

POLITICIZING THE CLASSROOM*

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I'll begin with my practical proposal. I think it's different both in content and in spirit from the ones that liberal or vaguely progressive law professors typically put forward. For the last maybe fifteen years, I've been trying to politicize my classroom.¹ Politicizing the classroom means trying to teach basic contract, property and tort doctrine using cases and hypos that will perform three functions.

First, the cases and hypos have to be pedagogically useful just to get the students to learn black letter law. I see myself as having a major responsibility to teach doctrine, bar review type stuff. Though my students sometimes criticize me for not doing enough, I think I teach as much as or more of this than my more conservative colleagues. If I did less, I would risk losing the students. I need cases and hypos that will perform this function while still working well to further my second objective, which is that cases and hypos should illustrate gaps, conflicts and ambiguities in the system of black letter law. I try to get students to see the pervasiveness of occasions for choice by judges when they are deciding what the rules should be.

The third element, the politicizing element, depends on the first two. The cases and hypos that pose the problem of what to do with a gap, conflict or ambiguity in the system of doctrine should split the conservatives and the liberals in the class as close to right down the middle as possible. In other words, when I ask them to vote on how a case should have come out, which I do every two or three days, the students should find themselves evenly divided between two sharply contrasting yet possible rules to govern the facts. Or they should find

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1. I've written on this topic before. See Duncan Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 38 (David Kairys ed., rev. ed. 1990); Duncan Kennedy, *Liberal Values in Legal Education*, 10 NOVA L.J. 603 (1986); Duncan Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1 (1983); Duncan Kennedy, *First Year Law Teaching as Political Action*, 1 LAW & SOC. PROBS. 47 (1980); Duncan Kennedy, *How the Law School Fans: A Polemic*, 1 YALE REV. L. & SOC. ACTION 1 (1970).

themselves arrayed along a left-right spectrum, corresponding to a range of rule solutions.

In the ideal case, I'm trying to teach the students some very familiar (from their point of view) basic doctrine, say about battery or when self-defense is a defense in tort law. The goal is to choose a case and run the discussion so that it will be quite plausible to make a legal argument either for the outcome that the majority opinion reached or for an opposite outcome. Regardless of whether or not there's a dissent, the case is then at least potentially somewhat controversial from the students' point of view.

The technique works if, when asked to argue in favor of either resolving the case in the liberal or in the conservative direction, the students find themselves arguing hard among themselves, and are evenly enough divided so that no one feels that they are embarrassingly deviant from a class consensus, so that there's no inhibited minority. That requires using different cases for different groups.

The students at the New England School of Law, where I taught for a year, were more conservative than those at Harvard Law School, so you needed a more extreme conservative rule to get the class to divide evenly. At Harvard, my upper level Housing students are more liberal than my first year Torts students, so you need a more extreme liberal outcome to get them arguing among themselves. The goal is to polarize the class, that is, to polarize the actual experiences of learning black letter law and of developing facility at all those manipulative techniques that teachers of a liberal persuasion often denounce.

The idea is that students should experience the classroom as involving both doctrinal learning and the discussion of gaps, conflicts and ambiguities in doctrine. But also, day-after-day, they should be looking at each other as representatives of different kinds of left or right coalitions. Who is in what coalition will vary according to the issue. On gender issues, the students will divide differently than they do on class issues and differently than they do on race issues, and that's part of the fun of it.

That's my proposal. It's not at all an attempt to teach values or values clarification. I'd say it's part of a general project of trying to be a left wing, radicalizing teacher, to adopt an explicitly political agenda in my professional life, and to accept the inner tension, conflict and ambivalence that arises when you take dead seriously the cliché that teaching is a political activity whether you want it to be or not. If you

really believe that, rather than just paying lip service to it, you have to (a) figure out what your politics are and then (b) figure out how your teaching activity promotes, impedes or has nothing to do with them.

At the micro level, it seems like all of us are trapped into just serving the status quo by carrying out the professionalization process. We are inducting students into careers in law that are dominated by a market for jobs and a professional culture that is pretty much a given, that won't change much regardless of what we do in the classroom. And it is an open question whether doing something in the classroom wouldn't be indoctrination or preaching, and, therefore, professionally illegitimate.

I would describe myself as a weird kind of extreme leftist, well to the left of American liberalism, teaching in a context where the students divide between various forms of moderate liberalism and moderate to extreme conservatism, with a small number of more leftist students more or less like me. What is the relationship between my off-the-wall, egalitarian, race conscious, gender conscious, community control and sexual liberation oriented ideas about social life at the macrolevel, and the microlevel of the classroom? If there is a relationship, is it legitimate to try to do something about it?

I think most liberals agree that what we teach in the classroom when we teach legal rules and legal reasoning is not something detached from our macrolevel political beliefs. The legal rules of contracts, property, torts, civil procedure and so forth come into being through decisions that are always, in some sense, politically motivated. The arguments that judges like Skelly Wright or Shirley Abrahamson make in their opinions are recognizably liberal, just as the arguments of a thousand white, male, nineteenth-century judges are recognizably conservative. Liberal law teachers sympathize intensely with liberal judicial decisions and tend to think the conservative ones are just plain wrong.

They often see themselves as having to choose between pretending to be neutral, which means letting the students think that they think the conservative rules are perfectly all right, or taking sides, which involves openly or subtly endorsing the reasoning (or improving the reasoning) of the liberal decisions. When they take sides, they feel, or want to feel, that they are doing so in the name of an enlightened, progressive understanding of their professional role as teachers.

The more morally serious liberal professors are, and the more admirably conscious they are that law is politics, the more likely they are to end up preaching. They may disguise it as just trying to get the problem of values into the discussion, or as trying to get the students to understand the fact of a "multiplicity of voices" or whatever. They are likely to be accused of "political correctness" in its subtle form because students who don't share their liberal views (and even some who do) feel they're a captive audience for the teacher's personal politics dressed up as *good* values, and that talk about multiple voices ends up just reversing the hierarchy.

I'm not in favor of preaching (I'm not much of a preacher when I try—too old, arrogant, cynical). I think I can politicize my classroom without being guilty of indoctrination in the sense of transmitting my set of prescriptions for good law on the basis of my authority as a teacher. The idea is to politicize the classroom around *the students'* political views. It's a different strategy for trying to mediate the contradiction between my political commitments plus my view that teaching is political, and what I see as the students' legitimate demand that I not be an indoctrinator.

If I succeed in splitting the students right down the middle between the liberals and the conservatives, in having them duke it out and form alliances that shift over time, in allowing them to discover each other as political allies in the classroom, and in building their own experience of law as a political activity, that's good enough for me. That's something I'm imposing on them using my authority as the teacher. If the classroom is functioning the way I want it to, I'm imposing on them that it's very difficult to escape the politics of law. It's hard to get away from the feeling that legal argument is indistinguishable from political argument, which is at least problematic given what you'd thought about it before law school, so you have to adopt some existential stance toward that problem. You can distance the arguments if you want to, but I try to make the distancing as difficult as possible.

On the other hand, I don't see myself as laying down a line, except to the extent that my line is law is politics, and that I think I can legitimately teach. It is my professional obligation to convey to my students my understanding, of the nature of the discipline, in this case, its political nature. As long as I do not indoctrinate or preach

about what the rules should be, I don't think I can really avoid a professional obligation to teach them that law is politics, because that's what I think it is.

The first question was whether it is morally legitimate to politicize the classroom in the way I've described, and I guess the second question is, "Does it work?" Is it really possible to do anything if you see yourself as a radical, as a person off the edge of the map? At least to begin with, even radical students who share many of your views will just take it for granted that the answer is "no", and that neither you nor they can expect anything but to be totally defeated by the power of the socialization process.

Robert Granfield's book,² which Catherine Wells introduced as emblematic of the hopelessness of our situation, is actually just the opposite, though you have to read between the lines. First, his criterion for left political success in legal education is simply reducing the number of students who go into corporate law.³ That's an odd way to look at it, and really self-defeating, if you believe, as I do, that the demand side of the market is far more important than student ideology in explaining the job statistics, and if you also believe that radicalism raises issues of cultural and political resistance that play out in every workplace.

A much more important finding in the book is that thirty-eight percent of graduating Harvard Law School students said that their legal education made them "more radical."⁴ I don't think you could find more than a child's handful of other law schools in the country where students would say that. In most, the very term "radical" has disappeared from the political lexicon; you couldn't get thirty-eight percent to say even that they had become more "liberal." Granfield didn't seem to realize that there was something of interest here, possibly because for whatever reason, he decided just to ignore the activity of radical law teachers, critics and others, at Harvard. I think our activity explains the statistic. By the way, it would probably be significantly lower today than it was in 1986-87, and our loss of political momentum probably explains that too.

The statistic at least suggests the possibility that the strategy we chose was a good one, though it wasn't more than half consciously

2. ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND (1992).

3. *See id.*

4. *Id.* at 43.

adopted and many of my colleagues would probably deny that it has worked at all. I'd describe the strategy as having three parts. One is to support and help expand the small group of radical students who come to law school in some jeopardy of being swamped by the basic liberal consensus, or the conservative consensus, depending on the school. The idea is to help them protect their political energies, help them hook up with each other to form radical subgroups that can challenge the institution, and ally with them.

Not ally with them as teacher to student, though on a very basic level, yes, it always has to be that. It should be the old, "new" left idea of a coalition of anybody who wants to shake up the status quo. That coalition can get going to some extent in the classroom, without indoctrination, if the radical students find themselves saying, "just as I thought, law is politics." They can use the politicized class discussion to figure out who their political allies are. They can hook up with you, and you can hook up with them, and you can form these communities.

There's no need to be pretentious about radicalism, the way I think the big heroes of liberation theology and resistance pedagogy, theorists like Freire, tend to be. At a very primitive and modest level, it's possible to form little groups of people who are kicking against the law school status quo, groups where students and faculty are basically alive rather than deadened out or cooled out by the socialization process. It means going beyond just being the faculty advisor to the National Lawyers Guild, being more involved with them than that. I'm not denying that that has personal and professional risks. I'm just saying it sometimes works.

A second kind of objective is to move the liberals to the left. I think radicals should differentiate themselves sharply from liberals, because we really are different from them. But it's obvious that the main way for us to increase our numbers is to recruit liberals, rather than denouncing them or, even worse, blending in with them. I think the key here is that liberals are very anxious to believe that what they are doing is non-political, not "just ideology," but somehow validated at a much higher level as "right." And they want to see themselves as moderates. Both liberal law teachers and liberal students want to see themselves as doing just what all good, decent people with morals would desire to do if only they "got it".

I don't see it that way. I think society is ideologically divided, and everybody thinks they've got morals on their side, I don't think liberals have more values than conservatives or that it's even remotely a

question of who's "got it" and who hasn't, I see the various groups in a basic conflict about the distribution of wealth and power. All sides have ideological positions that they think are just great, and the question is, "How do you engage in the ideological conversation and dialogue with the hope of influencing people?" I try to do that from my own, very partial, political position without saying that I represent the truth, values in the abstract, or the greater good, because I'm not sure that I do.

My goal is to move the liberals to the left by making them confront, through these classroom political discussions, the extent to which their opinions are not just what all people with values think, but ideological commitments; I'd like them to confront the limits of moderation. What's at stake for liberals as classroom arguers is the allegiance of the undecided, the moderates who are political beginners or uncommitted. The conservative students are the teachers of the liberals here. They teach the liberals that they will lose the argument if they stick to vague moralisms, if they have neither concrete social, economic, political analysis nor a rhetoric that goes beyond the goody-goody.

I'd like them to get a sense of liberalism as a fighting faith, because then they might want to move beyond it. They might be willing to kick and scream a little more loudly, polarize a little more, and heighten the level of conflict a little more. They might stop alternating between being wimpy and being huffily self-righteous about the sexism or racism of the other side.

A third objective is to undermine the confidence of conservative students in dumb ideas that pretty clearly will disintegrate just in the light of day. There are a lot of these ideas, for example, that redistribution is always inefficient. There are also a lot of dumb liberal and dumb radical ideas that it's worthwhile to attack as self-contradictory. But I *don't* want to suggest that all conservative ideas are dumb or, even for a minute, that conservative students are outside the discussion. I aspire to be a teacher to my conservative students just as-much as to the liberal and radical students. I am proud when conservative students come and ask me to supervise their papers or ask me for letters of recommendation. I see that as a tribute to this part of the program.

What I'm proposing is to attack the problem of the perspectivelessness or the apparent neutrality or the abstraction of legal studies by making the classroom into a place where students learn doctrine

and legal argument in the process of defining themselves as political actors in their professional lives. This isn't *necessarily* left wing, in the sense of left wing under any and all circumstances. But in the actual context of American politics over the last twenty years or so, I think it's actually and left wing. The reason being that the denial of the politics of professional life is—I admit I'm speculating—a very important part of the centrist ideology that liberals use to evade their own inner impulse toward activism.

This is most definitely not the idea that we influence our students most by “who we are”, or by role modelling. Of course, we do exert influence that way. I can role model the left wing law professor for the tiny minority of my students who want to teach law, but I'm no model of the corporate lawyer they will most likely become. My more substantive strategy of politicizing the classroom often doesn't work at all; even at its best, it has no effect on many or most students, and has politically counterproductive effects on others. But it doesn't depend on your humanistic excellence (except to the extent that any teaching strategy does) or even on the students' understanding of your left politics (it's based on their politics, not yours).

Here's an example. In teaching self-defense in first year Torts, I use a bunch of cases and materials on battered women who kill in self-defense. The key case in the discussion, through which I try to teach them the evolution of the doctrine, is a case in which a lot of people think that the battered woman has gone way too far. It's a case in which a battered woman shoots her ex-lover. Her ex-lover comes to the door of her apartment and she is terrified of him, for reasons that are clear from the opinion, but which don't establish any more than some probability that he will harm her. She shoots him through the door, using a gun she stole from his apartment. The door is locked. She says, "who is it?" He never identifies himself. She correctly guesses it's him and she kills him.

This case usually works to divide Harvard Law students about equally. It produces a deep argument about the validity and the limits of the right to kill in self-defense. They learn in the process all the technical subrules of self-defense, but I think they leave the class often sort of shaken, a little bit at the revelation that judges and juries are resolving these things in a context of neutrality when they're so obviously deep political issues. So that's the strategy; it's a radical-left strategy, not a liberal strategy, but one that tries to honor the liberal commitment to academic freedom. Thank you.