A CONVERSATION WITH DUNCAN KENNEDY

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BY GERARD J. CLARK

ADVOCATE: Duncan, your address at a faculty colloquium was a great success. I thought we might be able to reach a larger audience in this interview. I think we just started by asking you just what is critical legal studies?

KENNEDY: What is it, indeed? I guess critical legal studies has two aspects. It's a scholarly literature and it has also been a network of people who were thinking of themselves as activists in law school politics. Initially, the scholarly literature was produced by the same people who were doing the law school activism. Critical legal studies is not a theory. It's basically this literature produced by this network of people. I think you can identify some themes of the literature, themes that have changed over time.

Initially, just about everyone in the network was a white male with some interest in 60s style radical politics or radical sentiment of one kind or another. Some came from Marxist backgrounds — some came from democratic reform. The ex-Marxists tended to be people who were disillusioned by sectarian left politics of the 60s and moved away from seeing themselves as hard liners. The liberal reform people had been disillusioned in a different way: by the failure of the federal government and the "system" as a whole to respond to the social problems of the 60s, the war, the civil rights movement and the women's movement. They had been moved to the left by their experiences of the 60s, whereas the more radical types had been moved to the right, or at least out of the hard militant posture. Then there were people who had missed the 60s or who weren't involved in it at all, but in retrospect a lot of themes of activism and oppositionism and stuff like that looked good to them. They were looking to redo the 60s.

The literature that this produced initially was an attempt to figure out large bodies of legal doctrine, the familiar things that are taught in law school — like contracts, constitutional law, corporate law or municipal government law. The idea was to understand them in a new way, as something more than just the product of legal reasoning and legal logic, something more than just the product of democratic majorities where they were mainly statutory, and something more than reasonable case by case development of sensible pragmatic ways to deal with problems. This literature tended to argue that each one of these areas of doctrine could be understood as political, in a bunch of different ways. The doctrines are political in the

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sense that they are the ground rules for struggle between groups, struggles that have a strong ideological dimension. In some areas, this is obvious. Nobody is going to study landlord/tenant law without seeing the rules as setting boundaries for conflicts between landlords and tenants as groups, as well as ways to amicably or rationally resolve disputes between particular people. What kind of conditions exist in apartment units and what kind of rents tenants pay and how much landlords get from their property are partly a function of what the

ground rules of landlord/tenant law are. One of the ideas was to apply that kind of insight to lots of other doctrinal areas. So a lot of it was just showing what was at stake. You could say that it was an attempt to get at the political element in the core of doctrine that was usually taught not in terms of distributional struggles but in terms of rational dispute resolution. That was one part of it.

Another theme was that historically the political power judges exercise through all these different doctrinal areas has been legitimated, explained, rationalized by saying it's true that judges aren't elected, but they don't need to be elected because the legal process imposes a kind of discipline on them that forbids them from being ideological actors in the system. It's not that everyone's a formalist. In fact, in the world where you and I went to law school, the formalists were few and far between. It wasn't the idea that the law is the law and it all can be logically deduced. But it was the idea that there was a kind of legal method that included precedent, legal reasoning and adherence to the basic principles of the legal order. Even if you acknowledged that the judges were in fact influencing distributive outcomes, and influencing conflict between groups, they weren't really doing it on their own hook, they were doing it as agents of the political process constrained to follow the law in some way.

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So a second major theme was to try to work out the ways in which legal reasoning as it's presented in legal opinions, treatises, and articles tended to mask the degree of ideological open texture, the degree of leeway that judges brought to decision-making and how their own politics came into play. Often opinions or doctrines or whole areas of law contained contradictions and gaps and ambiguities, and what the judges were doing really couldn't be adequately explained as just consistently following through what the legal materials required them to do. Quite a few early crit articles try to organize this sense of contradiction by identifying opposing visions or moral tendencies — formality vs. informality, for example — that seem to be fighting it out inside the law, making the law inconsistent because sometimes one wins and sometimes the other.

A third theme was analysis of the way the judges tended to exercise their discretion — the way they dealt with the open texture. The realists had long since pointed out that judges weren't just automatized, it wasn't mechanical. Nonetheless there hadn't been much attention to the idea that a lot of the production of legal discourse, legal doctrine, but also legal scholarship could be understood to have an implicit spin or tendency, a kind of centrist, moderate, legitimate-the-status-quo quality. It was pretty closed to solutions and arguments that favored sharp change in the system on behalf of the people who were being screwed by the system.

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This wasn't the earlier Marxist idea that the law is a ruling class conspiracy to hoodwink and oppress the masses, though many people think that's what critical legal studies "is". The idea is that judges' politics have a massive impact on the law they make, and that has a massive impact on who gets what in the system, but everyone is busy denying that this is so. Again, it's not that the judges are cheating or breaking the rules by playing a political role — given the open texture, there's nothing else they can do. But it is unfortunate that when they put their centrist politics into the law, they make it look like that's not politics at all.

Another big theme that comes from our initial 60s leftist point of view — which I still very much have myself — is that there's formal politics, the electoral system, the legislative system, the system of administration in the executive branch, and that's incredibly important, but a lot of the political events that people like us care about most happen in the family, the workplace, the schools, and public spaces like shopping malls or the street. Families, schools, workplaces and streets are places where fundamental questions of power and entitlement and welfare get hashed out between groups that are in conflict. People grow up in these institutions and they learn something more than just the utilitarian meat and potatoes of what to do in the family and in school. They also learn attitudes and styles and ways of relating to other people. Law teachers are modeling for their students how partners are expected to treat associates, how bosses are expected to treat secretaries, how the person in the office is expected to treat the maintenance person who comes around and is emptying the trash and vice versa. There's lots of hidden politics in school that influences the equally hidden politics of the workplace.

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that was not just authoritarian but also often led lawyers to control and dominate their poor or weak clients and pretty much kow-tow to their powerful institutional clients. A lot of that was taught in law school. It still is.

More than that, the law school curriculum has had as one of its messages a kind of substantive political teaching which is: all you can expect from the system of law and governance in the United Slates are very small, narrow, little, cosmetic reforms. Law faculties have traditionally taught their students that the system makes an enormous amount of sense and it's very difficult to imagine it being anything other than it is. The kinds of things that you know about and you learn about in law school reinforce the tendency of normal middle class people to be pretty ignorant, pretty out of touch with the more brutal realities of the way our system works. By that I mean

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everything from what it's like to be a minimum wage non-union, no benefits worker in the fast food industry, through the way the law denies protection to women in domestic violence situations, through the way the actual race system in this country works. So the educational system produces this very powerful lawyer class which has a pretty narrow social perspective on what the consequences of the power that they are going to be exercising will be.

ADVOCATE: Duncan, in your description of critical legal studies you seem to have been using the past tense. Has the theory changed? Is it different today?

KENNEDY: Yes it is. I think it's interesting what happened to it. I'm not sure I completely understand why it changed, but it did. Here's the way I'd describe it. The project that I was describing was trying to get a handle on legal doctrine as both rules of the game and as part of the legitimating discourse of the political system. That project still exists and still continues but it's a much smaller component. In the early 80s, there was an enormous increase in the number of women law professors and also the beginning of a more left wing feminist kind of legal scholarship and legal work. In the network, the number of women involved in critical legal studies expanded very rapidly. That is, white women overwhelmingly. And then quite soon after that the number of minority men and women began to increase in legal education, and quite a few of them were interested in CLS as well. The largely white male originators got older, and a new generation of white men came onto the scene.

At this same time, it got to be a lot riskier than it had been to be identified as a crit, because we lost a bunch of tenure battles around the country. And the quite theoretical project about doctrine attracted lots of people who weren't particularly interested in a left activist project in law school anyway. Which is what a lot of us had been doing.

The result of that was a period in which the network went through one crisis after another. They were the kind of crises that happen when you try to create a mixed-gender anti-hierarchical milieu, and a racially heterogeneous milieu. It wasn't a struggle for control; there was no effort to subordinate everybody in the group to a single idea or line, or even an effort to develop an organization. Most of the people in the network agreed with the 60s idea that women ought to be organized as women and minority men and women should be organized as minorities to the extent they wanted to be. And for that matter, white men should get together and talk as white men. Wouldn't that seem like a relevant grouping?

As the network grew and got more and more socially complex, it fell apart into subnetworks. I regret that we couldn't keep it together as it expanded, but I must admit that I enjoyed participating in just about every kind of conflict that you can get in a multicultural, multigenerational coalition. We lost the sense of a dynamic, ever expanding group that was unified both by its theoretical themes and by activist legal education practice, but for many of us that was more than compensated by the chance to participate in a whole new set of more specific kinds of race or gender or class oriented little groups. Of course, not everyone has such a sanguine view, and maybe I see it all through rose colored glasses.

It's sort of ironic that as the sense of a coherent large group has dissipated, the purely imaginary entity called critical legal studies has come to have a larger and larger space on the map of American legal thought, as measured by things like Lexis. There have been an amazing number of articles written in the last 7 or 8 years about the relationship between feminist theory or black radical theory of one kind or another and critical legal studies.

There were 600 people at the last big conference, which was only eighteen months ago — almost two years ago. It was a kind of diffuse grab bag of every different kind of progressive thought in the large multicultural universe that is going on in legal academia. It was lots of fun, but I don't think there will be another event on that scale until a younger generation comes along and decides to appropriate the name and whatever may be left of the mystique. In the meantime, the subnetworks are flourishing, and some of them, the international one, for example, are positively rocking and rolling along.

Anybody can use the theoretical literature, and somewhat to the amazement of the old timers, quite a few people seem to want to use it. They are constantly reinterpreting the ideas and the history and cannibalizing them and incorporating them into all kinds of left projects. A typical example is there's now lots of writing about sexuality, including but not limited to gay and lesbian issues. The people doing that work incorporate this or that element of early critical legal studies for their own purposes, whatever they may be. I include my own recent work (here comes the plug), in my book called *Sexy Dressing Etc.,* published in October by the Harvard University Press.

ADVOCATE: Is there an actual critical legal studies organization?

KENNEDY: No. There isn't a critical legal studies organization. The network of people is informal. There are joint secretaries at the moment. They have the mailing lists. Critical legal studies conferences have occurred at regular or irregular intervals since 1977. But they are just organized by someone who decides they want to organize a conference.

ADVOCATE: In your description of Critical Legal Studies, I wondered how it fits into the larger intellectual climate of the 90s which might be characterized as post-modernism or maybe it's best known emanation the literary criticism movement.

KENNEDY; Well, that's a good question and it's not easy to answer. I think in CLS there have always been two identifiable tendencies, which were once called the rationalists and the irrationalists. There's been a strand in CLS, which I represent myself, which tends to emphasize first of all that critique has political value and importance in itself, that there's value in unmasking and tearing apart the kinds of baloney that gets produced to explain why things have to be the way they are. But the choice of an activist's projects must be based on the situational, on being intuitive. It means being very skeptical about the possibility of reconstructing either social theory or legal theory on the basis, say, of rights or communitarian sentiments.

I think my intellectual development was very strongly conditioned by the fact that my parents were liberal democrats and I grew up in a universe where sort of a general left-liberalism was combined with novels, poetry, painting, music, and architecture.

Now many of my closest friends and allies think that is exactly what we should be trying to do. The strand that I represent is different because it has been a kind of parallel right from the beginning to a lot of post-modernism because it's so skeptical about overarching theory. But it's a pretty politicized post-modernism; a lot of the post-modern cultural trend that you are talking about is anti-political and particularly hostile to the whole style of leftism. The type of post-modernism that's a strand in CLS is much more leftist. The rise of post-modernism and the literary theory people as a recognizable part of CLS is one of the developments, like the rise of critical-race theory and feminist legal theory and gay legal theory, that has diffused and diversified and opened up the relatively coherent radical project of, say, 1978.

ADVOCATE: Duncan, you've come to this set of notions, I guess, based on your reading and your experience. Who have been influential authors for you over the past 20 years?

KENNEDY: That's an intimidating question. I think my intellectual development was very strongly conditioned by the fact that my parents were liberal democrats and I grew up in a universe where sort of a general left-liberalism was combined with novels, poetry, painting, music, and architecture. My parents were arty-boho types. I majored in economics, and I still believe in doing left-wing, neo-classical law and economics; I was very influenced by Freud and Nietzsche. I was very influenced by French existentialism. I was one of those people who, when I was 18, wore black turtlenecks and I would have worn a beret if it hadn't been so humiliating and I liked to go to coffee houses and listen to Joan Baez and Bob Dylan type stuff. Then I got interested in structuralism, particularly in people like Levi-Strauss and Piaget.

When I was starting out as a law teacher, I was influenced by close friends of the time, Roberto Unger, Morton Horwitz, Karl Klare, Al Katz. I spent quite a bit of time reading Marx and Marxist theorists, and they had a deep influence. I reject the communist version of Marxism, so I'm not a historical materialist and I don't believe that the base determines the super-structure and I don't believe in state-ownership of the means of production and I don't believe in a vanguard party and I don't believe in the dictatorship of the proletariat and I don't believe in democratic centralism. From Marx I got two things which I think are just great: his critique of the way capitalism works, especially the role of ideology, and his emphasis on the struggle between classes. But we don't have to just say the struggle between classes, it's groups oppressing each other. fighting against each other, dominating each other, all in the context of ideology.

Both black radical writing and radical feminists writing have had a big impact on me and on my work over the years. The black radical writer who has been most important to me would be Harold Cruse, "The Crisis of the Negro Intellectual" and James Baldwin. The kind of feminists who have the strongest influence on me are also the ones I tend to disagree with most, people like Robin Morgan and Shulamith Firestone and Catherine MacKinnon and particularly Andrea Dworkin. I think Dworkin is way off base a lot of the time, but just brilliant too. And then the recent generation of people like Jane Gallop and Judith Butler who are basically pro-sex/post-modern feminists. Very, very interesting position which I have learned a lot from.

I don't want to give the impression that I've got a deep knowledge in any of the areas these books represent. I'm a hit and run reader, I try to skim along and just read what I like, and that's what I've liked.

ADVOCATE: Duncan, I understand that you teach Torts, Contracts, and Property. Taking Torts as an example, how may a critical legal studies approach to the content and the conduct of the classroom differ in your class from a Kingsfield class?

KENNEDY: Let me describe the style first. Our first goal was to be more humane, more humanist teachers than the people we had been most frightened of and reacted most strongly against when we were law students. Most of the people involved went to law school in the 60s or early 70s when the Kingsfield style was far more central to the law student experience than it is today. These authoritarian older men really scared everybody to death; no matter where you were coming from it was very

difficult not to experience them as the avenging father type. The first phase of reaction was an unsuccessful attempt to create a humanist touchy-feely exact counter image to that authoritarian patriarch image. It's not even worth talking about that phase in a sense because things have changed so much, I think partly because of the generational revolt against that style in general, but for lots of other reasons too.

My torts course is just like the more traditional offering in that I teach all the rules you'd get there, and I try to make sure the students learn as much or more black letter law as they learn from my more conventional colleagues. But it's different because it presents the law as ground rules of conflicts and struggles between groups, and presents judicial opinions as examples of how to argue back and forth about how to set those groundrules.

What remains of the old program for me is that I want the classroom to have lots of moments when students are interacting with each other in an egalitarian way, when they are working together, not working against each other, cooperative as opposed to competitive exercises. An objective I don't achieve as much as I'd like to is that they should feel that they know what they are learning step by step. I think one thing that's still very authoritarian in law school is that teachers don't see it as either that important or that easy or that possible to allow students to know enough about what they are learning in every class so that they can feel that they're in command of the learning experience. That creates a kind of infantilized dependence on the teacher who is saying right/wrong, skipping from student to student, leaving the student basically feeling helpless. These are liberal humanistic educational goals but no longer in as touchy-feely a way as they might once have been.

ADVOCATE: Can you describe the difference in content between your torts course and the more traditional offering?

KENNEDY: My torts course is just like the more traditional offering in that I teach all the rules you'd get there, and I try to make sure the students learn as much or more black letter law as they learn from my more conventional colleagues. But it's different because it presents the law as ground rules of conflicts and struggles between groups, and presents judicial opinions as examples of how to argue back and forth about how to set those groundrules. The emphasis is on the pro and con argument-bites judges and lawyers use over and over again.

Let me just illustrate the first point, which is what we've mainly been talking about here. I think tort law after WWII has been taught very differently than it was taught before then. After WWII, a kind of consensus casebook organization emerged in which the overwhelming mass of the torts course is devoted to unintentional torts, to accident law. There is typically a very short intentional torts section at the beginning that every teacher does, and then longer particular doctrinal areas are dealt with in separate chapters at the end that most teachers never get to or get to only very selectively — a little defamation maybe. The coherence of the course comes in the consideration of the conflict between negligence and strict liability, proximate cause and the problem of duty in all its different variations, all in unintentional torts.

I change the organization by increasing the discussion of intentional torts from maybe a week or at most two weeks to six weeks. I shrink the discussion of accident law and add another four weeks at the end on torts in contractual relationships, including insurance, landlord/tenant, doctor/patient, products liability and wrongful discharge. These two changes in the structure fit into a political program, which is to get the students to focus on the distributional and political functions of doctrine.

I don't preach in class, or indoctrinate students, but they get a sense of the ways that different common law and statutory tort rules about injury structure the relationships between men and women, blacks and whites, between workers and owners, professionals and clients, producers and consumers. The idea is that understanding that tort law structures these conflicts will change the students' understanding of society, make them more aware of the ways in which groups triumph over other groups, control them, dominate them and rebel against them.

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An example is that the six weeks of intentional torts teaches standard doctrine using cases that persistently raise gender issues. The tort of battery is introduced through domestic battery cases and legislation. It's black letter — you learn the elements of the tort — but you also learn about abuse, both in the cases and in background materials which are ideologically balanced. After doing battery we discuss the tort of assault — the conventional next thing to discuss. A large number of the traditional cases in this area involve men threatening women in one way or another. So I teach the elements of the tort through cases that deal with the extent to which the law will take into account the relative sensibilities of men and women as plaintiffs and defendants.

The next class is on the tort of intentional infliction of

emotional harm, where, again, a large part of the case law is focused on gender issues. I've selected the cases to question whether we want "equal treatment" or "special treatment" for women in this context, and also to give students a sense of how the limits on protection from harm reinforce the bargaining power of strong parties versus the weak parties, in situations like low wage non-union fast food work, because the employer, for example, often uses intentional infliction of emotional harm as a way to control workers. The next class is on racial and sexual harassment in the work place, including Title VII and Section 1983. This is doctrinally very tough for them at this stage, but they'll do the work because they're very interested in it.

I don't take sides on any of these issues (though the students know I'm a lefty), but I think the course has some politicizing effect, meaning that some students are radicalized and some become more conservative and some just come to see that they are ideological moderates rather than "apoliticals".

So, now skipping ahead, in the discussion of defenses we talk about the duty to act of police and judges, that is, the liability of police and judges for misuse of their authority or for failure to exercise their authority. We use the cases that involve the liability of police departments for failing to assist women in the battery situation. Then we take up self defense, with the focus on the question of when a woman who is being physically abused can kill her abuser in self defense — tort liability in that context. Then we take up the defense of consent, an important doctrinal area but also a basic way in which gender relations in the culture are structured.

All the rules are totally conventional tort law. You can get out your Prosser on Torts and follow day by day and see that you are learning all the rules that are in the hornbook. But you get a sense that the legal system is deeply involved in conflicts between men and women and is constantly setting the boundaries of what they can do to each other. Now there's an exactly parallel sequence woven in here on worker/owner conflict, including cases on the protection of business good will, secondary boycotts, picketing, closed shops. Then I try to bring the two strands together with a class on picketing of abortion clinics.

I don't take sides on any of these issues (though the students know I'm a lefty), but I think the course has some politicizing effect, meaning that some students are radicalized and some become more conservative and some just come to see that they are ideological moderates rather than "apolitical." I think you can politicize the class in this way and still be loyal to the idea of academic freedom and non-indoctrination. The students are learning the real doctrines of tort law that will be on the bar exam two years later. I think they understand them better when they learn them as they apply in a relatively small number of contexts that they are studying through the background reading — domestic abuse, for example. I don't tell them what to think about the social problem: I encourage them (o.k., I force them) to argue among themselves. The classroom politicizes the experience of law because there are lots of arguments between liberal and conservative students about what the doctrine ought to be, with their knowing they are being liberals and knowing they are being conservatives — learning legal reasoning in the context of seeing themselves as advocates for their own underlying political positions.