SERIE DOCUMENTOS DE INVESTIGACIÓN

Nuevos Estudios Socio Jurídicos

HISTORICAL DEBATES IN U.S. LEGAL EDUCATION:

DOMINANT VIEWS AND CRITICAL APPRAISALS

JUNY MONTOYA VARGAS

DOCUMENTO DE INVESTIGACIÓN No 13

Abril 2004

© Universidad de Los Andes - Facultad de Derecho
Teléfono: 3394949- 3394999. Ext: 3068
http://derecho.uniandes.edu.co
E mail: mrengifo@uniandes.edu.co

© Ediciones Uniandes
Cra 1ª. No 19-27. Edificio AU 6
Apartado Aéreo 4976
Bogotá D.C., Colombia
http://ediciones.uniandes.edu.co
E mail: infeduni@uniandes.edu.co

ISSN: 1692-8423

Coordinación editorial: Mauricio Rengifo Gardeazábal

Comité editorial:
Daniel Bonilla Maldonado
Alfredo Fuentes Hernández
Rodrigo Lozano Vila
Mauricio Rengifo Gardeazábal

Diseño de Cubierta: Jaime Flórez Moreno

Impresión
Econta S.A.
Carrera 1 No. 19ª 23
Bogotá, Colombia
Teléfono: 3 394949. Ext: 2195 - 2196
E mail: econta@uniandes.edu.co

Impreso en Colombia – Printed in Colombia

Todos los derechos reservados. Esta publicación no puede ser reproducida ni en su todo ni en sus partes, ni registrada en o trasmitida por, un sistema de recuperación de información, en ninguna forma ni por ningún medio sea mecánico, fotoquímico, electrónico, magnético, electroóptico, por fotocopia o cualquier otro, sin el permiso previo por escrito de la editorial.
Historical Debates in U.S. Legal Education: Dominant Views and Critical Appraisals

Juny Montoya*

Abstract

I present the history of U.S. legal education, first as it has been constructed traditionally by legal scholarship, and then from the point of view of critical scholars, both from inside and outside the legal academy. Critical sociology, critical history, critical educational studies, and critical legal studies help me to illuminate some angles of the history of U.S. legal education that remain unobservable from the dominant tradition, like the exclusionary character of the professionalization, the rising standards movement of the 30's, the ideological character of the core curriculum, or the hidden messages of the socialization process in elite universities. A close look to the assumptions behind the scientific character of law and the case method, using critical concepts such as hegemony, ideology, hidden, informal, and null curriculum reveal a more vivid and complex picture than the one drawn by traditional legal scholarship.

* Profesora de la Facultad de Derecho de la Universidad de los Andes.
Introduction

The history of U.S. legal education as told by legal scholars is the history of the evolution from apprenticeship to scholarly discipline and the story of the case method. It is told as a fairly straight account, in which tensions, innovation, intellectual brightness, partisanship and political struggle has been easily disentangled in a neat description. In this straight account, the academy has had the upper hand in the control of legal education and law schools for the last 130 years, since the academy won the initial struggle against the legal profession about how law should be taught and by whom. From that day, law was going to be taught not as a set of tools and skills, but as a universally valid, higher knowledge coming from the science of law; and it was to be taught for professors familiar with the case method, the scientific method for law teaching. Towards the end of this not yet finished history, lawyers would have lost their touch with social needs, if people's claims from the left and from the right are true, and the academy should be blamed for that, because, after all, it is still in control. However, a closer look to the assumptions behind the scientific character of law and the case method, using critical concepts such as hegemony, ideology, hidden, informal, and null curriculum reveal a quite different picture, more vivid and complex.

From a critical perspective, it is dubious that legal education is or has ever been in the hands of the academy. The profession has always played a leading role in the determination of the curriculum and in the form in which law is taught and practiced. Actually, it is not true that lawyers are not responsive: they are to societal demands understood as market demands: the rapid growth of the big law firm corporation in the last twenty years should be enough proof of this assertion. If they are not responsive to social demands understood as demands for the common good or the public interest is not because the academy does not pay attention to those issues at all, but mainly because both curriculum and instruction are oriented towards the kind of practice that those exercising leadership in the profession and in legal education champion: private corporative law.
The scientific and autonomous character of law is not some abstraction supported by scholarship, disconnected from the real world, but something that underlies the relationships between lawyers and non-lawyers and between professors and students. A vocabulary borrowed from science offers an aureole of neutrality and disinterest to an otherwise highly interested set of rules imposed by those who have the power to impose them; the legal profession, despite its mild claims against the study of law for being not practical and excessively academic, is the first beneficiary of that situation.

Nothing said so far should be read as if altruist students were misled from their public service careers by obscure forces acting on them, or as if altruist professors were silenced in law schools by the very same forces. Both lawyers-to-be students and scholars have interest in preserving the status quo of the profession. Reducing the teaching and learning of law to logical games makes easier the life of both students and professors: It is less difficult than engaging in the complexities of the social, political, cultural, and economic factors that converge around the production, application and transformation of law. Students learn a highly profitable game, professors can devote their 'spare' time to play it for profit and, equally important, the legal profession has a plenty supply of non critical, ethically "neutral" labor force.

In the following pages, I present the history of U.S. legal education, first as it has been constructed traditionally by legal scholarship, and then from the point of view of critical scholars, both from inside and outside the legal academy. Critical sociology, critical history, critical educational studies, and critical legal studies help me to illuminate some angles of the history of U.S. legal education that remain unobservable from the dominant tradition, like the exclusionary character of the professionalization, the rising standards movement of the 30's, the ideological character of the core curriculum or the hidden messages of the socialization non process in elite universities.

A critical scholar should start her work by asking herself basic and radical questions and reviewing the traditional answers to these questions with the lenses of
suspicion: What situations resulted in the historical development of the law school curriculum as it is today? What is the social function of the knowledge taught in law schools? Why and how are particular aspects of the collective culture presented in law schools as objective, factual knowledge? What are the educational goals and educational aims emphasized? What is the hidden curriculum? What is the null curriculum? What are the primary ways in which the curriculum represents the subject matter to students? What perspective does the current curriculum represent? What assumptions underlie the curriculum's approach to content? What assumptions underlie the curriculum's organization? Who controls the selection and distribution of knowledge? How is the control of knowledge linked to the existing and unequal distribution of power, goods, and services in society? What knowledge is of most worth? Whose is it? Which forms are most valued? How is curricular knowledge made accessible to students? How do we link the curriculum knowledge to the biography and personal meaning of the student? (Posner, 1995; Beyer & Apple, 1998; Apple, 1979)

As a novice scholar interested in issues of curriculum and legal education, this work is an initial attempt to develop a theoretical perspective for analyzing and understanding the law school curriculum. To develop such a frame, I have taken some of the above questions posed by critical curriculum theorists (Posner, 1995; Beyer & Apple, 1998; Apple, 1979) and applied them to the study of the U.S. law school curriculum as it emerges from the traditional narrative. Although I have not tried to answer each and all of these questions in these pages, they are my backlight when reading about the case method, curricular proposals, professional education and the rest.

One of the criticisms raised against critical theory is that it assumes to be morally superior to any other alternative. I have to acknowledge that criticism and confess my bias. I believe that critical theory goes against current status quo and it reminds us that to remain neutral is to support a state of things that is basically unfair, that to accept social Darwinism is wrong and even more wrong at the educational
setting, that the market is not the best way to allocate primary goods like education, health or food, and that private property does not precede civil rights and much less human rights. Those are the critical claims that I see as morally superior. At least for the time being.
History of the Law School: An Overview

Apprenticeship has been a central idea in the discussion about legal education in the U. S. since its origins. Law was no more than an apprenticeship for several centuries and only in the nineteenth century that perspective about law studies was clearly abandoned in favor of the scientific approach endorsed by Langdell. The scientific approach brought closer the study of law in America and Europe, and convergence of legal systems, driven by very similar socio-economics models have been bringing together legal systems and, indirectly, the study of law during this century. However, current curricular proposals in America, such as "the law office classroom" (Brown, 1985) seem to try to put back the clock in legal education (Colton, 1994) and make law studies an apprenticeship again (never mind that convergence is being pushed further under the drive of globalization).

Back in the XVIII century, during the colony, some U.S. lawyers were trained in the British Inns of Courts, but it was around apprenticeship that legal education properly started in the U. S. (Colton, 1994). By the time of the American Revolution "the contemporary American lawyer firmly believed that law could be best learned in a law office" (Colton, 1994, p. 965).

Apprenticeship was a contractual relationship by which a student paid a fee for receiving legal instruction from a lawyer. During a period which varied from two to five years he learnt by "copying writs, transcribing contracts, attending court, and seeking advice from his mentor." The student was also expected to learn substantive law and legal theory in his spare time by reading treatises (Colton, 1994).

As a response to persistent complaints of the solicitors-to-be in law offices about "the absence of any overall design to what they studied" (Johnson, 1978, p. 52), and the lack of attention that the "students" received from their "mentors," who were busy enough with their business and let them alone with incomprehensible books (Colton, 1994), private law schools emerged as a more formalized model for apprenticeship.
They were “generally outgrowths of the law offices of practitioners which had shown themselves to be particularly skilled, or popular, as teachers” (Stevens, 1983, p. 3).

In the late 1800s and early 1900s law teaching became part of the undergraduate curriculum in colleges. The study of law in colleges was “part of a gentleman’s liberal education” (Johnson, 1978, p. xii). Although law schools in the universities were created by initiative of the universities and not by the profession, the profession was interested in forging an alliance with the educative centers, both because of the prestige of colleges and of its exclusive power to confer degrees (Stevens, 1983).

Johnson (1978) characterizes nineteenth century law schools by minimal or zero admission standards, a faculty consisted of one or two practicing lawyers and occasional lecturers, two or three non exhaustive courses of study, and an LL.B. granted after one year of attendance which was not compulsory and could be replaced by individual study, under the direction of an attorney or by unsupervised reading of treatises.

According to Johnson (1978), these characteristics are better understood if one considers the fact that the nineteenth century law school was intended to serve a supplementary and incomplete role in legal training. Academic legal education was neither supposed to regulate entry to the legal profession nor to certify the professional competency of lawyers: “It was designated to blend in harmoniously with other arrangements for legal training and to operate in the context of other methods of professional regulation and certification” (Johnson, 1978, p. 42).

Johnson’s (1978) argument is that during the nineteenth century the formal mode of legal training was still apprenticeship, but combined with solitary study, observation of court procedures, service as a court clerk or justice of the peace, practice in justice and a brief period in a law school. The function of the law school was then to give order and coherence to the whole process.
Along the century, growth of the legal profession made more and more difficult the combination of apprenticeship and law school training. It was impossible to find a place in the offices for all the students, but even more important in the long run was the emergency of corporations, which shifted the role of lawyers from courtroom advocacy to counseling. This change affected both the image of the legal profession and the role played by law offices and law schools in the preparation of future lawyers: Lawyering begun to depend less on oratorical skills and more in the ability to grasp increasing complex legal issues. Legal offices did not look like a suitable place for that task.

Between 1870 and 1900 two competing models were already clearly defined for organizing the training of future lawyers. The first model tried to reproduce the apprenticeship model, proposing a law school ideally mirroring the legal office, where theoretical instruction and a wide range of practical courses were provided. Practitioners and part-time law teachers supported this model. The second model, the scholar model, quite distinctly placed the emphasis in methods of legal reasoning, arguing that law had to be studied as a science. The lawyer was viewed as a scientist researching cases and decisions to reveal the legal principles lying behind them. The law school was then the place for legal science more than for legal practice. This view was supported by academics and career professors (Johnson, 1978).

The triumph of the scholar model over the apprenticeship model could be dated around 1870, when Langdell introduced the case-driven curriculum in Harvard. This was a formalist curriculum under which to study the law was to study the doctrine generated from cases. Originally centred on private law, along time it expanded to include public law. The case model was adopted for the rest of universities and became the hallmark of U.S. legal education since then (Fox, 1989).

Fifty years after the so-called ‘triumph’ of the academy, law schools were still criticized for being still vocational schools training lawyers for advising clients and litigating in courts. The case method was seen as a tool useful to prepare better technicians but not to prepare "scientifically trained members of a learned profession"
(Cook, 1927, p. 303). Underlying these criticisms was the liberal university ideal: "that a university ought to be a place in which knowledge is obtained without direct reference to its professional use (Cook, 1927)

In the first decades of the 20th century, a new emergent approach towards what it was thought a truly science of law was rooted on behaviorist sciences. The realization that this type of knowledge was better studied by other social scientists led to the inclusion of many of those scholars into the law school faculties. To cope with these new scientific claims, it was developed a pragmatic or functionalist approach, based on the idea of the "fact-situation": The lawyer did not deal with compartmentalized subject matters, but with fact-situations involving even five or more traditional legal disciplines. Some attempts to rearrange the curriculum to reflect the paradigm of the fact-situations object failed.

The problem with that approach was that it could be seen as a reduction to absurd: If the purpose of a law school was to prepare a student to deal with fact-situations mirroring the ones in the law office, the law school was not needed anymore. The ideal learning place for such a task would be, once again, the legal office. Paradoxically, the pragmatic approach coming from scholar social science theory produced an anti-intellectual curriculum:

The anti-intellectualism of the functionalist model left law students without the intellectual skills needed to engage in what can be considered as an unaffordable task: If the law is what the courts will do and we are going to be scientific we must get the cases, and the facts outside the cases, and the data of the social sciences. But when we get this material it is useless because we don't know what to do with it... and we have no basis for selection and discrimination (Hutchins, 1934, p. 516).

The functionalism of the 20's was a direct antecedent of the realists in the 30's. More than a movement, the realists represented a general skeptic outlook "which
ultimately did for law what Russell and Wittgenstein did, with appreciably more intellectual elegance, for philosophy" (Stevens, 1983, p. 155). Their major contribution was to destroy the vision of law as an exact science based on objective and value-free rules. Realist scholars declared that legal educator and professionals "were living a lie" and that judges did not derive the law from the already decided cases, but that they generated (made) law. (Fox, 1989). By diminishing the predictive value of doctrine, this view, emphasizing process rather than substance, gave a new identity to U.S. legal scholarship (Stevens, 1983, p. 156).

Regarding legal education, the realists criticized the Langdellian model as "too academic and to unrelated to practice" (Stevens, 1983, p. 156). Their concept of practice was now wider. It was not just the application of legal rules to particular cases but it included the consideration of the social, economical, political, physiological, etc., factors involved in the situation. Their influence is notorious in the production of new "case and materials" books which would include perspectives from philosophy, sociology and economics. The echoes of this influence still reach the "Law and ..." movements of the 60's. Other of realists' contributions was clinical education, which was vigorously claimed by Frank in the 30's, although it did not find echo in the universities until the 60's.

It is important to notice that the intellectual excitement of the 20's, 30's and 40's around behaviorism, functionalism, realism, etc., was present only in a few elite universities. For example, in 1947 McDougal proposed the introduction of the social sciences (especially policy science) into the law curriculum in Yale. A few other schools also experimented with the social sciences, but still little changed occurred. In the rest of the country, legal education was a preparation for bar exams, based on lectures, textbooks and adaptations of the case method; they were more the product of lack of resources than of reflective decisions. The only noticeable change in curriculum was that the upper year courses began to be optional (Fox, 1989).
“Legal education until the 60s was largely hierarchical, formalistic, doctrinal, paternalistic and white U.S. male.” The curriculum was standard. Law was a logical puzzle to be learned or derived by logical deduction. The best law schools and law firms emphasized serving the profession through the organized bar (Fox, 1989).

In the mid-60s civil rights, women and consumer movements arose. The Legal Services Corporation came into being and law (legislatively and judicially made) expanded to help the poor and the powerless. Young activist lawyers joined law faculties. Curricula changed: clinics developed and poverty law courses were added (Fox, 1989).

By the end of the 70s forms of lower priced legal services appeared; legal advertising (formerly banned) and consumerism flourished. Students considered clinics among their most rewarding experiences, although faculty continued considering clinics second class. The entire curriculum except the first year became elective.

In the 70's groups of intellectuals sharing “a more jaundiced view of the legal system... a renew interest in the social sciences, and a political philosophy that was generally radical” gave origin to the Conference on Critical Legal Studies (CLS). Alike the realists, they shared more “a general sense of intellectual dissatisfaction” that a clear agenda or philosophy (Johnson, 1978).

Unfortunately, the new way that CLS tried to open for legal education—a way without hierarchies, competitiveness and privileges- has not been traduced in reforms inside the law schools. The reasons are complex, but without doubt the revolutionary, radical character of the proposals and the mixture of intuition, political agenda, and improvisation behind them were factors which stopped law school boards and other law faculties to modify the educational schemes subject to critic.

Fox (1989) describes the 80's as a time of retrenchment: A downturn in U.S. economy made people less generous. Chicago school version of law and economics triumphed as a theory for minimizing law: law makes sense only if it is efficient. Only
free market and meritocracy are efficient and therefore civil rights, affirmative action, subsidy and liability norms are not. The consequence for the law school curriculum was the entrance of ultra-free market law and economics courses.

Since the 80's, the profession has become increasingly commercialized. The number of available public interest jobs has decreased drastically. The only contesting voices came from the critical legal studies movement, which challenged law as being derived from political power, and from feminist and black legal scholarship, asking why women and blacks were systematically omitted from legal theory and the law. Although they have influenced legal educators, the legal curriculum has hardly reflected their influence (Fox, 1989) There have been also some recent calls for an increasing responsibility of the professional schools towards the society at large (Epstein, 1999; Kronman, 1999; Rhode, 1999).

Dominant Views

Curriculum: Building Blocks or Potpourris?

In the early 1900s the study of law in college was “part of a gentleman’s liberal education” (Johnson, 1978, p. xii). The movement towards professionalization made legal education each time more specialized allowing less room for the aim of offering a general education.

Gorman (1989) describes the current U.S. legal curriculum as built upon a few number of “foundation blocks”: the communication of certain substantive doctrines, which move from fundamental concepts to wider principles and rules; the examination of the institutions that declare and implement law; the training in a variety of legal skills, from writing to negotiating; the placement of the legal system in perspective by examining the point of view of historians, philosophers, comparative law, etc.; and, finally the examination of the structure, role and obligation of the legal profession.

Despite his neat description, Gorman (1989) acknowledges that a closer analysis of the current curriculum shows that it is not the result of a rational planning process,
but the blend of competing interests and views, including those of the university administrators, professors, students, and the legal profession.

As a result of the compromising efforts, the current three years curriculum only contains required courses in the first year, allowing a relative high degree of specialization in the remaining two. I say relative, because students are not forced to follow a "specialization" route. Whereas some students have an idea of which are their specific interests based on a more or less clear picture of their future career, the rest navigate among courses and seminars which are or appear to be unconnected and that do not necessarily lead towards specialization.

Sheppard (1997) presents the history of legal education as swinging between two interrelated goals, teaching the rules on the one side and getting a broad understanding on the other. A broad understanding is usually defined in terms of learning "lawyering" as opposed to learning the variety of court decisions and statutes or 'stuffing' students with the rules in force in every subject area of law (Sheppard, 1997).

The preoccupation for comprehensive coverage, however, has always being present. It was already apparent in the years that followed the implementation of the case method, regarding what should be the proper content of casebooks. This discussion can be seen as a concrete example of the debate between training and education, and also between providing information and developing reasoning and it is still alive today.

At the beginning most popular casebooks combined the substance of selected principles with the most engaging cases from courts reports (Sheppard, 1997). In a few years, the amount of legal materials started to grow and their complexity to increase. With the purpose of increasing coverage, the length of the case reported was reduced and the books lengthened, allowing more cases per book, more footnotes, annotations, and text notes. Notable voices for the humanistic ideal rejected the books promoting greater coverage: "The notion that the courses offered should include everything a
student need know, that he need consider or will consider that is not gone over in class, is a mistaken one" (Pound, quoted by Sheppard, 1997, p. 617)

Further preoccupation with coverage and with offering "some of the structure of the treatises as a framework for student understanding of the cases" (Sheppard, 1997, p. 616) lead to additional changes, such as more hours in classrooms, more detailed and longer casebooks, and more lectures and less class discussion.

All of these things, and more, are inescapable if we are going to try to cram all of the vast and growing complexity of U.S. law into the three years which our students have in school.... Thus, law professors should worry less about details and ramifications, and should concentrate more on method, technique, vocabulary, approach, arts, and the other things that go to make up a lawyer who will be qualified to dig into problems, learn their details, and handle them well when problems come before him in later years--for the most part, problems the details of which we could not possibly teach him now, no matter how hard we tried (Griswold, quoted by Sheppard, 1997).

Today, despite the alleged commitment to foster in students "broad and critical" understanding, the dominant emphasis on professional training points to the conclusion that the laboratory of the law school is not the library, as Langdell saw it, but the law office. Current curricular content proposals include counseling and negotiating courses, law office management and finance seminars, legal "autopsy" research, and other activities derived from the concept of the "law office classroom" (Brown, 1985) as the ideal classroom.

Other current proposals regarding curriculum content try to offer new conceptualizations of the legal practice. Alternative dispute resolution (ADR), for example, offers the opportunity to "imagine" a different role to be played by lawyers and the consequent different definition of lawyering in a context where adversarial resolution of conflicts had not preeminence:
Fundamental assumptions of legal education need to be reappraised in order for
the law curriculum to accurately reflect the movement away from legal
centralism and its exclusive focus on the adjudicative model towards a process
pluralism that envisages a range of different dispute resolution processes and
objectives (MacFarlane, 2001).

Finally, current market tendencies towards internationalization and
globalization are reflected in proposals that offer the opportunity to overcome the
dominant parochialism of U.S. law curriculum by offering courses about the law of
other countries, sometimes even in the domestic language of those countries, with the
purpose "to understand law in the context of the culture and language of which it is a
part" (Sanchez, 1997).

**Pedagogy: learning to think like a lawyer**

The case method, a combination of Socratic dialogue and court decisions study,
has been the distinctive feature of U.S. law schools in the context of doctrinal logic and
the most applied method for teaching law in USA since Harvard's dean Langdell
developed it around 1870 (Stevens, 1983, p. 63). He argued that the case method was
the scientific method for teaching law:

I have tried to do my part towards making the teaching and the study of
law in that school worthy of a university; toward making [Harvard] a
true university and the law school not the least of its departments... To
accomplish these objects, it was indispensable to establish at least two
things – that law is a science, and that all the available materials of that
science are contained in printed books... what qualifies a person,
therefore, to teach law is not experience in the work of a lawyer's office,
not experience in dealing with men, not experience in the trial or
argument of causes, not experience, in short, in using law, but experience
in learning law... (Langdell, 1887, p. 124).
Science for Langdell meant deductive logic. His theory, borrowed from the civil law tradition, was that the legal system was composed of a logically consistent set of principles that could be best derived through the empirical study of appellate cases and that these principles could then be objectively applied to each new case as it occurred (Hart & Norwood, 1994, p. 77).

The instructional idea is that students first read court decisions to particular cases, then extract the rules applied in the case and try to relate them to broad principles that can be applied to new situations. This last part is accomplished in class by Socratic questioning conducted by the professor. Yale's dean Kronman (2000) defines Socratic in an illuminating way:

By Socratic I mean both an unwillingness to take the soundness of any judicial opinion for granted no matter how elevated the tribunal or how popular the result, and a commitment to place the conflicting positions that each lawsuit presents in their most attractive light, regardless of how well they have been treated in the opinion itself (p. 647).

The essence of the case method as originally developed by Langdell is "to heighten student understanding of the nature of law, not just to train students in the content of the rules" (Sheppard, 1997, p. 593). By providing students with the raw material of law, students are allowed to make their own derivations. They can ask themselves the same kind of questions the professor poses before and after the class. Thus, the internalization of the questioning process is central to the method (Areeda, 1996).

Sheppard (1997) argues that because Langdell was interested not in imposing a particular view upon the student but in facilitating "a journey of independent discovery," acting as Harvard's dean he used to choose teachers among able students and not among practitioners (p. 604).

The case method still appears as the main alternative to recitation and monologic lecturing from treatises as the form of instruction—a practice that has been
reported as a rarity in U.S. law schools (Sheppard, 1997), but it is still well spread in European and Latin U.S. law schools (Nagle, 2000):

No longer would the professor deliver to uncritical mutes the essential ideas of cases and their relationship to the topics of the course. Instead, students were to discover the significance of the cases for themselves, to examine, analyze, and critique the cases they read by engaging professors in a colloquy (Sheppard, 1997, p. 598).

Since the middle of the twentieth century, the casebook and case method dialogue are the dominant tools of the U.S. law school:

The 1995 survey suggests that the casebook and the dialogue are overwhelmingly the most popular devices in U.S. law school lecture halls. Of the survey respondents, eighty-six percent use a casebook as the "primary assigned text (Sheppard, 1997).

It seems, however, that while the use of casebooks is widely spread among U.S. universities, using the case method is not: "Good case method instruction is a rarity" (Sheppard, 1997). Casebooks have been used for three different purposes: first, for imparting legal doctrine (the judicially approved generalization of the case); second, for understanding of the facts and rationale of each case; and third, as a basis for hypothetical extrapolation, "a way in which to lead students to test the soundness of reasoning and to apply it to new situations." Although this third, most sophisticated approach is the closest to the views of Langdell and Ames, Langdell's heir at Harvard, the unsophisticated use of casebooks as tools just for learning principles was by the mid-1950s the dominant method of teaching law in America. (Sheppard, 1997)

Yet today cases are frequently used merely as part of lectures, as examples of the principles and rules presented through the professor's monologue. Even when the class has the appearance of a dialogue, it is more a "quiz session," in which students are called to be tested in their memory ability to recall rules and not to be engaged in a reasoning process.
At the hands of a good teacher instruction by the quiz method can be a very lively and entertaining thing, but it lacks the vital spark of genuine student participation. The student is in no sense helping to bring a solution into existence. He is demonstrating that he knows and understands the solutions that have been produced by other people: judges, legislators and professionals; restators of law. When he reads the case in the casebook, he reads it, not as a problem, but as an illustration of one of these solutions...

...Bad examples included professors' giving answers rather than trying to make the students think for themselves, "furnishing the key to the bar exam" rather than stimulating legal reasoning, and assigning questions or cases to recite to individuals in advance, freeing other students from a sense of imminent participation....(Sheppard, 1997, p. 621)

It is apparent that the case method could be misused and actually it has been. Most of the criticisms raised against the case method are directed not against its ideal but against the forms in which it has been misused. Sheppard argues that "such misuse was already so common as to amount to a wholesale change in the method itself, narrowing the class dialogue from lawyering to laws so completely as to awaken the ghosts of the commentators and lecturers (Sheppard, 1997, p. 618).

Critical Tools

Critical theories of education take the form of reproduction theories: they study how education ensures the reproduction of social inequalities. Reproduction theorists argue that the educational system has become the institution most responsible for the transmission of social inequality in modern societies (Swartz, 1997).

A "classical" reproduction theory of education assumes basically that despite of education being essentially concerned with the transmission of knowledge, it ensures that the knowledge transmitted serve to protect the interests of the ruling elite and to maintain the status quo as long as education is controlled by the ruling class (Gibson, 1986, p. 11).
Seminal reproduction studies (Bowles & Gintis, 1976) which show the relationship between education and economic life have been criticized by assuming an over-deterministic view of those relationships. More recent approaches emphasize the mediating role played by education between social ideology and individual's consciousness as dialectical rather than as mechanistic. To those perspectives curricula are not mere products of simple economic forces (Apple, 1979).

Another important element in reproduction theories is the concept of hegemony: that condition where subordinates believe something, or hold something to be true, to be common sense, when in fact that 'common sense' is against their own best interests. Hegemony therefore is the struggle for, and the incorporation of, people's consciousness (Gibson, 1986, p. 53). Gramsci thought that (1971) the state exercised hegemony through schooling in that sense.

Pierre Bourdieu (1977; 1986; 1988; 1989) is one of the first and most influential architects of the theory of cultural and social reproduction through education. Bourdieu differs from functional and Marxist reproduction theorists (Althusser, 1971; Bowles & Gintis, 1976; Gramsci, 1971): he does not see education as directly determined by the state, the economy, or social classes (Swartz, 1997). He argues that the relationship between the education system and the labour market is characterized by a 'relative autonomy.' Schools are neither neutral nor merely reflective of power relations. They play a complex, mediating role in maintaining and enhancing them. The education system performs three central functions: cultural reproduction, social reproduction and "legitimation" for both of them (Swartz, 1997).

Bourdieu also examines how internal school processes of selection and instruction, school culture, and tracking offer the primary institutional setting for the production, transmission, and accumulation of the various forms of cultural capital actually enhance, rather than attenuate, social inequalities (Swartz, 1997, p. 191).

More recent cultural studies, developing the same line of argument, argue that citizens are, now more than ever, controlled by pervasive forces but the ubiquity of
those forces is such that no single subject, class, or apparatus can be singularized as responsible for doing the controlling:

Control is exercised through an economy that no single institution or state manages, a public opinion formed by media operating without overall direction, and styles of civic action and education that evolve toward ever increasing uniformity. This is control without a single subject doing the controlling (Kahn, 1999, p. 129).

Finally, by rescuing the role played by human agency, Apple (1979) and other critical educators (Giroux, 1983) construct a theory of reproduction without eliminating hope for authentic production:

The cultural sphere is nor a 'mere reflection' of economic practices. Instead, the influence, the 'reflection' or determination is highly mediated by forms of human action, the specific activities, contradictions and relationships among men and women as they go about their day-to-day lives in the institutions which organize these lives (Apple, 1979, p.4).

Critical appraisals: Ideology in Legal Education

Law schools are part of a set of institutions that convey a message through their very structure. They all reinforce the legitimacy of the economic hierarchy in which some people have lots and lots of money and plenty of power and access to knowledge and other people have none or very little.... Legal education at present is a not insignificant producer of ideological legitimation for the system of hierarchy (Kennedy, 1986, p. 605).

In the following pages, I will present some efforts to use critical theory to analyze legal education. My argument is that this kind of work illuminates aspects of the history of the law school, curriculum, and pedagogy that go unperceived by the accounts of the same issues under traditional legal scholarship. Most of the critical accounts have come from the field of sociology and history. Within legal scholarship the most salient contributions have been made by Duncan Kennedy, one of the leading
voices of critical legal studies, who has devoted an important part of his critical work to issues of legal education.

Hegemony: Professionalization as Exclusion

It is the ideological character of professionalization that makes lawyer's history inevitable conservative ... an elitist and anti-democratic politics pervades most of the traditional writings on American legal history, just as it appears in virtually all of the rhetorical literature of the legal profession throughout American history” (Horwitz, 1973, p. 281).

From the perspective of a social historian (Auerbach, 1976), the fight for professionalization reveals the opposition between elite schools and 'the others.' Elite schools won the battle against part-time schools that proliferated until the 30's, when under their pressure the American Bar Association (ABA) raised the standards required to be accredited. The two years college requirement and the exclusion of partial-time law schools from the American Association of Law Schools (AALS) lead to the definitive closing of most partial-time schools after World War II (Auerbach, 1976).

To Auerbach (1976) the pressure from the legal profession and elite schools towards the raising of standards to counteract the proliferation of part-time schools, which were mainly serving immigrant student populations, was far more than just the triumph of an academicist claim: it was aimed to exclude from the profession certain populations that were not regarded as sharing U.S. values, and therefore were considered a peril for the goodwill of the profession. Auerbach documents and makes a strong case on how the ABA's raising of standards was aimed to exclude low class immigrants regarded as “the poorly educated, the ill-prepared, and the morally weak candidates.” Auerbach states it bluntly: “Professionalization is not value-free; it is a process and an ideology which serves profoundly political objectives” (Auerbach, 1976, p. 11):

Lawyers, as most of the highly qualified professionals, are understandably predisposed to belittle the idea that professional differentiation correlates with
race, religion, class, colour, sex, education, educational opportunity, and social origins, rather than with hard work, self-discipline, inductive reasoning skill, and academic achievement. Acknowledgement of such differentiation would cast serious doubts upon the fairness of the adversary process, the cornerstone of the U.S. legal system. Yet the existence and persistence of these divisions is beyond dispute (Auerbach, 1976, p. 4)

Granfield (1992), a critical sociologist, carries the exclusionary argument further. He argues that "law schools not only attempted to exclude subordinated groups from their ranks, but also trained lawyers to represent the interests of social elites" (p. 11). The ideological triumph consisted was achieved when all this was done without being perceived as class interested. By assuming the character of experts trained in the pursuing of a value-free-science, professionals emerging from "Langdellian" law schools reached social legitimation and 'a view of themselves as a "classless" class' (p. 29).

The Extra-Curriculum: Learning To Live Like a Lawyer

The study of Granfield (1992) about Harvard Law School students as elites-information is an important attempt to penetrate the ideological character of legal education from the point of view of the extra or informal curriculum: the set of "planned experiences outside the formal curriculum" (Posner, 1995, p. 12). Granfield combines structuralist approaches to ideology with the study of the "lived experiences" in which elite law students construct their identities as elite lawyers (p. 3).

Granfield's (1992) study shows how in the process of learning to think like a lawyer, the emphasis of the formal curriculum on technical aspects isolated from social contexts works as a "self alienating ideology" whereby students "replace a justice-oriented consciousness with a game-oriented consciousness" (p. 52). In other words, in learning to think like a lawyer the vast majority of students become cynical. The few who are able to resist do it because they have strong commitments to normative positions.
Legal education is more than just learning the law. Granfield's (1992) empirical work shows how despite all the rhetoric in official discourses about the public service vocation of the legal profession, the formal curriculum is reinforced by the informal curriculum in educating law students for representing the interests of those who can afford to pay for it.

Granfield's study explores in details how the informal curriculum at Harvard, made of pre-law school competitiveness, classroom and extra classroom socialization, and job recruiting processes from the very first year initiates students into a "culture of shared privilege" (Granfield, 1992, p. 141) that accomplishes the task of teaching to students both "to desire prestigious jobs and to have the social qualifications to fulfil elite positions" (p. 123).

Through this informal curriculum nearly any intention to pursue public interest work or to serve social justice needs has been definitely erased from students' heads when they arrive to the third year.

*Hidden Curriculum: The Core versus the Periphery*

The term “hidden curriculum” refers to “institutional norms and values not openly acknowledged by teachers or school officials” (Posner, 1995, p. 12). It also refers to unintended and undesirable outcomes of schooling (Jackson, 1996). Since it was defined more than 30 years ago it has been a controversial concept. Even though the mere existence of such curriculum has been questioned, it illuminates the unquestionable fact that “knowledge is transmitted by the school's structure and its routines as well as by teachers and textbooks” (Schrag, 1996, p. 276), no matter how we can call this phenomenon. It is in this sense that the idea of a hidden curriculum is helpful to grasp the meaning of certain curricular structure at the law school and Duncan Kennedy's (1983) work is an outstanding effort to bring into light those “hidden” structures. I will rely heavily on his work in the next analysis.

In “The political significance of the structure of the law school curriculum”, Duncan Kennedy (1983) relies heavily on a critical frame to analyze the history of U.S.
legal curriculum, disentangling the political forces that shape it and deciphering the ideological messages that it helps to transmit. It is worth to study in some detail Kennedy's views, because it exemplifies the application of critical tools for the deconstruction of the dominant ideology that permeates curriculum and teaching at the law school.

Today, as it has been for the last century, the first element of the core component of the law school curriculum is doctrine understood basically as private law: contracts, property, and torts. According to Kennedy (1983) "(Doctrine) is the common law as it existed in 1890...the doctrines of freedom of contract, sanctity of private property, limitation of tort liability, and the existence of many tort excuses" (p. 8).

Kennedy shows how the conservative character of the doctrinal curriculum is questioned in different occasions from 1930 on and modified by the introduction of courses and other leftist curricular elements such as public law, interdisciplinary studies, legal process analysis, clinical education, and policy analysis, which nevertheless have left intact the core of private doctrine as the center of legal education.

Thus, and even if the "periphery" cannot be excluded from the current curriculum, it has been in general "hijacked" in several ways from its critical original function. The most common way in which this hijacking takes place is by redirecting the original critical analysis embodied by courses in the periphery towards less critical and more conservative agendas, as it is in the case of the best known and extended versions of law and economics, legal process and policy analysis.

What is the ideology underlying the doctrine-periphery structure of the curriculum? First, there is a series of assumptions about the nature of doctrine: Teachers assume that to teach doctrine is to show that contracts, property, and torts have a logical coherence. This is the Langdellian idea of the science of law: this knowledge obeys to a logical structure that goes from few general principles to particular rules in a coherent way. For Kennedy, this belief is "tantamount to belief in
the basic institutions of capitalism as rational and coherent” (p. 9). Second, teachers assume that

The core is law, the periphery is politics. The core is based on the clean, anti-emotional logic of doctrine, whereas the periphery is based on altruistic passion. ... The core equals reality, It is the way things really are, whereas the periphery is the ideal, the way we would like things to be. ... The core is individualistic, the periphery is collective or communal.... The core of doctrine is unitary... (whereas) what is the core of public law? ... the doctrine is the domain of necessity... there are premises and principles. There is a reasoning process which is legal. There is an outcome, and that outcome is correct legally, irrespective of whether it is right or wrong ethically.... Law becomes a necessity machine. Be good at law is being good at operating the machine. (10) The periphery, of course, is the domain of choice, of pluralism... the area of open texture, of freedom as opposed to necessity. Because it's "inherently subjective," it can't be necessary (pp. 10-11).

These beliefs are so deeply embedded in the daily life of law schools, that “it is natural and virtually inevitable consequence that students drift from the periphery into the core” (p. 11). Under this view, the proper function of the school is to teach doctrine. To prepare students for future professional practice is to teach them doctrine. After all, “The bar lives on doctrine. It doesn’t live on public law. It lives on doctrine” (p. 11).

Kennedy's argument is that this whole construction is wrong. First, doctrine is not coherent, rational or unitary and the periphery is not the realm of “freedom, subjectivity, open-texture, looseness or arbitrariness.” Doctrine is taught as unitary only by ignoring its internal moral contradictions (a common communal, collectivist ethical, altruist notion on the one hand and an individualistic, autonomy oriented notion on the other hand). Second, there is not distinction between the core and the periphery. The internal contradictions of doctrine cannot be understood without reference to the periphery (like two opposed "interdisciplinary" economic theories):
Teachers give a phony impression of logical coherence, not on purpose, but out of the tradition of teaching. The tradition of teaching sets the teacher up with a tag for every rule, and the succession of tags gives the teacher and the students the sense of necessity, the sense of logic, the sense of unfolding rationality that then distinguishes the doctrinal from the periphery (p. 14).

The task of a critical teacher is to teach the complex structure of law “while at the same time confronting them with the inescapable necessity to choose for themselves how to resolve the contradictions as they arise in their own lives.” (p. 16)

*Null Curriculum: What the Case Method does not Teach*

In this section, I will review the history of the case method from what is left outside. Although the null curriculum is usually defined in terms of the subject matters which are not taught by certain curricula (Posner, 1995), I will use the term here to refer to the absence of value considerations in the way the method for teaching and learning the science of law is most frequently used.

Since its inception, it is the scientific character of the case method what has been object of attention, sometimes to be asserted and sometimes to be questioned (Stevens, 1983, p. 63). Fifty years after the so-called ‘triumph’ of the university model, when its academic value came under new attacks by defendants of the university ideal (Cook, 1927, p. 303), scholars inspired by the behavioural sciences tried to reconceptualize the case method in terms of scientific experimentation (Sheppard, 1997, p. 593).

Another 50 years later the alleged scientific character of law, embodied in the case method as is most frequently used, was criticized from leftist scholarship for its poor conception of the role of an ‘authentic science’ of law in society and for its incapability to educate lawyers able to articulate broader value issues:

Better educated lawyers, judges, and law-trained public officials certainly were needed to help identify and articulate values and choices in the twentieth century; the university law schools, with their stress on a value-neutral science
of law, however, did not provide lawyers with the knowledge and skills necessary to define and shape broad questions of public policy. Instead, university schooled lawyers in the techniques and methods necessary to manipulate the existing legal system (Johnson, 1978, p. xvii).

To my understanding, these criticisms do not address any essential characteristic of the case method—Socratic dialogue, for example, has been of great help in value clarification and moral education (Raths, Harmin, & Simon, 1978), but they validly address a major deficiency in the way in which it is most used: Law teachers frequently use the case to teach the law as a technique in which moral, political or any other considerations have no place.

That values play no role in the traditional law classroom is illustrated by the following story from a student concerned with social justice issues:

A woman in law school learns very quickly that the classroom and courtroom are not places for "feelings" talk or for sharing one's own experiences. I remember vividly my first-year contracts class.... We read a case...I understood and with which I could identify. I came to class prepared to talk about the unjustness of the store's treatment of this uneducated woman. I wanted to share my understanding of the cycle of poverty that would lead someone to spend more than they had on a luxury item. ...My professor quickly informed me that legal discourse does not involve the terms "right" and "wrong."... Morality, remedying the cycle of poverty, bringing justice to those who take advantage of the poor, these were not relevant to class discussion. It is not about right and wrong, it is about "the law." Amid the embarrassed laughter of my classmates, I quickly vowed never to open my mouth again in class. In one class period, I learned that the values I felt were important to instill in legal discussion were irrelevant and illogical. My stories and my perspective were wrong (Flagg, 2002, p. 118).
The above story also illustrates one of the most poignant criticisms against the case method as is actually conducted in law classrooms. An authoritarian use of it closes more than opens possibilities for further exploration. Behind a façade of academic rigor often lies a moral message about the disconnection of law with the things that are meaningful in students’ lives (Fox, 1989).

Since the 70’s the student revolution attacked the counterproductive effects of an aggressive and insensitive use of the case method. Students’ complaints about a cruel and humiliating use of the case method drove to moderation on its application. Even though the personal experience I just describe above is from 1999, not very old, some are willing to acknowledge that “the classrooms of today are a much friendlier place to learn” (Colton, 1994, p. 963).

Hart and Norwood (1994) summarize criticisms to the case method as it follows: it postulates an adversarial model of the legal system, training students just as litigators; it emphasizes “thinking as a lawyer” but it does not teach students the full range of lawyering skills necessary to practice; it does a poor job in values education; and, finally, it fails to correlate law to the social sciences.

However, the most common criticism to the case method is that it does not accomplish its major promise: to teach students to think as lawyers, because it teaches “by example, rather than forcing students to engage in their own rigorous mental analysis” (Hawkins-Leon, 1998, p. 1). The case method emphasises learning the holding of a case instead of how the holding was reached (p. 1).

Cultural Reproduction: Teaching the Science of Law

Modern location of law among the social sciences appears reluctant; legal scholars more frequently compare their discipline to physics, and the path from profession to scholarly discipline in the twentieth century has been erratic (Donald, 2002, p. 167).

Donald’s text, coming from an educator and not a lawyer, show the confusing state of affairs in law as a discipline and points out explicitly the way to make an
exercise of critical analysis: exploring the meaning of most conceptual misconceptions that are entrenched in the dominant view about the discipline of law, that is, reviewing the ideas that law is a science, that law is an autonomous discipline, and that legal education is scholarly driven.

The dominant view of law as a science has a peculiar contradictory character. It is pervasive in classrooms and in the conversations between law teachers and non-lawyers, but it is not supported by scholarship. My point is that to stand for the 'scientific' character of law is shameful for whoever has taken a glimpse to the modern conception of science, but to defend as science—or to pay lip-service—is convenient for lawyers' and law teachers' modus-vivendi: "Lawyers and laymen alike must be persuaded that law embodies reason, not will; that it is a mysterious science inaccessible to the uninitiated; that "thinking like a lawyer is transcendent rather than time-bound" (Auerbach, 1976, p. 11).

Saying that "legal scholars more frequently compare their discipline to physics" means obviously that they regard law as a science, even as a "hard" science. But law can be regarded as a science only as a result of two almost heretical reductionisms. The first one is to reduce the concept of science to one of deductive and inductive logic derivations—forgetting that logic is not central and might be even absent in the formulation of hypothesis, the process of falsification, and the emerging of new theories, all of them central in the structure of modern science. The second reductionism is to describe what is law in terms of such logical derivations. Not only in Langdell's time (Sheppard, 1997) but also in current teaching, the science of law assume that law is about deriving solutions to particular cases from general principles and inducing principles from particular cases. It is understandable why a third year law student told me: "I learned how to derive the rule from the case during the first year; as long as we keep doing the same in second and third years, I don't know what else I am doing here."
Sometimes learning the science of law is described in terms of more complex thinking processes—description, selection, representation, inference, synthesis and verification—(Donald, 2002). However, it is the proclaimed “inner logic” of “learning to think like a lawyer” the one that allows a second misconception to occur: to think that law is an autonomous discipline that can be taught, understood, learned, and applied in isolation from any other social discipline. My argument is that this misconception, made out of ignorance or of convenience, is what makes political, historical, social, economic, philosophical or value-laden, analysis irrelevant or “peripheral” in legal education (Kennedy, 1983):

I don’t think I have to say much about the feeling that maybe politics has no place at all in law teaching, just because law is not political –the feeling that it’s just rules and analytic techniques out there which we have the job of imparting to our students... (Kennedy, 1986, p. 607)

The third misconception follows as a corollary. The convenience of having a pocket-version science of law allows lawyers to flirt with the idea of being scholars without abandoning their true professional commitments. But the truth is that law is more complex than that, a lot more complex. However, if law is grossly reduced to formal logic and we think that that is the only thing a law school has to offer, practitioners are right when they assert that the best place to learn the legal profession, the business of being and thinking a lawyer, is the law office (never mind that the real practice of law is not a matter of logic). Once again, proposals to eliminate the third year of law school and even the second naturally follow from here (Colton, 1994).

In summary, the ideological message underlying teaching the science of law is that law is a set of rules and analytic techniques and that learning to think like a lawyer means learning to play a set of logical games which are disconnected of any consideration about their ethical value or political purpose. This is what makes students cynical after a short time of study of law (Granfield, 1992) and the science of law conservative: “Almost all of us have the sense that our own teachers in law school
wanted to be "value-neutral," and that value-neutral teaching in this system is implicitly biased to the right" (Kennedy, 1986, p. 608).

**Resistance through Legal Education**

Maybe the right slogan is that you can resist illegitimate hierarchy and alienation anywhere, any time, on any issue. If there's no right place, then there's no pact with the devil either, and we should demand of our students who go into corporate law practice that they do something there ... The real enemy of resistance is the will to submit (Kennedy, 1981, pp. 38-40).

Law in the way is taught offers little space for criticism of current social practices, for social commitment or for transformation of the current status quo (believing that there is something wrong with those things). The old question of what we can do about it is the next thing we should ask ourselves. The place for human agency within a system of cultural and social reproduction becomes central then. As Apple says, people are not puppets on the hands of conservative forces or dupes with no understanding of the real relationships of the world (Apple, 2001). Law plays a conservative role in society and most law students embrace a conservative agenda because it connects perfectly with their life projects. Critical studies cannot to change those general facts. Neither law students nor law professors or law schools are the ones called to do the radical changes that a more just society requires. But we should resist the current state of things and not assume that is inevitable. Critical studies try to counteract the common sense idea that the way things are is the only way they can be (Apple, 2001).

The purpose of critical educators is not to indoctrinate their students on leftist agendas, but to open spaces where the possibility of imagining a more just world can flourish. This is one of the most valuable legacies from critical pedagogy, teaching students "to think and act in ways that speak to different societal possibilities and ways of living" (Giroux, 1983, p. 202). In the following paragraphs, I present some of the
forms in which human agency can resist and change hopefully the hegemonic ideology in legal education.

The work of Granfield (1992, p. 201) shows that against the general cynicism of law students who see law as a game—and by the way, a high profitable one, students who have political, religious, or social commitments can resist the message of the dominant legal education about the neutrality of the law. They conceptualize law as a tool to be used for grander purposes. They resist to buy the message that "law is at the service of justice" equals to "law is at the service of private property."

What can be done to offer support to those few idealist students who try to resist their legal education, want to learn the law but do not want to buy the dominant message about its role in society? An institutional strategy in terms of curriculum is offering a set of coherent courses on public interest law and credits for volunteer work to help students to choose alternative careers in law (Granfield, 1992). The current core curriculum offers to students the perspective of corporate law as the main if not the only choice in the practice of the profession. Professional careers on environmental law, labour law, public interest law or public administration (we could add judicial or academic careers in most of Latin America) are not promoted by the core curriculum and, what is more, they are perceived by students as reserved for losers in most cases. One student told me that among them the prevalent idea is that "if you do not join a good corporate law firm it is because you are not able to do it."ii

A second strategy, more personal because involves directly the political commitment of liberal professors, is "protecting the liberal students from being bulldozed out of their liberal values by the conservative majority and to support them against conservative students and conservative professors" (Kennedy, 1986, p. 606). This strategy is connected to the first one and requires making the classroom a safe place for students who are committed to social justice projects or to critical or radical ideas, giving them space where they can express their ideas and supporting them so they can avoid the embarrassment of being a minority. Kennedy's teaching strategies
address these concerns. Kennedy chooses cases where political opposite views about the outcome tend to split the classroom almost evenly, so dissidents do not feel overwhelmingly inferior in number and power (Kennedy, 1994).

A third strategy would be politically motivated. Kennedy calls it the ‘ideological’ strategy. It is aimed to “not simply supporting the liberal students but trying to act on them, to push them to the left” (Kennedy, 1986, p. 606). The professor should select materials containing strong arguments for both sides along with the corresponding black letter law. Then, at class, he would allow each side to defend their views about the case, showing during this step some favoritism to liberal arguments. Finally, the strategy would be to attack liberals’ arguments to make them feel that there is something weak on the common reformist and meliorist arguments and that maybe there is something they do not like about the system that is more profound than what they thought before. In one word, Kennedy tries to make them “entering into a fundamental critique... of the fundamental economic structures that are sustained by property rules, contract rules, and tort rules” (Kennedy, 1986, pp. 614-666).

In a brief appraisal of these strategies, I would like to stress the idea that the purpose of critical educators should be not to get students think like us, but to help them to think by themselves; to help them to be free from mainstream views but also from our own views. The strategies presented above retain their educative value as long as they open possibilities and do not close them, as long as they are based on authentic dialogue and not in monologue or adversarial opposition, and as long as they are empowering rather than discouraging. Regardless of this commitment to candidness, Kennedy himself acknowledges that maybe the last strategy described here retains some indoctrination component.

Other two aspects worthy to remark from the strategies I have just delineated are the form of the dialogue and the discouraging element.

In a law class, the form of dialogue is defined as a debate around two opposite forms to solve a legal problem. Although debates can be used with pedagogical
purposes (Burbules, 1993), I would argue that the law school already favors an adversarial mode of adversarial debate where the important point is to win the controversy and not to gain a richer understanding of the issues at stake (Moulton, 1983). My own several years old experience about using adversarial debates in legal argumentation courses has taught me that these contests are useful to train in rhetorical skills, but they cannot be considered authentic dialogues. When the main interest of the participants is to win, when no one is interested in learning from the other or willing to change their own positions, dialogue is not possible: “Where the communicative virtues are lacking, dialogue cannot occur” (Burbules, 1993).

The discouraging message is a risk coming from students open exposure of some of these strategies, specially the last described above. If they are attacked on their meliorist and reformist arguments, it is reasonable, as Kennedy does, to think that students will go home thinking that something else is needed. How do we know that they are not going to feel that there is nothing to do? That instead of pushing reformists to the left we are confining them towards the inactive center? When my students say that helping 200 or 300 people is nothing compared to the enormous dimension of the problem, it is not a naïve argument born from the Tolstoian anguish of realizing how little can be done, but the excuse for not doing anything and keep a Hobbesian behaviour in a hard and competitive society.
Conclusion

In this paper I have outlined the history of major debates in U. S. legal education, focusing on the way law schools have constructed their role in society, their aims, the curriculum content, and the forms of pedagogy encouraged.

I have presented with some detail the main features of the dominant view that emerges historically from these debates: a practice-oriented curriculum that tries to formally to compromise between the interests of multiple stakeholders in a fair way, while actually championing doctrinal courses over clinic, skills development, interdisciplinary or any other type of courses; and a pedagogy centered around case-books that shares a general rationale, but that frequently it assumes forms that counteract such rationale (like the use of cases for teaching the rules).

Finally, using the work of critical historians, critical sociologists, critical educators, and critical legal scholars, I have tried to show how concepts such as ideology, hegemony, hidden curriculum, null curriculum, and resistance help to illuminate some aspects of legal education that are not evident under dominant views: the exclusionary character of the professionalization and rising standards movement of the 30's, the ideological character of the core curriculum, the hidden messages of the socialization process in elite universities, are some of the features that are illuminated under these lenses.

However, the most important concept is resistance. It is the one that opens hope for human agency to break the cycle of reproduction. At this point of my academic development, I fully pledge to the tasks of resistance theorists: to identify and document examples of student (and professors) resistance to schooling and to the hidden curriculum, to differentiate between self-defeating and productive examples of resistance (that lead to political change), and to suggest ways of mobilizing the resistance phenomenon for political change (Gordon, 1991, p. 30).

Two final caveats
Although this is not a comparative study, most of the insights I have about legal education come from my experience as a law teacher in Colombia and I cannot avoid to use them when looking to the U.S. legal education issues. I believe that my experience contributes to more than distort my understanding of U. S. legal education, especially when they are put within the tradition of critical legal studies in U.S. Being a lawyer in the Western capitalist societies is nowadays a kind of fraternity: we talk a sort of common language, notwithstanding misunderstandings.

The second caveat is that my knowledge of U.S. legal education comes fundamentally from writings and from the few foreign graduates of U.S. law master programs that I have known in Colombia in the past few years. However, I have had also the opportunity to attend during the last year a seminar on legal education at the UIUC College of Law, where I have obtained some insights from U.S. law students and professors. I hope those insights would have helped me to counteract any distortion that my reading might have produced.
References


---

\footnote{Law student class intervention, UIUC, Champaign, 2003.}

\footnote{Student interview, Uniandes, Bogota, 2002}