Duncan Kennedy and My Worst Nightmare

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What is a young professor's worst nightmare? That students will pierce the mask of infallibility that we all pretend to. It doesn't occur often: I once had to counsel a first year teacher who was worried that this would happen. "Don't worry about the students," I said. "Remember, the lion tamer knows the lion can eat him, but the lion may not."

But it happened to me in 1968 in my second year of teaching and that is how I met Duncan Kennedy. My first year of teaching Property had been disappointing: fresh from 4 years working for USAID in Latin America and unprepared to be a law school teacher, I had picked an old textbook that the students and I found boring. So for the second time around I looked for something more innovative and challenging. I settled on a book that seemed ideal: instead of organizing the course by doctrinal categories, this text was organized functionally around the role of property law in land development. Of course, I knew even less about land development than I did about property law doctrine. But I figured I could pick up both as I went along.

That wasn't so easy given the way the book was put together. But I was managing to keep a little ahead of the students and thought I could muddle through. Then one day a student stood up. Announcing that the book was utter nonsense, he proceeded to rip it to shreds. That was Duncan Kennedy in his first year in Law School.

Oh my God, I thought*, who is this guy*? Although for a few minutes it looked like my life, or at least my teaching career, was coming to an end, I managed to rally and accept the challenge. From then on, critique of the book became a legitimate theme in the class with Duncan in the lead. It made the class livelier. It might even have helped students learn more: after all, to critique the book you had to know the doctrine you claimed was poorly presented. Needless to say the next year I found another text.

That was how my 45-year friendship and collaboration with Duncan Kennedy began. Our second major encounter in his student years dealt with his essay about Yale entitled "How the Law School Fails: A Polemic."[1] A sweeping denunciation of educational practices at the school, this essay was a precursor to the more famous monograph on *Legal Education and the Reproduction of Hierarchy*.[2] The 1970 essay analyses all aspects of the Law School, paying close attention to the psychology of students and teachers, the psychodynamics of the classroom, and the School's role in the formation of America's managerial elite. It paints a dismal picture of the school and critiques faculty and students alike.

Duncan brought a draft of this paper for me to review before he made it public. I realized it was a remarkable document. It revealed flaws in the law school I had not

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[1] 1 YALE L. REV. L. & SOC. ACTION 71 (1970).

[2] This now famous piece was originally published at 32 J. LEGAL. EDUC 591 (1982). It was subsequently republished with additional material as LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (2007).

appreciated. It displayed psychological insight more often found in novelists than lawyers. It showed a level of political sophistication rare among law students.

But it also was explosive. This was a time of great tension in the school. A general student revolt was underway in which radical criticism of the university merged with the anti-war movement and with racial tensions brought to a boil by the trial of the Black Panthers taking place in New Haven. In this atmosphere, a great divide had appeared between students and senior faculty some of whom thought that the student radicals (including Duncan) posed an existential challenge to the university itself. One famous professor, in a fit of paranoia, likened our students' actions to the attack on German universities by the Nazis. In this climate, I thought, publishing this paper, brilliant thought it might be, would be like throwing a match into a pile of tinder.

Concerned that publication of such a sophisticated and often accurate critique of the Law School could harm his career, I urged caution and restraint. Needless to say, Duncan ignored my pleas and published the paper in issue 1 of a new student-edited journal. I don't know how the senior faculty responded: by then the divide between senior faculty who excoriated the students, and the juniors like me who often sympathized with them, had grown too great for such discussions to take place. I suspect, however, that many of the senior people were furious. Nonetheless, a few years later when he had graduated and was clerking on the Supreme Court, the faculty offered Duncan a position as assistant professor. He chose, however, to go to Harvard.

These two incidents helped improve my teaching skills and see some of the flaws in an institution that had shaped me and I had revered up to then. But it was the third encounter with Duncan in those years that started me on a life-changing intellectual and political trajectory and set the stage for the work he and I did together in CLS and beyond. This happened in a seminar I taught entitled "Law and Modernization" which sought to analyze the relationship between law and economic development.

It is traditional for people to talk about the influence teachers had on their work. But this is a story of how a student influenced a professor's attitude towards his chosen field of study. In the course of that seminar my view of the field of law and development, including of my own prior work, began to change. Duncan's participation played no small role in that experience.

To understand what happened, I have to go back to the years before I was at Yale. From 1962-1966 I worked as a lawyer in the Latin American Bureau of the US Agency for International Development. My job was to ensure that aid projects conformed to US law and negotiate loan agreements with governments and corporations.

As time went on I started to ask myself: what do law and lawyers have to do with development? In order to promote development, USAID had projects to "modernize" everything in Latin America from macro-economic governance to business organization, primary education, agricultural methods and land tenure. It seemed to me and a few other USAID lawyers that law would also need "modernization" yet reform of law and legal institutions played no role in US foreign assistance strategy. So we started pilot programs in law reform. The effort was modest and halting: we had no guidelines to follow and little support from Agency policymakers who saw no reason to reform legal institutions.

One obstacle to robust law and development programming was the dearth of literature on law in development studies. While development studies scholars were producing volume after volume on economic development, administrative development, educational development, political development, and so on, there was next to nothing written on "law and development." When I left the government to take up a teaching post at Yale, I made it my project to try to fill this intellectual gap and I helped Yale get a grant from USAID to start a Program in Law and Modernization.

The class was my first effort to work out a theory of the relation between legal institutions and development. The assigned material included the very limited literature that was beginning to emerge. U.S. scholars had started to develop an account of the role of law in development by combining ideas from the sociologists' theory of modernization, the development economists' view that strong states were need to jump start capitalist economies, the neo-evolutionary idea that development meant following the path of advanced capitalist nations, and US lawyers' rosy views about the role of law in our own society.

Out of this amalgam emerged a consensus that the legal systems of developed countries were "pre-modern" and thus ill-adapted to play a role in the regulated capitalist economies and modern societies that development policy sought to bring about. To this diagnosis was added a cure. These legal systems needed to be "modernized" and this meant making them more like the legal systems of the U.S. and Europe. The solution was to retrain their lawyers using U.S. methods and transplant laws and legal institutions from the U.S. and other "advanced" countries.

These reforms, it was thought, would lead to greater economic efficiency and growth. But first generation law and development scholars were not just interested in economic goals; many also thought that legal transplants and U.S. style legal education would help promote liberal values by strengthening the "rule of law."

The seminar was designed to explore these ideas and I was gratified when Duncan enrolled: I knew he would have a lot to offer. But I should have known that putting these mainstream ideas in front of Duncan was like showing mice to a hungry cat—or, better, beefsteak before a hungry lion! Here were some nice juicy ideas about law and its relationship to society and economy just waiting for him to pounce on. And pounce he did! Not only did he challenge every aspect of the mainstream consensus in class: he produced a powerful counter-narrative.

Drawing on the classic critique of colonial policy by J.S.Furnival,[3] Duncan wrote a paper that showed that the introduction into Burma of "modern" British laws and legal institutions, including British property rights, led to the destruction of traditional Burmese society and the impoverishment of Burmese farmers. A sophisticated financial elite coming from British India and armed with knowledge of the new system were able to manipulate the law in ways that enriched them and undermined the Burmese. In this story, legal modernization was not a tool for equality and emancipation, but rather an instrument of colonial domination and impoverishment. The possible parallels to current U.S. government foreign aid programs in general, and law and development in particular, were not hard for me and the students to see.

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[3] J.S. FURNIVAL, COLONIAL POLICY AND PRACTICE (1948).

This seminar was a turning point in my academic life. I was already beginning to have doubts about first generation law and development ideas, some of which I had helped create. But these were tentative and still largely inchoate: the seminar and especially Duncan's role in it, helped move me further towards full-blown critique.

The result was an article I wrote with Marc Galanter a few years later entitled "Scholars in Self- Estrangement: Reflections on the Crisis in Law and Development Studies in the United States."[4] The title referred to the fact that Marc and I were criticizing first generation projects we ourselves had developed and ideas we had helped create. We criticized law and development scholarship for lacking a base in empirical study, making ethnocentric assumptions about the superiority of Western institutions, relying on dubious neo-evolutionary theories, and hewing too close to development agency agendas. We called for a less ethnocentric approach and a more critical stance.

This article was one of the best things I ever did and is still widely cited 40 years after it was published.[5] It launched my career as a leader of law and development studies and, by showing me the value of rigorous academic critique, helped put me on a path that led to Critical Legal Studies. I cannot say I owe it all to Duncan, but his role at a pivotal time in my career was of great importance and cemented our life-long friendship and collaboration.

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[4] 1974 WIS. L. REV. 1062 (1974).

[5] For a discussion of the origins of that article and a review of the subsequent trajectory of law and development studies, see David Trubek, *Law and Development: 40 Years after Scholars in Self Estrangement: A Preliminary Review*, Univ. of Wisconsin Legal Studies Research Paper No. 1255 (May 9, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435190.

Kennedy, in contrast, seems to disagree with Dworkin in every conceivable respect such as the nature of law and legal reasoning, the role of right, the relation of law to its outsides (politics/ideology), thus questioning the objectivity and neutrality of legal reasoning, and he seems to be advocating what could be termed as a â€œradical indeterminacyâ€ thesis. The paper attempts reading Dworkin and Kennedy alongside each other, rather than in opposition, and so it deploys two interrelated strategies to establish such frame. One is concerned softening what appear to be rigid opposition through sc Don't worry Duncan, Courtney's there I made this myself Duncan's Worst Nightmare.Â I personally believe Chris McLean should have the real celine dion come over and Duncan's challenge is that he has to kiss her. That would have been so much more awesome. Reply. horsepassionforever Featured By Owner Nov 8, 2013 Student General Artist. hha ha lool. Reply. Meganinuyasha Featured By Owner Jul 5, 2012 Hobbyist Writer.