical terms,”\(^{103}\) he “appeared lucid, mentally acute, business-like and rational.”\(^{104}\) These findings assume that terminal illnesses can reveal their devastation on the body, but somehow the mind is immune. Medics know that the mind and the body are intricately interconnected. I, too, know that the mind/body dualism is a myth. I know this not just because I have been trained in health, but also because I suffer from chronic occupational overuse syndrome which affects my mind and body. At university, I use a room which is reserved for students with disabilities. I frequently have to debate with able-bodied students who are using the ergonomic computers in this reserved room. Just as the Court in Gustav held that Mr Parkinson’s apparent rationality meant that his physical impairment could not possibly be affecting him, so, too, just because I “talk no problem,”\(^{105}\) apparently means that there is nothing wrong with me physically. On the contrary, sometimes I am so sore that I cannot be a “chatterbox” or think.

The experiences of disabled law students are noticeably absent from Kennedy’s and most feminists’ critiques of legal education. Perhaps this omission is reflective of the minority of law students and professors who have disabilities. My contention, however, is that the mind and the body are intricately interconnected.

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\(^{104}\) Gustav & Co Ltd v Macfield Ltd (24 May 2007) CA 168/05 205 Arnold J for the Court, para 54.

\(^{105}\) Many able-bodied students complain that because I “talk no problem” it follows that I cannot possibly have any physical impairment. Do you, able-bodied law student, need to see a “broken body” in order to be convinced of the ‘reality’ of my claim? Disability need not be seen as a “fixed category most clearly signified by the wheelchair user” but as a fluid and shifting set of conditions. See Margrit Shildrick and Janet Price “Breaking the Boundaries of the Broken Body” (1996) 2 Body and Society 93, 94.
absence of disability from these accounts is also reflective of the disembodiment of the law. For the past two decades, there has been a "corporeal turn"\footnote{For example, see Anne Witz “Whose Body Matters? Feminist Sociology and the Corporeal Turn in Sociology and Feminism” (2000) 6 Body and Society 1; Margaret Shildrick Lissy Bodies and Boundaries: Feminism, Postmodernism and (Bio)Ethics (Routledge, London and New York, 1997); Jane Usher (ed) Body Talk: The Material and Discursive Regulation of Sexuality, Madness and Reproduction (Routledge, London and New York, 1997). While some jurisprudence scholars, especially feminists, have recognised the law’s failure to theorise embodiment, there is not a sustained movement in legal academia which can be described as a “corporeal turn.” Hilaire Barnett, for example, acknowledges the disembodiment of the law, but does not push the analysis further. See Hilaire Barnett Introduction to Feminist Jurisprudence (Cavendish, London, 1998) 205. Pheng Cheah, David Fraser and Judith Grbich Thinking Through the Body of the Law (Allen & Unwin, Sydney, 1996).} in sociology and feminism. By contrast, the body has been conceptually blind in mainstream law and there is comparatively little literature. A notable exception proposes “thinking through the body”\footnote{Shildrick, above n 105.} as a means to overcome the mind/body dualism in law. The law could recognise that the boundaries between categories such as mind/body, rationalism/empiricism, ability/disability are “leaky.”\footnote{Stewart, above n 25, 850. See also Kahlenberg, page 1: “there are other, more effective” ways to teach law.”} The law could recognise that the boundaries between categories such as mind/body, rationalism/empiricism, ability/disability are “leaky.”\footnote{Kennedy, above n 20, 20. These “peripheral subjects” are useful because they teach students the big picture. Otherwise, there is too much focus in law school on “trees at the expense of forests.” Kennedy, above n 7, 40.}

C. Alternative Legal Education Pedagogies

Legal education “could have been otherwise” and the “way law is taught is emphatically not immutable.”\footnote{Gilbert, above n 64, 156 argues that the secondary curriculum should be designed to teach students how different disciplines like science and history work as systems. Her theorising arguably applies equally well to the law school curriculum.} This approach would counter the dominance of formalism. A notable exception proposes “thinking through the body”\footnote{For example, see Anne Witz “Whose Body Matters? Feminist Sociology and the Corporeal Turn in Sociology and Feminism” (2000) 6 Body and Society 1; Margaret Shildrick Lissy Bodies and Boundaries: Feminism, Postmodernism and (Bio)Ethics (Routledge, London and New York, 1997); Jane Usher (ed) Body Talk: The Material and Discursive Regulation of Sexuality, Madness and Reproduction (Routledge, London and New York, 1997). While some jurisprudence scholars, especially feminists, have recognised the law’s failure to theorise embodiment, there is not a sustained movement in legal academia which can be described as a “corporeal turn.” Hilaire Barnett, for example, acknowledges the disembodiment of the law, but does not push the analysis further. See Hilaire Barnett Introduction to Feminist Jurisprudence (Cavendish, London, 1998) 205. Pheng Cheah, David Fraser and Judith Grbich Thinking Through the Body of the Law (Allen & Unwin, Sydney, 1996).} to teach systems-level thinking.

1. Using “peripheral subjects”\footnote{Shildrick, above n 105.} to teach systems-level thinking

Subjects such as jurisprudence should not be located on the periphery of the legal curriculum. Jurisprudence teaches students to be systems-level thinkers. Students not only need content expertise, but they also need to understand how law works as a system.\footnote{Stewart, above n 25, 850. See also Kahlenberg, page 1: “there are other, more effective” ways to teach law.”} This approach would counter the dominance of formalism.
2. Challenging the marginalisation of skills

Kennedy argues that law schools “teach a small number of useful skills.”112 His views are echoed by some students who enter law firms shocked to discover that they have not “learned how to be lawyers.”113 However, there has been progress. Skills-focused courses are now required, but they were not when I started law school ten years ago. Despite these improvements, more could be done.114 For example, students should be encouraged to conduct legal research in all subjects.115

3. Reconceptualising knowledge and learning

Opponents of postmodernism and poststructuralism often voice complaints that these movements are apolitical, nihilistic and offer few solutions.116 In response to these charges, I am offering solutions. Rather than presenting knowledge to students as something that is monolithic and fixed, knowledge could be (re)presented as organic and in process.117 In the ‘knowledge society’, identifying the “correct solution”118 may be less important than knowing how to do things with, and generate, new knowledge.119

112 Kennedy, above n 8, 50.
113 Kimes, above n 24, 257.
115 For analyses on the importance of encouraging law, medicine and education students at all levels to do research see Clare Cappa “A Model for the Integration of Legal Research into Australian Undergraduate Law Curricula” (2004) 14 Legal Education Review 43; Rosemary Hipkins Learning to Do Research (NZCER Press, Wellington, 2006); Jennifer Moore “Practitioner-Researcher Imaginations: Teaching Social Research to Medical Undergraduates” (2008) 10 Focus on Health Professional Education: A Multi-Disciplinary Journal 1-21.
117 Gilbert, above n 64, 66.
118 Kennedy, above n 8, 50.
119 Gilbert, above n 64, 67.

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Legal education could be reconstructed as problem solving, inquiry-based, cooperative, and collaborative.¹²⁰ When learning is collaborative, students are less likely to apathetically “believe what they are told” or “accept the way things are.”¹²¹ New Zealand research indicates that Maori and Asian students are the most likely to “study regularly with fellow students.”¹²²

Comparisons are often made between medical and legal education.¹²³ Although medical education is hierarchical, studies report that medical students do not experience the same degree of anxiety and stress as law students.¹²⁴ One possible explanation for this difference is that medical education is more collaborative. A paediatrician has recently observed that the new Generation Y health practitioners have a “collaborative approach”¹²⁵ and “relative lack of deference to hierarchy.”¹²⁶ This approach is “changing the way we do medicine.”¹²⁷ It is to be hoped that legal education adopts this collaborative approach at its earliest convenience.

¹²⁰ There is growing recognition in the legal literature that problem-based learning could be an effective way to teach law. For example, see Fiona Martin “Teaching Legal Problem Solving: A Problem-Based Learning Approach Combined with a Computerised Generic Problem” (2003) 14 Legal Education Review 77; Julie Macfarlane and John Manwaring “Using Problem-Based Learning to Teach First Year Contracts” (1998) 16 Journal of Professional Legal Education 271.

¹²¹ Kennedy, above n 8, 40-41.

¹²² Morris, above n 3, 215. See also Turow, above n 2, 70 who describes being “positively intoxicated by the kind of speed and depth of insight that could be achieved by a group of bright, willing people working together” in a study group. Similarly, anecdotal evidence from discussions with mooting students at Victoria University suggests that this type of learning is enjoyable.


¹²⁴ For example see Krieger, above n 3; Kellner, above n 123.

¹²⁵ Matt Philp “Why You Don’t Understand Your Kids” (September 2008) North and South issue 270 38, 40.

¹²⁶ Ibid. See also Claire McEntee “Hierarchical School System Faces Change” (11 August 2008) The Dominion Wellington CS, for a discussion of the dramatic changes in secondary education as schools move from hierarchical to community focused and collaborative models; Joanne Ingham and Robin A Boyle “Generation X in Law School: How These Law Students Are Different From Those Who Teach Them” (2006) 36 Journal of Legal Education 281, for a discussion of the importance of adopting teaching methods which are appropriate to new generations of students.

¹²⁷ Philip, above n 125, 40.
Conclusion

My main contention has been that the disciplinary practices of law school do not entail a state of absolute oppression. Kennedy’s desire for resistance is lost in his over-emphasis of the supposedly relentless character of subordination. A preferable approach is to stress the relationality of power and the possibility of change. Kennedy could have usefully applied his indeterminacy of the law thesis to his construction of law students’ and professors’ subjectivities.

The law has traditionally avoided looking at “who or what thinks or produces the law.”128 By contrast, the theorists from whom I have drawn in this essay are unashamedly transparent about our “positionality.”129 It is time for law schools to start teaching students that it is acceptable for, and inevitable that, emotional and rational selves will integrate and merge. As many critical race theorists and feminists remind us, ‘experience’ counts as knowledge.

My analysis has highlighted that particular choices have been made in legal education, while others have been overlooked. This is an important observation because it suggests that multiple choices are available. In a space with multiplicities the potential for change exists. It “could [still be] otherwise”; hierarchies can be challenged by daily micro practices.

Kennedy’s critique of legal education recognises that it “doesn’t have to be that way.”130 Thus, his analysis of legal pedagogy is more convincing and accurate than his descriptive claims about students and professors. However, Kennedy’s “utopian proposal”131 for a new legal education curriculum is limited because he does not challenge long-held ideas about knowledge and learning. My re-orientation of legal education does not necessarily entail major structural changes. Some of my suggestions could be incorporated relatively easily. For example, collaborative and cooperative learning could be incorporated by increasing the length of tutorials.

In keeping with my own cries about the importance of empiricism and student voice, I started, and will conclude, this essay

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130 Kennedy, above n 8, 59.
131 Kennedy, above n 20, 120.
with students’ own accounts. Refusal to become a docile student can involve Kennedy-style polemics about large-scale structural changes.\footnote{K C Worden “A Student Polemic” (1986) 16 New Mexico Law Review 573, 574.}

It’s our tuition dollars, our careers, and our intellectual and emotional investments that are at stake. We are the “grassroots” of the law schools; we must take part in the struggle against the reproduction of hierarchy fostered by our institutions. (Emphasis in the original).

Resistance to hierarchies in legal education can also entail subtle, micro instances of defiance.\footnote{Turow, above n 2, 209.}

That moment served to make overt the mood of quiet opposition and determination of some in the class to resist any heavy-handed techniques.

\footnote{K C Worden “A Student Polemic” (1986) 16 New Mexico Law Review 573, 574.}

\footnote{Turow, above n 2, 209.}