Legal Intellectuals in Conversation

Reflections on the Construction of Contemporary American Legal Theory

James R. Hackney, Jr.

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Critical Legal Studies

DUNCAN KENNEDY

HACKNEY: Why did you make the choice to become a legal academic?

KENNEDY: For me, becoming a legal academic was a third choice—given my druthers I would have been a novelist. And if not a novelist, I would have been a participant in a liberal political reform movement as a wielder of state power. Being a legal academic began to look good to me when I was in law school. When I began law school it never occurred to me to go into legal academics, but both the novelist option and the wielder of state power option suddenly began to look much less plausible. There I was in law school and I discovered that I had the knack for being a law student. It was a period of time when we were all very cocky about our talents and possibilities. I thought that this was something through which I could develop both my literary side and my political activist side, but also that I was better at it than I was at either of those other things.

HACKNEY: And who was the U.S. president when you went to law school?

KENNEDY: Johnson was the president, so the idea of working for the government as a left political activist was at least somewhat plausible when I started, but it was unraveling fast while I was in law school. I worked for the Central Intelligence Agency for two years before I went to law school. During the time I worked for the CIA, and during my first year of law school, there was this dramatic shift going on both in me and, more important, in the country. So this was the moment of polarization in which, between 1966 and 1969, there was the split of the liberal camp into a radical antiwar part and a centrist or you might say loyalist part, with the division suddenly arriving all across the culture. I was completely affected by it. I was radicalized between 1966 and 1969. The liberal option became far less attractive in every way. But also, the liberals began their long slide. The right was coming to power—not instantly, you know, it was slow, but the handwriting was on the wall—the reaction had begun.

HACKNEY: The CIA, that's interesting. What did you do for them?

KENNEDY: I worked in the CIA's National Student Association operation, which was basically part of the Cold War liberalism project. It was government-funded sponsorship of youth and student pro-democracy political activities. I was a Cold War liberal. So I hated Communists above all, and thought that this highly deceptive activity was well worth it in the world of the Communist threat. But another thing that happened to me and a lot of other people between 1966 and 1969 was that we really lost our belief not just in the virtuousness of the U.S. role in the world, but also in the Communist threat. A major reason for that was that the Soviet Union was obviously in sharp and irreversible decline. The Prague Spring was very significant. Not because it showed what a big threat the Soviet Union was, but because it showed that the Soviet Union was basically no longer a threat because it could only maintain itself in Central Europe by violence. Therefore, it was not a plausible threat. The United States began to seem like a much worse threat—both abroad and domestically.

HACKNEY: Now, undergraduate, what did you major in? I know you attended Harvard College.

KENNEDY: I studied development economics.

HACKNEY: Were there professors who particularly influenced you in the economics department?

KENNEDY: The person who was prominently identified with the kind of economics I believed in was John Kenneth Galbraith, but he was at the time the U.S. ambassador to India. He was not there. Of the two professors who had the biggest effect on me, one wasn't an economist. He was

Edward Banfield, a reactionary University of Chicago–trained sociologist, who was allied with James Q. Wilson. However, he was a sharp, politically acute, interesting manipulator and understander of how neoclassical thinking could be combined with sociological thinking. I thought he was great—politically alien but a great teacher and with amazing critical intelligence.

The other person was Richard Caves, who was a liberal. He's still alive, and an emeritus Harvard professor. He was an industrial organizations specialist, but he wasn't an institutionalist. He was a neoclassical industrial organizations person, very well respected at the time, but he taught us all the critiques of simpleminded neoclassical policy prescriptions. So there was Banfield, who had a neoclassical critique of all liberal policies, and Caves who had critiques of all the neoclassical policy prescriptions from an industrial organizations point of view. The other person was Carl Kaysen, who taught both in the economics department and at Harvard Law School, and was one of the early people doing law and economics of antitrust. He was a liberal who taught a graduate economics course in antitrust that I took. His basic message was that the mainstream neoclassical arguments that prescribed deregulation were all wrong. So I was exposed to these three sets of critiques by economists, which had as their message there's a very good reason why an economist, on economic grounds, would reject either simpleminded liberal solutions, or the simpleminded conservative solutions. That was my training.

HACKNEY: That must have been a great background for law school because Guido Calabresi was at Yale, and law and economics, I assume, was in the air, right?

KENNEDY: Calabresi was there. Calabresi was writing *The Costs of Accidents*, but had not published it yet. I think he published it in 1970. Actually, law and economics at Yale was represented by Robert Bork.

HACKNEY: This was based on Bork's work in *The Antitrust Paradox*?

KENNEDY: Yes, Bork wrote his first antitrust article before we got there. Calabresi was rising into prominence but just developing his book, which was much better than the articles that he'd written up till then. The articles were all basically somewhat confused in their encounter with the Coase theorem. *The Costs of Accidents* actually did develop a coherent way of understanding the Coase theorem as a lawyer. Calabresi was not very charismatic. He had a quality that we perhaps unfairly interpreted as preening, and we thought he was condescending to us. The faculty was divided up into different schools, but law and economics was just Calabresi and Bork

(and Ward Bowman and Ralph Winter, who was eventually to become a right-wing, Reagan-appointed federal judge).

Bork and Calabresi had nothing to do with one another. Bork was a right-wing University of Chicago law and economics person, and Calabresi was the complete enemy of the Bork approach. Much more characteristic of the general faculty were the Harvard people (Calabresi was allied with them), who were Harry Wellington, Alexander Bickel, and Ronald Dworkin. Wellington, Bickel, and Dworkin were all graduates of Harvard Law School, *Harvard Law Review* editors, and Supreme Court clerks—totally into the deep questions of reasoned elaboration and principled adjudication—the liberal rights people agonizing about what to say about the Warren Court at the very height of its activism. They were much more dominant as a group than law and economics types. In fact, we used to say, we student lefties at Yale, that what had basically happened was that Harvard had become Yale and Yale had become Harvard because these people were so dominant. And then there were the social science people; they were another important faction on the faculty, but they were not economists.

HACKNEY: Did the social scientists represent remnants of legal realism?

KENNEDY: They weren't remnants—they were alive and kicking 1960s law and society types. The three principal players were Abe Goldstein, Joseph Goldstein, and Stanton Wheeler. They were all into psychology and criminology. Joseph Goldstein was into psychoanalysis. So that was a significant subcategory of the senior faculty—the law and social sciences people.

Law and economics, as a dominant force in the legal academy, doesn't begin to come into its own, until, I would say, 1975. When I was on the law teaching market in 1970, the fall of 1970, I interviewed at the University of Chicago, invited by Richard Posner, who was very nice to me. He was just beginning to be what we would call "Richard Posner" because he had just published his article about why the fellow-servant rule was good, laying out the critique of modern tort law as interference with free market functioning. At the time, that was a complete outlier position. Most people who read it and could understand it thought it was an outlandish attack from the right on what every good liberal knew was the rational truth. So it was a scandal rather than an intellectual wave.

HACKNEY: So Ronald Coase had not percolated through the legal academy?

KENNEDY: Calabresi and Posner were percolating Coase. That was how it was percolated. There was no other percolation in mainstream legal academia.

In Chicago, there were antitrust people, so the antitrust people were aware of Coase.

HACKNEY: Yes, applied economics. One other strand prominent in your intellectual thought is the Continental strand. Can you describe how you encountered the wave of Continental theorists?

KENNEDY: I was very influenced from the beginning by two strands of Continental thought: the critical theory, Western Marxist, and post-Marxist strand (which would include Herbert Marcuse and Jean-Paul Sartre—two important parts of that); and the structuralist strand (particularly Claude Levi-Strauss and Jean Piaget). So how did I encounter them? Well, in two ways. First of all, I was just a child of the zeitgeist. These ideas were very much in fashion with the intellectual left beginning in the late sixties through the seventies. They were in fashion in a way that is unimaginable now. Most people who thought of themselves as in some left intellectual space were at least a little interested in studying them. So that was one thing. And that applied both to the critical theory and to the structuralist strand. The other thing is that I was a person who was very open to European influence because I grew up in Cambridge in a milieu where people prided themselves on their cosmopolitanism, and the meaning of cosmopolitanism was basically the other side of the English Channel, the Continent, with "Continental this," and "Continental that." We were the "Continentals"—as in the *Saturday Night Live* parody by Christopher Walken. I spent two years of my life in France as a young man. I spoke French, and I could read French easily. I was in a good position to put together this sort of Continental fashion with my post-realist Yale legal education.

HACKNEY: So what age were you when you actually lived in France?

KENNEDY: The first time I lived in France, after I graduated from Andover, I went by myself at the age of eighteen. I lived in Paris, and worked as a clerk in a bank for the equivalent of $120 a month. It was a formative experience. After college, I worked for the CIA in Paris for a year.

HACKNEY: When you first began teaching at Harvard, what was your first set of courses, and when you sat down to think about your existential position, how did you deal with the common set of questions facing any beginning professor: How am I going to approach teaching law and students? How am I going to approach my scholarship? There's always that moment when you first become a law professor when you ask yourself, "Well, what am I going to do here?"

KENNEDY: Sure. I saw myself as part of a collective generational movement—not an organized movement, but collective. I had a strong sense

that there was a "we," who were the student law school generation of the period from 1967 to 1971. We had had a striking and unusual experience in law school of rebellion against law school, but also we had begun to think about law in a way that was significantly to the left of the liberal orthodoxy. The mainstream of the law school world was not conservatism; the mainstream was liberalism. This was a cultural critique as well as a political and intellectual critique. The cultural critique was that law schools were governed by an uptight, straight, white male ethos, which was authoritarian. Not everyone was personally authoritarian, but it was organized around the power of the authoritarians. There were "hard" guys and "soft" guys. The soft guys were nice, but they were powerless in relationship to the hard guys. That was a key idea conveyed through legal training. The world is structured around the hard/soft distinction, and the hard dominates. Hard trumps soft. The system, the professorial system, was then mirrored among the students. It produced a kind of "training for hierarchy," to coin a phrase.

One goal, which I had right from the beginning, from the very first day of class, was to teach the class in ways that would undermine or counteract that culture. This involved figuring out different ways to interact with students in the Socratic classroom because I believed in the Socratic method, and I still do. I like large classes, and I like the drama and excitement of the large class. I didn't like the ethos of the intimate, supportive small group as the alternative to the harsh, cruel world because that was just reproducing the hard/soft dichotomy. So my goal as a beginning law teacher was to find a way to be inside the spectacle, the theatrical spectacle, of the large, 140-person, first-year classroom, and turn it into something whose meaning was as much as possible the opposite of training students to be either nasty, hard-guy authoritarians or nice but powerless soft guys.

The question was how could the classroom experience be changed through teacher-student interaction, and the structuring of events? It involved creating an atmosphere in which students really did talk, and teaching in a way that did not "hide the ball." An important part of the structure of the typical first-year classroom was that the teacher talked to the smart students, and basically gave them a sense that they were part of a quite deep and sort of secret knowledge that you have to be very sophisticated and quick to pick up. Large numbers of first-year students were basically just slogging through, doing their best to survive from day to day, and they never got it. So the idea was to abolish that distinction

between the student elite and the student masses, by making some of the basic "secret" stuff available to everybody, making it explicit. It was also important that these "student masses" included a brand-new wave of women students and students of color, as well as white male students who hadn't been that well prepared for law school, or who were culturally out of sync with the particular style of the hard-guy professors. It was an egalitarian agenda inside the elite world of law school.

That was the pedagogical agenda. I also had an intellectual agenda that related to my course offerings. I was interested in private law. Why? Because private law was the elementary material from which lawyers' attitudes toward law were formed. In my generation, almost everybody was obsessed with constitutional law because of the waning Warren Court. The Warren Court, which was being replaced by the Burger Court and was just disappearing, was still the icon and the obsession of all leftists. The idea that the Supreme Court was a profound transformative agent, for most people in the legal culture, was just the "thing."

I was more sympathetic to the radical people who saw the Supreme Court as over and over and again selling out, and not taking sufficiently seriously the more radical demands for justice of groups that were excluded. I also thought that it was a mistake to focus on the Supreme Court. The thing to focus on was the base on which all the attitudes of the Supreme Court were ultimately constructed, which was private law. This is the reason I taught contract law.

Also, I thought that if you wanted to affect legal education, you had to get into the core. Again, another structure of legal education was that soft people taught upper-level courses in regulatory, humanistic, and "feel-good" fields. Tough, strong, hard, and powerful people taught basic first-year courses, and dominated the classroom. So the idea was to get out of the soft-guy pigeonhole, and challenge the hard guys on their own terrain. So I taught contracts and legal history as my two main fields, except for the first year. Al Sacks, dean of Harvard Law School, persuaded me to teach the legal process course, which I did. After that, I taught trusts for a couple years because the idea there was to get inside private law, to the part of private law that was excluded because it was too altruistic and too "goody-goody," and to bring it back in relationship to the property-contracts-torts parts. This had actually been part of the agenda of Harvard Law School up until World War II, when trusts was finally eliminated from the curriculum. So I taught trusts for a few years, but the main things I did were contracts and legal history.

A big aspect of first-year private law teaching for me was to undermine some conservative ideas that were very prevalent even in the (fading) liberal heyday. The most important was that there were deep problems with interference with freedom of contract, whether in contract law, tort law, or property law, because liberal intervention "hurts the people you are trying to help," and is condescending and paternalist to boot. Liberal students were unprepared for these arguments, and I taught them as best I could the standard but too often forgotten responses of earlier generations of legal progressives. I didn't consider this indoctrination, since I presented both liberal and conservative arguments very fully and left the students completely free to choose.

My upper-level course was "The History of Legal Thought." The idea of legal history was that legal history was the place to do the critical, theoretical, and structuralist reconceptualization of legal theory. So legal history and legal theory were, in my view, the same.

HACKNEY: Did you approach it as intellectual history? When we think about legal history, it's normally not constructed as intellectual history.

KENNEDY: I called it the history of legal thought, which was intellectual history, except it was intellectual history of law, and it was loaded with legal doctrine. In this first stage of my legal history work, the thing that I was most interested in was what you might call a "death of reason" narrative. That stream ran parallel to the leftist stream, which for me at the time was about class struggle. The death of reason stream was about how elites work to keep law in the domain of the structured, rational, and necessary. What I liked was that the jurists' own internal critiques of their rivals' efforts to keep law rational were undermining the whole enterprise in a kind of process of mutual destruction.

The American legal elite repeatedly engaged in a process of reform and critique, and then reconstruction. Each time the pretensions to rationality of legal science were reduced, making it more contingent, and more political, but still retaining a sharp law/politics distinction. The original, rational conception of American law was extremely powerful, barely even threatened on any level by politics. But over time the politics part got greater and greater, and the law part shrank and became a small defensive enclave, with very strong fences, razor wire, guard dogs, and electrification of the fence, as it got smaller and smaller.

I stuck to the American legal elite in telling this story, because I didn't know anything about any other system, and I had a pretty strong nativist prejudice against European legal thought. Since then, I've gone

in the other direction, and I tend to understand the American legal thought story as part of the general narrative of the history of reason in the West, of which law was a part everywhere, along with the history of religion and the history of science. I think of the history of legal thought, in the context of the histories of religion and science, as part of a general Weberian process of disenchantment or derationalization. Max Weber was to be the first person to write about the history of Western law from that perspective. I didn't realize how many other people actually had done a lot of these things. My purpose was to get way beyond legal realism. The idea was that the realists had been so committed to policy science and policy analysis as the way in which they would preserve the law/politics distinction that they were never able to take their own critique seriously.

People often say that the kind of stuff that I was doing at that point (and that the rest of us were doing, too) was an extension of the realist project, and that's true, but it was a big, big, big extension. The people who were actually the heirs of the realists often hated us because, as you are well aware, the scientistic dimension of realist thought was very powerful and dominant—the engineering metaphor. The realists really didn't think that they were dissolving anything except idiotic formalism. Get rid of that, and we will have something that is "hard" to substitute for it, which is rational policy thinking. We crits were basically doing to policy analysis what the realists had done to formal doctrine. So this is a big difference between critical legal studies and legal realism. We were targeting our critique on legal realism. People constantly say, "Well, isn't it all in legal realism?" No! It's the opposite. Legal realism did to legal doctrine what we did to policy analysis. (And it was very hard to do.) The policy analysts, moreover, were very quick to see the difference. People who were the liberal constitutionalists couldn't see the difference, but the people who did policy analysis saw it immediately.

HACKNEY: The social science folks at Yale that you talked about previously could see it coming a mile away.

KENNEDY: Yes, absolutely.

HACKNEY: You kind of slipped from the "I," Duncan Kennedy, to the "we." Perhaps this is the moment to think about the genesis of critical legal studies [CLS] because, I suppose, that's the "we." You're situated here at Harvard Law School, and have a constellation of thoughts in your mind that definitely seem to be a precursor to what we view as critical legal

studies. Whom did you first begin to talk with about that set of ideas? Was it your law school group or people here at Harvard?

KENNEDY: That's fairly easy to answer because we've been around this story quite a few times now. However, this answer may have become ritualized and, therefore, be wrong. So my picture of what happened was that there was one network of people who were Yale Law School students from the period between '67 and '71, including, for example, Mark Tushnet, Rand Rosenblatt, and Ann Freedman, who went into law teaching, and they preserved the critical moment of student activism at Yale Law School, which is amazingly described by Laura Kalman in her book *The Yale Law School and the Sixties*. That was one part of it.

When I got to Harvard Law School, I fell in with Morton Horwitz and Roberto Unger. We were all hired at the same time, and as it very often happens in law faculties, people that are hired in the same year form a kind of cohort. There's a kind of intimacy that comes from arriving at the same time, but it developed very quickly way beyond that into a very deep intellectual alliance. And a number of law students, for example, Karl Klare, Cathy Stone, and Mark Kelman, were attracted to our project. So the nucleus of critical legal studies came from putting together the Yale people with the Harvard people—David Trubek was the other person. David Trubek had been denied tenure at Yale during this period of the early seventies, and had gone to Wisconsin. He represented both the Yale connection and a Wisconsin connection, and there was a SUNY Buffalo connection. David had been connected with the Yale students, and I was connected both to the Yale students and all these Harvard people. The result was a set, a significant set, of people. So when David Trubek and I set out to devise the first critical legal studies meeting in Madison, we were easily able to come up with a list of about sixteen to twenty law professors who were loosely within the "idea," which was a confluence of Marxist and Weberian traditions in legal theory with a left spin. That was the "idea" of the initial critical legal studies event. There were efforts to include law and society and social sciences people of the older generation, but they didn't come or quickly dropped out, because right at the beginning it had this generational spin to it. It is important to understand that aspect of critical legal studies. We tried repeatedly to create complex generational alliances, but, generally, we failed to ever bond or link up with people who were born before 1940. There were three or four exceptions, like David Trubek and Rick Abel—Arthur Leff a little bit. It was very striking—the sharpness of generational

division—so at the outset this was a creation, overwhelmingly, of people under forty.

HACKNEY: Now that initial moment, how would you describe the set of ideas that had brought you together as a group? You mentioned Marx and Weber.

KENNEDY: I would say that the themes that united us, in the initial group, were very limited. That is, the differences were many more than the things that were in common. As soon as the group was constituted, it attracted lots of other people, with lots of other basic orientations. I would say that at the beginning, the thing that we had in common was leftism, in the sense of occupying what was then a generational position to the left of the dominant mainstream American liberalism. This was not about fighting Nixon; it was about being against the people in legal academia and in the culture in general who are the dominant intellectual forces and were way to the left of Nixon. The idea is, the word is, radical.

One component was Marxism—but there were very few early crits who were Marxist in any usual or orthodox sense. Marxism was an important influence rather than a dogma to be accepted or rejected. Some of us were more into it than others of us. But Marxism was just one of the strands of American radicalism, rather than being *the* thing. You could get to your radicalism from many, many different places, including democratic socialism, the counterculture, or just bitter disillusionment with mainstream American liberalism. Generic radicalism was the single most important idea: we were in favor of doing more, sooner, at greater cost, with greater potential disruption about race issues, economic justice issues, and then gender issues than the mainstream, the liberal mainstream, would do. This was because we had both a more egalitarian and a more communitarian ideology, and because we believed that it was desirable and permissible to operate at a higher level of confrontation with the culture.

So there were two different things. The first was the rejection of mainstream liberalism, as both too moderate in substance and too moderate in tactics, politics, and ethos. The other thing we shared was a belief that our professional life was loaded with politics, that as teachers, we were participating in an institutional apparatus that was producing people who would participate in the political, economic, social, and cultural systems, already programmed to support the status quo. That's the reproduction-of-hierarchy idea. That was widely shared. So I'm saying that the things that brought us together were political—both at the level of the state, and at the level of the institution.

HACKNEY: This seems to go back to your prior discussion—it was definitely generational. It was a thing of the times.

KENNEDY: Oh absolutely. It was a thing of the "young" of the times. Not a thing of the "old" of the times.

HACKNEY: One of the interesting strands running throughout *Critique of Adjudication*, your text, is this divide between the rationalists and irrationalists within CLS. First of all, can you describe the divide? Second, was it always present, even at the nascent stages of CLS, or was this something that had developed after the initial moment of euphoria and meeting of like minds?

KENNEDY: I would say it was present at the very beginning. It was present among people who were at Yale Law School already. I preferred to call the rationalists "Northerners," and the irrationalists "Southerners." Those names were a little more consistent with my version of the irrationalist position. The division would basically be about how to understand the role of theory, descriptive and normative, in diagnosing what was wrong with the system, and in establishing one's utopian project for the future.

It was a spectrum. At one end of the spectrum were people who believed that in order to understand what was wrong with the system, to understand the system, it was necessary to have a theory. The theory could be American empirical social science, Marxism, classical liberalism, or whatever. It could be Weberian sociology, understood as a systematic approach to the study of society. Then when you figured it out, what you needed was a commitment of some kind to a normative theory. You could believe in rights, or socialism, or in overcoming the subject/object dichotomy, or you could believe in communal life, or democracy. From community, or democracy, or rights, or anarchy, or socialism, or whatever, would flow the program for social transformation. That's the North, the far North. Everything depends on having a theory.

HACKNEY: And it could do something for you.

KENNEDY: Not only that, in the Northern view, unless you have it, you are paralyzed. People who don't have theories are demobilized. That was a basic strand of the New Left and sixties generation thinking, which was passionately into the discovery and adoption of new theories. It was partly a reaction against the antitheoretical character of mainstream education—humanist liberal education—in the fifties and sixties.

We Southerners were, right from the beginning, in many ways, a little postmodernist. We tended to be extremely skeptical about pretensions to universality and truth, and dubious about the rational power Northerners

attributed to their theories—both descriptive and normative. We tended to believe that both in the understanding of reality and in deciding what you wanted to do, there would be large areas of indeterminacy, or slippage, or confusion, or vagueness. Categories like intuition, decisionism, intersubjectivity, the aesthetic, and (the Northerners might have said of us) maybe even table tapping, were absolutely essential both in deciding what was going on and in deciding what to do.

HACKNEY: So this is where the Continentals, the aesthetic, come into play.

KENNEDY: But it's also very American. We Southerners partook of a particular kind of American pragmatism—antagonistic to European grand theory. For example, William James and John Dewey—their attitude toward the Germans was that they're insane hyperrationalists—they overdo it. They just don't get what life is like. So this is not Europe versus America. Europe and America are on both sides. Sartre is on both sides of this conflict. The older Sartre got, the more committed he was to theoretical reconstruction. So we, the South, are early Sartre. The North are later Sartre. In American terms, it's the same division. The Southerners took from Europe and the Northerners, too. The Northerners took different things than the Southerners. For example, the Northerners treated structuralism as a determinism, where the Southerners treated structuralism as a semiotics of social life.

HACKNEY: I've been thinking about the distinction between objectivism and skepticism. Do you accept the distinction? Would you consider yourself to be a "skeptic"? Of course, you could ask how I define "skeptic."

KENNEDY: Yes, I would ask that.

HACKNEY: It's hard to define it in the affirmative, as opposed to the negative. And maybe that's just the way it's characterized. But one idea is that the skeptic is always a critic of the objectivist or, perhaps better defined, the rationalist, poking holes in the argument. Tracing your intellectual trajectory, there seems to be a pattern. You get to Yale Law School, you look at the social scientists, and you say, "Well, that's insane—it doesn't quite work." You take a grander view of the progression of American legal theory, and you say, "The whole enterprise just doesn't work." Then you get within the contours of CLS and you encounter folks who have the same political objectives, but they constitute the Northerners, so you say, "Let's take a step back . . . "

KENNEDY: Yes, to the south.

HACKNEY: You take a step south. And then, I want to eventually get to this discussion, you encounter the legal economists, contemporary legal

economists, who represent the most recent gasp of rationalism, and level a devastating critique, along with traditional liberals, with respect to that enterprise. So, in my historiography of American legal theory, I place you in the skeptic category. Now, this is your opportunity to embrace it or realign yourself.

KENNEDY: I guess I would have to say that within your frame, I'm a skeptic. However, I wouldn't choose to call the object of my skepticism objectivism. The reason for that is that my own understanding of the history of legal thought is that, as I've said before, it's a process of derationalization, rationalization, derationalization, and critique. It's deconstruction, reconstruction, critique, deconstruction, and reconstruction, on a trajectory that is the death of reason narrative. I would associate the category of objectivity with only a few of the strands that together make up the history of law as reason. Many of the most important rationalizers in the history of legal thought have rejected objectivism. For example, Ronald Dworkin, in a famous and quite excellent article, says, "Please don't talk about objectivity anymore." That's actually the title of his response to Stanley Fish and Walter Benn Michaels.

You can be a rationalist without taking the objectivity/subjectivity distinction as central to your understanding at all. What you need within law is the belief that there is a distinction between law and politics, which puts on the law side many characteristics that you would say are the characteristics of objectivism but may be characteristics of other points of view as well. Aristotelians are not objectivists. Finnis, for example, would be horrified, I suspect, to be characterized as an objectivist. His whole Aristotelian shtick is to completely reject that kind of idea, and to reject the fact/value distinction and the concept of subjectivity. But he's a hyperrationalist, and a deep believer in the law/politics distinction. I would say the important distinction among legal theorists is between the vast majority of rationalists and the small but virtuous minority of nonrationalists, not necessarily irrationalists.

The role of critique in the story is a complex one. Critique is a practice of rationalists. It is wrong to think of critique people or the skeptics as different in that respect from the people building the rational structure over time. My picture of it is that the glory of rationalism is its commitment to critique, and its comedy or tragedy, depending on how you look at it, is that in the generational play, and in the course of historical drift, the oedipal young trash their rationalist elders in order to clear the ground for their own rationalist theories. That's how you succeed in life. You first

clear some ground, and then you build your own. The irony of history, the sort of Hegelian trick of history here, is that the critical process has turned out to be more cumulative than the constructive process. This is an irony. The development of critical techniques is preserved generation after generation, and developed as the young critique the old in order to lay waste to their structures so that they can build their own. This has produced a vast repertoire of critical techniques, and the possibility of a kind of critical training within legal discourse, which is just much further along than you would ever have imagined a century ago.

The constructive enterprise, where these young destroyers affirm that they are working for the greater glory of legal reasoning, has had a different fate over time, it seems to me. It turned out that the accomplishments of legal reasoning get smaller over time—they're not cumulative. The preservation of a law/politics divide around a rational/un-rational distinction produces a more and more palliated, shrunken, dwarflike version of rational construction, instead of a bigger and bigger, more glorious one. So critique has prospered within this dialectic at the expense of the constructive. This is the death of reason narrative in the domain of legal discourse, and it's similar to that narrative as it plays out in the history of science, the history of art, the history of economics, the history of Western culture in general, and particularly the history of religion. We can even see this development in law as an extension of the derationalization of religion: one of Max Weber's most striking interpretations was that the search for the "absolute" shifts out of religion to law, and meets a similar fate in its new home.

That's my understanding. I don't think it's an inevitable process, and I think as a matter of fact, reconstruction comes back. It's not right that the death of reason narrative is an inevitable story, and I think Weber was quite wrong in the part of his worldview in which he understood that derationalization was an inevitable and irreversible process—disenchantment, as he called it. I think that the world gets re-enchanted all of the time. I'm not claiming to have identified a universal law of history. I actually see myself as a participant—a little, tiny, minor participant—in the process, with the following role (I wonder whether you'd call it a skeptic's role).

I'm interested, as a participant, in deploying the critical tools on two fronts—on the one hand, the leftist front, and on the other, the modernist/postmodernist front. On the leftist front, I think the critical tools are endlessly necessary to deal with the ways in which moderates and

conservatives legitimate their practices and proposals by fronting them with false rational facades. It's not that they're doing it on purpose—they're not lying. They're deceiving themselves. They're in denial about how ideological their positions are, and they believe that they're more grounded in rationally structured argument than, in fact, they are. So there is a critical or skeptic's task, which is to demystify proposals on the center and the right.

My first orientation is a leftist orientation to stand in the way of the center and the right's appropriation of rational techniques to make their ideological preferences sound necessary. However, I think that the techniques also have to be used on the left, in order to clarify for the left what's really at stake. At the same time, I'm enthusiastically in favor of proposals. I'm not at all a skeptic in the sense that I'm against proposals, and I'm not a skeptic in the sense of being against organizations. I've spent a lot of my life organizing things, people, and events, and proposing things of a positive character. I don't know whether that still makes me a skeptic. For me, there's no inconsistency in using the tools of critique developed over this long period of time to get at the ideological mystifications of the center and the right, to clarify things on the left, and (in a completely positive and constructive way) move forward to champion ideas.

HACKNEY: I think that's an interesting point with regard to how the rationalists cannibalize themselves. I don't know if that's endemic in the rationalist enterprise, or a historical fluke, but I think you've really hit on an interesting historical phenomenon. Now, I see your encounter with contemporary law and economics as an application of exactly what you just laid out.

KENNEDY: I'd like to start out by insisting on the strict parallelism in my own work between the critique of law and economics and the critique of liberal rights theory. Furthermore, I'm not critical at all, in any way, of the larger enterprise of bringing economics to bear on law and legal theory. In that larger sense, I consider myself to be a practitioner of law and economics. I write articles with graphs in them, and I make economic policy arguments for particular legal reforms and against other legal reforms, in which I try to deploy economic analysis, within the limits of my capacity. I majored in economics, and I went to graduate school in economics for a semester. I've never been a mathematically oriented person, but I'm not at all numerophobic and I was deeply steeped in the underlying technique of microeconomic analysis and welfare economics as they were done in the early sixties. Now it is the mid-2000s, that was forty years ago, but, I must

say, I notice as I look around at others who do law and economics, how often we seem to do the actual legal economic work at about the same technical level. Even if they have PhDs in economics, there's not much they can do that's more technically exciting than what we first-generation tyros can do with our rusting, primitive tools. Of course, old people always say things like that.

That said, I have a critique of mainstream American law and economics, on several different levels. First of all, I would distinguish between conservative mainstream and liberal law and economics. Calabresi was the original representative of the liberal strand. Calabresi seems to me to have pretty much given up quite early on, and was marginalized in the field for almost fifteen years. But eventually PhDs in economics, like Ian Ayres and Christine Jolls, and less technical people like Jon Hanson, began to resuscitate the liberal version. The right-winger Chicago school adherents were not technically sophisticated, but believed quite naively that their project was a "scientific" one. They welcomed the PhDs, for their technical expertise, and seemed surprised when the new recruits turned out, paradoxically, to be quite liberal. The conservatives ended up destroying the internal ideological coherence of law and economics by their recruitment practices. The current situation in law and economics, as I see it, is that it is divided between the more or less old school, relatively technically unsophisticated right-wingers and the moderate liberals who are far more technically advanced, but also tend to be less legally sophisticated and less clear about the underlying political issues.

I have a single critique of both groups, which is that their collective preoccupation with the efficiency norm as the welfare economics gold standard for understanding law is analytically untenable. In terms of social theory, it's so primitive and naive as to be ridiculous. We learned in the welfare economics course that I took at Harvard in 1963, by reading I. M. D. Little's *Critique of Welfare Economics*, to reject arguments that have been the absolute total orthodoxy of law and economics ever since 1973. Again, this was in 1963. So I. M. D Little's book is a critique by a right-winger, attacking left-wing labor economists in Britain. The leftists wanted to justify the British post–World War II nationalizations of the "commanding heights" of the economy, using Kaldor-Hicks, to argue that they increased total welfare. Little attacked them on the ground that such a justification was simultaneously radically indeterminate (offer/asking problems, etcetera) and ethically incoherent. In order to do law and economics in a way that is plausible, you have to take distributional

consequences into account, and that destroys the illusion that you are applying a value-neutral criterion. Distributional consequences of policy choices need to be elaborately vetted, and then assessed. A similar point was made by Francis Bator in "Simple Analytics of Welfare Maximization," another thing that we had to practically memorize as economics majors.

HACKNEY: And you're talking about the second generation, or still the first generation?

KENNEDY: This is still the first generation, the conservative ones. The liberal ones seem to me to have basically begun to correct a number of the most obvious mistakes. They are much more technically sophisticated, but they still have a background commitment. The liberals are wedded to a distinction in economics between efficiency and distribution that exactly parallels the law/politics distinction in liberal rights theory.

HACKNEY: Louis Kaplow and Steven Shavell emphasize that theme.

KENNEDY: Yes, they all do. So here my basic idea would be that the law/politics distinction in liberal rights theory is parallel to the efficiency/distribution distinction in law and economics. In mainstream law and economics, the point is that efficiency equals law and distribution equals politics—just as rights equal law, according to Dworkin, and interests equal politics in liberal rights theory. The way to preserve the distinction, in each field, is internal to the disciplines. And I have a critique in each case of the way that is done, arguing that sticking to efficiency or rights doesn't keep politics out of the analysis. Let's begin with efficiency. It turns out that the efficiency category, when it's rendered appropriately complex and contextual, can't be done without exactly the types of "subjective" judgments that efficiency analysis attempts to keep in abeyance.

HACKNEY: Is this the Ed Baker "starting points" critique?

KENNEDY: The Ed Baker "starting points" critique is an important part of it. But the problem of instantiating an efficiency calculus, rendering it concrete, goes beyond just starting points. It also includes, for example, the offer/asking problem, the problem of third-party effects, information asymmetry, unstable equilibria, path dependency, and an array of issues now raised in the cognitive psychology literature. Offer/asking was an early example of that cognitive analysis, an example of the much broader contemporary category of bounded rationality. If you take all those things into account, the efficiency calculus dissolves into a kind of complex set of pragmatic judgments that are not easily distinguished from the so-called value-laden judgments that would be involved in doing distribution.

Moreover, the idea that you could do efficiency as "legal rules" and then do distribution through after-the-fact one-shot transfers, or just through welfare legislation, is not coherent, as I have argued on several different occasions, in several different ways. It's not possible to imagine such a system as a functioning social system for both analytic and concrete institutional reasons, and our system has certainly never borne the slightest resemblance to the model that is routinely idealized and/or presupposed in mainstream law and economics, whether right-wing or liberal.

There are three really distinct criticisms. First of all, efficiency dissolves into a subjective, highly valued-laden, and, therefore, political thing, not easily reconciled with the claim to political neutrality. The distributive calculus will often yield a higher level of both certainty and consensus than efficiency. The second one is that the proposal to leave distribution to the legislature, and have judges stick to efficiency, is neither institutionally nor analytically coherent. And the last is that both the conservatives and the liberals have a very large number of "free market biases" built into their analytics that are economically ungrounded. Let me just give an example.

Virtually all economists will assert that rent control is bad. They, including legal economists, are simply ignorant of the economic arguments in favor of actual modern, functioning rent control. They tend to almost mindless repetition of statements about rent control, which show that they don't understand the economics because they don't understand the way it works. The "new model" legal regimes put into effect in several hundred U.S. jurisdictions in the late 1960s (and most terminated in the 1990s) didn't apply to new construction, and provided landlords a steady income stream corrected for inflation, as opposed to the World War II New York City model economists imagine to have been in effect everywhere. "New model" rent control was an anti-gentrification device, not an attempt to shift surplus from landlords to tenants. Economists learn the critique of the old model early in college and treat it as their collective sacred cow. It's a dogma. The free market presumption pervades. Those are my critiques of mainstream law and economics.

For the rights-theory people I have a very closely parallel kind of critique. When you do rights analysis, looking to specify the right that should govern in a specific situation, taking into account that rights conflict, and that there are powers as well as rights in the system, the devil will be in the details. The actual specification of the right in practice, just like the problem of the specification of efficiency in practice, is not clearly distinct

from general political analysis. Rights analysis collapses or dissolves into what we understand as the generally value-laden "subjective" character of our political discourse. Using "rights" as law against politics, or judicially articulated "rights" against the legislature, which is what Dworkin does, has exactly the same first difficulty that we find with mainstream law and economics, which is that the analytic is radically indeterminate, or maybe we could say that it underdetermines in situations with high stakes. Taking the ideas like the public interest, general will, or welfare of society into account, which is what's on the political side for rights analysts, is no more subjective, no vaguer, no more value laden, than what you do when you balance competing rights against each other. So that's the parallel to the first critique.

Second, remember my view is that the efficiency people have a consistent free market bias, which affects, drives, and distorts their efficiency analysis. Often, they're just wrong, propagating their ideology under the cover of technical economic expertise. In many, many important, high-stakes situations, the free market solution is not the efficient solution, according to plausible arguments inside the system, or it isn't possible to determine with any degree of certainty which of a number of solutions is the efficient one. Remember, I'm not just a critic, or a skeptic, I also want to do the argument. My view is that more often than not, efficiency is against the free market solution, overall.

The rights argument suffers from the same flaw. I would describe mainstream American liberal rights analysts as generally moderate-to-left liberals. It is transparent that they have a political agenda, which has nothing to do with rights. Rights are the dress-up language for their particular kind of center-leftism. As center-left people they are opposed to any kind of radical change on the left, and equally opposed to any rolling back of the existing social and economic accomplishments of progressivism. They are basically standpatters who would like to move a little bit forward with a little bit of a liberal agenda. They're Clintonians. Dworkin is a Clintonian, maybe a left-Clintonian. Those are the rights people.

Dworkin operates at the level of high theory, but here I've been talking about the way he, and dozens of law professors who have no interest in his high theory, produce "rights" answers to legal questions that are simply the moderate-left program turned into rights language. Doing the same analysis, someone coming from my more left political position would come up with a more left-wing answer to the question than they do, just as conservatives would come up with a much more right-wing one, but

we could all do it in rights language, just as we could all do it in efficiency language. So there's this strong parallel between the rationalization project represented by the efficiency/distribution distinction and the rationalization project represented by the rights/politics distinction.

HACKNEY: So in that regard, what I take to be a principal idea that you deploy—the pervasiveness of ideology—is reflected in the praxis of groups. Your connection between ideology and adjudication is also reflected in ideology and legal theory. You can apply the analysis to the rights theorists and you can apply it to the law and economics types, arguing at bottom, it's an ideological project.

KENNEDY: There's no "at bottom." We PoMos don't believe in "at bottoms." That's the whole point.

HACKNEY: Okay, but can you talk about how ideology plays a role?

KENNEDY: The idea is that there is an internal critique and an ideological critique. They are not quite the same thing. I've just been doing an internal critique, combined with an ideological critique. The internal critique stresses the underdetermined character of the outcomes claimed by the law and economics and the rights theorists. They [law and economics and rights adherents] think the outcomes are determined by the working out of the consequences of their premises. That's not true. To explain where they come out we need something else, which is their ideology. Ideology plays a major explanatory role for me in understanding the way legal reasoning, from the level of the court to the level of Dworkin, works. Without the concept of ideology, it's very hard to understand what's going on.

However, ideology is not the "base," or the "at bottom," any more than the economy is the base. I have never said that, and I don't believe it. It is natural for Americans, relatively unfamiliar with these debates in social theory, to think that if you talk about ideology you must be saying this is what's *really* going on. In the prior generation, the generation of leftists of the late sixties and early seventies, the idea was that the economy was what was really going on. The economy was the "base," and ideology was the "superstructure." Now, people often think that we are saying that ideology is the base, and law is the superstructure. No! People like me, we PoMos, reject base/superstructure distinctions. We don't believe that the economy is the base and ideology is the superstructure, or that law is the superstructure. We don't believe that ideology is the base. We believe that these things mutually affect each other and that each level has its resistance, its impermeability, its opacity, none is simply a transparent reflection of or product of another level. All the levels are interacting in

a kind of friction. They constrain, inspire, and disrupt each other. When one is completely open another can fill the gap, but that doesn't mean that because it's open, it's totally open everywhere.

The basic formula is that for questions of law that have very high stakes, there is very often a condition of underdetermination by the legal material. Just focusing on legal materials according to the typical criteria of legal reasoning leaves the results radically underdetermined. Policy analysis is also underdeterminative. Under those circumstances, ideology can be highly influential. However, ideology is also full of gaps, conflicts, and ambiguities. Let's suppose you're a typical American liberal. Your liberal ideology is not going to tell you what your attitude should be toward hate crimes. On the one hand, you're a total multiculturalist, left-liberal, politically correct identity-politics person, and on the other hand, you are a civil libertarian and a free speech fanatic. Which way you come out is not going to be the product of the ideology. It's underdeterminative at that level.

Very often, law fills the gaps of the ideology! Liberal ideology is unhelpful on hate crimes, so instead of explaining to you what it requires, a particular liberal might respond, "Well, that's just illegal. That's against the law. We don't need to discuss that. It's in the Constitution," or something. So I don't believe in a base/superstructure distinction, and I believe that both the law level and the ideology level are full of gaps, conflicts, and ambiguities. Each can supplement or determine the other from time to time.

HACKNEY: Posner and Dworkin are viewed as principal representatives of law and economics, and rights theory, respectively. Can you discuss their specific role in these debates, and the recent neopragmatist shift in their intellectual positions?

KENNEDY: Dworkin and Posner are not that much older than me (Dworkin maybe ten years, Posner less), but they are both members of the previous generation, the pre-sixties generation. Of course, they have plenty of representatives in the sixties generation. It's important that the critical legal studies side doesn't have representatives from their side of the divide. The oldest crits were David Trubek and Rick Abel, both caught in between. Dworkin and Posner were, from the very beginning, objects of attack for critical legal studies. The attacks varied from smart, intelligent, highly cogent, and extremely effective, to wild, windmill, and utterly ineffective. The attacks also varied on the spectrum from respectful and within the rational dialogue mode to quite nasty.

Let's loosely characterize what happened both in law and economics, and in liberal rights theory as a kind of neopragmatist turn, or an interpretive turn for that matter. Why did that happen? One reason was the subtle dialectic between law and economics, rights theory, and critical legal studies. Critical legal studies sometimes allied with rights theory against law and economics, and sometimes allied with law and economics against rights theory. I think that the single best early critique of Posner is not Ed Baker's, which is very good, but it's "Is Wealth a Value?" by Dworkin, which is a really devastating attack on Posner. Conversely, I found, Posner's attacks on liberal rights theory in his Holmes lectures a few years ago very convincing. I think the reason I like these critiques is that they so plainly show, if not the influence of CLS on these guys, then their belated discovery on their own of what we had been saying for a long time.

It's hard to know which, because of the strategy that both most mainstream law and economics people and most rights people adopted with regard to critical legal studies. First, they really and truly ignored us. You could study with these guys for twenty years and never hear critical legal studies mentioned. Second, they certainly gave as good as they got in terms of personal attack. Let me say in passing that for myself I preferred to be ignored, because they were so nasty, when they deigned to pay attention to us, and for some reason, in spite of my own pretty respectful attitude, both Dworkin and Posner were particularly contemptuous of me. The third prong in the strategy was the move to neopragmatism. However, I do believe that it can be said that we flogged and whipped them into neopragmatism. So they did three different things: ignore us, personally attack us, and give in. Dworkin's turn to interpretation is equivalent to Posner's neopragmatism—both, in effect, have given in.

HACKNEY: What's your critique of the neopragmatist/interpretist turn by both Posner and Dworkin?

KENNEDY: It's just mush on top of mush—another chapter in the derationalization narrative, the death of reason narrative. American pragmatism is a part of that. They are no more successful in defending the law/politics distinction, or the judge/legislator distinction, with their neopragmatist technique than they were with their more formalist technique.

HACKNEY: Isn't the response that they've perhaps given up the law/politics distinction?

KENNEDY: I would say absolutely not for one second. So here's a humorous example. Just look at their (strikingly nasty) debate about *Bush vs. Gore.* Dworkin and Posner each claimed legal correctness, denying their own

positions had anything to do with politics—while each violently accused the other of being totally political. It's great reading. Each of them is a legalist, denouncing the other as a traitor to legality. My reaction was, "Well, every bad thing each of them says about the other is correct."

I think I should introduce the emotional or psychological dimension here, since it obviously influences my thoughts about all of this. I am in a sense a student of both Dworkin and Posner, and, when I describe my attitudes, that shouldn't be left out of the account. So I'm both their student and in some sense an antagonist. One of my reactions to their exchange around Posner's Holmes lectures was that although they took nasty swipes at me in passing, they really only cared about each other. And then, my second reaction was that I no longer think of myself, as I once did, as at least in part addressing my work to them.

At some point, you have to stop; you have to recognize that the people who are older than you, in this case your teachers, are not that interested in you, and anyway they will quite soon be gone from the scene. By now, they should be less significant to you than the people who are younger than you. There's a moment at which perspective has to shift from the inevitable upward gaze toward your teachers, who have authority behind them in that way, with whom one can have all kinds of oedipal relations, to a different set of oedipal relations, the oedipal relations down the scale, rather than up the scale.

When I shift my attention, as a sixty-four-year-old, very senior professor, to more recent developments and more recent scholarship in the areas that interest me, I'm a little disoriented. The fairly clear definitions of opposing positions and their dialectical relationships that are available to me in understanding critical legal studies, law and economics, liberal rights theory, law and society, law and literature, critical race theory, and feminist legal theory don't seem useful. When I try to understand the legal theoretical lives of people under about forty, I'm puzzled in a way that I'm not for the lives of people born between 1938 and 1968, a thirty-year span.

You, James, are at the end of the generational spectrum, according to my model here, because you were born in 1964. The kinds of stories that I've been going on and on about can't be easily replicated if we ask, "What's gone on since about 1990?" There's a sense in which all these dramatic events were sort of over by the early nineties. Posner's Holmes lectures, with the reactions of Dworkin and other senior rights theorists, were a kind of last gasp, a fascinating reliving or restaging of a drama from the

recent past. It seems as though—now this could be wrong—legal theory has lost the fairly central place it held in legal consciousness and legal discourse in the period from the late fifties up to the nineties (meaning the elite "United States–ian" world of legal discourse). It has been eclipsed, in a sense even discredited. It's no longer useful on the career ladder, but even more important, it's no longer crucial in the search for enlightenment. That's a really big change.

HACKNEY: So it's very pluralistic?

KENNEDY: It's a common idea that the world of legal theory has become incredibly pluralistic. I'm saying something a little different, that legal theory is out. At the same time, law profs who aspire to be part of the larger discourse have to show that they know what it is, and that they have an eclectic familiarity with it.

HACKNEY: It is the death of legal theory, but legal theories proliferate. Could one put this under the umbrella of the neopragmatist/interpretist turn? Will this lead to more genuine dialogue among the various legal theories as opposed to the drama of conflict?

KENNEDY: I guess I think the opposite. I think that interest in legal theory has waned dramatically. It used to be worth it for a young law professor to try to find some position to occupy in the pluralistic universe, and to take part in the drama of critique between theories. But that's the past.

Today there's no peer pressure, and there's no authoritarian pressure for people to have positions in legal theory. Most people are just eclectic. That's not pluralism. Moreover, very few people, I think, believe it's worth it to engage in the task of defining, comparing, and critiquing the extant theories. A fortiori, it's not worth engaging in the polemics that made life interesting in what I'd call the good old days. So I'm on the other side of your optimistic prediction of dialogue. It seems more likely that the theory enterprise will be dormant for a while, and then it will come back in one form or another.

HACKNEY: When we have the next grand theory?

KENNEDY: Perhaps it will take another grand theory. I don't really have a strong sense of it. I think the ground is not fallow. I'd say the younger generation seems to experience the ground as over-plowed and barren. So I'd say legal theory is out.

HACKNEY: Let me push back a little. Maybe one way legal theory is in, is as follows. If you are a tort law scholar, you take a job as a tort law professor. However, there's almost no way that you can't at least encounter critical

race theory, law and economics, law and society, CLS, etcetera. You have to be relatively conversant in a plethora of legal theories. For example, if you teach torts, you have to know about Richard Delgado's critique of hate speech doctrine. In addition, it's almost a must for a torts professor to know the Coase theorem, and the critiques of law and economics. Is that the death of legal theory, or the death of "grand" legal theory?

KENNEDY: I'd say it was the death of legal theory. I don't think it has much to do with grand theory. Torts teachers have to know bits and pieces of various theories, though I doubt even a third of U.S. torts teachers could recite on Delgado's critique of hate speech. So I agree with your description. However, what it means to me is that the theoretical enterprise as it was understood by the people who produced the bits and pieces isn't happening anymore. Of course, there are exceptions. I think the (to me) amazingly durable interest of a small number of younger profs in the whole Coleman/Epstein commutative justice riff is one. But in general I think there are very few younger profs for whom it's a big part of a life project to integrate a theoretical position with a doctrinal position or a political position.

HACKNEY: It's like a toolkit.

KENNEDY: It's like a toolkit, but it's a toolkit that is very divorced from the context in which the tools were developed, and it's not necessary to be particularly proficient with any of the tools.

HACKNEY: Yes, you have to be conversant.

KENNEDY: "Be conversant" is a very good term to describe it.

HACKNEY: That's exactly right. So it's a very shallow level of understanding. Maybe the description isn't dialogue, but a state of equanimity with respect to multiple theories.

KENNEDY: Equanimity, I couldn't agree more. But remember, I come from the generation of screaming and yelling. So the idea of a state of equanimity sounds like the death of legal theory. The twenty years that separate you and me are the twenty years of grinding conflict. The idea of equanimity is not surprisingly much more plausible to people at your end of the period. But I see you as still part of the same generation, at the young end, that stretches all the way back to Dworkin and Calabresi and Posner. So it's easy to understand what you're doing as the youngest person in the generation talking to the oldest people in the generation. That's a classic enterprise. Imagine that you are a person discovering these debates for the first time today, a person who didn't know of their existence, who had been cut off from them because at some point maybe in the nineties,

there stopped being an active intellectual/political/emotional legal theory scene. I imagine that person, maybe frustrated and having trouble finding any progressive collective activity in legal theory, picking up this book, not as a participant or part of the audience back then for the events described, but as a newcomer. The reaction might well be something like, "Wow, I wonder what *that* was like."