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Book Review: A Critique of Adjudication: (Fin De Siècle), by Duncan Kennedy

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BOOK REVIEW

A Critique Of Adjudication:(Fin De Siècle)

BY DUNCAN KENNEDY

(Cambridge: Harvard University Press, 1997) 424 pages

In characteristically irreverent Critical Legal Studies (CLS) style, Allan Hutchinson's 1987 review of Ronald Dworkin's *Law's Empire* treated that weighty jurisprudential tome as if it was an action movie *à la* the *Indiana Jones* epics.[1] If one were to turn this CLS spirit back upon the recent work of one of that theoretical school's[2] most prominent voices, Duncan Kennedy, then an amusing cinematic analogue for *A Critique of Adjudication: (fin de siècle)*[3] might be *Austin Powers: International Man of Mystery.* In that film a 1960s swinger emerges from cryogenic slumber to take on the late 1990s. The temptation to satirize is heightened by the sense that Kennedy is offering *Adjudication* as a candidate for the canon of late century jurisprudence along with the definitive works of Dworkin and H.L.A. Hart.[4]

Whether or not Kennedy would approve of such cheekiness, he deserves better.[5] While *Austin Powers* suggests something of the "60s throw-back"[6] or fashionably radical[7] stereotypes that have been used to

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[1] A. Hutchinson, "Indiana Dworkin and Law's Empire" (1987) 96 Yale L.J. 637.

[2] A note on the CLS label: Critical legal studies has been regularly identified as a "movement." Professor Kennedy indicates, however, that while CLS continues as a school of thought, the movement broke apart in the 1980s: *infra* note 3 at 9.

[3] D. Kennedy, *A Critique of Adjudication (fin de siècle)* (Cambridge, Mass.: Harvard University Press, 1997) [hereinafter *Adjudication*].

[4] The dust jacket, at least, is clear in this regard. William H. Simon of Stanford Law School writes: "The two principal books with which to compare Kennedy's in recent decades are H.L.A. Hart's *The Concept of Law* and Ronald Dworkin's *Law's Empire*. Kennedy's book deserves to be as popular as theirs." Consider it done!

[5] This is not to say that Dworkin did not, but Hutchinson's review was, or is, great fun.

[6] An entertaining example is provided by Scott Turow's account of his experience as a first-year law student at Harvard. Turow's civil procedure professor, "Nicky Morris," who is apparently modelled after Duncan Kennedy, is disparagingly referred to by some students as "Beat Nick" for his informal demeanour, colloquial language, and abstract, humanistic approach to his subject. For his part, however, Turow is very complimentary. See S. Turow, *One L* (New York: Warner, 1977). My thanks to Larry Buhagriar for bringing this to my attention.

[7] For example, Brian Langille launches a thoughtful critique of Canadian and American CLS scholarship from a mainstream perspective in "Revolution Without Foundation: The Grammar of Scepticism" (1988) 33 McGill L.J. 452. The article, however, also evokes the tone of an exasperated school master wagging a finger at a class room of unruly students who insist upon engaging in "fashionable" skepticism. Also, see Madame Justice Beverley McLachlin's response to the

deride first generation CLS scholarship, such generalizations say nothing about the important substance of this literature. For Kennedy's part, at least, *Adjudication* is a testament to the author' sensitivity to the historical situation, limitations, and ironic dimensions of the CLS project that has been the inspiration and the *bête noire* of so many since the late 1970s.

In most general terms, Kennedy associates his work with what he refers to as the modernist/postmodernist theme of critique initiated by the "more ambitious" critics such as Jean-Paul Sartre, Herbert Marcuse and Michel Foucault.[8] These continental theorists challenged capitalism by attacking "'official' or 'bourgeois' culture, 'phallagogcentrism,' and rationalism generally."[9] Rather than taking on capitalism, Kennedy's more modest objective is to engage many of the same modernist/postmodernist categories and strategies to argue that the practice of adjudication serves to reinforce economic and social stratification in America. According to Kennedy the rational, objective model of legal reasoning that is reflected in the written decisions of appellate level judges represents a denial of the ideological nature of that activity.

While Kennedy indicates that irony is a defining characteristic of the modernist/postmodernist approach that he champions,[10] irony may work against him in the present work. *Adjudication* has many strengths, and it represents a fascinating and often extraordinarily confessionary chronicle of a jurisprudential era. But in anchoring his analysis of judicial activity with the themes of "bad faith" and "denial," Kennedy's work suggests a considerable reliance on the kind of self-evident righteousness which CLS literature has been so successful in exposing and challenging in mainstream liberal legal theory. Another irony may relate to the fact that, when it is tightly focused upon specific examples of judicial activity and/or particular legal issues, CLS literature like Kennedy's has provided valuable support for the idea that law is better understood as a dynamic social process than as a static subject for

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"fashionable" tendency "to characterize the judicial role as increasingly powerful, political and, most devastating of all, essentially udemocratic": Hon. B.M. McLachlin, "Of Power, Democracy and the Judiciary" (1991) 25 L. Soc. Gaz. 20 at 20.

[8] *Adjudication*, *supra* note 3 at 5.

[9] *Ibid.* at 8.

[10] Kennedy indicates that early CLS scholarship attempted to liberate "irony," along with (get ready) "contradiction," "alienation," "desire," "doubleness," "despair," "ecstasy," and "yearning" from the "circular, ambiguous, or incomplete" character of rights arguments: *ibid.* at 345. Exactly why the former compliment of characteristics recommends itself over the latter is not immediately clear. The latter group is certainly easier to remember.

positivist analysis. Unfortunately, these dynamic insights may be uniquely resistant to clear articulation in the sweeping treatise form in which Kennedy has chosen to trade. Accordingly, while this volume makes a valuable contribution, it is a problematic one. Perhaps Kennedy would have it no other way.

Some of the scope of Kennedy's more than twenty years' worth of leftist legal scholarship is reflected in *Adjudication*, but he is primarily concerned with articulating his own variation of the CLS critique of adjudication. Kennedy's discussion touches upon social theory, philosophy, legal education, and cultural issues. He also presents a valuable historical overview of the American legal experience and the currents of theory that have evolved to explain and critique this experience, along with many interesting and provocative comparisons to legal theory and practice in Britain and continental Europe. Kennedy emphasizes and aligns his own project with what he calls the "viral" strain of American legal critique, that which was born in the first half of the century when a current of liberal thought began to argue that there were no right answers to legal questions.[11]

As developed by the legal realists and CLS scholars, this strain of critique has come to emphasize both the significance of policy considerations for judicial decisionmaking and the extent to which such considerations are ideological in nature. The picture of judges as political actors conflicts with the liberal ideal of the rule of law in its fullest form. This ideal presumes a substantive distinction between law and politics, policy and ideology, adjudication and the legislative process. While Kennedy identifies with the CLS strategy of undermining the distinction between judicial application and judicial legislation,[12] he proposes to provide an "internal" critique of judicial practice. This is in contrast to the "merely logical" critique that Kennedy attributes to other CLS scholarship.[13]

Kennedy's internal critique is marked by the related notions of bad faith and denial. Kennedy tells us that American legal discourse forces judges to be ideological performers, purveying decisions and articulating rule choices that reflect familiar liberal or conservative alternatives.[14] The bad faith character of this activity relates to the extent to which the element of ideological choice is denied. According

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[11] *Ibid.* at 81.

[12] *Ibid.* at 37.

[13] *Ibid.*

[14] *Ibid.* at 133.

to Kennedy, the ideological element is "a kind of secret, like a family secret—the incestuous relationship between grandfather and mother—that affects all the generations as something that is both known and denied."[15] A scheme of legislative review of judicial decisions—"counterfactual legislative supremacy"—is discussed in chapter 9 as a way of restricting judges' law-making power.

Kennedy treats us to some very interesting moments on the road to identifying and defending his own patch of jurisprudential terrain. One of these arises when Kennedy accepts that his theoretical position between rule scepticism and legal determinism, seems to share an uncomfortable proximity to the British legal positivist: "Oh my God, am I really just a Hartian?"[16] Kennedy is also prepared to accept some common ground with Dworkin, although he distinguishes his position from Dworkin's by indicating that "Dworkin's central distinctions, between 'political theory' and 'partisan or personal politics,' and between rights and policies, can [not] do the work he wants them to do."[17]

The emphasis that Kennedy places upon the notion of bad faith is among the most striking and problematic aspects of *Adjudication.* A tenet of the modernist/postmodernist critical legal project is that there is no external vantage point from which to assess the system of signs—in this case, words—that creates, rather than merely conveys, the subject of "law."[18] Accordingly, short of calling for an abandonment of law, which Kennedy does not do, the best alternative is to try to make the members of the judiciary more aware of the ideological dimensions of their work.[19] To some considerable extent, however, the judiciary's work must be expected to remain within the linguistic confines that define it. One is left to wonder, then, how it is that we can know that judges are acting in bad faith. If Kennedy is suggesting that they do so merely by acting as

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[15] *Ibid.* at 191.

[16] *Ibid.* at 177. Shortly afterwards on the same page Kennedy states that his theory is not "I hope, hope, hope, just what the Brits have been saying all along."

[17] *Ibid.* at 37.

[18] Kennedy provides an overview of basic semiotic concepts at the beginning of chapter 6, "Policy and Ideology." He contributes to the clarity of his discussion in this part by introducing accessible concepts such as "argument bites" and "flipping" in order to demonstrate the way in which ideology is channelled into adjudication in the guise of policy. There is, however, the odd clanging reference such as his allusion to the "semioticization" of policy discourse, *ibid.* at 147. If it qualifies as discourse, then it must be a semiotic system. Accordingly, his identification of the process of semioticization is confusing.

[19] The benefits of this alternative might include greater judicial deference to representative institutions and judicial decision making that does more to protect and advance substantive equality.

judges, then this concept which is supposed to characterize his contribution to the critique of adjudication represents a fairly standard critical generalization about the legal process.

At the heart of Kennedy's argument is the point that, given the demonstrated lack of a substantive distinction between law and ideology, bad faith and denial on the part of the judiciary is proven by the apolitical tone of the opinions that they write, and the professional discussions that they engage in to which he has been privy.[20] Essentially, then, Kennedy demands that we attribute to judges an extraordinary lack of sophistication. In fact judicial sophistication does not even meet the standards of the journalists to whom Kennedy refers who regularly characterize judges as political actors.[21] This impoverished, even simplistic, notion of judicial self-awareness is required in order for bad faith and denial to operate as the kind of pejorative terms that Kennedy seems to intend.

Frankly, many of us would probably be relieved if we could easily accept that judges are in denial as to the ideological nature of their work, and also that judges do not think that the public appreciates that adjudication is ideological. This would make criticism of judicial activity much more straightforward than it is when we engage the more complex possibility that we are all in on the "family secret" but compelled to talk as if we are not. In this regard, it might be as well to keep Terry Eagleton's admonition in mind. In warning against simplistic antitheses to dominant social ideologies, Eagleton points out that such ideologies are "well capable from time to time of enlisting irony and self-reflexivity on their side. Good liberals, as E.M. Forster knew, must be liberal enough to be suspicious of being liberals."[22]

According to this more complex possibility, that if law is largely distinguished from politics by linguistic conventions which are observed within certain institutional contexts, then law's existence depends upon judges doing "the objectivity thing" in their opinion writing. There may be more transparent alternatives to this,[23] but they might not be law. The exploration of extra-legal or law reform strategies or both for pursuing social and political goals are worthwhile projects. They are not,

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[20] In chapter 8, "Strategizing Strategic Behaviour in Interpretation," Kennedy introduces an "imaginative reconstruction of my three types of judges as deniers" by drawing upon "the evidence of opinions read in their historical context, plus a little time spent at judicial conferences:" *ibid.* at 194.

[21] *Ibid.* at 29.

[22] T. Eagleton, *The Ideology of the Aesthetic* (Cambridge: Blackwell, 1990) at 379.

[23] Kennedy alludes to such alternatives rather enigmatically, *supra* note 3 at 4.

however, dominant themes of Kennedy's project in *Adjudication.* Accordingly, the theme of bad faith takes on a strange aspect which is at once both absolutely righteous and profoundly uncertain.

This strangeness blossoms in the latter chapters of *Adjudication.* For example, Kennedy accuses those who invoke the language of rights merely to formulate political demands of acting in bad faith. Those of us who assume that this is as good a reason to invoke rights-talk as any, are charged by Kennedy with taking advantage of "the other person's good-faith belief in the presuppositions of the discourse."[24] Later, Kennedy is willing to make a limited concession to this kind of cynicism, as long as the cynics are true to themselves: "I am all in favour of deploying these discourses [such as rights-talk] for strategic reasons ... as long as the deployer has in mind the element of bad faith in his or her performance."[25] Of the questions that arise in response to these statements, the most pressing is why on earth this kind of self-honesty should matter to Kennedy.[26]

Some of the preceding may reflect a reading of Kennedy's work which is characteristically Canadian. It may be the case that the personal experience of "loss of faith" in legal reasoning that Kennedy discusses so directly[27] is less profound in our particular legal and historical context, somewhat because our expectations have always been lower. Canadian legal culture is such that it has been able to produce a figure like Frank Scott, who combined strong constitutionalist and civil libertarian convictions with his co-authorship of the Regina Manifesto, the radically anti-capitalist and reformist sentiments of which are still striking.[28] It is possible, therefore, that the link between ideology and law has never been as much of a "family secret" here.

Furthermore, the American experience has become increasingly relevant to Canadians since the *Canadian Charter of Rights and*

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[24] *Ibid.* at 310-11.

[25] *Ibid.* at 358.

[26] Some of Kennedy's earlier work dealt very compellingly with the phenomenological aspects of adjudication, proposing interesting and usefully ways of thinking about how legal materials represent forces of freedom and constraint upon ideologically motivated judges, without drawing upon the kind of puritanism that bad faith and denial seem to imply. See in particular the article upon which much of chapter 7 is based: D. Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36 J. Legal Educ. 518.

[27] See *Adjudication, supra* note 3 at 311-14 and, in particular, Kennedy's discussion of his experience as a second-year law student working for a law firm.

[28] See generally S. Djwa, *The Politics of the Imagination: A Life of F.R. Scott* (Toronto: McClelland and Stewart, 1987).

Freedoms[29] expanded the institution of judicial review in this country. However, our approach to that institution may continue to be influenced by the British legal tradition. Canadians might be expected to temper their expectations for enhanced judicial power with some lingering sense of the British model of "The Judge." As Kennedy explains it, this model is less potent than the American counterpart. In this regard, Canadian readers may be struck by the similarities between Kennedy's outline of "counterfactual legislative supremacy" and the *Charter*'s "nothwithstanding clause."[30] Kennedy's scheme would go some way toward undermining the mythic dimensions of the American judicial model by making the decisions of appellate courts automatically appealable to legislatures. Arguably, the ability of Canada's Parliament or the provincial legislatures to pass legislation notwithstanding the judiciary's decisions as to the scope of our fundamental freedoms, legal and equality rights, has something of the same effect. Accordingly, Kennedy's proposal, which challenges the American model of adjudication, is already supposed to be factored into the Canadian model.

Quite apart from these sorts of national and jurisdictional issues, what contributes to difficulties in reading *Adjudication* is the extent to which the static nature of conventional academic discourse is an imperfect medium for conveying conclusions about what the dynamic, dialectic nature of the social world means for law and adjudication.[31] While Kennedy can be commended for not conceding the field (and taking up painting or something instead), the reader is often challenged to distinguish substantive insights from a wealth of generalizations about judicial activity, and limited associations with—and distinctions from—other theoretical perspectives. This is not to say that Kennedy "goes wrong" in his discussion. Rather, Kennedy's book supports the

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[29] Part I of *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[30] *Ibid.* s. 33.

[31] See R. Heilbroner, *Marxism For and Against* (New York: W.W. Norton, 1980) c. 2. Heilbroner writes, at 56-57:

> The hypothesis, then, is that dialectics is at bottom an effort to systematize, or to translate into the realm of manageable, communicable thought, certain unconscious or preconscious modes of apprehending reality, especially social reality. This hypothesis gives us some clue as to why the exposition of dialectics leaves us satisfied at one level of our minds while dissatisfied at another. Its ideas of flux, contradiction, and essence, remain elusive in terms of ordinary reasoned discourse.

observation that "[a]mbiguity, the bane of positivism, is the very essence of dialectics."[32]

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[32] *Ibid.* at 57.