

THE PRESENCE AND ABSENCE OF LEGAL MIND:

A COMMENT ON DUNCAN KENNEDY'S *THREE GLOBALIZATIONS*

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Throughout *The Birth of Biopolitics*, Michel Foucault chides himself for engaging in “schematic” exposition, by which he meant (by his standards) unforgivably “abstract” or “bald” or “sketchy” or “stark” generalization.¹ Foucault’s historical method demanded an intense skepticism toward universals—“primary, original, and already given object[s],” for example, “the sovereign, sovereignty, the people, subjects, the state, civil society” and so on—from which, he alleged, conventional historical analysis was prone to derive the meaning of concrete practices.² Foucault desired to *start* with these practices not in order to use them to interrogate the universals (“the historicist reduction”) but to determine their historical meaning in the absence of the “grid of intelligibility” that the universals supplied: “Let’s suppose that madness does not exist . . . what can history make of these different events and practices which are apparently organized around something that is supposed to be madness?”³ It was galling, then, that the compressed time of a lecture frequently required of Foucault the expository equivalent of the economist’s clichéd *a priori*: “assume a can opener.”

Duncan Kennedy’s *Three Globalizations of Law and Legal Thought, 1850–2000*⁴ (*Three Globalizations*) brings *The Birth of Biopolitics* to mind for two reasons. First, like Foucault, Kennedy engages in schematic exposition.⁵ The difference is that Kennedy does not apologize for doing so: rather than contradict his method, schematic exposition is entailed by it. Second,

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1. MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978–79* 39, 105–107, 133, 168, 194–197, 293 (2010).

2. *Id.* at 2.

3. *Id.* at 3.

4. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 63 (David Trubek & Alvaro Santos eds., 2006).

5. Here I must part company with Aya Gruber, who commends *Three Globalizations* for its “thick description.” See Aya Gruber, *Duncan Kennedy’s Third Globalization, Criminal Law, and the Spectacle*, 3 *COMP. L. REV.* 1 (2012). But perhaps this is simply a difference in perspective between a historian and a lawyer.

notwithstanding this difference in method, Foucault may be able to help readers understand the puzzle of Kennedy's third globalization: that is, its incoherence, or its lack (when compared to the first and second globalizations) of any "discernible large integrating concept."⁶

I pursue both of these matters below. But first I feel it necessary to situate myself vis-à-vis discussions of *Three Globalizations* that have already taken place. Kennedy's essay, which was published in 2006,⁷ was used to kick-start a workshop on contemporary legal thought held in October 2011 at the University of Colorado Law School and organized by Pierre Schlag and Justin Desautels-Stein.⁸ A second workshop, which then concentrated exclusively on contemporary legal thought, was held at Harvard Law School in June 2013, some of the fruits of which appear in this issue of *Law and Contemporary Problems*. As it happens, I was involved in neither workshop. This article was solicited late in 2013 by Justin Desautels-Stein after one of the Harvard participants dropped out, and I, in my innocence on a pleasant autumn afternoon, wandered too close to the University of Colorado Law School.

One might wonder why, as an absentee from those earlier conversations, I would become involved now. After all, I have no prior connection with Kennedy himself—neither student nor colleague, nor friend (nor enemy). We have met on a couple of occasions. I was, of course, influenced as a youthful scholar by critical legal studies (CLS), but I was a pretty distant fellow traveler (both literally, given that I spent the 1980s in Australia, and intellectually, given that CLS never displaced an even more youthful allegiance to Marxism). Though I was well aware of Kennedy's leading role in CLS (who could not be?) it was the self-identified CLS historians—Morton Horwitz, Robert Gordon, and others—with whom I formed lasting contacts.⁹

In fact, the reason for my involvement in this symposium is quite simple: To a historian, Kennedy's work should be highly intriguing. Much of his early scholarly career was devoted to the production of an extended (though mostly unpublished) history of Anglo-American legal thought during the later nineteenth and early twentieth century, *The Rise and Fall of Classical Legal Thought*.¹⁰ Kennedy's manuscript became a samizdat classic during the heyday of CLS. However, outside the CLS circle, his brand of intellectual history has not been widely pursued in the general field of legal history, where social

6. Kennedy, *supra* note 4, at 63.

7. Kennedy, *supra* note 4.

8. Papers from that workshop that focused on Kennedy's third globalization were subsequently published in the *Comparative Law Review*. See Gruber, *supra* note 5.

9. Rudely, in the last few years a good bit of my time has been devoted to repaying their generosity by developing a critique of their "critical legal history." See, e.g., Christopher Tomlins, *What is Left of the Law and Society Paradigm after Critique? Revisiting Gordon's "Critical Legal Histories,"* 37 LAW & SOC. INQUIRY 155, 159 (2012); Christopher Tomlins, *After Critical Legal History: Scope, Scale, Structure*, 8 ANN. REV. L. & SOC. SCI., 31, 37 (2012).

10. Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC., 1, 3 (1980).

history has long been dominant.¹¹ Because Kennedy does not consider himself a historian as such, his commitment to the production of explicitly historical scholarship has been episodic rather than continuous.¹² As a result, his work sits outside the legal-history canon; it has never been intellectually required of legal historians that they grapple with it, either in substance or method. This is unfortunate but remediable. His work is extremely stimulating and it is good to see it continue and expand. Among the generality of legal historians, its time may yet come.

Three Globalizations exemplifies the simultaneously episodic and expansive nature of Kennedy's historical work. It is founded on *The Rise and Fall of Classical Legal Thought* but adds to it in four distinct ways. First, *Three Globalizations* addresses classical legal thought's successor, which Kennedy calls "the social."¹³ Second, it traces the origins of both classical legal thought and the social to points outside of the United States, thereby describing the United States as receptor rather than initiator of these schools of thought. Third, as its title suggests, *Three Globalizations* gives particular attention to the international spread of both modes of legal thought. Finally, it sketches the outlines of a third globalization—modern legal consciousness—that is more or less apparent in the wake of the decomposition of the social after 1968. The essay has its own specific genealogy, incarnated first as a lecture on what CLS might contribute to peripheral countries; then delivered at a conference on globalization held in Bogotá, Colombia, in April 2001; revised and presented the following year as a distinguished visitor lecture at Suffolk University Law School in Boston; and revised again and published in 2003 under the title *Two Globalizations of Law and Legal Thought: 1850–1968* in the *Suffolk University Law Review*.¹⁴ *Three Globalizations* is then a further revision of the Bogota lecture and a revised and extended draft of *Two Globalizations*. This genealogy, and the two published essays themselves, help confirm how, since the 1980s, much of Kennedy's attention has been given to the transnational promotion of CLS not as the political movement it attempted (and failed) to become in the United States, but as "a legal academic school of thought" of use "to the part of the intelligentsia of peripheral countries that is interested in left/modernist/post-

11. Robert Gordon notes that "work on the history of contradictions in legal thought," which he associates with Kennedy, "seems rather to have petered out" compared to the "explosion of . . . work in social-legal history" that focuses on "law at the vernacular level, law 'imbricated' . . . in structures and processes of everyday interaction among social actors." Robert W. Gordon, "Critical Legal Histories Revisited": A Response, 37 LAW & SOC. INQUIRY 200, 209 (2012). For a detailed history of that "petering out," see Justin Desautels-Stein, *Structuralist Legal Histories*, 78 LAW & CONTEMP. PROBS., nos. 1–2, 2015 at 37.

12. See Kennedy, *supra* note 10, at vii–viii, xxvi–xxxi, xl–xlii; see also Duncan Kennedy, *Introduction to Legal History*, DUNCAN KENNEDY, http://duncankennedy.net/legal_history/index.html (last visited Nov. 1, 2014) (explaining "[i]t seems only fair to warn the reader in advance that I have no formal academic training in the field, and that my reasons for writing legal history have little to do with those that characterize the United Statesean post-60's academic mainstream in this area").

13. Kennedy, *supra* note 4, at 22, 37–62.

14. These details are all recounted in Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850–1968*, 36 SUFFOLK U. L. REV. 631, 631 (2003).

modernist critiques of the current world system.”¹⁵

I

The 2011 University of Colorado workshop gave particular attention to the third globalization, which remains the least developed of Kennedy’s phases of legal thought. At least some of those participating in the workshop took their task to be to fill in some of the third globalization’s substantive blanks. I have more to say about this in part II of this article, but my objective is to assess the entire effort, so I begin at the beginning, which returns us to the question of method.

Kennedy’s object of attention is not law per se but legal consciousness—the “structure of categories, concepts, conventionally understood procedures, and conventionally given typical legal arguments” *within* which thinking about law occurs, supplemented by structures of subjective experience.¹⁶ The “structure of categories . . . “ constitutes a mode of thought, or *langue*, that is sufficiently stable to be capable of production, transmission, and reproduction, but not so constraining as to predicate specific outcomes.¹⁷ Outcomes—the “specific, positively enacted rules” that express the mode of thought in action in different fields of law—are *paroles*, practices capable of indefinite variation within the boundaries of the mode of thought, according to subjective circumstance, locality, and so forth.¹⁸ As all this indicates, Kennedy’s method is structuralist, derived from semiotics.¹⁹

Visually, one can imagine *Three Globalizations* as a succession of cycles within circles. Each *langue* undergoes a cycle of growth, maturity, and decay within an expanding, then contracting, circle of transmission. As each cycle decays or contracts, it leaves behind continuing traces of itself, like wreckage on a beach after the tide ebbs, available to be combed and recycled. Each cycle’s decay–contraction overlaps with its successor’s growth–expansion, and indeed the two are related in that the successor is a reaction to, and critique of, the predecessor. Critique does not occur, however, as a response to the predecessor’s ideological or philosophical substance, for the very good reason that in Kennedy’s account—within very broad limits²⁰—a *langue* has no

15. *Id.*

16. Duncan Kennedy, *Introduction to Legal History*, DUNCAN KENNEDY, http://duncankennedy.net/legal_history/index.html#LC (last visited Nov. 1, 2014).

17. Kennedy, *supra* note 4, at 23.

18. *Id.* There is some tension in Kennedy’s account between the emphasis upon *parole* variation and the contention (in the U.S. case) that “development in different fields of law over the last century followed a single pattern.” *Id.* at 25.

19. See Justin Desautels-Stein, *Experimental Pragmatism in the Third Globalization*, 9 CONTEMP. PRAGMATISM 175, 183 (2012).

20. Kennedy writes:

Classical [l]egal [t]hought was liberal in either a conservative or progressive way, according to how it balanced public and private in market and household. The social could be socialist or social democratic or Catholic or [s]ocial Christian or fascist (but not communist or classical liberal). Modern legal consciousness is the common property of right wing and left wing rights

ideological or philosophical substance.²¹ (This of course is not true of its multifarious *paroles*, which can and do express a profusion of ideologies and philosophies.) Rather, each *langue* is “a way of thinking without an essence.”²² What distinguishes each from the next is simply that it is a *distinct* way of thinking about law. Thus, the first cycle—globalization, classical legal thought (1850–1914), is a way of thinking about law “as a system of spheres of autonomy for private and public actors, with the boundaries of spheres defined by legal reasoning understood as a scientific practice.”²³ The second cycle—globalization, that of the social (1900–1968), is a way of thinking about law “as a purposive activity, as a regulatory mechanism that could and should facilitate the evolution of social life in accordance with ever greater perceived social interdependence at every level, from the family to the world of nations.”²⁴ The third, problematic cycle (1945–2000) has no discernible single “way of thinking.” It is simply the sum of the distinct expressions of legal consciousness that prevail in the present. As this implies, its way of thinking is plural and contradictory, simultaneously postclassical and postsocial, a reaction to both that also reproduces elements of both anew. The third is “the unsynthesized coexistence of transformed elements of CLT with transformed elements of the social.”²⁵ If this sounds untidy, that is because it is.²⁶

Kennedy offers no “overarching theory of what caused these modes of thought to emerge when they did, of what determined their internal structural properties, of the particulars of their geographic reception, or of their effects or functions in social life.”²⁷ He does, however, identify their provenance. Classical legal thought originates in Germany and spreads throughout the world via “influence within the system of autonomous Western nation states and imperialism broadly conceived.”²⁸ It is widely influential in the Anglosphere.²⁹ At its point of focus lies the reconciliation of individual wills. The social also

theorists, and right-wing and left-wing policy analysts.

Kennedy, *supra* note 4, at 22.

21. *Id.*

22. *Id.*

23. *Id.* at 20–22.

24. *Id.* at 22.

25. *Id.* at 63. Although Kennedy’s dates (1945–2000) imply that the third cycle is over, it seems to me one cannot really detect an “end” yet to modern legal consciousness as he defines it, and therefore it remains.

26. For a sense of this modern–postmodern “untidiness” on an epic scale and a struggle to define it, see BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE, AND POLITICS IN THE PARADIGMATIC TRANSITION (1995).

27. Kennedy, *supra* note 4, at 23–24.

28. *Id.* at 28.

29. Anglosphere is a recently formulated neologism referring to the English-speaking “network” formed by English settler colonialism—the United Kingdom, Ireland, the United States, English-speaking Canada, Australia, and New Zealand—supplemented by English-influenced former colonies of possession—the English-speaking Caribbean, English-speaking Oceania and the English-speaking populations of Africa and India. The term was coined by Neal Stephenson in THE DIAMOND AGE: OR, A YOUNG LADY’S ILLUSTRATED PRIMER (1995).

begins in Germany, but its most complete early expression is French. Whereas classical legal thought is the mode of the academic jurist (law professor), the social is the mode of the legislator whose object of attention is society as an interdependent organism.³⁰ As the social globalizes, it feeds on, and is fed on by, nationalism, and it undergoes endless transfigurations from European fascism to Latin American authoritarianism and autarky, to Christian and social democracy, to anti-imperial independence movements. Its apotheosis lies in its post-World War II union with Keynesian macroeconomics. The third globalization has its origins in the postwar United States, and it lionizes the judiciary but has no particular point of focus. Everything that Kennedy says about it actually suggests absence rather than presence, a mode of thought that is not in fact modal at all—all *paroles*, no *langue*.³¹

Kennedy's account of the first two globalizations is lengthy and not without considerable detail.³² It is, however, necessarily schematic. In his own words his essay "covers a very large amount of material both in time and space" by employing "sweeping assertions . . . supported by a minimal footnote apparatus . . . rather than sustained research."³³ This is not simply a consequence of a decision to synthesize but a matter of method. Kennedy proceeds from the universal—the successive cyclic *langues* of legal consciousness—to the particular practices—the *paroles*—that instantiate them. The former are sharply delineated. The latter, infinite in number, can only be sketched, hinted, skimmed, and generalized. The goal is structural, both in the sense of creating a taxonomy that sorts empirical data, and in the sense of offering a method for historical legal study that itself embodies a way of thinking—a *langue* that may be instantiated in the *paroles* of others who have tested and will participate in testing the explanatory capacity of its structure of categories.³⁴

The way of thinking that the essay embodies, Kennedy explains, is

30. On the expression of this perspective in the U.S. case, see Christopher Tomlins, *Framing the Field of Law's Disciplinary Encounters: A Historical Narrative*, 34 LAW & SOC. REV., 911, 925–26 (2000).

31. Catharine Wells, *Thoughts on Duncan Kennedy's Third Globalization*, 3 COMP. L. REV., 1–2, 7, 9 (2012). This seems to me also to be the message of Giovanni Marini's *Taking Comparative Law Lightly. On Some Uses of Comparative Law in the Third Globalization*, 3 COMP. L. REV. 1 (2012).

32. Inevitably one can quibble here and there. Were there no globalizations before 1850? The Anglosphere had quite a lot of legal consciousness in common before 1850. Whether English imperialism was a globalization, of course, depends on one's definition of "globe," but the sun never set on it, and Kennedy's own globe has some empty spaces too: the Russian Empire–USSR, for example, is an absentee; Africa is mainly an add-on in the analysis compared with close attention to Latin America. Timing, too, could be made more ragged than the neat divisions of 1850–1914, 1900–1968, and 1945–2000. Jhering's fight against the German historical school's *Begriffsjurisprudenz* (jurisprudence of concepts) begins barely a decade after the inception date of Kennedy's first globalization. See Christopher Tomlins, *History in the American Juridical Field: Narrative, Justification, Explanation*, 16 YALE J. L. & HUM. 323, 361–62 (2004). As I said, one can quibble.

33. Kennedy, *supra* note 4, at 20.

34. That it is such is confirmed by many of the sources that are cited—"reports about the work done by [Duncan's] graduate students on Asian, African and South American Law." See John Henry Schlegel, *Together Again*, 3 COMP. L. REV. 1, 3 (2012).

(unsurprisingly) CLS: “[c]ritical legal studies [is] the approach of this article.”³⁵ What does this entail? Two related propositions. First, that legal institutions and ideas are not simply “frameworks or contexts” for other developments but are constitutive of them.³⁶ They are constitutive in particular when it comes to that other looming omnipresence of assumptive causality, economic activity. Kennedy establishes this very firmly, right from the outset: “economic activity can[no]t be understood as something autonomous in relation to a set of passive institutional and legal conceptual constraints, as the term’s framework and context suggests. Legal institutions have a dynamic, or dialectical, or constitutive relationship to economic activity.”³⁷ Even more firmly, they are constitutive not as a matter of relational theorizing, as is often the penchant of law-and-society scholarship,³⁸ but in the nitty-gritty of day-to-day professional struggle. “[S]trong economic actors influence law making just as much as they are constrained by it,” but it is lawyers who throw the switch: “lawyers for economic actors, lawyers working as legislators, judges and legal academics . . . have a professionally legitimated role to play, a role that parallels and overlaps that of the economic power-holders.”³⁹ Here, I think, Kennedy is directly addressing the “intelligentsia of peripheral countries” whom he desires to convince of the utility of CLS as “a legal academic school of thought” in their own formative struggles.⁴⁰ He is also addressing that audience in the final paragraph of the essay, which returns to the same theme of contemporary possibility:

The three globalizations are incidents in the story of military force, economic power, and ideological hegemony within the capitalist period of world history. But I understand this period not as playing out the logic of capital, but rather as the period of universal rationalization, paradoxically intertwined with the death of reason. The death of reason permits (but does not require or in itself bring about) the taking back of alienated powers that can be used for local or national or transnational change toward equality, community, and wild risky play.⁴¹

From this first proposition follows the second, that life—and possibility—is unimaginable without (constitutive) law.⁴² In other words Kennedy refuses

35. Kennedy, *supra* note 4, at 71.

36. *Id.* at 19.

37. *Id.* at 19. I am, of course, not the only person to have underlined this passage, which appears in the third paragraph of *Three Globalizations*. See John Henry Schlegel, *Three Globalizations: An Essay in Inquiry*, 78 LAW & CONTEMP. PROBS., nos. 1–2, 2015 at 19.

38. On which, see Christopher Tomlins, *How Autonomous is Law?*, 3 ANN. REV. L. & SOC. SCI. 45, 48–49 (2007), and, in a lighter vein, Christopher Tomlins, *Bucking the Party Line*, 39 LAW & SOC. INQUIRY 226 (2014).

39. Kennedy, *supra* note 4, at 20.

40. Kennedy, *supra* note 14, at 631. The sentiment is reminiscent of E.P. Thompson’s gauzy and condescending “Causes which were lost in England might, in Asia or Africa, yet be won.” E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 13 (1966). But Kennedy, unlike the Thompson of *Whigs and Hunters*, is no rule-of-law romantic. See E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 258–69 (1975); see also Tomlins, *supra* note 38, at 49–52.

41. Kennedy, *supra* note 4, at 72–73.

42. As Schlegel puts it, “[t]he privileging of law—and, indirectly, lawyers and legal academics—in the discussion that is going to follow is all but complete.” Schlegel, *supra* note 37, at 22.

Foucault's invitation "to suppose that [law] does not exist," to ask "what can history make of these different events and practices which are apparently organized around something that is supposed to be [law]?" Instead he engages in the "historicist reduction." He "starts from the universal and . . . puts it through the grinder of history."⁴³ The result: three cycles, on each of which centers a circle. Why is this problematic?

In fact, as a matter of historical narrative, I think it is not problematic—not at least for the first and second globalizations. In each of these cases Kennedy offers a persuasive account of a recognizable mode of legal thought, evidence of its existence as such, and a narrative of its transnational generalization from an identifiable point of West European origin, all in reasonable accord with, for what it is worth, my own sense of what is happening in regions I know something about (the Anglosphere) and such other specialist literature with which I am familiar.⁴⁴ His "heterodox" observations on the U.S. case in relation to the first and second globalizations thus seem quite defensible. U.S. scholars who might bridle at Kennedy's description of the United States until the 1930s as "a context of legal reception," progenitor of an "original synthesis" (I take this to mean U.S. antebellum legal thought) with no exterior influence of its own, will find much to confirm Kennedy's contentions in David Rabban's

43. FOUCAULT, *supra* note 1, at 3.

44. One of Kennedy's "modest" ambitions for *Three Globalizations* is that other researchers will confirm its hypotheses "by finding things that uncannily correspond to what one would have predicted given the narrative." In that spirit I draw to his attention (but perhaps he has already encountered it) Cheng-Yi Huang's wonderful article, *Enacting the "Incomprehensible China": Modern European Jurisprudence and the Japanese Reconstruction of Qing Political Law*, 33 LAW & SOC. INQUIRY 955, 955–56 (2008). (I happened to be *Law and Social Inquiry's* editor at the time.) The abstract reads as follows:

The great ambition of Japanese colonialism, from the time of its debut at the end of the nineteenth century, was the reformulation of Chinese law and politics. One of the most extraordinary examples of this ambition is *The Administrative Law of the Qing Empire* [Shinkoku Gyōseiho], a monumental enterprise undertaken by the Japanese colonial government in Taiwan intended not only to facilitate Japanese colonial administration of Taiwan but also to reorder the entire politico-juridical order of China along the lines of modern rational law. This article examines the legal analysis embraced in *The Administrative Law of the Qing Empire* and recounts its attempt to reconstruct the Qing's "political law" (seiho) by a strange, ambiguous, and hybrid resort to "authenticity." The strangeness of this Japanese colonial production comes from Japan's dual position as both colonizer of Taiwan and simultaneously itself colonized by "modern European jurisprudence" (kinsei hōri). In uncovering the effects of modern European jurisprudence on the Japanese enterprise, we will discover Japan's pursuit of its own cultural subjectivity embedded in *The Administrative Law of the Qing Empire*, epitomizing the campaign of national identities observable in the process of East Asian legal modernization.

Id. at 955. *The Administrative Law of the Qing Empire* purported to be a translation of imperial Chinese law, but, Huang shows, it was not. "It is organized in the European genre of *Pandekten* (Pandects) rather than in traditional Chinese statutory format . . . [It] incorporates Western legal knowledge," an infusion that was not the work of European jurists "but of Japanese scholars who had only started to learn Western law a short time before the appearance of the survey." Finally, it was prepared not only for the use of Japanese colonial officers "but also for the Chinese themselves; the objects of this colonial investigation."

recent *Law's History*.⁴⁵ Kennedy's insistence that legal realism was an assault on the social rather than a manifestation of it recalls contemporary literature that emphasized the personal split between Pound and the realists⁴⁶ and sidelines work that has teased out realism's links with social science.⁴⁷ But the point is made fleetingly.⁴⁸ Other heterodoxies are matters of long-time local dispute between Griswold Hall, Room 311 and the former occupant of 310 (now Langdell Library 308).⁴⁹

Where the matter seems more problematic is in the carryover of cycle-within-circle to the third globalization. Here the problem is that there is no obvious universal from which to start, no emergent *langue* to transnationalize, only *paroles*.⁵⁰ This is where Foucault's invitation (with which we began) suggests that Kennedy is proceeding in his third cycle in the same manner as in the first and second, the absence of any "discernible large integrating concept" notwithstanding.⁵¹ His method has become that of the fiction: proceed *as if*. What about instead simply recognizing the absence as absence? "[W]hat can history make of these different events and practices which are apparently organized around something"⁵² that is not there?

45. DAVID RABBAN, *LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* (2013). But see KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM* (2011), which offers a quite distinct intellectual history of American legal consciousness in the nineteenth and twentieth centuries.

46. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960* 44–46 (1986) and works cited therein.

47. See generally JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

48. Nevertheless it is significant. Though on one reading, to divorce American legal realism from the social and leave it hanging in one brief sentence is to reduce it to a provincial "Unitedstatean" peculiarity, I do not think this is the objective at all. Legal realism is, rather, an "antisocial" wormhole that connects with and empowers CLS by fortifying it with Weberian means, thereby setting it apart from other "sects" of modern legal consciousness, potentially a *langue* of its very own in the making (Kennedy has made this genealogical argument in greater detail elsewhere). See, e.g., Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L. J. 1031, 1066 (2004); see also *infra* text accompanying notes 88–103.

49. Kennedy, *supra* note 4, at 25 n.6; see also Morton Horwitz, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/faculty/directory/10405/Horwitz> (last visited Nov. 1, 2014); Duncan Kennedy, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/faculty/directory/10469/Kennedy> (last visited Nov. 1, 2014).

50. Jorge Esquirol finds the representation of *parole* multiplicity, particularly in the third globalization, attractive. See Jorge L. Esquirol, *The 'Three Globalizations' in Latin America*, 3 COMP. L. REV. 1, 3, 7–11 (2012). Esquirol proposes that the coherent *langues* of the first two globalizations are in fact hybrid in the peripheral "contexts of reception." See SANTOS, *supra* note 26. From the periphery, the absence of a *langue* emanating from a center is potentially empowering of the periphery. It may encourage the periphery to generate a *langue* that can globalize the erstwhile, self-proclaimed, center. See DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2000). However, my conclusion about the dynamics implicit in Kennedy's essay is different.

51. Kennedy, *supra* note 4, at 63.

52. FOUCAULT, *supra* note 1, at 3.

II

Three Globalizations purports to be organizational and descriptive—“a set of boxes for the organization of facts” and the generation of hypotheses.⁵³ Kennedy’s description of his essay is reminiscent of Milton Friedman’s description of economic theory as “a filing system.”⁵⁴ And of course the similarity is methodological in that economic theory, in Friedman’s terms, fulfills all the conditions of Kennedy’s *langue*.

Viewed as a language, theory has no substantive content; it is a set of tautologies. Its function is to serve as a filing system for organizing empirical material and facilitating our understanding of it; and the criteria by which it is to be judged are those appropriate to a filing system. Are the categories clearly and precisely defined? Are they exhaustive? Do we know where to file each individual item, or is there considerable ambiguity?⁵⁵

And so on. Friedman here is actually invoking the *langue*-like character of one sort of economic theory—positive economics—to distinguish it, sharply, from another sort—“normative or regulative” economics.⁵⁶ He is doing so, with some wit, in the name of John Neville Keynes (the father of John Maynard Keynes).⁵⁷ He is doing so in 1953—early in the upswing of Kennedy’s third cycle. And he is doing so with explicit acknowledgment of the capacity of the *langue* of positive economics to produce “indefinite” *parole*-like variation.⁵⁸

What is being encountered here, I believe, is the presence absent from the third globalization. It is a presence that *The Birth of Biopolitics* insists we recognize.⁵⁹ And, interestingly enough, it is a presence (like the first two globalizations) that has its point of origin in Germany.

The presence is neoliberalism. It emerges as a critique of the social, in the process of which (Friedman’s invocation of the elder Keynes is an instance of this⁶⁰) it deploys aspects of what the social criticized, particularly its formalist conception of science—“a body of systematized knowledge concerning what is”—against what the social proffered in its place—“a body of systematized

53. Kennedy, *supra* note 4, at 24.

54. Milton Friedman, *The Methodology of Positive Economics*, in MILTON FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS* 3–43 (1966).

55. *Id.* at 7.

56. *Id.* at 3.

57. *Id.*

58. For example:

Closely related differences in positive analysis underlie divergent views about the appropriate role and place of trade-unions and the desirability of direct price and wage controls and of tariffs. Different predictions about the importance of so-called ‘economies of scale’ account very largely for divergent views about the desirability or necessity of detailed government regulation of industry and even of socialism rather than private enterprise. And this list could be extended indefinitely.

Id. at 6.

59. See also Kerry Rittich, *Making Natural Markets: Flexibility as Labour Market Truth*, 3 COMP. L. REV. 1 (2012).

60. See Friedman, *The Methodology of Positive Economics*, in FRIEDMAN, *supra* note 54.

knowledge discussing criteria of what ought to be.”⁶¹ But, crucially, it does not resile from the social’s regulatory capacities; rather, it redeploys them.⁶² Above all, however, its *langue* is not a mode of legal thought. Its “events and practices” are organized around a mode of economic thought—neoclassical economics.⁶³

Kennedy does not ignore neoliberalism, but his attention to it is fleeting in large part because neoliberalism is, in his terms, a right-wing ideology rather than a consciousness or mode of thought from which multiple political projects can issue.⁶⁴ But to treat neoliberalism as such is to discount its capacity to be “a filing system” that can generate indefinite variation. And, in fact, to make “the neoliberal” the absent presence of the third globalization is highly compatible with Kennedy’s characterization of modern legal consciousness, the mode of (contemporary) legal thought that is the subject of the third globalization, as a schizophrenic oscillation between neoformalism, balancing tests, and rights. What this reinforces, however, is that the plural and contradictory legal *paroles* of the third globalization—all variations and reformulations of what went before—are not simply manifestations of the absence of a coherent legal *langue*; they are manifestations of chaotic legal *response* to the domination of the current neoliberal cycle by an economic and not a legal mode of thought.⁶⁵

The Birth of Biopolitics is a genealogy of liberalism, considered to be an art of government, organized around four propositions. First, liberalism is not a theory or an ideology but a practice, “a way of doing things.”⁶⁶ Second, liberalism “regulat[es] itself by continuous reflection.”⁶⁷ As such, it is a practice that changes. Third, as “a principle and method of the rationalization of the

61. John Neville Keynes, *The Scope and Method of Political Economy*, in FRIEDMAN, *supra* note 54, at 34–35.

62. FOUCAULT, *supra* note 1, at 129–289, 317. *The Birth of Biopolitics* was to have been a genealogy of governmental practices since the nineteenth century rationalizing “the problems posed . . . by phenomena characteristic of a set of living beings forming a population: health, hygiene, birthrate, life expectancy, race” and so forth. In fact, Foucault spends the entire course of lectures on an introductory analysis of liberalism and neoliberalism: “It seemed to me that these problems were inseparable from the framework of political rationality within which they appeared and took on their intensity. This means ‘liberalism’ since it was in relation to liberalism that they assumed the form of a challenge.” *Id.* at 317. Nevertheless, the questions toward which *The Birth of Biopolitics* points are, “How can the phenomena of ‘population,’ with its specific effects and problems, be taken into account in a system concerned about respect for legal subjects and individual free enterprise? In the name of what and according to what rules can it be *managed*?” *Id.* (emphasis added).

63. Kennedy seems actually to acknowledge this, indirectly and in passing: “My hope is that the ‘three globalizations’ narrative will support the conviction that the progressive elites of the periphery can and should devise national progressive strategies, rather than accept the prescription of the center, that they simply ‘open’ their economies and ‘reform’ their legal systems.” Kennedy, *supra* note 4, at 24.

64. *Id.* at 28. Foucault, in contrast, does not treat neoliberalism as ideology, but rather as one more expression of a liberal art of government that consistently asks how much government is too much.

65. Response can be supportive or condemnatory, approving or alienated; it can be left or right or reactionary. The main point is that the multiple *paroles* of legal response are not specific instantiations of the mode of thought being globalized but rather are echoes or reformulations of the surpassed legal *langues* of the first and second globalizations, which, in default of anything new, are supplying the means of response to the centrality of a nonlegal *langue*.

66. FOUCAULT, *supra* note 1, at 318.

67. *Id.*

exercise of government,” liberalism begins from the premise “that [the activity of] government . . . cannot be its own end.”⁶⁸ Finally, and liberalism’s fundamental question: “What is the utility value of government and all actions of government in a society where exchange value determines the true value of things?”⁶⁹

The first and second globalizations can both be understood as the generalization of successive and distinct modes of legal thought, centered on precisely these four propositions, in which “the economic” is subordinate to or constituted by “the legal.”⁷⁰ The third globalization cannot be understood that way because neoliberalism reverses the relationship: in both theory and fact it addresses these principles and questions in the *langue* of economic thought. Take as exemplary Foucault’s account of neoliberalism’s origins in Germany. He points to the Freiburg School of “ordoliberal” economists (so called because they were grouped around the journal *Ordo* founded in 1936), whose importance lies in their centrality to post–World War II German reconstruction and its absolute commitment to “the direction of the economic process by the price mechanism,” that is, by the operation of a free-market economy rather than by state planning.⁷¹ As an art of government, ordoliberalism does not propose to render the state redundant in favor of a “naïve naturalism” of exchange.⁷² Market freedom is a creature of competition, not exchange, and (unlike classical conceptions of exchange⁷³) there is nothing natural (spontaneously self-sustaining) about competition.⁷⁴ Competition requires the

68. *Id.* As such, liberalism is profoundly distinct from cameralism and its administrative expression *polizeiwissenschaft*, in reaction to which, in Germany, it arose. As the nineteenth-century German jurist and codifier (and liberal opponent of Bismarck) Eduard Lasker put it, “rule of law and rule of police are two different ways to which history points, two methods of development between which peoples must choose and have chosen.” See WILLIAM REDDY, *MONEY AND LIBERTY IN MODERN EUROPE: A CRITIQUE OF HISTORICAL UNDERSTANDING* 16 (1987).

69. FOUCAULT, *supra* note 1, at 46.

70. “The economic” is subordinate in the sense that the first and second globalizations both formulate liberalisms in which the market is defined by the state as a space of definitively ‘economic’ activity circumscribed by the state that supervises it to the extent the state deems appropriate (which could mean anything from “not at all” to “completely,” depending on the state’s *parole*).

71. FOUCAULT, *supra* note 1, at 47. Note that this is not simply a response to National Socialism (which, Foucault points out, was in any case the rule of a party not of a state) but to the far longer history of étatism in Germany—Weimar, World War I’s planned economy, Bismarck, *polizei*, cameralism, and so forth. So what is proposed here is, for Germany, a wholly new concept of economic activity.

72. FOUCAULT, *supra* note 1, at 120. On the historical relationship between claims of “natural order” in the economy and liberal and neoliberal legal thought, see BERNARD HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011).

73. For example, Adam Smith’s:

This division of labour, from which so many advantages are derived, is not originally the effect of any human wisdom, which foresees and intends that general opulence to which it gives occasion. It is the necessary, though very slow and gradual consequence of a certain propensity in human nature which has in view no such extensive utility; the propensity to truck, barter, and exchange one thing for another.

ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 24 (1981).

74. FOUCAULT, *supra* note 1, at 120–21.

state and its regulatory capacity as an essential guarantor of market freedom and as judicial arbitrator of the endless frictions of competition. It requires a state that governs *for* the market and that molds society to the market economy's competitive rationality. The objective is "an economic-juridical ensemble," a "regulated set of activities," operative in a rule-of-law state that "tell[s] people what they must and must not do" without devoting itself to a particular outcome.⁷⁵ But, crucially, it is from their roles as both guarantor of market freedom and formal arbiter of competition that the reconstructed state and its institutions derive their legitimacy, such that

in contemporary Germany, the economy, economic development and economic growth, produces sovereignty; it produces political sovereignty through the institution and institutional game that, precisely, make this economy work. The economy produces legitimacy for the state that is its guarantor . . . [T]he element that comes first in this kind of siphon is the economic institution.⁷⁶

And more:

the economy does not only bring a juridical structure or legal legitimization to a German state that history had just debarred. This economic institution, the economic freedom that from the start it is the role of this institution to guarantee and maintain, produces something even more real, concrete, and immediate than a legal legitimization; it produces a permanent consensus of all those who may appear as agents within these economic processes, as investors, workers, employers, and trade unions. All these economic partners produce a consensus, which is a political consensus, inasmuch as they accept this economic game of freedom.⁷⁷

The neoliberal *langue* of economic freedom and guarantor rule-of-law state described by Foucault transmits and generalizes precisely as classical legal thought and the social have been transmitted and generalized.⁷⁸ This cycle also has a circle centered upon it. Once again, the Anglosphere (notably Britain and the United States) is the receptor. The transmitters are people (Ludwig von Mises, Friedrich Hayek, Aaron Director, Ronald Coase), their books and journals, and institutions (the London School of Economics, the University of Chicago, the Olin Foundation).⁷⁹ As the cycle matures, its ambit widens: in "soft" Europe it becomes known as the social market economy.⁸⁰ In the "anarcho-capitalist" United States, human-capital theory and the enterprise society mold a *homo æconomicus* who becomes "the correlate of a governmentality which will act on [his] environment and systematically modify its variables."⁸¹ Particularly in its U.S. form, the cycle seeks the absolute

75. *Id.* at 163, 172.

76. *Id.* at 84.

77. *Id.*

78. See KEYNES, *supra* note 61; see also Esquirol, *supra* note 50, at 3.

79. For a useful though incomplete intellectual history of the American case, see Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*, 26 J. L. & ECON., 163, 189–92 (1983); see also HARCOURT, *supra* note 72, at 121–50.

80. The idea of the social market economy (*Soziale Marktwirtschaft*) originated in Germany under the first postwar Chancellor, Konrad Adenauer, and his Christian Democratic Union administration. It spread to Austria and France and eventually became a central principle of the European Union.

81. FOUCAULT, *supra* note 1, at 271.

“generalization of the economic form of the market . . . throughout the social body” and indeed throughout the state itself, “assess[ing] government action in strictly economic and market terms.”⁸²

I could go on. But *The Birth of Biopolitics* is there to be read by anyone who so desires, and by now my main point is surely evident: Although at neoliberalism’s point of inception its ordoliberal exponents embraced it as “an economic-juridical ensemble” (Walter Eucken called it “the system”⁸³), its essential premises are economic rather than juridical. In other words, the third globalization is organized around a *langue* of economic thought to which legal thought is essentially supplementary. This is why, in the available analyses of the legal consciousness of the third globalization, one encounters (1) the spectacle of criminal law and criminal-justice institutions reorganized around the market and market behavior;⁸⁴ (2) reformist legal activity premised on the inevitability of the market economy’s continuing centrality,⁸⁵ concentrating on opportunities for a more democratic capitalism that might exist in variations of governmental and enterprise scale;⁸⁶ and (3) a significant instance of experimentalism in contemporary legal thought that, on close analysis, is not distinguishable in its premises from the forms of legal thought that more directly implement neoliberal economics.⁸⁷ Each is a legal *parole* that, in the process of constitutively targeting society for the market, instantiates the *langue* of neoliberal economics. All this suggests that, in the ways of thinking that characterize modern legal consciousness, the range of what is constitutively possible is significantly narrower than the breadth of imagination characteristic, according to Kennedy, of classical legal thought and the social.

III

One question remains: What is the relationship of Kennedy’s own mode of thought—critical legal studies—to “modern legal consciousness”?

If he is right, and the third globalization does have a legal-intellectual *langue* of its own, then, as an instantiation of modern legal consciousness, CLS must necessarily exist somewhere along its (schizophrenic and chaotic) continuum between neoformalism derived from the first globalization and balancing derived from the second, presumably closer to the latter than the former. There is some evidence that this could be a plausible location for at least some forms

82. *Id.* at 243, 247. For the effects (and the *paroles* of “outsider jurisprudence” or “jurisprudence of alienation” that these provoke) see Wells, *supra* note 31, at 8–9.

83. FOUCAULT, *supra* note 1, at 163.

84. HARCOURT, *supra* note 72, at 191–239; FOUCAULT, *supra* note 1, at 239–65; Gruber, *supra* note 5, at 10–17, 18–25 (noting the extraordinary salience of criminal law–criminal justice to neoliberal globalization, but attributing this to the victim’s rights movement, mass communications, and “spectacle-based legalism.”)

85. Amy J. Cohen, *ADR and some Thoughts on the Social in Duncan Kennedy’s Third Globalization of Legal Thought*, 3 COMP. L. REV. 1 (2012).

86. Amy J. Cohen, *The Law and Political Economy of Food: Some Reflections on the Local and the Small*, 78 LAW & CONTEMP. PROBS., nos. 1–2, 2015, at 101.

87. Desautels-Stein, *supra* note 19.

of CLS. For example, Mark Kelman notes that, seen from the perspective of legal academic thought, CLS

might well seem to be the latest revival of an anti-Formalist, Legal Realist movement at law schools that have historically vacillated between ‘conceptualists’ believing in both the autonomy and scientific purity of judicial legal discourse and policy-oriented scholars who felt that legal discourse was just economics, psychology, or politics applied to disputes processed by courts, agencies that more or less wield only certain forms of state power.⁸⁸

But Kelman actually wrote his book to *distinguish* CLS from “deconstructive [r]ealist critique.”⁸⁹ Meanwhile, although Kennedy *does* associate CLS with realism, the association is not with realism’s deconstructivist tendencies but with its transmission into the United States of “Weber’s basic critiques of the social—that it illegitimately attempted to generate a legislative ought from the is of social change, and that it often (not always) tried to bootstrap validity in the juristic sense from the facts of regularity of behavior and normative consensus.”⁹⁰

Indeed, what is really interesting about the reception of Weber into U.S. legal thought in Kennedy’s account is that it is “not prophetic” of anything. Instead it is “quickly succeeded” by something distinctly non-Weberian, the contemporary mode of legal thought (modern legal consciousness) in the form of policy analysis, into which is blended “formalized substantive rationality,” and balancing, and human rights judicial review.⁹¹ The Weberian-realist thread is left hanging until CLS picks it up again. In other words, Kennedy’s account of CLS is inconsistent with his account of the relationship between *langue* and *parole* in legal thought. CLS is not a *parole* form of the *langue* of contemporary legal thought, but something distinct—a resumption of the reception of Weber into U.S. legal thought.⁹²

Another way to answer the question is to assume I am right. There is no *langue* of contemporary legal thought. “Modern legal consciousness” is simply the sum total of *parole* responses to a neoliberal *langue* that originates outside legal thought. If so, CLS can function as one of those responses. It is hardly an enthusiastic response (like law and economics), or a response of critical implementation (like the various pragmatisms discussed by Desautels-Stein⁹³) so presumably it is located somewhere amidst the oppositional jurisprudences

88. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 11 (1987).

89. *Id.* at 12–13.

90. Kennedy, *supra* note 48, at 1070. One should note that both Kelman and Kennedy are preoccupied with critical legal studies in the forms it took in the United States. This is understandable, given that CLS is of U.S. origins, but also parochial, in that it has flourished continuously for longer and in a greater diversity of forms elsewhere in the Anglosphere. See, e.g., Costas Douzinas, *A Short History of the British Critical Legal Conference, or The Responsibility of the Critic*, 24 LAW & CRITIQUE 2, 8 (2014).

91. Kennedy, *supra* note 48, at 1070–75.

92. *Id.* at 1032, 1076.

93. See Justin Desautels-Stein, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 MICH. ST. L. REV. 565 (2007)

of alienation—critical race theory, feminist theory, queer theory, among others—that Catharine Wells identifies.⁹⁴ But “oppositional jurisprudence of alienation” does not accord with my sense of what CLS meant or means. Whether a historically failed political movement or a more current “legal academic school of thought,” CLS seems to me to have aimed persistently (and in a sense cheerfully) at a far different relationship to its political-intellectual environment than oppositional alienation. Kennedy will not mind, I hope, if I cite Unger: “[W]e have refused to mistake the ramshackle settlements of this postwar age for the dispensations of moral providence or historical fate We build with what we have, and willingly pay the price for the inconformity of vision to circumstance.”⁹⁵

Kennedy has identified CLS as one of modern legal theory’s sects.⁹⁶ As such it cannot stand outside modern legal consciousness. Nevertheless, Kennedy’s CLS has distinctly metatheoretical ambitions, as the whole project of *Three Globalizations* attests.⁹⁷ To that extent it exists within modern legal consciousness like the originators of the social did within classical legal thought—the potential agent of decomposition that aspires to transcend the conditions of its existence.⁹⁸ As such, Kennedy’s organizational concentration on the periphery might be seen as an attempt to create a basis there for a fourth globalization (which, by his dating system, is certainly due)—an attempt to enlist that “part of the intelligentsia of peripheral countries that is interested in left/modernist/post-modernist critiques of the current world system” in a further “‘plan’ or project of those with access to the legal, administrative, and judicial processes in [ex-]colonies and states, a project for influencing economic activity.”⁹⁹ If the first globalization was the triumph of classical liberalism over premodern economic and social policy, the second the triumph of laissez-faire’s critics, and the third the triumph of neoliberal economics over the social, then the fourth can be a further transformation, led once more by lawyers, “of how . . . society understands economic development.”¹⁰⁰ Kennedy’s CLS hence becomes the means to “tak[e] back . . . alienated powers that can be used for local or national or transnational change toward equality, community and wild risky play.”¹⁰¹

Denizens of the global center know that each of the center’s globalizations has wrought its own particular brand of havoc (military force, economic power, ideological hegemony) on the periphery. Each has proven by its example that

94. Wells, *supra* note 31, at 9.

95. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 118–19 (1986).

96. See Kennedy, *supra* note 48, at 1032.

97. Wells, *supra* note 31, at 2–4.

98. Historically, then, its position is analogous to Kennedy’s insistent description of legal realism as in but not of the *langue* that informed its present. See *supra* note 48 and accompanying text.

99. Kennedy, *supra* note 4, at 20; Kennedy, *supra* note 14, at 631.

100. Kennedy, *supra* note 4, at 20.

101. *Id.* at 73.

law is politics by other means. On the other hand, peripheral revolutions stoked by the center's intellectuals have their own checkered history. Kennedy asserts that politics is law by other means, and he cites Weber to support the contention.¹⁰² As an admirer of Weber, he will be aware of Weber's advice that "an ethic of ultimate ends and an ethic of responsibility are not absolute contrasts but rather supplements, which only in unison constitute a genuine man—a man who *can* have the 'calling for politics.'"¹⁰³ At the same time as one applauds the ultimate ends, one hopes that this man knows what he is doing.

102. *Id.* at 72.

103. Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 127 (H.H. Gerth & C. Wright Mills, eds. 1958).