THREE GLOBALIZATIONS: AN ESSAY IN INQUIRY

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Duncan Kennedy's paper *Three Globalizations of Law and Legal Thought: 1850–2000*[1] is one of the most important pieces of legal intellectual history written by an American scholar in the last fifty years. It makes a clear, insightful, and provocative argument about the structure of legal thought over the past century and a half. Previously, I published a quick summary of a body of work in economic history that I thought could strengthen Kennedy's central argument.[2] At that time, I ignored the brief introduction and even briefer conclusion that Kennedy used to frame his argument in *Three Globalizations*. I simply could not make sense of that framework; it seemed internally incomplete, if not incoherent.

In this piece, I attempt to understand Kennedy's framework. Why now, if not then? The answer is simple: Pierre Schlag's *The Dedifferentiation Problem*[3] seems to provide another way to understand the source of the incompleteness and possible incoherence in Kennedy's thought that first puzzled me back in Critical Legal Studies days, puzzled me when first writing about *Three Globalizations*, and, I might add, still puzzles me now, since Kennedy's thought is normally so clear and cogent. In the abstract to a recently published paper, Schlag forcefully—perhaps too forcefully—summarized his understanding of dedifferentiation in the contemporary intellectual life of law:

> [O]ur more sophisticated theories of law lead us to a point where we are no longer able to distinguish law from culture, or society, or the market, or politics or anything of the sort. Not only are the various terms inextricably intertwined (something that other thinkers have observed) but we are no longer in a position to articulate any relations between these various terms at all. It is with this latter realization that the dedifferentiation problem kicks in. Because the various terms cannot be disentangled, we find ourselves in the odd position where there is nothing of any positive character to be said about their relations. Each is already the other and, thus, they can have no relation. This is rather bad news for the ways in which we have traditionally conceived

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1. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT 19, 25–71 (David M. Trubek & Alvaro Santos eds., 2006).

2. John Henry Schlegel, *Together Again*, 3 COMP. L. REV. 1.0 (2012).

3. Pierre Schlag, *The Dedifferentiation Problem,* 42 CONTINENTAL PHIL. REV. 35 (2009).

> theories of law—indeed any theory that gets off the ground by distinguishing law from a discrete something else (which, on first glance, would seem to include all legal theory).[4]

What I now understand is that what bothered me in *Three Globalizations* is Kennedy's resolute attempt to set law off from economics and politics. I could not understand why he insisted on differentiating law from those things with which it is "inextricably intertwined."[5]

In my attempt, an attempt that at the outset I might admit to be rather unsatisfactory, to understand why Kennedy tries to separate what is not separable, I begin with a brief summary of the argument in *Three Globalizations*. Thereafter, I offer a detailed reading of the text of the of Kennedy's introduction and conclusion that concern me. While doing so, I regularly intersperse commentary on the relevant piece of text. Finally, I add a few concluding thoughts.

Three Globalizations exemplifies the use of structural analysis to understand the position of contemporary legal actors.[6] This effort aims to provide such actors, specifically those on the political left, with suggestions for ways that the current constellation of legal thought might allow for arguments that might support the causes of the various pieces of the Party of the Left. Kennedy's argument is historical, in the sense that it documents change over time, but not causal, in that it mostly avoids assertions about why such structures of legal thought take the form that they do or why the change from one structure to another takes place. Because the historical argument is structural and eschews causal speculation, it is relatively easy to summarize. As I have previously observed,

> For [Kennedy,] the story of legal thought, or at least the portion that he wishes to tell, begins in the 1850s. This is the well-told story about Classical Legal Thought, an understanding of law that he sees as having given out by the onset of the First World War. This understanding was based on a strong distinction between public and private spheres of autonomous action, a commitment to individual and property rights and a belief in legal interpretation as a process of deduction from within a coherent, and equally autonomous, legal order. These elements fused into a program for law that emphasized fault and freedom of the individual will to act in furtherance of its own projects.
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> Rather than following Classical Legal Thought with what to American academics is the normal trilogy of Sociological Jurisprudence, Legal Realism and Legal Process, [Kennedy] instead posits a unity between these the first two of these bits of jurisprudence that he calls The Social. He dates this understanding of law to the years between 1900 and 1968. While acknowledging that The Social had developed in opposition to Classical Legal Thought, [Kennedy] sees it as equally importantly affirming law as a purposive activity that featured regulatory mechanisms that would bring about "the evolution of social life in accordance with ever greater perceived social interdependence." It emphasized group, not individual rights, social welfare as

4. *Id.* at 35.

5. *Id.*

6. *See generally* Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness*, *in* 3 RESEARCH IN LAW AND SOCIOLOGY 3 (Steven Spitzer ed., 1980).

> producing social justice, the primacy of institutions and institutional arrangements, and more than a bit of corporatism.
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> [Kennedy's] third period, extending from 1945 to 2000, conspicuously lacks a name. Though some people might expect that he would describe this period as the synthesis of Classical Legal Thought, seen as a Hegelian thesis, and The Social, seen as a Hegelian antithesis, Kennedy eschews any such interpretation. Instead, he presents his view of this period of law "as the unsynthesized coexistence of transformed elements of [Classical Legal Thought] with transformed elements of The Social." To him it seems to emphasize somewhat contradictory things—human rights and nondiscrimination, the rule of law and pragmatism, and the possibility for multiple and conflicting projects of normative reconstruction of society so as to emphasize The Social or Classical Legal Thought or some mix of both.
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> For [Kennedy,] each of these understandings of law has its own visions of economic life—the free market, market alternatives, the pragmatically regulated market, respectively. Each also spread globally from a specific national site—Germany, France and the United States, respectively, hence the first words of the title of his piece: *Three Globalizations*. Overall, after luxuriating in the great and insightful specificity of [Kennedy's] insights, the reader has the impression that true to his structuralist roots, for [Kennedy,] thought happens, sometimes in reaction, sometimes in synthesis, with what came before, but happens relatively autonomously from other cultural, economic, political or social projects and so can be, and was, shaped in specific national, colonial or post-colonial circumstances.[7]

Kennedy lays out the "three globalizations" in the first twenty-three paragraphs of the piece, his introduction.[8] Positioning his work as a bit of pure intellectual history, he begins by tracing the lineage of his project to the law and development work of Trubek and Galanter and their self-critique, *Scholars in Self-Estrangement*.[9] Kennedy approvingly sees their work as "problematizing the relatively simple instrumental idea of law with which the field had begun, and politicizing our understanding of development."[10] However, he rejects the understanding of the topic of law and development in the usual terms—legal framework and economic context—with the assertion that the economic context is not autonomous from the legal framework.[11]

What one might have expected to come next—that economic institutions have a dynamic or dialectical or constitutive relationship with legal activity—does not. Instead, what follows is the assertion that the legal framework was a "plan" or "project of those with access to the legal, administrative and judicial processes . . . , a project for influencing economic activity."[12] Such policymakers were, however, not the only persons acting on the law.[13] Kennedy continues, "In

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7. Schlegel, *Together Again*, *supra* note 2, at 1–3 (citations omitted). I am grateful to the *Comparative Law Review* for permitting me to use such a long quotation.

8. Kennedy, *supra* note 1, at 19–25.

9. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.

10. Kennedy, *supra* note 1, at 19.

11. *See id.* ("Legal institutions and ideas have a dynamic, or dialectical, or constitutive relationship to economic activity.").

12. *Id.* at 20.

13. *Id.* ("[S]trong economic actors influence law making just as much as they are constrained by it. They too have projects . . . .").

struggles over the regime, the institutional and conceptual possibilities of law are at stake . . . ."[14] And what does this "regime" consist of?: "the repertoire of possible policies, as well as large numbers of particular rules that make up contested wholes like laissez-faire or socially oriented law."[15] In this struggle, "lawyers for economic actors, lawyers working as legislators, judges and legal academics . . . have a professionally legitimated role . . . that parallels and overlaps that of the economic power holders."[16]

Notice what has happened in but six paragraphs: An assertedly dialectical relationship between legal frameworks and economic institutions is subtly cast aside, and instead attention is moved to a struggle over the legal framework in which lawyers have a role equal to that of economic actors. The privileging of law—and, indirectly, lawyers and legal academics—in the discussion that is going to follow is all but complete. Without saying so, Kennedy has largely dropped economic life from his history. Thus, the question to be addressed already is "What will the law, broadly conceived, be?" not "What will the economy be?" or even "What will law/economy be?"

"So what?," one might ask. Only this: Kennedy is very good at legal analysis, especially the structural analysis of law, as well at legal intellectual history. He seems not very interested in economic history.[17] His audience is likely to be people who are trained in law. "Give the audience what they expect if you want to be heard" might be his objective. Thus, his choice should not be seen as surprising. At the same time, it *is* a choice, and a choice that suggests that the opening observation about constitutive relationships need not be taken too seriously. To use an old phrase, the "[r]elative [a]utonomy"[18] of law is likely to turn out to be less relative and more autonomous and so less continuous and more episodic in its relationship to economic life. Kennedy sees lawyers as arguing "about how to channel or direct economic and social change,"[19] rather than reflecting such change, or as instantiating economic life. This relationship seems unlikely to be the case as a general matter, though it is surely possible in some situations. It sounds suspiciously like the role of lawyers that Trubek and Galanter critiqued.[20]

Kennedy next describes his project in modest detail. Classical Legal Thought comes first, then The Social, and then an unnamed present. For

14. *Id.*

15. *Id.*

16. *Id.*

17. In contrast, I am rather poor at legal analysis—I find it tedious and so boring—and am annoyed by most intellectual history, but am rather good at a currently unfashionable form of economic history. Kennedy would surely be tempted to question the analysis above and what follows based on these facts alone, and so I should note that while he is not interested in economic history, he is interested in economic analysis and very good at it. Again, I find such tedious and so boring. There is a pattern here, perhaps that between horse flies and horses.

18. *See generally* Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC'Y REV. 571 (1977).

19. Kennedy, *supra* note 1, at 20.

20. *See* Trubek & Galanter, *supra* note 9.

Classical Legal Thought, "[t]he mechanisms of globalization were direct Western imposition in the colonized world, forced 'opening' of non-Western regimes that remained independent, and the prestige of German legal science in the European and Western hemisphere world of nation states."[21] Oddly, The Social had no mechanisms of globalization but only "agents" that were "reform movements, of every political stripe, in the developed West, nationalist movements in the periphery, and the elites of the newly independent states after 1945."[22] Later, Kennedy makes a connection between these agents and French legal thought.[23] The third globalization again has "mechanisms" that were the "American victory in World War II and the Cold War, the 'opening' of nation states . . . through participation in the world market on conditions set by multilateral corporations and international regulatory institutions, and the prestige of American culture."[24]

Here too comes the first mention of "legal consciousness," a specification as well as a limitation of what was earlier called by the more general word "framework."[25] Legal consciousness is implicitly defined first negatively as *not* "the view of law of a particular political ideology," *not* "a philosophy of law," and *not* "a particular body of legal rules," but later positively as "a conceptual vocabulary, organizational schemes, modes of reasoning, and characteristic arguments."[26] For Kennedy, consciousness is a "*langue*, or language," which is individualized in various legal regimes as the local "*parole*, or speech," as the positive law of that country.[27] As such, "legal consciousness is the common property" of the Right and the Left.[28] It is the water in which legal fish swim.

The reference here to Saussure[29] is crucial. For if indeed Kennedy has identified several *langues* shared worldwide—and on my meager knowledge of such things his claim seems true—then he has developed an extraordinarily powerful tool for both understanding and using law. At the same time, in support of his claim he identifies two ways that "transnational mode[s] of thought come[] into existence": the combination of ideas with distinct origins by "jurists" as well as the processes of geographic diffusion through the "mechanisms" or "agents" that were identified earlier.[30]

Why the work of "jurists" displaces the previous transnational mode, while the work of "mechanisms" and "agents" combines the new "with 'indigenous'

21. Kennedy, *supra* note 1, at 22.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Compare id.* at 22 *with id.* at 20.
26. *Id.* at 22.
27. *Id.* at 23.
28. *Id.* at 22.
29. *See* FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 8–17 (Charles Bally & Albert Sechehaye eds., Roy Harris trans., Open Court ed. 1986) (distinguishing between language—*langue*—and speech—*parole*).
30. Kennedy, *supra* note 1, at 23.

elements, and the residuum of the previous mode, into a new national synthesis,"[31] is not immediately clear. The import of the distinction between the first and third globalizations, which have "mechanisms" that transmit the mode of thought, and the second, which has "agents" doing that work, seems relatively obvious. Agents are good guys; they bring reform. Mechanisms are hostile; they impose external understandings of law that are resisted—by whom it is not clear—when combining the indigenous elements of the previous system with the new.

Notice here, however, that to the extent that the story of change in the *langue* might be filmed, the story would be an old "Western" with guys in white hats and guys with black ones, and not a more modern "noir" one where everyone has motives that are at least dubious. An arena where economic life has been evacuated is surely an easier ground on which to avoid the noir in national life. Still, one might wonder about the sterilization of lived experience that such an evacuation implies. While again Kennedy has made an important choice in signaling who are the good guys in a story that is decidedly not ambiguous in meaning, the full importance will take some time to appear.

The part played by the "jurists," identified earlier as "legal academics," with their "professionally legitimated role" whose work results in the displacement of a previous mode of thought, is unclear in Kennedy's proto-Western. There is an absence here with which the jurists seem implicitly to be contrasted. And, as is the case with all absences, there are possible suppressed presences. Who might be the nonjurists? Kennedy provides his reader with few clues. Ordinary lawyers are an obvious possibility, as are the bureaucrats who administer the old regime. However, the reason for the presence of this absence seems to be unimportant. It seems doubtful that "jurists," earlier identified as legal academics, are the bad guys. At the worst, they are the indifferent vectors of pointless academicism, the unwitting Ouija board of the world spirit or of randomness or of something in between. So, I shall leave the jurists in their place as not-bad guys for the time being.

After sensibly eschewing "an overarching theory of what caused [his three] modes of thought to emerge when they did," Kennedy lists his three ambitions for his project: "increasing the . . . intelligibility" of the history of Western law; providing an impetus for research that might "confirm" his hypotheses about that history; and supporting "political interventions"—"left or radical left interventions"—into the ongoing history his narrative implies.[32] The reason for these ambitions bears extensive quotation:

> [I]n any given period, the plausibility even to ourselves of our political convictions is, to a limited but important degree, a function of how we understand our history. In this case, my hope is that the "three globalizations" narrative will support the conviction that 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, and accept the consequences for

31. *Id.*

32. *Id.* at 23–24.

good or ill.[33]

Then, with a candid admission of the ways in which his story is "heterodox,"[34] Kennedy ends his introduction by emphasizing the most important of his heterodoxies—his denial that Western law, civil or common, North American or European, "evolved through time according to distinct, internally determined system logics."[35]

I wish to stop again before moving on. Three matters seem important at this point. First, it is not obvious why partisans of the Party of the Left need to be reminded that legal consciousness is constructed. Is Kennedy here assuming that all lawyers need to be reminded that law could be otherwise and so his job is to give his friends a leg up on the Party of the Right? Or, is he assuming that only the Party of the Left hangs on to the notion that legal conscious is not constructed?

Perhaps the answer to this question does not matter, except, second, almost immediately after identifying the people whose work he champions, Kennedy finds it necessary to add, "the connection between narrative and political intuition is tenuous,"[36] a recognition that ties in nicely to the admission that it is his "hope" that his efforts may benefit the Party of the Left.[37] Does his limited hope for a connection between his story and politics at all tie in with the absent antithesis to the jurist? This would make sense of Kennedy's inability or unwillingness to name this absence. Perhaps, in the end, the day-to-day role of the jurist is of quite ambiguous significance; perhaps, it is all pointless scribbling; perhaps law is constructed without agency.

Third, one might easily note the choice to avoid noir-like stories, and instead imply the classic white hat versus black hat Western is wholly unsurprising given the tie of Kennedy's project to "progressive elites" developing "progressive strategies."[38] Just exactly what makes a strategy "progressive?" "Progressive" is doing a great deal of work at a crucial point in Kennedy's description of his project, and yet, unless it is just a fancy word for "what I and my friends see as good," the meaning of the word is rather hard to nail down.

After all, it has been a long time since the Party of the Left expressed anything but hostility toward the "progress" that modernity was supposed to bring. Likewise, a more narrow reference to historical Progressivism seems implausible, given the hostility of both the Party of the Left and the objects of its solicitude to the characteristic Progressive notions that, one, the upper-middle and lower-upper classes know what the lower classes need and, two, it is the job of both classes to delineate and secure those needs. And it would seem that a particular kind of historical amnesia would be required for one to frame

33. *Id.* at 24.
34. *Id.*
35. *Id.* at 25.
36. *Id.* at 24.
37. *Id.*
38. *Id.*

national projects as "progressive."[39] Indeed, it is not even clear that there is a group of individuals, other than "progressive elites," that shares an interest in the large collection of "goods," in both senses, that these elites champion, at least without resorting to some obviously defunct notion of false consciousness, somewhat liberally distributed.

It is even more difficult to understand exactly what the relationship is between progressive elites' role as the white hats in a Western and the choice to gently, but firmly, privilege law by pushing economy away. After all, a rather strong case could be made that many, if not most, of the Party of the Left's objectives are responses to economic deprivation, as well as its oft-accompanying friend, economic predation. The key[40] to understanding this relationship can be found in the final pages of *Three Globalizations*, but before one gets to that conclusion there comes the great meat of this piece, the description of the globalizations.

Kennedy's discussion of Classical Legal Thought[41] breaks no new ground, unless ascribing a Germanic origin to this way of thinking may be thought of as such. The same is not true of The Social,[42] where, in generating a new category that holds together sociological jurisprudence and legal realism and tying both to the French thought, Kennedy has achieved something significant.[43] And his description of the current situation[44] as a time where modes of thought that can be identified with Classical Legal Thought and The Social coexist in a way that allows various political projects to draw from either, seemingly at will, is a very good bit of descriptive jurisprudence that has escaped other observers of the passing intellectual scene in law.

Still, two things bear mentioning: First, the historian in me is not convinced that such coexistence is all that unusual. At least in the United States, the resistance to both sociological jurisprudence and legal realism, a resistance that can easily be seen in our Supreme Court as late as 1935, suggests a rather long period of coexistence.[45] And my guess is that the methods of reasoning typical of early nineteenth century "Protestant Baconianism"[46] survived both Darwin and the Civil War.

Second, the observer in me cannot resist noting the many references to economic life in Kennedy's discussion of his three globalizations. Exactly why

39. Bert reminded me of the implausibility of this inclusion of the search for national distinctiveness in the common litany of progressive projects.

40. Beyond the fact that Kennedy has long struggled to keep discussion centered on law.

41. Kennedy, *supra* note 1, at 25–37.

42. *Id.* at 37–62.

43. I believe that Legal Process Theory should be included in the same category, but this is a technical dispute about the significance of World Wars I and II and the Cold War that should not be allowed to detract at all from Kennedy's achievement.

44. Kennedy, *supra* note 1, at 63–71.

45. *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL (1998); WILLIAM TWINNING, KARL LLEWELLYN AND THE REALIST MOVEMENT 175–84 (1973).

46. Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education,* 17 LAW & HIST. REV. 421, 423 (1999).

his introduction so firmly pushes economics away while his story does not is extremely puzzling.

The conclusion of *Three Globalizations* is but four paragraphs long.[47] The first three are a crisp and impassioned exposition of "the tendency to see a discussion of the politics of law . . . as reducing law to politics."[48] Kennedy is against such a reduction.[49] For Kennedy, law is not politics, but rather politics *by other means*, just as politics is law *by other means*.[50]

Just why it is important that the means of law and of politics are separate and distinct is not at all clear on the text of the three paragraphs devoted to the subject. Nor is it precisely obvious why the final paragraph shifts topic when it observes:

> I understand [the Third Globalization] . . . 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. But they are powers whose ethical exercise starts from accepting the existential dilemmas of undecidability that legal discourse has, from globalization to globalization, staunchly denied.[51]

The fact that these observations are important to Kennedy's project is made clear by the strong language and use of the first person, not once, but twice, in so short a compass.[52] Still, the exact nature of that importance is not obvious.

It seems that one key to the relationship between the two parts of Kennedy's conclusion and also to the relationship between the introduction and the conclusion is the two words "equality, community."[53] These are the words that can most directly be tied to the projects of the Party of the Left, at least in terms of the basic values of "progressive elites." And the objective to reclaim alienated powers has been a Party of the Left project since the time of Marx. Still, it is unclear exactly why progressive elites need to be distanced from the equation of law with politics, and, by a parity of reasoning, the equation of politics with law, by using the phrase, "by other means," despite the interesting lineage of the idea that Kennedy reminds us includes both von Clausewitz and Carl Schmitt.[54] Perhaps Critical Legal Studies' emphasis on plasticity,

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47. Kennedy, *supra* note 1, at 72–73.

48. *Id.* at 72.

49. *See id.* (arguing that "the reduction is impossible" because the political projects of both the Left and the Right are shot through with contradiction, both in the ideological content of their positions and the legal theory used to support them). It is hard to imagine that the same thing cannot be said about the legal projects of the Left and the Right, or the economic projects of the Left and the Right, or the cultural projects of the Left and the Right. Why would one expect consistency in any of these areas of human life?

50. *See id.* ("Commitments as an actor within a legal consciousness shape politics as well as the reverse.").

51. *Id.* at 72–73 (footnote omitted).

52. *See id.* at 72. Examining the centrality of "wild risky play" to Kennedy's thought is an interesting topic that I shall pass over, though would not underestimate.

53. *Id.* at 73.

54. *Id.* at 72.

contingency, and mutability, when combined with how easy it could be for fancy law professors at fancy institutions to assume the effectiveness of their policy prescriptions, makes it unproblematic to discount the likelihood that politics was or could be an important influence on law. At the same time, "by other means" could hold at bay any nagging fear of the irrelevance of law as well as law professors, when faced with the great din of politics in contemporary life. Perhaps not.

Still, it is likely that the question about distancing law from politics is a cognate of the question I posed earlier: Why does law need to be distanced from economics, such that one might say law is economics *by other means* and economics law *by other means*? Each is the assertion of the "relative" part of "relative autonomy," the assertion that there is a core of economics, of law, of politics, that is not shared with the others. As Kennedy puts it narrowly,

> [I]t seems to me . . . that politics is law by other means, in the sense that politics flows as much from the unmeetable demand for ethical rationality in the world as from the economic interests or pure power lust with which it is so often discursively associated."[55]

The same might be said both of law and of economics. Law participates in the unmeetable ethical demand for rationality in the world as much as does politics, and economics in some hands seems only to dispute the "unmeetable" part of this objective. What conceivable reason might there be for some "core," and here I am more than a little tempted to say "nature," some Aristotelian essence, that separates the claimants for intellectual primacy? Specialness? Academic disciplinarity?

As a practical matter, I understand what Kennedy is driving at. A contrast between two comments that I received from friends back when I started teaching highlights his proposition quite well. At the time, I offered both civil procedure and a seminar in judicial decisionmaking. A friend from my days in practice in Chicago, when informed of the latter offering, asked, "Well, Schlegel, after you have told them about graft and corruption, what do you talk about?" A colleague who was teaching torts in the same section that I was teaching civil procedure asked, "Schlegel, can't you help me convince my students that judges can't do whatever they want to do?" Kennedy knows what all good law professors know: At some level of analysis, and for some purposes, law both is politics and is not. Graft and corruption there surely is, but not just that. Judicial preference for some economic actors over others surely exists, but not just that.

However, as a theoretical matter, I am more than a bit bewildered. Granted, the languages of the courtroom and the legislature and the legal academy—and the economics academy, too—are different, but the drive toward reason, however misguided after its announced death, is pretty much the same. As is the risk of graft and corruption, I might add. Still, even more important is the fact that law and politics are one of many pairs of concepts where the meaning

55. *Id.* (footnote omitted).

of each is parasitic on the meaning of the other. Other examples include nature and culture, wild and tame, law and equity, substance and procedure, objective and subjective, as well as slightly more complicated patterns such as animal, vegetable, and mineral. Each of the concepts can be said to have a center where meaning seems at first glance to be rather clear, but each is quite obviously no such thing. Each represents a human carving up of the world "out there" that might be otherwise or even seen as a spectrum, rather than a dichotomy.[56]

It is here where Schlag's discussion of dedifferentiation bites, and bites hard, for the same that goes for law and economics goes for progressive, a term that seems to butt up against an unspoken alternative, especially when law/politics and progressive/conservative, or maybe regressive, or possibly liberal, come together. Consider that neoliberalism is progressive in the same sense that nineteenth-century liberalism was. The one fought the economic restraints of mercantilism; the other, the economic restraints of The Social. And, if one comes to understand that it is the role of law to structure, and so establish, markets, and thus that simply to focus on restraints is a grave error, The Social was progressive in exactly the same sense as Classical Legal Thought and law and economics. All three are attempts to structure, and so establish, markets. All three are only names given to relative stages in the attempts by humans, through their governments, to do the job of structuring. They do not describe essences. But all this Kennedy surely knows.

So, where are we now? We have several puzzlements: first, the elision of economics from a discussion of law; second, the similar distancing of law from politics; and third, the strange inability to identify the negative cognate for "jurists." We also have one bit of reasonably solid ground. "Agents" are good guys and "mechanisms" are bad guys. A second is quite obvious: Progressive elites are good guys, too. I think a third bit of solid ground can be found in an as-yet-unremarked-upon reference to "the existential dilemmas of undecidability,"[57] but it will be a while before we can get there. For the time being, attending to the matter of the relationship between the good-guy progressive elites and the need to both elide economics and distance politics seems more pressing.

When one sees an argument for either separateness or fusion or even for middle positions such as relative autonomy, the first question that might come to mind is, "What is really at issue here?" Is the dispute as pointless as would be a dispute over whether Adam failed to tie the names gnu, wildebeest, and zebra to the correct animal? Or is something else at stake?

Sometimes the answer is reasonably clear. Llewellyn argued, wildly unsuccessfully, for the term "law–government" because to him it emphasized

56. A good example comes from my wife, a field botanist who is often confronted by the lumpers-and-splitters problem when identifying plants. The lumpers refuse to recognize the multiple speciations argued for by the splitters and vice-versa. And then there is the problem of whether "species" that can hybridize could possibly be separate in the first place.

57. Kennedy, *supra* note 1, at 73.

their combined search for ways of ordering society.[58] Way back when, I wrote that "LAW IS POLITICS"[59]—and, as a failed math major, I knew that identities are commutative, so that politics is law. I spoke as I did because the distinction seemed to obscure the question: To whose benefit might the adoption of a rule inure? This question was often submerged on the law side before law and economics and public choice theory forced stylized answers on us. However, even then I never really understood what was at stake when the primary concrete reason for the claim of relative autonomy was to distinguish critical Marxism—and so Critical Legal Studies—from classic Marxism's dismissive relegation of law to the superstructure. That relegation served to preserve Marxism's privileging of the economic base, the original trashing of the distinction between up and down.[60] After all, if scholars and others who found Critical Legal Studies abhorrent wanted to call us Marxists, "relative autonomy" was not going to keep them from doing so.

At other times it is not clear at all. Why does Kennedy, who asserts his antidisciplinarity, push disciplines away in the introduction and conclusion, but at the same time speak of economics and politics in the great—in both senses—central section of *Three Globalizations*? Why is it that national, colonial, and postcolonial circumstances shape the reception of each of the three globalizations but economics, politics, and culture do not? Surely these two assertions do not together add up to the proposition that, in the North Atlantic nations, the rule of law is so deeply entrenched that politics, economics, and culture are fully distanced from the working pure of legal ideas. That would be ludicrous.

Now, none of this can be news to Kennedy either. So, to whom is he talking? I doubt it is law students. Few, if any, of those students who owe their allegiance to the Party of the Left are at all unaware of the intimate relationship between law and politics or economics, as well as the limitations of all three, though perhaps the same is not true for traditional liberals.

More importantly, regardless of their politics, students these days are not bothered by any potential "axiological undecidability" or "indeterminacy" as they create arguments.[61] They come from a world where there is no such thing as determinateness, where everything is mashed together, where one can like completely antithetical things and not think twice about doing so, where everything is what it is and the job is to learn it, hopefully quickly and painlessly, and move on. Indeed, one of the great sadnesses of interacting with today's students is the way that they resist the attempt to create any higher level of coherence than that to be imagined in Kennedy's description of law as

58. *See generally* WILLIAM TWINNING, KARL LLEWELLYN AND THE REALIST MOVEMENT 175–84 (1973).

59. John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 411 (1984).

60. "Up" is good; "down" is bad. In emphasizing the importance of the economic base, Marx upends this valorization in Western thought.

61. *See* Kennedy, *supra* note 1, at 72.

American legal realism left it—a neatly mowed field, all rules of exactly the same height. Learn all the rules, and the stomach butterflies will still.

Perhaps Kennedy's target audience is not students in general or even student adherents to the Party of the Left, but rather a specific subgroup, those individuals whose politics are rooted in identity. The clue here would be his reference to "a feminist identity politics of protection and a queer theoretical anti-identity politics of sexual liberation."[62] If so, I suppose that Kennedy is harkening back to the old fights surrounding the Critical Legal Studies' "critique of rights."[63] Still, however correct we were that rights were no more than second best to cultural acceptance and that cultural nonacceptance would limit the effective reach of rights, we lost that fight. So, it seems implausible that Kennedy is pushing away economics and politics—and, I might add, culture and all but doctrinal history—in order to reassure those seeking to advance the various projects for identity-based rights that it is worthwhile to do so, even if such ideas are not universalizable.

A long time ago I had the sense that when focusing on legal consciousness—and so on legal doctrine, though not doctrine narrowly conceived—Kennedy's audience was law professors and other members of the legal elite, the jurists who seem to lack a negative cognate in Kennedy's story. I suppose that this is still possible. After all, the most narrowly doctrinal people in the world—other than some first-year law students—are the normatively obsessive law professors and their wannabe legislative, judicial, bar-association committee, American Law Institute, and National Conference of Commissioners on Uniform State Laws kin. And there are times, especially during Kennedy's discussion of The Social,[64] when I sense some talking to doctrinal scholars of the normative persuasion creeping back in.

I have never thought that law professors were a plausible audience for Kennedy's best work; each of these scholars may talk as if he takes doctrine seriously, but all that most of them take seriously is the (self-)promotion of the particular normative position each chooses to advocate. It is for this reason it seems that the ambiguous position Kennedy leaves for jurists—neither good guys nor bad—is a modest acknowledgement of the implausibility of addressing this audience. It would be hard to label jurists as the guys with the black hats. After all, they brought us The Social. However, in the present situation they are hardly the guys with the white hats. Self-promotion is not a socially charming trait, and most of the Academy's normative positions are woefully inadequate responses to the reigning conservative cultural ethos, the reiteration of a failed liberal legalism. In such circumstances, the best one might do is to leave the jurists hanging, neither fish nor fowl, not even entitled to a proper contrasting parasitic negative cognate.

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62. *Id.*

63. *See generally* Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM / LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002).

64. *See* Kennedy, *supra* note 1, at 37–62.

Given the implausibility of all of the forgoing options, I see no reason to believe other than that the audience for this work consists of young lawyers from the Party of the Left who are going out into the world, outside of the North Atlantic, seeking to do good works in some country that probably will seem to be less "home" after returning from contemplating *Three Globalizations*. These are the students whose work Kennedy trumpets in his footnotes. Perhaps they are the heirs of those in Critical Legal Studies who were seriously concerned by the assertion that critique, pursued to its ultimate conclusion, would lead to political disempowerment, as if we had already reclaimed our alienated powers. It might be that the existence of separate means for economics, law, and politics would help guard against disempowerment and would aid those who would confront the "existential dilemmas of undecidability."[65]

To identify an audience does not answer the question why, in this piece, which is anything but narrowly doctrinal, Kennedy still pushes away culture, economics, and politics, among other things. Disempowerment is a problem only for those who are paralyzed by choice. Why would distancing the context of choice make paralysis easier to overcome? After all, lawyering is an intensely situational business. No sensible, experienced lawyer will walk into a courtroom not knowing all that can be quickly found out about the judge, the lawyers, and the opposing parties. Who has clout? Who does not? Who will listen to an argument? Who will see it as a waste of breath? Who will let you try your case? Who will try your case for you? Who will behave respectfully? Who is a bully? And most importantly, what is really at stake for the other parties? While I have never done legislative work myself, acquaintances who have speak of the same considerations: in sum, of the culture, economics, and politics in which legislative activity is taking place.

Now, at the same time, no sensible, experienced lawyer will ignore the way that any argument will fit into the existing understanding of precedent, however clear or deeply confused it may be. As Alan Freeman used to make clear, *on the doctrine* capitalism is unconstitutional, but that does not mean that such is a sensible argument at this time and in this country.[66] But in my experience, the likelihood is that young lawyers will pay too much attention to doctrine, not too little. The fact that, in the context of the overall legal consciousness at this time and in this country, an argument that fits rather imperfectly, or not all, is unlikely to deter a new lawyer from making it. Gunslingers all, these young people will proudly enter into a courtroom or legislative hearing as scared and as confident as if they had a gun in their pocket. And in most American courtrooms or legislative hearings most everyone will understand that the person who imagines having a gun in his pocket really has nothing more than

65. *Id.* at 73.

66. *See, e.g.*, David L. Gregory, *Lessons from Publius for Contemporary Labor Law*, 38 ALA. L. REV. 1, 16 n.42 (1986) (discussing Freeman's argument at an Association of American Law Schools workshop).

the extended index finger of a fist. So that person will get knocked around a bit, but will come back no worse for wear.

I am not sure that this is quite so true outside of the narrow compass of the North Atlantic. All I know is what I read in the papers. However, from such a limited base of knowledge, it seems that in many places people with real guns are not likely to be tolerant of the young person who imagines having a gun in his pocket but really has nothing more than the extended index finger of a fist. People, including lawyers, are disappeared in such places. So, it is probably even more important for a lawyer outside of the cosseted precincts we inhabit, to know all the things an American lawyer would want to know, and then some. Culture, economics, and politics surely bulk large in such places. Thus, leaving such considerations out of the story of legal change over the past century and a half is not likely to be doing anything good for students likely to practice in such places.

Of course, I find it hard to believe that any student coming from outside of North America to study in our precious world would be surprised by the brutal politics—often underpinned by economics and culture—back home. So, maybe, all that is omitted from Kennedy's world of *Three Globalizations* makes no difference. Still, I wonder why one might allow the education of such students to be as impoverished as that of American students. After all, as Robert Maynard Hutchins, once boy Dean of the Yale Law School, said when asked to comment on legal education years after he left it, "The best practical education is a theoretical one."[67] Kennedy has delivered a good theory. Why is it not still better? What makes him push away culture, economics, and politics over and over and over?

Pierre Schlag has suggested to me that Kennedy's arguments tend to be structured in such a way as to close off all but one alternative for his audience. "This is the only possibility," they seem to say to the reader. I am not willing to dispute Pierre; he is a better, more careful structuralist than I. Still, if he is right, it is somewhat odd for an individual, as indebted to existentialism as Kennedy is, to attempt to use reason to force an existential leap of faith. After all, existentialism is an ontology, an assertion that it is the nature of being human that reason will run out, that in the face of the radical otherness of the other—the "fundamental contradiction" that Kennedy long ago asserted and then quickly rejected[68]—one cannot but choose, for one is always on some wire, walking without a net. One does not reason to ontological understanding, especially one who affirms "the death of reason."[69] One either gets an ontology or one does not. It is like the mantra "*Om*." An ontology, like a mantra, has no implicit or explicit negative cognate, the other half of a linguistic pair of

67. Robert M. Hutchins, *The University Law School*, *in* THE LAW SCHOOL OF TOMORROW 5, 15 (David Haber & Julius Cohen eds., 1968).

68. *See generally* Peter Gable & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

69. Kennedy, *supra* note 1, at 72.

ineluctably dependent, parasitic concepts.

Let me say it yet again: Surely Kennedy knows that. He has read far more existentialism than I have. If the "ethical exercise" of retaken "alienated powers" requires "accepting the existential dilemmas of undecidability that legal discourse has, from globalization to globalization, staunchly denied,"[70] then those who get this will just choose to act in the face of undecidability. For those who do not, what do they need? Their needs present a problem for a teacher who understands that there is no possibility but to choose to act. Here is where "ethical exercise" has some bite. Do those who do not understand the inevitability of choice need culture, economics, and politics—and probably some other things—so that they have at least an inkling of what action may entail? I have long thought so. And I cannot imagine Kennedy in any role other than that of the fully ethically aware teacher, and in saying so, I am not attempting some rhetorical trick to suggest otherwise. Why then does he push away those things that seem to be ethically required in these circumstances? I don't get it.

Perhaps for Kennedy, the essentiality of the existential moment of choice implies a focus on the narrowest dimensions of choice, in this case, on law, and so requires that everything else be pushed away—culture, economics, politics, and what have you. I guess I cannot see the existential moment in that way. For me, existentialism is a stance toward the world, not a program of action. The leap of faith—an action of the ego in submitting itself to the unknowability of the world, the otherest other—is a leap of being, all of it, not just some narrowly delineated part of either the self or the other. To thus leap implies a denial that there is any other alternative for the irreducible "I," an I that is both alone and deeply situated. A sheltered undecidability is but a shadowed thing.

At the Pro-Seminar at which I presented this piece, Bernard Harcourt called to my attention the fact that I had used the phrase "culture, economics, law, and politics" as if these were differentiated entities, just the practice for which I had criticized Kennedy. He was, of course, correct. Even worse, I have continued to do so above. The English language makes it difficult to live in a dedifferentiated world. It seems that it would be particularly annoying to the reader were I to append to every mention of such concepts the phrase "as it is commonly understood." What can one do in these circumstances?

This problem is not a new one. More than a few years ago I offered the following paragraph at the end of wrestling with a book of intellectual history:

> David Kennedy once told me something to the effect that postmodern legal scholarship, like postmodern fiction, will not come to a conclusion; it will just end. As far as I can tell, though others may disagree, there is not a single postmodern bone in my body. Nevertheless, I think I am about to end, not conclude. Conclusion is impossible. If there is no epistemologically privileged position, then I cannot *know* that intellectual history is better written in the fullness of such social context as one can muster. But by the same token, I am not limited to mere *belief*, as the notion of

70. *Id.* at 73.

> belief is parasitic on the notion of knowledge. Well, if I cannot know and am not limited to belief, then I guess that I am sure that I am right. At least I have given my best arguments. If you are not persuaded, try some arguments of your own. In the alternative, there is always thumbwrestling.[71]

Three things ought to be apparent from this paragraph: One, I have no damn idea about the bones in my body; two, I have long been obsessed with the disciplinary narrowness of intellectual history; and three, I have no solution for the problem that Bernard identified. I can, however, say this: Pushing away what is conventionally seen as politics or economics or culture is not a good idea when one is trying to understand the world in which law is found. Perhaps that negative stricture is the best that our language will permit us.

Still, I would be the first to admit that I have little reason to believe that I am likely to convince Kennedy or anyone else who does either legal intellectual history or, more narrowly, legal scholarship, of the importance of paying close attention to culture, economics, and politics. The same is true of my declamation that existential doubt cannot be escaped, even with the aid of culture, economics, law, and politics—all one can do is get over it and just make the necessary leap of faith. After all, no one followed when I suggested to my Critical Legal Studies friends that, if one took Thomas Kuhn seriously, as one ought to do, then law was not going to change significantly on the basis of our critique, which only reinforced the status quo, unless we began to organize our presentation of law with a different set of categories.[72] Nor was universal applause heard when I spoke of the need to structure legal education not around doctrinal categories, but around the world in which law was done.[73] And it appears that few people understood that when I said, "LAW IS POLITICS,"[74] it was equally apparent to me that "POLITICS IS LAW."

Why, then, wrestle with Kennedy's introduction and conclusion? Well, as I noted at the outset, doing so is not meant to detract from the substantial achievement that is *Three Globalizations*. Rather, to wrestle with a complex text is good clean fun, especially when one understands that to play Sisyphus, to roll the rock up the hill, knowing full well that it will roll back down again, is to be fully human. And at my age, when one begins to become conscious that eventually walking and breathing will become iffy, to feel fully human yet again is a kick.

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71. John Henry Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435, 467 (1989) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986)).

72. The event took place at the Critical Legal Studies conference at the University of Minnesota Law School in 1981.

73. *See generally* John Henry Schlegel, *A Damn Hard Thing to Do*, 60 VAND. L. REV. 371 (2007); John Henry Schlegel, *Walt Was Right*, 51 J. LEGAL EDUC. 599 (2002).

74. Schlegel, *Notes*, *supra* note 59, at 411.