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Legal Instrumentalism and the LSA: 'A Movie Treatment'

*LSA 2nd Half Century Junior Scholars Essay
Competition (honorable mention)*

In the 2nd half century, LSA should entertain the death/rebirth of "law as a tool for social change." We innovate by examining the artifacts of an instrumental genre of knowledge and by investigating our impulse to invent varieties of normative technologies.

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LSA 2nd Half Century Project



The Pitch

Last year at the Law and Society Association (LSA) meeting in Boston, I spotted Richard Abel less than five minutes after checking in. I saw him perusing the program and other handouts and it suddenly occurred to me – sighting an LSA veteran is what makes attendance at an LSA meeting official! The veterans are the wise masters, our Mr. Hennesseys and Mr. Miyagis, sharing lessons which junior scholars apply to the new and complicated world before us.

Recently, several LSA wise masters published retrospective articles, taking stock of the past fifty years (Abel 2010; Seron, Coutin and White Meeusen, 2013) or reflecting autobiographically on the life of a law and society scholar (Cotterrell 2013; Lempert 2013). Each piece told a similar story of early optimism for applying social science methods to law, followed by challenges and now trepidation about our ability to face a particular ordeal. In their way, each described an unfolding of calls-to-action, obstacles and victories, bringing to my mind, at least, the oft maligned three-act structure of a Hollywood screenplay. In the spirit of the LSA wise masters, this paper presents a synopsis of scholarship and perspectives that influenced socio-legal research and sketches the dramatic context of the next half century.

The protagonist in our screenplay, a newly formed LSA, ventures into the strange world of socio-legal research and is quickly set upon by trials, tests, meetings with enemies and allies. Fast forward a few pages and we are now contemplating the next half century from the vantage point of fifty years gone by. According to the paradigmatic structure (Field 1994), we are at the middle of Act II and the midpoint of the film, an occasion for a metaphorical death and rebirth in preparation for an ultimate trial and reward. In this, a kind of coming of age story of LSA, I suggest we entertain the death/rebirth of “law as a tool for social change.”

In our 2nd half century, LSA should revivify insights about epistemic relativism and instrumentality. We can no longer imagine ourselves to be “at the helm” (Latour 2002) of inert legal rules or institutions – or research technologies for that matter. This rebirth will push us to notice and also challenge the ways that law reinvents itself, competing with informal dispute processing and private technologies that govern. We will innovate by examining the artifacts of an instrumental genre of knowledge (Riles 2004) and by investigating scholars’ and practitioners’ impulses to invent varieties of normative technologies (Halliday 2009).

The first (60 minutes) 50 years

The late Syd Field (1994) and Robert McKee (1997) notoriously¹ adapted the mythological structure in Joseph Campbell’s *The Hero with a Thousand Faces* (1968) for the Hollywood screenplay. According to these “screenwriting gurus” (BBC 2013), Act I introduces the ordinary world and presents an inciting incident or call to action {Thornhill calls the bellboy over when Kaplan’s name is called; Obi-Wan suggests Luke accompany him to Alderann}. On accepting the challenge, the protagonist crosses the threshold into the new world {Neo chooses the red pill; Dorothy takes possession of the ruby slippers} and thus begins Act II.

The synopsis for our Act I could read: At a time when legal research and social science were distinct, LSA answered the call to bridge fields, applying social science methods to topics on law, legal professions and legal institutions. These economists, historians, legal scholars, political scientists, psychologists and sociologists “challeng[ed] the canonical through interdisciplinarity” (Seron, Coutin and White Meeusen 2013, 293) and chased progressive social

¹ In the postmodern film *Adaptation*, Charlie Kaufman struggles to adapt the novel *The Orchid Thief*. Meanwhile, his twin brother Donald attends one of Robert McKee’s seminars, following which he is able to sell his psychological thriller for over one million dollars.

change through law. But LSA faced obstacles. Law and society was considered a fringe field. Mainstream legal academy treated LSA scholars like outsiders (Silbey and Sarat 1987) and viewed social science research “as a tool that ‘real’ law professors could use to inform their doctrinal and policy analysis but not as an enterprise to be valued in its own right” (Lempert 2013, 7).

LSA passed these early tests. Law and society scholars are now “distinguished professors, department chairs, center directors, and deans” (Lempert 2013, 11). Moreover, not only are scholars who were once outsiders now on the inside, but formerly fringe topics – the everyday life of law, legal consciousness, administrative and regulatory bodies (Levi and Valverde 2001) – now sit alongside mainstream research topics like Supreme Court doctrine and decision-making.

A second early challenge presented in the form of requiring a practical application in order for the legal academy to consider social science research meaningful (Abel 2010). Early LSA scholarship resonated within law faculties sympathetic to Legal Realism, which emphasized that rules and legal rights were a means to social ends, not ends in and of themselves. But the Legal Realist legacy was to ensconce law in its place as an instrument or tool for social change. Similarly, socio-legal research set in as an instrument for civil justice reform (Garth and Sarat 1998), barring more descriptive or critical social science research.

But here too there were victories. In the early 1980s, LSA was able to challenge notions that law and society were distinct by examining law’s role in constituting social relations (Silbey and Sarat 1986). This constitutive approach illustrated law’s influence in structuring society and the taken-for-granted legal categories which not only founded relations but often maintained power imbalances. LSA scholarship also exposed law’s unintended consequences, for example

the thinning of the mess and widening of the net in ADR (Abel 1982). Despite these ongoing victories, however, LSA members now express doubt about their objects of research and challenge the parol of their organizing ideas.

Midpoint: a bleak future?

In film, an interaction or event in the middle of Act II causes the protagonist to feel furthest away from fulfilling his/her goals {Jake Gittes is knocked unconscious; the Oracle tells Neo that either he or Morpheus is going to die}. Momentarily the lowest point in the dramatic arc, the reversal of fortune forces the protagonist to commit to the objective with renewed drive and desire. {In a classic comedic scene, a kidnapped Gloria Mundy escapes from a locked room, spying a racy game of Scrabble as she hangs off the fire exit.}

At our century's midpoint, LSA members may feel furthest away from achieving our goals. Socio-legal studies' relationship with legal instrumentalism has soured. Scholars sympathetic to law's embeddedness in politics, culture or other social determinants (e.g. Tamanaha 2011) risk drifting away from law as a scholarly subject in its own right (Garth and Sarat 1998; Riles 2004). And LSA's inclusivity may have led to its own unintended consequence of more extensive interaction within, but less mixing between areas of interest (Lempert 2013).

LSA wise masters convey doubts about law and law's promise as a tool for social change (e.g. Abel 2010). There is also a sense that a "hegemonic logic of means and ends" (Riles 2006, 60) has turned pernicious in deeming everything up for instrumental grabs. This *instrumentalizing of the expressive* is reconstructing culture, women's rights and the Rule of Law into a tool to accomplish other goals that law or society defines.

Yet, as in film, the most devastating and transformative ordeals appear as ‘attacks by allies’ {Gloria is kidnapped at the library, her place of work; it is the Oracle who delivers the bad news to Neo}. In particular, legal pluralism and transnational legal research call into question law’s relevance, not only a subject of scholarly attention, but also as an organizing form or field with a sound epistemological basis. This scholarship which complicates the relationship between official and unofficial forms of ordering in a sense invites recognition of the jurisdictional claims of ‘customary’ or non-state regulation. Research into private or voluntary regulatory technologies – such as UN corporate codes of conduct or World Bank standards and indicators (Fisher, Davis, Kingsbury and Merry 2012) – dissolves boundaries between governance and law in ways that are intriguing but precarious. Legal norms are “in jeopardy” not in the vertical sense that International Law norms are jeopardized when states do not enforce international obligations. Rather, they are in jeopardy in a horizontal way, where contingency is implicated in fragmentation and in multiple sometimes contradicting choices for legal rules and institutions. Overlapping regulatory orders and jurisdictional redundancies bring us to the brink of confusion and self-doubt about the boundaries, relevance and competency of socio-legal research.

Possibilities for Reward & Return

Most often, the knowledge or device the protagonist needs to seize a reward exists but remains inaccessible until a crisis presents {Dorothy always had the ruby slippers; Neo only needed to believe}. Following our ordeal, socio-legal scholars should be able to apply epistemic insights from the past in a re-imagination of relationships between means and ends. In our next act, LSA members reconsider the idea that law is a tool in light of new insights that technologies do not merely give shape to exogenous plans and schemes but enfold time, space and actants

through mediating practices (Latour 2002). We relinquish aspirations to master or tame technologies to achieve social ends and “study up” (Merry 2006) by looking at knowledge *practices* and *how* rules are created.

We will fare better in the next 50 years if we accept that the idea of a tool for change attracts and motivates even as we question its efficacy. Consider how social justice and law reform projects translate into law and globalization (Zumbansen 2013) in “Justice Systems” programs at the World Bank, in partners at the Global Forum for Law Justice and Development, and in Rule of Law programs at the State Department or national organizations such as the American Bar Association. These institutions invest heavily – financially and conceptually – in the idea of law as a tool. Similarly even our own research – our objects of study and the structure of our work – remains enmeshed in a problem-solution framework (Miyazaki 2010).

But once we see divisions between means-ends or problem-solution for what they “really” are – analytic aesthetics – we can embrace *and* be freed from instrumentalism in law and in research. We can enjoy law’s technical appeal, its logic and fictional aesthetics, its permission and promise for justice and reform. We can innovate and experiment with alternatively structured projects – juxtaposing topics rather than adopting the problem-solution framework – and dissolve constructed barriers between subjects, such as those between domestic and international law, or center and peripheral legal institutions.² We will recognize that it’s not just about getting knowledge right or correcting a malfunction in legal institutions or legislation. We will be able to see the competition between different forms of knowledge (Levi and Valverde 2001) and the way legal actants seek to control the boundaries of *legal* knowledge. We observe the ways different forms of knowledge are mobilized to constitute legal subjects (for example lay

² Judges who interact with new legal forms and other non-case related work are an example of the latter.

versus expert in Aboriginal sentencing circles, e.g., Goldbach & Hans 2013) and maybe we even glimpse the irrationality of academic knowledge (Lempert 2013). This is the boon we share.

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The Karate Kid (1984)

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North by Northwest (1959)

Star Wars Episode IV (1977)

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The Wizard of Oz (1939)

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