

# Rebels from Principle:

## Changing the Corporate Law Firm from Within

Why is it that although the "left" has never been stronger in legal education than it is today, there is no sign at all of a left movement within the elite bar? I think it is a tragic waste of talent for a graduate of HLS to go to work for a large corporate law firm, and that such firms play alternately evil and inconsequential roles in American economic, social and political life. Nonetheless, I don't see all corporate lawyers in large firms as damned by their career choices, and I've had many students I respected who took that path. Why haven't they found a way to put their progressive instincts and ideas to work in a collective way on the transformation of their work situations?

At least for the moment, I want to put to one side some plausible explanations, such as, that they were never really progressive to begin with, or that large corporate firms are such powerful environments that they remake their young associates in their own images, or that young lawyers simply sell out. I want to explore instead the contribution of left liberal and radical professors to the demobilization of lawyers in elite practice. My suspicion is that we have had our own reasons for drawing a psychological map of career alternatives that makes it easier, paradoxically, for our students to make choices we disapprove of and then surrender more or less completely to the institutional situation in which they find themselves.

It's not too hard to see why the practice of corporate law has a special and demonic place in the left liberal picture of the universe. Corporate lawyers are in alliance with selfish business interests. They lobby against regulatory legislation and then try to pick it to pieces in the courts; they do their best to bust unions, or to preserve "union free environments"; and by tax practice

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they mean tax minimization. In exchange for all this antisocial activity, they receive grotesque monetary rewards, which they take without an apparent trace of shame — indeed, with a combination of glee and smugness, as though to say, at one and the same time, how delightful it is to have ripped everyone else off, and that nothing could be more richly deserved than big bucks for top quality.

There is another element to the left liberal critique. At least viewed from the outside, modern corporate law practice appears to be merely pseudo-professional. The firms are too big, too stratified, too intimately linked with their corporate clients, for the lawyers in them to lay a convincing claim to being "their own men" (or women). People steeped in the professional ethos tend to see corporate lawyers as lackeys — only a step away from being gross nouveau riche businessmen. They are declassé.

For the student convinced that there is something wrong with corporate law practice, left liberal and

radical law teachers have had some alternatives to offer. If you can't or don't want to "be like us," a marginalized academic, then the things to do are to go into government practice for a regulatory agency, become a legal services lawyer, or, if you're lucky and well-connected, get a job as a public interest lawyer. These jobs supposedly involve you on the side of expanding the area of equal rights; on the side of equalizing bargaining power rather than making it even more unequal; on the side of the state sector against the vested interests.

There are weaknesses to this position, and they would still be there even were I to elaborate it beyond this extremely summary form. Each year, as I crank up the old address to the troops about not practising corporate law, I anticipate objections, objections that will occur immediately to third-year students with a lot of educational loans to pay off and a sense that they are entitled to take the jobs that will be best for them. The objections fall into two categories: it's not as bad as it's painted, and the alternatives are not as good.

Most of what corporate lawyers do is just "greasing the wheels of the system." They make deals between giant corporations and register their securities. As between, say, being a garage attendant and washing the cars of the ruling class, and being a corporate lawyer, there's not that much to choose, from a moral point of view. You don't have to be a war criminal, and many aren't. Moreover, some corporate lawyers manage to do better than just avoiding war crimes. There are genuine liberals among them, who give money to good causes, do political work for the Democratic Party, and take jobs as

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## by Duncan Kennedy

humane bureaucrats in liberal administrations. Some firms allow associates to do some *pro bono* work. Third-year students tend to focus on these redeeming features — on the innocuousness of the tasks and on the possibility of using the money and social prestige and actual power of the firms as a way to do good in their spare time.

On the other side, it is not so easy to get an "alternative" job in legal services or public interest law or with a "good" regulatory agency, or in teaching. It is not the case that there are large numbers of these jobs going begging because of the moral deficiencies of law school graduates. Moreover, there is an element of exaggeration in the stark contrast between the two types of work. Teaching, for example, involves training the Hessians who we will then condemn for using their skills to dismember the body of the Republic. Public interest law is "oh, so elite," but eventually the developer will get the environmental impact statement and go ahead with the project, for all the elegance of the environmentalists' brief. State regulatory agencies nowadays appear on both sides of the line dividing good guys from bad guys. Radical legal services lawyers worry that their activity demobilizes poor people when it works (by co-opting them) and demobilizes them when it fails (by demoralizing them). Left law professors are the most vulnerable to this "you're another" form of counterattack: we are directly implicated in the forms of practice we condemn. We therefore tend to react quite harshly to the rationalizations students use to explain going to Wall Street. For example, "everyone" knows that fancy corporate law practice is more intellectually demanding than legal services practice. I just don't think it's true. It's a self-serving class prejudice, along

the lines that the legal problems of rich people *have* to be more interesting than those of poor people, just as the literary taste of rich people has to be more refined than that of poor people. It is tempting to respond by representing anyone doing a

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noncorporate law job as a hero, and to exaggerate the corruption and compromised impotence of corporate practice, so that the choice between them will retain its clarity.

And there's the rub. Intensifying the contrast between corporate and noncorporate work doesn't have much if any impact on the actual choices of our graduates. But it does have an impact on their understanding of the meaning of that choice. And that impact is to make it seem that going to Wall Street involves signing a pact with the Devil — an irrevocable pact whose very meaning is that there is nothing you can do *within* corporate practice except try to avoid getting your hands really filthy, while salving your conscience with an occasional reformist gesture like a vote for George McGovern. When we exaggerate just how corrupt and compromised corporate law practice is, we tell our students that the wrong choice puts them beyond the pale of left politics — forever.

Of course, the goal is to prevent them from signing on the dotted line. But the effect is that *after* they've signed, there seems to be no further basis for communication, let alone community.

The worst of it is that our condemnation of corporate practice fits neatly with a whole set of images students bring with them to law school, all of which reinforce the idea that once you sign on, it's all over. For example, each year I ask my first-year torts class what they would do if, as young associates, they were asked to work on a particularly repulsive tort case representing a defendant they thought had been really and truly in the wrong and who was using legal technicalities and specious policy arguments to avoid liability. A surprisingly large number of students respond to this dilemma as follows: they express real unhappiness at the state of the law; they affirm that they would "try to change the law" so this kind of thing couldn't happen in the future; and they say they would work on the case, without objection or attempt at evasion, because when they joined the firm they were "impliedly" agreeing that they would represent the firm's clients, within the limits of the canons of ethics, no matter how repulsive the client's behavior.

When I ask what they think would happen if they refused the case, they answer with surprising unanimity either that they would be fired or that at least they would have sacrificed any chance of making partner. Remember that most of these students expect to be in situations very much like the one I am describing, and to be in them more often than occasionally, and that this discussion occurs in the middle of the first

semester of law school. What this means to me is that a large proportion of Harvard law students have an image of what corporate practice is like that is actually *more* bleak than my own. When I up the ante about the immorality of that practice in order to deter them from doing it, I am playing into their own most powerful fantasies of what will be demanded of them.

There is a further irony. Not only do they agree with me about how compromising corporate practice will be, but I agree with much of their critique of the alternatives, at least in so much as their critique asserts that we are doing, and can do, much less than we sometimes claim we can. First, the liberal legal strategy of expanding the area of equal rights, regulating the market, and expanding the state sector has been an enormously important force in the history of the United States, but if you talk to leading left lawyers today, legal services lawyers or women's rights lawyers, the first thing they say is that they are going through a crisis of confidence about that strategy. Illegitimate hierarchy and alienation are more powerfully armored against legal reform than seemed likely 75 years ago. *To some extent*, securing people's rights just perpetuates the model of bureaucratic public and private organization and individual life. :

The structure of illegitimate hierarchy and alienation is built much more deeply and intimately into our lives, our personal and family relations, our professional and bureaucratic relations, into all aspects of life, than the legal strategy allows. True, there are victories, a genuine liberal legalization of the world, which is not to be denied or rejected. But there are limits to the extent to which one can now feel that the success of the rights strategy is the success of the left.

One thing this means is that the locus of conflict between oppression and liberation can't be conceptualized

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as always outside us. It is inside us as well, inside any liberal or left organization, and also inside the apparently monolithic opposing organizations, like corporate law firms. I think it follows that there are no strategies for social transformation that are privileged a priori — either in the sense that they designate the *right* place to struggle because struggling in *that* place will lead most certainly to the overthrow of illegitimate hierarchy and alienation, or even in the much more limited sense that some struggles have an absolute moral priority over others. I guess this is a roundabout way of saying that organizing the working class is not tantamount to organizing the human race, now that most people in the United States identify themselves as middle class, and now that we can see how much of liberation there would remain to be done after, say, the "nationalization of the means of production."

There are two quite different ways to respond to notions like these, supposing for the moment that they are accurate. It's hard not to feel that something is lost when we can no longer say that there is a right place and a right way to do one's politics, and that those who make different choices forfeit their claim to our esteem. But it also opens another possibility — the one I've set out to explore here. 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; we should propose to them a real alliance (with a lot of reservations and a right to criticize on each side) rather than an either/or choice.

On one level, all this means is that we should take seriously the dilemmas that are familiar to corporate lawyers, and offer what support we can in making the right choice about those dilemmas. My grandfather, who graduated from Harvard Law School about 75 years ago, was a corporate lawyer in upstate New York. By the twenties he was a senior partner in his firm, and one of their clients was a chemical company engaged in making, among other things, poison gas for the War Department. The factory was a pretty Victorian building by a river, but the neighbors complained about the smells, and they claimed they couldn't grow anything in their gardens anymore. They threatened law suits. One way the client dealt with the threats was by putting magnificent geraniums in window boxes across the front of the building, with the windows open and the fumes coming out. It was a visual argument that the complaints were crazy. But in order for it to work, every Monday morning about 3 AM the client sent a grounds crew to replace all the flowers before they died. It went on week after week through the growing season.

My grandfather didn't, that I know, take any action. He should have tried to do something about it. That doesn't mean that there was, in fact, anything he could have done that would have worked. But he might have taken a riskless step out of a sense of moral outrage, or a very slightly risky step, or he might have done something that would have risked losing the client. If you were a young associate in his firm, and knew what was going on, you should have confronted him, maybe, and tried to get him to do something. He died when I was small, and I have no real sense of how he would have reacted, and that's important to what I'm saying. I'm not

advocating suicidal moralism on the part of associates with left liberal or radical personal political opinions. But I think we should ask of our students that in practice they try to figure out whether there are intelligent, more or less controlled risks they can take to put their careers behind their opinions.

According to my students, they "impliedly agreed" not to do any such thing, and if they tried, they'd be fired, or never make partner. But that is a self-serving lie. They *want* to think that so they'll have an excuse for total passivity once they've made their pact with the Devil. There are many variations on law firm hierarchy. There are firms in which senior partners test associates to see if they are such sell-outs that they'll do anything, no matter how ethically questionable, and firms in which someone will put a black mark in a mental book if you show the slightest hesitation about putting your arm to the elbow in muck. There are firms where you can get out of doing bad things with the equivalent of "please, not tonight, dear, I have a headache," and firms where you can engage your coworkers in a serious dialogue about the ethics of particular cases.

Most of the lawyers I know have no idea which of these descriptions fits their firm, because they've never made the slightest effort to politicize their work situations. Sometimes they *think* they know, but you just *don't* know until you've tried, and as soon as you do try, you change everything, one way or another, and most of what you thought you knew becomes irrelevant. Let me say again that I'm not advocating self-immolation — more like sly, collective tactics within the institution where you work, to confront, outflank, sabotage or manipulate the bad guys and build the possibility of something better. I don't want to give the impression that I am mainly concerned with traditional lawyers' dilemmas like the lying client, though they serve well

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enough as an introduction. What I am suggesting is the politicization of corporate law practice, which means doing things and not doing things in order to serve left purposes, not because they fit or don't fit the Canons. The point is to turn down clients because they want you to fight unionization, or because they want to delay implementation of environmental controls, even though it's all totally within the law. But the point is also to reconceive the internal issues of firm hierarchy as an important part of one's political life, fighting the oligarchy of senior partners, opposing the oppression of secretaries by arrogant-young men who turn around and grovel before their mentors. It means engaging in indirect struggle to control the political tone of the office, say by refusing to laugh at jokes. Blank expressions where the oppressor expects a compliant smile can be the beginning of actual power.

Rebelliousness is like a muscle. You can strengthen it or you can let it atrophy. It is only if you engage in perennial collective resistance while you are young that you'll be strong enough to do anything when control is finally handed to you by the simple facts of aging and death. If you fight now, if you come to stand for something now, you'll be able to make things different when you own the place. If you've done nothing during the long interval but cave in, and cave in, and cave in, you won't even know it when you own the place, or if you know it you won't care.

Some of this is a matter of witness. Young associates should think of it as a requirement of moral hygiene that they defy the people they work for, and do it at regular intervals, even if the defiance involves only a little risk. Some of this is a matter of conspiracy in the world of office politics. It involves learning the new role of left militant political worker within the elite bureaucratic institutions of modern capitalism. In this second aspect, it has nothing at all to do with witness, except insofar as witness (defiance, confrontation, individual acts of courage) serves the cause. As in every form of serious political action, one's ability to do it depends on flipping back and forth between contradictory maxims each of which is right only some of the time: "live to fight another day" has its place as soon as one accepts that the goal is power, rather than heroism or consistency.

But "live to fight another day" can be taken too far in its turn, if it comes to mean, "wait until I make partner — then I'll show them." Of course it's true that the old die, the young age, they get control. Some of the students I once preached to about the evils of corporate practice are now middle-level partners. But if all you've done while you were an associate is live out the fantasy of compromise within an imagined universe of total impotence, there is no way you will make it any different when your turn comes. It is unthinkable for people who have lived that kind of passive, alienated existence as associates and junior partners to be in control of their destinies when the moment finally arrives when they could have a coup. One of the enemies of resistance is the sense that it would be self-indulgent, given the rewards one is receiving, to put energy into developing demands and fighting battles in the workplace, rather than spending the time helping less privileged people in their struggles. If you have a way to make a real contribution — I don't mean financial — away from work, you should obviously go ahead and make it. But I

don't think, in the current state of the left, that one can disregard the possibility that you have as much of an obligation to fight the hierarchy of senior partners, the oppression of non-lawyer staff, the firm's hiring policy and its choice of clients, as you have to do *pro bono* work. Indeed, it sometimes seems to me that the claim of self-indulgence is a paradoxical excuse for doing nothing, or for doing things that are less difficult and less threatening than seriously militant office politics.

Office politics is difficult and threatening in part because it involves the risk of sanctions. But people who are very brave about taking risks over principles are often particularly hesitant in this area. One reason is that office politics require you to incorporate an element, however small, of negativity, conflict, pain and danger into day-to-day relations with older people who have authority over you. The strategy I am proposing involves fighting with your elders and betters — sassing them, maybe; undermining them, maybe; hurting their feelings, certainly. It means doing bad things to daddy, and it has an inevitable aspect of Oedipal conflict, which it's better to face than to deny. If you don't want to do it, or want to withdraw from it, you'll always have the excuse that it's just ego-tripping, or "acting out," and that the mature view is to see the truth on both sides, and so on and so forth. The *real* enemy of resistance is the will to submit.

Let me close with two tactical maxims. The first is that what is at issue is politics, not grandstanding or heroism. If you think before you act, if you are subtle, collusive, skillful and tricky, if you use confrontation when confrontation will work, you should be able to do left office politics without being fired, and make partner. All you need is the persistent will to do it, a willingness to experiment.

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modest expectations of success, and some psychological armor against the feeling that nothing you do can make any difference to the course of world history. So what if it doesn't make any difference to the course of world history.

The second maxim is "find another person." The left slogan of community applies very powerfully to resistance within elite bureaucratic organizations. If you are alone, you will fail. If you can't find someone else, you shouldn't even try it. But there is *always* someone else, if you look hard enough and are willing to help the most likely prospects move little by little from mere disaffection to active resistance.

*The Bulletin recognizes the controversial nature of Professor Kennedy's article and welcomes alumni response both pro and con.*