

## A MIRROR FOR THE MAGISTRATE

*Editorial Notes: Vivian Darkbloom (2099-2177) was one of the most original and least understood writers of her time. Her work combined fact and fiction, historical method and artistic license, or, as the critic John Ray, Jr., has put it, "the passion of the scholar and the precision of the poet" in equal (and confusing) measures.*

*Much of the controversy surrounding her work has arisen as a consequence of the tremendous destruction of historical evidence which took place during the Purifications of the late twenty-second century. Among the most heinous crimes committed by that misguided movement was the virtual annihilation of all written records from the latter years of the twentieth century, as well as from the first two decades of the new millennium. This period, of course, was Darkbloom's favorite subject of, as she put it, "historioaesthetic inquiry."*

*The following selection exemplifies the rewards and frustrations that await the reader of Darkbloom's work. The primary materials that she employed—Kennedy's letters, journals, and judicial opinions—have long since been destroyed. The books she supposedly reviews were almost certainly products of her protean inventiveness (although the historian Herbert Ashe has recently disputed this assumption). Readers are therefore left to puzzle out for themselves the tangled paths taken by authorial invention and historical reality, as those fraternal twins wend their way through Darkbloom's text.*

*Because that task need not be made more difficult than necessary we have provided, for the reader's convenience, annotations to some of the author's more recondite references. Darkbloom's own footnotes are presented in roman type, while editorial contributions are designated by italics.*

*This version of the text is adapted from the variants presented in A Critical Edition of the Complete Works of Vivian Darkbloom, H. W. Gabler, ed. (Dresden, 2291-2297).*

Books referred to in this essay:<sup>1</sup> *Camelot or Cawdor*<sup>2</sup>: *The Ambiguous Reign of Duncan Kennedy*, Eileen MacDuff,<sup>3</sup> The Clarendon Press, 441 pps., \$3.95; *After Life's Fitful Fever*,<sup>4</sup> Sylvia de la Roy, Norah & Co., 337 pps., \$2.65; *The Unacknowledged Legislator*,<sup>5</sup> Edgar H. Bergson, Martello Books, 581 pps., \$6.00; *Kennedy and his Precursors: The Collected Letters and Journal of Duncan Kennedy*, Henry Flower ed., Olympia Press, 783 pps., \$6.95.

The celebrations marking the 100th anniversary of the New Covenant have been enlivened by the publication of several studies dealing with the final years of the Constitutional Republic. The combination of social chaos and intellectual ferment that marked those tumultuous times remains a source of fascination to scholars trapped within the staid reality of a comparatively rational era.<sup>6</sup> In particular, the colorful and enigmatic figure of Duncan Kennedy has provided an irresistible subject for historians of the revolutionary period.

## I

After the debacles of the Quayle administration—the default crisis, the Holy Hoosier scandal, and the attempted sale of Alaska—the Presidential campaign of 2004 took place in an atmosphere of social upheaval not seen in America since the first Civil War.<sup>7</sup> When Jesse Jackson's New Democratic Coalition managed to eke out a victory in the Electoral College despite receiving only forty-one percent of the popular vote (the balance of the electorate was split between Sam Nunn, the Republican Candidate, and Pat Robertson of the Christian Liberty League), dire consequences for democracy seemed imminent. At first President Jackson assuaged fears by attempting to bring centrist elements into his administra-

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1. *No independent evidence concerning these texts survive. Scholars have long assumed that both they and their supposed authors are fictitious. See Gabler, Darkbloom's Cryptic Garden, in The Disappearing Classic (Dublin, 2283). But see H. Ashe, Ghostly Signs (Los Angeles, 2298).*

2. *In Shakespeare's Macbeth, Macbeth, Thane of Cawdor, murders Duncan, King of Scotland. The reference to "Camelot" has not been satisfactorily explained, although Darkbloom's interest in Arthurian legend is well documented. See E. Idle, Darkbloom and the Holy Grail (London, 2263).*

3. *MacDuff slays Macbeth at the climax of Shakespeare's tragedy.*

4. *"After life's fitful fever, Duncan sleeps well." Macbeth, Act II, S: iii, l. 67 (Standard Edition).*

5. *In his Defense of Poetry, Percy Bysshe Shelly claimed that "[p]oets are the unacknowledged legislators of the world."*

6. *Given what was destined to occur within Darkbloom's own lifetime, it seems hardly necessary to note the retrospective pathos of this remark.*

7. *C.F. Alderson's The Wages of Fear remains the best general study. See also Sylvia de la Roy's perceptive Millennial Politics in an Age of Doubt.*

tion. But the deepening debt crisis, an assassination attempt on July 4, 2005, and the outbreak of war over much of Eastern Europe in September of that year all worked towards forcing him to satisfy the demands of the hardliners in his fragile coalition. His first opportunity to do so came with the death of Chief Justice Posner on November 17th.

The nomination of Duncan Kennedy<sup>8</sup> to the highest judicial office in the United States would have been hardly conceivable a decade earlier, when Kennedy resigned from his professorship at Harvard Law School in order to pursue a project that he kept hidden from even his closest friends.<sup>9</sup> After disappearing into the mountains of central Mexico for nearly eight years, Kennedy unexpectedly resurfaced in the middle of Jackson's primary campaign as a sort of all-purpose ideological factotum whose ideas flitted among the prophetic rumblings of the Reverend's inspired oratory.

Why the Senate agreed to confirm this obscure ex-professor with what was, by pre-revolutionary standards, a "radical" past<sup>10</sup> is still a hotly contested question. Eileen MacDuff's provocative new book puts forth a highly original if somewhat tenuously documented theory: Duncan was in fact a member of the famous Kennedy clan<sup>11</sup> that exerted such a hold on the American imagination in the latter half of the twentieth century. She offers evidence of Boston connections, prep school charm, and other impressionistic trifles to bolster her theory, while explaining away the considerable evidence against it by evoking the "black sheep" hypothesis: the respectable members of the family conscientiously avoided ever acknowledging their embarrassing connection.<sup>12</sup>

Henry K. Flower provides us, in his introduction to Kennedy's letters, with a more serious analysis of the question. He contends that Jackson's election signalled the beginning of the crisis of legitimacy that led to the dissolution of the Constitutional Order nine years later. In the midst of economic chaos and the threat of war,

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8. *Duncan Kennedy (1942-?) has been identified as an actual person. It has been reasonably well established that he did teach at Harvard Law School for some time after 1970. See H. Ashe, Ghostly Signs at 242-51.*

9. See Mark Tushnet's touching if somewhat unreliable memoir, *Duncan, We Hardly Knew Ye*, in his *Diary of a Jailhouse Lawyer*.

10. Kennedy's involvement with the self-proclaimed "Critical Legal Studies" movement dogged his nomination. See Tushnet (cited in note 9).

11. *John Kennedy (1917-1963) was the 35th President of the United States. His brother Robert was a senator from Massachusetts.*

12. MacDuff also indulges in pyrotechnical feats of speculative research in order to demonstrate that Duncan competed in the luge at the 1988 Winter Olympics. [*Herbert Ashe has uncovered evidence that lends credence to this unlikely claim. He has found a "Duncan Kennedy" listed among the finishers in the Olympic luge competition in a recently discovered copy of The New York Times newspaper dated February 15, 1988.*]

Flower argues, the ideological makeup of the Supreme Court no longer seemed a momentous question. A deeply divided Senate was unwilling to expend energy on such abstract battles when more concrete conflicts loomed before them every day. Despite some pro forma parliamentary skirmishing, Kennedy's nomination was duly confirmed on March 15, 2006.

His first two years on the Court were uneventful: he assigned himself relatively few opinions or dissents, while those he wrote, although distinguished by a certain breeziness of style, were rather tame examples of what legal historians have labelled the Objectivist approach to jurisprudence.<sup>13</sup> Left-wing members of the administration were soon claiming that Kennedy, like so many of his predecessors, had been captured by the inertia of the institution he was expected to change.

The event that guaranteed Kennedy's elevation from the footnotes to the main text of history was at first nearly lost among the calamities that engulfed the nation in 2008. The failure of three of the country's largest banks in February was followed in short order by the collapse of financial markets, the bankruptcy of thousands of corporations, food riots in Tennessee, Mississippi, and West Virginia, and the calling out of the Army by Executive Order. When President Jackson attempted to vest emergency powers in himself, including the power temporarily to dissolve Congress prior to the November elections, the Joint Chiefs of Staff announced they were temporarily dissolving the office of the Presidency until a provisional military government could restore public order. Jackson was placed under house arrest on October 3rd. Two days later the Supreme Court published its first decision of the Fall Term, *Roth v. Howe, et al*, 801 U.S. 1, Kennedy, C.J. writing for a divided Court.

*Roth* involved a suit by a social security recipient whose tax on her benefit check was raised after she was granted a sizeable bequest in her brother's will. The plaintiff argued that the legislative intent behind the Emergency Social Security Tax Act of 1997 (the so-called Pepper tax) required that the statute be construed so as not to take into account increases in a recipient's income that took place as a result of inheritance from a blood relative. The Court rejected the plaintiff's claim. The Chief Justice's opinion begins with some hackneyed comments about the need to narrowly construe statutes, unless such a construction would interfere with the "effective pur-

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13. A classic formulation of this school's ideas is found in Kennedy's article *Legal Realism and Critical Legal Studies: A Synthetic Approach*, recently reprinted in J. Hercules, ed., *Les Fleurs du Mal: Voices From the Grave of Liberal Democracy*.

pose of the law," etc.<sup>14</sup> The opinion then states that "it is well settled that this Court will not closely scrutinize any Federal statute whose primary purpose is to encourage the development of a more egalitarian distribution of wealth." The opinion supports this statement with a quote from an old case, *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531:

Principles of substantive due process forbid any activity in a line of commerce where the effect of such activity is likely to exacerbate class differences based on wealth.

Thousands of dog-eared copies of volume 410 of the United States Reports simultaneously opened to the same cited page. In every one, the quoted passage silently shouted its guilty words:

Section 7 of the Clayton Act forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly.

## II

Sylvia de la Roy's biography traces the intellectual origins of her subject's grand scheme; Edgar Bergson's book recreates its actual genesis in the wilds of Mexico before describing its monstrous conclusion in the marbled halls of the Supreme Court.

Roy's book contains a catalog of Kennedy's personal library that was made for the judicial auction which followed his arrest. Among its many arcane volumes she discovered a text entitled *The Critical Legal Studies Movement*, by the Brazilian philosopher and quasi-mystic Roberto Unger. Little remembered today, Unger is described by Roy (using a quote from one of his contemporaries) as a "romantic Christian Hegelian"; this collocation of mutually exclusive adjectives mirrors the obscurity of Unger's prose. Roy concentrates on a passage in Unger that calls for a "deviationist" reconstruction of extant legal doctrine. At Harvard, Unger and Kennedy were once members of the same scholarly conventicle; Roy locates in these regions of Unger's thought the seed of Kennedy's eventual destruction.

Roy identifies the following heterogeneous texts in her subject's collection:

1. Aldous Huxley's<sup>15</sup> famous fable which posits that a half-

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14. Nathan Zuckerman justly comments: "How often the stalest of clichés has played midwife at the birth of the revolutionary idea!"

15. *English novelist (1897-November 22, 1963)*.

- dozen monkeys wielding chaotic typewriters would, given sufficient time, produce the complete works of Shakespeare.
2. The second part of Lewis Carroll's *Sylvie and Bruno*, which observes that the limited number of words in a language are capable of a determinate number of combinations. This number, although extremely vast, is not infinite. "Soon" Carroll says, "literary men will not ask themselves 'What book shall I write' but 'Which book?'"
  3. T.S. Eliot's essay *Tradition and the Individual Talent*, which asserts that the truly creative artist alters the texts that precede his own work through the force of his simultaneous extension and restatement of the tradition within which he works.
  4. Harold Bloom's *The Anxiety of Influence*. This work, perhaps the most influential piece of twentieth century postmodernist criticism, avers that the "strong poet" is locked in a Freudian father-son struggle with his literary precursors, and that he attempts to escape the smothering weight of their creative power through subversive "misreadings" of their texts.
  5. Jorge Luis Borges' story, *Pierre Menard, Author of the Quixote*, in which the following passage has been underlined twice:  
 Menard (perhaps without wishing to) has enriched, by means of a new technique, the hesitant and rudimentary art of reading: the technique is one of deliberate anachronism and erroneous attributions . . . . This technique would fill the dullest books with adventure. Would not the attributing of *The Imitation of Christ* to Louis Ferdinand Celine or James Joyce be a sufficient renovation of its tenuous spiritual counsels?

These texts indicate in an indirect way Kennedy's movement towards an imaginative reconstruction of the law; the letters he wrote during his years in the wilderness give evidence of how difficult that movement was. In a letter to E.P. Thompson dated February 2, 1995, he wrote: "[T]o reimagine the law requires you to reimagine something much more than *the* world: you must create—like Blake, like Heidegger—a world in all its unmediated complexity." Two months later he laments to the Nigerian novelist Donald Mbuti<sup>16</sup> that "in your country history is still plastic, is still waiting to be formed by the heavyhanded sculptors of the past." What he has in mind is made clearer in a journal entry marked September 17th:

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16. (1958-2047).

The past is, ineluctably, a garden of forking paths. Why should historical consciousness be forever barred from the road not taken? To trace the history of the Wilson administration is relatively simple; to formulate that of the Debs' presidency requires a subtler intelligence.

On October 5th he wrote:

History, whether objective or subjective, is not an inexhaustible subject: its limits are the limits of language. Only when we have imagined every possible past will we be liberated from the tyranny of the actual.

The advent of the new year saw the first fatal outlines of the project beginning to take shape. In early January he wrote to Clare Dalton:

The good interpreter need not strictly be a "true" interpreter.<sup>17</sup> Once it is no longer tethered to the crass demands of historical objectivism, any text—every text—becomes decentered, ambiguous, and ultimately explicable only through the subjective necessity of the interpreter. A man reads what he wants to read and disregards the rest.<sup>18</sup>

Thus emboldened, Kennedy spent much of the next three years traveling between the universities of Texas and Mexico and his mountain home, gathering material and recruiting impressionable young assistants for a vast undertaking. His plan was rigorous in execution and heroically absurd in scope. Kennedy set out to revise, or as he put it, "alter" the history of the United States after 1918. He began by worsening the post-war recession so as to split the Republican Party in the election of 1920, thereby bringing about the third party triumph of the Socialist candidate, Eugene Debs. From this premise he carefully extrapolated, rearranging the lives and actions of hundreds of historical figures. In the 1940s Jerome Frank and Edward Levi were elevated to the Supreme Court; in 1942 Hank Greenberg batted in a record 193 runs.<sup>19</sup> The rational practice of socialism softened the blow of world-wide recession and preserved American neutrality when the Russo-Germanic war

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17. Augustine of Hippo's *On Christian Doctrine* (see especially Book I, Section 41) is listed among the books in Roy's catalog.

18. This is an example of Darkbloom's celebrated use of the anachronistic allusion. Here, she has Kennedy "allude" to a lyric by a minor contemporary poet, Ceran Birkenstok (2108-2153):

*The eagle flies where it needs to fly  
Before it comes to rest.*

19. William James, *VI* has conclusively established that Greenberg's highest total of runs batted in was 183. See *W. James, VI. Those Were the Fields of Avalon* (6th ed. 2271).

broke out in 1947. By June of 2000 Kennedy's enterprise had reached the 1960s. Here uncertainty halted him. He wrote to Robert Gordon:<sup>20</sup>

The histories now run to more than 7,000 pages, all generously annotated. My most trusted co-workers are beginning to generate the necessary secondary texts . . . . Still, the essential problem remains: once we have awoken from this nightmare<sup>21</sup> what is to be done with "the law" itself? I'm paralyzed between alternatives. The easier route, of course, is to alter the texts themselves, to superficially harmonize them with their new social and historical context. Laugh if you will at my bourgeois scruples, but something about that approach strikes me as less than completely straightforward . . . .

His journal reveals that by the spring of the following year a solution had presented itself:

A rich vernal languor fills our modest village. Last night, listening to the White Album (ah Sexy Sadie!) a sudden apprehension of the end of our labors flowed through me.

The method Kennedy hit upon was as ancient as it was radical. His new society was still burdened with an anachronistic legal discourse. But the texts of that discourse remained anachronistic only so long as they were interpreted within the context of a discarded past. Freed from that past, they instantly opened themselves to every form of hermeneutical rehabilitation. Soon Kennedy was at work with an apostolic fervor: he applied the procedures of the Cabalists<sup>22</sup> to entire volumes of Supreme Court decisions; he read cases cryptographically, allegorically, emblematically, even vertically; he employed that method of reading known as *boustrophedon* (following one line from left to right, the next from right to left); he methodically substituted certain letters of the alphabet for others; he assigned numerical values to letters, or to whole words, searching for the secret calculus of the law.

He succeeded beyond his most fervent imaginings. On November 22 he wrote to Gordon:

The case method—we mocked it mercilessly!—has stripped away the scabs of doctrine from these dusty volumes. Yesterday we found nothing but naive sociology (*Brown v. Board*), faulty logic

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20. Author of *Critical Legal Histories*, collected in *The Eagle and the Phoenix: Essays on Socialism in America*.

21. "History is a nightmare from which I am trying to awake." P.C. Newman, *The Path To Purification* (2148).

22. *Medieval Jewish sect whose interpretive methods fascinated Darkbloom. See Joyce Freudson, An Artist Among the Sephardim.*

(*Roe v. Wade*), or racist retrenchment (*Simpkins v. Spielman*); today these texts abound in the most wicked irony, the most pointed satire. Even Swift, even Kafka cringe before the lancelet of Harry Blackmun's art; Foucault would not disdain Burger's effortless erudition.

He was in the midst of unearthing the hidden treasures of the Federal Reporter, Second Series, when he received a letter from Reverend Jackson's national campaign coordinator.

### III

Kennedy had revitalized the art of critical jurisprudence; his brethren on the High Court remained unaware of this achievement. An entire wall of the Chief Justice's office was given over to the new history of America, and his many clerks were kept busy checking references to its pristine pages. So lucid, so powerful were the products of Kennedy's passion that his fellow Justices never questioned, or even inquired into, the contents of the leatherbound volumes.

At first the Chief Justice was content to apply his interpretive techniques to the work of his colleagues silently, and to those opinions he assigned to himself and allowed his clerks to author. But as the political situation deteriorated he became bored with his responsibilities, and he resolved to enliven the work of the Court. In an impish moment he wrote to Heidi Feldman, a professor of Social Theory at the University of Heidelberg:

I have freed the law from the burden of objective interpretation—it is high time to shackle it again. My next opinion will dispense with irony and subterfuge. The hour has come for our new history to once more capture the past in the amber of irrefutable fact . . . Do you realize that the histories of the Project now fill 37 tomes of more than 600 pages each? That the secondary texts are nearly as voluminous? That we have begun to alter the 123 volumes of the Harvard Law Review? *Roth v. Howe* will take judicial notice of a new reality . . . .

Despite the anarchy that was overtaking the government, Kennedy's impeachment was achieved with surprising swiftness.

### IV

The penultimate entry in his journal (the last entry is in an unknown hand) is dated December 24th, 2008:

The form of the appearance of the will is only the present, not the past or the future . . . . No one has lived in the past, no one will live in the future; the present is the form of all life, it is a

possession that no misfortune can take away . . . . History is an infinite sacred book that all men write and read and try to understand, and in which they too are written.

*Paul Campos, ed.\**

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\* Associate Professor, University of Colorado. His article *Against Constitutional Theory*, 4 *Yale J. L. & the Humanities* 279 (1992), provides an anticipatory evaluation of certain as yet undiscovered interpretive techniques.