

gods.¹⁰ Og det er nøkkelen til å forstå hvordan de brukes i praktisk argumentasjon. Taleren vil at lytteren skal ta i bruk kunnskap han allerede har. Taleren må ha tillit til at når en forståelsesramme lanseres, så vil lytteren være i stand til å lese den til også i den øvrige presentasjonen av saksfakta.

Dommer er sjelden skrevet med en sluttet argumentasjon med tvingende logisk gyldighet. I saker der det er strid om saksfakta er det vanligere at dommen overlater en del opplysninger til leseren sammen med et anbefalt makrofortellingsperspektiv, så får leseren selv prøve sammenhengen og se om han lar seg overbevise, eller ikke lar seg overbevise. Og her kommer vi tilbake til hvordan straffeprosessen fungerer som kriserite, som kollektivt rop etter mening, som felles ryddeaksjon. Den problematiske hendelsen domstolen må ta stilling til, blir forstått i lys av typiske hendelsesforløp. Det er makrofortellingene som er bærere av de moralske dommene. Det er ved å klassifisere hendelser og handlinger innunder kjente og delte makrofortellinger, at vi tillater oss å tilskrive skyld. Og det er å plassere skyld straffeprosessen først og fremst kan gjøre for oss.

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10 En diskusjon av begrepet *makrofortellinger* opp mot konkurrerende begreper som *myter* og *kulturelle nøkkelfortellinger* finnes i Kjus 2007: 91 ff. Diskusjonen berører også hva makrofortellingene kan sies å være: 93, 37 ff.

Interview with Duncan Kennedy, Harvard Law School, Cambridge MA (USA), May 2008

BY MAURO ZAMBONI¹

I was a visiting scholar at Harvard Law School in 2008, giving me the opportunity to finally meet and interview Duncan Kennedy after years of reading his many profound and varied academic works spanning subjects from legal education to housing law, contract law to Law and economics. As many other scholars and practitioners before me (regardless of political or legal theoretical stance), I was fascinated not only by Kennedy's deep knowledge of both American and European social, economic, political, and legal realities. What was striking for me was his masterly conveyance of this knowledge in a way discerning patterns and tendencies, both those peculiar and those common for the European and American contexts.

Starting at these points, Kennedy pushes the analysis further into a critical perspective of the law and its function in the Western societies, a critical perspective which aims at to make that which is »bad« implode from within and in its place, allow alternative ways to flourish, ways of revealing and solving the problems that lawyers meet daily and are forced, as Kennedy would probably say, to »repress« in order to preserve an illusionary »neutral position« in society. In other words, as Kennedy once told me during one of our long discussions, »nobody can hide behind the slogan 'sorry if I created injustice, but it is not my fault, I am just doing my job.'

1 I would like to thank Laura Carlson (Faculty of Law, Stockholm University, Sweden), for her work in transcribing and proof-reading the interview. I am also profoundly thankful to Alf Petter Høgberg (Faculty of Law, Oslo University, Norway) for always supporting and encouraging me in this task. Finally, a special thank to *Wenner-Gren Stiftelserna* for financially contributing to my stay at Harvard as well as the *Stockholm Law Faculty's Trust Fund for Publications* and *DJØF Publisher* for financing the work of transcription and proof-reading. The footnotes in this article were added by the interviewer (after approval by Duncan Kennedy) in order to clarify certain concepts, give bibliographically complete extended references of works named during the interview, or simply in order to suggest further reading.

o as a lawyer, live in this society and therefore are personally responsible for justice you create or help to reproduce in it, always.«

ntention originally was to structure the interview around two major poles: , more »public« one would have directly addressed Critical Legal Studies after »CLS«], its history and theoretical and generational underpinnings; the would have been more of a »private« character and dealt with Kennedy's rk and assessment of its successes and (few) failures. However, during the v (as probably will be noticed in the following), I soon discovered why Ken- a legal thinker who more than others has contributed to the relativization of inction between »private« and »public:« the two poles I had planned sud- isappeared as soon as Kennedy started answering the questions, creating ead for a beautiful depiction of the history of CLS and personal experiences s inseparable elements. In this way, the interview confirmed once more one asic legacies of Kennedy's work: for the very social and political nature of , we cannot observe the law and its (un)developments as passive and neutral ders; whether we want it or not, we are all always social and political anid therefore, necessarily participants responsible for the good or bad in the , more generally, in society as targeted by legal regulation.

ii: Professor Kennedy, I was thinking of structuring this interview around two major liscussion: the first, more »public« one concerns the history and legacy of the CLS mo- while the second is more »private-oriented,« focusing more on your works. As I said, group of questions will deal with one of the things for which you are famous, that is ig one of the fathers or mothers, if not the father/mother, of CLS.

art, I was wondering whether you could offer the reader a general assessment of the why CLS happened in the general history of Western legal thinking. In particular, one that seems to trouble historians of legal thinking regards the nature of CLS: Was it a atural development of a certain environment? For example, was CLS a sort of direct ughter of the pragmatic and politically oriented approach typical of a certain parts of n legal thinking from the end of 19th century and fully developed by the American lists?

an we consider CLS a sort of random product, not so heavily determined by specific , historical and legal circumstances but mostly by the fact that certain people were born i met in their work? Should CLS then be considered a product of a sort of chaos theory of an evolutionary theory? In short, is CLS the »natural son and daughter« of its sort of deterministic product of a certain socio-political environment, or is it a stochastic sort of solitary Napoleonic figure in the landscape of the legal thinking?

ly: In order to answer your question, I think I can give you a very short tion of the conditions that are part of the explanation of Critical Legal Studi- e United States. However right from the beginning I think it is important to he fact that the critical approach to the law is not something that was hap-

pening only in the United States. It is clear that American CLS came into existence and had its first beginnings in a very specific time and place, which was the Yale Law School in the late 1960's, and there is a whole book by Laura Kalman about Yale Law School in the 1960's.² A group of students between 1967 and 1972 at the Yale Law School, and two assistant professors who were denied tenure, that is Richard Abel and David Trubek, were the group of people who were responsible for creating the organization CLS in the late 1970's. Of course, they had found some allies who came from other places, but there was no other group that could be seen as the core the way the Yale people were.

What happened during this period at Yale Law School between 1967 and 1972, approximately, paralleled developments occurring all over Europe as well as in other parts of the United States. First of all, there was as a similar generational develop- ment and it is important to stress that generational politics are crucial to understand- ing CLS. It is on one level just the legal manifestation of a generalized, generatio- nal, intellectual, political revolt that occurred in all the developed countries of the world, the First World at least, in this moment. Moreover, in France at exactly this moment the *critique de droit* movement emerges, and in Italy there is the *uso alternativo del diritto* approach.³ So the question »why did it occur in the United States?« is actually misleading because a critical approach to the law was occurring in these other places as well.

There are many ways in which CLS was different from the *critique de droit* move- ment and also different from *uso alternativo del diritto*. There was no communication between these movements at any point either in the late 60's or later. Only in the 80's, after *critique de droit* and *uso alternativo del diritto* were basically over while CLS was flourishing were there contacts between CLS people like myself, and the prior leaders of *critique de droit* and *uso alternativo del diritto*.

We can then see the idea of a generalized generational revolt that is both political and intellectual. The American moment of student activism was, as was the Euro- pean 68, a genuine moment of totalizing critique and activism. This activism that ultimately ten years later produced CLS was about the draft, conscription for the Vietnam War, it was about race politics, and it was about the beginnings of femi- nist politics.

All these were factors in student activism but it is very important to stress the fact that it was also what you might call civil society activism, that is it was an edu- cational rebellion, against education everywhere in Europe as in the United States.

² See generally Laura Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* (Chapel Hill: University of North Carolina Press, 2005).

³ As to this connection, see Anna di Robilant and Ugo Mattei, *The Art and Science of Critical Scholarship. Postmodernism and International Style in the Legal Architecture of Europe*, 75 *Tulane Law Review* 1060-1065 (2001).

s a major aspect not the politics of the state, the politics of war and peace, politics of legislated distribution, but the politics of civil society and specifically politics of education, with the politics of patriarchal authority in the family as a part of it. It had an opening in the direction of the politics of the so-called »private sphere« although that was undeveloped in the period between 1967 and 1972. The American second-wave feminism took off and produced an intense and radical politics of the private sphere. The generational revolt happened all over the

student activists of the late sixties were, of course, a minority among law students. A subset of the minority, a small minority of the minority, became legal academics. They had to then get jobs and get tenure, and the people who were fired professors who were dismissed, had to get new jobs and get tenure in their new schools, and that had happened by 1977. So between 1972 and 1977, there is a period in which the people, who were law students between 1967 and 1972, became school professors. This minority who continued in academia were the people who had already as student activists had seen themselves as having a specific legal intellectual agenda as well as a general political activist agenda.

These people hooked up with people who had gone to a variety of other schools, especially with a new network of young professors that had come into existence at Yale Law School. The founders of CLS in 1977 were the Yale group, the Harvard group, both consisting of assistant professors and recently tenured professors, and a number of their students, who were already themselves entering the market to become law teachers. You can then see how the question of how CLS came into existence is a completely different question of how it flourished after 1977.

Another crucial and different question would be: why was it that the Yale Law School produced this set of people who could then be the leading figures of the movement when it got started in the late 1970's? I think the answer to that is connected with two factors. First, the Yale Law School was supposedly the most liberal law school in the United States and therefore the generational rebellion that took place at the Yale Law School was generational rebellion against the dominant modes of American progressivism, not against the right, not against the conservatives at all. The generational rebellion that took place at Yale was a rebellion against the center American political intelligentsia ruling elite power.

In the future CLSers went to Yale went because it was so progressive, and the period of 1958 is the crisis of exactly that mode of American progressivism. These students had gone there because it was a leftist sort of a place but then they arrived at Yale and found that moderate leftism appeared to be compromised by its unwillingness to confront sufficiently seriously the center and center right powers that were in power during the war and failing to respond seriously enough to the race issue. Yale became the crucible in which the progressive intelligentsia, discredited by the war

and by their failure to act decisively in the racial crisis, met the young who were looking to them for leadership but were disappointed and turned against them.

As to the second factor explaining why Yale Law School produced the leading figures of CLS, this consists in the fact that it was pedagogically retrograde. It provoked student rebellion because, as a pedagogical environment, it mirrored the authoritarian character of American moderate progressivism. American moderate progressivism, on one hand, was in the public sphere the moderate left, but, on the other hand, it was completely conventional when it came to institutional relations and open therefore to the anti-authoritarian critique typical of the 60's.

I think that the roots of CLS can be traced to the internal contradictions of American moderate progressive liberalism as both something that pulled in and attracted people who liked it for its progressivism, and then came up against the moment of its crisis, which is the beginning of its historical crisis in the United States. Over the next fifteen years, this mode of American progressivism was gradually crushed from two sides, first – and only briefly – by us, the radical left, and then by the right, by the Reagan/Thatcher universe. So first we seemed to be discrediting and challenging American progressivism, but then basically it turned out that we were irrelevant, historically irrelevant, and it was actually the reaction against us by the right that ultimately brought the liberals to their knees by the 1980's.

Zamboni: *Do you mean that the liberals, or American progressivism, were sort of squeezed between the CLS critique from the left, which attacked them for their moderate features, and the right that while pointing at you as the enemy, did so in order to pass through and destroy the liberals' position?*

Kennedy: Exactly. The right did not care about us in CLS. They merely used us as a symbol. So they ran against us, but their real enemy was the moderate liberals who, on their side, experienced us in CLS not as their allies but as their enemies. The moderate liberals thought we were their enemies. As you can see, this context is not an unfamiliar context to many European situations, where there are resemblances to the American experience.

Zamboni: *As to the European experience, I think this is true but only to a certain extent. If I draw a comparison with the two situations I am more familiar with, namely France and Italy, there was certainly a sort of deep sense of dissatisfaction towards the institutional and traditional left wings, represented by the socialist and communist parties and, to some extent, by the historical trade unions. Similarly to the United States, in these two European contexts the major attack by the critical scholars, both inside and outside the academia were also directed towards the authoritarian way of teaching and doing politics. However, these enemies were represented by the traditional conservative or right-wing forces, like the Christian Democrats in Italy and the Gaullists in France.*

y: So the critical scholars were fighting further to the right than their American counterpart. I think that was very true, but there is another major difference between the European and American critical experience from an organizational view. If one looks at the factors that made it possible for CLS to flourish and rapidly from the late 1970's through the 1990's, one can see that for 15 years, CLS was extremely successful as an organizing project, more so than either the *critique de droit* movement or the *uso alternativo del diritto*. As a Scandinavian or northern European equivalent, I have to say I have no idea what would. A Northern European CLS network did come into existence in the mid 1990's, but I really know nothing about it.

ii: *I unfortunately am neither very familiar with the history of critical legal thinking in Nordic countries, particularly in what you have designated as to its 60's roots in the states. However, my (probably wrong) impression is that in Scandinavia (i.e. with the exception of Finland) from the 60's until recently the critical approaches to the law coming from the left have always been somehow absorbed and neutralized by the institutional structures created by the Social Democratic ideology (at least according to the American and rest of the world's political standards), such as the political spectrum, the trade unions, the state bureaucracy (including academia) and student organizations. In other words, my impression is that in Scandinavia, the »potential Critics« and their »potential disruptive« messages were almost already from the very beginning into a generally (according to the American and European perspectives) leftist traditional institutional apparatus.*

y: Differently, the American Critics were in rebellion against that very moderate liberal Democratic formation, that was what we were in rebellion against, and it was not destroyed until the 1980's, because it was only in the 1980's that the system managed to destroy it. However, looking at the history of CLS in the United States it is possible to observe another very important factor that made it possible to have this 68ish moment after a pause of six or seven years, starting again in the late 1970's and through the 1980's. Interestingly enough, this too is a generational story, we could call it a second generational story after the first generational story, i.e. the generational politics of the late 1960's I have just spoken about. This second generational story is specific to America, and to American legal education and in order to make my point clearer I am going to give you some statistics. Between 1970 and 1990, the number of ABA accredited law schools expanded from 146 to 175, so this is adding 29 law faculties, and the number of law students grew from 82,000 to 135,000, adding 50,000 law students. Between 1975 and 1990 the number of women law students grew from 7,000 to 55,000, from 8.5 % to 40.7%. Between 1975 and 1990, the number of students of color grew from 10,000 to 17,000, an additional ten thousand. The number of full-time law professors between 1970 and 1990 grew from 2,300 to 5,300, almost double. The num-

ber of full-time women rose from 517 to 1,338 and between 1985 and 1990, the number of full-time minority teachers rose 301 to 512.⁴

What do all these numbers mean? In the United States during this whole period, i.e. between 1975 (when CLS was getting going) and 1990 (when CLS more or less came to an end as a movement), many students became law professors. Typically after they graduated from law school, when they were 25 or 26, they worked for a couple of years and usually became professors at about age 30, a process which nowadays is no longer true.

During this period of time, there was then a gigantic influx of thirty year olds to legal education, into a system of legal education that was relatively highly hierarchical, that is the schools were rigidly ranked in a single national system, inside law faculties, the organization was also relatively rigid and hierarchical. Just as you can see that the first wave of CLS after 1968 are the early baby-boomers, you can see that the second wave, that is the people who create CLS as a mass academic organization after 1978, this wave was made by the late baby-boomers.⁵ They are the people who are at the very end of the demographic and they are flooding in, radically reducing the average age of faculties and crowding the older and established and more authoritarian figures from below.

You can then see how this is a classic situation of institutional vulnerability. The older generation of CLS people, who are by now arriving at the age of forty, are members of the prior generational revolt and they ally with the new coming arriving people who were moreover their students. So the first generation of baby-boomers has become tenured law professors, they have young students who they encouraged to become law professors, and that means that within the arriving cohort of the young, there are many people who are already students of the prior generational rebels.

However, there is one more factor to take into consideration, this too of a demographic nature. If one looks at this period, one sees that law faculties are expanding, just as jobs in political science, sociology, anthropology, history and English literature are disappearing. Just as the law faculties are sucking in vast numbers of new, young professors, the opportunities in traditionally politicized social science disciplines are disappearing. In other words, American higher education is shifting radically after 1975.

4 These statistics can be traced in Duncan Kennedy, *Afterwords*, in D. Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against the System*. A Critical Edition 204-205 (New York: New York University Press, 2004).

5 »The baby boom« commonly refers to the unusual spike in birth rates which took place following World War II in several English-speaking countries, e.g. the United States and Canada. Baby boomer is then a term used to describe a person who was born during the post-World War II baby boom, in particular between 1946 and 1964.

reason why the opportunities in the traditional faculties are disappearing is the early baby-boomers took all the jobs, all the new jobs in anthropology, sociology, history, political science between 1970 and 1980, so that there are no jobs. The young people are being driven into law because the early baby-boomers, the generationally rebellious baby-boomers, are now clogging the arteries of the academic system. I think this might be what you were calling in the beginning a sort of »necessity« or deterministic explanation of why CLS was born.

ii: *I was exaggerating a bit. I was attempting to somehow »stretch« the framework of existing factors of the birth of the CLS movement to two ideal-typical poles of possibilities, namely deterministic vs. stochastic.*

iii: If we use a »deterministic« ideal type, it is then possible to identify the conditions that made the generational rebellion behind CLS possible: in this case a rapid expansion of the number of jobs, while a large number of the people who took them had an element of disappointment with the possibility of becoming a professional liberal intellectual academic in one of the traditional fields where progressive academics went to work. The leftism of CLS had these two moments, that is after 1975, each of which is profoundly generational. One can say that the strategy of CLS was always partly political and partly very much familial, that is always had a strong element of defiance of the patriarchal structures of education and civil society institution. One could say that the whole »CLS thing« followed the fact that when World War II was over, the Cold War permitted an unprecedented expansion of the American economy producing waves of suburbanization and a significant increase in the birth rate. You can see that everything is just following a step from there.

iv: In addition to this generational or familial factor, there is another factor, this one at the individual level. Another reason for the success of American CLS was the political strategy, which was different in profound ways from the political strategies of *usso* or *vo del diritto*, of the *critique de droit* movement, and also of the leftism in law in higher education, in either economics, anthropology, sociology or history. As I would describe the political strategy of CLS was, at least from the point of view of European politics, utterly and totally eclectic from the beginning. It was unitary at any point. The notion that CLS political strategy was a unitary attack on law. It was self-consciously an eclectic mixture of different kinds of Marxism (this was always a minority strand), different kinds of 60's civil society rebellions, American pragmatic traditional progressivism, the influence of European post-structuralism and then European post-structuralism, and finally, CLS quickly absorbed and gave space also for race and gender-based critiques.

v: CLS was never unitary and never had the dimension and ambition of being a total project. CLS was always not just eclectic but also very consciously anti-program-

matical, another 68ish aspect one could say. CLS was not programmatic in the sense that it was not oriented to a concrete reform program that the state might adopt and in terms of legal education, it was mainly anti-authoritarian, as opposed to being programmatically transformational for legal education. The contributions were not oriented, as was the *critique de droit*, to the idea of taking power through the mobilization process and then bringing about an institutional transformation based on a program; this was not the CLS idea. The basic program of CLS was to establish multiple forms of alternative leftist analyses. »Multiple forms« here means multiple leftist analyses at the level of legal science, inside the discourse of legal science, while at the same time establishing multiple alliances in particular law faculties designed to transform the educational culture.

Zamboni: By these last words, it appears that CLS was born with the idea of producing its own very assassins, i.e. the sons and daughters that in their turn would murder CLS, such as critical race theory, feminist jurisprudence. Would it be possible to state that, at the end of the day, the very goal of CLS was not to produce its own program of critique, but instead to produce an environment (or in Bourdieu's terminology, a »field«) that then would nourish and stimulate other movements and their programs of critic?

Kennedy: The idea was to create an environment that would welcome and nourish many different forms of critique. During the fifteen-year period CLS stretched over, that is between 1977 and 1992-1993, the people understanding themselves to be the influential collective leadership were a collective leadership representing quite different strands of critique. It is only after the first six or seven years, I would say after 1983-1985, that the impact of the arrival of the waves of women professors and African American professors became large enough to impact the organization in a serious way. Between 1983-1985 and 1992, a major internal dimension of the life of CLS as a movement became the inner conflicts and collaborations around race issues and gender issues. One source of internal division was then among white men, men and women of color, and white women.

vi: However, there was a second theme that was just as important as race and gender, namely the crisis of traditional progressivist ideologies and the arrival of a very challenging new (leftist) form of post-structuralism or post-modernism. In other words, the other internal divisions within CLS dealt with the relationship between the younger generation of post-structuralist, post-modern oriented white men and the prior generation of 68-ish white men, most of whom were either post-Marxist or post-liberal. This prior generation was either disappointed Marxists who had adopted a new theoretical orientation, or disappointed moderate American progressives who had been radicalized. The old people were devoted to internal critique, and in that sense they were not »over« Marxism, but definitely no longer positivist Marxists – they were more in the tradition of the early Marx. The *Theses on Feuerbach*

ave been much more important to them than Volume II of *Das Kapital*, if I it that way.⁶

happened between 1983-1985 and 1992 was a series of multiple, cross-conflicts. For example, you could be an African American woman post-alist allied on the one hand with other women and with some African American, but also with some young white post-structuralist men, against some of white men, and gender traditionalist African American men. There was possible potential combination of identity politics with ideological and logical politics and this was the success of the organization for about seven years, during which we had a very large number of events. They were small such as summer camps that lasted for a week or two with ten or twenty and an intense, intellectual, and social interaction, and they were very large with several hundred participants at a large congress that would go on for three days. These events occurred with great regularity, at least two every n different levels and scale, in which these internal issues were what we d. The development of each of the different internal strands was affected by action with the other strands during this period.

ii: *I know Professor that it is always difficult to determine »who is guilty« in the case intellectual murder«, but I was wondering one quite simple question, which I am sure very complex answer. Who put an end to the CLS experiences? Were internal factors, escalation of divisions and conflicts between the different CLS strands, a feature that, inted out before, was in the very nature of the CLS during the 80's?*

And CLS cease to make the »headlines of the legal newspapers« due to external or environmental changes, e.g. the establishment and consolidation through the 1990's of a »conservative and political culture, or at least a less radical and more moderate attitude towards cal, social and legal problems?

y: I would say that a very basic part of the narrative of the CLS story is that point, this experience, which was enormously positive but also enormously , produced both a lot of ecstasy and a lot of rage, and in the end lost its ve capacity, i.e. it fell apart. The network disintegrated into its component

Theses on Feuerbach comprise eleven programmatical notes, written (almost in epigrammatic form) by Karl Marx in 1845, but published only posthumously in 1888 by Friedrich als. These notes are considered an example of the »Young Marx,« i.e. a Marx who is still e process of transition from the Young Hegelians' focus on philosophy to his mature fo-n economics, as developed in *Das Kapital*, published in 1867 (Volume I), 1885 (Volume II) and 1894 (Volume III). In particular, the *Theses on Feuerbach* stress the idea that the true philosophy can be achieved by political action: »Philosophers have hitherto only preped the world in various ways; the point is to change it.« See <http://www.marxists.org/archive/marx/works/1845/theses/index.htm> (last visited January 1, 2009).

parts and the overall, unifying, large umbrella just ceased to exist. This end was a result of many different factors, some of which were purely internal. Though I agree that the categories of error, and crime, both internal and external, are always very important to our understanding of things of this kind, I still think it is a little too schematic to characterize our demise as a murder or to decide that the end of CLS as a movement was caused either by external forces or internal errors.

You might even say that maybe no one was guilty and no one was innocent, or that everyone was guilty and everyone was innocent. Perhaps the question should be: how was it possible to make CLS last so long? It seems like a quite surprising and unusual accomplishment, to have been able to keep such a movement going for fifteen years. There are no other examples of academic leftist organizations in the United States surviving that long. One might ask: What was the genius of the organizers to make it last so long?

However, going back to what caused the decline of CLS, it is also easy to see some external factors. Mainstream actors in legal education worked hard and quite consciously to limit its influence and to discipline, in various ways, young law teachers who were tempted by it. Despite the wide-spread assumption to the contrary, law and economics was not the disciplinary factor that caused the decease of CLS. Law and Economics was coming into existence and prospering at this time, and they had to deal with strong resistance from the mainstream of legal academia, just as we did. Like us, they were trying to acquire institutional position. Some Law and Economics scholars participated in the efforts of the mainstream to punish us, but their main preoccupation was to find a strong place in the system.

The main disciplinary efforts came from the center-left to center-right mainstream of legal education. Our activities had a polarizing effect, and to many in the mainstream we appeared, surprisingly in retrospect, to be a real threat to the professional way of life of legal academia. We were experienced as destructive, as a little crazy, as undermining legitimate structures of authority, as young people in this type of context are always experienced by the elders: unsophisticated extremists, exaggerators, unoriginal although we thought we were very original, and so forth.

The disciplinary effort against us was strengthened because by the late 1980's and early 1990's; the number of new law teaching jobs began to decline. The enormous demographic pressure by the baby-boomers I mentioned before was over, the expansion was over. We were back to simply replacing existing faculty; in other words, the academic job market tightened. In this tightened job market, it began to be common to ask job candidates who were associated in any way with the Crit professors, whether they were Crits. The question was asked in a way that unmistakably suggested that your chances of getting a job required you to say no. At the tenure level, a significant number of Crit assistant professors were denied tenure at

over the country under circumstances that suggested they would have ensured if they had not been Critics.⁷

At the same time, there is the internal *cursus honorum*, which in a very hierarchical system of faculty, becomes a crucial question for young professors, since it asks whether and how they can move up the hierarchy of schools, changing from one to a more prestigious school.⁸ I know that, while this system exists in parts of Europe, it is absent in other parts, since in many European countries law faculties are not sharply ranked. In the United States, law faculties are ranked on a very steep curve. Therefore, a very important question became whether you could destroy your chances of moving up the ladder. As you can see, you did not want to shoot people in order to shut down the desirability of CLS as a way to advance your career if you were a young person.

Be sure that I have left many other factors out, but what I would say is that the combination of factors caused the end of the period of incredibly rapid expansion: internal disintegration, a loss of the ability to carry on this painful and painful dialogue, on the one hand, combined with external pressure, and the transition of the demographics, on the other hand. With all of these factors, CLS no longer offers a plausible movement experience after 1991 or 1992.

Q: I would now like to move a step further, but starting from a point evident from what you have stated up to now. You seem to stress the fact that CLS is primarily a moment of transition in one specific field of the human activities, namely legal education. Some of the criticism directed at CLS and to your work target exactly this: they criticize your being focused almost only (or at least heavily) on the »faculty's law« and not on the »law in action,« i.e. on what is actually experienced and practiced outside the structures of legal education. Assuming you are the devil's advocate, I pose the following question: Why do you put so much emphasis on legal education and its need of radical changes, instead of the »law in action«? Why do you often stress the necessity of »new kinds« of teaching the law and not, for example, »new kinds« of making the law by the United States Supreme Court, by lawyers in poor neighborhoods, or by in-house attorneys operating in a large multinational corporation? Allow me to be a bit provocative and suggest a possible answer: Did you and your colleagues speak so much about radically change law education simply because you are law professors and familiar only with that specific part of the legal world?

Richard Bix, *Jurisprudence: Theory and Context* 218-219 (3rd ed., London: Sweet & Maxwell, 2003).

Traditionally, during the Roman Republic and the early Empire the *cursus honorum* (in English, the sequence of honors) was the sequential order of public offices which should be held by candidates aspiring to the highest political positions. Nowadays the expression is used, in particular in the academic worlds of English speaking countries, in order to identify the necessary steps that have to be taken in a career development in order to achieve the highest positions.

Kennedy: That is an interesting question, and I guess the first thing I would have to say is that I do not think of myself as putting a particular emphasis on legal education. I wrote a pamphlet, called *Legal Education and the Reproduction of Hierarchy*, about legal education (it has recently been published as a book, with a new introduction and some commentaries) and some articles on the same topic, but I have written probably fifty law review articles, and several books, and only a small minority are about legal education.⁹ So I do not see myself at all as mainly a person who is writing about legal education. However, I do believe that writing about legal education has been an important part of the strategy of the creation of CLS. I am not apologizing for being interested in writing about legal education, it's just that it is not my central preoccupation. I do not know why a person would think that if they were familiar with my work, which seems to cover a very large variety of topics.

For example, I have written a lot of doctrinal articles. That is, articles about contract law, property law and tort law, from a critical perspective, which are about the doctrine, that is they are about what the rules are. I have written a whole bunch of Law and economics articles that are about the actual anticipated consequences and effects of different legal regimes. I have also written a lot of legal history, or the history of legal thought, and a good deal on legal theory (including CLS critiques of writers like Hart, Kelsen and Dworkin). I've also taught a course on Low Income Housing Law and Policy, and written a bunch of articles about the concrete details of housing markets in cities and neighborhoods, and different kinds of policy proposals for improving or changing the legal rules governing low-income housing with a left agenda.¹⁰ That would be how I would describe my own overall set of academic interests.

In spite of all that, a central question still remains: Why is legal education important for CLS and myself? The central position of education in general is an idea shared by the late 60's generational rebellion, first, and then the late 70's-80's CLS

⁹ An exhaustive bibliography of Duncan Kennedy's work can be found at his personal website at: <http://duncankennedy.net/topics/index.html> (last visited January 1, 2009).

¹⁰ See, e.g., Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 *Florida State Law Review* 485-519 (1987); Duncan Kennedy and Leopold Specht, *Limited Equity Housing Cooperatives as a Mode of Privatization*, in G. Alexander and G. Skapska (eds.), *A Fourth Way? Privatization, Property, and the Emergence of New Market Economies* 267-285 (London: Routledge, 1994); Kennedy, *The Limited Equity Cooperative as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 *Howard Law Journal* 85-125 (2002); Kennedy, *Legal Economics of U.S. Low Income Housing Markets in Light of »Informality« Analysis*, 4 *Journal of Law in Society* 71-98 (2002); and Kennedy, *Cost-Benefit Analysis of Debtor Protection Rules in Subprime Market Default Situations*, in E. Belsky and N. Retsinas (eds.), *Building Assets, Building Credit* 266-282 (Washington: Brookings Institution Press 2005).

ional rebellion. The target is what we might call very abstractly »modern bourgeois thought:« Modern bourgeois thought makes a very sharp distinction between two domains. On one side, there is a »public domain,« which involves on the one hand the state as an actor, and on the other hand, the formal political apparatus of society. This means that under the label »public domain« there is not only the state apparatus, but also the political parties' apparatuses and the political meetings where politics is located, and where real issues are addressed. On the other side, there is the »civil society domain,« which is understood as private and defined as *par excellence* pre-political or anti-political, or non-political. There is a normative element to this way of looking at things: when the concerns of the public domain invade the private, it is »corruption;« likewise, the »politicizing« of the private domain of civil society is an evil. The regulating principles are religious, familial, professional »ethics,« rather than politics.

The 68ish idea, which is central to people of my generation, was that the personal is political, the professional is political, everything is political. This is a critique of the simultaneous exaltation and trivialization or marginalization of personal experience (familial, sexual, professional), in relation to the »authentic« political subject, the citizen in the public realm of the state, the courts, the political media, and does so by presenting a representative of something larger than himself, something beyond himself, which he advocates and sacrifices.

The idea that people should be deeply preoccupied with the politics of their specific workplace if they are middle and upper middle class, is understood in this tradition as not leftist. If you are a member of the bourgeoisie, if you are a member of the middle or upper middle class, the professional and technical class, meaningful political action on behalf of people who are less privileged than yourself, on behalf of the oppressed, the hungry, the thirsty, the unclothed, or the homeless. In other words, it is just selfish to be interested in what is happening inside your own priviledged familial or professional milieu.

Another basic 68ish idea is to reject this construction of the self and to say something like: »Of course, you should have a practice on behalf of people who are less privileged than yourself,« but the reduction of middle class leftism to imaginary resistance or service to the people at the bottom, is the death of the left. It is the death of the left, because the structure of modern society is not 90 % the proletariat and 10 % factory owners. This is an old left fantasy of the organization of society as a diamond, society has a diamond, not a pyramidal shape, so that the least advantaged is a minority.

A program of social transformation has to be aimed at the mass, and the mass, for example, in Europe, is not the immigrants in the *banlieues*, they are a minority.¹¹ The idea is to move away from the illusion that the mobilization of the minority at the very bottom of the social pyramid, the immigrants in Europe, for example, or the black poor in the United States, could transform the whole society. Of course, any leftist has an ethical duty to work on the behalf of those groups. But if that is all there is to it, then this politics is not a transformative politics for the society understood as a whole; it is only an act on behalf of an oppressed minority by another un-oppressed minority within the majority. By the way, I'm just assuming that we agree that standard social democratic politics, of the European or American variety (Blair, Royce, Obama) is not transformative in any sense.

It is common to think that commitment to immigrants or minorities, to the truly marginalized and oppressed, is much more difficult than, say, the politics of the middle class workplace or the middle class family. But it is really scary to work within the actual milieu where you are a privileged member against these hierarchical structures that could immediately implicate your daily life. There are two different ideas of political virtue here.

One is the American or European idea of the street fighting hero -- a middle class man, who fights the police, on behalf of let us say illegal immigrants. However there is another idea of political virtue, a 68ish idea: in the workplace, when you are dealing with older people who have power over you, and with whom you may be associated for years and years to come, you should push against them, without the goal of beating them up with an iron bar, and with no risk of being beaten by the police, but with the idea of entering into generational and political conflict in the intimate space of work (and similarly in the family). It is not necessary to choose. These are just different ideas of political virtue.

The trivialization by conventional progressives of the preoccupation with the transformation of the middle class and upper middle class professional and technical workplaces is in my mind one of the things that destroyed the left. I'm still influenced by André Gorz, who wrote a book called *Strategy for Labor* back in the 60s.¹² You have to recognize that capitalism transformed itself a long time ago and it is now in 2008 internally a highly fractional or »fractile« social economic system of power relations, with no »core,« no »base,« no »strategic pressure point.« The idea is to pick opportunistically whatever place in the system seems to be vulnerable to resistance, without imagining that one will be doing more than working over the very long term to create conditions in which dispersed resistances might coalesce

¹¹ The *banlieues* are the French suburban areas of larger cities which usually, but not necessarily, are characterized for being areas of social housing and in general of low-income population.

¹² See André Gorz, *Strategy For Labor: A Radical Proposal* (Boston: Beacon Press, 1967).

nothing larger. When there are opportunities in the chemical industry, that moment to organize in the chemical industry. Or when that is the situation for instance government employees in the Ministry of Finance, that is the moment to organize within the Ministry of Finance. It is to find moments of dis-equilibrium that create the possibility of creating order and organization. A very important point about CLS was this very opportunistic strategy.

A feature of modern capitalism explains why legal education was a plausible site of resistance in the late 70's and 80's. Legal education is not a privileged site, but a product of the circumstances of the moment, and today in the US it doesn't have a particularly promising site. At various times in the last thirty years, I've seen that maybe opportunities were emerging within law firms as well. One of the things that caused me to be regarded as a completely crazy person in American legal education was that I wrote an article about resistance within law firms.¹³ If legal education is a site of resistance for professors dealing with other professors, or professors dealing with professors, then what about the law firm?

It seems to me self-evident that a left political practice has to be willing to regard bureaucratic organizations of civil society as sites of resistance and this was also a feature of CLS at the organizational and movement level. Now of course, its plausibility was deeply connected to the demographic factors that I mentioned before, there was a sense that legal education was a privileged site as a result of this expansion of the number of jobs and the number of students, the number of lawyers. All these people coming into the system who were not really assimilated into it, they created a moment.

Question: This idea of the emergence and establishment of CLS as connected, among other things, to a specific generational moment leads to an evergreen question concerning CLS: What is alive and what is dead of this movement which was so prominent and for so many years?

Answer: What I have just described and what I described before was a moment of dis-equilibrium which created an opportunity for organizing, if the organization is made like as its premise that it is relevant to organize where you are living, as well as to organize to assist and work on behalf of people who are less privileged than you. That was the idea and you could do both and you ought to do both.

¹³ Kennedy, *Rebels from Principle: Changing the Corporate Law Firm from Within*, 3 HARVARD LAW BULLETIN 36-40 (1981), also available at Duncan Kennedy's personal website at: http://duncankennedy.net/documents/Rebels%20from%20Principle_Changing%20the%20Corporate%20Law%20Firm%20from%20Within.pdf (last visited January 1, 2009).

What happened to CLS after was the re-stabilization of the system, that is the moment of instability passed. The system re-equilibrated and CLS as a movement of dissent and disruption, as an element of disorder, died, as a result of both internal factors and external factors.

However, there was an accomplishment of CLS, a concrete accomplishment -- not just the leaving of traces: We did manage to institutionalize ourselves. There are several levels. There is now an institutionalized left in law faculties that is to the left of American moderate progressivism, to the left of the center-left. This was not true before CLS. Second, there is a large and still steadily growing body of left legal scholarship, a larger body to the left of the center-left than there is in other academic disciplines. This is a product of the CLS organizing strategy and its success. Though we are not alive as a disruptive factor, we are still present and still archiving, so to speak, as a resource for a future resurgence of the American left. That is the first thing we did.

The second accomplishment of CLS still completely alive is that we politicized legal education. We did not radicalize it: our goal and our fantasy was to radicalize it but we totally failed in this effort, since legal education re-stabilized as a center-left, center, and center-right discursive formation. However, at least we did politicize it because, in spite of the fact that we never got more than a small minority within any faculty, we did force divisions, political divisions and political transparency across a very large part of the complete spectrum. We made the moderate conservatives split between reactionaries and conservatives. We split the liberals between leftists, moderate liberals and right-wingers, producing the sectarian character of American legal education, which is completely different from Europe. American legal education is sectarian in the sense that the law faculties are divided and, within the many different tendencies within legal academia, no tendency is dominant. The idea that Law and economics is dominant is completely false; many Europeans think it is true, but Law and economics is a minoritarian strand in legal education. No faction can any longer regard itself as speaking the truth of law with authority. Every faction has to realize that there are other people who think they are idiots.

Zamboni: This is very interesting. Do you mean that one of the legacies left by CLS to the contemporary academic world is that CLS somehow forced legal academics to talk about politics?

Kennedy: Yes, but CLS did not simply force legal academics to talk about politics. CLS forced legal academics to acknowledge that they were in some sense operating from political commitments. Nowadays people working in legal academia do not have to talk about politics, they just have to recognize their strand; for instance, if they belong to Law and economics, whether they are more »liberal« than »conserva-

and economics; if they are liberal constitutionalists, they are more or less in that tendency, and so on.

I would like to take a small step back to the underlying background of your statement that one positive legacy of CLS has been the fact that they forced legal academics their political premises. I actually have two questions as to this. First, quite why is this revelation by law professors of political commitments good for the law? In what sense is it positive to force a professor in constitutional law, for instance, to reveal her political stance before discussing the First Amendment? Does this »disclosure« sit better in the classroom better lawyers as opposed to those simply listening to a law professor of whose political opinions they are not fully aware? The second question concerns the very political nature of these premises that, according to CLS, academics ought always openly recognize in teaching and writing. Why should academics reveal their political premises and not religious beliefs? In both cases, that is, political ideology and religious beliefs, we are facing a personal system of values that the law professor perceives (and therefore transmits) the law. Why according to CLS should a student or a colleague somehow force his/her professors or colleagues to reveal their specific political backgrounds, but not religious ones, nor cultural roots, nor economic

If I understand your questions, the first presupposes the idea that the development in legal thinking and practice, like CLS, is whether it makes better. The second question, if I understand, has to do with the way we in CLS have the thing that needed to be unmasked« and acknowledged. Why »politics« is conceived, excluding, for example, religion?

The second question first: In terms of the United States, as I am sure as you are aware, we do not have a radically secularized political culture. Allegiances, as well as positions about the whole range of civil society including for example, abortion, sex education in the schools, the range of issues, and so forth, are all part of what we mean by politics. And this is when we are talking about what needs to be acknowledged, unmasked, as conditioning our views about law. All these issues are completely pre-CLS idea of politics and therefore politics should not be understood as a pursuit of state power but as politics in the broadest sense of extra-legal value-orientation or ideology, even these in the broadest sense. The point is that the juristic has to be put in relation to politics in the sense of the whole of extra-juristic, ideological or value-orientations.

Three main arguments as to why it is important that students understand what they learn from professors as conditioned by the professors' politics (un- in the broadest sense). And also that they understand legal doctrines, legal norms having a political dimension, as a product of and contributor to the politics

of the society in which they are situated. The first argument is a very straightforward, very simple-minded and old-fashioned argument. It is a truth argument. As a matter of fact, I would assert that the law, the legal dimension, the juristic, the level of legal validity, legal argument, are radically more intelligible if put in relation to their political underpinnings. I want to use the word in the favored sense of *intelligible*, that is not more predictable but more comprehensible.

The idea that law is in some sense an expression of society, and of a society's politics broadly conceived, is a cliché in Europe, and justifies having a course in the sociology of law. But if you are teaching constitutional law or contract law or property law in Europe, you are allowed to say: »Oh, we took on board this relation between political underpinnings and law long ago because we are teleological reasoners; we believe in a purposive analysis, and purposes come from society, so of course we understand all of that.« Despite the intention of the founders of the discipline, this also is a totally depoliticized approach to the law. One accomplishment of CLS was to force recognition that the mere appeal to teleology or the purposive, or to the social, is useless as a way to get at the politics of law.

This appeal to the teleological or purposive aspects of the law simply reifies the purposive, the teleological, and the societal or the social as opposed to understanding the social as a domain of contradiction, internal tension and conflict. That is the truth defense of the strategy adopted by CLS of bringing to the fore the sectarian dimension, for instance in legal academia. This does not mean that there cannot be dialogue and exchange and argument among the different strands, but that this can be done only by removing the notion or illusion that this dialogue and exchange really is scientific and not political. Both in legal academia in particular and law in general, a conflict is always a conflict that is embedded in the ideological.

The second defense of the message put forward by CLS would sound like this: Does the revealing of the political background of the law to the law students make them better lawyers? Absolutely! Law students become better lawyers in every sense if their understanding of law has this character. They also become more humane and more ethical lawyers. The basic message here is that you always need to be conscious, to use Sartre's phrase, that you have a »back,« a part of you that is necessary to your existence but that you cannot actually see. The value of understanding ourselves to have presuppositions that are a sort of ideological, political back is that it helps us avoid becoming ethical monsters through righteous ignorance, or denial, or the existence of this dimension of our own orientation or situation.

The third defense of the CLS idea of making the law and legal education political is that it is progressive. It is in the tradition, actually the most fundamental tradition of the Marxist or post-Marxist left, which is to critique the various ways in which social norms are reified and naturalized and rendered apparently necessary when in fact they are matters of human choice and volition. Those are the three different defenses of this attitude towards the politicization of the system.

ni: *I would like to conclude now by addressing two small questions to Duncan Kennedy: «private individual» rather than Duncan Kennedy as a «public intellectual.» The question is whether you see a new Duncan Kennedy in current (and the near future) legal thinking. In other words, is it possible for a young scholar to repeat what you (and your colleagues) did in the late 60's until the early 90's with the same (or even a higher) level of commitment and intensity?*

ly: I think a basic point here is that there are many people with the same opportunity. However, as the famous saying goes, you do not choose the hour of your death, so whether you think of it as a blessing or a curse, you can't choose to live in better times – that is, in times in which the opportunity for resistance is available. The asking. We were offered this opportunity on a silver platter. Because I was born in 1942 into the American ruling class, I had the chance to participate in a generation of generational conflict that I did not make. I am simply the product of the times, although of course I acted and failed to act, and made mistakes and made tactical decisions with my comrades, in a collective kind of action. Now we live with the same disruptive ambition, the same critique of the elders that we had today an extremely different and more difficult situation.

It seems to me that these difficulties make the model of our activity not very different from people who are now thirty years old. I do believe, however, that the current situation creates a different set of opportunities for *oppositionism*, for different forms of *oppositionism*, even though it is not obvious to me situated as I am, exactly where these are. It is up to the young to find them for themselves, with whatever help we can give them. Locating the possible veins or lines of fracture where resistance can work is something that has to be redone in every generation. There is nothing that guarantees that a given generation will ever find it and it is not possible to have lived out your life without ever having been offered a real opportunity for serious resistance. It is also possible that that opportunity will appear completely unpredictably, around the corner when you least expect it. I can give the only real advice that an old 68er can give under these circumstances, which is summed up by the phrase, «seize the day.»

ii: *The second and very last question can be considered a sort of self-evaluation of your professional life. What is the thing that Duncan Kennedy, either as a legal thinker or as a political activist, is most proud of in his entire life?*

y: There are actually two things I am most proud of. The first thing I am most proud of is my participation in the organization of the CLS movement. The second is a particular piece of analysis in an article called «Freedom and Constraint

in Adjudication» which brings together legal realism and post-structuralism.¹⁴ So these are what I would say are the two things. One is the completely concrete, political activity of organizing, and the other is a very specific intellectual moment combining realism and post-structuralism.

Zamboni: *Thank you very much.*

Kennedy: You are welcome.

¹⁴ See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 *Journal of Legal Education* 518-562 (1986). The version of this article as reprinted in James Boyle (ed.), *Critical Legal Studies* (Aldershot, Dartmouth, 1992) can also be downloaded at Duncan Kennedy's website at: http://duncankennedy.net/documents/Freedom%20and%20Constraint%20in%20Adjudication_A%20Critical%20Phenomenology.pdf (last visited January 1, 2009).