

Law and Social Change: relationship between law and society

I. Recall jurisprudential paradigms; the view from inside the law

natural law theories

legal positivism, analytical jurisprudence

legal realism

questions: how does law achieve justice?

how does legal logic work?

II. Changing the focus and scope: emergence of a social science of law

Social sciences emerged in 19th century as result of massive changes during previous century. Goal: to explain variation in social conditions and account for changes.

Observed changes where they had been relatively constant for centuries:

social structure (relationships, organization of roles, obligations)

technology (plows, communication, weaving)

culture (religion, leisure, folk tales)

Changes in time and space (collapsed distances, world opened, people and things circulated), led to speed up in rates of change

questions: how does the legal system work/ function?

how does social change take place?

what is the role of law in promoting or impeding social change?

III. Bohannan, "Differing Realms of the Law:" a structural functionalist perspective on law and social change.

origin of law is in custom, in non-legal institutions

law differs from custom - agency of enforcement

law restates custom for the specific purpose

of enabling legal institutions (institutions with power to use force)

to perform their tasks (Bohannan called this "double

institutionalization")

but, law is never a mere reflection of custom

duality of restatement ---> lag in time, translation effects

game of catch up and/or engine of change

Problem: is law a product of consensus? how does struggle and conflict get express?

#### IV. Maine (1822-1888), *evolutionary perspective* on law and social change

in general, evolutionary theories posit:

analogies between human societies and biological species

imply positive, progressive change, adaptation and efficiency

acquire strong normative and functionalist tone

substantively focused on the individual in history

influential attempt to apply evolutionary logic to development of law,

Ancient Law (1861)

three stages of development differ by way law made, justify authority, and resolve conflicts

1) patrilineal, autocratic, no body of rules, no courts or even stable customs, case by case ad hoc, "khadi justice," divine right

2) shared authority among powerful group, rule on basis of custom collective memory, oral tradition, law is found

3) with invention of writing, get codes, recorded decisions, and notion of change as deliberate human action, not whim or tradition, possibility of ordering, hierarchical system

changes in content,

from family to individual

from status (position) to contract to agreement

conveys responsibility, negotiation,

critique: political biases, rationale for existing system, free market economy

only role of government and law guarantor of contracts

empirical accuracy?

never identified causal mechanism

#### IV. Emile Durkheim (1858-1917)

Major thesis: societies are essentially, and necessarily, moral.

"held together" by member's commitments to shared values

law: is core expression of these values.

different social structures have different sorts of legal systems

Simpler societies with low division of labor (more alike than different)

a strong collective conscience, little or no individual identity,

solidarity based on similarity - (Mechanical solidarity - society is

"mechanically" reproduced in each individual)

law is repressive:

entire community is victim, moral boundaries transgressed

community participates in punishment

goal of punishment is to reestablish moral boundaries that have been  
violated

little or no individualized punishment, focus not particularly on violator

who may be killed, expelled, or reintegrated (but not rehabilitated)

example: Scarlet Letter, Megan's Law

At the other end of a continuum,

Societies with complex division of labor, strong ethic of individualism, diverse,  
heterogeneous populations

solidarity is tied to diversity which leads to interdependence

people don't FEEL connected, but they are (Organic solidarity, as parts of  
complex interdependent whole, parts of the body cannot live without  
each other)

law is regulatory, restitutive, compensatory:

individual punishments tailored to restore (rehabilitate) violator

fewer public rituals, citizens play less of a role, professional activity

point is to maintain order

How does change take place? changes in geographic mobility,

technology, social composition, and consequent division of labor.

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“Recidivism.” From Vicki J. Running, “Analyzing the Constitutional Challenges and Policy Considerations Facing Megan’s Law, ...” Honors Thesis in Philosophy, Wellesley College, 1997.

Table: Index of Crime, United States, 1980-1999.