The Misplaced Role of Phenomenology in Duncan Kennedy's Theory of Legal Interpretation

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In "Freedom and Constraint in Adjudication: A Critical Phenomenology," Duncan Kennedy puts forward a criterion of adequacy for theories of legal interpretation.[1] For Kennedy, any theory of legal interpretation must account for the subjective experience—or phenomenology—of interpreting the law. Kennedy claims that legal interpreters feel both free to interpret legal materials in accord with their sense of justice and bound to interpret those materials in a particular way. The experience of law, Kennedy claims, is an experience of both freedom and constraint.

While Kennedy forcefully *claims* that a theory of legal interpretation must account for—or hold true to—the phenomenology of the legal interpreter, he never provides a compelling *argument* for this claim. The phenomenological criterion seems to exist as an article of faith for Kennedy. Why not think, for instance, that the freedom judges feel in interpreting the law is merely a form of self-deception and has little to do with the content of the law? On the other hand, why not hold the position—al la Derrida[2]—that the feeling of constraint is a mere illusion?

On the basis of a phenomenological exploration, Kennedy puts forward the following, rough theory of legal interpretation: the content of legal materials is only determinate—or *in*determinate—in relation to a judges efforts to interpret those materials in light of his or her ideological commitments. Kennedy writes:

> To say that the interpretation of a rule was determinate is only to say that at the end of the work process the interpreter was unable to accomplish the strategically desired re-interpretation of the initially self-evident meaning of the norm as applied to the facts.[3]

For Kennedy, then, the process of legal interpretation itself is an exercise of ideologically driven re-interpretation.

In what follows, I argue that the phenomenology Kennedy articulates does not support his theory of legal interpretation. This failure provides support for the conclusion that the phenomenological method itself is faulty. While phenomenology can provide us with rich descriptions of experience, descriptions that go missing in "objective," scientific descriptions of the world and ourselves, the method is not suited to provide constraints on theorizing about the nature of legal normativity.

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[1] Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) [hereinafter Kennedy, *Adjudication*].

[2] *See generally* JACQUES DERRIDA ET AL., LIMITED INC (1988). (Derrida argues that the meaning of a word, rule, or work of philosophy is always deferred, or open to later authoritative interpretations.)

[3] DUNCAN KENNEDY, LEGAL REASONING: COLLECTED ESSAYS 153–74 (2008) [hereinafter KENNEDY, LEGAL REASONING].

I. Kennedy's Phenomenology of Adjudication

Kennedy provides us with a fictional, first person account of a Boston judge who must decide whether to grant an injunction that will prevent striking union bus drivers from protesting by lying down in front of buses operated by non-union drivers.

Kennedy's fictional judge first contemplates a rule forbidding protesting workers from interfering with the owner's means of production, the buses.[4] The judge initially sees this rule as a constraint on his action. The rule, on the face of it, requires that he grant the injunction. This impression of his duties under the law clashes with his sense of justice, his conviction about how he should rule. The judge then seeks a legal reason to deny the injunction.

Kennedy's judge experiences a sense of freedom when he determines that he may be able to cast this case as governed by the First Amendment.[5] If the workers are exercising their First Amendment rights in protesting the bus company, he reasons, there should be no federal injunctive relief for the company. But soon after this realization Kennedy's judge feels a sense of panic because his initial aim, he realizes, is not simply that of denying the injunction, but that of undermining the initial rule that he first felt as a constraint.

While Kennedy's judge experiences a sense of freedom in contemplating the various cases, policy arguments, an alternative rule interpretations that could justify his denying the injunction, he also experiences a sense of constraint in recognizing that he has taken an oath to uphold the law, will be sanctioned by the legal community if he fails to properly justify his decision, and recognizes that any sanction from the legal community will undermine his authority in future cases.[6]

Thus, Kennedy's judge experiences the legal rule along with the various valid methods of legal justification as freeing, while viewing the legal community and his own sense of integrity as constraining. In short, the experience of making a legal decision as a judge, Kennedy argues, is the experience of freedom and constraint, the experience of the tension between the law and the judge's sense of justice.

II. Kennedy's Theory of Legal Interpretation

As a phenomenological account of judging, it appears that Kennedy's account succeeds. It just has to be true that judges who have a firm conception of justice that differs from their initial apprehension of the law experience law in the way that Kennedy describes. Problematically, Kennedy relies on this phenomenological account in critiquing what he calls the "Hart/Kelson theory of legal interpretation." Kennedy does not focus on the entirety of Hart or Kelson's theory, but attacks a claim that they hold in common—that we can divide applications of legal norms into two categories: core and periphery. Applications in the former category are said to be easy, or automatic, given the meaning of the norm in question. Applications in the latter

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[4] Kennedy, *Adjudication*, *supra* note 1, at 519.
[5] *Id.* at 524.
[6] *Id.* at 527.

category are more difficult in that they require imagination and considerations of nuanced contextual factors.[7] Hart and Kelson both disagree with rule skepticism, or the view that there is no such thing as the correct application of a rule or a set of rules.

Kennedy complains that the Hart/Kelson theory ignores the phenomenology of judging and thus how the application of a legal norm is placed into the category of core or periphery. Kennedy claims that the phenomenology of judging reveals that norm applications are categorized only *after* the judge has made an effort to interpret the norm in a way that aligns with how he or she would like to rule. For Kennedy, that an application of a legal norm is categorized as a core application is not an intrinsic feature of the norm but a feature of the norm in light of a judge's attempt to interpret the norm to suit his or her sense of justice. Core applications, for Kennedy, are those that resist a judge's efforts to re-interpret.

III. A Mismatch Between Phenomenology and Theory

Kennedy's phenomenology of adjudication does not support his theory of interpretation. Kennedy claims that in many cases the meaning of a legal rule is experienced as given, as requiring a certain outcome. This experience only changes when the judge begins to think about how she may permissibly interpret the rule in a way that supports her desired outcome. But this phenomenology better supports the Hart/Kelson theory. Hart and Kelson claim that in many cases the meaning and proper application of a legal norm is clear. Hart and Kelson would argue that judges sometimes initially experience rules as determinate because in many cases legal rules *are* determinate. The best explanation of Kennedy's phenomenology, it seems, is given by the Hart/Kelson theory.

Kennedy does hold that judges experience law as both freeing and constraining, but this feeling comes only after the judge determines how she would like the case to come out and begins the project of *re*-interpretation. The act of re-interpretation only makes sense in light of an initial understanding of the meaning of a norm. As Kennedy argues, it is legitimate for judges to consider various interpretations of legal rules, but this fact lends no support to the claim that the *phenomenology* of judging reveals that applications of legal rules can be understood as core or periphery only with reference to attempts at re-interpretation.

Given that Kennedy's articulation of the phenomenology of judging does not seem to support his theory of legal interpretation, we can ask what phenomenological account *would* support Kennedy's theory. It seems that phenomenological account of the following shape best fits Kennedy's theory: The judge, after studying the set of rules and cases that are to govern the case under consideration, has *no* impression of what the law requires. He only knows how he wants the case to come out and begins the project of interpretation in light of his understanding of justice. The judge attempts to craft a decision that fits both the legal materials and his conception of justice. He experiences this task as either easy or difficult. In situations of the former type, we can say that the judge's application of the legal norm was a core application, in the latter

[7] KENNEDY, LEGAL REASONING, *supra* note 3, at 154–57.

situations we claim that the application was at the periphery of the norm. Here there is a clear sense in which the distinction between core and periphery applications can only be understood relative to acts of ideologically driven interpretation.

Clearly not every experience of every legal norm is of this type, but it is likely that *some* persons experience *some* legal norms in this way. This fact reveals a larger problem with Kennedy's use of phenomenology. Not only does his phenomenological account not support his theory of legal interpretation, his phenomenological account is but one of many possible accounts. The first-year law student, the experienced judge, the law clerk, the firm partner, and the law professor have differing experiences of the law. Some legal interpreters interpret in light of their sense of justice while others only interpret the law for a paycheck. As Wittgenstein warns, it is a mistake to look to phenomenology to ground facts about meaning.[8]

The phenomenological method is valuable in that it can reveal facts about our experience that we tend to ignore when we think about ourselves from a scientific perspective,[9] but Kennedy's assumption that phenomenology can provide us with a criterion of adequacy for an account of legal interpretation is simply mistaken.

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[8] LUDWIG WITTGENSTEIN ET AL., PHILOSOPHICAL INVESTIGATIONS § (2009) (Wittgenstein argues that the meaning of a word is necessarily public, such that private sensations, or person's phenomenology, do not set the meanings of words).

[9] *See* MAURICE MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION vii (2002) ("It [phenomenology] is the search for a philosophy which shall be a 'rigorous science', but it also offers an account of space, time and the world as we 'live' them. It tries to give a direct description of our experience as it is, without taking account of its psychological origin and the causal explanations which the scientist, the historian or the sociologist may be able to provide.")