

Responses

In the Fall, 1981 issue of the *Bulletin*, we invited response to an article by Professor Duncan Kennedy entitled "Rebels from Principle: Changing the Corporate Law Firm from Within." We received a number of letters from alumni as well as a reply from **Professor Detlev Vagts '51**. Professor Vagts' response and many of the letters follow.

One can read Lord Chesterfield's *Letters to His Son* with both an appreciation of its irony and a sense that two centuries have not wholly destroyed the usefulness of its lessons in civilized jungle fighting. Professor Kennedy's advice to young radicals matches Chesterfield's humor. Indeed the idea of young leftist associates devising a scheme so "subtle, collusive, skillful and tricky" as to outfox, say, a partner grown gray in the takeover business, Joseph Flom '48 for example, transcends Chesterfield's humor to rival Thurber's Walter Mitty. Its practicality, however, is, to say the least, uneven.

Thus, there is need for advice to the young radical lawyer that speaks from both sympathy and experience. Few are prepared to undertake that. Were there better-qualified volunteers I would gladly yield since I lack one ideal qualification — sharing in their belief that the present American system is more irredeemably corrupt than human systems tend to be. The best that I can offer is a general sympathy for anybody who finds him or herself in a job serving a structure that one regards as immoral. The starting place for my effort to feel myself into the leftist lawyer's position is located in 1933 in Hitler's Germany. My father then chose to leave the Institute for Foreign Policy in Hamburg rather than serve there after it became a tool of Nazism. A close friend is the surviving son of one who chose the other path, staying there and even shifting to the Abwehr, the Nazi C.I.A., to fight the system until his doom. Thus I can try to imagine myself in the frame of mind of one who feels that serving the corporate system is like serving Nazism (or Stalinism). Beside, like Lord Chesterfield I have been at court, i.e., in a corporate law firm and have some conception of the differences between life out there and life in academia.

In brief, the radical lawyer of 1982 has three choices: to go to a corporate law firm and resist through "sly" tactics, to go there and resist openly or to go somewhere else. I take Professor Kennedy to advise the first, though the layers of irony are so thick as to obscure the message. I would disagree. The disadvantages of the "sly" alternative start with the short-range problem that it is unlikely to work, given the perceptiveness of the opposition. It certainly won't work a second time. Meanwhile, the practice of using subtle and tricky messages corrupts one's ability to communicate with anybody — read Czeslaw Milosz' *The Captive Mind* for a full exposition of what happens under totalitarianism when the language of subversion becomes a habit. This set of tactics bewilders all those around one and both bewilders and frightens those who are dependent upon the user. A Jerry Rubin may be amusing with his jesting at twenty-five but at forty is apt to be both ridiculous and dangerous — assuming that he has survived and made his way to the top of the heap through those manipulations. Finally, the process corrupts one internally. As Professor Kennedy says, "Rebelliousness is like a muscle." But so is integrity. There are disturbing signs that it is getting less and less exercise nowadays. Remember that the extraordinary dangers faced by those who worked inside Hitler's system strengthened their moral fiber and validated their acts of deception.

What then of candid inner opposition? The article is quite right in saying that joining a law firm need not involve the surrender of all moral choice. One can push for fairer treatment of the staff or reject assignments that offend one's conscience — at least at some firms. The problem, though, comes with repetition. A marriage where "not tonight, dear, I have a headache" is a nightly routine is in trouble. One can combine mild reformism with work in a high pressure law practice but one simply cannot survive in it if one is involved in a constant series of battles of conscience over what one is asked to do. The article seems to imagine the life of the law firm as rather like the academic one with a good deal of freedom of choice and rather little close interaction with fellow workers — to say nothing of the protections of tenure. Soon the attempt to combine corporate law work and opposition begins to foreclose other alternatives. It is all too easy to let one's standard of living float up alongside one's pay increases; then the sacrifice involved in leaving to join the struggle more directly becomes unthinkable. Besides, it is simply impossible for the regular working class or academic leftist to take seriously the forty-five thousand a year fellow traveller. Since it is likely to be a long time — much longer than the years between 1933 and 1945 —

for a real radical opportunity to come, strategies need to be thought of in the long term.

One is left, then, with going elsewhere and taking up the very difficult task of building or creating a left organization. Professor Kennedy quite rightly stresses the need for this but underplays the difficulty of reaching out to others in the competitive and hence divisive atmosphere of the big firm. This is not to say that it is easy outside. The history of the left, particularly the American left, is full of schisms and divisions. However, there are organizations — law firms, law communes, some government offices, some parts of law school faculties — that offer beginnings. Times are discouraging for them but some survive and others could be built. And that is where the talented young radical lawyer belongs. To hold out the alternative that one can keep one's leftist conscience and "still make partner" is to disguise an inescapable dilemma. Those who think that they can have both through a few sly schemes are likely to wind up as weary court jesters in motley shaking their bells at the passing parade.

Detlev Vagts '51
Professor of Law
Harvard Law School

The Fall, 1981 issue of the *Bulletin* states that it welcomes alumni response both pro and con to an article by Professor Duncan Kennedy entitled "Rebels from Principle: Changing the Corporate Law Firm from Within." My response, while certainly not pro, is not really (with one exception set forth below) con; rather my reaction is one of complete amazement. I never expected to find in the *Bulletin* a perfect specimen of the thought processes, attitudes and, most wonderful of all, the vocabulary of the late 1960's-early 1970's radical chic — splendidly preserved without any contamination by the events of a decade.

Consider the vocabulary. Phrases like "the demobilization of lawyers in elite practice," "illegitimate hierarchy and alienation" and "the left militant political worker within the elite bureaucratic institutions of modern capitalism" are sprinkled through the article, and they must bring nostalgic tears to the eyes of many a former militant. The words could just as well have been written in 1969 rather than 1981. If the youth of today doubt that people who thought and spoke like this once roamed the earth, this article is irrefutable proof — Professor Kennedy is a veritable Lucy of the Left.

Although I am daily involved in the "corruption and compromised impotence of corporate practice" and have been "greasing the wheels of the system" for twenty-five years, I don't know whether the "special and demonic place in the left liberal picture of the universe" which Professor Kennedy attributes to this type of practice is justified. However, I can confirm that, in the course of such practice, "tax practice" means "tax minimization," and if there is a tax lawyer who does not seek to minimize his client's taxes, may my clients never fall into his hands. And I am prepared to face the "seriously militant office politics" which he advocates. If there must be war, I shall fight in the conference rooms and at the water coolers, and if the troops do finally "own the place," good luck — let them try to meet the payroll next week.

There is, however, one point in the article which violates the standards of civilized warfare. I don't mind being called a lackey or *déclassé*. But when Professor Kennedy exhorts all law school graduates to employ the ultimate weapon: "refusing to laugh at jokes," I am aghast. "Blank expressions where the oppressor expects a compliant smile can be the beginning of actual power," he says. Have you no shame, Kennedy? Asking the young associate exposed to a snappy one-liner to refrain from rolling on the floor with laughter or even to suppress a quiet smile in favor of a blank expression simply goes too far. I hereby warn all the lawyers in my office that a blank expression when I tell a joke will be treated as evidence of subversion and dealt with accordingly.

George I. Mulhern Jr. '54
Boston, Massachusetts

Kennedy's article in the Law School *Bulletin* Fall, 1981 must be causing thoughtful students who took him seriously to cringe as they reflect on their own naiveté. It is amazing to think that anyone who can read and who has lived through the sixties and seventies could still believe that the Left represents a repository for moral values or a promise for the improvement of society. In fact the Left is merely the mirror image of the Right and exerts, to the extent it is in power, as rigid and destructive censorship of the individual through physical and legal repression as the worst Rightist dictatorship. The hope for moral and individual values lies in thinking for oneself and avoiding the caricatures of the Left and Right which appear to obsess Kennedy. I suggest that to a disinterested observer of the human condition big government is a significantly greater threat to moral and individual

values than big business could offer at its worst. Big government has the police and legal power to force its will on the individual who cannot escape (except possibly by exile) while big business has only economic power which can be escaped relatively easily.

Kennedy has painted a hallucinatory picture of the corporate department of a large law firm which is false and insulting to one who has experienced that environment for many years; he contrasts his imaginary construct with a vision of the Left which appears to be similarly but oppositely biased. I do not believe such writing can be described fairly as morally honest or intellectually acceptable.

Robert L. Foote '41
Glencoe, Illinois

Having just read Professor Kennedy's article, I thought I would write to suggest another alternative to offer students when he "cranks up the old address to the troops."

While I do not share his political views, I do share his concern regarding the career choices available to graduating students — and the moral implications of those choices. In my view, each of the commonly discussed alternatives requires the student to surrender control over — and therefore responsibility for — the type of lawyer and person he or she will become. In a corporate firm, the young lawyer seeks to emulate the corporate ideal projected by the firm; the legal services or government attorney does the same. As a result, there is little need to develop one's own values and standards.

Yes, all attorneys are in a position to do good, and the system can be changed from within — whether through the Walter Mitty-type rebellion described in the article, or more dramatic means. But please offer students another alternatives. Tell them to start their own firms or to join small firms.

Any Harvard graduate could go to virtually any town or city in the country and alone, or with some friends, start up a successful practice. There are a number of helpful books on the subject, and while the project is not easy, it is not as difficult as they might feel. Not only have I done this myself, but I am familiar with others in other parts of the country who have done this as well. Starting a practice does not require a lot of money, and within two or three months the practice will be self-supporting.

The cases encountered in private practice are just as interesting and challenging as any to be found on Wall Street. In addition, by selecting their own cases, lawyers are able to shape their own lives and prac-

tices. It is not an easy life, because one is constantly forced to confront one's ideals with no institutional excuses for protection.

My personal belief is that fundamental changes in our society will not come about through government regulation (how much more establishment can you get?), or legal services programs (too vulnerable to political pressures and too predictable). What is needed, and what we are beginning to see, are small firms throughout the country, upsetting the balance of power at unexpected times and places. Those interested in litigation can take on the large corporations, city hall, or even "public interest" organizations. Those interested in business or corporate work would be in a position to provide legal services for small and medium-sized businesses whose need for competent, creative legal counsel cannot be overstated.

I hope someday Harvard will do more to psychologically prepare its students for small firm practice. Until then, I hope that at least this option is suggested when the troops receive their marching orders.

Richard H. Friedman '79
Sitka, Alaska

The "Rebels from Principle" article in the Fall, 1981 Harvard Law School *Bulletin* repeats what I find to be one of the most irritating clichés about the public interest movement: "... it is not so easy to get an alternative job in legal services or public interest law... it is just not the case that there are large numbers of these jobs going begging because of the moral deficiencies of law school graduates."

It is the case that there are many public interest jobs that go unfilled. What the reason is I leave to others to speculate. It is true that the more visible elements of the public interest bar are hard to crack. There's no doubt that most recent HLS graduates won't be able to get a job with the Natural Resources Defense Council or the ACLU. However, there are many, many jobs with grassroots public interest groups. These include PIRG's (Public Interest Research Groups) and numerous community organizations.

To paraphrase an old community organizing slogan: "Don't kvetch. Organize." Professor Kennedy should not give in to those students who complain that they just can't find a public interest job. They're there, if at some sacrifice. I for one would be happy to have a Harvard Law School professor as an on-campus recruiter.

Gene Russianoff '78
NYPIRG
New York, New York

Duncan Kennedy's mindless pap entitled "Changing the Corporate Law Firm from Within" contains at least 27 drug-induced sixties clichés including "sell out," "big bucks," "the system," "liberation," "dialogue," "oppression," "collective resistance," "confrontation," "alienated," "struggle," "militant," and "ego-tripping." Fascinatingly, stringing these clichés in order — any order — pithily conveys the compelling logic of what Professor Kennedy is trying to say.

Perhaps more importantly, Professor Kennedy's article illustrates the often startling paradox of the free market that he abjures, that it can be at once efficient and yet encompass isolated dislocations of great magnitude. The notoriously low pay of law professors is doubtless well-deserved and is a triumph of our economic system. But why, one wonders, is the Harvard Law School tuition so high?

C. Christopher Cox '77
Newport Beach, California

Duncan Kennedy is a cheapshot artist of the first magnitude. He also craves attention, else why this sophomoric diatribe against corporate lawyers? As for including his grandfather in this polemic, I suspect Mr. Kennedy is secretly angry with him for having the good sense to attend HLS and not the institution in New Haven.

Mr. Kennedy quite clearly has his head on sideways, doesn't have his facts straight about corporate practice, and quite likely doesn't want to be told otherwise. I have practiced in a corporate field for thirty years, and have never had so much fun. I sleep well, travel a bit, and have no guilt feelings. I do not receive "grotesque monetary rewards" (not that I would pass them by if presented.)

The *Bulletin* has nothing to be proud of in publishing this sententious drivel.

William R. van Gemert '49
Boston, Massachusetts

I had not realized that the Harvard Law School *Bulletin* had set out to become a humor magazine; however, the piece in the Fall, 1981 issue, signed by someone purporting to be Professor Duncan Kennedy, was a masterful parody of the ramblings of a narcissistic twit. What gave you away, however, was the self-evident fact that no such person could hope to find employment on the faculty of the Harvard Law School.

Richard Murray '57
San Francisco, California

Putting to one side his slogans and fantasies about recreating society, there are three things to say about Professor Duncan Kennedy's homily in the Fall *Bulletin*.

The first, and least important, is that he is frighteningly naive. How can one assume, except on faith, that "being on the side of the state sector," for instance, automatically serves the public good? Why does he treat the words "illegitimate" and "hierarchy" as permanently hyphenated? How can he ignore the causal link between the "liberal legalization of the world" that he admires, and the "grotesque monetary rewards" of lawyers (particularly, he might add, of \$40,000 new associates) that he deplores?

A second comment is that some of the issues he touches on do matter. The bar ought more often to admit that there is more to professional morality than staying a millimeter this side of the Canons of Ethics: there is the question of what one does with one's life. A lawyer whose scruples haven't atrophied from too many trips to the bank has to consider what he owes the public for the talents and opportunities he was given. And although everyone is entitled to counsel if the system is to work, it's true also that not all clients are equally attractive (though few are easily labeled all good or all bad, and nearly all look better after you meet the people on the other side).

It is more, though, a question of the totality of one's effort than of political judgments about individual cases. One should not barter one's soul to practice law, and one does not have to. It is inconceivable to me that any attorney in my firm would be forced to work on a case if he found it morally offensive. But you can't expect to be a habitual conscientious objector and still plan to be a general. No law graduates were ever conscripted to join my firm (or to go to law school, for that matter). If they do so, it's because they seek challenging work, development of skills, able co-workers, an opportunity to help people, and wealth for themselves. If you are far to the left and only support causes you like, then you ought not be offering yourself for general hire as a lawyer. The problem is not with the clients or the cases, it's with you — you are in the wrong line of work.

Which brings up the third, and most troubling, aspect of Professor Kennedy's advice: that he is implicitly contemptuous of those he is advising, and offers them only the unhappiness of acting out his own daydreams.

Why does Professor Kennedy not do his young readers the respect of assuming they are people of honor? Why does he not address the ethical problems of accepting a law firm's bread while at the same time being "subtle, collusive, skillful and tricky" in order to "sabotage and manipulate"? Are not young lawyers who

do that going to wind up either self-deluded or guilt-ridden?

To the dilemma of career choice Professor Kennedy holds out the answer every child wants to hear: that you can have it both ways. You can drive a BMW, live in a stylish apartment, work for greedy clients, and still stay pure at heart and be on the winning side, come the revolution. All you need do is occasionally snarl at your bosses and organize the oppressed classes around the Lexis computer and the coffee machine until the dictatorship of the proletariat arrives. It's an appealing faith. Even if you don't heed the ascetic call to the monasteries of public interest law, even if you dodge service in the Jesuitical armies of militant regulation like EPA or OSHA, you still can enter the Kennedy hagiography through minor martyrdoms and plotting in the catacombs of corporate law.

The troubling aspect of the Kennedy prescription for quiet revolution is not that it is threatening to management. Nor is it the loose language and vague objectives of his advice (presumably "left" lawyers are to lead us through "equalizing bargaining power" and acting "on the side of the state sector" to productive and benign egalitarian democracies like, say, Poland?). Nor is it even the awful possibility that Kennedy-trained associates might stop laughing at my jokes.

No, the real danger of Professor Kennedy's medicine is to the patient who swallows it. Instead of helping young people grow up, he is making that harder. Could one better ensure frustration and unhappiness than to tell talented young law graduates — as he does — that careers they have chosen at the bar are morally inferior; that the system which depends on them is wildly flawed; and that their only hope for moral salvation is disloyalty and passive aggression, by turning the workplace into an arena of misguided political tension?

They certainly will not finish feeling both good about themselves and professionally valuable. Just for fun, try growling at many of the people you work with for a few days, the way Kennedy wants. Is such behavior really elevating? Does the road to happiness really lie in contributing as he suggests "an element, however small, of negativity, conflict, pain and danger into day-to-day relations with older people who have power over you," turning life into a politicized immorality play?

In the end, his moralism has no root in practice and his practical suggestions lack morality. Kennedy's political agenda may be fun for the classroom, but one hates to think of others being moved to act out his obsessions at the expense of their own lives. It isn't just that Professor Kennedy is a bewildered shepherd; it's that he's positively dangerous to his sheep.

John G. Kester '63
Washington, D.C.

Professor Kennedy's optimistic primer on changing the corporate law firm from within came as a pleasant surprise. "Show me a large law firm and I'll show you a whorehouse" probably exaggerates. On the other hand, when the choice is between the principles that were assumed and rarely discussed in my day at HLS and the immediate needs of an important client, many a lawyer who is a pillar of probity when it doesn't matter will be (go) prone to take the practical course.

Consider, too, the lawyer who passes his days "just greasing the wheels of the system," leaving it to his partners to defend the rights of tobacco companies, auto companies, polluters, et al. to continue their ways of causing deaths. Possibly he differs more in degree than in kind from the Good German of the 1930's and '40's. Or consider the fairness of the system which that lawyer greases. One person's life is worth \$3 an hour, and another's is worth sixty or seventy times that.

I offer my own experience for the information of those who are still in school or sufficiently unencumbered by success to see a choice: I spent nine stimulating and nearly always delightful years with a large Wall Street firm. As my own person I later stood in unemployment lines and took in tenants to supplement a four-figure income. The hot dogs I ate then had greater savor than the steaks I ate before. If your conscience causes a firm to find you "not congenial," there are worst fates than being fired. Perhaps one of them is not being fired.

Malcolm H. Bell '58
Norwalk, Connecticut

Professor Kennedy's recent article "Rebels from Principle: Changing the Corporate law firm from Within" is an example of the bankruptcy of pseudo-leftist practice within academia. He succeeds in placing reform of corporate law practice on the agenda of those purporting to favor radical social change only by sacrificing the most basic elements of leftist analysis. His assertion that "there are no strategies for social transformation that are privileged a priori" carries with it the implication that anything can be revolutionary, as long as it confronts the amorphous adversary Kennedy labels "illegitimate hierarchy and alienation."

This kind of vague, idealistic nonsense continues to pervade "leftist" academic work in the United States. It allows both its writers and readers to apply a salve to whatever social concerns they may profess, while skirting the need for a formulation of a theory and practice to end oppression in this country. The real problem is not that there are corporate law

firms, but that there are corporate clients. Corporate law firms contribute to the subjugation of the poor and working class in America not because there are "bad guys" who run them, but because they serve a social function in buttressing the role of capital. By identifying the "illegitimate hierarchy" of the Wall Street law office as the adversary, Duncan Kennedy has proposed an irrelevant battle.

For the sake of argument, I will grant his premise that associates will be able to have influence on their firms' caseloads. (This is a dubious proposition at best — who else but corporate clients can afford the firms' fee scales? It is analogous to a middle-level manager in a factory convincing the boss to triple wages because the workers really deserve it.) Corporate clients will still need to achieve their goals. They are driven by social forces within the institutional structure of capitalism that are larger than individual "moral" choices. Those clients will either find other law firms to bust unions for them, or if Professor Kennedy's "strategy" is entirely successful, find alternative methods to accomplish the same end. Whether or not the "office politics" of corporate law firms are cleaned up will not contribute one iota to the alleviation of the suffering of the workers injured by dangerous conditions on their jobs, or of low-income tenants evicted by condominium conversions. Farmworkers will still die at an average age of 49.

Any strategy for change must come to terms with the fundamental origins of injustice within the economic structure of capitalism itself. Unless a proposed course of action addresses that problem, it is not revolutionary, or even "rebellious," but a sham.

The problem is that any strategy has to move you somewhere, and Professor Kennedy gets us nowhere. Kennedy and those like him in the left of the legal community, see the practice of law as a "thing-in-itself" divorced from its social context. It is this idealistic attitude that is at the root of his artificial separation of corporate law firms from their clients. It is also this attitude that has engendered the "crisis of confidence" among liberal law reformers that he describes so well. After 15 years of legal and legislative "victories," they are beginning to realize that legal practice alone is irrelevant unless it is connected to popular mass organization that can consolidate and enforce whatever legal gains are made. Change is never made in the courtroom alone; it is largely made in the workplace and in the community.

Professor Kennedy correctly identifies the manner in which the "left" of legal academics delineates choices to their students as a primary cause of their opting for corporate jobs. I couldn't agree more wholeheartedly with his conclusion. It is the kind of analysis exhibited in his article that drives them away in droves. If this

utopianism and refusal to come to terms with the material reality of making change is all they have to offer, why bother to hear more?

The answer lies not in dreaming up non-existent possibilities of making fundamental social change from within the corporate law firm. Rather, it lies in a re-definition of the lawyer as a practitioner of change. Such a redefinition must begin with the premise that it is impossible for a lawyer, qua lawyer, to make social change. This eliminates the contrast between corporate and "public interest" work that Kennedy laments, but in the opposite direction. Let us recognize that most of the "public interest" options available to students at HLS have as little possibility of making radical social transformations as does corporate work. Liberal fantasies notwithstanding, no government will put you on the payroll while you try to overthrow it.

The function of the left in the academic legal community should be to encourage progressive students to stop thinking of themselves as lawyers who will make change by filing briefs. Legal skills are useful, but only in the service of some large organizational strategy for change. Once that obstacle is hurdled, the options are limitless. There is no shortage of a constituency: 80% of the U.S. workforce is unorganized, the poor are facing major attacks in the form of benefit cutoffs and facing forced labor in workfare programs. In short, the problems are out there and will remain until those who are really committed to changing them sit down and face some hard realities. Organizers of change seldom get regular paychecks. They can't aspire to the kind of comfortable lives that "left" law professors or "public interest" lawyers expect. This is not because of some romantic notion about deprivation but because the constituencies simply can't afford anything more. But people associated with non-cooptable organizations (independent of government or institutional funding) struggling for fundamental change in this country do make a living and are making change. Far too few of them are lawyers.

Professor Kennedy should ask himself seriously whether the course of action he advocates can actually achieve the kind of society he says he wants. As Fidel Castro, referring to pseudo-leftists in Latin America, once remarked "you can call yourself an eagle without having a single feather."

David S. Shelton '84 *
Boston, Massachusetts

**The Bulletin is sorry to report that Mr. Shelton died in March.*

Professor Kennedy speaks from ignorance and bias in his sweeping condemnation of corporate law firms as instruments of evil.

Admittedly there are some bad corporate lawyers, just as there are occasional bad professionals in any group. But I can certify from long experience that the level of ethics in corporate law firms is even higher than in the profession at large.

I worked with a large New York City law firm for thirteen years. Ethics there were of the highest, and relations between the lawyers and with the staff were uniformly pleasant. No work was done for any client who was not entitled to representation, nor was any work performed except openly and freely. The same appeared to be true of other large firms with which I was in contact.

Of course, much of our work was in the capacity of an adversary, involving contentions with which leftists could disagree. But we respected everyone's right to disagree, which is more than Professor Kennedy is willing to do. It is clear from his diatribe that those who disagree with his pre-set views can expect only to be damned and accused of "corruption."

While, as might be expected, most of our work was client-oriented, the public stood to benefit from our handling of many cases and projects — in fact, a greater proportion than would be true of the work of an ordinary general practitioner.

I feel that whatever good I may have been able to accomplish in those tasks would not have been possible except for my association with and training by a group of brilliant, friendly, dedicated and honorable corporate lawyers, assembled largely by the late Emory R. Buckner, a native Nebraskan like myself, who gave me my job. In acknowledgment I established the Emory R. Buckner Scholarship Fund at the School in 1968. Obviously it is difficult for me to think kindly of a graduate who would accept his livelihood from an employer while intending to be disloyal, as advocated by Professor Kennedy. No one should go to work for an organization of which he has a low opinion to begin with.

The School thrives on the expression of diverse points of view, and Professor Kennedy plays a brave role in speaking out. It is well, however, that not many seem to be heeding his advice. Perhaps in time he will realize that because he is against something, that does not make it bad.

Rupert Warren '31
Buffalo, New York

A law school which tolerates on its campus students which tar the attorney with the wickedness of the client, is no law school, but is a brainwashing device to destroy the legal profession.

The source of the corruption of the Harvard Law School to these states has not been apparent to the few of us concerned about its degeneration. One source is now self-identified, namely, Duncan Kennedy. If he is not fired forthwith, maybe the search for the culprits should include the Board of Overseers.

J. Edward Thornton '32(33)
Mobile, Alabama

Anticipating the chorus of boo's for Duncan Kennedy's path-finding article on the ethical role of young lawyers in the corporate law firm hierarchy (*HLS Bulletin*, Fall 1981), I wish to register a resounding cheer. As a student in Professor Kennedy's first course at HLS, a 1L Contracts course, I was thoroughly annoyed at section-mates who carped at his constant probing at the edges of a lawyer's responsibility to his client, the public interest, and himself. These students wished that Kennedy would simply stick to "black-letter" law. These were the same classmates who savagely set on any student displaying less than total command of the subject under discussion. They were sorely surprised at Professor Kennedy's reprimand for their failure to understand the value of cooperative, rather than competitive, learning. They were, likewise, the same students whom Kennedy describes in his fall article as indicating that they have no choice but to acquiesce in a partner's request that they indulge in questionably ethical representation of clients.

The thesis which I would like to add to that expressed in Kennedy's article is that these characteristics are causally, rather than casually, linked. Professor Kennedy was too polite to his colleagues on the HLS faculty to suggest that the cause of this complex of views rested in the oft-stated, sometimes-explicit message which they send to students. By example, students were encouraged to view colleagues as no more than competitors in a value-free arena. Accordingly, as students, there was no value in assisting the learning of others, as it would merely reduce one's own prominence in the competition for a professor's favorable notice. Discussions of anything other than "black-letter" law were wasteful, as they could not help students learn how to beat out colleagues in securing new business. Similarly, as attorneys, declining to take an unethical or socially destructive position was pointless and self-defeating as there would always be

another attorney eager to take away the questionable business. My other professors beamed this message to me loud and clear as a student, and the evidence of its being adopted wholeheartedly by my classmates was not hard to find.

Far from the cries for Kennedy's resignation which will undoubtedly be elicited by his article (motivated in large part, I am sure, by his frankly leftist point of view), I think the man ought to be elevated to Dean at the first available opportunity — for consistently putting his finger on the most salient, and touchy, issues of legal education today.

In sum, kudos to Kennedy! Please let us read more of his refreshing, if iconoclastic views.

Glenn A. Stover '74
Arlington, Virginia

I highly praise Duncan Kennedy's article on the right course of action for corporate lawyers. He has taken an unfavorable position which I believe to be correct. Too often lawyers separate their work from their moral sense; the result is bad action and evil. The world would be a better place if, e.g., no organization could sell infant formula because no lawyer defended them in a lawsuit to stop such sales.

Many of our bad acts come from too much greed and too little altruism. Until we can discipline ourselves to be happy with fewer material possessions, the high salaries of corporate law will woo too many away from right action.

I take issue, however, with Kennedy's argument that jobs in legal services and public interest law are difficult to obtain. Since graduation I have held two jobs, one in legal services and the other in mental health law; neither was difficult to obtain. Like any Wall Street firm, legal services and public interest employers like to have HLS graduates.

Jim Keith '79
Anchorage, Alaska

Professor Kennedy's suggestions to young corporate lawyers on changing the law firm from within were, I felt, sound but too modest.

We are faced with dangers which are widely perceived as threatening the existence of our civilization. These include, to mention a few, the deepening anger and

hostility of the world's have-nots, the growing greed of the haves, the increase in the poisons found in the air we breathe, the water we drink and the food we eat, the spread of nuclear weaponry among nations. The need to respond to such threats must involve old as well as young lawyers and government officials and private executives.

The frequently quoted epigram of Hillel, a teacher who lived two-thousand years ago, applies to each of us. "If I am not for myself, who will be? And if I am for myself only, what am I? And if not now, then when?"

Benjamin Phelosof '50
Rochester, New York

Your article in the *Harvard Law School Bulletin*, Fall, 1981 is, to my utter surprise, the very first swallow I have yet seen this long winter. It is an act of honest courage aimed at the very heart of capitalism. Moreover, it displays an excellent "feel" for the Oedipal dimensions of the problem it addresses.

For this reason I will, if you will permit me, tell you my own story. I have done *mutatis mutandi* exactly what Professor Kennedy advises young associates to do.

Originally I am from Yugoslavia, where I was appointed an assistant professor in 1970. I was sent back to Harvard to get my LL.M., but in the meanwhile the regime back home had changed to a more "daddy-like" one again and I was forced to seek employment in this country.

I went to work for New York Law School and was shocked to discover that it was run by the dean and the trustees, not the faculty. I became actively involved in the rebellion. A petition complaining of the lack of academic freedom there was signed and sent to the AALS. AALS sent its investigatory committee, which did not do anything. Most of the people who had signed the petition are now gone, the tenure track being seven years long.

I decided to return to Yugoslavia in 1979 hoping to be able to find employment and thus, before leaving I stood up in no uncertain terms for the rights of the faculty. In such a context I discovered several interesting things. People in this country, much more so than where I come from, are afraid to rebel in any fashion. They are submissive. Students, too, are submissive to an incredible degree. In spite of all the ideology to the contrary, the positive identification with power in this country is stronger than in any other country I have experienced. In their unhappy consciousness, for example, students realize that rebellion against the prevalent values (so cleverly covered up by law's discursiveness) would be the metaphysically

redeeming alternative. The energy is there, but it has to be activated. Fear, the introjected common sense of the dominant social consciousness, the shallowness of material security and perhaps more than anything else the insecurity stemming from the subaltern position in which all are held are responsible for the frightened passivity which, I believe, is addressed in the article.

Something very similar is going on in Eastern Europe. Rudolph Bahro has described the analogous process in his *Alternative in Eastern Europe*. On the level of the presupposed, I believe, the situations are identical, but rebellion as the only true alternative to resignation and ritualization responses to anomie is in both cases equally improbable. The insecurity coupled with artificially maintained consumerism are the bulwarks of the given social power structure here and there. Poland is no exception, since the real reasons for rebellion there lie in the utter deterioration of the material production, which in turn makes the system incapable of providing even as much as to maintain people in the status in which they can still lose something.

That, of course, is the long-range effect of the situation: once the correlation between power and intelligence is entirely subverted, as it is in Eastern Europe, then the economic system will deteriorate. This is not happening here and the Harvard Law School is the best proof of it. As long as the bloom of the nation's intelligence is willing to serve, the system will go on.

This is the negative side of it. Yet there is an owl of Minerva preparing to fly at last. The level of the presupposed is being questioned. This last semester I taught criminal procedure at Fordham. Never before was I able to discuss with students notions such as Heidegger's conception of truth as disclosedness (as opposed to simple adequation on which the law tends to rely). There is a reservoir of metaphysical energy in the students; they are willing to shake off the mechanical notions of formal logic and they get excited when the possibility of a different conception of the world is even hinted at. Even within the discourse of legal teaching, as Professor Unger has shown, it is possible to articulate the potential meaning of an alternative, new mode of existence. *Something to look forward to.*

Social consciousness, after all, is made of interactions of individual consciousnesses. The latter absorbs all the nonsense of the past, law being perhaps the most articulate and powerful part of it, and it is forced to confront it, sometimes painfully, with the realities of its own future — as manifested today. I believe that the intellectual process, far from being epiphenomenal, in fact carries the process of the formation of the new from its beginning to

full articulation. We live in very important times and our own inner searching, peeling off our own existential onions until we are faced with the forlornness of the ultimate existential anxiety and the nothingness below it, is what the history of today really means. The swallow is not yet an owl; the night and the winter still last. But there is something to look forward to.

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Duncan Kennedy's polemic, "Rebels from Principle: Changing the Corporate Law Firm from Within," (Fall, 1981) appropriately raises the hue and cry about babbity in big-firm corporate practice and the subtle ways in which such conduct is reinforced by legal education. From the perspective of those of us in law teaching, I think such a self-critical analysis is telling. Much of the malaise which Professor Kennedy identifies results in some critical degree from the perception that law professors — particularly left/liberal law professors — are ethical (and political) relativists.

In my six years of teaching, serving pro forma as resident liberal, I, like Duncan Kennedy, have watched scores of talented and sensitive law graduates approach their entry into "big-firmhood" with the sort of troubled backward glances at their past lives that one would expect from those boarding the barge to Elba, leaving their loved ones behind forever. And I can't even count the numerous defensive conversations I have had at alumni affairs with former students who gather around and try to outdo one another by impugning the motives and morals of their own scurviest (and generally most profitable) corporate clients. The game, of course, is one of self-degradation, i.e., "I've sold out entirely, what more can I say?"

But, as Duncan Kennedy points out, there is a substantial amount of anecdotal evidence suggesting that it is simply not true that one must always abandon one's morals or ideology in order to succeed in the smelter of big-firm corporate practice. There is no reason why (at least *arguendo*) lawyers cannot continue to exist after law school as ordinary human beings, with their own idiosyncratic politics, morals, emotions, etc. One should not be expected to give up one's individuality to become a professional. What a demeaning image of our profession — that we are professionally inadequate when we stop to consider the significance and consequences of our actions.

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Harvard Law School Bulletin

Spring 1982

Harvard Law School Bulletin

Spring, 1982

Volume 33, Number 2

Editor
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Advertising:
Correspondence, insertion
orders and copy may be sent
to the editorial office.

Address Correction:
Changes of address should
be sent to the editorial office.

Published twice a year, Fall and Spring, at Harvard Law
School © 1982 by the President and Fellows of Har-
vard College. Printed in U.S.A.

Cover Photo: Professor Phillip Heymann and
Assistant Professor Susan Estrich lead seminar on
Criminal Law and Administration. Photo by
Michael Nagy.

Artwork: pp. 16-21 by Joni Levy-Liberman

Photo Credits: Joan Lebold Cohen, 3; John
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