gods. Og det er nøkkelen til å forstå hvordan de brukes i praktisk argumentasjon. Taleren vil at lytteren skal ta i bruk kunnskap han allerede har. Taleren må ha tillit til at når en forståelsesramme lanseres, så vil lytteren være i stand til å lese den til også i den øvrige presentasjonen av saksfakta.

Dommere er sjeldent skrevet med en sluttet argumentasjon med vingende logisk gyldighet. I saker der det er strid om saksfakta er det vanligere at dommen overlater en del opplysninger til leseren sammen med et anbefalt makroforfatterperspektiv, så får leseren selv prøve sammenhengen og se om han lar seg overbevise, eller ikke lar seg overbevise. Og her kommer vi tilbake til hvordan straffeprosessen fungerer som kriserite, som kollektivt røp etter mening, som felles ryddelseskolon. Den problematiske hendelsen domstolen må ta stilling til, blir forstått i lys av typiske hendelsesforløp. Det er makroforfattene som er bærere av de moralske dommene. Det er ved å klassifisere hendelser og handlinger inne i kjente og delte makroforfatter, at vi tillater oss å tilskrive skyld. Og det er å plassere skyld straffeprosessen først og fremst kan gjøre for oss.

Litteratur:

Honko, Laurie: Riter: en klassifikation. I Fataburen 1976, 71-84
Kjeldsen, Jens E.: Rostrikh i vår tid: en innsikt i moderne rorsvik teori. Spartacus 2006

o as a lawyer, live in this society and therefore are personally responsible for justice you create or help to reproduce in it, always.«

intention originally was to structure the interview around two major poles: more »public« one would have directly addressed Critical Legal Studies (CLS), its history and theoretical and generational underpinnings; the would have been more of a »private« character and dealt with Kennedy’s work and assessment of its successes and (few) failures. However, during the (as probably will be noticed in the following), I soon discovered why Ken-

a legal thinker who more than others has contributed to the relativization of inflection between »private« and »public«: the two poles I had planned sud-

isappeared as soon as Kennedy started answering the questions, creating a steady for a beautiful depiction of the history of CLS and personal experiences inseparable elements. In this way, the interview confirmed once more one basic legacy the Kennedy’s work: for the very social and political nature of we cannot observe the law and its (un)developments as passive and neutral dis- whether we want it or not, we are all always social and political ani-

mated therefore, necessarily participants responsible for the good or bad in the, more generally, in society as targeted by legal regulation.

11: Professor Kennedy, I was thinking of structuring this interview around two major discussion: the first, more »public« one concerns the history and legacy of the CLS mov-

emite the second is more »private-oriented,« focusing more on your works. As I said, group of questions will deal with one of the things for which you are famous, that is one of the fathers or mothers, if not the father/mother, of CLS.

art, I was wondering whether you could offer the reader a general assessment of the CLS happened in the general history of Western legal thinking. In particular, that seems to trouble historians of legal thinking regards the nature of CLS: Was it a natural development of a certain environment? For example, was CLS a sort of direct offspring of the pragmatic and politically oriented approach typical of a certain part of legal thinking from the end of 19th century and fully developed by the American dists?

an we consider CLS a sort of random product, not so heavily determined by specific, historical and legal circumstances but mostly by the fact that certain people were born to work in their work? Should CLS then be considered a product of a sort of chaos theory of an evolutionary theory? In short, is CLS the »natural son and daughter« of its sort of deterministic product of a certain socio-political environment, or is it a stochastic sort of solitary Napoleonic figure in the landscape of the legal thinking?

ly: In order to answer your question, I think I can give you a very short version of the conditions that are part of the explanation of Critical Legal Studie United States. However right from the beginning I think it is important to he fact that the critical approach to the law is not something that was hap-

ningen only in the United States. It is clear that American CLS came into existence and had its first beginnings in a very specific time and place, which was the Yale Law School in the late 1960’s, and there is a whole book by Laura Kalman about Yale Law School in the 1960’s.² A group of students between 1967 and 1972 at the Yale Law School, and two assistant professors who were denied tenure, that is Richard Abel and David Trubek, were the group of people who were responsible for creating the organization CLS in the late 1970’s. Of course, they had found some allies who came from other places, but there was no other group that could be seen as the core the way the Yale people were.

What happened during this period at Yale Law School between 1967 and 1972, approximately, paralleled developments occurring all over Europe as well as in other parts of the United States. First of all, there was as a similar generational development and it is important to stress that generational politics are crucial to understandings CLS. It is on one level just the legal manifestation of a generalized, generational, intellectual, political revolt that occurred in all the developed countries of the world, the First World at least, in this moment. Moreover, in France at exactly this moment the critique de droit movement emerges, and in Italy there is the uso alternativo del diritto approach.³ So the question »why did it occur in the United States?« is actually misleading because a critical approach to the law was occurring in these other places as well.

There are many ways in which CLS was different from the critique de droit movement and also different from uso alternativo del diritto. There was no communication between these movements at any point either in the late 60’s or later. Only in the 80’s, after critique de droit and uso alternativo del diritto were basically over while CLS was flourishing were there contacts between CLS people like myself, and the prior leaders of critique de droit and uso alternativo del diritto.

We can then see the idea of a generalized generational revolt that is both political and intellectual. The American moment of student activism was, as was the European 68, a genuine moment of totalizing critique and activism. This activism that ultimately ten years later produced CLS was about the draft, conscription for the Vietnam War, it was about race politics, and it was about the beginnings of feminist politics.

All these were factors in student activism but it is very important to stress the fact that it was also what you might call civil society activism, that is it was an educational rebellion, against education everywhere in Europe as in the United States.


s a major aspect not the politics of the state, the politics of war and peace, tics of legislated distribution, but the politics of civil society and specifically tics of education, with the politics of patriarchal authority in the family as a It had an opening in the direction of the politics of the so-called »private although that was undeveloped in the period between 1967 and 1972. American second-wave feminism took off and produced an intense and politics of the private sphere. The generational revolt happened all over the student activists of the late sixties were, of course, a minority among law ±. A subset of the minority, a small minority of the minority, became legal cs. They had to then get jobs and get tenure, and the people who were fi-professors who were dismissed, had to get new jobs and get tenure in their s, and that had happened by 1977. So between 1972 and 1977, there is a which the people, who were law students between 1967 and 1972, became 301 professors. This minority who continued in academia were the people ready as student activists had seen themselves as having a specific legal intel- agenda as well as a general political activist agenda.

people hooked up with people who had gone to a variety of other schools, arly with a new network of young professors that had come into existence at Law School. The founders of CLS in 1977 were the Yale group, the Har- up, both consisting of assistant professors and recently tenured professors, of their students, who were already themselves entering the market to law teachers. You can then see how the question of how CLS came into is a completely different question of how it flourished after 1977.

er crucial and different question would be: why was it that the Yale Law produced this set of people who could then be the leading figures of the mo-when it got started in the late 1970's? I think the answer to that is connec-w factors. First, the Yale Law School was supposedly the most liberal law in the United States and therefore the generational rebellion that took place Law School was generational rebellion against the dominant modes of progressivism, not against the right, not against the conservatives at all. erational rebellion that took place at Yale was a rebellion against the cent-merican political intelligentsia ruling elite power.

uture CLSers went to Yale went because it was so progressive, and the pe-58 is the crisis of exactly that mode of American progressivism. These stud gone there because it was a leftist sort of a place but then they arrived at went when moderate leftism appeared to be compromised by its unwilling-confront sufficiently seriously the center and center right powers that were the war and failing to respond seriously enough to the race issue. Yale the crucible in which the progressive intelligentsia, discredited by the war and by their failure to act decisively in the racial crisis, met the young who were looking to them for leadership but were disappointed and turned against them.

As to the second factor explaining why Yale Law School produced the leading figures of CLS, this consists in the fact that it was pedagogically retrograde. It pro-voked student rebellion because, as a pedagogical environment, it mirrored the authoritarian character of American moderate progressivism. American moderate progressivism, on one hand, was in the public sphere the moderate left, but, on the other hand, it was completely conventional when it came to institutional relations and open therefore to the anti-authoritarian critique typical of the 60's.

I think that the roots of CLS can be traced to the internal contradictions of American moderate progressive liberalism as both something that pulled in and attrac-ed people who liked it for its progressivism, and then came up against the moment of its crisis, which is the beginning of its historical crisis in the United States. Over the next fifteen years, this mode of American progressivism was gradually crushed from two sides, first – and only briefly – by us, the radical left, and then by the right, by the Reagan/Thatcher universe. So first we seemed to be discrediting and challenging American progressivism, but then basically it turned out that we were irrelevant, historically irrelevant, and it was actually the reaction against us by the right that ultimately brought the liberals to their knees by the 1980's.

Zamboni: Do you mean that the liberals, or American progressivism, were sort of squeezed between the CLS critique from the left, which attacked them for their moderate features, and the right that while pointing at you as the enemy, did so in order to pass through and destroy the liberals' position?

Kennedy: Exactly. The right did not care about us in CLS. They merely used us as a symbol. So they ran against us, but their real enemy was the moderate liberals who, on their side, experienced us in CLS not as their allies but as their enemies. The moderate liberals thought we were their enemies. As you can see, this context is not an unfamiliar context to many European situations, where there are resemblances to the American experience.

Zamboni: As to the European experience, I think this is true but only to a certain extent. If I draw a comparison with the two situations I am more familiar with, namely France and Italy, there was certainly a sort of deep sense of dissatisfaction towards the institutional and traditional left wings, represented by the socialist and communist parties and, to some extent, by the historical trade unions. Similarly to the United States, in these two European contexts the major attack by the critical scholars, both inside and outside the academia were also directed towards the authoritarian way of teaching and doing politics. However, these enemies were represented by the traditional conservative or right-wing forces, like the Christian Democrats in Italy and the Gaullists in France.
So the critical scholars were fighting further to the right than their American counterpart. I think that was very true, but there is another major difference the European and American critical experience from an organizational view. If one looks at the factors that made it possible for CLS to flourish and rapidly from the late 1970’s through the 1990’s, one can see that for 15 years, CLS was extremely successful as an organizing project, more such as the critique de droit movement or the uso alternativo del diritto. As Finnish or northern European equivalents, I have to say I have no idea what it is. A Northern European CLS network did come into existence in the mid 1990’s, but I really know nothing about it.

I unfortunately am neither very familiar with the history of critical legal thinking in the context, particularly in what you have designated as to its 60’s roots in the late 60’s. However, my probably wrong impression is that in Scandinavia (i.e. with the Finns) from the 60’s until recently the critical approaches to the law coming left have always been somewhat absorbed and neutralized by the institutional structures by the Social Democratic ideology (at least according to the American and rest of political standards), such as the political spectrum, the trade unions, the state bodies (including academia) and student organizations. In other words, my impression is Scandinavia, the potential Crits and their potential disruptive messages were already from the very beginning into a generally (according to the American perspective) leftist traditional institutional apparatus.

Differently, the American Crits were in rebellion against that very model of a Democratic formation, that was what we were in rebellion against, and as not destroyed until the 1980’s, because it was only in the 1980’s that the managed to destroy it. However, looking at the history of CLS in the United States is possible to observe another very important factor that made it possible and this 68ish moment after a pause of six or seven years, starting again in the 70’s and through the 1980’s. Interestingly enough, this too is a generation, we could call it a second generational story after the first generational, the generational politics of the late 1960’s I have just spoken about.

Second generational story is specific to America and to American legal education in order to make my point clearer I am going to give you some stats. Between 1970 and 1990, the number of ABA accredited law schools expanded from 146 to 175, so this is adding 29 law faculties, and the number of law students from 82,000 to 135,000, adding 53,000 law students. Between 1975 and 1990, the number of women law students grew from 7,000 to 55,000, from 8.5%. Between 1975 and 1990, the number of students of color grew from 17,000, an additional thousand. The number of full-time law professors between 1970 and 1990 grew from 2,300 to 5,300, almost double. The number of full-time women rose from 517 to 1,338 and between 1985 and 1990, the number of full-time minority teachers rose 301 to 512.

What do all these numbers mean? In the United States during this whole period, i.e. between 1975 (when CLS was getting going) and 1990 (when CLS more or less came to an end as a movement), many students became law professors. Typically after they graduated from law school, when they were 25 or 26, they worked for a couple of years and usually became professors at about age 30, a process which nowadays is no longer true.

During this period of time, there was then a gigantic influx of thirty year olds to legal education, into a system of legal education that was relatively highly hierarchical, that is the schools were rigidly ranked in a single national system, inside law faculties, the organization was also relatively rigid and hierarchical. Just as you can see that the first wave of CLS after 1968 are the early baby-boomers, you can see that the second wave, that is the people who create CLS as a mass academic organization after 1978, this wave was made by the late baby-boomers. They are the people who are at the very end of the demographic and they are flooding in, radically reducing the average age of faculties and crowding the older and established and more authoritarian figures from below.

You can then see how this is a classic situation of institutional vulnerability. The older generation of CLS people, who are by now arriving at the age of forty, are members of the prior generational revolt and they ally with the new coming arriving people who were moreover their students. So the first generation of baby-boomers has become tenured law professors, they have young students who they encouraged to become law professors, and that means that within the arriving cohort of the young, there are many people who are already students of the prior generational rebels.

However, there is one more factor to take into consideration, this too of a demographic nature. If one looks at this period, one sees that law faculties are expanding, just as jobs in political science, sociology, anthropology, history and English literature are disappearing. Just as the law faculties are sucking in vast numbers of new, young professors, the opportunities in traditionally politicized social science disciplines are disappearing. In other words, American higher education is shifting radically after 1975.

5 "The baby boom" commonly refers to the unusual spike in birth rates which took place following World War II in several English-speaking countries, e.g. the United States and Canada. Baby boomer is then a term used to describe a person who was born during the post-World War II baby boom, in particular between 1946 and 1964.
reason why the opportunities in the traditional faculties are disappearing is early baby-boomers took all the jobs, all the new jobs in anthropology, history, political science between 1970 and 1980, so that there are no jobs. The young people are being driven into law because the early baby-boomers, the generationally rebellious baby-boomers, are now clogging the arteries of academic system. I think this might be what you were calling in the beginning a sort of necessity or deterministic explanation of why CLS was born.

II: I was exaggerating a bit. I was attempting to somehow stretch the framework of the birth of the CLS movement to two ideal-typical poles of possible iom, namely deterministic vs. stochastic.

y: If we use a deterministic ideal type, it is then possible to identify the possibilities that made the generational rebellion behind CLS possible: in this case a large number of jobs, while a large number of the people who took them had an element of disappointment with the possibility of becoming a professional intellectual academic in one of the traditional fields where progressivism went to work. The leftism of CLS had these two moments, that is after 1967 after 1975, each of which is profoundly generational. One can say that the leftism of CLS was always partly political and partly very much familial, that is it had a strong element of defiance of the patriarchal structures of a civil society institution. One could say that the whole CLS thing followed the fact that when World War II was over, the Cold War permitted an unprecedented expansion of the American economy producing waves of suburbanization that increase in the birth rate. You can see that everything is just following from here.

e: A generational or familial factor, there is another factor, this one at the level. Another reason for the success of American CLS was the political, which was different in profound ways from the political strategies of uso del diritto, of the critique de droit movement, and also of the leftism in an higher education, in either economics, anthropology, sociology or history. I would describe the political strategy of CLS was, at least from the point of view of European politics, utterly and totally eclectic from the beginning. It was, at any point. The notion that CLS political strategy was a unitary attack was, it was consciously an eclectic mixture of different kinds of Marxism (this was always a minority strand), different kinds of 60's civil society rebellions, American pragmatist traditional progressivism, the influence of European and then European post-structuralism, and finally, CLS quickly absorbed space also for race and gender-based critiques.

LS was never unitary and never had the dimension and ambition of being another 68ish aspect one could say. CLS was not programmatic in the sense that it was not oriented to a concrete reform program that the state might adopt and in terms of legal education, it was mainly anti-authoritarian, as opposed to being programatically transformational for legal education. The contributions were not oriented, as was the critique de droit, to the idea of taking power through the mobilization process and then bringing about an institutional transformation based on a program; this was not the CLS idea. The basic program of CLS was to establish multiple forms of alternative leftist analyses. Multiple forms here means leftist analyses at the level of legal science, inside the discourse of legal science, while at the same time establishing multiple alliances in particular law faculties designed to transform the educational culture.

Zamboni: By these last words, it appears that CLS was born with the idea of producing it: very assassins, i.e. the sons and daughters that in their turn would murder CLS, such as critical race theory, feminist jurisprudence. Would it be possible to state that, at the end of the day, the very goal of CLS was not to produce its own program of critique, but instead to produce an environment (or in Bourdieu’s terminology, a field) that then would nourish and stimulate other movements and their programs of critique?

Kennedy: The idea was to create an environment that would welcome and nourish many different forms of critique. During the fifteen-year period CLS stretched over, that is between 1977 and 1992-1993, the people understanding themselves to be the influential collective leadership were a collective leadership representing quite different strands of critique. It is only after the first six or seven years, I would say after 1983-1985, that the impact of the arrival of the waves of women professors and African American professors became large enough to impact the organization in a serious way. Between 1983-1985 and 1992, a major internal dimension of the life of CLS as a movement became the inner conflicts and collaborations around race issues and gender issues. One source of internal division was then among white men, men and women of color, and white women.

However, there was a second theme that was just as important as race and gender, namely the crisis of traditional progressivist ideologies and the arrival of a very challenging new (leftist) form of post-structuralism or post-modernism. In other words, the other internal divisions within CLS dealt with the relationship between the younger generation of post-structuralist, post-modern oriented white men and the prior generation of 68-69 white men, most of whom were either post-Marxist or post-liberal. This prior generation was either disappointed Marxists who had adopted a new theoretical orientation, or disappointed moderate American progressives who had been radicalized. The old people were devoted to internal critique, and in that sense they were not over Marxism, but definitely no longer positivist Marxists — they were more in the tradition of the early Marx. The Theses on Feuerbach
have been much more important to them then Volume II of Das Kapital, if I
tie that way.\footnote{6} happened between 1983-1985 and 1992 was a series of multiple, cross-
conflicts. For example, you could be an African American woman post-
alist allied on the one hand with other women and with some African Amer-
ican, but also with some young white post-structuralist men, against some of
white men, and gender traditionalist African American men. There was
possible potential combination of identity politics with ideological and
logical politics and this was the success of the organization for about seven
years, during which we had a very large number of events. They were small
such as summer camps that lasted for a week or two with ten or twenty
and an intense, intellectual, and social interaction, and they were very large
with several hundred participants at a large congress that would go on for
three days. These events occurred with great regularity, at least two every
in different levels and scale, in which these internal issues were what we
d. The development of each of the different internal strands was affected by
action with the other strands during this period.

\footnote{6} I know Professor that it is always difficult to determine «who is guilty» in the case
tellectual murder, but I was wondering quite simple question, which I am sure
very complex answer. Who put an end to the CLS experiences? Were internal factors,
scalet of divisions and conflicts between the different CLS strands, a feature that,
tinted out before, was in the very nature of the CLS during the 80’s?
d CLS cease to make the «headlines of the legal newspapers» due to external or envi-
changes, e.g. the establishment and consolidation though the 1990’s of a «conserv-
ial and political culture, or at least a less radical and more moderate attitude towards
al, social and legal problems?}

y: I would say that a very basic part of the narrative of the CLS story is that
point, this experience, which was enormously positive but also enormously
, produced both a lot of ecstasy and a lot of rage, and in the end lost its
ve capacity, i.e. it fell apart. The network disintegrated into its component

\textbf{Theses on Feuerbach} comprise eleven programmatical notes, written (almost in epigram-
form) by Karl Marx in 1845, but published only posthumously in 1888 by Friedrich
sls. These notes are considered an example of the «Young Marx», i.e. a Marx who is still
process of transition from the Young Hegelians' focus on philosophy to his mature for-
economics, as developed in Das Kapital, published in 1867 (Volume I), 1885 (Vol-
d) and 1894 (Volume III). In particular, the Theses on Feuerbach stress the idea that the
ture philosophy can be achieved by political action: «Philosophers have hitherto only
etered the world in various ways; the point is to change it.» See http://www.marxists-
archive.marxworks/1845/theses/index.htm (last visited January 1, 2009).
Kennedy: That is an interesting question, and I guess the first thing I would have to say is that I do not think of myself as putting a particular emphasis on legal education. I wrote a pamphlet, called *Legal Education and the Reproduction of Hierarchy*, about legal education (it has recently been published as a book, with a new introduction and some commentaries) and some articles on the same topic, but I have written probably fifty law review articles, and several books, and only a small minority are about legal education. So I do not see myself at all as mainly a person who is writing about legal education. However, I do believe that writing about legal education has been an important part of the strategy of the creation of CLS. I am not apologizing for being interested in writing about legal education, it’s just that it is not my central preoccupation. I do not know why a person would think that if they were familiar with my work, which seems to cover a very large variety of topics.

For example, I have written a lot of doctrinal articles. That is, articles about contract law, property law and tort law, from a critical perspective, which are about doctrine, that is they are about what the rules are. I have written a whole bunch of Law and economics articles that are about the actual anticipated consequences and effects of different legal regimes. I have also written a lot of legal history, or the history of legal thought, and a good deal on legal theory (including CLS critiques of writers like Hart, Kelsen and Dworkin). I’ve also taught a course on Low Income Housing Law and Policy, and written a bunch of articles about the concrete details of housing markets in cities and neighborhoods, and different kinds of policy proposals for improving or changing the legal rules governing low-income housing with a left agenda. That would be how I would describe my own overall set of academic interests.

In spite of all that, a central question still remains: Why is legal education important for CLS and myself? The central position of education in general is an idea shared by the late 60’s generational rebellion, first, and then the late 70’s-80’s CLS

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1. An exhaustive bibliography of Duncan Kennedy’s work can be found at his personal website: [http://duncan kennedy.net/topics/index.html](http://duncan kennedy.net/topics/index.html) (last visited January 1, 2009).

A program of social transformation has to be aimed at the mass, and the mass, for example, in Europe, is not the immigrants in the banlieues, they are a minority. The idea is to move away from the illusion that the mobilization of the minority at the very bottom of the social pyramid, the immigrants in Europe, for example, or the black poor in the United States, could transform the whole society. Of course, any leftist has an ethical duty to work on the behalf of those groups. But if that is all there is to it, then this politics is not a transformative politics for the society understood as a whole; it is only an act on behalf of an oppressed minority by another un-oppressed minority within the majority. By the way, I'm just assuming that we agree that standard social democratic politics, of the European or American variety (Blair, Royale, Obama) is not transformative in any sense.

It is common to think that commitment to immigrants or minorities, to the truly marginalized and oppressed, is much more difficult than, say, the politics of the middle class workplace or the middle class family. But it is really scary to work within the actual milieu where you are a privileged member against these hierarchical structures that could immediately implicate your daily life. There are two different ideas of political virtue here.

One is the American or European idea of the street fighting hero -- a middle class man, who fights the police, on behalf of let us say illegal immigrants. However there is another idea of political virtue, a 68ish idea: in the workplace, when you are dealing with older people who have power over you, and with whom you may be associated for years and years to come, you should push against them, without the goal of beating them up with an iron bar, and with no risk of being beaten by the police, but with the idea of entering into generational and political conflict in the intimate space of work (and similarly in the family). It is not necessary to choose. These are just different ideas of political virtue.

The trivialization by conventional progressives of the preoccupation with the transformation of the middle class and upper middle class professional and technical workplaces is in my mind one of the things that destroyed the left. I'm still influenced by André Gorz, who wrote a book called Strategy for Labor back in the 60s. You have to recognize that capitalism transformed itself a long time ago and it is now in 2008 internally a highly fractional or fractile social economic system of power relations, with no core, no base, no strategic pressure point. The idea is to pick opportunistically whatever place in the system seems to be vulnerable to resistance, without imagining that one will be doing more than working over the very long term to create conditions in which dispersed resistances might coalesce.

11 The banlieues are the French suburban areas of larger cities which usually, but not necessarily, are characterized for being areas of social housing and in general of low-income population.

nothing larger. When there are opportunities in the chemical industry, that moment to organize in the chemical industry. Or when that is the situation for instance government employees in the Ministry of Finance, that is the time to organize within the Ministry of Finance. It is to find moments of discord that create the possibility of creating order and organization. A very unexpected aspect of modern capitalism explains why legal education was a plausible resistance in the late 70’s and 80’s. Legal education is not a privileged site, or the circumstances of the moment, and today in the US it doesn’t particularly promising site. At various times in the last thirty years, I’ve that maybe opportunities were emerging within law firms as well. One of them caused me to be regarded as a completely crazy person in American education was that I wrote an article about resistance within law firms. If you are a site of resistance for professors dealing with other professors, or dealing with professors, then what about the law firm?

As self-evident that a left political practice has to be willing to regard caucasian organizations of civil society as sites of resistance and this was also a site of CLS at the organizational and movement level. Now of course, its public was deeply connected to the demographic factors that I mentioned before, there was a sense that legal education was a privileged site as a result of this span of the number of jobs and the number of students, the number of jobs. All these people coming into the system who were not really assimilated, they created a moment.

ni: This idea of the emergence and establishment of CLS as connected, among other things, a specific generational moment leads to an evergreen question concerning CLS: What and what is dead of this movement which was so prominent and for so many years?

ly: What I have just described and what I described before was a moment of eubium which created an opportunity for organizing, if the organization is like its premise that it is relevant to organize where you are living, as well to organize to assist and work on behalf of people who are less privileged than you. That was the idea and you could do both and you ought to do both.

What happened to CLS after was the re-stabilization of the system, that is the moment of instability passed. The system re-equilibrated and CLS as a movement of dissent and disruption, as an element of disorder, died, as a result of both internal factors and external factors.

However, there was an accomplishment of CLS, a concrete accomplishment — not just the leaving of traces: We did manage to institutionalize ourselves. There are several levels. There is now an institutionalized left in law faculties that is to the left of American moderate progressivism, to the left of the center-left. This was not true before CLS. Second, there is a large and still steadily growing body of left scholarship, a larger body to the left of the center-left which is not in other academic disciplines. This is a product of the CLS organizing strategy and its success. Though we are not alive as a disruptive factor, we are still present and still archiving, so to speak, as an resource for a future resurgence of the American left. That is the first thing we did.

The second accomplishment of CLS still completely alive is that we politicized legal education. We did not radicalize it: our goal and our fantasy was to radicalize it but we totally failed in this effort, since legal education re-stabilized as a center-left, center, and center-right discursive formation. However, at least we did politicize it because, in spite of the fact that we never got more than a small minority within any faculty, we did force divisions, political divisions and political transparency across a very large part of the complete spectrum. We made the moderate conservatives split between reactionaries and conservatives. We split the liberals between leftists, moderate liberals and right-wingers, producing the sectarian character of American legal education, which is completely different from Europe. American legal education is sectarian in the sense that the law faculties are divided and, within the many different tendencies within legal academia, no tendency is dominant. The idea that Law and economics is dominant is completely false; many Europeans think it is true, but Law and economics is a minoritarian strand in legal education. No faction can any longer regard itself as speaking the truth of law with authority. Every faction has to realize that there are other people who think they are idiots.

Zamboni: This is very interesting. Do you mean that one of the legacies left by CLS to the contemporary academic world is that CLS somehow forced legal academics to talk about politics?

Kennedy: Yes, but CLS did not simply force legal academics to talk about politics. CLS forced legal academics to acknowledge that they were in some sense operating from political commitments. Nowadays people working in legal academia do not have to talk about politics, they must have to recognize their strand; for instance, if they belong to Law and economics, whether they are more liberal or conserva-
and economics; if they are liberal constitutionalists, they are more or less in that tendency, and so on.

I would like to take a small step back to the underlying background of your state-
by that one positive legacy of CLS has been the fact that they forced legal academics
their political premises. I actually have two questions as to this. First, quite
why is this revelation by law professors of political commitments good for the law?

What sense is it positive to force a professor in constitutional law, for instance, to
her political stance before discussing the First Amendment? Does this "disclosure"
sitting in the classroom better lawyers as opposed to those simply listening to a
all law professor of whose political opinions they are not fully aware?

and question concerns the very political nature of these premises that, according to
academics ought always openly recognized in teaching and writing. Why should a
or reveal his or her political premises and not religious beliefs? In both cases, that is

cial ideology and religious beliefs, we are facing a personal system of values that
vary the law professor perceives (and therefore transmits) the law. Why according to
a student or a colleague somehow force his/her professors or colleagues to reveal
pecific political backgrounds, but not religious ones, nor cultural roots, nor economic

If I understand your questions, the first presupposes the idea that the test
upment in legal thinking and practice, like CLS, is whether it makes better
The second question, if I understand, has to do with the way we in CLS:
the thing that needed to be unmasked« and acknowledged. Why »politics«
conceived, excluding, for example, religion?

The second question first: In terms of the United States, as I am sure as
en you are aware, we do not have a radically secularized political culture.
alliances, as well as positions about the whole range of civil society is-
cluding for example, abortion, sex education in the schools, the range of
ues, and so forth, are all part of what we mean by politics. And this is
when we are talking about what needs to be acknowledged, unmasked,
conditioning our views about law. All these issues are completely pre-
CELS idea of politics and therefore politics should not be understood as
pursuit of state power but as politics in the broadest sense of extra-
value-orientation or ideology, even these in the broadest sense. The point
at the juristic has to be put in relation to politics in the sense of the whole
of extra-juristic, ideological or value-orientations.

Three main arguments to why it is important that students understand
they learn from professors as conditioned by the professors' politics
(in the broadest sense). And also that they understand legal doctrines, legal
having a political dimension, as a product of and contributor to the politics
of the society in which they are situated. The first argument is a very straightfor-
ward, very simple-minded and old-fashioned argument. It is a truth argument. As a
matter of fact, I would assert that the law, the legal dimension, the juristic, the level
of legal validity, legal argument, are radically more intelligible if put in relation to
their political underpinnings. I want to use the word in the favored sense of intelli-
gible, that is not more predictable but more comprehensible.

The idea that law is in some sense an expression of society, and of a society's poli-
tics broadly conceived, is a cliché in Europe, and justifies having a course in the so-
ciology of law. But if you are teaching constitutional law or contract law or prop-
erty law in Europe, you are allowed to say: »Oh, we took on board this relation
between political underpinnings and law long ago because we are teleological reason-
ers; we believe in a purposeful analysis, and purposes come from society, so of course
we understand all of that.« Despite the intention of the founders of the discipline,
this also is a totally depoliticized approach to the law. One accomplishment of CLS
was to force recognition that the mere appeal to teleology or the purposeful, or to
the social, is useless as a way to get at the politics of law.

This appeal to the teleological or purposeful aspects of the law simply refits the
purposeful, the teleological, and the societal or the social as opposed to understanding
the social as a domain of contradiction, internal tension and conflict. That is
the truth defense of the strategy adopted by CLS of bringing to the fore the secta-
rian dimension, for instance in legal academia. This does not mean that there cannot
be dialogue and exchange and argument among the different strands, but that this
can be done only by removing the notion or illusion that this dialogue and exchange
really is scientific and not political. Both in legal academia in particular and law in
general, a conflict is always a conflict that is embedded in the ideological.

The second defense of the message put forward by CLS would sound like this:
Does the revealing of the political background of the law to the law students make
them better lawyers? Absolutely! Law students become better lawyers in every sense
if their understanding of law has this character. They also become more humane
and more ethical lawyers. The basic message here is that you always need to be
conscious, to use Sartre's phrase, that you have a »back,« a part of you that is neces-
sary to your existence but that you cannot actually see. The value of understanding
ourselves to have presuppositions that are a sort of ideological, political back is that
it helps us avoid becoming ethical monsters through righteous ignorance, or denial,
of the existence of this dimension of our own orientation or situation.

The third defense of the CLS idea of making the law and legal education political
that it is progressive. It is in the tradition, actually the most fundamental traditi-
on of the Marxist or post-Marxist left, which is to critique the various ways in which
social norms are reified and naturalized and rendered apparently necessary when in
fact they are matters of human choice and volition. Those are the three different
defenses of this attitude towards the politicization of the system.
ni: I would like to conclude now by addressing two small questions to Duncan Kenne-
>private individual< rather than Duncan Kennedy as a >public intellectual.< The
whether you see a new Duncan Kennedy in current (and the near future) legal thin-
ner in other words, is it possible for a young scholar to repeat what you (and your collec-
CLS) did in the late 60's until the early 90's with the same (or even a higher) level of
and intensity?

ly: I think a basic point here is that there are many people with the same
However, as the famous saying goes, you do not choose the hour of your
whether you think of it as a blessing or a curse, you can't choose to live in
ing times - that is, in times in which the opportunity for resistance is avai-
lar the asking. We were offered this opportunity on a silver platter. Because I
in 1942 into the American ruling class, I had the chance to participate in a
of generational conflict that I did not make. I am simply the product of the
although of course I acted and failed to act, and made mistakes and made
tactical decisions with my comrades, in a collective kind of action. Now a
with the same disruptive ambition, the same critique of the elders that we
is today an extremely different and more difficult situation.
ems to me that these difficulties make the model of our activity not very
or people who are now thirty years old. I do believe, however, that the cur-
ator creates a different set of opportunities for oppositionism, for different
oppositionism, even though it is not obvious to me situated as I am, exactly
esque are. It is up to the young to find them for themselves, with whatever
I help we can give them. Locating the possible veins or lines of fracture
is resistance can work is something that has to be redone in every generation.
thing that guarantees that a given generation will ever find it and it is
possible to have lived out your life without ever having been offered a
portunity for serious resistance. It is also possible that that opportunity will
completely unpredictably, around the corner when you least expect it. I
at the only real advice that an old 68er can give under these circumstances,
w, is summed up by the phrase, >seize the day.<

ii: The second and very last question can be considered a sort of self-evaluation of your
professional life. What is the thing that Duncan Kennedy, either as a legal think-
tical activist, is most proud of in his entire life?

y: There are actually two things I am most proud of. The first thing I am
oud of is my participation in the organization of the CLS movement. The
s a particular piece of analysis in an article called »Freedom and Constraint

14 See Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36
Journal of Legal Education 518-562 (1986). The version of this article as reprinted in James
Boyle (ed.), Critical Legal Studies (Aldershot, Dartmouth, 1992) can also be downloaded at
Duncan Kennedy's website at: http://duncankennedy.net/documents/Freedom%20and-
%20Constraint%20in%20Adjudication_A%20Critical%20Phenomenology.pdf (last visited
January 1, 2009).

Zamboni: Thank you very much.

Kennedy: You are welcome.