Kennedy, Consciousness, and the Monostructural Account of the American Legal Order

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A central problem at the core of American legal theory concerns the best explanation of legal ontology—legal actors' space within, and relationship to, the governing legal order—and the manner in which this explanation relates to American legal change. One subset of this problem is fairly simple to represent: 'In the beginning' the American legal order looked like X. Today it looks like Y. What does this development say about the evolving nature of legal actors' role within American law, and how does this transformative ontology affect our understanding of disparate areas of American law? Once one factors in the multiple actors, fields, doctrines, and social-historical backgrounds associated with this historical project, it becomes clear how truly herculean this task is.

Over the past several decades, historians, political scientists, and legal academics have submitted a fair number of possible solutions to this problem.[1] Unfortunately, one of the best available solutions to this riddle in American legal scholarship—a solution submitted by Duncan Kennedy—has not received adequate attention. In the sections that follow, I plan to reconstruct Kennedy's valuable theoretical approach to legal ontology and American legal development.

I. Legal Consciousness

The term "consciousness" is not frequently thrown around in mainstream legal circles today. When it is, the term is commonly associated with legal actors'—or potential legal actors'—degree of awareness of legal rules, or actors' desire to discover or shape legal rules (e.g. John drove 55 mph on the highway because he was *conscious* of the legally enforced speed limit).[2] A richer and more robust usage of the term, however, does exist in the critical legal literature. For several decades, Critical Legal Studies

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[1] *See, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (Sanford Levinson ed., 1961); Evan S. Lieberman, *Causal Inference in Historical Institutional Analysis: A Specification of Periodization Strategies*, 34 COMP. POL. STUD. 1011 (2001); LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION (1955); MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996); CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1935); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy Maker*, 6 J. PUB. L., 279 (1957).

[2] *See, e.g.*, Austin Sarat & William L. F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L. J, 1663 (1989); SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); William N. Eskridge, Jr. and John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

(CLS) scholars have been able to skillfully theorize this unorthodox term.[3] Duncan Kennedy, a leading critical theorist, writes: "The idea of legal consciousness is that people who practice legal reasoning do so within a pre-existing structure of categories, concepts, conventionally understood procedures, and conventionally given typical legal arguments."[4]

Kennedy discovered that framing legal ontology and American legal development in terms of consciousness does a better job than other theories of explaining the heightened degree of indeterminacy, contingency, and pluralism that exists in our legal universe. A well-rounded theory of legal consciousness communicates the "multiple trajectories of possibility" in the American legal order.[5] In *A Critique of Adjudication*, Kennedy writes that American law is not preordained, static, or univocal. Instead, American history matters, human agency matters, and minor alterations in legal behavior can—and have—produced innumerable effects. An account of legal ontology and history that emphasizes legal consciousness highlights these central features of our legal order; this account understands that "there is a false determinacy in the social world, and the false determinacy hides a true determination by human agency."[6]

But what, precisely, is a legal consciousness? I understand Kennedy to be arguing that a legal consciousness is an ecosystem, a complex network of connected types. A person requires this network in order to come into contact with the American legal order and make sense of that contact.[7] For instance, when a person comes into contact with feature F of the American legal order, she is able to interpret F, assign characteristics to F, and relate to F through particular types.

Types provide the concepts and contents needed to make sense of the different features found within our legal order. Within a legal consciousness, at least four given types operate together to supply legal actors with the "cognitive maps that shape" how each actor will "approach a given case and imagine the available choices."[8]

A. Ideas

Legal ideas represent the first type found within a legal consciousness. This vast type includes "ideas about the nature, function, and operation" of American law.[9] Value hierarchies, ideologies, and moral opinions are represented within this first type. Legal

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[3] Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3, 8 (1980) [hereinafter Kennedy, *Historical Understanding*].

[4] Duncan Kennedy, *Legal History: Introduction*, DUNCAN KENNEDY (last visited Jan. 15, 2015),http://duncankennedy.net/legal_history/#LC.

[5] Robert W. Gordon, *Critical Legal Histories*, 36 STANFORD LAW REVIEW 57, 112 (1984).

[6] DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 18 (1997).

[7] Kennedy, *Historical Understanding*, *supra* note 3, at 5.

[8] Keith Whittington, *Once More Unto the Breach: Post-Behavioralist Approaches to Judicial Politics*, 25 L. & SOC. INQUIRY 601, 622 (2000).

[9] David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

actors seeking to excavate the moral principles undergirding the law, or to unearth the "constitutional essence" that sets out the normative priorities of the American state, are operating within the type of legal ideas.[10] These ideas set boundaries on the legal order, and color persons' perspectives on legal situations, for they "impose limits, suggest directions, provide one of the elements of a style" even if they are not entirely responsible for final outcomes.[11]

B. Behaviors

The second type operating within a legal consciousness is legal behaviors. This type sets out those behaviors that are deemed to be legally permissible, legally required, or law enhancing. Certain manners, practices, and rituals adhere within a particular consciousness. Legal behaviors serve an important rationalizing function in the United States. These behaviors legitimate the use of political power within our legal order, "showing that the law-making and law-applying activities that go on in our society make sense and may be rationally related to some coherent conceptual ordering scheme."[12] Legal behaviors ought to align with the first type—legal ideas—but they need not always be the mere practical extension of the first type. For example, the legal behaviors that happen to fit within the same legal consciousness as republican legal ideas do not always amount to the pure embodiment of republicanism.

C. Tools

Legal tools comprise the third type found within a legal consciousness. This type includes the set of rules, procedures, technologies, and interpretive resources deemed to be appropriate for legal usage by persons working within a particular consciousness. These tools represent the equipment a person can rely on to legitimately interpret the law and adjudicate legal disputes.

D. Institutions

Closely connected to legal ideas is the final type: legal institutions. This type is responsible for constructing and legitimating legal agents and infrastructural arrangements, as well as settling American case law. It is in this type that questions such as '*Whose ideas? Whose actions? Which publics*?' are "made and imagined rather

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[10] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) [hereinafter DWORKIN, FREEDOM'S LAW]; LEVINSON, *supra* note 2.
[11] Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 292 (1978); Kennedy, *Historical Understanding*, *supra* note 3, at 8.
[12] Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1018 (1981).

than merely given in a self-generating process that would unfold independently."[13] Legal ideas and institutions work hand in hand to explain and justify the American legal order.[14] Gordon (1981) points towards the role of this type within legal consciousness when he writes, "Legal texts participate in the construction of the social world, populating it with creatures of law's own devising."[15] Legal institutions frame and order the "direct personal connections" within the American legal order, and settle the hierarchies, rules, and relationships surrounding legal texts.[16]

II. The Monostructural Account of the American Legal Order

In the most elaborate account of legal consciousness to date, Duncan Kennedy details the anatomy of a *single* legal consciousness.[17] For this reason, I refer to Duncan Kennedy's account of the American legal order as a monostructural account. According to the monostructural account, one overarching structure of legal consciousness exists—and has always existed—within the American legal order. This consciousness is comprised of smaller "subsystems," in which "every element" is "related to every other."[18] Over time, changes in the relationship between these lower elements do take place within the single structure of legal consciousness.[19]

According to this account, the legal consciousness must "develop, evolve, transform themselves, but are nonetheless somehow 'the same thing,' as opposed to other entities, that they were at the beginning."[20] The four types within the legal consciousness do shift around, but often in a synchronized and even pattern. Legal ideas evolve, behaviors realign, and tools and institutions recalibrate. According to Kennedy's monostructural account, these gradual, internal reformations are what drive American legal development.

This view of historical transformation, which holds out the promise of chain novel consistency within the constitutional universe, oftentimes is coupled with an especially normatively charged telling of legal development.[21] For instance, changes at the sub-systemic level of the single-structured legal consciousness can lead some generations to express more or less liberal attitudes towards the Constitution, to consider matters of justice, property, centralization, or decentralization more pressing, or to arrive at a morally superior relation to the legal order than other generations.

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[13] ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 108, 111 (1986).
[14] Trubek, *supra* note 9.
[15] Gordon, *supra* note 12, at 1035.
[16] UNGER, *supra* note 13, at 26.
[17] For other, less developed, monostructural accounts, see SOTIRIOS BARBER, ON WHAT THE CONSTITUTION MEANS (1984) and RONALD DWORKIN, LAW'S EMPIRE (1986).
[18] Kennedy, *Historical Understanding*, *supra* note 3, at 6, 7, 22.
[19] *Id.* at 14–15.
[20] *Id.* at 23.
[21] *Id.*; DWORKIN, FREEDOM'S LAW; DWORKIN, LAW'S EMPIRE (1986).

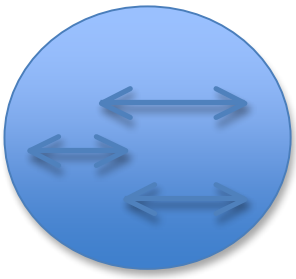

Diagram 1: The monostructural account of the American legal order, with internal, sub-systemic transformations (⟷) driving American legal development.

The final characteristic of Kennedy's monostructural account that I would like to bring attention to is its relatively static ontology. Kennedy views the "intelligentsia" as the primary legal actors and those most often responsible for the sub-systemic transformations which lie at the heart of American legal development.[22] In *A Critique of Adjudication*, Kennedy claims:

> A person entering American political life finds it organized, loosely, into ideological intelligentsias, which are self-conscious groups that identify with particular interests, while proclaiming particular normative abstractions, and which, historically, worked for the adoption of specific positions on issues that supposedly reflect both the interests and the universal norms.[23]

In many ways, this narrows our view of the public at issue in the American legal order. By 'public,' I mean to denote the set of persons who populate the American legal order, as well as the multiple roles that these persons embrace within that order.[24] Within Kennedy's monostructural account, a fairly bifurcated public is observed. Although liberal processes of denial, mediation, and legitimation require the cooperation of both the ideological intelligentsia and the whole of society, it is the intelligentsia who consistently perform the sub-systemic transformative acts within the American legal order, while the rest of the public either stands loosely complicit or entirely inactive, mere recipients of the changing legal landscape.[25]

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[22] Barber, *On What the Constitution Means*; Kennedy, *Historical Understanding*, *supra* note 3, 22.
[23] DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 50 (1997).
[24] Kennedy, *Historical Understanding*, *supra* note 3, at 6.
[25] Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 213, 214 (1979).

III. Conclusion

The search to uncover the link between legal ontology and American legal history has bedeviled legal scholars for decades. In several important works of legal theory, Duncan Kennedy has argued compellingly on behalf of a particular understanding of this theoretical link. Through the language of legal consciousness, Kennedy has presented a monostructural account of the American legal order. This monostructural account sees sub-systemic changes—changes at the level of types—as having evolved in concert to drive American law forward. Kennedy's narrative also provides a remarkably stable view of legal actors, trans-historically divided between the intelligentsia and the rest. Although this highly controversial account undoubtedly leaves room for critique both from the legal left and legal right, I believe that critical engagement with Kennedy's monostructural theory represents the best path forward for continuing research in the area of legal ontology.