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POLITICS AND DENIAL

Pierre Schlag*

Here are three things that make Duncan Kennedy's work so insightful to some yet so infuriating to others:

First, he refuses to accord respect to what legal academics take most seriously about law. He is resolutely antimonumentalist. When he's done discussing some momentous legal issue, it turns out that the conflicting arguments are organized around a couple of "plausible moves." It's disarming.

Second, Kennedy is resolutely infrastructural. This puts him at odds with virtually all legal theorists who try to provide comprehensive accounts of their subject matter. Their mantra is: "encompass and subsume." Kennedy's is: "burrow and infiltrate."¹ They overarch. He undermines. Kennedy will, at times, claim to be a structuralist, but it is always a peculiar kind of structuralism—ungrounded, floating, nonfoundational.

Third, Kennedy has an absolute horror of reification—most particularly the reification of his own thought. Indeed, Kennedy strives valiantly to subvert the reification of his own thinking. Reading his work, it is hard to avoid the sense that he prefers motion to stasis, verbs to nouns, Sartre to Lévi-Strauss, engagement to theory, contradiction to coherence and, most topically, politics to law.

All of this is to say that *A Critique of Adjudication: Fin de Siècle*² ("Critique") is not a conventional work. It's not so much a theory of adjudication as it is a sustained exploration of adjudication from a series of designedly discordant perspectives. Of the many possible entries into the work, I have chosen politics and denial.

I. POLITICS

As a group, cls people have never quite agreed on what they meant by "politics." If one goes through the literature, "politics"

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¹ Hence, the worm at the heart of being, the tale of the two bad mice, the virus.

² See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1997) [hereinafter CRITIQUE].

turns out to a highly protean notion—a rhetorical umbrella for a variety of different conceptions, including politics as value choice, power, ideology, interest group struggle, power/knowledge, and class warfare.

I was told recently that the undertheorization of “politics” in cls was, in part, an attempt to avoid the “manifesto syndrome” common to the American left. In this syndrome, tenets of political positions are proposed, discussed, adopted—whereupon four-fifths of the people in attendance promptly leave the room, never to be heard from again.

Whatever the strategic merits of leaving the term “politics” relatively underspecified, it did present some problems. For those of us on the margins of cls, it was always a bit frustrating not to know just what cls thinkers meant by “politics,” or how much of a hold cls thinkers believed “politics” might have on, or in, law. It was also a bit frustrating not to know what cls thinkers meant by “law.” (In fairness, this did not distinguish cls from other schools of thought at the time—all of which got off their particular dime by bravely pretending that everyone knew what that particular word (law) meant.)

Some cls understandings of “politics” were so transparently modest as to seem utterly beyond contention—hence, for instance, the notion that “doctrine” can be, and is, in fact, pushed around by policies or value judgments. The same might be said of the notion that when judges decide cases, they must inevitably—at least in cases they care about—make value choices.

Other understandings, i.e., the view that law consists of political struggles carried on by awkward means, seemed plausible in certain areas of law. In fields like labor law, abortion, race discrimination, landlord-tenant, there seemed to be an almost “perfect fit” between the political and legal terminology. In other areas of law, the legal terminology did not coincide exactly with the political terminology but was “close enough”—states’ rights for instance, often served as a vehicle for discriminatory racial policies. But then in still other fields of law (e.g., securities law), there seemed to be no obvious, or even nonobvious, convergence (neither “perfect fit” nor “close enough”).

It seemed possible, of course, that in the right circumstances, any given piece of positive law (fraudulent concealment, resale price maintenance) could, and did, become the site of political struggle. But this contingent possibility did not seem sufficient to support a claim that law is politics—at least not in any interesting sense.

That there were distributive stakes in the outcomes of litigation also seemed clear. In a trivial sense, this is always true. The problem was: Could it be seen as true in a more than trivial sense? Were the goods distributed along recognizable political lines or not? Sometimes yes. Sometimes sort of. Sometimes seemingly not. Given the endless mediations of law, the hermeneutic clumsiness of regression analysis, and the difficulty of even framing the right question, all of this seemed exceedingly difficult to sort out.³

Then there was the notion of law as politics in the sense of academic cabals, inside tracks, old boys' clubs, the ingrown reproduction of the academy, the race to place the clerks, colonization of the academic provinces, and propagation of the faith. For those legal academics who were busy trying to bring about constitutional paradigm shifts through law review articles or planning the future of the nation in footnotes, this vision of the politics of law seemed startlingly underwhelming. But for many of us, it did not: the sociology of the academy helped explain much about the character and limitations of legal thought and legal education. Still, apart from Kennedy's pioneering work (the little red book) and Peter Gabel's overly enthusiastic endorsement of "unalienated relatedness," this vision of politics also remained underdeveloped.

Another vision of politics was this sort of old New Left notion of taking up New Left political positions and trying to advance them through grand normative arguments or legal theory. This struck me, and still strikes me, as an unbelievably romanticized project. But it clearly captured the imagination of many legal academics: people wrote as if there were these great political formations of left, center, and right, mobilized for struggle, just waiting for the final touches on the normative instructions issuing from the law schools.

Politics was also cast as a kind of vaguely Nietzschean assertion of the will, or crypto-Heideggerian existentialist resoluteness. Again, this view of politics has remained underelaborated. In fairness, of course, given that we are talking about an ungrounded moment of existentialist commitment, it's not clear that there is a whole lot more to be said on this score. I do not mean this as criticism. On the contrary, this view of politics is "a natural" for law. Legal dogmatics come clothed in the language of rationality, good judgment, dialogue, etc., but there is always that unredeemed moment of decision when the gavel

³ This difficulty was certainly not unique to cls.

comes down: Law is as much the thought that shapes the act as the act that shapes the thought.

Now, admittedly, much of my downplaying of the significance of the cls "law is politics" claims stems from a bit of revisionist history (in the pejorative sense of the term). In terms of the American legal academy as a whole, even the more modest versions of "law is politics" were not so modest when made in the late '70s and early '80s. It is difficult today, in 2000, to conjure up the prevailing form of consciousness that dominated the American law schools of the '70s. But this much can be said: It was, by and large, an article of faith that there were "objective" answers to legal problems. And whatever "objective" meant (still an interesting question today), it did not mean (take my word for it) "intersubjective validity." This was also a time when legal academics talked about whether a case was "correctly decided," and, in turn, actually expected "the" correct answer to that question. In that context, even the seemingly innocent notion that a judicial decision might require a value choice could well have seemed shocking. Indeed, much of what is taken for granted today about the politics of law is probably a function of the efforts of cls thinkers, even if the role accorded politics is far more domesticated than what most of them had in mind.

II. KENNEDY'S POLITICS

Amidst these various floating conceptions of politics, Duncan Kennedy's earlier work seemed to simply presume the ontological integrity of politics. Whereas law was always riven with contradiction and the self wrought in paradox, political commitment always seemed uncommonly easy and uncannily whole for Kennedy. In his work, political commitment typically appeared early, up front, and in such a seemingly innocent way, you might actually miss it.

Here's an example from the 1986 essay, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, in which Kennedy describes what it is like to be a judge who wants to rule in favor of striking workers who engage in a "lie-in," and against whom management seeks an injunction.⁴ Some thirty pages into the article, Kennedy writes:

Throughout the discussion to this point, I have spoken as a judge who knows how he wants to come out and is vigorously trying to bring the law into accord. [*Yes that is true.*] It is now time to

⁴ See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 548 (1986).

critique the how-I-want-to-come-out pole of our duality
[Yes, this would be good.] First, however, let's reify it with an acronym: HIWTCO. *[What do you mean FIRST let's reify it? WHAT are YOU talking about? It's been reified since page TWO of the article! It's never been anything but a reification!]*⁵

And then the rest of the article is about how HIWTCO—this political commitment—fares in a field of law. The discussion is extremely interesting. Judicial decision making appears as successive reflective disequilibria. But as Jeremy Paul convincingly demonstrates, Kennedy's political commitment (i.e., HIWTCO) is underelaborated and underexplored; it just arrives on the scene in a most decontextualized way—modified and modifiable only as it is experienced within the resistances of law.⁶

This was a simplified view of politics. It was simplified in the sense that political commitment had already taken place (and all the nonlegal considerations leading up to that commitment were left offstage). In *Critique*, by contrast, Kennedy does problematize the ontology of politics. Politics is identified as a struggle among "ideological projects," variously described as conservatism, liberalism, and leftism. Conservatism and liberalism are described in terms of various commitments on isolated issues or issue clusters (labor/capital, seller/consumer, status issues such as race, gender, etc.). The projects are given "substance" through evocation of stereotypical stances on these issues. Kennedy suggests that these projects are broadly recognizable to persons participating in American political life. And, no doubt, most readers would agree.

Even though we would agree (I certainly did), we should resist this moment. In fact, Kennedy invites us to resist this moment. If we read on, these ideological projects unravel. In fact, the very idea of a project unravels. Read the wonderful passage below. Experience its truth (*"Yes, Kennedy is right."*). Marvel at the rhetoric (*"But the man isn't saying anything that he isn't already taking back."*). And then experience the irony (*"Yes, the description feels right, and it feels right precisely because there's nothing there that is not already at once in fusion and also unraveling."*). So here's the passage:

The fudged notion of a project may be preferable to the more precise terms paradigm, episteme, and conception, but it has its difficulties. The idea is that a person entering American political life finds it organized, loosely, into ideological

⁵ *Id.*

⁶ See Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779, 1812-13 (1991).

intelligentsias, which are self-conscious groups that identify with particular interests, while proclaiming normative abstractions, and which have, historically, worked for the adoption of specific positions on issues that supposedly reflect both the interests and the universal norms. An ideological project so conceived is not reducible to . . .⁷

Now, in an analytical mode, one wants to say, “*Well, of course, the man can make sense of everything in terms of ideology—the category is so inclusive and so protean that there is nothing it cannot explain.*” So, one could say this, but Kennedy is already there: “So how can I use liberalism and conservatism as elements, as conceptual tools for understanding adjudication, if my own view is that each, when viewed as a ‘philosophy,’ is an internally contradictory hodgepodge?”⁸ “*Yes, exactly right: how can you do that?*” Now, this is a question he does not answer. Instead, he offers some “stabilizers” to suggest how it is that conservatism and liberalism might be recognizable as projects, despite their lack of internal coherence:

Self-conscious consensus: it’s liberal to come out a particular way on a new issue if the liberals say it’s liberal.

History: it’s a liberal position if people who called themselves liberal thought at some point in the past that it was entailed by liberal premises.

Structural position vis-à-vis alternatives: it’s liberal if it is situated between a well-defined conservative position and an equally well-defined Communist or anarchist position.

Local coherence: it’s liberal if it is close to a lot of similar, well-defined liberal positions . . .⁹

Being a liberal, then, means thinking like the liberal next to you or like liberals in the past or it means finding a Communist and a conservative to sit between. Notice that this depiction of politics is on the verge of satire. Being a liberal (or a conservative) in terms of these stabilizers is not even ironic—it is self-parody.¹⁰ The irony only kicks in when you realize that the joke is real—lived out, everyday. Again, the description resonates.

Now, the stabilizers do help make the ideologies recognizable. But what these stabilizers do not do is render the ideologies meaningful. Given Kennedy’s descriptions of the various ideological projects, it’s not clear why anyone would consciously

⁷ CRITIQUE, *supra* note 2, at 50.

⁸ *Id.*

⁹ *Id.* at 53 (emphases added).

¹⁰ Or maybe it’s a parody of Karl Llewellyn’s stabilizers. See KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521-35 (1960).

choose to get behind liberalism or conservatism or leftism (or indeed any other ideology).

Why do this? You would be swearing allegiance to some project whose political or moral valence remains unknown to you. You would be earnestly lining up eager to support or to fight against an organized yet incoherent set of signs. At this point, there is a critique from the traditional left:

Now look here. You, Duncan Kennedy, have left politics a virtually empty category. It turns out, in fact, that an ideological “project” is a contradictory and self-consuming rhetorical space. Not surprisingly, your account renders liberalism and conservatism rather shallow and circular as political enterprises. And, as for leftism, to the extent it avoids this unhappy prospect, it is only at the cost of being radically underelaborated in the book. It survives if only as a series of ad hoc commitments to context-specific issues and local politics.

But there is also a critique that issues from a more postmodern quarter. It goes:

Look. You, Duncan Kennedy, have rid politics of its pretense to a stabilizable identity. You have (rightly) put its character in question. But then you nonetheless insist that we should be or remain political—on pain of being in bad faith. But your own critique—one that slides easily from law to politics—suggests that it would be bad faith to trust in the categories of politics. Everything you say about “rightness” in the law transposes to the political. And at that point, there is no particular reason to privilege the political. Those who would sign up for a political project would seem to be as much in bad faith as those who sign up for this or that version of the “correct” theory of law. In fact, “signing up” seems to be itself the grammatical form of bad faith.

So one could say this . . . except that Kennedy has already said it: Do not swear allegiance to a project.¹¹

So, to try again: how is adjudication ideological? The short answer is that law is pervaded by the contests among various ideological projects. Case law is the juridical residue of past ideological struggles. Adjudication disposes of the distributive stakes. The political character of law rests neither on the states of mind of judges nor simply on the consequential effects. Rather, the discourse of law, its texts, its determinations of the fields of legal reasoning, bargaining, etc., are themselves ideologically marked.

All right. Except that not all areas of law are openly politicized in terms of conventional “ideological projects.” Sure,

¹¹ See CRITIQUE, *supra* note 2, at 285-89.

law is politics . . . but there is a great deal of law that might be more readily described in other (far less catchy) formulas: law is accounting! Or, law is documentation!

Of course, some areas of law are transparently politicized: these are the kinds of ideological disputes that Kennedy lays out as examples of policy proposals by cls thinkers. I will split them into two groups—earlier labeled “perfect fit” and “close enough.” The perfect fit group involves those areas of law in which the substantive ideological disputes are almost directly translated in law itself: the categories of ideology are the categories of law, i.e., labor law, race law, gender law, First Amendment law. The “close enough” group involves those areas of law in which the adjudicatory allocations of power among established governmental actors have, as a historical matter, often tracked with, and often affected, the political fortunes of recognizable ideological projects. These include federalism, local government law, and public international law.

But there are whole areas of law that are mapped out with an ontology and a grammar that do not readily translate into any easily recognizable ideology. The obvious answer, from a critical perspective, is that the ideological stakes are there, but they have been suppressed through repeated juridical acts of denial.

So what we have in these seemingly nonpoliticized areas of law are juridical precincts where the politics have effectively been expelled or domesticated. This may be right: as an historical matter, it's certainly conceivable that an area of law once politicized has become depoliticized—and, what's more, depoliticized through the work of adjudication.¹² Once we move away from the historical perspective to a description of contemporary law, then some difficulties of a descriptive as well as strategic character emerge. Kennedy asks us to see that law is at once a contradictory product of ideology and denial of the ideological.¹³

III. DENIAL

As a kind of description of law, this sort of “contradiction account” has a certain appeal. It has some advantages over those

¹² For an early example of this sort of claim, see Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265 (1978).

¹³ In *Critique*, “denial” functions as an explanatory or elucidating device. More importantly, perhaps “denial” is the key site for political activity: denial of the ideological stakes is the demon to be rooted out. See Gary Minda, *Denial: Not Just a River in Egypt*, 22 CARDOZO L. REV. 901 (2001).

legal theories that strive for maximum coherence or integrity. The latter (Dworkin's work comes to mind) achieve coherence by expelling any impurities from law that could controvert or upset the theory. "Coherence accounts" depend upon a jurisprudential cleansing of the field in the drive to achieve a perfect monism—the grand overarching theory. If the monistic aesthetic were merely conceptual, it might be pleasing: Mondrian jurisprudence. But inasmuch as the cleansing of the conceptual field corresponds to the cleansing of the material and social identities in the field, there is reason for pause. Monism can have a nice face (compassionate monism?), but when one considers its social and material implications (namely, just who or what gets erased), it's not so nice anymore.

But Kennedy's contradiction account has certain problems as well. One problem, of course, is that the structure of the explanation is overly accommodating. Given denial, one can say that law is at once X and the denial of X. When someone says, "What are you talking about, law isn't X!" the response is: "You're in denial."

Kennedy does not limit his account of denial to the individual legal professional. On the contrary, an important aspect of his work, dating all the way back to *The Structure of Blackstone's Commentaries*,¹⁴ is that law is, in part, a discourse of denial. In other words, denial is built into legal doctrine, theory, etc. The difficult question is: What happens when denial—at the level of legal discourse—has been successful at purging ideology from a certain area of law? This would seem to matter not simply from a conceptual standpoint (just what is it that Kennedy is saying here?) but also from a political standpoint (if there is no trace left of the political in a particular area of law, then what's the point in calling that law political?). This comes dangerously close to saying: This is a political matter—it's just that the politics have been completely taken out of it.

It turns out then that, just as the coherence accounts can lapse into an overly facile form of analysis, so too can contradiction accounts. The coherence explanations defuse conflicting accounts through expulsion ("law works itself pure"). The contradiction accounts defuse nonconforming data by relegating them to an ethically unflattering realm labeled "denial."¹⁵

¹⁴ Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 205 (1979).

¹⁵ As Jeremy Paul pointed out at the conference, psychological literature indicates that denial is not necessarily something to be avoided. It is, in part, an adaptive mechanism.

Within coherence or contradiction accounts, there's no a priori way to eliminate these kinds of problems. The redemption of either kind of account (coherence or contradiction) is a function of its plausibility. Either kind of account can seem more or less plausible, interesting, or useful in light of the way in which it organizes, describes, and valorizes matters that are thought to be important.

Important to whom? The value of either kind of account seems to be a function of the subject—his or her cognitive, psychological, or political interests.

My preference, like Kennedy's, is for contradiction accounts. This is based in part on the contingent fact that the overwhelming majority of legal academics seem bent on representing law as a coherent and rational enterprise. In this context, it would seem helpful to have at least a few people exploring law from a less juridically exalted angle. But, mostly, my preference stems from an aesthetic judgment: much of the time, I simply do not experience law as a coherent enterprise, though an important aspect of the enterprise is the representation of law as coherent.¹⁶

It might seem that this acknowledgment of the importance of aesthetics to contradiction accounts gives a distinct advantage to coherence accounts that claim to be conceptual in nature. But that doesn't follow at all. The view of law as coherent, rational, and integrated is also informed by a certain aesthetic experience. The point here is that whether one sees law as contradicted or

So denial, in and of itself is neither here nor there. It's a parasitic concept—and its ethical or political valence depends on the identity of its object, context or source.

In terms of the Self: Sometimes denial is an adaptive mechanism—a way of warding off threats to the self, and that is a good thing. Sometimes, denial is a way of avoiding confrontations that need to be resolved, and that is a bad thing.

In terms of Personal Ethics: Sometimes denial precludes facing up to ethical or political choices, and is thus wrong. Sometimes, denial is a way to mobilize the self for resolute action, and is thus a good thing.

In terms of Aesthetics: Sometimes denial precludes the self from experiencing a broad range of phenomena, and thus yields a narrow self capable of only small thoughts and small actions, which is a bad thing. Sometimes denial restricts experience so as to ward off injurious influences that might lead to personality disintegration, which is a good thing.

In terms of Politics: Sometimes denial enables work or struggle against strong odds, which is a good thing. Sometimes denial keeps people working at useless tasks, which is a bad thing.

The juxtaposition of these propositions yields, at this level of abstraction, an undecidability about the virtues and vices of denial. But there is more. In the propositions above, it is quite possible, and in some contexts will be appropriate or desirable, to reverse the valences—so that the “and that is a good thing” becomes “and that is a bad thing,” and vice versa.

¹⁶ See PIERRE SCHLAG, *THE AESTHETICS OF AMERICAN LAW* (forthcoming 2001). A lot of that, of course, has to do with the identity of that three letter word, “law”—but that's neither here nor there.

coherent, and whether one sees argument as denial or justification, both depend on an aesthetic experience of law. That is not to say that one's view cannot change. Quite the contrary. But change will not require arguing one's way through complex conceptual arguments as much as it will require training the self to see and experience the law in a different way.¹⁷

¹⁷ *See id.*

