THE POLITICS OF DUNCAN KENNEDY'S CRITIQUE

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INTRODUCTION

Duncan Kennedy's *A Critique of Adjudication: Fin de Siècle*1 ("Critique") makes an exceptional contribution to legal and social thought. Culminating three decades of intense work, *Critique* offers an original and compelling account of adjudicative lawmaking2 that challenges conventional views of what legal decision makers do.

*Critique* has particular significance for lawyers who wish to contribute to social justice and egalitarian redistribution. Such lawyers seek to pursue transformative projects in legal work, that is, to develop strategies and work-methods that aim to contribute to systemic social change and that are at the same time committed to an ideal of legality. Conventional theory and professional norms look with suspicion on this agenda when they do not expressly condemn it. Cutting against this grain, Kennedy demonstrates that adjudicators and advocates can respect norms of fidelity to law and to professional calling while at the same time

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* Copyright 2001 Karl Klare, George J. & Kathleen Waters Matthews Distinguished University Professor, Northeastern University School of Law. For the record, Duncan Kennedy was my teacher and mentor, and we have been friends, colleagues, and comrades for nearly thirty years. I am deeply gratified to take part in this symposium celebrating his work. As will be seen shortly, none of this bars robust disagreement.

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

2 *Critique* has been criticized for emphasizing appellate adjudication (as distinct from trials, legislation, or other legal processes). Kennedy does not claim that adjudication is the "most important" legal arena, merely that it is an important and politically significant arena in some legal cultures. Similarly unpersuasive is the criticism that Kennedy is "too focused on the United States." Kennedy makes no claim of universal or cross-cultural validity for his account of adjudication (in fact, his methodology rebels against such claims). Far from taking the U.S. model for granted, Kennedy goes to great lengths to recount a variety of historical and institutional reasons for U.S. "exceptionalism." Moreover, he is an accomplished comparativist, particularly in the area of private law theory. Perhaps his observations on European legal systems are mistaken or incomplete, but that is a different point. That Kennedy has the most to say about the legal system he knows best and which provides the milieu of his political activism hardly seems a fatal criticism.
strategically pursuing ideological projects aimed to promote social change. Kennedy does not claim that pursuing transformative projects is easy or automatic, or that they always achieve their intended goals, just that they are possible—practically and ethically—and that they may contribute meaningfully to egalitarian social change. *Critique* provides a jurisprudential account of how lawyers committed to democratic politics and to working within a democratic legal system, can also busy themselves as lawyers in transforming that system. No other legal theorist has come close to providing such an account, certainly not with Kennedy's coherence and rigor. Part I of this Article restates Kennedy's basic arguments, emphasizing the legitimacy of carefully drawn transformative projects.

Regrettably, one aspect of the book may strain some readers' receptiveness to Kennedy's seminal theoretical achievements: Kennedy's discussion of contemporary radicalism in the United States, touched on throughout the book and addressed at length in the concluding chapter. Kennedy constructs the left as a site of recurring conflict between two intellectual and political styles: traditional leftism, which is self-righteous and compromised, and his camp, modernism/postmodernism (“mpm”), beleaguered and misunderstood, but much more interesting.

[The mpm version of leftism] chooses the ethos of post-ness, doubleness, yearning, irony and the aesthetic, the element of self-conscious formal manipulation in the name of unknowable primal underforces and dangerous supplements, cut by the critiques of the subject and of representation. It chooses them over the traditional course of leftist righteousness (whether in the mode of post-Marxist “systemacity” or of identity politics) and, with equal intensity, over the compromises of left liberalism.3

*Critique* concludes with an extended, factional defense of mpm, a call to arms to continue the struggle against traditional leftist self-righteousness.4 Kennedy's idea is that, now and always, the conflict between these warring camps defines the left. The conflict is unavoidable, so we ought to roll up our sleeves and get on with it. Kennedy discusses no other contemporary political issue in any detail, thus leaving the impression that the left must make an urgent priority of enacting transgressive performances that will disrupt the theoretical systems spun out by (mostly) middle-aged, left-wing intellectuals and the positions advanced by (mostly) younger academics captivated by identity politics. The

3 *Critique*, supra note 1, at 339 (citation omitted).
4 See id. at 339-64.
vital objective is to prevent these mostly well-intended but hopelessly self-righteous souls from foisting their implicitly totalitarian knowledges on the rest of us.

This hardly seems a compelling agenda. It baffles me that Kennedy descends from his theoretical Olympus to perch on this sectarian mole hill. Thankfully, the agenda sketched in this portion of the book has very little influence on Kennedy's workaday political activism (apart from occasional mpm performances at staid academic events that usually come as a breath of fresh air). Part II of this Article criticizes Kennedy's factional presentation of mpm.

I have no intention of criticizing the mpm political style, or of arguing that traditional leftism is "right" or "better" or "more effective"; or of suggesting that dialogue and debate between these approaches is unfruitful. Much less do I intend to "challenge" or "criticize" modernism and postmodernism in social thought and the arts, which would be a ridiculous undertaking given that modernism and postmodernism encompass much of what is interesting in twentieth-century thought, literature, music, and art. Modern political experience and imagination have been profoundly shaped by acts of defiance that owed more to rebelliousness and transgressive spirit than to any ideological strictures—Rosa Parks taking a seat in front of the bus and Wang Weilin blocking the column of tanks on a Beijing boulevard offer two vivid examples. Even quotidian acts of resistance—Václav Havel's lowly greengrocer who one day decides not to display a party slogan in the shop window—may unleash psychic and political forces that feed into a revolutionary process.

I am prepared for, but would be saddened by the inevitable riposte to this Article, namely, that all I am doing here is advancing my "factional interests" as a traditional leftist. Mpm is not the target of my critique. Rather, my misgivings concern the unproductive way some leftists of all varieties discuss these issues. Unfortunately, Kennedy's polemic reflects the worst tendencies: exaggerated claims and mocking denigration of competing approaches. Kennedy thinks the left should encourage compulsive repetition of ritual fratricide. In my view, this is a tragic waste of

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5 Of course, other equally significant and courageous acts of refusal and resistance seem to have been inspired, at least in part, by complex, systematized political or religious tenets. For example, Gandhi's civil disobedience campaigns, communists who joined Resistance units during World War II, or Bukharin discrediting his own show-trial "confession" from the dock partly from a motive to redeem Bolshevism.
the left's limited political and intellectual resources. We should give it a rest.\(^7\)

I. KENNEDY'S THEORY OF ADJUDICATION

Virtually all of modern jurisprudence rests on a distinction between legal reasoning and politics. Legal analysis and reasoning, on the one hand, and political argument or philosophy, on the other, are thought to be recognizably distinct discursive practices. We can tell one from the other. Therefore, a statement of the type, "this court's judgment abandoned legality and crossed the line into politics," is meaningful; it is taken to describe an event that properly trained and acculturated professionals can identify. To a significant extent, contemporary jurisprudence studies the doctrinal and institutional implications of the existence of this boundary. Mainstream legal theory specifies rational decision procedures that, when faithfully and professionally executed, discipline and constrain jurists so that their decisions are based on legal authority and argument rather than upon the judge's politics, personal preferences, or idiosyncrasies (these being the only other possibilities imagined). Kennedy demonstrates that most of these commonplaces amount to wishful thinking.

Of course, sophisticated legal theorists rarely espouse the simplistic view that adjudicators either decide cases by performing legal reasoning or that they abandon legal constraint and enact personal views. They concede that the boundary between law and politics is both indistinct (so that it is sometimes difficult to know whether we are on legal or political terrain) and porous (so that politics sometimes sneaks under the radar to trespass on law's territory). All sophisticated legal theorists acknowledge a degree of indeterminacy in legal reasoning, so that sometimes adjudicators refer to, or are subtly influenced by, extralegal values and assumptions.

One possible response to the mainstream approach would be to rethink the starting point. Instead of beginning with the law/politics dichotomy, we could construct theory on the foundational assumption of a complex interweave between law

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\(^7\) This Article disengages Kennedy's celebration of mpm from his theoretical insights. In my view, there is no necessary connection between the two. Several symposium papers attribute mpm to a loss of faith induced by Kennedy's theoretical suppositions and conclusions. The linkage is plausible, although a case could also be made for the reverse proposition that the political style drives the theory. But Kennedy insists, and I agree, that the political implications of legal-theoretical work, and, specifically, the political implications of theoretical faith or skepticism, are indeterminate. See CRITIQUE, supra note 1, at 340, 362-63. At least for this reader, the book's postmodern skepticism is far outweighed by its underlying faith in the liberating potential of political struggle.
and politics. We would no longer debate how to keep law out of politics, but instead consider what consequences do or ought to follow from the permanent presence of politics within legal discourses. Interesting and fruitful questions would arise. What should democratic jurists do about the inevitable presence of political threads in the fabric of adjudication? How conscious are we of the political aspects of adjudication? How candid? Do political elements impact differently in various types of cases, fields of law, or legal cultures? Does the presence of the political offer any positive yield to legal reasoning or is it always and everywhere to be distrusted?

But mainstream legal theory shuns this path and instead devotes itself to discovering strategies to secure the law/politics boundary and to keep political infiltration of legal territory to a minimum (hence, talk of interstices and penumbras, reasoned elaboration of neutral principles, institutional competence, equality and coherence and integrity, etc.). The more sophisticated the theorist, the thinner the line between law and politics. Still, in the conventional view, a commitment to the rule of law means being committed to marking and maintaining some kind of law/politics divide. At least in principle, conventional theory must be able to point to examples of purely legal decision making as distinct from cases in which the appeal to, or unconscious influence of, extralegal values went “too far.” The great judges are great, or so I was taught in law school,

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13 See generally Ronald Dworkin, Law’s Empire (1986).
14 Consensus at a given time and within a given legal-interpretive community is not the same thing as a known distinction between legality and politics. Insofar as it adheres to a foundational law/politics distinction, mainstream jurisprudence must have some solely legal decisional criteria—criteria that can be applied without making choices or judgments consciously or unconsciously influenced by extralegal values, sensibilities, or intuitions—with which to determine that, e.g., the range of solutions X to Y are legitimate legal outcomes to the case A v. B, but solution Z is not. It will often occur that the vast majority of trained participants in a given legal-interpretive community will agree that X, Y, and intermediate solutions are the only legally correct outcomes, but that Z is legally unauthorized. But the fact of consensus is just a historically situated datum about what many professionals think is or is not a convincing legal artifact. The consensus does not establish that the legal necessity of results in the X to Y range is a property or entailment
because they possess the innate genius to sense how much is "too much."

In mainstream theory, it is an article of faith that adjudicators should never consciously and knowingly "do" politics instead of law. By definition, ideologically oriented strategic behavior is inconsistent with a judge's duty of interpretive fidelity, so that if law becomes consciously politicized, it is fallen. The villains of mainstream theory are judges who enact their politics in the teeth of their self-understanding that legal reasoning requires a different result, and advocates and scholars who urge judges to do such a thing. These people are really fallen and should resign from their profession. If ideologically oriented strategic behavior is automatically a departure from norms of legality, it follows that the idea of a transformative project within jurisprudence is a contradiction in terms. Lawyers committed to egalitarian social transformation who internalize the mainstream view seem to face an unenviable choice between betraying legal and professional norms or of putting their ethical and political values on hold in the course of their working lives, or even of betraying them.

A common but patent misunderstanding of Kennedy's position is to imagine that, having rejected a distinct law/politics divide, he must then be taking the "opposite" position that there is no difference between law and politics, that law is just politics, that

15 An interesting point to emerge from this symposium is that Kennedy uses the concepts "good" and "bad faith" in several different ways. In this Article, "good" and "bad faith" refer to the ethical constraints associated with the professional roles of judge and advocate.

16 See Paul D. Carrington, Of Law and the River, 34 J. LEGAL EDUC. 222 (1984) (arguing that "legal nihilists" who challenge certain basic mainstream assumptions will necessarily end up teaching law students the ways of corruption, bribery, and intimidation and therefore have an ethical duty to resign from their teaching positions). The only specific example of legal nihilist work cited was Roberto Mangabeira Unger's The Critical Legal Studies Movement, 96 HARV. L. REV. 563 (1983), a spectacularly inapt candidate for the label. Carrington later indicated that, by legal nihilism, he meant "CLS folks" who allegedly believe that "legal texts do not much matter." Letter from Paul D. Carrington to Robert W. Gordon, in Peter W. Martin, "Of Law and the River," and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1, 12 (1985).

17 Many progressive lawyers find themselves dividing their professional activity from their personal moral and political aspirations. One becomes an ardent legalist in public life and a politically engaged oppositionist in private. Experience suggests that this schizophrenic fracture between public and private personae is not a viable, long-term definition of self, and that it hastens burnout and co-optation. Moreover, a lawyer who is committed to social justice, but who accepts that politics plays no legitimate role in legal reasoning, faces a particularly daunting challenge. She must argue—somewhat implausibly—that the existing legal rules, properly understood and applied, require the progressive outcome in every case.
anything goes. It is true that some left-wing legal criticism up to about the mid-1970s sounded like this. But Kennedy's work—and critical legal studies ("cls") work generally—has little in common with this dated outlook. Indeed, throughout his career, Kennedy has delighted in illuminating the reversed conceptual symmetries that obtain between liberal legalist jurisprudence and orthodox Marxism.

Thus, like mainstream jurisprudence, orthodox Marxism saw law and politics as distinct realms (this is before the revolution). Jurists sincerely believe they work within a hermetically sealed, neutral discourse. But the truth, for orthodox Marxism, is that law is a superstructure erected upon and programmed by the "real" engine of history, the social practices constituting the "relations of production." Thus, while in liberal theory politics sometimes illicitly intrudes onto the legal field, for traditional Marxism the normal circumstance is that political considerations entirely colonize law. Bourgeois law is inherently constrained and inflected by its extralegal, class-structural integument. The dirty secret of law under capitalism is that it is an ideological mask for class interest. It is simply politics hidden beneath technical mumbo-jumbo. So both liberal theory and orthodox Marxism accept a conceptual distinction between law and politics. But whereas liberal jurisprudence takes the ideal of nonpolitical law seriously, orthodox Marxism was largely cynical about it. For old-style Marxism, legal discourse is fallen, not occasionally, but most of the time and everywhere. Of course, the ruling class endeavors to hide this, because legal discourse could not perform its legitimation functions if it were widely understood that law functions to prop up the capitalist order.

Neo-Marxists abandoned economic determinism long ago, and those interested in law struggled to get past the crude view that legal processes are externally programmed by capitalist relations of production. These efforts generated some very interesting research, but they usually ended up resorting to vague metaphors or fudge words, such as "relative autonomy," "dialectical relationship," or "determination only in the last instance." Neo-Marxism also acknowledged that, even in its fallen state, legal discourses sometimes embody emancipatory values and aspirations and entrench interim victories of the oppressed and

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18 See, e.g., Louis B. Schwartz, With Gun and Camera Through Darkest CLS-Land, 36 STAN. L. REV. 413, 423 (1984) ("Central to the CLS outlook [is] the proposition[] that law and politics are one . . . ."); id. at 433 ("CLS writers see law as simply an expression of politics.").
However, the problem remained of how and by what criteria one may distinguish progressive from regressive law. Thus, Neo-Marxism was unable to develop ways to conceptualize transformative projects within law. At best, leftists could seek short-run gains by opportunistically deploying legal strategies at the margins and in the interstices. After the revolution, we were told, governance, rule making, and rule application would assume entirely new forms, directly and transparently chosen by the people without the mediation of alien institutions over which they have no control. This would require a complete break with the legal form as we know it, which is a perfect isomorph of the commodity form. What we now call governance and law will come to embody new social practices guided by an entirely new logic. Unfortunately we can’t say much about that, because, as is well known, the owl of Minerva spreads its wings only at dusk.

Critique provides a fresh perspective on the law/politics relationship, which reveals the incoherence of the notion that jurists must either remain within legal discourse or cross over into politics. Kennedy shows that it is impossible to give a plausible description of what happens in judicial lawmaking based entirely on norms and conventions internal to legal discourse. There is no quarantined, politics-free zone where adjudication can proceed, and, consequently, there is no border to traverse into politics. Kennedy’s first methodological innovation “is to get rid of the idea that there is an objective boundary line we can draw between questions of law that have correct determinate answers and questions that can be resolved only through ideological choice.”

Kennedy is not saying that mainstream theory underestimates how frequently politics intrudes on legal reasoning or how difficult it is to keep politics “out.” He does not accept the view that ideology sometimes “enters into,” “distorts,” or “takes over” legal reasoning, because that way of talking presupposes that politics is initially on the outside looking in. Consciously or not, political considerations are always present in legal analysis, even in its grinding daily routine. It may be unobserved or misunderstood or denied, but politics can never be eliminated from legal

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22 Also, there is probably no law-free zone in modern societies that is untouched by the socially constitutive power of legal ideas and practices. But that is another, long story.
23 CRITIQUE, supra note 1, at 19.
interpretation, no matter how scrupulous and expert the judge. This is neither abnormal, nor a sign that legality is fallen, nor a reason for loss of faith. Quite the opposite. Once the place of politics in legal interpretation is understood, it becomes possible to conceive of projects of strategized legal interpretation in the service of social, economic, and political liberation that are fully consistent with legalist commitments. Politics cannot be kept "out" of adjudication, because politics is part of it from the start. Indeed, Kennedy's point is that the interpretive practices we call adjudication would be paralyzed and therefore could not occur if judges were unable to draw upon extralegal political and moral sensibilities.24

I wish to emphasize that this is not an argument that legal and political discourses are interchangeable. Of course, judging is something different from doing policy analysis or normative political theory. Each discourse has distinct concerns and ambitions, and its own repertoire of argumentative techniques and criteria of validation. A community of political theorists might accept as persuasive arguments of a type that jurists might reject as irrelevant or unhelpful to their work. Strictly from the standpoint of rhetorical tradition, a legal-interpretive community can often distinguish between legal and nonlegal types of argument. The point is that, while judging and philosophizing are different activities, the difference is not that moral and political choices belong in the latter but not the former. The differences concern how political choices do and/or should impact on argument, reasoning, and decision making in the respective activities.25

24 It is surprising how much of Kennedy's core argument Judge Richard Posner concedes in his otherwise muddled and disjointed review of Critique. He writes, for example: "many of the members of [the legal and larger communities] believe, in . . . good faith, though erroneously, that legal materials are sufficient to resolve even the most difficult cases." Richard A. Posner, Bad Faith, NEW REPUBLIC, June 9, 1997, at 34, 38 (reviewing CRITIQUE, supra note 1) (emphasis added). In other words, the belief that judges simply apply law to cases is a naive mistake. Moreover, he adds, "the judge is not likely to be fully candid, in writing an opinion in a difficult case, about the degree to which he has had to rely on policy or personal values to decide the case." Id. Judge Posner believes this judicial practice of systematically withholding information from the public—some would call it "deception," although Posner prefers the more euphemistic label "tact"—is actually in the public's interest because "[a] judicial opinion has to be acceptable both to the legal community and to the larger community that is affected by what judges do." Id. Posner's paper trail will raise some awkward questions should he ever seek Senate confirmation to a higher judicial office.

25 Experience teaches that whenever one makes any assertion that law and politics are intertwined, no matter how carefully qualified, a certain number of readers will reflexively respond that one must be making the extreme claim that law is just politics, and therefore judges are and should be free to decide cases however they want, guided only by their political convictions. This is a misunderstanding. The claim that law and politics are inextricably linked does not entail the conclusion that law is just politics and nothing else.
Kennedy's claim is that competent, diligent legal analysis frequently and quite normally induces in conscientious judges a genuine experience of uncertainty about the pertinence, meaning, and implications of legal authorities. In the presence of this uncertainty, the direction the judge ultimately takes is, and must be, influenced by extralegal concerns, sensibilities, and values. Because, by hypothesis in this situation, available legal tools are not perceived, or are not yet perceived to solve the case, a sense of direction must come from elsewhere. This is not to say that the judge can or should simply refer to her ideology in order to “tip” the case or resolve the uncertainty. Even assuming that professional norms and role expectations authorize a judge to consult her “ideology” for the “tipping factor,” divining the legal (or even the policy) implications of an ideological position—like divining the implications of legal materials—is an interpretive practice that often fails to generate determinate answers. “Consulting one’s ideology” often and quite routinely generates uncertainty similar to what jurists sometimes experience in assessing the legal materials. The view that once we abandon legal reasoning decisions turn solely on the judge’s politics (or what she had for breakfast) is therefore a misunderstanding for precisely the same reason as is the mainstream view that diligent adjudicators should decide cases solely on the law. Deciding concrete cases by consulting ideology is no more possible than deciding by consulting only the law. Rather:

[Legal] rules... dispose ideological stakes as products of the interaction between the legal materials, understood as a constraining medium, and the ideological projects of judges. The rule choices that emerge from the interaction should be understood neither as simply the implications of authority nor as the implications of the ideological projects, but as a compromise.26

From these starting points, Critique develops a striking revision of the meaning of “legal constraint.”27 Kennedy begins

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26 CRITIQUE, supra note 1, at 19. Thus, Kennedy does not believe—in fact he expressly rejects the idea—that legal outcomes can be explained solely by reference to political interests.

27 These paragraphs borrow from a more detailed presentation contained in Karl Klare, Legal Culture & Transformative Constitutionalism, 14 S. AFR. J. ON HUM. RTS. 146, 156-72 (1998).
with two of the standard legal realist/cls observations: (1) legal texts do not self-generate their meanings; and (2) they are shot through with apparent and actual gaps, conflicts, ambiguities, and obscurities. Legal texts must be interpreted through legal work. Interpretation is a meaning-creating activity, so that "the law handed down" to adjudicators consists in part of meanings created by prior adjudicators. Legal materials are not fixed and unyielding, nor can the techniques of legal reasoning be exhaustively described (like a computer program). Adjudicators perform work within a medium. The medium is constraining, but it is also plastic (although not infinitely plastic).

Kennedy believes that legal constraint is a meaningful concept (which is why he explicitly rejects a "global indeterminacy" thesis and the view that "law is just politics"). However, in contrast to the mainstream view, he argues that legal constraint is not a property or an objectively knowable quality of legal materials themselves. Rather, legal constraint is a particular kind of experience a legal actor has (or may have) in the course of doing legal-interpretive work in the legal medium. Whether and how strongly legal constraint is "in effect" with respect to any particular legal problem are matters of feeling, belief, controversy, and conviction within the context of a particular discursive community. No neutral decision procedures exist capable of objectively establishing whether a given set of legal materials imposes tight, loose, little, or no constraint on an outcome.

This does not imply that "anything goes" or that texts mean whatever we might wish them to mean. The legal materials may resist our best efforts to interpret them in a certain way. As an empirical matter (not a result of "cultural determination"), it frequently happens that trained participants in a particular legal culture reach a consensus that the materials bearing on a particular problem admit of only one outcome or a narrow range of outcomes. The point is that the constraint or bindingness of the legal materials is an experience or interpretation of them, not an innate, uninterpreted property of the materials themselves. Every lawyer has had the frustrating experience of discovering that the legal materials simply rebuff her best efforts to make them out to mean something she fervently wishes they would mean. Yet most lawyers have also, at one time or another, felt an initial impression of constraint weaken and dissolve over time. Most of us have at least occasionally experienced the thrill of discovering a new perspective on familiar materials, so that their apparently constraining power dissolves and these same materials can, through perfectly respectable, professional arguments, be
rearranged, recast, and reinterpreted in a more favorable manner. Most lawyers can recall the experience of struggling with an interpretive problem to no avail and then marveling as a more gifted colleague plots out the contours of a solution. On the other hand, sometimes the sense of the dissolution of constraint is short-lived. New problems arise or old ones reassert themselves, and the sense of boundedness reconstitutes.

Seeing adjudication as interpretive work within a medium or discursive context that is both constraining and plastic shifts the focus of legal theory. The mainstream concern is, what should a decision maker do when presented with a tension between her understanding of the legal materials and her moral and political convictions? The traditional villain is the jurist who betrays norms of interpretive fidelity by enacting her political preferences in the face of legal constraint. No doubt this jurist appears in real life and poses practical problems for the integrity of the legal system in which she operates. But in retrospect, this villain poses no great difficulty for jurisprudence. From the standpoint of theory, an adjudicator who consciously disregards legal authorities that her best professional judgment tells her require a certain outcome, and instead rules the other way in service to some ideological objective, is not doing legal work. The truly difficult dilemmas for legal theory are posed by judges who are uncertain whether they are constrained by the legal materials, judges who form a mistaken conviction that they are bound, and judges who know or should know they are only loosely constrained, but whose opinions strive for the appearance of legal necessity. The real problems for legal theory are routines of uncertainty, error, and bad faith, not cases of betrayal.

Take, for example, the case of a judge who has a strong moral intuition about how a case should be decided, but the precedents disclosed by initial research combine with arguments by counsel to indicate strongly that the case should come out the other way.

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28 There may be exceptional cases. For example, consider a claim by torture victims against the security police in apartheid South Africa. Assume that the judge is convinced the factual allegations are truthful but that applicable law plainly immunizes the defendants. I am open to the argument that the right thing to do from the standpoint of fidelity to law is to rule for the claimants and fudge the doctrine, if the judge can get away with it. Even in this situation, however, a good lawyer might well be able to cite international human rights norms and instruments that demand a remedy for the claimants, thus avoiding the dilemma as to whether justice is consistent with legality. See generally Etienne Murenik, Dworkin and Apartheid, in ESSAYS ON LAW AND SOCIAL PRACTICE IN SOUTH AFRICA 181-217 (Hugh Corder ed., 1988).

29 The discussion to follow could equally involve a "political" intuition or belief, where "politics" refers to views, assumptions, beliefs, and values about social organization and justice.
What is the proper course of action—the legally correct course of action—in this situation? Most people interested in legal theory would probably quickly agree that if the judge disregards these legal authorities and arguments and hands down the intuitively favored result (perhaps garnished with unconvincing technical arguments she does not really believe), she has—for better or worse—abandoned fidelity to the norms and expectations of her role.

What are the alternatives? Caught in a conflict between moral intuition and apparent legal constraint, the judge might defer to her first impression of applicable law. Surely most lawyers and legal theorists would find this course of action troubling and would suggest, to the contrary, that the proper path at this juncture is to engage in further reflection and analysis. Surely fidelity to law does not bar her from doing, and may even compel the judge to do more, legal work before coming to a decision. Implicit in this sensible advice is the possibility that, if the judge diligently works with the materials (does more research, rereads cases, takes another look at the record, etc.), she might have one of those experiences of authentic dissolution of constraint. On reconsideration, the intuitively appealing initial answer might turn out to be a legally correct or even a legally preferred outcome, which the judge may endorse with complete confidence that she faithfully adhered to norms of interpretive fidelity. If, after deploying the currently accepted repertoire of legal arguments, the judge concludes in good faith that the authorities point (or defensibly point) toward the result she thinks just, whereupon the judge rules consistent with her moral intuitions and her considered view of the law, does anyone doubt she is doing the right thing?

But this judge devoted intellectual resources to finding this solution, not because legal constraint impelled her to do so, but because of personal moral sensibilities external to legal discourse. It is disingenuous to describe the outcome of the case as resulting solely from legal constraint. That the judge reached the result chosen owes at least something, one might say quite a lot, to the moral intuitions and deeply held beliefs (not necessarily conscious) that prompted her to look for it. One would better describe this as a case of a judge who made strategic decisions (about the investment of scarce intellectual resources and energy) pursuant to a moral project (to do justice by her lights). 30

30 For another example, imagine a judge so steeped in traditional values and assumptions about society and also about legal interpretation that she habitually fails to perceive the gaps, conflicts, and ambiguities in legal materials that would appear upon
Maybe the judge will not find the legal answer she is hoping for. Perhaps no amount of legal work will dissolve her initial feeling of constraint, either because she lacks the necessary skill and sophistication in legal work, or because the materials stubbornly refuse any but the initial interpretation. Only then does the decision maker face a choice of following her personal/political convictions or obeying her best interpretation of the law. More precisely, only then does she appear to face such a choice (her understanding that she is legally constrained may be mistaken). If she then goes down the ideological path, she will be lying to the parties and to the public and disavowing legal norms. No doubt some judges in real life go this route. Possibly it happens every day of the week in some courts, which would be a serious institutional problem. But at least this sort of calculated dishonesty and norm-betrayal raises no great conceptual difficulty for legal theory.

Thus, the mainstream assumption that legal decision making can, in principle, operate apart from the influence of the decision maker’s ethical and political values collapses at two points (at least). First, legal work—the interpretive practices in which judges, advocates, and commentators engage—partially constitutes the legal materials and therefore endows them with meaning. In fact, legal work often shapes a lawyer’s sense of what the relevant legal materials are, let alone what they mean. As Kennedy argues: “Fidelity to law kicks in only when there is law to be faithful to. Any legal actor, advocate, or judge, can influence what the law ‘is,’ through legal work.”

Second, judges and other participants in adjudication constantly make conscious and unconscious choices about how to deploy their intellectual energy and resources. These choices rest on values, perceptions, and intuitions external to the legal materials, since the choices arise in response to apparent gaps, conflicts, and ambiguities in the materials. Since lawyers’ interpretive practices partially constitute the legal materials, decision makers’ choices about how to deploy their intellectual resources, made under the influence of their underlying moral and political concerns, affect the accumulated, substantive meanings we attribute to the legal materials. Quoting Kennedy again, “one cannot say with certainty that when closure

more thorough analysis. Surely this judge also enacts a politics partially sourced outside the legal materials. By default, she inscribes a spin in favor of the ideological status quo upon legal authorities that these materials do not require or even necessarily permit. The only reason why we do not recognize this case as an example of “politicized” adjudication is that the practice is so conventional as to go unremarked upon.

occurs it is a product of a property of the field rather than of the work strategy adopted under particular constraints."32

It follows that in contested cases, what makes for a "good," "legally sound," or "legally correct" interpretation depends partly on the legal materials themselves but also at least partly on the practitioner's training, skill, and insight, and the choices she makes about how to allocate her intellectual energies and resources. These choices must ultimately turn on moral and political sensibilities and convictions that cannot be derived entirely from the legal materials, since it is often the case that the meaning and constraining power of the legal materials is unknown or uncertain without the intervention of legal work.33

In short, the judge's personal/political values and sensibilities cannot be excluded from interpretive processes and adjudication. This is not because judges are weak and give in to political temptation, but because it is impossible to give a coherent account of legal interpretation or decision making in which values external to legal discourse play no role. Nor can the influence of external values be restricted to a narrow range of special (e.g., "interstitial" or "penumbral") cases because we have no unstrategized decision procedures (decision procedures that do not involve interpretive work) to tell us whether or not a given case is "special" or "interstitial" or "penumbral." The judge's moral and political values play, and cannot help but play, a routine, normal, and ineradicable role in adjudication. Legal criticism ought to acknowledge this reality. The community's assessment of the judge's work product ought appropriately to turn, at least in part, on the community's judgment of the worth of her motivating values. We have no solely legal criteria of correctness for resolving contested cases apart from the persuasive "deployment of the argumentative tools that legal culture makes available to judges trying to generate the effect of legal necessity."34 It is therefore impossible to say in contested cases what is the correct, nonstrategized legal solution (that is, the correct solution excluding judges' strategic choices about the investment of their intellectual resources).

32 Id. at 798 n.7.
33 At this stage of the discussion, the usual mainstream response is to say that the judge is not and should not be at large in allocating her intellectual resources, but rather should be guided solely by values and principles immanent within the legal order. This is a circular argument. Decisions about legal work cannot be determined solely by values immanent in the legal materials, because it always requires legal work to determine what those values are.
34 Kennedy, Strategizing, supra note 31, at 797.
Judges—and the advocates, academics, and parties who seek to influence their thinking—make choices influenced by extralegal values and sensibilities in the routine course of legal work. Legal practitioners should share the secret with their publics in the interests of transparency, and they should accept responsibility for the political and moral consequences of their actions. Kennedy has shown that strategic behavior within adjudication (and by extension, other forms of legal work) is inescapable. Consequently, if lawyers pursue ideological projects transparently and in good faith, with appropriate modesty and self-reflection and on behalf of egalitarian and democratic politics, strategic behavior within legal work can be legitimate. There is no necessary contradiction between working for social transformation within adjudication and embracing the commitments and obligations of legality.

II. A CRITIQUE OF CRITIQUE

Having opened the door to transformative projects within adjudication and advocacy, what has Kennedy to say about practical politics and issues of the day? With a single exception, political discussion in Critique is at a very general and suggestive level, which is perfectly appropriate for a book on legal theory written by someone whose activism is oriented to the local and pragmatic.

A. Kennedy's Leftism

This much we are told: Kennedy is a leftist. He believes that universalist aspirations should be mobilized in projects to rectify injustice, reduce suffering, and respond to “people’s deep longing for justice and liveliness.” The left project is a struggle for a more egalitarian and solidaristic society. “[Leftists aim] at transformation of existing social structures on the basis of a critique of their injustice, and specifically . . . the injustices of racist, capitalist patriarchy.” Kennedy believes in the extension of democratic norms and participation into the so-called private sphere (e.g., the workplace) and in dismantling illicit hierarchy in all facets of social life. He is militant in the cause of class, racial, gender and sexual justice, and an enthusiastic advocate of redistribution of wealth and power.

Kennedy's outlook might be capsulized as radical, grassroots, multicultural post-social-democratic, with a thin glaze of anarcho-

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35 See Critique, supra note 1, at 6-7, 11-12, 17.
36 Id. at 17.
37 See id. at 341.
38 Id. at 340.
syndicalism (although this latter is—sorry, Duncan—mostly rhetorical). Kennedy genuinely believes—this will come as a shock to many people—in (a complex and sophisticated version of) the rule-of-law ideal. He is committed to democratic methods of achieving social change. He thinks organized government can perform useful functions, but he is not fixated on, in fact—he is suspicious of—centralized state power. In any case, he assumes that the U.S. left will remain so uninfluential during our lifetimes that it will never get close to the corridors of state power. Kennedy acknowledges Marx’s influence, but the strand in Marxism looking toward insurrectionary seizure of the organs of state finds no resonance in Kennedy’s work; if anything, it is treated as a dangerous fantasy.

On the other hand, Kennedy is deeply critical of the social democratic tradition and the postwar, northern European welfare states. He wants to transform property, family, workplace, and institutional relationships, not just soften income inequality through transfer payments. Any day of the week he prefers participatory mobilization from the bottom up to technocratic-bureaucratic reform from the top down. However, he does recognize that sometimes the latter is indispensable. He believes in empowerment, not just entitlements, although he believes in those, too. Unlike in the Continental social democratic tradition, gender, racial, ethnic, national-origin, sexual, and other identities, power relationships, and redistributional claims loom large in Kennedy’s politics. Still, he deems “universalism” a “connecting thread” of the left project. His style, instincts, and sensibilities are avant-garde: “My project for changing the world through artifact production is left wing and culturally modernist/postmodernist.

In terms of strategy and tactics, Kennedy advocates critical practices designed to delegitimate the going system. He works on the assumption that:

[B]elief systems constitute all of us in ways inconsistent with our own longings [for] and impede our efforts to realize justice and liveliness by falsely making it appear that they can’t be realized . . . . My idea is to participate with others in producing representations that will be inconsistent with these “legitimating” but also “constitutive” belief systems.
He supports and devotes considerable intellectual energy to reformist public policy initiatives (although he is as interested in producing oppositionist theater in such initiatives as he is in the social engineering). For example, Kennedy does extensive legal, policy, and organizational work in the area of tenants' rights and affordable housing. He is particularly interested in programmatic initiatives to achieve wealth redistribution by challenging background legal rules (e.g., common-law property rules) that sustain illegitimate hierarchy. But leftism, for Kennedy, is not a coherent program or set of principles, much less a dogma. It is a "site" or "location" of ideological encounter, dialogue, and evolving coalitions. Leftism should welcome a wide range of views on theory, goals, and strategy.

Despite his many biting comments about the tyranny of leftists who demand political commitment, Kennedy believes in group activism and political commitment. He warns us that political discourses are indeterminate, internally contradictory, incomplete, and always in need of revision (in precisely the same way that legal discourses are). Political ideas and values are always subject to criticism and re-imagining through the infinite regress of interpretation. But Kennedy explicitly rejects the quietistic conclusion that coherent political action is impossible. People and groups can have authentic experiences of interpretive closure in political thought and strategizing, grounded on such "stabilizers" as historical and institutional path-dependence, pragmatic judgment, and the experiences shared and understandings developed in the course of self-conscious group activity. In short, Kennedy believes in political projects. He believes we can choose strategies and make leaps into action and commitment based on contextualized judgments.

Critique doesn't leave us with "nothing," in the sense of making it impossible to decide what to do, say, whether or not to be a leftist, or of making it impossible to figure out enough about how the social order works to choose a strategy of left action within it. Those of us who are not moral realists (believers in the objective truth of moral propositions) are used to committing ourselves to projects, and deciding on strategies, on the basis of a balancing of conflicting ethical and practical considerations. In the end, we make the leap into commitment or action. That we don't believe we can demonstrate the

45 See id. at 363.
46 See id. at 52-53.
correctness of our choices doesn't make us nihilists, at least not in our own eyes. 47

Thus, for all its talk of loss of faith, 48 Critique is essentially a hopeful book. Its basic message to lawyers interested in social justice is: "there is room for maneuver, there are many worthwhile things for us to do." 49 Kennedy regards large-scale social transformation as a serious and worthy ambition. He advocates collective action to envision and achieve social justice. At the same time, Kennedy's political thinking reflects the "chastened" outlook of most fin de siècle leftists 50—"chastened" meaning theoretically modest, self-critical, conscious of the particularity and bias of every epistemic stance, attentive to the world's complexity and limits on human capacity to transform it, and cautious about "metanarratives of complete emancipation [and] the lure of redemptive politics." 51

Although there was no occasion to discuss this in the book, Kennedy regularly engages in activist projects. Perhaps because of his strong and unconventional views, idiosyncratic style, and sheer brilliance, Kennedy has been the target of a great deal of personal criticism from people who know nothing about him and who do not seem to care whether any of their anecdotes are true. 52 One

47 Id. at 361-62. Kennedy shows that loss of faith in grand theory does not imply nihilism, and it certainly does not mean that closure is impossible on legal, moral, and political questions. See id. at 361-63. The cls movement is often, but mistakenly, criticized as "nihilist." See supra note 16. This is a very common misunderstanding or misrepresentation of Kennedy's work. In his work, loss of faith means only that the closure cannot be attributed to a knowable, objective structure of human experience that "produces," "necessitates," or "entails" the closure. Therefore, we must always be alive to the possibility that internal criticism, changing circumstances, and innovative perspectives may dissolve an earlier sense of closure and reopen the field for political and ethical work leading to new senses of closure. True, there are only a few, thin paragraphs on stabilizers that ground consensus and rational decision making in politics. More on this theme would be desirable here. Readers will find much on this in Kennedy's other work.

48 See CRITIQUE, supra note 1, at 8, 286, 295-96, 311-12.

49 He explicitly ascribes the following goals to his work on adjudication:

[T]o reveal the large role played by the legal system; to deligitmate the outcomes achieved through the legal system by exposing them as political when they masquerade as neutral; to show that they are in some sense unjust and that their injustice contributes to the larger injustice of the society as a whole; to be, thereby, a radicalizing force on those who read and accept the analysis; and to suggest ways that a radicalizing project should approach the task of making the system less unjust through political action.

Id. at 280.

50 See id. at 12.

51 The phrase is from An Interview with Martin Jay, 14 TIKKUN, Nov.-Dec. 1999, at 49.

52 For example, the Wall Street Journal reported in an op-ed piece by a Harvard law student, designed to portray Kennedy as an elitist hypocrite, that Kennedy drove a Jaguar sports car to work at Harvard. See WALL ST. J., Apr. 3, 1990, at A20. Kennedy has never owned a Jaguar or any other luxury car. At the time, his family owned a 1985 Nissan Sentra. He usually walks to work. The Jaguar was a figment of the student's imagination.
particularly uninformed canard portrays him as an armchair intellectual. In fact, he is committed to and devotes enormous and sustained energy to activist projects.

Some of his activities have an iconoclastic and countercultural flavor, like the occasion when he mobilized a group of law professors to create and distribute several issues of an irreverent and parodic "underground newsletter" called *The Lizard* at an annual meeting of the Association of American Law Schools ("AALS"). However, most of Kennedy's activist projects are stylistically conventional and as "serious" and "earnest" as the traditional left activism he mocks in *Critique*. Here is a sample: supporting electoral candidates and ballot referenda, campaigning for affordable housing and tenants' rights in political, legal, and organizational forums, demonstrating for peace and against U.S. militarism (e.g., he helped organize a rally to protest the U.S. invasion of Grenada, and marched on Washington to protest intervention in Central America), consulting on the Alaska oil-spill case, participating in labor solidarity efforts (e.g., supporting staff unionization at Harvard University and picketing an AALS convention to support hotel employees in a labor dispute), and engaging in anti-apartheid activity such as the divestment campaign at Harvard. A particularly appealing characteristic of Kennedy's activism is that he happily assumes his fair share, and usually more, of the detail and grunt work—arranging meetings and rallies, drafting leaflets, stuffing and sealing envelopes, doing administrative work for groups, obtaining signatures on petitions, telephoning, holding signs and banners, mediating personality conflicts, and fundraising. In addition to all of this, he has been a tireless activist within legal education, working with exceptional devotion and courage to combat racial, gender, and political discrimination in law school appointments and promotions decisions. He is an ardent supporter of clinical legal education and regularly teaches housing law and policy at Boston's Legal Services Center. Did I mention that he has organized more—and more politically interesting—conferences, colloquia, symposia, anthologies, study groups, and academic summer camps, in the United States and abroad, than anyone can remember?

In sum, Kennedy generally espouses open, grassroots-oriented, and pluralistic ideas about what leftists can and should do to work for social change. His record of activism for good causes is admirable. He has no patience for complacency or

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However, the *Journal* refused, on repeated requests from friends, to print a correction. See Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779, 819 n.75 (1992).
surrender. He wants us all to go to work for justice and equality. Quite appropriately, he cautions against intellectual arrogance and top-down social engineering, and he reminds us of the great crimes that have been committed and the terrible hardships that have been caused in the name of leftist ideals.

B. Kennedy’s mpm

I wish Critique had left well enough alone, but Kennedy concludes with an extended analysis of leftism in the United States, drawing on arguments developed earlier in the book. This is the only matter of contemporary politics he discusses at length.53

When it comes to intraleft polemics, there’s no more Mr. Nice Guy. Not to put too fine a point to it, but Kennedy can’t stand much of what he imagines the American left is doing. A few diplomatic gestures suggest that an effective left-wing movement requires diverse approaches. Nonetheless, at the end of the day, Kennedy privileges mpm over traditional leftism.54 He thinks that mpm is right and that self-righteous traditionalists who make their claims of rightness are wrong. In nearly four hundred pages of subtle, contextualized observation, overdetermined explanation, complex interrogations, and ironic reversals, this is the one political point on which Kennedy is unyielding.

Kennedy sees the history of postwar American radicalism as a series of conflicts between traditionalists, by far the dominant group, and mpm leftists, "very much a minority strand."55 At the beginning of the Cold War, radicalism was largely defeated. Liberals, not radicals, dominated left-of-center political discourse, such as it was. But then the sixties happened. Popular movements and a left intelligentsia resurfaced and grew exponentially. New expressions of both traditional leftism and mpm emerged in this exciting climate. By the mid-1970s, most strands of sixties radicalism were repressed or quiescent. Superseding intellectual currents and movements based largely on identity politics connected with older liberal discourses, such as “constitutional

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53 Kennedy’s observations are limited to the U.S. context, and in this particular instance the book is “U.S. focused.” It is unclear whether and how Kennedy would apply his points in other contexts.

54 Some readers who identify more with mpm than I do complain that mpm emerges from Kennedy’s book looking as bad as traditional leftism. True enough, Kennedy describes mpm as elitist, aggressive, exhibitionist, condescending, and arrogant. See CRITIQUE, supra note 1, at 353-55. He says mmps have a psychological need to avoid commitment. See id. at 350. Nevertheless, Kennedy privileges mpm by identifying so strongly with it. In any case, most of my criticisms would remain even were we to conclude that his mordant disdain spreads evenly over the entire left.

55 CRITIQUE, supra note 1, at 391.
rights discourse,"56 "fancy theory,"57 and popular discourses of rights-claiming.58 Left-liberals regrouped around an interpretation of the sixties as a constitutional rights revolution,59 a triumph of rights-claiming by hitherto excluded and oppressed social groups.60 “[T]he left in general [came] to rely on rights as the principal basis for universalizing its positions.”61 By the 1970s, “[l]eft discourse had moved from its ‘rational social policy’ phase through a brief, late-sixties Marxist phase, in the direction of the Liberal rule of law and rights discourse of the general political culture.”62 Standing on a foundation of constitutional law, identity politics, and advanced liberal political theory, left-liberalism emerged as the dominant stance on the left in the United States. Indeed, according to Kennedy, by the late 1970s, left-liberalism was the left.

And that, more or less, is how things remain today. Liberal rights discourse achieved almost complete hegemony on the left, vanquishing its intellectual rivals (neo-Marxism, existentialism, many varieties of cultural radicalism, whatever). Mpm remained alive among a dispersed handful of intelligentsia-types who identified with leftism—in the broad sense of working to realize a more just, egalitarian, and solidaristic society—but who “experienced the discourse of the left... as... self-righteous and simple-minded.”63 This fraction sought to “escape the sense of being impersonally compelled to agreement or commitment,”64 whether the pressure came from the establishment or the left, and it engaged in practices aimed to achieve “liberation from inner and outer experiences of constraint by reason.”65 In the legal field, mpm rediscovered and extended the techniques of “viral critique,” eventually turning them on leftist as well as mainstream discourses and thereby generating large quantities of yearning, irony, ecstasy, and loss. From these developments grew many controversies in critical studies and related networks (Fem-Crit, Critical Race Theory, Queer Legal Theory, and so on).

56 Arguments in briefs and law review articles to the effect that a correct, nonideological interpretation of constitutional law materials “requires” left-liberal results.
57 Using a sophisticated philosophical apparatus to derive popular, left-wing rights applications from general, consensus-based rights assertions, without resort to ideology.
58 See CRITIQUE, supra note 1, at 300-03, 325-27, 340-44.
59 See id. at 327.
60 See id. at 302-03.
61 Id. at 309.
62 Id. at 344.
63 Id.
64 Id. at 349.
65 Id. at 340.
Kennedy’s history sheds light on some aspects of the left’s intellectual history, but it also has some problems. It is massively incomplete and loaded with hyperbole and overdrawn contrasts. Apart from the valiant band of mpm holdouts, just about everyone in Kennedy’s imaginative left is either a liberal constitutionalist, an identity politician blathering vaguely about rights, or perhaps a die-hard Marxist systematizer. His selective account leaves out much of the best work done in the past two decades. For most of the left, the past twenty to twenty-five years has been a long journey of passage away from both systemic theory and empty rights-formalism in the direction of contextualized political and intellectual work of exactly the kind Kennedy supports (although without necessarily fetishizing transgression or embracing the mpm allergy to rightness-claims). His description of appropriate practices—one tries “to figure out enough about how the social order works to choose a strategy of left action within it”\textsuperscript{66}—is more or less how most interesting leftists proceed these days. Few of them spend a great deal of time lamenting our lack of convincing metahistorical narratives or our inability theoretically to ground and conclusively to establish the correctness of our political choices. Granted, some leftists still \textit{talk} as though they believe or would like to believe in a grand theory. But the rhetoric rarely describes what people actually \textit{do} in their writing and activism. Kennedy’s mpm describes most of today’s interesting left. Most of us are, in his words, “used to committing ourselves to projects, and deciding on strategies, on the basis of a balancing of conflicting ethical and practical considerations,”\textsuperscript{67} after having tried to learn as much as we can about how the social order works.

In other words, Kennedy’s account of left intellectual history is fatuous. Of course, it wasn’t really meant to be subtle or complete. Rather it was intended merely as a springboard for the main event: the factional defense of mpm’s holy war against self-righteous rationalism. Kennedy’s story leaves the U.S. left short on original ideas but long on conflict between traditionalists and mpm.

Traditional leftism, for Kennedy, includes people who want to engage in action, to “do” things, to be “effective,” but it also includes intellectuals with a dangerous tendency to spin out visions of a just society or theories about how we might get from here to there. Kennedy’s traditional leftists often demand commitment and engagement from others on the basis of these theories of justice or the forces of history. Let’s be honest: in their fantasies,

\textsuperscript{66} Id. at 362.

\textsuperscript{67} Id.
most leftists would like to capture state power (or at least influence public policy). The intelligentsia fraction of traditional leftism is characteristically committed to "systematicity" (i.e., one or another version of structuralism) and to the self-serving but mistaken belief that valid social-change initiatives must instantiate theoretical premises. As Kennedy sees it, many traditional leftists believe they actually possess a complete and coherent, descriptive and prescriptive analysis of social life. These people are self-righteous, self-certain, sanctimonious, desperately seeking to be loved, and boring. Kennedy thinks traditionalists can make a useful contribution, but alerts us to the ever present danger that they will foist their incipient totalitarianism on the rest of us.

The left needs a counterweight to prevent traditional leftists from dragging us down. This important historical role is given to the mpm leftists, whose vocation it is to resist and undermine the traditional leftists' self-righteous demands for commitment on the basis of misguided claims of "rightness." Mpm leftists expose the traditional left's denial of contradiction and its naive faith in rationalistic and universalizing claims. Mpm's mission is not accomplished by doing things (like organizational work), but by creating transgressive artifacts and/or enacting transgressive performances that disrupt rational grids thus eliciting characteristic emotions associated with the death of reason, viz., ecstasy, irony, depression, despair, alienation, contradiction, desire, yearning, doubleness, loss, and nostalgia.  

Mpm's crusade to save the left from itself focuses with particular intensity on two defining features of traditionalism—"claims of rightness" and demands for political commitment based on them; and the traditionalists' characteristic attitude toward "reconstruction." Kennedy has a Pavlovian reaction to claims of rightness—no matter how qualified, partial, or tentative. "[M]pm ... is hostile to rightness in all its forms." At best, a claim of rightness is an ideological cover for regimentation and conformity, at worst, a crypto-totalitarian threat. Mpm believes leftists must "avoid[] either submission to or production of commitment, at any cost." For Kennedy, "a defining strand" of mpm leftism is "a particular attitude toward rightness[,] ... the attitude that the demand for agreement and commitment on the basis of representations with the pretension to objectivity is an enemy."

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68 See id. at 7-8, 339-44.
69 Id. at 11.
70 Id. at 350.
71 Id. at 341.
POLITICS OF CRITIQUE

By a “claim of rightness,” Kennedy means an assertion that a proposition about social life is not only true, but demonstrably true. For example: “settled and coherent international human rights law doctrine requires the conclusion that child labor under age ten is illegal,” or “history teaches that oppressed groups advance by making alliances rather than by proceeding in political isolation,” or “it follows from the philosophical concept of equal respect that the Fourteenth Amendment bans racial segregation.” Now, it is important to note that Kennedy has no objection to leftists asserting as truthful statements like “child labor under age ten is or should be illegal,” “oppressed groups need allies,” and “racial segregation is an evil.” A statement only becomes a claim of rightness when one asserts that it is demonstrably true on the basis of some sort of knowledge (e.g., legal reasoning, empirical social science, political philosophy) or as a derivation from uncontroversial, transhistorical rights. One can appeal to such ideas, and political movements can even find in them a basis for consensus, so long as the assertion is based on hunch, pragmatic judgment, moral intuition, group experience, specialized context, or a combination of these things. Leftists may even, indeed should, rely on learning and technical expertise, if appropriately blended with local knowledge and pragmatic judgment. Thus, Kennedy would not regard as a rightness-claim, and presumably would have no problem with, a statement in the following form:

From my vantage as (e.g.) an academic working in a relatively low-unemployment, developed nation, the performances commonly known as international human rights law doctrine can be interpreted, and I stand behind the interpretation that, child labor below age ten should be and therefore is illegal, although I acknowledge that other interpretations are possible and that even I might see it differently if I occupied a different epistemic position.

As a theoretical matter, this situated, self-critical, interpretive formulation of the child-labor claim is vastly superior to a necessitarian assertion in the form “proper legal reasoning requires result X.” The manner in which an advocate may want to phrase the claim in a given context—say, in a legal brief—raises strategic considerations, but I grant that the interpretive formulation is truer to what we know about the limits of human knowledge. Moreover, although I cannot prove it, I have a strong intuition that systematic falsification of truth can never serve

72 “A person with mpm aspirations would . . . try to counter or oppose the demand of leftists for agreement and commitment based on correct legal reasoning or on the existence of rights.” Id. at 342.
human liberation; therefore, I believe transformative lawyers ought not adopt, for supposedly strategic reasons, a routine of pretending to believe that legal reasoning impersonally compels determinate outcomes, when we know that it does not and cannot. Mpm criticism is right to challenge belief in the tight coherence and determinative power of legal reasoning. However, Kennedy makes an unexplained, unwarranted, and, in my view, counterproductive leap. Granted, many leftist lawyers are not up on the latest academic debates in epistemology, so they sometimes use vintage rationalistic phraseology to describe their work (which, as often as not, owes little to Enlightenment rationalism or grand historical narrative). Does it follow that they are enemies? Does it advance the cause of social justice to talk that way about friends and comrades?

As with rightness-claims, mpm mocks and transgresses the traditionalist fixation on “reconstruction.” By this, Kennedy means the characteristic left-liberal and traditional-left attitude that “critique is not enough” and that, unless the left “goes beyond critique” and presents “an alternative,” it condemns itself to political irrelevance. Therefore, the traditional leftist insists we “ought to be doing reconstruction” (even if the speaker has no ideas to propose). Moreover, the positive alternative progressives must offer cannot be just a series of isolated proposals for institutional change. It must be an integrated and institutionally elaborated vision of a better, more just society, grounded in a new model of civilization. Traditionalists often throw in a dose of moralism, asserting that critique is easy and fun whereas reconstruction is much more difficult and less glamorous, but is what “serious” leftists do.\footnote{See \textit{id}. at 360. Curiously, the commitment to the necessity of reconstructive vision that Kennedy attributes to the traditional left converges with mainstream strictures as to what leftists must do if they want to be taken seriously (or granted tenure). With tiresome predictability, center and right thinkers dismiss left-wing work on the ground that criticism of the status quo is illegitimate unless accompanied by a comprehensive and detailed alternative model of social and institutional relations. \textit{See generally} Fischl, \textit{supra} note 52. Of course, mainstream thinkers almost never impose an equivalent condition on their own right to present their work to the public. The hypocrisy is all the more irritating because the critical work dismissed in this fashion frequently contains interesting and thoughtful proposals for reform and social change (although not fully elaborated utopias).} The distinction Kennedy draws is between particular reconstructive projects (which Kennedy thinks are okay) and a project of reconstruction in the name of a totalizing, alternative model, with its own ethical foundations and institutional assumptions (not okay). It is important to emphasize that Kennedy is not opposed to reconstructive projects, any more than he is opposed to (nondemonstrable) assertions of truth. As a
matter of fact, most of the time, he is personally working on one or another reconstructive project, like campaigning for legal rights for Massachusetts tenants. What bugs him is the misguided attitude that we must do totalistic reconstruction, even if the best we are able to do at present is to advance local projects in our respective contexts.

As an intellectual style, reconstructionists "still believe in the 'systematicity' of social order and in the possibility of an ethical foundation."74 They insist we must construct "positive" theories to replace the mainstream ideas that we demolish through critique. Criticism is not and may not be an end in itself. The function of criticism is "ground clearing for the erection of new edifices of rightness."75 For traditional leftists, "it is self-evident that reconstruction should ideally always follow critique."76 "[T]he call for reconstruction is an affirmation of faith in theory as a way to rightness."77 "Positive theory" has the function of "representing social order in a way that would allow us to have some assurance that we are right to be left, and right to pursue particular strategies in favor of equality and community."78

Leftists who call for "positive theory" are just looking for a security blanket. They should know that the intellectual and political history of the twentieth century teaches that there are no security blankets. Kennedy can barely conceal his disdain. From the mpm point of view, "[t]he project of reconstruction (as opposed to any particular proposal) looks ... like the reification or fetishism of theory, in a mode parallel to the fetishism of God, the market, class, law, and rights."79 Traditional leftism is the cultural heir to the "bourgeois [project of] rightness, or reason, or the production of texts that will compel impersonally."80 It is an enemy.

C. What's Wrong with This Picture?

There is something quite odd about Kennedy's mpm polemic. A defining feature of mpm, he tells us, is its contempt for and uncompromising resistance to "the traditional course of leftist righteousness (whether in the mode of post-Marxist 'systemacity' or of identity politics) and ... the compromises of left liberalism."81

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74 CRITIQUE, supra note 1, at 360.
75 Id. at 341.
76 Id. at 340.
77 Id. at 361.
78 Id. at 360.
79 Id. at 361.
80 Id. at 341.
81 Id. at 339.
In other words, Kennedy stakes his political outlook on the traditional vs. mpm distinction. He thereby presupposes the coherence and power of this foundational distinction. But the techniques of internal criticism he so masterfully developed in other contexts reveal that this distinction is neither coherent nor clear. It is a false dichotomy, no more coherent or analytically useful than, say, the state action doctrine. For one thing, Kennedy never explains, or even addresses, why we should assume that the traditional-leftism dangers (righteousness and demands for conformity) outweigh the corresponding mpm dangers (narcissism and political quietism). Presumably this is a situation-sensitive ("empirical") question, which cannot be resolved a priori. Kennedy’s premise—traditional leftist righteousness produces more bad consequences than mpm narcissism—is entitled to no more weight, a priori, than a proposition like “contract enforcement maximizes the satisfaction of party preferences.” As Kennedy has taught a generation of law students, whether contract enforcement fulfills or derogates party preferences depends on the facts and circumstances of the particular case, such as whether or not any of a well-known variety of market failures is operating in the context. Similarly, whether Martin Luther King Jr. was right or wrong to believe he was doing God’s will, his faith empowered him to lead extraordinarily creative and brave movements for social change. To put it mildly, he, his associates, and his followers disrupted a lot of rational grids.

Moreover, Kennedy posits fixed correlations between traditionalism and self-righteousness, on the one hand, and mpm and transgressive spirit, on the other. These associations may or may not hold in a particular case or context. Granted, there are traditional leftists who still claim access to universal, objective truths about social order, like the unreconstructed Marxist-Leninists who hawk their archaic pamphlets on the fringes of political rallies with more than a trace of self-righteousness. However, not many traditional leftists fit this mold. On the other hand, and with the utmost respect, mpm contains its own share of arrogant and self-righteous bores. Nor do all mpmms reject in principle the possibility that occasionally a significant proposition about social order can be provisionally experienced as true. Ironic reversals abound. There are many examples of traditional leftists who set out to do systematic theory (e.g., “updating Marx” or “synthesizing feminist jurisprudence”), but whose work is so

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82 For readers unfamiliar with the state action doctrine, a basic building block of U.S. constitutional law, suffice it to say that this comparison is not a compliment.
creative and challenging that it explodes the canons of system and opens us to entirely new ways of thinking about problems.

In short, Kennedy's left is made up of straw people. In this instance, he ignores variety, complexity, and contradictory impulses. He sees only the worst tendencies, and overlooks the ways in which conflicting currents of left thought and activism learn from and make connections with each other. Absent from his account are the post-Marxists who try to take indeterminacy on board, or the identity-politics people who struggle to incorporate the critique of rights. The vast majority of the actual left consists of people whose theoretical work and/or activism operate at the local, contextual level, but who nonetheless see themselves as part of a broader, loosely bound, nonsectarian movement to make a better world. Most U.S. leftists are not self-certain systematizers. They see their activism as inspired by universal values of equality, democracy, and multiculturalism, but do not attempt to derive these commitments from grand theory, nor do they look to grand theory to provide determinate applications of or directions for these political values in particular initiatives and conflicts. In sum, most interesting leftists are on both sides of Kennedy's traditionalist vs. mpm divide.

When examined closely, Kennedy's line, if it is a line, is so razor thin as to be unhelpful for the purposes for which he raises it—analyzing the situation of the contemporary U.S. left. The problem is not like, say, sorting out the stylistic differences between Michelangelo and Cubism. The distinction here comes down to the difference between self-consciously contextual, pragmatic, partially intuitive claims and judgments, and claims and judgments that may be phrased in necessitarian rhetoric but which are mostly unselfconsciously contextual, pragmatic, and partially intuitive. Is this difference so important as to justify mpm's ferocious attack on the traditionalist enemy? All this sound and fury because one side is more attuned than the other to recent academic-theory literature? Even granting Kennedy the (debatable) empirical proposition that mpm's but not traditional leftists have learned to acknowledge the bias and instability of one's epistemic positionality, isn't the appropriate response to engage in dialogue rather than jihad? Ditto for the distinction between reconstructive projects and the project of reconstruction. If we set aside the rhetoric, the line between leftists who work on locally focused reconstructive projects (okay) and leftists who insist that we work on broad reconstructive projects (not okay) becomes fairly academic.
The incoherence of Kennedy's story is heightened by the fact that he offers two descriptions of the left, not one. In the patent version, traditionalism predominates (it is the common, garden-variety American radicalism) whereas mpm is "very much a minority strand." This version obliges Kennedy to describe the vast majority of the left—his movement—as uncritically swept up in constitutionalism and liberal rights theory and hopelessly committed to a belief that political action must be preceded by a grand theory that proves the transhistorical correctness of what we are doing. But his citation to examples of such leftists is very limited. Kennedy is either reluctant to or cannot make the case that the majority of people associated with the left fit that description.

So he sometimes shifts to a latent version or subtext, which is that just about everyone left-of-center worth considering is mpm except for a few rationalist holdouts. Then what, specifically, are the residual reconstructive, rightness-claiming, and systematizing projects against which we must zealously guard? Mostly, this is left to the imagination. When pressed, Kennedy identifies four categories of traditionalist work/activism: (1) reconstructive political theory (although reconstructive projects in social theory are acceptable); (2) left-liberal, essentialist identity politics; (3) reform initiatives oriented to the national level of politics; and (4) sectarian party-building. Now, left-liberal essentialist identity politics is actually not "leftism," within Kennedy's definition, so category two can be disregarded. As to category three, Kennedy again provides no specific examples, and, indeed, generously acknowledges that, say, lobbying or law-reform initiatives at the national level could make a valuable contribution, and that his preference for localist work is largely a matter of taste. At the end of the day, the "dominant strand" of American leftism boils down to a handful of academics who do grand political theory, say, enthusiasts of Jürgen Habermas's recent work, a handful of elitists who are immersed in the Washington, D.C., political scene, and members of a few surviving Marxist fringe groups. Does Kennedy seriously propose that this rag-tag band—maybe we're talking about a few hundred people—is the greatest enemy threatening progressive forces in the United States?

83 CRITIQUE, supra note 1, at 339.
84 I rely here, in part, on the discussion at the Miami symposium and conversations with Kennedy. The subtext I located in Critique is mostly a "presence by an absence," that is, Kennedy's frustrating omission in chapter 14 of textured discussion of concrete examples of leftist work, traditional or mpm.
Kennedy's traditionalist vs. mpm distinction and its associated subdistinctions (truth claim vs. claim of demonstrable truth, reconstructive projects vs. project of reconstruction) do reflect some important theoretical insights and differences. But they do so only in caricatured, polar extreme. In practical application, such as in analyzing the contemporary left, these distinctions are incoherent with an ideological spin (mpm = good, traditional leftism = bad). This is an ironic venue for Kennedy to end up in. An important contribution of contemporary critical legal theory, which Kennedy's own work greatly inspired, is internal criticism of the foundational dichotomies of liberal legal culture and political thought. A generation of legal critics has sought to reveal the incoherence and ideological spin of framing distinctions such as public vs. private, freedom vs. coercion, reason vs. passion, state vs. civil society, self vs. other, male vs. female, substance vs. process, object vs. subject, contract vs. tort, act vs. no-act, etc. A common thread in this writing is the observation that the opposites suddenly reverse in complicated and unexpected ways and that, particularly close to the boundary, the opposites blend. Kennedy's political discussion would be improved by self-critical application of this literature to his own account of the left.

CONCLUSION

Kennedy's advocacy for mpm has a point and makes a contribution to the intellectual history of the U.S. left. But the insights are drowned by a wave of hyperbole, ad hominem attacks, and ungenerous characterizations. Kennedy's account is locked into a compulsion to repeat and mocks any suggestion that we can go somewhere new. It would be one thing if this were all in good fun. But these polemical practices are costly and wearying, whoever deploys them. They needlessly insult friends, coworkers, and comrades, and they alienate potential recruits. They waste time, sap energy, and squander precious resources. In this particular case, polemical excess threatens to obscure Kennedy's great accomplishments in legal theory, which is where readers' attention should be focused.

85 See Gerald E. Frug, The City as a Legal Concept, 93 HARV. L. REV. 1057, 1075 ("Liberalism is ... a view based on seeing the world as a series of complex dualities."). See generally id. at 1074-78.
86 See, e.g., DUNCAN KENNEDY, The Stakes of Law, or Hale & Foucault!, in SEXY DRESSING ETC. 83, 85 (1993) (describing how legal realists taught that ordinarily both coercion and freedom are present in wage bargaining).