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MICHAEL FREEMAN

ON BEHALF OF THE FACULTY OF LAWS
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Professor of English Law
University College London

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General Editor's Preface

UCL Law School held its eighth international interdisciplinary colloquium in September 2004. This book is the product of the colloquium. My thanks are to Professor Hazel Genn who helped to co-convene the colloquium, to Lisa Penfold who ably administered it and to Laura Smith and Priscilla Saporu without whose administrative and secretarial assistance the book would not have seen the light of day.

The next volume in this series, to be published later in 2006, is on 'Law and Psychology'.

The next colloquium on 'Law and Philosophy' will take place on 6 and 7 July 2006. Enquiries about this may be addressed to Lisa Penfold at (**lisa.penfold@ucl.ac.uk**). One is planned on 'Law and Bioethics', for July 2007.

Professor Michael Freeman

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Contents

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Law and Sociology

Michael Freeman

One of the most characteristic features of twentieth-century jurisprudence was the development of sociological approaches to law.[1] The social sciences had an influence almost comparable to that of religion in earlier periods.[2] And legal thought has tended to reflect the trends to be found in sociology.

There are different approaches but one can pinpoint a number of ideas in the thinking of those who adopt a sociological approach to the legal order. There is a belief in the non-uniqueness of law: a vision of law as but one method of social control.[3] There is also a rejection of a 'jurisprudence of concepts', the view of law as a closed logical order.[4] Further, sociological jurists tend to be sceptical of the rules presented in the textbooks and concerned to see what really happens, the 'law in action'.[5] It is common to see reality as socially constructed, so that there is no natural guide to the solution of many conflicts.[6] Sociological jurists have believed also in the importance of harnessing the techniques of the social sciences, as well as the knowledge culled from sociological research, towards the erection of a more effective science of law. There is also a concern with social justice, though in what this consists, and how it is to be attained, views differ.[7]

[1] See R. Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25 *Journal of Law and Society* 171.

[2] Auguste Comte (1798–1857) of course, who invented the term 'sociology', though not the discipline, put forward a new Religion of Humanity, with an elaborate ritual aimed at achieving an effective means of social cohesion. See M. Pickering, *Auguste Comte* (London, 1993).

[3] On Eugen Ehrlich (1862–1922) see N. Littlefield, 'Eugen Ehrlich's Fundamental Principles of the Sociology of Law' (1967) 19 *Maine Law Review* 1–27. See also S. Henry, *Private Justice* (London, 1983). Cotterrell, below p. 19 discusses Ehrlich.

[4] Exemplified in the work of F. Gény, *Méthode d'Interprétation et Sources en Droit Privé Positif* (Paris, 2nd edn., 1932).

[5] And note K. Llewellyn's programme of 'Realism': 'Some Realism About Realism' (1931) 44 *Harvard Law Review* 1222. See, further, N.E.H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for An American Jurisprudence* (Chicago, 1997).

[6] *Cf.* P. Berger and T. Luckmann, *The Social Construction of Reality* (Harmondsworth, 1966) and I. Hacking, *The Social Construction of What?* (Cambridge, Mass., 1999). Social order has been described as where 'the struggle between individuals was halted and truce lines were drawn up' (*per* A. Hutchinson and P. Monahan (1984) 36 *Stanford Law Review* 199, 216).

[7] Contrast the views of the social engineer Roscoe Pound (1870–1964) (on whom see D. Wigdor, *Roscoe Pound: Philosopher of Law* (Westport, Conn., 1974)) with today's Rational Action Theory, discussed by Cotterrell at p. 26.

For much of the twentieth century the sociology of law was eclipsed by sociological jurisprudence. It was Pound, rather than Weber or Durkheim, who was the dominant figure, despite the 'vagueness of his conceptual thinking'.[8] From the 1960s the term 'sociological jurisprudence' was used less frequently, and what came to be known as 'socio-legal studies' took root. Advocates of socio-legal studies[9] emphasize the importance of placing law in its social context, of using social-scientific research methods, of recognizing that many traditional jurisprudential questions are empirical in nature and not just conceptual.[10] Socio-legal studies have been described by Cotterrell as a 'transition phase'.[11] It had a considerable impact: on the law, on legal education, on legal research, on law publishing. It also had shortcomings, well identified by Lawrence Friedman.

> To many observers, the work done so far amounts to very little: an incoherent or inconclusive jumble of case studies. There is (it seems) no foundation; some work merely proves the obvious, some is poorly designed; there are no axioms, no 'laws' of legal behavior, nothing cumulates. The studies are at times interesting and are sporadically useful. But there is no 'science', nothing adds up... Grand theories do appear from time to time, but they have no survival power; they are nibbled to death by case studies. There is no central core.[12]

Socio-legal studies was largely lacking in any theoretical underpinning.[13] The law—and this was often defined narrowly[14]—and the legal system were treated as discrete entities, as unproblematic, and as occupying a central hegemonic position.[15] There was rarely any attempt to relate the legal system to the wider social order or to the state. When reforms were proposed, they were to make the legal system operate more efficiently or effectively. And the emphasis was more on the 'behaviour'[16] of institutions, than on trying to understand legal doctrine.

This is not what the sociology of law is about, as those who remember the writings of Weber, Durkheim, or Ehrlich were able to point out. For the sociology of law, as Campbell and Wiles pointed out thirty years ago, focuses on 'understanding the nature of social order through a study of law'.[17]

Much of the focus in contemporary writing, as this book simply demonstrates, is on what is involved in this understanding. Should legal definitions be transformed into sociological categories, or sociological insights into legal concepts? Can the

[8] As Cotterrell, at p. 19, notes. [9] For example, Hazel Genn.

[10] *Cf.* J. P. Gibbs, 'Definitions of Law and Empirical Questions' (1968) 2 *Law and Society Review* 429. [11] *Law's Community* (Oxford, 1995), 296.

[12] 'The Law and Society Movement' (1986) 38 *Stanford Law Review* 763, 779.

[13] And see A. Hunt, 'Dichotomy and Contradiction In The Sociology of Law' (1981) 8 *British Journal of Law and Society* 47. [14] See Cotterrell, n.11, above.

[15] This was also the common juristic position, exemplified in the classic by H.L.A. Hart, *The Concept of Law* (Oxford, 1961; 2nd edn., 1994). He, of course, purported to be writing 'descriptive sociology'. And see N. Lacey, *HLA Hart* (Oxford, 2004), and H. Ross, *Law As a Social Institution* (Oxford, 2001).

[16] See also D. Black, *The Behavior of Law* (New York, 1976). A defence of Black is M.P. Baumgartner in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Oxford, 1996), ch. 28.

[17] 'The Study of Law in Society in Britain' (1976) 10 *Law and Society Review* 547, 578, 553.

two approaches be combined? If the law has a limited sociological understanding of the world, does sociology have anything to offer the jurist to enable him/her better to appreciate it? As David Nelken has pointed out, there are dangers.[18] He, following Sarat and Silbey,[19] notes the concern of sociologists of law that they will be used ('the pull of the policy audience'), compromising academic social science and blunting the edge of political critique. Nelken's own concern is that 'the introduction of different styles of reasoning can have ill effects for legal practice by misunderstanding and thus threatening the integrity of legal processes or the values they embody'.[20]

For Cotterrell, on the other hand, the sociology of law is a 'transdisciplinary enterprise and aspiration to broaden understanding of law as a social phenomenon.'[21] He emphasizes the centrality of the sociology of law for legal education and legal practice: 'the methodology of sociological understanding of legal ideas is the deliberate *extension* in carefully specified directions of the diverse ways in which legal participants themselves think about the social world in legal terms'.[22] Sociology, Cotterrell argued, offers insights into legal thinking, and can transform legal ideas by re-interpreting them.

But can sociology 'climb out of its own skin and get inside the law to understand and explain the law's "truth"?'[23] That it has difficulties in so doing are attributable only in part to its limitations. As Banakar demonstrates, 'the fact that law secures its domination and authority through normative closure ... denies the commonality of discourses of sociology and the law, posing unique methodological problems for the sociology of law. The sheer institutional strength of the law hampers access to empirical material, questions the relevance of sociological insights into legal reasoning and ... raises doubts on the adequacy of sociology to produce a knowledge which transcends its own reality'.[24]

Nelken's response is that if we are 'to bring sociology of law up against its limits',[25] its dependence on sociology must be recognized. It then becomes necessary to 'examine more carefully how its reflexivity and that of law relate'.[26] He points to a range of writing in legal and social theory which sets out to analyse differences, and similarities, between sociological reflexivity and legal closure: Lyotard's 'phrases in difference',[27] Luhmann's autopoiesis,[28] Murphy's law's estrangement.[29]

[18] 'Blinding Insights?', 'The Limits of a Reflexive Sociology of Law' (1998) 25 *Journal of Law and Society* 407. [19] 'The Pull of the Policy Audience' (1988) 10 *Law and Policy* 97.

[20] n.18, above, 408.

[21] 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25 *Journal of Law and Society* 171, 187. [22] *Ibid*, 190.

[23] This question was posed by R. Banakar, 'Reflections on the Methodological Issues of the Sociology of Law', (2000) 27 *Journal of Law and Society* 273, 274. See further, R. Banakar, *Merging Law and Sociology: Beyond The Dichotomies in Socio-Legal Research* (Berlin, 2003).

[24] *Ibid*, 284. [25] n.18, above, 415. [26] *Ibid*, 417.

[27] *The Differend, Phrases in Dispute* (Minneapolis, Minn., 1988).

[28] See further M. King and C. Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Basingstoke, 2003). [29] *The Oldest Social Science* (Oxford, 1997).

Cotterrell believes that the law can profit from sociologically-inspired resolutions, particularly when legal doctrine is rift by conflicting precedents. This is undeniably true, and it would be foolish for the lawyer to ignore social insights. However, as Nelken points out, the institution of such insights has 'the potential to distort or at least change ... legal practices rather than simply help them to sort out self-induced muddles'.[30] If only we knew when social science could guide us to the answer, and convince us it was the right one. Nelken may well be right that social insights function differently when they prise open legal closure (he cites Downs's discussion of the so-called 'battered women's syndrome' as a method of displacing law's myths about women battering[31]), than when they are used to provide closure.[32] But, as Trubek points out, 'whatever social sciences can do for the law, it *cannot* offer ... objectivist grounding for legal policy'.[33] This is not the view of all legal sociologists.

Donald Black, notably, predicts the development of 'sociological law', when lawyers reflexively internalize the conclusion that sociology is the best guide to legal outcomes.[34] According to Black, the sociology of law entails the adoption of an observer's perspective:[35] this requires detachment (in striking contrast to what Cotterrell advocates). Black, however, claims that its findings are of great relevance to participants in the legal system. It may challenge long-standing conceptions about law: 'official versions' of the intentions and purposes of particular statutes are not, as a result, granted automatic respect, but are instead subjected to critical scrutiny.[36] So too are the 'conventional justifications of court procedures, and the legal representation of clients'. The sociology of law 'even suggests new possibilities for manipulating legal systems deliberately in order to bring about desired results, techniques of social engineering likely to become highly controversial as well as highly effective'.[37]

In the late 1990s a new form of sociological jurisprudence was proclaimed: realistic socio-legal theory. To Brian Tamanaha, this identifies and develops foundations for the social scientific study of law.[38] He draws on philosophical pragmatism to establish an epistemological foundation which specifies the nature of social science and its knowledge claims, and a methodological foundation which uses both behaviourism and interpretivism. Like Cotterrell, but for very different reasons, Tamanaha believes that legal theory and socio-legal studies have a lot to learn from one another. Unlike many sociologists of law, who took

[30] n.18, above, 422.

[31] See D. Downs, *More Than Victims: Battered Women, the Syndrome Society, and the Law* (Chicago, 1996).

[32] n.18 above, 422.

[33] 'Back To The Future: The Short Happy Life of the Law and Society Movement' (1990) 18 *Florida State University Law Review* 1.

[34] *Sociological Justice* (New York, 1989).

[35] *Ibid*, 19–22.

[36] An excellent example is M.J. Lindsay, 'Reproducing a Fit Citizenry: Dependency, Eugenics and the Law of Marriage in the United States, 1860–1920' (1998) 23 *Law and Social Inquiry* 541–85.

[37] *Per* Baumgartner, n.16, above, 413.

[38] *Realistic Socio-Legal Theory* (Oxford, 1997).

a definition of law from within jurisprudence,[39] Tamanaha insists that law should not be defined in ways that assume sociological connections, but should be subject to investigation and proof.

In a riposte to standard conceptual jurisprudence he maintains that

> what law is and what law does cannot be captured in any single scientific concept. The project to devise a scientific concept of law was based upon a misguided belief that law comprises a fundamental category. To the contrary law is thoroughly a cultural construct, lacking any universal essential nature. Law *is* whatever we attach the label *law* to.[40]

This is to confront conceptual jurisprudence face-on by denying that there is a concept of law. That he does not go this far is apparent from later work,[41] and from a response to this very criticism[42] in his Symposium on the book.[43] There he says of theorizing about the concept of law that 'we do it because law is a key social phenomenon that must be understood, analysed and discussed, which could not begin nor be carried far without conceptual analysis.'[44]

It is rather a recognition—of course, not novel[45]—that different phenomena fall under the concept 'law'. Law is a concept conventionally applied to a 'variety of multifaceted, multifunctional phenomena: natural law, international law, people's law, and indigenous law . . .'.[46] Tamanaha insists that there is not a 'central case of law':[47] he cites the example of international law which has its own integrity and has been functioning as a form of law for at least two centuries but which remains, under traditional and conceptual analysis, 'a borderline form of law'.[48] He is concerned that the central case approach to the concept of law fits, and was the product of, the ascendancy of state law that accompanied the rise of the state. His alternative conceptualization of law is, he believes, 'better able to account for the proliferation of different kinds of law than the traditional monotypical view of *the* concept of law'.[49]

On the question as to how one can evaluate whether one concept of law is better than another, Tamanaha offers the following evaluative criteria:

> First, the concept must be coherent, or analytically . . . sound, in the sense that, for example, it should not contain internal contradictions, or have gaps in crucial spots. Second, the concept must be consistent with, or 'fit', or be adequate to, the reality, phenomenon, or

[39] For example, Max Weber. [40] n.38, above, 128.

[41] 'A Non-Essentialist Version of Legal Pluralism' (2000) 27 *Journal of Law and Society* 296–321.

[42] By Brian Bix, 'Conceptual Jurisprudence and Socio-Legal Studies' (2000) 32 *Rutgers Law Journal* 227–39, 229–30.

[43] 'Conceptual Analysis, Continental Social Theory, and CLS' (2000) 32 *Rutgers Law Journal* 281–306. [44] *Ibid*, 283.

[45] John Austin recognized it: so do H.L.A Hart and John Finnis (note his emphasis on the 'focal' meaning of law). [46] n.38, above, 128.

[47] n.43, above, 284. [48] *Ibid.*

[49] n.43, above, He does not include within this the implications of cyberspace, on which see M.J. Radin and R.P. Wagner, 'The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace' (1998) 73 *Chicago and Kent Law Review* 1295–317.