


2016

The Prospects for Change: The Question of Justice in a Law & Society Framework

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Recommended Citation

Raphael, Michael W. 2016. "The Prospects for Change: The Question of Justice in a Law & Society Framework." Presented at the Annual Meeting of the Law and Society Association, New Orleans, LA: CUNY Academic Works.

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The Prospect for Change:

The Question of Justice in a Law & Society Framework

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Abstract

- What is the law and society framework and where has it gotten us? A student in a classroom might raise their hand and offer “understanding legal pluralism” as a possible answer. However, the conceptual problem with legal pluralism is the coexistence of potentially conflicting bases of justification. Given this, desiring to understand how the law shapes the structural underpinnings of whichever “legal” phenomena and its “ongoing transformation”, is nevertheless an immense achievement that stops short of its underlying goal – the achievement of human dignity through human rights. For example, to talk about ‘multi-stakeholder consultations’ and other pithy phrases that describe different kinds of ‘collective actors’ that can come together and have a “meeting of the minds” is to conflate the moral principle on which a ‘human right’ stands with a legal framework *based on cooperation of independent actors*. As we try and come together to regulate for substantive change, it is necessary to recognize how the discourse we engage in divides us further. The law and society framework needs a new direction.

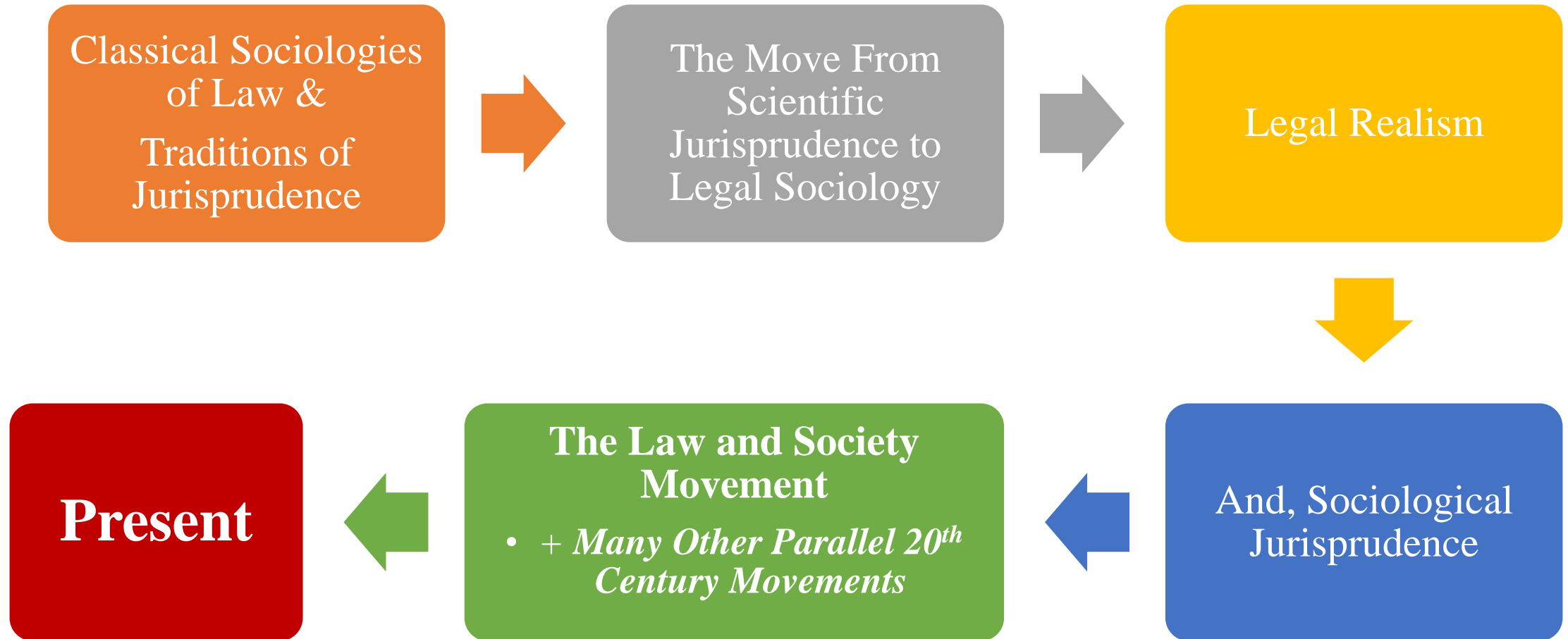
Outline

1. The Terms and Conditions of Socio-Legal Research?
2. The Logic of Discovery and...
 - a. The Development of the Law and Society Framework
 - b. The Unit of Analysis in Socio-Legal Research
3. The Prospect for Change
4. The Prospect of Cognitive Mediations

Questioning the ‘Terms and Conditions’ of Socio-Legal Research

- Outside of a ‘natural law’ perspective, we sociologically face the problem of theoretical pluralism in the identification of ‘legal’ phenomena.
- This is important for basic assumptions concerning validity and argumentation.
- As socio-legal scholars, we seem torn between “order” and “conflict” in how we understand what the organizing principles of society are and our ongoing debate between “is” and “ought”.

The Development of the Law and Society Framework



What is law?

Classical Sociological Approaches

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

Post-Classical Sociological Approaches

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

20th Century Movements

- 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

The Unit of Analysis in Socio-Legal Research

- What all these disagreements point to is a propensity to, at times, “talk past each other” by using the “same words” in “different languages”.
- The “is” versus “ought” debate needs to be restated to formulate a means of providing law and society a coherent framework / paradigm.
- Such a paradigm focuses on how the question of change relies upon sociological conditions, broadly understood, which poses problems for observation and the attribution of legal categories to a person or class of persons.
- This is why I teach my students that sociology deals with the **relationship between** the social and societal contract.

The Prospect for Change: Bringing Law & Society Back to ‘Big’ Ideas

- Focusing on the differences between the social and societal contract presents a contrast between two different models of the actor where competency is not assessed as narrowly as in the naturalistic explanations that tend to be offered in the cognitive sciences.
- A true sociological conception of justice, its relative, “freedom”, and therefore “choice”, relies on law and society taking a “cognitive sociological turn”, instead to a merely cognitive one.
- What would this look like?

This is a question of “cognitive mediations”.

The Prospect of Cognitive Mediations

A Brief Introduction to Cognitive Sociology

Table 1. The Relationship Between Cognitivism and the Individuality of Mind*

Type of Cognitivism	Levels of Thinking	Basis of Mind	Locus of Cognition	Scope of Thinking
Individual	Personal Idiosyncrasies	Personal Experience	Individuals	$i = 1$
Plural	Social Mindscapes	Society Cognitive Diversity in <i>Thought Communities</i>	Social Beings	$i \geq 2 \cap h - 1$
Universal	Universal Commonalities	Cognitive Science	Human Beings	$h = \text{humanity}$

*This analysis is based on a reading of Zerubavel, 1997: 1-22 and a personal communication with Zerubavel on 02/28/2015.

Table 2. The Model of the Actor in Plural Cognitivism Revised

Author	Model						
Zerubavel*	Human Being	+	Social Being Cognitive Socialization of Socio-Mental Structures	+	Personal Idiosyncrasies	=	The Individuality of the Actor
Raphael	Human Being	+	Social Being Cognitive Mediation of Sociality Sociability Social Nature	+	Personal Idiosyncrasies	=	The Individuality of the Actor
			Cognitive Mediation of Society Societability Socio-Mental Structures				

*This analysis is based on a reading of Zerubavel, 1997; Zerubavel & Smith, 2010.

Table 3. Raphael’s Model of Cognitive Mediation: Socialization vs. Societalization

General Features	<i>Scope of Mediation</i>	<i>Type of Mediation</i>	<i>Type of Competency</i>	<i>Spectrum of Calculation</i>	<i>Type of Regulation Learned (Institutional Reflexivity)</i>
Cognitive Socialization	Social Beings	Sociability	Accessing Sociality	Primarily Strategic, Yet Not Calculative Conditions	Indigenous to Encounters
Cognitive Societalization		Societability	Conditions of Membership	Primarily Strategic and Calculative Conditions	Imposed Upon Encounters
<i>Level Specific Features</i>	<i>Level of Cognitive Mediation</i>	<i>Epistemological Status of Content</i>	<i>Scope of Learning</i>	<i>Type of Relational-Patterned Procedures</i>	<i>The Freedom to Learn / Type of Contract</i>
Cognitive Socialization	Primary	Information	Social Nature	Relational-Patterned Procedures for Processing Relational-Patterned Procedures	No Agency: Rousseau’s ‘Social Contract’ as ‘Each is Dependent on All’
	Secondary		Cognitive Skills	Primarily Heuristics	
Cognitive Societalization	Primary	Knowledge	Societal Expectations	Primarily Algorithmic Heuristics	Societal Contract
	Secondary	Specialized Knowledge	Cognitive Division of Labor	Algorithms & Algorithmic Heuristics	Agency in Private Contracts

Questions and Comments?

Thanks For Listening!

Please feel free to inquire further at
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If you are interesting in finding out more about
my work, follow me on Academia.edu at
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