Duncan Kennedy as, Yes, Mentor

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Duncan Kennedy and I entered Yale Law School in the fall of 1967, though we didn't meet—we both think—until our second year, when he was an established academic superstar and I—wasn't. We were both active in politics, though of different strains. Having been a "member," whatever that meant, of Students for a Democratic Society as an undergraduate at Harvard, I continued to work with people at Yale who opposed the Vietnam War, in a group known (not ironically) as The Resistance. Our focus was on actively resisting the draft. According to Laura Kalman's history of Yale during our years there, Duncan was more concerned with politics within the Law School and its student body—foreshadowing his later concern for making the pot boil at whatever location one found oneself (or perhaps enacting his already formed views on that matter).

Duncan participated in, or helped organize, what I recall as an informal seminar on law and social theory, focusing on issues of law and development that were of interest to him, David Trubek, and Richard Abel. I floated in and out of the group, reading and thinking about Marxist approaches to law and trying to work out my own thoughts about the ways in which legal ideas—more in structure than in doctrinal substance—were connected to but, in the jargon, were relatively autonomous from class relations.[1]

Conversations with Duncan about law, social theory, and politics were always "interesting." I use the scare quotes because it took me years to figure out some of the conversations' features. First, of course, there was the substance—the relationship between rules and standards (not then formulated in those terms, I think), for example. Then there was a level that I could occasionally discern, which dealt with the structure of the conversation about substance: What does it mean that we (or, more often, in my experience, you) are formulating the problem in the way you are? Third, I often had an inchoate sense that there was yet another level, which I came to think of as the strategic one: What are we (or, more often, in my experience, Duncan) trying to accomplish through this conversation?[2] And, years later, I have come to think that there probably was a fourth level—but I still have no idea what it was.

These conversational levels came into play, for me, when Duncan took my draft Note for the Yale Law Journal and whipped it into shape. The Note, which the Journal board rejected twice before (as I believe) Duncan persuaded it to accept on a third go-round, deal with the connection between *Swift v. Tyson* and the nineteenth century

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[1] Eventually this interest produced my first book, on the law of slavery in the American South, which was also influenced by my work as a graduate student in history under the guidance of Eugene Genovese. Mark Tushnet, THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST (1981); *see also* Mark Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSPECTIVES 96 (1978). *Marxist Perspectives* was a journal Genovese founded.

[2] I think it worth noting that the value of these conversations, on all levels, casts some doubt on the Habermasian view that strategic communication is categorically less valuable than deliberative communication.

codification movement.[3] Duncan saw the germs of two ideas in the paper; I'm not so humble as to think that he planted them there, but it was clear to me then that he did see that I was grappling with deeper issues than I had initially understood. The ideas were, first, about the relationship between common law and codification, which, the Note suggested, were less distinctive modes of legal reasoning and analysis than nineteenth century proponents of either had thought they were, and second (and as a result) about the implications of my argument for Legal Process ways of thinking that dominated the intellectual project of the core of the Yale Law School faculty.

Duncan was particularly interested in the latter because it was consistent with, and perhaps provided some support for, his own developing critique of Legal Process. He was especially enthusiastic about an article by Jan Deutsch on the Legal Process school.[4] I read the article but at the time didn't understand the reason for Duncan's enthusiasm. Rereading it years later, and more sophisticated myself, I came to understand that what Duncan appreciated was the way in which Deutsch demonstrated that the premises of Legal Process analysis, about irreducible divisions in political, social, and economic views, undermined the conclusions the Legal Process school drew about the possibility that law could serve as the vehicle for organizing a divided society.

After Duncan graduated I stayed in New Haven for an additional year, and we fell out of touch until the beginnings of the Critical Legal Studies Movement. I've described my role in CLS's origins elsewhere.[5] Here I reflect on the intellectual dialogue with Duncan within CLS. Along with Karl Klare and Morton Horwitz, I argued for one "side"—the reason for the scare quotes will appear in a moment—in the conversation about social theory and its relation to law, and Duncan argued for the other "side." We contended that as analysts and critics we could make rough generalizations about the dynamics of legal systems embedded in their economic and social settings, whereas Duncan contended that even the roughest generalizations were always subject to challenge because the phenomena to which they purported to refer—whether small-scale, such as doctrines that were said to "tilt" against workers, for example, or large-scale, such as (to use a contemporary example) neoliberalism—were always subject to revision in detail in ways that would not convert the phenomena into something categorically different.

I must note that Duncan's view grounded his powerful phenomenology of judging, as fully developed in the *Critique of Adjudication*.[6] That, among other things, eventually led me to agree, more or less, with his post-modernist views about law and social theory. For me, Duncan's view is this: All dichotomized ways of thinking about law and social theory, and by implication all categories we might want to use in thinking about those topics, are misleading to the point of being wrong.

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[3] *Note,* Swift v. Tyson *Exhumed*, 79 YALE L. J. 284 (1969).

[4] Jan Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

[5] Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

[6] Because Duncan's primary attention has been to private law, I took some comfort from the fact that his phenomenology of judging built public law concerns into the judge's way of grappling with what seemed to the judge to be difficult problems.

Except when they aren't.[7]

[7] To be clear, I take this last sentence to be part of Duncan's view.