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## A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE: CONFESSION WITHOUT AVOIDANCE

Tamara R. Piety\*

I was invited to participate in this symposium on Duncan Kennedy's most recent book (although by now perhaps it isn't), *A Critique of Adjudication: Fin de Siècle*<sup>1</sup> ("*Critique*"), by my dear friend and mentor Michael Fischl. I have long been an admirer of Duncan and was, at that very moment, finally presented with the opportunity to meet him, to take classes with him. But I hardly felt that my enthusiasm for his work (what I've read anyway) qualified me to pontificate on the merits of *Critique*. So, when the invitation came, I was—let me not mince words—flabbergasted. I thought, "What am I to say?" It seemed an invitation for me, a latecomer to the conversation,<sup>2</sup> to display my ignorance to all and sundry since one must have studied a formidable body of jurisprudence, sociology, psychology, political theory, economics, and heaven knows what else in order to even be able to fully *grasp*, let alone comment on, Duncan Kennedy's work in this book. It is a trap for even the wary and the wily.

Still, the gauntlet has been thrown, and I am a sucker for a dare. Mustering up my stores of wariness and wiliness I will confine myself to my perhaps idiosyncratic reactions. I have basically three observations. First, *Critique's* thesis seems modest. But it is not. Second, its claims *appear* noncontroversial. But they are not. Finally, although *Critique's* tone is confessional and apologetic, its substance is not. Each of these observations is explored below.

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\* Stanford Law School, Teaching Fellow 2000-01. J.D. University of Miami 1991, LL.M. Harvard 2000. Thanks are due to Nancy Rapoport, Marietta Auer, Amalia Amaya Navarro, Trevor Farrow, Dimitri Evseev, Patricia Piety, and Julia Reiman who read and commented on this Article. Any defects that remain are surely a result of my failure to follow their advice. Thanks, too, to Duncan Kennedy who not only has a sense of humor, but was generous enough to share his thoughts with me on some of my objections. Finally, thanks go to Michael Fischl for his support, advice, and encouragement and without whom none of this would have been possible.

<sup>1</sup> DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1997) [hereinafter *CRITIQUE*].

<sup>2</sup> I hesitate to say that the "conversation" is the one conducted in critical legal studies ("cls"), so I'll just say academia.

I begin with my own confession. On a first reading I found *Critique* frustrating and puzzling. I *did* experience the “irony, despair [and] ecstasy”<sup>3</sup> that Duncan Kennedy says is part of his aim.<sup>4</sup> Well, to tell the truth, I was initially a little light on the “ecstasy” part. He hedged every observation with so many qualifiers and disclaimers that it was hard for me to figure out what he was saying. And, at bottom, it seemed, on that first reading, that he wasn’t saying very much—for example, that “ideology influences adjudication,”<sup>5</sup>—even though he used almost four hundred pages to say it. Finally, I was dismayed by the confessional tone of *Critique*, by what appeared to me reversals or retreats.

My despair was premature. Having now read *Critique* several times, I have to say that if not quite “ecstasy,” I experience a great deal more awe at the complexity and breadth of the analysis in *Critique*. Duncan has done it again. *Critique* is packed with messages at several levels (some of which may be intentional misdirection). It is simultaneously personal and political, art and legal analysis. In *Critique*, Kennedy displays his formidable intellectual prowess and delivers an analysis that is complex, acute, challenging, and (as always) provocative.

Still, I was struck by the divergence between my earlier and later reactions. Echoes of the first reaction persisted. Why did *Critique* inspire the emotions in me that it did? After much reflection, I concluded that most of the emotion *Critique* initially inspired in me stems from the modern/postmodern (“mpm”) stance that Kennedy takes in *Critique*. And I have no doubt that this is also what makes it controversial. On simply stylistic grounds it is hard to penetrate and difficult to digest. But the difficulty goes deeper than that. The mpm stance is an aggressive and defiant claim to “rightness” that says it is impossible to be “right.” This is not a modest claim, insofar as it “answers” the looming questions of existence by saying there is no answer. Paradoxically, the assault on rightness is delivered mostly in terms of logic. Thus it is possible to agree with Kennedy intellectually even if emotionally you believe that he *must* be wrong, *hope* he’s wrong. The mpm strand is controversial on one level because it seems to leave us with nothing to do, and on another level because, in adopting it, Kennedy separates himself from many of his traditional allies on the left. He reveals this tension between

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<sup>3</sup> CRITIQUE, *supra* note 1, at 342.

<sup>4</sup> *See id.*

<sup>5</sup> *Id.* at 196.

the left and the mpm orientations<sup>6</sup> and argues, appearances to the contrary, that it is possible to have allegiances to both.<sup>7</sup> Indeed, you could read the confessional tone of the book as an attempt to confess to the allegation of his mpm ways while avoiding the claim that mpm is destabilizing to the left. He may be right that this is *possible*. But I doubt that *Critique* convinces anyone who thinks otherwise.

### I. "DIGESTING" DUNCAN

Kennedy says in the mpm mode that he wants to "eat" his subject, but I think the style he uses makes it difficult to "digest" for the rest of us, or at least some of us.<sup>8</sup> His style is a mixture of the highbrow and the lowbrow, from Joseph Raz to Roseanne Rosannadanna.<sup>9</sup> He liberally uses quotation marks as "sneer quotes" (or "scare quotes" as some call them).<sup>10</sup> Sometimes he offers attribution to the ideas of others and sometimes he doesn't, making it hard to distinguish between quotations and sneer quotes, between what came from someplace else and what he just made up.<sup>11</sup> And he *does* appear to make words up—sometimes signaled with quotations, sometimes not, like "hypothetico-descriptive."<sup>12</sup> On the other hand, Kennedy also uses "big words" like "hypostasized,"<sup>13</sup> "metonymic,"<sup>14</sup> "epistemic,"<sup>15</sup> and "ontology,"<sup>16</sup> to name only a few that rarely find their way into everyday conversation. Of course, this sort of vocabulary isn't restricted to mpm practitioners, but it is a persistent criticism of this school that its adherents are more prone than most to use language that is

<sup>6</sup> See, e.g., *id.* at 356-63.

<sup>7</sup> See *id.* at 363-64.

<sup>8</sup> See *id.* at 15.

<sup>9</sup> See *id.* at 388. Duncan tells me that he really meant Emily Litella. I didn't even catch that until he mentioned it. Never mind.

<sup>10</sup> Obviously, though, I do like the technique, since I use a lot of "sneer" and "scare" quotes too. Imitation is the sincerest form of flattery! For me it is meant to represent a lack of commitment to the content of the word. That is, if I say "truth," I mean to call into question whether it really *is* the truth, the difficulty in determining what truth is and so forth. I don't mean to sneer *or* to scare but merely to raise a rhetorical eyebrow.

<sup>11</sup> I do *not* mean to suggest that Kennedy doesn't properly attribute quotes to their sources (except maybe Roseanne Rosannadanna). He does. What I mean is that it is sometimes difficult to figure out the *reason* for the quotes.

<sup>12</sup> CRITIQUE, *supra* note 1, at 5.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 17.

<sup>15</sup> *Id.* at 49.

<sup>16</sup> *Id.* at 50.

unintelligible to many.<sup>17</sup> I mean, after all, does anyone *really* understand what is meant by “a disrupted rational grid”?<sup>18</sup> All of these devices make *Critique* hard to read and difficult to understand in what seems an artificial way. As Kennedy himself notes, mpm theory is “intelligible as disruption only to people who have mastered the various formal languages it targets.”<sup>19</sup> And he has a very large number of “formal languages” in mind. The sources he refers to are not limited to the usual legal ones such as Cardozo, Llewellyn, Fuller, Hart, Sacks, and Dworkin.<sup>20</sup> Instead, he ranges far and wide in the search for inspiration. A partial list of sources includes Sartre, Marcuse, Marx, Foucault, Heidegger, Kant, Weber, and Feuerbach. So far so good. It isn’t surprising to find any and all of these references in legal writing.<sup>21</sup> But the list *continues* with Ferdinand de Saussure, Claude Levi-Strauss, Freud, Jean Piaget, Silbey, Lukács, Gramsci, Althusser, Rand, Habermas, Ralph Ellickson,<sup>22</sup> James Baldwin, Virginia Woolf, Jean Rhys, Harold Cruse, Victor Serge, Rodchenko, Stepanova, Weilheim Reich, Michelle Wallace, W.H. Auden, Dos Passos, and Allen Ginsberg.<sup>23</sup> Is there anyone he did *not* consult?!

Oh well. I’m sure I missed some. But, “attention flagging,” I move on. Such a broad array of references can lead to a crisis of confidence in the reader. Reading *Critique*, I began to feel I needed some quick reference—something like “Foucault for Dummies”—that would help give me a handle on what he was saying. Take, for instance, the following:

Making and appreciating artifacts are two paths toward transcendent experience, but they regularly upset the theory of the experience. The analytics, which in modernism are always *ex post*, are incorporated into the performance by

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<sup>17</sup> Witness the following exchange overheard at a dinner given at Harvard Law School:

*Faculty member:* I just got a 150-page manuscript from Duncan Kennedy which he has asked me to read.

*Judge:* Good God! Did he send it to everyone?

*Faculty Member:* No.

*Judge:* Well that’s good. You know, the trouble with that boy is he uses too many big words!

<sup>18</sup> *CRITIQUE*, *supra* note 1, at 7. Come on. Tell the truth! Okay. Okay. It’s just me . . .

<sup>19</sup> *Id.* at 353. “Mastered,” mind you. “Familiar with” doesn’t cut it. Forget about, “vaguely acquainted with” or “I’ve heard the name.”

<sup>20</sup> *See id.* at 33.

<sup>21</sup> In fact, with respect to Foucault, it is almost *de rigueur* to provide some mention of his work in legal writing today.

<sup>22</sup> I read this to refer to “Ralph Ellison,” as in the author of *Invisible Man*. But, for reasons stated above, I am not sure that this is correct. It *could* be Robert Ellickson. But then this is nit-picking.

<sup>23</sup> It is an additional challenge that the uninitiated probably don’t know how to correctly pronounce many of these names.

postmodernists and emphasize the omnipresence of repressed or denied “primal forces” or “dangerous supplements” and the plasticity of formal media that presuppose that they are not plastic.<sup>24</sup>

What does this *mean*?! What are “primal forces” and “dangerous supplements”? And are the quotes “sneer quotes”? Or are these phrases recognizable to the cognoscenti as terms from one or more of the above sources? Should I recognize them? Should I be embarrassed if I do not? Should I pretend that I do?<sup>25</sup>

As if to leaven all this weighty stuff with lighter matter, Kennedy mixes up examples like the one above with slang, colloquial, informal language, and references to popular culture. In *Critique* you find words like “phony” and “hypercool.”<sup>26</sup> “Fudge” may be in danger of becoming a term of art after Kennedy’s liberal use of it in this book. It is one of his favorite words.<sup>27</sup> Well, you get the idea. He also uses loaded phrases, like “turns this trick,” whether to be intentionally irreverent or as a double entendre, or both, one is left to guess.<sup>28</sup> To some, this sort of informality is indecorous or inappropriate in serious academic writing.<sup>29</sup>

*Critique* is also literally jam-packed with cultural references, some of which, like Roseanne Rosannadanna, are unintelligible to those who don’t share his cultural reference points.<sup>30</sup> It is also filled with what appear to be “inside jokes,” giving me the persistent feeling that I was missing something.

All of this illustrates one of the difficulties of smashing contexts, one of Kennedy’s avowed goals in *Critique*. If you smash the context, you also potentially destroy or compromise the reference points by which people can understand your ideas. One of the dangers of refusing to play within agreed frameworks is that people won’t understand you or will feel alienated. This, in turn, illustrates the very weakness that Kennedy himself attributes to mpm: elitism.<sup>31</sup> That is, the mpm approach is a way of being “right” that is difficult to access. And while the mpm style may

<sup>24</sup> CRITIQUE, *supra* note 1, at 7-8.

<sup>25</sup> However, the alert reader will notice that in *one short paragraph* I manage (in Kennedy-esque fashion) to commit all of the sins of which I accuse him. Just in case you thought I didn’t notice.

<sup>26</sup> CRITIQUE, *supra* note 1, at 347.

<sup>27</sup> See, e.g., *id.* at 109, 111, 129.

<sup>28</sup> *Id.* at 121.

<sup>29</sup> “Nuts to them,” I say!

<sup>30</sup> What I mean is that if you are too young to remember early *Saturday Night Live* shows, you won’t get it. Alas, I cannot say this is one of my problems.

<sup>31</sup> CRITIQUE, *supra* note 1, at 353-56.

succeed in generating “irony, despair, ecstasy,”<sup>32</sup> I don’t think it does much in the way of enticement.<sup>33</sup> (Particularly not when you characterize the opposition as “self-righteous and simple-minded.”<sup>34</sup>) Instead, the approach that Kennedy uses in *Critique* runs a higher than average risk that it will be misunderstood, violently opposed, and arouse bitter antagonism. Disturbing as it is, this is not merely because of the *content* of its ideas, but because of its *delivery*. It is the method of delivery *itself* that is rather hostile, confrontational, elitist, and not very modest, despite its many claims to modesty.

## II. BEING RIGHT—OR “MODEST IS AS MODEST DOES”

On its surface, however, *Critique* looks rather modest. It is as laden with qualifiers and disclaimers as ornaments on a Christmas tree. Over and over again Kennedy explicitly qualifies and downplays the significance of what he says, describing it as “not necessarily a lie,”<sup>35</sup> “scale[d] down,”<sup>36</sup> “modest,”<sup>37</sup> “my version,”<sup>38</sup> “plausible,”<sup>39</sup> then only “loosely plausible.”<sup>40</sup> “My conclusions are *only hypotheses*, and even if all proved correct . . .”<sup>41</sup> He disclaims “pretensions to objectivity.”<sup>42</sup> All Kennedy *claims* to say is that his theory is at least “interesting” because it *might* happen “sometimes.”<sup>43</sup> He claims that he is not trying to describe what is “really going on.”<sup>44</sup>

This assumed modesty is consistent with the mpm perspective that is hostile to “rightness in all its forms.”<sup>45</sup> The mpm strand of his theory “is a particular attitude toward rightness.”<sup>46</sup> “This is the

<sup>32</sup> *Id.* at 341.

<sup>33</sup> *See id.*

<sup>34</sup> *Id.* at 344.

<sup>35</sup> *Id.* at 15.

<sup>36</sup> *Id.* at 12.

<sup>37</sup> *Id.* at 5276.

<sup>38</sup> *Id.* at 9.

<sup>39</sup> *Id.* at 246.

<sup>40</sup> *Id.* at 276 (emphasis added).

<sup>41</sup> *Id.* at 5 (emphasis added).

<sup>42</sup> *Id.* at 341.

<sup>43</sup> *Id.* at 194.

<sup>44</sup> *Id.* at 19-20. Kennedy seems to purposely adopt an “aw shucks” sort of style, saying things like “(insert big German word.)” *Id.* at 179. (Is this as opposed to a big French word like “*ressentiment*,” used on page 266?) And, on page 277, he says: “(I believe that this is a rough paraphrase of a passage somewhere in the *Grundrisse* about the critique of political economy, but I just can’t seem to find it.)” *Id.* at 277. I really do not understand the purpose of these sorts of asides. But they remind me of the old George Carlin routine that went something like, “See my beard? Don’t be skeered. It ain’t weird. It’s just a beard.”

<sup>45</sup> *Id.* at 11.

<sup>46</sup> *Id.* at 341.

attitude that the demand for agreement and commitment on the basis of representations with the pretension to objectivity is an enemy."<sup>47</sup> In other words, if it is not modest, how can it be mpm? However, it is impossible to believe that this hostility to rightness is *simply* contrariness. Rather, it seems to reflect the idea that "rightness" isn't "right."<sup>48</sup> And that *is* a claim. And it is not so modest, either.<sup>49</sup>

Despite all the above disclaimers, Kennedy sometimes steps from behind them and boldly asserts that he *does* aspire to providing a "general social theory."<sup>50</sup> His aim, he says, is to "subvert"<sup>51</sup> and (presumably as a result) to "change the world."<sup>52</sup> Can this *really* be an analysis that is "afraid of its own implications"?<sup>53</sup> Maybe. But looking at *Critique* as a whole, it seems that we should not take these disclaimers too seriously. Refusing to be pinned down is just another way of trying to be "right."

All Kennedy is doing is trying to avoid the *consequences* of claiming to be right by mollifying, qualifying, and disarming many anticipated criticisms from the usual suspects. This is a familiar ploy. It is a strategy to block disagreement by saying in advance that you are "not actually 'asserting' anything."<sup>54</sup> After all, if all you claim to say is that your theory isn't "necessarily a lie,"<sup>55</sup> then how can it be "wrong"? On the other hand, he *also* says he wants his theory to be "intensely controversial."<sup>56</sup> How can such an

<sup>47</sup> *Id.*

<sup>48</sup> Ironically, this stance has something in common with J.S. Mill's argument about the value of the minority opinion. If any opinion has a better claim to "not merely be tolerated, but to be encouraged and countenanced, it is the one which happens at the particular time and place to be in a minority." JOHN STUART MILL, *ON LIBERTY* 46 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859). Mill does not claim that the absence of unanimity is a necessary condition of truth. See *id.* at 41-42. Nevertheless, this passage suggests that Mill believed a persistent assault on the received "truths" was a good thing, if only because it will make the *true* truth more obvious, more living, and so forth. Kennedy seems to be making at least the first claim, if (obviously) not the second, in his attitude toward rightness.

<sup>49</sup> Of course, as always, Duncan is right on top of this observation. "From the Promethean modernist point of view, the postmodern commitment to internal critique seems associated with a psychological commitment to being right in the critique of rightness, and to avoiding either submission to or production of commitment, at any cost." *CRITIQUE*, *supra* note 1, at 350. I *cannot* be described as a Promethean modernist, but it certainly seems a valid observation to me.

<sup>50</sup> *Id.* at 1.

<sup>51</sup> *Id.* at 12.

<sup>52</sup> *Id.* at 17.

<sup>53</sup> *Id.* at 12.

<sup>54</sup> MICHAEL MORTON, *THE CRITICAL TURN: STUDIES IN KANT, HERDER, WITTGENSTEIN AND CONTEMPORARY THEORY* 15 (1993).

<sup>55</sup> *CRITIQUE*, *supra* note 1, at 15.

<sup>56</sup> *Id.* at 62.



apparently mild assertion be “controversial”? It can because it is not really so mild. In *Critique*, Kennedy convincingly demonstrates that ideology *cannot* be purged from adjudication. And, although this claim, particularly the “infected with ideology” part, seems fairly uncontroversial on the surface, it is not when you consider the mpm stance on rightness. It is the mpm strand that insists there is no way to rationalize this ideological (read “policy”) feature of adjudication. The idea that law is infected with ideology is not so threatening if you still have faith that there is a way to make the law “rational” as the term is commonly understood. The mpm stance Kennedy adopts seems to deny that possibility. In the best Socratic tradition, Kennedy is saying that his study of the subject of adjudication<sup>57</sup> has led him to conclude that the truth is that he doesn’t *know* the truth. In this he echoes Oliver Wendell Holmes: “When I say a thing is true I mean that I can’t help believing it—and nothing more. . . . I don’t bother about absolute truth or even inquire whether there is such a thing, but define Truth as the system of my limitations.”<sup>58</sup> Kennedy is not claiming that he has no beliefs or values, just that we shouldn’t expect him to tell us what his “system” is, or to justify it on rational grounds.

### III. THE “POST”-MAN WON’T DELIVER

In *Critique*, Kennedy positions himself in the mpm camp, and does so defiantly and unequivocally, aware that to some this is an “obnoxious and unattractive style.”<sup>59</sup> The unavoidable conclusion is that he thinks mpm is “right” in some sense. But he doesn’t say in what sense. And how could he, without contradicting himself, if mpm is so opposed to “rightness”? Thus, we are informed, “[m]pm is not about authenticity.”<sup>60</sup> Rather, he says the point of mpm, and of challenging “rightness,” is simply to unblock all these emotions: “irony, despair, ecstasy, and so on . . .”<sup>61</sup> But what is the value of generating all these emotions if it is not valuable or good or “right” somehow to be emotionally unblocked? Kennedy says the mpm product as just an “artifact” and says, “[m]y strategy aims only to undermine and entice.”<sup>62</sup> Entice to what?

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<sup>57</sup> Not to mention all of that stuff in Part I of this Article.

<sup>58</sup> Letter from Oliver Wendell Holmes to Learned Hand (June 24, 1918), *reprinted in THE FIRST AMENDMENT: A READER* 28 (John H. Garrey & Frederick Schauer eds., West Publ’g 2d ed. 1996).

<sup>59</sup> *CRITIQUE*, *supra* note 1, at 356.

<sup>60</sup> *Id.* at 344. I use the words “right,” “authentic,” and “true” somewhat interchangeably, understanding that there may be subtle differences in meaning between them. I don’t think these differences are significant in this context.

<sup>61</sup> *Id.* at 341.

<sup>62</sup> *Id.* at 340.

Undermine to what end? This is legal criticism as art. And perhaps this is what Kennedy means it to be—nothing more than the “transgressive artifact” meant to inspire all these emotions, the suppression of which is experienced as a “wound.”<sup>63</sup> But I don’t think so. I think it goes deeper than merely the value of free expression. The undermining he engages in is of what we like to think of as the rationality of our values. This insight clicked for me when I reviewed the early work of some of the legal realists.

I was struck by the extent to which the early writings of the realists sounded like Kennedy in *Critique*. It was almost as if no time had passed between 1931 and 1998. So I found myself asking, “What is different about what Kennedy is saying in *Critique*?” At the same time, in their style, the Realists *sounded* in some ways *more* like the (so-called) formalists they were criticizing so relentlessly. It was a paradox. Then I found what I think is at least perhaps the explanation. The difference was faith in science. The realists’ writing did not diverge so much from that of their predecessors (however you want to designate them, formalists, traditionalists, etc.) in this respect. Both Realist writers and their predecessors displayed what might be retrospectively called a “faith” in science writ large or Progress. In that, the Realists were saying something very different from Kennedy.

Consider the following quotes from pre-Realist thinkers: “Law, considered as a science, consists of certain principles or doctrines.”<sup>64</sup> “[L]aw . . . is not a mere collection of arbitrary rules, but a body of scientific principle.”<sup>65</sup> Now compare these thoughts of Felix Cohen, a noted Realist: “It is through the union of objective *legal science* and a critical theory of social value that our understanding of the human significance of law will be enriched.”<sup>66</sup> This is Cohen’s observation near the end of *Transcendental Nonsense*.<sup>67</sup> Throughout this article, he argues that we don’t know enough to make the moral decisions that are inevitably made in the law because we have not done the empirical and statistical studies that would properly inform those moral decisions. While Cohen *explicitly* disavowed the notion that this scientific knowledge would *determine* the answers to moral questions, it is similarly clear that he had faith that it would help generate *better* answers. Similarly, Karl Llewellyn urged that rigorous observation

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<sup>63</sup> *Id.* at 345.

<sup>64</sup> C.C. LANGDELL, *Preface to A SELECTION OF CASES ON THE LAW OF CONTRACTS*, at vi (Boston, Little, Brown, and Co. 1871).

<sup>65</sup> 1 JOSEPH H. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* 24-25 (1935).

<sup>66</sup> Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 849 (1935).

<sup>67</sup> *Id.* at 809.

(read “scientific method”) of behavior with respect to law, while it would not provide agreement on value judgements, *would improve* the dialogue concerning these interests as a matter of “scientific decency.”<sup>68</sup>

In the above quotations, Langdell and Beale, respectively, reflect the impulse that I believe to be typical of the late nineteenth or early twentieth century: to “scientifize” the object of their labors. At the same time, to call something “scientific” was to offer it the highest praise. Faith in science was boundless. If, in fact, it was painfully obvious that humankind was faced with all sorts of injustice and “outrageous fortune,” still there was faith that science might one day solve this problem—even if not in the observer’s own lifetime. One could live in faith and hope. Felix Cohen and Karl Llewellyn apparently had every bit as much faith in science as Langdell and Beale. Maybe more. They seemed to think that the cure for the absence of science in law was more science. In contrast, Kennedy writes from a position of a loss of faith in science and just about everything else.<sup>69</sup>

While these references make clear that neither writer has some sort of simplistic faith in science as a source of what Kennedy calls “external determination,” they do reflect a faith that the law can be rational.<sup>70</sup> In contrast, Kennedy *can* be read as saying this is not possible. Kennedy seems to discount or minimize the rationalizing force of a moral, ethical, spiritual, or psychological touchstone emanating from concepts such as “God,” “science,” or “rights.”<sup>71</sup> What they *promise* (although perhaps rarely deliver) is some sort of unifying or agreed-upon concept that can render ideological battles as ones about the correctness of the *interpretation*, without shattering the appearance of a common understanding. The “common-ness” of the understanding may be an illusion, and the external source may not determine choices, but its value, as long as it is believed in, is the hope that more work will

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<sup>68</sup> Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 445 (1930).

<sup>69</sup> See, e.g., CRITIQUE, *supra* note 1, at 311-14, 333-38. Actually, this is not true. Kennedy *has* faith, and in more than just the value of *Critique*. But it can’t be named because the very process of naming the articles of faith exposes them to deconstruction by critique in a rationalist framework.

<sup>70</sup> *Id.* at 277.

<sup>71</sup> I take it this is the view of rights as “outside” the law that Kennedy discusses. See *id.* at 306-14. Note the following quotation from *Critique*: “When people want to claim things from the legal system, they put their demands in rights language, as they once put them in religious language.” *Id.* at 334 (emphasis added). “Rights,” as such a unifying concept, is being seriously challenged by a view that locates the center of the law’s animating ethos and justification in economic “rationality” and marginal utility.

reveal an ever more perfect expression of it.<sup>72</sup> And this work is to be performed through reasoned elaboration.

Kennedy clearly *has* an animating ethos for his choices. However, he just doesn't claim that it can be rationally proven to be the "correct" one, or that there is a single one for the law in particular. This is a powerfully disturbing and subversive message in a culture that celebrates the supposed supremacy of Reason. If all you have in the first place is faith in Reason (i.e., that Reason could provide you with, or prove, a system of values that would be coherent and consistent along formal lines), then Kennedy's *Critique* may well cause you to lose faith and provoke despair. If, on the other hand, you *don't* have faith in Reason, but you feel the need to pretend that you do, *Critique* is profoundly threatening because it seems to say, "stop pretending," at least as a matter of theory if not of practice. (More on this paradox later.) I think it is this part of *Critique* that is threatening and controversial to friends and enemies alike and leads to the charges of nihilism coming from both opponents and allies. If by "nihilism" critics mean that he doesn't believe in anything and therefore cannot act, Kennedy says this is not true.<sup>73</sup> Whether his approach is demobilizing or leads to a situation where you just find yourself paralyzed and unable to act is, according to Kennedy, merely an empirical matter.<sup>74</sup> But Kennedy himself is far from believing that, as an empirical matter, the mpm critique has the demoralizing effect proclaimed by some critics.

Meanwhile, if you agree with the mpm analysis but *do* feel immobilized, and you seek some direction on how to share Kennedy's happy state of mind, you are out of luck. He does not deliver any.<sup>75</sup> That is, Kennedy is unlikely to convert those "waverers" looking for a programmatic alternative, since he offers none.<sup>76</sup> "Get your own values," he seems to say. But he *is* happy to share his belief that virtually every *other* response to this conundrum is misguided. He rejects reconstruction projects *and* theoretical projects.<sup>77</sup> He demythologizes rights, claiming they are *not* the "centerpiece" of Liberal legalism that *others* (read "the

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<sup>72</sup> I think Pierre Schlag makes a similar point when he writes: "It is no more possible to continue doing law in an intellectually respectable way once the metaphysic is gone, than to continue to worship once God is dead." Pierre Schlag, *Law as the Continuation of God by Other Means*, 85 CAL. L. REV. 427, 440 (1997).

<sup>73</sup> See *CRITIQUE*, *supra* note 1, at 361-63.

<sup>74</sup> See *id.* at 338.

<sup>75</sup> This is undoubtedly just a variation on the question, "What would you put in its place?" that Michael Fischl said "killed" *cls.* Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992).

<sup>76</sup> See *CRITIQUE*, *supra* note 1, at 363.

<sup>77</sup> See *id.* at 359-61.

unenlightened") may think they are.<sup>78</sup> He rejects doing grand theory. And much of what he rejects about legal reasoning is (paradoxically) its pretensions to rationality, saying some theories or arguments are "circular, ambiguous, or incomplete."<sup>79</sup> This is only a problem if we think it is *better* that they be linear, unambiguous, and complete. It says *nothing* about their intuitive or emotional appeal. Rationality thus "proves" the nonexistence of objectivity, and perhaps rationality itself, on purely rational grounds. That is a pretty strong claim. Of course, my description of his project is "going too global" here, because Kennedy is only talking about a discrete portion of what is called "law."

#### IV. MORE ON BEING RIGHT—MANDARIN MATERIALS

The most important way in which Kennedy attempts to be "right" is in the way he restricts the field of his analysis to appellate decision making. This is what he refers to as "the mandarin materials controversy."<sup>80</sup> He seems to feel that the objection to focusing only on appellate decision making is that it overstates the degree to which people's behavior is influenced by these decisions.<sup>81</sup> And he may be right in identifying this as the most persistent criticism. That is not, however, my objection.<sup>82</sup> I think focusing exclusively on appellate decision making obscures the extent to which ideology influences, constructs, and reinforces social norms at the trial court level and at the pre-law level.<sup>83</sup> Kennedy doesn't challenge the traditional notion that the decisions of a trial court make no "difference in the world beyond the dispute before the court."<sup>84</sup> I just don't think this is true. If ideology infects, constructs, and reinforces itself in the daily practice of the trial courts, as I believe it does, then it renders what happens at the appellate level less significant.

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<sup>78</sup> See *id.* at 338.

<sup>79</sup> *Id.* at 345.

<sup>80</sup> *Id.* at 266-71.

<sup>81</sup> See *id.* at 268.

<sup>82</sup> At least I don't think it is. Perhaps all I am doing is restating the same controversy Kennedy identifies.

<sup>83</sup> See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). Although one could quarrel with Ellickson about who qualifies as a "neighbor" and his perhaps too rosy view of the desirability of social norms as an alternative to law as a form of control, his principal point is an important one for Kennedy's work. Ellickson asserts that the law has a much less prominent role in resolving disputes, structuring the resolution of those disputes, or influencing behavior than is often assumed in discussions of the importance of law.

<sup>84</sup> CRITIQUE, *supra* note 1, at 268.

Just as Kennedy asserts that there is a “(mis)understanding of the intelligentsia”<sup>85</sup>—namely, that the common law is the “background” while legislation is the “foreground”—there is a similar background/foreground misunderstanding with regard to the trial court versus appellate court distinction. That is, we treat the vast amount of lawmaking that takes place in the trial courts (state and federal) as relatively unproblematic background, significant only to the parties. The conventional assumption is that only appellate decisions determine law for parties *other than* those involved in the dispute before the court. I don’t think this conventional assumption is correct. How a judge decides an issue in a particular dispute becomes a part of the store of knowledge in that jurisdiction with respect to what is *possible* or *likely* for future decisions.

Moreover, decision making at this level is not only important to future litigants, but is also a force that shapes the behavior of those who make the law real—police and prosecutors. Police and prosecutors make the law too, insofar as they can enforce (or decline to enforce) existing laws and create new interpretations of them.<sup>86</sup> Their decisions are, at least in part, informed by what they think the courts (not to mention the politicians, monied interests, etc.) in their jurisdiction will approve. If the law appears to say that it is criminal battery when your lover hits you, but in practice you cannot get the police to arrest or prosecute him, which law is more important to you—the law in action or the law on the books? Statute books are filled with laws that are rarely enforced. Sodomy laws are a familiar example.

This lawmaking power of police and prosecutors isn’t limited to a *failure* to enforce. Their practices can also have the effect of creating de facto law. Isn’t it police (with or without profiling) who created the DWB (Driving While Black) “violation”?<sup>87</sup> Likewise, it is probably no coincidence that those most likely to suffer from the *unwritten* law are also (arguably) categorized as the oppressed, the very people for whom Kennedy seeks to intervene. By limiting his discussion to the law as it appears in appellate cases, he contributes, in however slight a capacity, not only to the invisibility of the unwritten law, *but to its insignificance* as well.<sup>88</sup>

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<sup>85</sup> *Id.* at 241.

<sup>86</sup> I take it this latter point was what the movie *The Accused* dramatized. See THE ACCUSED (Paramount Studios 1988).

<sup>87</sup> It may be argued that because there is no such criminal statute as “Driving While Black,” it isn’t a real “violation.” Of course, it can form the basis of a charge, just not the one for which the defendant was originally stopped.

<sup>88</sup> Are they not also “oppressed” simply because they are subject to a “law” that isn’t written down anywhere, even if they wouldn’t otherwise qualify as “oppressed”?

The practices, customs, habits, predilections, and prejudices of the judges in a jurisdiction are *also* a part of the “shadow of the law”<sup>89</sup> under which lawyers, and the parties they advise, operate.<sup>90</sup> Indeed, they may be the most important part of the shadow, if my experience is any indication of the weight trial judges give to “the law” as embodied in appellate decisions.

During my years in practice, I found it to be the exception rather than the rule that the judge had read my brief or motion prior to the hearing (if there was one). And the judge’s reliance on “the law” in making a ruling after hearing the argument appeared, far too frequently, to be unburdened by any outside reading of her own. Rather, written opinions seemed influenced by what the law said no more than perhaps fifty percent of the time. Rulings issued from the bench perhaps even less so. However, Kennedy says “judges and their law clerks see themselves as required to do their own work to produce not only *the best outcome between the parties* but also the best legal argument they can muster in favor of the rule they decide should apply.”<sup>91</sup> I am not sure either of these assertions is correct—even most of the time. Contrary to Kennedy’s assumption that American judges view themselves as having to do “some” of their own work rather than “presiding over a beauty contest” and leaving it to the lawyers, they are, in my experience, very often content to do just that.<sup>92</sup> This is particularly true at the trial level, if only because of time constraints and *not* because the spirit is unwilling.

But even if trial judges were all models of diligence and intelligence and had all the time in the world to do their jobs, we have some legal doctrines or principles that tell them they are *supposed* to leave it to the lawyers. One familiar example is that the judge should not go “outside the pleadings.” The “plaintiff is the master of his complaint,” goes the oft-repeated maxim. This seems to explicitly recognize that there may be facts and/or law applicable to the dispute at hand, but the judge should *not* refer to them if the parties don’t, *regardless* of whether doing so might lead to the best result between the parties. Of course, in practice, judges often *do* suggest theories and revisions to lawyers, just as they very often use strong-arm tactics to encourage parties to

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<sup>89</sup> For the origin of the phrase “shadow of the law,” see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Ellickson of course makes the point that people often don’t just bargain in the shadow of the law, but outside of it altogether. See ELLICKSON, *supra* note 83, at 52.

<sup>90</sup> See CRITIQUE, *supra* note 1, at 270.

<sup>91</sup> *Id.* at 162-63 (emphasis added).

<sup>92</sup> See *id.* at 162.

settle. Conversely, judges are capable of ignoring these principles by finding that the case falls within some exception if, for whatever reason, they are motivated to do so.

This restriction on judges to deal with the facts of the case as presented to them by the lawyers is no less true at the appellate level. It is perhaps even *more* true, since the appellate court is admonished to avoid issues not properly raised in the court below. In habeas cases, the court will ignore issues not raised in the state appellate court, no matter how much evidence is available in the record to support petitioner's claim. Of course, these doctrines become a convenient basis for making ideological choices without the necessity of offering pesky justifications.<sup>93</sup> It may be that, in many circuits, half or more of the cases coming before the courts are dealt with this way. So, I think Kennedy's assumption about how judges view themselves, if he thinks that translates into practice, is wrong.

In addition, I think that judges are often very pragmatic about how important it is to use "the best" reasoning. When asked why he chose one rationale over another in a particular opinion, Justice Brennan used to hold up his open palm and say "five votes." Whether that means Justice Brennan considered who "won" to be more important than the rule offered in the opinion is speculative. Still, it could be interpreted to reflect a certain skepticism about how important it was to have the "best" reasoning. Or perhaps a particular reasoning is "the best" simply because it was the one that most closely matched the direction Justice Brennan thought the decision should go. Whatever interpretation is the correct one, Justice Brennan's comment suggests that Kennedy's assumptions about how American judges operate are somewhat idealized.

While I agree that appellate decisions dispose of, or appear to dispose of, significant ideological stakes and are certainly no nullity, it seems that political, social, and ideological motivations play just as strong a role at the trial level as the appellate, if not more so, because events at the trial level are usually<sup>94</sup> even more insulated from widespread public scrutiny. At the appellate level,

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<sup>93</sup> For example, during the year I was clerking for the United States Court of Appeals for the Eleventh Circuit, I would estimate that about half or more of the cases were "36(1)'d." Each circuit has what are in effect its own local rules for the conduct of appeals that supplement the Federal Rules of Appellate Procedure, and Local Rule 36(1) is the Eleventh Circuit rule that permits dismissal by a per curiam affirmation without a written opinion. I'd say the number of cases summarily disposed of was about the same, maybe less, in the Fifth Circuit, based on my three months clerking in that circuit. Of course, this is just anecdotal evidence. The practices of these courts may have changed, or the time I was there might have been anomalous. But, somehow, in this era of burgeoning dockets, I doubt it.

<sup>94</sup> High-profile trials like that of O.J. Simpson are the exception.



I think there is a conscious belief that the court needs to make the decisions palatable to others. At the trial level, on the other hand, some judges seem not at all concerned with whether the opinion or result will be palatable to many others (except insofar as it might affect elections). Ideology, and every other “illegitimate” motivation for decision making, including, but not limited to an idiosyncratic preference for one of the parties, is “rawer” and more unbridled in its application at the trial level. One of the judges I clerked for used to say that “the most powerful person in the United States government, even more powerful than the president, is the federal district court judge.” He claimed that this was because “he doesn’t need to get anyone to agree with him.” Having been both a district court judge and an appellate court judge, he was speaking from experience. At the appellate level, the judge becomes aware that she not only has to get at least one of her colleagues to agree with her, but she must also justify her decision: that is, offer it as something other than idiosyncratic or overtly ideological. In short, here the judge has an incentive to issue a rule that looks good “on paper.”<sup>95</sup> There is no such constraint on lawmaking at the trial level.

Kennedy’s response is that this model of the appellate judge working in isolation is the *a fortiori* case. That is, if ideology creeps into the decisions of this imaginary judge who, with all the time in the world, before she even talks to her colleagues and tries to build a consensus, this judge who works so hard, then it obviously affects the decisions of real judges. So Kennedy is starting from an ideal model of the conditions for adjudication. Still, why are we spending so much time discussing what does or does not happen with the hypothetical appellate judge of ideal temperament who is surrounded by ideal conditions? Wouldn’t it seem more logical to try to determine what real judges do?<sup>96</sup>

The problem with these views, *i.e.*, that the law in action may be more important than the law on the books, or that what judges actually do is more important than what they (or we) say they do,

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<sup>95</sup> See CRITIQUE, *supra* note 1, at 270. One could read the end of the second paragraph on page 270 to imply that judges *know* when they make it that a particular rule will look better on paper than it does in practice. I’m not sure that this is true. While I don’t rule this out, I think in such cases the judges *do* intend to for the rules to be effective. However, I claim that it is precisely the denial about what goes on at the trial level—how often the rules influence judges themselves—that increases the likelihood of such “mistakes.” It may be that there is, practically speaking, no alternative to assuming that judges follow the rules. After all, as Kennedy points out, enforcement has its limits. See CRITIQUE, *supra* note 1, at 269. Nevertheless, this assumption of widespread adherence to the rules, in the face of widespread disregard of them, has its own “moderation effect.”

<sup>96</sup> Oh dear! Sounds a good deal like Felix Cohen’s suggestion.

is that it is too big, too messy. It is overwhelming. Indeed, it may be impossible to analyze on all but the most limited scale.<sup>97</sup> And how could we know what *really* motivated an opinion, even supposing we could read minds, when Kennedy so convincingly demonstrates that the judges *themselves* may not be fully aware of their reasons for deciding a case in a particular way?<sup>98</sup> Even if you could make the work of judges more “transparent,” that is, if they frankly and overtly made ideological choices in judicial opinions, it would not address the problem of the judge’s own self-awareness. Similarly, if judicial opinions were subject to appeal to the legislature, I doubt it would make these opinions more transparent. I suspect that the process of legislative lawmaking is, like adjudication, indeed, perhaps all human decision making, split up into the process for public consumption and the process that takes place in the backrooms. That is what we needed the “sunshine” laws for in the first place. Too much of the rationale for lawmaking in legislative and administrative bodies took place in the dark. Even in legislative lawmaking, we distrust the overt, public posturing and the self-serving, vague statements of legislative “purpose” that accompany it.

The temptation is to conclude that we cannot say anything meaningful about what is going on<sup>99</sup> without doing empirical work. So I may just be restating the books/action and empiricism argument Kennedy tries to deal with by “confession and avoidance.”<sup>100</sup> Still, Kennedy’s argument focuses more on whether *the parties* know or conform their behavior to the law, and merely appears to *assume* that judges do. But if judges are only relying on the law half the time, and if they rarely read the legal arguments directed at them (my own “empirically ungrounded empirical generalization”), it looks like “denial” if we pretend otherwise. For me, this is a more significant area of “denial” with respect to the law and the power of judges than the denial of ideology that Kennedy discusses.

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<sup>97</sup> For example, looking at how many convictions there are for something like sodomy in a particular jurisdiction may reveal something about the unwritten law about the application of the written law, particularly if a pattern appears among those prosecuted.

<sup>98</sup> See CRITIQUE, *supra* note 1, at 181-82.

<sup>99</sup> It is unclear whether Kennedy’s object is to describe what is “really going on” in the law. On the one hand he repeatedly claims that he is not. See, e.g., *id.* at 19-20. On the other, looked at as a whole, it is hard not to conclude that *Critique* is Kennedy’s description of the phenomenon of adjudication as he sees it, or at least *part* of it.

<sup>100</sup> See *id.* at 267.

## V. "JUST THE FACTS, MA'AM"

Another way in which Kennedy limits the field and thereby reinforces the supremacy of appellate decision making in judge-made law is to decline to analyze the role of ideology in deciding questions of fact. This conforms to the principle that appellate courts are not to revisit decisions of fact made by judges but only decisions "of law." He writes, "This study is about 'questions of law' rather than 'of fact,'"<sup>101</sup> and that "[t]he kind of ideological conflict we are interested in here is over the definition of legal rules."<sup>102</sup> Quite apart from the question of whether it is easy to distinguish questions of law from questions of fact, hasn't he cut out a lot of the "good stuff" by limiting his discussion in this way? One of the insights of the Realists was that there was a lot of ideological action in decisions of fact, and in deciding whether a particular fact was or was not "inside" the rule or the standard. From this standpoint, many on the left (and the right for that matter) don't care as much about which legal rules get adopted as how those rules are *interpreted*. That is to say, we care about the content of the decisions. But there is simply no agreed-upon formula<sup>103</sup> for determining the content.

This is not to say that I think Kennedy's analysis is wrong as it relates to appellate decision making. I don't. I think it is pretty much dead on, not to mention elegant, meticulous, and subtle. It is just that I don't think it goes far enough. Many of the "political" elements of legal decision making are involved in deciding whether to include or exclude something from a legal category. One example is the debate over battered spouse "syndrome." The way the issue has come into the courts is primarily as a "syndrome" (read "illness") that purports to explain why battered women fail to leave their batterer, or kill the batterer rather than leave him. This frames the debate as one about whether a certain group (battered women, or women in general) will get special "rights" or treatment. This framework, however, ignores the possibility, as

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<sup>101</sup> *Id.* at 40.

<sup>102</sup> *Id.* at 43; *see also id.* at 60-62.

<sup>103</sup> By this I don't mean that the formula or concept, be it God, the Catholic Church, Science, or Milton Friedman, actually *will* provide definite answers. Rather, I mean that if there is at least agreement as to the source, the argument is about whether or not you've correctly *interpreted* that source—the Talmud, the New Testament, the king's will, the Little Red Book, Alcoholics Anonymous's Twelve Steps . . . *something*. Agreement about a source for the authority allows for disagreement—indeed heated disagreement—under the umbrella of the commonly agreed-upon, legitimate source. But we don't have any agreement as to the *source* for the answers to such questions. This is profoundly destabilizing. This is why I think conservatives have the advantage. They refer to their unifying concept of economic efficiency. It may be true that their confidence is misplaced. But as long as they *believe* in it, they have faith in what they do.

has been explored in numerous feminist articles, that it is a matter of refining or redefining what constitutes “imminent danger,” or what a “reasonable” response is for purposes of self-defense. A judge who has in mind the paradigmatic case of self-defense, such as two guys in a physical brawl, may well experience a sense of “closure” in denying a self-defense instruction to a battered woman who shot her husband in his sleep. The judge may experience this as an “easy” case on the facts. But that doesn’t mean that the decision isn’t political or ideological. Indeed, *this* is the sort of case I am most worried about. So the notion that ideology factors in only when the judge is faced with a decision in which such “closure” isn’t easy is, I think, just wrong.

#### VI. DESPAIR—OR FEAR AND LOATHING IN THE ACADEMY

The most threatening and provocative part of what Kennedy has to say in *Critique* goes to the legal academic’s *raison d’être*—“doing” or writing about “doing” law. Kennedy seems to leave us with nothing to write about. At least not if we want to be right! While he claims his vision doesn’t *necessarily* generate despair and paralysis, it is, as he himself notes, a persistent critique of his views.<sup>104</sup> And he doesn’t offer anything in *Critique* to avoid it. Instead, he urges us to alternate between politicization and passivity through balancing. How ironic that in the end we have that familiar workhorse of jurisprudence and legal decision making: “balancing”! “Balanced” how? Against what? With reference to what criteria? Kennedy doesn’t pretend to offer us any guidance.

And that is fine—for *him*. But he *has* offered a devastating critique of the sorts of work that legal academics routinely do. In addition to the overt criticism of Dworkin’s proposed “solution,” with which *Critique* is loaded,<sup>105</sup> Kennedy also rejects reconstruction,<sup>106</sup> grand theory,<sup>107</sup> global indeterminacy,<sup>108</sup> rights theory,<sup>109</sup> and traditional left determinism.<sup>110</sup> Proceeding from his own amalgam of left/mpm, he claims that “the left in left/mpm supports spending some time looking for ways to intervene in policy debates that seem likely to be good for the oppressed, *without betraying mpm.*”<sup>111</sup> Quite apart from the difficulty of

<sup>104</sup> See, e.g., *CRITIQUE*, *supra* note 1, at 337-38, 361-63.

<sup>105</sup> See *id.* at 119-30.

<sup>106</sup> See *id.* at 359.

<sup>107</sup> See *id.* at 294.

<sup>108</sup> See *id.* at 279.

<sup>109</sup> See *generally id.* at ch. 13.

<sup>110</sup> See *id.* at 294.

<sup>111</sup> *Id.* at 358 (emphasis added).

deciding what is or is not likely to be “good for the oppressed,”<sup>112</sup> how could one possibly intervene without “betraying mpm” if intervention requires a claim that one’s proposal is “right” or “better” or more rational or something?

So, what’s left? What’s an academic to do? Since Kennedy doesn’t tell us what his moral theory *is* (except in the most general terms), there is nothing much left to argue with him about. You can’t say he is “wrong,” because he is just telling you how he feels. But he is saying that most of the stuff legal academics spend their time on is a “waste of time.”<sup>113</sup> And his discussion on pages 372-74 seems to describe (ominously for me) the position of legal academics as marginalized, co-opted, complicit, and bored, turning to personal relationships and so forth to make “daily life tolerable.”<sup>114</sup> If you recognize yourself in this description, that probably means you are in trouble. While I hope that his prediction is wrong with regard to my own future, it is hard to argue that his description is wrong with respect to at least some legal academics. Kennedy may say professional ennui, despair, loss of faith, etc., have always been with us, and it is not mpm’s fault, but I’m pretty sure that some people think he’s wrong about that.<sup>115</sup>

The fact that *he* doesn’t feel despair in the face of the mpm element of critique doesn’t help those of us who do. He says we “misunderstand internal critique if we *imagine* that it might lead to a situation in which we had lost faith in ‘everything,’ so that we just wouldn’t know what to believe in or do.”<sup>116</sup> In this sentence he

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<sup>112</sup> An example of this problem may be the massive deinstitutionalization of the mentally ill after legal decisions that were purportedly victories for the rights of the mentally ill. Decisions such as *Donaldson v. O’Connor*, 472 U.S. 563 (1975) (holding that the mentally ill could not be confined indefinitely without review of their status or treatment, absent “dangerousness”), and *Youngberg v. Romeo*, 457 U.S. 307 (1982) (holding that the mentally retarded held in institutions were entitled to some sort of “habilitation”) were the product of civil libertarian activism on behalf of the mentally ill and the mentally retarded. Those advocating the positions represented in these decisions undoubtedly viewed them as good for *these* oppressed groups. However, it is commonly thought that these decisions resulted in widespread homelessness for the mentally ill. It may be that, although homelessness involves all sorts of deprivation and hardship, the mentally ill are actually “better off” because they are “free.” And there is evidence that some of those affected do prefer hardship and freedom on the streets to “three hots and cot” in lock-up. In general, though, no one thought to consult them on the relative merits of the two choices. Perhaps no one thought it would come down to that. But it gives one pause when thinking of intervention.

<sup>113</sup> See, e.g., CRITIQUE, *supra* note 1, at 333.

<sup>114</sup> *Id.* at 374.

<sup>115</sup> I’m not really one of them, even if modern/postmodernism doesn’t entirely appeal to me. For one criticism of the postmodern stance generally, see Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687 (2000).

<sup>116</sup> CRITIQUE, *supra* note 1, at 362 (emphasis added).

seems to be saying that those of us who experience this feeling are just “mistaken” about our own feelings. I could say, “speak for yourself Duncan!” But he is. Never mind.

For most of us, the psychological need to be “right” (not to mention the social need) is so compelling that, in the absence of an appealing theory purporting to be right, many of us really *can't* decide what to do. It is all very well to declare “God is dead” if you have “science” or Reason to fall back on, as the Realists did. But where do you go after a loss of faith in Reason, as well as all of the above? This is a *cri de coeur* from those who are convinced by his argument. As Pierre Schlag points out, “[t]his fear of losing reason is a fear of loss of control.”<sup>117</sup> Of course, one response is that control is an illusion in any event. But it is a tenacious illusion, as Kennedy himself demonstrates. He suggests that his hope is that we can determine our fates “without alienating our powers.”<sup>118</sup> Isn't this seeking a form of control? What *are* our powers? How can we hope to “determine” our fates when we have so little grasp on what *causes* our “fates”?

Even those who have long since given up on the notion that one set of normative values can be seen as objectively “better” than another still cherish the idea that there are legal ways to achieve the results one finds acceptable. Kennedy's work, however, seems to refute this faith.<sup>119</sup> While that *might* not be demobilizing *in theory*, it is, in fact, just that—to the extent that most players in the legal system appear to have accepted, or at least have acted consistent with, Kennedy's notion of “bad faith” and denial. It is ironic in the extreme that the mpm approach *itself* requires “doubled consciousness.”<sup>120</sup> While he says that this “doubled consciousness” is different than the denial he criticizes in judges, it is hard to know the difference from the outside. Double consciousness on the *inside* may look like inconsistency, denial, or duplicity from the *outside*. How do we know judges aren't employing “doubleness” as well? If I had to guess, I'd say we assume it from the content of their decisions. But in that we may be taking their rhetoric too seriously.

## VII. CONFESSION—WAS IT AS GOOD FOR YOU AS IT WAS FOR ME?

Finally, *Critique* has a confessional flavor, as if the author feels the need to atone for some past sins of omission or

<sup>117</sup> PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 21 (1998).

<sup>118</sup> *CRITIQUE*, *supra* note 1, at 19.

<sup>119</sup> I find it interesting that some readers come to exactly the opposite conclusion.

<sup>120</sup> See *CRITIQUE*, *supra* note 1, at 376.

commission (or wants the reader to think that). Mostly, though, these sins are only hinted at. You'd have to be an insider of the critical legal studies ("cls") movement to know what he is referring to when he makes reference to "failures of nerve and leadership" as part of the reason for the death of cls, "the movement."<sup>121</sup> To whom is he referring if not himself? Over and over again he refers to his theory or his approach as "chastened."<sup>122</sup> "Chastened" compared to what, in what way? It is unsettling and ominous to read him declare that he is "happy to raise [his] right hand,"<sup>123</sup> given that he claims to "abhor loyalty oaths and consider[s] it a point of pride to refuse them."<sup>124</sup> What can be gained by adopting this "chastened" stance?

As a crucial founder of the cls movement, Kennedy has indisputably been the focus of criticism and hostility for the last twenty years or so. In some circles, to merely mention the name "Duncan Kennedy" or "critical legal studies" causes critics, in Pavlovian fashion, to figuratively (or literally) foam at the mouth. He admits that he has sometimes been hurt by negative criticism.<sup>125</sup> It is, however, difficult to imagine that it is, for instance, Richard Posner to whom these mea culpas are directed. But if these apologies are to his past (and present?) allies, then not many are not likely to be mollified, as he dishes it out a little too much. While he *may* (who can be sure) be citing *himself* for a failure of leadership and the demise of cls, it could be that he means someone else. He also claims that some members of the movement succumbed to "discipline and seduction by the mainstream."<sup>126</sup> He doesn't identify anyone as a victim of discipline or seduction, but the players undoubtedly know (or think they do) to whom he refers. Those who suspect that he may be talking about them are unlikely to be lost in admiration for the rest of the book.

"[T]he advent of postmodernism" is another source Kennedy cites for the death of cls, but in *Critique* Kennedy remains unabashedly, nay aggressively, postmodernist in his approach.<sup>127</sup> Nor does he retreat from the position that "rights" are a dead end, another cause of the fracturing within cls to the extent that "gender and race politics" continued to rely on them. In short, there is very little in the way of capitulation or conciliation in

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<sup>121</sup> See *id.* at 9.

<sup>122</sup> E.g., *id.* at 5, 294.

<sup>123</sup> *Id.* at 13.

<sup>124</sup> *Id.* at 12.

<sup>125</sup> See *id.*

<sup>126</sup> *Id.* at 9.

<sup>127</sup> See *id.*

*Critique*—even to his friends. Given everything else Kennedy says in *Critique*, all this “confession” *does* look a little like taking “one’s clothes off in public” and expecting to be “applauded rather than punished.”<sup>128</sup> To paraphrase another *Saturday Night Live* character, Kennedy seems to be saying “I’m right, and you’re not!”

#### CONCLUSION

Kennedy is undoubtedly right about many things. Fittingly, his observations are delivered in a paradoxical manner. He *appears* to be offering a modest, limited analysis of one facet of adjudication, but actually strikes at the core of what we all think we’re doing in this law biz. Kennedy’s observations are superficially uncontroversial (at least on the left), but are actually very controversial to the extent that he rejects the value of the projects pursued outside of the mpm position. He doesn’t claim to be correct, but does assert that the mpm approach *is* right. He appears to decry bad faith or denial in judges, yet recommends “doubleness” to left academics. It is a powerful critique and extremely disturbing. But I find myself wishing that he had not taken such a cautious tone, and that he had gone out on a limb and been a little more prescriptive—even if it could not be defended as “right.” If you agree with Kennedy’s analysis, then most of the characteristic activities of academics (left and right) look like a waste of time. So what’s left?<sup>129</sup> What’s left seems to be what’s left out of *Critique*—the subjects Kennedy deliberately leaves out as a result of the restrictions he places on his field of analysis. And perhaps that is what he meant all along.

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<sup>128</sup> *Id.* at 351.

<sup>129</sup> What *is* Left indeed?



