

## How we honour masters: Reflections on the work of Duncan Kennedy

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Duncan Kennedy is—and I venture ever will be—one of the titans of the ‘Legal Left’. He has without doubt one of the most fertile legal minds that modernity has produced. His work has placed legal scholarship, and especially ‘*left*’ legal scholarship, in dialogue with a broader set of social scientific and humanistic canons—from economics, to anthropology, to social theory, to linguistics, to cultural theory, to philosophy—taking insights from law to challenge, refine and extend radical and critical traditions far beyond that field.

Duncan was of course also a prime-mover in an intellectual movement that has revolutionised the way that lawyers theorise their subject—the Critical Legal Studies movement. His own scholarship crystallised and catalysed some of the most innovative insights that the movement generated. Mere paragraphs and footnotes of Duncan’s seminal pieces have inspired entire genres of legal scholarship and sub-movements of the critical trend in legal theory. And Duncan has been unfailingly supportive of generation after generation of legal theorists who have gone on to make staggeringly large impressions on modern legal scholarship in their own rights.

Duncan’s left-radical enterprise has enveloped roles<sup>1</sup> of fierce teacher, brilliant scholar and leader and (more recently) *éminence grise* of a loosely connected intellectual ‘scene’, and so there is much to celebrate as he approaches his retirement from formal academic teaching at Harvard Law School.

What will change when Duncan retires? Well, Duncan tells me that he will continue to retain an office, he will still ‘work with the network’ and may indeed have a couple of scholarly projects in him waiting to blossom. So Duncan Kennedy will remain an intellectual presence at Harvard and beyond. In this sense, little will change.

However, Duncan will no longer be in the classroom. He will not principally supervise any further doctoral students. The time of Duncan-as-teacher will formally be at an end. Those who come to law or legal theory from here on will access Duncan Kennedy’s work through the pages of journals and books, through what others write of him and how they interpret his work. The cohort of Duncan’s direct students will grow no further.

In light of this—and as one who has had the privilege of being a direct student of Duncan’s—I thought that I might, in this very short piece, offer some reflections concerning what I have taken from Duncan-as-teacher about *how* to engage with his

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<sup>1</sup> It is important to simultaneously keep these roles in the mind—each breathes life into the others. To read one out is to miss something important about Duncan and his project.

work, and by implication how scholars and students on the Left might go about celebrating their masters.

## *I. Masters and students; masters and slaves*

### *A. A distinction*

Let me take a moment to propose a distinction in the way that we might think about being a master in the scholarly or intellectual domain. To be a master is a relative thing; it is to have mastery *over* something. The distinction that I propose concerns the object of mastery.

One understanding of a master in this domain is as one who has comprehended and has control over a set of ideas or a subject matter. Ideas have been confronted and digested. The master understands them, is able to deploy them, reflect upon them, challenge them and refine them. The master does not find herself parroting slogans or ideas unthinkingly or unreflectively; the master controls the ideas; the ideas do not control the master.

A second concept of master is as the dominator or controller of *others*—in the intellectual domain—often over students. Mastery is therefore measured in the genuflections of others, rather than in the master’s relationship to ideas. Indeed, ideas become the *means* of domination—the way in which the master’s superior positioning over others is secured—rather than the object of mastery itself.

When speaking of masters in the intellectual domain, this distinction matters, especially when considering how a master’s students might engage with his or her scholarship. The master of ideas delights in her students rebelling against and challenging her scholarship in the interests of advancing knowledge. The master of students on the other hand seeks to quell such insurrection—being more interested in preserving position than advancing understanding.

### *B. Masters and the Left*

There is a tendency on the Left—both unconsciously and sometimes consciously—to construct masters in the latter of the two moulds above. To some extent, this is understandable. The paradigmatic dynamic between teacher and student in the critical tradition tends to be of the former ‘saving’ the latter from the stultifying falsity of mainstream thought. This messianic moment often leads to a peculiar and unequal dynamic between the teacher by the student, and—in its worst forms—an almost cult-like construction of the intellectual (and on the Left, political) community.<sup>2</sup>

Without doubt, the fate of at least some strands of modern Marxism reflects this kind of tendency. In some circles at least, Marx’s words—or certain interpretations of

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<sup>2</sup> Is undoubtedly the case that some of these dynamics exist outside of the Left also. However, there does seem to be something about the confluence of political righteousness, ‘oppositionalism’ and heterodoxy that makes the Left a particularly fertile ground for these trends.

them—become sacrosanct. Internecine warfare amongst those who have inherited Marx’s political and intellectual program has led to the calcification of an orthodoxy that demands pious but sometimes unmindful recitation of certain articles of faith,<sup>3</sup> literatures and mottos.<sup>4</sup> It becomes important to use certain categories or intellectual tools—and if these are not used—to justify quickly why not. In more pathological moments, the projects of understanding or action themselves take a subordinate place to debates about tools, methods and artefacts, with internal warfare taking the place of pushing for external progress.

And the warfare becomes fierce—perennial questions of method, outlook, and ‘what Marx really meant’ have sadly not always been the site of the most comradely of debate, but of accusatory sloganeering. ‘Marxist’ has become for some a label denied to, worn uncomfortably, and perhaps ultimately rejected by even those who take Marx’s work with the utmost seriousness and treat it with exceeding preciousness.<sup>5</sup>

Of course, it is not just Marxism that at times suffers from these tendencies. The followers of the Frankfurt School, Derrida, Foucault, Keynes, Chomsky, Sartre, Butler and so on will no doubt have seen similar tendencies in their own domains. Ideas become frozen in time, protected, in some sense inviolable. Honouring masters becomes an enterprise of placing their teachings behind glass in a museum, as though fragile. The flow of understanding stands still as if one (beautiful) ripple matters more than the raging river itself. And of course on the Left when understanding stands still, politics often fails to advance, and the project itself stalls.

So all of this comes at a terrible cost—when students of masters become slaves of masters, they risk becoming little more than masters of a ‘canon’, rather than masters of ideas in their own rights. They become footnotes to the work of their master, and risk adding little to the master’s spirit and broader intellectual and (where relevant political) project.

## *II. Duncan Kennedy, as I have experienced him*

Of course, the master-student relationship is a two-way street, shaped by both sides of the dynamic. And either side can shift the relationship into the unhelpful master-slave model. Sometimes masters want slaves, and sometimes students enslave themselves to masters.<sup>6</sup>

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<sup>3</sup> The labour theory of value is one that immediately springs to mind here.

<sup>4</sup> For example the need to ‘start from politics’ or ‘take account of class analysis’—important insights that often suffer from being more often recited than explored.

<sup>5</sup> Of course others have offered similar insights—see for example, MICHAEL ALBERT & ROBIN HAHNEL, *UNORTHODOX MARXISM* (1978); STEVE KEEN, *DEBUNKING ECONOMICS - REVISED AND EXPANDED EDITION* (2011) (especially chapter 17); and more personally/informally, Yanis Varoufakis, *How I became an erratic Marxist*, *THE GUARDIAN*, 18 February 2015, <http://www.theguardian.com/news/2015/feb/18/yanis-varoufakis-how-i-became-an-erratic-marxist>.

<sup>6</sup> The whole relationship can be quite emotionally and psychologically fraught (often in subtle and surprising ways) and in no way am I suggesting that it is an easy one to navigate—for either side.

And this is where my *experience* as Duncan's student offers something that I would like to share with those who will not have the good fortune of being his direct student.

I took several of Duncan's classes. He supervised my doctoral work. We would meet regularly to dissect readings, debate ideas, talk politics, debate my research and writing, and indeed (more often than not) to gossip. Duncan of course had a number of other students at the time, both in the classroom and those in whose research he was involved in one way or another.

I will not speculate as to how others engaged with Duncan or his work. What I can say, from my experience and without a shadow of a doubt, is that I never saw Duncan more alive as a teacher than when one of us was rebelling against him. The glint in his eye when you would say "Duncan, I just think you are wrong about that..." or the way he would expectantly and merrily shift in his chair when one of his students was meticulously building an argument to challenge his work. *Of course* he wouldn't always agree with you. But he was gleeful that you took him on (even though in the heat of battle you didn't always feel quiet as gleeful yourself).

Duncan recognised—I think—in the way that he taught that his best role was not master of others, but of ideas. Indeed, my single most gratitude-filled reminiscence of Duncan's teaching is of just how much he fostered my (already pretty annoyingly well-developed) intellectual stubbornness and contrarianism. His first and most lasting piece of advice to me as my teacher was: 'So you want to intervene on the 'Big Boys'? Good—you should.' Duncan's iconoclastic and rebellious political and intellectual tendencies also run deep at the *pedagogical* level.<sup>7</sup>

None of this is to say that Duncan was 'soft' as a teacher. He wanted you to learn. He wanted you to have an answer to the counterargument. He thought he was right and he would assert his view until you convinced him otherwise. But to honour him and his project, those of us who follow him owe it to Duncan not to enslave ourselves when we have yet to find an answer to his powerful arguments. Striving remains the greatest honouring of Duncan's work.

Throughout my time as his student—and even now—Duncan's continual challenge to me was and is to explore the meaning of a progressive, transformative political and intellectual agenda, informed but not ensnared by his own scholarship. This is the lesson of a great master of ideas.<sup>8</sup>

And this lesson teaches us something about the very best way to celebrate a master. We should not merely fling ourselves at Duncan's feet, but rather celebrate him by engaging with his work and the questions it allows us to ask. What is the best rendition

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<sup>7</sup> Indeed, Duncan was himself blisteringly critical of the ill-balanced relations of deference and lack of autonomy that can often build up between student and teacher in more pathological moments, as well as the responsibility that the teacher holds in reproducing these imbalances and broader hierarchies. See Duncan Kennedy, *Legal Education as Training for Hierarchy*, 32 J. LEG. ED. 591 (1982) at 593-4; 603-4.

<sup>8</sup> I have recorded my indebtedness to Duncan—both personal and intellectual—more fulsomely in VISHAAL KISHORE, *RICARDO'S GAUNTLET: ECONOMIC FICTION AND THE FLAWED CASE FOR FREE TRADE* (2014).

of the legal indeterminacy thesis and what does phenomenology have to do with it?<sup>9</sup> Is there anything sensible that can be theorised about the globalisation of legal consciousness, and if so what?<sup>10</sup> What happens to Marx's elucidation and critique of the logic of capitalism after Duncan's *Role of Law in Economic Thought*<sup>11</sup> piece, and what new directions does the piece show us in understanding and addressing that logic? Should we take the 'cultural turn' in legal theory seriously, and what does a Left agenda in law gain from embracing postmodernist methods?<sup>12</sup> And perhaps more importantly than even these questions—what lessons does Duncan's work provide us we move from the scholastic world of theory and ideas and to the world of action, to public policy, to setting and evaluating the organisational, institutional, political and normative conditions of social life and practice? Beyond the bare statements in his scholarship, does Duncan's work help us to think differently about economic policy? About international relations? About how we should organise our workplaces?

In short: celebrating Duncan—as with the celebration of all masters on the Left—should consist in standing upon his shoulders, not hiding in his shadows.

### *III. In honour of Duncan and his legacy*

And so if we seek to celebrate Duncan's legacy, scholarship and contribution to the Left/critical endeavour—as we undoubtedly should—we must strenuously resist the temptation to reduce him to a master of students, rather than of ideas. We should seek to reflect and amplify Duncan's brilliance through our own scholarship and political action, rather than merely sing its praises.

And if we seek to honour Duncan's work we *must* save him from being 'more often cited than actually understood'.<sup>13</sup> Duncan's work will be lauded by the extent to which it is engaged with, challenged, extended, critiqued and even surpassed. The master of ideas rejoices when her students have left her scholarship in tatters. For there is no

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<sup>9</sup> Some of Duncan's key contributions here include: *Freedom & Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEG. ED. 518 (1986); *A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation* in DUNCAN KENNEDY, LEGAL REASONING, COLLECTED ESSAYS (2008).

<sup>10</sup> See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000* in THE NEW LAW AND ECONOMIC DEVELOPMENT (David Trubek & Alvaro Santos eds., 2006).

<sup>11</sup> Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AMER. UNIV. L. REV. 939 (1985).

<sup>12</sup> See further Duncan Kennedy, *The Critique of Rights in Critical Legal Studies* in LEFT LEGALISM/LEFT CRITIQUE (Brown & Halley eds., 2002); Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991); Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147 (2001); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!* 15 LEG. STUD. FORUM 327 (1991); and generally DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) (1997).

<sup>13</sup> Michel Foucault once characterised the fate of Antonio Gramsci in this way: see Joseph A. Buttigieg, *Introduction* in ANTONIO GRAMSCI, PRISON NOTEBOOKS: VOLUME 1 (Buttigieg ed., 1992), referred to by PETER D. THOMAS, THE GRAMSCIAN MOMENT: PHILOSOPHY HEGEMONY AND MARXISM (2009) at 12.

greater compliment that to be taken seriously—and ultimately perhaps even transcended—by those one has taught.

Ultimately, Duncan has played his part of teacher—and what a part it has been. Duncan's legacy is now for us to make. By treating him as a master of ideas, rather than of slaves, we ensure that Duncan continues to teach us even though his time in the classroom is done.<sup>14</sup>

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<sup>14</sup> I imagine that when Duncan reads this piece he will immediately tell me that I am just completely and irreconcilably wrong about all of this. Perfect.