

2015

# On the Prospect of a Cognitive Sociology of Law: Recognizing the Inequality of Contract

Michael W. Raphael  
*CUNY Graduate Center*

Follow this and additional works at: [http://academicworks.cuny.edu/gc\\_studentpubs](http://academicworks.cuny.edu/gc_studentpubs)

 Part of the [Social Control, Law, Crime, and Deviance Commons](#), [Sociology of Culture Commons](#), and the [Theory, Knowledge and Science Commons](#)

[How does access to this work benefit you? Let us know!](#)

---

## Recommended Citation

Raphael, Michael W. 2015. "On the Prospect of a Cognitive Sociology of Law: Recognizing the Inequality of Contract." Presented at the Annual Meeting of the Mid-Atlantic Law and Society Association, New York: CUNY Academic Works.

This Presentation is brought to you by CUNY Academic Works. It has been accepted for inclusion in Graduate Student Publications and Research by an authorized administrator of CUNY Academic Works. For more information, please contact [AcademicWorks@gc.cuny.edu](mailto:AcademicWorks@gc.cuny.edu).

# On the Prospect of a Cognitive Sociology of Law

## **Recognizing the Inequality of Contract**

Michael W. Raphael  
Department of Sociology  
CUNY Graduate Center

# Abstract

- One of the few basic premises that sociological analysis assumes is a general answer to the question of how society is organized according to some sort of agreement or contract. Elucidating how this question is *still* unsettled requires an exploration of how several prominent thinkers have considered what the basis for society is and how it is related to justice founded in the cognitive sociological basis of individuality. Drawing on the cognitive and cultural turn, this critique offers a revision of the structure-agency problem and examines the implications for a sociological conception of freedom and a corresponding concept of causation for the human sciences.

# What is law?

## **Classical Sociological Approaches to Law**

- Karl Marx
- Max Weber
- Emile Durkheim
- Eugen Ehrlich
- Leon Petrazycki
- N. S. Timasheff

## **Classical Sociological Approaches to Law**

- Structural Functionalism
- Donald Black
- Pierre Bourdieu
- Michel Foucault
- Jürgen Habermas
- Niklas Luhmann
- John Rawls
- H.L.A. Hart
- Ronald Dworkin

## **20th Century Movements in Law**

- Critical Legal Studies
- Empirical Legal Studies
- Law and Economics
- Law and Literature
- Law and Psychology
- Legal Formalism
- Legal Realism
- New Legal Formalism
- New Legal Process
- New Legal Realism
- Post-Critical Legal Studies
- Post-Modern Jurisprudence
- Sociological Jurisprudence
- The Law and Society Movement



# A Social Media Representation of the Social Contract

$$\text{SOCIAL CONTRACT} = \frac{\text{SOCIETY'S NEEDS}}{\text{MINE}}$$

**Table 1. The Modern Classical Tradition of the Social Contract**

<b>Author</b>	<b>State of Nature</b>	<b>The Character of the Contract</b>	<b>The Power of the Sovereign</b>
<b>Hobbes</b>	A state of affairs in which there is no Sovereign power to keep everyone in awe.	A rhetorical device from which rational persons, looking to their most basic interests can see that they have sufficient reason for supporting an effective sovereign.	The Sovereign acts absolutely and is someone whom members of society have authorized to act on their behalf. Having authorized them, we own the actions of the Sovereign and recognize them as our own.
<b>Locke</b>	A state of equal political jurisdiction where all beings are equally sovereign over themselves.	A rhetorical device used to maintain that legitimate government can be founded only on the consent of free and equal, and reasonable and rational persons, starting from the state of nature.	Sovereigns to be fully aware that their reasonable conduct in exercising political authority is a necessary condition of their subjects being bound to accept their legitimacy: this awareness will serve as a constraint on their behavior.
<b>Rousseau</b>	The first of the four cultural stages before civil society where man is a lazy, unreflective, but free and happy animal.	A rhetorical device in which people become a people subject to the general will.	When taken individually, they are citizens; as subjects, insofar as they put themselves under the laws of the state, they share equally in the sovereign power.

# Universal Cognitivism

- Universal cognitivism seeks to articulate a model of the actor that stresses naturalistic explanations of human behavior.
- In this rigid ideal-type, naturalistic explanations of human behavior tend to be based on special modes of inference, testing or experimentation in their investigation of internal mental processes.
- These include learning, memory, perception, attention, cognitive control, language, motor control, decision making, and social cognition.

# Individual Cognitivism

- Individual cognitivism seeks to convey a model of the actor that underscores humanistic explanations of human behavior.
- In cognitive sociology, humanistic explanations of human behavior tend to be based on the analysis of the aggregation of actions in their investigation of social facts.
  - These include aggregates of beliefs, intentions, motives and reasons. Based in the richness of subjective experience, explanations of this kind are concerned with cognitive rationality, the formation and organization of mental representations and understanding their function and role in conduct.
  - Such ideal-typical explanations attribute causation on the premise that social facts are the product of *individual* actions – meaning the *locus* of cognition is in the *mind* with actions resulting from the subjective rationality of a conscious and intentional actor that is best described as *homo sociologicus*, an ideal type used for heuristic purposes.

## The Modern Classical Tradition of the Social Contract

Author	Source of Rights	Basis for Society	View of the Social	Type of Cognitivism
<p><b>Hobbes</b></p> <p><b>Locke</b></p> <p><b>Philosophy's</b></p> <p><b>Rousseau</b></p>	<p>Self-Abnegation from State of Nature</p>	<p style="text-align: center;"><b>Social Contract</b></p> <p style="text-align: center;">(As Described by Table 1)</p>	<p>Entities</p>	<p>Universal</p>

## The Revival and Opposition of Contractarianism

Author	Source of Rights	Basis for Justice	View of the Social	Type of Cognitivism
<p><b>Rawls</b></p>	<p>Self-Abnegation</p>	<p>Original Position → Social Contract → Justice as Fairness in a Well-Ordered Society</p>	<p>Entities</p>	<p>Individual</p>
<p><b>Dworkin</b></p>	<p>Self-Assertion</p>	<p>Hume's Principle → Kant's Principle → Objectivity of Personal Ethics → The Principle of Human Dignity → Bridges Personal Ethics and Political Morality → Justice as an Interpretive Moral Concept in a Liberal Society</p>	<p>Entities</p>	<p>Individual</p>

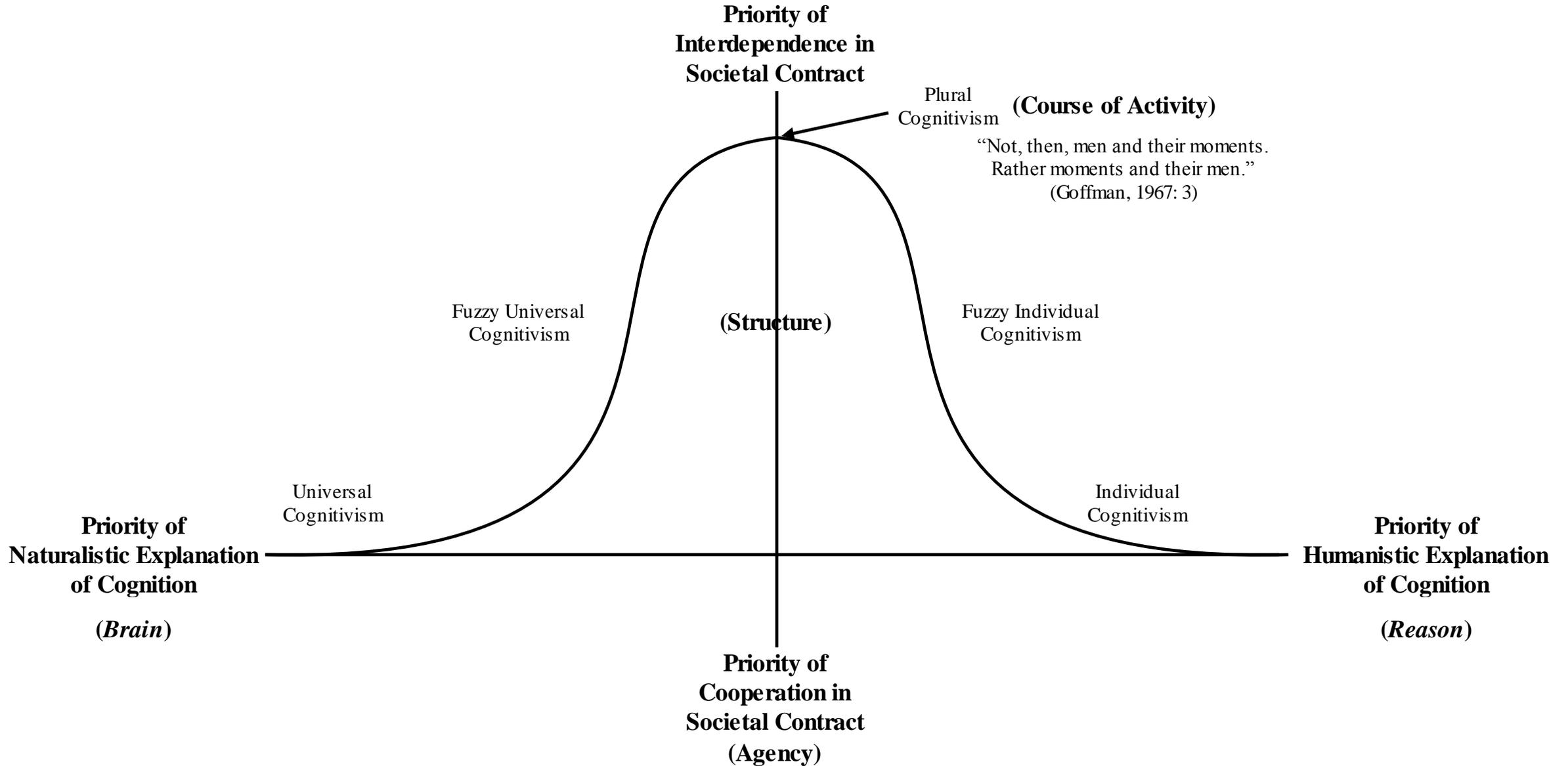
# Rousseau Reconsidered

- This is the perspective of a recent work by Michael E. Brown (2014) which is based on a reading of Rousseau that is different from the typical use of the idea of a social contract to shed light on the idea of a society, as if the latter is derived from the former.
- Brown begins by an internal critique of the human sciences that suggests an agreement that human beings are social “through and through and that this is not the sort of sociality that is typically described by reference to norms, roles, and complex organization.
- He then argues that the sociality inaugurated by the first convention cannot not adequately represented by reference to entities or by concepts typically included in the analysis of societies: interaction, cooperation, solidarity, exchange, interpersonal relations, social fact, social action, group, organization, institution, society, social structure, and social system. (2014: 5)
- What is so striking about this is that the ‘social’ and the ‘societal’ *cannot possibly be the same thing*.

**What Prospects?**

# The Loci of Cognition in the Model of the Actor

*(Five Ideal-Types)*



# Fuzzy Universal Cognitivism

- Fuzzy universal cognitivism stands as a residual category – a kind of cognitivism with a model of the actor that emphasizes naturalism in the explanations, but its ontological positions are not as balanced as plural cognitivism in accounting for naturalism, social organization and humanism.
- In this way, these three different models of the fuzzy universal cognitivist actor attempt to *locate* cognition in a way that does not exclusively focus on the ‘human agent’ nor on their ‘social being’.
- This kind of explanation offers research programs where the unit of analysis is largely systematic or institutional with an ontological position that mixes the *internal* mental processes with a notion of embedded agency.

# Fuzzy Individual Cognitivism

- Fuzzy individual cognitivism stands as a residual category – a kind of cognitivism with a model of the actor that emphasizes humanism in the explanations, but its ontological positions are not as balanced as plural cognitivism in accounting for naturalism, social organization and humanism.
- In this way, these four different models of the fuzzy individual cognitivist actor attempt to *locate* cognition in a way that does not exclusively focus on the ‘human agent’ nor on their ‘social being’.
- This kind of explanation offers research programs where the unit of analysis is largely variable with an ontological position that somewhat mixes the structural individualism of mental representations with a notion of agency related to the cognitive dimension of social facts.

# Plural Cognitivism

- Plural cognitivism seeks to formulate a balanced model of the actor subjected to socio-mental control and its processes of reification.
  - Socio-mental control describes how impersonal cognitive norms shape the thinking, learning and courses of activity individual actors *are able to undertake* as a result of institutional reflexivity.
- This flexible ideal-type utilizes the kind of explanation balances naturalistic observation found in universal cognitivism with the humanism favored by individual cognitivism.
- While recognizing there are universal commonalities (the brain) that enable cognition and idiosyncrasies that personalize experience (the subjective aspects of mind), plural cognitivism argues the *locus* of cognition is not solely in the brain nor solely in the mind, – it is of sociality mixed in with culture, history and society.

# Questions and Comments?

Thanks For Listening!

Please feel free to inquire further at  
[mraphael@gradcenter.cuny.edu](mailto:mraphael@gradcenter.cuny.edu)!

*E-Mail:*



If you are interesting in finding out more about  
my work, follow me on Academia.edu at  
<http://gc-cuny.academia.edu/MichaelWRaphael>

*Academia.edu*

