

## Review Essay

### A View from the Inside Looking In: *The Discipline of Law Schools* and the Making of Post-Modern Lawyers\*

Travis McDade\*\*

*In considering Philip Kissam's new book, The Discipline of Law Schools: The Making of Modern Lawyers, Mr. McDade concludes that law schools and legal education are too complex to be captured by a single, philosophical explanation.*

¶1 Unifying theories suffer an inherent problem: they attempt to unite, with one simple explanation, things that often don't warrant unification. Usually the best test of such theories is their ability to do this job cleanly. That means they must not only make convincing sense on their face but also stand up to factual scrutiny. For instance, any theory that attempts to explain what is at the center of the universe is either exactly right and can therefore weather empirical testing, or very soon has to pile exception upon exception to make up for its shortcomings. Law schools, it turns out, are a far more complicated subject than what's at the center of the universe.

¶2 That law schools themselves are at the center of Philip Kissam's universe is not in doubt. A longtime law professor,<sup>1</sup> during his career he has produced articles on a range of subjects related to legal education, from exams<sup>2</sup> to interaction with students<sup>3</sup> to legal writing,<sup>4</sup> many of which make cameo appearances in his new book, *The Discipline of Law Schools: The Making of Modern Lawyers*.<sup>5</sup> Certainly he is as much an expert on what goes on in law schools as the field is likely to produce. And though that experience seems to have shown him much, it has not taught

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\*\* Reference and Bibliographic Services Librarian, Moritz Law Library, Ohio State University, Columbus, Ohio.

1. Kissam served as an associate professor of law at the University of Kansas School of Law from 1973 to 1977; he has been professor of law at Kansas from 1977 to the present. He also has visited at Duke University School of Law, the Faculty of Law of the University of Vienna, and the London Law Consortium.
2. Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433 (1989); Philip C. Kissam, *The Ideology of the Case Method/Final Examination Law School*, 70 U. CIN. L. REV. 137 (2001).
3. Philip C. Kissam, *Conferring with Students*, 65 UMKC L. REV. 917 (1997).
4. Philip C. Kissam, *Thinking (by Writing) About Legal Writing*, 40 VAND. L. REV. 135 (1987); Philip C. Kissam, *Seminar Papers*, 40 J. LEGAL EDUC. 339 (1990).
5. PHILIP C. KISSAM, *THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS* (2003).

him that the discipline of law schools defies a single, philosophical explanation. It is this overweening dedication to the idea that law schools can be *explained* that most detracts from this book.

¶3 The root of this problem can be found in the acknowledgments section of *The Discipline of Law Schools*. In it Kissam thanks a former colleague who introduced him to the works of Michel Foucault and encouraged him “to apply Foucault’s ideas to contemporary social institutions.”<sup>6</sup> This book seems to be the fruit of that encouragement, and Foucault’s ideas too often the hammer that turn every problem into a nail. That’s too bad, because Kissam has experience of the sort that warrants using it as the foundation of the book’s assessment of the law discipline instead of the view that instead is offered: a look shot through the critical legal studies prism.

### Theories

¶4 Kissam claims a “simple thesis” for his book: “[w]e must study *the routines, habits and tacit knowledge* of law schools if we are to comprehend American legal education, its paradoxes, and the law and lawyers that American law schools produce.”<sup>7</sup> What this means for him is not only the core law curricula, but also how these core curricula are taught, how students are tested, the intellectual environments created, and the consequences for the American legal system. This simple “thesis” is asked to carry a lot of water.

¶5 One of his first concerns is how promotion of a particular intellectual method devalues other intellectual methods. Specifically, the way the law curriculum favors analysis and the breaking down of legal problems into small, constituent parts, which, he feels, discounts the construction of more “complex or novel legal arguments.”<sup>8</sup> For Kissam, the “promotion” of this law school style amounts to beating law students over the head with one method until they are too tired or too frustrated to do anything else. The reason this is done is not because it is the right or the only way—but because that is how it has always been done and is, therefore, the easiest way.<sup>9</sup>

¶6 This argument is sound on its face and has some real validity. If Kissam had simply explored this argument on its own merits, this might have been a very different book; but, as with many of his claims, he insists on foisting negative attributes on the system that don’t belong. For instance, he claims this “devaluation also appears in the general disdain of many lawyers, law students and law professors for ethical questions about legal practices.”<sup>10</sup> This is a bold statement—that privi-

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6. *Id.* at ix.

7. *Id.* at 5.

8. *Id.* at 6.

9. *See id.* at 25–31.

10. *Id.* at 6.

leging one analytic method over others not only devalues those other intellectual methods, but also other aspects of legal education, particularly legal ethics. Not only does this proposition not follow from the original idea, but anecdotal evidence gathered from law students and law professors would suggest otherwise. But even points that run counter to common sense can be believed if supported by citation to some hard—dare I say analytical—evidence. Alas, Kissam's citation<sup>11</sup> on this matter refers to two sources that never made this claim at all.

¶7 A corollary argument falls victim to the same overreach. Kissam writes about the “law school’s distinctive oral culture, which celebrates oral heroism and tacitly devalues complex reading and writing.”<sup>12</sup> He gives as examples the stadium-style classrooms and Moot Court exercises that, on their face, seem to support this oral culture view. But any real look at what is most valued in law school quickly turns this proposition on its head. Certainly the single most important cocurricular activity on a law graduate’s resume is membership on the law review, an intense, complex reading and writing experience if ever there was one. And the two avenues for gaining membership on the law review—grading on and writing on—are both wholly dependent upon law students’ ability to express themselves with the written word.

¶8 Kissam attempts to cut this counterargument off at the pass by mentioning the “speech-like forms of effective final examination writing”<sup>13</sup> that “approximate a sort of one-way courtroom-like discourse.”<sup>14</sup> Given that there is no explanation—certainly no citation—as to how effectively written final exams are at all “speech-like,” it seems like he is preemptively covering for his overreach. While oral prowess is certainly an important component of the successful law school student, it is by no means requisite; it is a useful skill only and unlikely ever to supplant the heavy emphasis that is continually placed on critical reading of case law.

¶9 Almost unbelievably, Kissam later takes the opposite point of view, becoming an advocate for more oral culture. In a section devoted to the ills of legal writing programs, he laments that the first-year writing curriculum has come to rely more on traditional written corrections of student works followed by written revisions than on “genuine collaborative work between instructors and students.”<sup>15</sup> Certainly had such individualized collaboration between students and teachers, based wholly on oral exchanges, been the norm in law schools, Kissam would have presented it as further evidence of the discipline’s unfair oral culture.

¶10 Kissam then moves on to one of his favorite themes: that law schools are a conservative redoubt. The crux of his argument, repeated several times, is that

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11. *Id.* at 6 n.13 (citing Ian Johnstone & Mary Patricia Treuthart, *Doing the Right Thing: An Overview of Teaching Professional Responsibility*, 41 J. LEGAL EDUC. 75, 88–92, 95–96 (1991); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000)).

12. KISSAM, *supra* note 5, at 7 (citations omitted).

13. *Id.*

14. *Id.* at 122.

15. *Id.* at 144.

law schools as institutions inherently favor conservative values by emphasizing property, order, precedent, and a continuation of the status quo in their classrooms.<sup>16</sup> For readers familiar with critical legal studies, this is not a new argument. “Order is tacitly privileged over considerations of social justice by the discipline’s silent emphasis on ‘the leading cases’ and ‘the rules of law’ in case method classes, and by the quiet reliance that law school examinations place upon understanding existing legal doctrines.”<sup>17</sup>

¶11 Well, of course. Order *is* privileged over social justice in the case law method. This is not to say social justice is not important, but rather that social justice (and all ultimate goods) must first start with order. A fair argument could be made that social justice is best served by another system of laws, but surely Kissam can’t be claiming that a system *without* order and *without* rules of law would in any way promote social justice. Aside from these more philosophical claims, on a practical level any system that did not rely on rules, order, or precedent certainly would not have any need for law schools, the very institution he wants to heal.

¶12 As for his larger claim that law schools are a conservative institution and that “[l]earning is unfairly tilted”<sup>18</sup> in that direction, a recent issue of the *Journal of Legal Education* contains an article that almost completely belies this theory.<sup>19</sup> The article, reporting data derived from a sample of students from twenty-eight law schools who entered in 1997 and graduated in 2000, makes the point that students do not, in fact, leave law school with more conservative opinions on social issues than they had when they entered; if anything, law school tends to have a very slight influence in the other direction.<sup>20</sup> Its most important conclusion is that law schools seem to contribute almost nothing at all toward attitudinal changes in law students from their first year to their third and that previous claims of conservative changes can best be accounted for by self-selection before law school or outside changes during it.<sup>21</sup> This article certainly is not the end of the debate but, unlike many of Kissam’s theoretical claims on the issue, it does at least have the heft of recently gathered data behind it. And it is printed in a journal that, judging by the frequency with which he cites articles from it, Kissam trusts.

¶13 Another idea that Kissam needs to reconsider is his much mentioned distinction between “elite” law schools and “non-elite” law schools. The problem is that he never offers a sufficiently clear definition of what he means by an “elite” law school. There are criteria—including a four-part test<sup>22</sup>—for what it takes to be

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16. *See id.* at 9–10, 229–30.

17. *Id.* at 10.

18. *Id.*

19. J.D. Drodny & C. Scott Peters, *The Effect of Law School on Political Attitudes: Some Evidence from the Class of 2000*, 52 J. LEGAL EDUC. 33 (2003).

20. *Id.* at 35–39, 45–47.

21. *Id.* at 46–47.

22. *Id.* at 19–20.

an elite law school, but the standards are fuzzy and impossible to attain. For instance, according to Kissam, to achieve elite status, a law school's "students must graduate from prestigious undergraduate colleges and have obtained 'the top' or 'best' scores" on the LSAT.<sup>23</sup> Also, "[c]orporate law firms must hire enough of the school's graduates so that all entering students can expect or hope to obtain prestigious or well-paid legal positions upon graduation."<sup>24</sup> The word "prestigious" is a term far too similar to the very word ("elite") he is trying to define to be anything but tautology.

¶14 His definition of "elite" law schools would be best served by examples, hard numbers, or even a list of five or ten schools that he would place in this category, but nothing of this sort is included. Alternatively he should abandon the concept altogether since, using his own criteria, there really can be no hard and fast distinction between a school and the one ranked immediately above or below it. He betrays the truth about the unimportance and meaninglessness of "elite" in a subsequent footnote in which he writes about the tests of professors from "elite" schools.<sup>25</sup> Two of the "elite" schools mentioned are the University of Illinois and Vanderbilt University. While there is no question that these are topflight law schools (both are ranked in *U.S. News and World Report's* top twenty-five), can all of their students be said to have the "best" scores on the LSAT and come from "prestigious" undergraduate institutions? Kissam should ditch the "elite" moniker altogether.

## Solutions

¶15 By the time Kissam gets around to proposed solutions, the reader is so worn out from philosophical and factual back bending in trying to understand his claims that it is hard to believe his solutions could stand on solid ground. But many do. His assertion that reliance on one accepted form of instruction ought to be de-emphasized is correct and has increasing purchase in the law curriculum.<sup>26</sup> As he says, a diversity of intellectual methods might lead to a diversity of lawyering that would in turn bring certain models of the law in from the margins.<sup>27</sup> The one-size-fits-all model of instruction and lawyering would serve more people on the ash heap of history.

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23. *Id.*

24. *Id.* at 20 (citations omitted). Kissam often uses the imprecise phrase "corporate law firms" (it even appears as a heading in the index) which this reviewer took to mean law firms that serve corporations, not law firms that are corporations. For professors and students of business associations, that is an important distinction.

25. *Id.* at 50 n.120.

26. *See id.* at 265–70. For instance, in order to compete with "elite" schools, increasing experimentation at low-tier schools with curriculum and specialization might eventually influence the whole discipline.

27. *Id.* at 14–15.

¶16 Aside from their shaky foundations, his solutions also face another problem: they are too often couched in terms that make them inaccessible to any but those sharing his philosophical background. This is particularly disturbing given Kissam's professed desire to include traditionally underrepresented "others." There is nothing quite as off-putting to outsiders as jargon, and too many of Kissam's concluding chapters are laden with the stuff. For example, consider the following passage: "Yet the Dialogical Self enters the moral conversation for the purpose of seeking guidance in making ethical choices about her actions, and at some point she must suspend her deconstructive questioning and choose to act in accordance with her ethical judgments."<sup>28</sup> Cleaning up his sentences would subtract about fifty pages from the book but add considerably to its usefulness.

### Editorial Minutiae

¶17 The subject of properly citing references in legal scholarship is not up for debate—information from sources other than your own experience and ideas other than your own need to be documented. But when writing a lengthy book, the subject of how to document sources ought to at least be thought out. Footnotes are not the *sine qua non* of a fine law monograph; often, endnotes or other less obtrusive means of citation are preferred. But if footnotes are chosen—and the intent is to make the text a valuable resource—then the notes themselves must not only be accurate but also timely. Unfortunately, Kissam has the habit of claiming in the text that one source or another is "current" or "recent" when, in fact, that is not the case.

¶18 For instance, a footnote attempting to explain one aspect of the current state of tenure-track law professors—beginning "Currently about 50% of all law professors . . ."—cites a law review article written in 1991.<sup>29</sup> Another 1991 source is used to support a sentence in the text that begins "[M]any law schools today . . ." <sup>30</sup> The propositions these footnotes support turn out to be so obvious that Kissam couldn't be faulted for not offering a citation at all, but once he decides to provide a supporting citation for what he describes as the current situation, it ought to be from a source more recent than twelve years old. In a more egregious example, in writing about the previous experiences of "today's law student," Kissam uses a book written in 1968 as one of his sources.<sup>31</sup> Similarly, when Kissam states that the law school curriculum demands between twelve and fifteen class hours per week from law students—again, a claim that probably could be stated without a supporting footnote—he uses a source from 1975 as his authority.<sup>32</sup> Later, Kissam

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28. *Id.* at 260 (footnote omitted).

29. *Id.* at 59 n.150.

30. *Id.* at 142 n.86.

31. *Id.* at 216 n.115.

32. *Id.* at 82 n.29.

notes that an author “argued recently” for a particular proposition—this turns out to have occurred in a book published in 1996.<sup>33</sup>

¶19 This relatively routine imprecision may not strike readers as that important, but for a professor who is as concerned with legal writing and legal scholarship as Kissam is, it ought to be rectified. There are two potential solutions. One, update the footnotes. Or, two, simply eliminate language suggesting the data or information is “current” or the source is “recent.”

¶20 Another small editorial concern is Kissam’s peculiar tendency to overuse the word “tacit.” This may seem like a small matter (and in many ways it is), but it is a very distracting practice. On the first three pages of chapter one, “tacit” or “tacitly” appear nine times. On page 5 they are used seven times, showing up in five of the first six sentences; on page 6, three more times. And this trend never really stops: on page 229, six times; page 230, three more times. Aside from the basic unwieldiness caused by the overuse of the term, should any book whose lessons are so tacit need to be written in the first place?

### Conclusion

¶21 *The Discipline of Law Schools* is obviously the product of a career spent in the thoughtful study of the workings of these particular institutions. For that reason alone, the book is worth reading. Aside from that, Kissam’s strength is in his ability to use a central organizing theory as a way of getting his hands around a very large subject. The problem here is that this method too often forces Kissam to make claims that seem to have come more from reading trendy articles than from reading his students’ faces. Since he doesn’t offer any genuine data to support many of his claims anyway—just citations to other largely data-less articles—Kissam should have written about his personal experiences and how they influenced his views. While anyone can subscribe to particular philosophies and read their literature, Kissam’s strength is his actual experience. He should have utilized it more in this book.

¶22 Finally, this book could use a strong and even-handed editing. There is too much repetition, too much jargon, and too many minor editorial concerns that need to be fixed. Kissam addresses serious topics with serious ideas; they ought to be expressed clearly. A second edition might be significantly shorter, but no poorer for the loss.

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33. *Id.* at 272 n.10.