NOTHING IF NOT CRITICAL

A Review of *A CRITIQUE OF ADJUDICATION {fin de siècle}*, Duncan Kennedy (Cambridge: Harvard University Press, 1997)

In many respects, Duncan Kennedy is the Holden Caulfield of the legal academy, and *A Critique of Adjudication {fin de siècle}* is the jurisprudential equivalent of *The Catcher in the Rye*. Like J.D. Salinger's protagonist, Kennedy reveals a deep alienation and loss of faith in social institutions which translates into an antipathy towards "phonies."[1] He expresses disdain, if not contempt, for the denials, duplicity and bad faith that he finds when he examines the rhetoric and actions of those who have assumed traditional roles in the social institutions with which he is most familiar — in particular, appellate judges, legal educators, lawyers and legal philosophers.

The similarities do not end there. Two other broad parallels are especially worth noting. First, like Holden Caulfield, Kennedy is not a nihilist. While Kennedy's loss of faith and alienation run deep, they do not overwhelm him. One gets the impression that he, too, would like to be a catcher in the rye; that is to say, that he would like to live in a world in which he didn't feel like a stranger, in which he could engage in activities which were transparently moral — such as saving the less able from imminent danger — and in which basic values never conflicted and choices were always clear. Such a world would, no doubt, exist where there was widespread acceptance of his leftist stance against human oppression. However, Kennedy also recognizes that in the real world, choices are not clear, basic interests and commitments conflict, ambiguity permeates the webs of significance which give meaning to our social practices, and politics has become factionalized. In this context, Kennedy expresses deep discomfort. While he has faith in his own values, he has none in reasoned resolution to political conflict. Consequently, while he remains true to his leftist allegiances and even declares his support, albeit qualified, for the rule of law, he is unwilling to develop a positive, reasoned manifesto for reconstructive change. Unlike most other legal academics, Kennedy is a strong advocate of critique without reconstruction. He neither offers blueprints for perfecting the status quo nor for achieving a future utopia, and in fact rails against those who would construct a grand theory of social order and progress. His alienation extends deeply enough to lead him to conclude that such attempts are fruitless, and always subject to internal critique. "In the end," he states, "we make the leap into commitment or action. That we don't believe we can demonstrate the correctness of our choices does not make us nihilists, at least not in our own eyes."[2] Philosophers and social theorists who attempt to demonstrate the correctness of their progressive programs are the particular targets of Kennedy's criticism. He does not attack them, except to challenge forecasts that losing faith in reason will likely

---

1 Indirectly, Kennedy acknowledges the influence of Caulfield by admitting, "It's true that the worst thing in the world, from my 1950s viewpoint, was to be 'phony.'" *A Critique of Adjudication {fin de siècle}* (Cambridge: Harvard University Press, 1997) at 346 [hereinafter *Critique*].

2 *Ibid.* at 362.

contribute to the rise of Nazism or Stalinism. Instead, he points to their uniform history of failure and refuses to engage in a discourse with them.[3]

The second parallel between Holden Caulfield and Kennedy is in their mode of self-presentation. Holden Caulfield, while not an inspiring figure, nor a beacon of moral light, is a memorable and enduring invention. His honest and unforgettable voice continues to resonate for all those who find themselves squeezed into a mould which they do not quite fit. Similarly, Kennedy has invented a memorable identity for himself. His authorial voice is rarely dull; his patterns of speech are fresh and original; he takes pains to avoid the rigid and dry conventions of academic writing, peppers his analysis with casual commentaries and provocative asides and animates his loss of faith with iconoclasm, and playful but challenging attempts to expand the boundaries of legal analysis. At times, these can be exasperating, but they also highlight the dimensions of the moulds into which we are squeezed and the insidiousness, perversity and banality of the rhetoric which those in the legal profession are trained to master and employ in cases which can have a momentous impact on our individual and collective lives.

While one may be justifiably vexed by the flimsiness of some of Kennedy's arguments and hypotheses, or by his lack of generosity towards other theorists, his greatest success is in reminding us of facts that legal and political theorists frequently neglect or conveniently forget: that politics has become a confrontational practice that pits group against group, interest against interest and ideology against ideology; that it is practised not just in the legislature but also in the courtroom and in the law school; and that in this context, political debate, having been compromised by factional interests, cannot aspire to identify solutions which represent a community judgment of collective well being. Moreover, Kennedy reminds us of this with an enviable dash of panache. His provocative prose draws the reader in, challenging him or her to defend basic assumptions against Kennedy's disruptive attacks, or to concede to them. Kennedy's success, however, is diluted by the book's weaknesses, on which I shall concentrate in the following pages and thereby risk creating the impression that my reactions to the book were more negative than was actually the case.

Most of the failings are not apparent in the critique of adjudication itself, but in the chapters which surround it. In these chapters, Kennedy theorizes about theorizing, and attempts to place the critique of adjudication within a broader critique of rights and reason, and to explain and defend the positions of scholars in the Critical Legal Studies movement. The actual content of these chapters, however, does not support Kennedy's ambitious intentions. In comparison, the flaws in the critique of adjudication are minor: for example, Kennedy presents as normal or commonplace, approaches to adjudication which are highly unusual, if not bizarre.[4] Also, it is often difficult to distinguish Kennedy's critical stance from less radical stances, such as those developed by legal

---

[3] Kennedy is particularly critical of those he calls "fancy theorists" who try to validate left-wing assertions of rights by using "the most sophisticated philosophical apparatus" (*ibid.* at 333).

[4] For example Kennedy introduces as typical the "bipolar judge" who tries to maintain his or her neutrality by alternately swinging between conservative and liberal stances (*ibid.* at 197).

positivists;[5] and thus, one could argue that Kennedy's main conclusions are not particularly contentious.

A number of explanations can be offered for the fact that the book has two distinct parts, one dealing with adjudication, and the other with objectivity, reason and other abstruse issues. First, as the title of the book suggests, Kennedy is as interested in explicating what a *fin de siècle* critique involves as he is in offering a critical phenomenology of judicial decision-making. In fact, from the emphasis and relative amount of attention devoted to this issue, one gets the idea that Kennedy is more eager to pull postmodernism into the mainstream of legal theory than he is to delegitimize the judicial role. Second, the general theoretical project is required to give radical bite to what would otherwise be a relatively tame critique of judicial decision-making. By attacking reason itself, Kennedy magnifies what is at stake. It might also be said that Kennedy is anxious to distance himself from the reconstructive social programmes of the American Legal Realists whose attacks on judicial decision-making form the underpinnings of his own views. Third, one can speculate that Kennedy saw himself as being open to attack if he presented a critique of adjudication without any explanation of why he restricted himself to a purely negative stance. Kennedy seems to recognize that critique without positive recommendation is open to being challenged as empty, unproductive and perhaps vainglorious. My guess is that the lengthy theoretical introduction and concluding chapters of the book are an attempt to defend himself from such an attack and are a retort to those who would ask, "So what?" Fourth, Kennedy sees a need to justify his postmodernist stance to leftist colleagues who challenge his rejection of theory, objectivity and reason. By the very act of entering the debate, however, and by attempting to offer a justification of his stance, I think Kennedy leaves himself open to the challenge that he has committed himself to a potential resolution of the debate, a possibility which his theoretical stance denies. Further, Kennedy's willingness to give reasons for engaging in postmodern critique seems inconsistent with his unwillingness to provide reasons for reconstructive change. If the latter task is seen as fruitless, then one would think the former is as well. In fact, how the concept of a reason for action, with its connotations of objectivity, can fit into a postmodernist project in which values are identified as purely subjective, is not addressed.

It is tempting to ignore Kennedy's commentaries on his postmodernist stance. However, since they frequently overshadow the substantive core of the book and threaten to jeopardize the very fabric of the text, one cannot simply pretend they are not there. At base, Kennedy offers three distinct arguments for adopting a critical posture: first, that the claims to objectivity attached to theories of adjudication and reconstructive manifestos are ill-founded; second, that criticism ought to be assessed according to standards other than those employed by the rationalist; and third, that

---

[5] Kennedy himself seems to have this difficulty. After outlining H.L.A. Hart's account of judicial discretion, he writes, in parentheses, "Oh my God, am I really just a Hartian?" and later states very uncertainly that his own account is distinguishable from those of British jurisprudes: "[I]t [his account of judicial decision-making] is not I hope, hope, hope, just what the Brits have been saying all along" (*ibid.* at 177).

critique is a tool which can contribute significantly to the politicization of social institutions, such as law schools. In the following pages, I will highlight questions which these arguments leave unanswered, questions which prevent me from regarding the arguments as particularly compelling. Before doing so, however, I shall turn to the critique of adjudication itself.

THE CRITIQUE OF ADJUDICATION: THE IMPACT OF IDEOLOGY

Kennedy's neo-realist critique of adjudication, the substantive core of his book, is effective, but relatively modest. The central theme can be articulated quite concisely: our society is polarized by ideological division. The important political issues of the day are conceived differently by different social groups, each of which promotes its solution as right, and other groups' solutions as wrong or misguided. The divisions, between right and left, between conservative and liberal are unlikely to be bridged in the foreseeable future. Moreover, we have committed ourselves to a political environment where political power is gained and relinquished by established groups which adhere to particular clusters of values. In sum, we "do" politics in a confrontational and competitive way. Within this framework, political debate is not constructive nor dialogical in nature.

Kennedy effectively hammers home the point that this is the context within which judges operate. He asserts that it is insufficient to note that judges have the opportunity to impose their "personal" political views on the law. This wrongly suggests that their political views are developed in a social vacuum. Judges too are ideological decision-makers, insofar as their judgments are influenced by outlooks which have been promoted by political factions. Judges, such as the bipolar judge mentioned above,[6] frequently deny that they are ideological decision-makers. Instead, judges claim that their stance is neutral and their views are objective rather than based on personal or partisan political views. By doing so, they act in bad faith. By allowing ideological stakes to be settled by the judiciary, a number of political results are effected which would not come about in a counterfactual world in which the legislature had the final say in all questions of law. Three particular effects are highlighted. First, the moderation effect: If an area is heavily governed by law there will be a reduction in the power of ideologically oriented actors to bring about significant change.[7] Because judges *feel* constrained by a duty of interpretive fidelity to avoid ideological decision-making that they would adopt if they were legislators, changes will be more moderate. This conclusion appears to me to be quite uncontentious, suggesting merely that settled law will have a powerful influence on decision-makers who see themselves as interpreters as well as law makers. Second, the empowerment effect: Kennedy claims that legal intelligentsias get to settle ideologized group conflicts through a mystified adjudication process, with less concern for the electoral process than they would feel as legislators.[8] This conclusion would also appear to be uncontentious, suggesting that lawyers and judges are impressed more by what they consider to be accurate

---

6 *Supra* note 4.

7 *Critique*, *supra* note 1 at 216.

8 *Ibid.* at 224.

interpretations of the law than by majority demands. Kennedy tries to animate this point by suggesting that the empowerment of legal intelligentsias by means of the grant of broad political powers to courts of appeal is a particularly American phenomenon not found in Western Europe. His sketchy contrast between the two arenas is astonishingly general and belied by obvious examples. For example, Kennedy states,

> The American intelligentsia has a naive belief in constitutionalism: the myth of the possibility and the reality of a national life organized in accord with a set of founding principles, along with the myth that the judge presides "over" politics.... The Western European intelligentsia has no confidence in sacred political texts whose mere interpretation guarantees legitimacy. It believes that "anything can happen," whether or not you have judicial review.[9]

But what about the homage accorded by western Europeans to the various civil codes, to the European Convention on Human Rights and to the Maastricht Treaty? These examples lead one to wonder whether this speculative foray into comparative law is well-conceived.

Third, Kennedy points to the legitimation effect which is that "the particular set of hierarchies that constitute our social arrangements look more natural, more necessary and more just than they 'really' are."[10] The scare quote is a device frequently used by Kennedy, especially in this context. For example, he also notes that "[t]he common law is perceived as 'less political' than it 'really' is."[11] As shall be noted below, references to reality and appearance are problematic because of Kennedy's postmodern stance. Basically, his point, again hardly controversial, is that a system of legislative supremacy would politicize the common law by creating more opportunities to unsettle it.

The focal concepts in Kennedy's analysis of adjudication are the concept of ideology and that of bad faith. Kennedy presents these concepts as the radical kernel at the centre of his theory, but ultimately they do not give it much subversive bite. Essentially, the message is that while appellate judges are ideological actors, their political choices are affected by the fact that they *feel* constrained by legal texts and past decisions.

Kennedy takes care to articulate what he means by the term "ideology" and to distinguish his usage from that of others. He notes that he is not using the term in a Marxist sense to denote a representation of reality that is demonstrably false, nor to distinguish it from a scientific and truthful representation. Also, Kennedy is not using ideology "in the bad sense, in which it indicates fanaticism, willingness to let the end justify immoral means out of a misplaced excess of righteousness.... The ideologue is a character, unable to compromise, a polarizer or splitter, the enemy of collective good feeling."[12] Kennedy defines an ideology as a universalization project of an ideological intelligentsia that sees itself as acting for a group with interests in conflict with those

---

9 *Ibid.* at 235.
10 *Ibid.* at 236.
11 *Ibid.* at 240.
12 *Ibid.* at 370.

of other groups.[13] This is not helpful, of course, unless we know what an ideological intelligentsia is. Perhaps his clearest statement is the following:

> [A] person entering American political life finds it organized, loosely into ideological intelligentsias, which are self conscious groups that identify with particular interests, while proclaiming particular normative abstractions, and which have, historically, worked for the adoption of specific positions on issues that supposedly reflect both the interests and the universal norms.[14]

Liberalism and conservatism are prime examples of ideologies because "these quite concrete positions in group conflicts are backed by more or less elaborate universalization projects, which allow advocates to claim that each of the more particular positions is an instance of correct application of general principles."[15] Given the endurance of the conflict between conservatives and liberals, it also makes sense to talk of our society as being ideologically divided along that axis.

Kennedy's discussion frequently involves the concept of "interests," but he does use the term consistently. Initially, he defines interests as "enduring orientations of groups to outcomes for conflicts."[16] This embraces more than selfish advantages or benefits. A group of altruistic good Samaritans who believe that it is always better to put the well-being of others before one's own, would be an ideological group in Kennedy's estimation since it believes that conflicts between self and others should be resolved in favour of the latter. However, in the above quotation, Kennedy also distinguishes between interests and normative abstractions and, at a later point, he differentiates ideology from policy on the ground that policy is presented as being in the interests of everyone. He states, "[p]olicy arguers present it as different from pure politics, or ideology, because it appeals to universal rather than particular interests."[17] In fact, throughout the text Kennedy fails to distinguish between conflicts between self-interested groups, and conflicts between those who have different visions of the social good and an interest in realizing their chosen vision. For instance, judges frequently refer to their lack of self-interest in any conflict which comes before them, and distinguish themselves from other political actors on that ground. They keep their distance from lobby groups and interest groups who seek access to those in power, in a way that other politicians do not, and frequently ground their legitimacy on a claim to *independence* which is based on their non-alignment when self-interested groups conflict, rather than on a claim of *neutrality* towards questions of the social good. We apply a broader concept of corruption to judges than to elected politicians, whom we see as having the task of promoting the selfish interests of their constituents. Kennedy's failure to distinguish between claims of neutrality and claims of independence diminishes the persuasiveness of his account of ideology. However, this omission is not in itself a fatal flaw, since Kennedy's primary aim is to mount a serious challenge to any claim of legitimacy by a non-elected decision-maker. Even if they avoid self-

---

13 *Ibid.* at 308.
14 *Ibid.* at 50.
15 *Ibid.* at 47.
16 *Ibid.* at 40.
17 *Ibid.* at 110.

interested decision-making, we can nevertheless ask why decisions by appellate judges should continue to represent and promote an ideological perspective, years, if not decades, after the government which appointed the decision-maker has lost popular support.

Kennedy's claim of widespread judicial bad faith is essentially that judges recognize the existence of a democratic deficit, and that this awareness must produce cognitive dissonance or denial, a psychological state which Kennedy describes in some detail, relying heavily on the language of popular psychology. A judge may give what he or she believes is the best interpretation of the law available, may be convinced that the solution is "right," and superior to any other available, but must nevertheless recognize that a person of a different ideological stripe would reach a different solution. In a world of ideological fragmentation, a judge's position as the legitimate voice of the community is difficult to defend. It cannot be defended by claims that the judge is not personally involved, is as objective as possible or is neutral.

Kennedy goes out of his way to attack the theory of adjudication promoted by Ronald Dworkin, in particular his attempt to tame the impact of politics by distinguishing between policy and principle, and his emphasis on the need to render judge-made law coherent. Curiously, however, he relies heavily on well-known attacks by mainstream legal theorists, such as Joseph Raz, Gerald Postema and Kent Greenawalt, and adds little to their critiques. However, he declines to follow the accounts of adjudication proposed by these theorists, asking us to take it on faith that they too are subject to internal critique.

Ultimately, Kennedy, the disillusioned existentialist, asks us to take a lot on faith — he barely mentions the legislative process and its defects; he fails to consider whether one could provide good reasons for entrenching political values, removing them from the fluctuations of interest group politics and posits, without question or defence, the apparently self-evident premise that participatory democracy is preferable to any system which relies on expertise or specialized elites. Instead, he shifts gear and asks us to ride his postmodernist critical roller coaster, with the promise of ecstasy rather than reasoned elaboration.

THE BASIC CONUNDRUM: REJECTING RIGHTNESS AND OBJECTIVITY

In almost his first breath, Kennedy presents the reader of *A Critique of Adjudication {fin de siècle}* with the conundrum which drives the whole book. He begins by identifying it as "a work of general social theory written from a leftist and a modernist/postmodernist point of view."[18] The introductory paragraph also expresses the hope that the representation of adjudication that he offers will be both "convincing and unsettling." On first reading, these two utterances may seem to be quite compatible and uncontentious. However, when Kennedy explains what a modernist/postmodernist (mpm) point of view involves, a paradox becomes visible, one which raises the question whether the text presents a coherent set of ambitions. In one of its guises, the

[18] *Ibid.* at 1.

conundrum is created by the author's self-identification as both a leftist and a modernist/postmodernist. As Kennedy explains, "'[b]eing right' in the rationalist sense has been a crucial part of leftism, and the mpm strand in the project is hostile to rightness in all its forms."[19] In another of its guises, the conundrum is revealed when Kennedy expresses the hope of presenting a convincing representation while advocating the rejection of standards of rightness. He writes:

> An important strand, a defining strand in the mpm project, is a particular attitude toward rightness.
>
> This is the attitude that the demand for agreement and commitment on the basis of representations with the pretension to objectivity is an enemy...[20]

If we are to be convinced by Kennedy's text, by his claims and his arguments, on what grounds should we be convinced if not by their rightness? For the reviewer, the major difficulty becomes that of determining on what basis to evaluate Kennedy's book if not according to a judgment that the claims and arguments that he makes are right. Does it even make sense to say: "This is a persuasive account of judicial decision-making, but I don't want to imply that it is right?"

Kennedy's attempts to articulate an account of why rightness is the "enemy" are the book's least successful parts, in that they offer a sketchy account of rightness, objectivity and truth, instead of a careful analysis. Kennedy seems to realize that he is stepping into deep waters and skims the surface in order to avoid more profound problems. At one point, for example, he admits that theories of adjudication must fit the facts, while nevertheless maintaining that this does not commit him to standards of objectivity or rightness. This is his explanation:

> It makes sense to me to say that adjudication exists as an objective reality 'out there', in the sense described above; 'it' is something that I, as the knowing and representing subject, am at the mercy of. It makes sense to criticize particular representations (other people's) on the grounds that they are false. It doesn't make sense to me to speak of the representation as objective.
>
> My notion is that the most you can hope for is that your representation won't suffer the fate of falsification.... But that your representation doesn't get falsified doesn't mean that it is 'true' or that it won't soon be falsified in spite of your best efforts and good faith...
>
> What the audience can hope for from (as yet) unfalsified socio-legal studies is not objectivity, but a 'hit,' generated by putting ourselves in relation to the trio of an object (such as adjudication), an author, and a representation by the author of the object. The goal of modernist representation is to produce an artifact, a representation that can produce ecstasy in, inform, and perhaps change the audience without having to be accepted as true in the mirror sense, indeed often by playing on the limits of representation (that is, of methodology).[21]

---

19 *Ibid.* at 11.
20 *Ibid.* at 341.
21 *Ibid.* at 16.

Kennedy claims that his position is not one of radical scepticism, nor a global internal critique nor an "impossibility theorem that invalidates or refutes the possibility of objectivity, rationality, subjectivity, or representation, or all of them at one blow."[22] That is to say, he is not offering a general theory of why objectivity is impossible. But in the passage cited above, Kennedy reveals that one of his concerns about claims regarding the rightness and objectivity of representations of aspects of the social world, is that when you attach such a claim to the representation, you are in effect claiming that it mirrors or reflects exactly the way the world is. Such a claim will be defective because an author will always be highlighting some aspects of the subject matter as important, while de-emphasizing other features. In other words, Kennedy seems to be stressing that a representation of social life will always be imbued by the theorist's subjective values. Just as cartoons of political figures can reveal more about their character than some photographs do, by grossly distorting looks and gestures, theoretical texts can aim for insight by relying on well-conceived exaggerations or understatement. Or, consider the representation of a landscape. While some may be tempted to say that only a photo-realist presents a true likeness of the scene, and that the representation by an impressionist is somehow defective as a reproduction of the scene, this ignores the fact that both the photo-realist and the impressionist have chosen to present the scene in a particular way. Both paintings reflect a way of looking at the subject matter. It is inappropriate and unduly restricting to adjudge one representation as true and the other false.

So far so good. But this view is hardly inconsistent with the views of mainstream legal theorists. For example, both Joseph Raz and Ronald Dworkin admit that their theories of law are not value neutral. Raz admits that his account of law presents law in a particular light, highlighting features which draw to our attention some important aspects.[23] Dworkin claims that his account of law is interpretive and explicitly develops an account of interpretive truth which has both descriptive and evaluative aspects.[24] Neither endorses a mirror conception of truth. At one point in his text, Kennedy makes a snide reference to philosophers who introduce a philosophical account of objectivity into their account of adjudication "thinking they are thereby clarifying things for us philosophical illiterates,"[25] without realizing that objectivity in this context has a specific legal usage. Kennedy is subject to a similar attack when he diverts his gaze from adjudication to theoretical objectivity.

Ultimately, Kennedy resorts to the claim that legal and political theorists, like judges, are ideologists. He claims that theorists who assert that certain matters are fundamental or who make claims that their interpretation is the best way to understand the social world, push their views on others in ways that do not allow for genuine or open discussion. Thus, we return to the idea that mainstream political and legal theorists, like judges, engage in universalization projects, which, as noted above,[26] aim to promote

---

22 *Ibid.* at 348.

23 See, for example, J. Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) at 50-52.

24 See, for example, R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).

25 *Critique*, *supra* note 1 at 24.

26 See text accompanying *supra* note 13.

the interests of some group in the name of the whole polity. While I argued that Kennedy's failure to define "interests" does not haunt his attack on judicial legitimacy, I think that it does weaken his attack against theorists, since they make no claims to legitimacy. Without clarity on the issue of what an interest is — does it connote self-interest, or merely a desire that social disputes be resolved in a particular way? — Kennedy's attack does not get off the ground. One gets the idea that Kennedy adopts the more cynical interpretation. In his discussion of legal education at the end of the book, Kennedy presents the language of rightness as "a script that promises social power to those who master it."[27] It is a point which could be applied to other contexts, particularly to the context of theory production. The connection between theory production and self-interest seems clear enough here. Nevertheless, it is a connection which is merely asserted. The reader is not provided with cogent evidence by which to assess the claim, and is left wondering whether deep cynicism is an appropriate reaction.

CRITIQUE AS PERFORMANCE

By getting caught up in an attempt to give a sketchy account of truth and a cynical account of theory production, Kennedy gets involved in a needless and confusing tangle. It is needless, because Kennedy could have relied exclusively on another, more effective gambit in defence of his critical project. This strategy involves presenting his work as a performance. Claiming that the most an author can hope for is a positive emotional reaction from his or her reader, and the more powerful the emotional reaction the better — ecstasy or despair are, apparently, preferable to a warm glow or mild dismay — he implies that a work of legal theory is a form of spectacle. It should be regarded as an artistic performance rather than a call to debate, reflective interchange or discussion, which is how other theorists regard their work. Kennedy seems to be suggesting that any reflection that his critique engenders should be personal reflection regarding the emotional response that the work produced. He explains that he rejects rightness as a criterion by which to evaluate a text or representation because "a set of emotions — irony, despair, ecstasy, and so on — ...are crushed or blocked when we experience the text or representation as 'right'."[28]

By offering this representation of his project, Kennedy can explain both his refusal to develop his own positive account of legitimacy and legal reasoning and thereby engage with other legal theorists who have attempted to justify the role of the judiciary, and his insistence that he restrict himself to the role of critic. When pursuing this approach, he unpacks his account of the nature of his critical project by presenting it as a "transgressive artifact," "that 'shatters' the forms of 'proper' expression in order to express something that those forms suppressed."[29] Another image on which he relies heavily is of critique as a virus. He tries to articulate the psychology of this type of critique as follows:

---

27 *Critique*, *supra* note 1 at 364.

28 *Ibid.* at 341.

29 *Ibid.* at 342.

> First, we might understand critique as a deliberate act of destruction aimed at the experience of rightness in all its forms. It succeeds as aggression, when the sense of rightness is destroyed in oneself or in others....
>
> Second, we might see mpm psychology as exhibitionism by which I mean the desire to take one's clothes off in public and find oneself applauded rather than punished.... The idea is to turn daily objects into art objects, and daily living patterns into theater or dance, in a way that disrupts both poles, rather than affirming their harmonious distinct existences, and still to please.[30]

Kennedy's comments about aggression and exhibitionism suggest that he sees himself as doing the equivalent of putting a moustache on the Mona Lisa, or placing a urinal on the wall of an art gallery. From this perspective, he does not have to offer an account of objectivity, truth or rightness, since they have no role to play in the evaluation of a performance aimed at stimulating an emotional response to his critique.

This role of performance artist suits Kennedy well. He is a consummate performer and stylist. His book is provocative, by which I mean that it does evoke strong emotions as well as raising interesting questions. However, the representation of theory as performance is not wholly satisfactory. The tensions become particularly apparent at those points where Kennedy admits that his scepticism is not total. For example, early in the book he admits, with two caveats, that he does believe in the rule of law. This admission leads the reader to ask some basic questions: Why does he not critique the rule of law? Why does he support it as a matter of political morality? What values does it embrace at its core that he thinks are so important? What concept of human well-being does he think it promotes? By refusing to answer these questions, Kennedy does not allow his beliefs to be subject to reflective scrutiny. He does not even show that he has himself subjected them to reflection. That Kennedy honestly feels the need to express his irredeemable loss of faith in some social institutions is not open to question. But his failure to turn a reflective eye to those factors in which he positively believes casts doubt on whether his loss of faith and his apparent cynicism are actually irredeemable. If Kennedy's alienation is redeemable, is it really a matter of enduring interest to us? In the end, if alienation is what it's all about, isn't Seymour Glass a more interesting character than the adolescent Holden Caulfield?[31]

CRITIQUE AND POLITICIZATION

In the conclusion to the book, where Kennedy stresses the strategic role of critique, a similar tension comes to the fore. He connects mpm critique with the politicization of inegalitarian and oppressive social institutions. It politicizes by exposing their claims to be pursuing neutral missions. At this point, critique is part of a call to action, but it is a very unclear call, since Kennedy is unwilling to commit himself to destroying these institutions, nor to wholesale politicization. Instead, he advocates a balanced approach. He writes:

---

30 *Ibid.* at 351.

31 See J.D. Salinger, "A Perfect Day for Bananafish" in *Nine Stories* (Boston: Little, Brown and Co., 1953); and J.D. Salinger, *Seymour: An Introduction* (Boston: Little, Brown and Co., 1963).

> Politicization has its attendant costs, including ... the risks to one's own career and to the careers of friends and allies that are present the minute one goes against this particular grain. Sometimes these costs are not worth paying. I am talking about a balance, not politicization at all costs, above all not "principled" politicization, which to my mind is just another way to be right.[32]

Kennedy's unwillingness to specify the factors which may outweigh the need to politicize and fight against oppressive institutional practices renders it difficult to know when he thinks politicization is an effective strategy. In effect, his message is to fight oppressive measures when it is worthwhile to do so. Despite his antipathy to the concept of rightness, he seems to end the book by calling on those who share his alienation to do the right thing. This is neither insightful as strategic analysis nor powerful as rhetoric.

Donald Galloway
Professor of Law
University of Victoria
Victoria, B.C.

32 *Critique*, *supra* ntoe 1 at 376.