

The force that through the green fuse drives the flower*

Peter Gabel

The great thing about Duncan's work is *the presence behind it*. Yes there is the brilliant dismantling of the various rational schemes designed to legitimize a less-than-humane world (liberal constitutionalism, law-and-economics, legal reasoning in general when presented as a self-contained method for arriving at outcomes or truths), but the social change dimension of this critique is the force behind it, the exertion against the system of the loving, egalitarian presence that Duncan actually *is*. That's why we all feel a loss at the idea of him "retiring"...it seems to deprive us of our right arm in the struggle to bring into the world a human reality that he himself embodies and that has always backed up his critique and supported our own. Fortunately, he won't actually retire; it's till death do us part; so we can celebrate the occasion rather than feel sad or bereft about it.

But how does Duncan's own work incorporate "the presence behind it" into it? The answer that he might give is, "not at all." In response to one early effort on my part to get him to actually say it, to spit out the relationship between who he is and what he is for, he responded warmly, "You are betraying our program by conceptualizing it." He has always rejected the attempt to name what the good is that is being allowed to emerge into public space by the work of demolishing what obscures it. How then does "the presence behind it" improve the world? Here is Duncan: "Modernism/postmodernism (mpm [or Duncan's own project])...is a project with the goal of achieving transcendent aesthetic/emotional/intellectual experiences at the margins of or in the interstices of a disrupted rational grid. The practical activity of mpm centers on the artifact, something made or performed (could be high art, could be the most mundane object, could be the deconstruction of a text, could be the orchestration of a dinner)."² And if I were to say in response to this formulation that what is "transcendent" about such experiences is that when successful they create a new encounter with the other manifesting authentic mutual recognition and prefiguring a loving and egalitarian world, Duncan might respond, as he once did, "That does not sound to me like an evocation which can fulfill the legitimate functions of communication, of language and knowledge, because it's abstract bullshit, whereas what we need is small-scale, microphenomenological evocation of real experiences in complex contextualized ways in which one makes it into doing it."³

Yet whatever he might say, the fact is that Duncan's work has had the impact that it has because his readers, students, colleagues, opponents, and friends have always felt that by using his methods to break on through to the other side, we were getting

* The title is from the title of a Dylan Thomas poem, "The force that through the green fuse drives the flower" from *THE POEMS OF DYLAN THOMAS* (2003), published by New Directions.

¹ Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 *STAN. L. REV.* 1,1 (1984).

² DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION*, *FIN DE SIÈCLE* 7 (1997).

³ Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 *STAN. L. REV.* 1, 3 (1984).

somewhere—and not just a neutral free space inhabited by disconnected monads who, liberated from rationalistic, ideological illusions, could now think whatever they wanted and do whatever they wanted, but rather that we were getting to genuine higher ground of mutuality, solidarity, humor, insight and reciprocal freedom, a space that was not neutral but morally redemptive and empowering.

Can the force of Duncan's presence within the critique (of rights, of law and economics, of legal reasoning in general) be given its illuminating place without, as he would say, "conceptualizing it"? Perhaps his own position on this would be that an intellectual critique is not a disembodied text but is rather always spoken or written by a living being who exerts his own presence through it and toward his listener or reader, and that it is on this meta-plane of reciprocity, of being-together and seeing the object of critique together in a new light, that a better world starts to be born each time that it happens. Therefore, trying to incorporate my imagined version of Duncan's own line into my own words, I would say Duncan's own presence as a loving and egalitarian being reaches through the words, enlivens them with their style and presence, and proposes a new place to stand that is not itself written or spoken, but is nevertheless a morally transcendent element of the critique itself, a felt appeal that is indispensable to the critique's value that gives it moral direction and makes it more than mere "deconstruction."

Where I take issue with Duncan is that I think we can rely on the very same co-presence of the listener or reader who Duncan expects to understand the true meaning of the spoken or written critique to also understand the true meaning of the spoken or written moral appeal. The fear that one is "betraying the critique by conceptualizing it" foregrounds the risk of misunderstanding, cooptation and the use of one's words to re-rationalize oppression, domination and exploitation, the opposite of what we are aspiring to: A "society based on authentic mutual recognition, love and solidarity" could mean some suffocating, coercive collective as well as the transcendent egalitarian social world that I have in mind when I write those words, just as liberalism calls the effects of capitalism the realization of freedom and equality. But foregrounding this fear sows doubt rather than confidence. *If* the world is filled with the co-presence of our mutual humanity as its social truth, if we are not disconnected monads floating in the neutral space that liberal and other forms of rationalism seek to legitimize, then we only strengthen our confidence in that bond between and among us—that bond that *is* us—by conceptualizing it, by putting it out there, not as verbal formulations existing independent of the living ground we breathe into them, but as expressions of that ground and affirmations of it in a world whose very problem is that it denies that that ground exists. Since we are trying to move from doubt to confidence in each other, the listener to our words needs not only to hear us but to know that he hears us; he/she needs and we all need to see the message on the flag.

Whether I'm right or not, however, the actuality of Duncan's presence in the world has been a great source of inspiration, joy, and confidence all these years. I tend to be in favor of always saying it, but he really has always "made it into doing it" and so has given the rest of us that much more strength to keep doing it ourselves.