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Note Topics, Professors, and Scholarship: An Autobiographical Sketch of a Law School Experience

*Jason Broth*

Introduction

How does a law student form a note topic? Typically, a student is instructed to find a pressing legal issue about which no one has yet written. That student finds the relevant cases, journal articles, and any other applicable materials written on this topic. He or she then uses these materials to summarize the current state of the law, expose the problem with the law, and propose some sort of remedy, while making certain that the work includes an outrageous number of footnotes to justify its scholastic value. Most, or at least many, students use this approach to note-writing. It was what I began to do before frustration overtook me.

This process of note-writing leads toward topics regarding narrow issues of law, such as differing liability under each state’s particular tort statute or how the criminal law fails to adequately address a specific problem. I do not intend to degrade this type of topic, as many lawyers and perhaps judges find these articles useful. The narrow manner in which the notes are constructed, however, causes them to become abstracted from the questions that press at the heart of the legal system and, as such, possess value for only a small class of people.

It is important that at least some notes deal with the broader issues of the legal system rather than narrow issues of law. Only through an examination of these broader systemic issues can individuals begin to have an effect on the way in which the legal system functions within our society and thereby suggest alternatives to address the broader economic and social problems that persist in this nation. Some note writers should attempt to study questions about the legitimacy of the legal system, the problems and

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biases built into the way in which law is practiced and taught, alternative perspectives of the law, and other more philosophical, critical, and theoretical approaches to the legal profession and legal scholarship. This is the direction in which I will proceed with this note.

Some readers of this introduction may be thinking, "Here we go again... with another Critical Legal Studies (CLS) person complaining about the problems of the legal system... another young Duncan Kennedy reader about to attack the hierarchy of the law." Perhaps this is a fair assessment of my project. I concur with most of Kennedy's insights and observations detailed in his splendid 1982 essay, "Legal Education as Training for Hierarchy." To some degree, it is difficult for me to avoid duplicating Kennedy. This piece, however, is far more autobiographical than Kennedy's work; it combines Kennedy's critical style with the autobiographical format of books like One L2 or Broken Contract. With this in mind, a brief description of Kennedy's essay provides a necessary foundation for the reader.

The guiding idea in Kennedy's essay, which he announces in the first sentence, is that law school is a political environment, despite the attempt of the law school system to appear neutral. This appearance of neutrality insidiously forces the law student to engage the law school experience in a particular manner and manipulates the student unknowingly into a particular ideological attitude toward law, society, and the economy. At the same time, the student becomes a part of the hierarchy that is law school in order to join the greater hierarchy that is in fact the legal system. Kennedy describes this system by discussing legal education and legal teaching techniques in a general manner and then shows how these techniques contribute to the disorientation, followed by the metamorphosis, of the students. He also describes why it is nearly impossible, even for the leftist student, to be critical of the law school experience. On this point, I believe Kennedy's essay is somewhat dated and is perhaps where my particular experience in law school will extend and redevelop Kennedy's thinking.

Kennedy writes that most left thinkers are basically helpless at the hands of the curriculum because they have only two tools of analysis at their disposal: "rights" analysis or traditional Marxism. The former, he

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4. Kennedy, supra note 1, at 38.
5. Id. at 38-43.
6. Id. at 46-47.
7. Id. at 46.
and I both agree, is seductive yet ultimately illogical and cannot lead to a meaningful transformation of society. The latter is "critical of law but also dismissive" because it envisions law as a lackey of class conflict; this approach results in an entire rejection of the system without allowing one to engage with it and then criticize it from within.

Although I agree that some left students are mired down in these two types of thinking, many contemporary students' exposure to Jacques Derrida, Michel Foucault, Walter Benjamin, and Georg Lukacs at the undergraduate level has armed them with additional ammunition in their arsenal of critical analysis. Previously, these thinkers were primarily studied by graduate students, but, as commonly occurs over time, their writings filtered down to the lower levels as they became more "canonical" and accepted. As a result, I will focus on the complexity and personal disparity of the new left student in dealing with the situation in law school and the alienation created by the legal education system, a topic that Kennedy only addresses in his conclusion. I will also discuss the prevailing attitudes in society toward education generally, attitudes which have increasingly made the 1990s a hostile place for many progressive thinkers. I will use my own experiences to illustrate my points and trace my history from the end of my college years to the writing of this note as a way of allowing any individual, lawyer or not, to reflect on the trend in American colleges and universities. This note is not meant to be an empirical study; I do not pretend to speak for anybody else's experience but my own. Even with that in mind, however, I feel that the observations of an individual can be used as a tool to reflect on the entirety of the system and the trend in society. Ultimately, I hope to show that the changes in our universities result from a backlash by some scholars based not on intellectual difference but on a prejudice that is deeply imbedded in the Anglo-American system. Finally, this discreditation of new left thinking is a means to thwart social change and to reinforce the corporate vision of America.

I. Prior to Law School

The formulation of this topic was a hard fought battle, yet it was within this battle that I found myself confronted with the same questions about the appropriate role of a progressive thinker that have plagued me since my college years. I was an English major at Vassar College, where I spent the bulk of my final two years studying not only literature but also literary

8. Id. at 47.
9. These four authors are all 20th Century continental thinkers. Derrida and Foucault are usually equated with French postmodernism. Benjamin and Lukacs are two of the major neo-Marxist philosophers.
theory and philosophy. I was especially close to two of my professors, each of whom had Yale Ph.D.s and studied under Harold Bloom. Through my personal and academic association with them, I developed a strong background in Romantic poetry and American Transcendentalism, with a major influence from Harold Bloom, Geoffrey Hartman, J. Hillis Miller, Paul de Man,10 and Jacques Derrida. Simultaneously, I had a great personal interest in Indian literature, culture, and storytelling; accordingly, I studied the works of Roland Barthes, Michel Foucault, Claude Levi-Strauss and some “post-colonial” critics, including Gayatri Spivak.11

The culminating event of these studies was the creation of my senior thesis, which addressed a book entitled The Education of Little Tree.12 This perplexing fictional work was a best seller as an American Indian autobiography. It was not written by an Indian, however, but by Forrest Carter, a former Ku Klux Klan member and known southern white racist. The factual situation surrounding this book was perfect for a post-structuralist discussion of the issues of author, text, authenticity, meaning, and beauty. I used the above-mentioned theorists to examine, de-construct,13 and semiotically explore both the text and, importantly, the critical and popular reaction to the text. This thesis was not simply about an enigmatic book. Rather, this book was a vehicle to use critical theory to reflect on the prevailing culture that created it, loved it, and then finally loathed and discarded it.

Within this project, I discovered not only the “academic” value of critical theory but also the “real world” implications that it imports. Critical theory can compel educators to confront the issues of what we should read, why we should read it, and how it will influence our system.

10. These four scholars were all professors at Yale University and came to be known as “the Yale School.” Their primary literary focus was in Romantic poetry, though their contribution to literary theory, especially that of Bloom and de Man, was great.
11. The importance of Barthes and Foucault in this area is their development of semiotics, the study of the system of signs. Levi-Strauss was a social anthropologist and a forerunner of structuralism. Spivak is currently a noted critic of post-colonial literature.
13. Although the word is usually written as “deconstruction,” without the hyphen, I decided to use the style in which Derrida originally writes the word so as to draw some attention to its constituent parts. I feel that this brief treatment of deconstruction is necessary because of the many legal scholars who have broadly misunderstood the idea and its process and, as a result, are likely to dismiss any scholarship which fails to make some sort of direct treatment of this concept when it is raised. These scholars tend to think of deconstruction as the explosive and chilling destruction of some sacred edifice. As Derrida himself explains when he introduces the word in Of Grammatology, demolition is not the proper metaphor for his concept: “Further, it inaugurates the destruction, not the demolition but the de-sedimentation, the de-construction, of all the significations that have their source in that of the logos.” JACQUES DERRIDA, OF GRAMMATOLOGY 10 (Gayatri Chakravorty Spivak trans., 1976).
of apprehending the world. Exploring these issues is not about changing the lives of individuals in dramatic ways or reforming the ills of society in a moment. Rather, it is about infusing into the discourse a self-reflective aspect which, over time, will hopefully generate greater societal examination of our situations and the influences in our lives. Imbedded in this summary lies my belief that a scholar who challenges our assumptions about the world possesses the potential power to influence change and make a proverbial difference.¹⁴

As is common with many graduating college seniors today, I was confronted with the question of what course of graduate study to pursue. This decision was as difficult for me as it was for many other law school students whom I have subsequently met. Even though we came from a wide variety of academic fields, we still faced the same dilemma: do I choose the field which I feel is more challenging, more intellectually exciting, and closer to my heart, or do I go to law school? Obviously, this phrasing of the question reflects my bias. Despite this bias, I, like many others who share it, made the choice to go to law school. How does one account for this discrepancy between desire and decision?

Several explanations for this phenomenon exist, but I consider two to be the most relevant. The first regards the pure economics of the matter. The career opportunities in many academic fields, particularly English, which would have been my choice, are limited. Professorships are becoming increasingly difficult to obtain, and there are few other jobs for which a Ph.D. is not an over-qualification. On the other hand, no matter how many complaints there are about our society’s excess of lawyers, numerous jobs are available to an individual with a law degree. Additionally, a lawyer has the potential for earning a great deal of money, particularly at the high end of the economic spectrum. Although this was not my goal, being able to obtain a job was. Many students feel that in order to make the costly investment of attending graduate school, they must be assured of a return; thus, they frequently choose law school over the competing field.¹⁵

Secondly, many people choose law school over competing academic fields because of the old-fashioned belief that the law can be a vehicle for social justice and social change. This notion was largely influential on my own decision to attend law school. Although a philosophy or English professor may influence society through both teaching and writing, that effect is long-term (multi-generational), abstract, and somehow always

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¹⁴. I use this word “difference” in its ordinary meaning.
¹⁵. Although the critique of a system that, in effect, prefers tort and contract attorneys to molecular biologists and authors might be appropriate, that topic will be left to others who think in this same vein.
deferred. Reminiscent in my mind is the beginning of the Langston Hughes poem “Dream Boogie”:

Good morning, daddy!
Ain’t you heard
The boogie-woogie rumble
Of a dream deferred?
Listen closely:
You’ll hear their feet
Beating out and beating out a—
You think
It’s a happy beat?¹⁶

Although the project of incremental change is of extraordinary importance, this section of Hughes’ poem strikes a heartstring with me regarding the uncertainty of it all. It is a dream, but how do you know that it will happen? How do you know that you are moving toward it without any tangible evidence? Even the noted literary critic Henry Louis Gates instructed, “I tell students who want to change the world to go into a different field.”¹⁷ The law offers a seemingly more aggressive, proactive, and tangible approach to reform. In Marxist terms, even though one does not see the discourse change, one can see the wealth redistributed. To a young progressive, as Kennedy and I concur, this is the lure of the law.

This choice to pursue a legal education over one in an academic field does not, however, represent an abandonment of the learnings of contemporary thinkers. In the naiveté of the graduating college student lurks the unfounded hope that one will be able to merge Marx, Freud, and Derrida with the teachings of a legal education. Unfortunately, only an occasional law school professor welcomes this type of thought. Admissions policies are designed to thwart it, hiring policies are designed to disfavor it, and grading and ranking schemes, as well as the bar exams, are created to stifle it. Virtually everything in the law school setting and, in fact, in society in general has been put in a position to discredit progressive thinking. This realization invoked in me first a sense of alienation and later the hostility that has led to this note, in which I will trace chronologically the intellectual inadequacies I have encountered through my first two years of law school.

¹⁶. LANGSTON HUGHES, SELECTED POEMS OF LANGSTON HUGHES 221 (1959).
II. One L

Although I felt somewhat guilty and saddened by the pragmatic decision that I had made in coming to law school, I entered with an air of optimism. My first semester classes were Contracts, Property, Civil Procedure and Criminal Law. Of the four, I was most excited about Property and Criminal Law, as I felt that these classes were directly relevant to the lives of a huge segment of the population, and I had already formulated many of my own critiques of the existing systems in these areas. It was not long before I realized that my extra-legal thinking regarding these and the other areas of the law which I was studying had little place for expression. These thoughts had, at best, borderline relevance to the lives of most students and professors, who viewed them as some sort of academic or artistic oddity. They were like paintings to be hung on the wall, glanced at sometimes, admired occasionally, discussed rarely, and even more rarely meditated upon. Law school was only for learning the way in which the law worked.

With this understanding, I tried to do outside reading to supplement my casebooks and maintain a connection to those underlying philosophies and principles that had guided me toward law school. I purchased two books that semester to satisfy these cravings: *Discipline & Punish* by Michel Foucault\(^\text{18}\) and an essay collection entitled *The Politics of Law*.\(^\text{19}\) I read all of the Foucault book and parts of the other book, generally finding them to be thoughtful and distinguished works. Unfortunately, the time constraints and institutional pressures of my required homework prevented me from continuing my outside reading. Although I felt no great desire to be in the top of my class, I still felt the pressure of the grading system because of its constant presence in many other student’s minds. Thus, my outside reading was diminished.

Perhaps even more harmful than my limited exposure to critical reading material during my first semester was the lack of teachers and colleagues who were interested in discussing and exploring these ideas. Prior to my law school experience, a huge portion of the learning process in my life had been comprised of intellectual interaction with students in an intimate atmosphere. This type of interaction did not exist in the first year of law school. Classes were large and lecture-oriented. Law professors did not expect creative or alternative thinking; in fact, they discouraged such thinking and, instead, favored those with the ability to quickly explain the facts, issues, and holdings of cases. There was no discourse; there was an examination. Kennedy has been comprehensive and critical on the issue of

\(^{19}\) THE POLITICS OF LAW (David Kairys ed., 1982).
the teaching style in law school, so I end my discussion here in favor of one regarding the law school student body.

The rigid focus by the admissions board on grades and LSAT scores has lead to the acceptance of many students who have chosen law school for the respect accorded to lawyers by family and friends and the high average salaries that lawyers make. There is seemingly little personal focus in the admissions process on the goals and motivations of the students, except perhaps as an afterthought to grades and test scores. As a result, many left-thinking students who regard law school not as a precisely calculated career move but as a means of putting themselves in a position to achieve some social goal are excluded from top law schools because they simply do not make the grade. Accordingly, my intellectual interaction with many of my colleagues was on matters which to me were superficial, and my ability to advance radical conceptions of the law dwindled more each day. Ultimately, my first semester was filled with an exceptional feeling of loneliness tempered only by assurances from my faculty advisor that there were others like me and that in the second year I would have more freedom in choosing my classes and thus be better able to find my niche.

My second semester was substantially like my first in terms of the classes and professors that I had. Thus, my initial feelings about law school remained essentially unchanged, with one slight variation. The intimidation of the classroom environment gradually decreased as the students became more accustomed to the method, and many began to feel more comfortable and relaxed. As my own intimidation level lessened, however, my resentment began to blossom. During this semester, much of my frustration and sadness began to turn into the anger that I described in the opening of this essay. Rather than catalog my thoughts and feelings, however, I will relate two anecdotes from my second semester where my alienation in law school readily surfaced.

My Contracts course was year-long and taught by a conservative faculty member. During the second semester, the course reached the topic of unconscionability. The professor was examining a case in which the court had used this doctrine to rule a contract void. The terms of the contract suggested that one party used its wealth and legal knowledge to the severe disadvantage of the other party, who was in a disempowered position. The professor acknowledged this point but then proceeded to explain why this case represents terrible decision-making because it departs

20. KENNEDY, supra note 1, at 50-56.
21. This is not to say that left-thinking students have poor scores and grades but that they may be more concerned with intellectual development and thereby less focused on grades and, particularly, standardized test scores.
from the rules and thereby undermines the determinability of the law, thus
driving up the cost of business and making it worse for everybody (except,
of course, the plaintiff in the case). I responded to the professor with an
opposing point of view, indicating to him that there were fallacies in his
description of the market, that unconscionability is as predictable a rule as
any other, and that it is not "bad policy" for judges to intervene on the
behalf of parties who are in unfairly disadvantaged bargaining positions.
He accepted my argument without much response other than asking me
how my "tender conscience" felt about the result in the next case, which
brought rolls of laughter from the class. I had just been taught a lesson.
Law school was not a discussion; it was dictation. As I had previously
thought but had not proven until that moment, this professor would not
allow dissent. His response to me did not address the merits of my
argument but was to ridicule my political position as naive, nurturing,
effeminate and clearly other than the "law." To add injury to insult, I was
then put on the other-than-Socrates end of his ritualistic Socratic dialogue.

The other relevant anecdote during my second semester amusingly
illustrates my point about the lack of engagement by many students.
During my statutory course on Consumer Health and Safety, the professor
was discussing the impact of exposé literature on industry. One student,
who spoke routinely in that class, offered his opinion: (I paraphrase), "I
believe that writings like Unsafe at Any Speed\textsuperscript{22} and Slaughterhouse
Five\textsuperscript{23}, regarding the meat packing industry, \ldots [are beneficial]." I
chuckled and shook my head, while most other students simply sat silently.
Moments later, when he finished speaking, the professor, who was herself
smiling, corrected his blunder.\textsuperscript{24} Other than that, however, this point went
unnoticed. No one seemed to mind the confusion of two major American
literary and historical works. Why should they; this is law school, and only
the rules really matter.

My in-class introduction to legal philosophical scholarship further
distressed me. Although I will later discuss my views on the ways in
which theory from the arts and social sciences have thus far been utilized
by most legal scholars, I am including this prefatory information here since
it was directly relevant to my first year experience. In the aforementioned
Consumer Health and Safety course, the professor included a reading on
statutory interpretation written by Bill Eskridge and Phil Frickey entitled
"Statutory Interpretation as Practical Reasoning."\textsuperscript{25} The piece attempted

\begin{quote}
\textsuperscript{22} RALPH NADER, UNSAFE AT ANY SPEED (1965).
\textsuperscript{23} KURT VONNEGUT, SLAUGHTERHOUSE FIVE (1972).
\textsuperscript{24} The blunder being that the student meant to refer to Upton Sinclair's classic piece,
The Jungle.
\textsuperscript{25} William N. Eskridge & Philip P. Frickey, \textit{Statutory Interpretation as Practical
\end{quote}
to borrow discourse from Hans-George Gadamer and later hermeneutics theorists, but as a work of philosophy it is greatly lacking. The authors repeatedly used overly broad generalizations, such as referring to "philosophy and literary theory"\textsuperscript{26} as a monolith in which all scholarship is supposedly unified and in agreement on certain issues. Also, in freely borrowing from Gadamer and quoting small phrases out of his work, like "hermeneutical circle,"\textsuperscript{27} Eskridge and Frickey corrupted such phrases and used them to justify their theory and show that it has legitimacy outside of the legal realm. I was outraged at the abusive nature of this work; I previously had imagined that my only problems with most "journal quality" articles would regard the content used by, or the approach of, the author and not the academic misrepresentation in the work.

My frustration was compounded further when we discussed the piece in class. The most common and pervasive complaint by other students about Eskridge and Frickey was their perpetual and unnecessary use of large and abstruse words like hermeneutic. The professor repeatedly encouraged these students to look beyond these words and phrases because authors only use them "to get published in certain journals." She comforted the students by telling them that they were not expected to know what these words meant because, in essence, they were just "fancy-talk," lacking any importance in and of themselves.

These experiences reflect two of the major points that this essay seeks to address. First, the interdisciplinary scholarship that has been written by lawyers is often of poor quality, as a whole, relative to that produced in other fields (at least the other fields with which I am familiar, e.g., English and Philosophy). Secondly, and much more importantly, law school, school in general, and society at large has grown seemingly hostile to certain intellectual ideas. This hostility is reflected in the attitude of the students, who ascribe the use of words and ideas with which they are unfamiliar to a flaw in the writer rather than to their own deficiency. Even more frightening was my witnessing of a tenured law school professor assure these students that finding out about hermeneutics is basically a dictionary exercise and thereby summarily dismiss the continental philosophic tradition since Heidegger.

III. Two L

Kennedy's description of the law school curriculum closely matches my experience. He lists the first year courses, discusses them, and then writes:

\textsuperscript{26} Id. at 334.
\textsuperscript{27} Id. at 340.
Then there are the second- and third-year courses that expound the moderate reformist program of the New Deal . . . . Finally, there are peripheral subjects, like legal philosophy or legal history . . . . These [courses] are presented as not truly relevant to the ‘hard’ objective, serious, rigorous analytic core of the law; they are kind of a playground of finishing school for learning the social art of self-presentation as a lawyer.28

I took both Constitutional Law and Criminal Procedure, the “reformist” classes to which Kennedy refers, as well as Jurisprudence, the “peripheral” type of class of which Kennedy writes. I also elected to take American Indian Law and the Law of Archaeology and Relics. These last two courses were small and taken by few students (presumably because of the specific nature of the material, in which I was personally interested). Despite the fact that I was able to “choose” my courses (this statement is misleading, given the extreme amount of coercion built into the system based on the size of the classes, the number of classes taught on each subject, and the awareness of the later bar exam that covers only certain topics), my feelings about law school remained essentially the same.

These classes, like those of my first year, were not critical of the system that created the rules. I was excited to take Constitutional Law because I saw that as an area in which judges only and always made policy choices based on an arbitrary set of criteria and then justified them in a post hoc manner using the language of prior constitutional decisions. As a result, Constitutional Law is perhaps the best course to examine the “logic” of the rules and expose the fact that it is not logic at all but rather a legitimation of a set of rules and values to the benefit of certain people and to the disadvantage of others. Unfortunately, few of these ideas pertained to my Constitutional Law class experience. Instead, we identified case holdings and then tested them against a series of hypothetical questions. If they failed the scrutiny of examination, then we concluded that the holdings should be modified. Occasionally, the class would focus on the fact that a particular decision was made as a matter of policy and could not properly be justified using the internal logic of constitutional law. Basically, it was just like any and all of my other law school courses.

Jurisprudence was the topic that I most desired to study. I expected to find others “like me” in this course and to begin discovering the philosophy of the law. The course turned out to be the gravest disappointment yet. The professor was a specialist in federal courts. He knew little of Critical Legal Studies and virtually nothing about continental philosophy other than about Immanuel Kant (via his use in Anglo-American thinking). The

28. KENNEDY, supra note 1, at 44-45.
course reading was a smattering of unchallenging works. This course provides a fine example to support Kennedy's assertion that legal philosophy classes are designed to polish a student's edges so as to be able to present the facade of a lawyer when at a cocktail party. During the classroom time, the professor essentially explained the works through simplification and translation, followed by a "what's-your-opinion" type of open-ended question directed at the entire class.

I found the class unproductive, uneducational, and taught, at best, on the intellectual level of a freshman course in college. Even beyond those disappointments, however, the time allocated to the respective authors and groups frustrated me the most. Duncan Kennedy was discussed for less than one entire class session, while Ronald Dworkin and John Rawls, together, were allotted approximately six class sessions. I assume the professor considered this allocation of time well thought-out. To him, Dworkin and Rawls were acknowledged brilliant intellectuals who had great influence within the American legal community; thus, the course must focus more heavily upon them. Continental philosophy, however, so badly discredits them that, in my opinion, it renders their work impotent. This point of view was never addressed, providing yet another example of the uncritical approach to the law.

This failing cannot be placed solely at the feet of the course's professor. It seems not entirely his fault that he was teaching a course for which he was underqualified. That fact must be laid at the feet of the law school administration. Why wasn't someone with a deeper humanities or CLS background teaching the course? One possible explanation is that there are so few people of this type on the faculty that there was not one available to teach the course. I know of not one faculty member at my law school who would openly refer to himself or herself as a Crit. To repeat, there is not one such person on the faculty of the largest law school in California.

Along with the composition of the student body and the school admissions policy, one can see an extraordinary bent in the hiring policies away from a certain type of thinker with a particular set of ideals. This reality can only be explained as evidence of the brewing hostility toward far leftist thinking in our colleges and universities. My law school seemingly wants to produce lawyers who achieve, in the traditional sense, rather than individuals who, armed with knowledge of the law, can help

29. Id. at 45.
30. Dworkin and Rawls are generally considered to be two of the most noteworthy current legal philosophers. Their work, however, is almost exclusively based on the Anglo-American tradition, for which reason they often escape the wrath and critique of those who routinely attack interdisciplinary scholarship.
contribute to the leftist goals of radical change and redistribution of wealth and power.

IV. Writing My Note

I initially approached the writing of this note with great enthusiasm. I saw it as an opportunity to relive the experience of writing my college senior thesis, the importance of which I have previously described. Unfortunately, the reality of the note-writing process quickly set in, and I was adrift in attempting to formulate a topic. After much struggle, however, a fascinating topic struck me. My theoretical background was heavily influenced by the Yale school, and I thereby decided to apply that background to the law. I chose Harold Bloom’s theory of poetry developed in his work *The Anxiety of Influence*\(^\text{31}\) and wanted to apply it to legal works, primarily judicial opinion-writing. With this in mind, I began my research for supporting materials and completed my preemption check. After arduous hours of logging time on Lexis, I discovered a few articles that mentioned or discussed Bloom and several more that cited to him. I printed these pieces and enthusiastically began reading them.

Ultimately, I discovered that there were basically only three articles that made more than cursory mention of Bloom and his theories. I hoped that these articles would establish a foundation for a note which would undertake the monumental task of reformulating Bloom’s ideas about the creative process to fit legal scholars’ and judges’ discussions of the law. Bloom’s writing, particularly in *The Anxiety of Influence*, is extraordinarily dense and possesses an uncountable number of obscure allusions. Accordingly, I hoped these articles would provide some framework and reference point with which to begin my work.

The first piece, written by Charles Collier, was entitled “The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship.”\(^\text{32}\) Although the title suggests that the article would readily lend itself to my topic, Collier essentially supported a thesis antithetical to the one in this essay. He used Bloom merely to explain that many legal scholars proceed in an interdisciplinary manner because of “the theory of intellectual influence and revisionism.”\(^\text{33}\) Collier basically contended that such scholars abuse the law by seeking “something that law cannot offer . . . an external, non-legal source of scholarly legitimacy.”\(^\text{34}\) He seriously simplifies the goals of interdisciplinary

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33. Id. at 193.
34. Id. at 194.
scholarship by primarily arguing that legal scholars cannot look to external sources for intellectual authority.

Interdisciplinary scholarship is much more complex than Collier suggests. This new scholarship seeks to challenge the assumptions of the law as it stands and reconstruct new formulations of the law which (for many scholars) are not themselves seeking legitimacy. Rather, these reformulations are mere examples of alternative understandings that are equally plausible but reflect a different set of underlying assumptions. For instance, Roberto Unger describes a system in which the law is constantly forced into making radical change so as to recognize, in my reformulation of Unger, the illegitimacy of all positions and thereby avoid dogmatic acceptance of any one.35 I am ultimately grateful to Collier for his outstanding historical analysis that reveals how late-nineteenth century Langdellian formalism leads to the type of narrow legal note topic that I discussed in my introduction.36 His treatment of Bloom’s work, however, is uninformative and limited. He only applies Bloomian theory to legal scholars of the 1980s, explaining their use of the interdisciplinary approach as a way of stepping out of the shadow of their precursor scholars of the late 1950s and 1960s.37 To borrow a word from Collier’s title, this is an unsightly “abuse” of Bloom’s theory. It is not abusive in that it seeks authority where it properly should not, as Collier claims of today’s legal scholar. Rather, it is intellectually abusive, doing extraordinary violence to Bloom’s theories by mischaracterizing them and then audaciously merely footnoting The Anxiety of Influence.

In The Anxiety of Influence, Bloom discusses an individual poet’s relationship to a precursor poet and the specific literary tropes used by these poets in fighting the battle to develop a creative space for themselves.38 He never speaks of a category of thinkers, and an idea, like the use of interdisciplinary scholarship, is not a trope at all. Although never said directly, in many ways Collier’s critique of this scholarship approaches that of my Consumer Health and Safety teacher and is reflected in his quotation of Geoffrey Miller: “These are times of ferment in legal academia. Standard doctrinal analysis, which all but occupied the field a decade ago, is now retreating before the onslaught of all sorts of fancy new techniques.”39 Thus, I believe that Collier’s big problem in using Bloom is that he confuses Freudian repression with the desire to be published, earn tenure, and be hip.

36. COLLIER, supra note 32, at 195-198.
37. Id. at 202.
38. BLOOM, supra note 31.
As a piece of interdisciplinary scholarship, at least on this point, Collier is unimpressive. He did motivate me, however, to shift my note topic in my own mind. I began to feel that I could not merely use Harold Bloom without justifying why I was using Bloom, why such a topic is valid for a law journal, and even why the interdisciplinary approach should continue to be used. Ten years ago, in the 1980s, this type of scholarship was unquestioned. But now, in the 1990s, the hostility toward this interdisciplinary approach has grown and leaves writers like myself to fight a battle of justification. Collier’s piece and his quotation of Miller are perfect examples of the animosity toward certain left thinking that has grown in the academic community over the past several years.

The other two pieces that I found which dealt with Bloom were entitled “The Value of Friendship in Law and Literature” and “Agon at Agora: Creative Misreadings in the First Amendment Tradition.” The first piece, written by Kaufman, was more satisfying than Collier’s piece yet still not without its problems. Kaufman initially uses the “anxiety of influence” in a non-Bloomian sense. It refers instead to the should-be anxiety felt by legal scholars who have failed to elevate the status of their enterprise in response to Derrida’s ingenuitive elevation of philosophy. This “anxiety of influence” is a conscious one and thereby merely shares the same name as the anxiety discussed by Bloom. Later in his piece, however, Kaufman explicitly discusses Bloom and his theories. Kaufman effectively describes Bloom’s book and uses it to make excellent insights into law, philosophy, and even Bloom himself. He fails, however, to actually use the Bloomian tropes to examine judicial opinion-writing.

Although extremely long, Kaufman’s piece lacks specific examples of his points and thus provides no guidance for the most difficult question of all: how do you identify specific instances of repression in judicial decision making? Kaufman’s deficiency is acceptable, however, as his project does not concern this issue. He asserts two goals for himself. First, he hopes to encourage judges to elevate their decision writing. Second, he hopes to encourage others, particularly legal scholars, to be more accepting of Derrida’s insight and critical legal scholarship rather than dismissing it. Though I found Kaufman’s voice both comforting and friendly, it has been at least three years since he wrote this piece, and, in my opinion, the

42. KAUFMAN, supra note 40, at 644.
43. Id. at 648.
44. Id. at 713.
45. Id.
hostility toward Derrida and CLS in American legal academic circles grows increasingly more hostile despite Kaufman's efforts.

The second above-mentioned work, "Agon at Agora" by David Cole, is outstanding and precisely on point. Cole discusses Bloom's theories thoroughly and with great insight; he is subtle and sensitive to the nuances of Bloom. Cole's piece provided both a framework in which I could operate and room for disagreement, correction, and further development of Bloomian and related criticism in regard to the law. By this time, however, I was so troubled by my law school experiences and the Collier article that I was unable to proceed with my original plan. Cole's article was nearly ten years old, and I knew that a topic on Bloom could wait. Still, I was torn between proceeding with a topic that was intellectually challenging and stimulating, like the one on Bloom, or changing to a more mundane, yet important and necessary, topic, such as one addressing Collier. My decision became clear after viewing a speech on C-Span in January, 1995, and reading an article that same month in the San Francisco Examiner Magazine.

One morning, I happened to watch on C-Span a speech given by the newly appointed chairperson of the Presidential Committee on Higher Education. The thrust of the speech regarded returning "values" and the "classics" to higher education. She described the previous generation of college students as a lost generation (likely referring to people ages 20-26), infatuated by the valuelessness of nihilism. This generation was also, in her opinion, dominated by relativism, the bane of society, and the inability to appreciate beauty for what it is. She implicitly referred to French theory, stemming from scholars like Derrida and Foucault, as the cause of this crisis. She drew loud cheers from the audience, yet I was quite somber. I had just discovered that I was part of a generation lost and that my insights were less valid than those of others. I was part of the intelligencia of Generation X and, like my lesser-educated cohorts, was devoid of vision. Her message was clear: traditional Democratic thinking has no room for a group of postmodern children who cannot learn to respect the liberal credo. This irrational hostility obviously targets a certain group of left thinkers.

46. For instance, Cole explicitly says that addressing the feminist critique of Bloom is outside of the scope of his project. Id. at 864, n.25. Yet that topic raises a number of fascinating issues when considered in light of the fact that judicial writing has been male dominated up until fairly recently. Issues surrounding ways in which judicial opinion-writing has changed since women have become a force in the judiciary raise unlimited intriguing questions.

47. Unfortunately, it was not until several days after I saw this speech that I realized the importance that it had for me. Thus, I am unable to cite the broadcast or even provide the name of the speaker.
Even more provocative to me than that speech was Gary Kamiya’s article in the Sunday, January 22, 1995, San Francisco Examiner entitled “Civilization & Its Discontents.” Kamiya basically attacks “P.C.ism” on college campuses and discusses the short history of the battle surrounding political correctness. The article points to the 1987 book, The Closing of the American Mind, which became a surprise best seller as the beginning of the public debate on these matters. Kamiya attacks the ideas of “political correctness” and “diversity” as pseudonyms for affirmative action, racism, and a senseless and unprincipled assault on tradition. Although Kamiya’s unjust characterizations and simplifications of these issues disturbed me, I was most angered by his use of certain phrases and words that linked his position to that of the C-Span speaker. For instance, in his opening paragraph, Kamiya refers to “incomprehensible French philosophical shrapnel.” Wisely, Kamiya never mentions Derrida, Lacan, or other French scholars so as to avoid the exceptional intellectual difficulty of addressing their theories. Instead, he focuses on the effect, as he sees it, of the use of these theorists in academic institutions. He points to racial and gender conflicts on college campuses and then equates the now common use of these thinkers with the creation of the conflicts.

By a sleight of hand, Kamiya tries to make the reader believe that high theory is synonymous with political correctness and multiculturalism. For example, he writes, “[b]ut far more disturbing than the strained work generated by ‘engaged’ literary critics is the moral intimidation practiced by certain multicultural zealots.” He then explains how multiculturalism is used as a weapon to unfairly discredit certain traditional scholars, thereby stifling them. Kamiya ridiculously makes it appear as if only leftist thinkers are allowed on university faculties and that all others have been chased away. This experience is far from my own and that of other students whom I know. Kamiya exaggerates the situation on college campuses as a rhetorical device. He uses hyperbole in order to inflame the reader, who is frustrated with the issues of race, gender, and poverty that dominate the lives of today’s youth. In a most Gingrichian fashion, Kamiya hopes to enrage the public into crying for a battle to win back the schools. The objective of this battle is not a peaceful coexistence amongst all theorists but the annihilation of certain left thinkers. His side, unfortunately, seems to be winning.

Toward the end of the article, Kamiya finally refers to the specific French authors responsible for today’s problems. In responding to their

48. KAMIYA, supra note 17.
50. KAMIYA, supra note 17, at 15.
51. Id. at 15.
52. Id. at 22.
positions, he resorts to the ultimate analytical tool: ridicule. Kamiya writes, "[e]verything could be deconstructed; nothing was sacred. Liberalism? A fraud. The ‘autonomy of the aesthetic’? Don’t make me laugh. The ‘real world’? Puh-leeze." He then relates a one-liner from "then-Education Secretary William Bennet . . . that ‘Deconstruction is like the Godfather, it makes you an offer you can’t understand.’" These two sarcastic remarks each reflect separate but related points. First, there are certain propositions so fundamental that it is not even worth the time to examine them. Second, much like the reaction of my Consumer Health and Safety class to hermeneutics, if there is a concept that you cannot understand, then the philosophy behind it is too complex about which to concern yourself. These two points expose a sentiment that is anti-intellectual, irrationally hostile, and reflective of nothing more than a political bias and society’s prevailing attitude toward certain scholarship.

Conclusion

As previously mentioned, this note is not an empirical study and regards only personal observation. After reading it, however, one can be left with no doubt that at my law school, French philosophic thinking is by no means the dominant mode of discourse. Similarly, I have found little evidence to indicate that, except in certain isolated institutions (for instance, the University of Colorado at Boulder, Harvard University, and SUNY Buffalo), there is any significant number of thinkers working in this vein. Even in his own article, Kamiya includes but glosses over the point that Ralph Rader, who is a member of a new organization “dedicated to championing aesthetic approaches to literature,” is also the head of the English Department at UC Berkeley, one of the top English departments in the nation. He is anything but postmodern. Additionally, Secretary Bennet and the new chairman of the Presidential Committee on Higher Education have demonstrated open hostility toward French theory. Yet Kamiya and others speak in a manner which makes it appear as if those who refuse to engage in post-structuralist thinking are unable to achieve positions of influence and that, as a result, havoc has been wreaked on the system. This appears to be pure scapegoating.

The problems of multiculturalism and racism on our college campuses, according to Kamiya and these others, is a result of nihilism brought on by Derrida and his cohorts rather than resulting from the inherent racism in the system brought on by a nation that has been built on racial intolerance and disempowerment of the economic lower classes. Don’t blame the system,

53. Id. at 24.
54. Id. at 25.
55. Id. at 21-22.
blame individuals who fail to take personal responsibility for how they are. This position is a counterfactual farce, but, like Allan Bloom’s book, it sells, and it sells big. People are tired of the message of the “politically correct,” and conservative scholars have managed to use this sentiment to attack leftist thinking. Despite Kamiya’s claims about the ease of being a left thinker on a college campus, the fact that his article is being published and supported indicates that he is not being entirely forthright.

Although those who discredit leftist thinkers might maintain the belief that they speak and act in society’s best interests, their beliefs are as misguided as those supporting Gingrich and his “Contract with America.” If humanity is to advance, certain things must happen, the most urgent of which is a redistribution of wealth. CLS and other leftist thinking is designed to attack and expose the illegitimacy of both the legal system and the norms underlying the legal system which are responsible for justifying the current distribution of wealth. Such leftist thinking allows individuals to peak behind the veil of “logic” and uncover the unfairness, inadequacies, and biases present in our lives. For this reason, it is only in the best interest of the wealthiest few Americans to maintain the system as it is and discredit, ridicule, and eliminate radical thinkers. These thinkers present a well-articulated intellectual threat to the system (much like the threat that I presented to my Contracts professor) that has brought these Americans wealth and power. As a result, the system has been modified to deal with these individuals by forcing them out of colleges, not hiring them in the first place, and accepting an indifferent student body, while, at the same time, blaming these individuals for creating the problems that they actually merely exposed. This is what the battle on college campuses is actually about. This is the battle that the leftists are losing.

56. More properly described as the “Contract on America.”