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OF DUNCAN, PETER, AND THOMAS KUHN

*John Henry Schlegel**

It would be a lie to say that I have always enjoyed Duncan's company. His private persona is a delight. An afternoon spent in my kitchen remains particularly memorable, as well as a brief interchange at the second Boston critical legal studies ("cls") conference and an incredibly kind intervention that helped to facilitate my being at the University of Miami Law School conference. However, from the beginning I have had trouble with Duncan's public persona—that of the missionary.¹ I really don't like missionaries, something that must come from growing up in the very liberal edge of American Protestantism. So, when faced with Duncan's public persona, I have always been torn between dislike of the show and the expectation that if I listen carefully, I will learn something.²

Why tell you these things, other than to insist again on the importance of the personal in intellectual history? Simply this: since the beginning, Duncan has chosen to work within a framework that can be readily understood by what he has taken to be his target audience of unbelievers. Thus, starting with his early piece on legal formalism,³ his has been an internal critique.⁴ Another example of this approach, albeit a very good one, is *A Critique of Adjudication: Fin de Siècle*⁵ ("Critique").

* Professor of Law, State University of New York at Buffalo. Laura suggested that I make some necessary explanations.

¹ I am not the only one to make this observation. In *A Discussion of Critical Legal Studies* Paul Bator said, "It's Duncan as a recruiting agency that's the problem, not Duncan as a professor." HARVARD SOCIETY FOR LAW & PUBLIC POLICY & THE FEDERALIST SOCIETY FOR LAW & PUBLIC POLICY STUDIES, *A DISCUSSION OF CRITICAL LEGAL STUDIES* 32 (1985). I am also inured to snide remarks about the company that I can be associated with.

² You will have to ask Duncan what he thinks of my company and public persona. All I know is that he was not pleased with my stance as an outsider objecting to the reproduction of hierarchy within our little crew. See Duncan Kennedy, *Psycho-Social CLS: A Comment on the Cardozo Symposium*, 6 *CARDOZO L. REV.* 1013, 1016 (1985).

³ See Duncan Kennedy, *Legal Formality*, 2 *J. LEGAL STUD.* 351 (1973).

⁴ An internal critique is one made from within the premises of the system under examination. External critique is made from some point outside the system; historical or sociological or economic standpoints come easily to mind.

⁵ DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1997) [hereinafter *CRITIQUE*].

Now, Duncan surely believes that proceeding by means of internal critique is the most plausible plan for making converts. I do not disagree. But, at the same time, I am convinced that his choice to approach the job of transforming an intellectual field as would a particular kind of missionary, through the world view of the intended convert—a demonstration of faith—rather than through the provision of health care, education, or other good works—a demonstration by witness—was and remains a mistake, though a mistake made not by Duncan alone and a closer call than I will make it out to be.

The choice to proceed by means of internal critique, to make sure that the audience could understand the message, meant that the best result that we in cls could hope for from our efforts was the marginalization by inclusion, and therefore clear subordination, that any dominant mode of thought can graciously offer to its worthy adversaries. Thus, I believe that my unease with Duncan's public persona is not only a snippet of my biography, but also a reflection of what seems to me to be a deficiency in his thought, apparent in the book we here celebrate by taking seriously.

In an effort to isolate and explain this deficiency, I wish first to go back to an old standby, Thomas Kuhn's book, *The Structure of Scientific Revolutions*.⁶ In the mid-1970s, when I broke into this racket, everyone was reading Kuhn. The world was awash in "paradigm shifts," "new paradigms," and sententious utterances designed to be "paradigmatic." For me, the most curious thing about Kuhn's work was the mechanism he used in his story to explain how paradigm shifts took place.

As Kuhn told the story, the "normal science" of puzzle solving accumulates "anomalies" that are systematically interpreted as consistent with the "dominant paradigm"—observation of this action of inclusion is apparently one of the ways to determine empirically what is the dominant paradigm—or are simply ignored, swept under the rug. Then, all of a sudden, for no generalizable reason, practitioners in the field begin to take these anomalies seriously and a sense of crisis ensues. Out of this crisis comes a period of "extraordinary science" during which the crisis is resolved, either by modestly reconceptualizing the existing paradigm or by adopting a new paradigm that explains the anomalous findings. More importantly, this crisis provides a new set of puzzles to which a reestablished "normal science" might pursue answers. Once established, this new paradigm will

⁶ THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

systematically interpret some findings as consistent that its adoption has rendered anomalous or will sweep these findings under the rug. But, never fear, that is how science works: a paradigm always directs inquiry in such a way as to make some things intelligible—and so showcased as examples of the progress of science—and others unintelligible—and so ignored.⁷

While Kuhn was routinely criticized for “glorifying subjectivity and even irrationality,”⁸ as well as for offering a “relativistic”⁹ understanding of science, the brouhaha over his book seemed to ignore one significant aspect of his tale. In his depiction of the overwhelmingly rational actions of real scientists who, like most workers, simply want some intellectual order in their lives, he had introduced into science, not subjectivity or irrationality, but magic.¹⁰ Try as Kuhn might to explain the phenomena that he had so clearly described, there seemed to be no way to identify beforehand the level of systemic disorder necessary for a group of scientists to decide that a given collection of anomalies brought their field into a state of crisis. Even worse, there seemed to be no obvious way to predict why one or another alternative paradigm would emerge victorious in the contest to replace the rejected one. It was as if some scientist at a cocktail party during an international conference got to yell first, “Crisis!” and then, “Paradigm Shift!,” as a result of which the field would be significantly reordered and science would then proceed along its merry way much as before. This would be the equivalent of reenacting on some larger stage the teenage ritual saved for hot summer nights where, at a stop light, one occupant of a car would yell, “Chinese Fire Drill!” and all would empty the vehicle only to thereafter change places in it and then proceed on much as before.

For me, this element of magic, along with Kuhn’s notion that differing paradigms were incommensurable, is one of the great strengths of his description of scientific revolutions. Since it is not argument that changes a dominant conception but magic, taken together these two things suggest the futility of arguing against the dominant conception of anything. Even if one sees a field or its practices radically differently and understands that anomalies have

⁷ It is clear, though Kuhn does not emphasize it, that another possibility could follow from this set of occurrences: a new discipline might be created to house the new paradigm if a significant disagreement about the plausibility of the new paradigm arose among the practitioners of the old one.

⁸ KUHN, *supra* note 6, at 186.

⁹ *Id.* at 205.

¹⁰ Roberto Unger, in another context, made it clear that a different way to think of this question is as a matter of grace. I have resisted the urge to follow him because I quite seriously doubt that lawyers are likely to be on the receiving end of grace.

really proliferated in that field, saying so over and over is not going to help. All one can do is either go forward in the way that one believes work should go on under a new paradigm, i.e., provide exemplars of good work under that new paradigm,¹¹ or just “make fun” and so “trash” work done under the dominant paradigm. In my work I have tried both approaches¹² with admittedly limited success¹³ even within the cls flock.¹⁴ And I still continue to do so.¹⁵ Of course, limited success is what one should expect since magic doesn’t work every time.

¹¹ Such, of course, is what Kuhn decided was the proper use of “paradigm” in his elaboration of that concept in his 1969 postscript to the second edition of his little book. That he consigned the rest of the content of that word to what he called “disciplinary matrices” ought not stop us from continuing with his earlier usage. KUHN, *supra* note 6, at 181-91.

¹² Which is not to say that I haven’t made the “mistake” of arguing against the existing paradigm from within it. However, sometimes the target is simply too tempting to pass up. See, e.g., John Henry Schlegel, *A Tasty Tidbit*, 41 BUFF. L. REV. 1045 (1993); John Henry Schlegel, *Does Duncan Kennedy Wear Briefs or Boxers? Does Richard Posner Ever Sleep? Writing About Jurisprudence, High Culture and the History of Intellectuals*, 45 BUFF. L. REV. 277 (1997).

¹³ See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995). This is my best attempt to do things as I would have them done under some other paradigm. For other attempts at working this way that now seem less successful to me, see John Henry Schlegel, *A Certain Narcissism; A Slight Unseemliness*, 63 COLO. L. REV. 595 (1992); John Henry Schlegel, *American Legal Theory and American Legal Education: A Snake Swallowing Its Tail?* in *CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE* 49 (Christian Joerges & David Trubek eds., 1989); David Trubek & John Henry Schlegel, *Charles E. Clark and the Reform of Legal Education*, in *JUDGE CHARLES EDWARD CLARK* 81 (Peninah Petruck ed., 1991).

For examples of trashing that seem to have gone better, see Alan Freeman & John Henry Schlegel, *Sex, Power and Silliness: An Essay on Ackerman’s Reconstructing American Law*, 6 CARDOZO L. REV. 847 (1985); John Henry Schlegel, *Better than No Teeth at All*, 50 MD. L. REV. 231 (1991); John Henry Schlegel, *Law and Endangered Species: Is Survival Alone Cause for Celebration?*, 28 IND. L. REV. 391 (1995); John Henry H. Schlegel, *Revenge, or Moon (Over) Your Law School*, 41 J. LEGAL EDUC. 467 (1990).

¹⁴ Both John Henry Schlegel, *The Relevance of Critical Legal Theory for the Teaching of Civil Procedure* (1981) (unpublished conference paper, on file with author) and John Henry Schlegel, *So You Want to Teach Critically, My Little Chickadee* (1982) (unpublished conference paper, on file with author) evoked not a yawn.

¹⁵ Of late I have begun to respond to the criticisms collectively called postmodernism or antifoundationalism by writing history, in my case the history of the American economy since World War II, in a mode that my colleague, Bert Westbrook, calls cinematographic. If concentration on the foreground detail makes understanding impossible, as all becomes trees, and concentration on the far background simply reproduces God’s-Eye Grand Theory, understanding might still possibly be had in the middle distance, as a horizon might be seen from a passing train, should one be willing to approach one’s subject with a sufficient understanding of the fallibility of one’s creations, a certain affection for one’s characters, and a certain ironic distance from the intentions of those characters. That such an approach is without various existing disciplinary paradigms can be seen from the criticisms I have received from those who work within them. Boiled down, their advice reduces to, “You need to write more like they do in my field.” That, of course, is what I cannot do.

Duncan seems to disagree with the conclusion that I have drawn from Kuhn's book, assuming that he has ever considered it, for this conclusion would suggest the ultimate futility of an internal critique of liberal legalism of the kind that Duncan has always pursued. This is not to say that his efforts have been for naught. At times I have found examples of his critique unbelievably breathtaking in the way that each clears away acres of underbrush to reveal the crisp, regular outlines of whole areas of law.¹⁶ Others, I know, have had a similar experience.¹⁷ Still, one can understand more fully why I find the pursuit of internal critique to be a deficiency in Duncan's thought by comparing his work on adjudication with work by his good friend Peter Gabel. Peter's work clearly points up both the strength and the weakness of the attempt to transform an intellectual field, not even by means of external critique, but from a position possibly describable as "aside from," or maybe "outside of," "after," or "otherwise" than the debate implied by the liberal legalist paradigm.

I would summarize Duncan's argument in *Critique* as follows. In many, perhaps most, cases the existing state of doctrine allows appellate judges to choose how to decide a case based on their ideologically conditioned attitudes toward the events or transactions before them. In so doing, judges have no lever and no place to stand, and so they just make up their answers, not randomly, but in patterns that can be accounted for by their sense of, not some abstract notion of a neutralized "policy," but of what are commonly thought of as "political" preferences of the kind commonly associated with being a Democrat or a Republican.

Duncan asserts that the process of political decision making happens often, but not necessarily, or even likely, always. He is careful to make it clear that he believes that even in appellate courts there are cases where all that is called for is application of the obvious rule.

And, he regularly makes arguments in the following form: "It may or may not be true that lawmaking through adjudication buttresses the status quo in the way I have described. It seems plausible to me, and worth working on, both at a theoretical and at

¹⁶ For publications that brought this reaction, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. (1979); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America—1850-1940*, in 3 RESEARCH IN LAW AND SOCIOLOGY 3 (Steven Spitzer ed., 1980); Duncan Kennedy, *Utopian Rationalism in Legal Thought* (1970) (unpublished manuscript).

¹⁷ My colleague, Betty Mensch, reports the same reaction and, interestingly, to the same works as in *supra* note 16.

a practical level.”¹⁸ Moreover, Duncan adopts a restrained view of “the political.” His is not an argument at the level of “Liberalism”—a grand political theory that undergirds all contemporary legal and political thought in an endless struggle to suppress unarticulated communitarian alternatives—but rather at the level of contemporary domestic politics—liberals and conservatives in common parlance.

Thus, in form at least, Duncan’s book is not designed to outrage. The concepts and most of the examples should be familiar to almost anyone reasonably well educated in law. Further, the argument is comfortably situated within the recognizable contours of American academic jurisprudence. The very chasteness of the presentation flags the book as an example of internal critique. Indeed, it is almost respectfully addressed to true believers in the dominant faith, as if to say, “Pardon me, old chap, but before you head out of the men’s room you probably should know that your fly is unzipped.”

Contrast Peter Gabel’s anything but well-known effort to cover the same terrain, *Reification in Legal Reasoning*.¹⁹ It is a truly great piece, intellectually challenging and psychologically insightful. At the same time, however, one needs to recognize that Peter writes from the perspective of existential Marxism flavored with psychoanalysis. His argument is thus recondite and his prose verges on the rebarbative. For several years I tried to teach Peter’s piece to first-year law students. However, in the end I gave up since my students simply refused to read it, and I refused to try the dirty, old trick of putting it on the exam. The real problem for most of them was that nowhere did the piece connect with their intellectual experience.

Peter begins his argument with the assertion that “[h]uman relationships within contemporary capitalism are characterized by a traumatic absence of connectedness that does not wish to become conscious of itself.”²⁰ Humans deny their lack of connectedness to each other because doing so is a condition for maintaining what little connectedness actually exists with others. Such connectedness comes from perceiving oneself in a social role constituted by capitalism, a perception that is shared by others. Each of these experiences of being in a role is also a perception of oneself as “thing-like”—the essence of alienation—each of these roles is thus properly seen as reified, that is, taken to be concrete

¹⁸ CRITIQUE, *supra* note 5, at 246.

¹⁹ Peter Gabel, *Reification in Legal Reasoning*, in 3 RESEARCH IN LAW AND SOCIOLOGY, *supra* note 16, at 25.

²⁰ *Id.* at 28.

when it is in fact contingent. At the same time the thing-like quality of each of these reified roles is felt by humans to be illegitimate, though denied to be such, and so there is always the possibility that the collectivity may “explode the whole thing.”²¹ In this circumstance: “The function of ‘the law’ is to give each of us the impression that the system operates according to normative law.”²² Therefore, “the law is a denial . . . of our collective experience of illegitimacy.”²³ Thus, the function of law is legitimation.

A judge like all other humans in the capitalist system, is “passivised within a role, fulfilling . . . ‘the judicial function.’”²⁴ In acting out this function, the judge begins with “a sense of the whole culture . . . that he passivizes into the movement of a quasi-object, such that each discrete situation of facts reveals itself to his mind against the background of the total ‘factual’ context from which the law has emerged.”²⁵ In other words, the judge apprehends the completely reified social structure characteristic of capitalism, denying the made, changeable contingency of social relations. This reified structure is understood as the normal movement of the social field, both in the sense of “normal” as “regular,” and in the sense of “normatively compelling.” In this latter sense, the reified structure embodies the “presupposed norm” that the judge thereafter will be called on to “apply.”

From the judge’s perspective, any legal dispute is a “disequilibrium”²⁶ or a breakdown in the system of normal social relations that must be set right. The judge sets things right by generating a conceptual analysis that embodies the presupposed norm that inheres in the reified system of social relations. To accomplish this task, the judge reifies “*legitimizing* concepts” drawn from the presupposed norm so that “it will appear that the functioning of the system is simply the factual activity of the legitimating concepts, thereby representing the system itself as legitimate a priori.”²⁷ This method affirms the status quo. Then, the judge reverses the movement of thought so as to generate “a process of re-experiencing the event itself as that event is signified through legitimating concepts.”²⁸ The point of this process is that it is a way of continuing the denial of the illegitimacy and

21 *Id.* at 29.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* at 31.

26 *Id.* at 33.

27 *Id.* at 37.

28 *Id.* at 41.

unconnectedness of social relations as they are experienced under capitalism by depicting the unalienated group in its imaginary form as a part of political theory.

Now, I am not foolish enough to assert that *cls* would have had a more triumphal trajectory had we all embraced Peter's construct for judicial decision making, for my guess is precisely the opposite. Nor do I wish to suggest that Peter's construct is in some way "better" than Duncan's. Indeed, casting an argument in prose that is readily understandable for most lawyers makes Duncan's construction obviously more plausible, if one's purpose is seeking converts. Even less do I wish to suggest that Duncan's conception is "pedestrian" while Peter's is "revolutionary." Indeed, when Peter's conception is stripped of some of its Marxist and psychoanalytic trappings, it somewhat resembles Karl Llewellyn's explication of how a judge uses "situation sense" to identify a "type-fact situation" in which an appropriate decisional rule is "immanent."²⁹ On the other hand, I do wish to suggest that Peter's construct is incommensurable with Duncan's in the way that differing paradigms are incommensurable.

Note first what disappears from Peter's world—rule and discretion, strict and liberal construction, law and politics, neutral principles, original intent. All of this is implicitly cast aside as somehow irrelevant. In their place are other markers of potential debate—alienation, roles, reification, presupposed norms, equilibration. All of these concepts are similarly irrelevant to Duncan's world. Yet some things are common to both worlds—most obviously questions of the appropriateness of individual norms in given factual situations. All three of these characteristics are indicative of the fact that these two understandings of judicial decision making are products of different paradigms for understanding law, paradigms as different as those classic examples of paradigms—Ptolemaic and Copernican astronomy.

If paradigms shift as if by magic, as I have argued Kuhn should have understood, and as I believe is implicit in the work of Foucault, whose explication of differing *epistimes* studiously avoids the very different work of explaining the transition between any two, then there is a deficiency in Duncan's consistent strategy of internal critique. Such deficiency is absent from Peter's "otherwise" critique of judicial decision making. Given the basic rule of argument that one never argues on an intelligent opponent's turf, it ought to have been apparent to all of us in *cls* as lawyers that the cost of working within an extant paradigm is the

²⁹ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

chance to shift a paradigm. To engage in internal critique is to abandon the transformative potential of one's work, a potential that might be set off against the real likelihood that any work outside the existing paradigm will sink unnoticed, like a bad bet on a "sure thing" in the fourth at Aqueduct.³⁰

Those not drawn to the futility of regularly tearing up parimutual tickets representing bets on sure things, who instead decide that internal critique is a more plausible approach to life and work, may consider the history of cls, for that history demonstrates the limits of such an approach. Slowly we lost momentum when, after two good ideas—the indeterminacy thesis and the critique of rights—we never came up with a third.³¹ I hold this eventuality against no one, least of all Duncan. He kept trying out candidates for that third idea,³² while I didn't have a clue.

However, looking back at our alternatives, I don't think that we missed anything obvious. Within the paradigm of liberal legalism, about all that was left was sustained work on the decisional biases in American law. We began this work with respect to law and economics; thereafter it was taken up by first the Fem-Crits and then the Race-Crits. However, internal critique could go only so far. We might work to increase our numbers and attempt to protect our juniors, but without that next big unassimilable idea we were going to end up as did American legal realism, marginalized in the act of being included. We would then become nothing more than one of the possible perspectives that

³⁰ There is, of course, the possibility that by "chipping away" at a paradigm bit by bit eventually there will come a time when the whole edifice will disintegrate. Laura Kalman argues that this is what was done to Realism by the 1950s "neutral principles" crowd. And it is just barely possible that Duncan believes that he is engaged in such a chipping away so that in time the demise of the liberal legal order will follow. All I can say is that I do not believe that this is how paradigm shifts take place. At least the one that I have observed—the adoption of plate tectonics in geology—did not take place that way, nor do I think that the adoption of relativity theory in physics proceeded in that way either.

³¹ Laura Kalman suggests that the notion that law was "relatively autonomous," neither directly tied to economic relations and the interests of the ruling class nor free of the influence of those relations and interests, an idea dragged into law from Neo-Marxism—was the third good idea and that cls floundered in its search for a fourth. She may be right. However, while I see evidence of a continuing impact of indeterminacy and the rights critique in legal scholarship narrowly conceived, I see no evidence of the continuing impact of the notion of relative autonomy there. Indeed, the only surviving traces of the concept seem to be in legal history, where it seems to me to have been co-opted in the service of a traditional doctrinalist scholarship rather than to be standing as a continuing critique of traditional practice, as is the case with the other good ideas.

³² For examples of this search, see DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983) [hereinafter KENNEDY, *LEGAL EDUCATION*]; DUNCAN KENNEDY, *SEXY DRESSING ETC.* (1993); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 *HOFSTRA L. REV.* 711 (1980).

can be found in a law professor's kit bag, just another take on current problems that must be dragged out when it becomes time for any topic to be looked at from all sides—in the name of fairness, of course—in the big tent that is the Association of American Law Schools.

Contrast the course of law-and-society scholarship in the years since 1978 when, in that first meeting in Madison, cls began as a potentially broad grouping of empirical and critical scholars. From the beginning reviled by hard-core cls partisans as conservative and positivist, law-and-society work has become less positivist and more left-wing in the past fifteen years. It remains a modestly vibrant, unassimilable force in the law schools, a standing challenge to traditional understandings of law.

Still, the law-and-society alternative to internal critique, much less Peter's example of an "otherwise" world, offers no easy promise of success. After all, transformations of intellectual life are magic. I have no reason to believe that had Duncan and the rest of us gone wholeheartedly down the road of external critique some lucky person would have gotten the chance to yell, "Paradigm Shift!" However, I do think that, from a missionary perspective, we might have garnered a wider range of adherents than we did by following our critique a bit further so as to reject the paramount position of normative legal scholarship,³³ and, instead, focus on the daily practices of lawyers, the various routine activities of law-trained individuals.

In focusing on the practices of lawyers, we might have begun with the simple question, "What do lawyers do all day?" In answering this question, we would have found that a few things become apparent. First, only a specialized few parse doctrine on a regular basis and fewer still make appellate arguments. Thus, our classes, and the thrust of our intellectual engagement, had better focus on something else.

Second, looked at critically, a good deal of what lawyers do all day, whether their practice is litigational or transactional, is negotiate bureaucracy. Their stock-in-trade is understanding the institutional imperatives of bureaucratic organizations. A systematic theory covering a range of bureaucratic structures would be a useful tool for graduates and the basis for a potent critique of law.

³³ This is, of course, the position for which Pierre Schlag has become well known, some might say infamous. See, e.g., PIERRE SCHLAG, *LAYING DOWN THE LAW* (1996); PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998); Pierre Schlag, *Normative and Nowhere to Go*, 43 *STAN. L. REV.* 167 (1990); Pierre Schlag, *Normativity and the Politics of Form*, 133 *U. PA. L. REV.* 801 (1991).

Third, looked at from a different perspective, another large part of what lawyers do is formalize relationships between legal actors, e.g., borrower/lender, acquirer/target. In doing this kind of work, lawyers focus on understanding the foreground of specific client concerns, the background of institutional structures, and the often modest, quite general law that, like the mote, lies in the middle distance. All three need to be unified in order to produce a set of documents that get the client's job done. Simple theories that would generalize the lawyer's job in this way would be of great assistance to new associates, eliminating much of the mystique associated with the laying on of legal hands, and lead directly to quite serious questions of the value of and limits to the services provided.³⁴

All of these and similar questions about the practices of lawyers are of serious interest to that great mass of law students who are disaffected from the enterprise because "law school is not about anything." It is just possible that they are also of interest to a differently disaffected group of law professors as well. We might have targeted these individuals rather than those sharing our generalized left politics. After all, if we were going to be marginalized anyway, we might as well have been marginalized with more friends.

In this sense, I think that it was and remains a mistake for Duncan and our crew to have followed Chairman Mao and placed politics first, as well as to have implicitly worked from the top down. It was wonderful to find our theories validated when, as we predicted, scholars, and even whole faculties, at fancy law schools reacted with horror to what we said. Such a confirmation of theory is heady stuff. But to the extent that the battle for the soul of the law schools was going to be won, it was going to be won in that great range of quite ordinary schools. As one also might have predicted, faculty and students at these schools were not turned *from* the Dark Side simply because faculty at fancy schools saw *us* as representatives *of* the Dark Side—precisely the reverse. This loss of potential adherents was unfortunate because our internal

³⁴ This suggestion should not be construed as a plea for more clinical education. Most of what passes for such in this country is an embarrassment. Clinical teaching is still wedded to the ideas that doing good works will redeem the dross that is the classroom, that theory is unnecessary to the practice of law, and that skills are context free. These are silly notions. While Deweyian "learning by doing" is sensible, in both senses, the point of Dewey's idea was that theory emerged out of practice. But one does not need "real clients" so to derive theory. Indeed, for this purpose clients are a distraction. When done in a rich context, the painstaking examination of a fifty-page merger agreement will do as well or better as a basis for building theories about practices than thwarting an eviction, at least if one is not primarily engaged in saving the souls of law students, a dubious activity in any case.

critique, of which this book of Duncan's is an excellent example, was hardly revolutionary. Whatever one may think of janitors and law professors regularly switching jobs, the real revolutionary idea would be to assign law professors and law students to law schools by lot!³⁵ None of us has ever suggested that in print.³⁶

³⁵ See NEIL DUXBURY, *RANDOM JUSTICE* (1999).

³⁶ Duncan, who suggested that janitors and law professors switch jobs in KENNEDY, *LEGAL EDUCATION*, *supra* note 32, reminds me that a proposal somewhat similar was floated in that wonderful piece of ephemera, *Lizard No.1*, published by AFAR, a group of cls members, and distributed free at the AALS meeting that year: "Third, the schools should abolish their own hierarchy, so as to create social justice for law teachers, equalizing financial resources and randomly reassigning teachers (within narrow regional preferences) until all the schools in a given area are comparable in wealth and at least initial prestige." AFAR, *LIZARD NO. 1* (1984). Of course, this is a long way from ensuring that there would be no significant difference between the student body at Harvard and that at Chapman.